U.S. GOVERNMENT INFORMATION POLICIES AND PRACTICES—ADMINISTRATION AND OPERATION OF THE FREEDOM OF INFORMATION ACT (PART 4)

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON GOVERNMENT OPERATIONS HOUSE OF REPRESENTATIVES

NINETY-SECOND CONGRESS

SECOND SESSION

MARCH 6, 7, 10, 14, AND 17, 1972

Printed for the use of the Committee on Government Operations

U.S. GOVERNMENT PRINTING OFFICE
76-253-O WASHINGTON : 1972

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402 - Price $1.50

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U.S. GOVERNMENT INFORMATION POLICIES AND PRACTICES—ADMINISTRATION AND OPERATION OF THE FREEDOM OF INFORMATION ACT

(Part 4)

MONDAY, MARCH 6, 1972

HOUSE OF REPRESENTATIVES,
FOREIGN OPERATIONS AND
GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2154, Rayburn House Office Building, Hon. William S. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives William S. Moorhead, Jim Wright, Ogden R. Reid, and Frank Horton.

Staff members present: William G. Phillips, staff director; Norman G. Cornish, deputy staff director; and William H. Cophenhaver, minority professional staff, Committee on Government Operations.

Mr. MOORHEAD. The Subcommittee on Foreign Operations and Government Information will please come to order.

Today's discussion with a group of experts in government information continues a series of hearings on one of the most important problems facing our democratic society.

Call it "government secrecy," "news management," the "credibility gap," or "truth in government," it is a problem which has been with us since our form of government was established. It is a political problem, but it is not a partisan problem.

All administrations, whether Whig or Federalist, Republican or Democrat, have faced the problem; no administration, no President, no Congress has solved it. In fact, the problem of informing all of the people who are an integral part of the democratic process has become more and more important in recent years—has grown to alarming proportions, particularly since World War II.

We started our current series of hearings last summer in connection with the publication of the so-called Pentagon papers. These hearings also dealt with the need to maintain a free press as guaranteed by the first amendment to our Constitution, prerogatives of the legislative branch in obtaining information from the executive in order to fulfill our constitutional responsibilities, and the increasing dangers of erosion of public confidence in government because of restrictions by the executive on the free flow of information.

We will continue the series of hearings on the Federal Government's information plans and policies with a study of how well one attempt to insure the people's right to know is working. We will take a careful look at the operation of the Federal Government's first Freedom of Information Act—an act which became section 552 of title 5 of the United States Code on July 4, 1967. The Freedom of Information Act was based on 11 years of studies and investigations by this subcommittee. It was not designed to solve all Government information problems, but it was passed by the Congress to help correct a growing attitude that Government business is none of the public's business.

We plan to find out whether the executive branch of the Federal Government is following the letter—and the spirit—of the Freedom of Information Act. And we plan to suggest legislative solutions to any shortcomings we uncover.

The study of the overall operations of the Freedom of Information Act will be followed by hearings on one special section of the act which permits executive agencies to hide Government information in the name of national defense or foreign policy—the system for classifying Government documents as "Top Secret," "Secret," or "Confidential."

We will then look into the particular problems—and the particular needs—the Congress has in gathering from the executive branch information which the legislative branch must have to conduct its part of the business of Government.

We will look at the special information problems posed by the hundreds of Government advisory groups who hold thousands of official meetings, often behind closed doors with no public or congressional knowledge of decisions made or deals discussed.

We will also hold hearings on a number of bills on information matters which have been referred to this subcommittee.

Today, we open this current series of hearings with a unique opportunity. This is the first chance the public—and the Congress—has had to gain a historical overview of the public information practices of those who govern our democratic society.

We hope to lift the lid, however slightly, of the White House and the executive departments to find out how the Government information system works—and how it should work. Again, I emphasize that this is not a partisan effort. We seek a historical view, not a political view. Thus, we have asked top information experts from past administrations—backed up by men who served for many years in civil service information jobs—to share their knowledge and their ideas with us.

We had hoped that Mr. Herbert Klein, the first Government-wide Director of Communications, would join the other experts in this discussion. He declined to testify on the ground that members of the President's immediate staff do not appear before congressional committees.

Nevertheless, I look forward with pleasure to the insights which the public and the Congress will gain from today's discussion of Government information problems in our democratic society. We are honored to have with us Mr. James C. Hagerty, former Press Secretary to President Eisenhower; Mr. George Reedy, former Press Secretary to President Johnson; Mr. Harold R. Lewis, former Director of Information, Department of Agriculture; Mr. Arthur Sylvester, former

Assistant Secretary for Public Affairs, Department of Defense; and Mr. J. Stewart Hunter, former Associate Director of Information for Public Services, Department of Health, Education, and Welfare.

Mr. Pierre Salinger, former Press Secretary to President Kennedy, was scheduled to testify, but he is involved in a certain campaign in New Hampshire and could not be with us today.

Mr. Reid?

Mr. Reid. Thank you, Mr. Chairman. I, too, would like to welcome the distinguished panel we have here today and to say how important I believe their testimony is to the freedom of information that is essential to our Government. James Madison said 200 years ago, "a popular government without popular information or the means of acquiring it, is but a prolog to a farce or a tragedy or perhaps both."

When we began the first phase of these hearings last June, the time of the "Pentagon Papers" case, I said we were facing a crisis of treason in government. That crisis is still with us today, and, hopefully, we can deal not only with the question of strengthening the Freedom of Information Act, the procedures by which material is classified or declassified in the executive, and the need for congressional oversight thereon, but equally, I hope that we will take a look at the broad question of executive privilege, because in recent years there has been an accrual of power by the Presidency at the expense of the Congress, with the Congress increasingly unable to get certain kinds of information central to its legislative and constitutional responsibilities. And here I would make a distinction between staff papers and tactical decisions of the Executive, distinguish that from the broad question of providing information that is absolutely central to policy and judgment the Congress must make in appropriating funding.

In any event, to the extent that we can strengthen first amendment rights, the whole question of freedom of information and accountability of the Executive to the American people, I think, you, gentlemen, will render a service, and I am particularly, in a very strongly bipartisan sense, glad to welcome you here this morning.

Mr. Moorhead. Thank you, Mr. Reid.

Mr. Wright?

Mr. Wright. Thank you very much, Mr. Chairman. It is a pleasure, of course, to welcome such a distinguished group of witnesses. I am particularly happy to be on hand to welcome my own personal friend, George Reedy, and I will look forward to the testimony.

Of course, there is not any subject more central to the question of democracy than that of freedom of information, and I suppose that this has been true since the day that Thomas Jefferson waged his unremitting battle to open up the corridors of government to the trust of the public. It has always been central to American democracy. And I have discovered and observed that we in the House have had no terrible, traumatic troubles since we opened up our vote count on recorded votes. The obvious fact is that the public has the right to know how the Members of the House voted. I think it has some salutary effects and, indeed, it has increased the Member voting by something like 80 percent, and, in addition to that, it has increased the number of votes taken on individual amendments on the floor of the House.

As we move forward bit by bit toward a more open country, a more enlightened electorate, I think we can fairly trust people, and I am pleased that these hearings are being conducted, Mr. Chairman. I sure look forward to the testimony we will be receiving.

Mr. Moorhead. Thank you, Mr. Wright.

Mr. Horton?

Mr. Horton. Mr. Chairman, and members of the committee, I, too, want to welcome this distinguished panel at the opening of these very important hearings which are going to continue for some 25 to 30 days on a subject which I think is one of the most important subjects that we could have before us, because it touches the very foundations of our society.

The basis of our form of government rests on an informed citizenry, participating in decisionmaking. People—and especially their elected representatives—must have available as much information as possible in order to make wise decisions. Without an ability to choose, no one can be secure in his home or nation; no one can be assured that his resources are being spent wisely; no one can have any confidence that the world of tomorrow will present a compatible environment or even be around.

Periodically, Congress has attempted to confront the paper wall, which shields off the free flow of information, by exposing improper actions, threatening reprisal, or enacting legislation. Since the beginning of our Republic, it has wrestled with Presidents over the subject of executive privilege. Under the past three Presidents letters of assurance have been exacted by our subcommittee, promising that information would be withheld from Congress only under the strictest limitations. Yet, the Congress continues to be frustrated in its efforts to obtain needed information, as subsequent hearings will disclose.

In 1966, after a decade of supporting hearings, the Government Operations Committee enacted the Freedom of Information Act designed to restrict the Executive's right to withhold information from the public. Yet, as these hearings will show, the law has frequently been honored more in the breach.

Increasingly, in recent years, as our Nation has become mixed in foreign wars and drained economically, Congress and the public have attempted to break through the security classification barriers. Yet, as hearings before this subcommittee revealed last fall, at least two-thirds of the 20 million documents now held under security classification could be made public without endangering national security. Yet, in spite of this known fact, information dating back to the past century remains classified along with current newspaper articles and information being circulated widely through commercial and foreign sources. It is incredible.

While Government is restraining the dissemination of information essential to the Congress' ability to legislate and to the public's right to be informed, it is engaged in the gathering and dissemination of information which invades personal privacy and undermines the social fabric. Wiretapping and eavesdropping, army spying, and the creation of computerized data banks are among those activities which have contributed to these conditions. Especially worrisome in this category is an activity of Government which I recently uncovered, namely, the sale to commercial firms, political candidates, and others

of computerized mailing lists of names of citizens compiled by Government agencies from those legally required to submit information to or otherwise transact business with such agencies. Upon hearing of this, I introduced H.R. 8903 which now has over 65 cosponsors and which is scheduled for consideration in a later phase of these hearings.

Mr. Chairman, the time has come for Congress to face the issue squarely and resolutely. The information which we develop in these hearings will enable us to overcome the wall of secrecy and the invasion of privacy which now pervades our society.

It is readily apparent that a balance must be provided between the people's right to know, the need for government to maintain certain confidences, and the individual's right to be secure in his person. There is also the need for the communication media to report responsibly. As these hearings progress, I hope we maintain this balance in the exploration of possible solutions. In so doing, however, I believe it essential that we keep before us the clear mandates of the Constitution which command the protection of individual rights of privacy and which places upon the Congress the responsibility to make all laws necessary and proper for the proper conduct of public affairs.

Thank you, Mr. Chairman.

Mr. MOORHEAD. Thank you, Mr. Horton. And as you have said, we will have hearings on the subject of your very important bill.

Gentlemen, as is our custom as an investigatory committee, we ask the witnesses to rise and be sworn.

Do you solemnly swear that the testimony you are about to give this subcommittee, will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. HAGERTY. I do.

Mr. REEDY. I do.

Mr. LEWIS. I do.

Mr. SYLVESTER. I do.

Mr. HUNTER. I do.

Mr. MOORHEAD. Because the Congress is very much interested in seniority, I suppose that we should start with the witness that has the greatest seniority. We will first hear from you, Mr. Hagerty.

STATEMENT OF JAMES C. HAGERTY, FORMER PRESS SECRETARY TO PRESIDENT EISENHOWER

Mr. HAGERTY. Mr. Chairman, and members of the committee, I am vice president of American Broadcasting Co., Inc., but as I understand it, Mr. Chairman, your invitation to participate in this hearing was related more to the years when I had the privilege of serving as press Secretary to President Eisenhower during his two terms in that office.

Consequently, I shall speak from a government service point of view and, bearing in mind your request to limit opening remarks, I shall make some general observations and a few suggestions concerning the complicated and controversial problem of the dissemination of government information to the public. Then, of course, I shall be happy to try to answer any questions you may have on the subject.

At the outset, I think it is pertinent to the discussion to point out that the proper dissemination of government information to the news media

and to the public is by no means a new problem. It has been a fairly constant issue, in varying degrees, between government, the news media and the citizens of our Nation almost since our founding days. From time to time in our country's history it has resulted in public distrust of the credibility of government. It has also raised questions as to the responsibility and integrity of a free press. It has never been definitively solved and I am not sure it ever can be.

But hearings like this, I do believe, can be helpful and informative. Personally, I have always believed that government information procedures, like government itself, should be studied and reviewed periodically so that, if necessary, changes and modifications in policies and practices can be made to try to meet changing conditions and times. It cannot remain static, for the simple reason that government and public attitudes do not remain static.

I think it really comes down in principle and in practice to a matter of understanding and balance between the Government and its citizens. Admittedly that understanding and balance is difficult of constant attainment and sometimes it does get out of kilter, either unintentionally or deliberately. Yet, as the 1966 report from the House Committee on Government Operations recommending passage of the Freedom of Information Act declared at that time, the goal should be the achievement of "a workable balance between the right of the people to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy."

And, the report added, "the right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his Government."

Now, I don't think that any reasonable private citizen nor any individual in government service can deny such a goal as a necessary objective. But its practical achievement, it seems to me, lies in the key words "workable balance" and "without indiscriminate secrecy."

For no one can also fail to realize—as indeed the Freedom of Information Act does in its nine exemptions—that Government must conduct part of its operations privately if it is successfully to formulate its policies and reach its final decision in both foreign and domestic affairs. But once those final decisions are made, again with the exception of the exemptions voted in the act, they should become a matter of public record and knowledge without question, without bureaucratic delay or subterfuge.

As far as the implementation of the act since its passage in 1967 is concerned, I am not in a position to cite chapter and verse of instances where legitimate information required under the law has been hard to get, was unavailable or was refused. I am sure there are many instances of that and I am sure that others who will appear before these hearings will be more informed on such developments.

But, as one who has worked in government in a rather sensitive position, I would like to conclude these brief remarks with a few personal observations on one aspect of government activities that may lie close to the heart of the problem we are discussing. It is the classification system used throughout the Government. I, personally, have always had certain reservations about some of the strange ways it functions.

While such a classification system is essential to the operation of government, particularly in the fields of national security and relationships with other governments as well as in the development of internal policies and programs, I firmly believe it could and should be improved and modernized. Indeed, as I understand it, the present administration, on orders from the President, is presently reviewing the system and will no doubt make some changes in procedure. They are long overdue, believe me.

For the system as I knew it—and I have no reason to believe it has changed to any degree since I left the Government—was an antiquated one, dating from World War I and added to during World War II and since then. It was often subjected to abuse and used with widespread regularity as a matter of rote, or imagined protection from error or even as a means of impressing other agencies, departments, or individuals in government of a singular point of view of a particular agency or department. All too often, classification also seemed to depend either on the whim or the play-it-safe attitude of government personnel who were merely following the old Washington adage: "If in doubt, classify it." And so it went in upward progression, from one stamp-happy Government office to another, from "For Official Use Only" to "Confidential" to "Secret" to "Top Secret" to "For Eyes Only."

As a matter of fact, more than a few times when I was Press Secretary I would receive reports or papers from Government sources that I was scheduled to release publicly at my next press conference that were literally covered with classified stamps, including the highest ratings. I would then actually have to take these papers to the President and have him declassify them on the spot. And, believe me, the only thing that was "Top Secret" about that was what he would say when he was talking to me and had to go through such nonsense.

Now, I am not urging that the classification system be aborted. Far from it. It is essential to the operation of any government. But I do believe that the system should be thoroughly reviewed and studied, as I understand it is at present. Based on my own experience, I would like to make the following recommendations to this committee concerning the system:

1. I would hope each department or agency of the Government should have a classification clearinghouse which would have the sole authority to determine whether any of its papers or actions should be classified. Such an organization should be staffed by rather high-level Government personnel. This would tend, at least, to eliminate the haphazard classification action by Government personnel who happen to have a set of classification stamps handy. It would certainly be helpful also if such stamps were not available to personnel under a certain grade level—maybe at least GS–14 or GS–15 to start with.

2. It might be worth considering whether the Freedom of Information Act should be amended to provide for a required periodic review of all classified material by either an independent and quasi-judicial board or commission, or by a special staff of the National Security Council, or by a similar board or staff within each department and agency reporting directly to the Cabinet officer or agency head.

Such a board or staff would be authorized to determine periodically whether existing documents, or portions of them that do not endanger national security, should be removed from classified listings. It would be a gigantic and awesome job at first, and it would take a long time to go through the present classified documents. For example, as I understand it from GSA, at the present time, there are some 150 million pages of papers from World War II that are classified, 20 million of which are classified by joint action of the United States and the United Kingdom. For Korea, there are about 75 million pages of documents classified. That is a lot of nonsense. I just do not understand why you cannot start a review of these things and see what can be made public, and then bring them up to date. It is a tough job, but if it could be started, I think you would have the result of eliminating some of the present problems relating to Government information. It would be a start.

Mr. Chairman and members of the committee, that concludes my prepared remarks and, as I said, I would be happy later to attempt to answer any questions you may have on this subject. Thank you again for your kind invitation to participate in these hearings today.

Mr. Moorhead. Thank you, Mr. Hagerty, for your excellent statement. We will hear the statements of all of the witnesses, and then the subcommittee will propound to all of the witnesses.

We would like next to hear from Mr. George Reedy.

Mr. Reedy?

STATEMENT OF GEORGE REEDY, FORMER PRESS SECRETARY TO PRESIDENT JOHNSON

Mr. Reedy. Thank you, Mr. Chairman. My name is George Reedy and I am a fellow of the Woodrow Wilson International Center for Scholars, and dean designate of the College of Journalism, Marquette University.

I merely wish to make a few general remarks at the outset and then, of course, be available for the questions that come later.

I understand you gentlemen have some 30 days of hearings ahead of you, and I have no doubt that during those 30 days you are going to be able to construct a genuine chamber of horrors. But, I think there are a few general principles governing this whole question of access to information, and of freedom of information, that are very important to keep in mind.

First of all, there are really two problems involved here. One is the problem of access to information: the other is the problem of knowing that the information is there. I think that the latter has become one of the principal problems of government. Mr. Hagerty has just cited the example of 150 million pieces of classified paper that are still hanging over from World War II. Now, the thought that that leaves in my mind is if there are 150 million classified pieces of paper, how many pieces of paper are there hanging over from World War II and all of the years since then which have not been classified, but for all practical purposes, might as well be simply because nobody knows they exist, and nobody knows how to get at them?

This has become a considerably greater problem in the last few years, because the character of the White House staff has changed and

in the changing of the character of that staff, what you now have is a situation where many pieces of paper can be brought into the White House staff that formerly remained in the executive agencies.

For the executive agencies the newspaper corps over a period of many decades has developed techniques which sooner or later will unearth the kind of information that is necessary for them to proceed about their profession. My friend, Arthur Sylvester, has had a great deal of experience with these techniques and they are quite effective.

But, with the White House staff you have a somewhat different situation. At one time, the White House staff was a relatively small group of people. They consisted of personal advisers to the President, and were covered by executive privilege which was exercised, in my judgment, in an extremely legitimate form. I do not think that you should be able to pry loose from a President personal matters he does not want to have pried loose. But, even if you should be authorized to do it, there is simply no way of getting at it. I do not care what law you write, or what you put through the Congress, or how many safeguards you set up, the President heads another branch of the Government, and to really try to pry loose from the President his thoughts, and the personal advice that comes to him, I think, would come close to precipitating a congressional crisis. But with the proliferation of White House staff members we are at a point where we are getting a shift of operating agencies into the White House itself.

I do not know what the size of the White House staff is today, and I doubt if it would be possible to find out without appointing a very large commission to go through the place, and make a head count. But I do know that in some testimony before the Senate Foreign Relations Committee, it has been estimated that the current National Security Council staff is more than three times the size of the Security Council staff that was there when I was in the White House, and I thought that was too big. I know that the press staff, if you add together both Mr. Klein and Mr. Ziegler, is at least three times the size of the staff that I had, and while I had plenty of problems, very great problems, they were never really staff problems. There is a rather good rule in the White House which is if any one part of the White House increases by a certain amount, the rest are going to rise to it.

What this means, is that you are beginning to get a tremendous amount of the actual operation of the Government centered in the White House itself where it is covered by executive privilege.

I think from the standpoint of freedom of information, or rather access to information—freedom of information is something else—one of the principal problems that has to be faced is the fact that new agencies are being created in the White House, agencies where information is gathered, collected, and used in a manner that formerly characterized agencies like the Defense Department, State Department, Labor Department, et cetera. These agencies have a certain vulnerability to the press, which I think is a highly healthy vulnerability.

Somewhere along the line, we have to take a very careful look at this fundamental problem of the new forms of organizations that are arising, of the new White House staffs that are really no longer personal advisers to the President and who, from a realistic standpoint, should not be considered in that category, but who are housed within the

White House confines and therefore are fairly invulnerable to the press.

I would like to make one other general statement and, that is, that I think freedom of the press and access to information is from a philosophical standpoint just about where it has always been. You have freedom of the press because the press is willing to fight for it and because usually in fighting for freedom of the press, they have been able to pick up some allies. You have access to information because the press has always been capable of probing around for areas of vulnerability. We have had a free press for a couple of hundred years now, and over that period of time newsmen have learned many techniques. As long as you do not set off one part of the Government, which is relatively invulnerable, the press one way or another will succeed in prying loose the information that the public needs.

I think that you gentlemen performed a very valuable service when you passed the Freedom of Information Act. I am not quite certain that you are going to get a large number of cases under it, or that you are going to get a lot of information out of it. But frequently the value of legislation consists in the fact that it exists and that every government official knows that the press has an ultimate weapon against him if he becomes a little bit too tight, too tough in withholding information. This means he will be considerably more candid.

But, you would still have to get back to the other question of what good is the weapon, if information can be placed into areas that cannot be reached by the normal processes. I am not a lawyer and I do not come here with specific recommendations because I think this is a legal question. But, I believe if I were in your position, gentlemen, this is the principal thing I would look at. What can be done about these huge, sprawling bureaucracies, these new agencies that are being set up within the White House itself?

Thank you, gentlemen.

Mr. Moorhead. Thank you very much, Mr. Reedy, for that extremely helpful statement.

We would like now to hear from Mr. Arthur Sylvester, a former Assistant Secretary for Public Affairs, Department of Defense. Mr. Sylvester?

STATEMENT OF ARTHUR SYLVESTER, FORMER ASSISTANT SECRETARY FOR PUBLIC AFFAIRS, DEPARTMENT OF DEFENSE

Mr. Sylvester. Thank you, Mr. Chairman. I do not have a prepared statement. I come here as a civilian. It is the first time in a good number of years that I have appeared before a congressional hearing as a civilian instead of a government official. It is a pleasant feeling to enjoy the freedom of a civilian again.

I come to you after 37 years in the news business, 15 on the executive side, and 6 years in the Defense Department with responsibility for its many public information programs.

I would make one or two observations before opening myself up to any questions you may have. I assume that all of us start with the idea that a government information program must be factual and truthful throughout.

However, if I say that thesis is relative at times, it is because when the Government speaks it does not always speak only to its own people. It speaks to several audiences. It speaks to its own people, it speaks to its friends, it speaks to the neutrals, and it speaks to its enemies. Was the administration truthful or not truthful when spokesmen stated that Mr. Henry Kissinger, the President's adviser on international security affairs had suffered a stomach upset while on a Far Eastern trip while actually he had stopped off to China to make arrangements for Mr. Nixon's visit there? The explanation was not factually correct but I think it was justified in view of what was developing. Moreover, the President was going to report the fact to the people when something very important was finally arranged.

I think of the situation at the turn of the 18th century in our country. There were ever so many religious sects and they all had their wonderful preachers; they all had camp meetings in the wilderness, in the forests of the then west, which would be western Kentucky. Among them were two groups, the truthful Baptists and the lying Baptists. Now, the truthful Baptists tell the story of a minister who had five children. The Indians captured him and four of the children. The fifth was hidden nearby. The Indians demanded of him whether the four constituted his whole family. And he looked them in the eye and said, yes, they did. The truthful Baptists held he had no right to spare the fifth child and they consigned him to hell fire and damnation. But the lying Baptists, of whom I am one, believed that he did exactly right, and if necessary, should do it again.

It is with that proviso, I think one must judge government information. We should also remember that all men put their best foot forward. We all justify ourselves, and when men become government officials, I do not think that changes them.

I would like to question a phrase which I saw only once in the report. Mostly the report referred to and talked about freedom of access to information, which I think is the basic thing, not the so-called peoples' right to know. This phrase, if you look at it, is meaningless. There is no expression of the peoples' right to know in the Constitution, and there is no provision for the people to exercise it. The press has used it to identify themselves as the source of the peoples' right to know. But ask yourself, what happens if there is a strike and the strike closes down the papers in a city for 2 or 3 months? Where did my right to know go? The danger, I think, is that people will get the idea that they have a right to know and that this right must be exercised through the media. In time, your successors will be passing a law which will set up a national commission of some sort to enforce that right to know by stepping in, by directing papers.

The first amendment protects the right to publish, but it also protects the right not to publish. I, as a newspaper man, do not control your mind only by what I tell you. I do it by what I do not tell you. This is a very valuable right for all media, which I think they are jeopardizing with their emphasis on the peoples' right to know. Freedom of access to government information for everybody, as your report states, is the goal.

I would like to make two suggestions. One is a dangerous one and I probably should make it just as I am leaving, so I will make it

second. The first one is that as you go along you consider the feasibility of requiring each agency to identify a single person as responsible for the release of information, someone on whom you can put your finger for the responsibility of getting the news out. I think this will tend to reduce buckpassing. At the same time, I think you should give considerations to the peril of the leak of information that is properly classified. A government cannot long endure under those conditions.

Finally, and I say this after very good relations over 6 years with this committee, I do think that the congressional committees can set an example themselves. You can increase access to information by opening up some of your meetings and by making available how you vote. After all, you are doing the Government's and the peoples' business, and it seems to me that the people have a right to access to the legislative branch, as well as to the others.

Thank you, Mr. Chairman.

Mr. Moorhead. Thank you, Mr. Sylvester, and the welcome mat is still out for you, despite those remarks. I expect they will be repeated by future witnesses.

We would like now to hear from Mr. Harold R. Lewis, former Director of Information, of the Department of Agriculture.

Mr. Lewis?

STATEMENT OF HAROLD R. LEWIS, FORMER DIRECTOR OF INFORMATION, DEPARTMENT OF AGRICULTURE

Mr. Lewis. Mr. Chairman, members of the committee, I left the Government a little less than a year ago after nearly 35 years in the information business, and my comments are being given as a private citizen. But they are based on considerable experience with Government freedom-of-information matters, and I hope that they will be of some practical value to the committee.

Being out of the Government gives one a new perspective of the news. You are able to observe it more critically, and you are impressed—in fact, sometimes appalled—at the diversity of complex national and international issues that daily confront the U.S. public. As a professional separated for the first time from official sources, you begin to wonder how the layman is able to sift out what is personally most meaningful to him, and how good an understanding he can have of governmental proposals and actions.

So, from the standpoint of making information freely available, the freedom of information law, I felt, was a real milestone in the long history of sensitive relationships centered on the peoples' "right to know" versus the need Government has felt to withhold information for national security or other reasons.

For a government information officer, a strategic part of whose job was to keep information moving, the new law had distinct advantages in its policy direction for disclosure, and in the provisions that put the burden of proof for withholding on the Government and which gave citizens the right to seek legal action against withholding. Particularly in the early phases of the law's application, these measures brought about a more positive attitude toward disclosure among administrative and other officials, and they strengthened the hands of those responsible for release of information.

Against these pluses from the law have been difficulties in its administration that in my opinion have to a considerable degree frustrated its purposes. Such difficulties have stemmed in part from the law's flexibility, in part from organizational steps taken to implement, it, and to some extent from attitudes of government officials regarding program administration relationships with nongovernment people.

First, in retrospect, arrangements for administering the law can have real influence on how effectively it can be applied. For example, in a widespread department such as Agriculture with many constituent units, an agency-by-agency system for handling FOI requests and appeals without designated strong central review and direction can create weaknesses. Without such central authority, it is difficult to effect speedy and consistent fulfillment of both requests for information under the law and to appeals resulting from refusals.

The situation can be further complicated when the appeal officials—those who make the agency decisions—are administrative heads by virtue of their positions in the organization.

Typically, three types of officials would be involved in considering an FOI request or appeal—an administrator, a legal counselor, and an information officer. The information officer's role would chiefly be that of adviser, not decisionmaker. He would have to resort to persuasion rather than clearcut decision, and persuasion rarely carries the weight of authority.

As a result, some FOI decisions could be made without adequate regard for implications of withholding action. A central point of review, with specific authority beyond that usually provided department staff officers, would obviate many FOI difficulties and provide for continuous review and education.

Because the freedom of information law is broad and general, it is of course necessary to work under it on a guideline basis—rather than under specific provisions that in a more absolute way would point to specific courses of action. This naturally leaves a great deal open to interpretation.

The nine exemptions are a case in point, important as they are in setting policy directions. Because they are permissive, people who lean toward withholding can often see them in that light rather than as a means of disclosure. In appraising the exemptions from the information point of view—especially during the earliest days of the law's existence—it actually was necessary to clarify that they made it possible, not necessary, to withhold information.

Related to disclosure considerations under the exemptions can be concerns about relationships with business in the conduct of government programs. Government officials can sometimes develop well-intentioned but proprietary attitudes toward the programs they administer. This can lead to fears that disclosure of certain types of information, for example, might result later in the inability to obtain needed cooperation from business representatives. Again as an example, claims that information was received in confidence can create problems. Confidentiality is to be honored under prescribed conditions. But—except where legal restrictions exist—you can avoid its being used as a shield against disclosure through procedures that give advance notice of intended release of submitted information.

Also, it has been my observation that most of the indicated fears seem to be unfounded, that once the initial reaction to disclosure is experienced, business between government and industry proceeds quite normally.

Finally, I would like to make three suggestions for strengthening FOI activities and goals:

1. That the Congress strongly reiterate the intent and purpose of the freedom of information law in view of experience under it since July 4, 1967. This would help rekindle an awareness that the law is here to stay and should be administered positively.

2. That the Congress arrange a review of executive mechanisms set up to administer the law, with the goal that those less encumbered than others with program responsibility and relationships be brought more authoritively into the decisionmaking process.

3. That provisions of the law—especially the exemptions—be reviewed in light of executive agency experience to ascertain whether some provisions need clarification or definition by Congress to assure that they are used effectively to support the law's thrust for disclosure.

Few laws are absolute or self-administering. The sound judgment and good intent of many people toward the welfare of the public are needed to make such a measure as the freedom of information law work effectively. Because acts of our Government touch the lives of all our people so comprehensively today, people need to be informed about where their greatest welfare lies. Direction from the Congress to strengthen administration of the freedom of information law is key to meeting this great need of the U.S. public.

Thank you, Mr. Chairman.

Mr. Moorhead. Thank you very much, Mr. Lewis.

We now would like to hear from Mr. J. Stewart Hunter, former Associate Director of Information for Public Services, Department of Health, Education, and Welfare.

Mr. Hunter?

STATEMENT OF J. STEWART HUNTER, FORMER ASSOCIATE DIRECTOR OF INFORMATION FOR PUBLIC SERVICES, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Mr. Hunter. Among the witnesses called by this committee in 1966 were the heads of the major Government departments and independent agencies. Almost to a man, they testified that the proposed Freedom of Information Act was "restrictive", "potentially severe and disruptive," "not in the public interest" or, at mildest "unnecessary."

I doubt that one department head could be found today who would not applaud the law's existence and pledge allegiance to it. The comparison is not invidious, for to be in favor of the "public's right to know" is to be against sin and in favor of general righteousness.

After 4½ years of operation, what is the real state of affairs? Is information really and more readily available under the act?

In a recent Washington Post article, a case was cited of a professor of history who, while working on his doctorate, applied to the National Archives for its files on pollution. He was told that he could not use anything stamped "Bureau of Investigation."

"The period I was interested in was the first decade of the Twentieth Century," the professor wrote. "I feel ridiculous even suggesting that the Nation's security could be threatened by seventy years passed, but apparently somebody does."

In the spring issue of the Texas Law Review, in an article entitled "The Games Bureaucrats Play; Hide and Seek Under the Freedom of Information Act," Mrs. Joan Katz of Mr. Ralph Nader's Center for Responsive Law says:

> [The Act] has not fulfilled its advocates most modest aspirations * * *. The ambiguities and deficiencies of [the statute] will be remedied, if at all, only by the passage of new and improved legislation.

These are harsh judgments. After 4½ years as one of the act's principal administrators in HEW, my own opinion is that the truth, as it usually does, lies somewhere in between. I believe that the law's general effect has been salutary and has worked in the public interest. I believe, however, that there are faults in the act and in its administration in the executive branch which are indeed grievous and need correction. These hearings are most welcome, for there has been world enough and time to make a proper assessment of the act.

We can begin, I believe, with the premise that no government can exist which is totally open. It is equally true that representative government cannot possibly exist in a closed society. People's right to know is, in fact, less important than their need to know if they are to reach reasoned decisions for social action. This has been my consistent view as a government information officer and it is what gives the Government information function meaning and substance.

Recognizing the relative nature of things, let me review briefly our experience at HEW. First, the statistics. The Department's report to you last summer, Mr. Chairman, on 4 years' experience, showed 368 formal requests under the Freedom of Information Act. Of these, 258 were granted, 16 granted in part, 77 denied, and 17 in process. I should point out that these represented formal requests. A great many more were settled informally—and usually affirmatively—by telephone, in conference, or by a simple reminder that administrative whim no longer serves as an excuse for refusing access to information. Moreover—and this is an important point—the 258 which were granted would have been denied except for the act and that would have been the end of the matter. Knowledge of the act's existence has brought about, in fact, a slow, sea change in attitudes within HEW and, I dare say, in other parts of government, from an impulse to deny, toward a disposition to reveal information. Critics maintain that if this is so, the change is too slow—and I would agree. But a change in attitude exists and that is progress.

It is of some interest to note the exemptions provided under the law which were the basis of HEW denials: 11 involved trade secrets; nine interagency memos; seven personnel files; and four investigative files compiled for law enforcement purposes. The balance were a combination of several or scattered among other exemptions.

When you are dealing, as this committee will be, with freedom of information and with the design of freeing more of it, the "whys" of denial are the really important factors. Were we correct in those we made in HEW? With the aid of excellent advice from HEW's General Counsel's office, I am reasonably certain that the decisions were

technically sound under the law and the Department's public information regulation. With the luxury of lengthening perspective, I am less certain that we were always ethically on firm ground in every case.

Congressman John Moss was kind enough to praise HEW publicly a year or so ago for our handling of the Freedom of Information Act. Such success as we had—and it is certainly qualified—can be attributed to several factors: First, we took the law seriously and approached its administration affirmatively; second, we restricted authority to deny to a very few people—in fact, just four officials here in Washington which is obviously the principal point of information, thus promoting reasonable consistency of viewpoint; and third, we tried to judge each case ad hoc, thus avoiding that iron of precedence which is so often the last refuge of bureaucracy.

As time wore on, however, it became increasingly clear that no matter how affirmative the approach or how scrupulous the intent to remain positive, it was impossible to live up to the full spirit of the law or our own expectations for it.

From the standpoint of HEW, there are, in my judgment, several principal reasons:

1. The exceptions provided in the law itself, as Prof. Kenneth Culp Davis of the University of Chicago pointed out in the summer of 1967, are too broad, too loose, and too difficult to interpret. These faults were carried over in HEW's public information regulation and in other agencies. As the exemptions now stand, almost any administrator can, if he puts his mind to it, find refuge in them. To be sure, administrative remedy for appeal exists and the road to the courts is open but few have the patience, the time or the resources to follow this route.

2. The timelag between an applicant's request and action by a government agency has proved to be far too long and the absence of a specified time sequence frustrates the law. I am sorry to say that certain agencies of HEW, notably the Food and Drug Administration, have lamentable records. The Administrative Conference of the United States, representatives of which are to appear before this committee, has proposed 20 days for an initial denial and, as I recall it, 30 on appeal. I believe this is reasonable and workable.

3. In HEW—and possibly in other agencies—clear conflict exists between earlier legislation and the Freedom of Information Act. For example section 1106 of the Social Security Act, as later amended, authorizes denial of information on virtually every operation of that agency. This authority was blanketed in HEW's public information regulation, as was similar restrictive legislation dealing with the Food and Drug Administration. It has placed severe inhibitions on the successful administration of the Freedom of Information Act. The original intent of the Social Security Act amendment was to protect the earnings records of those enrolled—a perfectly laudable objective. But section 1106 as it now stands squarely contradicts the Freedom of Information Act. As long as it exists, it will constitute a barrier to obtaining information on that agency's operations.

Perhaps this committee might consider querying all Government agencies to determine to what degree similar legislation may be hampering the flow of information.

You will, Mr. Chairman and members of the committee, be receiving many more suggestions for strengthening the act. As a member

of the executive branch and as a government information officer, I welcomed this legislation when it was enacted. I have been puzzled, if I may say so, at the apathy of some of my colleagues in public information who should, in conscience and as a practical matter, have become its vigorous champions. They and the members of the press should give you their enthusiastic approbation and support.

I welcome, as they should, this reappraisal which you are now undertaking, as being necessary, timely, and very much in the public interest.

Woodrow Wilson once wrote: "No man has ever seen a Government. I lived in the Government of the United States for many years and I never saw the Government of the United States."

The engine of government is, indeed, formidable and surely none of us may ever comprehend it all. By exposing as many of its moving parts to the public view as possible, we are nonetheless materially advancing knowledge about government. This is essential in our kind of society. In so doing we contribute to the vitality and the endurance of the Government of the United States and to our democratic faith.

Thank you, Mr. Chairman, and members of this committee for this opportunity to participate in these important hearings.

Mr. MOORHEAD. Thank you, Mr. Hunter, and I thank all of the witnesses.

First, I would like to ask unanimous consent to include as part of the record the text of our press release announcing the hearings, the schedule of witnesses and the other matters dealing with the hearings. Without objection, that will be made a part of the record.

(The press releases follow:)

NEWS RELEASE OF COMMITTEE ON GOVERNMENT OPERATIONS, JANUARY 24, 1972

Representative Chet Holifield, Democrat, California, chairman of the House Government Operations Committee, and Representative William S. Moorhead, Democrat, Pennsylvania, chairman of the Foreign Operations and Government Information Subcommittee, today announced plans for hearings on the economy and efficiency of operations under the Freedom of Information Act (5 U.S.C. 552). The detailed review of the administration of the act is scheduled to begin early in March.

The information law, the product of 11 years of subcommittee hearings, studies, and reports, was enacted in 1966 and became effective throughout the executive branch on July 4, 1967. The subcommittee hearings will be the first comprehensive review of how effective the new law has been in achieving its objective to broaden the public's "right to know" about the activities of the Federal Government.

The hearings will examine the executive branch handling of the Freedom of Information Act on a selected case basis to illustrate actual experiences of individual citizens, corporations, journalists, law firms, and others, Moorhead said. The subcommittee will also review case law based on court interpretations of various exemptions contained in the act and will pinpoint those Federal agencies with the "best" and "worst" performance records as shown in a subcommittee analysis of case-by-case denials of information.

Other phases of the extended hearings will cover such subjects as public information aspects of the Government's security classification system, congressional access to executive branch information, public access to meetings of Federal agencies, and on several bills referred to the subcommittee that would amend the Freedom of Information Act.

Moorhead said that both governmental and outside witnesses will be invited to testify on various aspects of the law's operation. Some sessions will be panel discussions by Government information experts and by representatives of the

media. A list of witnesses who will be testifying at the subcommittee hearings will be announced at a later date.

Members of the subcommittee, in addition to Moorhead are: Representatives John E. Moss, Democrat, California; Torbert H. Macdonald, Democrat, Massachusetts; Jim Wright, Democrat, Texas; John Conyers, Jr., Democrat, Michigan; Bill Alexander, Democrat, Arkansas; Ogden R. Reid, Republican, New York; Frank Horton, Republican, New York; John N. Erlenborn, Republican, Illinois; and Paul McCloskey, Jr., Republican, California. Ex officio members are Representatives Chet Holifield, Democrat, California, and Florence P. Dwyer, Republican, New Jersey.

NEWS RELEASE OF COMMITTEE ON GOVERNMENT OPERATIONS

(MARCH 2, 1972)

Representative Chet Holifield, D.-Calif., chairman of the House Government Operations Committee, and Rep. William S. Moorhead, D-Pa., chairman of the Foreign Operations and Government Information Subcommittee, today announced that hearings on the administration and effectiveness of the freedom of information law (5 U.S.C. 552) will begin at 10 a.m., Monday, March 6, in room 2154, Rayburn House Office Building. The hearings will be open for live radio and television coverage. The tentative list of witnesses for the first 2 weeks of hearings is attached.

Expert witnesses at the opening day's hearing will testify on basic Government information policies as they affect the public's "right to know." They include Presidential press secretaries from the past three administrations—James C. Hagerty (Eisenhower); Pierre Salinger (Kennedy); and George Reedy (Johnson). Other experts include departmental public information specialists—Arthur Sylvester, former Assistant Secretary for Public Affairs, Department of Defense; J. Stewart Hunter, former Associate Director of Information for Public Services, Department of Health, Education, and Welfare; and Harold R. Lewis, former Director of Information, Department of Agriculture.

A group of legal experts on the Freedom of Information Act will testify on Tuesday, March 7. Former Associate Justice of the Supreme Court Arthur J. Goldberg will be the witness on Thursday, March 9. Assistant Attorney General Erickson from the Justice Department's Office of Legal Counsel will be heard on Friday, March 10.

The hearings are expected to continue on this and other aspects of the law through June. Lists of other witnesses and subject areas to be covered will be released in the coming weeks. Later hearings will include problems involving the law's exemption affecting security classification and national defense secrets and the problems of congressional access to information from the executive branch, including workable limitations on so-called Executive privilege. The hearings will also explore public access to meetings of various Executive agency "advisory groups," which involve policymaking decisions.

In June, the subcommittee will hold hearings on two measures to amend the freedom of information law—H.R. 8903 (Horton, R-N.Y.) and companion bills that would prohibit the sale by Federal agencies of mail lists for commercial purposes and H.R. 854 (Koch, D-N.Y.) and companion bills that would require Federal agencies maintaining files or records on individuals to apprise them of such records, with certain exceptions affecting national security or law enforcement records.

Moorhead said that witnesses will include Members of Congress, Government officials, and outside organizations having direct experience in the operation of the freedom of information law. Some of the sessions will be panel discussions of legal experts, historians, representatives of the news media, and others who have used the law to obtain information from the Federal Government, either by administrative decision or by court action. The hearings will also review case law based on court interpretations of various exemptions contained in the law and pinpoint those Federal agencies with the "best" and "worst" performance records as shown by an analysis of case-by-case denials of information.

Members of the subcommittee, in addition to Moorhead, are Reps. John E. Moss, D-Calif.; Torbert H. Macdonald, D-Mass.; Jim Wright, D-Tex.; John Conyers, Jr., D-Mich.; Bill Alexander, D-Ark.; Ogden R. Reid, R-N.Y.; Frank

Horton, R-N.Y.; John N. Erlenborn, R-Ill.; and Paul N. McCloskey, Jr., R-Calif. Ex officio members are Reps. Chet Holifield, D-Calif., and Florence P. Dwyer, R-N.J.

TENTATIVE WITNESS SCHEDULE (PARTIAL LISTING)

HEARINGS ON U.S. GOVERNMENT INFORMATION POLICIES AND PRACTICES—ADMINISTRATION AND OPERATION OF THE FREEDOM OF INFORMATION ACT

Monday, March 6, 10 a.m., room 2154, Rayburn

A panel of Government information experts consisting of:
Mr. James C. Hagerty, former press secretary to President Eisenhower.
Mr. Pierre Salinger, former press secretary to President Kennedy.
Mr. George Reedy, former press secretary to President Johnson.
Mr. Harold R. Lewis, former Director of Information, Department of Agriculture.
Mr. Arthur Sylvester, former Assistant Secretary for Public Affairs, Department of Defense.
Mr. J. Stewart Hunter, former Associate Director of Information for Public Services, Department of Health, Education, and Welfare.

Tuesday, March 7, 10 a.m., room 2154, Rayburn

A panel of legal experts on the Freedom of Information Act consisting of:
Mr. Frank Wozencraft, attorney, Houston, Tex.
Mr. Anthony L. Mondello, General Counsel, U.S. Civil Service Commission.
Mr. Richard B. Wolf, deputy director, Institute for Public Interest Representation, Georgetown University Law Center.
Mr. David Parson, chairman, Committee on Government Information, Federal Bar Association.

Thursday, March 9, 10 a.m., room 2247, Rayburn

Mr. Arthur J. Goldberg, former Supreme Court Justice, former Secretary of Labor, and U.S. Ambassador to the United Nations.

Friday, March 10, 10 a.m., room 2154, Rayburn

Mr. Ralph E. Erickson, Assistant Attorney General (Office of the Legal Counsel), Department of Justice, accompanied by Mr. Robert Saloschin, attorney, Office of the Legal Counsel.

Tuesday, March 14, 10 a.m., room 2203, Rayburn

Mr. Roger C. Cramton, Chairman, Administrative Conference of the United States, accompanied by—
Mr. John F. Cushman, Executive Director, Administrative Conference.
A witness to be designated by the Office of Management and Budget.
A panel of individuals having experience in the administrative workings of the Freedom of Information Act consisting of:
Mr. Reuben Robertson, attorney;
Mr. Harrison Wellford and Mr. Peter Schuck, Center for the Study of Responsive Law;
Mr. Bertram Gottlieb, Transportation Institute.

Friday, March 17, 10 a.m., room 2203, Rayburn

A panel of the news media having experience in the use of the Freedom of Information Act consisting of:
Mr. Ward Sinclair, Washington bureau, Louisville Courier-Journal;
Mr. R. Peter Straus, publisher, Straus Editor's Report;
Mr. Roy McGhee, reporter, United Press International, Washington bureau;
Mr. Donald L. Barlett, reporter, Philadelphia Inquirer; and
Mr. John Seigenthaler, editor, Nashville Tennessean.
(This partial list will be supplemented to include witnesses for other hearings to be held prior to the Easter recess on March 20, 24, 27, and 28.)

NEWS RELEASE OF COMMITTEE ON GOVERNMENT OPERATIONS, MARCH 6, 1972

The Foreign Operations and Government Information Subcommittee of the House Committee on Government Operations today launched a new series of hearings into information policies and practices of the Federal Government with testimony from a group of ex-presidential press secretaries and departmental public information officials.

Subcommittee Chairman William S. Moorhead, D-Pa., cited in his prepared opening statement congressional concern over "the increasing dangers of erosion of public confidence in Government because of restrictions by the Executive on the free flow of information."

He said that "the problem of informing all of the people who are an integral part of the democratic process has become more and more important in recent years and has grown to alarming proportions, particularly since World War II."

"Call it Government secrecy, news management, the credibility gap, or truth in Government, it is a problem which has been with us since our form of Government was established. It is a political problem, but it is not a partisan problem."

Former presidential press secretaries James C. Hagerty (Eisenhower), Pierre Salinger (Kennedy), and George Reedy (Johnson) were scheduled to appear in a panel discussion of the basic problems of information and the internal business of Government versus the public "right to know" with former public information officers Harold R. Lewis (Agriculture), Arthur Sylvester (Defense), and J. Stewart Hunter (HEW).

The initial portion of the hearings will center on the administration and effectiveness of the Freedom of Information Law, passed by Congress in 1966 after more than 11 years of studies and investigations by the subcommittee, then headed by Representative John E. Moss, D-Calif.

"We plan to find out whether the executive branch of the Federal Government is following the letter—and the spirit—of the Freedom of Information Act," Moorhead stated, "and we plan to suggest legislative solutions to any shortcomings we uncover."

Early in May, the subcommittee will concentrate its attention on the portion of the Freedom of Information law which permits executive agencies to hide Government information in the name of national defense or foreign policy—the system for classifying Government documents as "top secret," "secret," or "confidential." Extensive hearings were held by the subcommittee on classification procedures last summer in connection with its review of questions arising from the so-called "Pentagon papers" controversy.

Moorhead said that other portions of the hearings would deal with the particular needs and problems of Congress in obtaining information from the executive branch which is required to carry out its constitutional responsibilities. Also on the hearing agenda for June is an investigation of special information problems posed by "hundreds of Government 'advisory groups' who hold thousands of official meetings, often behind closed doors with no public or congressional knowledge of decisions made or deals discussed."

Chairman of the parent Government Operations Committee is Representative Chet Holifield, D-Calif. Other members of the Foreign Operations and Government Information Subcommittee are: Representatives John E. Moss, D-Calif.; Torbert H. Macdonald, D-Mass.; Jim Wright, D-Tex.; John Conyers, Jr., D-Mich.; Bill Alexander, D-Ark.; Ogden R. Reid, R-N.Y.; Frank Horton, R-N.Y.; John N. Erlenborn, R-Ill.; and Paul N. McCloskey, Jr., R-Calif.

Mr. MOORHEAD. Now, with the agreement of the members of the subcommittee, I would like to suggest we proceed under the 5-minute rule for the first round of questioning, and then under the 10-minute rule thereafter. And I would ask the staff to notify everybody, starting with the chairman, when the 5 minutes have expired.

Mr. Hagerty, I was amused by your description of having to go to President Eisenhower to get papers declassified that you wanted to release. You have had the same trouble with the bureaucratic machinery, that sometimes frustrates us in the Congress, I gather.

Mr. HAGERTY. Quite often, Mr. Chairman.

Mr. MOORHEAD. And if President Eisenhower said this is now still top secret, that is because of the President's ability to use strong language when he did not want to reveal to this subcommittee; is that correct?

Mr. HAGERTY. Let us say that was between he and I.

Mr. MOORHEAD. Mr. Reedy, did you have any similar experiences? Did you have to get papers declassified by the President himself that you thought should be revealed to the public?

Mr. REEDY. No, not many papers. The principal problem in the White House, of course, is that what the press really wants to know are the intentions of the President, and information comes out of the White House according to the desire of the President to release his intentions or not to release his intentions. I think that Mr. Hagerty served in the White House when there was a greater adherence to the staff and command system. He operated in an atmosphere where papers, I believe, carried more weight and more authority. In the White House I served in, formal papers were far less significant. What really counted were the discussions and the desires and the intentions of the persons. You see, this is one of your greatest problems. We can get bogged down a little bit too much here in thinking that this is a question only of data. Really data are only a small part of it. What really matters is intention, and that is a very difficult thing to force out in the open. You can never really pry loose a man's intentions.

Mr. MOORHEAD. The next question I would like to direct primarily to Mr. Hagerty and Mr. Reedy, but I would welcome comments from the other witnesses. Since Presidential press secretaries are constantly exposed to questions from the press, my question is, Shouldn't they also be permitted to appear before congressional committees, and, if so, what ground rules should be adopted to protect their legitimate confidential communications between the President and his press secretary?

Mr. HAGERTY. Here you get into, Mr. Chairman, this whole problem of executive privilege. As far as I was concerned I was a staff officer to the President. I did my best to help the news media when I could, but I was working as a confidential staff officer to the President.

One of the things that in any discussion like this, I think you have to bring up—and my argument with some of my friends in the news media—is that you cannot compare Presidents or the way they operated, unless you compare the decade in which they operated. The 1950's were entirely different from the 1960's, and the 1960's bear little resemblance to the 1970's, and the 1970's are going to bear little resemblance to the 1980's. During the time that Mr. Eisenhower was in office, it was a relatively quiet period of time. Korea was settled in the first 9 months of his administration. The only time that our troops were used in a foreign exercise was Lebanon. There at the request of the president of that country, we sent in 25,000 troops, all of which was made public from the time they landed until the thing was cleared up. Internally in the United States, you know, it was a different ball game than it is now. Our States were solvent, our cities were relatively solvent. The greatest civil rights confrontation in the years that I was in the Government was Little Rock. Well, Little Rock was

a tea party compared to Watts and Newark and what is happening in our society at the present time.

Mr. MOORHEAD. Well, what is the difference between your being subjected to questions by the press and being subjected to questions which a congressional committee asks?

Mr. HAGERTY. I had, and I am sure that George and other press secretaries had, the complete knowledge of both the secret operations of the Government, as far as programs and policies were concerned. There would be many instances where I do not think that I could have testified, and would have had to say, "I am terribly sorry, sir, I can't answer that question publicly." Now, this is what worries me. This is what concerns me, and it would not be attempting to shield things from you. It would just be that the information I had was of a secret nature, and until the President decided that it should be public, I could not decide on my own that it would be public.

Mr. REEDY. I would like to make still another distinction, Mr. Chairman. We have an example of a very grave problem here which is why I have raised this whole problem of the White House staff. I do not think that you will ever be able to subpena a press secretary or to bring him before the committee for the simple reason that it would be the same thing as bringing the President before the committee. I cannot conceive of a press secretary that does not have a personal relationship with the President. When the press secretary is answering questions for the press, he is answering them for the President.

Now, the problem that I am raising is that this basic relationship, which I think is legitimate, has now become a huge blanket. It is not just a question of one administration by the way. This is a trend that started a long time ago, and is increasing, I think. You have a major problem when you have such huge White House staffs that are invulnerable to press questions and congressional questions. But, if you are going to get to any point where you say that any assistant who genuinely has a personal relationship with the President can be brought before congressional committees, you encounter the constitutional question of your capacity to bring the President before committees.

Mr. MOORHEAD. Thank you, Mr. Reedy. My time has expired.

Mr. Reid?

Mr. REID. Thank you, Mr. Chairman.

I would like to address a question to Mr. Reedy and Mr. Hagerty if I may, but preface it with a proposition and one or two comments.

First, I think that today the press is under the most serious attack in its history. Now, this may be perhaps more a question of accident than design, but the exercise of prior restraint on the right to publish, which I believe should be removed from the reach of the Executive, the improper subpenaing of reporters, notes and the beginning of the use of the licensing power to threaten to control content of radio and TV in contravention, in my judgment, of the applicability of the first amendment rights, are clearly warning signals.

Mr. Reedy has talked about access and the knowledge of what we feel as being two elements of the problem, and I would like to ask you two questions. One, would either or both of you, favor a mechanism of oversight on classification, an oversight over declassification with this mechanism, which I think probably would be a congressional mecha-

nism with the Senate and the House having the right to declassify and make public that which was improperly classified?

And the second question that I would like to ask deals with executive privilege, which I think is really the fundamental question here today. Mr. Reedy has talked about the danger of a congressional or a constitutional crisis. I am planning to introduce legislation shortly, with bipartisan support, that would require the executive to provide information to a congressional committee when requested, and if there is a failure to do so there would be an automatic cutoff of funds within 30 days, and the Comptroller General would be required not to countersign Treasury warrants. And if the executive persisted in spending these funds, the executive would be subject to sanction.

Now, the distinction here is not on the confidentiality of staff in the White House or tactical decisions or advice given to the President, but it relates to the question of benchmark policy decisions, where when the Congress is asked to act or is required to exercise first. And here I would make a distinction between telling the Congress that we are tilting towards Pakistan, which I think the Congress is entitled to know, and private communications with an ambassador or Chief of State. But, unless the Congress gets fundamental information, and there are several instances, the Gulf of Tonkin being one, where fundamental information was not available to Congress which would have related to the congressional decision. And I think there has to be some kind of an accommodation. It may have to be determined in the courts.

But, would you, Mr. Reedy, comment first on a classification mechanism, and, second, some way of reaching the question of executive privilege through accommodation, particularly, in the light of the shift of many agencies into the White House, and the blanket you now talk about?

Mr. Reedy. Well, in answer to your first question, Mr. Reid, I would definitely favor some sort of legislative oversight over the whole classification process. The thing has become a monster. Jim talks about the 150 million pieces of paper. Don't forget that is out only of World War II. It represents only a small part of the papers available in the Government. I do not believe, however, that oversight would get to the fundamentals of the problems you are raising. I agree with you that the press is under heavy attack, and there are very grave dangers. I think these things are largely in our society. There are many forces at work over which you gentlemen have no control and no jurisdiction and about which you can do nothing. But, nevertheless, I think it would be good and useful to have declassification because I believe it would be a reassuring thing to the public. If you were to declassify 150 million pieces of paper in one swoop, I do not know what the press would do with it, but at least the papers would be available for inspection.

Your second question bothers me. I believe, and again I am not speaking as a lawyer but as a student of government, that you would have a great deal of difficulty encroaching on the prerogatives of the executive. I have a rather strong feeling that if you went that far with the law that you would get one of those "Mr. Marshall has made his law, now let him enforce it" propositions later, depending on how far you pushed it.

But, secondly, let us even assume that you would do it, or could. I think you would do one healthy thing, I think you would eliminate the amount of paper in the Government. There would be a greater amount of informal conversation, and fewer memorandums. I think we have far too much paper floating around today. We are being drowned in a sea of paper.

But, nevertheless, even if you could do it I think that all you would get, then, would be memorandums that were extremely sterile. I do not think this would advance the cause of freedom of information or access to information.

Mr. Reid. The chairman has kindly suggested that Mr. Hagerty have a chance to respond, even though we have run a little over the 5 minutes. And I again would make a distinction, one between fundamental benchmark policy, going to war, questions of that kind, or major changes, to which the Congress should be entitled to have some information, from necessary staff work that should remain confidential.

Mr. Hagerty. Well, I think I have made my position quite clear on classification. I think something ought to be done about it, both by the executive branch and by the Congress. And I think that more thought, more study on this, and review of this can lead to modifications and changes in that system.

Mr. Reid. And that would include the right to declassify and make public that which was improperly classified in the interest of the right to know?

Mr. Hagerty. I would have to see what the words are and how you would work it out. I cannot say "Yes."

Mr. Reid. You do not exclude that, though?

Mr. Hagerty. I would not exclude it, but I think it has to be in relationship with the Congress and the executive branch of the Government, and I do not know how you are going to work that out at the present time.

But, by and large, I would be leaning in favor of something like that.

Mr. Reid. Yes.

Mr. Hagerty. On the executive side, however, this is another question. There were many times, and I can only talk about my own time in the Government, there were many times in internal discussions, even with the President of the United States where I, as a staff officer, would deliberately take a different point of view, even if I did not believe it, because nobody else had raised it.

You have to be in a position where you give your boss all sides of the question. Now, if I were to raise something like this in an internal staff meeting with the President, and then be called upon to testify on what I said on something that I did not really believe in the first place, I think then you screw up the whole intimate working relationship with a President. And I am now talking only of the White House, between a President and his staff.

I would agree with George that during the 1950's our staff was an awful lot smaller than the present staff. The problems were smaller.

But, you cannot, you cannot choke off through legislation or any way else the internal discussions within, we will say, the White House, where people are deliberately taking another point of view to get that point of view to the President, so that he has all sides of the question.

We are staff officers of the President, we are not like members of the Cabinet or assistant members of the Cabinet. We are appointed and serve at the pleasure of the President, period.

We are not confirmed, we are not nominated. That is a different situation. But, I would think that it would be most difficult and, in fact, impossible to have staff officers up testifying.

Mr. REID. Thank you, Mr. Hagerty.

Mr. MOORHEAD. Mr. Wright.

Mr. WRIGHT. Thank you, Mr. Chairman. I know that two or three of the witnesses have made specific recommendations for changes in the Freedom of Information Act. And Mr. Hunter, for example, made two that interest me.

I believe you suggest, Mr. Hunter, that the time lag between an applicant's request for information and action on that request is entirely too long, and you quoted the Administrative Conference as recommending a 20-day period for response to an initial request, and a 30-day period for response on an appeal. Do you think that should be written into the law?

Mr. HUNTER. I would be inclined to favor it because we are all familiar with the possibility inherent in the law for delay, and I have seen this in operation in HEW and other parts of the Government in which a request finally died as a result of longevity in process.

And I am sorry to say so, but some of them in HEW we acted on with reasonable speed, but we are also, as administrator of an act of this sort, at the mercy of others, and not infrequently at the mercy of people who do not want to reveal the information that has been requested.

And you could use the law as a delay indeterminately. I believe it would be very useful to write it into the legislation.

Mr. WRIGHT. Thank you. One other question, Mr. Hunter:

You make reference to the fact that section 1106 of the Social Security Act, coming as it does under the exemption of the Freedom of Information Act, which exempts disclosure exempted by other statutes, authorizes denial of information on virtually every operation of your agency. Would you be inclined to favor an amendment which would limit that to the very understandable matter which you said the act initially was intended to exempt—that is, earnings, and the records of people enrolled in the social security system?

Mr. HUNTER. I think as a first step I do not know how prevalent this is. I can only speak for HEW, but by blanketing in early legislation we have had problems with the Public Health Service in terms of legislation that was contradictory, and internally it was supposed to revise this because these were internal relations, and there were discussions within the Department still going on with Commissioner Ball, a very able man, about revision of this particular section of the law, to make it more responsive.

I think that what might be very useful in this instance is to look into 1106, to examine it carefully.

And I would also suggest to the committee that you have a look at other Government agencies to see whether that is happening there.

Mr. WRIGHT. Thank you.

Mr. Reedy and Mr. Hagerty, I have a little problem with the suggestion advanced by our colleague, Mr. Reid, to the effect that we should require all administrative agencies to give any information

asked by Congress under penalty of losing their authorization, or their capacity to spend money. I think we must begin with the recognition that there are certain items of information which in the public interest must be held rather securely.

I am afraid we might get into a little difficulty there if Members of Congress would follow the path of becoming their own declassification agencies and reading the classified documents into the record.

If we had that many declassification agents, we probably would not have any classification at all.

But what Mr. Hagerty said in the beginning is quite true, I think, that what we strive for is balance, and this has been a historic problem of a free society.

There was a man named Heraclitus who said that the problem of organized society is to combine that degree of liberty without which law would be tyranny with that degree of law without which liberty would be license. Mr. Sylvester, I think, mentioned the need to keep secret the whereabouts of Henry Kissinger on at least one occasion. I can see that. I wonder, though, if officially we do not have too many cover stories for things we well could simply acknowledge. I am thinking, Jim, about a thing that occurred when you were at the White House—the U–2 incident. I think it embarrassed us a little when the Russians shot the fellow down and we denied that he was there, and the President later had to identify that as a "cover story."

I remember the words, even. It made me feel a little squirmish.

Mr. HAGERTY. It made us feel a little squirmish, too.

Mr. WRIGHT. It probably did. Why wouldn't it have been better for him to say, "Yes. Yes, we were flying over there to see what you fellows were doing. We have advocated an open skies policy. We advocated it at the United Nations, and we have made that public, and you fellows ought to fly over here."

Mr. HAGERTY. I cannot talk about it too much. I voluntarily signed a little paper taking an oath not to review certain things when I left that office. And, you know, hindsight is a wonderful thing. We move too fast.

But, the other side knew there were overflights, and I would think that looking at it now, that your suggestion was probably very good or would have been good. But, when you are right in the middle of it, it's different. If anything, we move too fast.

Mr. WRIGHT. What a comfort it is, Mr. Hagerty, to know that I have made those same mistakes.

Mr. HAGERTY. But in the world we live in there are overt and there are covert activities of our Government, and I would hope that they would continue for our own personal knowledge and safety. But on that one, if anything, it was too fast. And there you were with egg on your face and good egg, but it happened, and I would not be surprised if in the future something like this might happen again.

Mr. WRIGHT. Thank you, Mr. Chairman.

Mr. MOORHEAD. Thank you.

Before yielding to the gentleman from New York I would like to say that Congressman Horton has written an excellent article in the January–February issue of Case and Comment entitled "The Public's Right To Know."

And without objection I would like to have that made a part of the record at this point.

(The article follows:)

The Public's Right to Know

by Hon. Frank Horton

The recent publication of the Pentagon papers, detailing U. S. involvement in Vietnam, and the dispute over the editing of the CBS program, "The Selling of the Pentagon," have focused national attention on the inevitable conflict in a democracy: the government's need for secrecy to protect the national interest, the public's right to know about the workings of its government and the media's responsibility to report the news.

The basis of our form of government rests on an informed citizenry, participating in decision-making. This principle assumes that the people must have available as much information as possible in order to make wise choices.

Yet, there is an undeniable need for government to withhold some information from the public if such information would be advantageous to hostile nations or seriously damaging to the national interest.

The media have a duty and a responsibility to inform the public in a fair and accurate way about the workings of the government.

Because of the nature of the responsibilities and obligations of the public, government and media in the democratic process, conflicts inevitably occur—the publication of the Pentagon Papers and the CBS program, "The Selling of the Pentagon," are the most recent examples.

Propelled by these concerns, the Foreign Operations and Government Information Subcommittee of which I am a member, has held hearings on the entire question of the "public's right to know." It is this area that the Subcommittee was authorized to investigate and protect when it was created in 1955.

As a result of my years as a member of this Subcommittee, and because the question of the "public's right to know" is vital to the survival of our democracy, I have undertaken a major study of this entire area.

The findings of this study are included in this article.

This article examines the entire question of secrecy, security and the classification and declassification of government information. This includes an analysis of Executive Order 10501, which outlines the conditions under which information may be classified and declassified, as well as Executive Privilege, which circumscribes the kind of executive branch data that may properly be withheld from Congress.

The Freedom of Information Act of 1967, which was passed in 1966 to provide the public with as complete access as possible to public records and to prevent government agencies from unjustifiably withholding information, is also examined as a key element of the public's right to know.

The question of truth in media news reporting will also be looked at. The media are protected from Congressional restraints by the First Amendment, which says "Congress shall make no law abridging freedom of speech or of the press."

EXECUTIVE ORDER 10501—Authority for Federal Secrecy?

Presidential Order 10501 sets out the rules and regulations determining which government agencies may classify information as secret, which officials may decide that information must be withheld from public view, how material is to be classified, for how long it may be kept secret, and what procedures must

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This article was written especially for Case & Comment.

be used to declassify material which no longer is sensitive and which is no longer properly hidden from the public.

This far-reaching Presidential Order was first issued in November, 1953, and has been amended at least six times since then. The Order is entitled "Safeguarding Official Information in the Interest of the Defense of the United States." As presently written, it authorizes the heads of 34 different Federal agencies, departments, commissions and offices to delegate to their subordinates the power to classify defense-related information in one of three categories of secrecy: Top Secret, Secret or Confidential. In addition, the heads of twelve more agencies are permitted to classify material but are not authorized to delegate classification powers to others in their agencies.

Executive Order 10501, which occupies 14 printed pages, begins as follows:

WHEREAS it is essential that the citizens of the United States be informed concerning the activities of their government; and

WHEREAS the interests of national defense require the preservation of the ability of the United States to protect and defend itself against all hostile or destructive action by covert or overt means, including espionage as well as military action; and

WHEREAS it is essential that certain official information affecting the national defense be protected uniformly against unauthorized disclosure;

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes, and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows. . .

The Executive Order goes into great detail about what kinds of material may be classified, and what procedures for distribution, protection and declassification of such material should be used. For example, in setting out the appropriate use of the Top Secret classification the Order states:

> ". . . The Top Secret classification shall be applied only to that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation such as leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to the national defense."

The Order is replete with warnings and statements to the effect that overclassification of material should be avoided, but it goes into even more detail as to the need to avoid underclassifying material, particularly material which, while not Top Secret or Secret in and of itself, is connected with information or material which is legitimately Top Secret or Secret.

Also, the Order specifies a procedure, to operate within each agency, as well as between and among several agencies, for declassification of material. But it is clear that the authority to declassify is far more restricted in several ways than the authority to classify. On bal-

ance, more emphasis is given in Executive Order 10501 to protection of classified material than to declassification of information that is no longer sensitive.

This has resulted in much overclassification of information and a tremendous backlog, numbering in millions of documents, of material which, while properly kept secret initially, should have been declassified years ago.

20 Million Secrets

The main point that emerged from the hearings of my Subcommittee on Foreign Operations and Government Information on the Pentagon Papers and on this Executive Order was that there were as many as 20 million classified documents within the Federal structure.

One witness before the Subcommittee, William G. Florence, a recently retired Air Force civilian security classification official, told us that he felt 99½ per cent of the 20 million documents could now be made public without compromising national defense.

While experts disagree as to the exact number, it is safe to say that at least two-thirds of these Top Secret, Secret or Confidential documents should have been made public long ago, since their sensitivity to national security has expired. These documents range from an absurd "Secret" classification of already-published newspaper articles, to proper Top Secret stamps on current troop deployment plans.

Despite several amendments to Executive Order 10501 since it was issued in 1953, which have been designed to avoid overclassification of information, the situation is still serious, and the public's right to know is being ignored in too many instances. One amendment properly reduced the number of Federal agencies empowered to classify material.

Until January, 1961, such agencies as the Migratory Bird Conservation Commission and the Indian Arts and Crafts Board had authority to classify documents as military secrets. Other amendments reduced the number of classification categories from four to three and stipulated time limits for "downgrading" of classified material from Top Secret, to Secret, to Confidential and finally, to public information.

Despite these efforts, the classification system remains jammed with overclassified material. Witnesses before our Subcommittee said the problem was that there appears to be an unlimited number of people within the government with the power to classify, but a lower priority and fewer people are assigned to the declassification of outdated documents.

In some ways, this is understandable. With limited staff and resources, an agency would put a higher priority on protecting current material that is truly sensitive, than on digging into its files to make public outdated troop plans for World War II or the Korean War.

The weight of the Executive Order, and the stiff penalties provided under the Espionage Act for disclosure of classified material serve to impede unwarranted disclosure of classified material. But the same factors also impede legitimate declassification of non-sensitive material. Government workers, while they have little cause to hesitate in classifying or even over-classifying a document, are reluctant to take responsibility for declassifying information about which they have even the slightest doubt.

President Nixon has recently asked Congress to fund 100 additional people whose job it will be to declassify thousands of World War II documents which have remained secret only because no one wanted to spend the time or money needed to declassify them. This is an important step forward, and it is the first time in many years that the public's right to know has received this kind of Presidential priority. However, the addition of 100 people does not solve the overall problem.

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To help insure the public's right to know and to untangle the web of secrecy which has grown up behind Executive Order 10501, I am proposing several steps to help guarantee that the people and the Congress have access to information that is not truly sensitive.

Proposals to Untangle the Secrecy Backlog

My analysis is that there has been no government plot to delude, or deceive the public. On the contrary, the lack of attention to declassifying outdated documents, including much of the contents of the Pentagon Papers, has been a result of low or no priority placed on carrying out the tedious job of reviewing each document and clearing it for public release.

To untangle this web of secrecy, I am proposing several steps to guarantee that the people can get access to information as soon as it is prudent and possible to release it without compromising our security or our defense posture.

I propose the following changes in Federal procedures and priorities both within and outside the scope of Executive Order 10501:

1. Each agency empowered under 10501 to classify information should be asked to include in its budget requests to Congress for fiscal 1973 funds sufficient to properly staff, within the office of the agency head, an Office of Information Declassification. This staff should be sufficient to complete the task of sifting through classified documents and declassifying outdated documents so that the declassification process is brought completely up to date by the end of fiscal year 1974. Of course, priority information of public interest that is no longer sensitive should be declassified first, leaving more routine documents for processing toward the end of this two year period.

   The Offices of Information Declassification in each agency should remain sufficiently staffed after July 1, 1974 to maintain a current declassification program. Some agencies may require only one or two people to complete this task, while agencies which have extensive classification of material may require substantially more. The Office of Management and Budget should be under Presidential directive to give priority treatment to these budget requests in their annual review of individual agency budgets.

2. Executive Order 10501 should be amended to provide that each classified document, in addition to being stamped with its appropriate level of secrecy, should also be marked to show:
   a. the office and official responsible for classifying the document;
   b. the earliest time the document would be eligible for "downgrading" to a lower level of secrecy, and for declassification; and
   c. the offices or officials authorized to review the classification of the document and to declassify it.

3. That each Office of Information Declassification established under the first proposal report annually to the House and Senate Committees on Government Operations, and that these reports shall include:
   a. the number of documents currently in the possession of the Federal agency which are classified Top Secret, Secret and Confidential;
   b. the number and general description of documents declassified or downgraded in the past twelve months;
   c. the estimated "classification backlog" of the agency, that is, the number of classified docu-

ments which have not been reviewed for declassification, but which have passed the date of eligibility for review;

d. an estimate as to what steps or funds may be required for the agency to bring its declassification procedures up to date.

I believe that these steps which I have recommended to the President and the Government Operations Committees, will insure that the public's right to access to government information will not, either deliberately or inadvertently be relegated to last priority (as has been the case under Executive Order 10501) in the Federal government's effort to protect information that is truly sensitive to national security.

Executive Privilege

There is no question that there is a current crisis of confidence and of information existing among many segments of American society. You can say that we are today beset with several "credibility gaps" in America.

The first of these credibility gaps is between government and the public at large. "Are we getting the straight story from Washington?" "Everything worth knowing is secret!" These are typical comments of American citizens concerned about the truthfulness and reliability of government.

In addition to the serious secrecy backlog, there are other gaps of credibility.

A lesser-known, but equally serious informational gap has developed within the Federal government itself, in the very delicate but important relationship between Congress and the President. Under the doctrine of separation of powers, among the three branches of the Federal government, the President is not responsible to the Congress and the Congress is not responsible to the President. Both are co-equal branches of government. However, in order for the government to function, it is necessary that a high degree of trust and cooperation be developed between Congress and the President, and it is also necessary that neither branch act to obstruct the proper functioning of the other.

Recently, the information gap between Congress and the President reached the proportions of a small public crisis. This was highlighted when it was learned that the Senate Foreign Relations Committee, which normally has full access to classified material, had requested a copy of the "Pentagon Papers" three times from the Administration, and each time the Administration refused, citing the doctrine of Executive Privilege. The Papers were finally released only after parts of them were published in the press.

The term "executive privilege" is most commonly used to refer to a situation where the Executive Branch of the government refuses to divulge information requested by the Congress. Others, including Senator Sam J. Ervin, Chairman of the Senate Judiciary Subcommittee on Separation of Powers, use the term to mean "the withholding of information of any kind by the Executive Branch from any persons, be they Members of Congress, or members of the taxpaying public."

At issue in the question of Executive Privilege and its use to keep information from Congress and the people are conflicting principles. First is the power of the President to withhold information, the disclosure of which he feels would impede the performance of his constitutional responsibilities. Second is the power of the legislative branch to obtain information in order to legislate wisely and effectively; and third is the basic right of the taxpaying public to know what its government is doing.

The dispute over the use of Executive Privilege is just one aspect of the overall debate going on in our government over the increasing concentration of

power in the Executive, and the lessening of power of the Congress. In foreign policy, I have addressed the problem of Congress abandoning its constitutional powers over war and peace to the Executive—to the point where Congress has all but lost its role in the decision to wage war, or to engage American troops abroad. Part of this erosion of legislative power is a direct result of the fact that the Executive has more information at its disposal than the legislature.

Where the Congress is uninformed, it obviously cannot be expected to act in a timely and responsive manner. Where certain kinds of information are held exclusively by the Executive, that branch of government is in a strong position to determine, by itself, how that information will be used. This is why the question of Executive Privilege, and its use and abuse, is crucial to the effective and constitutional operation of our government.

Congress Has a Right to Know

Since the Administration of President George Washington, the desire of the President to keep certain information from Congress because he feels it would compromise his office and his responsibility, and the desire of Congress to be told all have resulted in conflict. When asked by the House of Representatives to produce information on the St. Clair expedition, President Washington replied that:

> ". . . The House . . . might call for papers generally . . . The Executive might communicate such papers as the public good would permit and ought to refuse those, the disclosure of which would injure the public . . . Neither the committee nor the House had a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President."

Despite George Washington's contentions above, all of the requested documents were subsequently turned over to the Congress. However, his words began the idea that inherent in the President's authority was the power to withhold information if, in his discretion, it would compromise his duty, under Article 2, Section 3 of the Constitution to see that the "laws are faithfully executed." Because courts have held that the "President alone and unaided could not execute the laws," but requires, "the assistance of subordinates" the alleged authority to withhold information, or to exercise this "Executive Privilege" has thereby been extended to the entire Executive branch.

While there is no express language in the Constitution permitting Executive Privilege, its development has come about partly because the Congress has failed to assert its own power in the face of Presidential claims of the inherent power to withhold information.

Thus, each succeeding President has set the policy for his Administration by telling the Congress how he will interpret and follow the doctrine of Executive Privilege, instead of the Congress laying down guidelines for how the doctrine should be used, if at all.

President Kennedy was the first President to seek to end the practice of delegating Executive Privilege to other officials within his Administration. Each recent President, at the start of his term, has written a letter to the Chairman of the Government Information Subcommittee of the Government Operations Committee stating his policy with regard to Executive Privilege. President Kennedy's letter stated:

> ". . . this Administration has gone to great lengths to achieve full operation with the Congress in making available to it all appropriate documents, correspondence and information. That is the basic policy of

this Administration, and it will continue to be so. *Executive privilege can be invoked only by the President and will not be used without specific Presidential approval.*"

Thus, in the Kennedy Administration, no Cabinet officer or other official could withhold information requested by Congress without the personal and express consent of the President regarding that information. President Johnson and President Nixon have followed this laudable precedent.

In addition, President Nixon has set up an elaborate procedure which Executive branch officials must follow before the doctrine can be invoked. The agency or department head concerned must consult with the Attorney General as to his desire to withhold information from Congress. If the Attorney General refuses, the information must be supplied. If the Attorney General agrees, he just then refers the matter to the Counsel to the President, who must then consult with the President and obtain his final judgment as to whether Executive Privilege should be invoked.

Despite these limitations in the use of the doctrine, there are many who feel that *any* refusal of information is inconsistent with the Freedom of Information Act of 1966, which prohibits the withholding of any information from the Congress by the Executive. Current controversy over foreign policy issues has prompted suggestions that Congress finally take the initiative and clearly define by statutes how Executive Privilege may or may not be used.

Military Assistance Plans

Presidents, over the years, have felt it necessary to protect "staff papers" and internal information which is exchanged during the decision-making process from public and Congressional scrutiny. The contention is that the Executive Branch, while it must be made to defend and justify its decisions once they are formulated, should not be required to have Congress looking over its shoulder in conference room discussions, where differing views and options are discussed by Executive officials and where decisions are reached.

Under this contention, Presidents have historically refused requests for members of their personal staff to appear to testify before Congressional Committees, on the theory that this would be inordinate interference with the inner workings of the President's personal office and staff. I do not disagree with the need to protect the policymaking process and the staff discussions and memoranda which make up this process. There is increasing concern, however, that so much of the power of government is becoming concentrated in the Executive, and particularly in the White House staff itself, that there is a greater need for Congress to be informed of the attitudes and decisions of officials who are close to the President.

This concern is particularly strong in the field of foreign affairs. Under this Administration and in the past few, a great deal of foreign policy power has been lodged in the White House, in addition to the State Department. Despite the great influence of Henry Kissinger and his staff in foreign policy decisions, however, the Congress and its Committees have been denied the right to question Dr. Kissinger even in closed sessions, because he is a member of the White House staff.

Concern over refusal to provide Congress with access to certain information erupted into a confrontation recently when the Senate Foreign Relations Committee threatened to cut off funds for the Foreign Military Assistance programs unless the Defense Department produced its tentative five-year plan for military assistance to countries abroad or, in the alternative, unless the President himself asserted the right of Executive Privilege over this information. The contention of this Committee was that it could not be expected to legislate wisely unless

it had access to the Administration's plans for these programs over the next five years.

The crisis was averted when the President, for the first time in his Administration, formally asserted the right of Executive Privilege, stating that release of this information to the Committee would infringe on the proper exercise of executive powers. Because of the importance of military assistance policies, especially in light of the Vietnam experience, where a military assistance program grew into a major, decade-long war, I feel strongly that Congress should have access to information which reflects the Administration's best judgment and plans for future assistance. Without this kind of information, Congress cannot exercise its best judgment, and if Congress does act without it, we take yet another step toward giving up Congressional war powers to the Executive.

Legislative Steps to Limit Executive Privilege

A number of proposals have been made for dealing with the question of Executive Privilege through permanent legislation. The strongest bill has been proposed by Senator Fulbright. His measure, S–1125, would require that any administration official called to appear before a Committee of Congress must, in fact, personally appear, even if he intends to assert that the information sought by that Committee is covered under executive privilege. If the witness does assert executive privilege over all or part of the information sought from him, he would be required by S–1125 to present a letter personally signed by the President which asserts the privilege of withholding the information.

There are others who feel that executive privilege, since it is not specifically covered anywhere in law or in the Constitution, should be thrown out altogether, and that the Executive should never be permitted to withhold information from Congress, no matter how tentatively misleading the documents sought may be.

While this sounds like maximum protection of the public's right to know, I think before such a drastic step were taken, Congress would have to show responsibility in the protection of information which, if disclosed publicly, could severely endanger our national interests or security.

My view is that the separation of powers, and the relationship between Congress and the President does justify a very carefully limited doctrine of executive privilege. In the past, the decision as to how to use and interpret the doctrine has been left to each President. I feel that the current practice of limiting executive privilege to the President alone, and prohibiting lower level executive branch officials from asserting it without specific Presidential approval should be written into law.

Also, I feel that since greater and greater power has evolved to the White House staff in recent administrations, executive privilege should not be automatically applied to every request by Congress to interrogate members of the President's staff. Congress as the elected representatives must have access to all information held by the Executive which has a true and direct bearing on the ability of Congress to wisely and fully exercise its Constitutional powers.

Thus, I would support legislation to limit the exercise of executive privilege by law to accomplish these safeguards of the public's right to know, and the Congress' right to be fully informed of what the Executive is doing and thinking.

The Freedom of Information Act

On July 4, 1966, President Lyndon B. Johnson signed Public Law 89–487, the Freedom of Information Act.

This new law, developed after twelve years of work by the House Subcom-

mittee on Foreign Operations and Government Information, was passed to provide the public with as complete access as possible to public records and proceedings, and to prevent government agencies from unjustifiably withholding information. While Executive Order 10501, discussed earlier, concerns the withholding of information which is classified, or essential to national security, the Freedom of Information Act deals with non-classified information which should rightly be open to public scrutiny. The Act covers agency decisions and proceedings, records, staff manuals, regulations and documents leading to the issuance of regulations and a host of other material.

The Freedom of Information Act was adopted to revise and improve the public information section (section 3) of the Administrative Procedure Act of 1946. Government agencies, it was found, were using this section of law to withhold, rather than to make public, information under their control.

The intent of the new law is that disclosure be the rule, not the exception; that all individuals have equal rights of access to government information; that the burden be on the government agency to show why a document should be withheld, rather than force the individual requesting access to information to show why it should be disclosed. The old procedure, as set forth in Section 3 of the Administrative Procedure Act, had placed the burden on the public rather than on the government.

A very crucial provision in the Freedom of Information Act gives individuals who are refused information the right to seek injunctive relief in the Federal Courts.

The Act provides for nine exceptions to automatic disclosure, and included under the exceptions are those documents required by Executive Order to be kept secret in the interest of national defense or foreign policy. Additional exceptions are: matters related solely to the internal personnel rules and practices of an agency; interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency; reports on financial institutions regulated or supervised by the Federal government; and geological and geophysical data, including maps, concerning wells.

Periodic reviews of the Freedom of Information Act since 1967 by Congress and the media have found that while the law is working better than its predecessor, there are still serious deficiencies, many of which are the same deficiencies which existed under Section 3 of the Administrative Procedure Act.

The Act is not self-enforcing. It needs strong executive support and initiative to carry out its full intent, and it requires the willingness and ability of the media and the public to seek court decisions to enforce freedom of information in specific cases.

Problems Under the New Law

On July 20th of this year, four years after the effective date of the Freedom of Information Act, the *Washington Post* carried an article by Morton Mintz which pointed up some very serious problems with the Freedom of Information Act, problems which bar the public from viewing much of the workings of its government.

According to Mintz' article, a graduate student complained to his Senator (Lee Metcalf of Montana): "At the National Archives I was advised that I could not use anything that was stamped 'Bureau of Investigation.' " The student, who is working on a Ph.D. thesis in history, stated he was interested in information covering the first decade of

the twentieth century and that he felt "ridiculous even suggesting that the nation's security could be threatened by information seventy years past, but apparently somebody does." The files to which this man sought access concerned *pollution* in the United States in the early 1900's.

Mintz also reported the hopeful side of government information. In a court case where the Department of Labor cited the Freedom of Information Act as authorization to keep secret certain information about job safety inspections and violations, a Federal District Judge ruled that the Secretary must provide the information to the public. In a similar case, the Agriculture Department was routinely preventing public access to records it kept on meat and poultry products which it suspected of being adulterated or unwholesome. It cited the Freedom of Information Act as exempting the material from public disclosure as an "investigatory file." Both the Federal District Court and the Court of Appeals ruled against the Department and for public disclosure.

These are two important examples in which the 1967 law has been effective in freeing access to information to the public which was withheld by the government before Congress gave individual citizens the right to challenge Federal agency secrecy in the courts.

There are other examples, however, which point up serious deficiencies in the Freedom of Information Act. The Food and Drug Administration has frequently refused to make available transcripts or other public access to proceedings where firms are told to show cause why they should not be prosecuted for Food and Drug Act violations. Several Federal Advisory Committees and Advisory Councils have also sought to keep their deliberations and meetings closeted from public view.

The law also has flaws in the other direction. Some of the exemptions from disclosure provided for in the Act are too narrow and too ambiguous, in addition to those which are too broad. One well-known example is the inadequate protection in the law for legitimate individual rights of privacy.

Last year, I learned from a constituent who was required to register with the Treasury Department as a gun collector under the Gun Control Act of 1968, that his name, and 140,000 other names of gun collectors and dealers were being sold indiscriminately. The computerized mailing lists, sold by the Treasury, were being used by commercial firms seeking to sell firearms to persons on the list, to political candidates seeking support for their legislative stands against gun control, and to anyone else who could produce $140.00, or one tenth of a cent per name, to buy the list. I surveyed over 50 Federal agencies to learn what policy they followed under the Freedom of Information Act where mailing lists were concerned.

The results were astounding. Some said the Act forced them to make all mailing lists available to everyone; others cited provisions of the same law which they interpreted as prohibiting the distribution of any mailing lists; others had no policy at all. As a result of my survey and the confusion over construction of the Act, I introduced a bill, H.R. 8903, to protect individual privacy from indiscriminate use and sale of Federal mailing lists. There are over 65 cosponsors of my bill, which has been referred to the Foreign Operations and Government Information Subcommittee, on which I serve. The chairman of the Subcommittee has assured me thorough hearings will be held. Hopefully, this aspect of the Act can be clarified and individual rights of privacy protected.

Congress, because it is the national legislature, is not subject to the Freedom of Information Act. No federal agency may cite the provisions of the act as justification for withholding any information from Congress. It is important that Congress have completely free access to

federally-held information, except for that which is withheld under a carefully defined and applied doctrine of Executive Privilege.

Recently, an attempt was made on the floor of Congress to distort this Congressional exemption from the act, and to, by reference, extend this exemption to a new Consumer Protection Agency, which would be created under a bill which has been passed by the House of Representatives. Congressman Chet Holifield, Chairman of the House Committee on Government Operations, and I handled the Consumer Protection Act, H.R. 10835, on the House floor. Both the Chairman and I opposed an amendment which would have permitted the new agency to probe into the files of other federal agencies containing information covered by the Freedom of Information Act. The amendment, known as the Moorhead amendment, sought to accomplish this by directing the new agency to conduct these investigations for the purpose of reporting the results to the Congress. Since the information would not be classified, by including it in a report to Congress, it would, therefore, become part of a public document. By this vote, legitimate trade secrets and other information protected under the act would be made public. The amendment was soundly defeated 160 to 218, but it serves as an illustration of the need to protect the concept of the Freedom of Information Act both from those who seek to use it to over-protect nonsensitive information from the public, and those who seek to eliminate any and all informational controls, even those which protect security information, individual privacy, trade-secrets of private industry and the like.

Amendments Needed Now

There is clearly a need to take a fresh look at the Freedom of Information Act, and to comb through its detailed provisions in light of four years of experience with this new law.

The Freedom of Information Act is a major attempt by Congress to create an enforceable right for the public to see the records of government agencies. It is an important step towards this goal, but experience under the Act has shown that the present language falls short of fully attaining public access to government information.

The basic approach of the Act is very sound. It makes all records presumptively available for public inspection, with the Federal agencies bearing the full burden of justifying any withholding of information. This is certainly better than forcing the individual to show some special hardship in order to rebut a statutory presumption of secrecy or nonavailability. The Act creates nine specific areas of exemption from public disclosure. This is a better way of dealing with the necessity for keeping some information secret than trying to provide for blanket areas where secrecy is justified.

Still, administrative and judicial experience with this law have shown that its nine provisions exempting disclosure of certain kinds of information are in need of significant redrafting and improvement. In order for the Freedom of Information Act to be meaningful, any exemptions must be very sharply drawn. The current nine exemptions are an improvement over the two which were provided in the law before 1967, but they are still too vague to guarantee any real "right to know."

For example, the Act uses general terms like "confidential" and makes no attempt to define them. It contains two provisions for protecting privacy without pointing out any relationship between the two. The exemption covering "trade secrets and financial information" is poorly written and can be interpreted far too broadly. The last two exemptions in the present law seem somewhat superfluous, since their subject matter is covered under other exemptions.

Of course, some ambiguity in any new statute is understandable, and it is probable that four years ago, many of the problems that have developed under this law were not foreseeable. Now, however, the problems have been sharply focused over four years of experience.

The vagueness of parts of the statute has enabled many agencies to issue regulations permitting secrecy which take full advantage of a number of serious loopholes. While there is frequently some justification in the history of the law to support these strained interpretations, some of these agency regulations clearly go against the spirit of the law—the presumption in favor of public disclosure and against secrecy in government.

It is true that some agency regulations providing for the withholding of information cite the wrong exemption under the Freedom of Information Act, and that at least some of the information could rightly be withheld under one of the other exemptions—but some agencies use this technique to insure nondisclosure by placing their records under as many of the nine exemptions as possible.

I certainly will support efforts to redraft parts of the bill, to tighten up the language of its nine exemptions to bring them closer to the realities of disclosure and secrecy which four years of experience under the present law have exposed.

I also will work to provide more meaningful protection of legitimate individual privacy under the law, at the same time that we seek to breathe new life and new meaning into its protection of the public's "right to know."

The News Media

No matter how successful we are at eliminating needless government secrecy and untrue or misleading official pronouncements, the public must, in the final analysis, depend upon the vast news media as the only source of all information about what is happening both in and out of government.

Any discussion of the quality or re-

liability of the news media, including newspapers, magazines, radio, television and other news sources, must begin with the very strongest endorsement of the Constitutional guarantee of freedom of the press. It is often tempting and justifiable to criticize those who report and comment on the news.

Charges of inaccurate and biased reporting are rampant, and, considering the vast number of pages of newsprint and hours of broadcast news that are presented to the American public each day, these charges are inevitable. It would be highly dangerous, however, to suggest that the way to improve news reporting in America is to subject the media to public or government regulation.

I would dismiss any and all suggestions that the Federal government seek to improve news accuracy or eliminate the bias of certain media by placing them under regulatory rules and policies. Any such regulation probably would be a violation of the First Amendment in any event.

Once the necessity of preserving a free press is established, however, it must be emphasized that in any democratic society, it is crucial that the media be both free and *responsible*. Earlier this year, a Committee of Congress cited the CBS television network for contempt of Congress for its refusal to produce edited films and interviews used in preparation of the controversial documentary, "Selling of the Pentagon."

It was charged that the network, or at least those responsible for this production, had deliberately failed to report facts which would have cast legitimate doubt about the conclusions reached in the broadcast. Similar charges of inaccurate and incomplete reporting were raised against another documentary about the slaughtering of polar bears and other arctic mammals.

I voted against citing CBS for contempt of Congress, because I thought it would set a dangerous precedent of government reprisals against the free press.

Newspapers and magazines and other printed media are, of course, subject to no federal regulation, other than taxes, labor standards, postage rates and other federal laws which do not affect the content or policies of these publications. The broadcast media, while it is subject to licensing by the Federal Communications Commission for use of the airwaves, which are in the public domain, is not subject to censorship or other regulation which would place news broadcasts and editorials under any federal control. Because the media in this country should never be made subject to censorship or strict regulation of the content of presentation, it is vitally important that the media accept the responsibility which accompanies freedom of expression.

The news media have a tremendous and immediate impact on public opinion in America. This gives newspapers and radio and television stations and networks a major say in the decisions and operations of government. If their power is responsibly exercised, it can provide a very necessary and beneficial safeguard for the people of this democracy. If the facts which they present to the American people are accurate and complete, and fairly presented, the result will be a well-informed public—a public which is well-equipped to make the right choices, and to form intelligent opinions about government decisions and government leaders. If, on the other hand, the media use this tremendous power over public opinion in an irresponsible way, the results can be disastrous. If news presentations are incomplete or inaccurate, or if they are continually presented in a way that is clearly biased and opinionated, the public will not only be poorly informed, it will be misinformed. A misinformed public, or a public which is needlessly aroused by misinformation is alien to the principles of democratic government —where the judgment of the people

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must be the final reservoir of political power. If that judgment is poor judgment, based on misinformation, the democracy will flounder.

A simple example, stated from the standpoint of a member of Congress, may be useful to illustrate this point. Often, the television networks present documentaries on troubling public problems. Immediately after a television or magazine exposé on a major problem like hunger, the military, inhumane treatment of animals or other emotionally-charged subjects, a Congressman's mailbox is fllled with constituent letters and telegrams, inquiring about the need for federal actions or legislation to correct the problem. This is the way a representative democracy should work. But if the media program or article contained inaccurate or slanted information, and if it confused opinion with fact, either inadvertently or deliberately, there is virtually no way to repair the damage of misinformation. It is impossible for government or anyone else to compete with the media in terms of getting facts across to the public. Of course, it should not be necessary to compete with the media, if they do their job as responsible and reliable sources of information on all subjects.

In order for the media to accept this serious responsibility, it must police itself. It must set internal policies to assure that every possible effort is made to present the truth—the whole truth—to the American public. It must, where necessary, bend over backwards to assure that the listening, viewing and reading public can distinguish between reported facts about current events and the personal opinions of reporters and broadcasters.

Some Congressmen have offered a bill to require that broadcast media clearly label those portions of news programs and documentaries which are really commentary or fiction, so they can be more easily separated from actual facts.

My inclination is to oppose doing this by federal legislation, but I would strongly favor greater attention by media organizations to assure that all news presentations are responsible, accurate, fair and full reports to the public about the events of our complex world.

Conclusion

Our founding fathers recognized the need for a free and uncensored press, a press free to communicate and comment on the affairs of government. They incorporated this principle into the First Amendment when they wrote, "Congress shall make no law abridging freedom of press. . ."

It is imperative that government, the press and the public work to uphold this Amendment and to maintain the free flow of information, for this is the very foundation of our democratic form of government.

The criticisms I have offered here of Executive Order 10501, which governs official secrecy, of the currently applied doctrine of Executive Privilege, of the Freedom of Information Act of 1966, and of media reporting, are offered in this spirit. Support from the legal community for the proposals I have made for improving all of these aspects of the flow of information to the people, would contribute greatly to the stimulation of public concern of these issues—concern which must be evident before Congress, the Executive and the media will take the necessary steps to insure and protect the public's right to know.

Mr. HORTON. Thank you, Mr. Chairman, and I appreciate your putting that in the record. It does have some recommendations that I make in these various areas and I am glad that it will be in the record so that the Members and those who will be reading these printed records can have those recommendations before them.

Mr. Reedy and Mr. Hagerty, when does there come a time when information which has been exchanged between the President and those people that are working with him in a staff relationship should become public knowledge, or do you feel that it never should become the public's knowledge?

Mr. HAGERTY. No, I think that you have to divide Presidential actions between foreign and domestic. I think that domestically once a final Presidential decision has been made on any problem, it should be made public immediately. But while it is being developed, while it is being developed within the various departments and agencies, and until he makes that final decision, I think that there you can just say: "I have nothing to say."

If you are talking to a press secretary, he would have to say, "I just have nothing to say."

But, once a decision is made by the President, I think it should be automatically released.

On foreign affairs or national security it is a little different, is it not? There are many times when that cannot be made public at the present time. I think eventually it should, and I think eventually it does.

Mr. HORTON. Mr. Reedy?

Mr. REEDY. I think you have asked a question, Congressman, to which there is no good answer. You see, the problem here is the peculiarly personal nature of the President's job. This is a highly unusual thing, you know, and the President, in a sense, is the White House, and the assistants that have a personal relationship with him are extensions of the President.

Now, I, myself, have a philosophy that all information should be made available almost immediately, but that is really not answering the question. That is merely an expression of personal philosophy and does not govern others.

The facts are that the President is going to determine for himself the circumstances under which such information will be released. He is in a constitutional position where you really cannot touch him except through an adversary process by the Congress—an adversary process that I do not think you could bring into the courts for a decision.

I do not think you can set up any form or standard dialogue between the President and his personal assistants should be made public at a certain point.

Mr. HORTON. Well, it seems to me there are different areas that are involved. You are talking basically in this area about the executive privilege.

Mr. REEDY. Right.

Mr. HORTON. Now, a staff person, such as yourself, who was a confidant of the President, is perhaps to be treated differently from someone who is in one of the executive agencies and who is not in that confidential relationship.

Mr. REEDY. Right. I agree.

Mr. HORTON. I recognize that executive privilege does extend to these other persons, but I believe there is a will and intent to tighten up on executive privilege and I think a greater willingness to make information available.

I think under President Nixon, his letter of intent, makes it clear that he intends to be at least as tough as his predecessor in claiming executive privilege, and I am sure the next President will be at least as diligent as present and past incumbents.

So, it seems to me that there is a difference as to who is involved in the executive privilege. Now, did you have any comment on that?

Mr. REEDY. Yes. I think you also have to be very cautious not to get confused between form and substance. I think about the best we can do, and I really think it should be required by law, is to withhold executive privilege except in instances where it is stated individually, by the President, in writing, and quite possibly certified by some of the other officers. I know roughly speaking that has been the informal agreement over the years, but it is an agreement that really has never been fully tested.

I think it has to be forced. It is one I would rather see in the law.

Now, I do not believe the Presidents would exercise the right of executive privilege very frivolously if they had to do it in writing each time. If they would do it frivolously, I do not think there is really anything you gentlemen can do about it, but I have a feeling that there should be some such legal requirement, and that the only way you can get a workable answer to it is to set up a legal requirement and start testing it and see how it works out.

You know, on this whole question of access to information or freedom of information, you can very easily get yourself lost by assuming that certain words or certain forms have a real meaning.

For instance, my friend, Arthur Sylvester, thinks all congressional committees should be open—that there should be no secret sessions. Well, I have no particular objection to that except I worked up here on the Hill as a staff assistant for very many years. I know very well what would happen. You would have caucuses before the open session at which you would mark up bills. Similarly, if you had a law that required the National Security Council meetings to be open, I really do not think that would bother a President in the slightest.

He would have open meetings of the National Security Council, but first invite some of the people in for lunch before the meeting. There is a certain limit beyond which you cannot push this question of prying loose information, no matter what law you pass.

Some way will always be found of withholding that information which Government administrators think should be withheld for the good of the people.

Mr. HORTON. I am in accord also with the rest of your testimony that more and more the functions of Government are being transferred to the White House, and we have been concerned about this.

For example, in another subcommittee of the Government Operations Committee where we have been working with regard to reorganization, this has been one of the things that we have been concerned about, the fact that most of the decisions are being made in the White House.

You indicated in the thrust of what you had to say that the White House staff had grown. In other words, I assume that what you meant to say was that you could justify exceptions for the press secretary and those in a similar capacity but now that the staff is growing, and this sort of thing, it becomes more difficult.

Mr. REEDY. That is correct.

Mr. HORTON. Do you feel that there is a point at which the line should be drawn? I mean, is it easy to say the press secretary should be protected, but should there be a line drawn some place past the press secretary?

Mr. REEDY. The line that has to be drawn is where the relationship is genuinely a personal relationship. This is why I believe that the only way you can get it is to place the President in a position where he must exert this question of executive privilege individually and in writing.

I do not know how you can define by law which man does have a personal relationship and which man does not have a personal relationship. It is obvious on the face of it that very few of the White House assistants have a personal relationship, but the real determination has to be made by the President himself. That is why I think that if you required him to state that relationship individually, on each individual situation, you might get a handle on it. This is a very serious problem, Congressman. You are absolutely correct.

What we are doing is transferring all of the staff level, that is, all of the important staff and all of the important functioning of the Government into one new, huge super agency that is relatively invulnerable to Congress and newspaper attack.

Mr. HORTON. Thank you. My 5 minutes are up.

Mr. MOORHEAD. Thank you, Mr. Horton.

Without objection, then, we will proceed under the 10-minute rule for another round of questions.

Mr. Reedy, I want to follow up on Mr. Horton's questioning. As you know, first President Kennedy and then President Johnson, and then President Nixon exchanged letters with the former chairman of this committee (Mr. Moss of California) setting forth the assertion that executive privilege would be personally invoked by the President, and in writing.

Is it your testimony that you believe that this agreement in some form should be put into statutory language so that future Presidents would be bound by it when they would not be bound under the existing exchange of memoranda?

Mr. REEDY. Yes, I do feel it should be put into statutory language. The difficulty with a written agreement is that it lulls people to sleep, whereas if you actually had a statute on the books, sooner or later someone would test it. I know of no situation in which this principle of agreement has been tested. I know that some committee chairmen or some group of men, if there was a statute would say, "Now, let us see if this works," and they would try it.

If I could think of another definition which would differentiate for me the assistants, with the personal relationships, and the huge mass of people that really belong in the Defense Department, or the State Department, or Labor, or HEW, I would be in favor of that distinction.

But, that is the only handle I can see for it, Mr. Chairman.

Mr. Moorhead. Thank you. Now, the problem of "backgrounders" and "deep backgrounders" have received a lot of attention lately to the extent that some newspapers decided that they would refuse to participate in backgrounders where they cannot name the official who has given out the information.

From your experience, both in and out of Government, all of the panelists, is there a value of backgrounders or is this a practice that you cannot legislate out of existence, one that you should, or one that you should discourage? Or is it a valuable tool that should be encouraged?

Mr. Reedy. It is primarily a problem for the press, Mr. Chairman. There is, in my judgment, an extremely narrow field in which the background definitely serves a legitimate purpose.

I am talking about the formal type of backgrounders, a meeting that takes place in this city, and is basically a creature of World War II where you did have delicate information which the Government wanted to have out but for diplomatic reasons could not put out under official auspices.

Now, that is a very, very limited range. What has happened since then is that the thing has proliferated and has become almost a fad, and as a fad I believe it is rather harmful to the Government itself. You know, things do run in fads in this city. People do not necessarily do things because of carefully calculated reasons, and there are many Government administrators that I believe are attracted to the backgrounder the same way that they might be attracted to the latest deodorant, or the latest in fashion or dress, or something of that nature. But, I do not think there is anything you gentlemen can do about it. I think the press for the time being should get very hardnosed about it.

They can stop it. Over a period of time I think we will establish an equilibrium and that the backgrounders will be used then for a legitimate purpose.

Mr. Moorhead. Mr. Sylvester.

Mr. Sylvester. I think, Mr. Chairman, there is a distinction between the backgrounder organized and initiated by Government to get across a point of view, and a backgrounder initiated by a newsman with the head of a department and a selected group. If they are sophisticated enough it is a very, very valuable thing on the basis of my own experience here in Washington from 1944 to 1961.

The British who are magnificent at this, have a sophisticated group to work with. They go into an international meeting where everybody agrees nothing will be said. But the British, and even more so, the French, will murder the United States in the sense that they tell their story before ours is told, and it may be to our disadvantage. The Germans were also doing that and still are.

Mr. Moorhead. Mr. Hagerty?

Mr. Hagerty. I do not know what they mean by deep background. This is a term that has been invented since I left the Government. They have other phrases, too.

But, I do think that backgrounding for the news media, many times at their request, is very helpful to them, not necessarily for the story of the day, but if this happens, this is the background of what is going to be developing during the evolution of a problem or an action.

I had no trouble, really, when I was down here with this, with the newsman. And I never had, in the course of the 8 years I was down here, anybody break a confidence, which is another question. But this deep background and particularly what is done in the White House pressroom with tape recorders, now, is ridiculous. Everybody knows who is giving the backgrounders. I really think that it is greatly overdone at the present time and I cannot understand, also, why the news media doesn't object. Well, indeed, they are taking various stands on this now.

However, under the way the news media and the Government works, if an individual goes into that backgrounder, I think he is bound by the rules of that backgrounder and cannot change the rules in the middle of the ball game. This is another problem from the press point of view, or the news media point of view. I found when I was here that it was very helpful to the news media to have infrequent backgrounders. It is certainly very helpful, and I think George and Arthur would agree with this, particularly if your President is overseas where you have a backgrounder with the American newsmen that are with him.

The other countries, many of them, when I was there, they didn't have backgrounders. They just put it out, even though there was an agreement not to. And you have to, for your country, for your news media, keep them informed the best you can, and many times you do it with backgrounders and you are not quoted.

But, this new thing of deep background, and other things I do not understand. I don't think anybody else does, either.

Mr. Moorhead. Do you gentlemen believe that there is certain information which cannot be made generally public but which should be made available to Members of the Congress who have to establish policies and legislation for the United States.

Mr. Hagerty. Yes; I think very much so, and this is one of the things that we have not touched on.

And again, I can only speak for the President that I worked for, but during the 8 years that I was with President Eisenhower, he had regular meetings with the congressional leadership on both sides. Usually it averaged about once a month, where the leaders of the Congress would come down, and they would just sit and discuss these matters.

Again, this was the way he happened to work. It was based not only on respect for the Congress, but as you gentlemen know, Mr. Sam Rayburn, and Mr. Lyndon Johnson, who were the Speaker and majority leader, were personal friends as well as Members of the Congress.

And as I say, about once a month, pretty regularly, the leadership of the Congress came down and discussed these matters. I think a President should do it a lot more and then, of course, there are other committees, Foreign Affairs Committees, and Military Affairs Committees, where the Government does go in and informs the members of those committees, not necessarily the full membership of the Senate or the House, where they keep those committees involved informed on a private or secret basis in many instances, of the affairs of the Government.

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So, I think at least the President I worked for made a very conscious effort to keep the Congress and its leadership informed of what he was thinking and what he was going to do.

Mr. Moorhead. Mr. Sylvester?

Mr. Sylvester. Mr. Chairman, the interesting point, I think, is that Mr. Hagerty worked for a military officer who supposedly is one of the worst sources of information, whereas we have had three successive Presidents from the Congress and you gentlemen say that things are in a pretty bad way. It would seem to suggest that something happens to them after they leave this wonderful Hill and go down into the valley. They have an entire change of attitude.

Instead of taking the views that you do, they are causing, apparently, the troubles that you are discussing here. Is there some relationship? Does that happen to people from here?

Mr. Moorhead. I do not think any of us have ever gone down to the valley, and that is one of the reasons I had hoped to have Mr. Salinger here, who at least had experience on Capitol Hill, so that we would see what the situation would be.

Let me ask you: How valuable is the press conference, and how much of it is actually managed ahead of time, with planted questions and already prepared answers, and how often should they be held?

Mr. Reedy. In the first place, I do not think you can get into any question of how often they should be held. The President is always going to determine that, and I do not think there is any way in the world that you can compel him to hold it four times a month, or two times a month, or six time a year. The press just will have to chip away if he is not holding enough of them.

As far as the management of the conference is concerned, I do not intend to speak for any administration, other than my own, but I think from time to time efforts are made to manage them deliberately and I think they usually wind up in a fiasco. You know. planted questions look like planted questions.

But I think that there is a form of management that comes out of the format itself. This has nothing to do with any conscious plan or any conscious design. If you are in television, that means you are limited to 30 minutes because the television time slots are there. The end of 30 minutes that is the end of the press conference.

You have about 350 to 450 people at a conference. That means there is no chance for followup questions because every reporter in the room has a question he just has to ask. Under those circumstances, I think the President has a tremendous advantage over the press.

I doubt whether very much comes out of a press conference that would not come out of a formal release.

But, I think the real value of a Presidential press conference, and this I think is tremendous, is that it gives the American people an opportunity to see how their President reacts under questioning, and this really is in one sense more important than the information.

After all, information is something that changes from day to day. What people really want to know is what kind of a President have they got, and how does he react under pressure? For that reason I think that a press conference serves a very valuable purpose, but not from an information standpoint.

Mr. HAGERTY. I would be inclined to disagree slightly with my friend George on this, and again speaking only for the President I worked for. He felt, and I know his staff felt that the press conferences were very valuable to the President, and that they should be held with fairly decent regularity.

It did two things. It permitted the President to give his points of view, philosophy, actions, thoughts on the major questions of any given week.

But, it also gave him and his staff a pretty good cross section of the questions which were being asked by the press which were concerning the American people throughout the country. The only thing that we struggled with for the 8 years was the lack of followup questions. But, I blame that on the news media and not on the President. There were many times when he would be discussing a major problem and the next question on the floor, rather than continuing that question, would ask about the price of beans in Ohio. That was not the President's fault. He was there, willing and able to discuss these matters. And if they are not followed up by other questions, I do not see how you can blame it on the President. I think some of the onus has to be on the newsmen for not following up these questions when they do not think the answer is fully given by the President, or they have questions that they would like to follow up.

And, we hoped many times that there would be followup questions. We also hoped many times that the important questions of the day would be asked at the press conference which the President was prepared to answer, but which were not asked by the news media.

Mr. MOORHEAD. Thank you.

Mr. Reid.

Mr. REID. Thank you, Mr. Chairman.

Mr. Reedy and Mr. Hagerty, I would like to have you address your attention a little bit to the premise relative to executive privilege. Both John Moss and I, as coauthors of the Freedom of Information Act, never believed that there was necessarily an implicit or inherent power of executive privilege. At least we have never believed it was sweeping and all encompassing.

By that we have felt that we are dealing here with coordinated branches of the Government, that the Founding Fathers never intended for our country to have a man, one-man government, but an equal balance, if you will, between the legislative, judicial, and executive.

Now, the Constitution is fairly clear, I think, that the Congress shall have power to lay and collect taxes, duties, et cetera, to declare war, to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.

That is to say, there are certain rights under the Constitution given to the Congress, and I do not believe, even though you might maintain that there is an executive power of privileges, that it reaches to the point where the executive has the right to deny information to the Congress that is central to the Congress' constitutional and legislative purposes. You have both, I think, addressed yourself to the position of the assistant to the President, and the staff member, and the confidential relationships between those individuals and the President,

or to internal memos that are central or, indeed, I mentioned telegrams from Ambassadors and Chief of State. But, do you believe that the right of the executive privilege, if you believe that it is a sweeping right, extends to the point where the executive can withhold from Congress information that is absolutely central to a clear legislative congressional purpose?

And I wish you could comment on the premise, how you think this matter can be addressed. I recognize that you have to get an accommodation and a balance. But, I do not think that we can continue with an imbalance where almost to a man the members of the Senate and many in the House believe that information is central to decisions on Vietnam, as one case, where definitely it was withheld, information that was absolutely crucial to a sound congressional judgment.

Mr. Reedy. Congressman, the problem is, in a very strict key word—the word "right." We usually, I think, use the word a little bit too loosely, without recognizing that it has a number of meanings.

There are legal rights, the right to a trial by jury, the right to habeas corpus, and that sort of thing, and those are absolute rights, and they are absolute because they are enforceable.

But, "right" in another sense means what can be done and what can not be done. We do not live under a military system by which the Chief Executive is picked by the legislative body. Our system is that we have a separate constituency for the man in the White House, a separate constituency for the men on the Hill. They may be the same people, but they vote different ways.

I would prefer a system where the Chief Executive was fully, absolutely accountable to the Congress. I think that this separation, this absoluteness has caused some very major difficulties in our whole society, and I think it is leading to many of the situations that you described. But, we also have to deal with what we have. Whether the Constitution does or does not recognize executive privilege, it has set the President up in a position where you cannot subpena him and bring him before your committees, and you cannot secure papers he will not give you.

Consequently, I think you have got to somehow get at the thing by trying to differentiate between his personal assistants, because if you do not get him you are not going to get them, I don't care what laws you pass.

So, you have to differentiate somehow between the personal assistants and the personal papers, and the problem is this struggling mass——

Mr. Reid. If I may interject, what I am dealing with is a benchmark policy decision, central to congressional responsibilities. I am not talking about peripheral decisions, or tactics or internal staff work or confidential material. But, would you maintain that the Executive has the right to deny the Congress, and leave aside the form of transmittal, information that is central to the Congress clear responsibilities?

Mr. Reedy. When you ask the question in that form, Congressman, of course he does not have the right to deny Congress information, subject to its ability—-

Mr. Reid. Let me ask a second question.

Mr. Reedy. But, the form in which you are asking the question, Congressman, does not quite accord with the reality of the relationship between the Congress and the President.

Mr. Reid. Well, I can tell you the reality, and we have had a study made by GAO which shows a whole series of cases where either information has been withheld on the grounds of executive privilege, or on the ground that it was not proper to forward it, or there have been interminable delays, and some of this information has been clearly central to the legislative function of the Congress.

Let me go to another ground. Do you believe, Mr. Hagerty, that the Government should have a right to prior restraint to the right to publish?

Mr. Reedy. Definitely not.

Mr. Reid. I am glad to hear you say that. Is that your judgment?

Mr. Hagerty. It certainly is, sir.

Mr. Reid. Do you believe there should be acknowledgment of newsmen's privilege which would basically protect the supenaing of reporters' notes except under the most serious consequences?

Mr. Reedy. Yes, sir.

Mr. Reid. Do you agree with that?

Mr. Hagerty. I agree very much in principle. I am not sure you can write legislation. Now, I am talking from my own company's point of view. We would refuse to give out takes on material we do not use on the air or our reporters' notebooks or anything else, and we will maintain that position.

But, in principle I agree with you.

Mr. Reid. Let me put the question another way: Do you not believe that first amendment rights are clearly applied equally to radio and TV media as they do to the printed media?

Mr. Hagerty. Oh, yes; indeed.

Mr. Reid. To me there is no distinction, and I think the action of the House in trying to deal with Mr. Stanton was a very improper intrusion of first amendment rights that should be protecting the media that you have the honor to represent.

Let me ask you one final question on this: Are you concerned about the tendency to use the licensing power by the appropriate agency to intrude into questions of content? The instant matter, of course, was whether a radio station and the TV networks should use certain songs that had drug lyrics. I was concerned about that because they seemed to be reaching to confront not the questions of the fairness doctrine or the geographic distribution of the various radio stations.

Mr. Hagerty. I think it should be discussed on that very specific question. Our radio stations, on their own initiative, do not use some of these songs that had a lot of drug exhortation in them. But, we did it ourselves. I certainly think it should be discussed publicly with Members of the Congress. And, indeed, we did discuss it with quite a few Members.

Mr. Reid. Well, like the Federal Communications Commission saying they do not like something as distinguished from something generally accepted as the fairness doctrine and the broad public interest. But, to go beyond that into another area as to prescribe certain kinds of programing.

Mr. Hagerty. Well, Mr. Reid, you know that there is a long answer that I could make on these things, but it boils down to this: That on license renewals, the FCC makes the final decisions on whether we get our license renewed or not, and we have to base that license renewal on

the conduct of our station, as it has operated in the public interest, and everything else.

And I think all of us in the business are quite aware of this, and take actions ourselves within our own stations.

Mr. Reid. Yes, I understand. Could I ask just one other question, and I thank the chairman for his indulgence. I think you have accurately and articulately, if I may say so, described the problem of access to the White House, and to classified material, and knowing what information there is. And as you are well aware, I do not think there has been an administration in town in recent years which has not upon occasion leaked top secret material which when it was placed in a favorable light generally raised no objections, but if similar material got leaked that put it in an unfavorable light—in other words, a double standard.

What do you believe is the fairest way to work out an accommodation that I think the Nation deserves and requires between in essence the White House and the Congress, so that there is an appropriate flow of information, because quite clearly there is a major shift of agencies into the White House. You cannot query Mr. Kissinger, and I am not suggesting that you should.

But, there are matters that now are determined there that you cannot get but once could, from the State Department. How would you agree about what to do on that problem?

Mr. Reedy. I think that somewhere some legal intelligence has to be devoted to making a distinction between those members of the White House staff that can be called before congressional committees and those that cannot.

The only course I have thought of so far is forcing the President to exercise executive privilege in writing on separate occasions. But quite possibly ingenious legal minds can design some others that will be far more effective.

The problem lies in the distinction, Congressman, and it is a terribly difficult one.

Mr. Reid. Let me ask the distinction a little differently. Leave aside the individual. Does the Congress have a right to a full, fair and accurate briefing, in secret, if that is required about national security on the Gulf of Tonkin, for example, before that resolution is enacted?

Mr. Reedy. Yes; I think from a moral standpoint there is no question about it. What worries me is the practical way in which you can get at it.

Mr. Reid. I am talking about the exchange of information, not the individual who should do it, but whether the Congress should be in a position of having to enact in this case a fundamental policy decision which was subsequently questioned.

Mr. Reedy. I understand, Congressman, and my response is that I think Congress had a moral right, and I think it would be helpful for the state of the body politic if the Congress not only had the moral right but had the capacity to compel it.

My problem is: How do you compel it?

Mr. Reid. Thank you.

Thank you, Mr. Chairman.

Mr. Moorhead. Mr. Horton.

Mr. Horton. Mr. Chairman, I only have one or two questions.

Mr. Sylvester, in your position in DOD, did you encounter situations where you found information that you made public that was not accurate information?

Mr. SYLVESTER. Was not accurate?

Mr. HORTON. Right.

Mr. SYLVESTER. I can think of one which I learned about afterward.

Mr. HORTON. What did you do?

Mr. SYLVESTER. The instance I am talking about——

Mr. HORTON. I was not talking about an incident. You can tell it if you like.

Mr. SYLVESTER. Yes, I have found cases. It went, for instance, to the question of the number of persons who were killed in Vietnam. It seemed to me fundamental that that record should be complete in all categories. When I got into it, it was not quite as simple as I thought. There was the question of men taking off from carriers for an attack on the mainland who went into the drink. Were they casualties of the Vietnam war or were they not?

I discovered that the Navy did not consider them war deaths. But I felt very strongly and knew from experiences that I had had that the Department of Defense could not tell their parent that they were not victims of the Vietnam war. They would not be there if it were not for the war. Eventually we did have those deaths included in the casualty lists.

Now, you asked for an example, and that is the one that comes quickly to mind. But it was not the result of evil intention. It was a result of the system of reporting and classification whether you died on the battlefield, or whether you actually died over a target, or whatnot.

Mr. HORTON. What about the cost of the war and budget deficits?

Mr. SYLVESTER. I have never been impressed by any figures on budget, about the cost of anything. I think they are highly relative, and they are always less than they turn out to be. I would never have believed any of the figures that have been given out, not because they were given out viciously, maliciously, as bad figures.

I did not know, and very few people, if any, knew because you got into a heavy discussion of what you included in the cost of the war.

Mr. HORTON. From your experience, do you feel that there has been a lack of information made available to the Congress and to the public with regard to the cost of the war—and budget deficits.

Mr. SYLVESTER. Your question was: Do I feel there was a lack of information available on the cost of the war?

Mr. HORTON. Well, the question that I have is do you feel that there was an inadequate reporting to the Congress and to the public?

Now, there are two different things. One is to the public and one is to the Congress, and especially to the Congress in the light of the questions that Mr. Reid was just asking. Do you feel that there was inadequate information made available to the Congress and to the public with regard to the cost of the war so that the Congress did not have all of the information available upon which to make judgments and decisions?

Mr. SYLVESTER. Well, I assume your questions must be addressed to the Appropriations Committee.

Mr. Horton. No, no. I am asking with regard to the Department of Defense and the type of information you gave. I mean, you had this information available if you wanted to get it.

Mr. Sylvester. At this date I can say I wish I had all of that information, but I do not believe anybody did.

Mr. Horton. Why didn't you have it?

Mr. Sylvester. Well, that would take us into a completely different hearing, but the basic reason is that there were so many costs which were arguable with the Department, whether they were costs of the war.

Mr. Horton. Shouldn't the public have a right to know about what went in to make up these costs? The point I am getting at is there seems to be a lot of ambiguity about cost and where it comes from, and you cannot always get that type of information from the executive.

Now, should there not be some way that the Congress can get that type of information so it can make its own judgment, if you will?

Mr. Sylvester. I would certainly think that the Congress would have both the responsibility to get it and the right to get it. I find that in trying to find out what the costs are in a corporation statement can be very misleading and vague, so when you get into something like the Vietnam war I would start out with the theory and the basic suspicion that the costs were going to be from what you judged them or A, B, and C, judged them.

But, basically if you are asking me if the Congress had the right to find out what the costs are, I would say that the Congress has the right to get it, and to find out. A lot of the questions that the Congressmen ask are not very well put, or very well backgrounded, and I realize it is hard work to be a Congressman.

I cannot imagine, as a newsman, sending someone to this committee to get a story that I could not get myself.

Mr. Horton. One of the problems I think we have in the Congress, and I want to mention it here now, one of the problems in the Congress is that we have very inadequate staff, even on committees. We just have a handful of people. The Department of Defense, the President's Office, the executive agencies have literally thousands of people, the most up-to-date information available, the most up-to-date equipment available, and everything else, at their disposal.

And we are severely handicapped in obtaining essential information. That is why I feel it is so important for the Congress to not have any obstacles in its way to get the type of information that I am asking about here, and that the other Members have referred to, because we just do not have the numbers of people, the sources available or the techniques or the modern equipment to get that type of information. And literally you are sitting with a group of Congressmen who are doing what they can, individually, to try to get all of this mass of information.

Now, if we could have the availability, it would make a lot of difference and, of course, when you have to fight to get the type of information, it is a problem.

For example, it is a question of who you can ask. Mr. Hagerty stated a moment ago that he wished at some time that they had asked questions because the President was prepared to answer.

Well, a lot of times the Congressmen do not ask just the exact question with the exact language in it, and so the executive is able to hedge, if you will, or get around direct answering of that question.

That is one reason why there is the contest between the executive and the legislative to get that type of information upon which we can make good decisions. And that is why we are trying to find out how we can obtain it.

Now, have you got any ideas about how we can go about getting that type of information?

Mr. SYLVESTER. I would say, one, I have not got any ideas. I think one of the difficulties you have is the division between the major party in Congress and the man in the White House. I think it complicates the problem. I was amazed at the time I was in Government at the tremendous capacity of your staff, small as they are. Maybe they do a better job than the staff at the White House because they do it more intensively, and they investigate well, and they are pretty well informed, and they really penetrate you.

It has been my own observation about congressional committees, when the word gets around that you are going to investigate something in an executive department, then everybody really has a most unhappy time.

If you really want to cause trouble, if you really just want to pass the word around that you are going to look into it——

Mr. HORTON. Then the material really starts going underground, then.

Mr. SYLVESTER. You also have all sorts of people down in the Department of Defense that have this information, and whether they are working for Defense or for you is always a question. But, seriously, you have a tremendous power, and I was always amazed at how worried, particularly career people, were at the idea of a congressional investigation, and I always felt that was great.

Mr. HORTON. Mr. Chairman, I would just like to say that I think we have had some outstanding testimony from each one of these gentlemen. It has been a very diversified type of testimony, involving many different areas: Freedom of Information Act matters, the public right to know, and many others. It has been an effective presentation.

We could go on asking questions for the rest of the day, but I do want to take this opportunity to commend each one of the participants on this panel for the information they have presented on this very important question.

Mr. MOORHEAD. Thank you very much, Mr. Horton. I agree with you. I think this is one of the first times in my experience with the Congress where we have had people who could discuss the relationship between the executive and the Congress, and particularly with the experience of service in the White House and service at the department level, and it is a subject that has never been resolved under our Constitution and probably never will be. But, I think that viewing it and discussing it in this fashion, with no partisan motives, is a very helpful thing.

I have a few questions on the operation of the Freedom of Information Act, which I should like to submit, particularly to Mr. Hunter and Mr. Lewis and Mr. Sylvester. Mr. Lewis suggested in his testimony that those less encumbered than others with program respon-

sibilities and relationships be brought more authoritatively into the decisionmaking process of whether to reveal information. Do you think that the primary responsibility for the decision to release information should be on the part of the public information officer in the various departments and agencies?

Mr. Lewis. Mr. Chairman, I very definitely feel that this is where the greatest measure of responsibility should be. It has always seemed to me a bit incongruous for the people who are directly involved in, or who have a direct responsibility for the administration of programs, to also have major responsibility for making FOI decisions. Such a situation can embrace many factors, including requests for information that may be embarrassing at times, or which may have an effect on a group being worked with outside Government, for example. Without an unbiased approach you cannot always get, in my estimation, a well-balanced picture of what is involved in the information request and how best it should be handled.

Information people are by the nature of their training and in the performance of their job, more sensitive, I think, to the general needs of the public than are technical and administrative people.

They work every day with the media people, and know better the impact of what is going to happen, either good or bad, based on how an information situation develops.

Public information people, at least the ones I worked with, were sympathetic toward the law and its goals. I had a general overall authority for the coordination and direction of information in the Department, and that was related to the work of the agency information people. I worked with them very closely on this matter, educationally and otherwise, to support the law.

But, I think it is fair to say that since you are working for the boss, you have got some handicaps, without adequate decisionmaking authority.

Mr. Moorhead. Mr. Hunter, do you agree or disagree?

Mr. Hunter. I agree with Harold. We made the decision fairly early in HEW that the principal responsibility for the administration of this act would lie with public information people, on the basis that Harold has mentioned.

Their experience in dealing with the media, their general sympathy with the idea of getting information out of their agency and to the public, made the choice inevitable.

And I think the other thing we did is we restricted denial authority to a very few people. I think when it is diffused, the larger the diffusion that you make within the agency, the less likely you are to find a law operating the way it should. If you specify denial authority and give it to someone, put someone on the spot to make the decisions, then you have a chance to advance the law more effectively.

I think if we had success in HEW, it is attributable, as I indicated in my statement, to these factors. I had the primary authority for the Department, overall, for the administration of the act, and worked closely, of course, with members of your committee in doing so. Legal counsel is essential, of course, and I was fortunate in having excellent advice.

Mr. Moorhead. Mr. Sylvester, do you agree with that, and particularly whether you think there should be centralization within a de-

partment of responsibility for administering the Freedom of Information Act, and generally getting information out to the public?

Mr. SYLVESTER. On that simple question, yes, very much so. However, I think we are overlooking an important element, and that is that information is a rather innocuous word in itself.

But it has a tremendous dynamic political effect, or may have, not because it is right or wrong, but just because it is, and since there is a political government, and every 4 years the head of that government is going to offer his stewardship to the people for approval—information has an impact on those people and it will be used this year with that knowledge.

Mr. MOORHEAD. Well, we have got the proposition now that there should be centralization within the departments and agencies of the public information function, and I would like to ask Mr. Reedy and Mr. Hagerty, should there be governmental centralization and coordination of information within the White House?

Mr. REEDY. No.

Mr. HAGERTY. No.

Mr. MOORHEAD. Is there any danger in that?

Mr. HAGERTY. It just does not work. Now, of course, on the major problems, issues, questions from the White House to the various departments, yes. Then I stayed very closely in touch with my opposite members in State and Defense. But, to try to coordinate the various branches of the Federal Government on what they are putting out, forget it. You just cannot do it, and I was responsible, George was responsible for these statements, announcements, actions from the President, and you have to assume that in the major problems the other departments are reflecting that, too.

But, to try to coordinate them on a daily basis, it just could not possibly be done.

Mr. REEDY. I would like to just add something to that, Mr. Chairman. Obviously, any White House press secretary with any sense is going to keep in touch at least with the principal information officers of the Government. But, if you were ever to establish as a principle that information would be coordinated in the White House, I think you could forget freedom of information and access to information, and everything else. The way the public really does get a break is that the Government is so huge that frequently the left hand does not know what the right hand is doing, and that is the way the public learns something from time to time.

I think that is the worst thing you could do, is to require such a coordination.

Mr. MOORHEAD. Mr. Hunter.

Mr. HUNTER. I would like to make sure the distinction is made. I was talking in this instance of authority under the Freedom of Information Act. From my own experience in Government I certainly would agree with Mr. Hagerty and Mr. Reedy that there is an impossibility of complete coordination. It is difficult enough within our own department. My reference was made simply to the authority under the Freedom of Information Act.

Mr. MOORHEAD. I think the record is pretty clear on that.

Would you gentlemen be willing to answer questions in writing by members of the committee, which we might submit to you?

Mr. SYLVESTER. Yes, Mr. Chairman. May I just say that I disagree with these gentlemen? Actually I did not work with or under Mr. Hagerty, so I cannot speak about him.

I had a very happy relationship with Mr. Reedy and under President Kennedy, and actually you do have to have a coordinated system, you do have to know what each department is going to put out. Not every little piece, but there are things that go on in the White House, and programs and plans that the President has underway which can be very badly damaged or put askew if I at Defense or somebody in State releases some given information at a time that louses everybody up.

When I was in the Defense Department we were expected to give the White House in advance a list of the main things that we were going to put out in the week ahead. I do not see how you can operate a government without that, and I think this new job Mr. Klein has as Director of Communications—I do not know how it works or how he can work it outside the White House—is basically what the Government needs. It is very important to have a coherent system so when this Government speaks it speaks with one voice, responsibly, so the people can then hold it accountable.

And if everybody is yakking, then nobody is responsible.

Mr. REEDY. I want to make the additional comment that what Mr. Sylvester is talking about is no different from what I said. Obviously, if the White House Secretary has any sense, he is going to keep in touch with Mr. Sylvester and the rest of them. What I would object to is a policy or rule of law, because once you get one of those things, you are going to start down the road. Just leave the people alone with that one, and you will get enough coordination without having to enact a policy or law.

Mr. HAGERTY. And I thought I covered that, too, on what I said. In the major problems, of course, we stayed in touch with the departments and the different people in the public relations field. But, not on the usual daily releases that the departments are turning out by the barrel.

Mr. MOORHEAD. Yes.

Mr. LEWIS. I generally support what Mr. Reedy and Mr. Hagerty indicated about this. On the basis of our experience, if you had a sensitive or important matter and did not get it over there, why you could hear about it and should, of course.

But I think that the coordinating function at the White House has two dimensions. One is the political, and the other is concerned with the "career phase" of information. How successful such an operation is in terms of what goes out to the people and how well it holds their confidence, is dependent on how you weld the two together or keep them apart, and that's very difficult.

Mr. MOORHEAD. Well, gentlemen, it is the second call of the quorum. I want to thank all of you very much.

I think this has been a frank exchange between the executive or former executive and the Congress, which should be encouraged, and in the future I think we have learned a little bit about the internal operations, but particularly the White House and the departments, and this will be of help to the committee in its further deliberations.

I should like to announce that tomorrow at the hearings we have scheduled a panel of legal experts on the Freedom of Information Act:

Mr. Frank Wozencraft, attorney from Houston, Tex.

Mr. Anthony L. Mondello, General Counsel to the U.S. Civil Service Commission.

Mr. Richard B. Wolf, deputy director, Institute for Public Interest Representation at Georgetown University Law Center, and Mr. David Parson, chairman of the Committee on Government Information of the Federal Bar Association.

I should also like to announce that former Justice Arthur Goldberg's appearance scheduled for Thursday had to be postponed to a later date.

The subcommittee now stands adjourned until tomorrow morning at 10 o'clock.

Thank you, gentlemen.

(Whereupon, at 12:30 p.m., the hearing was recessed, to reconvene at 10 a.m., Tuesday, March 7, 1972.)

U.S. GOVERNMENT INFORMATION POLICIES AND PRACTICES—ADMINISTRATION AND OPERATION OF THE FREEDOM OF INFORMATION ACT

(Part 4)

TUESDAY, MARCH 7, 1972

HOUSE OF REPRESENTATIVES,
FOREIGN OPERATIONS AND
GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:20 a.m., in room 2154, Rayburn House Office Building, Hon. William S. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives William S. Moorhead, Bill Alexander, Ogden R. Reid, and Frank Horton.

Staff members present: William G. Phillips, staff director; Norman G. Cornish, deputy staff director; and William H. Copenhaver, minority professional staff, Committee on Government Operations.

Mr. MOORHEAD. The Subcommittee on Foreign Operations and Government Information will please come to order.

For the second day in the current series of hearings on the status of the people's right to know the facts of government, the Foreign Operations and Government Information Subcommittee has called upon lawyers who have given careful thought to problems involved in the Freedom of Information Act.

Yesterday I announced that former Justice Goldberg was originally scheduled to appear before the subcommittee on March 9 and had requested to have his hearing postponed. It is now scheduled for March 21 at 10 a.m., in room 2247.

The subcommittee also has called upon specially qualified research experts at the Library of Congress to prepare background material for this hearing. The American Law Division of the Library's Congressional Research Service has digested the significant court decisions of the past 4 years under the Freedom of Information Act, comparing those decisions to a memorandum which the Department of Justice prepared to explain the act when it became effective on July 4, 1967.

A comparison of the Department of Justice memorandum to 4 years of case law interpreting the Freedom of Information Act indicates that the memorandum is out of date.

The Department of Justice memorandum, issued June 1967, was designed as a working basis for all of the other agencies of the executive branch of the Federal Government to set up regulations imple-

menting the Freedom of Information Act. It was a starting point, and definitive interpretations of the provisions of the act were to await court rulings.

We have those court rulings—more than 100 cases, with one-third of them ruling on significant issues—but the Department of Justice has not revised its memorandum to reflect the case law.

The courts have moved toward a definition of how "identifiable" a public record must be to fall under the Freedom of Information Act. The courts have touched upon the "fee" which agencies may charge for finding and copying public records. But the Department of Justice has not revised its memorandum on these subjects.

The case law has narrowed the interpretation of "personnel rules" which may be a basis for withholding public records, but the Department of Justice memorandum has not reflected the narrower interpretation. The courts have unanimously rejected the Government's arguments that all confidential and financial information need not be made public, yet the Department of Justice memorandum still permits any kind of confidential information to be withheld from the public. And the memorandum's interpretation of "investigatory files" and of "internal memoranda" does not adequately reflect the current court decisions.

We plan to discuss this problem later in the week with representatives of the Department of Justice. Today, we hope to get some additional background on the problem from lawyers with special knowledge in the field.

They are Mr. Frank Wozencraft, of the Texas bar, a former Assistant Attorney General who participated directly in the drafting of the 1967 Department of Justice memorandum; Mr. Anthony Mondello, formerly of the Department of Justice and at present the General Counsel of the Civil Service Commission; Mr. David Parson, chairman of the Government Information Committee of the Federal Bar Association, and Mr. Richard Wolf of the Institute for Public Interest Representation of the Georgetown University Law Center.

We had intended to hear the witnesses in that order, but in view of the fact that some of the members are not yet present and only Mr. Wolf has a written statement, I have suggested—and have gotten the approval of the other witnesses—that we start with Mr. Wolf so that as the members arrive they will have a written statement to review. I ask you, Mr. Wolf, to start off the witnesses' presentations.

Mr. Wolf. Thank you, Mr. Chairman.

STATEMENT OF RICHARD WOLF, ON BEHALF OF GEORGETOWN UNIVERSITY LAW CENTER'S INSTITUTE FOR PUBLIC INTEREST REPRESENTATION

Mr. Wolf. On behalf of Georgetown University Law Center's Institute for Public Interest Representation, I appreciate the opportunity to present to the Congress some of our concerns with the operations of the Freedom of Information Act.

I describe my remarks as expressing "concern" with the act because our experience indicates that the response of Federal agencies and departments to the act has often been one of resistance and delay. Instead of prompt and inexpensive disclosure of information, agen-

cies have sought refuge in the act's exemptions. Agencies have often taken months to respond to specific requests for information—if they have responded at all. And where potentially difficult questions of disclosure arise, the agency often has not sought to informally resolve the request with the person seeking the data, but has forced the matter into a posture so inflexible that only the courts can settle the controversy. If the Federal bureaucracy does not quickly change its attitude and perform within the spirit of the act, the statute will become, I think—unfortunately—only a litigating lawyer's dream: Two levels of agency determination, a U.S. district court opinion, and a U.S. court of appeals review.

I would like to emphasize in these remarks, and perhaps expand upon them a little bit later, some of the problems in delays and costs in compelling disclosure. These problems also very importantly reflect upon an individual's ability to make our increasingly complex Government work for him.

Will a person seek information from his Government if he knows it will mean bearing the cost of a court suit and probable appeal before he gets it? Will a reluctant agency be able to drain all utility from a request by a lengthy delay in responding to the request, followed by many months of litigation? I think these questions are as important as determining what material is exempt from disclosure and what must be released.

The problem of cost and delay is most acute for the person without means who desires material or information from the Federal Government. It also affects and drains the funds of what has come to be called "the public interest" law firm or organization whose purpose is to raise issues of broad public significance. Often, these individuals and groups require data which is in the hands of the Federal bureaucracy, in order to adequately explore such questions. But, met with assertions by the agency that the material either can't be found or won't be released, the energies of such groups are directed principally to obtaining that material and, after this arduous battle is over, only then to the underlying issues which the material may shed light on. Often this is too late to do much about those issues.

In the last 5 years, administrative law has undergone vast and fundamental changes. The question of "standing"—determining who may challenge agency action or inaction—has been expanded to include almost any person who can show that he is or will likely be affected by the agency's activities. Coupled with this development in administrative law is the fact that the issues which Federal agencies and departments are required to resolve are becoming increasingly complex. And I think it is accurate to predict that the Supreme Court and the U.S. courts of appeals will increasingly defer to the final agency decision in developing which I have called this new administrative law. Because of these factors, it is critical that agencies be exposed to the reasoned ideas and criticisms which an informed public can bring to the administrative process. But, lengthy delay and high costs in obtaining information is likely to make public participation meaningless.

I would like to give some examples and include one additional comment on one of the frustrations that our institute and other groups have encountered in the past few months.

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Some examples from our institute's work will illustrate the problems. We are trying to learn from one Federal department whether one of its well-publicized programs actually is in operation and, if so, what the policy directives are for those charged with its administration. Many millions of dollars are at issue and the program affects a large number of people. The program—if it does exist—should be scrutinized by the public and by the groups which the program aims to assist. Although the request we have made does not seem to us to raise difficult problems of law—Does the program exist? Are there guidelines for its operation?—we have waited so far almost 2 months for even a written answer from a high official in that department. As a result, we do not know whether the so-called secret law exists or, perhaps worse, that the program for some reason will not even be implemented.

A second example is our request of a different Federal department for certain data which the department might reasonably contend should not be disclosed. In addition to honoring the specific request of our client, resolving the issue will also clarify the problem for the department. However, in this case, it took an operating division of the department 3 months to formally deny our initial request, and it has been another 3 months during which our required internal agency appeal has been pending. In other words, for 6 months we could not get an answer from the department in response to our request, let alone having it resolve the matter.

Finally, another example illustrates an agency which, though reluctant to give us information, in fact, finally gave us information, but the way in which it was disclosed created an additional problem. In this instance, we requested a list of persons who were eligible for certain Federal benefits. The agency had not notified these persons of their statutory rights which were required to be asserted by a given date. After threat of a Freedom of Information Act suit, the agency provided us with the names, but required us to furnish the stenographic resources and some of the stationery if the potential beneficiaries were to be reached in time.

I suspect, Mr. Chairman, all of these examples represent the prevailing philosophy of most of the Federal bureaucracy, and, if the act is to mean anything, this attitude must be changed.

I would like to briefly touch upon the time factor in the proposed amendment which I suggest be considered by the committee. Section (a)(3) should be amended by inserting the following after the phrase in the act "shall make the records promptly available to any person;":

> The agency shall respond to the request within 10 days after receipt thereof, stating the manner by which the information will be provided to the person and the cost, if any, for such information. If the agency refuses or is unable to promptly provide the information or record requested, it shall state in detail its reason therefor. Within 15 days of receipt by the agency of a written appeal by a person denied in whole or in part any information requested in accordance with this paragraph, the agency shall determine whether the requested information, or any part thereof, was properly denied and shall state in detail the reasons for its determination. The information shall be provided no later than 10 days after the agency's acknowledgment of its availability, unless otherwise objected to in accordance with this paragraph.

Upon reflection of this language last night, I would criticize my own proposed amendment and say that in certain instances the time I have suggested is too long. It might be, for example, that certain

agencies would not require an internal appeal, agencies small enough so that its public information officer or an appropriately designated lawyer can give answers right away which would be the end of the request as far as that agency was concerned. There would be no internal agency appeal. If you did not get your requested information, you would then be free to go to the courts without further agency review. This might avoid an adjudicatory period which is likely to be the case under my proposed amendment.

My view of the problem of costs can briefly be summarized. I think that part of the business of a democratic government is dispensing information to the public quickly and cheaply. There is no reason why the person requesting information should have to pay for copies. In many instances today, agencies already supply without charge a copy of most documents which are requested of it. I think, at least for one copy, the expense of duplication should be borne by the agency and not by the person requesting it. With respect to the accumulation of "identifiable data," the issue is somewhat different, and I can understand the problems there. I would suggest that, at least where this material is easily obtainable, no charge be made. Where the data must be culled from many records, a charge might be required to deter the frivolous or malicious, but this should be a minimal amount.

I will conclude with a recommendation to amend one of the present exemptions. Exemption (4) should be changed to read: "trade secrets, and confidential commercial information obtained from a person, where the disclosure of such information would place a person at a clearly unwarranted commercial disadvantage."

This phrasing, I think, will protect businesses from unfair competitive pressures. It will open to public scrutiny many of the activities which large businesses are engaged in and help the public determine if it is getting its money's worth with respect to the contracts and preferences generated by the Federal Government which businesses often enjoy. There is no reason to retain the obscure and complex phrasing as exemption (4) is presently written.

So far the act has received relatively little examination by the courts, despite the hundred or so cases that have thus far appeared. My count indicates that the Federal courts of appeals have decided only 17 cases. Nine of these have occurred, as might be expected, in the District of Columbia circuit. We are seeing some trends developing in this circuit. But the Supreme Court, except for yesterday's announcement, has yet to pass on any of the complex issues of privacy and disclosure which are raised in the act. Some of these difficult problems are perhaps better left to careful judicial development, and this will certainly occur.

However, Congress and this committee can strengthen the clear mandate of the act by eliminating some of the confusing language and speeding up the process of disclosure, as I have noted. Congress should also require agencies to submit, at a minimum, annual reports to this committee and to the public relating the amount of requests for information under the act made to the agency, the type of information requested, the agency's responses, and the time taken to disseminate the material. In these ways the act may encourage effective public scrutiny of the law which is made and administered daily by Federal agencies. If this occurs, the act will have fulfilled its promise.

Mr. MOORHEAD. Thank you very much, Mr. Wolf.

Now, off the record a minute.

(Discussion off the record.)

Mr. MOORHEAD. We will now call on Mr. Frank Wozencraft to make his presentation.

STATEMENT OF FRANK M. WOZENCRAFT, ATTORNEY, HOUSTON, TEX.

Mr. WOZENCRAFT. Thank you, Mr. Chairman, and members of the committee.

It is an honor to be invited here today to comment upon the Freedom of Information Act.

It has been almost 6 years since this committee voted favorably in the House, in the form previously adopted by the Senate, the bill that became the Freedom of Information Act when it was signed by President Johnson on July 4, 1966.

As the chairman commented earlier, it was one of my earliest missions as a newly appointed Assistant Attorney General in charge of the Office of Legal Counsel, to supervise for the Attorney General preparations of his memorandum for the executive agencies and departments concerning the act which was published in June 1967, shortly before the act went into effect 1 year after its enactment.

Preparation of this memorandum was a major item of concern for the Office of Legal Counsel. A good many people in that office participated in it, including, toward the latter stages, Mr. Mondello, General Counsel of the Civil Service Commission, who is here today. And we went through a very full-fledged effort to make this memorandum as complete as we could, based on the knowledge we had at the time.

Before coming to the memorandum itself, let me comment a little on the act itself, if I may.

Since returning to private practice in 1969, I have had less occasion to follow in detail how the act has been applied and how the courts have interpreted it. However, my interest in the act has continued, and I have had some contact with it as the vice chairman of the Administrative Conference of the United States until February 1971; and, presently, as a member of the Council of the Administrative Law Section of the American Bar Administration. I have also had occasion to invoke the act as a lawyer in private practice, and I am, therefore, pleased to say that I have seen it work.

The views I express today, which are personal and should not be attributed to any of these organizations I have mentioned, thus reflect experience with the act from both sides of the street.

When the act was first passed, the reactions ranged from jubilation that now all Government information would be public to dire predictions that exposing Government processes and files to the public limelight would destroy effective government. Both were extreme. The first reaction overlooked that by the nine exemptions written into the act Congress had clearly intended to protect some kind of Government information from public scrutiny. The second seemed to fear that our democracy was too fragile to withstand the gaze of the public it existed to serve. Yet, as the Attorney General stated in the

foreword to his memorandum, "Nothing so diminishes democracy as secrecy. Self-government, the maximum participation of the citizenry in affairs of state, is meaningful only with an informed public."

Now, after almost 5 years under the act, those who expected it to strip away the veils of Government secrecy feel cheated; and those who predicted disaster grumblingly insist that although the pillars of the Republic have not crumbled the act has been an expensive and troublesome nuisance and they wish it would go away.

Since I shared neither set of expectations, I share neither view today. I have been disappointed that the act has not yet had more impact, but I am far from disheartened. The drafting of the act leaves much to be desired, and its implementation far more. Nevertheless, viewed objectively and disregarding excessive fears or expectations, the act remains a watershed event in the history of Government, unprecedented, as far as I know, by any other nation.

The act was a watershed event, because it reversed the philosophy of releasing Government information. Previously, the Government would withhold the document unless it was persuaded that there was a valid reason to disclose it. Now, it must release the document, unless it can establish a valid reason to withhold it. That was, and is, and should be, a cause for jubilation in itself, even though its promise has yet to be entirely fulfilled.

It takes a long time for streams to travel from the watershed to the ocean. It takes a long time to achieve, with any degree of completeness, so drastic a reversal of the approach of Government employees toward the release of information that they have been carefully taught to guard.

As Mr. Wolf commented earlier, this philosophy has not yet worked its way all the way down through the Federal Government. It would be unusual as well as remarkably fortunate if it had. But it is working its way down, and from the opportunities that I have had to deal with the act since leaving the Government, I have found that it has made a difference. The act has facilitated this change of philosophy, even though it has not achieved it completely, and I have never seen an act that could reverse a philosophy by enactment alone. It has facilitated this change through three basic elements.

First, and most important, it has shifted the burden of proof to the Government, which must establish the applicability of one of the act's nine exemptions before a document can be withheld.

Second, it has ordered that this information be made available not just to the chosen few but to any member of the public.

Third, it provided for judicial review if a document is withheld, through a suit for injunction in a Federal district court with the burden of proof resting upon the Government.

It has always been clear, despite these useful statutory provisions, that if the act resulted only in disclosure of documents upon court orders its benefits would be meager indeed. You just cannot get that many cases into court.

The important need was for the spirit of the act to be honored throughout the Government. President Johnson stressed this in signing the act, urging "a constructive approach to the wording and spirit and legislative history of this measure." In his signing statement, he instructed every official in his administration "to make information

available to the fullest extent, consistent with individual privacy and the national interest."

The Attorney General's memorandum calls for the same spirit. It reminded the agencies that the act's exemptions were permissive rather than mandatory, and stressed that "In some instances, the public interest may be best served by disclosing, to the extent permitted by other laws, documents which they would be authorized to withhold under the exemptions." This admonition was particularly important because a close analysis of the act, as we found in working on the Attorney General's memorandum, showed that several provisions were far from clear. I do not have a copy of the chairman's opening statement, but I believe that there was a comment in it that the memorandum had not been amended since its issuance in 1967, and that is certainly correct as far as I know, although my contact with such matters has been considerably less since January of 1969.

I do believe that there have been memorandums that have emanated from the Office of Legal Counsel that have submitted supplementary instructions to the agencies and departments, and I am familiar with one such memorandum in December of 1969. It was issued by the then Assistant Attorney General William Rehnquist.

I would also like to point out, though, that in the memorandum itself, it was clearly recognized by the Department of Justice that this could only be a guideline, looking forward, and an express statement was placed in the foreword to the memorandum that while this memorandum represented a conscientious effort to correlate the text of the act with the legislative history, some of the statutory provisions allow for more than one interpretation and definitive answers may have to await court rulings.

I believe that this committee will find that those rulings, as they have come down, have been the subject of considerable attention by the Office of Legal Counsel in the Federal Government, although, again, I cannot pretend to be familiar with exactly the means in which these decisions have been communicated to and how much attention they have received in the various agencies. However, the memorandum itself allowed room for precisely that kind of evolutionary process as these questions reached the courts. We recognized its importance then, and nothing that has happened since has led me to feel that it has been any less important.

When we began preparing the memorandum, we first, of course, carefully reviewed the wording of the act. We turned to the legislative history, particularly the committee reports. We still came up with questions on what the Congress had intended on a good many important areas. We got together with the General Counsels of various departments and agencies and asked them for their views, and we checked their testimony before this committee and the Senate committee earlier. And, then, we turned to the staff of this subcommittee and the staff of the Senate Subcommittee on Administrative Practices and Procedures, from which the act, in the form in which it was eventually enacted, had emerged.

While we recognized, as I mentioned earlier, that definitive answers might have to await court rulings, we had a law that the agencies and departments had to start administering then. We could not wait around for court rulings to decide how it should be administered, and so what

we provided in these guidelines was our best effort at that moment in time and space in figuring out just exactly what was meant. And I can assure this committee that rarely, in my experience, has any clearance and investigatory process in the preparation of any Government document been more comprehensive.

We worked very closely with the staff of both this subcommittee and the Senate subcommittee, and the final version of the memorandum was cleared with the members of the staffs of those committees.

Recognizing the concern of the press and the leading role it had played in fostering adoption of the act, we also discussed the memorandum, before its publication, with representatives of the American Society of Newspaper Editors, the American Newspaper Publishers Association, and the Magazine Publishers Association, and other press organizations. We also sent preliminary copies to the National Association of Broadcasters and the Sigma Delta Chi. They made several suggestions about the memorandum, and we adopted many of these suggestions.

On the whole, however, they seemed quite gratified with the Department's constructive approach toward this important legislation. And I cannot remember of any instance in which a concern expressed by any representative of one of these press organizations or of the House and Senate subcommittees remained unsatisfied. That does not mean all of their thoughts were adopted, but I believe we made our best efforts, at least, to meet the objection if not precisely in the way they would have suggested in the first place. But the point got achieved, and it seems to me that this is evidenced by the reaction in the press and in the Congress when the memorandum was released.

In that period we also met with bar association groups. There was a very valuable institute held by the American Bar Association in April 1967, in which I participated, along with a good many Government officials. Prof. Kenneth Culp Davis was a member of the panel, and Congressman Ogden Reid of this committee was also a member of the panel. We found that most useful in focusing on the problems of statutory interpretation that were posed through the act.

Through conferences and speaking with government groups and bar groups and the Federal Bar Association, we sought to explain the memorandum and encourage compliance with the act.

We even called a meeting of the public information officers of the various departments and agencies and urged them to see to it that the spirit of this act was fully implemented throughout the Government. When we were asked in the Office of Legal Counsel by other agencies about particular documents, it was on a review kind of basis, because we had no authority to tell them what to do with their documents. But we were always happy to discuss the questions with them. And when we were asked about a document, we would counter with the question of whether there was really a good reason why the document should not be disclosed. Did it come within one of the nine exemptions of the act and, if so, which one? Even if it did come under an exemption, was the public interest on balance best served by withholding the document or by disclosing it?

It is surprising how often the answers came out in favor of disclosure.

I remember one specific instance when the Under Secretary of a Cabinet department telephoned to ask me about a particular document which his staff recommended withholding and which they believed came within one of the exemptions. It was requested by a national news magazine. I reviewed the document with him by phone, and I asked him whether he really thought that there was any reason why he had to withhold the document. Obviously, he had been troubled about the recommendation of his associates or he would not have telephoned me in the first place, and, as a result of our discussion, the document was released.

Now, that is the kind of thing that would never hit the press or public attention in any way, and there is no reason why it should. It was simply the case of the act not only being complied with but one in which the spirit of the act was being used to go beyond what perhaps might have been withheld under an exemption. It resulted in its disclosure.

Now, in the almost 5 years since it has been launched, how has the act worked?

Well, it would be ostrich-like to assert that the act is being fully, much less joyfully, implemented throughout the Federal Government. In these hearings, you will doubtless learn of instances where officials have acted as if they hardly recognize the existence of the act at all, while others undoubtedly have sought to hide behind inapplicable exemptions or unreasonable delays of the kind Mr. Wolf mentioned. I have encountered a couple of them myself. Yet the act is there. I am convinced that it has made a healthy difference, even though not yet as great as I would have hoped.

But, on one occasion in private practice, I invoked the act on behalf of my client in an executive department where my initial request was refused by the bureau chief. I appealed to the solicitor of the department, the appropriate appellate channel, and my appeal was granted. The bureau, which was very concerned about releasing the documents, was required within the department itself to release them. There was no occasion to go to the courts, as I was entirely prepared to do if necessary.

In other instances, reminding officials of the requirements of the act has facilitated working out a reasonable solution to a problem that could not have been resolved without the act, without the knowledge that sitting back there behind this process was a court with the right to review the action of the agency. It is almost impossible to measure how many documents have been made because of the act. Only when they are not made available does the matter get public attention.

Most of the attention that the act has received in the courts and the press has understandably revolved around the disclosure of documents. But that is only one of three major areas covered by the act. From the standpoint of government, two other areas are equally important and much too neglected. They are also the most difficult to implement.

The two areas I refer to both involve what is called the "hidden law." The first section of the act, 5 U.S.C. 552 (a) (1), requires agencies to publish in the Federal Register "substantive rules of general applicability" and "statements of general policy or interpretations of general applicability formulated and adopted by the agency." Subsection (a) (2) requires that final opinions and statements of policy not pub-

lished in the Federal Register be made available for public inspection and copying.

The first of these provisions provides that no person shall be adversely affected by rules not so published.

The second provides that no unpublished opinion shall be "relied on, used or cited as precedent by an agency against a party" unless it has been indexed and made available or unless the party has had actual notice.

Mr. Chairman, these provisions go to the heart of good government, the question of whether this is a government of laws or just of men. Not surprisingly, some officials feel that publishing guidelines and indexing precedents, hamper their free exercise of discretion. It does, and it should. If discretion is completely unfettered, we become simply a government of men. Law loses its significance. Only those who work consistently with the agencies can learn their written or unpublished rules. Not even lawyers in general practice, much less the press or the public, can find out about these until it is often too late. This is an area to which I hope this committee will direct specific and detailed attention. It is an area where a great deal needs to be done. The provisions of the act are there. It is very difficult to implement, and I am most hopeful that this committee can assist in causing it to be better implemented.

Admittedly, it is difficult and expensive to collect all of the policies of agencies. The unwritten policy has to be reviewed before it can be published. It is expensive to index all of these precedents. You have to burrow into the file drawers and find out which ones you are using are precedential. The 1966 act provided that index requirements are only applicable to precedents after the effective date of July 4, 1967.

The Office of Legal Counsel encouraged the agencies, however, to collect all of the precedents and make them available in reading rooms where the public could have ready access to them.

The act does require publication, it requires indexing of these precedents in it, since 1967. It is good law, it is good government, to make that happen.

Mr. HORTON. Mr. Wozencraft?

Mr. WOZENCRAFT. Yes, sir.

Mr. HORTON. Could I interrupt you to ask you to spell out the implementation that you feel that the Congress should pursue, to make it more effective?

Mr. WOZENCRAFT. Yes, sir. I will come to that part of it later, but let me anticipate that now.

As I mentioned, it is very expensive to publish guidelines and index precedents. It takes a lot of manpower and resources. It is not just a matter of waving a magic wand. The budgets of these agencies have led them to feel the pinch pretty severely. I actually talked to the chairman of one agency about this problem, while I was acting chairman of the Administrative Conference in late 1970. He told me that he simply could not afford to spare the manpower and the money that it would take to do it. One of my suggestions is that this committee and the Congress encourage line items in budget appropriations to be devoted to compliance with the Freedom of Information Act. This would take away the most prevalent excuse for failure to comply with the act and would enable the agency to be held more strictly account-

able. As it is, I can understand the reluctance of the chairman that feels his substantive mission would suffer if he undertakes this mission. At the same time, I am very disappointed that the Freedom of Information Act seems to loom so low on his particular hierarchy of statutory responsibilities, because he is compelled to obey that law as much as the law that governs his own particular agency.

I might add that this particular chairman is no longer with the Government, but I believe that his successor is moving very forcefully in the direction of fuller compliance with the act. I do believe that the budgetary problem is a key to this particular difficulty.

I might also point out that while the act presently provides for filing fees which, in some cases, may be considered exorbitant, they nevertheless do not enrich these agencies. That money all goes into the regular U.S. Treasury and it does not come back to the agencies through increased appropriations.

So, whenever they have to process a request for a document that takes a lot of time, they are just out that much money and that much manpower or whatever it takes to satisfy the request.

That would be one suggestion.

My second suggestion would be in the oversight of the substantive committees in particular—and perhaps this committee can be useful in encouraging that oversight and perhaps you can in the hearings that are forthcoming elicit useful information in these areas. I would hope that each chairman when he comes before a committee, be it this committee or his substantive committee, would be asked: "What have you done to see to it that all of the general policies and guidelines in your agency are published?"

I would be very interested in their explanations. I am sure that most agency heads are anxious to comply with these requirements of the act. These are practical problems.

Frankly, they benefit from this publication as much as anybody else.

There are instances, undoubtedly, when lower echelon officials, or somebody who is below their visibility level at least, are saying "We have a policy against something." And how easy it is for that official, when the Freedom of Information Act is mentioned and he is asked why that policy—if it is a policy—is not published, to say "Well, we don't exactly have a policy against what you propose. Let us just say that we would regard it with extreme disfavor."

As a practical matter, such disfavor can be fatal to the member of the public dependent on that official's action. I believe that a great deal better government can result from the implementation of this particular provision, which is presently in the act, throughout the Government.

The Attorney General's memorandum has called for that, and I am confident that the overwhelming majority of those in the Government would like to see it done. But it is not easy to do without the money to do it. It is one thing to say "We have a policy," and it is another thing to write it out and get it in shape and expose it to the world in the Federal Register. That is where the time-consuming work comes in.

How frequently do serious problems occur that never reach the courts or receive public attention?

This is very difficult to document.

The freedom of information section of the administrative law section of the American Bar Association undertook last year to survey among practicing lawyers of instances in which they had encountered violations of the act. The response was surprisingly meager. There is room for surmise that this resulted not from an absence of violations but from some lawyers being too busy to answer the questionnaires and others, knowing that they must deal with agencies in the future, being unwilling to bell the cat. The results of this survey, I understand, have been made available to the staff of this committee.

As a council member of the administrative law section, charged with liaison with this committee, let me add here that I am certain this committee would welcome any opportunity to cooperate with this subcommittee and the Congress in any way that it possibly can. As you may know, the American Bar Association speaks officially only with one voice, and I am not that voice. I am speaking for Frank Wozencraft, and not for the American Bar Association. But I do know, of my own knowledge, of the eagerness of these gentlemen to be helpful to the Congress in any way that they can.

If the implementation of the act is still far from being adequate, how can it be improved?

Essentially, this is a grassroots problem that should be attacked in each agency, and those agencies can be encouraged to attack it through the means I just mentioned to Mr. Horton—for example, through questions upon substantive hearings and at this hearing and at appropriations hearings.

There is room, of course, for general coordination, and yesterday there were some questions addressed to the panel about whether there should be some overall Government censorship or general authority. The answers were that there should not be but that there should be some coordination. I certainly feel there should be no information czar who has the power to choke off information that an agency would like to release. I think it works much better in the particular agency where they have knowledge of the particular records.

On the other hand, from what I know of the work of the Office of Legal Counsel, recently—and, again, it is no longer first hand—I know they have a committee set up there that is intended to provide advice to agencies and coordinate general policies to be sure that one agency does not withhold a document that should really be released. Of course, the agencies have to come to the Department of Justice before that happens, but that committee then has a chance to put in a few words. And, in some instances where the Department of Justice represents the agency in litigation, there is room for discussion with the agency about what can be properly defended in court.

Moreover, the Administrative Conference of the United States, from whose chairman you will hear next week, has initiated some very useful recommendations aimed at improving compliances among the various agencies. I am somewhat familiar with these because they were initiated while I was vice chairman of the Conference. But, here again, the Conference has no enforcement authority. It has to rely upon the willing cooperation of the agencies, and I am certain that the Conference—you can learn more about this from Chairman Cramton next week—will welcome congressional assistance in that respect.

And this brings me to what I consider the most promising means of fostering compliance—congressional oversight. The hearings that this subcommittee began yesterday will give you an opportunity to explore from a variety of standpoints the most critical areas. You have unparalleled access to the operating heads of the departments and agencies. You have unparalleled access to the media in publicizing what you find. You have the continuing opportunity to ask for and obtain explanations when violations of the act are asserted. And you will, undoubtedly, address yourselves at the conclusion of these hearings to the question of whether the act should be amended—with far more information than any of us have at the moment.

When the act was first adopted, the areas of uncertainty were so great that we would have welcomed clarifying amendments if nothing else. In the years since the act has gone into effect, the courts have resolved some of these uncertainties and administrative practice has set a pattern for dealing with others. But even an amendment that clarifies existing uncertainties may create new uncertainties until it is construed by the courts.

I am inclined to think that more important gains can be achieved by congressional oversight, although I do not negate the possible benefits of statutory amendments. I simply suggest that these amendments, if there are to be amendments, should be carefully drafted to avoid creating new uncertainties.

If the act is to be amended, I would urge attention to three areas in particular. One of these I have already mentioned in response to the question that Mr. Horton asked, that I believe it would be useful to amend the act to provide that fees for producing documents go not to the Treasury but to the agency that has the expense of producing the documents.

Second, I believe that it would be very important to provide for stronger enforcement of these hidden-law prohibitions I discussed earlier. As the act reads now, just judicial review under subsection (a)(3) seems limited to production of identifiable records. Only if a person is adversely affected by an unpublished policy or is subjected to an unpublished precedent would the courts have an opportunity to review agency action under subsection (a)(1) or subsection (a)(2). I am aware that one court ruling, in an action under (a)(3), has dicta to the effect that injunctive relief may also be available as to (a)(1) and (a)(2). If so, great, I am delighted. I would feel a lot happier though, as a lawyer, in having the provisions of the act itself and having a considerable doubt about the accuracy of those—even though I certainly agree with their aim, I would feel unhappy if the injunctive remedy were expressed to the extent of subsection (1) and subsection (2).

The third area of amendment is the most sensitive of all and that, of course, is the area of the coverage of these exemptions. It would, indeed, be helpful if some of these were drafted more precisely. Individual privacy in national security cannot be protected if every document in the possession of the Government must automatically be revealed to anyone who seeks it; yet, each exemption is a restriction on the public's right to know. The balance is difficult to strike and even more difficult to phrase in statutory language.

Some exemptions may run themselves to abuse because they are so broad, even though their underlying concepts are sound.

On the other hand, there is room for concern that exemption 6, which precludes disclosure of personal and medical files only if it should constitute a clearly unwarranted invasion of personal privacy, is too narrowly drawn. Should not an invasion of personal privacy be a subject of concern even if it is not "clearly unwarranted invasion of personal privacy?"

And should not exemption 4 more clearly protect the right of a citizen to confide in his Government, as in the case of alleged unfair labor practice, without the fear of economic or other reprisals through which such disclosure might lead? This would be not cured entirely, I am afraid, by the amendment that Mr. Wolf suggested earlier. But I join him in the thought that exemption 4 can stand a great deal of additional attention. And, frankly, no section gave us more difficulty in preparing the memorandum than that section. We ended up on page 34 of our memorandum saying that it seems obvious—let me read the exemption for the record to get a little view here of what I am talking about.

It reads:

> The provisions of the act shall not be applicable to matters that are * * * (4) trade secrets and commercial or financial information obtained from any person and privileged or confidential.

Mr. HORTON. Is it "any person" or "a person?"

Mr. WOZENCRAFT. "Any person and privileged or confidential."

Gentlemen, we found this very difficult from the standpoint of grammar as well as substance, and this is a question on which we directly question the staffs of both subcommittees, and we came out—excuse me. Mr. Mondello points out to me that the original statute was "any" but in the recodification process, the recodifiers of the Congress have an extreme dislike of the word "any" and they changed it to "a." And, so, that change was made in the recodification, not by this committee and not, I am sure, with any intent to make a substantive change, but in the recodified law which was enacted and, therefore, does supersede the original act. It is "a person." The rest of the subsection remains equally obscure, and what we have met up with is the statement that it seemed obvious to us, from both talking with the subcommittee staff and reviewing the committee reports, that Congress neither intended to exempt all commercial and financial information on the one hand, nor to require disclosure of all other privileged or confidential information on the other.

We close with the aberration that agencies should seek to follow the congressional intent as expressed in the committee reports.

Fortunately, the courts interpreting these exemptions have exercised their interpretative authority and their equitable discretion to protect these rights. It is my personal view that the courts, as a constitutional matter, as in *Heck* v. *Bowles*, do have this equitable discretion no matter what the act says, and, yet, a recent decision in the Court of Appeals for the District of Columbia reaches the contrary conclusion. There is now a direct conflict between the Second Circuit and the Court of Appeals for the District of Columbia on this question. It is one of those that, as we indicated in our memorandum, is simply going to

have to be resolved by the courts. And I must say that this is another example of the fact that there is no substitute for clear statutory language.

One thought more. The Freedom of Information Act is aimed directly at the executive branch and the independent agencies. It does not purport to touch any other branch of the Government, yet the public's right to know is equally important in all branches. I would hope that this committee would find some opportunity to explore the extent to which information is sufficiently available to the public in other branches as well as the executive branch.

Mr. Chairman, I have great hopes that the kinds of hearings you have scheduled will produce the kinds of facts on which the implementation of this important act can be evaluated. You, undoubtedly, will hear conflicting viewpoints expressed vigorously and, often, there may be merit in directly opposed positions as to the disclosure of Government information and, as this committee knows from other hearings, this includes areas where valid policy goals conflict and must be balanced or reconciled. By exploring this area, this subcommittee is performing a truly valuable service. You are entitled to the appreciation of the American people for focusing attention upon the importance of the people's right to know in detail the activities of their Government.

Thank you.

Mr. Moorhead. Thank you, Mr. Wozencraft, and particularly for those closing remarks. The subcommittee appreciates that.

Mr. Wozencraft has referred quite a good deal to the Attorney General's memorandum and the supplemental memorandum of December 1969. I think they should be a matter of the record, and, without objection, it is so ordered.

(The memorandums referred to follow:)

ATTORNEY GENERAL'S MEMORANDUM

ON THE

PUBLIC INFORMATION SECTION

OF THE

ADMINISTRATIVE PROCEDURE ACT

A MEMORANDUM FOR THE
EXECUTIVE DEPARTMENTS AND AGENCIES
CONCERNING SECTION 3 OF THE
ADMINISTRATIVE PROCEDURE ACT
AS REVISED EFFECTIVE JULY 4, 1967

UNITED STATES DEPARTMENT OF JUSTICE

RAMSEY CLARK, *Attorney General*

June 1967

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402 - Price 25 cents

STATEMENT BY PRESIDENT JOHNSON UPON SIGNING PUBLIC LAW 89–487 ON JULY 4, 1966

The measure I sign today, S. 1160, revises section 3 of the Administrative Procedure Act to provide guidelines for the public availability of the records of Federal departments and agencies.

This legislation springs from one of our most essential principles: 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 curtains of secrecy around decisions which can be revealed without injury to the public interest.

At the same time, the welfare of the Nation or the rights of individuals may require that some documents not be made available. As long as threats to peace exist, for example, there must be military secrets. A citizen must be able in confidence to complain to his Government and to provide information, just as he is—and should be—free to confide in the press without fear of reprisal or of being required to reveal or discuss his sources.

Fairness to individuals also requires that information accumulated in personnel files be protected from disclosure. Officials within Government must be able to communicate with one another fully and frankly without publicity. They cannot operate effectively if required to disclose information prematurely or to make public investigative files and internal instructions that guide them in arriving at their decisions.

I know that the sponsors of this bill recognize these important interests and intend to provide for both the need of the public for access to information and the need of Government to protect certain categories of information. Both are vital to the welfare of our people. Moreover, this bill in no way impairs the President's power under our Constitution to provide for confidentiality when the national interest so requires. There are some who have expressed concern that the language of this bill will be construed in such a way as to impair Government operations. I do not share this concern.

I have always believed that freedom of information is so vital that only the national security, not the desire of public officials or private citizens, should determine when it must be restricted.

I am hopeful that the needs I have mentioned can be served by a constructive approach to the wording and spirit and legislative history of this measure. I am instructing every official in this administration to cooperate to this end and to make information available to the full extent consistent with individual privacy and with the national interest.

I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded.

FOREWORD

If government is to be truly of, by, and for the people, the people must know in detail the activities of government. Nothing so diminishes democracy as secrecy. Self-government, the maximum participation of the citizenry in affairs of state, is meaningful only with an informed public. How can we govern ourselves if we know not how we govern? Never was it more important than in our times of mass society, when government affects each individual in so many ways, that the right of the people to know the actions of their government be secure.

Beginning July 4, a most appropriate day, every executive agency, by direction of the Congress, shall meet in spirit as well as practice the obligations of the Public Information Act of 1966. President Johnson has instructed every official of the executive branch to cooperate fully in achieving the public's right to know.

Public Law 89–487 is the product of prolonged deliberation. It reflects the balancing of competing principles within our democratic order. It is not a mere recodification of existing practices in records management and in providing individual access to Government documents. Nor is it a mere statement of objectives or an expression of intent.

Rather this statute imposes on the executive branch an affirmative obligation to adopt new standards and practices for publication and availability of information. It leaves no doubt that disclosure is a transcendent goal, yielding only to such compelling considerations as those provided for in the exemptions of the act.

This memorandum is intended to assist every agency to fulfill this obligation, and to develop common and constructive methods of implementation.

No review of an area as diverse and intricate as this one can anticipate all possible points of strain or difficulty. This is particularly true when vital and deeply held commitments in our democratic system, such as privacy and the right to know, inevitably impinge one against another. Law is not wholly self-explanatory or self-executing. Its efficacy is heavily dependent on the sound judgment and faithful execution of those who direct and administer our agencies of Government.

It is the President's conviction, shared by those who participated in its formulation and passage, that this act is not an unreasonable encumbrance. If intelligent and purposeful action is taken, it can serve the highest ideals of a free society as well as the goals of a well-administered government.

This law was initiated by Congress and signed by the President with several key concerns:

—that disclosure be the general rule, not the exception;

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—that all individuals have equal rights of access;
—that the burden be on the Government to justify the withholding of a document, not on the person who requests it;
—that individuals improperly denied access to documents have a right to seek injunctive relief in the courts;
—that there be a change in Government policy and attitude.

It is important therefore that each agency of Government use this opportunity for critical self-analysis and close review. Indeed this law can have positive and beneficial influence on administration itself—in better records management; in seeking the adoption of better methods of search, retrieval, and copying; and in making sure that documentary classification is not stretched beyond the limits of demonstrable need.

At the same time, this law gives assurance to the individual citizen that his private rights will not be violated. The individual deals with the Government in a number of protected relationships which could be destroyed if the right to know were not modulated by principles of confidentiality and privacy. Such materials as tax reports, medical and personnel files, and trade secrets must remain outside the zone of accessibility.

This memorandum represents a conscientious effort to correlate the text of the act with its relevant legislative history. Some of the statutory provisions allow room for more than one interpretation, and definitive answers may have to await court rulings. However, the Department of Justice believes this memorandum provides a sound working basis for all agencies and is thoroughly consonant with the intent of Congress. Each agency, of course, must determine for itself the applicability of the general principles expressed in this memorandum to the particular records in its custody.

This law can demonstrate anew the ability of our branches of Government, working together, to vitalize the basic principles of our democracy. It is a balanced approach to one of those principles. As the President stressed in signing the law:

> "* * * 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 curtains of secrecy around decisions which can be revealed without injury to the public interest * * *. I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded."

This memorandum is offered in the hope that it will assist the agencies in developing a uniform and constructive implementation of Public Law 89–487 in line with its spirit and purpose and the President's instructions.

RAMSEY CLARK,
Attorney General,
June 1967.

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SPECIAL NOTICE CONCERNING CODIFICATION

As this memorandum went to press, Public Law 90–23 had just been enacted. That law amends section 552 of title 5, United States Code, to codify the provisions of Public Law 89–487. While the codification does not make substantive changes from Public Law 89–487, it makes about 100 changes in language, captioning, structure, and organization designed to conform the text to the other provisions of title 5 as codified in 1966.

Since all agencies must publish regulations under the new law by July 4, 1967, no attempt has been made to adapt this memorandum to the codified text. Such adaptation also seems inadvisable for other important reasons. A principal function of this memorandum is the correlation of the text of Public Law 89–487 with its relevant legislative history. The text of that legislative history is replete with references to phraseology and subsection designations in the act which are changed in the codification. Moreover, for almost a year the act has been discussed by those dealing with it by reference to the terms of its original enactment. Use of this memorandum by those who are charged with preparing and applying agency regulations would be hampered by shifting to the new phraseology and subsection designations in this memorandum.

Therefore, since the relevant committee reports make clear that the codification does not change the meaning of the originally enacted text, this memorandum will refer to the law in terms of the original text of Public Law 89–487. See S. Rept. No. 248, 90th Cong., 1st Sess., p. 3; H. Rept. No. 125, 90th Cong., 1st Sess., p. 1. Appendix A sets forth the full text of Public Law 90–23 in parallel column with the full text of Public Law 89–487. Appendix B in tabular form shows the relationship of their respective subsections.

THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT

On July 4, 1966, President Johnson signed Public Law 89–487, which amends section 3, the "public information" section of the Administrative Procedure Act (the "APA").[1] The amendment, which becomes effective on July 4, 1967, provides for making information available to members of the public unless it comes within specific categories of matters which are exempt from public disclosure. Agency decisions to withhold identifiable records requested under subsection (c) of the new law are subject to judicial review.

As the legislative history of the revised section 3 shows, dissatisfaction with the former section centered on the fact that it was not a general public information law and did not provide for public access to official records generally. That section, of course, was not a "public information" statute despite its title. It permitted withholding of agency records if secrecy was required either in the public interest or for good cause found. It was an integral part of the APA, and it required disclosure only to persons properly and directly concerned with the subject matter of the inquiry.

The revised section 3, on the other hand, is clearly intended to be a "public information" statute. The overriding emphasis of its legislative history is that information maintained by the executive branch should become more available to the public. At the same time it recognizes that records which cannot be disclosed without impairing rights of privacy or important operations of the Government must be protected from disclosure.

The report of the Senate Committee on the Judiciary (S. Rept. No. 813, 89th Cong., 1st Sess., p. 3)[2] describes the need for delicate balancing of these competing interests as follows:

> "At the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records.

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[1] Public Law 89–487, 80 Stat. 250, revises 5 U.S.C. 552, formerly section 3 of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1002 (1964 Ed.).

[2] For the sake of brevity, the following citations are hereafter used:
"S. Rept., 88th Cong." for S. Rept. 1219, 88th Cong., 2d Sess.
"S. Rept., 89th Cong." for S. Rept. 813, 89th Cong., 1st Sess.
"H. Rept." for H. Rept. 1497, 89th Cong., 2d Sess.

It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation.

"It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure."

The Congress was aware that the decision to withhold or disclose particular records cannot be controlled by any detailed classification of all official records, but has to be effected through countless ad hoc judgments of agency officials, each intimately familiar with the particular segments of official records committed to his responsibility. Those executive judgments must still be made, for Congress did not attempt to provide in the revised section a complete, self-executing verbal formula which might automatically determine all public information questions. Indeed, the staggering variety of Government records makes such a formula unattainable. The revised section, instead, establishes in subsection (e) nine general categories of records which are exempt from disclosure. These categories provide the framework within which executive judgment is to be exercised in deciding which official records must be withheld.

Upon signing Public Law 89–487 the President stated:

"I know that the sponosors of this bill recognize these important interests and intend to provide for both the need of the public for access to information and the need of Government to protect certain categories of information. Both are vital to the welfare of our people. Moreover, this bill in no way impairs the President's power under our Constitution to provide for confidentiality when the national interest so requires. There are some who have expressed concern that the language of this bill will be construed in such a way as to impair Government operations. I do not share this concern.

"I have always believed that freedom of information is so vital that only the national security, not the desire of public officials or private citizens, should determine when it must be restricted.

"I am hopeful that the needs I have mentioned can be served by a constructive approach to the wording and spirit and legislative history of this measure. I am instructing every official in this administration to cooperate to this end and to make information available to the full extent consistent with individual privacy and with the national interest."

This is the spirit in which agency officials are expected to construe and apply the limitations of subsections (a) and (b) and the nine exemptions of subsection (e). Agencies should also keep in mind that in some instances the public interest may best be served by disclosing,

to the extent permitted by other laws, documents which they would be authorized to withhold under the exemptions.

Prior to July 4, 1967, every agency should issue rules in which it describes, to the extent feasible, which of its records are within the requirements of the statute, where they may be inspected, the procedures to be followed in requesting access, the opportunities for administrative appeal, the fees to be charged, the stage at which records involved in matters in process are to be available, and whatever other considerations may be involved in achieving the statutory objectives.

STRUCTURE OF THE REVISED SECTION 3

The revised section 3 consists of a general introductory clause discussed below, followed by eight subsections, (a) through (h). Each of the first four subsections, (a) through (d), establishes specific requirements for the publication or disclosure of different kinds of documents or information. Subsection (a) lists only those materials which must be published in the Federal Register. Subsections (b) and (d) describe materials which must be made available for public inspection or copying. Subsection (c) concerns requests for "identifiable records" which must be made available upon the request of any person. Each of the first three subsections contains its own sanction for noncompliance.

Subsections (a) and (b) contain, within the description of the materials to which they apply, explicit limitations upon what must be published or made available. For example, subsection (b)(C), which requires staff manuals and instructions to staff to be made available, is limited to "administrative" manuals and instructions, and to those which "affect any member of the public."

Subsection (e) declares that none of the provisions of section 3 shall be applicable to nine listed categories of matters. In its original form, the bill (S. 1160) provided exemptions in each subsection, designed to apply only to that subsection. The Senate subcommittee found that such approach resulted in inconsistencies. After considerable effort to tailor the standards established by the exemptions to the particular subsection to which they were to apply, the subcommittee decided to consolidate all of the exemptions in subsection (e), including in the earlier subsections the several limitations referred to above to meet the special needs of the requirements of each of those subsections.

Thus the exemptions of subsection (e) apply across the board and govern all of the materials described in subsections (a), (b), (c), and (d). Accordingly, materials which are exempted under subsection (e) need not either be published in the Federal Register or made available upon request or otherwise. It is important to bear this in mind in considering the discussion which follows.

THE INTRODUCTORY CLAUSE

"Sec. 3. Every agency shall make available to the public the following information:"

Agencies Subject to the Act

By its first two words, the introductory clause of the enactment makes it clear at the outset that its requirements are to apply to every department, board, commission, division, or other organizational unit in the executive branch. This results from the definition of the term "agency" in section 2(a) of the APA as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," excluding Congress, the courts, and the governments of the territories and possessions and of the District of Columbia.

Elimination of Previous General Exceptions

The introductory language of the previous section 3 established two general exceptions from all of its requirements. That language was as follows: "Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency * * *."

The revision begins instead with an affirmative direction to all agencies to make official information available to the public, thus proclaiming at the outset "a general philosophy of full agency disclosure" (S. Rept., 89th Cong., 3), and establishing the fundamental character of the revision as a "disclosure statute" rather than a "withholding statute" (S. Rept., 89th Cong., 5).

SUBSECTION (a)—PUBLICATION IN THE FEDERAL REGISTER

"(a) PUBLICATION IN THE FEDERAL REGISTER.—Every agency shall separately state and currently publish in the Federal Register for the guidance of the public * * *."

Subsection (a) concerns only materials which must be published in the Federal Register. Its general objective is to enable the public "readily to gain access to the information necessary to deal effectively and upon equal footing with the Federal agencies." (S. Rept., 88th Cong., 3.)

The report of the Senate committee, together with the Senate hearings on the bill, indicate that there were "few complaints about omission from the Federal Register of necessary official material." The comments received concerning Federal Register publication indicated "more on the side of too much publication rather than too little." (S. Rept., 89th Cong., 6.) Accordingly, the revised subsection contains provisions which permit incorporation by reference in the Federal Register of material "which is reasonably available" elsewhere, and avoid the necessity for "the publication of lengthy forms." It also incorporates "a number of minor changes which attempt to make it more clear that the purpose of inclusion of material in the Federal Register is to guide the public in determining where and by whom decisions are made, as well as where they may secure information and make submittals and requests." (S. Rept., 88th Cong., 11.)

The two principal changes in subsection (a) result from (1) the elimination of the previous general exceptions, and (2) the tightening of the sanction for failure to publish materials required to be published. In addition to the provision that no one shall be required to resort to materials which the agency has failed to publish, the revised subsection provides that no person shall be "adversely affected" by such materials, unless he has actual notice hereof.

Substitution of Exemptions for the Previous Exceptions

The previous subsection (a), like the other subsections of the previous section 3, was subject to the two general exceptions for "(1) any function of the United States requiring secrecy in the public interest" and "(2) any matter relating solely to the internal management of an agency." Further, it required the publication of only those statements of general policy and interpretations which were "adopted by the agency for the guidance of the public."

The revision eliminates these exceptions and relies upon the exemptions set forth in subsection (e) to distinguish the items listed in subsection (a) which should be published from those which should not. The words "for the guidance of the public", which still appear in the subsection, now explain the purpose of Federal Register publication of all material covered by subsection (a).

The considerations involved in determining what documents should be published in the Federal Register for the guidance of the public under subsection (a) obviously are very different from the judgments required in determining whether a particular record appropriately can be disclosed to a person who requests access to it under subsection (c). In meeting the requirements of subsection (a), the problem gen-

erally is to select, from a variety of information that anyone may see, material which is useful for the guidance of the public and therefore should be published. Under subsection (c), on the other hand, the question is to determine whether disclosure will injure a public or private interest intended to be protected under the act.

The difficulties inherent in applying the subsection (e) exemptions to all of the various judgments required under subsections (a), (b), (c), and (d) not only necessitate commonsense constructions of the exemptions; they also increase the necessity for determining precisely what is to be included within each of the items listed in each of those subsections. For example, unless the limitations spelled out in subsection (a) are sensibly construed and applied, concern about the "tightened sanction" against nonpublication could lead to publication of many documents which are of no interest to the public and only serve to aggravate the problem of "too much publication."

In the case of a few agencies, national defense considerations may preclude substantial compliance with any of the requirements of subsection (a). In other cases, foreign policy considerations may limit the extent to which an agency is able to comply with the subsection (a) requirements. If in such cases classification under Executive Order 10501 or statutory or other authority does not afford an exemption from the requirements of this subsection, the agency should seek appropriate exemption by Executive order under subsection (e)(1).

The second exemption in subsection (e), for matters "related solely to the internal personnel rules and practices of any agency," is similarly important in applying the requirements of subsection (a). Its derivation from the previous internal management exception makes it clear that it is intended to relieve from the Federal Register publication requirements all matters of personnel administration. Such matters include personnel policies, interpretations respecting personnel questions, personnel administration forms and procedures, statements of the course and method by which personnel management functions are performed, regulations or general orders concerning the conduct of military personnel, and all other internal matters of personnel administration which do not involve the general public. The Senate report cites as examples "rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like." (S. Rept., 89th Cong., 8.)

However, it is apparent from the legislative history of exemption (2) that it is intended to relieve from the requirements of the revision—and therefore from the publication requirements of subsection (a)—much more than internal documents relating to matters of personnel administration. Congressman Gallagher explained on the

House floor that exemption (2) is intended to protect from disclosure such documents as income tax auditors' manuals. (112 Cong. Rec. 13026, June 20, 1966). Similarly, the House report explains that although this exemption "would not cover all 'matters of internal management' * * *," it would exempt from public disclosure such matters as "operating rules, guidelines, and manuals of procedure for Government investigators or examiners." (H. Rept., 10.)

Thus, in discussing each of the major requirements of subsection (a), it is important to keep in mind the possible applications of each of the subsection (e) exemptions, as well as the limitations spelled out in subsection (a) itself.

(A) Descriptions of Agency Organization

"Every agency shall separately state and currently publish in the Federal Register for the guidance of the public (A) descriptions of its central and field organization and the established places at which, the officers from whom, and the methods whereby, the public may secure information, make submittals or requests, or obtain decisions;"

The previous section 3(a)(1) required that every agency separately state and currently publish in the Federal Register descriptions of its central and field organization "including delegations by the agency of final authority," and descriptions of where the public can obtain information. The revision deletes the requirement that such delegations be published, leaving to each agency discretion to determine what delegations it should include in its descriptions of agency organization. The only other changes in the provision add the words "the officers from whom" and the words "or obtain decisions" to the requirement that the public be advised as to where to obtain information. In general, the amendments embodied in the revision of section 3(a)(A) should result in little, if any, change from previous practice.

The Office of the Federal Register suggests that publication of organizational information in the United States Government Organization Manual should not be regarded as a substitute for, but merely a useful supplement to, the requirement to "currently publish" such information in the Federal Register.

(B) Methods of Operation

"Every agency shall separately state and currently publish in the Federal Register for the guidance of the public * * * (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;"

This language is almost unchanged from the previous section 3 and apparently is intended to effect little change in present practice con-

cerning the publication of statements of the general course and method by which agency functions are performed. Although the revision substitutes the exceptions in subsection (e) for the previous general exceptions to section 3, nothing in either the Senate or House reports on S. 1160 or the explanations offered on the House floor suggests any change in the functions to which this publication requirement is to apply. The reports explain that the purpose of these provisions is "to guide the public in determining where and by whom decisions are made, as well as where they may secure information and make submittals and requests." (S. Rept., 89th Cong., 6; H. Rept., 7.) These provisions are intended to make available useful information concerning agency functions which are of concern to the public.

While exemption (2) in subsection (e) excludes matters of personnel administration and operating instructions, guidlines, manuals, and other materials which are for the use of agency staff only, it does not exclude all matters of internal management. (H. Rept., 10.) With respect to the "course and method" by which internal management functions are "channeled and determined," the criterion for publication is whether the particular "course and method" is of concern to the public. For example, procurement and other public contract functions and, in some cases, surplus property disposal functions are matters in which members of the public have an interest, whereas information concerning other proprietary functions usually would not be useful to the public. To the extent that internal management functions are of substantial interest to the public, agencies should describe in the Federal Register the methods they employ in performing those functions. Of course, functions such as adjudication, licensing, rulemaking, and loan, grant, and benefit functions, are within the publication requirement of section 3(a)(B), except as they may be exempted under subsection (e).

General course and method.—The subsection requires agencies to disclose, in general terms designed to be realistically informative to the public, the manner in which matters for which it is responsible are initiated, processed, channeled, and determined. In the case of functions exercised so seldom that it is not practicable to prescribe a definite routine, the published information should be as complete as may be feasible, identifying at least the title of the official who has responsibility for such matters and the office to which inquiries may be directed. The provision does not require an agency to "freeze" its procedures, or to invent procedures where it has no reason to establish any fixed procedure. However, any change in published statements of course and method should be announced in the Federal Register to assure that the public is currently informed.

Formal and informal procedures available.—Particularly in light of the revised provision governing the effect of failure to publish required materials in the Federal Register, agencies should reexamine their present published statements as to the nature and requirements of all formal and informal procedures to assure that their published materials fully apprise members of the public of their rights and opportunities. For example, if an agency provides opportunity to any member of the public for an informal conference on a matter within its jurisdiction, the fact that the practice exists should be stated in the Federal Register with a view both to serving the convenience of the public and facilitating the agency's operations. Such procedures exist widely and are known to the specialized practitioner. The general public should be informed as to their availability and how and where to take advantage of them.

(C) Procedural Information

"Every agency shall separately state and currently publish in the Federal Register for the guidance of the public * * * (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;"

Rules of procedure.—Although the previous section 3 made no reference to "rules of procedure," such rules had to be published in the Federal Register because that section provided that no person was to be required to resort to procedure which was not published. The new requirement that "rules of procedure" be published is therefore merely a restatement of the previous requirement. However, both the Senate and House committees found instances in which agencies had not issued necessary rules of practice and procedure, had not published rules which had been issued, and had not kept published rules up to date. Such deficiencies should be remedied.

Forms.—To meet the problem of "too much publication," the revision relaxes somewhat the requirement concerning the publication of forms, giving the agencies broad discretion to determine what constitutes appropriate publication. Whereas the previous section 3(a)(2) required agencies to publish in the Federal Register statements of the "nature and requirements" of forms, the revised provision only requires publication of either "descriptions of forms available" or "the places at which forms may be obtained." The change is intended "to eliminate the need of publishing lengthy forms." (S. Rept., 89th Cong., 6.) However, it will usually be useful to the public to publish an up-to-date list of forms showing the heading, the number (if any) and the date of the most recent version, in addition to the place where

the forms may be obtained. The subsection, of course, does not require the creation of special forms for every type of relief which might be sought.

Section 3(a)(C) concerns only rules, forms, instructions, etc., which are to be used by the public. It does not require publication in the Federal Register of internal management forms and similar materials.

(D) Substantive Rules, Policies, and Interpretations

"Every agency shall separately state and currently publish in the Federal Register for the guidance of the public * * * (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency;"

Section 3(a)(D) involves three changes. First, it applies only to substantive rules and interpretations "of general applicability." Second, it deletes the phrase "but not rules addressed to and served upon named persons in accordance with law." Third, it deletes the phrase "for the guidance of the public", which now appears at the beginning of subsection (a). Deletion of the latter phrase at this point is designed to require agencies to disclose general policies which should be known to the public, whether or not they are adopted for public guidance.

The first two changes are intended to be formal only. Ordinarily an agency would not adopt a rule or interpretation for publication in the Federal Register unless it is "of general applicability," which would exclude rules addressed to and served upon named persons. Thus, an agency is not required under subsection (a) to publish in the Federal Register the rules, policies and interpretations formulated and adopted in its published decisions. Instead, this "case law" is to be "made available under subsection (b)." (H. Rept., 7.)

Consistent with the purpose of all of subsection (a) to enable the public "to find out where and by whom decisions are made in each Federal agency and how to make submittals or requests" (H. Rept., 7), rules, policy statements, and interpretations as to matters which do not concern the general public are to be omitted from the Federal Register. For example, agency rules governing the use of employee parking facilities and agency policy relative to sick leave are outside the requirements.

To the extent that rules, policy statements, and interpretations must be kept secret in the interest of the national defense or foreign policy but are not required to be withheld by Executive order or other authority, agencies should accommodate to the statutory plan by seeking an appropriate exemption by Executive order in accordance with subsection (e)(1).

Although the Senate committee expressed the view that rules of particular applicability "such as rates" have no place in the Federal Register (S. Rept., 88th Cong., 4), there is no requirement that all rate schedules be omitted. Frequently, rates are collected by a single utility, but are paid by and therefore may be of interest to a broad spectrum of the public. In some instances an agency may find it desirable to publish such rates in the Federal Register even in the absence of any requirement.

(E) Amendments

"Every agency shall separately state and currently publish in the Federal Register for the guidance of the public * * *(E) every amendment, revision, or repeal of the foregoing."

"The new clause (E) is an obvious change, added for the sake of completeness and clarity." (S. Rept., 89th Cong., 6.)

Force and Effect of Unpublished Materials

"Except to the extent that a person has actual and timely notice of the terms thereof, no person shall in any manner be required to resort to, or be adversely affected by any matter required to be published in the Federal Register and not so published."

The previous subsection 3(a), like the revision, required publication in the Federal Register of substantive rules, statements of policy, and interpretations, in addition to information concerning agency organization and procedures. However, the previous provisions relating to failure to publish required materials applied only to materials concerning organization and procedure. It provided that no person shall be required "to resort to organization or procedure" not published in the Federal Register. Notwithstanding its finding that complaints with respect to Federal Register publication "have been more on the side of *too much* publication rather than *too little*" (S. Rept., 88th Cong., 11), the Senate committee decided that the revision should afford "added incentive for agencies to publish the necessary details about their official activities." Accordingly it added the provision that no person shall be "adversely affected" by any matter required to be published in the Federal Register and not so published.

In its report in the 88th Congress, the Senate committee explained with respect to this change that the "new sanction explicitly states that those matters required to be published and not so published shall be of no force or effect and cannot change or affect in any way a person's rights." (S. Rept., 88th Cong., 12.) Of course, not all rules, policy statements, and interpretations issued by Federal agencies impose burdens. The Senate committee, apparently acknowledging this fact, decided after issuing its report in the 88th Congress, that the "new

sanction" should apply only to matters which impose an obligation upon persons affected, and not to matters which benefit such persons. Since the provision did not, in fact, "explicitly" state that unpublished materials are to be "of no force or effect," no change in the provision was necessary to reflect the committee's revised intention. All that was needed was a change in the explanation in the Senate committee report. Accordingly, the Senate committee report issued in the 89th Congress and the House report omit any reference to the "force and effect" of unpublished materials and explain only that no person shall be "adversely affected" by such matters. (S. Rept., 89th Cong., 6; H. Rept., 7.)

From the revised explanation it is evident that the new provision enlarges upon the corresponding provision of the original section 3. It applies not only to organization and procedure, but also to the other items within the publication requirements of subsection (a)—substantive rules, statements of policy, and interpretations. However, the new sanction operates only to relieve persons of obligations imposed in materials not published, and not to deny them benefits.

In any case, actual and timely notice cures the defect of nonpublication, and "a person having actual notice is equally bound" as a person having constructive notice by Federal Register publication. "Certainly actual notice should be equally as effective as constructive notice." (S. Rept., 88th Cong., 4.)

Incorporation by Reference

"For purposes of this subsection, matter which is reasonably available to the class of persons affected thereby shall be deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register."

In its report the Senate committee found that there are "many agencies whose activities are thoroughly analyzed and publicized in professional or specialized services, such as Commerce Clearing House, West publications, etc. It would seem advantageous to avoid the repetition of much of this material in the Federal Register when it can be incorporated by reference and is readily available to interested members of the public. This is one way in which the Federal Register can be kept down to a manageable size." (S. Rept., 88th Cong., 4.)

It should be noted, however, that incorporation by reference is not a substitute for actual publication in the Federal Register except to the extent permitted by the Director of the Federal Register. See rules of the Director, 32 F.R. 7899, June 1, 1967, 1 C.F.R. Part 20.

Standard of what is "reasonably available."—To meet this test the material incorporated must be set forth substantially in its entirety in the public or private publication and not merely summarized or

printed as a synopsis. Also, if the publication to be incorporated is a private publication, it should be readily available to the class of persons affected thereby, and not be difficult for them to locate.

Sufficiency of reference.—For purposes of this provision, the Senate report explains that the term "incorporation by reference" contemplates "(1) uniformity of indexing, (2) clarity that incorporation by reference is intended, (3) precision in description of the substitute publication, (4) availability of the incorporated material to the public, and, most important, (5) that private interests are protected by completeness, accuracy, and ease in handling." The provision is not intended to permit the incorporation of materials the "location and scope" of which are familiar to "only a few persons having a special working knowledge of an agency's activities." (S. Rept., 88th Cong., 5.)

SUBSECTION (b)—PUBLIC AVAILABILITY OF OPINIONS, ORDERS, POLICIES, INTERPRETATIONS, MANUALS, AND INSTRUCTIONS

"(b) AGENCY OPINIONS AND ORDERS.—Every agency shall, in accordance with published rules, make available for public inspection and copying * * *."

In the previous section 3, subsection (b) related only to "final opinions or orders in the adjudication of cases." Although the heading of the revised subsection (b) is "Agency opinions and orders," it enlarges the scope of the subsection by adding "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register" and "administrative staff manuals and instructions to staff that affect any member of the public."

The extended coverage of the subsection is explained in the House report as follows:

> "In addition to the orders and opinions required to be made public by the present law, subsection (b) of S. 1160 would require agencies to make available statements of policy, interpretations, staff manuals, and instructions that affect any member of the public. This material is the end product of Federal administration. It has the force and effect of law in most cases * * *.
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> "As the Federal Government has extended its activities to solve the Nation's expanding problems—and particularly in the 20 years since the Administrative Procedure Act was established—the bureaucracy has developed its own form of case law. This law is embodied in thousands of orders, opinions, statements, and instructions issued by hundreds of agencies. This is the material which would be made available under subsection (b) of S. 1160." (H. Rept., 7.)

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Agency Rules Governing Availability

All of the materials to which subsection (b) applies are of the kinds which would ordinarily be available in a public reading room if one is provided by the agency. Some agencies may find the operation of one or more such facilities the easiest and most practicable way of complying with the requirements of subsection (b). Others may find different means of making materials available more satisfactory.

Every agency is required by the subsection to publish rules which should deal, at least, with (1) access to the items listed in the subsection, (2) deletion of identifying details, as provided in the subsection, (3) the availability of copies, and (4) the maintenance of a current index. Charges should not be made for the normal use of reading rooms or other similar facilities for examination of information of the type required by subsection (b) to be made available for public inspection. Charges should be made, however, to recover the costs of any search of records or of duplicating, reproducing, certifying, or authenticating copies of all documents, whether the documents are located in the reading room or in storage warehouses. (S. Rept., 88th Cong., 6.)

The only charges in connection with materials on file in reading rooms and similar facilities should be the actual cost of duplicating or copying materials where copies are requested. "Subsection (b) requires that Federal agency records which are available for public inspection also must be available for copying, since the right to inspect records is of little value without the right to copy them for future reference. Presumably, the copying process would be without expense to the Government since the law (5 U.S.C. 140) already directs Federal agencies to charge a fee for any direct or indirect services such as providing reports and documents." (H. Rept., 8.)

Inclusion of Materials Not Subject to the Requirements

The basic purpose of subsection (b) is "to afford the private citizen the essential information to enable him to deal effectively and knowledgeably with the Federal agencies." (S. Rept., 88th Cong., 12.) Yet the subsection does not require access to or the indexing of all of the materials which may be useful to further this purpose. Statements of policy and agency interpretations which are published in the Federal Register pursuant to the requirements of subsection (a) are specifically exempt from the requirements of subsection (b), including the indexing requirement of the latter subsection. In establishing procedures and facilities for making subsection (b) materials available, however, agencies should keep in mind the basic purposes of the subsection and include whatever materials may provide "essential in-

formation." A reading room, for instance, will be more useful if it provides ready reference to all rules and policy statements which have been published in the Federal Register.

(A) Final Opinions and Orders

"(b) AGENCY OPINIONS AND ORDERS.—Every agency shall, in accordance with published rules, make available for public inspection and copying (A) all final opinions (including concurring and dissenting opinions) and all orders made in the adjudication of cases * * *."

The term "order" is defined in section 2(d) of the APA as the whole or a part of the final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in any matter other than rulemaking. Thus the term includes every final action of an agency except the issuance of a rule.

Neither the previous section 3 nor the revised section contemplates the public availability of every "order," as the word is thus defined. The expression "orders made in the adjudication of cases" is intended to limit the requirement to orders which are issued as part of the final disposition of an adjudicative proceeding.

The sanction applicable to subsection (b) is set forth in its last sentence:

> "No final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects any member of the public may be relied upon, used or cited as precedent by an agency against any private party unless it has been indexed and either made available or published as provided by this subsection or unless that private party shall have actual and timely notice of the terms thereof."

The scope of this sanction seems to limit the effective reach of subsection (b) to those orders which may have precedential effect. Other orders, of course, may be requested under subsection (c). However, keeping all such orders available in reading rooms, even when they have no precedential value, often would be impracticable and would serve no useful purpose. It should also be noted that subsection (b) expressly provides that it shall not apply to any opinion or order which is "promptly published and copies offered for sale." This is to afford the agency "an alternative means of making these materials available through publication." (S. Rept., 89th Cong., 7.)

The term "opinions" relates only to those issued with and in explanation of "orders made in the adjudication of cases." The words "concurring and dissenting opinions" were added to the previous requirement "to insure that, if one or more agency members dissent or concur, the public and the parties should have access to these views and ideas." (S. Rept., 89th Cong., 7.)

(B) Statements of Policy and Interpretations Which Are Not Published in the Federal Register

"Every agency shall * * * make available for public inspection and copying * * * (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register * * *."

Whereas subsection (a) requires publication in the Federal Register of statements of general policy or interpretations of general applicability, subsection (b) covers statements and interpretations which are not of general applicability, but which the agency may rely upon as precedents. The policy statements and interpretations included within this provision are only those which have been adopted by the agency itself, or by a responsible official to whom the agency has delegated authority to issue such policy statements and interpretations. The provision in subsection (b) respecting the deletion of "identifying details" applies to such matters.

The House report (H. Rept., 7) emphasizes, however, that under the new language of section 3(b)(B), "an agency may not be required to make available for public inspection and copying any advisory interpretation on a specific set of facts which is requested by and addressed to a particular person, provided that such interpretation is not cited or relied upon by any officer or employee of the agency as a precedent in the disposition of other cases." (H. Rept., 7.)

(C) Manuals and Instructions

"Every agency shall * * * make available for public inspection and copying * * * (C) administrative staff manuals and instructions to staff that affect any member of the public * * *."

Standards established in agency staff manuals and similar instructions to staff often may be, for all practical purposes, as determinative of matters within the agency's responsibility as other subsection (b) materials which have the force and effect of law. In accordance with the basic purpose of subsection (b), "to afford the private citizen the essential information to enable him to deal effectively and knowledgeably with the Federal agencies" (S. Rept., 88th Cong., 12), subsection 3(b)(C) requires the public availability of "administrative" staff manuals and instructions to staff if they "affect any member of the public." The exemptions of subsection (e) apply.

Limitation to "administrative" materials.—The hearings in both the Senate and House refer to a number of instances in which agency manuals and similar materials contain confidential instructions to agency staff which must be protected from disclosure if they are to

serve the purpose for which they are intended. For example, agency instructions to contracting officers governing the outer limits of what they may concede on behalf of the Government in negotiating a contract cannot be disclosed to private contractors without rendering fair negotiation virtually impossible. Similar problems exist in connection with instructions to agency personnel as to (1) the selection of samples in making "spot investigations," (2) standards governing the examination of banks, the selection of cases for prosecution, or the incidence of "surprise audits," and (3) the degree of violation of a regulatory requirement which an agency will permit before it undertakes remedial action.

Congressional recognition of these goals is shown by the limitation of section 3(b)(C) to what the draftsmen have designated "administrative" manuals and instructions as distinguished from those which contain confidential instructions. The Senate report (S. Rept., 89th Cong., 2) states that "The limitation * * * to administrative matters * * * protects the traditional confidential nature of instructions to Government personnel prosecuting violations of law in court, while permitting a public examination of the basis for administrative action." The House report (at pp. 7–8) explains that "an agency may not be required to make available those portions of its staff manuals and instructions which set forth criteria or guidelines for the staff in auditing or inspection procedures, or in the selection or handling of cases, such as operational tactics, allowable tolerances, or criteria for defense, prosecution, or settlement of cases."

All agencies should reexamine all manuals, handbooks, and similar instructions to staff which have been used only internally, to ascertain whether they include standards and instructions which necessarily cannot be disclosed to the public. After any confidential standards and instructions are deleted, documents containing "essential information" of the kind sought to be made available to the public by section 3(b)(C) should be included in the public index and made available for public inspection and copying, or published and offered for sale, unless they come within one of the exemptions of subsection (e).

Limitation to materials which "affect the public".—Consistent with the general purpose of subsection (b), section 3(b)(C) is not intended to apply to materials which do not concern the public. For example, manuals on property or fiscal accounting, vehicle maintenance, personnel administration, and most other "proprietary" functions of agencies which do not affect the public would be excluded from the requirement of subsection 3(b)(C).

EXCEPTION OF MATERIALS OFFERED FOR SALE

"Every agency shall, in accordance with published rules, make available for public inspection and copying * * * unless such materials are promptly published and copies offered for sale."

To provide agencies with "an alternative means of making these materials available" (S. Rept., 89th Cong., 7), materials listed in clauses (A), (B), and (C) of subsection (b) which are "promptly published and copies offered for sale" are not subject to the requirement that they be included in a public reading room or otherwise be made available for public inspection and copying. This should not be construed to exclude materials offered for sale from the indexing requirement set forth later in subsection (b). As with materials published in the Federal Register, if a reading room is maintained, it would be helpful to the public if a copy of materials published and offered for sale were made available for examination in such a room. Of course, there would be no requirement to reproduce such materials since copies could be purchased.

DELETION OF IDENTIFYING DETAILS

"To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction: *Provided,* That in every case the justification for the deletion must be fully explained in writing."

Throughout their consideration of S. 1160, the Senate and House committees were acutely aware of the need, in enacting any public records statute, to avoid any public disclosure of information which might result in an unwarranted invasion of privacy. At the same time, the public may need access to the statement of principles and standards, and the rationale and explanation of agency policy, set forth in agency decisions which determine private rights and obligations.

Accordingly, subsection (b) contains a special provision designed to make these matters available to the public but authorizing the deletion of "identifying details" in particular cases where disclosure of these details would result in an invasion of the privacy of the parties or other persons concerned. This special provision, as it relates to section 3(b)(A), makes a distinction between "opinions" and "orders," since it refers to the former and not the latter. The provision apparently contemplates that a statement of principles and reasoning may be set forth in an "opinion" issued with an order, and that the "order" itself is merely a summary statement of the agency's final action in the adjudication of a case. If disclosure of an order in a case file would constitute a clearly unwarranted invasion of personal privacy, the

order is exempt under subsection (e)(6) from any requirement of section 3 and need not be disclosed or indexed. However, if the agency issues an "opinion" which states any principle or policy of precedential significance, the agency in publishing the opinion or making it available may delete "identifying details" to the extent necessary to prevent a clearly unwarranted invasion of personal privacy, with a full explanation in writing of the "justification" for the deletions.

The purpose of the mechanism thus embodied in the revision is explained as follows in the Senate and House reports:

> "The authority to delete identifying details after written justification is necessary in order to be able to balance the public's right to know with the private citizen's right to be secure in his personal affairs which have no bearing or effect on the general public. For example, it may be pertinent to know that unseasonably harsh weather has caused an increase in public relief costs; but it is not necessary that the identity of any person so affected be made public." (S. Rept., 89th Cong., 7.)
>
> "The public has a need to know, for example, the details of an agency opinion or statement of policy on an income tax matter, but there is no need to identify the individuals involved in a tax matter if the identification has no bearing or effect on the general public." (H. Rept., 8.)

The reference to income tax matters in the House report shows that this provision is intended to protect privacy in a person's business affairs as well as in medical or family matters. In this connection, the applicable definition of "person," which is found in section 2(b) of the Administrative Procedure Act, includes corporations and other organizations as well as individuals. In the context of this section, the reasons for deleting identifying details would seem as applicable to corporations as to individuals.

Explanation of "justification for the deletion."—"Written justification for deletion of identifying details is to be placed as preamble" to documents from which such details are deleted. (S. Rept., 89th Cong., 7.) Without such explanation, the public availability of the document, with all identifying details deleted, might present more questions than it answers.

Obviously, the explanation should not defeat the purposes of the deletion by raising inferences which may be even more injurious than the invasion of privacy which the provision avoids. Agencies must exercise careful judgments to assure that they furnish as much information as they can without violating the spirit or defeating the purpose of the provision.

There are agencies with large numbers of cases involving matters which, if disclosed, would invade personal privacy. As a matter of administrative feasibility, it may be necessary for such agencies to specify fully in the rules they issue to implement subsection (b) the usual reasons for deletions, and to cite these rules in the "preamble" to each opinion or group of opinions as the justification for the deletion, instead of attempting to set forth a complete explanation in each one of the opinions they make available.

Public Index

"Every agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter which is issued, adopted, or promulgated after the effective date of this Act and which is required by this subsection to be made available or published. No final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects any member of the public may be relied upon, used or cited as precedent by an agency against any private party unless it has been indexed and either made available or published as provided by this subsection or unless that private party shall have actual and timely notice of the terms thereof."

The House report explains that the provision requiring the maintenance of a current public index of materials within subsection (b) is designed to "help bring order out of the confusion of agency orders, opinions, policy statements, interpretations, manuals, and instructions by requiring each agency to maintain for public inspection an index of all the documents having precedential significance * * *." (H. Rept., 8.)

The public index requirement is limited to items required to be made available by subsection (b). This excludes, for example, statements of policy and interpretations published in the Federal Register, since the Federal Register index is deemed sufficient as to them. In some cases, agencies may find it useful to include such materials in their public index in the interests of making it complete and comprehensive, even though such indexing is not required. The limitation also excludes from the requirement items exempted by subsection (e) and items outside the limits of subsection (b), such as administrative staff instructions which do not affect the public. The criterion as to what constitutes "identifying information," within the meaning of this provision, "is that any competent practitioner who exercises diligence may familiarize himself with the materials through use of the index." (S. Rept., 88th Cong., 6.)

Because "considerations of time and expense cause this indexing requirement to be made prospective in application only" (S. Rept.,

89th Cong., 7; H. Rept., 8), agencies may, at any time, cite as precedent an opinion, order, policy statement, interpretation, manual, or instruction adopted by the agency prior to July 4, 1967, the effective date of the requirement, irrespective of whether it is listed in the agency's public index. However, agencies should be mindful of the underlying purpose of the indexing requirement. For instance, agencies which do not maintain such an index at the present time may find it helpful to compile and make available an index of the major precedents now relied upon, even though they are outside the requirement.

Careful and continuing attention will be required to distinguish "documents having precedential significance" (H. Rept., 8)—the only ones required to be included in the index—from the great mass of materials which have no such significance and which would only clutter the index and detract from its usefulness. Of course, this does not mean that an agency is not free to include nonprecedential material where it considers such inclusion helpful.

To illustrate the nature of the index contemplated by this requirement, both the Senate and the House reports point out that many agencies already maintain public indexing systems which are adequate within the meaning of this requirement. (H. Rept., 8.) "Such indexes satisfy the requirements of this bill insofar as they achieve the purpose of the indexing requirement. No other special or new indexing will be necessary for such agencies." (S. Rept., 89th Cong., 7.)

Both the Senate and House reports (S. Rept., 89th Cong., 7; H. Rept., 8) cite the present indexing system of the Interstate Commerce Commission as a system which satisfies the requirements of this provision. Decisions of that agency are reported in several sets of reports, each of which deals with a substantial segment of the Commission's jurisdiction. Railroad and water carrier cases, for example, are printed in the series entitled "Interstate Commerce Commission Reports," now some 328 volumes. Decisions arising under its more recently granted jurisdiction over motor carriers are published in a separate set, now more than 100 volumes, entitled "Interstate Commerce Commission Reports, Motor Carrier Cases." Each of these sets contains in each volume an alphabetical subject-matter index which furnishes citations to page numbers in that volume only.

In addition, the Commission publishes a series entitled "Interstate Commerce Acts Annotated" (20-odd volumes) which is a comprehensive index digest patterned generally after the United States Code Annotated. It covers all of the Interstate Commerce Act and related acts administered by the Commission, as well as other acts which affect the Commission, for example, selected sections of title 28, United States Code, relating to appeals.

It is important to note that the indexing system of the Interstate Commerce Commission, although very comprehensive, is selective and does not attempt to list all final opinions and orders made in the adjudication of cases. It includes only those opinions which are considered by the Commission to be potentially significant as precedents. Its use as a model therefore accords with the explanation in the House report (H. Rept., 7) that the indexing requirement of subsection (b) is to include all documents "having precedential significance," and with the explanation in the Senate report (S. Rept., 89th Cong., 7) that orders, opinions, etc., which are not properly indexed and made available to the public may not be relied upon or cited "as precedent" by any agency.

Actual Notice

Failure to index a document or to publish or make it available does not preclude using it as precedent against any party who has "actual and timely notice of the terms thereof." As assurance against defects in publication and indexing, some agencies may find it desirable to supplement their compliance with the index requirement by establishing procedures whereby all regulated interests are given actual notice of the terms of materials which may be used against them, through the use of mailing lists or otherwise. The same idea, of course, may be applied on a limited basis. If it is impracticable to afford actual notice to all interested parties subject to a particular policy or interpretation, it may be desirable to serve a copy upon those parties most interested. If such practice is adopted, it should be used in addition to rather than in lieu of the required publication and indexing, since the essential purpose of the subsection is to make available to the public the "end product" materials of the administrative process. (H. Rept., 7.)

Whereas the provision of the original section 3 relating to the effect of failure to make matters available under subsection (b) provided only that opinions and orders not made available for public inspection were not to be "cited as precedents," the corresponding language in the revision is that materials not thus available are not to be "relied upon, used or cited as precedent" against any private party who has not had actual notice of the terms thereof. The legislative history contains no explanation of the difference between the new provision and that which it replaces. The additional words may have been inserted merely for emphasis, or to preclude an agency, in making a final decision, from relying upon a precedent which has not been made public.

SUBSECTION (c)—OTHER AGENCY RECORDS

"(c) AGENCY RECORDS.—Except with respect to the records made available pursuant to subsections (a) and (b), every agency shall, upon request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute and procedure to be followed, make such records promptly available to any person."

Agency Records to Which Subsection (c) Applies

The "Except" clause with which the provision begins is intended "to emphasize that the agency records made available by subsections (a) and (b) are not covered by subsection (c) which deals with other agency records." (S. Rept., 89th Cong., 2). Whereas subsections (a) and (b) require the publication or general availability of the materials described in those subsections, the "only records which must be made available" under subsection (c) "are those for which a request has been made." (*Ibid.*)

The term "records" is not defined in the act. However, in connection with the treatment of official records by the National Archives, Congress defines the term in the act of July 7, 1943, sec. 1, 57 Stat. 380, 44 U.S.C. (1964 Ed.) 366 as follows:

> "* * * the word 'records' includes all books, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics, made or received by any agency of the United States Government in pursuance of Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data contained therein. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included within the definition of the word 'records' as used in this Act."

It is evident from the emphasis in the legislative history of Public Law 89–487 upon the concept that availability shall include the right to a copy, that the term "records" in subsection (c) does not include objects or articles such as structures, furniture, paintings, sculpture, three-dimension models, vehicles, equipment, etc., whatever their historical value or value "as evidence." It is equally clear that the definition is not limited to historical documents, but includes contemporaneous documents as well.

Subsection (c) refers, of course, only to records in being and in the possession or control of an agency. The requirement of this subsection

imposes no obligation to compile or procure a record in response to a request. This is evidenced by the fact that the term "information" in the bill, as introduced, was changed by the Senate to "identifiable records" and by the legislative history of that change. (S. Rept., 89th Cong., 2.)

Most requests will probably be directed to records which are the exclusive concern of the agency of which the request is made. Where a record is requested which is of concern to more than one agency, the request should be referred to the agency whose interest in the record is paramount, and that agency should make the decision to disclose or withhold after consultation with the other interested agencies. Where a record requested from an agency is the exclusive concern of another agency, the request should be referred to that other agency. Every effort should be made to avoid encumbering the applicant's path with procedural obstacles when these essentially internal Government problems arise. Agencies generally should treat a referred request as if it had been filed at the outset with the agency to which the matter is ultimately referred.

Meaning of the Term "Identifiable"

A member of the public who requests a record must provide a reasonably specific description of the particular record sought. As the Senate report states, the "records must be identifiable by the person requesting them, i.e., a reasonable description enabling the Government employee to locate the requested records. This requirement of identification is not to be used as a method of withholding records." (S. Rept., 89th Cong., 8.)

The requirement is thus not intended to impose upon agencies an obligation to undertake to identify for someone who requests records the particular materials he wants where a reasonable description is not afforded. The burden of identification is with the member of the public who requests a record, and it seems clear that Congress did not intend to authorize "fishing expeditions." Agencies should keep in mind, however, "that the standards of identification applicable to the discovery of records in court proceedings" are "appropriate guidelines," and that their superior knowledge of the contents of their files should be used to further the philosophy of the act by facilitating, rather than hindering, the handling of requests for records. See S. Rept., 89th Cong., 2.

Agency Rules Implementing Subsection (c)

Because of the summary nature of the disclosure requirement of subsection (c), the abbreviated form in which the exemptions of sub-

section (e) are stated, and the technique of providing a single set of exemptions applicable to all of the publication and disclosure requirements instead of tailoring separate exemptions to fit each requirement, it is apparent that extensive implementation by agency rules will be necessary.

In addition to the rules required under subsections (a) and (b), every agency should promulgate rules which will establish, for agency personnel and the public alike, standards governing the availability under subsection (c) of types of records in the agency's possession. The guidelines of the statute afford little more than a framework. They should be implemented by agency rules which are clear and workable. The rules should prescribe the procedures to be employed in making records available, the time when they shall be available, the charges therefor, and the procedures involved.

Copies

A substantial problem in the practical application of subsection (c) is the physical problem of producing records, upon request, which are not available in a public reading room or similar facility. A copy of a requested record should be made available as promptly as is reasonable under the particular circumstances. Where an agency's contract with a reporting service requires that copies of transcripts be sold only by the service, the copy in the possession of the agency should be made available for inspection. If a copy of the transcript is requested, the agency may refer the applicant to the reporting service.

Techniques of records retrieval and copying are advancing rapidly. Appropriate procedures and adequate equipment may contribute as much to successful compliance with subsection (c) as thoughtful and intelligent implementation of the statutory standards in the agency's rules. Therefore, all agencies should carefully plan and equip to meet the problems of physically producing requested records.

Fees

The provision authorizing agencies to require payment of a fee with each request for records under subsection (c) makes it clear that the services performed by all agencies under the act are to be self-sustaining in accordance with the Government's policy on user charges. Congressional intent on this point is further evident in the legislative history of this act. See H. Rept., 8, 9.

The law (5 U.S.C. [1964 Ed.] 140) referred to in the House Report as directing Federal agencies "to charge a fee for any direct or indirect services such as providing reports and documents" provides the statu-

tory foundation of the user charges program. This user charges statute begins with the following statement of purpose:

> "It is the sense of the Congress that any work, service publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, * * *."

The statute further authorizes the head of each agency to establish any fee, price, or charge which he determines to be "fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts * * *."

Guidance in carrying out the user charges policy is contained in Bureau of the Budget Circular No. A–25, "User Charges." This circular provides that "where a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service." The circular prescribes general guidelines to be used in (1) determining the costs to be recovered, (2) establishing appropriate fees, and (3) providing for the disposition of receipts from the collection of fees and charges.

It is evident from the provisions of the user charges statute, the Bureau of the Budget circular, and the legislative history of the act that the enactment does not contemplate that agencies shall spend time searching records and producing for examination everything a member of the public requests under subsection (c) and then charge him only for reproducing the copies he decides to buy. Instead, an appropriate fee should be required for searching as distinguished from a fee for copying. Such fees should include indirect costs, such as the cost to the agency of the services of the Government employee who searches for, reproduces, certifies, or authenticates in some manner copies of requested documents. Extensive searches should not be undertaken until the applicant has paid (or has provided sufficient assurance that he will pay) whatever fee is determined to be appropriate.

By charging reasonable fees which compensate the Government for the cost of performing such special services, the agency will comply with the congressional intent to recover costs. Charging fees may also

discourage frivolous requests, especially for large quantities of records the production of which would uselessly occupy agency personnel to the detriment of the proper performance of other agency functions as well as its service in filling legitimate requests for records.

Judicial Review Under Subsection (c)

"Upon complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated shall have jurisdiction to enjoin the agency from the withholding of agency records and to order the production of any agency records improperly withheld from the complainant. In such cases the court shall determine the matter de novo and the burden shall be upon the agency to sustain its action. In the event of noncompliance with the court's order, the district court may punish the responsible officers for contempt. Except as to those causes which the court deems of greater importance, proceedings before the district court as authorized by this subsection shall take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way."

Any person from whom an agency has withheld a record after proper request under subsection (c) may file a complaint in the appropriate United States district court. The agency then has the burden to justify the withholding, which it can satisfy by showing that the record comes within one of the nine exemptions in subsection (e).

While it is not the purpose of this memorandum to discuss the jurisdiction of the district courts or the procedures in such cases, it should be noted that most cases arising under subsection (c) will be handled by the General Litigation Section of the Civil Division of the Department of Justice. In those cases, upon receipt of a copy of the summons and complaint served upon the Attorney General and notification of its filing by the United States Attorney (see Rule 4, Federal Rules of Civil Procedure), the General Litigation Section will request the agency to furnish a litigation report.

Since subsection (c) provides that these cases should be given a priority on the court docket, the agency should similarly accord priority to the submission of its report in order that a timely response to the complaint may be filed, thus avoiding the necessity of requesting extensions of time.

Some agencies are authorized to conduct their own litigation. Where its authority permits, the agency may decide to handle its own cases under this act. In view of the general litigation responsibility which the Department of Justice has for all other departments and agencies in the executive branch, it is important that agencies handling their own litigation under this act keep the Department of Justice currently informed of their progress and forward to the Civil Division copies of significant documents which are filed in such cases.

The House report aptly describes the district court proceeding under subsection (c) as follows (H. Rept., 9):

> "The proceedings are to be de novo so that the court can consider the propriety of the withholding instead of being restricted to judicial sanctioning of agency discretion. The court will have authority whenever it considers such action equitable and appropriate to enjoin the agency from withholding its records and to order the production of agency records improperly withheld. The burden of proof is placed upon the agency which is the only party able to justify the withholding. A private citizen cannot be asked to prove that an agency has withheld information improperly because he will not know the reasons for the agency action."

The injunction is an equitable remedy. As the above language recognizes, in a trial de novo under subsection (c) the district court is free to exercise the traditional discretion of a court of equity in determining whether or not the relief sought by the plaintiff should be granted. In making such determination the court can be expected to weigh the customary considerations as to whether an injunction or similar relief is equitable and appropriate, including the purposes and needs of the plaintiff, the burdens involved, and the importance to the public interest of the Government's reason for nondisclosure. See *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944); *United States* v. *Reynolds*, 345 U.S. 1 (1953); 2 POMEROY'S EQUITY JURISPRUDENCE §§ 397–404 (Symons 5th ed. 1941).

It should also be noted that district court review is designed to follow final action at the agency head level. The House report states that "if a request for information is denied by an agency subordinate the person making the request is entitled to prompt review by the head of the agency." (H. Rept., 9.) In reviewing this action, the district court is granted "jurisdiction to enjoin the agency from the withholding of agency records and to order the production of any agency records improperly withheld from the complainant." Jurisdiction of a suit against agency officers, as distinguished from the agency itself, is not explicitly granted. The subsection also provides that "in the event of noncompliance with the court's order, the district court may punish the responsible officers for contempt."

These provisions seem to assume the usual two-step procedure followed by courts of equity in contempt proceedings for violation of court orders. Following the statutory plan, the district court would presumably issue an order directed to the agency, which, under the language of the statute, is the only party defendant. In the event of noncompliance with the order—which would presumably have been served upon the head of the agency or whomever he delegated to make the final agency decision—the court would probably issue an

order to show cause directed to the responsible officer, which he would then have opportunity to answer. Subordinate officials who are not responsible for final agency action have a duty to follow the instructions of the agency head or his delegate and are probably not subject to the contempt provision. See *Touhy* v. *Ragen*, 340 U.S. 462 (1951).

SUBSECTION (d)—VOTING RECORDS OF AGENCY MEMBERS

"(d) AGENCY PROCEEDINGS.—Every agency having more than one member shall keep a record of the final votes of each member in every agency proceeding and such record shall be available for public inspection."

This subsection applies, of course, only to the votes of members of boards, commissions, etc., and not to agencies headed by a single administrator. Originally, the provision required that a public record be kept of all votes by agency members. After study, the Senate committee concluded that there might be "considerable disadvantage" in the disclosure of "preliminary votes." (S. Rept. 88th Cong., 7.) Therefore, the provision was revised to apply only to "final votes of multi-headed agencies in any regulatory or adjudicative proceeding." (H. Rept., 9.) Again, the exemptions of subsection (e) apply as well to this subsection as to the other subsections.

SUBSECTION (e)—EXEMPTIONS

"(e) EXEMPTIONS.—The provisions of this section shall not be applicable to matters that are * * *."

We have noted above that subsection (e), containing the exemptions, applies to all of the various publication and disclosure requirements of the new section 3. Adoption of this structure, rather than the tailoring of specific exemptions to each of the disclosure requirements contained in subsections (a), (b), (c), and (d), inevitably creates some problems of interpretation. An appropriate exemption from the Federal Register publication requirements of subsection (a) is not necessarily an appropriate reason for keeping secret a record requested under subsection (c). Exemption (2), for example, which relieves from all of the requirements of the act "matters that are * * * related solely to the internal personnel rules and practices of any agency," obviously is an appropriate exemption from the requirements of subsection (a) governing publication in the Federal Register. However, in the case of a request for access to a particular document under subsection (c), a strict, literal application of the language of exemption (2) frequently might produce incongruous results, shield-

ing from disclosure matters with respect to which there can be no possible reason for secrecy, such as blank forms used by Government employees in applying for leave.

It is obvious from a reading of subsection (e) that the exemptions must be construed in such manner as to provide a set of "workable standards," achieving the desired balance which is the basic statutory objective.

(1) National Defense and Foreign Policy

"The provisions of this section shall not be applicable to matters that are (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;"

In a statement on the House floor when S. 1160 was presented for consideration, Congressman Dole expressed the view that the "bill gives full recognition to the fact that the President must at times act in secret in the exercise of his constitutional duties * * *." (112 Cong. Rec. 13022, June 20, 1966.) With respect to the same problem, Chairman Moss presented the bill as one which is "not intended to impinge upon the appropriate power of the Executive * * *." (112 Cong. Rec. 13008, June 20, 1966.)

To the extent that agencies determine that matters within their responsibility must be kept secret in the interest of the national defense or foreign policy, and are not required to be withheld by Executive order or other authority, they should seek appropriate exemption by Executive order, to come within the language of subsection (e) (1). The reference in the House report to Executive Order 10501 indicates that no great degree of specificity is contemplated in identifying matters subject to this exemption. However, in the interest of providing for the public as much information as possible, an Executive order prepared for the signature of the President in this area should define as precisely as is feasible the categories of matters to be exempted.

(2) Internal Procedures

"The provisions of this section shall not be applicable to matters that are * * * (2) related solely to the internal personnel rules and practices of any agency;"

The House report explains that the words "personnel rules and practices" in subsection (e) are meant to relate to those matters which are for the guidance of agency personnel only, including internal rules and practices which cannot be disclosed to the public without substantial prejudice to the effective performance of a significant agency function. The examples cited in the House report (H. Rept., 10) are "operating rules, guidelines, and manuals of procedure for Govern-

ment investigators or examiners." An agency cannot bargain effectively for the acquisition of lands or services or the disposition of surplus facilities if its instructions to its negotiators and its offers to prospective sellers or buyers are not kept confidential. Similarly, an agency must keep secret the circumstances under which it will conduct unannounced inspections or spot audits of supervised transactions to determine compliance with regulatory requirements. The moment such operations become predictable, their usefulness is destroyed.

As the examples cited in the House report indicate, the exemption in subsection (e)(2) is designed to permit the withholding of agency records relating to management operations to the extent that the proper performance of necessary agency functions requires such withholding. However, as the House report states, at page 10, "this exemption would not cover all 'matters of internal management' such as employee relations and working conditions and routine administrative procedures which are withheld under the present law." It follows that the exemption should not be invoked to authorize any denial of information relating to management operations when there is no strong reason for withholding. For example, the examining, investigative, personnel management, and appellate functions of the Civil Service Commission relate solely to the internal personnel rules and practices of the Government and, as such, are covered by the exclusion in subsection (e)(2). However, the Commission now publishes all its regulations in the Federal Register, and its instructions are available to the public through the Federal Personnel Manual, which may be purchased at the U.S. Government Printing Office. This is an example of the exercise of the principle that the exemption, even though it may be literally applicable, should be invoked only when actually necessary.

(3) Statutory Exemption

"The provisions of this section shall not be applicable to matters that are * * * (3) specifically exempted from disclosure by statute;"

Explaining exemption (3) the House report, at page 10, notes that there are "nearly 100 statutes or parts of statutes which restrict public access to specific Government records. These would not be modified by the public records provisions of S. 1160."

The reference to "nearly 100 statutes" apparently was inserted in the House report in reliance upon a survey conducted by the Administrative Conference of the United States in 1962. This survey concluded that there were somewhat less than 100 statutory provisions which specifically exempt from disclosure, prohibit disclosure except as authorized by law, provide for disclosure only as authorized by law, or otherwise protect from disclosure. The reference therefore indicates an intention to preserve whatever protection is afforded under

other statutes, whatever their terms. For examples of the variety of statement of such provisions compare 18 U.S.C. 1905; 26 U.S.C. 6103; 42 U.S.C. 2000e–8, 2161–2166; 43 U.S.C. 1398; 44 U.S.C. 397; and 50 U.S.C. 403g. For a general, but not exhaustive, compilation of relevant statutory provisions, see Federal Statutes on the Availability of Information, Committee Print, House Committee on Government Operations, 86th Congress, Second Session, March 1960.

(4) Information Given in Confidence

"The provisions of this section shall not be applicable to matters that are * * * (4) trade secrets and commercial or financial information obtained from any person and privileged or confidential;"

The scope of this exemption is particularly difficult to determine. The terms used are general and undefined. Moreover, the sentence structure makes it susceptible of several readings, none of which is entirely satisfactory. The exemption can be read, for example, as covering three kinds of matters: i.e., "matters that are * * * [a] trade secrets and [b] commercial or financial information obtained from any person and [c] privileged or confidential." (bracketed initials added). Alternatively, clause [c] can be read as modifying clause [b]. Or, from a strictly grammatical standpoint, it could even be argued that all three clauses have to be satisfied for the exemption to apply. In view of the uncertain meaning of the statutory language, a detailed review of the legislative history of the provision is important.

Exemption (4) first appeared in the bill (S. 1666) following full committee consideration by the Senate Committee on the Judiciary in the second session of the 88th Congress. It then provided for the exemption of "trade secrets and other information obtained from the public and customarily privileged or confidential." The Senate report explained the addition of exemption (4) as follows:

> "This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes. It would also include information customarily subject to the doctor-patient, lawyer-client, and other such privileges." (S. Rept., 88th Cong., 6).

When S. 1160 was introduced in the 89th Congress, exemption (4) differed in two respects from the previous version. The words "commercial or financial" had been substituted for the word "other," and the word "customarily" had been deleted.

While the first of these two changes could be read as narrowing the exemption, a comparison of the Senate reports in the 88th and 89th

Congress indicates, rather, that it was intended to make sure that commercial and financial data submitted with loan applications would come within the exemption. The description of exemption 4 at page 9 of the Senate report in the 89th Congress is the same as that quoted above from the report in the 88th Congress, except that reference to the "lender-borrower privilege" is inserted and the following sentence is added: "Specifically it would include any commercial, technical, and financial data, submitted by an applicant or a borrower to a lending agency in connection with any loan application or loan."

The Senate report in the 89th Congress thus treats the change as expanding rather than contracting the coverage of the exemption, since it not only adds the above language, but also continues to refer to the doctor-patient and lawyer-client privileges, which certainly are not "commercial or financial," and all the other material referred to as exempt in the previous report.

Deletion of the word "customarily" apparently had a different basis. While at first glance the reach of "privileged" might be considered extended by removal of the modifying word "customarily," the change also serves a narrowing function by negating the possibility of a privilege created simply by agency custom. The word "customarily" is still used in the report, but with examples of the kinds of privileges which are protected by the exemption.

The House report on this exemption generally parallels the Senate language with several additions, including such matters as disclosures or negotiation positions in labor-management mediations, and scientific or manufacturing processes or developments. The report states at page 10:

> "This exemption would assure the confidentiality of information obtained by the Government through questionnaires or through material submitted and disclosures made in procedures such as the mediation of labor-management controversies. It exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government. The exemption would include business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments, and negotiation positions or requirements in the case of labor-management mediations. It would include information customarily subject to the doctor-patient, lawyer-client, or lender-borrower privileges such as technical or financial data submitted by an applicant to a Government lending or loan guarantee agency. It would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations."

The last two sentences, in particular, underline the protection afforded by this exemption to information given to the Government in confidence, whether or not involving commerce or finance.

It seems obvious from these committee reports that Congress neither intended to exempt all commercial and financial information on the one hand, nor to require disclosure of all other privileged or confidential information on the other. Agencies should seek to follow the congressional intention as expressed in the committee reports.

In view of the specific statements in both the Senate and House reports that technical data submitted by an applicant for a loan would be covered, and the House report's inclusion of "scientific or manufacturing processes or developments," it seems reasonable to construe this exemption as covering technical or scientific data or other information submitted in or with an application for a research grant or in or with a report while research is in progress. Lists of applicants, however, would not necessarily be covered.

In view of the statements in both committee reports that the exemption covers material which would customarily not be released to the public by the person from whom the Government obtained it, there may be instances when agencies will find it appropriate to consult with the person who provided the information before deciding whether the exemption applies.

One change was made in exemption (4) by the Senate committee in the 89th Congress: the phrase "information obtained from the public" was amended by substituting the words "any person" for "the public." It seems clear that applicability of this exemption should not depend upon whether the agency obtains the information from the public at large, from a particular person, or from within the agency. The Treasury Department, for instance, must be able to withhold the secret formulae developed by its personnel for inks and paper used in making currency.

An important consideration should be noted as to formulae, designs, drawings, research data, etc., which, although set forth on pieces of paper, are significant not as records but as items of valuable property. These may have been developed by or for the Government at great expense. There is no indication anywhere in the consideration of this legislation that the Congress intended, by subsection (c), to give away such property to every citizen or alien who is willing to pay the price of making a copy. Where similar property in private hands would be held in confidence, such property in the hands of the United States should be covered under exemption (e) (4).

(5) Internal Communications

"The provisions of this section shall not be applicable to matters that are * * * (5) inter-agency or intra-agency memorandums or letters

which would not be available by law to a private party in litigation with the agency;"

The problems sought to be met by this exemption are principally the problem of prejudicing the usefulness of staff documents by inhibiting internal communication, and the problem of premature disclosure. The House report explains the exemption as follows:

> "Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fishbowl.' Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy. S. 1160 exempts from disclosure material 'which would not be available by law to a private party in litigation with the agency.' Thus, any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public." (H. Rept., 10.)

Accordingly, any internal memorandum which would "routinely be disclosed to a private party through the discovery process in litigation with the agency" is intended by the clause in exemption (5) to be "available to the general public" (H. Rept., 10) unless protected by some other exemption. Conversely, internal communications which would not routinely be available to a party to litigation with the agency, such as internal drafts, memoranda between officials or agencies, opinions and interpretations prepared by agency staff personnel or consultants for the use of the agency, and records of the deliberations of the agency or staff groups, remain exempt so that free exchange of ideas will not be inhibited. As the President stated upon signing the new law, "officials within Government must be able to communicate with one another fully and frankly without publicity". The importance of this concept has been recognized by the courts. See *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss Jena*, 40 F.R.D. 318 (D.C., D.C., 1966), affirmed for the reasons stated in the district court opinion—F. 2d—(D.C. Cir. May 8, 1967).

In addition to its explanation of exemption (5) quoted above, the House report in its general discussion of the bill's provisions states:

> "* * * in some instances the premature disclosure of agency plans that are undergoing development and are likely to be revised before they are presented, particularly plans relating to expenditures, could have adverse effects upon both public and private

interests. Indeed, there may be plans which, even though finalized, cannot be made freely available in advance of the effective date without damage to such interests. There may be legitimate reasons for nondisclosure * * * in such cases." (H. Rept., 5–6.)

The above quotations make it clear that the Congress did not intend to require the production of such documents where premature disclosure would harm the authorized and appropriate purpose for which they are being used.

(6) Protection of Privacy

"The provisions of this section shall not be applicable to matters that are * * * (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;"

The Senate committee (S. Rept., 88th Cong., 7) explains this exemption as follows:

"In an effort to indicate the types of records which should not be generally available to the public, the bill lists personnel and medical files. Since it would be impossible to name all such files, the exception contains the wording 'and similar records the disclosure of which would constitute a clearly unwarranted invasion of personal privacy'."

The House report is to the same effect:

"Such agencies as the Veterans' Admininstration, Department of Health, Education, and Welfare, Selective Service, and Bureau of Prisons have great quantities of files containing intimate details about millions of citizens. Confidentiality of these records has been maintained by agency regulation but without statutory authority. A general exemption for the category of information is much more practical than separate statutes protecting each type of personal record. The limitation of a 'clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual. The exemption is also intended to cover detailed government records on an individual which can be identified as applying to that individual * * *." (H. Rept., 11.)

It is apparent that the exemption is intended to exclude from the disclosure requirements all personnel and medical files, and all private or personal information contained in other files which, if disclosed to the public, would amount to a clearly unwarranted invasion of the privacy of any person, including members of the family of the person to whom the information pertains. As was explained on page 19 above, the applicable definition of "person," which is found in section 2(b) of the Administrative Procedure Act, would include cor-

porations and other organizations as well as individuals. The kinds of files referred to in this exemption, however, would normally involve the privacy of individuals rather than of business organizations.

Another possible area of invasion of privacy would be the furnishing of detailed information concerning Government employees or others. The House report (p. 6) notes that the Civil Service Commission has ruled that "the names, position titles, grades, salaries, and duty stations of Federal employees are public information." It seems reasonable to assume that the Congress regarded with approval the Commission ruling, which in a letter of March 17, 1966 addressed to the heads of Departments and agencies gives examples of the circumstances under which such information should be made available, and establishes guidelines to govern the discretion to disclose such information concerning Government employees. (See Cong. Rec., March 21, 1966, pp. A 1598–1599.) To assure the privacy sought to be protected by exemption (6), similar guidelines should apply to requests concerning lists of persons who are not Government employees. It should be noted that the Commission ruling referred to above does not authorize the release of employees' home addresses. Whether such addresses are protected by this exemption would depend upon the context in which they are sought.

(7) Investigations

"The provisions of this section shall not be applicable to matters that are * * * (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a private party;"

The House report emphasizes that the term "law enforcement" is used in exemption (7) in its broadest sense, to include the enforcement not only of criminal statutes, but rather of "all kinds of laws, labor and securities laws as well as criminal laws." (H. Rept., 11.) Thus, the files compiled from investigation by Government agents into charges of unfair labor practices would be exempt as investigatory files compiled for the purpose of enforcing the labor laws. Similarly, a file compiled by the Immigration and Naturalization Service in the investigation of an application by an alien for adjustment of status, or one compiled by the Securities and Exchange Commission concerning violation of securities regulations, would be exempt as investigatory files compiled for the purpose of enforcing the immigration and securities laws respectively.

Frequently the investigations which are made reflect violations of law or circumstances requiring redress by administrative proceedings or litigation. The House report makes clear that in such cases the additional "files prepared in connection with related Government liti-

gation and adjudicative proceedings" are included within the exemption. (H. Rept., 11.)

It should be noted that the language "except to the extent available by law to a private party" is very different from the phrase, "which would not be available by law to a private party in litigation with the agency," used in exemption (5). The effect of exemption (5) is to make available to the general public those internal documents from agency files which are routinely available to litigants, unless some other exemption bars disclosure. The effect of the language in exemption (7), on the other hand, seems to be to confirm the availability to litigants of documents from investigatory files to the extent to which Congress and the courts have made them available to such litigants. For example, litigants who meet the burdens of the Jencks statute (18 U.S.C. 3500) may obtain prior statements given to an FBI agent or an SEC investigator by a witness who is testifying in a pending case; but since such statements might contain information unfairly damaging to the litigant or other persons, the new law, like the Jencks statute, does not permit the statement to be made available to the public. In addition, the House report makes clear that litigants are not to obtain special benefits from this provision, stating that "S. 1160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings." (H. Rept., 11.)

(8) Information Concerning Financial Institutions

"The provisions of this section shall not be applicable to matters that are * * * (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions;"

The meaning and purpose of this exemption are obvious. It is "designed to insure the security and integrity of financial institutions, for the sentitive details collected by Government agencies which regulate these institutions could, if indiscriminately disclosed, cause great harm." (H. Rept., 11.)

An earlier version of exemption (4) protected trade secrets, but made no mention of financial information and would not have protected information developed by agency investigators and examiners, as distinguished from information "obtained from the public." Exemption (4) as enacted, however, covers commercial and financial information as set forth at pp. 32–34 above. Exemption (8) emphasizes the intention of the revision to protect information relating to financial institutions which may be prepared for or used by any agency responsible for the regulation or supervision of such institutions.

(9) Information Concerning Wells

"The provisions of this section shall not be applicable to matters that are * * * (9) geological and geophysical information and data (including maps) concernings wells."

The House report explains that "this category was added after witnesses testified that geological maps based on explorations by private oil companies were not covered by the 'trade secrets' provisions of present laws. Details of oil and gas findings must be filed with Federal agencies by companies which want to lease Government-owned land. Current regulations of the Bureau of Land Management prohibit disclosure of these details only if the disclosure 'would be prejudicial to the interests of the Government' (43 CFR, pt. 2). Witnesses contended that disclosure of the seismic reports and other exploratory findings of oil companies would give speculators an unfair advantage over the companies which spent millions of dollars in exploration." (H. Rept., 11.)

It should be noted that, although the information involved in exemption (9) might not be a "trade secret" within the meaning of the earlier version of exemption (4), it would seem to constitute commercial and financial information covered by the present exemption (4), as described at pp. 32–34 above. The addition of exemption (9) is helpful in explaining the intention of the statute with respect to such information.

SUBSECTION (f)—LIMITATION OF EXEMPTIONS

"(f) LIMITATION OF EXEMPTIONS.—Nothing in this section authorizes withholding of information or limiting the availability of records to the public except as specifically stated in this section, nor shall this section be authority to withhold information from Congress."

The House report explains that "the purpose of this subsection is to make clear beyond doubt that all the materials of [the executive branch] are to be available to the public unless specifically exempt from disclosure by the provisions of subsection (e) or limitations spelled out in earlier subsections. And subsection (f) restates the fact that a law controlling public access to Government information has absolutely no effect upon congressional access to information." (H. Rept., 11.)

SUBSECTION (g)—DEFINITION OF "PRIVATE PARTY"

"(g) PRIVATE PARTY.—As used in this section, 'private party' means any party other than an agency."

The word "party" is already defined by the APA as including "a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency pro-

ceeding." The term "agency proceeding," in turn is defined as any agency process involving rulemaking, adjudication, or licensing. See 5 U.S.C. 551(3) and (12).

SUBSECTON (h)—EFFECTIVE DATE

"(h) EFFECTIVE DATE.—This amendment shall become effective one year following the date of the enactment of this Act."

The date of enactment of Public Law 89–487 was July 4, 1966. The effective date of the act, therefore, is July 4, 1967. By that date agencies should already have published their rules and procedures implementing the new statute, and these rules and procedures should then become effective.

APPENDIX A

COMPARATIVE TEXTS: Public Law 89–487 and Public Law 90–23

Public Law 89–487

(Sec. 3 of Administrative Procedure Act, as amended by Public Law 89–487)

SEC. 3. Every agency shall make available to the public the following information:

(a) PUBLICATION IN THE FEDERAL REGISTER.—Every agency shall separately state and currently publish in the Federal Register for the guidance of the public (A) descriptions of its central and field organization and the established places at which, the officers from whom, and the methods whereby, the public may secure information, make submittals or requests, or obtain decisions; (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available; (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations; (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and (E) every amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms

Public Law 90–23

(Sec. 552 of title 5, United States Code, as amended by Public Law 90–23)

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

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

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

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

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

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

(D) substantive rules of general applicability

thereof, no person shall in any manner be required to resort to, or be adversely affected by any matter required to be published in the Federal Register and not so published. For purposes of this subsection, matter which is reasonably available to the class of persons affected thereby shall be deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(b) AGENCY OPINIONS AND ORDERS.—Every agency shall, in accordance with published rules, make available for public inspection and copying (A) all final opinions (including concurring and dissenting opinions) and all orders made in the adjudication of cases, (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register, and (C) administrative staff manuals and instructions to staff that affect any member of the public, unless such materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of

adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

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

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

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

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

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

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

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an

policy, interpretation, or staff manual or instruction: *Provided*, That in every case the justification for the deletion must be fully explained in writing. Every agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter which is issued, adopted, or promulgated after the effective date of this Act and which is required by this subsection to be made available or published. No final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects any member of the public may be relied upon, used or cited as precedent by an agency against any private party unless it has been indexed and either made available or published as provided by this subsection or unless that private party shall have actual and timely notice of the terms thereof.

(c) AGENCY RECORDS.—Except with respect to the records made available pursuant to subsections (a) and (b), every agency shall, upon request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute and procedure to be followed, make such records promptly available to any person. Upon complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated shall have jurisdiction to enjoin the agency from the

agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

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

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

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records

withholding of agency records and to order the production of any agency records improperly withheld from the complainant. In such cases the court shall determine the matter de novo and the burden shall be upon the agency to sustain its action. In the event of noncompliance with the court's order, the district court may punish the responsible officers for contempt. Except as to those causes which the court deems of greater importance, proceedings before the district court as authorized by this subsection shall take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(d) AGENCY PROCEEDINGS.—Every agency having more than one member shall keep a record of the final votes of each member in every agency proceeding and such record shall be available for public inspection.

(e) EXEMPTIONS.—The provisions of this section shall not be applicable to matters that are (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; (2) related solely to the internal personnel rules and practices of any agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from any person and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency; (6) personnel and medical files and similar

and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

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

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

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

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

(5) inter-agency or intra-agency memorandums

files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a private party; (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions; and (9) geological and geophysical information and data (including maps) concerning wells.

(f) LIMITATION OF EXEMPTIONS.—Nothing in this section authorizes withholding of information or limiting the availability of records to the public except as specifically stated in this section, nor shall this section be authority to withhold information from Congress.

(g) PRIVATE PARTY.—As used in this section, "private party" means any party other than an agency.

or letters which would not be available by law to a party other than an agency in litigation with the agency;

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

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

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

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

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

SEC. 2. The analysis of chapter 5 of title 5, United States Code, is amended by striking out:

"552. Publication of information, rules, opinions, orders, and public records."

and inserting in place thereof:

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

SEC. 3. The Act of July 4, 1966 (Public Law 89–487, 80 Stat. 250), is repealed.

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Public Law 89–487

(h) Effective Date.—This amendment shall become effective one year following the date of the enactment of this Act.

Public Law 90–23

Sec. 4. This Act shall be effective July 4, 1967, or on the date of enactment, whichever is later.

APPENDIX B

TABLE OF COMPARATIVE STRUCTURES: PUBLIC LAW 89–487 AND PUBLIC LAW 90–23

Public Law 89–487

Sec. 3. Every agency shall make available to the public the following information:

(a) Publication in the Federal Register.—Every agency shall separately * * *

(A) descriptions of * * *
(B) statements of * * *
(C) rules of procedure * * *
(D) substantive rules * * *
(E) every amendment * * *

(b) Agency Opinions and Orders.—Every agency shall, in accordance with published rules, make available * * *

(A) all final opinions * * *
(B) those statements of * * *
(C) administrative staff * * *

Public Law 90–23

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

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

(1) Each agency shall separately * * *
(A) descriptions of * * *
(B) statements of * * *
(C) rules of procedure * * *
(D) substantive rules * * *
(E) every amendment * * *

(2) Each agency, in accordance with published rules, shall make available * * *

(A) final opinions * * *
(B) those statements of * * *
(C) administrative staff * * *
(i) it has been indexed * * *
(ii) the party has actual * * *

(c) AGENCY RECORDS.—Except with * * *
(d) AGENCY PROCEEDINGS.—Every agency * * *
(e) EXEMPTIONS.—The provisions of this section shall not be applicable to matters that are
(1)
(2)
(3)
(4)
(5)
(6)
(7)
(8)
(9)
(f) LIMITATION OF EXEMPTIONS.—Nothing in this section authorizes withholding * * *
(g) PRIVATE PARTY.—As used in this section * * *

(h) EFFECTIVE DATE.—

(3) Except with * * *
(4) Each agency * * *
(b) This section does not apply to matters that are—
(1)
(2)
(3)
(4)
(5)
(6)
(7)
(8)
(9)
(c) This section does not authorize withholding * * *

NOTE.—Where applicable, the definition of "private party" has been incorporated into the text of Public Law 90–23.

NOTE.—Section 2 of Public Law 90–23 amends the analysis of chapter 5 of title 5, United States Code, to comport with the caption of section 552.

Section 3 of Public Law 90–23 repeals Public Law 89–487.

Section 4 of Public Law 90–23 in effect retains the July 4, 1967 effective date for the new law.

*In its place in the Administrative Procedure Act, section 3, 60 Stat. 237, 5 U.S.C. 1002 (1964 Ed.), was preceded by the caption "Public Information." That caption, and some of the captions which precede the text of each of the lettered subsections of section 3, Public Law 89–487, have been molded into the new caption for 5 U.S.C. 552.

U S GOVERNMENT PRINTING OFFICE 1967 O—264-800

U.S. Department of Justice,
Washington, D.C., December 8, 1969.

Memorandum to General Counsels of All Federal Departments and Agencies Re Coordination of Certain Administrative Matters Under the Freedom of Information Act, 5 U.S.C. 552

The Freedom of Information Act, providing for compulsory disclosure of agency records not exempted by the act, confers administrative responsibility on each agency and makes the agency's final decisions subject to judicial review. The Department of Justice conducts litigation in defense of agency determinations under the act and furnishes certain advisory and other services pertaining to freedom of information problems. In general, the Department's litigation functions in this area are conducted by the Civil Division, and the advisory and other functions are conducted by the Office of Legal Counsel.

In discharging these functions, the Department has noted several developments which we believe warrant your attention. First, the Government in recent months has lost cases in court which involved a number of the exemptions contained in the act. *Consumers Union* v. *Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. July 10, 1969) (involving exemptions 2, 3, 4 and 5); *General Services Administration* v. *Benson*, 415 F. 2d 878 (9th Cir. Aug. 26, 1969) (exemptions 4 and 5). Second, there has been considerable variation in agency practices with respect to consulting the Department on freedom of information controversies before the agency takes final action which may result in the filing of suit against the agency. Third, there are particular problem areas under the act which are common to a number of agencies, where an exchange of views may be beneficial.

The implications of the judicial decisions cited above, as well as other cases, are under continuing review in the Department. However, enough review has already been accomplished to point to two conclusions: (1) Although the legal basis for denying a particular request under the act may seem quite strong to an agency at the time it elects finally to refuse access to the requested records, the justification may appear considerably less strong when later viewed, in the context of adversary litigation, from the detached perspective of a court and from the standpoint of the broad public policy of the act; (2) an agency denial leading to litigation and a possible adverse judicial decision may well have effects going beyond the operations and programs of the agency involved, insofar as it creates a precedent affecting other departments and agencies in the executive branch.

In view of the foregoing, it seems manifestly desirable that, in most instances, litigation should be avoided if reasonably practicable where the Government's prospects for success are subject to serious question. This can often best be done if, before a final agency rejection of a request has committed both sides to conflicting positions, the matter is given a timely and careful review, in terms of litigation risks, governmentwide implications, and the policy of the act, as well as the agency's own interests. To facilitate review of the nature just described, we need your cooperation. To improve cooperation on our part, we have just established an informal committee of representatives of the Civil Division and of the Office of Legal Counsel.[1] The functions of this committee will be to assist in such review and help assure closer coordination in our work.

We request that in the future you consult this Department before your agency issues a final denial of a request under the Freedom of Information Act if there is any substantial possibility that such denial might lead to a court decision adversely affecting the Government. Such consultation will serve the review function discussed above, and in some instances may also enable us to assist you in reaching a disposition of the matter reasonably satisfactory both to your agency and to the person making the request. The requested consultation may be undertaken formally or informally as you prefer, and ordinarily should be directed initially to the Office of Legal Counsel rather than to the Civil Division.

As regards the third development under the act noted near the beginning of this memorandum—the emergence of certain problem areas common to several

[1] The members of this committee as of now are: Jeffrey F. Axelrad, Civil Division, extension 3300; Robert V. Zener, Civil Division, extension 3354; Steven P. Lockman, Office of Legal Counsel, extension 2039; and Robert L. Saloschin, Office of Legal Counsel, extension 2674; chairman, Deputy Assistant Attorney General Thomas E. Kauper, Office of Legal Counsel, extension 2051, will be chairman ex officio.

agencies on which exchange of view and experience may be mutually beneficial—there is one such area warranting mention at this time. This area consists of various questions as to the availability of information on the testing of manufactured and other products (including such items of information as the identity of the maker or supplier, brand names, models, generic descriptions, test criteria, test procedures, test results, comparative ratings, limitations pertaining to products or characteristics not tested, et cetera). If the activities of your agency involve testing or information pertaining thereto, we would welcome any statements of experience, policies or views which you may care to provide. Such statements may prove useful to other agencies engaged in similar activities and to this Department in representing or counseling such agencies.

It is our hope that through the consultation and review procedures outlined above and through exchanges of experience and views on problems of common interest, positive benefits will accrue to individual agencies, the Government as a whole, and the public.

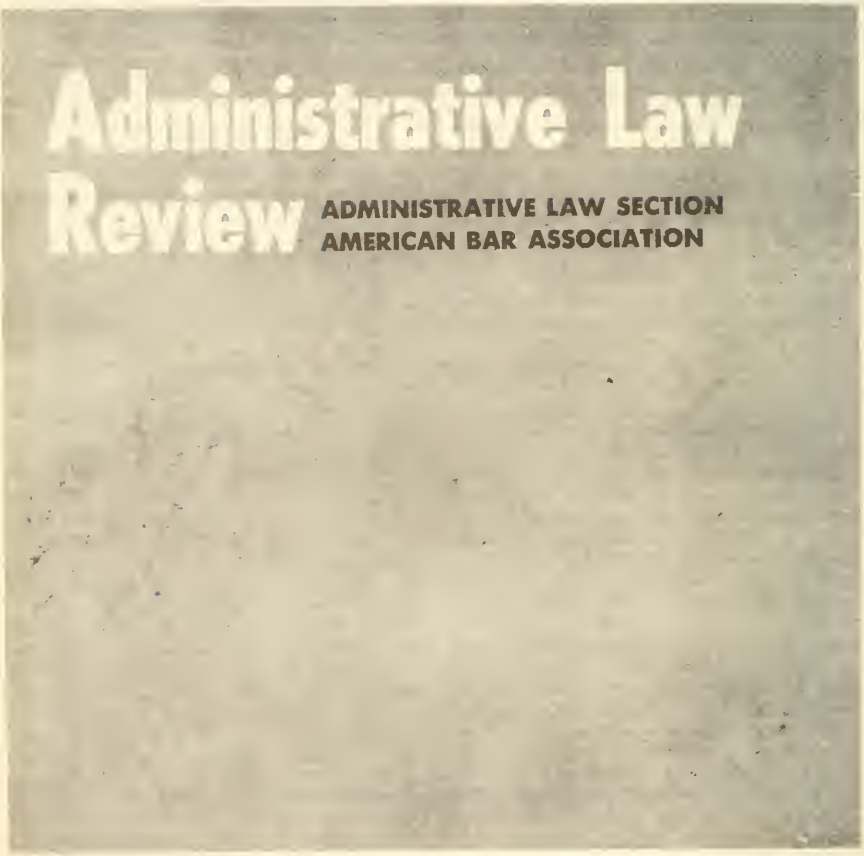
Please feel free to call us if you have questions about the foregoing.

WILLIAM H. REHNQUIST,
Assistant Attorney General, Office of Legal Counsel.
WILLIAM D. RUCKELSHAUS,
Assistant Attorney General, Civil Division.

Mr. MOORHEAD. In addition, Mr. Wozencraft has made a speech entitled "The Freedom of Information Act—The First 36 days," which was printed in the Administration Law Review of March 1968.

Without objection, I think this should be a part of the record also.

(The material referred to follows:)



VOLUME 20 NO. 2 (MARCH, 1968)

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These remarks were delivered before a session of the Administrative Law Section on August 9, 1967 in Honolulu, Hawaii. Mr. Wozencraft, Assistant Attorney General of the United States, has charge of the Office of Legal Counsel which assumed responsibility in drafting agency guidelines for compliance with the important Freedom of Information Act. The informal remarks of Mr. Wozencraft carry forward his discussion which appeared in the last issue of the Review.—The Editors.

THE FREEDOM OF INFORMATION ACT— THE FIRST 36 DAYS

FRANK M. WOZENCRAFT

When Bob McCarty and I discussed the title of this topic, I agreed to the present title for two reasons. First, it is obvious that I couldn't prepare a text in advance if I was going to speak on something current. Second, my colleague Tony Mondello was speaking at the Federal Bar Association on July 28th in San Francisco just twenty-four days after the Act became effective. Now that it is thirty-six days old, we can claim 50% more experience with the Act.

The really surprising thing is that during these past twelve days we have had the first court decision under the Freedom of Information Act, which I will turn to shortly. First I want to acknowledge that we have an audience of afficionados who know at least as much about this Act as I do, because everything that I know is already in the Attorney General's Memorandum on the Act.

For those of you who have not yet been initiated into the delights of construing the Freedom of Information Act, let me summarize that there are three main things this Act accomplishes, all of which are basic changes in the law as it is today. The first is that under this Act any person has standing to seek a document, regardless of whether he is properly and directly concerned with the document, as is required under the present Administrative Procedure Act's section 3.

The second is that the burden is on the government to justify withholding a requested record, and not on the requester to show why he needs the document. The government can usually support this burden only if the document comes within one of the nine exemptions which are set forth in subsection (b) of the Act.

The third basic change is that there is now judicial review, if the document is withheld, through a suit for injunction that can be brought in a Federal District Court, with the burden of proof resting upon the

government. Obviously, this is a basic change in the philosophy that has been in effect on government information. It has always been a basic approach that you withhold a document unless you have good reason to disclose it. Under this law, the philosophy will be to disclose a document unless you have good reason to withhold it. Any lawyer, familiar with the significance of burden of proof, knows what an important change this really is. Any lawyer also knows that with the potentiality of court review at the end of the road, things happen a lot better sometimes than if there were no such potentiality.

That is a very brief summary of what the basic changes are all about. As I said, I will assume that most of you have at least as much knowledge of the Act as I do. For those who don't, the Section has been kind enough to make available to all of you here, copies of the Memorandum of the Attorney General on this Public Information Section.

This manual was prepared by the Office of Legal Counsel, but it is the Attorney General's Memorandum. It speaks for the Department of Justice. I suppose at this point, as Bud Fensterwald did yesterday, I should assert a disclaimer. When I get beyond the basic explanation I just made, or beyond what the Memorandum says, I am really speaking only for myself. I do have a few thoughts that I would like to share with you, but please don't hold them against the Attorney General.

In the excitement and emphasis on disclosure of documents and judicial review, I think it is important not to forget the quieter but equally important consequences of sections (a)(1) and (a)(2) of the Act. The first requires publication in the Federal Register of organizational data and rules, and the second requires agencies to make precedential material available to the public. Each subsection has its own sanction. The first of these provides that no rule that is not published in the Federal Register, if it has general applicability, shall adversely affect a member of the public. The second one provides that no order, opinion, statement of policy or interpretation will be used as a precedent against a party unless it has been indexed and made available or published as provided in (a)(2), or unless the party had actual and timely notice of it.

My reference to (a)(1) and (a)(2) may seem confusing, since we do not use those designations in the text of the Attorney General's Memorandum. There is an explanation, however.

You will remember that this new law, Public Law 89-487, was initially enacted in 1966 to be effective on July 4, 1967, and that it was not codified when the rest of the APA was codified in 1966. It took a special act, Public Law 90-23, to codify the text of Public Law 89-487 into what is now designated at 5 U.S.C. 552.

In the Memorandum which we prepared we stayed with the old numbers of Public Law 89-487 because it facilitated one of the major purposes of the Memorandum, which was to correlate the statutory history with the text of the Act. The committee reports which constitute much of that history refer to the subsection designations and phraseology of Public Law 89-487 which were changed in the codification process. The codifiers noted, however, that codification was not intended to affect the substance of the Act. So I think we are safe in assuming that any changes are changes of style and not of substance. At least that is what the codifiers intended.

It took a great deal of work to prepare this Memorandum, because, as all of you who have reviewed this law carefully know, there are many ambiguities in this statute. It is very difficult to construe. In many spots it is hard to tell exactly what was intended.

We have done our very best to go back into the committee reports—in fact, we even talked with some of the members of the staff who had a hand in drafting parts of this Act—to try to find out what Congress had in mind. I hope that this Memorandum faithfully reflects the Congressional intent in this area. Sometimes there may appear to be some difference between the intent as it appears in the committee reports, and what would be the normal grammatical construction of some of the language. We have done our best to consider both in this Memorandum. If it leaves a lot of questions unanswered, as it certainly does, that is because a lot of questions are not answerable. They have to be considered in the context of specific fact situations. Sometimes, perhaps, courts will have to determine what they mean—but we have done the best we could.

The preparation of regulations under the Act was another difficult job, and a lot harder than we anticipated when we started drafting. Each department, of course, issues its own regulations, and we have not reviewed the regulations of all the other departments. When we drafted our own regulations we tried to be very careful not to block off the really great flow of information which is handed out by the Department of Justice, day after day, free of charge. Under this statute the agencies are encouraged to assess a reasonable user charge when they turn things loose. Well, we could see what would happen if when you lawyers write in for a copy of the brief in a case, we would insist on a charge of 25 cents per page.

Also, we were worried about having cautious people in the field decide they had better not turn anything loose without checking with the

Department in Washington. And yet, if you have ninety-eight U.S. district attorneys treating the same document in different ways, you have some real problems. We tried to solve this by providing that any official request under this Act does carry a charge and will be reviewed in Washington. But everybody from the field can go ahead and release what they have been releasing as a routine matter, free of charge. We hope that these provisions will not be used to make information less available, but indeed will make it more available.

Now the regulations are on the books, and I think most of the agencies have furnished reading rooms or areas where you can find their precedents—the opinions that they are going to be relying upon in their proceedings. The Act does not require that any of the materials made available by subsection (a)(2), but issued before its effective date, be indexed or put on the shelves; but we have encouraged all of the agencies to make their major precedents, even those issued before the Act became effective, available in their reading rooms. The whole idea of this Act is to make information more accessible to the American people, and that is exactly what we are urging the agencies to do.

But as I said a little earlier, I think much more important than the precise changes in the wording of the law, is the change of approach—the change in attitude in Government. I hope it will accelerate as it percolates throughout the government and will become an accepted view of the way agencies should operate in their dealings with the people, who in the final analysis are the government.

We have already seen some beneficial results from this. People from the agencies still call us every once in a while for consultation, even though we really completed our work on the Act when we came out with the Memorandum. In the Office of Legal Counsel we are office lawyers. Our job is to assist the Attorney General in his role as legal adviser to the President and the Executive Branch. If a lawsuit comes up, it is the Civil Division of the Department of Justice, or the lawyers of the particular agencies, who will handle it. But we are sometimes consulted on the Act and obtain information on what the agencies are doing. When we are, we usually raise the question of whether there is really a good reason why the document being discussed should not be disclosed. Does it come within one of the nine exemptions of the Act? If so, which one? Even if it does come under the nine exemptions—is the public interest, on balance, best served by withholding the document, or by disclosing it? It is surprising how otfen the answer comes out in favor of disclosure.

This is the thought process that we are trying to encourage. There are documents where the public interest is much better served by withholding. These exemptions so indicate, and they are there for good reasons. You just can't run a government when you turn everything loose, not only to any citizen, but to any alien who comes and asks for it. We have to keep that in mind when we interpret these exemptions.

I am sure that all of you are interested in hearing from the men who have been keeping accounts. There have been many requests. There has been a lot of mumbling and grumbling about how the burden on the Government would become intolerable. Well, it has been pretty intolerable getting ready for July 4th, I will say that. Those of you who are with the agencies know how intolerable it has been. But I think we can all agree that while there has been some good steady business, there hasn't been the great surge that some alarmists feared. There are some cases that might have become lawsuits concerning documents that the agencies were convinced were under the exemptions. But the exemptions were not invoked because the agencies decided that it really didn't hurt to release the documents anyway.

However, there are three lawsuits that have actually been filed. One was filed by Shell Oil Co. against Secretary Udall in the Colorado District Court. This involves the validation of land patents in a proceeding of the Department of the Interior. I understand that the Civil Division of the Department of Justice is defending that case. Even if I knew about it I couldn't comment on pending litigation; but since I don't know about it, that is no problem.

The second case was filed in the District of Columbia by a private practitioner against Secretary McNamara, seeking copies of the Defense Contract Audit Manual. The manual is comprised of two volumes. One part is public and the other part is confidential. The Department of Defense labelled the first volume "Confidential" and placed the second volume "on the record." They might have been smarter to number the volumes the other way around.

But without going into the merits of that case, because I'm not really familiar with it, let me move into the third case which has resulted, as I mentioned earlier, in the first court decison under this Act. That is the case of *Barceloneta Shoe Corporation* v. *Compton and the National Labor Relations Board*. This case was decided just about as far from here as you can get and still be in a U. S. District Court, the District of Puerto Rico. It involves an NLRB proceeding where there were unfair labor practice charges brought against the Barceloneta Shoe Corporation, and a hearing was set to begin on August 1st. On July 20th, in

came the Barceloneta lawyers saying, "Let me have your files, your affidavits, all your investigatory statements." When NLRB said, "No," they said, "Well, we need them under the Freedom of Information Act." The NLRB then said, "They exempt under exemptions 4 and 7, you haven't exhausted your administrative remedies, and also this isn't a case where the court ought to exercise its equitable discretion to grant an injunction." The answer was filed on July 26th. It was amended—and on July 28th there was an argument on the motion. The court decided the case on July 31st. It ruled that it need not reach the jurisdictional question of exhaustion of administrative remedies, because, on the merits, it was very clear that these documents should not be disclosed to the plaintiffs. It held them exempt under exemption 7 as part of an investigatory file and also exempt under exemption 4 as a statement which had been given in confidence to the NLRB. The Court found no grounds for exercising its inherent equity powers because it was very clear that if you did release these kinds of records, the disclosures would adversely affect the whole process of enforcing the National Labor Relations Act.

The opinion is very interesting. It quotes our Memorandum at considerable length on the applicability of exemption 7, particularly page 38 of the Memorandum. In considering exemption 4, it pays no attention to "commercial or financial" which you remember was one of the great questions in that particular exemption, i.e., whether it should be read in the disjunctive, conjunctive, or whatever. And it asserts very flatly that the Government is entitled to honor the confidence of people giving information in confidence.

I feel that this conclusion is very important to the helpful administration of this whole Act. If people get too worried about what is going to happen in the courtroom at the end of the road, they are going to withhold information that otherwise they would freely give to the Government. I think the Government's ability to honor a confidence legitimately entered into is certainly most important, and obviously we are pleased with this decision.

One swallow does not make a summer—one decision does not make a conclusive judicial doctrine of interpretation of this whole Act. There will be more cases. There will be more problems. But the *Barceloneta* case, I think, is an early and felicitous vindication of the approach that we tried to take on this in the Department of Justice—the common sense approach. Look at the facts. Look at the equities. Don't permit premature disclosure. Honor the commitment of confidentiality but don't let the Government get away with any nonsense. If there are documents

that can be disclosed without harm to the public interest, then go ahead and disclose them.

So much for the first 36 days. There may be a lot of problems brewing which we will hear about on the 37th. But basically, as I said before, the job of OLC in this area has now been completed. We hope we have at least set things on the right track. The actual implementation of this statute is going to depend on what the agencies themselves do with it. I have been very impressed with the conscientious effort of the general counsels of these agencies to see to it that their agencies understand the law and abide by not only the letter, but also the spirit of the law, as they were asked to do by the President when he signed this bill, and as the Attorney General again urged them to do in the foreword to our Memorandum.

Every question under the Act involves a matter of judgment. There are few open and shut cases. I talked with my office this morning to learn if any more suits have been filed, or if I could make any more hot-off-the-griddle information available to you. Marty Richman, my First Assistant, said that every question he has had to answer in this area since we left has been a close one. This is the point where judgment comes in. I hope we have had enough experience to have fairly good judgment in this area from now on. And I think that the important thing is to remember, as the Attorney General says in the Foreword, that under this new statute, "disclosure is a transcendent goal yielding only to such compelling considerations as those provided for in the exemptions of the Act."

I would like now to make one final comment that is related not to the Freedom of Information Act, but to my experiences of working with the Act and the other efforts in which I have had the privilege of dealing with the counsels for the agencies and representatives of the Bar, the press, and the Congress. This is a very fine and dedicated group of people, and I mean that sincerely about the people in each of these areas. We have dedicated public servants in government, and I have been delighted with the high caliber, competence and character that I found there when I came from private practice. The Bar is dedicated to the advancement of the public good. The press is dedicated to getting information out to the people, where they can really evaluate it. The Congress is dedicated to getting the best laws on the books.

Now, all these people look at problems from different angles. They have different slants on it. They bring different experiences to bear on the problem—and they are going to come out with different answers. These are honest answers based on earnest, considered differences of

opinion. Nobody has a monopoly on the truth. The truth is somewhere in between—and hopefully evolves from the meeting and merging and abrasions of the contact between these various groups. This has been the history of our government. It is also the history, I think, of a constructive working relationship between the Bar and lawyers in government. Working on Bar committees in Texas, revising the corporation laws and the securities laws, I learned the hard way that there are a lot of views that have to be taken into consideration, and that usually, when you do take them all into consideration, the best product emerges.

Last year in Montreal, I had the privilege of telling this Section of my personal conviction, based on my experience in private practice and in government, that great things can happen when the Bar and the government work together—not always in agreement, but honoring the sincerity and high motives of every person involved, the genuine desire of people to do what is, after all, the job that all of us have—to serve the best interests of the American people. That is the approach that we in the Department of Justice have tried to take in working on this Memorandum on the Freedom of Information Act. I know it is the approach that the Bar takes, and we welcome the opportunity of working with you. Thank you. (Applause)

MR. McCARTY: Frank Wozencraft, we thank you very much. Those of you who were at our Institute on Federal Agency Practice last April heard him there on this subject. In fact it was sort of a sneak preview on this statute, and the work his office was involved in at that time. We have now been brought up totally to date for at least the first thirty-six days, and Frank has come a long way to do this for us. We are indeed grateful to you. Thank you again. (Applause)

I know Mr. Wozencraft would be glad to entertain any questions you may have for him. Yes Sir?

PAUL BLAKE: I am Colonel Paul Blake from San Francisco. I would like to ask whether Frank feels this new Act has any application to the production of documents in ordinary civil litigation? Are the documents protected from production under this Act—does it automatically protect civil cases?

MR. WOZENCRAFT: As we indicated in our memoradum, I don't think Congress really was thinking in terms of litigation when it enacted this statute—and I find that the court in this Barceloneta case has the same idea. The gist of it is—I take it—that this should not be regarded as a law having great relevance in the field of other litigation. It produces its own litigation. But so far as other litigation is concerned, there is a statement in the House Committee Report that this law was not

intended to give litigants any earlier or greater access to information than they would have under the rules and procedures in courts.

MR. DECKER: I wonder if I might ask a question. I am Bob Decker, one of the former general counsels for the Department of Defense. In looking at number five, memorandums or letters which would not be available by law to another party. This seems to be a backhanded way—I know it wasn't done by the Attorney General, but by Congress—of protecting what seems to me vital and is brought out somewhat in the comments, and that is the process of decision by major government agencies or governmental officials. The Moss committee, for instance, was trying very hard in the old days—to dig up a report of a meeting that was held by a large number of our greatest scientists in the country—as to whether we should get a sputnik up before Russia. We had committed ourselves to get the Vanguard up. This was an advancement for the nations of the world in geophysical knowledge. Von Braun came and said, "Look, I can get a sputnik up before Russia. They are going to send it up on September so and so, the 100th anniversary of the birth of their greatest scientist. And I can get it up by putting two of mine together and bingo! It will go up first, and we will get the prestige of it." The Secretary of Defense, Charlie Wilson, was advised not to do that, because it would be a defection from our undertaking about carrying through the Vanguard, and who would worry who got the first one up. (laughter)

Leonard will remember that we were all startled at the Pentagon that it didn't go up on the 100th anniversary of the birthday which was September 14th. They missed it by a whole month. But the Moss committee, time after time, tried to get the memorandum of who voted how — on this committee of experts. Well, the process of their making any executive decision will be hopeless if he is exposed to the risk of saying that he decided against such and such an expert. And the expert will not give his advice, if thereafter he is going to be pilloried for having given the wrong advice.

MR. WOZENCRAFT: Mr. Decker, I couldn't agree with you more. I think that is, obviously, one of the basic causes of concern within the government about this Act and its possible interpretation. And the Congress, I think, made it clear in the committee reports that it intended to take care of the problem with exemption number 5. The House report, for instance, which we quoted on page 35, says that "agency witnesses argued that a full and frank exchange of opinion would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the ex-

change of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fish bowl.' " And there is more of the same.

One thing I think I should point out, is that this law does not apply to information given to Congress. The committee chairmen of Congress feel perfectly free to go ahead and request information from the agencies without regard to this Act.

MR. CLARENCE HART: I am from Saint Paul, Minnesota. The view was expressed yesterday by the Chairman of a very important administrative Board, unofficially, of course, that in his view this Act would not be enforced by the administrative agencies. That the District Court was the medium of enforcement and that the administrative Boards would not act to implement it. Is that a proper reflection of how this would be enforced?

VOICE: What agency was that? (Laughter)

MR. HART: The biggest one. I think if you reflect on that you will find it is one that handles more matters of this type than any other — but that is immaterial.

MR. WOZENCRAFT: Well, regardless of the source, it is very hard for me to comment on a statement by someone who is a government official, without seeing the statement and knowing the official. So let me just say, that as far as I am concerned — and as far as the Department of Justice is concerned — and as far as all of the agencies I have talked with are concerned, the agencies know that they are intended to comply with and implement this law. Now, there are going to be questions that will reach the courts. There are going to be questions where the agencies and the private people seeking the information will disagree as to the meaning of the law. When you talk about enforcement — probably yes, that comes from the court. But implementation comes from the agencies and that is the important thing, because if nothing gets turned loose except what a court orders turned loose, you will not have very much information.

MR. McCARTY: Ladies and gentlemen. I don't want to over-impose on Mr. Wozencraft — he will entertain two more questions.

MR. PETTIT: I am Walter Pettit from San Francisco. Mr. Wozencraft, you said it was not the intent of the Congress to give earlier or greater rights to litigants in Federal courts. I assume that is provided by the Federal Rules of Civil Procedure. Would you comment on whether or not you feel that this Act gives litigants before administrative boards any greater rights than they would otherwise have in

view of the rather limited rights given to discovery before many of these boards.

MR. WOZENCRAFT: I think that is a question that obviously is going to have to be worked out in different contexts and in different agencies, depending on the kinds of documents that are sought. But basically speaking, this Barceloneta case, for instance, is an example of an administrative proceeding — of an unfair labor practice charge before the NLRB — wherein the court has held that it would not give earlier or greater access to these documents than would be available in that administrative proceeding. Now these are documents which were exempt under two of the exemptions. If the documents had not been exempt under any of the exemptions then you might have a very different situation. So, again, I think we have to look at the actual facts of the particular case. I am sorry to have to seem so particularized on this. If there is a general rule in this area, it is that — in the words of the old economics principle — "the one certainty in life is that it all depends." (Laughter)

MR. KEATINGE: I forgot to ask this question at the Institute in April and I know it will be of interest to all those working in the securities field. As you will remember, we had a heated debate in April about the applicability of the new Act to the issuance of so-called "no action" letters under the Securities Act of 1933. As an old securities expert, Frank, could you express your views about the applicability of the new Act to the release of SEC "no action" letters, or at least to the release of the principles pursuant to which the "no action" letters are issued.

MR. WOZENCRAFT: Well, Dick, I am certain I can't give you any more definitive answer to that than Manny Cohen gave to you in April — and I think you and I agree that that wasn't entirely definitive. (Laughter) I do feel this, that under subsection (a)(2), it is very clear that no decision can be used as a precedent against an individual unless it has been made available.

Again, from what Manny said, and also from what I have heard since, they are planning to publish extracts of summaries of the more important provisions of their "no action" letters. To me this seems like a very sensible way to handle the problem because, usually, the request for a "no action" letter is a soul-baring process. A company comes in and says, "Look, SEC, we are going to tell you all. This is the whole works. Now you look at this and tell us if, on the basis of these facts, you can let us proceed as we plan or not. Is this okay, or will you take action against us if we do it?" The SEC considers it at great length, and

if it decides that it is okay, it comes out with a "no action" letter. Then the agency carefully says, "Now look, this is no precedent. We feel we may not want you to do this again under different facts. Our letter is limited to these particular facts." And that is right. If you made them give you a general principle that would be applicable across the board, it would take you about six more months to get the "no action" letter, and you would only get about one third as many. So I think that the right and ability of a private practitioner to give confidential information to the SEC should definitely be protected. I feel equally strongly that where an SEC doctrine is involved — where they do have principles that are going to be applied — then those, certainly, should be made available to the general practitioner, either through statements of policy or, where they are developed through "no action" letters, in summaries of the legal principles or policy formulations that they have adopted through the kind of digest or summary they are talking about.

MR. McCARTY: Mr. Wozencraft, thanks very much again. I am sure that we can continue this for quite some time, but I think we have leaned on you long enough. Perhaps some of you having other questions may be able to beard Frank after this is over. There is one final question that several have asked about. There is considerable interest in this Barceloneta Shoe Corporation case — if you could give us specifics on where that decision can be located, I think everybody will appreciate it.

MR. WOZENCRAFT: Yes, it is the Barceloneta Shoe Corporation and Crowley its agent, but I think Barceloneta will do it — versus Raymond J. Compton, individually, and as regional director of the Regional Office of the National Labor Relations Board. It will probably be carried as the Barceloneta Shoe Corporation versus Compton. It is Civil Action Number 505-67, United States District Court, in the District of Puerto Rico, July 31, 1967.

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Frank M. Wozencraft is Assistant Attorney General in charge of the Office of Legal Counsel. This Office assists the Attorney General in his capacity as legal adviser to the President and the Cabinet, preparing the formal opinions of the Attorney General and counseling on legal matters with the White House and the various government agencies. One of its subsections is the Office of Administrative Procedure. The Attorney General's Memorandum on the Freedom of Information Act was drafted by the Office of Legal Counsel.

Mr. Wozencraft graduated *summa cum laude* from Williams College in 1946, after rising from private to captain in the U. S. Army in

World War II. He graduated from Yale Law School in 1949, serving as editor-in-chief of the Yale Law School Journal, and then spent a year as law clerk to Supreme Court Justice Hugo L. Black. From 1950 until he was confirmed as Assistant Attorney General in April 1966, he practiced law in Houston, Texas, with the firm of Baker, Botts, Shepherd and Coates. He has also been appointed by President Johnson as a member of the Commission on Political Activity of Government Employees and of the National Advisory Panel on Insurance.

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Mr. MOORHEAD. Gentlemen, before we call on the next witness, it is the custom of this subcommittee to administer the oath to witnesses and I would like to do that retroactively and prospectively at this time.

Would you please rise?

Do you solemnly swear that the testimony you have given and will give to this subcommittee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. WOLF. I do.

Mr. PARSON. I do.

Mr. WOZENCRAFT. I do.

Mr. MONDELLO. I do.

Mr. MOORHEAD. Our next witness will be Mr. Anthony L. Mondello, General Counsel of the U.S. Civil Service Commission.

Mr. Mondello?

STATEMENT OF ANTHONY L. MONDELLO, GENERAL COUNSEL, U.S. CIVIL SERVICE COMMISSION

Mr. MONDELLO. Thank you, Mr. Chairman. I appreciate the opportunity to say very little, which is all I intend to say here. I appreciate the opportunity to be here to be of whatever assistance I can.

In view of my own part in respect to the Attorney General's memorandum, I would like to say just a few words about my role with the Freedom of Information Act in the Civil Service Commission today.

In a good many areas of my functioning I find that many are willing to say or at least to suspect about the executive branch that if they know of one little thing that went wrong or one big thing that went wrong in one agency, that it is bound to occur all over in thousands of cases, and I regard the statement by Mr. Wolf, at page 5 of his statement, where he says, "I suspect all of these examples represent the prevailing philosophy of most of the Federal bureaucracy and must be changed" as simply reflective of this attitude.

Now, that statement of Mr. Wolf's and the similar attitude of a lot of people is not an accurate reflection of what is going on in the agency I work in, in the Civil Service Commission, and I suggest that the committee not accept that as their own judgment unless and until you develop an actual factual support of a substantial sort that indicates that is true someplace. I think there is far more disclosure today than there ever has been before. I think that mood is growing. I think it started with the passage of the act, and I suggest what resistance you discover now by the people in the executive branch who appear unwilling to disclose documents is something akin to what I will find and you will find in the *Zeiss* case which is cited at page 35 of the Attorney General's memorandum. And in *Zeiss*, I was then in charge of the daily operations of the Office of Alien Property in the Department of Justice, the agency which actually had possession of the documents that one of two private litigating parties were seeking to obtain from us. I had heard from counsel from the side that wanted the documents, and we turned over very many documents. I have refreshed my recollection this morning and learned in Judge Robinson's opinion that by the time we had gotten to the litigation we had given up 4,500 documents and had retained 49 documents. I think I personally passed on all of those documents that any member of my staff felt at the time

should have not been released. I think initially there were several hundred, and I went through them all, and finally we went to litigation on 49. And I think that that is what is going on now.

By the way, we fought about that, and we won in the *Zeiss* case. We won our judgment as to the unavailability of the documents, and it was sustained by the district court, and that decision was upheld on appeal.

But I think people who see resistance in Government officials now mistake what it is. The resistance certainly is plain, but I think it begins to occur at a completely different stage than normally it would have occurred before passage of the act. I think agencies are giving much more; I think the act has been very effective; I think the resistance is now setting in at a later point on the course, but resistance will always be unwelcome and, as Mr. Wozencraft has informed you, there always are going to be situations where nothing short of a court resolution is going to make much sense. The provisions of the act, as you know, purport in very few general statements to take care of the literally billions of documents the Government houses. To me, it is kind of marvelous that the act has been as effective as it has, in spite of this almost hopelessly general language.

In the Civil Service Commission, after the act was passed and even prior to the time I joined the Commission which occurred in April 1968, they actually sat down—and they did this too after I got there—and decided, without anybody pushing us, just what documents formerly withheld should, because of the passage of the act, be made available.

We sent a list of such documents to the Senate committee which had requested whether we could generate that kind of information, and we found that we could.

But more important to me was what happened to the attitudes of the bureau and office officials in the Commission who sat down with us and heard from me, and from the foreword of this memorandum what the new attitude about the disclosure of documentation had to be in the Federal Government.

What it means to me is when they went on to their daily duties they had in mind a new idea of what had to be disclosed. And by the way, when we prepared the memorandum we noticed that the Civil Service Commission, with which I was not totally familiar at that time, had a very good record about having material that was technically exempted by the second or the fifth or sixth provisions of the exemptions of the act, yet making it all public, including it in their regulations and including it in their instructional statements which are essentially written to personnel officers all over the Government but which are available, for sale, through the Superintendent of Documents to anybody who wants to see them. We thought that was a good view of how that act should be treated, and we said so in the memorandum.

I later went to work for the Commission.

I cannot believe, in view of chance conversations I have had over the course of all of the 4 years I have been at the Commission with personnel in the General Counsel's office of other Government agencies—I do not believe that other agencies are paying any less attention to

the Freedom of Information Act than we do in the Civil Service Commission or than I did in the Department of Justice.

I would like to support an additional item that Mr. Horton and Mr. Wozencraft were discussing, the item of cost. My predecessor, as General Counsel at the Civil Service Commission, Leo Pellerzi, knew that we alone in the Commission had all of the decisions that had been made under the Hatch Act, and that troubled him and he did want to publish them. He did make them available, so if anybody came in they could see them.

But that obviously was not enough. When a Federal employee who had allegedly violated the Hatch Act would go to a lawyer in Seattle and say "would you defend it?", it would be difficult for the lawyer to know whether his client had been treated well or badly because he would not have the decisions available. After I became General Counsel and I was acquainted with the problem, I tried to get money put aside so that we could do something about it. We did. We put out a four-volume work, complete with topical index, and we published in two of those volumes all of the cases ever decided since 1940, State cases, and all of the Federal cases decided since 1886, and they are now out for all the world to see; they are in every major library in the country, and we did something about it. That cost my budget about $35,000 to $45,000, and it was hard money to find.

We have a similar kind of a problem with respect to the appeal cases. As you probably know, in most adverse actions in the Federal Government the agencies first handle each case and then appeal is made to the Commission. We have been asked many times to report our decisions on those cases. We have not yet made them public, and the difficulty is that there is a good deal of private information about employees in those cases, and what we have to do is to go through them and delete all of the identifying details so that the result of the case is perfectly plain and everybody can see it and deal with it.

But on the two occasions when I noticed we established a project to get that done, the personnel who were supposed to do the work would be diverted because we have had such a monumental caseload increase in the Board of Appeals and Review that it became a question of allocating lean resources—we were either going to turn out more cases so that employees' cases would not wait overlong, or we would not have any cases to report. So, these matters represent attention that we cannot afford to spend in the Commission, either with regard to these appellate cases or with regard to our more principal function of controlling the records that are maintained on all Federal employees. We do not maintain them all; the agencies have custody of most of them, but we do have a monitoring, leadership responsibility about what is maintained and how it is kept and what is allowed out to the public. We have regulations on the books about that, and none of the people who asked us for information have yet come in and told us that our regulations are poor. Currently, there is a tendency toward computer use for gathering information with greater efficiency. In dealing with private information—there are so very many people that have raised alarm. There are some who are fearful we may commit monumental invasions of privacy if we are not extremely careful

on how we treat this. So, we are kind of caught between two fires, those who would have us divulge almost everything and those who are terribly anxious that we not commit invasions of privacy. Although I think it has been effective until now—I am not sure just how protective the clearly unwarranted invasion of privacy test, as stated in the sixth exemption, would be if the matter were pressed. But I know of no invasions that we think have been clearly unwarranted which we have had to make or which the courts have had us make.

Beyond that, the Commission has had, as we have reported to the committee, some 23 cases where we have turned people down for information or documentation that was requested from us. They have not filed administrative appeals, although I do know of final decisions in our Commission which were made by the executive director of the Commission. And I know there have been cases processed so that the ultimate letter of denial went on his signature to an individual who had requested the document.

Mr. Horton. Mr. Chairman, may I interrupt the witness to ask a question?

Mr. Moorhead. Certainly.

Mr. Horton. You talk about making information available and computer lists—and, of course, you do have lists of people in your agency. I have a bill which is the subject of a later hearing, and I wonder if you could comment as to whether or not your agency does sell or make available lists of the names and addresses of people that are on file in your agency?

Mr. Mondello. No, sir; we do not; and we think it would be bad practice and really inconsistent with what the theory of invasion of privacy is. We are very leery in giving out home addresses, for example.

Mr. Horton. Do you make names available?

Mr. Mondello. Yes, the name, grade, title and duty station of every employee is public information and so declared in our regulations.

Mr. Horton. But you do not give the addresses?

Mr. Mondello. No, sir, we would not do that, except on occasions when we are served with a subpena or subsequent to indictment when the police are looking for somebody and they bring to us the official papers which indicate that a court would like for us to divulge the address, in which case we will do so. But, ordinarily, we will not do it.

Our regulations also prohibit the practice of making lists available for commercial or political solicitation. We do, after all, have the Hatch Act for enforcement, and political solicitation to us is as bad as commercial solicitation appears to be to other agencies. But we have not furnished mailing lists, for a fee or not, to anyone that I know about. We have turned down requests for them.

I think that is all I really feel I need to say, and I will be available for questioning, Mr. Chairman.

Mr. Moorhead. Thank you, Mr. Mondello.

We would like now to hear from Mr. David Parson, Chairman of the Committee on Government Information of the Federal Bar Association.

Mr. Parson?

STATEMENT OF DAVID PARSON, CHAIRMAN, COMMITTEE ON GOVERNMENT INFORMATION, FEDERAL BAR ASSOCIATION

Mr. PARSON. I am honored to testify here today. I am an attorney in Chicago, Ill. During 1962–65 I was an attorney with the Federal Government in Washington. I have been chairman of the Federal Bar Association's Government Information Committee for several years.

Although I have been asked to appear as representative of the Federal Bar Association, my remarks do not necessarily represent the association. The association has acted in many positive ways to explain to Government attorneys legislative matters and to spur on legislation on certain matters. For example, the Committee on Government Information has devoted time and effort to an explanation of the matter of individual privacy versus various social needs, the Federal data bank, freedom of information, etc. In that connection, for example, back in 1966 we spent much time with our Government lawyers and with staff committees on the proposed Freedom of Information Act. At our 1967 annual convention we had over 200 Federal lawyers hear a frank and free discussion of the freedom of information bill, at which the Honorable Anthony Mondello explained the Attorney General's memorandum; and we had background on the Public Information Act and the Administrative Procedure Act given by a private attorney; and a representative of HEW, Allison Wilcox giving the agency view of Government information and privacy. Continuing over the years, we have done the same thing. In our opinion, this exposure to the act by hundreds of Government employed lawyers—whose job it is to administer the act—has helped to make the act viable and responsive.

From my experience in private and government law practice, I think that the Federal lawyer does recognize that whatever agency or congressional committee is his immediate employer, his ultimate employer is the people themselves. But having chosen to be a civil servant and therefore depending on continued Federal service for his psychological as well as his economic well-being, the Federal lawyer does not and cannot be expected to countermand his immediate employer beyond suggesting a judicial interpretation of the Freedom of Information Act. If the act is truly to result in the public's right to know, there must be open to inspection those corridors of power of both the executive and the Congress. Information is power, and the use of information must, of necessity, be in the hands of the governing bodies, the executive and the Congress.

But the public must have available to it, as a matter of right, the information itself so that it can make its own judgment as to whether the use of that information has been responsible and judicious.

I have several proposals with regard to amendments to the act, but those, I believe, Mr. Chairman, will come up in the course of your questions.

Mr. MOORHEAD. If you would like to submit them for the record—we want to be sure that we have all of your proposals in the transcript.

Mr. PARSON. Well, if I may go ahead then, I would like to.

Mr. Moorhead. I mean, if you have them in written form, they can be incorporated in the record.

Mr. Parson. In written form, yes, Mr. Chairman.

Mr. Moorhead. Without objection, that will be received.

Mr. Parson. Thank you.

(The proposals follow:)

The author of an article in 48 Texas Law Review at page 1261 (1970) discusses the 4th exemption dealing with "Privileged or Confidential Information." Like Professor Kenneth Culp Davis in his article in 34 University of Chicago Law Review at page 761, she argues persuasively that the 4th exemption should be restricted to *commercial and financial information which is privileged or confidential*, and that an *objective* test by the courts should determine which, if any, *such* information should be held to be confidential. The courts are not uniform in their decisions; and this should be clarified by legislative action.

With regard to the 5th exemption, i.e. inter-agency or intra-agency memoranda, the author argues that public policy of the Act demands disclosure of memoranda dealing with *fact* or *policy* once the decision, order or regulation has been issued. Although Congressman Moss in the committee reports stated "I don't think it possible at this time to go that far in drafting language", the time would now appear appropriate to do so by carrying out the basic intention of the Act to make more visible the inner workings of the Government.

The 7th exemption protects disclosure of "investigatory files compiled for law enforcement purposes." *First*, legislative action should make clear that "law enforcement purposes" relate to *regulatory* as well as *judicial* enforcement proceedings. *Second*, once an investigation has ceased and adjudication, or the realistic prospects thereof have ended, investigatory files should be open to the public. *Third*, an investigatory file, during pendency of litigation, or its realistic prospect, should *not* be deemed to include informer's information, but only the informer's identity; should *not* be deemed to include facts and other material, the disclosure of which will not hamper or harm the Government's case. In other words, the intent of the Act to disclose information, even though ostensibly protected by an exemption, should be carried out.

Mr. Moorhead. Does that complete your statement?

Mr. Parson. It does, indeed. Thank you, sir.

Mr. Moorhead. We will proceed, under the 5-minute rule.

Mr. Reid. There are not too many of us here today.

Mr. Moorhead. Mr. Mondello, while your testimony is fresh in our memory, you spoke very favorably of the record of the Civil Service Commission on the implementation of the Freedom of Information Act. Yet, in our questionnaire of last August when we had asked the Commission for the number of requests for information that had been made under the act, it was clear that, unlike most agencies, your commission does not keep any central record of requests for information received.

Mr. Mondello. We do now, sir. We gave you a record of 23 cases, I think, and by going through all of our correspondence files we established this.

Mr. Moorhead. But, because you do not keep a record of requests that have been turned down at the lower levels, we do not really know how many requests were made that were turned down by the Commission. Is that not correct?

Mr. Mondello. We do not really know if there were any, that is, requests that were turned down. We do know that a great many requests are made and information has just been willingly given. So, I do not know how to reach back with a capacity to generate that, but there has never been any documentation.

Mr. MOORHEAD. But, if we ask in the future, your recordkeeping will be such that you will be able to tell us how many requests have been granted, and how many have been turned down?

Mr. MONDELLO. If it is not true, it will be true starting tomorrow. I can assure you of that.

Some of the information you really want to know is whatever requests are made and you do not care if they are made in writing, and it gets to be—I do not know how many times. I do not know how much time anyone should spend at counting up requests that are made, that are just granted off the cuff. I would have to divert our time to that but, you know, we could do it, I suppose.

We have regional offices throughout the country and area offices, some 65 of them. We have a good deal of information, and we do give a good deal of it out on request. We even set up a new telephone system so that people can make a free telephone call to us and get information.

Now, you know, every time anybody asks us—there are literally millions of those requests made of us in the regions, and I cannot—I would not want to set up an arbitrary procedure. May I deal with the committee staff on this?

Mr. MOORHEAD. I think that would be a good thing. We would like to be able to establish which agencies were complying with the act and which agencies were reluctant to do so. Based on your records, it is difficult to tell whether the Civil Service Commission is really living up to the spirit of the act, or not. That is the point I am trying to make.

The other point is, the custom of the Civil Service Commission to hold hearings of appeals of employees in private, that is your custom, is it not, even if the employee requests an open hearing?

Mr. MONDELLO. That issue is currently before the courts. In fact, it has been submitted, after argument, to the Court of Appeals in the District of Columbia, in connection with the *Fitzgerald* case. The short answer is "Yes". Most of the hearings we held in adverse action cases presently are because the matters talked about in those hearings with respect to possible witnesses, and the principal party, do involve private matters.

We have constantly, through the years, held these hearings not open to the public. The question of whether we should do so when an individual does not wish his or her hearing to be closed is a more difficult problem than on the surface appears. That has been argued, on its merits, now, to the Court of Appeals, and I would rather await the outcome of that. I do not think I should talk about it.

Mr. MOORHEAD. I would like to ask all of you gentlemen if you could discuss the respective roles of the general counsel, of public information officers, and of administrators in the implementation of the law. I am particularly interested in your comments on my thought that initially the responsibility should be the public information officer, and only if he decides to turn down a request for information should it be necessary to bring in counsel.

Mr. Wozencraft, do you have any thoughts on that?

Mr. WOZENCRAFT. I believe usually, Mr. Chairman, if the request comes from the newspaper or other media source, it would go to the

public information officer. If, on the other hand, it comes from a lawyer dealing with a particular branch of an agency, it would go directly from him to that agency branch. It is not the kind of matter that the public information officer would have any occasion to be familiar with. There would just be one more step if they had to bring him in. I do believe that the ultimate appeal is very well vested either in the general counsel or in someone like the Under Secretary, who will be relying upon the general counsel because the lawyers have a lot better idea of what is going to happen to them in the court proceedings, if they do not produce the documents.

I think that is a salutary effect in terms of releasing more documents. I do believe that a responsible departmental official, preferably a Presidential appointee, confirmed by the Senate, should be the ultimate authority within the agency. And I agree that there should be just one appellate step within the agency to avoid too many tiers and layers.

Mr. Wolf. If I might comment on that, I think possibly, Mr. Chairman, that our image of the public information officer has been one in general of someone who does not seriously think in ways of some of the alternatives which I would submit could possibly be worked out if the right individual were in that position to make him the first and last repository of the request.

If he really does feel, and he is a responsible, sophisticated person, and is aware of the agency problems, he will call up the general counsel. But, I do not think it necessarily has to be that way.

Ideally the agency should be able to respond right away, and the public information officer should be a supergrade employee, and have the confidence of the chairman, as Mr. Wozencraft suggested, and the agency—and this will make the agency more responsive, I think.

Mr. Wozencraft. If I may make one further comment. I did not mean to imply that only lawyers should be charged with releasing documents. As I said earlier, I think the public information officer can be very useful in a great many situations, but a lot of times his problem is also to have a great consciousness of the image of the agency. Sometimes if the image of the agency might be tarnished a little bit by the document , he may be much more inclined to withhold it rather than release it.

And my thought of having a general counsel in at the appellate level is in case that does happen, to let us have someone else to whom an appeal can be directed.

Mr. Mondello. In the commission on such matters I get in on the appellate matters, too, and furnish legal counsel, and finally until a decision is reached in this area, I think we should keep lawyers on the scene all of the time because I think the lawyers in Government have been very helpful in persuading these operating officials who, you know, for 20 years perhaps ran an office, owned the files, so to speak, and have been turning down everybody under the former section 3. It has been legal counsel, I think, who has been very instrumental in letting them realize that day is gone, and the great benefits of the act seen in the past 4 years, I think, are a direct result of that kind of working out with lawyers with the threat that we are going to lose it in court, and you make the agency head resist, and nothing could be more devastating than when the Department of Justice committee says to somebody that it is indefensible and we will not take it to court. We will not defend it,

and I think that is the end of the road right there, and there are lawyers who do that, too.

Mr. Moorhead. Mr. Reid.

Mr. Reid. Thank you, Mr. Chairman. I particularly would like to welcome Mr. Wozencraft, Mr. Mondello, Mr. Wolf, and Mr. Parson, and thank them for coming this morning. And I think their testimony has been articulate and very valuable. I would especially like to say a warm word of greeting to a friend of long standing, Frank Wozencraft, and to salute him for the work that he did when he was in the Justice Department to try and strengthen the clarifications, if not the substance of the act. And it is a particular pleasure to see him here this morning.

Mr. Wozencraft. Thank you, sir.

Mr. Reid. Let me, Frank, ask you a couple of quick questions, and then a fairly tough one, if I may.

First, would you concur that an amendment to the Freedom of Information bill should reduce the provision now applicable under the Administrative Procedure Act in the Federal Rules of Civil Procedure which permits the Government at this point to take 60 days to apply to a shorter period such as 30 days?

Mr. Wozencraft. Mr. Reid, I think this is really part of the whole judicial remedy and structure. I do not really believe I am sufficiently familiar with litigating in such a situation to give a very informed judgment on it. Obviously you do have to move fast on a lot of these requests, or they do not do any good, and in many instances where that is the case the courts have shortened the time available for reply. Perhaps that is a better answer than an across-the-board limit that might result in less satisfactory dealings with questions that are not all that rush and are extremely intricate. I certainly agree with you that prompt attention is necessary.

Mr. Reid. Well, the reason I mention it is, as you know, John Moss and I proceeded under the act relative to the Pentagon papers. By the time the matter finally got before the court for decision, of course, most of the documents had been declassified, and to some degree part of the questions were moot. And my impression is that we should speed it up.

Let me go directly, however, to that particular case, and to the question of executive privilege, a relationship that perhaps should exist between tighter definitions, executive privilege, and what happened in the case of the Pentagon papers. This was *Reid* and *Moss* v. *Laird*, and the plaintiff had asked the court to personally examine the four volumes of Pentagon papers.

This was in order to determine whether they were properly classified, and thus properly withheld under the security classification exemption in the Freedom of Information Act. And the court ultimately declined to review the documents and accepted the Department of Defense affidavit that the documents were properly classified.

Four reasons were advanced by the court, Judge Gesell. One, the court has no expertise in national security matters.

Two, the court finds ex parte and in camera proceedings distasteful and does not like to remove the proceedings from the adversary process.

Third, the act does not require the court to examine secret documents; and

Fourth, if such procedure were required, courts would spend all of their time having to review classified documents.

Let me take this in stages with you, if I may. First, one of the questions here is what does the exemption actually refer to when we say specifically required by Executive order to be kept secret in the interest of national defense or foreign policy.

If you look at the Executive order in question, 10501, top secret classification is very strict, and yet no one has interpreted it in that fashion. Now, it explicitly says the top secret classification shall be applied only to that information or material, the defense aspects of which are paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation, such as leading to definite breaks in diplomatic relations affecting the defense of the United States, and armed attack against the United States or its allies, a war or compromise of military defense plans, or intelligence operations, and then it gets a little weaker, or scientific or technological developments vital to the Nation's defense.

Basically, if you read that sentence, on its face it is really talking about exceptionally grave damage, and it is really saying something like World War III. Well, quite obviously, the intent of the Executive order has been grossly violated because almost everybody or anything, what the Secretary has for breakfast, is classified top secret.

So, I think that definition needs to be drastically tightened so that, in fact, we are talking about top secret.

And second, I think we should put an end to all of these extralegal classifications which are prohibited by the Executive order, and technically, as you know, secret, top secret, and confidential are the only ones that are supposed to be used in the Executive order, and it says no other designation shall be used to classify defense information.

And yet, with impunity there are a whole series of additional classifications and access classifications which, in effect sets up and triggers a whole new series of procedures of access.

So, I think that it is obvious, but what I would like to ask you more precisely is when we get into an area where clearly a Government agency in this case has improperly withheld certain information, and we have had, incidentally, at the outset of this suit testimony from the State Department that 80 to 90 percent of these documents should never have been classified in the first place, and how do we get the courts to make a judgment?

They said that they did not want to hide behind, in essence, the certification of the Department of Defense. There has to be a remedy here of some kind. Would you care to comment on that?

Mr. Wozencraft. Well, Mr. Reid, that very question will be before the Supreme Court in the case of *Environmental Protection Agency* v. *Pasty Mink*, where certiorari was granted yesterday. I have a hunch their answer will be considerably more enlightening and persuasive than any I would give. I do feel we must be careful always——

Mr. Reid. I do not know whether it may be more enlightening, but it may be somewhat more persuasive.

Mr. Wozencraft. I am sure that it will be more persuasive. I do feel that your point on having the separate classifications is an exceedingly valid one. I have a very low threshold of tolerance for the number of subclassifications which appear, and it reminds me of one I remember

that crops up all over the place, "administratively confidential." I guess that means not to show it to anybody that should not see it, but it certainly has no validity or import in terms of any legal right.

Mr. Reid. Well, in that context, how would you deal with a right that I think perhaps should be in existence, the right of discovery? We had testimony yesterday from George Reedy and others pointing out that the Congress, for example, does not have access to information so that it does not know what to ask for.

And equally, if the Executive is misbehaving, they do not broadcast it, and they are not accountable, whereas they do broadcast, by a double standard, things that put them in a good light. There is some development of this right of discovery in environmental law. Do you see some way that this could be applied here?

Mr. Wozencraft. Mr. Reid, I think that what is needed here is a statute dealing with discovery as part of the Administrative Procedure Act. This has been recommended by the Administrative Conference of the United States. A recommendation to the same general effect is also presently being considered by the administrative law section of the American bar.

The absence of discovery as to Government agency processes is a real lack, and ought to be filled. I believe it should be filled by an act devoted to it, rather than attempting to adapt this particular act which has a very different purpose. This act is, after all, intended to make information available to any person. There is nothing under this act available for a litigant, for instance, that is not also available to his competitor.

Under a discovery statute you can use a rifle instead of a shotgun, and it would seem to me that that is the appropriate way to approach it.

Mr. Reid. Let me ask another question on the subject of executive privilege. We have testimony from a number of people, including former Justice Goldberg, a number of editors, reporters, and the like. The more I listen to their testimony, the more I am convinced that the right of executive privilege is not an all-pervasive one.

Mr. Rehnquist, now on the Supreme Court, when he testified, talked about an implicit or inherent right of executive privilege. John Moss and I have never been convinced that it was that broad, and it seems to me on the premise that the Constitution did not intend that we have one-man government, but rather coordinated branches of Government, and if that be, so does the executive, in your judgment, have the right to withhold, and leave aside the form for the moment, the right to withhold from Congress information and facts central to a congressional, constitutional legislative decision?

One of the examples that comes to mind is that the Congress was denied information on the Gulf of Tonkin at the time it was asked to act. I am not talking here about confidential staff papers, or meetings between chiefs of state, or ambassadors' telegrams, or things of that sort.

I am talking about benchmark policy decisions, central to, for example, a finding responsibly under the Constitution by the Congress. And here do you think executive privilege is to preclude that kind of information going to the Congress?

Mr. Wozencraft. Mr. Reid, first let me point out that we are talking now about something quite different from the Freedom of Information Act, which would not deal with executive privilege, since executive privilege itself is a question of constitutional basis rather than a statutory basis.

Mr. Reid. Well, I am not sure we are talking about two different things, because one way we can perhaps reach or remove some of the executive privilege from the Executive is through the Freedom of Information Act. That is a parliamentary as well as a constitutional question.

Mr. Wozencraft. Well, to the extent that the executive privilege exists, it is a creature of the Constitution, and to the extent it is a creature of the Constitution, I think there is serious question about the extent to which it can be affected by a statute.

Now, let me quickly pass on, though, to what I regard as a very practical approach that everybody has to take. The Executive and the Congress have to take such an approach in this area of executive privilege itself. The Constitution did set up three separate branches. It is not the parliamentary system, whether or not it should be. This has led to some of the most important and frustrating problems of the Government.

We were called upon to deal with it in the Office of Legal Counsel occasionally, and the Congress has had lengthy hearings on that subject for some years, and nobody has found any definitive answers. At the same time, that does not mean that everybody has been floundering meanwhile, because the Congress has a very real set of weapons, and it knows very well how to use these weapons in terms of congressional oversight.

It also uses them in terms of appropriations.

It uses them in terms of confirmations of presidential appointments, and where it finds that the Executive is seeking to retreat behind a veil it would like to tear away, it has very real powers with which to tear away that veil.

Conversely, it must be acknowledged that the Executive has very real powers under article II of the Constitution. The two branches have gotten together pretty much on the basis of comity and on the need of each branch for the other to work with it if this country is to function well.

There may be a better answer than that. I have not yet found it.

Mr. Reid. Let me take it one step further. Senator Fulbright has introduced a bill in the Senate, and I am by way of introducing one in the House, the effect of which would be that if a committee of the Congress required of an agency the production of information central to a legislative purpose, and then this information is withheld, and if there is a certification that all information that is relevant has not been supplied, then the funds are cut off within 30 days.

The Comptroller General is directed not to sign warrants to the Treasury, and criminal sanctions are brought to bear on the Executive should any such funds be spent. Now, quite obviously, if one ever got such a bill through the Congress—I do not visualize it happening tomorrow—the matter would end up in the courts.

And what we are trying to seek here, obviously, without a total confrontation, is an accommodation. But, I think it useful to discuss the

premise here, and my premise is that the Executive does not have an exhaustive right to deny information to Congress that is central to a constitutional purpose of the Congress, and I would be quite surprised, if it ever got to the courts, if the courts would hold that there was an exhaustive right. In fact, the *Reynolds* case, I think to the extent that it is germane, indicated that it was not a broad, inherent, explicit right that was lodged with the President, but if there was such a right of judgment, it lay with the courts.

Mr. WOZENCRAFT. Well, Mr. Reid, I think your first suggestion of budgetary restrictions and limitations is likely to prove devastatingly effective if it is adopted without any of the other sanctions you suggested. It may never need to reach the courts. Indeed, traditionally the conflicts between the Executive and the Congress have not reached the courts. They have much more frequently been worked out by jockeying back and forth for some solution to which each side will grudgingly agree, because each side possesses real weapons, and each side needs the other.

Your mention of the seeking of an accommodation is where I would hope that the ultimate answer would lie.

Mr. REID. I agree with you, but the fact is that the White House today is increasingly moving within its umbrella. OMB antipoverty efforts, and it is even alleged that there is some aspects of the State Department that have been transferred. Be that as it may, it is getting harder and harder for the Congress to reach it, and when suddenly the wall of executive privilege goes up on the grounds these are all personal advisers to the President, or some other reason, then the Congress increasingly is either unable to find out what is going on, participate in the decision, or act properly within its constitutional mandate.

And, therefore, I think this particular problem is a central one if the Congress is not to be merely an appendage on the White House.

Thank you very much.

Mr. WOZENCRAFT. Thank you, sir.

Mr. MOORHEAD. Thank you.

Mr. PARSON. Mr. Chairman, may I just make one comment to Congressman Reid?

Mr. REID. Yes, sir.

Mr. PARSON. One of the men I think you could choose is Phil Kurland.

Mr. REID. One of the very best, if I may say so.

Mr. PARSON. On the occasion when he testified last year before this committee, when asked to testify on the subject of executive privilege, he said, "I respectfully refer you to Congressman Reid for greater expertise in this matter."

Mr. WOZENCRAFT. I might add, Congressman, that the work of you and Mr. Moss in such matters as calling attention to each President your thought that only the President, himself, should invoke this privilege, I think has been most helpful.

Mr. REID. Thank you.

(Discussion off the record.)

Mr. MOORHEAD. Mr. Wolf has suggested that copies, at least single copies of Government documents be furnished free to the person who requests them.

Do any of the other witnesses have any thoughts on that matter?

Mr. MONDELLO. We do it. We do it now, if it is not troublesome to us. We do pass out enough of our own information that we want people to know. If somebody requests a document, and we make a copy on the Xerox machine, it would cost us more to compute the cost than to just give it to them. So we just give it to them, and a good deal of this is going on.

I do not know who is being stingy about it. What I have just said is subject to the case of a person who wants 700 documents, in which case you do have to charge something, and there is an Office of Management and Budget circular on how you compute the cost so that you do not overcharge.

But, you do not get the benefit of what costs you have expended.

Mr. WOZENCRAFT. Mr. Chairman, I might add to that that when the act was first going into effect we were concerned at the Department of Justice that somehow or other these fees might dry up the flow of information which was already being provided free of charge.

We instructed the U.S. attorney's offices throughout the United States for instance to continue to make available free-of-charge copies of briefs and other documents that they had been making available.

At some point added cost does become a burden, and somebody has to bear it. Perhaps it should be the taxpayer. In that case it should be in a line item in the budget so that we do not frustrate the activities of the agency to deal with its other substantive functions. At least agencies should receive the fees, as I mentioned earlier, that come from any sort of payment should be paid into them, and if it is to be free, then some source of funds must be made available to the agency with which to make these copies available.

Mr. MOORHEAD. Did you have any thought, Mr. Parson?

Mr. PARSON. Mr. Chairman, as to whether a legal counsel or a public information officer should direct these activities, I had the pleasure of serving under Edward R. Murrow at USIA. At USIA and across the board in small agencies, the people I have talked to, I think we discovered the same thing. When the director of an agency, the head of the agency, has as his basic tenet the distribution and availability of information, then it follows that everybody or most everybody in the agency will follow his policy; therefore, it does not become a problem for the lawyer, and it does not become a problem for the public information officer. It is only when the head of the agency does not set that policy of distribution of information that it then becomes a problem of whether we are charging too little or too much, whether one person or another has to make that final determination of what will be distributed.

So, I think the crux of the matter is, as I have also seen it in practice, is that once the heads of the agencies are aware of the need for the public to have this information, any information, information which does not violate the right of privacy and national security, then all of the other problems really melt away.

Mr. MOORHEAD. About court costs and the plaintiff who has been denied information by some Government bureaucrat. There has been a discouragement of trying to use the courts, as the act provides. There is also the expense of bringing suit. What do you think, Mr. Wolf, about whether the Government, if it loses a case, should pay the court costs of the plaintiff?

Mr. Wolf. I think that is not something that should be opposed, Mr. Chairman, but I do not think it would get at the root causes of the failure to disclose. I can see that, and I think that would be a helpful addition to the act. It would have a slight deterrent effect, but I think what Mr. Parson said is the key.

If the agency had adopted the philosophy of disclosure, then all is well and good, but I do not think that too much reliance should be placed upon the recovery of the cost, court costs.

I think it does help, possibly, the indigent or the individual who is just faced with this rather lengthy court suit. But, I think court costs at the end of the line are not really going to encourage him to come forward and make that request if he knows that he is going to have a lengthy delay. I think it is helpful.

Mr. Wozencraft. Mr. Chairman, I would like to add that it seems to me that we are really talking here about is how we are going to spend the taxpayers' money. There are certain numbers of dollars, and unfortunately that number is not infinite, that can be used for the enforcement of that act. Is that money better used in counsel fees, or is it better used in making funds available, for instance, for the correlation and the publication of guidelines and the precedents and making available free copies of material?

Mr. Cornish. Mr. Chairman, I wonder if I might inject a question at this point?

Mr. Moorhead. Mr. Cornish.

Mr. Cornish. It is on the cost issue. If I am not mistaken, Mr. Wozencraft, and Mr. Mondello, I think you suggested that the cost and search fees ought to go to the agency involved instead of the Treasury.

Mr. Wozencraft. Yes, sir.

Mr. Cornish. Would that not possibly encourage the imposition of more and higher fees? Is there not an irresistible temptation to get something in return for the services provided, even if it means going to the filing cabinet, pulling out a piece of paper and saying, "Here, that will cost you a dollar?"

Mr. Wozencraft. That might be a human temptation, Mr. Cornish. I believe there are ways to resist it, however. For instance, that might be one item that is subject to the price freeze, or at least to phase II, and perhaps if phase II ends and it becomes a problem, I believe that this committee could institute its own phase III, asking the various agencies why they had seen fit to raise the rates.

Mr. Cornish. Well, we are trying to institute, as a matter of fact, a phase. I do not know what number it is, but the Cost of Living Council right now, in regard to their information on pricing apparently has some problems.

Mr. Wozencraft. Even the policemen need policing sometimes.

Mr. Cornish. Thank you, Mr. Chairman.

Mr. Moorhead. Mr. Wozencraft, last summer in the Washington Post there was a case involving the Pentagon papers and the Government submitted an affidavit describing the classification method used under Executive Order 10501, stating that it is sometimes necessary to classify a document in which there is no page contained therein which would be subject to classification. It is called compilation classification. Do you think that such a document would legally be withheld under the exemptions under the Freedom of Information Act?

Mr. Wozencraft. Well, Mr. Chairman, this again would depend upon the facts of the particular case, and I must confess that I am not familiar with the facts.

I did notice in the court of appeals opinion in the *Mink* case that documents that were part of the file there that were not themselves classified were released eventually, even though they had not been in the first instance, and were made available. That seemed to me like a very healthy approach toward declassification.

Mr. Moorhead. Thank you, Mr. Wozencraft.

Mr. Cornish, did you have another question?

Mr. Cornish. No.

Mr. Moorhead. Mr. Phillips.

Mr. Phillips. This is directed to Mr. Wozencraft and Mr. Mondello. Mr. Chairman. Were there any attempts in the Office of Legal Counsel when you were there to review drafts of proposed agency regulations implementing the Freedom of Information Act prior to their publication in the Federal Register? I am talking about in the first few months after the Attorney General's memorandum was issued, and prior to the time when regulations were actually promulgated?

Mr. Mondello. Yes. I was the person who reviewed them. I cannot say I reviewed all agency regulations. I reviewed all I could reach, and all I could get the agencies to send me in advance, and I hope that I was instrumental in seeing that these were decent regulations when they were ultimately issued. What I would normally do is that I would get one and read it, and then I was, of course, well versed in the legislative history, and what the contents of the Attorney General's memo were likely to be.

Most of the regulations were written between the period we got out the memo and July 4, 1967, the effective date of the act. A good many came out by July 4th, and some of them, as you remember, were late. I would call the person in charge of writing them and typically he was in the General Counsel's Office, and if I saw things that people like Jack Matteson and Jim Lanigan would not like in the regulations, I would tell them about it.

I used them as a kind of a club. Sometimes you did not have to use any kind of club. If I simply raised the question myself it was enough to cause deletion or modification.

I remember there was one situation in one agency where there was nothing I could do to get them to change. I guess that happened on a number of occasions, because they had, themselves, discussed whatever the policy matter was thoroughly and decided that this was the way their regulation was going to be.

Well, it was not my function to direct, but it was no trouble for us to do what I have described. I would make notations on the regulations for the purpose of getting ready for a long phone call, and these annotated copies are some place in the Department of Justice files, and if they ever became important we could get them out, I guess.

Mr. Wozencraft. Again, it is important to remember that the role of the Office of Legal Counsel is simply advisory, and we had no authority to get any agency to send us anything. Frequently, while not wanting to keep the regulations away from us, necessarily, they still

were dealing with a deadline and had to rush their regulations into the Federal Register without getting a review first.

And I do not think that all of the failures to send things to us resulted from a desire to avoid us, although I would not say in all cases that was true.

Mr. PHILLIPS. But your role was as adviser, then——

Mr. WOZENCRAFT. Yes.

Mr. PHILLIPS. There was cooperation within the executive branch on the wording of the details of the regulation to make sure that they were in compliance with the intent of the Attorney General's memorandum and the intent of Congress?

Mr. MONDELLO. Yes, sir.

Mr. WOZENCRAFT. We did our best to achieve that. I would say that it was maybe not entirely achieved successfully. On the matter of fees we had no authority whatever. People can set whatever rate they want, and that just was not a legal question.

Mr. PHILLIPS. Was there any thought given early in the game to drafting a model regulation that could be proposed to the various agencies, or were they pretty much given their own head in dealing with their own unique types of problems?

Mr. MONDELLO. Well, that was the difficulty. There were things I did not know, for example, about HEW, about the kinds of documents they had, whether they should or should not be made available, and I could not be very helpful to them, and a model set of regulations would not have helped them very much.

It would not have helped them any more than the memorandum did, and as a matter of fact, the memorandum had been in several different stages of draft and was sent out to everybody so they could comment, because sometimes we found agencies telling us that we had done something grievous that would just distort their programs terribly, and we listened to them all, and we tried to accommodate what we could with what the act said.

In the process, of course, they knew what our ideas were that were coming out in the book in the earlier draft, and so they had good steering, or at least as effective as we could provide on what it was that should go in the regulations. And in effect the language here in the Attorney General's memo—although it is in narrative form, and in some length—was something very handy to a person writing regulations because it does indicate where the policy is clear and where it is unclear, and sometimes it is very important to know that.

Mr. PHILLIPS. When the memorandum was written, was there any thought given to periodically updating it as case law developed?

Mr. WOZENCRAFT. I do not believe so, because we expected that the case law would itself be an updating. We expected the agencies to keep track of the cases. We made clear in the memorandum that as the case law developed, the agencies would be expected to follow it, and believe me, the amount of effort and time that went into this one product was enough to make us all heave an exhausted sigh when it was over.

Mr. MONDELLO. I know I had in mind at the time that we knew that the Attorney General's memorandum on the Administrative Procedure Act, itself, which came out in 1946, had been very helpful to the agencies because it was the Attorney General's committee that

started the whole ball rolling, and they worked on the legislation very closely, and they distilled out all of their information in that memo, and it is considered a prized document to own now, since it is very hard to find one and it is out of print.

Mr. WOZENCRAFT. It was never even revised.

Mr. PHILLIPS. The memorandum is out of print now, as a matter of fact.

The reason I asked the question, Mr. Chairman, is that later in the hearings I hope we are going to develop in testimony the fact that in many instances specific agencies have not been following the case law, even when it has affected their own agency in other *Freedom of Information* cases. This is why I thought that it might have been helpful if this 1967 memorandum could have been updated, perhaps on an annual basis so that there would be no excuse for agencies not to be knowledgeable about cases that had been decided by the courts that affected cases in which they were currently dealing.

Mr. WOZENCRAFT. When I left the Government in 1969, there had at that point been very few cases, and it is only really recently that the case law has begun to develop. As we know, yesterday the first case has reached the Supreme Court.

I might point out, though, that in various bar association meetings there has been continuing attention given to this problem that would bring it to the attention of the agencies, often through the Federal Bar Association which has held regional meetings and had programs at its annual meetings. And the American Bar Association in August of 1970, at its annual meeting in St. Louis, had a panel on the Freedom of Information Act and the agencies that is published in the 1971 issue of the Administrative Law Review. So the bar associations have been dealing with these things as they come along.

The matter has continued to receive attention, although it has not resulted in amendments to the original memorandum.

Mr. PHILLIPS. Those panels have been very helpful, and I have noticed in reading the articles that you refer to that, many general counsels from agencies were participating, as well as those who were in the audience.

But, I submit that this is not a substitute for formal action on the part of the Department of Justice to make sure that the machinery of government is kept fully apprised of the court developments that affect the Freedom of Information Act.

Mr. MOORHEAD. Mr. Cornish.

Mr. CORNISH. Thank you, Mr. Chairman.

Mr. Wozencraft, I have been kicking around here for about 7 years, and I have just come in contact with a strange new animal which is called a "gratuitous" Government document. Have you ever heard that terminology used in relation to a Government document?

Mr. WOZENCRAFT. No, sir; I did not stay around that long.

Mr. CORNISH. Well, it was defined for me, and let me give you the definition of a "gratuitous" Government document. It is one which is kept by an agency, which it is not required to keep; that is, it is kept for the convenience of some of the internal working groups, or bureaucrats within the agency.

Is it your opinion that a "gratuitous" Government document should be made available to the public, just as much as any other Government

document required to be kept by either law or regulation within the agency?

Mr. Wozencraft. Well, without knowing more about what kinds of documents really are gratuitous, I would see no distinction between them and any other kind of document.

Mr. Cornish. I agree with you. Thank you very much.

Mr. Wolf. If I could comment just very briefly on that, I would certainly endorse what Mr. Wozencraft said.

But, I think that this kind of document that you refer to often comes up in an agency which is developing policy but has not formally promulgated it.

They put a proposed regulation in the Federal Register, and a year later it may be the regulation comes out in the second printing, but in that time there is a lot of interim policy decisions being made on the basis of "tentatively drafted" documents, documents that may or may not be formally adopted. These documents should be fully disclosed because they are affecting people, obviously, daily, and they should not fall under the interagency memorandum exceptions.

Mr. Cornish. Well, so that there will not be any misunderstanding about it, I will identify the type of document that it is.

It is a numerical summation of the action taken by an appeals board or panel of the Selective Service System.

Mr. Wozencraft. It sounds like any other document to me.

Mr. Cornish. Thank you.

Mr. Kronfeld. I have just one question.

Mr. Moorhead. Mr. Kronfeld.

Mr. Kronfeld. Thank you. The Department of Justice, for a number of years now has had an informal committee which reviews and accepts queries from the executive departments about the availability of documents. The Department generally advises whether this document should be released, whether the Department feels they could defend it if it became a matter for litigation.

Now, do any of you gentlemen feel that this committee should be formalized with periodic reports made to the agencies, reports which would be the kinds of information they gave out, which may be a substitute for rewriting of the 1967 memorandum, and add some additional information for the agencies which are not keeping up on the periodic basis with the case law as it comes down?

Mr. Wozencraft. Mr. Kronfeld, without being completely familiar with how that committee is operating, I think your idea of supplemental submissions by the committee is a very good one. There are, I am sure, emerging attitudes that they will see, and that could usefully be disseminated to the other agencies and departments.

I believe they would still be advisory but they could still be very useful, I think.

Mr. Moorhead. Mr. Copenhaver has a question.

Mr. Copenhaver. Did you want to answer?

Mr. Mondello. No.

Mr. Copenhaver. I have one brief question: There has been some suggestion that because of the burden that may be placed upon the courts in handling a large number of appeals from denials of requests for information, and also the burden placed on individuals who re-

quest information to have to go through the legal procedures and the court costs, there should be established some kind of quasi-independent advisory board, perhaps organized along the lines of the Civil Rights Commission, which could be responsible for entertaining quests or petitions to review denials of information or classifications of documents.

Senator Muskie's bill has a provision along these lines. Would you gentlemen care to comment about the desirability of establishing such a review board which could perhaps act more quickly in an appeal, more informally, less costly?

Mr. Wozencraft. Mr. Copenhaver, without having had any opportunity to evaluate the full proposals, I would fear that such a group might simply become another layer of appeal, and that it would not have any direct knowledge of the various agencies.

It also would cost money to establish it and to staff it, and it might be a very good thing. I do not want to say out of hand that it would not.

On the other hand, I would hope that the present informal procedures in the Department of Justice could do essentially the same job. I think sometimes you get farther in informal procedures, just as in the Congress once in a while an informal visit can produce better results than a formal confrontation. Perhaps the same thing is true in this freedom of information area.

There are a lot of instances that I am familiar with, as Mr. Mondello commented earlier, where the Department of Justice simply does not have an opportunity to be familiar with the problems of these various agencies. There have been cases where we have felt that the agency was wrong, but where the agency has been very sure that it was right, and was prepared to go to court to prove it.

And sometimes they have been right, and other times they have been wrong, and the courts have told them so. I have a considerable amount of confidence in the ability of our judiciary to be sensible on this whole matter. I like the idea of some sort of judicial discretion to look at the facts of the situation, simply because no overall statutory wording that I have ever been able to come up with is so perfect that it can balance conflicting valid interests and objectives in each instance. I rather think that the courts are a pretty good forum for that.

Mr. Copenhaver. Before I ask Mr. Parson and the others to comment, do you recall the *Reid-Moss* case where Judge Gesell in essence said that he did not have the time or did not desire to go behind the security classification and review the documents because of the burden of time and other factors. That is one reason for prompting the suggestion of the alternative to the court.

Courts of course, are authorized to appoint masters. Would this be an alternative procedure in cases where there is a need to review a large number of documents of a complicated nature? Would you think that this is a possibility?

Mr. Wozencraft. It certainly would be a possibility, Mr. Copenhaver. I do not really know how heavy a burden this has been on the courts. I know in the earlier stages, one of the dire predictions was that the courts would be swamped. I do not think that prediction has proven to be true, and if it ever becomes true, then certainly other methods of

handling this situation must be developed. I believe that the biggest time lag is not in the court decisions, as much as in the agencies themselves and in their appellate procedures, and that is where I would like to see things speeded up, without saying the other would not be useful as well.

Mr. PARSON. To me, with a history of looking at the various freedom of information provisions, and looking at the history of invasion of privacy which has occurred, and particularly in the area of the computer law, this certainly smacks to me of the creation of a new censorship kind of board.

With regard to the masters, as such, we in Chicago have had a history of wealthy masters, and I suppose we are attuned to the fact that the courts themselves can more readily dispose, whether it be in camera, or otherwise, of these issues, and do it well and do it fast.

But, again I get back, I always get back to the fact that if in the first instance we can impress the head of an agency for the need to make information free, then everything flows from that point.

Mr. MONDELLO. If I may offer one additional comment, I think there is a danger in setting up a new agency charged with the responsibility to take on the Freedom of Information Act burden of the executive branch. I think you get farther faster with following Mr. Parson's view or my own, that if you impress on an agency head or his general counsel, or PIO, that this act has got to be enforced, you are going to get a lot further a lot faster than if you set up another level of appeal before you get to court.

If we believe in it, then we can make it work.

Mr. WOLF. I would strongly agree with everything that has been said against creating another board, that the responsibility should be on the agency itself. I would also comment just briefly on what Mr. Wozencraft was suggesting about equitable consideration by a judge who is assessing some of these matters.

Right now there is a split; that is, the court of appeals in the District of Columbia has said only where the phrase "clearly unwarranted invasion of privacy" is involved do you get into the equitable balancing process. I think that is a good idea.

However, I would add the "clearly unwarranted" phrase possibly to exemption 1 to suggest that a judge should be into this balancing process even in the most sensitive national security questions. I would not add the "clearly unwarranted" phrase to every one of the exemptions to it and thereby make it all a balancing matter, but I would add it possibly to No. 1. As suggested in my earlier testimony, other documents requested should be given without the court balancing factors which Congress has already considered.

Mr. COPENHAVER. Would you agree that there seems to be some dispute in the law as to whether the court should go behind a security classification against an alleged claim of an exemption under No. 1 exemption of the FOI law and that we could spell this out in legislation? Would you agree that we intend the court to go behind the allegation and into whether it meets the prescribed definition of classification?

Mr. Wolf. You are talking about the basic problem of executive privilege.

Mr. Copenhaver. No. 1 exemption.

Mr. Wolf. I think yes: the courts can. and I think constitutional lawyers far better versed than I would support the position of the judiciary reviewing the dimensions of executive privilege.

Mr. Copenhaver. Thank you, Mr. Chairman.

Mr. Moorhead. Thank you very much, gentlemen, for your cooperation, your helpful testimony, and your suggestions to us.

We appreciate it a great deal.

When the subcommittee adjourns today, it will adjourn to meet on Friday, March 10, at 10 a.m., in this room, where we will hear from witnesses from the Department of Justice.

The committee is now adjourned.

(Whereupon, at 12:35 p.m.. the hearing was recessed, to reconvene at 10 a.m., Friday, March 10, 1972.)

U.S. GOVERNMENT INFORMATION POLICIES AND PRACTICES—ADMINISTRATION AND OPERATION OF THE FREEDOM OF INFORMATION ACT

(Part 4)

FRIDAY, MARCH 10, 1972

HOUSE OF REPRESENTATIVES,
FOREIGN OPERATIONS AND
GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:10 a.m., in room 2154, Rayburn House Office Building, Hon. William S. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives William S. Moorhead and John Conyers, Jr.

Staff members present: William G. Phillips, staff director; Norman G. Cornish, deputy staff director; and William H. Copenhaver, minority professional staff, Committee on Government Operations.

Mr. MOORHEAD. The Committee on Foreign Operations and Government Information will please come to order.

We are fortunate to have at our hearing today officials from the Department of Justice who are among the Federal Government's top experts on control of information. I am confident that they can shed some light on two aspects of a problem which this subcommittee has been studying intensively since last summer.

One problem is the administration of the Federal Government's first Freedom of Information Act which established policies for public disclosure of information about the Government's day-to-day activities.

The other problem is the system for classifying and controlling information which has a direct effect on national defense and foreign policy.

Last week in a discussion of this problem on the floor of the House of Representatives, I warned that the White House was about to issue a new directive, Executive Order 11652, on the handling of classified information. I urged the administration not to try to head off legislative action in this field by any premature action. But on Wednesday, March 8, the President issued his new Executive order entitled "Classification and Declassification of National Security Information and Material" fortunately delaying the effective date of his order until June 1, 1972.

The President's public statement accompanying this new Executive order is an excellent one in many respects, emphasizing past abuses of

the classification system and promising an Executive order that would end them.

The staff of the subcommittee and I have given preliminary study of the Executive order itself and it appears to us that the Executive order itself does not live up to the laudable goals contained in the President's statement.

The order is a very restrictive document.

It appears to be an order written by classifiers, for classifiers.

For example, examination of the order shows that it effectively prevents the automatic disclosure of a "top secret" document for 10 years and a "secret" document for 8 years.

Now what does that mean? It could mean simply this: A President could safely stay in office for his full two constitutional terms, totaling 8 years, and at the same time make it possible for his Vice President or another of his party supporters to succeed him without the public knowing of the full details of major defense or foreign policy errors his administration had committed. In other words, the same political party could control the Presidency for 12 years when, perhaps, the public would throw it out of office if only the facts were known.

This is but one of the problems which are apparent in the President's highly publicized new secrecy program. Beginning today—and continuing through the coming weeks—we will look into these problems carefully.

And we also will look at the parallel problem of the control of the routine facts of Government operations. The Department of Justice has interpreted sections of the Freedom of Information Act, not only as it applies to the Department's own public records, but also as it applies to the public records of all other Government agencies.

Four years ago when the Freedom of Information Act spelled out the law—and the spirit—governing the people's right to know the facts of government, the Department of Justice issued a guideline memorandum explaining to all other agencies how they should administer the act. Two years ago the Department issued another memorandum, setting up its own Freedom of Information Committee to advise other agencies on how to handle court cases which had been filed under the act.

There have been well over 100 cases filed so far. Many of them have provided important interpretations of the Freedom of Information Act. The courts, for instance, have uniformly rejected Government arguments that all public records containing privileged financial information must be kept secret. And they have generally rejected Government arguments that so-called internal memorandums must be kept from public knowledge.

But there has been no move toward updating the Department of Justice's basic memorandum on the act. And there has been no attempt to circulate throughout the Government the advisory opinions of the Department's own Freedom of Information Committee.

Maybe today we can find out why. And maybe, today, we can discuss procedures which will improve public access to basic Government information.

Mr. Erickson, we are happy to have you with us. In accordance with the custom of our subcommittee, would you and your associate, if he is to testify, rise and take the oath.

Do you solemnly swear that the testimony you are about to give this subcommittee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. ERICKSON. I do.

Mr. SALOSCHIN. I do.

STATEMENT OF RALPH E. ERICKSON, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE; ACCOMPANIED BY ROBERT SALOSCHIN, ATTORNEY, OFFICE OF LEGAL COUNSEL

Mr. MOORHEAD. We are pleased to have you, Mr. Erickson, and if you will introduce your associate, and I hope that you can agree that you will summarize portions of your testimony so that there will be more time available for discussion with the subcommittee members.

Mr. ERICKSON. Mr. Chairman and members of the committee, I would first like to introduce my associate, Robert Saloschin, who is the chairman of our Freedom of Information Committee within the Department of Justice. He is here with me this morning.

I will, in recognition of the length of the prepared statement that we have submitted, attempt to summarize or delete portions which I think are rather self-evident and do not need reemphasis at this point in time. As I go through the statement, I will attempt to identify the areas where we are deleting so that you may follow.

Mr. MOORHEAD. That would be helpful, but your whole statement will be made a part of the record because it is a comprehensive record that should be part of the hearings of this subcommittee.

Mr. ERICKSON. Thank you. I would like to have it made a part of the record.

(See p. 1208.)

Mr. ERICKSON. Mr. Chairman, we appreciate the opportunity to appear before your committee and to tell you something about the work of the Department of Justice with respect to the Freedom of Information Act. Let me start by saying that we are continually striving to improve our efforts in this important field of law and government, but we also feel that on the whole we are doing a reasonable job at the present, considering the magnitude and complexity of the challenges which face us.

Your committee has asked us for information on two different aspects of the Justice Department's work in this field. First, you have indicated an interest in the administrative procedures employed by our Department when processing requests for access to our own records under the Freedom of Information Act. Second, you have requested an explanation of the Department's role in providing legal services to other executive branch agencies concerning freedom of information requests for their records.

I am not at this point going to go into our present regulations, which I think are readily available. I will skip over to the bottom of page 4 of our statement.

Statistically speaking, the Department has received approximately 535 formal requests for access to our records under the Freedom of Information Act, from July 4, 1967, through July 7, 1971. Approxi-

mately 75 percent of those requests were directed to the Immigration and Naturalization Service and the Bureau of Prisons.

At first glance, the total number of requests received by our Department may appear to be unusually small when compared to the number which we understand other agencies have received. The disparity may be explained in part by the varying methods which different agencies may employ in determining whether a request is to be considered as one under the Freedom of Information Act. Our regulations provide that all information that was made available to the public before the act was passed shall continue to be made available. Generally, only requests for material which might fall within one of the act's nine exemptions are likely to be treated as Freedom of Information Act requests. Thus, even though a person may request access to Department documents, and specifically refer to the Freedom of Information Act in his request, we continue to make records available that were available previously without counting the request as a freedom of information request. Apparently other agencies may include such requests within their freedom of information statistics, or they may even include all requests for information whether or not there would be any question under the act.

Our statistics also show that access to the requested records was granted in whole or part in 224 of the cases, and that access was denied in the remaining 311. Our denial rate of approximately 60 percent may appear disproportionately high when compared with other agencies. However, we do not consider our rate to be disproportionate for a number of reasons.

First, as we just explained, many of the requests where the record was released were requests that involved information of a kind made available before the act was passed, and these requests are generally not considered as freedom of information requests. The omission of this substantial category of granted requests naturally has a substantial effect on the statistical balance.

Second, because of our law enforcement responsibilities, the Department must compile and maintain many investigatory files. Some of the freedom of information requests we receive seek material contained in these files. Information of that nature is expressly exempt from disclosure under the act, and a discretionary release of such material is not often considered warranted.

Finally, our statistics reveal that 247 requests were refused pursuant to the "invasion of privacy" exemption. The vast majority of those cases concern the Immigration and Naturalization Service. These are cases in which requests are made for the names and addresses of aliens, often by finance and collection agencies, sometimes by alleged friends or relatives. It is felt that such disclosures would often constitute "a clearly unwarranted invasion of personal privacy". However, even where such requests for personal information are denied, the alien is usually notified that a request has been made. The alien can then voluntarily make contact with the requester.

My next several paragraphs relate to the procedure in the event that there is an appeal from the official denial and here again, I think that is adequately covered in the statement. I will go over to the bottom of page 9.

Before leaving the subject of the Department's administrative processing of requests for its own records, I would like to emphasize that the review and recommendation procedures which I have described involve the personal attention of high level and well qualified personnel. In other words, our handling of these matters is by no means a perfunctory process.

This might be a good point—after having discussed our processing of requests for our own departmental records and before turning to our functions in assisting other agencies in processing requests for theirs—to say something about our litigation work. The Civil Division of our Department handles the litigation for most Government agencies when suit is filed under the Freedom of Information Act. A status report indicated that as of January 1, 1972, the Civil Division had 46 freedom of information suits pending in some stage of litigation. This represents a slight increase over the 41 cases pending a year earlier. Only three of the 46 currently pending cases involved suits brought against the Justice Department for its own records, two of them seeking FBI files on the Kennedy assassination. The remainder of the 46 cases were brought against a broad cross section of other Government agencies. It should be pointed out that since there are a few Government agencies which handle their own litigation, there may be slightly more cases pending than the 46 listed in the Civil Division's report.[1]

It is estimated that the Government's position is sustained in roughly 50 percent of the cases which are litigated nationwide, although the Government has very little success in the Court of Appeals for the District of Columbia circuit. The issues most frequently litigated, naturally, are the exemptions permitting the Government to withhold access to requested records. A survey of 32 reported court cases involving the Freedom of Information Act (through 330 F. Supp. and 499 F. 2d) indicates that the exemptions most frequently at issue in litigation are exemption 4 (relating to certain kinds of information given to the Government in confidence)—eight cases; exemption 5 (internal Government communications)—14 cases; and exemption 7 (investigatory files compiled for law enforcement purposes)—nine cases. Other exemptions which were at issue somewhat less frequently include exemption 1 (relating to certain national defense and foreign policy materials); exemption 2 (relating to internal procedures); exemption 3, an exemption based on other statutes; and exemption 6, which is designed to protect personal privacy in medical, personnel, and other files.

The Department's efforts to minimize the amount of litigation against all Government agencies in this field, and to minimize the need for requesters to file suits, were among the reasons which led to the formation of our Freedom of Information Committee, which I will discuss in the next part of my statement.

Let me turn now to describe our role when the records of other agencies are sought under the act. In such cases, our functions are limited by the decentralized administration of the act, as prescribed by Congress, in requiring each agency to act on requests for its own

[1] It has been roughly estimated that a total of about 200 freedom of information suits have been filed since the act was passed. Those no longer pending have been decided, settled, or dropped.

records. In other words, we generally have no authority to compel another agency to comply with a request for its records. Subject to this limitation, the functions of the Justice Department in freedom of information matters are counseling, coordinating, and representing other agencies in court. Within the capacity of our small staff and the pressure of other work, we are trying to perform these functions as best we can.

In describing our counseling and related work, I will first outline very briefly the history of our efforts which led to the creation of our Freedom of Information Committee. Then I will discuss the work of the Committee: How it functions, the amount of its workload, the kinds of records involved, the sources of the requests for access to them, the pattern of the Committee's reactions or advice, and finally an estimate of its effect on the administration of the act.

During the year after the act was passed and before it went into effect in July 1967, the Office of Legal Counsel prepared the Attorney General's memorandum on the act—the familiar 47-page blue booklet dated June 1967—to assist other agencies in applying the act, and we also handled many requests for assistance or advice from agencies or formulating their own regulations under the act. These major tasks were performed very largely by Mr. Wozencraft, Mr. Mondello, and Mr. Maxson, all of whom left the Department some years ago. There followed an interim period of roughly 2 years, 1968 and 1969, in which we began to be increasingly concerned that some agencies might be engaging in dubious or unwarranted denials of requests under the act, leading to litigation burdensome both to the requester and to the Government. This feeling crystallized after the July 10, 1969, decision in the famous hearing aids case.[2]

The impression was sharpened that same summer after various informal requests for assistance and advice reached us from agencies that were receiving the attentions of Mr. Nader and his associates. The situation was discussed by this office with the Civil Division, which as I indicated, handles litigation under the act. On December 8, 1969, the Department sent a memorandum to the general counsels of all agencies over the signatures of Mr. Rehnquist and Mr. Ruckleshaus, at that time the heads of the Office of Legal Counsel and of the Civil Division. The memorandum asked the agencies to consult the Department before issuing a final denial under the act if there is any substantial possibility of litigation adversely affecting the Government. The memorandum also created a Justice Department Freedom of Information Committee of five lawyers, three in this office and two in the Civil Division, to provide these consultations.

Since creation of the Committee 27 months ago, the counseling and coordination functions of the Justice Department in freedom of information matters have been largely coextensive with the work of this

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[2] *Consumers Union* v. *Veterans' Administration*, 301 F. Supp. 796 (S.D. N.Y. 1969), appeal dismissed as moot, 436 F. 2d 1363 (2 Cir. 1971). In this case the VA denied a request for records of Government tests on commercial hearing aids that were being considered for VA procurement. After a decision against the VA in the district court as to part of the records sought, which was appealed by the plaintiff in order to obtain the rest of the records, the VA turned over all the records, and the appeal was dismissed as moot.

Committee. An interesting report on the Committee's work during its first 8 months was made by its Chairman, Robert Saloschin, who is with me today, at a symposium of the American Bar Association's administrative law section. This symposium was published in the March 1971 Administrative Law Review, and we will be glad to provide you with a copy of it.[3]

Mr. Moorhead. We would like to receive that copy for the committee files.

Mr. Erickson. Mr. Chairman, we will note that and we will see that you get it.

(The report is in the subcommittee's file.)

Mr. Erickson. One of the statements in Mr. Saloschin's report warrants repeating today, namely that the Committee in its work aims for a minimum of formality and a maximum of speed.

Through March 1, 1972, just about a week ago, we estimate that other agencies of the Government have contacted the Committee between 400 and 500 times on matters directly or indirectly related to its work. This estimate is necessarily a rough one, because these contacts are almost invariably by a telephone call, usually to the chairman, and some calls may represent related contacts on the same matter, or may cover several matters, or may prove to have little relation to Committee work. Nevertheless, these numerous contacts must be screened to see if they warrant a Committee consultation, or can be disposed of without taking the Committee's time. The estimated 400 to 500 contacts which I mentioned have led to approximately 120 committee consultations. A consultation is generally held when the agency has reached the point of tentatively deciding to issue a final denial of access to its records under the act. The rate of consultations seems to be accelerating, and is estimated to be running now at roughly between 75 and 100 a year.

These 120 consultations have involved about 30 different agencies, or a somewhat larger number if constituent agencies within a large department are counted separately. An approximate numerical breakdown of the total number of consultations among the various agencies is being prepared for your information.

Consultation procedures are usually quite simple. About 80 percent of consultations are conducted by a face-to-face meeting of the Committee with representatives of the agency. Agencies usually send a lawyer and one or two operating officials to a consultation, although the representation may vary from just one person to several and occasionally includes both the general counsel and the head of the agency. Typically the Committee is represented by at least three and usually four of its members. All five members are of course notified of every meeting, and sometimes all five attend.

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[3] Two of the Committee members listed in the symposium report, and in the Dec. 8, 1969, memorandum, Robert Zener of the Civil Division and Steve Lockman of OLC, have since left the Department and have been replaced on the Committee by Walter Fleischer of Civil and Fredericka Paff of OLC. Since I came to the Department last autumn, I have served as the ex officio chairman of the Committee. The Chairman, Mr. Saloschin, is an experienced lawyer in our office who began working on these matters some months before the Committee was established.

Speed is a major goal in all the Committee's work, and it is usually obtained. A meeting usually occurs within less than a week of the phone contact which led to it, and some are held the very next day. Sometimes papers that will be discussed at the meeting are shown to Committee members beforehand.[4]

The meetings vary in length from about 30 minutes on simple matters to 2 hours or more on complex ones. No minutes are kept, although any participant is free to take his own notes. The agencies usually get the Committee's reaction immediately, from the discussion during the course of the meeting, although in some cases there may be further telephone calls or other contacts after a meeting. As for the remaining 20 percent or so of Committee consultations which do not involve a face-to-face meeting with agency representatives, the usual procedure is that papers from the agency are circulated to the Committee members, who read them and give their comments to the chairman, and if no further discussion is needed, the chairman gives the agency the committee's collective reaction by telephone.

Now that I have described the committee machinery, a few words about the grist that goes through the committee's mill. As you can imagine, the various types of agency records involved in committee consultations cover a very broad spectrum: the same is true of the sources of the requests for access. Let me refer first to the records, then to the sources of the requests.

It is almost impossible to describe the range of records covered by 120 consultations; indeed, a single consultation may sometimes involve thousands of records of several types. Moreover, a great deal of correspondence, discussion, search, and analysis may be required just to determine what is the nature of the records which may be within the ambit of the request. This is especially likely to be true of requests that are less specific and more categorical in their terms. Nevertheless, within these limitations, and with considerable trepidation about the value or accuracy of summary descriptions, here are some illustrative samples: we have a list in the next three pages of my prepared statement of 37 illustrative samples of the types of requests that we have had. Rather than go through all of these examples, I am going to pass over to a point approximately one-third down page 22 of the statement.

Mr. Cornish. Mr. Chairman?

Mr. Moorhead. Yes, Mr. Cornish.

Mr. Cornish. May I interject at that point? Mr. Erickson has said that his office is preparing an approximate numerical breakdown of the total number of consultations among the various agencies for our information. I wonder if that might be included in the record at the appropriate point.

Mr. Moorhead. I think that is a good idea. Without objection it will be placed in the record.

(The material follows:)

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[4] One member of the Committee follows the practice of examining only papers other than the records in dispute.

List of agencies which have had consultations with the Department of Justice Freedom of Information Committee, December 8, 1969 through March 1, 1972

(Note: The information on this list is approximate, but may be considered as substantially accurate)

List of Agencies	*Number of consultations*
Agriculture Department (including ASCS, C. & M.S., CEA, Forest Service, Packers and Stockyard Administration, Food and Nutrition Service)	17
Atomic Energy Commission	4
Civil Aeronautics Board	3
Commerce Department	2
Commission on Civil Rights	1
Department of Defense (including Air Force, Navy, Army)	22
Department of Transportation (including FAA)	6
Environmental Protection Agency	1
Federal Power Commission	1
Federal Trade Commission	3
General Services Administration	2
Health, Education, and Welfare, Department of (including Medicaid, FDA, NIMH, OE)	7
Home Loan Bank Board	2
Housing and Urban Development, Department of	5
Interior Department	6
Interstate Commerce Commission	1
Labor Department	2
National Aeronautics and Space Administration	4
National Labor Relations Board	1
National Science Foundation	1
Office of Economic Opportunity	2
Postal Service	2
Renegotiation Board	3
Selective Service System	2
Small Business Administration	1
State Department (including AID)	8
Treasury Department (including Customs)	7
Veterans' Administration	2
Miscellaneous, joint or pending	2
Total	120

The above list represents only consultations; it does not include an indeterminable but considerably larger number of agency contacts with the chairman or another member of the committee which did not result in a consultation but which may have involved preliminary guidance.

Mr. ERICKSON. We would like to have that included in the record, and we will supply it for that purpose.

Continuing, then, and commencing on page 22.

The descriptions of records I have just given you or described to you may seem a bit overwhelming, and they are necessarily superficial. They do little more than suggest what the records themselves may contain, how they were made, and how they are used. Yet all of these factors—the contents, origin, and use of the records—may be important in trying to decide whether they are exempted from compulsory disclosure under the act, and also in deciding whether, even if so exempt, they should nevertheless be released, as a matter of policy or discretion. The latter decision, of course, is one for the agency, but the committee will sometimes suggest to an agency that difficult decisions about the exempt status of records may become unnecessary if there is a discretionary release.

I understand there is also some interest in the kinds of sources of the requests that reach the Committee. We have only an incomplete picture of the kinds of sources of the requests that reach the committee: for instance, we may not always know whether the requester is a lawyer, or if he is we may not know whom he represents, and even if we know who his principal is, we may not know the nature of the latter's interest. Such matters, of course, need not be disclosed by a requester under the act.

Within these limitations, and allowing for some overlapping of categories of requesters, the sources of the requests which led to the 120 committee consultants have apparently included the following:

And here again I think we have a rather extensive list which I will just incorporate by reference and have that made a part of the record, if I may, and go over to the midpoint of page 24.

What has been the pattern of the Committee's reactions to the cases which the agencies have brought to it? Here again, there are so many complexities, qualifications, and uncertainties that an attempt to summarize these reactions with any precision would probably be misleading if not impossible. But broadly speaking, our estimate of our own experience is that the committee's reactions in its 120-odd consultations can be grouped into the following general pattern: In about 40 instances, or about one-third of the consultations, the committee's reaction has been that the records the agency was planning to withhold were clearly or very probably exempt from compulsory disclosure and would be so held in case of litigation. Such a reaction, like most of the Committee's reactions, is usually reached only after both an analytical and a judgmental appraisal of the controversy and its circumstances. Even when denials seem clearly authorized, the committee may work in the direction of greater disclosure, as by reminding the agency that an exemption is only an option to deny, not a directive to do so. The Committee also will occasionally suggest revisions in the proposed letter of final denial, explaining more clearly the reasons for the action. As a further comment about these clearly-exempt cases, the agency may have decided before consulting the Committee to give the requester much of what he wants, thus helping to narrow the issues and perhaps strengthening the case for denial of the remainder.

In a second one-third of our consultations, the committee's reaction has been that some or all of the records that the agency was planning to withhold must be regarded as not exempt or probably not exempt and should be released. This second group of about 40 instances breaks down further into about 15 cases where the records in dispute seemed essentially mixed—some probably exempt and some not—and about 25 cases where the Committee told the agency that the records in dispute must be released or that the case for withholding them was very weak, although sometimes with the exception of a small amount of material, which might be withholdable because of recency, names or identifying details, or other reasons.

The remaining third of the consultations consists chiefly of in-between cases, those in which the dominant note in the Committee's reaction, after reviewing the various factors pro and con, was doubt or uncertainty. This group, however, also included a few instances in which the Committee's principal reaction was to suggest an alternative solution or a practical accommodation of the dispute. The doubtful

cases often involve situations in which the Committee felt the agency had sound legal grounds for the proposed denial, but that nevertheless there would be considerable risk of defeat in case of litigation. Also included in this uncertain group are situations where an analysis of the terms of the law seems to point one way but the facts, viewed in the light of current ideas of public policy, seem to point the other. I should add that such elements of uncertainty may also be present, although in lesser degree, in the more numerous cases where the committee definitely feels that the records in question are, or are not, exempt.

To what extent do the agencies consult the committee as they were asked to do in the Department's 1969 memorandum, and to what extent do they follow its advice? While we do not have fixed procedures designed to check up on these two points, our experience indicates a good degree of agency respect for our efforts.

We believe that, by and large, the agencies generally do get in touch with us when they have situations covered by the 1969 memorandum. Indeed, as the estimated 400 to 500 agency contacts with the committee that I mentioned earlier would indicate, they also get in touch with us on freedom of information problems that may technically be outside the terms of the 1969 memorandum, such as cases at an initial stage, cases where they have not yet tentatively decided to deny, situations where requests for access are only anticipated, and similar situations. These contacts, even when they do not lead to consultations, are nevertheless a significant adjunct to the Committee's main work, because the chairman can often give some preliminary guidance immediately or after discussion with one or more member of the committee, and that may solve the problem. The steady flow of these agency contacts or inquiries reinforces our belief that most agencies are generally faithful to our request in the 1969 memorandum.

We realize, of course, that there may be some variation among agencies in consulting us, and even variation within a given agency from time to time. If there are lapses, they may be due to factors like personnel turnover, oversight, or other reasons, such as for example an agency feeling that there is no need to consult in a situation which seems to them clearly identical to those previously discussed.

As to whether agencies that have consulted us follow our advice, it is our definite impression that they generally tend to do so. Here again we do not have any routine procedure for checking up on whether our advice is followed. Yet there are many times when the remarks of agency representatives during a committee consultation, or our subsequent contacts with the agency, leave little doubt that the agency will make available records which we have told them would probably be held not exempt. It is also quite likely that they will deny access when we have told them they were legally free to do so, because they were tentatively planning to deny access when they consulted us. However, in that substantial minority of cases in which the committee's final reaction was uncertainty, it would be hard to measure whether the agency followed our advice, although we believe a reaction of uncertainty has some influence in the direction of disclosure. On this whole question of following our advice, however, I must point out that it is just advice, not an order, that those who attend the com-

mittee consultations are not necessarily the agency decisionmakers, and that Congress in the act left the administrative decision up to each agency with respect to requests for its own records.

In conclusion, we at Justice are working with you in Congress as participants, within our own branch of Government, in the task of trying to insure the success of the Freedom of Information Act. The act is an epochal step in democratic government. Our experience indicates that that act is working, but that much additional effort, experience, good judgment, and good will may be needed to keep it working and to improve its operations. You may be assured the Department of Justice will continue to give its best efforts toward a fair, reasonable and effective administration of the act.

That concludes my prepared statement this morning.

Mr. Moorhead. Thank you very much, Mr. Erickson. We appreciate your abbreviating your remarks. I think the list of the examples is important, but I think it most important that they be in the record and not necessarily important that we read them today.

On page 25 of your testimony you make a statement which I think should be repeated, and that is that under the Freedom of Information Act, an exemption is only an option to deny, not a directive to do so. I repeat that because I think that many of the agencies have not gotten that message. We really believe that even if a particular document legally can be kept from the public, that there may be many, many instances wherein the administration of government and democracy the choice should be to release the document, even though it may be technically under an exemption. I take it that you agree with that position?

Mr. Erickson. Yes, yes. I might, in that context, just describe briefly what the procedure is in the Department of Justice. You will recall that I referred to the statistics, the overall requests we record in the Department, which may very well be low in comparison to other agencies. Our normal procedure in the Department is to go through three steps.

The first, the materials that have always been made, always been made available, are made available, without consideration of the Freedom of Information Act. In that category we are talking about speeches, releases, this type of information which is readily disclosed and distributed. There is no question under the Freedom of Information Act as far as we are concerned, and they are freely distributed.

Our next step in the process is to ascertain if the document requested is what we would call a problem document. Is it likely to be harmful to anybody, the Department or the individual, and if we come to a determination that it is not, with respect to the Freedom of Information Act, it will be released.

Finally, we get to the hard core cases, if you will, in which we feel that there is a question, and then, of course, we will go to the Freedom of Information Act and the exemptions, and it is at that point we start calling them freedom of information requests.

Mr. Moorhead. Mr. Erickson, are you familiar with the recent Executive order on the subject of classification and declassification?

Mr. Erickson. Yes I am, not intimately familiar with it, but I am certainly familiar with it.

Mr. Moorhead. Was there any input from the Freedom of Information Committee on the drafting of this classification order?

Mr. Erickson. No, there was not. There was no input from the Freedom of Information Committee. I was personally involved as a Justice Department representative, however, so to that extent, there would have been.

Mr. Moorhead. Under the Executive order, the duty of interpretation is assigned to the Justice Department, is it not?

Mr. Erickson. Yes it is. The Attorney General has that responsibility under section 7C. I believe it is.

Mr. Moorhead. I notice in the Executive order, in the third paragraph, it refers to exemptions under section 552(B)(1) of title 5, which is the Freedom of Information Act, and it says "wrongful disclosure of such information or material is recognized in the Federal Criminal Code as providing a basis for prosecution."

What is the meaning of the word "wrongful" there?

Mr. Erickson. Wrongful in that context, to me, would mean disclosure of a classified document to one who is not entitled to receive it.

Mr. Moorhead. Therefore, you would say that disclosure of such information would not require intent to harm the United States?

Mr. Erickson. I would refer you to the particular statutes involved, and I was just giving you my broad interpretation of what wrongful would mean. I would have to relate that to the criminal statutes involved, both in title 18, and there is a statute in title 50 also which would cover this situation. I am sure that is the reference.

Mr. Moorhead. So that "wrongful" in this context would be wrongful as defined in the criminal statutes, not as defined in the Executive order, is that correct?

Mr. Erickson. That would be my understanding.

Mr. Moorhead. Because an Executive order cannot create a criminal offense, is that not correct?

Mr. Erickson. Yes, sir.

Mr. Moorhead. So that this Executive order just as the previous 10501 does not in and of itself create a law, a violation of which is a criminal offense?

Mr. Erickson. That is correct.

Mr. Moorhead. I think that that is important, because as you said before, the exemptions under the Freedom of Information Act are not directives, but are merely permissive. Therefore, if we construe this paragraph to make these disclosures of exempt items a violation, we are really misconstruing what you so ably testified were options rather than directions. This uncertainty which is created, that is, that mere disclosure of classified information, without the required intent under the criminal laws, is not in and of itself a criminal violation. It leads me to ask you, since you have studied this matter, do you think that in the United States there should be something akin to the Official Secrets Act which the British have?

Mr. Erickson. Well, the British Official Secrets Act is certainly one aspect that has received a great deal of notoriety or attention, and it seems to me that that is on one end of the spectrum when you are considering what proscriptions or prohibitions should be enacted. The other end would be to perhaps leave the laws as they presently exist,

and I do not know what the eventual result will be, or if there will be any change. I have certain misgivings about the British Official Secrets Act, if it were to be applied to this, in this particular setting.

Mr. Moorhead. One final question, before I yield to Mr. Conyers.

In section 1 of the Executive order, you use the words "national defense or foreign relations," and then parenthetically say, here and after collectively determine "national security." In the freedom of information law, the words of section 522(b)(1) are "national defense or foreign policy." Was there any reason for changing those words after you rely on the Freedom of Information law for statutory authority in the third paragraph of the order?

Mr. Erickson. I am not, I am not aware of any reason for that variation.

Mr. Moorhead. Thank you, Mr. Erickson.

Mr. Conyers.

Mr. Conyers. Thank you, Mr. Chairman. I too want to join in thanking you for a very adequate statement. The main point that I would like to raise concerns the fact that about 50 percent of the cases litigated do not sustain the Government's position. If that is so, that seems like a rather poor value average. That is to say that there may be a great number of other cases that are not brought because of the fact that the person or group cannot afford an attorney. I am beginning to think that if half of the time we are wrong in construing the provisions of this act, that perhaps we need to examine it a lot more carefully than we have in the past. Would you not think that a 50-percent loss rate of litigated cases suggests that some of the agencies may be construing portions of this Freedom of Information Act too severely?

Mr. Erickson. Well, that statistic, I would point out first, is an approximation. Second, it is a nationwide statistic, and we have found that certain courts have held against the Government much more so than others; namely, those right here in the District of Columbia.

Mr. Conyers. Of course, they would be more experienced with these kinds of cases than most other courts, would they not?

Mr. Erickson. Well, there are not that many cases that have been decided, so I would doubt there is any great experience or volume of expertise in the District at this time. I still think we are learning a lot under this act. It is not as good a record certainly as some would like to see to the point where, if the Government takes the case to court, they should win it.

On the other hand, there are a lot of unsettled areas, and as I say, we have diverse opinions, in one district or one circuit, compared to what we have here. I believe we are going through a process of trying to decide really what the law is. The statute is imprecise in some respects. I think we all realize that.

I am not suggesting a number of changes in it because I think in any statute you draft you have this problem. And I think it is an evolving process.

I would point out that we have yet to get to the Supreme Court on any freedom of information case, and my answer to your concern about the so-called 50 to 50 value average is one of some concern, but I am not seriously alarmed by it because we do have a new act, and

we have varying interpretations of it, and this is the way that we do get the proper guidelines.

Mr. CONYERS. Would you agree with the suggestion that here in the District of Columbia the circuits would have more experience in handling cases of this matter because there are so many cases involving the U.S. Government brought here?

Mr. ERICKSON. Well, there certainly are more cases brought here than any other circuit in the country.

Mr. CONYERS. At the same time we are involved in the Government, at some considerable cost, litigating these kinds of cases. Is there any way you can estimate what the costs of Government litigation under this act have run?

Mr. ERICKSON. I am sorry, I would have no idea.

Mr. CONYERS. Or any kind of an average cost per case?

Mr. ERICKSON. I certainly personally have no idea. We might attempt to develop something, but it would be very difficult.

Mr. CONYERS. Well, if——

Mr. ERICKSON. I think that sort of statistics which relate to the present cost of litigation aspects of the administering of the act would be quite difficult, much less——

Mr. CONYERS. Mr. Erickson, have you determined whether there are any loopholes or any parts of the act that you would bring to our attention for reconsideration?

Mr. ERICKSON. As I mentioned earlier, I have no proposals for amending or changing the act. If we are going through the process of having some interpretation, or receiving some interpretations from the court, I think it is almost premature at this time to propose specific amendments.

Mr. CONYERS. Do you think the act is working?

Mr. ERICKSON. Yes.

Mr. CONYERS. Do you think more information is being made available to the American public as a result of its enactment?

Mr. ERICKSON. Oh, clearly so.

Mr. CONYERS. What happens to the ordinary citizen who cannot afford a lawyer, who is not the representative of a corporation, or institution? What recourse does he or she have under this act? A lady in my district who is writing a book about some of the first black citizens who were taken into Naval Academy or West Point is having trouble getting access to the records.

I am sure it was before this act was written into law, and she could not afford an attorney. And I think we complained, and I am not even sure she ever really received the information.

But, in a sense, we still leave out Joe Citizen who may be making a rather routine inquiry. And if he knew that if he could afford a lawyer that he would have a 50-percent chance of probably winning, at least around Washington, D.C., it might be argued that he is not getting as much information as we would get under the act.

What are your observations on that point?

Mr. ERICKSON. Well, my personal experience within the Department of Justice would indicate that your constituent would have received rather favorable treatment.

First, the expense involved under our regulations is rather insignificant, and I have—I asked this specific question of those who handled

our requests initially: Has anyone ever been denied information by reason of failure to pay a fee?

And the answer I got back was no. I am speaking about the Department of Justice.

Mr. CONYERS. A fee that would be based on what?

Mr. ERICKSON. Pardon me?

Mr. CONYERS. What kind of fee are you referring to?

Mr. ERICKSON. There is a $3 initial fee that should come with requests under our regulations. Above that, there is a cost for copying.

Second, I think I can fairly state that we do not divide down, divide out requests made by lawyers and those by private citizens or individuals. In fact, most of our requests do come from individuals, and sometimes we have trouble deciding, or great difficulty deciding what they want or what they are after. It just so happens in the Office of Legal Counsel we get a great deal of requests generally which either come to the Department or are forwarded by Members of Congress for this sort of information, which we treat as nonfreedom of information requests for the most part.

Mr. CONYERS. I said that was my last question, but I just want to ask this final postscript. When you said that no one has ever been turned down for not being able to pay that $3 fee, does that mean that people who were not able to pay it were able to get the information?

Mr. ERICKSON. I asked that specific question yesterday, and the answer I got was that no one has ever been turned down for that reason.

Mr. CONYERS. Well, that could mean that no one has ever tried to get the information without paying a fee.

Mr. ERICKSON. Pardon me?

Mr. CONYERS. I said: Could that not mean that no one has ever tried to get the information without paying the fee?

Mr. ERICKSON. I did not ask that question. I am assuming there are cases where people just do not understand the procedures, a citizen writing a letter in longhand, a longhand letter and asking for something, I mean. I have seen these come across my desk many times and we answer them routinely. We could treat it as a freedom of information matter, but we do not.

Mr. CONYERS. And your presumption is that they would get that information even though they had not paid the fee?

Mr. ERICKSON. We would not claim it in the freedom of information request, but we would give it to them if we could locate it and have it.

Mr. CONYERS. I see. Thank you very much.

Mr. MOORHEAD. Following up on Mr. Conyers' question, Mr. Erickson, I understand there is a committee chaired by the Department of Justice, and including the Office of Management and Budget, and GSA, to consider the problem resulting from the lack of uniformity in agency fees. Is my understanding correct?

Mr. ERICKSON. Yes.

Mr. MOORHEAD. What, if anything, has this committee recommended about fees?

Mr. ERICKSON. I personally have not participated in that committee. I cannot answer that. Perhaps Mr. Saloschin can.

Mr. MOORHEAD. Mr. Saloschin.

Mr. Saloschin. In general, the committee feels that there are two areas where the agencies should be encouraged to review their fee regulations.

One is in the area of copying fees, and it was the feeling of the committee that many of the agencies—well, some of the agencies—may have copying fees which are too high, largely because they were written prior to the act going into effect in July of 1967.

And since that time copying technology has advanced considerably, and these fees should be reviewed. It is a particular problem when someone wants a copy of a lengthy document, and these fees can be burdensome. That was one conclusion that the committee reached.

Another conclusion that the committee reached was that at the time the act was passed, it was not realized, the problem was not faced up to that requests might be made for records where the request does not specifically indicate what the desired records are in a manner in which someone reading the request can go to a file room or a file cabinet and find those records. The problem of the so-called categorical request, and the question of who has the burden of identifying the records, this was gone into in the Bristol-Myers case. Now, in some instances, and I think there is one that was cited in Mr. Erickson's testimony in our own Department, literally thousands of dollars of costs can be absorbed by the Government, and no fee can be charged for this other than a nominal copying fee.

And these requests may come from defense contractors, or any source, of course, and therefore there was some feeling in the committee that the agencies should review the regulations so as to put themselves in a position to recoup at least a portion of the cost to the taxpayer of processing the unusually costly or burdensome request.

Mr. Moorhead. Has this committee taken action to do anything, or is this just a recommendation that is floating around in the air?

Mr. Saloschin. I believe that the Office of Management and Budget has made available or indicated it would make available to your committee a report which responds to your question more specifically than I can at the moment, from my recollection. I believe the report was dated sometime last November.

Mr. Moorhead. Mr. Erickson, you have indicated the actions of the Freedom of Information Committee vis-a-vis requests to other agencies. Does the committee play a part in internal requests to the Department of Justice, and if so, what part does it play?

Mr. Erickson. The Committee, as such, does not. The Office of Legal Counsel advises the Attorney General on appeals within the Department. It would initially come in to an individual that handles freedom of information matters, and if there is an appeal, an administrative appeal from that decision, it would go to the Attorney General, and we would advise the Attorney General at that point. The Office of Legal Counsel will, the Committee will not.

Mr. Moorhead. What is the basis for the recommendation to other agencies by the Committee? Does the Committee consider case law?

Mr. Erickson. Well, we certainly—the theory—we certainly follow up the initial concept set forth in the 1969 memorandum that we will collect as much information as we can. We gain a certain expertise by advising and consulting with other agencies, and we follow the cases as closely as we can. We attempt to be an expert in the area.

Mr. Moorhead. Would it not be advisable to rewrite and bring up to date the Attorney General's memorandum and establish a procedure for ongoing distribution of advisory opinions as new case law is developed?

Mr. Erickson. When I first became involved in freedom of information matter I looked at that book and I said, "My God, this thing should be brought up to date."

Since that time I have come to recognize that it may not be quite that easy to bring it up to date, because we do have a number of, I think, rather important questions to be answered, and maybe answered in the foreseeable future. I think it is something that should be brought up to date at some point in time. I am not sure that this is the exact time. I would certainly prefer to have some pronouncement by the Supreme Court before we do this.

But, I do think it is—it would be helpful, and it is something that should be done in due course.

Mr. Moorhead. Have you thought of any other method of keeping the various agencies up to date on developments in the law, such as seminars with public information offices, or lawyers charged with this duty in the various agencies?

Mr. Erickson. It is one of the questions. I feel something should be, something should be done. I have not formulated, really, any plan as to how it might be done. I mentioned the increase in our consultations, and it seems to me that that, in and of itself, serves to inform and keep other agencies advised.

But, I certainly would not be averse to some more concentrated effort, more expansive effort to keep other agencies advised, because I think the law is evolving, is developing, and certainly it would be a help.

Mr. Moorhead. Does your committee advise the General Counsel of the various agencies when a significant decision under the act is made?

Mr. Erickson. We have developed no automatic procedures for doing so, but that certainly would be one of the alternatives to be considered.

Mr. Moorhead. You have referred in your statement to the large number of requests which fall under the seventh exception, investigatory files. What is your definition of an investigatory file? Is it one that is open, on which action or prosecution may be intended? Does it include closed investigatory files?

Mr. Erickson. Well, that is certainly going to vary with the substance of the matter, or the agency involved. I am aware that there is a certain authority that the seventh exemption ceases, if you will, once the file has been closed. We do not consider that a final position.

I think there is authority to the contrary, and that is one of the open questions which I would expect the courts would be deciding in the foreseeable future.

Mr. Moorhead. In hearings last fall before another subcommittee of this full committee—the Natural Resources Subcommittee—Assistant Attorney General Kashiwa stated that it is, "A long standing departmental rule that when a congressional committee requests information concerning an open case, it should be informed that the file cannot be made available until the case is completed."

They cited the Justice Department rule 116–56.

First, does the Department of Justice still contend, in the light of the spirit of the Freedom of Information Act, and the pronouncements of Presidents Kennedy, Johnson, and Nixon, regarding the application of its executive privilege, and the clearly demonstrated necessity for Congress to be fully apprised of departmental actions, especially in view of the recent disclosures involving the Antitrust Division, that prohibitions against publicity concerning cases in litigation or under negotiation, as embodied in rule, apply to information requested by congressional committees?

Mr. ERICKSON. That is currently the position of the Department.

Mr. MOORHEAD. And does the Department of Justice still contend, as it did in the aforementioned hearings, that the general prohibitions against ex parte discussion of litigation as contained in the American Bar Association's Code of Professional Responsibility applies to requests by congressional committees for information or negotiations?

Mr. ERICKSON. Yes.

Mr. MOORHEAD. Are you familiar with the recommendations of the administrative conference that initial decisions on the requests for information under the act be made within 20 days, and that decision on appeals be made within 30 days?

Mr. ERICKSON. Yes; yes, sir.

Mr. MOORHEAD. Do you favor those recommendations?

Mr. ERICKSON. We are certainly—I cannot answer that categorically. We are looking into this in the context of our own regulations. Something should be done to put it in a time frame.

I think this is one of the criticisms that has been voiced. I do not know if a particular time limitation or the time limitations should apply. I have the impression that even though they (Administrative Conference recommendations) do use specific time periods, that there are several exceptions which may not make them as effective as they appear. But certainly it is in order to have something reasonably specific in that regard, that a requestor may do to receive action.

We have a practical problem in that regard in terms of how they respond to this request. It is a manpower request as much as—I mean it is a manpower factor as much as anything when you have complicated requests or extensive requests. It is very difficult, sometimes, to respond quickly, but we recognize it as a concern, as a problem, and we have time limitations for appeals and this sort of thing, but nothing for response to the initial request, at this time.

Mr. MOORHEAD. You would agree with me that information in some instances is very fragile, a commodity which spoils rapidly or becomes useless rapidly?

Mr. ERICKSON. That is another ingredient or another factor.

Mr. MOORHEAD. According to the information furnished the subcommittee by your Department, the Department of Justice, it takes—on the average—about 65 days, which is considerably longer than that time recommended by the Administrative Conference.

Mr. ERICKSON. Yes, that is—I think that is certainly longer than suggested by the Administrative Conference. I think there are varying reasons why that can occur. I have alluded to many of those before. Many times the request is not precisely to the point where we can readily locate the material, and it requires a further inquiry as to what a person is after.

Many, many of these requests come in from people who are not too well advised as to what they are looking for. They have a general idea of what they are after, and it is very, very hard to determine exactly what they are asking for.

Mr. MOORHEAD. When you reported to us on actions within the Department of Justice, talking about appeals being sustained, and some modified, what do you mean by modified?

Mr. ERICKSON. Well, the appeal is going to come about in the event of a denial so in that context the modification means either that part of the information denied will be supplied or all of it will be supplied.

Mr. MOORHEAD. Thank you.

Mr. CONYERS, did you have any further questions?

Mr. CONYERS. I wanted to pursue this requirement of a $3 fee in your form. Where did that notion of requiring a $3 fee derive from? It is not in the Freedom of Information Act, itself.

Mr. ERICKSON. Well, I will defer to Mr. Saloschin on that.

Mr. SALOSCHIN. Well, that regulation—that regulation was written before I, personally, became involved in freedom of information matters.

My own—I have been in the Department a long time, but my own involvement in freedom of information questions in my personal work dates from approximately May of 1969, and this $3 fee regulation was written before then.

But, in answer to your second question as to what the basis for that is in the act, in 5 United States Code, section 552, subsection (a) No. 3, which is perhaps the heart of the Freedom of Information Act, at least for this purpose, the statutory language states that each agency, on request for identifiable records may, in accordance with published rules state, and here I pause, the time, place, and fees to the extent authorized by statute. And there is a statute generally referred to as the user charge statute which this refers to, and that is the basis for it, that is the basis for the fee.

Mr. CONYERS. That is in addition to the copying fees, the cost of reproduction?

Mr. SALOSCHIN. That is a flat fee, if you read the regulations, which applies to all requests. As Mr. Erickson indicated, many times a request for information may come in by a citizen letter or over the telephone, and that fee is—no effort is made to collect the fee.

Mr. ERICKSON. That is a flat initial fee?

Mr. SALOSCHIN. That is a flat initial fee.

Mr. CONYERS. Now, does anyone charge $3 besides the Justice Department? Do you know of any others?

Mr. SALOSCHIN. I do not know but on the other hand, I am not familiar in detail with all of the many department and agency regulations on fees.

Mr. CONYERS. Well, it is my understanding that this is rarely done in other agencies.

Mr. SALOSCHIN. I do not dispute that and cannot. In fact, that is my impression.

Mr. CONYERS. So that even if this fee is not strictly sought, the fact that there would be a form requiring payment of the fee would operate

to inhibit questions coming from citizens who might not be corporations, or media, or law firm types?

Mr. ERICKSON. Well, here again I would just revert to what I said before, that I am not aware of any instance where the lack of this fee has been a factor in determining whether or not the information would be supplied.

Mr. CONYERS. Right. Well, that is true, but it still has a tremendous inhibiting effect. Maybe we do not know how many people did not write in because the form said send in $3, and it did not say anything about it being discretionary.

Mr. ERICKSON. I will have to speculate with you here, but I would certainly venture that the person who is—who does not have the $3 fee, or who is not going to pay the $3 fee is not very likely to be aware of the regulations and the expense or cost.

Mr. CONYERS. Well, they would be aware of it on the request form that they sent. They would become aware of it then even if they did not know about the statute or any of the details that we might be discussing, wouldn't they?

That would be the only way they could get the information, if they fill out the form, and the form said $3, please.

Mr. ERICKSON. In many of these requests, they come in just by letter, asking for certain information, and if it comes in with the form, without the $3, it is usually going to come from someone who has—is not fully informed about the requirement other than with respect to the form.

And here again no denial has been made on that basis.

Mr. CONYERS. Well, in view of the fact that you have only had 535 requests, and excluding corporate activities, Government agencies and firms, labor unions, Congress, media, we have 169 falling into the category of other. I suppose that is where John Q. Citizen falls into "other." That would suggest that there is not a lot of money being collected on these, and that it might be more in the spirit of the act if there were no fee at all. I have been taking a long time to get to that suggestion. I think it is out on the table. What would happen to the Department of Justice if they did not even have a requirement for the $3 fee?

Mr. ERICKSON. Well, perhaps I should have started this discussion by acknowledging rather quickly that we are considering complete revision of our regulations and the fee structure.

Mr. CONYERS. And this is included in part of the revision?

Mr. ERICKSON. Yes.

Mr. CONYERS. I am very delighted to hear that.

Mr. ERICKSON. In view of your concern, we will certainly consider that particular aspect.

Mr. CONYERS. And my interest does not stem from any of these other types of requests except for the "other" category. I want to make that very clear.

Mr. ERICKSON. Pardon me?

Mr. CONYERS. My interest on this subject does not extend to any of the other types of requestors except the "other", the 169 people that

might just be constituents, might be ordinary citizens, unfamiliar with the kind of regulations that we have discussed here today.

Mr. ERICKSON. I might add that we have several each week, it seems, requests that are forwarded by Congressmen on behalf of their constituents, and we just respond directly.

Mr. CONYERS. Thank you again.

Mr. MOORHEAD. Mr. Phillips.

Mr. PHILLIPS. Thank you, Mr. Chairman.

Mr. Erickson, you referred in your testimony to the December 8, 1969, memorandum to general counsels of all Federal departments and agencies regarding coordination of certain administrative matters under the Freedom of Information Act. This memorandum has been put into the record at our hearings last Tuesday.

Can you tell me, prior to the issuance of this memorandum, were there any other attempts by the Office of Legal Counsel to coordinate among the general counsels or public information officers the proper implementation of the act, or was this the first instance where there was a coordinated effort to achieve this purpose?

Mr. ERICKSON. Well, I would respond first by saying that the preparation of the Attorney General's memorandum was one rather major effort in this line, and needless to say, the Attorney General——

Mr. PHILLIPS. Besides that, were there any such steps taken in the interim period since the issuance of the Attorney General's memorandum in December of 1969?

Mr. ERICKSON. I am not aware of any. Maybe Mr. Saloschin is.

Mr. SALOSCHIN. No.

Mr. PHILLIPS. Perhaps the issuance of even informal memoranda?

Mr. SALOSCHIN. No; no effort was actually launched or mounted, but steps were considered and reviewed, and they were not taken because they did not seem to be practical. One such step was an effort to develop a questionnaire to improve our own awareness of what was going on in other agencies, and a considerable amount of manhours went into this project, but it was abandoned because it was not considered feasible for us to distribute it.

Mr. PHILLIPS. Of course, this was during that interim period of approximately 2½ years before the Freedom of Information Committee was formally established. Was it the custom for a General Counsel of an agency to consult with you over the phone as to the advice you might be able to give on whether or not a certain request for information in his agency might be made available under the act?

Mr. SALOSCHIN. I can only give you second-hand information in response to that because, as I mentioned to Congressman Conyers, my own involvement in this area did not commence until May of 1969. But, it is my impression that occasionally informal inquiries came in from around the Government and were handled by various people in the office, most of whom are no longer there.

Mr. PHILLIPS. Moving to another area, Mr. Erickson, last Tuesday your distinguished predecessor, Mr. Frank Wozencraft was one of our witnesses.

We discussed what the role should be in the administration of the act at the departmental or agency level. Could you comment on the question that we raised with him, as to what should be the proper role

between the General Counsel of the agency, the public information officer to whom the request is probably made originally, and perhaps an administrative secretary or some other middle echelon Government official who is involved in the administration of the act?

Do you feel that it would work better, for example, if it were handled entirely by general counsel or by public information officers, or as a combination; is a combination best, based on your experience on the kinds of appeals you have to mediate?

Mr. ERICKSON. I would feel rather clearly that if the inquiry were to come into the public information officer, that the public information officer should handle it to the extent that he can.

If he runs into a situation where he feels that it is something that he should not disclose, or cannot disclose, for some reason, he certainly should consult the general counsel. I would not expect that all of these things would be formalized within the general counsel's office. That, to me, is overlegalizing it, if you will.

Mr. PHILLIPS. Well, there are two conflicting philosophies here. Some public information officers say that if the decisions were up to them there would be a great deal more information made available to the public.

On the other hand, many general counsels say, off the record, that if the public information officers had their way the law would be violated every day.

Mr. ERICKSON. Well, I am assuming that we have a responsible public information officer that is going to be aware of the concerns, the interests of the Department, and the interest of the public, and the individual that may be involved in the disclosure which could be harmful to the person about whom the disclosure is being made.

And at that point in time we would expect a responsible public information officer to check with his general counsel.

Mr. PHILLIPS. One last area of questioning, Mr. Chairman.

To what extent has the Civil Division of the Justice Department developed expertise in defending suits for the Government under the Freedom of Information Act?

Mr. ERICKSON. Well, the handling of the freedom of information cases is localized, if you will, with the Department.

Mr. PHILLIPS. With U.S. district attorneys in the districts where suits are brought?

Mr. ERICKSON. This is within the Department itself. We do have a particular expertise. When you get to the various U.S. attorney's offices, I am not aware of any particular——

Mr. PHILLIPS. Suppose the suit were filed in the ninth circuit, say in the Federal district court in Seattle. Would the Government's case normally be handled by the U.S. district attorney in Seattle, or would the Justice Department send one of their stable of experts out to Seattle to assist, or perhaps handle the case?

Mr. ERICKSON. Mr. Saloschin?

Mr. SALOSCHIN. I am going to have to try to respond on the basis of my general impression and experience. I would say that in most instances that case would be handled by the U.S. attorney's staff out in the judicial district where the case is pending. But, with advice and

assistance from the departmental staff in Washington. That is my belief. That would be true in most instances, I would think.

Mr. PHILLIPS. I was referring to a specific case in Seattle, *Long* v. *Internal Revenue Service.* It is my understanding that the major work on that particular case for the Government was done by an attorney from the Department of Justice, who was sent on several occasions to the various hearings that were held in that court in Seattle. Is this an unusual case, or is this the pattern? This is a very specialized area of the law and I would be very much surprised if there were not a group of Government attorneys in the Justice Department who had a very intensive understanding and expertise in this particular area.

Could you look into that, perhaps, with some of your colleagues in the Civil Division, and supply for the record some comprehensive response, because I think it is important.

What bothers me is the two hats that the Justice Department wears in these kinds of cases. On the one hand the Office of Legal Counsel, and you two gentlemen are doing your best, I am sure, to carry out the intent of Congress in administering this law, at the administrative or appeal level in as many cases as possible.

And on the other hand, another arm of the Justice Department is perhaps developing a great deal of talent and expertise in trying to keep information hidden from the American people. I am just wondering how these two conflicting missions can be reconciled.

Mr. ERICKSON. Well, I would point out that we do have on the Freedom of Information Committee two lawyers from the Civil Division, one who is in the General Litigation Section, and another who is in the Appellate Section. Both of these are very familiar with the freedom of information cases. The extent to which they get out into the field or the region, so to speak, in the U.S. attorneys' offices, I cannot really respond to that, other than I know they are generally aware of what has transpired.

Mr. PHILLIPS. Mr. Chairman, as I suggested earlier, could we include in the record at this point some response from the Civil Division as to the extent to which attorneys from Washington, from the Justice Department, are sent out in the field to assist in the defense of Freedom of Information Act cases, in assisting U.S. attorneys?

Mr. MOORHEAD. Can you supply that for the record?

Mr. ERICKSON. Perhaps you would want to direct that to the type of service, or the type of assistance that they do offer.

Mr. PHILLIPS. Yes.

Mr. ERICKSON. If you limit it to just the physical appearance, it would be difficult.

Mr. PHILLIPS. If it is advisory, how many cases, and if the attorney from the Justice Department in Washington actually handles the case, or assists in handling the case with the local U.S. district attorney. I think some statistics should be supplied us along this line and would be very interesting, indeed.

Mr. MOORHEAD. Can you supply that, Mr. Erickson?

Mr. ERICKSON. We would be pleased to do that. I do not know that they will be statistics so much, as a general practice.

Mr. PHILLIPS. If we could have it for the last 2 fiscal years. That probably would be enough because I doubt if the practice has developed much more recently than that.

(The material follows:)

INFORMATION FURNISHED BY THE CIVIL DIVISION OF THE DEPARTMENT OF JUSTICE ON THE EXTENT TO WHICH THE DIVISION'S ATTORNEYS ASSIST U.S. ATTORNEYS IN CONDUCTING FREEDOM OF INFORMATION LITIGATION

1. Information on the conduct of cases in district courts:

(*a*) As of March 1, 1972, there were 48 cases filed under 5 U.S.C. 552 that were being handled by or under the control of the Civil Division. Of these 48 cases, 12 were being handled directly in all respects by Civil Division attorneys. In two additional cases, briefs were prepared by Civil Division attorneys and filed although the oral argument was left to the U.S. attorney's office.

(*b*) The factors which determine whether a case is handled by the U.S. attorney's office or directly by the Civil Division include (1) whether the issue is novel or has been previously litigated; (2) the probable importance of the issue; and (3) the work load of the U.S. attorneys' offices and of the Civil Division.

(*c*) The kinds of assistance given to U.S. attorneys on cases which they handle include in most cases transmittal of a detailed discussion of the legal arguments in support of the Government's position after obtaining and reviewing the agency's report. In addition, all paper of substance filed in Information Act litigation is sent to and reviewed in the Civil Division with frequent transmittal of suggests for conduct of the litigation to the U.S. attorneys' offices.

(*d*) The Division has no reason to think that the statistics set forth in (*a*) above vary greatly from the past practice. Thus, these statistics can be taken as more or less representative of the relative roles of the Department's local and headquarters lawyers throughout the history of this type of litigation.

2. Information on the conduct of cases in courts of appeal: Almost all Freedom of Information litigation at the appellate level which falls within the Civil Division's supervisory authority has thus far been conducted by Civil Division attorneys; there has thus far been one exception to this within the recollection of the Division's appellate staff. The staff also reports that about three or four appellate cases have been handled by attorneys with regulatory agencies which conduct their own litigation (e.g., NLRB and SEC). One appellate case, involving Internal Revenue Service records, has been handled by the Tax Division. When the basic issues arising under the act have been more clearly settled in appellate litigation, it is possible that more such appeals will be assigned to the U.S. attorneys' offices.

While it is not reasonably practicable to segregate the information presented above by fiscal year so as to show it for each of the past 2 fiscal years, the above information may be taken as indicating the general division of professional labor between the Civil Division and U.S. Attorneys during the last 2 fiscal years.

Mr. MOORHEAD. Mr. Cornish.

Mr. CORNISH. Thank you, Mr. Chairman.

Mr. Erickson, you mentioned in your testimony that you have a very small staff. How large is that staff?

Mr. ERICKSON. We have 18 lawyers.

Mr. CORNISH. Eighteen lawyers? How many of these lawyers work on freedom of information matters? Is it by assignment? I mean, or do you have specific people to do this?

Mr. ERICKSON. The Committee members, the Freedom of Information Committee members are the ones that would be working on freedom of information matters. There are three of those, now. This is not their exclusive assignment, however.

Mr. CORNISH. How many lawyers do you have working on executive privilege matters?

Mr. ERICKSON. Oh, my, we have people who have an expertise in executive privilege, but no one full time. I would say we have two people in the office who are knowledgeable, quite knowledgeable about executive privilege matters.

Mr. CORNISH. So, it is almost about the same number, then?

Mr. ERICKSON. Well, there is really no way to compare. It cannot be compared in this context simply because the executive privilege takes up far, far less time than the freedom of information time.

For example, I would guess that Mr. Saloschin is spending roughly 75 percent of his time on freedom of information matters. There certainly is no one in the office spending anywhere near that time on executive privilege.

Mr. CORNISH. I see. Now, one of the major responsibilities of your office is to counsel the various agencies on the Freedom of Information Act, and the possible cases that might be brought: is that correct?

Mr. ERICKSON. Yes.

Mr. CORNISH. What agency or office of the U.S. Government counsels the public on the Freedom of Information Act?

Mr. ERICKSON. Well, I am really aware of no agency that counsels the public, other than to the extent that I suppose that we do this.

Mr. CORNISH. Let us take a hypothetical example of a person who is having an especially difficult time with a recalcitrant agency from the inception of his information request. Can he come to you, or your office, and I do not mean to you personally, but your office for advice on these matters?

Mr. ERICKSON. No, we have no procedure for that.

Mr. CORNISH. So, he cannot——

Mr. ERICKSON. But that does not mean that we have not had requesters come in the office. Mr. Saloschin has spent a fair amount of time with people who have come in and asked for information.

Mr. CORNISH. Has that information been provided?

Mr. ERICKSON. No.

Mr. SALOSCHIN. Provide——

Mr. ERICKSON. The question was: Has that information been provided? No, we have not—I am sorry, are you referring to provided here? The information may be provided, at the consultation, to the requester.

Mr. CORNISH. During your testimony you pointed out that you often explain or try to emphasize to these agencies that exemptions in the Freedom of Information Act are not mandatory but permissive, and that in certain instances it might be in the public interest, even though a piece of information falls under one of the exemptions, to make it public. Is that correct?

Mr. ERICKSON. Yes.

Mr. CORNISH. I was also interested in some of the criteria you mentioned fitting into this decisionmaking process, and you said that one of the factors was whether it would "harm the agency." I wonder if you could explain what you meant by that?

Mr. ERICKSON. Well, that is one of the—I think I used that as one of the initial determinations you would make as to whether or not

you are even concerned about whether it be released. There may be a discretionary release if we have no reason for not releasing it.

Now, by harm to the agency I would say that falls generally into the category of disclosing information prematurely, let us say in the course of an investigation. I think that would be the prime example. Nothing specific comes to mind at this point in time, but if you are talking about an investigation or enforcement proceeding, or something of this type, and it would interfere with your orderly performance of your functions.

Mr. CORNISH. You would not include in that category, or would you, the embarrassment of the head of the agency, or matters of that sort?

Mr. ERICKSON. I would say yes and no to that. Yes in the sense that as a practical matter I think that is something where the first flag is raised, but when it reaches our committee or we are discussing that sort of thing, certainly it is our function to eliminate that sort of a consideration from whether or not the information is going to be disclosed.

Mr. CORNISH. But, would you not agree that that is not a justifiable factor to take into consideration in whether one of the exemptions is utilized or not?

Mr. ERICKSON. Correct, I find no basis in the exemptions for that.

Mr. CORNISH. At one point you mentioned the Immigration and Naturalization Service. You stated that there were certain invasion of privacy aspects to a number of those cases. Does the Department ever assist foreign governments or foreign legal firms in locating a person who might be the heir to an estate overseas, and that sort of thing?

Mr. ERICKSON. I cannot answer that. I am not familiar with that procedure.

Mr. CORNISH. Would the Justice Department refuse to disclose the location of a naturalized American citizen if he was the beneficiary of an estate overseas?

Mr. ERICKSON. I am not familiar with the INS. Mr. Saloschin may be. If he is, he may respond.

Mr. SALOSCHIN. I am not familiar with the specific practice, but from the information they have furnished us in handling analogous inquiries, my surmise would be that in the situation you described, the Immigration Service, if it did have the information as to the whereabouts of a naturalized American, would advise him that he had an inquiry or a contact from some source which reported that he was an heir who had inherited money from some foreign estate, or something of that sort, and then leave it up to him to assert his claim or his rights. That is what I would assume they would probably do.

Mr. CORNISH. Well, I would hope so, because it might help our balance of payments situation, for one thing. But, I am interested in the language in your statement, and you just brought it up again.

"However, even where such requests for personal information are denied, the alien is usually notified that a request is made."

Now, my fascination is with the word "usually." Is there some reason why it is usually, and not always?

Mr. SALOSCHIN. Again, I have to speculate, but there might be a situation where the alien in question, where his address is known to the service but where he might be, shall we say, in a mental institution or something of that sort. I really do not know.

Mr. ERICKSON. These are generalizations that we have from the Immigration and Naturalization Service, and I do not think speculation is really going to help us here that much. This is the general format which they have said they follow, and I think that is as much as we can reasonably respond.

Mr. CORNISH. I would like to revert back to my previous question before I got into the question of estates and these exemptions, and their being permissive, and not mandatory.

Can you foresee a situation where there might be information covered under the exemptions which possibly would cause harm to the agency in the sense of embarrassment or whatever it might be, but would be of benefit to the public?

Mr. ERICKSON. Nothing specific comes to mind. I just do not have anything in mind.

Mr. CORNISH. Well, this fits in rather precisely with the President's very excellent statement in regard to the Executive order just released, and he makes quite a point of the mistakes by bureaucrats, and he would hope that hiding these could be avoided under the new Executive order.

Mr. ERICKSON. That certainly was one of the strong points he made, that he would not tolerate that use of the classification system.

Mr. CORNISH. That is why I make such a point of this, and I am belaboring it.

But, that was the point and the thrust of my question, to make absolutely certain that in the advice that you give to the agencies, that the exemptions are permissive and not mandatory. Do you also make it clear to them that you are not talking about the personal embarrassment or the hiding of mistakes which might have been committed, in which the public would benefit by knowing?

Do you think that would be a reasonable responsibility on the part of the Department of Justice?

Mr. ERICKSON. Oh, yes, No doubt about it.

Mr. CORNISH. Thank you.

Mr. MOORHEAD. Mr. Conyers.

Mr. CONYERS. Might I ask if there has been or might be any consideration of reviewing whether the Government should pay the costs of a court action if they have lost a freedom of information case after denying the individual the information that was requested? There are several areas in the law where this sort of thing occurs, some civil rights actions——

Mr. ERICKSON. Yes, I was going to say particularly with civil rights actions.

Mr. CONYERS. Would that be a possible subject to be considered in your review of the Justice regulations on this matter?

Mr. ERICKSON. We certainly have not considered that to date. I accept your suggestion, and it is something that we certainly can consider.

Mr. CONYERS. Very good.

Mr. MOORHEAD. Mr. Copenhaver.

Mr. Copenhaver. I have just one general question, Mr. Chairman, and I will not take the time of the committee to go into extended questioning.

Mr. Erickson, I have a number of questions which I shall ask the chairman privilege to submit to you for your response in writing.

Mr. Moorhead. Mr. Erickson, will you attempt to answer questions submitted to you by the subcommittee in writing?

Mr. Erickson. Yes. I would like to know the general information format or the general import of Mr. Copenhaver's questions.

(The questions and answers thereto follow:)

Responses to 15 Questions to the Department of Justice on Freedom of Information Matters

(*Note:* Those questions were transmitted by the Subcommittee on March 24, 1972, to Assistant Attorney General Ralph E. Erickson, Office of Legal Counsel, Department of Justice, who had testified before the Subcommittee on March 10, 1972.)

Question 1. If the Department denies a request for information, does it inform the requester of his rights of appeal within the Department and to the courts?

Answer. Generally, our letters of denial have not contained such information. However, the forms furnished for public use in requesting records contain citations to the regulations which in turn contain citations to the Act. The regulations and the Act together set forth both administrative and judicial appeal rights.

Question 2. What procedures does the Department follow concerning avoiding the contamination of files, i.e., maintaining files so that current investigatory material, trade secrets, or classified information is segregated from information that can be made available to the public?

Answer. In general, the Department of Justice does not have any special procedures either for the "contamination" or for the "decontamination" of the files. (It is assumed those terms respectively mean the intentional mixing together and the intentional separating apart of materials that are available to the public and those that are not, for the respective purpose of frustrating or of facilitating such availability.) Except with respect to classified documents which are required to be kept separate from other records for the purposes of greater security of storage and of limiting access to duly authorized employees—and which constitute in the aggregate only a minor part of this Department's records—our records are generally grouped in ways that will facilitate their use by Justice Department personnel in carrying out particular work assignments, and are not grouped in ways designed to help either in exhibiting them to or in concealing them from other persons. Our work, after all, is the primary purpose for which our records are maintained. Accordingly, the organization and grouping of our records has evolved in ways that have been found to support the Department's overall responsibilities in such areas as litigation, law enforcement, legal services, and so forth. In other words, documents, records, and files of the Department will generally be organized and stored according to particular cases in litigation, particular investigations, particular legislative proposals, particular requests for advice or comments, particular organizational units, subjects, names, or periods of time, or some combination or subdivision of such features which, on the basis of experience or judgment, will best facilitate the assembly, review, and retrieval of the matter contained therein by departmental personnel in their work

It would be highly impracticable and burdensome to rearrange records that have long been grouped and maintained according to their pertinence to particular matters and their utility for established working procedures in order either to inject or to eliminate matter which is, or is not, available to the public.

Question 3. Does the Department, as a general policy, permit public access to files of investigations that have been closed? What is the Department's policy concerning the closing of such files as soon as possible? What procedures have been established to assure compliance with this policy?

Answer. As to the first part of this question, the answer is no, regardless what is meant by a file that is "closed." The investigative files of this Department—including those which may be characterized by various persons as "closed" in one sense or another—are voluminous. They contain great masses of unevaluated information the release of which would be injurious to innocent persons. In addition, the law enforcement needs of the United States make it vital to protect investigatory techniques and to maintain the continued trust of the public that investigative information may safely be given to the Department, without fear of its release if the particular file should for some reason later be termed "closed". As to the second part of the question, the Department's overall policies for the performance of its functions include a general policy of performing its work, including investigative work, expeditiously; this may tend to "close" files. As to the third part of the question, there is no special procedure to assure compliance with this policy of expediting our work, apart from the normal range of supervisory and management activities, which include ongoing review of workload and of utilization of available manpower.

Question 4. Does the Department continue to interpret Exemption No. 7 of the F.O.I. Act as permitting only litigants to have access to investigatory files?

Answer. The Department's interpretation of the 7th exemption is not accurately described in the question. Our interpretation is basically set forth in the Attorney General's Memorandum of June 1967 on the Act, at pp. 37–38. The question seems to imply that in the Department's view (a) litigants have general access to investigatory files, and (b) access by others is not permitted. As the discussion on p. 38 of the Memorandum shows, litigants are entitled only to limited access to such files.

Question 5. To what extent does the Department follow up on advice given another agency in order to determine what action was taken?

Answer. This question was answered in large part in the prepared statement to the subcommittee of Assistant Attorney General Ralph E. Erickson on March 10, 1972 at pp. 27, 29–30, which indicated the basis of our belief that our advice is usually followed, and also discussed some of the problems that would be anticipated if there were more rigid follow-up procedures on this point. It may be added, however, that we currently plan to give active consideration to possible administrative changes in this area.

Question 6. To what extent does the Department contact agencies which have not sought the Department's advice but which have become involved in F.O.I. litigation in order to determine if litigation could have been avoided or can be under like circumstances in the future?

Answer. When the Civil Division learns of the filing of a new Freedom of Information suit, this event can be expected to come to the attention of a Civil Division attorney who is a member of the Department's Freedom of Information Committee. If it appears to this attorney that the agency being sued may have failed to consult the Committee in accordance with established procedures before issuing a final denial of the plaintiff's request, the attorney follows the practice of notifying the chairman of the Committee. The chairman will then telephone the agency and, unless it appears that the suit is premature or that the agency is likely to make the records available, the result will probably be a consultation with the Committee within a very few days. Such instances, however, have been quite rare. One of the main objectives of these and other Committee consultations is to avoid unnecessary litigation in the case at hand and in like circumstances in the future.

Question 7. How does the Department now advise other agencies with regard to the interpretation of "identifiable records" contained in section 552(a)(3) of the F.O.I. Act? Is the burden still placed upon the requester? If so, what is the degree of the present burden?

Answer. The Department believes that the guidance set forth on page 24 of the Attorney General's Memorandum under "Meaning of the Term 'Identifiable'" is basically sound, if fairly applied, and that the requirement that a requester provide a "reasonably specific description" or a "reasonable description" of what he wants is in accordance both with the law and with common sense.

What is reasonable, of course, depends on the circumstances. If the requester's desire is fairly plain but his knowledge is so limited that he cannot make his request very specific, and if he cannot reasonably be expected to acquire the

knowledge needed to do so except from the agency, while at the same time the agency has grounds for believing that with some effort it could succeed in probably identifying the records that he seeks, the agency should, normally, cooperate in some way. It may either attempt to identify the records or, if a costly search is likely to be involved, it may communicate with the requester informing him of the anticipated costs and, to the extent feasible, offering to assist him in reformulating or refining his request in more manageable or readily identifiable terms.

Question 8. Present any recommendations which the Department itself supports or has received from other agencies concerning amendments to the F.O.I. Act, the Attorney General's Memo, or other departmental interpretation of that Act.

Answer. No recommendations for such amendments have been received or are supported by the Department at this time. (We do, of course, receive informal requests for current guidance on questions involving the interpretation of the Act, but these expressions do not in our view constitute recommendations for amendments to the Department's interpretation of the Act.)

Question 9. Has the Department explored the recordkeeping operations of other agencies to determine whether they can be arranged in an improved manner in order to make more information available to the public more rapidly?

Answer. No, since 5 U.S.C. 552 does not impose any such duty on the Department. The Department has no authority in this respect. However, we have occasionally in the course of a consultation suggested than an agency might explore the possibility of improving its administration of the Act by changing its records management practices.

Question 10. Cite any instances in which the Department has encountered other agencies charging too high fees and actions by the Department to have them reduced. What is the Department's policy at present regarding the charging of fees?

Answer. We have not encountered such instances or taken such actions, nor does the Department have authority to take such actions. This does not mean that we are not generally aware, as indicated in our answers to subcommittee questions on March 10th, that there may be problems concerning fees. As to the second part of the question, we are considering revising our own fees. Pending a possible revision of our fees, we will continue to administer our fee regulations in a manner that reflects fair consideration of the interests of the requester, including requesters who may be unable to pay.

Question 11. How does the Department currently interpret Exemption No. 4 of the F.O.I. Act? Is the phrase "privileged and confidential" interpreted to modify "trade secrets and commercial and financial information" or to constitute a separate category of exemption? Does the exemption only apply to the information obtained from the public or also to that obtained from other agencies?

Answer. The Department interprets the 4th exemption essentially as appears in the Attorney General's Memorandum at pp. 32–34. The phrase "privileged and confidential" must, in view of the wording and the legislative history as discussed in those pages, be interpreted *both* to modify the prior language *and* to constitute a separate category. If the phrase does not modify the prior language, *all* commercial and financial information would be exempt, an obviously incorrect interpretation. If the phrase is read as not representing a separate category, then among other consequences the clear language of both the Senate and House committee reports must be disregarded, for both expressly state that the 4h exemption covers matter subject to, e.g., the "doctor-patient" privilege, and such matter is obviously neither commercial nor financial.

The Department in advising other agencies has encountered types of situations which illustrate the public need for our interpretation on this point. For example, from time to time various agencies embark upon fact-finding inquiries into fires, accidents, or other casualties which occurred in their facilities or activities. The purpose of such investigations is not to punish or otherwise combat actual or suspected violations of law—there may be no violation in the worst disaster—but simply to discover all the causative facts in order to devise precautions or procedures to minimize the future risk of similar

mishaps or to minimize the probable losses of life, limb and property. To improve the chances for eliciting all information which might help to this end, witnesses must be assured that a frank and complete statement, including not only definite observations but also impression, suspicions, and theories, will not result in injury to the witness, either directly or by causing loss or embarrassment to his supervisor, his peers, his employer or other persons or groups to which he may relate. There is no basis in the Act for affording the comprehensive assurance needed to obtain the effective asistance of such witnesses unless the 4th exemption is properly interpreted. This is equally true where the witness is a serviceman or government employee who is part of an agency as where the witness is from outside the government. It is, of course, no solution to give assurances to obtain needed information and then to dishonor the assurances.

Question 12. How does the Department currently interpret Exemption No. 2 of the F.O.I. Act?

Answer. We interpret this exemption essentially as discussed in the Attorney General's Memorandum at pp. 30–31.

Question 13. Under what authority under the F.O.I. Act can information be withheld under a claim of executive privilege?

Answer. The withholding of information on the basis of executive privilege does not rest upon any authority granted by the Act but rather represents an exercise of power derived from the Constitution and which is controlled by the President as the head of the Executive Branch. The Act itself states (5 U.S.C. 552(c)) that it is not authority for withholding information from Congress. Executive privilege is, of course, exercised with restraint, since under the doctrine of separation of powers each of the three branches of the government must not only preserve its own independence but most respect the functions of the other two.

Question 14. How does the Department currently interpret the F.O.I. Act concerning the application of judicial review authority to sections 552 (a) (1) and (a) (2)?

Answer. Except to the extent hereinafter noted, we do not believe that the direct judicial review provision in subsection (a) (3) of the Act applies to subsections (a) (1) and (a) (2). We believe the structure as well as the wording of the Act support this view.

Subsections (a) (1) and (a) (2) of the Act taken together deal with a very small fraction of the aggregate mass of agency records; each imposes duties beyond making records available; and each contains its own separately stated sanctions, not including a lawsuit, against a failure to comply with its own mandate. The statutory language on judicial review is contained in (a) (3), and it speaks only of the enforcement of the duty imposed in (a) (3); the court is authorized to forbid an agency from "withholding agency records". Nevertheless, under the wording of (a) (3) itself, an existing agency record of the character described in (a) (1) or in (a) (2) but which has not been made available becomes, in addition, a record within the coverage of (a) (3) and thus may be requested, be the subject of litigation, and be ordered to be produced under (a) (3).

Question 15. In testimony before the Natural Resources Subcommittee of the Committee on Government Operations last year, the Department of Justice stated that under its internal rule 116–56, the total denial of ex parte discussion of cases under litigation applies to Congressional committee requests. It is understandable that public discussion of litigation or negotiations should be discouraged. However, interested committees of Congress should be kept apprised of such cases where important and far reaching public issues are being decided. It is also the opinion of the Chairman of this subcommittee that the American Bar Association sanctions against ex parte discussion of matters in litigation would not apply to a request by a Congressional committee when the committee guaranteed the confidentiality of the matter at issue. Please supply to this subcommittee a detailed explanation of the Department of Justice position on Rule 116–56.

Answer. As noted above, the Freedom of Information Act does not provide authority for withholding information from Congress. The departmental order is not, of course, based on the Act. It is based in part on 5 U.S.C. 301 empowering the heads of Executive departments to prescribe regulations regarding the cus-

tody and use of departmental records and in part on the basic duty of the Executive branch, including the Department of Justice, to assure that our laws are faithfully executed. Since information concerning a case that is or may be in litigation is collected and used by the Executive branch of the Government to aid in the duty laid upon the President "to take care that the laws be faithfully executed," and since extrajudicial disclosure of information of that nature would not be consistent with the Department's litigating, law enforcement, and other duly assigned responsibilities, it is the position of this Department, as reflected in D.J. Order 116–56, that requests including those from a Congressional committee for such information, apart from a description of the status of the case, should usually not be granted.

In this connection it is our belief that the premature disclosure of a pending case unjustifiably interferes with the Executive branch's litigative responsibilities both in law enforcement and in other proceedings. Counsel for a defendant or other adverse party could have no greater help than to know how much or how little information the Government has, what witnesses or sources of information it can rely upon, or its plan for establishing its case. Nothing can be more inherently prejudicial than to require a prosecutor to tip his hand. And if the disclosure is prejudicial to the adverse party, a judgment for the government may be vacated on the ground that the adverse party did not have a fair trial. To the extent that the adverse party may be entitled to advance information from the Government, it can be obtained under the discovery rules, subject to proper judicial review and control.

Moreover, disclosure before a Congressional committee, in addition to prejudicing the Government's chances of prevailing in the litigation, may subject the disclosing attorney to professional criticism for violation of professional ethics or to possible sanctions such as citation for contempt of court. Disciplinary Rule 7–107 of the American Bar Association's Code of Professional Responsibility, which substantially carries over Canon 20 of the former Canons of Legal Ethics, generally prohibits an attorney from making any extrajudicial statements, other than reference to a matter of public record, relating to the litigation. This Rule is applicable to attorneys of the Department of Justice. See A.B.A. Opinions on Professional Ethics, No. 199 (1940). Recently, the Department promulgated regulations which substantially incorporate the principles embodied in DR 7–107. 28 C.F.R. 50.2 *et seq.*

It is true that under subsection "I" of DR 7–107, the rule is not binding in those situations in which an attorney is participating in the proceedings of legislative, administrative, or other investigative bodies. However, the reason for this exception is apparently to accommodate the needs of these types of proceedings, not to permit a destruction of the main part of the rule by the device of communicating all the information to a legislative or other such body. It is our view that the policy sought to be accomplished by DR 7–107 is entitled to respectful consideration even when its terms may not be controlling. In this view, the rule should be read and interpreted as a whole, with a balancing of the advantages and disadvantages of disclosures, even where the rule itself would not prohibit disclosure. Accordingly, Order 116–56 represents a recognition of the ethical responsibilities of an advocate not to make extrajudicial statements relating to a pending case and as such it formulates a policy consistent with the general policy and tenor of DR 7–107.

As to the suggestion that your subcommittee will keep this information confidential, we have no doubt that this pledge would be given in good faith, and that every known consideration would be weighed before making any such material public. However, we believe a policy cannot be made anew because of personal confidence of the Attorney General in the integrity and good faith of a particular committee chairman. We cannot be put in the position of discriminating between committees or attempting to judge between them, and their individual members, each of whom has access to information once placed in the hands of the committee.

Mr. Copenhaver. The basic gist of my questions follow along the line that the Department of Justice has been, in essence, made the legal adviser for the Government in the area of freedom of information. And your committee, which you discussed, is the one which other agencies call upon for assistance in responding to requests for information.

And although you only serve in an advisory capacity, there is no question that your advice has a great deal of influence. With that in

mind, what has disturbed me in your testimony here today, as well as in the Attorney General's memorandum of 1967, when matched against the court cases, is that there are a number of inconsistencies which exist between the advice being rendered by the Justice Department and the interpretation of the law and congressional intent by the courts. Generally, the Justice Department has been more restrictive and cautionary in its interpretation of the law, which may have contributed to the public being denied information they were entitled to.

My primary interest is in learning what you intend to do as you review your position on this matter and examine your future role in order to develop a more positive thrust in the interpretation of the law:

Do you have any comment on that at this time?

Mr. ERICKSON. Well, are you suggesting that we update the 1967 memorandum?

Mr. COPENHAVER. Well, it is broader than that. I do not think the Government should have an office which is the ultimate central control of administering the law. It would be very dangerous, and I am trying to walk a middle line. But, since the Justice Department has been established in this role, and you do serve as a consulant and other agencies do come to you, I am concerned with the negative and overly conservative attitude which Justice does seem to display in this area. If I interpret the existing situation correctly, you do not even attempt to maintain an effective followup of the agencies which come to you seeking your advice in order to determine the disposition of the matter which you have advised them on. You do not appear to review and survey the agencies that do not come to you regularly to see if their actions are under appeal in the courts to an excessive extent. If you took a more positive attitude in light of the court decisions which are opening the law up in most areas, I think that we would find even more information being made available, less restrictions on information, and less court suits.

And, of course, as Mr. Conyers has pointed out, the 50–50 ratio of court losses by Justice is pretty bad, when I think the Justice Department's overall batting average is in the neighborhood of 80 or 90 percent.

In the area of what is identifiable information under the Freedom of Information Act or in areas having to do with the burden of proof, or in areas as to what is to be maintained in confidence, or what is to be an internal document, or what is to constitute an investigatory followup, the interpretation by the Justice Department is too restrictive which is leading to an undue withholding of information.

So I would hope—this is not a speech I am making, but I would hope that you would reconsider your role and see if you can, in reviewing your operations, revise your memo and your procedures to really develop a greater spirit of enforcement of the act.

Mr. ERICKSON. Well, I will just give a brief response, if I may. I do not believe that our attitude is as negative as you might think. I do not believe that to be the case. We are reviewing our own regulations. Certainly consideration is being given and will be given to revising the 1967 memorandum.

With respect to the historical and statistical information that you are suggesting that we develop, we have, of course, the normal prob-

lems of manpower and the capability of doing this. I think we are doing a great deal now. I think the effort in the office is expanding, and it may very well be that we are going to have to have more people to do this sort of a function.

I think that is one of the limitations we have, but it is certainly well within the many of the considerations and possibilities. We are looking at that, and will look at it.

One final comment with respect to the questions you are submitting. We certainly will be pleased to respond to them. Not having seen them, however, I obviously have to have somewhat of a caveat, in that if for some reason we cannot respond, well, I would want to feel free not to respond.

Mr. COPENHAVER. I would hope that you would not cite one of the exemptions to the FOIA.

Mr. MOORHEAD. I had hoped to terminate by noon, but I yield to Mr. Phillips and then Mr. Cornish.

Mr. PHILLIPS. Two very brief questions, Mr. Chairman. We have been discussing the role of the freedom of information committee in advising other agencies in matters relating to the act. Could you describe what role the committee plays within the Department of Justice? Is it a focal point of requests, or does it act pretty much the same way as it does with other agencies?

Mr. ERICKSON. I guess the latter is probably the better answer to it, in that we act more or less informally as counsel.

Mr. PHILLIPS. Do you work with your own public information people in Justice?

Mr. ERICKSON. Counsel, rather as the committee, and we will have informal discussions, perhaps, with people in the Civil Division.

But, our primary function is outside of the Department. The prime functions within the Department are to pass on appeals which are presented to the Attorney General.

Mr. PHILLIPS. Is it a formal sort of committee, as such, a structure, or does it consist of Mr. Saloschin and the attorneys that are assigned—the attorneys that you have mentioned earlier? Do they serve as a panel of experts, or is it a committee structured in the normal sense?

Mr. ERICKSON. Yes; there is a committee.

Mr. PHILLIPS. And it meets and keeps minutes?

Mr. ERICKSON. No; it does not keep minutes. It meets upon call of the Chair or any member, and it meets principally to consider requests from other agencies for consultation in connection with a proposed denial.

Mr. PHILLIPS. Do you keep a transcript of the proceedings?

Mr. ERICKSON. No; we do not.

Mr. PHILLIPS. There is no formality to it then?

Mr. ERICKSON. No.

Mr. PHILLIPS. That is probably the only committee I could think of that would not keep such records. I asked because we are, in another part of our hearings, going to be examining the role of these types of committees, advisory committees, interagency committees, and so forth, and to what extent they come under the act, itself.

One last question: In the response that you provided to the subcommittee in our questionnaire last August, there were a number of denials

of information requests by credit reporting companies. I think most all of them were under exemption (b) (6) of the act. I am a little puzzled as to why the Retail Credit Co., for example, would ask the Justice Department for information. What type of information were they looking for?

Mr. Erickson. I think Mr. Saloschin is particularly qualified to respond.

Mr. Phillips. There were perhaps 10 or 12 cases involving that company and other companies. Were these FBI reports they were looking for?

Mr. Saloschin. My impression is, and I am not absolutely certain of this, but I am fairly confident that these were efforts to find the addresses, home addresses of aliens for collection or credit purposes.

Mr. Phillips. So this would involve the Immigration and Naturalization Service?

Mr. Saloschin. Yes.

Mr. Phillips. It is kind of strange because that company is hired by many Government agencies to do investigative work for the Federal Government, and it just seemed like the cart was getting before the horse.

I yield now to Mr. Cornish.

Mr. Cornish. Thank you.

Now, Mr. Erickson, would you agree that under the Freedom of Information Act that an American citizen has the right to know and is not required to establish a need to know?

Mr. Erickson. Yes; it is certainly classified as—strike the word "classified", referred to as the right to know law.

Mr. Cornish. I wish you would advise some of our Government agencies of that fact, because they still have not gotten the message.

Mr. Erickson. We do occasionally—I mean not occasionally, very often, advise them.

Mr. Moorhead. Mr. Erickson and Mr. Saloschin, we thank you very much for your testimony and your patience with us. I think you have been of great help, and I hope we will continue to work together in the future to improve not only the language, but the administration of the Freedom of Information Act.

When the committee adjourns, it will adjourn to meet on Tuesday next, March 14, at 10 a.m., in room 2203 of the Rayburn Building, at which time we will hear witnesses from the Administrative Conference of the United States and a panel of individuals having experience in the administrative workings of the Freedom of Information Act.

Mr. Erickson. I just want to say thank you, Mr. Chairman, and members of the committee.

Mr. Moorhead. The Subcommittee on Foreign Operations and Government Information is adjourned.

(Mr. Erickson's prepared statement follows:)

Prepared Statement of Ralph E. Erickson, Assistant Attorney General, Office of Legal Counsel, Department of Justice

Mr. Chairman, we appreciate the opportunity to appear before your committee, and to tell you something about the work of the Department of Justice with respect to the Freedom of Information Act. Let me start by saying that we are continually striving to improve our efforts in this important field of law and government, but we also feel that on the whole we are doing a reasonable job at

the present, considering the magnitude and complexity of the challenges which face us.

Your committee has asked us for information on two different aspects of the Justice Department's work in this field. First, you have indicated an interest in the administrative procedures employed by our Department when processing requests for access to our own records under the Freedom of Information Act. Second, you have requested an explanation of the Department's role in providing legal services to other executive branch agencies concerning freedom of information requests for their records.

Turning to your first inquiry, our present regulations establish the procedures for making and processing requests for access to Justice Department records.[1] These regulations provide that requests shall be made on a form supplied by the Department. Use of such a form often enables the Department to identify and locate the requested materials much more quickly. However, failure to submit a request on the prescribed form is not regarded as a bar to having the request reviewed, and such a failure normally does not delay the processing of a request if the requester has otherwise provided information needed to process it.

Regardless of the form, the request may be sent directly to the Office of the Deputy Attorney General, or to any office, bureau, division, or other unit of the Department. In the latter case, the other unit will generally forward the request to the Deputy Attorney General, unless the material requested is of a kind that is customarily furnished without regard to the procedures under the regulations. The request, when so forwarded, may or may not be accompanied by the records sought, but there will usually be a recommendation for release or for denial of access. This recommendation is reviewed in the Office of the Deputy Attorney General, who then sends a response to the requester granting or denying the request or reporting that the Department does not have the records covered by the request.

A very similar procedure is followed for processing requests that were sent directly to the Deputy. These requests are reviewed for completeness to determine if the record sought is identifiable. The Deputy Attorney General then forwards the request to the head of the appropriate unit of the Department for review and recommendation. Usually, that unit is asked to draft a response to the request. The proposed response is reviewed in the Deputy's Office, and the requester is notified by the Deputy of the Department's action on the request.

One exception to the procedures I have just outlined occurs when requests are made directly to the Immigration and Naturalization Service for its records. By regulation (8 CFR 103.10(b)), the Immigration and Naturalization Service is authorized to grant requests for specified kinds of records without forwarding such requests to the Deputy Attorney General. However, when the Immigration and Naturalization Service proposes to deny a request, the case must be reviewed and acted upon by the Deputy, as previously explained.

Our regulations also authorize the collection of fees. Charges are prescribed for searching for and copying records, or for monitoring the requester's examination of the materials sought. The charges are computed by the office that initially reviews the request. However, it should be noted that the failure to pay the fee is not necessarily a bar to access. The Department does not collect fees in an amount that would equal the time and effort expended in searching for records, monitoring examinations of materials, and providing copies of records. In one recent instance, the cost to the Government to process a request was estimated as well in excess of $5,000 but only about $150 was collected.

Statistically speaking, the Department has received approximately 535 formal requests for access to our records under the Freedom of Information Act, from July 4, 1967 through July 7, 1971. Approximately 75 percent of those requests were directed to the Immigration and Naturalization Service and the Bureau of Prisons.

At first glance, the total number of requests received by our Department may appear to be unusually small when compared to the number which we understand other agencies have received. The disparity may be explained in part by the varying methods which different agencies may employ in determining whether a request is to be considered as one under the Freedom of Information Act. Our regulations provide that all information that was made available to the public before the act was passed shall continue to be made available. Generally, only requests for material which might fall within one of the act's nine exemp-

[1] 28 CFR Part 16.

tions are likely to be treated as Freedom of Information Act requests. Thus, even though a person may request access to Department documents, and specifically refer to the Freedom of Information Act in his request, we continue to make records available that were available previously without counting the request as a freedom of information request. Apparently, other agencies may include such requests within their freedom of information statistics, or they may even include all requests for information whether or not there would be any question under the act.

Our statistics also show that access to the requested records was granted in whole or part in 224 of the cases, and that access was denied in the remaining 311. Our denial rate of approximately 60 percent may appear disproportionately high when compared with other agencies. However, we do not consider our rate to be disproportionate for a number of reasons.

First, as just explained, many of the requests where the record was released were requests that involved information of a kind made available before the act was passed, and these requests are generally not considered as freedom of information requests. The omission of this substantial category of granted requests naturally has a substantial effect on the statistical balance.

Second, because of our law enforcement responsibilities, the Department must compile and maintain many investigatory files. Some of the freedom of information requests we receive seek material contained in these files. Information of that nature is expressly exempt from disclosure under the act, and a discretionary release of such material is not often considered warranted.

Finally, our statistics reveal that 247 requests were refused pursuant to the "invasion of privacy" exemption. The vast majority of those cases concern the Immigration and Naturalization Service. These are cases in which requests are made for the names and addresses of aliens, often by finance and collection agencies, sometimes by alleged friends or relatives. It is felt that such disclosures would often constitute "a clearly unwarranted invasion of personal privacy." However, even where such requests for personal information are denied, the alien is usually notified that a request has been made. The alien can then voluntarily make contact with the requester.

Normally the case is closed once the Deputy Attorney General grants a request and the records are made available. However, where a request for information is denied in full or in part by the Deputy Attorney General, the regulations (28 CFR 16.7(c)) permit the filing of a written appeal with the Attorney General within 30 days of the date of the initial decision. Of the 535 formal requests received through July 7, 1971, appeals were filed in 14 cases.

Upon receipt of an appeal, the case file is obtained from the Deputy Attorney General's Office and is forwarded to my office, the Office of Legal Counsel, for review. Sometimes this review can become an extensive process. It generally involves careful legal analysis, and it may require the unraveling of a lengthy and obscure appeal letter. In addition, it may involve initiatives by us, seeking the cooperation of other parts of the Department in providing, for example, a reexamination of voluminous records covered by a request, and apparently of an exempt nature, to see if some of them can nevertheless be made available to the requester as a matter of administrative discretion or policy.

Upon completion of our review, our Office sends a recommendation to the Attorney General for sustaining, reversing, or modifying the Deputy's initial decision. The Attorney General's decision is final. Out of the 14 appeals just mentioned, the denial by the Deputy was modified by the Attorney General in 4 cases; the Deputy's action was sustained in six cases, in one of which the appeal was unsuccessful because the records were nonexistent; and four cases were still pending on appeal at the date of the survey, three of which have since been resolved.

Before leaving the subject of the Department's administrative processing of requests for its own records, I would like to emphasize that the review and recommendation procedures which I have described involve the personal attention of high level and well qualified personnel. In other words, our handling of these matters is by no means a perfunctory process.

This might be a good point—after having discussed our processing of requests for our own departmental records and before turning to our functions in assisting other agencies in processing requests for theirs—to say something about our litigation work. The Civil Division of our Department handles the litigation for most Government agencies when suit is filed under the Freedom of Information Act. A status report indicated that as of January 1, 1972, the Civil Division had

46 Freedom of Information suits pending in some stage of litigation. This represents a slight increase over the 41 cases pending a year earlier. Only three of the 46 currently pending cases involved suits brought against the Justice Department for its own records, two of them seeking FBI files on the Kennedy assassination. The remainder of the 46 cases were brought against a broad cross-section of other Government agencies. It should be pointed out that since there are a few Government agencies which handle their own litigation, there may be slightly more cases pending than the 46 listed in the Civil Division's report.[2]

It is estimated that the Government's position is sustained in roughly 50 percent of the cases which are litigated nationwide, although the Government has very little success in the court of appeals for the District of Columbia circuit. The issues most frequently litigated, naturally, are the exemptions permitting the Government to withhold access to requested records. A survey of 32 reported court cases involving the Freedom of Information Act (through 330 F. Supp. and 499 F. 2d) indicates that the exemptions most frequently at issue in litigation are exemption 4 (relating to certain kinds of information given to the Government in confidence)—8 cases; exemption 5 (internal Government communications)—14 cases; and exemption 7 (investigatory files compiled for law enforcement purposes)—9 cases. Other exemptions which were at issue somewhat less frequently include exemption 1 (relating to certain national defense and foreign policy materials); exemption 2 (relating to internal procedures); exemption 3, an exemption based on other statutes; and exemption 6, which is designed to protect personal privacy in medical, personnel, and other files.

The Department's efforts to minimize the amount of litigation against all Government agencies in this field, and to minimize the need for requesters to file suits, were among the reasons which led to the formation of our Freedom of Information Committee, which I will discuss in the next part of my statement.

Let me turn now to describe our role when the records of other agencies are sought under the Act. In such cases, our functions are limited by the decentralized administration of the act, as prescribed by Congress, in requiring "each agency" to act on requests for its own records. In other words, we generally have no authority to compel another agency to comply with a request for its records. Subject to this limitation, the functions of the Justice Department in freedom of information matters are counseling, coordinating, and representing other agencies in court. Within the capacity of our small staff and the pressure of other work, we are trying to perform these functions as best we can.

In describing our counseling and related work, I will first outline very briefly the history of our efforts which led to the creation of our Freedom of Information Committee. Then I will discuss the work of the committee: how it functions, the amount of its workload, the kinds of records involved, the sources of the requests for access to them, the pattern of the committee's reactions or advice, and finally an estimate of its effect on the administration on the act.

During the year after the act was passed and before it went into effect in July 1967, the Office of Legal Counsel prepared the Attorney General's memorandum on the act—the familiar 47-page blue booklet dated June 1967—to assist other agencies in applying the act, and we also handled many requests for assistance or advice from agencies on formulating their own regulations under the act. These major tasks were performed very largley by Mr. Wozencraft, Mr. Mondello, and Mr. Maxson, all of whom left the Department some years ago. There followed an interim period of roughly 2 years, 1968 and 1969, in which we began to be increasingly concerned that some agencies might be engaging in dubious or unwarranted denials of requests under the act, leading to litigation burdensome both to the requester and to the Government. This feeling crystallized after the July 10, 1969, decision in the famous hearings aids case.[3]

The impression was sharpened that same summer after various informal requests for assistance and advice reached us from agencies that were receiving the attentions of Mr. Nader and his associates. The situation was discussed by this

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[2] It has been roughly estimated that a total of about 200 freedom of information suits have been filed since the act was passed. Those no longer pending have been decided, settled, or dropped.

[3] *Consumers Union* v. *Veterans' Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F. 2d 1363 (2 Cir. 1971). In this case the VA denied a request for records of Government tests on commercial hearing aids that were being considered for VA procurement. After a decision against the VA in the district court as to part of the records sought, which was appealed by the plaintiff in order to obtain the rest of the records, the VA turned over all the records, and the appeal was dismissed as moot.

Office with the Civil Division, which as I indicated handles litigation under the act. On December 8, 1969, the Department sent a memorandum to the general counsels of all agencies over the signatures of Mr. Rehnquist and Mr. Ruckleshaus, at that time the heads of the Office of Legal Counsel and of the Civil Division. The memorandum asked the agencies to consult the Department before issuing a final denial under the act if there is any substantial possibility of litigation adversely affecting the Government. The memorandum also created a Justice Department Freedom of Information Committee of five lawyers, three in this Office and two in the Civil Division, to provide these consultations.

Since creation of the committee 27 months ago, the counseling and coordination functions of the Justice Department in freedom of information matters have been largely coextensive with the work of this committee. An interesting report on the committee's work during its first 8 months was made by its chairman, Robert Saloschin, who is with me today, at a symposium of the American Bar Association's administrative law section. This symposium was published in the March 1971 Administrative Law Review, and we will be glad to provide you with a copy of it.[4] One of the statements in Mr. Saloschin's report warrants repeating today, namely, that the committee in its work aims for a minimum of formality and a maximum of speed.

Through March 1, 1972, just about a week ago, we estimate that other agencies of the Government have contacted the committee between 400 and 500 times on matters directly or indirectly related to its work. This estimate is necessarily a rough one, because these contacts are almost invariably by a telephone call, usually to the chairman, and some calls may represent related contacts on the same matter, or may cover several matters, or may prove to have little relation to committee work. Nevertheless, these numerous contacts must be screened to see if they warrant a committee consultation, or can be disposed of without taking the committee's time. The estimated 400 to 500 contacts which I mentioned have led to approximately 120 committee consultations. A consultation is generally held when the agency has reached the point of tentatively deciding to issue a final denial of access to its records under the act. The rate of consultations seems to be accelerating, and is estimated to be running now at roughly between 75 and 100 a year at the present time.

These 120 consultations have involved about 30 different agencies, or a somewhat larger number if constituent agencies within a large department are counted separately. An approximate numerical breakdown of the total number of consultations among the various agencies is being prepared for your information.

Consultation procedures are usually quite simple. About 80 percent of all consultations are conducted by a face-to-face meeting of the committee with representatives of the agency. Agencies usually send a lawyer and one or two operating officials to a consultation, although the representation may vary from just one person to several and occasionally includes both the general counsel and the head of the agency. Typically the committee is represented by at least three and usually four of its members. All five members are of course notified of every meeting, and sometimes all five attend.

Speed is a major goal in all the committee's work, and it is usually obtained. A meeting usually occurs within less than a week of the phone contact which led to it, and some are held the very next day. Sometimes papers that will be discussed at the meeting are shown to committee members beforehand.[5] The meetings vary in length from about 30 minutes on simple matters to 2 hours or more on complex ones. No minutes are kept, although any participant is free to take his own notes. The agencies usually get the committee's reaction immediately, from the discussion during the course of the meeting, although in some cases there may be further telephone calls or other contacts after a meeting. As for the remaining 20 percent or so of committee consultations which do not involve a face-to-face meeting with agency representatives, the usual procedure is that papers from the agency are circulated to the committee members, who

[4] Two of the committee members listed in the symposium report, and in the Dec. 8, 1969, memorandum, Robert Zener of the Civil Division and Steven Lockman of OLC, have since left the Department and have been replaced on the committee by Walter Fleischer of Civil and Fredericka Paff of OLC. Since I came to the Department last autumn, I have served as the ex officio chairman of the committee. The chairman, Mr. Saloschin, is an experienced lawyer in our office who began working on these matters some months before the committee was established.

[5] One member of the committee follows the practice of examining only papers other than the records in dispute.

read them and give their comments to the chairman, and if no further discussion is needed the chairman gives the agency the committee's collective reaction by telephone.

Now that I have described the committee machinery, a few words about the grist that goes through the committee's mill. As you can imagine, the various types of agency records involved in committee consultations cover a very broad spectrum; the same is true of the sources of the requests for access. Let me refer first to the records, then to the sources of the requests.

It is almost impossible to describe the range of records covered by 120 consultations; indeed, a single consultation may sometimes involve thousands of records of several types. Moreover, a great deal of correspondence, discussion, search, and analysis may be required just to determine what is the nature of the records which may be within the ambit of the request. This is especially likely to be true of requests that are less specific and more categorical in their terms. Nevertheless, within these limitations, and with considerable trepidation about the value or accuracy of summary descriptions, here are some illustrative samples:

Cost and income studies of producers in a commodity subsidy program; regulatory food inspection records; records of a defunct broker; a list of growers of a certain fruit; applications to participate in regulated business activities; records of private commodity sales; various aircraft accident report documents; certain welfare benefit records; records of tests or repair experience on various goods including appliances, medications, foods, transportation equipment, and toys; records pertaining to the development and regulation of energy facilities and resources; records of complaints or investigations of possible fraud or other wrongdoing by servicemen, civil servants, government contractors, contractors' employees, and others; records of the home addresses or take-home pay of government and of private industry personnel; abandoned applications for patents; internal government staff communications of all kinds; individual responses to questionnaires about personal motives for career changes; various types of records of governmental investigations for factfinding and other purposes after casualties involving government activities; instructions or guidance to government negotiators, auditors or other agents; records about plans for the possible closing or opening of military or other government facilities; corporate information in support of claims or contract proposals to the government together with agency evaluations of them; applications for scientific or other research grants together with evaluations of their probable merits; economic forecasts and property appraisals; agency communications with foreign government officials and with State government officials; reports of panels appointed to decide whether an employee should be examined by a psychiatrist; background reports and recommendations about applicants for positions; various records of advisory groups or of interview programs that were designed to develop or collect facts, or opinions in order to improve air safety regulation or some other Federal program; records of performance by contractors; records in civil rights matters; records of inquiries by an agency into the efficiency of one of its own units; reviews of a State's operations in a joint Federal-State program; records of Indian tribes; studies of economic concentration in certain industries; preliminary records for planning a reduction of agency personnel; market surveys; leave records of government employees holding second jobs; records of private participations in government-insured loans; correspondence between former Presidents and foreign leaders; records of activities under the antidumping law; and inquiries from importers about the dutiability of certain foreign products.

The descriptions of records I have just given you or described to you may seem a bit overwhelming, but they are necessarily superficial. They do little more than suggest what the records themselves may contain, how they were made, and how they are used. Yet, all of these factors—the contents, origin, and use of the records—may be important in trying to decide whether they are exempted from compulsory disclosure under the act, and also in deciding whether, even if so exempt, they should nevertheless be released, as a matter of policy or discretion. The latter decision, of course, is one of the agency, but the committee will sometimes suggest to an agency that difficult decisions about the exempt status of records may become unnecessary if there is a discretionary release.

I understand there is also some interest in the kinds of sources of the requests that reach the committee. We have only an incomplete picture of the kinds of

sources of the requests that reach the committee; for instance, we may not always know whether the requester is a lawyer, or if he is we may not know whom he represents, and even if we know who his principal is, we may not know the nature of the latter's interest. Such matters, of course, need not be disclosed by a requester under the act.

Within these limitations, and allowing for some overlapping of categories of requesters, the sources of the requests which led to the 120 committee consultations have apparently included the following: about 17 from business firms, including defense contractors, unsuccessful bidders, and regulated companies; about 17 from various "public interest" groups such as those of Mr. Nader; about 15 from Government employees, servicemen, or unions; about 14 from newspapers, reporters, or other media sources; about 10 from scholars or writers; about 10 from litigants in unrelated civil cases such as accident damage suits; about eight from "cause" groups such as peace, civil rights, etc.; four from trade associations; four from present or former legislators; four from persons who were the subjects of the law enforcement records which they requested; and the rest generally from lawyers and other citizens about whose interests we have no information whatsoever.

What has been the pattern of the committee's reactions to the cases which the agencies have brought to it? Here again, there are so many complexities, qualifications, and uncertainties that an attempt to summarize these reactions with any precision would probably be misleading if not impossible. But broadly speaking, our estimate of our own experience is that the committee's reactions in its 120-odd consultations can be grouped into the following general pattern: In about 40 instances, or about one-third of the consultations, the committee's reaction has been that the records the agency was planning to withhold were clearly or very probably exempt from compulsory disclosure and would be so held in case of litigation. Such a reaction, like most of the committee's reactions, is usually reached only after both an analytical and a judgmental appraisal of the controversy and its circumstances. Even when denials seem clearly authorized, the committee may work in the direction of greater disclosure, as by reminding the agency that an exemption is only an option to deny, not a directive to do so. The committee also will occasionally suggest revisions in the proposed letter of final denial, explaining more clearly the reasons for the action. As a further comment about these clearly exempt cases, the agency may have decided before consulting the committee to give the requester much of what he wants, thus helping to narrow the issues and perhaps strengthening the case for denial of the remainder.

In a second one-third of our consultations, the committee's reaction has been that some or all of the records that the agency was planning to withhold must be regarded as not exempt or probably not exempt and should be released. This second group of about 40 instances breaks down further into about 15 cases where the records in dispute seemed essentially mixed—some probably exempt and some not—and about 25 cases where the committee told the agency that the records in dispute must be released or that the case for withholding them was very weak, although sometimes with the exception of a small amount of material which might be withholdable because of recency, names or identifying details, or other reasons.

The remaining third of the consultations consists chiefly of inbetween cases, those in which the dominant note in the committee's reaction, after reviewing the various factors pro and con, was doubt or uncertainty. This group, however, also included a few instances in which the committee's principal reaction was to suggest an alternative solution or a practical accommodation of the dispute. The doubtful cases often involve situations in which the committee felt the agency had sound legal grounds for the proposed denial, but that nevertheless there would be considerable risk of defeat in case of litigation. Also included in this uncertain group are situations where an analysis of the terms of the law seems to point one way but the facts, viewed in the light of current ideas of public policy, seem to point the other. I should add that such elements of uncertainty may also be present, although in lesser degree, in the more numerous cases where the committee definitely feels that the records in question are, or are not, exempt.

To what extent do the agencies consult the committee as they were asked to do in the Department's 1969 memorandum, and to what extent do they follow its advice? While we do not have fixed procedures designed to check up on these

two points, our experience indicates a good degree of agency respect for our efforts.

We believe that, by and large, the agencies generally do get in touch with us when they have situations covered by the 1969 memorandum. Indeed, as the estimated 400 to 500 agency contacts with the committee that I mentioned earlier would indicate, they also get in touch with us on freedom of information problems that may technically be outside the terms of the 1969 memorandum, such as cases at an initial stage, cases where they have not yet tentatively decided to deny, situations where requests for access are only anticipated, and similar situations. These contacts, even when they do not lead to consultations, are nevertheless a significant adjunct to the committee's main work, because the chairman can often give some preliminary guidance immediately, or after discussion with one or more members of the committee, and that may solve the problem. The steady flow of these agency contacts or inquiries reinforces our belief that most agencies are generally faithful to our request in the 1969 memorandum.

We realize, of course, that there may be some variation among agencies in consulting us, and even variation within a given agency from time to time. If there are lapses, they may be due to factors like personnel turnover, oversight, or other reasons, such as for example an agency feeling that there is no need to consult in a situation which seems to them clearly identical to those previously discussed.

As to whether agencies that have consulted us follow our advice, it is our definite impression that they generally tend to do so. Here again we do not have any routine procedure for checking up on whether our advice is followed. Yet there are many times when the remarks of agency representatives during a committee consultation, or our subsequent contacts with the agency, leave little doubt that the agency will make available records which we have told them would probably be held not exempt. It is also quite likely that they will deny access when we have told them they were legally free to do so, because they were tentatively planning to deny access when they consulted us. However, in that substantial minority of cases in which the committee's final reaction was uncertainty, it would be hard to measure whether the agency followed our advice, although we believe a reaction of uncertainty has some influence in the direction of disclosure. On this whole question of following our advice, however, I must point out that it is just advice, not an order, that those who attend the committee consultations are not necessarily the agency decisionmakers, and that Congress in the act left the administrative decision up to each agency with respect to requests for its own records.

In conclusion, we at Justice are working with you in Congress as participants, within our own branch of Government, in the task of trying to insure the success of the Freedom of Information Act. The act is an epochal step in democratic government. Our experience indicates that the act is working, but that much additional effort, experience, good judgment, and good will may be needed to keep it working and to improve its operations. You may be assured the Department of Justice will continue to give its best efforts toward a fair, reasonable and effective administration of the act.

(Whereupon, at 12:05 p.m., the hearing was recessed, to reconvene at 10 a.m., Tuesday, March 14, 1972.)

U.S. GOVERNMENT INFORMATION POLICIES AND PRACTICES—ADMINISTRATION AND OPERATION OF THE FREEDOM OF INFORMATION ACT

(Part 4)

TUESDAY, MARCH 14, 1972

HOUSE OF REPRESENTATIVES,
FOREIGN OPERATIONS AND
GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:15 a.m., in room 2203, Rayburn House Office Building, Hon. William S. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives William S. Moorhead, John N. Erlenborn, and Paul N. McCloskey, Jr.

Staff members present: William G. Phillips, staff director; Norman G. Cornish, deputy staff director; and William H. Copenhaver, minority professional staff, Committee on Government Operations.

Mr. MOORHEAD. The Subcommittee on Foreign Operations and Government Information will please come to order.

In our fourth day of the current series of hearings on the status of the American people's right to know the facts about their Government's business, we intend to explore one of the more vexing problems coming out of the operation of the Freedom of Information Act. This is the problem of the fees charged by agencies for the searching and copying of records requested by the public. The Freedom of Information Act in subsection (a)(3) specifically authorizes the establishment of user fees as a means of recouping the cost of providing the requested information.

At this time, all agencies affected by the act have established a fee schedule. The most striking overall impression gained from an overview of these schedules is their lack of uniformity. The fees charged to the public for copying of documents ranges from a low of 5 cents per page to a high of $1 per page. Most agencies charge a fee of from $3 to $5 per hour for the time involved in searching for the requested information, and many agencies assess a fee of from $3 to $5 for the certification of requested records.

The subcommittee has also found that the incidence of charges levied under the published fee schedules are similarly erratic. In one instance an executive department has alleged that information for which a search fee of up to $20,000 could have been charged was furnished for only the cost of copying. In other cases, it appears that

departments have estimated fees of up to $100,000 for the compilation of available information. The conclusion is that the departments in question were using the fee schedule as a means of effectively denying the information to the party making the request.

Although the authority to impose fees was designed to offset the cost of the Government for the provision of requested information, it is questionable whether this intent is effectively being carried out. One regulatory agency did a statistical study of this problem. About 34,000 items for which a fee could have been charged were handled during the fiscal year in question. The fees collected would have amounted to about $17,000. However, some 11,000 bills would have been mailed to collect these fees. Since it costs this agency $1.60 to send out a bill, the cost of billing would have been about $17,600—or about $600 more than the amount they could have collected. At last word, the agency is still pondering the problem.

Many agencies have circumvented the copying cost problem by leasing copying facilities to private companies who charge the public for the services. The charges—which obviously include a profit margin for the company—are also a matter of concern to this subcommittee.

Today, we will hear testimony from a number of witnesses who have detailed knowledge of and experience with this problem.

Our first witness is the Honorable Roger C. Cramton, Chairman of the Administrative Conference of the United States. Appearing with Mr. Cramton is Mr. John F. Cushman, Executive Director of the Administrative Conference. The Administrative Conference of the United States is an advisory body charged with developing improvements in the legal and administrative procedures of the various Federal agencies and departments.

In 1971 the Conference promulgated recommendation No. 24 entitled "Uniform Implementation of the Freedom of Information Act." This recommendation, coupled with a detailed study of the problems inherent in the operation of the act, was forwarded to all agencies.

Chairman Cramton will address himself to the results of this and other related recommendations this morning.

I would like to add at this time that the subcommittee is most grateful for the assistance provided in the preparation for these hearings by the Administrative Conference through its Executive Director, Mr. Cushman.

Also to appear before the subcommittee this morning are Mr. Reuben Robertson, an attorney who is intimately familiar with executive department activities in the information field; Mr. Harrison Wellford and Mr. Peter Schuck, both from the Center for the Study of Responsive Law.

Mr. Wellford and Mr. Schuck have been litigants under the Freedom of Information Act and have had extensive experience with bureaucratic delay and evasion by departments unwilling to provide information to the public.

Mr. Bertram Gottlieb of the Transportation Institute also will testify this morning.

I will now call on Mr. Cramton to answer the question of today: to fee or not to fee.

Mr. Cramton.

STATEMENT OF ROGER C. CRAMTON, CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES; ACCOMPANIED BY JOHN F. CUSHMAN, EXECUTIVE DIRECTOR

Mr. CRAMTON. Mr. Chairman, I am delighted to appear at a hearing at which such vital matters as those spelled out by the chairman in his opening statement are under consideration.

The Administrative Conference has been devoting a great deal of effort and activity to the Freedom of Information Act and its implementation and to other problems of citizen participation in and public knowledge of, governmental activities that are closely related to the administration and effectiveness of the Freedom of Information Act. I would like to start by outlining briefly some of these other activities of the Conference before turning to a more detailed discussion of recommendation No. 24.

The right of the public to know about the activities of its Government and to have the opportunity to participate in a meaningful way in proceedings which establish major policies are matters which are at the core of a number of significant Conference recommendations.

This subcommittee is familiar with recommendation 16 of the Conference which urges elimination of the exemption from the rulemaking provisions of the Administrative Procedure Act of proceedings which relate to "public property, loans, grants, benefits, or contracts." The Conference, concluding that many actions falling within the exemption involved matters of great public interest and concern, called for legislation to repeal the exemption and also for agencies voluntarily to utilize public notice and comment before promulgating rules of this character. Experience thus far justifies the Conference's prediction that broadened public participation in such important matters as the use and disposition of public lands would lead to more informed governmental rulemaking.

I am pleased to report that recommendation 16 has received wide acceptance by the agencies most directly affected. In this endeavor, our efforts at implementation were substantially aided by the inquiries this subcommittee sent requesting a report on what steps agencies had taken to comply. Virtually all rulemaking involving public property, loans, grants, and benefits is now open to public notice and comment; only with respect to public contracts does the older practice continue.

More recently the Conference dealt broadly with the question of public participation in formal administrative proceedings. It recommended that agencies should encourage and assist the participation of groups that otherwise would be inadequately represented. In addition, each agency was asked to adopt procedures which minimize the cost of public participation by such steps as making transcripts available at a minimal cost of reproduction. Perhaps in questioning we can explore that important matter more fully. It is a matter on which the assistance of this subcommittee in pressing agencies for compliance would be of great benefit.

The National Environmental Policy Act of 1969, of course, has been a strong force in the same direction of citizen participation and open government. The act, as you know, requires Federal agencies, when engaged in major actions that will substantially affect the environ-

ment, to draft, circulate, and receive comments on environmental impact statements. This procedure has had the effect of opening formerly secret areas of governmental decisionmaking to public notice and comment. The recent newspaper discussion of the underground testing on Amchitka Island is merely one example of an important public decision which for the first time has been opened to public scrutiny by the requirements of NEPA.

It is my view that underlying that statute is a similar objective to that underlying the Freedom of Information Act. The two work in the same direction and reinforce each other. They dovetail, in effect, as part of the quest for broadened public participation in and knowledge of Government.

The conference's concern for broadened public participation in the administrative process has extended to the question of representation for otherwise inadequately represented groups. An early conference recommendation (No. 5) dealt with the need for more adequate representation of poor people in agency rulemaking.

I have subsequently worked with congressional committees, including subcommittees of the Committee on Government Operations, in the development of proposals to establish a new Federal agency to advocate the interests of consumers in proceedings before other Federal agencies.

Our interest in public information practices has also extended to the improvement of Government publications. I do not have to tell this subcommittee that the Federal Register, although of great use to lawyers and specialists as an official record, is not of great helpfulness to citizens and laymen in terms of keeping track of what the Government is doing. Most of the population does not even know the Federal Register exists, to say nothing about meaningfully using it.

In order to bring into the forefront the vast amount of useful information which the Federal Register contains, the Administrative Conference recommended the publication of a consumer bulletin. Such a bulletin is now published by the Office of Consumer Affairs. It has a wide circulation and provides timely information in layman's language about a great many matters of general public interest pending before Government agencies.

Finally, let me mention in passing the Conference's continuing concern with related problems such as: (1) broad discovery rules in agency proceedings; (2) the need for agencies to articulate their rules and policies in deciding cases or in undertaking any action; and (3) the need for paring down the degree and scope of discretion that exists in many parts of the informal administrative process.

Three recently completed studies of the Conference which deal with specific functions of Government that are part of this informal administrative process fall into the third category. One deals with the "no action" letter procedures of the Securities and Exchange Commission; another deals with the practices of the Renegotiation Board; and a third deals with change-of-status applications before the Immigration and Naturalization Service. A number of other studies are now pending which deal with important aspects of the informal administrative process.

The Freedom of Information Act was a major landmark in the citizen's "right to know" about Government. It shifted the burden of

proof to the Government to establish the applicability of one of the act's nine exemptions before a document could be withheld from any member of the public. While the agencies did not revise their information policies 180 degrees overnight, the act has worked a substantial change in the attitudes and practices of nearly every Federal agency. I have the impression, that I think can be supported, that information is now more widely and easily available than it was prior to the act's effectiveness in 1967. In short, I think the Information Act can be viewed as one of the success stories of modern government in an era in which the credibility of government and lack of success of many governmental measures are foremost on people's minds.

Despite the substantial progress, however, uncertainties and problems remain in abundance. Neither the act nor its judicial gloss make it entirely clear what information falls within the broadly worded exemptions. Agencies and reviewing courts alike have had difficulty in dealing with an enactment that purports to take no account of the citizen's reasons for requesting information and the use that he plans to make of it. Complaints continue to abound of foot dragging and unnecessary redtape on the part of some agencies in making information available that the statute clearly contemplates should be made available.

In this context, it was the view of the Conference that we could make an impact on implementation of the act by reviewing one of the most recently available tests of an agency's general intent to comply with the act by evaluating the regulations that an agency publishes in the Federal Register which sets forth the means by which it purports to comply with the act. For the purpose of this study, we had the benefit of the services of a qualified academic consultant, Prof. Donald A. Giannella of the Villanova Law School. Professor Giannella, on the basis of a very large-scale study of existing agency practices, rules and actions took the position that the procedures by which Government carries out the act's requirements are important, and that further effort to handle information requests quickly, efficiently, and adequately was needed. Also, he concluded that to explain what the Government does in dealing with information requests is extremely important.

Recommendation 24, adopted in May 1971, is in three parts. Part A sets forth five general principles that agencies should conform to in handling requests for information.

These are:

(1) a restrictive interpretation of the exemptions authorizing nondisclosure;

(2) full assistance and timely action on public requests for information;

(3) disclosure to the fullest extent possible of all but exempt parts of documents;

(4) specification of reasons when requests for information are denied, together with a statement as to how the denial may be appealed and to whom; and, finally,

(5) minimum fees for providing information, which should be waived when it is in the public interest to do so.

Part B of the recommendation states that each agency should adopt procedural rules to effectuate the above principles and sets

forth detailed guidelines as a model of the kinds of procedures that are appropriate for this purpose.

Part C calls upon each agency to establish a fair and equitable fee schedule relating to the provision of information. It further proposes that a committee of representatives from the Office of Management and Budget, the Department of Justice, and the General Services Administration should establish criteria for determining what are fair and equitable fees.

Recommendation 24 was communicated to all Federal agencies. They were asked to consider it seriously. They were also asked to respond to us by a given date as to the extent to which they had taken action pursuant to it and what further plans they had for such action. We have now received comments from all but a handful of Federal agencies.

Looking first to the five general principles of the recommendation, the record of compliance revealed by these agency responses is good. This assumes, of course, that compliance means a statement of intention to adhere to these principles in practice as distinguished from merely having them publicly stated in regulations. On this basis, we have rated about 25 agencies as in substantial compliance with the policies of the recommendation, and 11 agencies in partial agreement, with further study underway.

Turning to compliance with the major specific proposals of the guidelines, the record becomes more checkered. The regulations of the General Services Administration were relied upon heavily in drafting the guidelines, and, therefore, they are very good. Many other agencies have good rules, even though they differ in some respects from the model rules proposed by the Conference, or are silent in some respects. The Civil Aeronautics Board revised its rules in 1971 to bring them into full compliance with the Conference's recommendations. This is the only agency to date to have taken this step. We are thus faced with the situation where most agencies agree with the principles of the recommendation, but many have not reduced them to specific rules.

In testing the extent of compliance we look particularly for the following:

(1) Is an information office or official adequately identified?

(2) Must requests be made on a special form?

(3) Are there rules requiring prompt handling of requests, statements of reasons for denials, and procedures for appeals?

(4) What provision, if any, is made for charging for information? And,

(5) Are these fees reasonable?

In general, agency rules are good in identifying an office where the public may go or write for information. In this connection, I would point out that the descriptive information about the agencies now contained in the U.S. Government Organization Manual in a special box is of considerable help in this connection.

Very few agencies require an application for information to be submitted on a special form. Even those that normally require a form state that they waive it in most instances where the request is readily identifiable and readily identifies the information sought.

On the other hand, very few agencies have specific rules requiring that agencies respond to requests for information within a given time.

Ten days was suggested as the norm in the Conference's model rule. Many agencies state that requests are handled promptly, but there is no detailed data that we are aware of that reveals the relative promptness of various agencies in handling information requests. I would hope that that piece of data would be filled out either by the work of this committee or by a further study of the Administrative Conference.

Similarly, very few agencies' rules provide for giving reasons for the denial of a request for information. The practice in many agencies is to cite the exemption relied on but without giving any explanation as to why the requested information falls within it.

Most agency rules state the office or officer to which an internal agency appeal may be taken. The time, again, in which the appeal must be taken, however, is rarely stated, nor is the time for response.

The final part of recommendation 24 deals with the matter dealt with in Chairman Moorhead's opening statement, the appropriate fees to be charged for the provision of information. As noted earlier, the guidelines suggested that this was a matter in which an interagency committee composed of representatives from OMB, Justice and GSA should establish uniform criteria for determining fair and equitable fee schedules.

The Office of Legal Counsel took the initiative in calling a meeting of this interagency committee last summer. The interagency committee reached several conclusions:

(1) Fee schedules for routine reproduction or photocopying of documents are often too high;

(2) Charges for time spent in routine search or in monitoring reproduction should be at a clerical rate;

(3) Considerable flexibility is necessary with respect to fees for nonroutine compilations and reproductions of files where searches may require use of professional, operating, or management personnel. This last problem is particularly acute because to charge actual costs would often result in a prohibitively high fee, thus frustrating the primary intent of the Freedom of Information Act.

The agency responses to our requests for information on fee schedules, and a review of some of the applicable provisions in the Code of Federal Regulations, reveal the following:

Almost every agency has a rule which calls for charging fees.

Again, almost every agency has a rule permitting the waiver of any charge in appropriate cases and most make no charge where costs would be $1 or less. It should be observed that an immense amount of material is furnished upon request, either orally or in writing, without any charge at all.

Several agencies have a mandatory minimum charge for handling information requests whether any documents are provided or not. But mandatory fees are often not charged even when applicable. Chairman Moorhead gave a good example of one instance in which a mandatory charge was not made, and the reason why it was not made was that it would cost more to collect it than the amount involved in collecting it.

Copying charges vary widely, from 5 cents per page at Agriculture to perhaps as high as $1 per page at the Selective Service System. A charge of 25 cents per page is most common.

Clerical research charges vary widely, from a low of $3 per hour at the Veterans' Administration to as much as $7 per hour at the Renegotiation Board.

The question of fees is important and complex. A simple request by an individual for information that is readily available in a prepackaged form should normally be handled without charge as a part of the agency's general duties. When an agency is proceeding against an individual, and his defense requires the assembling of information in the agency's files, the work should be done at the agency's expense, especially if the person is indigent or of limited resources. On the other hand, Government should not be expected to assemble material for private or commercial use without charging the requester the full cost of the effort. Thus, for example, a commercial mailer who desires to assemble a mailing list from Government files or to obtain other information which has commercial value should, in my view, reimburse the agency for the clerical and professional services involved in reproducing the information.

These few examples do not begin to deal with the immense variety of situations which are characteristic of the real world, but in my view they make the point. In the last analysis, a fair and rational system of providing information to the public must take into account the character of the information requested and its value to the person who requests it. And this is particularly true with respect to the assessment of fees.

It is my hope that the illumination of agency practices provided by this hearing will encourage more Federal agencies to adopt the procedures proposed in the guidelines portion of recommendation 24. Emphasis should also be given to reducing the charges made by many agencies for reproduction of material. While a search fee may sometimes be appropriate, there is no justification for photocopying fees in excess of 10 cents per page.

As a final general observation, I am persuaded that the conference approach, aided by legislation oversight such as that provided by this subcommittee, is a most effective means of achieving compliance with the Freedom of Information Act. The experience of the Conference in considering specific freedom-of-information problems, such as the "no-action" letter procedures of the SEC or the "change-of-status" procedures of the INS, indicates that meaningful compliance with the act's requirements sometimes calls for a delicate balancing of competing and often equally compelling policies.

I am not now speaking of compliance with the strict letter of the law. That will come in due course. I am talking about persuading agencies to go the extra step, to release that which arguably may fall within the fringes of one of the exemptions but which would, by disclosure, be in the public interest.

What is needed is the development of a climate of opinion in which agencies regard the information they collect or require as public property. But attitudes cannot be mandated; they can only be molded. The Conference has the opportunity to work cooperatively with the agencies to achieve this objective. We will make every effort to use this opportunity wisely.

Thank you.

Mr. Moorhead. Thank you, Mr. Cramton.

I notice that you have appended to your statement appendix A, "Information Concerning the Administrative Conference of the United States." I think that should be made a part of the record, and, without objection, it will be made a part of the record.

(Mr. Cramton's statement, with appendix A attached thereto, follows:)

PREPARED STATEMENT OF ROGER C. CRAMTON, CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Mr. Chairman and members of the subcommittee. I appreciate the invitation to appear and testify in the hearings before this subcommittee on the administration and operation of the Freedom of Information Act. This is a subject of the utmost importance and one to which the Administrative Conference of the United States is devoting substantial time and attention.

As you know, the Administrative Conference of the United States—a permanent, independent Federal agency which began functioning in early 1968—is engaged in the improvement of the procedures of all Federal departments and agencies. The objective of the conference is to assist agencies in the more effective performance of their functions while providing greater fairness and expedition to participants and lower costs to taxpayers. The 86-member conference has a special expertise on questions of administrative law and procedure. A brief description of the Administrative Conference and some of its current activities is contained in an appendix to this statement.

I appear today in my capacity as the official spokesman for the Administrative Conference of the United States, since the Conference has taken a number of formal actions which bear on the availability of information to the public. As to matters on which the Conference has not acted, I will be expressing my personal views.

I plan to devote the major part of my remarks today to Conference recommendation 24—Principles and Guidelines for Implementation of the Freedom of Information Act. However, by way of background, I should first like to describe briefly a few closely related studies because they bring into focus the extraordinary range of matters which are relevant to any thorough discussion of Government information practices and policies.

The right of the public to know about the activities of its Government and to have the opportunity to participate in a meaningful way in proceedings which establish major policies are matters which are at the core of a number of significant Conference recommendations. This subcommittee is familiar with recommendation 16 of the Conference which urges elimination of the exemption from the rulemaking provisions of the Administrative Procedure Act of proceedings which relate to "public property, loans, grants, benefits or contracts." The Conference, concluding that many actions falling within the exemption involved matters of great public interest and concern, called for legislation to repeal the exemption[1] and also for agencies voluntarily to utilize public notice-and-comment procedure before promulgating rules of this character. Experience thus far justifies the Conferences' prediction that broadened public participation in such important matters as the use and disposition of public lands would lead to more informed Governmental rulemaking.

I am pleased to report that recommendation 16 has received wide acceptance by the agencies most directly affected. In this endeavor our efforts at implementation were substantially aided by the inquiries this subcommittee sent requesting a report on what steps agencies had taken to comply. Virtually all rulemaking involving public property, loans, grants and benefits is now open to public notice and comment; only with respect to public contracts does the older practice continue.

More recently the Conference recommended that in proceedings where decisions are preceded by notice and an opportunity to participate, each agency should clearly indicate that persons whose interest or views are relevant and not otherwise represented should be allowed to participate (recommendation 28). In this connection, agencies should adopt procedures to minimize the cost of public participation by such steps as making transcripts available at minimal or simple reproduction costs.

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[1] S. 1413, 92d Cong., first sess. (1971).

The National Environmental Policy Act of 1969, of course, has been a strong force in the same direction of citizen participation and open government. The act, in addition to requiring all Federal agencies to consider environmental values in their decisionmaking, requires the drafting, circulation, and receipt of comments on an environmental impact statement with respect to any major Federal action that may significantly effect the environment. The environmental impact statement procedure has had the effect of opening formerly secret areas of governmental decisionmaking to public notice and comment. It has provided strong reinforcement for the similar objectives of the Freedom of Information Act. It is only fitting that having testified last week in a Senate hearing which was exploring the administration and effectiveness of NEPA,[2] I should be similarly engaged this week with respect to the Information Act. Both are landmarks in the quest for broader public participation in and knowledge of government.

The Conference's concern for broadened public participation in the administration process has extended to the question of representation for otherwise inadequately represented groups. In 1968, a Conference recommendation was addressed to the adequacy of representation of the poor in agency rulemakings affecting their interests (recommendation 5). I have subsequently worked with congressional committees and testified in both Houses in support of proposals to establish a new Federal agency to advocate the interests of consumers in proceedings before other Federal agencies.[3]

Our interest in public information practices has also extended to Government publications. As you know, the Federal Register rarely serves as "actual" notice of agency action, as distinguished from constructive or legal notice. Except for lawyers, lobbyists, and public interest groups, most people do not even know that the Federal Register exists or for what purpose. In order to bring into the forefront the vast amount of useful information it contains, we recommended the publication of a consumer bulletin (recommendation 4). Such a bulletin is now published by the Office of Consumers Affairs, Executive Office of the President. The publication has a wide circulation and provides timely information in layman's language about a great many matters of general public interest that are pending before Government agencies.[4]

Finally, I would like to note that we have called upon agencies to adopt broad discovery rules (recommendation 21) and to articulate agency policies (recommendation 25). We have been particularly concerned about the lack of published precedents, rules and regulations, particularly in the area of informal proceedings or discretionary justice. Here I refer to recommendations addressed to specific functions such as "no-action" letter procedures of the SEC, the practices of the Renegotiation Board, and change-of-status applications before the Immigration and Naturalization Service (recommendations 19, 22, and 27).

As you can see from this very superficial description of some of our recommendations, the work of the Administrative Conference in seeking to improve administrative procedures touches almost constantly on freedom of information questions.

With this brief background, let me now turn to recommendation 24.

The Freedom of Information Act was a major landmark in the citizen's right to know about Government. It shifted the burden of proof to the Government to establish the applicability of one of the act's nine exemptions before a document could be withheld from any member of the public. While the agencies did not revise their information policies 180 degrees overnight, the act has worked a substantial change in the attitudes and practices of nearly every agency. There is a general impression that information is more widely and easily available than it was prior to the act's effectiveness in 1967. In short, the act is a success story in the possibility of orderly change of bureaucratic organizations.

But despite the substantial progress, uncertainties and problems remain in abundance. Neither the act nor its judicial gloss make it entirely clear what information falls within the broadly worded exemptions. Agencies and reviewing

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[2] Statement of Roger C. Cramton before the Committee on Interior and Insular Affairs and the Committee on Public Works, U.S. Senate, Mar. 7, 1972.

[3] Hearings on H.R. 14, 15, 16 and H.R. 3809, Subcommittee on Legislation and Military Operations, House Committee on Government Operations, May 6, 1971; S. 1177 and H.R. 10835, Subcommittee on Executive Reorganization and Government Research, Committee on Government Operations, U.S. Senate, Nov. 4 and 5, 1971.

[4] Other relevant recommendations in this area include proposed changes in the U.S. Government Organization Manual to make it a more informative document and in the Code of Federal Regulations to improve its indexing and statutory reference materials. (Recommendations 2, 3, and 12.)

courts alike have had difficulty in dealing with an enactment that purports to take no account of the citizen's reasons for requesting information and the use that he plans to make of it. Complaints continue to abound of foot-dragging and necessary redtape on the part of some agencies in making information available that the statute clearly contemplates should be made available. Thus it was the view of the Conference that one most visible test of an agency's intent to comply wtih the act would be through an evaluation of the regulations it publishes in the Federal Register which set forth the "descriptions of its central and field organization and the established places at which * * *, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions." (5 U.S.C. 552(2)(1)(A)).[5]

An excellent study, which formed the basis for the Conference recommendation on this subject, was prepared for the Conference by Prof. Donald A. Giannella, Professor of Law, Villanova Law School.[6] He stated the objective of his study as follows:

"The ideal goal of a free and open information policy which underlies the act requires all information requests to be treated equally. The judicial remedy written into the act will not assure this goal as a practical matter. Agency policies, regulations and practices will be more important in realizing it. The guidelines proposed are derived from this basic policy goal with an eye to the practicalities of agency operations. Although they are tailored to meet certain problems that have arisen under the act, they are primarily put forward as an attempt to develop reasonable and practical procedures for agencies to adopt to implement the Freedom of Information Act."

Recommendation 24, adopted in May 1971, after spirited debate, is in three parts. Part A sets forth five general principles that agencies should conform to in handling requests for information. These are:

(1) a restrictive interpretation of the exemptions authorizing nondisclosure;

(2) full assistance and timely action on public requests for information;

(3) disclosure to the fullest extent possible of all but exempt parts of documents;

(4) specification of reasons when requests for information are denied, together with a statement as to how the denial may be appealed; and

(5) minimum fees for providing information, which should be waived when in the public interest.

Part B of the recommendation states that each agency should adopt procedural rules to effectuate the above principles and sets forth detailed guidelines as a model of the kinds of procedures that are appropriate for this purpose.

Part C calls upon each agency to establish a fair and equitable fee schedule relating to the provision of information. It further proposes that a committee of representatives from the Office of Management and Budget, the Department of Justice, and the General Services Administration should establish criteria for determining what are fair and equitable fees.

The substance of this recommendation was discussed with a large number of agencies while it was in the process of formulation. It should be emphasized that the guidelines in part B were the form in which the recommendation was originally proposed and circulated. These specific proposals, concurred in by the Office of Legal Counsel, Department of Justice, were found acceptable to most of the agencies. The Assembly cast them in the form of guidelines in the belief that the Conference should not propose detailed rules; but retained them as a model with which agencies should compare their own procedures.

The heads of all agencies that are members of the Conference received the official recommendation in May 1971. Follow-up letters were sent in December 1971 to those who had not responded or who have had the matter under study. An additional 20 agencies have also been asked to comment. In late January 1972, we furnished the staff of the subcommittee with copies of the responses received as of that time, and we will be pleased to see that your file is kept current in the future. As of today, most of the agencies having significant public information responsibilities have commented on the recommendation.

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[5] The Conference in 1969 made a study of the indexing requirements of the act, 5 U.S.C. 552(a)(2). However, the study did not result in any recommendation since the statute was then quite new, there was wide disparity in interpreting the index requirements and cost and manpower seemed to be overriding considerations in the publication of indexes.

[6] "Agency Procedures Implementing the Freedom of Information Act: A Proposal for Uniform Regulations," 23 Admin. L. Rev. 217–70.

Looking first to the five general principles of the recommendation, the record of compliance is good. This assumes that compliance means statements of intentions to adhere to these principles in practice as distinguished from having them publicly stated in regulations. On this basis we have rated about 25 agencies as in substantial compliance with the policies of the recommendation and 11 agencies in partial agreement, with further studies underway. A number of agencies have yet to respond.

Turning to compliance with the major specific proposals of the guidelines, the record becomes much more checkered. The regulations of the General Services Administration were relied upon heavily in drafting the guidelines and therefore are very good. Many other agencies have good rules even though they differ in some respects from the model rules proposed by the Conference or are silent in some respects. The Civil Aeronautics Board revised its rules, effective November 27, 1971 to bring them into full compliance with the recommendation.[7] But this is the only agency to date to have taken this step. We are thus faced with a situation where most agencies agree with the principles of the recommendation but many have not reduced them to specific rules.

In testing the extent of compliance we look particularly for the following: (1) Is an information office or official adequately identified? (2) Must requests be made on a special form? (3) Are there rules requiring prompt handling of requests, statements of reasons for denials and procedures for appeals? (4) What provision, if any, is made for charging for information? (5) Are the fees reasonable?

In general, agency rules are good in identifying an office (or offices) where the public may go or write for information. In this connection, I would point out that the descriptive information about the agencies contained in the U.S. Government Organization Manual now identifies in a special box the office (or offices) where further information can be secured. This was an important aspect of recommendation 2 that has been fully implemented.

Very few agencies require an application for information to be submitted on a special form. Even those that normally require a form state that they waive it in most instances where the request readily identifies the information sought.

Very few agencies have specific rules requiring that agencies respond to requests for information within a given time (10 days was suggested as the norm in the Conference model rule). Many agencies state that requests are handled "promptly," but there is no detailed data indicating the relative promptness of various agencies in handling information requests.

Very few agency rules provide for giving reasons for the denial of a request for information. The practice in many agencies is to cite the exemption relied on, but without giving any explanation as to why the requested information falls within it. The Office of Legal Counsel of the Department of Justice is to be commended for the role it has assumed whereby agencies encountering difficult questions of interpretation of the exemptions to the act are encouraged to seek its advice. Cases referred probably involve only the surface of the iceberg, but they are likely to become most useful as a volume of precedential rulings is developed.

Most agency rules state the office or officer to which an internal agency appeal may be taken. The time in which the appeal must be taken, however, is rarely stated, nor is the time for response.

Some agency rules provide for making precedential rulings public, some agencies do it as a matter of good practice, but on the whole it is not clear that agencies are complying with the guidelines, much less the indexing requirements of the act in this regard.

The final part of the recommendation deals with appropriate fees to be charged for the provision of information. As noted earlier, the guidelines suggested that this was a matter in which a committee composed of representatives from OMB, Justice and GSA should establish uniform criteria for determining fair and equitable fee schedules. The Office of Legal Counsel took the initiative in calling a meeting on this subject last summer.

The interagency committee reached several conclusions: First, fee schedules for routine reproduction or photocopying of documents are often too high. Second, charges for time spent in routine search or in monitoring reproduction should

[7] 14 CFR Part 10, Section 310.

be at a clerical rate. Third, considerable flexibility is necessary with respect to fees for nonroutine compilations and reproductions of files where searches may require use of professional, operating, or management personnel. This last problem is particularly acute because to charge actual costs would often result in a prohibitory high fee, thus frustrating the primary intent of the Freedom of Information Act.

The agency responses to our requests for information on fee schedules and a review of some of the applicable provisions in the Code of Federal Regulations reveal the following:

Almost every agency has a rule which calls for charging fees.

Almost every agency has a rule permitting the waiver of any charge in appropriate cases and most make no charge where costs would be $1 or less. It should be observed that an immense amount of material is furnished upon request, either orally or in writing, without any charge at all.

Several agencies have a mandatory minimum charge for handling information requests whether any documents are provided or not. But mandatory fees are often not charged even when applicable.

Copying charges vary widely—from 5 cents per page at Agriculture to perhaps as high as $1 per page at the Selective Service System. A charge of 25 cents per page is most common.[8]

Clerical research charges vary widely—from a low of $3 per hour at the Veterans' Administration to as much as $7 per hour at the Renegotiation Board.

The question of fees is important and complex. A simple request by an individual for information that is readily available in a prepackaged form should normally be handled without charge as a part of the agency's general duties. When an agency is proceeding against an individual, and his defense requires the assembly of information in the agency's files, the work should be done at the agency's expense, especially if the person is indigent or of limited resources. On the other hand, Government should not be expected to assemble material for private or commercial use without charging the requester the full cost of the effort. Thus, for example, a commercial mailer who desires to assemble a mailing list from Government files or to obtain other information which has commercial value, should reimburse the agency for the clerical and professional services involved in producing the information. In the last analysis, a fair and rational system of providing information to the public must take into account the character of the information requested and its value to the person who requested it.

It is my hope that the illumination of agency practices provided by this hearing will encourage more Federal agencies to adopt the procedures proposed in the guidelines portion of recommendation 24. Emphasis should also be given to reducing the charges made by many agencies for reproduction of material. While a search fee may sometimes be appropriate, there is no justification for photocopying fees in excess of 10 cents per page.

As a final, general observation, I am persuaded that the Conference approach, aided by legislative oversight such as that provided by this subcommittee, is a most effective means of achieving compliance with the Freedom of Information Act. The experience of the Conference in considering specific freedom-of-information problems, such as the "no action letter" procedures of the SEC or the "change-of-status" procedures of the INS, indicates that meaningful compliance with the act's requirements sometimes calls for a delicate balancing of competing and often equally compelling policies. I am not now speaking of compliance with the strict letter of the law. That will come in due course. I am talking about persuading agencies to go the extra step—to release that which arguably may fall within the fringes of one of the exemptions.

What is needed is the development of a climate of opinion in which agencies regard the information they collect or acquire as public property. But attitudes cannot be mandated; they can only be molded. The Conference has the opportunity to work cooperatively with the agencies to achieve this objective. We will make every effort to use this authority wisely.

Thank you.

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[8] Some agency rules provide for charging a "reasonable fee" in undefined circumstances. Others have specific charges for special documents, photostatic copies, certified true copies, etc.

Appendix A.—Information Concerning the Administration Conference of the United States—March 1972

The Administrative Conference of the United States, a permanent, independent Federal agency, is engaged in the improvement of the procedures of Federal departments and agencies. The objective of the Conference is to assist agencies in the more effective performance of their functions while providing greater fairness and expedition to participants and lower costs to taxpayers.

The Administrative Conference Act (5 U.S.C. §§ 571–76) provides that the Administrative Conference shall consist of not more than 91 nor less than 75 members, of whom not more than 36 may be appointed from the private sector. The Chairman is appointed by the President for a 5-year term, with Senate confirmation; he is the only member who serves on a full-time, compensated basis. All other members, including the members of the council of the Conference, the governing board appointed by the President, contribute their services without compensation. In addition, the Conference is authorized to employ experts and consultants to research and report on particular subjects.

Since its activation in January 1968, the Administrative Conference has adopted 31 formal recommendations for improved procedures, some calling for legislation and the remainder calling for action on the part of the affected agencies. A number of additional recommendations will be considered at a forthcoming plenary session in June 1972. Many of the present recommendations have been implemented, and others are in the process of implementation. In addition, the conference study of an issue has led in several instances to immediate acceptance of procedural improvements by affected agencies, without the necessity of a formal recommendation.

Recent recommendations deal with such important subjects as:

Compliance by Federal agencies with the Freedom of Information Act.

Broadened public participation in Federal administrative proceedings.

Uniform procedures for the award of grants-in-aid, and compliance by grantees with conditions included in Federal grants-in-aid.

Exercise of discretion by the Immigration and Naturalization Service in change-of-status cases.

Procedures of the Food and Drug Administration for the formulation of food and drug standards.

Ten standing committees of the conference and the staff of the chairman's office, with the assistance of approximately 30 highly qualified academic consultants, are engaged in a wide variety of studies at the present time.

Current studies include the following:

FCC procedures for comparative broadcast licensing.

The administration and coverage of the Federal Tort Claims Act.

Devices for improved handling of citizen complaints against Federal administrative action.

The role of the chairman in independent regulatory agencies.

Admission and release procedures of the Veterans' Administration with respect to mental patients.

Department of the Interior procedures with respect to the leasing of Indian lands.

Procedures for expediting complex and protracted administrative cases.

The handling of disability benefit claims by the Social Security Administration and by other Federal agencies which administer disability programs.

Summary administrative action pending formal administrative adjudication.

Prosecutorial discretion in the enforcement of Federal regulatory crimes.

The use of trial-type hearings to develop rules of general applicability.

Conflict-of-interest problems in dealing with natural resources of Indian tribes.

Money penalties as an administrative sanction.

Procedures of the Federal Parole Board for the grant and revocation of parole.

Informal handling of timber rights by the Department of the Interior and of grazing rights by the Department of Agriculture.

Licensing procedures of Federal banking regulatory agencies.

The use of trial-type hearings in atomic energy licensing and regulation.

Handling of environmental issues in the licensing of power plants.

Procedures and policies of the U.S. Forest Service.

Regulatory procedures of the Department of Agriculture involving crop allotments and acreage quotas.

Procedures available to losing bidders for Government contracts.

Procedures for the negotiation, settlement, and suspension of protested rate filings.

Procedures for the development and use of statutorily required statements of environmental effect.

The use of publicity as an administrative sanction.

Handling by Federal agencies of incompetents' funds.

Advice to the public from Federal administrative agencies.

Preinduction judicial review of Selective Service system determinations.

"Adverse action" procedures for the discipline or removal of Federal employees.

Remedies for the resolution of property disputes between the United States and private persons.

A number of significant proposals have been made for the amendment and updating of the Administrative Procedure Act, which has now been in effect for 25 years. The Administrative Conference will devote a substantial portion of its efforts in 1972–73 to a systematic evaluation and review of proposed amendments of the APA. Systematic attention is also being given on a continuing basis to the development of minimum procedural standards applicable to the informal administrative process—the important but less visible activities of government which significantly affect millions of Americans each year.

The offices of the Administrative Conference of the United States are located at 726 Jackson Place NW., Washington, D.C. 20506. The chairman is Roger C. Cramton, formerly professor of law, University of Michigan.

Mr. MOORHEAD. You have also referred to the meetings with the Office of Management and Budget and the Office of Legal Counsel, Department of Justice. I have a letter from OMB dated March 6 on the general subject, and, without objection, that will be made a part of the record.

(The letter referred to follows:)

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., March 6, 1972.

HON. WILLIAM S. MOORHEAD,
Chairman, Foreign Operations and Government Information Subcommittee, Committee on Government Operations, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your letter of February 15, 1972, requesting that we designate a witness—someone familiar with the work of an interagency committee which grew out of a recommendation of the Administrative Conference of the United States regarding the Freedom of Information Act—to testify in hearings before your subcommittee on March 14.

As your letter indicates, the Administrative Conference issued its Recommendation No. 24, entitled "Principles and Guidelines for Implementation of the Freedom of Information Act," in the spring of 1971. The Conference's Recommendation No. 24 was in three parts, as follows:

A. General Principles. This part requested that agencies conform to a set of five listed general principles in handling requests for information.

B. Guidelines for Handling of Information Request. This part requested that each agency adopt procedural rules to effectuate the principles stated in part A, and set forth five pages of detailed guidelines to serve as a model of the kinds of procedures which would effectuate the principles stated in part A.

C. Fees for the Provision of Information. This part requested each agency to establish fair and equitable fee schedules for providing information. It recommended that a committee be established, composed of representatives of the Office of Management and Budget, the Department of Justice, and the General Services Administration, to determine a fair and equitable fee schedule. It was also recommended that the committee review agency fees to determine whether they complied with four criteria which were set forth in the recommendation.

Thereafter, OMB joined with Justice and GSA to establish a committee, as recommended in part C of the Conference's Recommendation No. 24. The committee concluded that fees charged by agencies were lacking in uniformity and

in some cases appeared to be excessive, and recommended that these matters be brought to agency attention. Action to give effect to this recommendation of the interagency committee is now in process, and I will be pleased to make a further report when that action is completed.

The interagency committee was not concerned with responses made by the agencies to parts A and B of the Administrative Conference's Recommendation No. 24. Neither as a member of the committee, nor independently, has the Office of Management and Budget received or reviewed the responses of agencies to the substantive recommendation contained in parts A and B. Consequently, we have no knowledge as to what steps are being taken or contemplated to implement (parts A and B of) the Conference's recommendations and we would have nothing to contribute to the forthcoming hearings of your subcommittee on the effectiveness of the Freedom of Information Act.

With a letter of September 2, 1971, we supplied detailed answers to the subcommittee's questionnaire regarding our own operations under the Freedom of Information Act, together with extensive supporting materials. That letter was supplemented by our two letters of September 3, 1972, responding to further inquiries from your subcommittee regarding the questionnaire.

I regret that we have no information regarding agency compliance with the recommendations of the Administrative Conference, except such as pertains to the Office of Management and Budget. Our response with respect to OMB was made in September 1971, and we understand a copy has been made available to you by the Conference. We shall, of course, be glad to furnish any further information the subcommittee may desire with respect to our own operations under the Freedom of Information Act.

Sincerely,

(Signed) GEORGE P. SHULTZ.
Director.

Mr. MOORHEAD. In addition, you have referred extensively to recommendation No. 24, "The Principles and Guidelines for Implementation of the Freedom of Information Act." Without objection, that will also be made a part of the record at this point.

(Recommendation No. 24 referred to above follows:)

RECOMMENDATION 24: PRINCIPLES AND GUIDELINES FOR IMPLEMENTATION OF THE FREEDOM OF INFORMATION ACT

The Freedom of Information Act, 5 U.S.C. § 552, expresses important policies with respect to the availability to the public of records of Federal agencies. To achieve free access to and prompt production of identifiable Government records in accordance with the terms and policies of the act, each agency* should conform to the statutory policy encouraging disclosure, adopt procedural regulations for the expeditious handling of information requests, and review the fees charged for providing information.

RECOMMENDATION

A. *General principles*

Agencies should conform to the following principles in handling requests for information:

1. Each agency should resolve questions under the Freedom of Information Act with a view to providing the utmost information. The exemptions authorizing nondisclosure should be interpreted restrictively.

2. Each agency should make certain that its rules provide the fullest assistance to inquiries, including information relating to where requests may be filed. It should provide the most timely possible action on requests for information.

3. When requested information is partially exempt from disclosure the agency should, to the fullest extent possible, supply that portion of the information which is not exempt.

4. If it is necessary for an agency to deny a request, the denial should be promptly made and the agency should specify the reason for the denial. Procedures for review of denials within the agency should be specified and any such review should be promptly made.

*The term "agency" as used herein denotes an agency, executive department, or a separate administration or bureau within a department which has adopted its own administrative structure for handling requests for records.

5. Fees for the provision of information should be held to the minimum consistent with the reimbursement of the cost of providing the information. Provision should be made for waiver of fees when this is in the public interest.

B. Guidelines for handling of information request

Each agency should adopt procedural rules to effectuate the principles stated in part A. To assist in this task the following guidelines are set forth as a model of the kinds of procedures that are appropriate and would accomplish this purpose.

1. *Agency assistance in making request for records.*—Each agency should publish a directory designating names or titles and addresses of the particular officer and employees in its Washington office and in its various regional and field offices to whom requests for information and records should be sent. Appropriate means should be used to make the directory available to members of the public who would be interested in requesting information or records.

Each agency should direct one or more members of its staff to take primary responsibility for assisting the public in framing requests for identifiable records containing the information that they seek. The names or titles and addresses of these staff members should be included in the public directory referred to above.

2. *Form of request.*—

a. *No standard form.*—No agency should require the use of standard forms for making requests. Any written request that identifies a record sufficiently for the purpose of finding it should be acceptable. A standard form may be offered as an optional aid.

b. *Categorical requests.*—

i. Requests calling for all records falling within a reasonably specific category should be regarded as conforming to the statutory requirement of "identifiable records" if the agency would be reasonably able to determine which particular records come within the request and to search for and collect them without unduly burdening or interfering with agency operations because of the staff time consumed or the resulting disruption of files.

ii. If any agency responds to a categorical request by stating that compliance would unduly burden or interfere with its operations, it should do so in writing, specifying the reasons why and the extent to which compliance would burden or interfere with agency operations. In the case of such a response the agency should extend to the requester an opportunity to confer with it in an attempt to reduce the request to manageable proportions by reformulation and by outlining an orderly procedure for the production of documents.

3. *Partial disclosure of exempt records and files.*—Where a requested file or record contains exempt information that the agency wishes to maintain confidential, it should offer to make available the file or a copy of the record with appropriate deletions if this can be done without revealing the exempt information.

4. *Time for reply to request.*—Every agency should either comply with or deny a request for records within 10 working days of its receipt unless additional time is required for one of the following reasons:

a. The requested records are stored in whole or part at other locations than the office having charge of the records requested.

b. The request requires the collection of a substantial number of specified records.

c. The request is couched in categorical terms and requires an extensive search for the records responsive to it.

d. The requested records have not been located in the course of a routine search and additional efforts are being made to locate them.

e. The requested records require examination and evaluation by personnel having the necessary competence and discretion to determine if they are: (a) exempt from disclosure under the Freedom of Information Act and (b) should be withheld as a matter of sound policy, or revealed only with appropriate deletions.

When additional time is required for one of the above reasons, the agency should acknowledge the request in writing within the 10-day period and should include a brief notation of the reason for the delay and an indication of the date on which the records would be made available or a denial would be forthcoming.

The 10-day time period specified above should begin to run on the day that the request is received at that office of the agency having charge of the records. When a request is received at an office not having charge of the records, it should promptly forward the request to the proper office and notify the requester of the action taken.

If an agency does not reply to or acknowledge a request within the 10-day period, the requester may petition the officer handling appeals from denials of records for appropriate action on the request. If an agency does not act on a request within an extended deadline adopted for one of the reasons set forth above, the requester may petition the officer handling appeals from denials of records for action in the request without additional delay. If any agency adopts an unreasonably long extended deadline for one of the reasons set forth above, the requester may petition the officer handling appeals from denials of records for action on the request within a reasonable period of time from acknowledgment.

An extended deadline adopted for one of the reasons set forth above would be considered reasonable in all cases if it does not exceed 10 additional working days. An agency may adopt an extended deadline in excess of the 10 additional working days (that is a deadline in excess of 20 working days from the time of initial receipt of the request) where special circumstances would reasonably warrant the more extended deadline and they are stated in the written notice of the extension.

5. *Initial denials of requests.*—

a. *Form of denial.*—A reply denying a written request for a record should be in writing and should include:

(*i*) A reference to the specific exemption under the Freedom of Information Act authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld.

(*ii*) An outline of an appeal procedure within the agency and of the ultimate availability of judicial review in either the district in which the requester resides or has a principal place of business, or in which the agency records are situated.

If the requester indicates to the agency that he wishes to have a brief written statement of the reasons why the exempt record is being withheld as a matter of discretion where neither a statute nor an executive order requires denial, he will be given such a statement.

b. *Collection of denials.*—A copy of all denial letters and all written statements explaining why exempt records have been withheld should be collected in a single central-office file.

c. *Denials; protection of privacy.*—Where the identity of a requester, or other identifying details related to a request, would constitute an unwarranted invasion of personal privacy if made generally available, as in the case of a request to examine one's own medical files, the agency should delete identifying details from copies of the request and written responses to it that are made available to requesting members of the public.

6. *Intra-agency appeals.*—

a. Designation of officer for appeals.—Each agency should publicly designate an officer to whom a requester can take an appeal from a denial of records.

b. Time for action on appeals.—There should be only one level of intra-agency appeal. Final action should be taken within 20 working days from the time of filing the appeal. Where novel and very complicated questions have been raised, the agency may extend the time for final action for a reasonable period beyond 20 working days upon notifying the requester of the reasons for the extended deadline and the date on which a final response will be forthcoming.

c. Action on appeals.—The grant or denial of an appeal should be in writing and set forth the exemption relied on, how it applies to the record withheld, and the reasons for asserting it. Copies of both grants and denials on appeal should be collected in one file open to the public and should be indexed according to the exemptions asserted and, to the extent feasible, according to the type of records requested.

d. Necessity for prompt action on petitions complaining of delay.—Where a petition to an appeals officer complaining of an agency's failure to respond to a request or to meet an extended deadline for responding to a request does not elicit an appropriate response within 10 days, the requester may treat his request as denied and file an appeal. Where a petition to an appeals officer complaining of the agency's imposition of an unreasonably long deadline to consider assertion of an exemption does not bring about a properly revised deadline, the requester may treat his request as denied after a reasonable period of time has elapsed from his initial request and he may then file an appeal.

C. Fees for the provision of information

Each agency should establish a fair and equitable fee schedule relating to the provision of information. To assist the agencies in this endeavor, a committee composed of representatives from the Office of Management and Budget, the Department of Justice, and the General Services Administration, should establish uniform criteria for determining a fair and equitable fee schedule relating to requests for records that would take into account, pursuant to 31 U.S.C. 483a (1964), the costs incurred by the agency, the value received by the requester and the public interest in making the information freely and generally available. The Committee should also review agency fees to determine if they comply with the enunciated criteria. These criteria might include the following:

1. *Fees for copying documents.*—In view of the public interest in making Government information freely available, the fee charged for reproducing documents in written, typewritten, printed or other form that permits copying by duplicating processes, should be uniform and not exceed the going commercial rate, even where such a charge would not cover all costs incurred by particular agencies.

2. *No fee for routine search.*—In view of the public interest in making Government-held information freely available, no charge should be made for the search time and other incidental costs involved in the routine handling of a request for a specific document.

3. *No fee for screening out exempt records.*—As a rule, no charge should be made for the time involved in examining and evaluating records for the purpose of determining whether they are exempt from disclosure under the Freedom of Information Act and should be withheld as a matter of sound policy. Where a broad request requires qualified agency personnel to devote a substantial amount of time to screening out exempt records and considering whether they should be made available, the agency in its discretion may include in its fee a charge for the time so consumed. An important factor in exercising this discretion and determining the fee should be whether the intended use of the requested records will be of general public interest and benefit or whether it will be of primary value to the requester.

Mr. MOORHEAD. Mr. Cramton, on page 17 of your statement I notice you mention the subject of assembling mailing lists from Government files for commercial mailers.

We have before this subcommittee a bill introduced by Congressman Horton which would prohibit the giving or selling of lists of names and addresses from Government files for commercial uses. Are you familiar with that legislation?

Mr. CRAMTON. Only marginally so. I have heard of it, but I have not studied it.

Mr. MOORHEAD. Have you studied it sufficiently that you can give an expression of your opinion, whether you would favor this kind of legislation or oppose it?

Mr. CRAMTON. I guess my personal position would be in favor of the general principle, while being somewhat cautious or skeptical as to whether it is possible to achieve it. There are all sorts of lists and data in Government files. It may be difficult to ascertain whether or not the person's request is for the commercial purpose of assembling a mailing list. These are many kinds of lists of one type or another that the Government has, and which seem to me private people might legitimately avail themselves of. Thus, I view it as a question of policy for this committee, in which you ought to canvass the serious problems and conflicting policies and make a judgment.

Mr. MOORHEAD. Thank you, Mr. Cramton.

I notice on page 3 that you state that only with respect to public contracts does the older practice continue. Why is there resistance on the part of making public contracts?

Mr. Cramton. Part of it is the fact that when the Conference recommendation was made the Government Procurement Commission had just been set up and was making elaborate studies of the whole Government contract field. And one of the questions that it had on its agenda was the procedures to be followed in rulemaking in the Government contract area. So the agencies that were involved in Government contracts in a big way, particularly the Department of Defense and GSA, took the position that they wanted to await the results of the Procurement Commission study. I am told that that study is expected to be completed fairly soon now.

The second reason is that the sheer bulk of the Government procurement regulations were thought to raise a question as to whether publication in the Federal Register, with opportunity for comment, would be useful or desirable. The Administrative Conference wants to reconsider the question, both in the light of the Procurement Commission report, and also in the light of a proposal that the American Bar Association is making to amend the Administrative Procedure Act to eliminate the public contract language.

In other words, the agencies have made what they think are compelling arguments for delay and reconsideration of that issue. I personally am somewhat skeptical of their arguments, but I think that the matter needs to be fully canvassed in the light of the Procurement Commission report.

Mr. Moorhead. Let me see if I understand your position. On page 3 you state that the Conference calls for legislation to repeal the exemption, but you have substantial compliance in some areas, and reasons for delay in enacting legislation in other areas, so at the present time would you say that for the moment legislation is not being requested by the Conference?

Mr. Cramton. No. We have requested the legislation and continue to think that it is a good idea. It has not gotten off the ground in terms of popular support for it, but we still push it. We are taking the position, however, that we are willing to reconsider the public contracts question if the Government Procurement Commission comes up with some good arguments to the contrary. We do not have closed minds on the question, so that, while we continue to favor the enactment of S. 1413, which would amend the Administrative Procedure Act to eliminate these exemptions.

The Conference has also initiated a larger study to consider some of the other exemptions to the rulemaking provisions of the APA. For example, rules that have very broad effects on the 3 million Americans who are employed by the Federal Government are also exempt from APA's requirements and are not included in the earlier Conference actions. It is my personal view that, if the Civil Service Commission is going to make a general rule that affects 3 million Americans employed by the Federal Government, they, their trade associations, and the general public ought to have public notice and an opportunity to comment before those rules become final. Thus, we are not only reconsidering the contracts question, we are going further and considering all of the exemptions to the APA rulemaking provisions.

Mr. Moorhead. Mr. Cramton, on page 8 of your statement you said that "Agencies and reviewing courts alike have had difficulty in dealing with an enactment that purports to take no account of the citizen's

reasons for requesting information and the use that he plans to make of it."

Are you suggesting that the Freedom of Information law be changed in any respect, to take that situation into account?

Mr. CRAMTON. If one could figure out a formula for doing it, it would be desirable. The practical fact is that every agency official takes into account who the requestor is, why he wants the information, and what he is going to use it for. And this is particularly true if the information is sensitive, may adversely reflect on some private person, might be used to seriously embarrass the agency and the like. Of course, there are good reasons and there are bad reasons. The language of the exemption that speaks solely in terms of "clearly unwarranted invasion of privacy," for example, does not begin to reflect the shadings of the actual cases.

Let me give you an example. Two labor law scholars wanted to study the election process of the NLRB. The NLRB has taken the position that the actual records of how employees voted in representation elections ought to be kept confidential because employer intimidation and all sorts of possible misuse was involved. The scholars, however, promised not to make the information public. They were interested only in studying the details so that they could inform the NLRB, the public, and Congress about the process itself.

The Court of Appeals of the District of Columbia decided that in view of the use which they were going to make of the information, that the NLRB should make the information available. It seems to me that that decision really does take into account the nature of the person, the constraints or conditions under which he uses the information, and why he wants it.

I think all of us in making information available take those factors into account. To the extent that the act excludes them from consideration it is unrealistic.

Now, if you asked me if I had a statutory proposal to spell out in what circumstances and for what kind of interests information ought to be available—such as scholars always get what they want, and the public interest laws firms either do or do not—I have no formula. I do not know if one could be designed.

Mr. MOORHEAD. It may be that if members of the subcommittee agree with your position we could applaud the decision of that court in our report thereby giving you some inducement.

Mr. CRAMTON. Of course, the proposed statute dealing with mailing lists, already mentioned, really involves the same point. It declares that in that situation the reason the person wants the information, the use he plans to make of it, is a relevant criterion.

It is with respect to fees, it seems to me, that the value that the information has to private individuals, and the uses they plan to make of it, can properly be taken into account by Government. Thus, if a corporation goes to the Department of Commerce and wants it to assemble material from census data that is of very considerable commercial value to the corporation, the corporation ought to pay the clerical and professional costs of assembling that information. This does not mean that Commerce should not provide the information. Perhaps it should do so to the extent that workloads permit and after more urgent re-

quests are met. But while Government ought to provide the information, it should in this situation charge the cost of supplying it to the corporation. In other situations, the Government ought to provide information about what it is doing without any cost at all to the citizen who wants to know about his Government's activities.

Mr. Moorhead. Thank you, Mr. Cramton.

I yield to Mr. McCloskey at this time.

Mr. McCloskey. Thank you.

Mr. Cramton, did you have any opinion on exemption No. 5, interagency or intra-agency memorandums or letters which should not be available by law except to parties that are involved in litigation with the originating agency?

Mr. Cramton. Well, it is somewhat odd to make the rights of the general public turn on the rights of the person who is litigating with an agency. I would say that the right of a person who is being proceeded against by the Government—and Government is prosecuting him perhaps to take away his license, or livelihood, or deport him from the country, or the like—ought to be in a somewhat more favored position than a casual bystander or a curious onlooker or a person who wants information for commercial purposes. But that is the policy that Congress has expressed, and what we have been talking about: a policy of equating the rights of everybody who requests information without regard to the person's reason for wanting it.

I am not sure what the provision means, because there is a great deal of uncertainty about what parties in litigation are entitled to in terms of discovery of material in the agency files. There has been enormous litigation of that question in the Federal Trade Commission alone, and in other agencies, where the question is less litigated, there is even more uncertainty about what a person who is a party, a proceeding is entitled to.

My conclusion is this exemption has the same defect as the other exemptions; that is, it is a very broad and ambiguous one which is not very certain in meaning.

Mr. McCloskey. Well, in the matters covered in your testimony, let us just take, for example, the time for an agency to respond to a request, the fee charges, and the distinction between the fee you might charge a commercial corporation for voluminous information and the distinction you might make between a 510(c) No. 3 or (c) No. 4 organization that wanted the same information.

Does not the variety, the breadth, and the type of information desired, the time to compile it by the agency involved, almost preclude us from adopting any statutory standard rule as to the time in which the information must be returned? We use the word "promptly" here. Could any law go any further than the word "promptly"?

Mr. Cramton. Or if the law did, if it contained a 10-day response rule, it would have to contain some exemptions for agencies that are very far flung, or where the information is not easily available. For example, someone may make a request to the Department of the Treasury, and it may involve a matter in which the file is kept in Anchorage, Alaska. In order to find out if the Anchorage office has the information, or what it is, the Government has to make a number of internal communications.

I think you are right in saying that a great deal of flexibility, discretion, and good judgment is inevitably going to be required in the administration of the act by Government officials. We cannot put it in a procrustean mold. The Conference said to the agencies that in general they should respond to an information request in 10 days; and, if they cannot do it in 10 days, they should at least inform the citizen why they cannot do it in 10 days. If the agency cannot find the information, if it does not have sufficient manpower, if it is checking with the Office of Legal Counsel at the Department of Justice to see whether the information is exempt from disclosure, the agency at least can tell the person why it cannot give him what he wants right now.

Mr. McCloskey. Have you looked at all at the concept of the ombudsman in this connection?

Mr. Cramton. Yes; we have. There have been a number of suggestions from time to time that the Administrative Conference constitute itself as a sort of ombudsman and offer to receive citizen complaints against the Federal Government, and handle them and review them, and so on. We have taken the position that to do that without either explicit congressional authorization or appropriate funding by the Appropriations Committee would be unwise.

But the Conference has devoted a great deal of study and attention to the handling of citizen complaints, and plans to do more. We are embarking on a very substantial comparative study of the procedures by which agencies of the Federal Government handle citizens' complaints: How long does it take them? At what level in the agency is the complaint handled? What resources are devoted to competent handling? Does review of the complaint lead to a change in result?

Mr. McCloskey. My question goes just to this, the present remedy for denial of a citizen's request for information is through the Federal courts, and there has been a growing consideration of the whole concept as to whether Government has grown so complex, so vast and comprehensive, and so intangible, and I might say even to Congress, as to make some of these executive agencies seem fairly impenetrable. Would there be any merit, or have you made any study of setting up an ombudsman to represent the citizen in his search for information?

Mr. Cramton. I think it would be a difficult area for an ombudsman to get in until the citizen has exhausted the available remedies. The available remedy, of course, is not only the opportunity to file a court suit and get a judicial interpretation of whether the requested information falls within one of the exemptions. There is the further possibility that the Office of Legal Counsel at the Department of Justice can play a unifying role in creating precedent and good governmental policy. The Office has done this to a degree, and it may be that that role could be expanded by conferring upon the Department of Justice some explicit regulatory authority to interpret the Freedom of Information Act.

Since the Department of Justice will have to defend a Federal agency if a suit is brought, many agencies refer the hard, trouble cases to the Office of Legal Counsel of the Department of Justice for advice. There is a small staff in that office that spends a great deal of time on freedom of information problems. Since the Office gets a wide variety of Information Act problems from all over the Federal Gov-

ernment, it tends to have a broader view or perspective than any individual agency.

Mr. McCloskey. But, they are located here in Washington.

Mr. Cramton. That is right.

Mr. McCloskey. Well, I think every Congressman has this problem, and I suppose we get 10 letters a month, or maybe 50 letters a month from constituents who say that they have run into arrogance, or abuse and denial of information by some Federal agencies back in the District. For example they would like the FHA or the Corps of Engineers to explain something or give them certain records and these agencies vary in responsiveness to the citizens.

The Congressmen, individually then, perform somewhat of an ombudsman position today in the search for information. One goal in considering how we tighten up the Freedom of Information Act is to alleviate this citizen despair, dismay, and anguish with a Government which seems to him abusive, or self-protective. Might not the ombudsman concept that has been adopted in some foreign countries be preferable to the current situation? There could be a legal office in the city of Washington, D.C., and then we have 435 individual Congressmen, plus a varying set of circumstances across the United States, which makes it almost impossible to apply given law or given requirements to any specific agencies, the ombudsman might be the appropriate alternative.

Mr. Cramton. Yes; I think that it would. Statutory creation of some kind of new instrumentality, however, would be required. There are two bills pending in the Congress now that purport to deal with this question.

One is a bill that Congressman Reuss has introduced at various times which would build up the congressional casehandling of citizen complaints. It would create an office of constituent assistance, I think it is called, which would handle complaints uniformly, expeditiously and professionally for those Congressmen who wanted to refer citizen-complaint letters to it.

The other proposal, sponsored by Senator Javits, would create in a limited area a new and experimental ombudsman institution which would handle whatever citizen complaints fell within its jurisdiction.

I think you are right in suggesting that the Freedom of Information Act raises the kind of questions which, if we did have an ombudsman institution in the United States, it would devote a lot of time and energy to.

Mr. McCloskey. Well, let me go to one final point, and that is this question of executive privilege, and this is with reference to the exemption No. 5, interagency or intra-agency memoranda. Last spring, we received the testimony of then Assistant Attorney General William Rehnquist before this subcommittee in which he alleged that executive privilege really applied to any advice given within the executive branch by one official to another who might not give candid advice if he knew that it was going to be made available to the public.

And, of course, the broad interpretation of Mr. Rehnquist's comment at that time, with this exemption 5 in here, would mean that any time a Government official gave an opinion to another Government official, that would automatically be, or could be claimed as an exemption. Do

you have any recommendation on executive privilege as defined in that manner?

Mr. CRAMTON. No; I do not. I think it is a very complicated question. At one extreme there is the constitutional issue of how much the President, as a separate branch of one of the three branches of the Federal Government, is immune from efforts that might be viewed as interfering with the executive operation. The President's executive privilege, however, surely is much more limited than the broad view that any memorandum between an official of the General Services Administration and one of the Office of Management and Budget—or of one executive department and one of another executive department—is not subject to disclosure because it is privileged under the Constitution.

There is a broad range of material on which Congress clearly can establish an information policy. It is a policy question for Congress. You do not want to go too far in forcing officials to write down everything, or in forcing them to write it down with such care that they are not very candid or frank in what they say because they anticipate that somebody will be looking at it and trying to make adversary use of it.

Mr. MCCLOSKEY. Such as Mrs. Beard's alleged memorandum?

Mr. CRAMTON. That is right. There will be consequences on Government recordkeeping, affecting the efficiency of Government and the type of information that is kept in writing, if you go too far in requiring disclosure. And there is a little bit of a question as to what extent Government officials have a certain degree of privacy within their own offices.

Mr. MCCLOSKEY. Let me put a specific question to you on this point to see if I can get a specific answer with reference to an example. Under the exceptions of subparagraph (b) the section does not apply to matters that are specifically required by Executive order to be kept secret in the interest of national defense or foreign policy. I do not think any of us would have any objection to advice given to the President or interagency memos related to foreign policy or national defense, but we had an example over the last several years where the Executive received the so-called Garwin report on the SST, not a matter connected with foreign policy or national defense, and when this committee requested it under the law, section 2954 of the United States Code, our request was denied.

The seven of us who were applying for the information asked the Executive, and we got the response back that this Garwin report was an internal Government document and not to be released to the Congress of the United States. Presumably that would apply under section 5 here. Is there any need for section 5? Can you conceive of any interoffice memorandum, outside of the field of national defense or foreign policy, that need be kept secret?

Mr. CRAMTON. I do not have, really, I think, sufficient knowledge or judgment on the question. I am disinclined to express a view on what I think is a question of substantive policy and not one of administrative procedure.

Mr. MCCLOSKEY. Well, certainly when you get a report on an SST, and the executive comes to the Congress and asks us to vote $400 million to keep the SST going, but declines to give us a report that the executive has paid for, certainly that is an example you can com-

ment on. Either it is rightly or wrongly withheld from us. What is your opinion?

Mr. CRAMTON. I do not have an opinion. I have not studied the details. Other than some newspaper references, I do not know what the material sought was, nor what the basis for not revealing it was.

The competing arguments are plain. Citizens ought to know important things that the Government is doing or thinking of doing. On the other hand, there are opposing policies. Officials of Government have got to be able to try out ideas, to assemble information without running the risk that they are going to always be cross-examined about their thought process or about the alternatives that they considered and rejected. There is a question about the efficient conduct of Government, and these are issues on which the Committee on Government Operations, it seems to me, is in a far better position to state national policy and arrive at conclusions than I am as an untutored lawyer.

Mr. MCCLOSKEY. Well, what is your opinion as chairman of the Administrative Conference of the United States, this goes to the heart of the real problem before us, does it not?

Mr. CRAMTON. It goes to the substantive balance of conflicting policies which relate to the concern for official privacy and for internal governmental efficiency. My reference to privacy is to the sphere of privacy that employees and officials have in their work.

Mr. MCCLOSKEY. But, this is the point I want to make to you. Let us take the SST, for example, or any other project that the Government might propose that is solely within the domestic field.

Mr. CRAMTON. Take Judge Mehrige's decision on school busing down in Richmond. Presumably a law clerk prepared memoranda for him and sketched out alternatives, and so on. The decision is of great public importance. Should the law clerk's memos be revealed, and, if so, to what extent?

Mr. MCCLOSKEY. Well, what is your feeling on that? What do you think?

Mr. CRAMTON. I think not. I think it would destroy or interfere with the intellectual process that judges are supposed to go through, and thus interfere with their independence. And I think the same is true with some official behavior. If policies of this kind are wise for the executive branch, should they not be applicable to other institutions of Government? If they are, why shouldn't they be applied to the courts or to the Congress itself?

Consider the information available to the public by this committee and its members. Are there certain kinds of information which, if they had to be recorded or made available to people who wanted to look at them, would to some extent interfere with your carrying out your duties? As you know, the range and variety of information requests is endless. It is a difficult job to strike a balance between the right to know on the one hand and efficient, effective conduct of Government programs on the other. I do not know where that balance is or should be struck, on all of these matters.

Mr. MCCLOSKEY. You have drawn the parallel to the judicial process where the judge goes through the weighing of different factors, and finally reaches his opinion, but setting aside the judicial process question, we are concerned here with both the public's right to know

and of our right to get at the facts as they may be for our legislative responsibilities.

But, the real question I want to put to you is whether in the processes of the executive branches of Government, in matters aside from the peculiar problems of the executive branch in handling foreign policy and defense, do you conceive in the domestic area—take the SST, building the Three Sisters Bridge, or any other public project in the domestic field, that these reports in their final form which go to the executive should not be made available both to the public and to the Congress?

Mr. CRAMTON. Executive agencies are required in all of these actions to make a great many documents publicly available. In the SST and the Three Sisters Bridge situations the more specific requirements of the National Environmental Policy Act require some pretty elaborate publication and circulation of information, consideration of public comments, and the like.

How much further should we go? And how can you define the category of memoranda that you want to reach? With respect to the particular report, the Garwin report in connection with the SST, I have only a very limited familiarity. But what about a whole series of memoranda by people in the Department of Transportation that dealt with various aspects of the question? What about information on phone conversations? Where are you going to draw the line, and what language is going to permit you to draw the line? Do you not ultimately on these questions, like the fee question, have to rely on some agency's flexibility and judgment?

Mr. MCCLOSKEY. Mr. Cramton, I am asking you specifically about section 5 of the exemptions, and if you use Mr. Rehnquist's definition and the interagency memorandum as an exemption, then you can exempt everything that passes from one part of the Government to another, can you not?

Mr. CRAMTON. I think that is too broad a brush.

Mr. MCCLOSKEY. Do you have any specific recommendations?

Mr. CRAMTON. No, just as with respect to the internal agency memoranda. I do not have a specific suggestion as to how you could tailor it down. I think there is a great problem how you narrow it down. On the privacy exemption, I guess I would remove the words "clearly unwarranted." In that respect maybe the statute might be broadened a little bit. I think that anything that constitutes an invasion of privacy of an individual outside Government, perhaps the agency should be allowed to not make the information available.

Mr. MCCLOSKEY. So, you would broaden No. 6 by taking out "clearly unwarranted" and you have no recommendation on subsection 5?

Mr. CRAMTON. That is right. In fact, my general impression is that the complexity and the difficulty of amending the act at this time makes it probably desirable to let the court decisions struggle along for a few more years and get a common-law accumulation of precedents. That may produce a very intelligible and sensible pattern. I agree that there is some cost in waiting for judicial clarification: there are some people who do not get information in the meantime who should. But unless you have a fairly clear idea of how you are going to tackle these

important exemptions, it may be better just to leave things as they are for the time being.

Mr. McCloskey. Thank you. I have no further questions.

Mr. Moorhead. Mr. Cramton, would you state for the record the Conference's recommendation for the 10 and 20-day time period for action by agencies?

Mr. Cramton. The guidelines portion of the recommendation (part B) states in paragraph 4(a) that the agency should respond to the request within 10 days or give a reason why they cannot respond within 10 days:

"Every agency should either comply with or deny a request for records within 10 working days."

That is not 10 calendar days, but "10 working days after its receipt unless additional time is required for one of the following reasons."

And then some reasons are spelled out that in practice seem to be sound reasons why the agency might need more time. And then it goes on and says:

> When additional time is required for one of these five reasons, the agency should acknowledge the request in writing within the 10-day period and should include a brief notation of the reason for the delay and an indication of the date on which the records would be made available or denial would be forthcoming.

And the 10-day period runs from the receipt of the request by the agency.

Mr. Moorhead. Thank you. I think that is sufficient, Mr. Cramton.

On page 16, you state that several agencies have mandatory minimum charges for handling requests, whether any documents are provided or not. You mean that some agencies can deny a request for information and still make a charge for it?

Mr. Cramton. That is right. Mr. Cushman has a chart that summarizes the agency rules on fees. Perhaps he could give you an example.

Mr. Cushman. I believe the Department of Commerce charges a $2 fee, irrespective of whether any information is, in fact, produced. In other words, just for the handling of the request. I believe in some situations this is also true of the Department of Justice.

Mr. Cramton. There would be general authority under the agency rule to waive the fee, but on its face it purports to be a mandatory fee that is applicable to all requests, whether or not information is forthcoming.

Mr. Moorhead. Mr. Cushman, that chart would be helpful as a part of our record. Could you submit it?

Mr. Cushman. It is a working paper. We are still in the process, sir, of evaluating comments which are still coming in. I had hoped to furnish to Mr. Phillips all of this information before your record closed.

Mr. Moorhead. Fine. That will be fine.

Mr. Cushman. The chart is part of our continuing study in this area, but at this particular moment it is not complete.

Mr. Cramton. We would be pleased to revise it, to get it typed—it is now in pencil form—and to submit it for inclusion in the record.

(The material follows:)

TABLE OF AGENCY FEES FOR THE PRODUCTION OF DOCUMENTS[1]

Agency	CFR citation	Minimum charge	Cost per page photocopy	Clerical search
AEC	10 CFR, pt. 9	$1; $2.50 (search)	$0.25	$5 per hour.
CAB	14 CFR, pt. 389	$1	$0.35	
Department of Agriculture	7 CFR, pt. 1	$1; $1 (search)	$0.05	$4 per hour.
Department of Commerce	15 CFR, pt. 4	$2 (nonrefundable); $2.50 (search).	$0.25	$5 per hour.
Department of Defense	32 CFR, pt. 286a	$1.50; $2.50 (search).	$0.25	$5 per hour.
Department of Health, Education, and Welfare.	45 CFR, pt. 5	Published separately by operating agencies.		
Department of Housing and Urban Development.	24 CFR, pt. 15	$1 (none if less)	$0.25	$5 per hour (1st hr. no charge).
Department of Interior	43 CFR, pt. 2		[Rules are not specific.]	
Department of Justice	28 CFR, pt. 16	$3 (nonrefundable)	$0.50 1st page; $0.25 additional.	$1 per ¼ hr.; 1st ¼ hr. no charge.
Department of Labor	29 CFR, pt. 70	None	$0.30	$1 per ¼ hr.; 1st ¼ hr. no charge.
Department of State	22 CFR, pt. 6	$3.50 (nonrefundable).	$0.40	$3.50 per hour.
Department of Transportation.	49 CFR, pt. 7	$3	$0.50	$3 per hr. (or actual cost, if more).
Treasury	31 CFR, pt. 1	[2] 2 (search)	$0.10	$3.50 per hour.
EEOC	29 CFR, § 1610	None	$0.25	$3.60 per hour; $0.90 per ¼ hour.
Farm Credit Administration	12 CFR § 604	[Rules are not specific.]		
FCC	47 CFR, pt. 0 § 441	[New rules under consideration.]		
Federal Maritime Commission.	46 CFR, pt. 503	None	$0.30	$4.50 per hour; ½ hour no charge.
FPC	18 CFR, pt. 1	[Available at Office of Public Information.]		
FRB	12 CFR, pt. 261	None	$0.10	$5 per hour.
FTC	12 CFR pt. 4	None	$0.30	Reasonable fee where applicable.
GAO	4 CFR, pt. 81	$3	$0.25	Not stated.
GSA	41 CFR, pt. 105–60	[Rules are not specific.]		
ICC	49 CRF, pt. 1002	$1	$0.25	$3 per hour.
NASA	14 CFR, pt. 1206	None	$0.07	$1 ¼ hour; 1st ¼ hour no charge.
NLRB	29 CFR, pt. 102	[Rules are not specific.]		
OEO	45 CFR, pt. 1005	None	$0.10 maximum	
Railroad Retirement Board	20 CFR, pts. 200, 262	[Rules are not specific.]		
Renegotiation Board	32 CFR, pt. 1480	$2	$0.25	$4 per hour; 1st ¼ hour no charge.
SEC	17 CFR, pt. 200	[Rules are not specific.]		
SSS	32 CFR, sec. 1606.57		$1 (includes search)	
SBA	13 CFR, pt. 102		$0.25	$2 minimum.
U.S. Commission on Civil Rights.	45 CFR, pt. 704	$1	$0.10	$5.32 per hour.
USIA	22 CFR, pt. 503	None	$0.40	$5 per hour.
VA	38 CFR, sec. 1.527	None	$0.25	$3 per hour; 1st ½ hour no charge.

[1] This table was prepared as a working paper in connection with administrative conference efforts to implement recommendation 24. It is not a complete list of agencies having rules on the subject, the extracted material is highly abbreviated and it does not take into account actual agency practices to waive charges in many circumstances.

Mr. MOORHEAD. Thank you.

On page 10 you describe "Recommendation 24," and the first general principle you say is a restrictive interpretation of the exemptions authorizing nondisclosure. Would that apply, or how would it apply to the first exemption involving national defense and foreign policy?

Mr. CRAMTON. It would apply to all of them. The language "National defense and foreign policy" can be given a very latitudinarian interpretation, or it can be given a narrow one. Take dumping determinations or countervailing duty matters before the Bureau of Customs and the U.S. Tariff Commission. In a sense those are part of

foreign policy, but really they are requests by domestic manufacturers that initiate a proceeding in which Congress has required that these agencies make certain determinations. My view is that there is a legitimate interest on the part of the general public in those matters, even though they are related to foreign affairs, as lots of things are. The SST program, for example, could have been related to foreign affairs, and there was some argument on grounds that foreign exchange, or our leadership in the free world as the producers of commercial airlines, was involved.

If you are in an ambiguous area, one ought to not strain to put something within the national defense or foreign affairs category. It really ought to be squarely in there. Take, for example, decisions made by the post exchange people about what commodities they are going to carry in post exchanges, or tests that have been run on appliances and products that are for sale in post exchanges. I would not view that information as falling within exemption 1, and yet the most latitudinarian possible interpretation would say yes, it is military, it is the post exchange and it occurs on a military base and it is national defense. I think that is too broad.

So, we urge a very restrictive interpretation.

Mr. Moorhead. It says "specifically required by Executive order to be kept secret."

Mr. Cramton. Right.

Mr. Moorhead. Are these dumping matters classified?

Mr. Cramton. No; no.

Mr. Moorhead. Well, then, they would not be, certainly, subject to the exemption?

Mr. Cramton. I am certain that countervailing duty matters are secret and information on them is exceedingly difficult to get, if not impossible at the present time.

Mr. Moorhead. You say they are classified secret?

Mr. Cramton. I think not. Only that as a practical matter the information is exceedingly difficult to get.

Mr. Moorhead. It would seem to me, taking the first exemption and your first principle, that is a restrictive interpretation of the exemptions authorizing nondisclosure. Reading those together, an agency which has a document bearing a classification label that has been requested, that document should be reread to determine whether or not it really could be declassified at that particular time——

Mr. Cramton. I think that is right.

Mr. Moorhead (continuing). And not just say, well, it has a classification stamp on it, and it cannot be made available.

Mr. Cramton. I think that is right.

Mr. Moorhead. Did you have a question, Mr. Phillips?

Mr. Phillips. Yes, sir, Mr. Chairman.

Getting back to this question of interagency memorandums that Mr. McCloskey raised a moment ago, the subcommittee has had prepared for it an analysis of the court cases that affect the nine exemptions under the act. I think we should point out that in six out of the 10 cases that have been decided by the courts involving interagency memorandums, the courts have held for the public and against the Government's position. I would like to quote just briefly from this study, which later will be made a part of the record of these hearings, on this point:

The exemption protecting interagency and intraagency memorandums or letters was intended to encourage the free exchange of ideas during the process of deliberation and policymaking. It has been held to protect internal communications consisting of advice, recommendations, opinions, and other material reflecting deliberative or policymaking processes. But, not purely factual or investigatory reports.

And in the case of *Soucie* v. *David*, which involved the SST and the report of the Garwin Committee, the court said, in this part of their opinion:

Factual information may be protected only if it is intricately intertwined with policymaking processes. Thus, for example, the exemption might include a factual report prepared in response to specific questions of an Executive officer because its disclosure would expose deliberative processes to undue public scrutiny. But, courts must beware of the inevitable temptation of a Government litigant to give this exemption an expansive interpretation in relation to the particular records at issue.

I think perhaps that will help clarify a little bit what the courts have drawn as a guideline in this exemption (b)(5) area.

Mr. CRAMTON. One of my reasons, if I might add a comment, for recommending that court decisions ought to be left alone for a while on the basic substantive questions is a belief that the judges, in fact, will be quite receptive to the policies that underlie the Freedom of Information Act. The trend of decisions is likely to be one, over time, that takes this restricted interpretation of the exemptions that the Administrative Conference urged agencies to take in their recommendation.

If you can come up with good language that clarifies the exemptions without causing more harm and confusion than you want, fine. But, if you cannot draft such language, you can leave things the way they are now, which means that a fairly receptive judicial reception is likely to be given to the freedom of information policies.

Mr. PHILLIPS. I just have one other question, Mr. Chairman.

Could you comment briefly on the extent of compliance by executive agencies on the indexing requirements under 552(a)?

Mr. CRAMTON. I would say that there has not been a great deal of compliance. The problem, as viewed by the agencies, is one of a lack of resources and money. It just apparently is not the kind of issue on which an Appropriations Committee will enlarge an agency's resources. It takes a lot of time and energy to prepare a good index, and it takes some pretty good people. It is not just a totally clerical kind of operation. If an index is to be useful, it has to be prepared, and the concepts and categories have to be prepared by intelligent minds. Most agencies just have not had the resources to devote to it.

Agencies have made a priority determination that an index is less important than other activities that they have to deal with. In summary, the record of compliance on indexing is not very good, and it is unlikely to get better until additional funding, specifically for the preparation of indices, is made.

Mr. PHILLIPS. The point I am trying to make is this is such a crucial area in terms of public access because of the requirements of an "identifiable record." If an individual who goes into an agency that does not have an adequate indexing procedure, or perhaps no indexing procedure, it is going to make it that much more difficult for him to identify properly the record that he is after, and make it easier for the agency to

deny his request. When Congress framed the Freedom of Information Act it had in mind a proper indexing procedure so that the individual would not run into this roadblock, as is often the case, of not being able to define a particular record.

So, it is crucial to the overall thrust and the intent of Congress when it wrote the act.

Mr. CRAMTON. Some agencies provide a great deal of assistance in finding particular items, largely through the trained personnel of librarians in the libraries and information rooms that many of the agencies have. I know this has been experienced by members of my staff who have gone to agencies and did not know quite what they were looking for. Many times they have gotten just extraordinarily friendly assistance and help in locating the relevant materials. And this is from employees who have no interest one way or another except to be helpful to requests that they receive.

I would not paint the situation as a totally black picture. The preparation of indices seems to be a matter which agencies find losing out in the priorities for their resources. It would be helpful if we had more and better indices.

Mr. PHILLIPS. I am talking about that information that is sensitive, which perhaps there is a predisposition to withhold anyway. This provides an additional cloak under which it can be hidden. The fact that there is not an adequate index that identifies that bit of information being sought provides that cloak.

Mr. MOORHEAD. Off the record.

(Discussion off the record.)

Mr. MOORHEAD. Mr. Erlenborn.

Mr. ERLENBORN. I have no questions at this time, Mr. Chairman.

Mr. MOORHEAD. Mr. Cornish?

Mr. CORNISH. Yes; thank you, Mr. Chairman.

Mr. Cramton, I would like to return to this question of inquiring into the reasons or the motivations of the requester for information. Did I understand you to say that you felt that one of the circumstances involved might be the possible embarrassment of the agency?

Mr. CRAMTON. Not a legitimate one, but one which some agency personnel will sometimes take into account. They should not. I was trying to reflect the realities of the world as we know it, and not necessarily the ideal world that we would like to live in.

Mr. CORNISH. Well, just to make the record clear, you are not suggesting that this is a legitimate cause to deny information?

Mr. CRAMTON. No; ideally the agency should be the most responsive to the "knight in white armor" who shows up representing a public interest group, whether it is environmental or consumer or whatnot, who wants information which will expose the wrongdoings of the agency. I just take it as a practical matter that the reception that that person receives is likely to be somewhat less favorable. At least more care will be given in terms of passing on the request.

Mr. CORNISH. You made the point that in your view that when information which has commercial value is provided, corporations or whatever it might be should be reimbursing the agency for the costs involved. Let us assume just for the sake of discussion that such information might have great commercial value, and would result in

considerable business for that company, which in turn would be reflected in rather large tax revenues to the Federal Government, which would not be otherwise obtainable by that company.

In other words, what I am suggesting here is that perhaps in some cases the access to the information makes it possible for a business endeavor to bring to the U.S. Treasury quite a considerable amount of revenue.

Mr. CRAMTON. I can certainly conceive of that situation occurring. In that situation, of course, the commercial interests will have no objection to the payment of a fee which is based upon the professional services required to produce it.

We are talking about information which has great value. If the Government were operating as a prudent businessman, it would auction valuable information off to the highest bidder. It does not do that.

The only charge Government will make or should make will be a very modest charge that reflects the actual professional and clerical time expended in assembling the information. That charge is going to be much less than the real value of the information.

You will not deter requests for information that has commercial value by imposing a modest charge. You merely prevent the general taxpayer from assisting in giving a windfall to a private person. I see no reason why a windfall should be given to the corporation that gets the Government, at the Government's own expense, to collect information with which the corporation can produce revenue.

Mr. CORNISH. The receipt of the taxes might wholly absorb the cost of providing such information, would it not?

Mr. CRAMTON. Why shouldn't it far more than absorb the total cost?

Mr. CORNISH. I think it could; and is it not true that many agencies of Government now, such as the Commerce Department, and other agencies, compile large amounts of information which they put into the form of public documents which are used for commercial purposes?

Mr. CRAMTON. There are some arguments in terms of governmental economy that ought to be reflected in these discussions. Some Federal agencies engage in widespread public information and propaganda activities on the part of the Federal agencies. Others perform services that benefit only very narrow interest groups and which do not have beneficial effects on the general public. To what extent should taxpayers' funds be spent on agencies sending out tons of material to casual requesters or to commercial requesters?

One of my boys once sent a postcard to the Federal agency, which shall remain nameless, asking about its activities and received at least 100 pounds of elaborate printed material over the course of succeeding months. While I was pleased that the Government was so responsive to his inquiry, it seemed to me that the response was somewhat excessive in terms of the Federal Treasury. Perhaps the major reason that the agency was so responsive is that it was interested in engaging in propaganda and public relations, and generally promoting its image before the general public.

There are some arguments for efficiency and economy in Government, and I do not think those ought to be neglected in the zeal to make everything available.

Mr. Cornish. Now on another matter—are you contending, at all, that Federal officers have a privacy of a special kind which is in addition to their own personal privacy?

Mr. Cramton. No, surely no real privilege. It is just a question of policy as to whether or not you want to make available every employee's memorandum, and whether that would interfere with the effective functioning of a particular office. I think it would be destructive if a judge's law clerk's memorandums, containing arguments and summaries and drafts prepared for the judge, were made available. I think that would be harmful to the exercise of the judicial function, because if that were done routinely it would force law clerks to be much more careful about what they say. They could not respond to judge's requests in the same candid, open, efficient manner.

There may be comparable policies that ought to be taken into account in terms of the operation of an administrator's office. He ought to be able to get private views from subordinates. He ought to be able to get memorandums from members of his staff without worrying that each memorandum is going to be publicly available.

Where you draw the line between these compelling, competing policies, I do not know. I leave that to the subcommittee.

Mr. Cornish. Well, I would just comment that this may be private advice, but it does involve the public business. Do you not think that we should know what goes into Government decisions as well as the decisions themselves? How else can you test the validity of some of those decisions?

Mr. Cramton. Because you require that the end product spell out the reasons and be persuasive, and, if it is not, it may be attacked on the merits. Agency decisions are subject to judicial review, and they will be set aside if they are arbitrary or capricious, or if they do not rest on substantial evidence in the record upon which they were made. And Congress can always come along and change any of these decisions.

Mr. Cornish. But oftentimes they have to take these decisions or reports on their face, without knowing the elements which went into them, and I think this is an important consideration.

Mr. Cramton. It is my view that the persuasiveness of a report is enlarged if it takes into account the arguments the other way. So, I think a good administrator, when he is engaging in something that he knows is controversial, will be candid in his final decision or report in terms of revealing the negative arguments, and then rebutting them and responding to them and indicating why he thinks they are outweighed. That is surely true in terms of drafting a good environmental impact statement. Even if the administrator decides that the other relevant policies outweigh environmental values, if he is going to do his job, he has to be candid about facing up to the arguments the other way. We should require him to do that, at least by making a negative judgment about what he does.

Mr. Cornish. Well, you would not limit this accountability just simply to the man who puts the final signature on the document or report or whatever it might be, would you? Do you not believe that his subordinates also have a public accountability?

Mr. Cramton. Yes; depending on what functions have been delegated to them; and what decisionmaking process you are talking about; and what kind of information is sought.

I think there are so many variables and the problems are so complex, that I am reluctant to make a sweeping generalization other than that I do not think any sweeping generalization is likely to be very useful.

Mr. CORNISH. Well, I just personally find it difficult to understand the point that subordinates should not be able to defend their positions, as well as their superior's. This really escapes me, and I really do not think the issue of privacy as such enters into it. But, that is a personal comment.

How do you feel about making public the amount of subsidies paid to farmers? Do you think those ought to be made public knowledge?

Mr. CRAMTON. I would think so.

Mr. CORNISH. You do not have any problems there?

Mr. CRAMTON. In fact, I think they may be required by law to be made available, now, in terms that they are actions of the ——

Mr. CORNISH. Well, the privacy question, you know, has been brought into it. What about the names and the addresses, or the salaries of public officials?

Mr. CRAMTON. That is all spelled in statutes and in appropriations material, and I think it is part of the public domain.

Mr. CORNISH. You do not have any trouble with that?

Mr. CRAMTON. No.

Mr. CORNISH. Thank you, Mr. Chairman.

Mr. MOORHEAD. Thank you, Mr. Cramton and Mr. Cushman.

The subcommittee will now hear from Mr. Reuben Robertson, attorney at law; Mr. Harrison Wellford and Mr. Peter Schuck of the Center for the Study of Responsive Law, and Mr. Bertram Gottlieb of the Transportation Institute.

Gentlemen, you notice the time. I hope that we can be brief, so that the subcommittee will have an opportunity to exchange ideas with you.

We will hear first from Mr. Reuben Robertson.

STATEMENT OF REUBEN B. ROBERTSON III, ATTORNEY, CENTER FOR THE STUDY OF RESPONSIVE LAW

Mr. ROBERTSON. Mr. Chairman, I am Reuben Robertson and, for the record, I am also associated with and a consultant to the Center for the Study of Responsive Law. I would say that between the three of us here who are associated with the center, we have probably had as much direct adversary experience, both administratively and in litigation, with the agencies under the Freedom of Information Act as any group.

I personally have been involved in three lawsuits that were necessitated against agencies when they wrongfully withheld information from me and students working with me

Mr. Wellford has been involved in three lawsuits, and Mr. Schuck is presently preparing several lawsuits. We are all preparing more, because of the difficulties we have experienced.

The point that I would like to stress, by way of introduction, is that the real problem of the Freedom of Information Act today, in my opinion, is much less the ambiguity of the statute, which has been talked about by a lot of commentators, than the intentional violation of the clear provisions of this law by the Government agencies. We have

had quite a bit of experience with particular agencies and officials who have a practice of holding out information, and playing a waiting game with citizens who are asking for information, until they either go away or file suit.

The filing of any suit, of course, entails obtaining legal counsel, it involves the expenses of legal costs and fees, and a great deal of time and delay. Most people, I think, when they are confronted with this kind of an approach do tend to go away. Often we have found that just the filing of a suit is enough to get the Government to release the information. This is one area that very much needs to be addressed by the committee.

One thing that is needed is to explore possible sanctions against the agencies, or against the particular officials involved, for wrongful withholding of information. One suggestion that you might want to consider is that the agency involved should pay the plaintiff's costs and attorney's fees if the litigation should prove to have been necessitated by wrongful withholding on the agency's part. That is one aspect of the problem of costs, and I would also like to address several other areas.

I do not have any prepared statement, so I am perfectly willing to respond to any questions as we go along.

Mr. McCloskey. Would the chairman yield?

Mr. Moorhead. Yes.

Mr. McCloskey. Did you have any statutory precedent where the Government is assessed attorney's fees or costs?

Mr. Copenhaver. The civil rights statute.

Mr. Phillips. Some civil rights cases in the Civil Rights Act.

Mr. McCloskey. Under the Civil Rights Act?

Mr. Erlenborn. Would the gentleman yield?

A similar provision is in the recently passed Equal Employment Opportunity Commission amendments.

Mr. Robertson. Generally, of course, as you point out, the rule is that the Government does not pay the plaintiff's costs and never pays the attorneys' fees except with special statutory provision.

Besides the cost of litigation and the cost of counsel, the matter of search fees have been a matter of some discussion before this committee. My own view is that the search fee should be eliminated entirely, because it is essentially inconsistent with the basic provision of the Freedom of Information Act that the Government should properly index and file and maintain its records.

The only reason that a search fee would be necessary is that there is no index in the agency of what information is available and where it is located. Very few, if any, agencies have gone to any kind of automatic data processing. Very few have comprehensive resources where you can go and find out what is available, and how you can get it, and who you are supposed to ask.

One particular incident, which demonstrates the intentional harassment aspect, occurred when one of the students working under me in a study of air safety asked an official at the Federal Aviation Administration for the names of the 26 inspectors who reported directly to him. He was charged a search fee for that information. That is typical of what can happen.

Mr. Moorhead. Why don't we hear from the other witnesses? Mr. Harrison Wellford and Mr. Peter Schuck.

Mr. Erlenborn. Mr. Chairman, would you yield for a question at this point?

Mr. Moorhead. Surely.

Mr. Erlenborn. Would you differentiate in your recommendations for search fees between a member of the general public asking for a search and a commercial organization asking for a search?

Mr. Robertson. Well, I think——

Mr. Erlenborn. For commercially valuable material?

Mr. Robertson. Yes, essentially there should not be a problem of extensive search costs, because there should be one place you could go in the agency and find out what information is there that you need, and then make a simple request for it.

We should not have a process of people going through files, and spending hundreds and hundreds of hours. Certainly a corporation or a commercial organization that wants to come in and have a special study made, or a special computer printout run, or something to that effect, certainly the costs of that kind of job should be assessed. But, my suggestion is that search fees are being used as a barrier rather than on the basis of a legitimate reimbursement aspect.

STATEMENT OF HARRISON WELLFORD, CENTER FOR THE STUDY OF RESPONSIVE LAW

Mr. Wellford. Let me add one point in response to your question. I think that there probably is reason for a distinction between say costs for companies seeking commercial information that will help them economically, and a case that I was involved in just last week where a scientist who is teaching at the University of Georgia requested information on a particular pesticide that he was interested in, and was asked to give some assurance that he could pay at least a fee of $100 before they would go to the trouble of making the search.

Now, I think there ought to be a provision for waiver in hardship cases where the individual seeking the information clearly does not have the means to pay a large sum.

I certainly agree with Mr. Robertson that if the information were organized with access by the public to the information as a primary goal, then there would not be as much time required to find this data.

Let me give, if I may, one case history of our involvement, which touches on a number of points already made this morning. Almost 3 years ago, we went to the Department of Agriculture to seek safety data on a variety of pesticides. The data was basically the various research reports and experiments which tended to support a company's claim that a pesticide was safe if used as directed.

Our motive was to get more outside scientists, particularly university scientists involved in weighing the benefits and risks of pesticides. The first response we got from the Department of Agriculture was that our request was not specific enough; that is, the records were not clearly identified. Therefore, we asked to see the indexes that USDA maintained which would allow us to specifically identify this material.

USDA said, they were sorry, but that the indexes they maintained were intra-agency memoranda and, therefore, they could not make these indexes available to us.

So, it was a catch-22 situation. We were told our request was not specific, and we were not given access to the indexes which would have allowed us to make our request specific.

So, we went to court and we sued them on that point. And Judge June Greene in the U.S. District Court for the District of Columbia made the following findings:

"First that it is a violation of the act to withhold from the public the means for requesting specific records."

"It is a violation of the act to withhold documents on the ground that parts are exempt and parts are not exempt."

This ruling curbs the USDA's use of its contamination tactic, which I will explain in a few minutes.

After we got this ruling we went back over to the Department to look at the data, at least to look at the indexes that had been made available to us. I want to read briefly to you a record of the conversation that we had over there when we went to see these records that we had won as the result of the suit.

After we looked at the files, at these indexes, we found that the records we wanted were in individual pesticide folders called jackets. We were talking to an official of the Pesticides Regulation Division.

Our question was: "Do you have any records of nonfarm pesticides?"

We were trying to look into the amount of pesticides used around the home.

We answered: "No, such information is contained only in the jacket, that is, the folders on individual pesticides."

Then the official asked: "Why do you want to know all of this? What do you want to do with it?"

Then, we responded: "I want to know about what safety criteria certain pesticides have that have been registered."

"But why do you want to know that?" they asked.

We responded: "Because I am interested in the information that is supposed to be public. I would like to see the jackets for certain pesticides."

The Pesticides Regulation Division official responded:

"You do not seem to understand certain public information is really confidential."

This is the reply: "But I thought confidential information was kept in sealed envelopes in the jackets."

The response: "The envelopes are not sealed: but they can be easily removed, can they not?"

"You do not seem to understand, the jackets contain company correspondence which might refer to confidential information. It would be too much work for our staff to read through all of the correspondence to remove references to confidential information."

Now, this is an example of contamination tactics that I am talking about, where they intermix and commingle exempt and nonexempt information in the same file.

Now, the responses here might have had some justification except we requested this information 2 years before and there was plenty of time to reorganize their filing systems so they would not have this commingling problem.

But they had not done anything about it.

So, we finally said: "If we cannot see the jackets on individual pesticides, who can?"

The response came back: "Representatives of the manufacturers and anyone else who Dr. Hays approves."

Dr. Hays at that time was the Director of the Pesticides Regulation Section, and we asked who should Dr. Hays approve, and the answer came back: "That is up to him."

Well, at that time, I think that episode really does describe the sort of philosophy with which that particular agency of the Federal Government approached the public's right to know.

The final straw was when USDA stated that if the information were made available, it would cost $91,840 to prepare the registration files for public viewing. At that point we decided to try to find other means to get the information.

The second point I want to touch on briefly is the use of the investigatory file exemption. We have tried to get information on enforcement activities both on pesticides and on meat. Decisions by the district court and the court of appeals help clarify exactly how this particular exemption should be applied. Judge Northrup in deciding *Wellford* v. *Hardin* in the district court, noted that the investigatory file exemption under the Freedom of Information Act was not intended to exempt all Government information about private enterprise and stated that the possible embarrassment to firms who had violated, in this case, meat laws, was not a justification for this exemption. Judge Northrup found the exemption was intended only to prevent persons against whom the Government was enforcing the law from obtaining an advance look at the Government's case, and that it did not apply when firms which were the subject of Government action had already received letters of warning or had their products detained. This is important, because very often, when you try to look into any kind of enforcement activities you will find that all records pertaining to enforcement, even if it involves a case which has been closed for 10 years, are still withheld from you on the ground that it fits within this exemption of the Freedom of Information Act.

Now, I think if these court decisions are sympathetically applied by the agencies, we will have an easier time of it in the future. In summary, the specificity requirement, the arbitrary charging of fees, the contamination or commingling techniques, and, finally, the investigatory file exemption are the areas where we have had the greatest problem in getting information from the Government. At this point, I would like to insert in the record a copy of my testimony before the Senate Subcommittee on Separation of Powers on August 4, 1971.

(The statement follows:)

PREPARED STATEMENT OF HARRISON WELLFORD, CENTER FOR THE STUDY OF RESPONSIVE LAW

Mr. Chairman, I appreciate the invitation to give my views on governmental secrecy before this committee. This committee has performed a great public service in highlighting the patterns of secrecy which have often prevented the Congress and the public from exercising responsibly their constitutional powers. Because so much attention has been devoted recently to denial of information about national defense and foreign policy, it is often overlooked that secrecy seems to be endemic to all bureaucracies. It matters little whether the agency is

concealing the latest move in Southeast Asia or the fat content of a hotdog. If an official feels the information may be embarrassing, the result is the same: stultifying practices of evasion, delay, and arbitrary and discriminatory denials in defiance of the Freedom of Information Act.

In the last 2 years the Nader task forces directed by the Center for Study of Responsive Law have challenged the barriers to the citizen's right to know in nearly 30 Federal agencies and found them formidable. We have found little justification for the "deep sense of pride" that President Johnson spoke of when, on July 4, 1966, he signed the Freedom of Information Act in the belief "that the United States is an open society in which the people's right to know is cherished and guarded."

In its contacts with Federal officials, the task force tried to convey information about unrepresented constituencies. It also tried to free the officials of the erroneous information which convinced them that problems did not exist. Charles Frankel, in his memoir of his service in the State Department, gives a rationale for this strategy:

> I used to imagine when the Government took actions I found inexplicable, that it had information I didn't have. But after I had served in the Government for some months, I found that the issue was more complex: often the Government does know something that people on the outside don't but it's something that isn't so. . . After a while I came to suspect that I might not be dealing with hard facts but rather with a world created out of hunch, hope, and collective illusion.

Our investigators, therefore, had two tasks: To get the facts and to try to free regulatory officials from the collective illusions which sometimes develop in bureaucracies too long insulated from public scrutiny. Neither task was easy.

In Washington's regulatory agencies, information, especially timely information, is the currency of power. The fact is illustrated in the reply of a leading Washington lawyer when asked how he prevailed on behalf of his clients: "I get my information a few hours ahead of the rest." The industry lobbyist derives his influence from his superior intelligence apparatus. From routine visits to an agency and leaks from carefully cultivated contacts, he anticipates agency action and turns it to his advantage. By contrast, most citizens learn about an agency's plans only at their public stage, when a decision or proposal is announced in the Federal Register or to the press. At this point, the opportunity for influence by the public is often very limited. It is at the stage of inner council discussions of draft reports and interim choices by an agency's lower echelons that the real decisions are often made.

Federal regulatory agencies enjoy great discretionary power over the programs they administer. For example, the Federal Insecticide, Fungicide and Rodenticide Act which directs pesticide control officials is basically a blueprint which sketches the agency's structure and states its goals. It leaves individual officials a wide freedom of choice in applying these goals to concrete cases. Under the agency's legal structure, they can go one way or another: they can delay registration of a pesticide by requesting additional tests for safety or accept the company's safety assurances without scrutiny; they can apply the effectiveness criteria narrowly (the pesticide need only show that it kills the target insect) or broadly (the pesticide in killing the target insect, must not kill so many beneficial insects that it reduces yield); they can decide which portion of the law to enforce or not to enforce; they can decide to recall a dangerous pesticide immediately or allow a company to sell all products already in marketing channels if it promises not to produce any more.

These facts, the bureaucrat's freedom to choose and the value of inside information in helping outsiders influence that choice, are the cornerstones of the lobbyists' profession in Washington. For the special interests which form an agency's regulatory constituency, information gathering has become a science. The stakes are high. If a lobbyist learns of impending administrative action against his client, he can give him time to prepare for the change or he may be able to arrange that the action is not taken at all. If he succeeds, often only he, his client, and a small number of bureaucrats know that the action was ever considered in the first place. Access also tells him which official is friendly and which is not, and guides him in pressing for the ouster of officials judged unsympathetic or unreasonable.

As a result of pressure from regulated interest, many agencies have developed an information policy with a double standard—one for citizens and one for special interest groups. In the Department of Agriculture, the chemical and meat industries are treated in accordance with the principle that, "with certain

exceptions, the records of the Department are freely available for public inspection." For the average citizen, however, the principle is turned on its head, and officials guard information with all the hauteur of a citizen above suspicion. As Dr. George Irving, Administrator of the Agricultural Research Service, candidly states: "The information in our files . . . is prepared for use by Government personnel . . . It is not made available to any person outside the Government, except for the few documents specified. . ."

The double standard reflects the pattern of preferential access which lobbyists, trade associations, and corporations have established over the years. The impact of its superior access to information has been described by Nicholas Johnson, who as Administrator of the Maritime Administration and later as Commissioner of the FCC, has matched wits with Washington's most entrenched subgovernments:

> On those rare occasions when proconsumer action is proposed in an agency, the subgovernment moves into block it. With its superior intelligence-gathering apparatus, leaks and regular agency watching, members of the subgovernment can anticipate potential agency action that is either adverse to their interests, or that can be turned to their advantage. Calls are made, visits are arranged, studies are done and released, Congressmen are made to be interested, the full page ads appear. Who is surprised any longer to have a lobbyist come to his office to discuss the contents of a staff document the commissioners have not yet seen—or that is supposedly under confidential consideration? This is how things work in Washington—the point is that the public has no one to represent their interests in this swamp.

The relationship between free access to information and responsible government is very direct. Excessive and discriminatory secrecy by Federal agencies seriously blocks the citizens understanding and ability to participate in government. It was with these truths in mind that Congress passed the Freedom of Information Act (FOIA) in 1966. According to a 1967 Attorney General's memorandum, Congress intended that "disclosure be the general rule, not the exception, and that individuals have equal rights of access; that the burden be on the Government to justify the withholding of a document, not on the person who requests it; that individuals improperly denied access to documents have a right to seek injunctive relief in the courts, that there be a change in Government policy and attitude."

The FOIA has not lived up to this broad promise. One problem is that the act expects of public officials an obedience to the unenforceable. If a public officer ignores the act, the citizen must engage the agency in court, the only recourse afforded by the act. Those who can afford legal challenge are those special interests who need the FOIA least of all. Examination of court records establish this point. In the first 2 years of FOIA, 40 cases were brought under the act. Thirty-seven of these involved corporations or private parties seeking information for some private claim or benefit. Only three cases involved a demand by the public at large for information. Most surprising of all, no member of the media, which should be the prime beneficiary of the FOIA, had initiated a single court action under the act. In practice, therefore, the attitudes of agency personnel determined whether FOIA was to be a pathway or roadblock for citizen access.

The broad discretion in the act has allowed each agency to create its own "common law" in interpreting it. In doing so, they have developed a maze of confusing and contradictory regulations. Information which is claimed to be exempt from disclosure in one agency is freely given in another (for example, records of advisory council meetings—USDA—no, National Highway Safety Bureau—yes). In some agencies all requests must be in writing and all interviews cleared in advance, and strict records of all interviews required; in others information is freely given over the phone in an informal way.

By any standard, the Consumer and Marketing Service is one of the Federal Government's most fearful and defensive bureaucracies. Many officials, from assistant administrators down to inspectors on the line, regard visits from consumer representatives as a trial of nerves which may jeopardize their careers if a superior judges they had said the wrong thing. The anxiety creates a double standard which prejudices consumer inquiry. Top administrators dine informally with Aled Davies and other meat lobbyists but interviews by Nader's Raiders are often grimly formal affairs with every question and answer jotted down carefully by hovering aides. Any C. & M.S. official of any capacity must make a detailed report to his superior of any contact with a raider. Other consumer representatives report similar treatment.

The need for an informed and effective consumer presence in the Department has been best described by Rodney Leonard, often a target for consumer wrath when he was Administrator of the Consumer and Marketing Service:

> I discovered during my service in the Department of Agriculture that many officials and employees of the Department seek to minimize the information made available to the public in order to shield their decisions and actions from questioning, and frequently to cover up mistakes and misjudgments in the administration of public programs. In a very real sense, the Administrator lacks information and analysis . . . which are not clothed in the self-interest of agency bureaucracy.

Prof. Kenneth Culp Davis, after surveying the patterns of official secrecy in the regulatory agencies, concluded:

> The goal should be to close the gap between what the agency and its staff know about its laws and policy and what an outsider can know. The gap can probably never be completely closed but the effort should always continue.

In USDA, as the incidents above demonstrate, the gap is very wide and no effort is being made to close it.

The Freedom of Information Act was little help against the capricious secrecy of PRD's director, Harry Hays. Hays and his superiors in the Agricultural Research Service treated the exemptions from disclosure permitted by the act as if they were taffy in a taffy pull. Listed below are their most common evasion tactics:

1. The contamination technique. PRD takes items of unclassified material that may prove embarrassing and combines them with several items of classified information. Result: The whole sum is classified. PRD claimed that pesticide formulas were so intermixed with the safety data which must be filed by pesticide makers that the entire registration file must be closed. Independent scientists are, therefore, not permitted to judge the adequacy of the safety claims a manufacturer makes for his pesticide.

2. Trade secrets. The formula of a pesticide, where it gives a company a competitive advantage, is properly exempt under the act. PRD, however, applies the exemption to virtually all information which a company does not want disclosed. Correspondence between PRD and pesticide makers was denied because it might contain references to trade secrets. In fact, much of the information classified as trade secrets, including many pesticide formulas, is common knowledge within the industry. The only group not familiar with it is the public.

3. Specificity. A typical tactic of many agencies is to delay replying to an information request for several weeks, then state that the request was not specific enough. UDSA, for example, waited 4 months after we initially appealed Hays' refusals to tell the task force that its request was too general, in spite of the fact that it requested the Shell "No Pest Strip" file by its actual serial number. Because USDA will not make available its file indices, the requests had to be somewhat general.

4. Search fees. Even if the agency concedes that information is public, it may impose arbitrarily high fees for collecting it. USDA stated that it would cost $91,840 and take 1.6 years to prepare its registration files for public view.

5. Investigation files. A common tactic is for an agency to open a file involving the investigation of violations of a Federal law or regulation and then conceal all information about a firm or product by dropping it into the file.

6. The working paper. Here information is withheld from the public but not insiders on the grounds that information is incomplete or in preliminary form. The President's Science Advisory Committee used this tactic with their report on 2,4,5–T. A draft of the report was finished in August 1970, and released, with a few changes, in May 1971. Industry defenders of 2,4,5–T made reference to the report for over 8 months before it was made available to the public.

The task force eventually challenged USDA's denials in Federal court. In *Wellford* v. *Hardin*, U.S.D.C., D.C. Civil No. 740–70 (Aug. 5, 1970), Judge June Greene of the U.S. District Court of the District of Columbia found that the Department had circumvented the Freedom of Information Act in making secrecy the rule rather than the exception and held:

(1) It is a violation of the act to withhold from the public the means for requesting specific records (i.e. the indexes to the registration and enforcement files) when lack of specificity is given as the reason for refusing to grant an information request;

(2) It is a violation of the act to withhold documents on the grounds that parts are exempt and parts are nonexempt. This ruling curbs USDA's use of the "contamination" tactic.

On December 19, 1969, the Nader Task Force sued under the Freedom of Information Act to force the Consumer and Marketing Service to release data which would inform the public about consumer protection programs in USDA. The suit[1] asked the U.S. District Court for the District of Maryland to order the Consumer and Marketing Service to release the following data:

1. The results of USDA analyses of hotdog ingredients by brand name;
2. The letters of warning sent by the Department to intrastate meat and poultry processors suspected of sending nonfederally inspected meat across State lines;
3. The name of each meat and/or poultry slaughterer or processor who had meat detained by C. & M.S. since January 1, 1965, the reason for the detention, and the ultimate disposition of the product;
4. The minutes of the National Food Inspection Advisory Committee;
5. Copies of the biweekly reports of the Director of the Slaughter Inspection Division to the Administrator of the Consumer and Marketing Service.

The purpose of this suit was to put some teeth in the heretofore empty jaws of the Freedom of Information Act. The information requested above was denied by USDA for the following reasons: (1) Results of Government analysis of hotdog ingredients were said to be trade secrets which might harm the market position of hotdog companies; (2) the letters of warning and the detention data were considered to be investigatory files which might jeopardize USDA's prosecution of a meat violation; (3) the biweekly reports were said to be intradepartmental memorandums as were the minutes of the National Food Inspection Advisory Committee.

USDA conceded the first point and made public its quarterly analyses of brand name sausage products, one of the few times the Federal Government has given the consumer access to data from its testing of consumer products. On June 26, 1970, Judge Northrup of the U.S. District Court in Baltimore, gave USDA's policy of secrecy a stunning defeat on its other denials. He ordered that the letters of warning and information on the detention of meat and poultry products to be made available to the Nader group. The decision marked the first time that the Department has been forced by a Federal court to disclose such information to the public. Disclosure of the letters of warning will reveal how much nonfederally inspected meat is crossing State lines, which States it is coming from and which companies are shipping it.

The information on detained meat is the first time the Department has been forced to reveal the brand names of various meat and poultry products found in violation of Federal meat laws. Judge Northrup noted that the investigatory file exemption under the Freedom of Information Act was not intended to exempt all Government information about private enterprise, and stated that the possible embarrassment of the firms which had violated meat laws was not a justification for this exemption. Judge Northrup found that the exemption was intended only to prevent persons against whom the Government was enforcing the law from obtaining an advance look at the Government's case. It did not apply when firms which were the subject of Government action had already received letters of warning or had their products detained.

The Department of Justice appealed and on May 25, 1971, Judge John D. Butzner of the U.S. Court of Appeals for the fourth circuit affirmed the district court decision. In doing so Judge Butzner broke new ground in securing the public's right to information on meatpackers who violate Federal meat and poultry laws. The case of *Wellford* v. *Hardin*[2] marks the first time that a Federal agency has been forced to reveal such data about enforcement activities against brand name meat products. It is also the first time a court has awarded a decision under the Freedom of Information Act to an individual consumer.

The court decided that the FOIA's investigatory files exemption did not apply to letters of warning and administrative detention information. Because the contents of such records are already known by the companies who were warned or whose products were detained, publication would not reveal any USDA secret investigative techniques.

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[1] The suit was filed under the Federal Freedom of Information Act by James J. Hanks, Jr., a Baltimore attorney representing the Nader group.

[2] *Wellford* v. *Hardin*, — F. Supp. — (4th Cir., 1971).

Judge Butzner held that the Freedom of Information Act was designed not to increase administrative efficiency but to guarantee the public's right to know how Government is discharging its duty to protect the public interest.

This decision is a major breakthrough in helping the consumer to make informed judgments as to meat and poultry quality. In addition, it imposes a healthy discipline for the USDA through the continuing threat of public accountability.

Rodney Leonard, a former Administrator of the Consumer and Marketing Service, sees release of this information as having a double benefit. First, it allows the consumer to evaluate for himself the services of the Consumer and Marketing Service's consumer protection program. Disclosures of the letters of warning, for example, put USDA officials on notice that no improper efforts to protect industry would be tolerated. In addition, disclosure encourages obedience to the meat laws. The packers will be much more likely to clean up their own operations if they knew their letters of warning were going to be made public. Armed with this information, the consumer can avoid the chronic violators of Federal inspection laws and make the marketplace an effective regulator of meat and poultry quality.

The Department of Justice has recently asked for a 45-day period to decide whether to appeal the decision in *Wellford* v. *Hardin* to the Supreme Court.

These cases are a step toward freer information in the regulatory agencies but a small step only. Despite the act's stipulation that such cases are to take precedence on the court's calendars, they may take 6 months or more to come to a decision. Then there is always the possibility of appeal. If public participation in agency decisionmaking is to increase, there must be immediate changes in the implementation of the Freedom of Information Act:

(1) Each agency should reply to a request for information within 7 working days. If more time is needed, a notice should be sent to the requester informing him of the date when the information will be available, and the reason for the delay.

(2) If information is denied, the denial should state the exemption being claimed, why it is applicable in this case, and an outline of appeal procedures available.

(3) A central file of all denials and the reasons for them should be maintained for public inspection.

(4) Agencies should organize filing systems so that exempt and nonexempt information can be easily segregated on request.

(5) Each agency should establish a one-step appeal procedure with final action within 10 days of the filing of the appeal.

(6) Specific procedures should be developed for taking corrective action when Federal officials resort to harassment techniques or other actions contrary to the act.

(7) Congress is not exercising effective oversight over the way the act is being observed in the agencies. There have been no congressional hearings since the act was passed.

Mr. MOORHEAD. Thank you.

Mr. Schuck?

Mr. SCHUCK. Thank you, Mr. Chairman.

STATEMENT OF PETER H. SCHUCK, ESQ., CENTER FOR THE STUDY OF RESPONSIVE LAW

Mr. SCHUCK. I might preface my remarks by saying that I have been with the center a relatively short time as compared with Mr. Robertson and Mr. Wellford. Judging from their experiences, I have observed that as time has passed, the activities of the agencies in guarding their information have become progressively less crude and more refined. But the efficacy of their attempts to guard their information has remained undiluted, and, so, when I discuss the cases that I will present, you will note that the agencies' activities have an air of plausibility about them but when closely examined, they are revealed as the same old tactics in new dress.

Before attempting to discuss my experience with the act, it is well to mention the act's merits:

First, the act and its legislative history put the Congress and the President on record as strong advocates of full disclosure to the public of the way in which the public's work is conducted. This virtue would be strengthened if Congress would extend the reach of the act to its own activities and if the President would vigorously discipline executive agencies and officials who subvert the principles of the act.

Second, the act shifts the burden of justification to him who would deny the public access to information. The official is obliged to find an exemption in which to cloak his claim of secrecy. This has led to some remarkably tortured readings of the act by secretive and defensive bureaucrats. And it has led to a welcome, if all too frequent, comic relief in the quest for public participation in Government. But it has also undoubtedly promoted the release of some information that might otherwise have been withheld.

Why, then has the act failed?

A brief discussion of a few case studies will perhaps make the discussion a bit less abstract.

The first case reflects common tactics of bureaucratic subversion of the act. It might be called the "Fob-him-off-with-a-meaningless-summary" stratagem or the "Delay-until-the-information-becomes-stale" routine. In early October 1971, I received information that the Missouri meat inspection program was in very bad shape, notwithstanding the fact that after having applied for and received a one-year extension, it had finally been certified by USDA under the Wholesome Meat Act of 1967 as "at least equal to" Federal standards. Last August, USDA required Missouri to conduct a survey of all of its meat processing plants. As a result of the survey in this "equal-to" state, 146 out of 484 plants were shut down by the authorities for noncompliance. About 15 or so never reopened. In September, USDA conducted its own random survey of 30 Missouri plants. Ten percent of the plants surveyed achieved a score of less than 70 and many more scored just above 70. According to USDA's own regulations governing certification of State programs, all plants surveyed must score 70 or above for certification to be granted. Nevertheless, this State was recertified as "equal to" Federal standards shortly thereafter.

I have been engaged since mid-October in a vain effort to gain access to three categories of information: (1) Compliance surveys conducted by USDA with respect to the meat inspection programs of Missouri, Nebraska and several other States; (2) USDA's correspondence with State officials concerning their findings; and (3) the surveys required by USDA to be conducted by these States and submitted to USDA as part of its compliance review program.

By mid-December, USDA had reneged on several oral promises to produce the information. It did supply a document entitled "Review Analyses of the Missouri State Meat Inspection System." This document is, to be most charitable, USDA's summary of the survey report. More accurately, the only information furnished concerning conditions in the plants is one page of unanalyzed scores for unidentified plants, and one-half page of extremely general descriptions of conditions in four exempt plants. This document was essentially useless to a citizen seeking to analyze the nature and quality of the Missouri

program and USDA's certification standards. Even less information was supplied on Nebraska, and none has been forthcoming on the other States.

I then filed the appropriate administrative appeals under the Freedom of Information Act. On March 2, I received a final denial from G. R. Grange, Acting Administrator of the Consumer and Marketing Service. Mr. Grange asserted that USDA "does not have surveys conducted by said States nor have any such surveys been submitted to the Department." One wonders how USDA can insure that certified States are and remain in fact equal to Federal standards if USDA does not even require the States to submit to USDA a copy of compliance surveys conducted at USDA's instance?

Mr. Grange then denied access to the other information citing the "investigatory file compiled for law enforcement purposes" exemption and the "intra-agency memoranda" exemption. Yet the case of *Wellford* v. *Hardin* and other Freedom of Information Act court decisions make it perfectly clear that these exemptions are not applicable to this type of information. Moreover, we are informed that the Department of Justice has informally reviewed USDA's position on my information request and has strongly urged USDA to make the information public.

Mr. Grange concluded his denial thus:

> It is my determination that disclosure of the requested information would be damaging to cooperative State and Federal efforts and would reduce the usefulness of the review procedures as a tool in maintaining compliance and carrying out the provisions of the (act). Furthermore, the surveys in question were performed some time ago, and the status of the plants named therein has changed.

I might add that I requested the information about 2 weeks after the surveys were made.

> Therefore, disclosure of this data would, in my view, constitute an unwarranted invasion of privacy. I must, therefore, deny your request for information.

I have not been alone in my unsuccessful efforts to gain access to this information. Missouri Senator Donald Manford has made the same request to USDA. As chairman of the Senate Appropriations Committee, Senator Manford feels a particular responsibility to evaluate the quality of the Missouri meat inspection program and its conformity with Federal standards. Yet USDA and the Missouri Department of Agriculture have both rejected his request. Similarly, KYTV in Springfield, Mo., has met with the same obstruction by USDA, thus hobbling the station's efforts to inform Missouri citizens about their own program. The Missouri Senate yesterday considered the subpenaing of these surveys from Missouri officials. I am not sure what the outcome of that was.

The second case demonstrates the use of the "It's-exempt-because-it's-embarrassing" approach to circumventing the act. One of the great tragedies of American politics has been the contribution by the Extension Service and other USDA agencies to the perpetuation of racial discrimination and poverty in many of our States. Seeking to determine the civil rights record of the USDA in recent years, I requested in November 1971, access to (1) all audits and investigative reports or other studies conducted by USDA's Office of Inspector General concerning the compliance by any USDA agency and any recipients of USDA assistance, with the Civil Rights Act of 1964; and (2) all

audits and investigative reports or other studies in the possession of USDA concerning such compliance conducted by State or local governments. My request was denied, with no reason being given other than that "the Freedom of Information Act and our regulations exempt OIG reports from mandatory disclosure," and that I would have to request the reports of State and local governments to USDA from those governments themselves. An administrative appeal is still pending. No statutory exemption has been cited to justify this denial. Nor is there any such exemption applicable to this type of final report of a preexisting state of facts. The information was denied because those audits and investigations are profoundly embarrassing to USDA and because the act offers no incentive to a public official to comply with the act, particularly under circumstances in which the nature of the requested information gives him a strong incentive not to comply.

The third case demonstrates the "Sue-us-again" tactic of avoiding the act. In the summer of 1969, my associate, Mr. Harrison Wellford, requested and was denied access to USDA's files of (1) warning letters to meat and poultry processors suspected of violating Federal meat laws, and (2) data on administrative detentions of meat and poultry products. After an expensive 2-year legal battle (over $6,000 in billable legal services), Mr. Wellford—and the public—established in the courts what Congress clearly established in the act—the right to inspect such information.

In an effort to study and analyze the ways in which USDA does and does not enforce the meat and poultry laws against processors and packers on behalf of consumers, I sent a Georgetown Law School student, Mr. Michael Mass, to USDA to study the back-up files which alone supply the details concerning how USDA disposed of the cases mentioned, without details, in the now-public warning letters and detention logs. USDA refused to permit public access to this information. According to Mr. Mass, Mr. L. L. Gast, Director of Compliance and Evaluation for the Consumer and Marketing Service, stated that consumers would have to undertake another prolonged lawsuit in order to win access to this information. I then made a formal request for this data, which was denied as were my subsequent administrative appeals.

The reasoning of the *Wellford* v. *Hardin* decision, which was directed at the warning letter and detention records, clearly extends as well to the detailed disposition data in the case files which underlie those records, yet the information remains secret. We shall be put to the expense of having to sue USDA once again to obtain this data.

The Department of Transportation is evidently a skillful practitioner of the "Now-it's-public-now-it's-private" gambit. A Nader study group analyzing the Federal Government's use of consultants requested access to a study performed for DOT by the Sperry Rand Corp., a major beneficiary of Government research contracts. The Sperry study had developed factual information on the management of the DOT research and development program.

DOT denied the requests, stating that "Although the reports were prepared for us by non-Government experts, we regard them as intra-agency memorandums." But just in case anyone should point out that this was a rather novel interpretation of the term "intra-agency," DOT was prepared with another justification for denial. The Sperry re-

ports, DOT contended, "consist of recommendations, proposals, advice, and opinions, and contain little or no factual information," and were, therefore, exempt under DOT regulations. Yet the proposal upon which the contract to Sperry was awarded, called for the development, testing, and evaluation of factual information, and Sperry was paid for reporting such information to DOT. If Sperry properly performed its contract, this information must be disclosed under the act. If Sperry did not properly perform it, why was it paid by DOT?

In general, there are two ways in which the act can be strengthened. First, the exemptions can be defined more precisely and narrowly. This approach is difficult and may create more problems than it solves by leading to overspecificity. A second, preferable approach is to build into the act sufficient incentives for bureaucratic compliance so that the act will become to a significant extent self-enforcing.

I suggest the following reforms would help to make the act self-enforcing:

First. The agency should be required to give an affirmative or a negative response to a formal request within a specified period of time, say 20 days. If the response is affirmative, the requested information must be supplied "promptly"—as provided in the existing act. If the response is negative, the requester would be immediately informed in writing, with the agency sending a copy of its letter of denial to a "Freedom of Information" unit, established in an independent consumer agency or other body outside the existing agencies.

Second. Within a specified period of time, say 20 days, from the receipt of the letter of denial, the freedom of information unit would rule on the validity of the denial under the act and inform both the requester and the agency of this ruling. Within a specified period of time, say 10 days, the agency would have to inform the requester of its acquiescence or nonacquiescence in this ruling. If the agency acquiesced, the information would have to be supplied "promptly." If the agency did not acquiesce, or if the requester was dissatisfied with the unit's ruling, the requester would then be entitled to sue immediately in a Federal district court. Since the vast majority of information requests are routine and fall into fairly well-established categories, the freedom of information unit could be a very small and progressively routinized operation whose rulings would over time create a consistent and integrated body of freedom of information law.

Third. If the requester is obliged to sue in order to obtain the requested information, and is successful, he should be entitled by statute to recover reasonable counsel fees from the agency which denied his request. If the court rules that the agency's denial of the information was frivolous or willful, the requester should be entitled to recover punitive damages from the agency in an amount established by statute. These provisions would not only place the financial burden of a wrongful denial of information on the agency, where it belongs, but would also provide the agency and its officials with a realistic and palpable incentive to comply with the provisions of the act.

Fourth. The act should be amended to include information in the possession of Congress, and should be clarified to remove any doubt that the work of consultants and other Government contracts is sub-

ject to the act, unless an exemption is otherwise applicable to the information request.

Thank you.

Mr. MOORHEAD. Thank you, Mr. Schuck.

(Mr. Schuck's prepared statement follows:)

PREPARED STATEMENT OF PETER H. SCHUCK, ESQ., CENTER FOR THE STUDY OF RESPONSIVE LAW

Gentlemen, my name is Peter Schuck. I am an attorney and a consultant to the Center for Study of Responsive Law, Ralph Nader's research and study group here in Washington.

I wish to thank the subcommittee for inviting me to testify at these hearings on the Freedom of Information Act. The subcommittee is to be commended for its initiative in taking the first systematic look at the way in which the Freedom of Information Act has actually operated in the almost 5 years since its enactment. For those of us whose daily activities include the monitoring of the policies and decisions of the Federal agencies, the act was hailed as a milestone in the legal development of a democratic society, a charter of pluralistic political life.

Our high hopes have met with keen disappointment. The noble intent of Congress in enacting the act has foundered on the rocks of bureaucratic self-interest and secrecy. A statute which should have facilitated public participation in the public's work, has instead engendered endless litigation. What is more important, the act has produced relatively little information of consequence to citizens concerned about agency policies.

Before attempting to discuss my experience with the act, it is well to mention the act's merits. First, the act and its legislative history put the Congress and the President on record as strong advocates of full disclosure to the public of the way in which the public's work is conducted. This virtue would be strengthened if Congress would extend the reach of the act to its own activities and if the President would vigorously discipline executive agencies and officials who subvert the principles of the act. Second, the act shifts the burden of justification to him who would deny the public access to information. The official is obliged to find an exemption in which to cloak his claim of secrecy. This has led to some remarkably tortured readings of the act by secretive and defensive bureaucrats. And it has led to a welcome, if all too frequent, comic relief in the quest for public participation in government. But it has also undoubtedly prompted the release of some information that might otherwise have been withheld.

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In an effort to study and analyze the ways in which USDA does and does not enforce the meat and poultry laws against processors and packers on behalf of consumers, I sent a Georgetown Law School student, Mr. Michael Mass, to USDA to study the backup files which alone supply the details concerning how USDA disposed of the case mentioned, without details, in the now-public warning letters and detention logs. USDA refused to permit public access to this information. According to Mass, Mr. L. L. Gast, Director of Compliance and Evaluation for the Consumer and Marketing Service, stated that consumers would have to undertake another prolonged lawsuit in order to win access to this information. I then made a formal request for this data, which was denied as were my subsequent administrative appeals.

The reasoning of the *Wellford* v. *Hardin* decision, which was directed at the warning letter and detention records clearly extends as well to the detailed disposition data in the case files which underlie those records, yet the information remains secret. We shall be put to the expense of having to sue USDA once again to obtain this data.

The Department of Transportation is evidently a skillful practitioner of the "Now-it's-public-now-it's-private" gambit. A Nader study group analyzing the Federal Government's use of consultants requested access to a study performed for DOT by the Sperry Rand Corp., a major beneficiary of government research contracts. The Sperry study had developed factual information on the management of the DOT research and development program.

DOT denied the requests, stating that "Although the reports were prepared for us by nongovernment experts, we regard them as intra-agency memorandums." But just in case anyone should point out that this was a rather novel interpretation of the term "intraagency", DOT was prepared with another justification for denial. The Sperry reports, DOT contended, "consist of recommendations, proposals, advice, and opinions, and contain little or no factual information", and were therefore exempt under DOT regulations. Yet the proposal upon which the contract to Sperry was awarded, called for the development, testing, and evaluation of factual information, and Sperry was paid for reporting such information to DOT. If Sperry properly performed its contract, this information must be disclosed under the act. If Sperry did not properly perform it, why was it paid by DOT?

In general, there are two ways in which the act can be strengthened. First, the exemptions can be defined more precisely and narrowly. This approach is difficult and may create more problems than it solves by leading to overspecificity. A second, preferable approach is to build into the act sufficient incentives for bureaucratic compliance so that the act will become to a significant extent self-enforcing.

I suggest the following reforms would help to make the act self-enforcing:

1. The agency should be required to give an affirmative or a negative response to a formal request within a specified period of time, say 20 days. If the response is affirmative, the requested information must be supplied "promptly" (as provided in the existing act). If the response is negative, the requestor would be immediately informed in writing, with the agency sending a copy of its letter of denial to a freedom of information unit, established in an independent consumer agency or other body outside the existing agencies.

2. Within a specified period of time, say 20 days, from the receipt of the letter of denial, the freedom of information unit would rule on the validity of the denial under the act and inform both the requestor and the agency of this ruling. Within a specified period of time, say 10 days, the agency would have to inform the requestor of its acquiescence or nonacquiescence in this ruling. If the agency acquiesced, the information would have to be supplied "promptly." If the agency did not acquiesce, or if the requestor was dissatisfied with the unit's ruling, the requestor would then be entitled to sue immediately in a Federal district court. Since the vast majority of information requests are routine and fall into fairly well-established categories, the freedom of information unit could be a very small

and progressively routinized operation whose rulings would over time create a consistent and integrated body of freedom of information law.

3. If the requestor is obliged to sue in order to obtain the requested information, and is successful, he should be entitled by statute to recover reasonable counsel fees from the agency which denied his request. If the court rules that the agency's denial of the information was frivolous or willful, the requestor should be entitled to recover punitive damages from the agency in an amount established by statute. These provisions would not only place the financial burden of a wrongful denial of information on the agency, where it belongs, but would also provide the agency and its officials with a realistic and palpable incentive to comply with the provisions of the act.

4. The act should be amended to include information in the possession of Congress, and should be clarified to remove any doubt that the work of consultants and other government contractors is subject to the act, unless an exemption is otherwise applicable to the information request.

The success of a pluralistic politics depends to an enormous extent upon the systematic continuous contribution to the policymaking process by all citizens affected by governmental decisions. This citizen input requires the fullest access to the information upon which public decisions are made, and should be regarded by public officials not as a burden, not as a meddlesome intrusion, but rather as a welcome opportunity to ennoble their performance of the public's work. By enacting the Freedom of Information Act, Congress affirmed this principle. It is now time to keep faith with that principle and make of it—and the act—a reality.

Mr. Moorhead. Mr. Gottlieb.

STATEMENT OF BERTRAM GOTTLIEB, TRANSPORTATION INSTITUTE

Mr. Gottlieb. Thank you, Mr. Chairman.

I do not have a prepared statement with me.

I was asked to testify at this hearing because of one experience which I had with the Maritime Administration in 1969.

In 1968, during the presidential campaign, now President Nixon, in a statement released in Seattle, came out with his maritime program, the program that he indicated that if he were elected he would recommend to the Congress.

It became known after President Nixon was elected and after he took office, that a recommendation would be brought forth to the Congress, and with that in mind as Research Director of the Transportation Institute, I decided to look into some of the aspects of the previous maritime legislation so that we would be in a position to recommend new legislation or to analyze recommendations of the President or others to the Congress. One of the areas that we wanted to look into was the whole area of subsidy for the American merchant marine, how it worked and whether it was a worthwhile program, and what changes might be made in new subsidy programs to make a new Merchant Marine Act more viable in preserving and improving the chaotic position of the American merchant marine.

An event occurred along about May, I guess it was, of 1969 which put some pressure on finding out this information at a more rapid pace than we had anticipated. I sent one of the young men who works for me to the Maritime Administration with what I had considered a very simple request, and that was to get information on two ships which had been purchased from the Government by the Farrell Co. under the Ship Sales Act of 1946. This was the act which enabled the Government to sell, to both domestic and foreign ship operators, ships built during the World War II buildup at prices much less than the costs to the American taxpayer.

The request that I made at that time was rather simple.

I wanted to know how much money had been paid in subsidies each year, by voyage, for two vessels. The young man came back to me and reported that the information office at the Maritime Administration had told him that that information was not available.

I then called up the agency and was referred to a Mr. James Dawson, who at that time was Secretary of both the Maritime Subsidy Board and the Maritime Administration, and he told me that that information was not available.

I discussed it with him at some length over the telephone, and since he indicated to me he really did not understand what I wanted, I sent him a letter—in which I specified the information I was requesting. I received an answer back from Mr. Dawson saying that I had not followed the proper procedures and that I should file form CD–3244, which is a form that the Department of Commerce uses for people asking for information. I filed that form with a $2 fee. At the same time I received some excellent assistance from a former staff member of this committee, Mr. Matteson. I had met Mr. Matteson when Congressman Moss was chairman of the subcommittee investigating the use of lie detectors in Government, and I was quite interested in that subject at the time. And, so, I guess my experience would be rather atypical, because very early in my requests for my information I received significant help from a staff member of this subcommittee who called the Maritime Administration and expressed his opinion that the Freedom of Information Act covered the records I was asking for.

However, I did submit my request on the proper form and the request was turned down. The reason given for turning it down was that the information was not available in keeping with 5 U.S.C. section B–4–8–5. I searched the United States Code for the citation which had been given me and could not find it in that form. But I did find it in a slightly different form, and I sent a letter to Mr. Dawson in which I told him that I had checked over his citations and that I found little value there, and I gave him my reasons for requesting a redetermination.

He had cited the various sections of 5 U.S.C. 552(b) (4) (5) and (8). I pointed out that the requested information on operating differential subsidies was for the period of December 22, 1948, to September 28, 1960, and the reason for those specific dates were—those were the dates during which two ships had received subsidy payments. I pointed out that certainly the Farrell Lines which operated these vessels could not be put to any competitive disadvantage in 1969 for disclosure of information at least 9 years old.

I also pointed out to him that the Maritime Administration published and mailed, and made available to the public the total operating subsidy paid to the various subsidized lines, including Farrell, and that the request which he refused simply requested the amount of the subsidy paid two of Farrell's vessels over an approximate 12-year period.

And third, that the Maritime Administration makes available to the public a significant amount of other information. For example, it gives the information on the date vessels were purchased by companies from the Government, the original construction cost of the

U.S. taxpayers of those vessels, the price paid by Farrell, or by any other company for the vessels, and the date that the vessels were disposed of by these companies, and how they were disposed of, and the nature of the disposition.

Sometimes they were scrapped, sometimes they were sold foreign, sometimes they were traded into the Reserve Fleet and so on. The amount of credit received by these companies for the vessels if they were traded back to the United States was also available.

And then I went on to suggest to him that if I had interpreted his citation properly, that item 4 refers to trade secrets and commercial or financial information obtained from persons in privileged or confidential ways, and I indicated that item 4 did not fit my request in any way, since I had requested information on the amount of subsidy payment paid by the U.S. Government for the vessels operations.

I had not requested any of the cost information the operator had submitted to the agency in order to get a subsidy payment or any of the other operating information. I simply asked for the amount of subsidy paid to the operator. I indicated that I did not request any inter- or intra-agency memorandums of letters, and I indicated that item 8 refers to information contained in operating or condition reports prepared by or on behalf of or for the use of an agency, and the information I requested for subsidy payments did not fit that, either.

And I finally pointed out that operating differential subsidies are paid from public funds under a program established by public law, and that I thought the public was entitled to know how those funds were expended, and I asked for a redetermination of the opinion.

After that I sent copies of my communications, and I was in constant contact with Congressman John E. Moss, and also Jack Matteson of the staff. Congressman Moss wrote a letter to Mr. Dawson saying that he felt that the act covered this type of information, and Mr. Matteson was in constant contact with the Maritime Administration.

And after about a 3-week period my application was favorably acted upon by the Maritime Administration.

This did not end it. I sent one of my people over, and he worked through some old Maritime Administration documents, and I got the information on those two vessels. Then I expanded my request and paid another $2 fee. I asked for the information on all of the ships that had been purchased by American operators from the U.S. Government under the Ship Sales Act of 1946. I originally was turned down on that because they said my request was too broad. I got the names of all of the ships, and submitted them to the agency.

I might add that when I say I did it, that I have a reasonably good-sized and well-equipped staff, with a good office and the facilities to do those kinds of things, which I suspect most people do not have.

Finally, however, they did agree to give it to us. They sent us a letter which said the only way they could give us the information was to have the people work overtime and Saturdays and Sundays, and that it would cost me a minimum of $8 an hour, and that they anticipated it would be a minimum of $12,000. I felt that was slightly high, since money had been paid to these companies and somebody must have had some justification. Maybe I was naive in assuming this, but I did assume that somebody had some records upon which

they paid these subsidies and, therefore, those records should be available.

Well, I decided against paying the $12,000 and I hired some students from George Washington University, part time, and after some considerable dickering with the Maritime Administration I received permission to have them go into the agency and do the work.

Now, I did this because these same students I had used in a previous effort at the U.S. Coast Guard, and I had received a letter from an official of the Coast Guard saying that these young men had come in, had conducted themselves in an exemplary manner, and had not interfered with the work of the Coast Guard, and that it had been a pleasure to work with them, and so on.

When I was told that doing this would interfere with the operations of the Maritime Administration, I presented this letter and secured tentative approval that would let us start and then see what happened.

Well, we did dig it out. I think the main reason for the refusals of my request was not the desire of the agency to withhold information. It would have embarrassed the agency if I had made my information public. The records were in horrible shape. They were all over the country, they were incomplete in many cases.

Records of particular voyages were missing. The Subsidy Board has a practice of paying a partial amount at the submission of certain records, and the full amount on the submission of more complete records. Sometimes one or the other of those records were missing.

So, finally we did put together the information we needed. I do not want to leave it there, because a significant change has taken place in the Maritime Administration since 1969. Mr. Andrew Gibson, at about that time, became Maritime Administrator, and is now Assistant Secretary of Commerce for Maritime Affairs. He brought about a significant change in the attitudes of the people in the Maritime Administration.

I stress this because I am not expert in the writing of laws, but I do feel insofar as this particular law is concerned, that more important than the words that might be in the act is the willingness of the people in the bureaucracy to conform voluntarily to the act.

And in this particular case there has been a dramatic reversal in the Maritime Administration. Prior to Mr. Gibson's taking over, the experiences that I have just illustrated were not unusual experiences. We were constantly frustrated in seeking even the most elementary information from MARAD. We felt that the purpose of the Maritime Administration was to see the demise of the American merchant marine and prevent anybody from getting any information on the operations of the agency which in any way might help us save the American merchant marine.

Since then, as I have indicated, since Mr. Gibson has become the Administrator and the Assistant Secretary, there has been a dramatic reversal. There is almost nothing that I can think of that in the last 2 years or more that we have requested of the Maritime Administration, that it not only has furnished us, but gone out of its way to see to it that the information we received was in a useful form. MARAD has worked very closely with us and others in the industry, to help us.

They have sought from us advice as to how the records could be better kept, so they could be useful to people who are working within the industry on both management and labor side. They have really been what I as a citizen would say is all that I could hope for from a department of the U.S. Government.

Today our experience with the Maritime Administration is nothing but excellent.

Mr. MOORHEAD. Gentlemen, it occurs to me that certain allegations against individuals and departments have been made, and we may want to call these people up to testify and we would administer the oath to them.

I think to make this testimony stand up equally, I would like to administer the oath to all of you, if you are agreeable.

Would you rise and raise your right hand? Do you solemnly swear that the testimony you have given and will give to this subcommittee has been the truth and will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. ROBERTSON. I do.

Mr. WELLFORD. I do.

Mr. SCHUCK. I do.

Mr. GOTTLIEB. I do.

Mr. MOORHEAD. Mr. Gottlieb, what was the cost of the investigation of your students compared to the $12,000 quoted you by the Maritime Administration?

Mr. GOTTLIEB. Unfortunately I cannot give you a specific amount because the young men that I had working on this were all students at the George Washington University, and worked for me part time. They not only worked on this project but they worked on other projects concurrently. I can only tell you that as their supervisor in this endeavor I would suspect that the total cost came to significantly less than the cost given to me as a minimum of $12,000. But, I do not think the $12,000 fee requested of me was an excessive amount, considering the way the records were at that particular moment in time. The records were just in bad shape. They are not in that kind of shape any more.

You know, it takes a little time after someone like Mr. Gibson comes into an agency, and makes significant changes. It takes time for that to trickle down in the agency so that the career people below him who have been used to working in a certain way for a long period of time finally begin to work in a different way. And I do not think they really believed that Mr. Gibson meant what he said in his commitment to the furthering of the industry, and doing a good job for the United States at the same time.

But now, as I have indicated, it has changed a great deal. But, I do not have any specific records on the cost.

Mr. MOORHEAD. Mr. Wellford, I think you quoted a conversation that you had with an official of the Pesticide Regulations Division.

Mr. WELLFORD. Yes.

Mr. MOORHEAD. What was the name of that individual?

Mr. WELLFORD. His name was Mr. Bussey.

Mr. MOORHEAD. Can you give the full name?

Mr. WELLFORD. Mr. Bussey was chief of the filing operations for the Pesticide Regulations Division, when this incident took place in 1970.

Mr. Moorhead. Was this a transcript of your conversation or——

Mr. Wellford. No. These are the notes that my people took during the conversation. We were not allowed to take a tape recorder with us when we went into the Division.

Mr. Moorhead. Well, those are the bells. I will just ask one more question at this time.

Do I understand that there is general agreement, with the possible exception of Mr. Schuck, that the main difficulty with the Freedom of Information Act is the attitude of the people with whom you are dealing, not with the law, itself?

I believe that was your testimony, Mr. Robertson, that it was not the ambiguity of the law, but the attitude of the people?

Mr. Robertson. Mr. Chairman, the two are clearly interrelated because we have a law which is essentially not self-enforcing, and we need to build in some sanctions. I think that our testimony would be agreement on this point, that the attitude is all important. But the attitude is also a product of not having any sanction that may be applied in case the attitude is not the kind that Congress expects.

Mr. Moorhead. Thank you.

Mr. McCloskey.

Mr. McCloskey. Can I ask you, just as a matter of practice in filing these lawsuits, with precedents on the calendar, how long does it take you from the time of filing your complaint to get the case adjudicated under this situation in the District of Columbia?

Mr. Wellford. Well, let me see. I think we began the case against the Meat Inspection Division in December of 1969, as I remember.

Mr. McCloskey. What I am trying to get at, are you looking at 60 days, or 6 months, or 9 months? What is the passage of time?

Mr. Schuck. Just the litigation?

Mr. McCloskey. From the time of filing your complaint in the precedent calendar, what do you get?

Mr. Wellford. We first made our request in July of 1969. We went through a lot of delays and appeals and so forth until we finally got a final denial from the Department. We then filed our complaint in December of 1969. At that time we were given part of the information we asked for, as soon as we filed the complaint.

The final opinion on the Government's appeal from the district court decision came down in May 1971, just about 2 years after we made our initial request for the information.

Mr. McCloskey. As I understand the collective experience of you gentlemen, you have all had two or three suits of this kind, and what would you give me as the average time between filing a complaint and the district court judgment?

Mr. Robertson. I would say that a good average would be a year. That would be an average. While the act calls for an expedited processing of a case brought under the Freedom of Information Act, often does not result in being the way these cases are handled in the courts expedited unless there is some special request for expedition made.

And second, that the Government under this act still has, like under most other litigation has, 60 days to answer the complaint. It seems to me that in freedom of information cases the Government ought to be

answering the complaint within 10 days. I have had the experience of the Government also not answering even within the 60-day period. It may be 3 or 4 months before the Government actually answers the complaint.

Mr. McCloskey. Let me go back to your specific recommendations. Do I understand that the consensus of the four of you is that it would tighten up this problem of bureaucratic noncompliance or reluctance to comply, if you were able to assess against his agency attorney's fees and costs? Is that correct?

Mr. Robertson. That is right.

Mr. McCloskey. Now, would you see any objection if we were to add such a section to the law about the frivolous, the willful, or deliberate denial of information, that if the person requesting information were to do so for purposes of harassment, or be unreasonable, or frivolous, that similar penalties be assessed against the individual for the Government?

Mr. Robertson. Because the law does not require any particular motivation——

Mr. McCloskey. I appreciate that. The problem the agencies are going to give back to us, and I have had this problem, and I have seen it as a private attorney, is that there are certain individuals out in the public at large who will take advantage of this kind of a position, and will ask for records that are voluminous, and by their nature would have no practical significance to anybody except to this individual. Balanced against the public's right to know, would it not be appropriate if we put such a provision in the law to make it cut both ways, attorney's fees and costs to be assessed on the other side?

Mr. Wellford. I think there is one balancing factor already present: it costs a lot of money to go to the trouble to sue and, as you know, that is what forecloses most people from going beyond that final denial.

Mr. McCloskey. That used to be true, but we have a lot of young public service lawyers now that are willing to undertake litigation.

Mr. Wellford. We have a few.

Mr. McCloskey. Don't you gentlemen meet that category in certain respects?

Mr. Robertson. I think you will find that public interest lawyers are not willing to take on frivolous suits, either. The priorities are very tight for lawyers in the public interest area and if something is really requested for harassment or for other frivolous purposes, I think that the mere expense of having to go to court is going to prevent that kind of abuse from being a continuing problem.

I have a lot of problems with the Government's costs of litigation, in a case where any citizen is asking for information, being assessed against the citizen, because that would be a strong disincentive to ask or to prosecute an appeal.

Mr. Wellford. That is not what you are asking is it? Are you saying that if the citizen sues and he loses, and the court finds that his suit was motivated by capricious, vindictive reasons, that the expenses of the Government in defending this suit should be assessed against him? Is that the proposal, basically?

Mr. McCloskey. I am talking about the frivolous appeal which cuts both ways under the current law. I know that either the plaintiff and/or the defendant who files a frivolous appeal is hit with the same as-

sessment of attorney's fees and costs, although possibly it is not used very often.

Mr. Wellford. Speaking as an individual, it would not bother me if your proposals were enacted.

Mr. Schuck. I agree; I think in addition that the proposal I made for an independent evaluation of the claim, at any early point before it goes to trial by this so-called freedom of information unit, would I think head off a lot of frivolous pursuits of these kinds of claims.

In addition, it would give the Government agency some indication of what an objective judge is likely to rule in the future, so that it would be much more likely upon a ruling by this unit that the original position was in violation of the law, and I think it would be much more likely to comply rather than go to court.

Mr. McCloskey. I have no further questions.

Mr. Moorhead. Mr. Phillips?

Mr. Phillips. Do you think, Mr. Schuck, with regard to this independent agency to which you would refer these kinds of denials, could that service be properly performed by the Office of Legal Counsel or are you talking about a separate entity that would be above, or coincidental to OLC?

Mr. Schuck. I think it is absolutely essential that this particular unit be placed outside of any particular line agency. In the case of certain requests, the incentives are so great on the part of the bureaucrat to maintain the secrecy of this information that that incentive invariably spills over into the Legal Counsel office.

I think what you want is a set of lawyers outside of the agencies, perhaps in the Consumer Protection Agency.

Mr. Phillips. How about the General Accounting Office?

Mr. Schuck. I would not think that the location of it is of great consequence, so long as it is independent, and I think that this unit could be very, very small, and as I say, I imagine about 95 percent of the requests are strictly routine and could be disposed of in 5 minutes.

And for the others which require some kind of dialog between the unit and the agency that, of course, would take more time, but I think few cases would be sufficiently involved to require a great deal of resources.

Mr. Gottlieb. May I comment on that? I do not want to disagree with the gentlemen at this table. This is the first time that I have met them, and most of the things they have said sound very good to me. I am not an expert in the kind of work they are doing, but I would hate to see the Members of Congress give up this ombudsman role to some other agency. I just do not think that another agency would have the kind, if I might use the word, of clout that Congressman Moss had in helping me get the information I wanted, and if you consider setting up any agency I would hope that you would not use that to stop people like me from using the good offices of the Congress to see to it that the agencies live up to the laws of the Congress.

Mr. Phillips. Of course, the General Accounting Office, being an arm of the Congress, could perhaps perform this function.

Mr. Gottlieb. Well, I have been involved with an opinion of the Comptroller General involving the Department of Health, Education, and Welfare, and its desire to close the public health service

hospitals, and the Comptroller General has ruled that they cannot do it, and yet they are going right ahead and doing it.

So, I have a little bit of concern for the power of the Comptroller General in this area.

Mr. Moorhead. Thank you very much, gentlemen, for presenting to us your horror stories, as I would describe them, and for your suggestions for legislative improvements, and the like. We have to adjourn the subcommittee because of a vote over on the floor of the House. The subcommittee will adjourn to meet on Friday, March 17, at which time we will have a panel of news media persons having experience in the use of the Freedom of Information Act.

Thank you very much.

(Whereupon, at 12:40 p.m., the hearing was recessed, to reconvene at 10 a.m., Friday, March 17, 1972.)

U.S. GOVERNMENT INFORMATION POLICIES AND PRACTICES—ADMINISTRATION AND OPERATION OF THE FREEDOM OF INFORMATION ACT

(Part 4)

FRIDAY, MARCH 17, 1972

HOUSE OF REPRESENTATIVES,
FOREIGN OPERATIONS AND
GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m., in room 2203, Rayburn House Office Building, Hon. William S. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives William S. Moorhead, John E. Moss, and John N. Erlenborn.

Staff members present: William G. Phillips, staff director; Norman G. Cornish, deputy staff director; and William H. Copenhaver, minority professional staff, Committee on Government Operations.

Mr. MOORHEAD. The Subcommittee on Foreign Operations and Government Information will be in order.

This morning we resume hearings by the House Foreign Operations and Government Information Subcommittee into the administration and effectiveness of the Freedom of Information Act. The act, passed by Congress some 6 years ago, was designed to make the public business of government the people's business, insofar as possible under our democratic system of government. In these hearings we are endeavoring to find out if the law is being carried out by the executive bureaucracy as Congress intended.

Is it increasing the flow of news?

Are the press and the public getting more information about their Government—its mistakes as well as its positive achievements?

Or are Government news censors finding new ways to circumvent the law?

For the past 2 weeks we have been examining these questions. Thus far, we have heard testimony from top Government information experts, former Presidential press secretaries, and from a distinguished panel of legal experts on the Freedom of Information Act. We have heard from the Justice Department officials who administer the law and from the chairman of the Administrative Conference of the United States. We have taken testimony from a number of witnesses

from public interest groups who have taken the Government to court to obtain information.

Today, we are pleased to have a panel of news editors and reporters who have had extensive experience in use of the Freedom of Information Act to obtain information. One of the great mysteries about the act is why it is not more widely used by the press. When the legislation was being considered 6 years ago, most of us thought that the public media would be one of the major champions and beneficiaries of this new weapon against the secrecy-minded Government news censor. Various organizations representing the news media were among the stanchest supporters of the work of this subcommittee and of the freedom of information legislation.

Yet, after more than 4 years of operation, only a handful of newspapers or other public media have actually invoked the provisions of the act to the limit by going into the Federal courts to fight for their first amendment rights. This does not mean that many newsmen do not make some use of the law to obtain information. Our investigations have shown that in many cases a newsman's threat to go to court often forces a nervous Government bureaucrat to make information available to him.

The witnesses today from the news media are the exceptions—they are those who have used the act effectively—as to the general rule of their colleagues, who have not bothered.

I hope that they will address themselves to some of the reasons, from their experience, why the freedom of information law is not more utilized as a news tool. The subcommittee is well aware from our investigations that the problem of news deadlines is paramount and that bureaucratic delays for weeks or months in responding to a newsman's request for information is an effective denial of that information. We are considering amendments to the law that would put a reasonable time limit on a final response by a Government agency to a request for information—perhaps 5 or 10 working days. While this is not a perfect solution, it would perhaps take some of the premium out of bureaucratic stalling tactics.

The subcommittee will welcome any suggestions you may have for amendments to improve the operation of the act. We commend you for your diligence in making effective use of the freedom of information law and welcome you this morning.

Our witness panel consists of:

Mr. Ward Sinclair, Washington Bureau, Louisville Courier-Journal;

Mr. R. Peter Straus, publisher, Straus Editor's Report.

Mr. Roy McGhee, reporter, United Press International, Washington Bureau;

Mr. James B. Steele, urban affairs writer, Philadelphia Inquirer; and

Mr. John Seigenthaler, editor, Nashville Tennessean.

Gentlemen, we would like to administer the oath to the witnesses. Would you please rise?

Do you solemnly swear that the testimony you are about to give this subcommittee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. SINCLAIR. I do.

Mr. STRAUS. I do.
Mr. MCGHEE. I do.
Mr. STEELE. I do.
Mr. SEIGENTHALER. I do.
Mr. MOORHEAD. Be seated, gentlemen. We certainly welcome you to the subcommittee. We look forward with great anticipation to your testimony.

We will hear all of the witnesses first and then exchange questions and answers with the subcommittee. We will start with Mr. Ward Sinclair of the Louisville Courier-Journal.

STATEMENT OF WARD SINCLAIR, WASHINGTON BUREAU, LOUISVILLE COURIER-JOURNAL

Mr. SINCLAIR. Mr. Chairman, members of the subcommittee, my name is Ward Sinclair. I am a member of the Washington news staff of the Louisville Courier-Journal and the Louisville Times, the newspapers of principal circulation in Kentucky and southern Indiana. I have been an employee of the Louisville papers for 8 years, the last 4 of which have been in the Washington bureau. My assignment here involves coverage of the activities of Congress and the Federal Government as they relate to the States of Kentucky and Indiana.

I thank you for offering me the opportunity to appear here this morning. It is understatement, I think, to say that the hearings you are conducting are of vital importance to the public. As the role of Government in our everyday lives increases, so grows the need for the public to be more clearly informed about the activities and the decisionmaking processes of that Government. Yet, as perhaps you may ascertain from some of the examples I will mention this morning, a news reporter's best efforts are sometimes thwarted, in spite of and not infrequently because of the Freedom of Information Act of 1967.

By way of beginning, it might be well for the subcommittee to consider some of the peculiar aspects of Washington news gathering by reporters representing newspapers hundreds and thousands of miles away from the home office. Many of us, such as myself, work rather independently of our editors. We have our assignments and our editors usually let us determine what is and what is not news of interest to our regions. Our contacts with the home office sometimes are frequent, sometimes infrequent. When the question of unavailability of information arises in a reporter-Federal agency confrontation, it is most often the reporter himself who must make the instant judgment about pursuing his quest. He can either accept an official's rejection of his request for information, or he can attempt to achieve his goal through other sources. Or he can invoke the Freedom of Information Act and attempt to bluster his way past the recalcitrant official. Most of us, not being lawyers and not being terribly conversant with the act, do not get very far, unless we are unusually persistent.

Still another factor—time and the pressure of deadlines—militates against the newsman in his efforts to ferret information out of the Federal bureaucracy. The Washington newsman often flits, if that is the right word, from one subject to another. Today he is at the Senate, tomorrow at the House, next week at the Interior Department and so on. Events do not wait for him. If he is stalled or deterred in his

efforts to collect information on one subject, there is always a fresh, new—and perhaps more easily covered—subject awaiting him, sometimes forced upon him by the pressure of time and events. Thus, the Government official who delays, fails to respond promptly, or passes the buck plays a far stronger hand than the reporter who, perforce, must move on to other things.

This morning I would like to relate to you some of my own personal experiences, so perhaps the subcommittee could get a better idea of the mechanical problems that a daily news reporter faces in gathering information.

Lest the subcommittee think that the Department of the Interior is my particular whipping boy, I should say that the bulk of my recent experience happens to be with the Interior Department as a result of my newspapers' interest in coal mine health and safety. To be charitable about it, the Department's administration of the law has been controversial. Coal operators, labor leaders, safety reformers, Congressmen, and newspapers, none of whose interests necessarily are the same, all have been critical of the Department. Because of the recurrent controversies, it has been in the political and bureaucratic interest of the Department to provide as little informational fuel as possible for the feeding of more fires. And like many agencies of the executive branch, the Interior Department's information-disclosure policies tend not to be guided by those information officers who are truly committed to the notion that the public has a right to know. Rather, they are determined by lawyers and political appointees who place some other considerations ahead of public disclosure of their scale of values.

I think that the most ironic and far-fetched example of what I am talking about is this incident: Early last year it became known that Harry Treleaven, a public relations man who played a key role in the 1968 Republican presidential campaign, had been hired as a consultant to study information programs of the Department. The man who hired Treleaven, in one of his early official acts as Interior Secretary, was Rogers C. B. Morton, the former Congressman and GOP National chairman. His study concluded, Treleaven then embarked on a new enterprise. He prepared a costly proposal to mount a massive media campaign to educate coal miners on the questionable proposition that they and not the mine owners were responsible for their safety. The Department was prepared to grant a contract without bids, without considering other proposals, to a Nashville, Tenn., public relations agency chosen by Treleaven and which had agreed to share the profits with Treleaven. After wide publicity in coal-State newspapers and after pressures from some Members of Congress, who charged conflict of interest and illegal contractual procedures, the Department dropped the Treleaven project.

But in the meantime, the Department was quietly implementing the recommendations made by Treleaven in his consultant's report—beefing up its public information staff to get across a better departmental image, even though President Nixon had ordered a Government-wide cutback on such activities. As best as I can tell, Interior's information staff has approximately doubled in the past year.

On August 5 of last year I made a telephone request to Robert Kelly, Information Chief, to see a copy of the Treleaven report, as it had come

to be called. Kelly talked with departmental lawyers, then reported back to me that the report was considered an "internal document," exempted from disclosure by the Information Act. He suggested, however, that I could further plead my case for disclosure by writing to Mitchell Melich, the Interior Solicitor. I did so on August 6. I argued in my letter that the law did not exclude consultants' reports. A month went by and finally, on September 10, I got a reply from Melich. He reiterated that the report was an "internal document," exempt from disclosure under terms of the Attorney General's memorandum interpreting the act. Mr. Melich also argued that disclosure of the document, which contained names of some information personnel and a critique of their work, would be an undue embarrassment to the persons concerned.

Shortly after Melich's formal reply arrived on my desk, columnist Jack Anderson acquired a copy of the Treleaven report and disclosed its contents, without naming names. I, too, acquired a copy of the report and again approached Melich, this time by telephone. I asked him, in light of the Anderson disclosure, if he would now consent to making the document public. He again declined. I then told him that I had the document and was concerned not with the names it named, but rather with its content. Would he officially release the document, even a sanitized version, with the names removed? He said such a sanitization would require too much time and that in any case he would not release the report.

Subsequently, on November 2, I appealed to Secretary Morton in a two-page letter. I related my problem to him and I repeated my offer to accept a sanitized version. One month later, on December 1, I received a reply from Under Secretary William T. Pecora. He said he had reviewed Mr. Melich's September 10 explanation and fully agreed with his decision.

My point in providing such detail on this one example is this: Partly because of my inability to pursue my request on a day-to-day basis and partly because of the Department's 1-month delay in answering each of my letters, the Department was able to put me off from August until December, a period of 4 months, hiding all the while behind the Information Act. In the end, even though I had a copy of the report and even though Jack Anderson had published its contents, the Department's answer remained the same—it would not disclose.

As an affair of state the Treleaven report, which cost the taxpayer $11,000 and which will have an effect on what and how the taxpayer ultimately learns about his Interior Department, does not rank very high. The Department's lawyers were able to correctly surmise that it was not a document absolutely essential to my work and they correctly guessed that it was not an issue that a Kentucky newspaper was likely to go to court over. The Treleaven report remains buried at the Department.

More briefly, here are two other examples of the Department's attitude toward disclosure of public information:

1. In February, 1971, the Department formally named a coal mine safety research advisory committee, which was authorized by the 1969 Mine Safety Act. The act specifically stated that members of the committee must be knowledgeable in the field of mine safety research and that a majority of them could have no economic interest in the coal industry.

Although the Department made no announcement of its selections, the Courier-Journal disclosed that at least seven of the 16 panelists had no knowledge of mining research. The only apparent qualifications of four of the seven were that they were active in Republican politics at the local level. Naturally, the appointments became controversial. The Department assured reporters that the majority of the panel members satisfied the no-conflict requirement of the law. But on February 11, when I made a formal request for information about the Members financial holdings, I was turned down flatly, on the grounds that the Freedom of Information Act provides confidentiality for such personal data. The dilemma was clear: There was serious reason to question the legality of the panel, but the public was obliged to accept the Department's dubious assurances that all was proper.

2. Again in early 1971, the Bureau of Mines' procedures for assessing penalties against mine safety violators became highly controversial. Small operators complained that they were being treated unfairly; large operators complained that proposed penalties were oppressive. Safety reformers contended that the Bureau was dragging its feet. In March, I asked the Bureau for permission to view its records relating to fines against individual mines. One of the assessment officers, Mitchell Sabagh, informed me that this was not public information, even though the 1969 Mine Safety Act leaves no doubt about the matter, at least as I read it. I appealed to the Bureau's public information officer, who relayed my request up the line. Again I was refused. Finally, after an exchange of letters, I was given a formal refusal. Then, with the prodding of this subcommittee's staff, the Department reversed itself. I was allowed to review part—only part—of the records I sought. But on the orders of Edward D. Failor, a political functionary who oversees the assessment program, I was prohibited from talking directly to the principal assessment officer. The result was ludicrous. The Bureau's chief information officer hovered at my elbow as I went through a time-consuming review of the records. As I asked questions about individual cases, he relayed them to the assessment officer who was standing nearby. The assessment officer would answer my questions through the information officer; I would duly record his answers, and move on to the next case.

My conclusions, published on April 18, were that there were serious inconsistencies in the Bureau's application of its penalty system. Contrary to its own public statements, the Bureau appeared to be ignoring the mandates of the 1969 safety law. A General Accounting Office investigation later confirmed those views and today, as the result of a suit filed in Federal Court by complaining mine operators, the future of the Bureau's entire penalty program is threatened. It is now understandable why the Bureau was so reluctant to have a reporter going through the records.

I could cite other lesser examples of foot-dragging on the part of Interior Department and Bureau of Mines officials to disclose information that by most definitions falls into the category of public information. The point remains the same: Unless they are confronted with more stringent guidelines than now exist and unless an information-hungry public is given more tools for quicker remedial action, officials of the executive branch will continue to be able to exercise an unreasonable control over the flow of information.

I think also that if the trend toward regionalization of the middle levels of the Federal bureaucracy continues, the public and the news media are going to face an increasingly difficult task in obtaining vital information. For example, a Washington-based Kentucky newsman formerly able to keep close tabs on the activities of his region's Office of Economic Opportunity programs, because they were handled here, now must try to do the same task by long-distance telephone to the regional office at Atlanta, Ga.

As the subcommittee discusses possible changes in the Freedom of Information Act, I would suggest that these points be considered:

1. The establishment of an independent watchdog committee whose sole purpose would be to aid the public and the news media in seeing that there is the quickest and fullest disclosure of information by governmental agencies.

2. The possible creation, in the executive agencies, of an office whose duty would be to respond promptly to disputed requests for information and whose job it would be to see that good-faith responses are given to the public. Somehow it must be made clear that there is a difference between public information and public relations. Too often honest and skilled Government information officers are placed in a position of having to gloss over or withhold data that would tarnish the image of their agencies.

3. Formulation of the principle that the public has the right to an immediate yes-or-no answer to requests for information so that the next step in the disclosure procedure can be quickly initiated before the pressing need for that information becomes dissipated.

4. That some remedy be devised, short of the costly access to the courts now provided by the law, to assure that appropriate pressures can be brought on the official or agency who declines to disclose. This, perhaps, could be a function of the watchdog committee I mentioned in point 1. The committee could be authorized to initiate legal action, if necessary, in behalf of the citizen who has neither the resources nor the knowledge to take such a step on his own.

5. The often-cited Attorney General's memorandum which interprets the Freedom of Information Act may be due for revision and simplification. This subcommittee has the wherewithal to see that such a revision is carried out, in keeping with the spirit of the act and any amendments that might result from the current deliberations.

I am not sure that this falls within this subcommittee's province, but I think I would be remiss if I did not mention that agency attitudes often are influenced by the examples set by the Congress, which last year held 37 percent of its committee meetings in secret. A typical example is the recent decision of the House to discontinue the practice of making available House payroll records every month. These records clearly are records of public interest, and, by inspecting them every month, newsmen came across information bearing heavily on the public interest. Now the payroll information will be available in booklet form every 6 months. The periodic publication of a payroll book seems destined to create an artificial news event that conceivably could cause more misunderstanding and unpleasantness than the authors of this idea envisioned.

Thank you for your attention.

Mr. Moorhead. Thank you, Mr. Sinclair.

The subcommittee will now hear from Mr. R. Peter Straus of the Straus Editor's Report.

STATEMENT OF R. PETER STRAUS, PUBLISHER, STRAUS EDITOR'S REPORT; ACCOMPANIED BY CHRISTOPHER SHERMAN

Mr. Straus. Thank you. Mr. Chairman, very much. I would like to speak briefly about a problem of information that we at Editor's Report know exists but we have not been able to obtain from the FCC. I am appearing before this subcommittee as publisher of Straus Editor's Report, a newsletter for media executives, and I am accompanied by Mr. Christopher Sherman.

There are two other facts I think I should in fairness mention in terms of my own qualification for the discussions that are going to ensue. I happen also to be president of radio station WMCA in New York City, which is a radio station licensed by the FCC, and indeed it is at this moment that New York radio stations are up for renewal of their 3-year license—all of the New York stations.

I have also served with an executive agency of the Government, with the Agency for International Development, having been Assistant Administrator for Africa, some years ago.

With that brief introduction I would just like to say I think this list, which can only be described as a "blacklist," of more than 10,000 Americans should at the very least be the subject of information for those Americans, that they should not be on what is effectively a blacklist without their knowledge. In my view, there is no more sinister weapon of any bureaucracy, private or governmental, than the secret blacklist. It is the club that the totalitarian state waves over a population it wishes to live with fear rather than with peace of mind.

It is frequently the lock that bars the door to free access to vital information.

It is often the wall standing between the individual and the pursuit of his chosen profession.

And many times it is the permanent black mark that has been unjustly stamped on an individual's record.

In my view, there is no room in a free society for the bureaucrat who can place someone's name on a blacklist without the need to justify the act to anyone else.

There is no room in a free society for the civil servant who can use the blacklist as a convenient shortcut substitute for careful thought or analysis.

Such actions merely serve to erect further barriers between the system and those who are governed by it. And one of the cornerstones of a democracy is the closeness and trust that must exist between the Government and the governed.

I will be delighted to answer any questions, but I would like to save the subcommittee's time by saying simply the list does exist. In an exchange between Mr. Sherman and Jack Torbet, Executive Director of the FCC——

Mr. Moorhead. Mr. Straus, I think this statement about a blacklist is so important that I think you had better tell the subcommittee.

Mr. Straus. Very good: Mr. Chairman, let me back up, if I may.

In a speech by Senator Sam Ervin, Jr., on May 20, 1971, following upon the Senator's questionnaire to various executive agencies, a speech before a computer conference of the American Federation of Information Processing Societies, Senator Ervin devoted a significant piece of his address on the dangers of computerized information banks to a discussion of this list. That was, to my knowledge, the first time that it had been mentioned or acknowledged in public. There had been some discussion before that it might exist but I do not think anybody had any demonstration of it.

If I may, I will read several paragraphs:

For instance, a response to the subcommittee questionnaire was recently sent in by the Federal Communications Commission. It shows that the FCC uses computers to aid it in keeping track of political broadcast time, in monitoring and assigning spectrums, and even in helping it make prompt checks on people who apply for licenses.

They told the subcommittee that they maintain a check list which now has about 10,900 names. This checklist, in the form of a computer printout, is circulated to the various bureaus within the Commission. It contains the names and addresses of organizations and individuals whose qualifications are believed to require close examination in the event they apply for a license. A name may be put on the list by Commission personnel for a variety of reasons, such as a refusal to pay an outstanding forfeiture, unlicensed operation, license suspension, the issuance of a bad check to the Commission or stopping payment on a fee check after failing a Commission examination.

In addition, this FCC list incorporates the names and addresses of individuals and organizations appearing in several lists prepared by the Department of Justice, other Government agencies, and Congressional committees. For example, the list contains information from the "FBI withhold list,"—

That is in quotes—

Which contains the names of individuals or organizations which are allegedly subversive, and from the Department of Justice's "Organized Crime and Racketeering List," which contains the names of individuals who are or have been subject to investigation in connection with activities identified with organized crime. Also included in the list are names obtained from other Government sources such as the IRS, CIA, and the House Committee on Internal Security.

That is the relevant quote from Senator Ervin's speech of last year. Upon knowledge of that we inquired first informally of the FCC to see if we might inspect this list of some 10,000 names and our informal approach was denied. We then in the form of a letter from Mr. Sherman on June 18, addressed to Jack Torbet, Executive Director of the FCC, specifically asked to consult the list.

Perhaps I should then read the reply which is reasonably short, Mr. Chairman, dated July 18, I believe, 18th or 19th. I cannot quite be sure of the stamp:

By letter of June 18, 1971, you have requested permission to examine a list of 10,900 names, in form of computer printout, of individuals and organizations whose qualifications might be suspect if they applied for license. You indicate that the printout was referred to in a report in "Broadcasting" (Closed Circuit, p. 7, June 14, 1971). You state that your "interest in seeing the list is to inform our readers of the basis on which names are added to the list." For the reasons set forth below, the list as well as any supporting data are maintained on a confidential basis and the request, therefore, is denied.

An examination of the list would not provide you with the information you specifically request, since the list does not set forth the reasons the names appear. Any supporting data concerning the reason for listing is kept in confidential files separate and apart from the list of names to which you refer. The computer printout is merely an administrative convenience used to associate any particular application with a name on the list.

With respect to the reasons for placing names on the list, the following will indicate the criteria used: bad check charges as a result of payment for either

licenses or operator examinations; unlicensed operations; suspension of licenses, or reports by the Coast Guard or others with respect to operators.

Under sections 308(b) and 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 308(b) and 309(a), the Commission is responsible for examining the "* * * citizenship character, and financial, technical, and other qualifications" of individual applicants or licenses; and no license can be granted, modified, or renewed without an affirmative determination by the Commission that the public interest would thereby be served. In the course of our processing of applications, we receive information of many different kinds from many different sources including other Government agencies and it has been public knowledge for some time that this kind of information is maintained at the Commission although we have discontinued the questionnaire practice which was the subject at issue in the following cases.

Moreover, as you know, the Public Information Act, 5 U.S.C. § 552, does not provide that all confidential information must be made available to the public upon request and it specifically exempts several categories of information from required disclosure.

Viewed in this character and since much of the information is furnished by other Government agencies, we can find no basis in the public interest for permitting public inspection of this list.

And it is signed John Torbet, FCC.

Mr. MOORHEAD. Would you be willing to make copies of those records available for the record?

Mr. STRAUS. Yes; of course.

Mr. MOORHEAD. Without objection, that will be included in the record at this point.

(The information follows:)

STRAUS EDITOR'S REPORT.
Washington, D.C., June 18, 1971.

JACK TORBET,
Executive Director,
Federal Communications Commission,
Washington, D.C.

DEAR MR. TORBET: According to a report in "Broadcasting" (Closed Circuit, p. 7, June 14, 1971), the Commission maintains a list of 10,900 names, in form of computer printout, of individuals and organizations whose qualifications might be suspect if they applied for license. As a journalist covering broadcasting, I asked Mr. Daniel Ohlbaum, deputy general counsel, if I could inspect the list if it existed. He confirmed that the list did exist, but that it was not generally available for public inspection, and that a request to see it should be directed to your office.

Our interest in seeing the list is to inform our readers of the bases on which names are added to the list. It is of interest to those who are licensees or applicants for what reasons they would be subject to special scrutiny. Speculation of the Commission's reasoning runs for convictions of fraud and grievous misdealings with the Commission to allegedly subversive political activity and party convictions.

I hope you will be able to assist me in explicating this matter for our readers.

Respectfully,

CHRISTOPHER SHERMAN,
Assistant Editor.

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., July 10, 1971.

MR. CHRISTOPHER SHERMAN,
Assistant Editor,
Straus Editor's Report,
Washington, D.C.

DEAR MR. SHERMAN: By letter of June 18, 1971, you have requested permission to examine a list of 10,900 names, in form of computer printout, of individuals and organizations whose qualifications might be suspect if they applied for license. You indicate that the printout was referred to in a report in "Broadcasting (Closed Circuit, p. 7, June 14, 1971). You state that your "interest in

seeing the list is to inform our readers of the basis on which names are added to the list." For the reasons set forth below, the list as well as any supporting data are maintained on a confidential basis and the request therefore is denied.

An examination of the list would not provide you with the information you specifically request, since the list does not set forth the reasons the names appear. Any supporting data concerning the reason for listing is kept in confidential files separate and apart from the list of names to which you refer. The computer printout is merely an administrative convenience used to associate any particular application with a name on the list.

With respect to the reasons for placing names on the list, the following will indicate the criteria used: bad check charges as a result of payment for either licenses or operator examinations; unlicensed operations; suspension of licenses, or reports by the Coast Guard or others with respect to operators.

Under sections 308(b) and 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 308(b) and 309(a), the Commission is responsible for examining the "* * * citizenship, character, and financial, technical and other qualifications" of individual applicants or licensees; and no license can be granted, modified or renewed without an affirmative determination by the Commission that the public interest would thereby be served. In the course of our processing of applications, we receive information of many different kinds from many different sources including other Government agencies and it has been public knowledge for some time that this kind of information is maintained at the Commission although we have discontinued the questionnaire practice which was the subject at issue in the following cases. For judicial recognition of the Commission's statutory authority to inquire into the character qualifications of applicants, see generally *Borrow* v. *FCC*, 285 F. 2d 666 (D.C. Cir. 1960), cert. den. 364 U.S. 892 (1960); *Cronan* v. *FCC*, 285 F. 2d 288 (D.C. Cir. 1960), cert den. 366 U.S. 904 (1961); *Blumenthal* v. *FCC*, 318 F. 2d 276 (D.C. Cir. 1963); and *Howitt* v. *U.S.* and *FCC*, 390 F. 2d 589 (3d Cir. 1968).

Moreover, as you know, the Public Information Act, 5 U.S.C. § 552, does not provide that all confidential information must be made available to the public upon request and it specifically exempts several categories of information from required disclosure.

Viewed in this character and since much of the information is furnished by other Government agencies, we can find no basis in the public interest for permitting public inspection of this list.

Sincerely yours,

JOHN M. TORBET,
Executive Director.

Mr. MOORHEAD. Thank you, Mr. Straus.

The subcommittee would now like to hear from Mr. Roy McGhee, United Press International, Washington Bureau.

STATEMENT OF ROY McGHEE, REPORTER, UNITED PRESS INTERNATIONAL, WASHINGTON BUREAU

Mr. MCGHEE. Gentlemen of the subcommittee, I cover the U.S. Senate. First, I would like to congratulate the committee for holding these hearings. Within the last couple of years the Congress as a whole has moved markedly in making more information available to reporters who cover the Capitol. I refer to the Reorganization Act, passed a year ago and the Freedom of Information Act itself, and the moves by the House of Representatives a year or so ago to have recorded teller votes.

Nevertheless, as Mr. Sinclair pointed out, a real problem still confronting the congressional reporter is the matter of executive sessions. I must say that it is not nearly as important to a reporter covering the Capitol as it is to one assigned to the executive branch. As you are aware, the political structure and nature of the Congress frequently enables a reporter to get information that is either advantageous to one side or another on most questions. However, that is not really an ideal way to get it and frequently it is colored. It places an added responsi-

bility on the reporter to make a judgment, which frequently he is unable to do.

I have been a reporter for more than 20 years for United Press and covered Government at all levels. The wire service reporter really does not face—as a general rule does not face—the same problems as the newspaper reporter, a reporter that works strictly for one newspaper or magazine reporter. Wire services are essentially in some areas a transmission service, but in Washington, and in the great news centers of the world, the wire service reporter also does a source reporting job that is perhaps more vital than the reporter covering for just one paper because his responsibility, as readily seen, is much wider.

I have had some experience, not with lawsuits in the Freedom of Information Act, but in citing it in trying to get information, not from the Congress, but from the Pentagon. I would like to relate the details of one incident, a minor story really, but one illustration of what reporters run into daily.

I had a chance conversation with a gentleman. He told me that in the Pentagon there was a slush fund, in his words, used by admirals and generals for their own private purposes, that the money was collected from gifts by civilian employees in the Pentagon and in the military, and then disbursed for such things as the health needs of wives or special parties and things like that.

I could not believe it. I did not believe it. But I thought, well, I will check on it.

So I called up the Pentagon, I called the Public Information Office, and asked if there were any private funds in existence in the Pentagon to which employees contributed or to which the Government contributed. And I was told, yes, there was such a fund. It is collected by the Defense Concessions Committee. So I asked what does the committee do? Where does it get its money? How does it disburse it?

I was told the funds are collected from rents and from concessions, machines, the cigarette machines, profits of that kind, and then distributed among the various agencies in the Pentagon.

When I began to ask questions about the details of the collections, however, how the money was distributed and for what purpose and who got it, I ran into the "it is none of your business" stuff. So I took this to the General Counsel of the Defense Department. I got this tip originally in the spring of 1970 and it was October before I was able to write a story about it.

I must say, though, that I was not full time on this assignment. As a matter of fact, it was not even an assignment at all. It was something I was doing as a labor of love.

Well, I had learned that the main source of the money, over a million dollars a year, came from the rental and gross receipts levied on the shopping mall businesses in the Pentagon. I inquired of the GSA what would happen to this money in other departments of the Government and invariably it is turned back to the Treasury. In the case of the Defense Department, it was turned over to something called the Defense Concessions Committee. I wanted to know how much the businesses were paying in rents or in gross receipts. It seemed to me that this was an essential fact in the story, how much money each of these businesses was paying. The money that should have gone into the General Treasury was going into such things as bridge parties, tennis

tournaments, hunt clubs, all sorts of things, recreational activities for the employees in the Pentagon.

The General Counsel at that time was James J. Kearney. When I finally got to him he said it was his opinion that these were nonappropriated funds and it was none of my business or anybody else's how they were spent. I pointed out to him that in other public buildings, according to the GSA, the rents were collected and turned back to the Treasury.

Well, part of the rents and part of the gross receipts from these businesses in the Pentagon are turned back to the Treasury but at that time the—I have forgotten the figures precisely but the general rates for such space in the suburbs was about $5 an hour. This was in 1970 when I was working on this story. But these stores over there were only paying $2.72 a foot. Very profitable and very concentrated market area there.

Mr. Moorhead. One point. You said $5 an hour.

Mr. McGhee. I meant $5 a foot. I am thinking about my own pay [laughter]. $5 a square foot.

They did tell me what they were getting on the square foot rental because part of this money they did have to turn back into the Treasury, but in addition to that they get a percentage of the gross receipts of the business. This they would not tell me. And they said that this was proprietary information that was—well, it might be used by a competitor for a disadvantage to the company, this sort of thing.

So, I told Mr. Kearney that I did not see it that way. It appeared to me that all this was coming from public space owned by everybody and that if there were revenues either paid on a square foot basis or on a gross receipts basis, it appeared to me they ought to be turned in to the Treasury, and I requested—I put in a formal request then for the precise amounts that each company was paying. He turned me down, as I said. So, I finally wrote the story and pointed out that I was turned down for this information and could not get it.

I went to Senator Proxmire, who at that time was conducting hearings in the—I have really forgotten, I have covered so much up here—I think it was the C–5 investigation, but I am not sure. It could have been another. I told him the problem I was having and asked him if he would ask the GAO to look into this and if they could get the information.

One of his men made a call to the GAO and got a call back and a GAO spokesman said they had been up and down this ladder 50 times and they could not get information on nonappropriated funds. So I wrote that in the copy, too.

That is where that instance stands. I have not pursued it further. I do not have time. My company did not file a lawsuit to get the information. As I say, we are essentially a transmission service. We transmit millions of stories a day round the world and one is—a story of this nature obviously has to take its place in the overall scheme.

One of my colleagues who covers the House of Representatives, Mr. Daniel Rapoport, has also had problems with the Defense Department. He wrote to Mr. Daniel Z. Henkin in January of this year with a specific request and specific lists for information on transportation supplied to Members of Congress. He was denied the information.

first by Mr. William E. Odom, who is a special assistant in the Public Affairs Division of the Department of Defense. I will read two paragraphs of the reply:

> The Department of Defense support of Members and employees of Congress—support is provided in accordance with this legislation, questions concerning travel performed by Members of Congress should be directed to standing committees which authorize such travel or to individual members. Any appeal you may wish to make of this response should be directed to the General Counsel of the Department.

Mr. Rapoport then appealed to the General Counsel, got back essentially the same information, that this was a congressional matter and not for the Department, that he would have to take it up here in Congress. It is readily seen, with 535 Members of Congress, we do not know where you gentlemen go. Obviously the information is collected in the Pentagon some place and obviously it should be made public. There is nothing sinister here. It is just a simple matter that some of the Members of Congress obviously do not want their constituents to know where they are, where they are going.

Anyway, that is our assumption.

Mr. Rapoport has not—he has invoked the Freedom of Information Act but has not filed suit under it. I would suggest that perhaps the Budget and Accounting Act should be looked into in this matter of the GAO's authority to audit the records of nonappropriated funds. It seems to me that that is a serious flaw. And in your own hearings——

Mr. Moss. We can respond there. I think it is custom and not law.

Mr. Moorhead. Mr. Moss has a comment.

Mr. Moss. My recollection of the accounting law of 1921 is that it leaves the Comptroller General to acquire the information. This committee went over this issue in relation to the shopping arcade in the Pentagon in the late 1950's, so they are just going back and resuming old bad habits. If they are now denying this information because we brought about its release I question that that is nonappropriated. This appears to be purely a slush fund that is not contemplated by any law as you explain it. I think we ought to acquire from DOD the legal basis for their fund and for their claim that it is privileged. The specific statutory citation.

Mr. McGhee. There is a——

Mr. Moss. It is not privileged under the Information Act.

Mr. McGhee. I did not think so. There is a retired colonel that runs this fund over there.

Mr. Moss. Most of those are operated by retired colonels. [Laughter.]

Mr. McGhee. His name is Ralph A. Glatt. His title is executive secretary of the Defense Concessions Committee. After repeated phone calls he sent me an order signed by the Secretary of Defense, I believe in 1956 setting up this fund—it is kind of an ad hoc organization—under which this order authorizes this committee to collect this money and disburse it. It is a very interesting procedure they go through. Each year——

Mr. Moss. In elective office it is called kickback.

Mr. McGhee. Well, there is an association in six areas of the Pentagon: the Army, Navy, Air Force, the Defense Intelligence Agency, the Office of the Secretary of Defense, and the Office of the Joint Chiefs. Now, the employees of one of these organizations in each of these offices—they are separate organizations—they file a budget with the

Defense Concessions Committee each year and the Defense Concessions Committee then apparently makes an estimate of how much money they are going to get from various concessions in the Pentagon and then doles it out to these various committees, various organizations. That is the way the money is collected. I mean, that is the way it is disbursed.

I have some figures here you may be interested in. Last year—this would have been 1969 because I wrote this story in 1970—the committee collected $887,000. It returned $179,000, $176,000 to the GSA for rental space at a rate of $2.72 per square foot. Total receipts in 1968 were $901,248. Now, the GSA told me, when I was reporting this story, that comparable space should return to the Government $4.50 per square foot. This contract that the GSA had with the Defense Department had not been revised since 1962. They were still going on a 1962 rate in 1970. The concession also returned to the Treasury's receipt account $225,406. This left revenues of $488,099, which if received from rental of any other Federal building space would also be returned to the Treasury, but they were not.

Mr. MOORHEAD. Mr. McGhee, you have been referring to your story on the wire service and also correspondence. Can you make copies of those available for inclusion in the record?

Mr. MCGHEE. I would be happy to. I am only sorry the space we have to keep files in the press galleries is fairly limited. I am not complaining. I had a file this thick and I threw it away maybe 3 or 4 months ago.

Mr. MOORHEAD. I am sorry you had to reveal that fact. Without objection, then, the documents will be made part of the record.

(The information referred to follows:)

CONCESSIONS

The Defense Department is collecting close to $1 million a year from private businesses operating in the Pentagon, but turns only a fraction of the revenues back to the Treasury.

It diverts almost half the money to a Defense concession committee. This committee, in turn, uses more than $250,000 a year to finance such activities as social clubs, dinner dances, and tennis tournaments for Pentagon employees.

The arrangement is unique in the Federal Government.

Rental receipts from all other commercial concessions in Federal buildings must be deposited in the miscellaneous receipts account of the Treasury, according to the General Services Administration (GSA).

Moreover, the Pentagon receipts and disbursals are not subject to any congressional audit, despite attempts of the General Accounting Office (GAO) to inspect the books.

Upon inquiry by UPI, however, Col. Ralph A. Glatt, (Ret.), executive secretary of the Defense concessions committee, on orders from the Assistant Secretary of Defense for Administration, made some figures available for recent years.

The committee was set up in 1958 under a directive from the then Deputy Secretary of Defense, Donald A. Quarles. The directive authorized the committee to lease space on the Pentagon mall to concessionaires and to run cafeterias in the Pentagon.

Last year the committee collected $885,681. It returned $179,176 to the GSA for the rental space, at a rate of $2.72 per square foot. The total receipts in 1968 were $901,248 and $917,042 in 1967.

GSA told UPI the $2.72 rate was set in 1962. It said comparable space in other Federal buildings produced a return to the Government of between $4.50 per square foot in the suburbs, or $5 downtown.

The concessions committee also returned to the Treasury's miscellaneous receipts account $225,406.

This left revenues of $481,099 in 1969, which if received from rental of any other Federal building space would also have gone to the Treasury to the benefit of all taxpayers.

Where did this money go?

Again, the Defense Department has refused to give a detailed account to the GAO. But again, Glatt supplied some gross figures to UPI. He said $263,555 was divided among six Pentagon agencies for recreation to and welfare activities. He said the money was divided according to the number of employes in each agency. He gave no breakdown, but as of December 31, 1969, there were 13,498 military and 13,984 civilians working in the building.

The Army got the biggest chunk of the money, $96,300. The Defense Communications Agency fund got $6,950, the smallest allocation. Other agencies and their share: Office of Secretary of Defense and the Joint Chiefs of Staff $43,921; Navy $39,552; Air Force $65,295, and the Defense Intelligence Agency $11,637.

All the agencies use the money to support such employe activities as bowling leagues, rod and gun clubs, annual dances and dinners and softball teams and tennis tournaments. One agency makes interest free loans to distressed employes and at least two finance influenza innoculations and glaucoma tests.

The concessions committee refused to tell UPI how much revenue it got from each of the 20 concessionaires doing business on the Pentagon mall. James J. Kearney, general counsel for the Department, said such information was "proprietary" in nature and therefore confidential. He did say, however, that in some cases the concessionaires paid the committee on the basis of the space occupied, and in some cases a gross percentage of revenues.

The concessionaires include a major department store, a drug store and a newsstand.

JANUARY 6, 1972.

Mr. DANIEL Z. HENKIN,
Assistant Secretary of Defense (Public Affairs),
The Pentagon,
Washington, D.C.

DEAR MR. HENKIN: Under 5 USC 552 I request the following identified information: A complete list of members of Congress and employes of Congress for whom the Defense Department provided travel during the first half of Fiscal Year 1972—from July 1, 1971 to Dec. 31, 1971.

In accordance with the recommendation of the Administrative Conference of the United States this answer should be forthcoming from you within 10 working days.

About Dec. 28, 1971 I submitted, through UPI's Pentagon correspondent, Warren Nelson, a written request for similar information. On Dec. 30, 1971 the Directorate of Defense Information issued the following reply:

"Any question concerning travel performed by members of Congress should be directed to the standing committees which authorize such travel or to individual members."

This response is unsatisfactory. The only means by which I can be assured of obtaining an accurate and complete list of Congressional travel is to acquire that information from the department of government which furnishes that travel and which maintains files on it.

Sincerely yours,

DANIEL RAPOPORT,
United Press International.

ASSISTANT SECRETARY OF DEFENSE,
Washington, D.C., January 20, 1972.

Mr. DANIEL RAPOPORT,
United Press Correspondent, Press Gallery, U.S. House of Representatives, Washington, D.C.

DEAR MR. RAPOPORT: This is in response to your letter of January 6 in which you request a list of members of Congress and employees of Congress for whom the Defense Department provided travel during the first half of Fiscal Year 1972.

Department of Defense support of members and employees of Congress traveling on official business of Congress is authorized by Public Law 207, 83rd Con-

gress. Support is provided in accordance with this legislation. Questions concerning travel performed by members of Congress should be directed to the standing committees which authorize such travel or to individual members.

Any appeal you may wish to make of this response should be directed to the General Counsel of the Department of Defense, who acts on behalf of the Secretary of Defense in such Freedom of Information Act matters.

Sincerely,

WILLIAM E. ODOM, *Special Assistant.*

UNITED PRESS INTERNATIONAL,
Washington, D.C., February 15, 1972.

Mr. J. FRED BUZHARDT,
General Counsel,
Department of Defense,
The Pentagon.

DEAR MR. BUZHARDT: In accordance with the last paragraph of the attached letter, I am writing to appeal Mr. Odom's refusal to provide me with Congressional travel data held by the Department.

I am advised by counsel that there is nothing in the Freedom of Information Act which requires me to exhaust all administrative remedies before instituting litigation to gain access to public records. Indeed, the law's insistence on early court consideration of FOI cases would argue against the need to contest an issue at the agency level. However, as an act of courtesy I am complying with *this* step in the Department's procedure. In this same spirit I trust that you will reply promptly.

Sincerely,

DANIEL RAPOPORT.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE,
Washington, D.C., March 2, 1972.

Mr. DANIEL RAPOPORT,
United Press International,
National Press Building,
Washington, D.C.

DEAR MR. RAPOPORT: I am responding to your letter of February 15, 1972, in which you appealed the refusal of January 20, 1972, by the Office of the Assistant Secretary of Defense (Public Affairs), to provide you with a complete list of members of Congress and employees of Congress for whom the Department of Defense provided transportation during the first half of Fiscal Year 1972, that is, July 1, 1971, through December 31, 1971.

I am advised by the Assistant to the Secretary of Defense (Legislative Affairs) that no identifiable record in the possession of the Department of Defense contains the information you seek. Consequently, it cannot be provided, and the Freedom of Information Act (5 USC 552(a)(3)) has no application. This conclusion is supported on page 23 of the *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* by the following explanation:

"Subsection (c) [5 USC 552(a)(3)] refers, of course, only to records in being and the possession or control of an agency. The requirement of this subsection imposes no obligation to compile or procure a record in response to a request. This is evidenced by the fact that the term 'information' in the bill, as introduced, was changed by the Senate to 'identifiable records' and by the legislative history of that change. (S. Rept., 89th Cong., 2.)"

A similar provision is set forth in DoD Directive 5400. 7, paragraph VII.D. (32 CFR 286. 7(d)).

Under Public Law 207, 83d Congress, all Congressional travel is subject to the control and regulation of Congress and its Committees. Accordingly, the letter from the Office of the Assistant Secretary of Defense (Public Affairs) appropriately suggested that you direct your question to the standing committees of Congress, which authorize such travel or to individual members of Congress. This is consistent with the guidance in Paragraph VII.E. of DoD Directive 5400. 7 (32 CFR 286. 7(e)).

I regret that we are unable to be of assistance to you in this matter.

Sincerely yours,

J. FRED BUZHARDT.

Mr. Moorhead. The subcommittee would now like to hear from Mr. James B. Steele, urban affairs writer, Philadelphia Inquirer.

STATEMENT OF JAMES B. STEELE, URBAN AFFAIRS WRITER, PHILADELPHIA INQUIRER

Mr. Steele. Mr. Chairman, members of the committee and staff, my name is James B. Steele. I am the urban affairs writer for the Philadelphia Inquirer. Another Inquirer reporter, Mr. Donald L. Barlett, and myself have been investigating the operations of the Philadelphia Federal Housing Administration office since June 1971 and in the course of that investigation we found that speculators on quite a massive scale in Philadelphia have bought rundown houses with serious defects, made cosmetic repairs for the most part and sold them at inflated prices to poor families, all with the approval of FHA, which insured the houses as being essentially defect-free.

What I would like to do at the committee's pleasure is briefly describe the steps we have gone through in terms of our disagreement with the Government over what type of information was available to us in this study and then also to briefly recount some of the arguments they have made as a basis for denying us that information.

Our essential argument is over whether or not the names of FHA staff and fee appraisers are public information. Fee appraisers, for purposes of the record, are private real estate brokers who appraise property for FHA for a fee. Staff appraisers are Federal employees, of course.

We first made a request for FHA staff and fee appraisers in August 1971 to the area office of HUD in Philadelphia. The reason for this was part of our continuing investigation of FHA programs in Philadelphia. It was to see who had appraised certain houses turned up in the course of our investigation. The number was into the hundreds at the time. Defective work had been performed and the houses began to fall apart shortly after low income people moved in. The importance of this is—that the low-income programs enacted by Congress in the 1960's starting in 1961, which got a great boost in 1968 through section 235 and through the section 223E special risk emergency funds, permitting FHA to insure houses in a lot of previously forbidden areas of central cities, were clearly going awry in Philadelphia. The foreclosure rate between 1967 and 1971 in Philadelphia on FHA-insured houses was greater in that 4-year period than in the previous 33 years of FHA's existence in Philadelphia. One of the conclusions we reached was essentially that the insurance of these substandard houses was clearly part of the reason for that soaring rate.

At any rate, to get back to the freedom-of-information question, we asked for the names of appraisers who set the values on these houses. This was turned down by the area office of FHA. A similar question was asked of the Washington office and we were told something to the effect that HUD must protect the appraisers from things that might be said about them. Then a formal request was made on August 30, 1971, under the Federal Freedom of Information Act by John McMullan, the executive editor of the Inquirer, to Theodore Robb, HUD's regional administrator. On September 1, Mr. Robb agreed to release the names of appraisers and the fee appraisers who

were on the Philadelphia office's approved list, but he refused to link them to any particular properties.

Obviously the failure to say who appraised specific properties only gave the names Mr. Robb released a certain marginal value. In denying us the information we sought, Mr. Robb claimed the information was exempt under the act as part of interagency memorandum and also as part of investigatory files. Where they got the investigatory files idea was that a Federal grand jury was then in session in Philadelphia and that the information we sought was contained in something like 23,000 file binders covering every house sold under these low-income programs in Philadelphia in recent years and that information was then before the Federal grand jury looking into abuses in FHA. Thus George Romney could not give what he did not have, we were told.

As is customary in a situation like this, we formally appealed to Mr. Romney and on November 11, Mr. Romney denied the request. In a four-page letter, he asked us to blame him for any slipups that might have been made by FHA, but don't blame the appraisers. He said it was not relevant to criticize an employee of HUD. He wrote:

> No enterprise, public or private, can expect its employees to contribute as openly and honestly to the formulation of its policy if those employees believe that their opinions (such as appraisals) are to be subject to public "second-guessing."

The key word in that passage is the word "policy". As you gentlemen know so well, the interagency memorandum exemption refers to policymaking and deliberative issues that may go on inside a department. Anyway, HUD was attempting to say that the name of the appraiser alone was in one way or another part of the policymaking decision of the Department.

The Inquirer then filed suit in the U.S. District Court in Philadelphia under the Federal Freedom of Information Act seeking to force the Government to disclose this information. On December 21, oral arguments were taken and one of the things that was clear in the arguments and briefs that were filed in the intervening time was that this was not just a Philadelphia issue. Much of the same language that Secretary Romney had used in his letter denying us the request also showed up in the lengthy briefs the Government filed as to why this information could not be made public.

Finally, as I believe many of you may know now, just a week ago yesterday a Federal judge in Philadelphia ruled in our favor, dismissing the Government's arguments on virtually all counts in an 11-page opinion. I will come back to what has happened in the intervening 7 days in a minute.

The thing that I think is one of the most interesting things about this case from our standpoint were some of the arguments the Government resorted to as to why the name of an appraiser of a specific house was secret and why it could not be made public. As I explained earlier on the interagency memorandum exemption, they considered the appraiser's name part of the policymaking decisions of HUD. I also explained the investigatory exemption they claimed in view of the fact that the Federal grand jury was looking at this. Beyond that, the whole case was characterized by some extraordinary legal footwork which I would suspect was never seen in a court of law. Let me cite a few of these because I think they are rather extraordinary.

During the oral arguments in the case, the assistant U.S. attorney who was representing the Government suggested that the Inquirer had sued the wrong party. And again he said George Romney could not give what he did not have. The names of the appraisers were then in file binders before a Federal grand jury. It was our position that our request for those file binders was made even before the grand jury's, for one thing.

Second, the Government also made the point that Federal employees have a constitutional right to privacy and releasing the names would violate that.

Further, they kept asking, in their brief, why the Inquirer wanted the names. They stated at one point that Government compliance would merely help the Inquirer sell more newspapers. They further reiterated many times that the appraisers' names were of no importance to the public after HUD adopted their recommendations.

I think this is an example of how far afield they went in some of their arguments. Better than anything I could say, I'll just read a few paragraphs from their briefs that will give you a better understanding of their position.

An example of the kind of language they used, again not dealing with either the question of interagency memorandum or investigatory files stated: "This court is entitled to know why plaintiff persists in pursuing its demand for this information." A couple of pages later they came back to that point and said:

> One can only speculate how the plaintiff might employ its knowledge of the names of the appraisers requested, but in view of the widespread publicity which plaintiff has given to this matter, it is fair to assume that at best the appraisers' personal privacy would be invaded. At worst they would be subjected to direct public criticism and castigation by the plaintiff, who is ill-equipped to make sound judgments concerning the quality of the appraisal reports, or the professional competence of the appraisers. Inasmuch as the obvious injuries which disclosure of the names of the appraisers would cause to the defendants and to the appraisers individually far outweigh any benefits which such disclosure might confer upon anyone else, disclosure should not be required.

Mr. Moss. I think this is about as outrageous a thing as I have heard and I might say again: names of personnel, their availability, that was one of the first cases ever studied by the Information Committee when it was created 17 years ago. But, an appraisal is not a private judgment; it is a professional judgment through which the applicant for the loan or the insurance pays a fee and it becomes the binding determination as to the amount of loan which can be made against the property. It is an essential ingredient in determining valuation. In fact, it is the key ingredient in determining valuation.

FHA charges the applicants for a loan, a fee for an appraisal. Most appraisers, appraisers in many jurisdictions, are licensed, and they lay their professional judgment on the line. They can be licensed as appraisers or they are brokers.

I happen to be a licensed real estate broker in the State of California. If I make an appraisal I fully expect that I must stake my professional reputation on its validity and it has been examined. I know of no privacy there. Whether the fellow works for the Government as a professional and the Government keeps the fee or whether the fee is paid to a contract appraiser, it makes no difference. By no stretch of the imagination would it be investigatory because he rendered a final

complete judgment. Certainly it is not interagency, nor is it internal within the agency because it is made available to the applicant for the loan or the loan guarantee.

I think it is a perfect example of the outrageous attitude, and I want to make it very clear, they are not peculiar to this administration or to that department or agency. They seem to be sort of a highly contagious attitude within the bureaucracy which grows ever more ominous in its desire to control what we know, think, and do.

Mr. MOORHEAD. You may proceed, Mr. Steele.

Mr. STEELE. We heartily concur. Those are many of our feelings throughout the whole case. One other thing they sought to bring in within their brief which I think was even more irrelevant than the ones I mentioned before, they attempted to say their investigations now in progress, referring to the grand jury investigation, could well be thwarted by making available the information requested:

> With respect to persons who are guilty or incompetent, the disclosure of the information sought to the media might well create an atmosphere in which an accused could not receive a fair trial and due process of law as guaranteed by the Constitution. It might create obstacles to successful prosecution by alerting certain persons to take steps to cover up their unlawful acts. Also it might render it more difficult to obtain unbiased jurors, in view of the publicity attendant upon disclosure.

I think the best thing to say about this brief of the Government was said by Judge Lord when he ruled last Thursday:

> We have reviewed at too great a length the contentions of the Government, and find in none of them justification for the withholding of the material sought, and therefore will enter the following order.

So, he certainly agrees with you, Congressman Moss.

On the two points of interagency memorandums and investigatory files, I think it might be well to incorporate in the record just briefly what the court said. On the interagency memorandums, the judge rejected the Government's argument—he said the exemption related only to internally related cases designed to assist the policymaking and the deliberative process of Government.

On investigatory files, he had this to say:

> The defendants have relied upon many cases which have held the grand jury's deliberations to be inviolate, and the minutes of their proceedings to be immune from discovery. That is not the situation presently before us. We are asked to release to plaintiffs only the names and addresses of the appraisers—information which was in no way protected before it was inserted into file binders presently being reviewed by the grand jury.
>
> The intent of Congress in passing the act was to permit the public to know. What the Government would have us do here is preclude the public from knowing the names and addresses of fee appraisers because they have been included, *after the fact*, in binders now before a grand jury. No request has been made to inspect minutes of the grand jury's proceedings. No attempt has been made to interview members of the inquiring panel.

One final thing the judge said was:

> The thrust of the Government's case, taking its philosophical direction from the correspondence of Secretary Romney and the Inquirer, is that constitutional guarantees with respect to the press are applicable only in cases of prior restraint. While we agree that this is not the classic case of attempted prior restraint, we find that even if it were, the cases are not limited in their remedial effect to them.

And they cite the case of *Near* v. *Minnesota*, 283 U.S. 697, 716; 1931. The following, I think, was in many ways the meat of his decisions:

We are confronted here by alleged improprieties by public officials or private citizens paid with public funds, and if the misdeeds were perpetrated, the public has a right to know about them.

While this is not the classic case of prior restraint, it approaches—it comes to court bearing a heavy presumption against its constitutional validity.

The defendants carry a heavy burden of showing the public such a restraint.

That is when it goes on to say the Government failed to prove that point.

Just in conclusion, where we stand now, 9 days after the judge's decision—also, by the way, after the decision came down, Secretary Romney announced to us that he did not intend to ask the Justice Department to appeal this decision and he said he intended to ask the Justice Department to turn over to us the names we sought. We have since made requests both to the U.S. attorney's office in Philadelphia and to the area office of HUD for the names. We are still waiting and, in fact, on Tuesday or Wednesday our attorneys returned to court for an additional order to compel HUD to release the information.

I haven't heard anything today. There may well be something happening on that at this very moment. The U.S. attorney's office also told us they had sent the opinion to Washington for review as to whether it would be appealed.

Thank you very much.

Mr. Moorhead. The statement by Mr. Romney—about no appeal—was that oral or written?

Mr. Steele. This was a statement phoned to us by his press aide.

Mr. Moorhead. Can you supply for the record the copies of the correspondence between the Inquirer and HUD?

Mr. Steele. Yes; I would be happy to.

Mr. Moorhead. I think that would be helpful for the record.

Without objection that will be printed in the record.

(The material referred to follows:)

[Exhibit "A"]

August 30, 1971.

Mr. Theodore R. Robb,
Regional Administrator,
U.S. Department of Housing and Urban Development,
Philadelphia, Pa.

Dear Mr. Robb: In connection with our discussion earlier today of Federal Housing Administration (FHA) mortgage programs, I would like to make the following requests for information:

1. The names and addresses of all fee appraisers employed by FHA since January 1, 1969.

2. The names and addresses of all staff appraisers employed by FHA since January 1, 1969.

3. The names and addresses of those persons who appraised specific properties for FHA mortgage insurance. (A list of the properties will be furnished later.)

4. The official status and present job titles of David Lang and Thomas J. Gallagher, and any other FHA officials who have been reassigned, or who have retired, in the last 6 months. (We also would like to make arrangements to interview Mr. Lang and Mr. Gallagher.)

The Inquirer, through this letter, is making formal demand for this material under the provisions of the Freedom of Information Act, which provides that such information is a matter of public record.

These requests should not in any way be interpreted to limit our right to obtain additional information about FHA operations at a later date.

Sincerely,

John McMullan.

[Exhibit "B"]

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,
Philadelphia, Pa., September 1, 1971.

Mr. JOHN MCMULLAN,
Executive Editor,
The Philadelphia Inquirer,
Philadelphia, Pa.

DEAR MR. MCMULLAN: I acknowledge receipt of your letter of August 30, 1971.

As you are probably aware, I stated at a press conference on August 26, 1971, that I had ordered a full investigation to determine the facts in view of allegations of faults, inequities, and profiteering in housing under section 221(d)(2) FHA mortgages in Philadelphia. At the same time it was announced that, among other actions, the fee appraisers employed by the Philadelphia FHA Insuring Office were being suspended. I emphasized then and I do so now, however, that their suspension was not to be construed as being indicative of my belief that all or any of the appraisers are guilty of any wrongdoing.

I have heretofore declined to make the names of these appraisers available to members of your staff because of my strong desire to safeguard them from any unfavorable and unwarranted inferences of wrongdoing in view of the investigation. Upon receipt of your request, however, I have reconsidered and enclose herewith the names and addresses of the fee appraisers employed by the Philadelphia Insuring Office from January 1, 1969, and the names of the staff appraisers during that same period. It should be understood, however, that the fact of the disclosure does not permit an inference on your part or on the part of your newspaper that I believe that the people on these lists are guilty of any wrongdoing and such an inference being drawn, in my opinion, would be grossly unfair to the appraisers.

I will not comply with your request enumerated No. 3 since the information requested is exempt from disclosure under the Public Information Act (Freedom of Information Act) as intra-agency memorandum and as matter that is part of investigatory files.

With respect to your fourth item of requested information, please be advised that, of this date, Mr. Thomas J. Gallagher's official title is that of Director, Philadelphia Insuring Office. The Department of Housing and Urban Development, however, is undergoing a reorganization and Mr. Gallagher, like some other personnel, have been temporarily reassigned pending a permanent assignment consistent with the new organizational structure. Accordingly, Mr. Gallagher was temporarily assigned as a Special Assistant in the Office of the Assistant Regional Administrator for FHA. He has not physically assumed those duties, however, because he has been on annual leave since June 13, 1971.

Mr. Lang's current position is that of Chief Appraiser in the Valuation Section, Underwriting Division, of the Philadelphia FHA Insuring Office. Under the reorganized structure he is to be the Chief Appraiser, in the Valuation Section Single Family Operations Branch.

I am unable to comply with your request for information about other FHA officials since it is far too broad and too imprecise to ascertain what FHA employees or classes of employees is the subject of your request. There are, in the course of any given months, reassignments and resignations at all levels of the FHA personnel ranks. A more particularized request, however, will be given prompt consideration by me.

Finally with regard to your other requests, I must point out that the Freedom of Information Act requires an agency, upon request, to make available *identifiable records.* Producing information through interviews with agency employees is not wthin the purview of the act. Moreover, I do not regard it as my obligation to arrange such interviews. If Messers. Gallagher and Lang are agreeable to being interviewed by you or members of your staff, I shall interpose no objection provided that any such interviews do not interfere with their performance of their official duties.

Because of your reliance on the Freedom of Information Act, I have enclosed a copy of this Department's implementing procedures for your guidance.

Sincerely,

THEODORE R. ROBB, *Regional Administrator.*

[Exhibit "D"]

SEPTEMBER 24, 1971.

Re appraisers for FHA mortgage insurance.

THEODORE R. ROBB,
Regional Administrator,
U.S. Department of Housing and Urban Development,
Philadelphia, Pa.

DEAR MR. ROBB: This office represents Philadelphia Newspapers, Inc., publisher of the Philadelphia Inquirer. I am writing to you with respect to the request of the Philadelphia Inquirer, formalized by letter of August 30, 1971, for information which you denied by letter of September 1, 1971.

Paragraph 3 of Mr. McMullan's letter requested the names and addresses of those persons who appraised specific properties for FHA mortgage insurance. A list of the specific properties as to which the names of the appraisers is requested is enclosed herewith.

You denied request No. 3 on the ground that the information was exempt from disclosure as "intraagency memoranda and as matter that is part of investigatory files." Based upon our review of the applicable law, we respectfully submit that this request does not fall within the exemptions you cited.

We ask that you promptly reconsider your determination as to this item and furnish the names and addresses of the appraisers for the properties on the enclosed list.

Will you please contact us early next week so that we will know whether we must file our petition for review pursuant to 24 C.F.R. section 15.61.

I look forward to your prompt and favorable reply.

Sincerely yours,

DAVID H. MARION.

[Exhibit "E"]

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,
Philadelphia, Pa., September 28, 1971.

Subject: Appraisers for FHA mortgage insurance.

DAVID H. MARION, Esq.
HAROLD E. KOHN, P.A.,
Attorneys at Law,
Philadelphia, Pa.

DEAR MR. MARION: I have received and reviewed your letter of September 24, 1971, and find no basis for modifying my previous denial of your client's request.

My denial of September 1, as you know, may be administratively reviewed by the Secretary in accordance with section 15.61 of the Department's regulations, an additional copy of which I am enclosing for your convenience.

Sincerely,

THEODORE R. ROBB, *Regional Administrator.*

Enclosure.

THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT,
Washington, D.C., November 11, 1971.

MR. JOHN MCMULLAN,
Executive Editor,
The Philadelphia Inquirer,
Philadelphia, Pa.
DAVID H. MARION, Esq.
Philadelphia, Pa.

GENTLEMEN: This is in response to the editorial in the Philadelphia Inquirer on October 22, 1971, which accused this Department and me of trying to cover up a scandal because we have decided not to give the press the names of people who appraised certain specified properties for HUD. This also responds to a request by Mr. Marion on behalf of the publisher of the Philadelphia Inquirer to reconsider that decision.

Let me begin by pointing out that in similar circumstances a U.S. district court has already ruled that HUD need not name an appraiser who appraises a specific piece of property. In its opinion the court stated, "[S]ince no possible purpose would be served by releasing the identity of the appraiser and based on equitable considerations, the court decrees that the identity of the appraiser be withheld." (*Tennessean Newspapers, Inc.* v *Federal Housing Administration*, decided in July 1971 by the U.S. District Court for the Middle

District of Tennessee). That court's decision confirms to me the legitimacy and correctness of my position.

The appraisals which concern the Inquirer, though prepared in the first instance by individuals, were adopted by HUD and became actions of HUD. Therefore, if any appraisals are wrong, it is appropriate to criticize HUD and HUD's executives, including me, but it is neither relevant nor appropriate to criticize the individuals who made them. Before appraisals are adopted by HUD, many are reviewed and may be changed by others within HUD, such as a review appraiser or the chief appraiser. The chief appraiser is administratively responsible for every appraisal made by those working under him which is adopted by HUD. Similarly, HUD's area office director and ultimately I are statutorily responsible for every appraisal.

The decision not to name individuals who made specific appraisals is not a coverup of HUD's actions. The names of those individuals who had some part in making an appraisal, accepting it, and acting on it are not related to the fact that HUD has adopted it. The press does not need to know those names in order to criticize HUD's actions.

Appraisals at HUD are analogous to information in a newspaper story which is printed without identifying the person who supplied the news or wrote the story. If the story is wrong, people should not demand to know who supplied the information, who wrote the article or who selected it for inclusion in the paper. It is the newspaper's story, and if the story is wrong, the newspaper is responsible and the newspaper should be criticized. Similarly, the appraisals which concern the Inquirer are HUD's appraisals.

Not only do you not need the specific names you request in order to pursue your investigations of HUD; I am convinced that publication of these names would be a disservice to the public. No enterprise, public or private, can expect its employees to contribute as openly and honestly to the formulation of its policy if those employees believe that their opinions (such as appraisals) are to be customarily subjected to public second-guessing.

As you know, the new regional administrator in Philadelphia, Theodore R. Robb, and the area director, William B. Patterson, have instituted thorough investigations into these matters. Should those investigations reveal unlawful conduct or inexcusable incompetence, we will act with appropriate vigor to root out the problem.

Turning to the formal request submitted to me by Mr. Marion on behalf of the publisher of The Philadelphia Inquirer asking me to review the refusal by Theodore Robb to name appraisers of certain, listed properties, I have carefully examined and considered that request. On the basis of that examination and consideration, the provisions of the Freedom of Information Act (5 U.S.C. 552), and the Public Information regulations of this Department, I affirm the decision of Mr. Robb to withhold this specific information. I concur in Mr. Robb's findings of September 1 that the information denied to the Inquirer is subject to (among others) exemptions (b) (5) and (b) (7) of the Freedom of Information Act, pertaining to intra-agency memoranda and matter that is part of investigatory files. Investigations now in progress could well be inhibited by making available the information requested.

Let me put to rest any assertion that this decision is contrary to that of the Supreme Court with respect to the so-called "Pentagon Papers." In that case, the issue was prior restraint of publication of documents already in the possession of certain newspapers. In this case, I am declining to give you information which Congress has decided need not under the Constitution, and should not, as a matter of sound public policy, be subject to publication.

The editorial of October 22, in addition to criticizing this Department and me, also criticized the Department of Justice for seeking to keep the press from publishing information in a civil action involving this Department. Although I do not undertake to speak for the Department of Justice, I understand that its interest in keeping some information from the press at this time is motivated by the desire that press coverage of this matter should not create an atmosphere in which defendants in criminal trials cannot receive a fair trial.

Finally, let me say that, to the extent the Philadelphia Inquirer has disclosed serious problems in the operation of our programs, we are grateful for the public service rendered by your newspaper. This is certainly in the finest tradition of a free press. At the same time, I cannot believe that you would not understand the serious and lasting damage that would be done to the proper operation of a Government Department if the head of that Department were to shift responsi-

bility for its actions to his subordinates by furnishing their names to the public press.

I trust that, if you see fit to disagree in print with my views, you will show your customary fairness by also publishing in full their expression in this letter.

Sincerely,

(S) George Romney
GEORGE ROMNEY.

Mr. MOORHEAD. The subcommittee would now like to hear from John Seigenthaler, editor of the Nashville Tennessean.

STATEMENT OF JOHN SEIGENTHALER, EDITOR, NASHVILLE TENNESSEAN

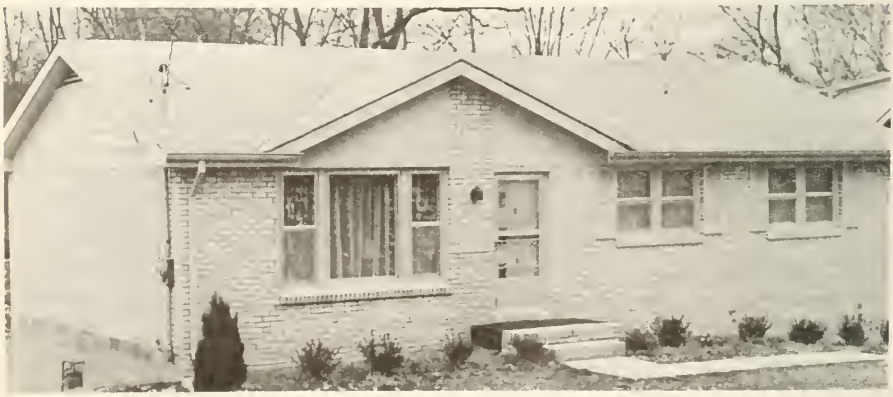
Mr. SEIGENTHALER. Thank you, Mr. Chairman and members of the committee. It is a pleasure to be here this morning. I think it is reasonably clear from what has been said by my friends from the press who testified already that there is a general disregard of the meaning of the act all through the Federal bureaucracy, and it begins in Washington and it stretches at least as far as Nashville, Tenn.

Our own peculiar problem currently relates, as the Philadelphia case does, to FHA appraisers in the Department of Housing and Urban Development. Our own investigation and our own story which led to our challenge of the right of that Department to withhold the names of an appraiser came about in this way.

Just about a year ago a man who is a realtor in Nashville came to our office on behalf of a friend of his. He said that this man is blind, his wife is blind, and he works as a mechanic in the State's garage. His wife works in the Tennessee School for the Blind. And, he said, he has a blind daughter and three minor children. And he said he has been mistreated by the Federal Government. The FHA had appraised his house at $10,800, and some subsequent appraisals had been made and it appeared to us, as a result of these subsequent appraisals, that the house is worth something in the neighborhood of $4,000.

We took some pictures which might be of interest to the committee. I think what Mr. Steele said about synthetic repairs shows up quite clearly.

(The illustrations follow:)



Mr. SEIGENTHALER. Now, the man had been in the house approximately a year—I will just pass these pictures on to the committee for possible interest at any rate. After looking at the house it did appear to us Mr. James had been mistreated and perhaps even swindled.

A reporter interviewed him and he said that he had been to the FHA three times, that his attorney who was really the attorney for the Blind Service Section of the State Department of Public Welfare, had made inquiries at FHA and FHA had told him that his original appraisal was not available to him, that he couldn't have it, that it was in Washington buried in some files.

We wrote some initial stories and ran those photographs and then began to go to the office of the FHA there, and make demands verbally for the appraisal. We were refused several times and finally, after writing repeatedly that we had been refused, we were told if we had a reporter up in Knoxville, some 200 miles away, on a given day—I think the date was April 6, and this was some months after we had initiated the stories, created some interest in Mr. James' plight—we were told if he would go to Knoxville that the appraisal would be made available to us. A reporter did go there and was then told that the Department had changed its mind and that the appraisal report would not be made available.

We then, after filing written notice, and written request was denied, we filed a suit under the Freedom of Information Act.

A hearing was set within 2 weeks by the Federal district judge. The Department came in on that day, and incidentally, the U.S. district

attorney represented the Department in this case, which I found to be——

Mr. Moorhead. The hearing was set within 2 weeks after you had filed?

Mr. Seigenthaler. Yes, it was. The court moved quickly and the court also moved by entering an order directing that no records pertaining to this matter be removed or destroyed and things looked very good at that point.

We went in, as I say. The Department of Justice was representing HUD and I found that disturbing and said so during the testimony; it occurred to me that, if a swindle indeed occurred, it might be in the U.S. district attorney's—the U.S. district attorney might be in a criminal prosecution on the other side—but he contended that was a facetious statement on my part. It was not.

But, at any rate, we came in for a hearing and the Department maintained that under the Federal Rules of Civil Procedure they were entitled to 60 days to answer, and they took that 60 days, during which time Mr. James continued to suffer, still somewhat cold and wet and the rain was coming in, the wind was blowing through the cracks in the house. He stopped paying his rent.

Finally, after 60 days there was a hearing and testimony was taken. Mr. James testified. Our reporter testified. I testified, and a representative of HUD, a Mr. Milton J. Francis, a Director of the Appraising and Mortgage Division, Assistant Secretary of Housing and Mortgage Credit for the Department of Housing and Urban Development, Washington, D.C., who came down to Nashville to tell why they couldn't let us have that appraisal.

He said, in effect—and the language is very similar to what you have already heard from Mr. Steele, in the answer of the Department to the request in Philadelphia—he said simply that if mistakes were made by appraisers, that these mistakes were made by the Department and it should be the Department that was held to blame for these errors.

He said that they were in the process of handling—perhaps if I could just read that part of the answer which I think really represents the feeling of the bureaucracy about the Freedom of Information Act and what it really is and whether they really consider it relevant to anything they are doing or anything we are doing.

He says:

> The principal reason is that the appraiser who works for the Federal Housing Administration is an employee of the Federal Housing Administration who operates under legal authority. Our Department is entirely desegregated, decentralized, and each field office has its own ground rules of operation pretty much with respect to certain quality matters, the kinds of properties, the kinds of locations they will go into. He is operating as an employee of the agency, of his superiors.
>
> The real concern we have is that we appraise in the neighborhood of close to a million properties a year. Each appraiser is responsible for appraising at least, if they are average properties, at least four properties a day. He must operate, therefore, in a certain way; otherwise we would bog down and we don't produce and as a result people don't get housing because I can't put a person in a house without an appraisal first. You can't assure a loan. Every time he makes an appraisal and makes a mistake, if he does in fact make a mistake, he is subject to public censor rather than to the censor of his employer—they used the word censor. At least perhaps the stenographer made an error. It is to make him—this will make him overly cautious, that

they have a tendency to undervalue the properties to be on the safe side when the purpose of the appraisal is to find as close as you can the market value, and secondly, to make requirements far in excess of what the property really needs and therefore to make such requirements which would make the price of the housing, because people would have to do so much to it before it would qualify under our standards and under his interpretation.

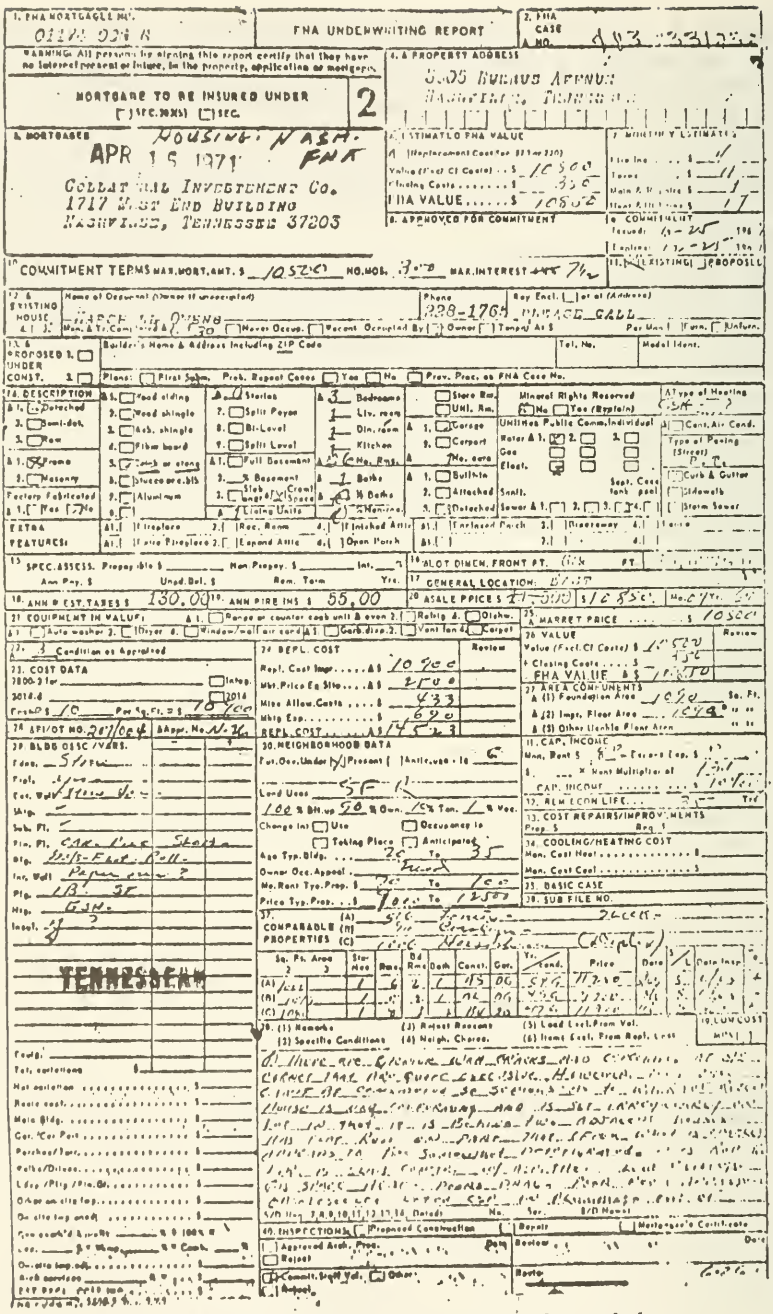
Mr. MOORHEAD. I wonder if you could suspend and pick up—Mr. Moss and Mr. Erlenborn both have to leave. I thought if they had some questions——

Mr. SEIGENTHALER. I really think, Congressman, that really—the result of the hearing was that the Federal district judge—well, let me say at the first instance when we went into court, they asked for 60 days. He told them to give us a copy of the appraisal report without the name of the appraiser on it.

Mr. MOORHEAD. The court ordered that?

Mr. SEIGENTHALER. The court ordered that initially and they gave us one. I don't have the original of that but I would like to make a copy part of the record—it was illegible, totally and completely illegible. We ran it in the newspaper. The only thing I have is a Xerox of the newspaper story, but it was illegible.

(The material follows:)



FHA UNDERWRITING REPORT

FHA Calls Own Copy 'Illegible'

This is the first page of an almost illegible copy of the appraisal report on the Nashville home of Hugh James released yesterday by the Federal Housing Administration. The second page is almost as difficult to read and did not include the appraiser's name or supporting documents. George Gregson, Nashville FHA supervisor, signed a document stating: "copy received is in large part illegible."

Mr. SEIGENTHALER. Subsequently we came back and the judge required them to give us a legible copy, but he ruled that it would not be necessary for them to furnish us with the name of the appraiser.

I might just read one sentence from his opinion. He said: "However, since no possible purpose would be served by releasing the identity of the appraiser, and based on equitable considerations, the Court decrees that the identity of the appraiser be withheld."

He found that the appraisal report was, in fact, a document, a public document, and that we were entitled to that but he ruled that the agency should be allowed to censor and delete from it the name of the appraiser and that is what we ultimately got. We appealed to the Sixth Circuit Court of Appeals in Cincinnati and that case was argued about 3 weeks ago and, of course, it is in the lap of the gods, or the bosom of the courts, or somewhere.

I wish that we had the good fortune that they had in Philadelphia, a judge who obviously recognized meaning and intent, the full impact of the Freedom of Information Act.

My own conclusion is that throughout the bureaucracy there is no real understanding of what the Freedom of Information Act is supposed to mean. I think they look upon it as a hindrance to efficient government operation. But I think, as those pictures will demonstrate, quite often it is used to cover up inefficiency, and clearly in the case of Philadelphia, much worse.

Thank you very much, Mr. Chairman.

Mr. MOORHEAD. Thank you, Mr. Seigenthaler. Thank all of you.

I am going to yield to my colleagues who have to leave, but before I do, particularly with respect to the testimony of the last two witnesses, I would say that as a member of the Housing Subcommittee I was familiar with the section 235 programs. We did have an investigation of these programs. Mr. Romney is a very fine man, but he refused to recognize there was any problem there. When we did bring to his attention a number of cases all across the country, not just in Philadelphia or Tennessee, he stopped the program for what we called "the existing housing programs" opposed to the new, and really rehabilitative programs.

It is clear that in some cases it was just incompetence on the part of appraisers who weren't used to dealing with inner-city slum situations, but in other cases there is certainly evidence that indicated collusion between real estate speculators, brokers, and the appraisers. Obviously, if you had to have the names of the appraisers and the real estate brokers to show a pattern of possible misconduct, the withholding of those names, it seems to me, clearly hampered any rational investigation.

Mr. SEIGENTHALER. Again, I just say this is a ludicrous attitude of the Department of Housing; that idea that the U.S. Department of Justice, could in some sense prosecute this entire Department. I think there are people within that Department who are making mistakes, for whatever reason, and the idea that was offered both in Philadelphia and in Nashville is that the Department made the mistake and therefore the Department should be held at fault.

Finally, I might just say the Department is not monolithic. It is human and I have another picture. This is the home they provided Mr. James under the section 235 program which is worth about $20,000.

He is quite happy in it. I talked to him last night. He is delighted with the situation.

I don't want to be completely unfair to the Department. They have done something for him. I don't know what they have done with that house that he was in before. They own it now. The deed was passed back to them, but the point to make, I think it is a good one. I think that Mr. Romney and others in Government simply don't understand what the Freedom of Information Act is really all about.

Mr. MOORHEAD. Thank you.

Off the record.

(Discussion off the record.)

Mr. MOORHEAD. I yield to Mr. Erlenborn.

Mr. ERLENBORN. Thank you, Mr. Chairman.

I won't take but a few minutes. I do have to leave because I have another appointment. I want to thank the members of the panel.

One suggestion was made, I think by Mr. Sinclair—several suggestions were made as to what this committee might do, what Congress might do. One that I noted in particular was appointment of a watchdog committee. I think that was your first point, on page 8. The establishment of an independent watchdog committee.

Did you intend that to be a congressional committee or an executive-level committee?

Mr. SINCLAIR. I have to admit I really haven't thought it through, but I think if there were such a committee it should be free both of Congress and the executive branch. I mean, independent in the fullest sense, at least as independent as it could be around here.

Mr. ERLENBORN. That is one of the problems I think we face so often today, creating a new consumer protection agency or other things that the people want the Government to create, and somehow or other create it outside the Government. It is rather a difficult thing to do.

Mr. SINCLAIR. Well, my second point also was that a parallel sort of board—a sort of body, might exist in each—in the Department of the Interior, for instance.

Mr. ERLENBORN. I think this subcommittee really is intending to perform that function, is ready and willing and able to perform that function. Those who have problems with the Freedom of Information Act are free to come to this committee, have come, and have received the help of the committee staff and members. It occurs to me that it might be a good idea if the committee would make this more widely known and possibly—and, I know, throw this out as a suggestion: once a month have public hearings on current disputes and problems with the operation of the Freedom of Information Act.

Mr. SINCLAIR. I wouldn't quarrel with that at all. As a matter of fact, the subcommittee staff has been—they might quarrel with it—the subcommittee staff has been very generous in helping me with my dealings with the Interior Department and they have been partially successful and partially unsuccessful.

Mr. ERLENBORN. Often just putting the light of publicity on these questions may help resolve them quicker than going through the courts. That is why I make the suggestion of the problems experienced in this area——

Mr. SEIGENTHALER. I think there will be enough problems across the country to have a line outside the door.

Mr. PHILLIPS. Would the gentleman yield at this point? I can say within the last 10 days since these hearings have begun and news stories began to appear around the country, we have received over 20 letters from people who have information problems. Most of them state in great detail in their letters exactly what those problems are all about. They could keep us busy for 6 months just tracking down the details of those 20 cases. Some are extremely complicated. I am sure we will have many more today, and tomorrow, and next week.

Mr. ERLENBORN. Well, it may be a job that is beyond the capability of the subcommittee. Apparently that is what you are suggesting. We don't have the staff or the——

Mr. PHILLIPS. I wish we did.

Mr. ERLENBORN. I think it is something that the subcommittee ought to consider.

I notice on page 6—first, I should make this observation and ask for your response. I presume that the freedom of information problem with the executive branch and the legislative branch of our Government is a nonpartisan problem experienced in both administrations. Would you all agree?

Mr. MCGHEE. Certainly.

Mr. SINCLAIR. I would agree.

Mr. ERLENBORN. The act has been in effect for 4 years or more. I imagine that you could find examples prior to 1969 of difficulties with the acquisition of information from the executive branch.

Mr. SINCLAIR. No question about it. I know the coal mine safety is one of our pet interests, as well. There is no sense of partisanship in what I said this morning.

Mr. ERLENBORN. I just wanted that point to be made since we have been making reference, and I think for good reason, to current cases. I wanted to have it understood that it is a longstanding problem.

Mr. Moss. Would the gentleman yield?

Mr. MOORHEAD. I think the gentleman from California and I would both stipulate to that.

Mr. Moss. The first case I studied I believe was a withholding under the second administration of President Washington.

Mr. ERLENBORN. I didn't realize the gentleman went back that far.

Mr. MOORHEAD. That is a lot of seniority. [Laughter.]

Mr. MCGHEE. Colonels are nonpartisan.

Mr. ERLENBORN. On page 6 of your statement, Mr. Sinclair, you made reference to Mr. Edward D. Failor. You say he is a political functionary. I wonder what GS rating that is. How do you define that job?

Mr. SINCLAIR. I don't know his GS rating. I know his functions are sufficiently important at the Bureau of Mines that he makes a salary equal to that of his boss, the Director of the Bureau.

Mr. ERLENBORN. Does that have reference to maybe a schedule C or A or some other classification? I was just wondering how you define a political functionary.

Mr. SINCLAIR. What I mean to say there is that he is a person whose credentials for his position, as far as I can tell, are entirely political credentials and his knowledge of coal mining is about as scant as mine.

Mr. Erlenborn. Mr. Straus, I was quite interested in your statement in particular where you say we should not be able to tolerate, and I am paraphrasing, the existence of secret blacklists. Is it the existence of the list that you object to or its secrecy?

Mr. Straus. The latter, Congressman, and I think you point up something on which my statement is not wholly clear.

Mr. Erlenborn. It was not clear to me and that is why I thought I should question it.

Mr. Straus. It seems to me perfectly obvious that any organization, let alone an organization the size of the U.S. Government, will require lists of people from time to time. Indeed, during my tenure at AID we often had use for such lists circulating around in terms of potential organizations for contracts to be let, and so on. I think the issue is, and the issue at AID was, when I was there: Do you allow these people who, for one reason or another, find themselves placed—are placed on that list, do you make some systematic effort to inform them of that fact? The secrecy of the blacklist is the problem, not that they are occasionally necessary, such lists are necessary administratively, but I don't think you put 10,000 Americans on a list who are proscribed without letting them know it. That is the issue.

Mr. Erlenborn. I am happy for that clarification because with that clarification I can thoroughly agree with you. I think Congress has made it clear that in the field of credit reporting, for example, an individual has a right to know and to challenge a bad credit rating rendered against him. The existence of a list is valid, however, and if we have a fellow who has given a bad check to the Government to pay his license fee, that ought to be known when he reapplies for the license; or if he has been an illegal operator, if he has violated the restrictions on his license, or requirements—that ought to be known. Of course, most of these are public hearings in the license renewal situation, but the existence of the list, the knowledge that these people at least ought to be closely questioned as to their activities, I don't find that objectionable.

Secrecy, the fact that persons don't have the opportunity to know that they are on the blacklist and challenge the basis of the information, I agree with you, that is bad.

Mr. Moss. In the overwhelming majority of the cases involving the FCC, on license renewals or license grantings, there are no hearings, public or otherwise.

Mr. Straus. That is correct, Congressman. The overwhelming majority.

Mr. Erlenborn. I would think if a person were challenged as to a renewal of his license he would have the right to a public hearing.

Mr. Moss. In certain instances of a broadcaster there would be a hearing, but not always, however.

Mr. Straus. That is correct. But, if I may, Mr. Chairman, I think to take 1 more minute on the point, the issue here, as I understand it, in layman's language, is not nearly as far, Congressman, as the potential hearing process for a license. What is involved here is a list of 10,000 Americans.

Mr. Moss. Yes; I can understand that.

Mr. Straus. Ten thousand Americans whose names, if they appear on an application for a license, require a whole different proceeding which

probably will result in their not getting the license. It is an internal administrative determination and this list is without any backup, simply a list of names, the result of which is anyone on that list, for whatever reason—a bad check or an alleged misdeed which may not be true—is prevented from having a fair crack at an FCC license.

Mr. ERLENBORN. One last point of clarification and I want to thank the chairman for yielding to me.

Mr. McGhee made reference to the fact that Members of Congress may not want their constituents to know where they are. Do you mean politically, philosophically, or physically?

Mr. MCGHEE. I think all three at times, Congressman.

Mr. ERLENBORN. Thank you very much.

Mr. MOORHEAD. Mr. Moss.

Mr. MOSS. Mr. Sinclair, in the report you had available, the testimony and even the record—did you publish it?

Mr. SINCLAIR. No; I didn't.

Mr. MOSS. Why not? You had nothing to stop you from publishing it.

Mr. SINCLAIR. That is right. I was trying to make a point really with the details of the Treleaven report. As far as my readers in Kentucky, my southern Indiana readers, I think the interest in that is—this is a subjective judgment—I think the interest in that is minimal and I don't prove very much by writing an article about the contents of the Treleaven report. I pursued this——

Mr. MOSS. You might ultimately teach the departments and agencies that they can't really keep as much secret as they would like to if you did publish it.

Mr. SINCLAIR. That is a good suggestion, but I was so incensed with the refusal and the attitude of the Department that I pursued this beyond the ordinary refusal.

Mr. MOSS. Did they ever cite any statutory basis for the withholding?

Mr. SINCLAIR. Yes; they did. The Freedom of Information Act and the section that seemed to them pertinent was quoted to me in a letter from Mr. Melich which I will be happy to make available.

Mr. MOORHEAD. Without objection, that letter may be made a part of the record.

(The letter referred to follows:)

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D.C., September 10, 1971.

Mr. WARD SINCLAIR,
The Courier-Journal,
The Louisville Times,
Washington, D.C.

DEAR MR. SINCLAIR: I have your request of August 6, 1971, for a copy of the so-called Treleaven report.

The report was prepared by Mr. Harry Treleaven when he served as a consultant to the Secretary of the Interior. The report is based on interviews with information personnel in the Department and the examination of publications, press releases, films, and other materials produced for distribution to the public. In addition to other matters, it identifies certain personnel working in the information offices by name, evaluates their ability, and in some cases comments on their personal philosophy.

It is our view that the report is an internal communication and as such is exempt from disclosure by 5 U.S.C. 552(b)(5). Furthermore, insofar

as identified individuals are discussed in the report, release of the information would constitute an unwarranted invasion of personal privacy.

The Attorney General's memorandum on the "Freedom of Information Act" indicates that the communication you seek is exempt from the disclosure requirement of the act. With respect to such communications, the Attorney General has said "* * * internal communications which would not routinely be available to a party to litigation with the agency, such as internal drafts, memorandums between officials or agencies, opinions and interpretations prepared by agency staff personnel or consultants for the use of the agency, and records of the deliberations of the agency or staff groups, remain exempt so that free exchange of ideas will not be inhibited. As the President stated upon signing the new law, 'officials within the Government must be able to communicate with one another fully and frankly without publicity'."

In the circumstances, we must decline to make the report available to you. However, in order that you may be informed as to how the report is described by the author, I am enclosing a copy of the "Introduction" which was prepared at the same time as the report.

Sincerely yours,

MITCHELL MELICH, *Solicitor.*

Enclosure.

INTRODUCTION

This report is based on interviews with senior information personnel in all of the Bureaus and Offices; and on an examination of publications, press releases, films and other materials recently produced by the Department for distribution to the media and public.

The first section of the report makes some general observations and recommendations, and includes a proposed reorganization of the Department's information operation.

In the succeeding sections, the structure and activities of the individual information offices are described and evaluated.

Mr. Moss. I quite agree with you that we have reached a point in the operation of the act where it needs to be strengthened, and I might add that comes as no surprise, as the act was the product of many, many compromises to get something, as a beginning, on the statute books and shore up a public right of access to information. It was clearly an imperfect act, but there were many hours of negotiations to have anything survive, and the committee at that time felt the most significant point in the law was the right of access to the courts on an expedited basis and to have the courts really review the justification for the withholding, not just keep an agency designation of a category.

Mr. SINCLAIR. Basically, that was the answer.

Mr. Moss. But for the court to review and determine what it actually was and whether it was justified to be withheld. The procedure does not provide a quick enough decision by the courts. The 60 days for the Government is far too long. I think the Government in every instance has taken the full 60 days, haven't they? Are there instances where they haven't?

Mr. PHILLIPS. It varies from department to department.

Mr. Moss. I thought Justice handled most of these on the taking of the 60 days.

Mr. SEIGENTHALER. They certainly did in our case.

Mr. Moss. I don't think any independent watchdog committee of the Congress would be able to do the job. I think we would have to have an independent commission, as nearly independent as you can create it under our form of government, somewhat analogous to the independent regulatory commissions, and it would have to be independently staffed with its own legal counsel, its own ability to initiate

actions in court against any department of the Government. I think quite clearly such a commission could not act against the Congress without some amendment to the Constitution, because, of all of the branches of Government, only the Congress has a constitutional right to secrecy. That is overlooked frequently in discussing the policies of the different branches of Government.

Nowhere in the Constitution is the executive branch given the authority to impose secrecy on anything, nor are the courts. The Constitution states that the Congress shall keep records of its proceedings, and it says from time to time that the Congress shall publish them except those portions which in its judgment require secrecy. To require the Congress to add some sort of amendment to the Constitution to remove this right for the Congress to impose a secret label upon material——

Mr. McGHEE. Congressman Moss, as a reporter, could I ask a question at that point: Has this power ever been delegated from the Congress to the executive?

Mr. Moss. No; we could not delegate our constitutional—we have not delegated our constitutional right; no. As a matter of fact——

Mr. McGHEE. How about Internal Revenue Service regulations?

Mr. Moss. As the executive expands you almost feel that the Congress operates under the delegated powers of the executive because they determine who gets information and how much.

Mr. McGHEE. When Congress writes a law that delegates to the executive agencies the responsibilities and the authority to make regulations thereunder, and those regulations impose a secrecy—I am not a legal scholar——

Mr. Moss. Where Congress intends privileged information to be kept from the public it has always said so. It has been rather clear. When it intended that the agency be permitted to keep information from the Congress it has made that point rather clear. In recent years we have been putting into more and more of the statutes enacted by the Congress an express provision that any limitation on the availability of information does not apply to Congress or the appropriate committees of the Congress.

Now, there are certain types of information where some degree of protection privilege is necessary. I think they are far more limited than those set forth in the information act. As a matter of fact, I don't really think you can keep much secret in this Government, and far too often there is a confusion between national security and individual security. I think probably most of the classified information is classified to avoid embarrassment, not to protect the security of the Nation. A number of years ago we had a panel, I think, of four flag officers who concurred in that observation and it was their judgment that over 90 percent of the classified information was needlessly classified. And, while I applaud the action taken recently by President Nixon on limiting classification, I don't think it is going to remove the worst practitioners from the field, the DOD, where routinely they try to classify everything. If it is a given office that deals with classified information at a level of "Secret," almost anything that goes in there, including the daily calendar, is classified.

Mr. McGHEE. The phone books.

Mr. Moss. Phone books. Well, we used to get copies of newspaper clippings that had been clipped from the daily press, put on a piece of blank paper with "Secret" at the top and bottom, and then filed. And that was then classified. So that without some sort of independent agency with full power to force the executive to disclose, I don't think we are going to cure the problems of excessive secrecy in our Government.

I see no other means of forcing the disclosure unless the Congress wants to adopt limitations on each and every appropriation providing that the funds appropriated cannot be used to maintain any files or information unavailable to the public, but that is rather an extreme approach because again, we do have areas where I think everyone would concede that some degree of privilege should be provided for information.

It certainly doesn't go to appraisal reports, however, nor—well, we ought to have a clear policy that when a Government study has been completed and a report filed, that it is public. Whether they act on it favorably or unfavorably that represents a final judgment, and I think we have a right to know the basis for the actions of our servants. These agencies regard this as proprietary but forget who are proprietors. It is the public, this Nation. We govern ourselves, but I think that only if we have a real drive by those concerned in Government and those in the media will we have a chance to bring about the enactment of the kind of law that will insure availability.

We have seen an example today of judicial timidity in interpreting the Freedom of Information Act and this is a matter wherein any number of instances the same experience has been demonstrated.

Mr. Seigenthaler. Congressman, on that point, could I just ask one question? In considering amendments to the act, first of all, in reading the act it seems to me that the Congress, and you would know this, that it is intended that the priority be given to demands for information.

Mr. Moss. Yes; we provided for an expedited consideration by the district courts.

Mr. Seigenthaler. That is right. Now, the court at least in one case has said the Federal Civil Rules of Procedure prevail and they are entitled to 60 days. It would seem to me that some amendment that might clarify the point that the courts are to move and to give priority demand——

Mr. Moss. I think we ought to convince that the whole procedure is a period of not more than 20 days.

Mr. Seigenthaler. That would be very helpful.

Mr. Moss. But it still is not going to provide the information because much of what you do not get today is not withheld. It just isn't supplied.

Mr. Seigenthaler. That is right.

Mr. Moss. That is a new kind of privilege, the privilege to smile and agree and never perform.

Mr. Seigenthaler. Yes; we are well experienced with that.

Mr. Moss. We used to have the housekeeping statutes, section 301 of title V. Everyone relied on that, but they changed that. Congress amended it, but now it is through inaction that the greatest amount of information is withheld. It is not refused. It is difficult to really take

them to court even. They are always getting together for you. I think the Members of Congress experience a great deal when dealing with the departments and the agencies.

Mr. Chairman, I would like to ask specifically some questions but I have a prior commitment which makes it necessary that I leave now. I do thank you for recognizing me.

Mr. MOORHEAD. If you want to submit questions in writing, I am sure the witnesses would be willing to answer such questions.

Mr. MCGHEE. Yes.

Mr. MOORHEAD. Thank you, Mr. Moss. I found this fascinating testimony about the experiences that you gentlemen have had at a working level and the handicaps that you face. We have heard before this committee of almost every technique of withholding information, but Mr. Seigenthaler's experience of "secrecy through illegibility" is a new technique we haven't heard of before.

Mr. Straus, your testimony about the blacklist was very interesting to me. I didn't know that such a list existed.

Mr. Moss, who is on the Commerce Committee, told me that he didn't know that it existed either. I think the existence of such a list is very disturbing. Also, if we could concede, as it appears you do in your answers to questions of Mr. Erlenborn, that there is a reason for the existence of such a list, we then come to the difficult balancing act of the rights of the individuals on the list, their right to privacy, their right not to have the public know that they are on such a list, balanced with the right of the public to know something about what the operation of the Federal Communications Commission is.

Is it your suggestion that anyone who knows or has reason to believe that his name is on the list should be able to get information from the Commission? Is that your solution to this problem of balancing public and private interests?

Mr. STRAUS. I think that is exactly the solution, Mr. Chairman. Obviously, while we at Editor's Report asked on behalf of our subscribers for the 10,000 names, and would, I am sure, have been delighted to have published it, that was a position, but I think it is not the final position. I think the final position in a republic must be that the individuals named thereon have a right to know and challenge, because it seems to me that the major problem here, talking in terms of the operations of any bureaucracy that I know of, is if you permit bureaucrats the possibility of exercising such a list and decisionmaking on its basis without the necessity of, which you and your colleagues confront every day, Mr. Chairman, the necessity of talking head to head with an aggrieved or presumably aggrieved individual, you are leading to a kind of bureaucratic condemnation which is very, very dangerous. So, I think the way you protect privacy and at the same time prevent wrongful inclusion of 10,000 Americans on such a blacklist is to allow them the opportunity to inquire.

So, I think mechanically one would have to assume that 200 million individual Americans would have the individual right to inquire whether their names were on such a list——

Mr. MOORHEAD. Would you go further and impose a duty on the Commission to say to John Jones: "Your name has just been put on the FCC blacklist?"

Mr. STRAUS. Yes, I would, to the last known mailing address, or whatever, some kind of formal notice so that the individual has some kind of opportunity to reply.

Mr. MOORHEAD. I have been reminded that in June we are going to have hearings on legislation related to this problem, a bill introduced by Congressman Koch of New York.

Mr. STRAUS. Yes, sir. I read that only recently. I saw it yesterday, and as a nonlawyer it looked on target to me.

Mr. MOORHEAD. Thank you. I am sure that Congressman Koch would be glad to have that remark placed in the record.

Mr. STRAUS. An inexpert remark, Mr. Chairman.

Mr. MOORHEAD. Mr. McGhee, did you testify that the GAO said it had no jurisdiction to examine into the nonappropriated funds?

Mr. MCGHEE. No. What I testified to was that an employee of Senator Proxmire had informed me after I had made a request through Senator Proxmire's office for possible GAO assistance in getting this information, and their reply to him was, as relayed to me, that the GAO had been up and down this ladder with the Pentagon. They had difficulty in getting—they had always had difficulty in getting information on nonappropriated funds.

Mr. MOORHEAD. I think this is something that the Government Operations Committee should look into.

Mr. Steele, in your testimony you said that the Government wanted to know why the Inquirer wanted these names. It seems to me one of the great virtues of the Freedom of Information Act is that it does not require persons seeking information to give a reason for that seeking of that information. This message has to be stressed to the various departments and agencies—over and over again.

Gentlemen, in your experience in dealing with the various departments and agencies, what do you think the proper role of the general counsel in the department, the administrator of the department, and the public information officer in the department should be? With which type of individual have you had the most success, and which type has given you the most difficulty? I know Mr. Sinclair talked about the Interior Department's information disclosure policies that tend not to be guided by those information officers who are truly committed to the notion that the public has a right to know.

Mr. Straus?

Mr. STRAUS. Mr. Chairman, Editor's Report, something like a year ago, before the particular case about which I was testifying today—some time shortly before that we did a rundown of public information officers of the departments as seen by the journalists going to see them, insofar as we could interview several dozen journalists in town and ask them which departments they thought were being cooperative and which they thought were being noncooperative.

I would be glad to submit that for the record. It is sort of an overview reading, a sense of feeling of which departments are helpful and which are not.

Mr. MOORHEAD. We would appreciate that very much. Without objection, it will be made a part of the record.

(The document referred to follows:)

STRAUS EDITOR'S REPORT—THE EXCLUSIVE WEEKLY LETTER FOR NEWS MEDIA EXECUTIVES—NOVEMBER 29, 1969

Better news coverage of the black community has so pleased Seattle editors and broadcasters that they've picked up the financing of a media/citizens council they deem responsible for the improvement. Two newspapers (Times, Post-Intelligencer) and five stations (KCMS, KING, KIRO, KOMO, KYAC) take part in the council, which was bankrolled by the Mellett Fund ($2,600) for the first year. Journalists, black youths and black establishment leaders have met monthly to probe community attitudes and critique specific stories. One Negro participant calls the improvement in the newspapers' coverage of the black community "remarkable" . . . An editor credits his council attendance with having "a direct effect upon our staff" . . . Several news stories originated in issues discussed at the sessions.

Elsewhere: The U.S. Justice Department's Community Relations Service has organized similar seminars involving the media and minority groups in several cities. Their efforts have led to continuing media-minority discussion in Boston, Cleveland, and Nashville. For information contact Ben Holmann (202–386–6122).

The Seattle council's moderator has written a 24-page critique on the first year of operations that gives valuable "how to" insights. We'll be glad to send you a copy.

The information offices of Cabinet Departments and agencies in Washington are there to help you put the local angle on a national story. They're not swamped by the regular beat men, who frequently have their own direct news sources . . . Most, but not all, of the information staffs will put themselves out for you. Before you phone, you should *know how other newsmen rate them*—which to go over, under, around: Agriculture, FTC, Interior, OEO, SEC (all mediocre) . . . or through: CAB, Commerce, Defense, FCC, Maritime Commission, FPC, HEW, HUD, ICC, Justice, Labor, Post Office, State, Transportation, Treasury (all generally good).

There are gradations in both categories. The FPC (386–6102) is exceptionally good. Interior (343–4124) is very poor; there's no access to Sec. Hickel on hard questions; and LBJ press office holdovers don't always pull with their new director. *Agriculture* (388–5247): Uncoordinated; long-known for delayed and inaccurate answers, poorly written handouts; target of upcoming freedom-of-information attack by Ralph Nadar . . . *Commerce* (967–5485): good, courteous, prompt answers . . . *Defense* (697–9312): daily briefings; good at publicizing mistakes of previous administration . . . *HEW* (963–4568): poor coordination; unwieldy series of subordinate information units . . . *HUD* (755–6980): accessible, efficient . . . *Justice* (737–8200): Info Chief Jack Landau (ex Nieman fellow) mirrors press phobia of his boss Atty. Gen. Mitchell; Landau is slow to return phone calls and hard to get at unless he's known you before. You'll do better asking for an aide instead . . . *Labor* (961–2027): good all round, although Nader plans a complaint on freedom-of-information grounds . . . *OEO* (382–3966): has been poor, but there's a new team . . . *Post Office* (961–7500): well organized; helps you get your story . . . *State* (632–2454): Robert McCloskey and Carl Bartch and fair, accessible, wired in to Sec. Rogers, helpful in setting up appointments . . . *Transportation* (962–3928): adequate, but that's all . . . *Treasury* (964–2041): good access to top officials; a "pro" shop. (Above numbers all area code 202.)

Another expense for the father of the bride: Paid wedding announcements . . . have been instituted at the Houston Post and Houston Chronicle. They're the first major metro dailies to drop news stories on all weddings and replace them with paid ads. Both papers had become fed up with the amount of space the wedding stories were taking. The Post had been running up to four pages each Sunday. The Chronicle was more choosy, but made enemies of those whose weddings weren't written up . . . The ads cost $25 for a two-inch, body-type story with picture (and up to $165 for two columns by eight inches) in the Chronicle and $15 for the first inch, $10 for each additional inch in the Post . . . Now, the Post usually runs just one page of Sunday wedding announcements labeled as ads; the Chronicle carries less. Houston society grumbled at first but now seem reconciled to the expense. And readers seem to be adjusting to the inevitable fact that many weddings simply don't get reported.

Travel reportage can be legitimate news and a real morale builder, if you have your news staff do the on-location reporting and filming. Reporters and

cameramen have been producing brief travel reports for KCRA-TV (NBC, Sacramento) since 1961. All 58 news staffers are eligible for assignments, and the station lets wives go along—at their own expense. The reports (averaging one country a month) are aired on the noon and evening news shows. They often can be tied to a country in the news. (The 24-segment series on the USSR was keyed to the 50th anniversary—1967—of the Bolshevik revolution. The Israel series was aired shortly after the 6-day war) . . . The travel reports are expensive ($2,000 for Mexico to $40,000 for the USSR), but they are available for sponsorship. Past sponsors include the morning Sacramento Union and some foreign car dealer associations. KCRA hopes to recoup more of the costs through a new effort at syndication. First big customer: Metromedia, which bought the USSR series for showing on its TV stations.

Watching the Watchdog: The FCC is headed for another grilling in the courts. And this time the result could be increased legal standing for citizen challengers as well as possible antitrust guidelines for license renewals. The case—now before the D.C. Appeals Court (oral argument Dec. 16)—involves KSL–AM in Salt Lake City, owned by the Mormon Church's Bonneville International Stations. A Citizen group complaint attacked KSL's license renewal in October, 1968, raising issues of media concentration and charging a right-wing bias in programing.

Besides KSL–AM–FM–TV, Church holdings in Salt Lake include the afternoon Deseret News, which has a joint operating agreement with the morning Tribune, as well as the city's major ad agency, bank and department store. Through other business ties the Church and three key families have extensive interests in Utah CATV, publishing, radio and television.

Although the FCC renewed KSL's license, soon after the original complaint, by a vote of 3 to 1 (Cox and Johnson out of town), two Salt Lake residents promptly filed a petition for reconsideration. The ensuing bureaucratic mish-mash—in which tapes and letters were lost and a citizen document was rejected because it wasn't double-spaced—led to the appeals court.

An important issue in the KSL case is the question of *who can file normal petitions before the FCC. Traditionally,* this right was accorded only to those who suffer economic injury or electrical interference by the granting of a license. But court decisions involving WLBT in Jackson, Miss., sanctioned petitions filed by *"public interest" groups* such as the NAACP and United Church of Christ. Although a *lower court* opinion concerning Chicago's WFMT *apparently authorized similar action on the part of individuals,* the FCC ignored the precedent in its hasty renewal of the KSL license.

Because of FCC bungling, the KSL case provides an opportunity for the court to engage in rule-making that would affect future FCC actions. *A Utah Law Review article* has already *proposed* an additional bench-mark for broadcast licenses: it would require *a positive finding by the Commission that a license grant or renewal doesn't violate any anti-trust laws.*

Stereo sound for standard AM radio is just waiting for the first station to try it. The newly-perfected equipment (transmitter converter at $18,000) is patented by Kahn Research Labs Inc. of Long Island (516) 379–8800 . . . The AM stereo comes out as regular monaural sound on one radio. Two receivers—one tuned to the left sideband, the other to the right sideband—give stereo. (Kahn says it also has the patent on an AM stereo receiver that could market for as low as $30) . . . *A U.S. station that wanted to try the system would have to get FCC approval* for the experiment. But at least one foreign broadcaster is set to make a trial.

If you think "STP" is a gas additive and "roses" are harmless, your coverage of the drug scene and the flower children is missing something in the translation. The "Call for Action" project at Denver's KLZ–AM (Time-Life) is using a dictionary of hip talk and drug lingo that we'll be glad to send you on request. It's brutal ("very good, exceptional").

Editors beat a path to the unmarked door of the fledgling Dispatch News Service, which gets credit for breaking the Pinkville "massacre" story. Dispatch now operates as a syndication service for the work of its star, former AP reporter Seymour Hersh, plus eight stringers (mostly students) around the world. When plans jell, Dispatch hopes to offer 8 to 10 feature stories monthly to its subscribers (via Telex), besides giving them first crack at front-page material it claims to have in preparation. Dispatch sold its Vietnam scoop to newspaper editors by telephone solicitation. (36 of the 50 managing editors contacted

bought the story.) The service is currently negotiating for market exclusivity with newspapers around the country. (Call 202-347-2670.) Rates aren't firm yet.

Mr. MOORHEAD. I think I interrupted you, Mr. Sinclair.

Mr. SINCLAIR. I think I have lost my train of thought.

Mr. MOORHEAD. I was talking about the lawyer, the information officer and the administrator.

Mr. SINCLAIR. My particular difficulties have come mainly from lawyers who, as it turns out, are more or less in a position of being the ultimate censor. I can appeal to Secretary Morton today, tomorrow and the next day, and my appeal ends up in the lap of a lawyer who turned me down in the first place and I get a letter back from the Secretary or Undersecretary, a letter drafted by the lawyer and the Solicitor's office is where I have had the difficulty.

I think, as I mentioned in my statement, that there are several other considerations that are put at a higher priority than the public's right to know, and I think those factors have been at work in my experiences with the Department of Interior.

Mr. MCGHEE. Mr. Chairman, I might add a word there. Frequently a difficulty in a press association reporter's work is that he will call and need some information and he knows to whom he wants to speak and the secretary of the gentleman will say, "I am sorry, you will have to go through the Public Information Office."

Now, we are working maybe on minute-by-minute time. I hate to use the word "deadline" because it is an outdated word now, but we are always in a hurry, in any event, so you have to call back the information officer and he says: "Specifically what do you want to know? I will see what I can get." You tell him what you want to know. He makes a phone call to the Secretary. Maybe an hour later you get a call back and maybe the response immediately suggests another question. This happens all the time. I know—I understand the way the Government works. Its servants can't spend all their time on the telephone talking to reporters, but it is a real technical problem involved here and particularly when the public information officers seem to have a sort of, well, an assignment to inhibit the passage rather than to speed it up.

I could give Mr. Straus some horrible examples.

Mr. MOORHEAD. Have you noticed—has this always been such with public information officers that their goal was to inhibit the release of information?

Mr. MCGHEE. Not always. On the contrary, in some cases they are very, very helpful, and there are innumerable experiences where we are put right through to the prime source and where the information officer himself will suggest I do this to speed things up. But, I must say that almost always, in those cases, it is not something that is likely to embarrass the Department, or not something that the Department thinks will hurt them.

Mr. STRAUS. Can I add just one word, Mr. Chairman? It seems to me in general terms—I don't know whether my colleagues on the panel would agree, but by and large in Government agencies the public information officers tend to be far the more helpful of the two, the general counsel and the public information officer. But, I think one has to generalize one step further to say in most of the departments, in most of the agencies, the effectiveness, the policymaking power of the two is very different and the counsel, in fact, wields a

very substantial policy voice in that agency or department and the public information officer seldom does. So, it is a little bit of an unequal contest that puts one against the other.

Mr. STEELE. In answer to your question, I think in our specific case the only thing we could say is that the problem really seems to be institutionalized throughout that agency.

We can't say from what we have seen that public information officers or lawyers in HUD, for example—that one is more reluctant than the other to give the information. It seems to be a very institutionalized thing in that Department, to prohibit the release.

One point, if I could make it very briefly, that is related to—that Mr. Seigenthaler talked about earlier, because I think it is important to talk about examples that are going on elsewhere. He was mentioning a question during his case, the U.S. attorney representing the department in a civil case, when at sometime then or in the future they can see where he might have been involved in a criminal action.

We have really the same thing in Philadelphia. I don't know directly the answer but it seems to me a serious problem that the U.S. attorney, who is responsible for the grand jury investigation, looking into the misdeeds of FHA or real estate speculators and mortgage dealers in Philadelphia, the same office and same individual is also responsible for arguing the Government's case, why it can't release this information to a newspaper which has also had the pressure on to keep that information going.

It strikes us as a conflict there, too.

Mr. SEIGENTHALER. The point on the information officer, if I could just make a local newspaper editor's point, is that the movement toward regionalism in the Federal bureaucracy is creating some problems. I just heard last week that the information office of the Department of Labor in Nashville is going to be closed and moved to the regional office in Atlanta. Well, it is the only information office for the Department of Labor in the entire State. Chattanooga, Knoxville, they all depend on the office. I guess it is no more difficult for them to go to Atlanta, but it is just going to mean that we are operating by long-distance telephone and I think the result of that is going to be that more of the reaction that Congressman Moss spoke of a few minutes ago, smiles and happiness, and "Yes, we will try to get that up to you next week or next month," or "We don't have it"—we are dealing with a voice on long-distance telephone.

I think in communities across the country, outside regional headquarters of various departments, it is going to become more and more difficult as public information officers are withdrawn from local communities. I suspect it is going to be a long time before we get anything out of the Department of Labor if this office is closed.

I wrote a letter to the Department last week——

Mr. SINCLAIR. On the same point I can give another example of the difficulties it has caused us. Some months ago, last fall, the head of the Department of HEW's occupational health program went to Kentucky and talked about some new figures that had been prepared on the incidence of black lung disease among coal miners. This was information of great interest to us and he talked specifically about Kentucky, and he had the figures. There was no problem. So, the message was relayed back to me that it was a subject that perhaps I would want to take a look at and do a story on eventually.

At the end of December I called to Rockville, Md., just a few miles up the pike, to see if I could get the information and I was referred to the HEW office at Morgantown, W. Va., and I called Morgantown. I was given a name and number. I called Morgantown and got the appropriate person who seemed most cooperative and said that she didn't know that that information would be available immediately, but she would send it to me within the next week.

I say that was the end of December and I haven't received the information yet.

This simply illustrates the difficulty of working by long-distance phone. I have got stories I should be working on right at this hour but there is something to do every day and if I can't get what I need now, I move on to something else or I am tempted to move on to something else, and I get back to black lung when I get back to it, whenever I have a slowdown.

Mr. SEIGENTHALER. I think they have learned if they can just put us off, next week, next month, or maybe next year before you are back in touch with them——

Mr. MOORHEAD. Mr. Sinclair, there is one thing I can't get through my head. The Department of Interior obviously knows that Jack Anderson has a copy of this Treleaven report.

Mr. SINCLAIR. Printed in 730 newspapers.

Mr. MOORHEAD. They know you also have a copy of the report. What possible motivation would there be for them to continue to refuse you the report itself? It would seem to me that once you have already been had you ought to give up and recognize the facts.

Mr. SINCLAIR. I don't follow their rationale, if there is a rationale. I don't follow it at all. I think it may be a personal matter, too, between me and certain—I won't use the word "functionaries"—at the Interior Department, certain officials at the Interior Department who prefer not to see me and there are some who refuse to talk to me, and if I have a question I have to relay it through an information officer who may or may not get an answer, and as Mr. McGhee pointed out, an answer to a question usually leads to another point that really ought to be explored. As we are dealing with public issues and working through the third party there just isn't that chance for a free exchange of information.

Mr. MOORHEAD. Thank you.

Mr. Phillips?

Mr. PHILLIPS. I might say that on our hearing schedule the Department of Interior will be testifying on the 28th of this month, so perhaps we can get the answer to that question from their witness.

Mr. SINCLAIR. They will be under oath, I trust.

Mr. SEIGENTHALER. Can I ask: Do you plan to hear from HUD?

Mr. PHILLIPS. Yes. On April 14.

Mr. SEIGENTHALER. It occurred to me when Mr. Steele said he heard from Mr. Romney's office that they are not going to appeal that case, that it might be that they are making a legal determination that they are not going to appeal that case, but that should we win in the sixth circuit—they very well might appeal our case on the grounds that the judge has given us half a loaf, in that "you can have the report but you can't have the appraiser's name." That might be a stronger case. I am saying: The lawyer makes the policy decision and it may be

a lawyer's decision, not proceeding in Philadelphia, in the hope that they can get us in the Supreme Court and make a better case. It would be very interesting to know what their policy is going to be if they have finally decided as a result of the judge in Philadelphia that they are going to let the bars down and deal in a forthright manner with us. That is one thing.

If they are simply picking legal cases to try to try to get the best arm on the press, that is something else again.

Mr. PHILLIPS. One of our earlier witnesses was Assistant Attorney General Erickson, who heads the Justice Department's Office of Legal Counsel. One of the areas of questioning was this coordinating role which OLC plays in the administration of the Freedom of Information Act. I suspect that a recommendation whether or not either of the Philadelphia or Nashville FIIA cases is going to be appealed beyond the present level will probably be determined in that office.

This also raises the question on the colloquy that we had with Mr. Erickson about the dual role of the Department of Justice in administering the act, on the one hand, and defending the Government's position in denial cases on the other. One of the interesting things we raised with Mr. Erickson was the role of the local U.S. attorney's office in defending the Government suits at regional levels in cities throughout the country, and what role the Justice Department's Civil Division plays in making available attorneys who are experts in the Freedom of Information Act to either associate themselves with local cases or perhaps handle them in their entirety.

We know of one case in Seattle where the Justice Department in Washington did send an attorney to work with the local U.S. attorney in defending a Government suit involving the Internal Revenue Service. We asked Mr. Erickson to supply for the record the number of cases in which attorneys have been sent from Washington to assist U.S. attorneys in these types of cases. We haven't received that information yet, but I think it will be extremely interesting in trying to delineate this two-hat role of the Department of Justice.

On the one hand, they should conscientiously try to uphold the intent of Congress when it enacted the Freedom of Information Act; their other role is to defend the Government's position in cases which are diametrically opposed. This is one of the real tough areas of these hearings, trying to determine what that role is and what it should be.

Mr. Chairman, I have just one general question to ask all the panelists. Aside from the problems of deadlines and getting information, can you, in your own opinion, express why more people in the news media have not used the act more extensively? There have been some theories expressed informally that perhaps some reporters are reluctant because they fear that they might alienate a source in a department and dry up that source as a result. It has been suggested perhaps some editors would frown upon going into court, the expense involved and so on. There are probably dozens of other reasons, but I wonder if each of you could perhaps give a reason or so that you think from your experience, why more of your colleagues have not taken advantage of the act.

We will start with Mr. Sinclair.

Mr. SINCLAIR. I have several theories and I run the risk of——

Mr. PHILLIPS. I know this is a ticklish area but it would be helpful to the subcommittee.

Mr. SINCLAIR (continuing). Of making myself unpopular among editors, but I think one of the problems is that—and I wouldn't call it the first problem in the lack of use of the act—I think one of the problems that is that there simply aren't enough hard-nosed editors around the country who are going to insist and push it until they get the information that they should be seeking out. Maybe they are not seeking out the kind of information that certain Government officials would like to withhold. I say that is not the principal factor. I think one of the reasons that you don't hear very much about the use of the act is that the reporters can be sometimes pretty crusty people and when official A says "You can't have this document," or this information, you go to official B. You keep going down the line and maybe by the time you reach official Y, you get your document. You get your information.

There are other ways to skin the cat and the examples you have heard this morning are examples that really don't fit that picture. We have exhausted our innovative remedies and couldn't get what we needed, and so we had to turn to the other tool that was available to us.

Mr. PHILLIPS. Some of our research has shown that in many cases the threat of using the act or an official request citing the act, and perhaps even with a notation that a carbon copy of that letter is being sent to the subcommittee will, in fact, produce the information. It isn't a guarantee, but it is an additional wedge or additional club that sometimes does work.

Mr. Steele?

Mr. STEELE. I will generally agree with the point that Mr. Sinclair has made. In terms of our own paper which was purchased—and I came there—purchased by Knight Newspapers about 3 years ago, there has been no reluctance to use the courts, and this has been, I think, a conscious effort on the part of a number of people because of the concern over the amount of information, both secret at the Federal level and the city and State level in Pennsylvania.

From that one I would like to draw some general conclusions that that sort of action is going to come more and more from newspapers. But I must confess that I really don't know that that would be true on a national basis, you know, how much you are going to find that the case. But, I think there is certainly a growing feeling among a number of reporters and writers and editors that I work with that it is kind of important to make these points legally, and that there is a legal right to this information that is being denied us.

So, in that sense, you know, I think you may see more and more of this.

Mr. PHILLIPS. Mr. Straus, would you have any additional comments?

Mr. STRAUS. I think the one just mentioned is very key. The Inquirer might be unusual but by and large in the country I think you still have to say there is a kind of reluctance and I don't know that I know the roots of that reluctance, that editors and journalists have to resort to the legal process as a source of information.

I don't think that fits very well.

The two reasons that occur to me are: (1) There is a time ingredient here. I think there is an extensive lack of knowledge of the Freedom of Information Act in the journalistic community in the United States today and despite what we in the media can do in the way of best

efforts and the gentlemen of the Congress can do, time is one of the elements. I don't think everybody in every newspaper and every TV station knows that there is, with all due respect, Mr. Chairman, that there is a Freedom of Information Act.

Mr. Moorhead. I think this is one of the purposes of this series of hearings.

Mr. Phillips. About 6 weeks ago the chairman of this subcommittee was interviewed by a wire service reporter on what a citizen should do, what steps should he logically take if he is denied information. This wire service story was published in papers all over the country, and we know because of the letters that we have received in response to that interview. People have written and said, "I have followed your one, two, three, four procedural steps, and I have run into this roadblock." These are some of the letters that I was referring to earlier that the subcommittee has received in the last several weeks.

So, maybe there is a growing awareness of what the act is and what might be done to obtain information under it. And certainly this is a step in the right direction after four and a half years.

Mr. Straus. I think there is one other element, if I may, and it is a little more unsettling, perhaps, and a little more potentially insidious, and that is: there has been a lot of discussion over the last few years about governmental efforts to control news. There is another side of that coin less discussed in the journalistic community, and that is the general issue of relations between journalists and Government officials and whether it is one of adversary or colleague or bosom buddy. There is a tendency and has been for a long time, I think, between many people in the distinguished press community and what they perceive to be their opposite numbers in Government not to "rock the boat," not only because their source of information may dry up, but really more for reasons of personal relationship. It just isn't nice to do it; it isn't done in the club. I think that is one of the considerations: the gentlemen around this table are demonstrating that they don't believe much in that. But a great many of their colleagues do still.

Mr. Phillips. Do you have any additional comment, Mr. Seigenthaler?

Mr. Seigenthaler. I would concur, generally, with the whole point of the attitude. I think there is misunderstanding about the act and I would even concur in some ways with the idea that the club atmosphere does prevail in some parts of the press. I do think, though, that there are a number of working reporters as Ward Sinclair points out, and as the reporters on this panel demonstrate, that there are a number of reporters who are constantly working to get information and are getting information and are using the act. They know about it and are using the act as a sort of a lever to break it loose and you never really hear about the many cases in which that occurs.

One of the problems is really reaching a point of conflict. I think that within Government, particularly, the information officer does know about it and he is anxious to avoid conflict if he possibly can, and so quite often reporters get waltzed around for a day, week, or month, and inevitably never get the information. They never are able to make a case with the city editor or with the editor, much less with the legal counsel of the newspaper, that they are really getting a runaround.

So, the conflict never comes into being. Issues never really join.

One other point, and that is a general impression that I have from talking really with other editors. I suspect that there are not very many lawyers in this country who are really willing to advise clients to take a dramatic, even courageous position against the Government in these matters. The idea of the Government's right to be secret is something, I think, that permeates most of society and a good many of the legal departments. I suspect if you went into the Justice Department, for example, and examined lawyers there about their understanding of the Freedom of Information Act you will be shocked to find—and I was in the Justice Department myself, I worked there for a while in the early sixties—you will be shocked to find they don't even know that it is on the books. It is a delight to me to hear that the Office of Legal Counsel came in and did know about it and was able to speak intelligently about it. I don't think most lawyers really understand what the act is all about and would be reluctant to advise their clients really to take on the Government in such a hazy area as what is secret and what is not.

Just if I might, I would like to throw this in, an unsolicited criticism. I am deeply concerned, as Mr. Sinclair said earlier that he was, about the question of executive sessions in the Congress and I think sooner or later Congress is going to have to come to grips with that problem as many State legislatures are having to come to grips with it, and I hope that at some point this committee will help the press further by confronting that issue and perhaps by taking some steps that will make access to those hearings a reality.

Mr. PHILLIPS. Certainly this area of the law is one of the newest and little-known areas. It is a highly specialized field. It might be compared in some ways to environmental law which is just coming forth into its own, and I think from our knowledge of attorneys who will be testifying later in our hearings, there are relatively few who have had that much experience. We are fortunate to have as witnesses next week a group of attorneys who have handled a great number of cases that have been heard by the courts under the Freedom of Information Act. So, we hope to obtain some ideas from them, as we have today, in that profession what some of the problems might be.

Mr. MOORHEAD. Mr. McGhee, would you have any comments?

Mr. MCGHEE. Yes. I think Mr. Straus and Mr. Seigenthaler have both hit upon a point that there is a club atmosphere among some reporters and some news sources. However, I really don't believe that that is a problem in the field because if a reporter is worth his salt, once he begins to want information from a friend in the Government and the friend refuses it, you immediately have an adversary situation. I would think, too, that nine times out of 10 the reporter is not a friend of the source—particularly in the vast bureaucracy in the Government. I may be—I consider myself a personal friend of a number of Senators and Congressmen. Fortunately, I don't have to deal with those personal friends very often in my professional relationships with them. I hope that I would not let a friendship interfere. But I think more fundamental than the people—than the reporters and the public for whom the act was designed, to provide access to Government information—is the bureaucrat in charge of it. He does not understand the purpose of the act. You can take a reporter who has never heard of the

act and he calls up bureaucrat A and asks him for some information and he doesn't get it. He knows that there is something wrong fundamentally there, particularly if there is no national security involved.

The bureaucrat looks at it differently. He thinks: This is my information; this is my bureau's information and it is nobody's else's.

I know I am an honest man. I know I am not stealing.

I think this is the attitude that a good many of them have and I don't know how you solve it. We have got a job, the bureaucrat thinks we have got to open up your books to the first reporter that calls. I understand if he thinks it is not practical.

Mr. PHILLIPS. I would hope one way we would do this is for a new public official who comes in above a certain level who is going to be dealing with this problem, that at least he has a briefing. He may need a little bit of on-the-job training about what the Freedom of Information Act means and what the regulation of that particular department or agency provides. Then he won't be able to plead ignorance when he is confronted with a situation such as this and handles it in a poor fashion. At least that should be a minimum to be required administratively in any executive department or agency.

Thank you, Mr. Chairman.

Mr. MOORHEAD. Mr. Cornish.

Mr. CORNISH. Thank you, Mr. Chairman. As a former correspondent for United Press International, I think this testimony is especially valuable to have on the record and I am particularly glad to welcome my old friend and colleague, Roy McGhee, with whom I worked for a number of years.

I have an observation and it is in the form of fear, perhaps unfounded, that the true investigative reporter is becoming a dying breed, and I have a feeling that he may be simply overwhelmed by the increasing size and complexity of Government and the daily routine which he must cover on a regular basis that is outside of the investigative scope of news reporting.

I wonder if the panel has any thoughts on that, whether there has been any diminution in the investigative reporter's role, whether they have noticed it.

Mr. MCGHEE. On the contrary, Mr. Cornish. In the press associations in recent years, I am sure you are aware of the special investigative teams that both the UPI and the AP have put in the field, and their reports have won innumerable prizes. I can recall days when a press association did no investigative reporting at all. They do provide a considerable amount of data. I would agree, though, that many reporters are overwhelmed by the great mass of information that they are given sometimes in the investigative field.

As an example, I recall several years ago—I never did write a story about it, I had too much—I was told that there was collusion on a Bureau of Reclamation dam out in the West someplace. So I went to the Department of the Interior and asked them for the books, and they said: "Sure, what do you want to see?"

So, I went down there and they had some documents that would stretch literally from here to that wall and they were as wide—the sheets were as wide as this table.

Well, I wouldn't—I couldn't make head nor tail of them. And I just flunked. They said, "What else do you want to see?"

You know, I wanted something that I could comprehend. When you have information that you can't understand, it is worthless.

Mr. CORNISH. I wonder if there are other comments.

Mr. SEIGENTHALER. I am inclined to agree. It does seem to me among reporters that I meet and talk to that there is really an intense interest in the field of investigative reporting, really a growing interest. I think the people on my staff, most of the reporters on my staff consider themselves to be investigative reporters. Beyond that, it seems to me that there are new areas such as consumer affairs and the environment, aside from the traditional areas of swindle, government corruption, that reporters are interested in getting into; medical affairs. It seems to me that there are more reporters in more different areas doing investigative jobs, maybe a different sort of investigation now, but I am really encouraged as I talk to newspapermen from other parts of the country as well as my own area, that really there is sort of a renewed interest in investigative reporting and I would say that there is a feeling in some areas of management that it is not nice, not proper, and sometimes dangerous. But again, I think that may be limited and perhaps dwindling. I hope it is.

Mr. STRAUS. I would say that Mr. Seigenthaler says it just exactly right. I think that the thesis probably is exactly opposite of what you say. I hope so. Much more optimistic than what you say.

Mr. CORNISH. I am really pleased to hear that even though I still have doubts. Mr. Seigenthaler, you mentioned that you felt that more congressional hearings should be open and I just want to say personally that I would agree with that but I wonder also whether the press and other media are prepared to deal or cover these increased open hearings and the wider flow of information which would result.

Mr. SINCLAIR. The answer is to open them up and we will find out.

Mr. SEIGENTHALER. When I was in the Justice Department there was a man who covered—well, it was a woman who covered Justice, and that is a big job. She covered Justice, the Supreme Court and HEW. She had an impossible task, but I don't really think our ability to cover it relates to the need to get the committee meetings open.

Just talking about going to court, about 7 or 8 years ago Bill Kovitch, now with the New York Times, was working with us covering the State legislature and our constitution says that the doors of the legislature should be open, and they went executive on him and he wouldn't leave, and they excluded him from the floors of the legislature, and we went to Federal court and got him back in.

I guess you don't have that clear constitutional mandate to make that sort of an effort in the Halls of Congress, but I don't really think our inability because of lack of manpower to do the job relates to the ques-

tion of the public as well as the press, to have access to what goes on in those meetings.

Mr. CORNISH. I would agree to that, but I think it is an important side issue and I think the press ought to be prepared to increase its manpower.

Mr. SEIGENTHALER. Or do more pool work, for example, to do a better job. If you have four people in the Justice Department covering those same three departments, some of that is overlapping and duplication. So, competition is necessary, but I think more and more pooling is going to be necessary for us to do an adequate job.

Mr. CORNISH. Having been a loner, I would advise against that, myself, but that is an interesting thought. Thank you, Mr. Chairman.

Mr. MOORHEAD. Now that the subject of congressional action and opening of hearings or meetings has been brought up, even though I don't think this subcommittee has jurisdiction—it would be the Rules Committee or the Joint Committee on Reorganization—but, just to get a clarified point, are you talking about hearings or markup sessions of the bills, or both?

Mr. SEIGENTHALER. I am talking about both, Congressman Moorhead. I think, Mr. Chairman, that there may be some—well, I am particularly concerned about appropriation hearings, just to be candid about it. That is the one area that is particularly offensive to me.

Mr. MOORHEAD. That is a hearing.

Mr. SEIGENTHALER. That is right. But, beyond that I am concerned about any executive session. I must say that I have difficulty outside areas of national security—I have difficulty understanding the need for executive sessions.

Mr. MOORHEAD. Congress has faced this problem. Some committees have decided to have open markup sessions. My understanding is that they have been rather unfortunate in the legislative product that is produced as a result. The compromise that Congress reached was to have executive sessions for markups but to release immediately after the meeting the votes with the names of those members voting on any amendments adopted or rejected in the executive session. This opens up the congressional process, not totally, but trys to balance what is the public interest—the production of good legislation or merely the conduct of the markup process in public before the press.

In my judgment all hearings except where national security is involved should be open hearings. In my judgment the legislative product is better in markup sessions in executive session, with a total revelation of members' position on votes taken for or against amendments. This is a compromise that in my judgment produces the best legislation with the maximum of disclosure to the public.

Mr. PHILLIPS. Could I make one other point on executive sessions that hasn't been mentioned, Mr. Chairman?

One of the reasons the rules were changed in the 1950's governing executive sessions were abuses under the old rules, when an individual was accused of something in public hearings with no opportunity to

defend himself. The new rule was called the Joe McCarthy rule. As we all recall, people were called Communists and other things in open session without an opportunity for that person to be apprised that that was going to happen. One of the reasons the rules were changed in the mid-1950's was to protect the rights of the individuals. Under current House rules, and certainly in the rules of this committee, when someone is going to be named in a hearing and accused of wrongdoing, the rules require that the subcommittee or all committees go into executive session so that that information can be received and kept in confidence until the individual who has been named has an opportunity to come and defend himself.

Now, I think that is certainly different from the general rule that we are talking about, closed hearings and I think that this point should be made clear. It is not a black and white situation. Some executive sessions are required in order to have fair play for individuals who are going to be directly affected. Perhaps their whole careers, their whole lives could be adversely affected. Certainly some of this did go on in the early 1950s and the rules were changed because of that terrible experience.

Mr. SEIGENTHALER. If I just might respond to that, Mr. Phillips. I simply agree that an awful lot of people had their names smeared during that era. But it would seem to me that that was a problem that Congress could and can now solve by effective staff work. I don't have any doubt that Congress has the ability and really does every day through exhaustive staff work, provide protection to people who are charged—indeed, as an example, they are, in the U.S. Senate Judiciary Committee hearings going on right now. It occurs to me that if the staff will make the effort, that people can quickly and appropriately have the opportunity to answer charges made against them if they wish to do so. I think that was a terrible era we went through and I think that the reaction to that on the part of the Congress was quite natural, and at the time I might have concurred in that, but it does seem to me that in the long run whatever is said before a congressional committee by a witness or by a Congressman is—the public is more benefited by knowing about the business of congressional committees than by not knowing.

Mr. PHILLIPS. Of course, one of the problems is that you have a public witness and he may comply with the committee rules and supply his statement 24 hours in advance and there is no mention of any individual in that statement. But, as it sometimes occurs in a colloquy, he can name a person and accuse him of wrongdoing without any kind of staff work possible to give that person that opportunity to do something to defend himself. There would be no way to anticipate it.

Mr. SEIGENTHALER. I agree with that but you make my very point. That happens now. I could sit here without giving you any advance notification and make that charge against some person at this open hearing. I don't really think that the cover of secrecy protects anyone from that.

Mr. PHILLIPS. The only thing the committee can do is to inquire of the witness if he is going to name names and make accusations. Now, if he tells us "no," he is not, and the hearing is going on and then he changes his mind because of an aggravation or a question that is asked him and he goes ahead and does it anyway, there is nothing we can do. We can't expunge the record. It is a difficult situation, I agree. Occasionally it does happen, but if you do know in advance that a witness is going to make serious allegations against a witness whom he intends to name, then under the rules we are bound to advise him that that has to be taken in executive session. It is not a clear-cut case either way, and certainly there are abuses just as there were abuses in the 1950's. There are abuses today.

Thank you, sir.

Mr. MOORHEAD. Thank you, gentlemen.

The subcommittee has received several excellent studies from the Library of Congress relative to these hearings, and I also am submitting some accompanying statements, which I think should be made a part of the record and without objection they will be made a part of the record.

(The material referred to follows:)

ACCOMPANYING STATEMENT BY REPRESENTATIVE WILLIAM S. MOORHEAD, CHAIRMAN, FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE

RELEASED FOR FRIDAY, MARCH 17, 1972

"In 1966 the Congress took the first step toward guaranteeing the people's right to know what their government is planning and doing. The Freedom of Information Act was by no means a failure, nor was it an all-out success, but its shortcomings are due more to resistance on the part of the huge bureaucracy than to compromises which are inherent in the legislative process which created the law.

"This is apparent from the analysis of the first four years of operation under the Freedom of Information Act. For every seventeen times citizens used the law to try to get public records, they were denied the information one time.

"On the surface, this looks like the government is leaning over backward—at the rate of 17 to one—to honor the Freedom of Information Act. But the Executive agencies granted the public access to public information only because they were pushed over backward—only because the Congress passed a law to require the Executive Branch to honor the people's right to know. This is obvious when the figures show that, in spite of the law, nearly 2,200 requests for access to public records were denied, completely or in part.

"Many government agencies seem to be doing everything possible to ignore the Freedom of Information Act. Some agencies—and the Air Force is the worst offender—try to make their information operations look good by claiming that thousands of requests for routine government documents are actually demands for access under the Freedom of Information Act. Other agencies—for example, the Civil Service Commission—keep no records and apparently have no interest in implementing the law.

"Another indication of the attitude that government business is none of the public's business is the long time it takes an agency to act on a request for information. The major government agencies took an average of 33 days to even respond to a request for public records under the Freedom of Information Act. And when the initial decision to withhold information was appealed by someone seeking the facts, the agencies took an average of 50 days to respond.

"I am not surprised by the fact that corporations and lawyers representing private interests appear to be making the most use of the Freedom of Information

Act. Those who can afford the expensive and time-consuming process of fighting for their right to know, will do so. I hope that the Congress can find a means to help the average citizen win his battles against the information bureaucracy.

"I am surprised, however, that the reporters, editors and broadcasters whose job it is to inform the American people have made so little use of the Freedom of Information Act. They were the major supporters of those in Congress who created the law. The free and responsible press is the keystone of an informed, democratic society and it should be the major user of the law designed to guarantee the people's right to know."

THE ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT

On July Fourth, 1966, the Federal Government's first Freedom of Information Act was signed into law. It became effective one year later, giving the departments and agencies of the Executive branch time to adopt rules explaining the procedures to be followed by any person requesting access to public records.

The Freedom of Information Act became section 552 of title 5 of the United States Code. It was the result of 11 years of investigation by the Foreign Operations and Government Information Subcommittee of the House Committee on Government Operations (formerly the Special Subcommittee on Government Information). It was also based on studies and investigation during most of the 11 years by Subcommittees of the Senate Judiciary Committee.

The new act repealed the so-called Public Information Section of the Administrative Procedure Act (Section 3) which had permitted Executive branch agencies to withhold government records "for good cause found" and "in the public interest." If no good cause could be found for withholding information, Section 3 permitted the government to release information selectively to persons "legitimately and properly concerned."

To explain the proper procedures for granting access to public records under the new Freedom of Information Act, the Department of Justice prepared a 47 page memorandum for all agencies of the Executive branch. The Attorney General's Memorandum issued in June, 1967 said that the key concerns of the law are—

That disclosure be the general rule, not the exception;

That all individuals have equal rights of access;

That the burden be on the Government to justify the withholding of a document, not on the person who requests it;

That individuals improperly denied access to documents have a right to seek injunctive relief in the courts;

That there be a change in Government policy and attitude.

After the Freedom of Information Act had been in operation four years, the Foreign Operations and Government Information Subcommittee began a series of studies and investigations to find out whether the new law was living up to the hopes of those who had worked for its creation and enactment for 11 years—and whether the Executive branch was administering the law in the spirit in which it was enacted, a spirit highlighted by the Attorney General's comments on the key concerns for the people's right to know the facts of government. The Subcommittee was mainly interested in the following sections of the Freedom of Information Law (5 U.S.C. 552) which spell out the right of access to public records.

"(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the

agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

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

"(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

"(2) related solely to the internal personnel rules and practices of an agency;

"(3) specifically exempted from disclosure by statute;

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

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

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

"(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

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

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

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

One step in the study and investigation was a series of questionnaires sent to all agencies of the Executive branch of the Federal Government by Congressman William S. Moorhead, chairman of the Foreign Operations and Government Information Subcommittee. The Freedom of Information Act, by its terms, does not apply to the Legislative or Judicial branches. The basic questionnaire covered the first four years of the Act's operations, from July 4, 1967 through July 4, 1971. The following are the questions:

1. How many formal requests for access to records under 5 U.S.C. 552 has your agency received between July 4, 1967, and July 4, 1971.

(*a*) In how many cases was access granted?

(*b*) In how many cases was access refused?

(*c*) In how many cases was access granted in part and refused in part?

(*d*) How many cases are pending?

2. For each of the cases in which access was refused, please provide the following information:

(*a*) The name and address of the individual or organization presenting the request for access and the date upon which it was presented;

(*b*) The date upon which access was initially refused;

(*c*) The section of 5 U.S.C. 552(b) (1) through (9) which was the basis for the refusal;

(*d*) Whether an administrative appeal was filed against the initial refusal and, if so, the date of the appeal;

(*e*) The date of the agency action upon the appeal and the title of the individual who took the action;

(*f*) Whether, before the final refusal, the agency consulted the Department of Justice as requested by the Department's memorandum of December 8, 1969, to General Counsels of all agencies.

3. For each of the requests for access to records which has resulted in court action under 5 U.S.C. 552, please provide the following information:

(*a*) The case citation and the date court action was initiated;
(*b*) A brief description of the agency records requested;
(*c*) A citation of the section of 5 U.S.C. 552 upon which the agency relied to refuse access;
(*d*) A brief explanation of the current status of the court action.

4. What legend is used by your agency to identify records which are *not* classifiable under Executive Order 10501 but which are not to be made available outside the government?

Please list each term and explain its application.

5. How many officials of your agency are authorized to classify material TOP SECRET under the terms of Executive Order 10501?

Please identify, by name and title, each individual so authorized.

6. How many officials of your agency are authorized to classify material Secret under the terms of Executive Order 10501?

7. How many officials of your agency are authorized to classify material Confidential under the terms of Executive Order 10501?

Before the questionnaire was sent formally to all departments and agencies of the Executive branch of the Federal government, it was pre-tested by discussing possible questions with a number of government officials who would have the eventual responsibility of answering the final questionnaire. Included were some who had participated in hearings while the law was being considered by Congress and others who had participated in drafting the Attorney General's Memorandum.

To analyze the questionnaire answers and assist in the research work necessary to help prepare the Foreign Operations and Government Information Subcommittee members for a series of hearings on United States Government information policies and practices, a special task force was set up by the Congressional Research Service of the Library of Congress. It included legal experts from the American Law Division and government experts from the Government and General Research Division, with the activities coordinated by Samuel J. Archibald of the University of Missouri Freedom of Information Center, serving as a consultant to the Congressional Research Service.

The analysis of the questionnaire answers was conducted by Dr. Harold Relyea and Sharon S. Gressle, analysts is American national government and public administration in the Government and General Research Division.

Data Analysis

Nature of the Data

The nature of the data obtained by means of the Subcommittee's questionnaire must be qualified as to its validity. While the aggregate data provided by the Executive agencies on the number of information requests and their action upon the requests suffers no quality limitation, the sample of individual-requestor cases listed in answers to the questionnaire was biased. Agencies were asked to identify only those requestors who had been denied, either in whole or in part, the material they had sought. The usual characterization of a valid measurement is one which "measures what it purports to measure" or obtains the information being sought. The identification of those denied information under the provisions of the Freedom of Information Act (5 U.S.C. 552), was a major purpose of the questionnaire. On the level of measurement of accomplishment, the questionnaire and the data obtained are valid. Yet data consisting only of denial cases may have a bias. This bias becomes important when certain sociological generalizations are made within the analysis, such as the proportion of one type of requestor vis-a-vis another or averages of time lapses in acting upon requests. It is not, therefore, valid to generalize from the sample analyzed to the total number of requestors seeking information under the Freedom of Information Act. Those denied requests constitute approximately one percent of the total number of requestors. While this figure is skewed by the large number of requests reported by the Department of the Air Force, the total number of denials reaches only five percent of the total number of requestors when the Air Force figures are removed from the computations.

While the percentage of denials appears to be relatively small such statistics mask the fact that (minus Department of Air Force totals) for approximately every seventeen requests for information under the provisions of the Freedom of Information Act, one request is denied. And even this consideration ignores the quality of information requested, the public interest which might have been served by granting the request, and the basis upon which the public record was denied. Further, certain agencies have higher ratios of refusal than others—some, as will be indicated, denying more requests than they grant. In brief, such statistics demonstrate problems in the administration of an act which was designed to make disclosure the general rule and not the exception and to promote equal rights of access for all requestors.

Nature of the Analysis

The focus of the analysis was chiefly upon agencies of the Federal Government which generally affect the public welfare or which, in the preliminary examination of returned questionnaires, indicated areas of special interest. While the overall survey covered some ninety Executive departments and agencies, this analysis considers selected respondents.

Certain statistical findings in this analysis utilized available data rather than a total or randomized sample. Averages of lapsed time for action on initial requests or appeals were occasionally computed on less than the total number of reported cases due to incomplete details on each case. It should, therefore, be noted that certain totals of individual or category items listed in the major analytical chart do not coincide with the appropriate number of reported cases.

Quality of Data

Responses to the Subcommittee's questionnaire were generally complete and detailed for most agencies, but in certain cases the agencies seemed to misunderstand the questions or they provided otherwise unusable information. The Department of Defense for example, acknowledged incomplete records to answer some questions. The Civil Aeronautics Board supplied aggregate information for fiscal year 1968 only. The Federal Highway Administration and the Federal Railroad Administration reported they kept no records on Freedom of Information Act requests.

In a number of instances details were omitted from agency responses. The number of requests for public records was not provided, for example, by the Department of the Army, the Department of Health, Education, and Welfare, the Coast Guard, the Federal Maritime Administration, and the Civil Service Commission, though those agencies did provide information on individual denials. Often no initial request dates were supplied for individual cases or no dates on appeals were given, thus making the computation of time intervals impossible or limited to a few cases. In many responses the titles and citations of relevant court cases were garbled or missing. The Department of the Army, the Department of the Navy, the Department of State, and the Securities and Exchange Commission failed to cite appropriate sections of the Freedom of Information Act as a basis for refusing information. Frequently, the responding agencies cited court cases which resulted from their refusals to provide materials but they failed to provide details on the administrative procedure which preceded judicial action. While the Air Force was way out of line in claiming to grant 202,714 requests for information under the Freedom of Information Act and to deny only 118 requests, some other agencies also appeared to inflate the figures on requests for information. The Agriculture Department claimed it granted 10,769 requests for information while denying only 137 requests; the Department of Transportation claimed 13,295 grants and 445 denials and the Civil Aeronautics Board claimed that 18,261 requests for information were received and only 33 requests were denied. The grant/denial record of other agencies seemed to be in line with their size and activity.

Those agencies which were out of line might have overstated the number of requests which were granted—counting a request for a routine government publication, for instance, as a demand for public records under the Freedom of Information Act—or the variations in numbers of requests cited may be one

more indication that the Freedom of Information Act is held in minimum high regard by the agencies responsible for protecting the people's right to know in a democratic society.

The possibility was considered that agencies might cite many sections of the Freedom of Information Act as authority to refuse requests for information initially, but cite fewer and more defensible sections if challenged in court. The analysis indicates only nine instances where initial citations of authority for refusal differed from citations in court. Nor was the trend within these cases unidirectional; in some instances more sections of the Act were cited at the court stage than at the initial refusal stage.

Computations were made for the average number of days required for each agency to respond to initial requests for information and for the average number of days to respond to appeals of the initial denials. These time spans ranged from an average of 8 days (Small Business Administration) to 69 days (Federal Trade Commission) for responses to initial requests and from 13 days (Department of the Air Force) to 127 days (Department of Labor) for responses to appeals. For those agencies listed in the analytical chart, the average number of days taken to respond to initial requests was 33 (for 27 agencies); the average number of days to respond to appeals was 50 (for 20 agencies). In terms of the average time lapse on initial requests for agencies listed in the analytical chart, 11 agencies exceeded this average; 9 agencies exceeded this average for time on acting on appeals. The Departments of Health, Education, and Welfare, Interior, Justice and Renegotiation Board exceeded the total average for both stages of the administrative process. Statistically, four agencies seem to be in no hurry to expedite requests for information under the Freedom of Information Act.

Only two agencies reported that they denied more requests than they granted. These are the Department of Justice and the Federal Power Commission, but in the latter case the outcome resulted from a total of only 8 requests. Other agencies indicated high refusal rates in their responses. These refusals are usually not overturned to any general extent when appealed within the agencies or when pressed in court. Of 296 requests which were appealed, 37 were granted and 196 were denied. Those remaining were granted in part, were pending, or results were unknown. Of 99 court cases which were initiated to obtain information denied by the executive agencies, 16 resulted in grants of the material sought and the remaining cases were either denied or appealed to higher courts.

FREEDOM OF INFORMATION ANALYTICAL CHART

[For period: July 4, 1967–July 4, 1971]

Agency [1]	Formal requests	Access granted [2]	Access refused [2]	Access granted in part [2]	Pending initial decision [2]	Refusals administratively appealed	Refusals sustained by administrative appeal	Refusals reversed by administrative appeal	Refusals reversed in part through appeal	Court action initiated [3]	Refusal sustained in court action
Atomic Energy Commission	392	376 (96%)	8 (2%)	6 (1.5%)	2 (.5%)	0				0	
Civil Aeronautics Board [7]	18,261	Unknown	33	3	0	5	1	2	2	2	0
Civil Service Commission [8]	Unknown	Unknown	Unknown	Unknown	Unknown	1	1			0	
Department of Agriculture [10]	11,093	10,769 (97%)	137 (1.2%)	79 (.7%)	9 (.08%)	17	11	1	5	2	
Department of Commerce [11]	182	109 (60%)	50 (27%)	9 (5%)	4 (2%)	11	11			[11] 8	1
Department of Defense [12] (other than Air Force, Army, and Navy)	2,732	2,638 (96.5%)	64 (2.3%)	29 (1%)	1 (.03%)	4	3		1	[12] 2	
Department of Air Force	202,957	202,714 (99.8%)	118 (.05%)	30 (.01%)	95 (.04%)	[12] 28	8	11	2	[12] 5	
Department of Army	Unknown	Unknown	Unknown	Unknown	Unknown	14	8	4	2	[13] 1	1
Department of Navy	Unknown	Unknown	Unknown	Unknown	Unknown	[12] 9				[12] 9	3
Department of Health, Education, and Welfare	368	258 (70%)	77 (21%)	16 (4%)	17 (5%)	[13] 8	5			[13] 5	1
Department of Housing and Urban Development	736	660 (90%)	48 (65%)	23 (3.1%)	5 (.6%)	[14] 7	3	1	2	3	
Department of the Interior [15]	15	6 (40%)	5 (33%)	1 (7%)	3 (20%)	5	5			[15] 1	
Department of Justice	535	215 (40%)	311 (58%)	9 (2%)	0	[16] 14	6	(16)	(16)	[16] 9	6
Department of Labor [17]	Unknown	Unknown	33	Unknown	Unknown	7	2	4	1	1	
Department of State [18]	195	171 (87.6%)	12 (6.1%)	9 (4.6%)	3 (1.5%)	(18)				2	1
Department of Transportation [19]	13,764	13,295 (96.5%)	445 (3.2%)	13 (.09%)	11 (.08%)	[19] 55	44	5	3	[19] 8	4
Department of the Treasury [20]	1,625	1,175	338	79	33	46	45	0	1	[20] 8	3

		(72%)	(21%)	(5%)	(2%)						
Environmental Protection Agency	1	1 (100%)	0	0	0						
Federal Communications Commission	98	63 (64%)	26 (27%)	7 (7%)	2 (2%)	[21] 5	4			[21] 1	
Federal Power Commission	8	2 (25%)	6 (75%)	0	0	3	3			[22] 2	
Federal Trade Commission	432	388 (89.8%)	36 (8.3%)	7 (1.6%)	1 (.23%)	0				[23] 7	
General Services Administration	37	21 (57%)	13 (35%)	2 (5%)	7 (3%)	0				[24] 5	
National Aeronautics and Space Administration	1,019	984 (96.5%)	5 (.49%)	10 (.98%)	20 (1.9%)	0				1	1
Office of Economic Opportunity [25]	1	1 (100%)								[25] 1	
Office of Emergency Preparedness	3	3 (100%)									
Office of Management and Budget	60	52 (87%)	5 (8%)	3 (5%)	0	0				0	
Renegotiation Board	40	11 (27.5%)	10 (25%)	15 (37.5%)	4 (10%)	13	11		2	[26] 9	1
Securities and Exchange Commission [27]	Unknown	Unknown	26	14	Unknown	[27] 40	14	9	15	[27] 3	1
Selective Service System	20	13 (65%)	5 (25%)	2 (10%)	0	0				[28] 0	
Small Business Administration	10	4 (40%)	1 (10%)	5 (50%)	0	[29] 1				[29] 1	
U.S. Information Agency	7	5 (71%)	1 (14%)	1 (14%)	0	0				0	
Veterans' Administration	46	35 (76%)	9 (20%)	1 (2%)	1 (2%)	3	3			[30] 3	
Total [31]	254,637	233,969	1,822	373	212	296	196	37	42	99	23

See footnotes at end of table, p. 1343.

FREEDOM OF INFORMATION ANALYTICAL CHART

[For period: July 4, 1967–July 4, 1971]

Agency	Refusal reversed in court action	Refusal reversed in part in court action	Average time for action on initial request [4] (in days)	Average time for action on appeal [4] (in days)	Types of requestors [5]						
					Corporation	Private law firm	Public interest group	Researcher	Non-Federal government agency	Labor union	Media
Atomic Energy Commission			28		4	2		1			
Civil Aeronautics Board [7]	2	0	[8] 10	[8] 30	16	10	1		4		1
Civil Service Commission [9]			(31)	(5)							
Department of Agriculture [10]		2	26	7			2	2		1	1
Department of Commerce [11]	1		(23)	(1)							
Department of Defense [12] (other than Air Force, Army, and Navy)			20	52	40	18	22	7	9		15
Department of Air Force	2	2	(124)	(17)							
Department of Army			18	64	13	18	1			2	6
Department of Navy		3	(48)	(11)							
Department of Health, Education, and Welfare	2	1	15	23	21	7		6	1		1
Department of Housing and Urban Development	3		(44)	(4)							
Department of the Interior [15]			43	13	54	9	3	3	4	2	1
Department of Justice			(134)	(25)							
Department of Labor [17]	1		Unknown	[12] Unknown	3	1		2		1	1
Department of State [18]			28	88	2	12		1	1		
			(6)	(8)							
			54	71	6	10	6	4			9
			(55)	(5)							
			21	36	5	25	14		5		12
			(71)	(5)							
			36	76	1	1	3				
			(2)	(4)							
			60	65	106	15	5	1	2	1	8
			(50)	(10)							
			28	127		18	1		1		
			(31)	(6)							
			48	[8]	2	3		2			3

			(24)								
Department of Transportation [19]	1	2	27 (77)	40 (48)	29	9	3				3
Department of the Treasury [20]			41 (196)	43 (47)	20	59	7	1	21	1	11
Environmental Protection Agency											
Federal Communications Commission			27 (35)	30 (7)	13		6		1		6
Federal Power Commission			31 (6)	27 (3)	6						
Federal Trade Commission	2	2	69		11	7	3	3	1		3
General Services Administration		1	48 (3)		5	2				1	
National Aeronautics and Space Administration			41 (10)		6	4			1	2	1
Office of Economic Opportunity [25]						1					
Office of Emergency Preparedness											
Office of Management and Budget			25 (8)		1	1		3	1		
Renegotiation Board		3	52 (26)	53 (13)	20	3	1	1			
Securities and Exchange [27]			Unknown	55 (33)	2	15	2	4			5
Selective Service System			29 (5)		1		1				
Small Business Administration			8 (4)	Unknown			1		1		2
U.S. Information Agency			Unknown		1						
Veterans' Administration	2		36 (9)	44 (3)	2		3			2	1
Total [3]	16	16			390	250	85	41	53	13	90

See footnotes at end of table, p. 1343.

FREEDOM OF INFORMATION ANALYTICAL CHART

[For period: July 4, 1967—July 4, 1971]

Agency	Types of requestors [5]		Bases for refusal [6] [Title 5 U.S.C.]								
	Congress	Other	552(b)(1)	552 (b)(2)	552(b)(3)	552(b)(4)	552(b)(5)	552(b)(6)	552(b)(7)	552(b)(8)	552(b)(9)
Atomic Energy Commission		1		1		1	5	2			
Civil Aeronautics Board [7]		4			2	25	5	1	9		
Civil Service Commission [9]	2	15		2			8	5			
Department of Agriculture [10]	12	21		2	13	71	17	14	37		9
Department of Commerce [11]		10			8	37	21	10	1		
Department of Defense [12] (other than Air Force, Army, and Navy)	1	9	8	16	14	23	27	1	2		
Department of Air Force	1	72	8	19	4	40	62	17	12	2	
Department of Army	2	4	4			2	5	2	1		
Department of Navy	1	4			1	2	3	1	1		
Department of Health, Education, and Welfare	1	22		1	8	10	15	7			
Department of Housing and Urban Development	1	9		1	22	38	22	1	13		
Department of the Interior [15]		1			1		2				
Department of Justice	2	169	1	1	4	3	28	244	38		
Department of Labor [17]		13				9	8		29		
Department of State [18]	1	13	([18])								
Department of Transportation [19]		54	1	5	37	15	28	7	23		
Department of the Treasury [20]	6	74	4	49	56	59	52	21	33	3	1
Environmental Protection Agency											
Federal Communications Commission	3	6				18	10		7		
Federal Power Commission							5				
Federal Trade Commission		14			3	20	13	1	23	1	1
General Services Administration		8	2	1		1	3	3	4		
National Aeronautics and Space Administration		1				7	6	2			
Office of Economic Opportunity [25]											
Office of Emergency Preparedness											
Office of Management and Budget		2	1				7				
Renegotiation Board		1		2	20	20	21		9		

Securities and Exchange Commission [37]		12									
Selective Service Sysetm		3			4			1			
Small Business Administration	1	2			6	3	2		1	1	
U.S. Information Agency			1								
Veterans' Administration		3			3	1		4	1		
Total [1]	34	547	30	100	206	403	375	344	244	7	11

[1] The chart is not inclusive of all agencies responding to the questionnaire. The agencies listed were chosen because they generally affect the public welfare or because, in the preliminary examination of returned questionnaires, they indicated areas of special interest for analysis.

[2] Figures in parentheses are percentages of the total number of formal requests to the agency. Due to rounding the percentages may not equal 100 percent.

[3] Incidences of court action do not necessarily reflect the number of appeals lost and brought to court. Many agencies cited court cases and provided no previous administrative action data.

[4] The figures shown in parentheses are the number of cases on which the average is based.

[5] Identity of requestor (in cases of refusal only) was provided by the agencies. Judgments were made in instances where types were not explicitly stated. Therefore the categories may not be fully illustrative.

[6] Sections cited are the exemptions written into the Freedom of Information Act. The number of exemptions will not always justify with the number of denials due to multiple citations or lack of citation altogether.

[7] CAB provided total number of requests for fiscal 1968 only. Kept no records of requests granted. Those refused cover the 4-year period.

[8] CAB. Of the 31 cases (initial refusal) computed, 22 received action within 24 hours. On appeal, 3 cases received action in loss than 15 days.

[9] CSC has not made it a practice to keep centralized records of requests. Therefore no figures were provided. Were able to identify 23 denials through reference to the General Counsel's office. It is possible that other formal requests have been denied.

[10] Department of Agriculture response was decentralized. Each constituent agency replied independently. The replies indicated no unified recordkeeping policy.

[11] Department of Commerce cited 10 cases action on which do not fall into chart categories: 7 were withdrawn before acted upon; 1 was for records at another agency; 1 was for nonexistent records; and 1 is unrecorded as to action taken. Of 8 court cases, only 3 were cited as requested. 2 were pending July 4, 1971; the other found for the agency. Of the remaining cases, 1 ordered release of documents (411 F. 2d 696) and 4 were reported as "Suit dropped. Resolved by access." Citations to the Code of Federal Regulations accompanied 5 U.S.C. 552(b) as basis for refusal.

[12] Department of Defense was decentralized in its replies. The constituent agencies, except Army, Navy, and Air Force, have been combined on the chart. Some question arises as to method of recordkeeping, i.e., Air Force reports over 200,000 formal requests for information; Army could give no statistics other than appeals (and no dates for appeal initiation); and Navy estimating that the number of cases would total millions, provided both initial denial and appeal information where possible. Navy provided an estimate for Marine Corps Headquarters: granted 16,804 access requests; denied 960 access requests; and granted in part 50 requests. No department-wide statistics were charted due to the imbalance created by Air Force figures. Court actinn: The 2 DOD (combined) cases are pending as are 3 from Navy and 1 from Air Force. Administration Appeal action: Air Force, no record tor 7; Navy reported 1 appeal pending.

[13] Department of Health, Education, and Welfare: Of 8 appeals, action was unknown on 2 and 1 is pending. Of 5 court cases, 1 is pending. HEW was irregular in its reporting of basis of refusal. In some instances it referred to only 5 U.S.C. 552(b), not citing specific exemptions and in some instances it relied solely on HEW Public Information Regulations or combined those with code citations.

[14] Department of Housing and Urban Development: Of 7 appeals, 1 is pending.

[15] Department of the Interior interpreted formal requests to be those which were appealed or otherwise considered by the Solicitor. The sole court case was not a result of refusal for information, but rather a refusal to gather, from all field offices, the information together in Washington for plaintiff's perusal. No final action was reported.

[16] Department of Justice: Of 9 court cases, 3 are pending. Appeal action: 6 modified (granted whole or in part); 1 pending and 1 record nonexistent.

[17] Department of Labor keeps no record of requests granted; when requests are initially denied copies of relevant correspondence are filed. The Code of Federal Regulations was also cited as a basis for refusal.

[18] Department of State has no formal appeals process. Of 2 court cases, 1 is pending. 5 U.S.C. 552(b) was general basis of refusal with no specific exemptions cited.

[19] Department of Transportation estimated the number of requests received as being over 14,000. Figures shown are those aggregated from the constituent agencies providing data. Of 55 appeals, 1 is pending and 2 have no record of action.

[20] Department of Treasury: Internal Revenue Service reported denial of access (whole or partial) in 306 instances; information was provided for 130 of those, the remainder being unidentifiable or granted on appeal. Of 8 court cases, 5 are pending.

[21] FCC reported 1 court case for which an appeal is pending. Action is unknown on 1 appeal.

[22] FPC reported 2 court cases, both of which are pending.

[23] FTC reported 7 court cases, 3 of which are pending.

[24] GSA: Of 5 court cases, 4 are pending.

[25] OEO reported 1 request which was not refused per se. The Director responded within 4 days stating that the document would be studied for possible release. Suit was filed the day the letter was dated. Before hearing the document was released.

[26] Renegotiation Board reported 9 court cases, 5 of which are pending.

[27] SEC provided information only on Commission action which constitutes appeal action. No initial refusal or basis for refusal data was provided. Time for appeal was computed from time of initial request. Of 40 appeals, 2 had no action recorded. Of 3 court cases, 2 are pending.

[28] Selective Service System reported 7 instances in which requests for information resulted in court action: refusal was sustained in 6 and reversed in 1. No previous administrative data was provided for these cases.

[29] SBA reported 1 appeal with action unknown and 1 court case which was declared moot.

[30] VA: Of 3 court cases, 1 is pending.

[31] Individual units may not equal apparent totals due to variations among agencies.

ACCOMPANYING STATEMENT BY REPRESENTATIVE WILLIAM S. MOORHEAD, CHAIRMAN, FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE—RELEASED FOR SUNDAY, MARCH 19, 1972

"No law is self-enforcing, least of all a law designed to help the citizen in a contest with the government. Thus, the Freedom of Information Act has a built-in enforcement tool—the citizen's right to go to court and force the government to prove the need to withhold public records.

"The court-enforcement provision has been used effectively during the first four years the Act has been in operation. In some areas—particularly the protection of national defense information and the protection of investigatory files—the courts have been reluctant to order the disclosure of government secrets. In other areas—particularly the contention that privileged financial information and internal memoranda must be hidden from the public—the courts have rejected government arguments.

"Hopefully, government agencies will consider the trend of court action and stop using the excuses for secrecy which have been rejected by the courts. If not, it may be necessary for Congress to amend the Freedom of Information Act to limit further the government's claim that routine financial information and government memoranda are not public records."

THE FREEDOM OF INFORMATION ACT GOES TO COURT

For 11 years the United States Congress wrestled with the problem of the people's right to know the facts of government. The result was a Freedom of Information Act, some 500 words long, which became the law of the land when it was signed by the President on July 4, 1966.

But the most important of those 500 words were those which stated that any person can go to court to gain access to government records, and the burden of proof that secrecy is necessary is upon the government.

To determine how well this segment of the Freedom of Information Act is working, the Foreign Operations and Government Information Subcommittee of the U.S. House of Representatives—the Subcommittee which had conducted the major part of the 11 year investigation into government secrecy—asked the Congressional Research Service of the Library of Congress to digest the major court decisions under the Freedom of Information Act.

A digest of significant cases interpreting the Freedom of Information Act (5 U.S.C. 552) was prepared by Daniel Hill Zafren and Paul Wallace, legislative attorneys for the American Law Division of the Congressional Research Service.

A subjective analysis of the digested cases—an attempt to plot the trend of court interpretation of the Freedom of Information Act—was prepared by Samuel J. Archibald of the University of Missouri Freedom of Information Center, working with the Government and General Research Division of the Congressional Research Service.

Following are the digested cases and the analysis which shows that, when the court enforcement provisions of the Freedom of Information Act are invoked, the courts impose their judgments upon the bureaucracy and the court judgment leans toward the people's right to know. For instance, the courts have ruled unanimously against the government's contention that "trade secrets" cannot be disclosed by the government because corporations would stop cooperating with government agencies. And a majority of their decisions have rejected the government argument that "internal memoranda" must not be disclosed because disclosure would inhibit free and frank discussions between government technical experts and their bosses.

But the courts have generally protected "investigatory files compiled for law enforcement purposes" and they have been wary of second-guessing Executive decisions about matters that are kept secret "in the interest of national defense and foreign policy."

Following are the parts of the Freedom of Information Act (5 U.S.C. 552) pertinent to this study:

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

"(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

"(2) related solely to the internal personnel rules and practices of an agency;

"(3) specifically exempted from disclosure by statute;

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

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

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

"(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

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

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

"(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

How the Courts Have Held

(By Samuel J. Archibald)

Four years ago the nation's first Freedom of Information Law set up a system for court review of government secrecy. Has the court enforcement provision been successful? Are the courts leaning toward public disclosure of government records?

The answer to the first question is an emphatic "Yes". There were 112 cases filed in four years under 5 U.S.C. 552, the Freedom of Information Law which took effect on July 4, 1967. In those cases decided so far the courts have carefully considered all arguments and required the government agencies to prove that continued secrecy is necessary in nearly every case. As important, however, is the threat of court action, for a government official who must prove in court that secrecy is necessary will think twice before refusing a demand for access to public records.

The question about the trend of judicial decisions requires a carefully qualified answer. The American Law Division of the Library of Congress has digested about one-third of the cases filed under 5 U.S.C. 552, and a subjective analysis based on this digest can provide only an indication of the future trend of court decisions on the people's right to know. There is not yet enough information available about court decisions on some sections of 5 U.S.C. 552 even to indicate a trend.

With this caveat, however, it is possible to conclude that the courts are rejecting government arguments that public records may be withheld if they contain privileged or confidential financial or commercial information. And they are rejecting government arguments that inter-agency memoranda are exempt from the disclosure requirements of 5 U.S.C. 552. The courts ruled against the government in all six cases involving the privileged or confidential argument and they ruled against the government in six of the ten cases involving inter-agency memoranda. The courts, however, are generally agreeing with the government's contention that investigatory files compiled for law enforcement purposes need not be made public. In only one of the seven cases involving investigatory files did the courts order disclosure.

The analysis of court actions under 5 U.S.C. 552 does not take into account the thousands of other government records which have been made public under the Freedom of Information Law without going to court. Stacks of government documents became available to the public after July 4, 1967 when 5 U.S.C. 552 required all agencies of the Executive Branch of the Federal Government to index and make public the details of day-to-day operations. In addition to providing this information about the end product of Federal administration, each agency was required to adopt clear and workable rules explaining how the public can get copies of other agency records.

As a result of these new rules many additional government file drawers were opened but, more important, almost all of the rules permitted an appeal to the top of the agency to overcome an initial bureaucratic refusal of access to public records. Administrative appeals filed in the past four years resulted in the disclosure of many public records. The appeals were effective—or, in many cases, the initial requests for public records were honored—largely because of the threat of court action against refusals.

It is obvious that the courts are taking seriously the statutory grant of jurisdiction "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld." And the courts are following the statutory directive to put the burden of proof that secrecy is necessary on the shoulders of the government agency which withholds public records.

While the courts do not always rule in favor of the person seeking access to public records, they do exercise a judgment which used to be exercised solely by the secrecy-minded bureaucrats in the executive branch of the Federal Government. And the judgment of the courts is much more often on the side of open government.

Only in the area of national defense and foreign policy have the courts refused to second guess the executive branch and decide whether secrecy is necessary. In two cases the courts refused to look at documents which the Defense Department claimed to be exempt from disclosure because of national defense. In seven other cases Federal judges, over government objections, decided to study documents in the privacy of their chambers and determine the validity of the government's claim of secrecy, but none of those cases involved so-called defense secrets.

In addition to the national security excuse for government secrecy, the courts have ruled on five other sections of 5 U.S.C. 552 which permit withholding of public records. They have leaned heavily toward the side of secrecy in interpreting one section—the protection of investigatory files. The rules hold that files compiled for law enforcement can be withheld from the public even if there is no enforcement proceeding initiated and even if the investigation does not involve criminal law. A reason advanced for protecting investigatory files is that tipsters will not cooperate with the investigators if they fear that their knowledge—and their identity—will become public knowledge.

The courts have rejected government arguments that a section of the Freedom of Information Law protecting trade secrets and other commercial or financial information can be broadly applied. They have ruled that the "trade secrets" argument does not apply to the government agency's own appraisal report, nor does it apply to a bare list of names and addresses. And even if some parts of a record are legitimate "trade secrets," the courts have directed the deletion of identifying details and disclosure of the rest of the record.

The other area in which the courts have leaned toward the public's side in the controversy over excessive government secrecy involves the contention that an agency's internal memoranda cannot be disclosed because disclosure would inhibit full and frank advice from a government technician to his boss. If a so-called internal memorandum is the basis for an agency's final action, the courts have ruled, the memorandum becomes a public record. So-called internal memoranda can be withheld to prevent disclosure of the mental processes of government officers, but even if a memorandum was prepared for the President of the United States, the court held that factual information in the memorandum must be disclosed unless it is inextricably intertwined in the policy making process.

There have been too few court decisions to indicate a trend on other sections of 5 U.S.C. 552 which permit withholding of public records, nor is a clear trend apparent in court decisions interpreting general sections of the law. On the question of how specifically a person must identify the public record requested from a government agency, the courts have ruled that the identification requirement cannot be used as an excuse for withholding documents, for the means to identify documents are solely within the control of the agency holding the record. And the courts have ruled against government arguments that—

the information sought could be ferreted out by diligent search outside the government;

a government unit is not an "agency" covered by the law even if it has substantial independent authority to exercise specific functions;

all of a public record can be withheld if only part of the document is exempt from disclosure.

While there have not been enough court decisions interpreting many sections of the Federal Government's first Freedom of Information Law to indicate clear trends, there is one certainty after the first four years of the law's existence: the courts are exercising their responsibility to judge the government's stewardship of the people's right to know and their judgment is substantially against unjustifiable secrecy.

COMPARISON OF PERTINENT LANGUAGE IN COURT DECISIONS WITH SECTIONS OF THE FREEDOM OF INFORMATION ACT

§ (b) (1) [MATTERS THAT ARE] SPECIFICALLY REQUIRED BY EXECUTIVE ORDER TO BE KEPT SECRET IN THE INTEREST OF THE NATIONAL DEFENSE OR FOREIGN POLICY

1. Epstein v. *Resor*

The jurisdiction of the District Court does not apply to information that falls within the exemptions set forth in subsection (b). To hold that the agencies have the burden of proving their action proper even in areas covered by the exemptions, would render the exemption provision meaningless.

The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.

2. Moss/Reid/Fisher v. *Laird*

The Act was not designed to open all Government files indiscriminately to public inspection. Obviously, documents involving such matters as military plans and foreign negotiations are peculiarly the type of documents entitled to confidentiality. Under the circumstances here presented, no *in camera* inspection is necessary.

3. Mink v. *EPA*

Documents that are now within the umbrella of a secret file but which would not have been independently classified as secret are not entitled to the secrecy exemption of sub-divisions (b) (1) solely by virtue of their association with separately classified documents.

§ (b) (2) [MATTERS THAT ARE] RELATED SOLELY TO THE INTERNAL PERSONNEL RULES AND PRACTICES OF AN AGENCY

1. Benson v. *General Services Administration*

None of the information sought related to internal personnel rules and practices.

2. Consumers Union v. *Veterans Administration*

None of the information sought comes within exemption (2).

3. Polymers, Inc. v. *NLRB*

The House Report interpreted this exception to cover operating rules, guidelines and manuals of procedure for government investigators or examiners.

"While the interest of the Board in refusing to produce the information sought is not clear, its relevance to the instant controversy is even less clear. We do not hold that under no circumstances would the Board be required to produce the (information); but in the context of the instant case we will not disturb the refusal of the Board to produce (it)."

§ (b) (4) [MATTERS THAT ARE] TRADE SECRETS AND COMMERCIAL OR FINANCIAL INFORMATION OBTAINED FROM A PERSON AND PRIVILEGED OR CONFIDENTIAL

1. Ackerly v. *Ley*

Whereas District Court only stated that the documents sought were internal records based on medical reports secured in confidential capacity, it did not detail the nature of the documents nor give reference to their exemptions enumerated in the Freedom of Information Act.

2. Benson v. *General Services Administration*

This exemption is meant to protect information that a private individual wishes to keep confidential for his own purposes, but reveals to the government under the express or implied promise by the government that the information will be kept confidential. The appraisal report on the other hand, is kept confidential by the appraiser on the client's behalf, not on his own behalf, and the client here is GSA. Thus the exemption does not apply to the appraisal report.

3. Consumer Union, Inc. v. *Veterans Administration*

None of the information sought comes within exemption (4).

4. Getman v. *NLRB*

Obviously, a bare list of names and addresses of employees which employers are required by law to give the Board, without any express promise of confidentiality, and which cannot be fairly characterized as "trade secrets" or "financial" or "commercial information" is not exempted from disclosure by subsection (b) (4).

5. Grumman Aircraft Engineering Corp. v. *Renegotiation Board*

The statutory history does not indicate that Congress intended to exempt an entire document merely because it contained some confidential information. On the contrary, should data which falls within exemption (4) appear in any Board opinion or order, both the Act and the Board's regulations recognize that the interests of confidentiality can be protected by striking identifying details prior to releasing the document.

6. Soucie v. *David*

The exemption protecting trade secrets and commercial or financial information obtained from a person as privileged or confidential is intended to encourage individuals to provide certain kinds of confidential information to the Government, and it must be read narrowly in accordance with that purpose.

§ (B) (5) [MATTERS THAT ARE] INTER-AGENCY OR INTRA-AGENCY MEMORANDUMS OR LETTERS WHICH WOULD NOT BE AVAILABLE BY LAW TO A PARTY OTHER THAN AN AGENCY IN LITIGATION WITH THE AGENCY

1. American Mail Line, Ltd. v. *Gulick*

If the Maritime Subsidy Board did not want to expose its staff's memorandum to public scrutiny it should not have stated publicly that its action was based upon that memorandum, giving no other reasons or basis for its action. When it chose this course of action "as a matter of convenience" the memorandum lost its intra-agency status and became a public record, one which must be disclosed to appellants.

2. Benson v. *GSA*

With respect to paragraph (5) of the Act, the House Report interpreted this language to say that "any internal memorandum which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public."

3. Consumer Union v. *Veterans Administration*

None of the information sought comes within exemption (5).

4. Grumman Aircraft Corp. v. *Renegotiation Board*

Congress intended that sec. 522 would make available to the general public any agency records which would routinely be disclosed to a private party through the discovery process in litigation with the agency.

5. International Paper Co. v. *Federal Power Commission*

The appellants' requested discovery must be denied under the fifth exception of the FIA because it seeks the disclosure of items used in the FPC's deliberation processes. To allow disclosure of these documents would interfere with two important policy considerations on which sec. 552(b) (5) is based: encouraging full and candid intra-agency discussion; and shielding from disclosure the mental processes of executive and administrative officers.

6. Mink et al. v. *Environmental Protection Administration*

It suffices to say that while the exemption protects the decisional processes of the President, or other policy-making executive officials, it does not prevent

the disclosure of factual information unless it is inextricably intertwined with policy making processes.

7. Polymers, Inc. v. *NLRB*

This Guide is said to be an internal advisory document for the use of Board personnel and plays no significant role in the Board's adjudication of election disputes. As such it appears to fall within the further exemption specified in section (5) as an "intra-agency memorandum".

8. Soucie v. *David*

The exemption protecting inter-agency and intra-agency memorandums or letters was intended to encourage the free exchange of ideas during the process of deliberation and policy-making. It has been held to protect internal communications consisting of advice, recommendations, opinions, and other material reflecting deliberative or policy-making processes, but not purely factual or investigatory reports. "Factual information may be protected only if it is inextricably intertwined with policy-making process. Thus, for example, the exemption might include a factual report prepared in response to specific questions of an executive officer, because its disclosure would expose his deliberative processes to undue public scrutiny. But courts must beware of the inevitable temptation of a government litigant to give this exemption an expansive interpretation in relation to the particular records at issue."

9. Sterling Drug, Inc. v. *Federal Trade Commission*

The documents prepared by the Commission staff should not be disclosed because the probable effect of a decision requiring disclosure of the staff memoranda would thus be to inhibit "a full and frank exchange of opinions" at least in that class of cases where opinions are not, and as practical matter cannot be, issued.

The memoranda issued by the Commission should be disclosed. The policy of promoting the free flow of ideas within the agency does not apply here. These are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be made available to the public. Thus, to prevent the development of secret law within the Commission, we must require it to disclose orders and interpretations which it actually applies in cases before it.

10. Talbott Construction Co. v. *United States*

If the documents sought by the plaintiff are policy and theory oriented, they are privileged under section (5). If they contain factual data they are subject to production.

11. Miller v. *Smith*

It would inhibit the free expression and interchange of views within the Coast Guard Commandant's staff if staff memorandums were available to the public.

§ (B) (6) [MATTERS THAT ARE] PERSONNEL AND MEDICAL FILES AND SIMILAR FILES THE DISCLOSURE OF WHICH WOULD CONSTITUTE A CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY

1. Getman v. *NLRB*

Although a limited number of employees will suffer an invasion of privacy in losing their anonymity and in being asked over the telephone if they would be willing to be interviewed in connection with the voting study, the loss of privacy resulting from this particular disclosure should be characterized as relatively minor. Exemption (6) requires a court *de novo* to balance the right of the public to be informed; and the statutory language "clearly unwarranted" instructs the court to tilt the balance in favor of disclosure.

2. Tuchinsky v. *Selective Service System*

In view of the violence that has been directed at local board officers and members, plaintiff would be entitled to only the names of the local Selective Service Board officials, but not personal information in regard to such things as their home addresses, occupations, races, dates of appointment, military affiliations, and citizenships; such information being available only if the local board chairman, after consultation with the persons involved, consents and it is determined that such disclosure would not harm the person and would not be an unwarranted invasion of that person's personal privacy.

§ (B) (7) [MATTERS THAT ARE] INVESTIGATORY FILES COMPILED FOR LAW ENFORCEMENT PURPOSES EXCEPT TO THE EXTENT AVAILABLE BY LAW TO A PARTY OTHER THAN AN AGENCY

1. Barceloneta Shoe Corp. v. Compton

Congress did not intend to give private parties charged with violation of federal regulatory statutes any greater right to inspect investigative file material than has been granted to persons accused of violating federal criminal laws.

If disclosure, as urged by Plaintiffs, is allowed, persons interviewed by Board agents in future investigations will not be as cooperative as they are now if they know that the information they give to the Board agents would be subject to public disclosure at any time before they have actually testified at a public hearing.

Defendant (NLRB) has shown a better right to keep its commitment to the persons giving such confidential statements, than have plaintiffs made for the disclosure of said documents prior to the hearing.

2. Benson v. United States

The legislative history of this statute indicates that it is not the intent of the statute to hinder or in any way change the procedures involved in the enforcement of any laws including files prepared in connection with related government litigation and adjudicative proceedings. The statute is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings.

3. Clement Brothers Company v. National Labor Relations Board

In addition to the common sense necessity of protecting the investigatory function and procedures of the Board, the legislative history of the Act itself makes it clear that the exemption in question is not limited to criminal law enforcement but rather applies to law enforcement activities of all natures.

4. Cooney v. Sun Shipbuilding and Drydock Co.

The report by investigators of the Department of Labor was not subject to absolute immunity from disclosure; rather, only those portions representing statements of witnesses and deliberations or recommendations by the federal official were exempted from disclosure.

5. Cowles Communications, Inc. v. Department of Justice

A file is no less compiled for law enforcement purposes because after the compilation it is decided for some reason there will be no enforcement proceeding. There are at least two reasons why investigation files should be kept secret. The informant may not inform unless he knows that what he says is not available to private persons at their request, but more important in this day of increasing concern over the conflict between the citizen's right to privacy and the need of the Government to investigate it is unthinkable that rights of privacy should be jeopardized further by making investigatory files available to private persons.

6. Evans v. Department of Transportation

Congress could not possibly have intended that letters about the health of pilots should be disclosed once an investigation is comp'eted. If this were so, and disclosure were made, it would soon become a matter of common knowledge with the result that few individuals, if any, would come forth to embroil themselves in controversy or possible recrimination by notifying the Federal Aviation Agency of something which might justify investigation.

7. Getman v. NLRB

Lists of employees eligible to vote in NLRB elections are not files prepared primarily or even secondarily to prosecute law violators, and even if they ever were to be used for law enforcement purposes, it is impossible to imagine how their disclosure could prejudice the Government's case in court.

§ (A) (3) ON COMPLAINT, THE DISTRICT COURT OF THE UNITED STATES IN THE DISTRICT IN WHICH THE COMPLAINANT RESIDES, OR HAS HIS PRINCIPAL PLACE OF BUSINESS, OR IN WHICH THE AGENCY RECORDS ARE SITUATED, HAS JURISDICTION TO ENJOIN THE AGENCY FROM WITHHOLDING AGENCY RECORDS AND TO ORDER THE PRODUCTION OF ANY AGENCY RECORDS IMPROPERLY WITHHELD FROM THE COMPLAINANT. IN SUCH A CASE THE COURT SHALL DETERMINE THE MATTER DE NOVO AND THE BURDEN IS ON THE AGENCY TO SUSTAIN ITS ACTION. IN THE EVENT OF NONCOMPLIANCE WITH THE

ORDER OF THE COURT, THE DISTRICT COURT MAY PUNISH FOR CONTEMPT THE RESPONSIBLE EMPLOYEE, AND IN THE CASE OF A UNIFORMED SERVICE, THE RESPONSIBLE MEMBER. EXCEPT AS TO CAUSES THE COURT CONSIDERS OF GREATER IMPORTANCE, PROCEEDINGS BEFORE THE DISTRICT COURT, AS AUTHORIZED BY THIS PARAGRAPH, TAKE PRECEDENCE ON THE DOCKET OVER ALL OTHER CAUSES AND SHALL BE ASSIGNED FOR HEARING AND TRIAL AT THE EARLIEST PRACTICABLE DATE AND EXPEDITED IN EVERY WAY

1. Ackerly v. *Ley*

After reviewing the documents *in camera*, the district court rendered summary judgment for the Commissioner of Food and Drugs.

2. Bristol-Myers Co. v. *Federal Trade Commission*

The order of the district court is reversed and remanded, for the district court failed to examine the disputed documents and explain the specific justification for withholding particular items. A bare claim of confidentiality will not immunize files of a government agency from scrutiny.

3. Committee for Nuclear Responsibility v. *Seaborg*

Executive privilege does not prevent Federal district courts from ordering *in camera* inspection of documents, except those reflecting military and diplomatic secrets. The court exercises its authority with due deference to the position of the executive. It will take into account all proper considerations, including the importance of maintaining the integrity of executive decision-making processes. But no executive official or agency can be given absolute authority to determine what documents in his possession may be considered by the court in its task. Otherwise the head of an executive department would have the power on his own say-so to cover up all evidence of fraud and corruption when a Federal court or grand jury was investigating malfeasance in office.

4. Consumer Union v. *Veterans Administration*

The rule that will be followed based upon the equity jurisdiction conferred by the Act is: where agency records are not exempted from disclosure by the Freedom of Information Act, a court must order their disclosure unless the agency proves that disclosure will result in significantly greater harm than good.

5. Cook v. *Willingham*

The Freedom of Information Act does not apply to the courts of the United States. A presentence investigation is made and the report submitted to the sentencing court pursuant to Rule 32(c) of the Federal Rules of Criminal Procedure. A presentence report is clearly not an agency record and is therefore not available to the public under the Act.

6. Coates Communications v. *Department of Justice*

The government should not be allowed to file an affidavit that a given file is an investigatory file and by so doing foreclose any other determination of the fact. Thus, the government will be required to deliver the file to the court for an *in camera* inspection.

7. Epstein v. *Resor*

The jurisdiction of the district court does not apply to information that falls within the exemptions set forth in subsection (b). To hold that the agencies have the burden of proving their action proper even in areas covered by the exemptions, would render the exemption provision meaningless.

The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.

8. Evans v. *Department of Transportation*

After an *in camera* inspection of letters about a pilot in the files of the Federal Aviation Agency, the district court granted the defendant's motion for summary judgment, finding that the material is exempted from disclosure.

9. Ferrell v. *Ignatius*

The district court obtains jurisdiction under the Act only on complaint of the party aggrieved. Here, since no complaint was filed and no summons was issued, no action was commenced and the court has no jurisdiction to act.

10. Irons v. *Schulyer*

The court is not required to examine every manuscript decision of the past 100 or more years to decide in each case if there is trade secret or other material which should be excluded. The legislative history of the Act indicates that it was not the intent of Congress to add materially to the burden of overworked courts.

11. Soucie v. *David*

Congress did not intend to confer on district courts a general power to deny relief on equitable grounds apart from the exemptions in the Act itself. However, there may be exceptional circumstances in which a court could fairly conclude that Congress intended to leave room for the operation of limited judicial discretion, but there is no such circumstance here.

To expedite the proceedings, the district court can most effectively undertake a determination whether the Report is protected by any statutory exemption by an *in camera* inspection of same. Even if the Government asserts that public disclosure would be harmful to the national defense or foreign policy, *in camera* inspection may be necessary. In such a case, however, the court need not inspect the report if the Government describes its relevant features sufficiently to satisfy the court that the claim of privilege is justified.

§ (3) . . . EACH AGENCY, ON REQUEST FOR IDENTIFIABLE RECORDS MADE IN ACCORDANCE WITH PUBLISHED RULES . . .

1. Bristol-Myers Co. v. *FTC*

The statutory requirement that a request for disclosure of government records specify "identifiable records" calls for a reasonable description enabling a government employee to locate the requested records, but it is not to be used as a method of withholding records.

2. Irons v. *Schulyer*

The request in the instant case "for all unpublished manuscript decisions" is not a reasonable request for identifiable records but rather a broad, sweeping, indiscriminate request for production lacking any specificity. It may be true that some of these opinions could be made available under the provisions of the Act if a specific request for an identifiable opinion were made, but a request for all is not specific enough to decide if any particular decision or decisions can be made available.

3. Shakespeare Co. v. *United States*

The ruling here sought must be identified with sufficient particularity so that their extraction from the files may reasonably be made by the employee responsible for them. In other words, something more than a fishing expedition must be shown.

4. Wellford v. *Hardin*

It is a violation of the Freedom of Information Act to withhold from the public the means for requesting an "identifiable record" when those means are exclusively within the control of the agency possessing the sought-after records.

§ (A) (3) . . . IN ACCORDANCE WITH PUBLISHED RULES STATING THE TIME, PLACE, FEES TO THE EXTENT AUTHORIZED BY STATUTE . . .

1. Reinoehl v. *Hershey*

31 U.S.C. 483a authorizes a charge which may equal one dollar per page for copies or $5 per hour for an employee to monitor the file while the applicant copies the file, and 5 U.S.C. 552 does not change this result.

GENERAL SECTIONS

1. Ackerly v. *Ley*

The fact that the information sought under the Freedom of Disclosure Act might be ferreted out by intuition and diligent search by person seeking the information is no reason for failure to disclose or refusal to compel disclosure.

2. Barcelonета Shoe Corp v. *Compton*

In enacting public information section of the Administrative Procedure Act, Congress did not intend to give private parties charged with violation of federal regulatory statutes any greater right to inspect investigative file material than has been granted to persons accused of violating federal criminal laws.

3. Soucie v. *David*

Access to a report by the Office of Science and Technology was refused on the contention that the OST is not an "agency" for the purposes of 5 U.S.C. 552, but rather a part of the Office of the President, and that the report is protected from compulsory disclosure by the doctrine of executive privilege.

The statutory definition of "agency" is not entirely clear, but the Administrative Procedure Act apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions. By virtue of its independent function of evaluating Federal programs, the OST must be regarded as an agency subject to the Administative Procedure Act and 5 U.S.C. 552. Therefore, the report is a record of that agency.

4. Wellford v. *Hardin*

It is a violation of 5 U.S.C. 552 to withhold documents on the ground that parts are exempt and parts nonexempt. In that event, "suitable deletions" should be made so as to bare nonexempt portions of the documents and avoid divulging exempt material.

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DIGEST OF SIGNIFICANT CASES REPORTED UNDER THE FREEDOM OF INFORMATION ACT (5 U.S.C., SEC. 552)

(By Daniel Hill Zafren, Paul Wallace, Legislative Attorneys, American Law Division)

Ackerly v. *Ley*, 420 F. 2d 1336 (D.C. Cir. 1969).

Appellant's complaint in the District Court sought equitable relief, in the form of compelled disclosure of documents, against appellee Commissioner of Food and Drugs in the United States Department of Health, Education and Welfare.

The Commissioner gave notice in the Federal Register of a proposal on his part to bar from inter-state commerce, as a "banned hazardous substance" within the purview of the Federal Hazardous Substances Act carbon tetrachloride and mixtures containing it.

Appellant, by letter sought permission "to review and inspect and/or copy all of the records" in the possession of the Commissioner "which relate in any way to the degree or nature of the hazard" referred to in the Commissioner's proposal.

After reviewing the documents *in camera*, the District Court rendered summary judgment for the Commissioner.

HELD: Vacated and remanded for further consideration.

(1) Whereas District Court only stated that the documents were internal records based on medical reports secured in confidential capacity, it did not detail the nature of the documents nor give reference to the exemptions enumerated in the Freedom of Information Act.

(2) The fact that the information sought under the Freedom of Disclosure Act might be ferreted out by intuition and diligent search by person seeking the information is no reason for failure to disclose or refusal to compel disclosure.

(3) The District Court's ruling was not susceptible of an appellate review which would generate confidence in either a reversal or an affirmance.

American Mail Line, Ltd. v. *Gulick*, 411 F. 2d 696 (D.C. Cir. 1969).

Action by steamship operators under Freedom of Information Act brought after the Maritime Subsidy Board for the Department of Commerce had required the operators to refund approximately $3,300,000 in subsidy payments.

The plaintiffs contend that in an attempt to formulate a meaningful agreement in their petition for reconsideration by the Board order, they filed with the Board an "application to inspect records" and in the alternative a renewed request for the reasons for a summary of the evidence upon which the Board based its ruling. The Board stated that its ruling was based upon a 31 page memorandum from which they clipped the last 5 pages and recorded it as its own findings in the matter and sent to appellants. Upon final refusal to produce the memorandum in whole, the appellants filed suit in the district court under the

Freedom of Information Act (5 U.S.C. sec. 552). The U.S. District Court for the District of Columbia granted defendant's motion for summary judgment and plaintiffs appealed.

Appellants contend that the April 11 decision, transmitted by the letter of April 12, constituted an order to them and the Act specifically states that the agency must disclose to any person upon request "all final opinions * * * as well as orders, made in the adjudication of cases" (5 U.S.C. sec. 552(a)(2)(A)).

Appellees contend that it is exempt from discovery because it is an "intra-agency memorandum(s) * * * which would not be available by law to a party other than an agency in litigation with the agency" under 5 U.S.C. sec. 552(b)(5).

HELD: Reversed and Remanded.

(1) The appellee failed to meet the burden requiring it to show that its April ruling did not have immediate operative effect. Appellants were ordered to refund approximately $3,300,000 and this order was stayed only pending the Board's decision on reconsideration. We therefore conclude that the Board's ruling of April 11 transmitted to appellants by letter of April 12 constitutes a decision and order within the meaning of 5 U.S.C. sec. 552(a)(2)(A).

(2) We do not feel that appellee should be required to "operate in a fishbowl", but by the same token we do not feel that appellants should be required to operate in a darkroom. If the Maritime Subsidy Board did not want to expose its staff's memorandum to public scrutiny it should not have stated publicly in its April 11 ruling that its action was based upon that memorandum, giving no other reasons or basis for its action. When it chose this course of action "as a matter of convenience" the memorandum lost its intra-agency status and became a public record, one which must be disclosed to appellants. Thus we conclude that the Board's April 11 ruling clearly falls within the confines of 5 U.S.C. sec. 552(a)(2)(A) and consequently it must be produced for public inspection.

Barceloneta Shoe Corp. v. *Compton*, 271 F. Supp. 591 (D. Puerto Rico 1967).

Plaintiff filed a complaint pursuant to the Administrative Procedure Act seeking to order defendant to produce Agency (NLRB) records which contained evidence received by them during the course of an investigation involving an alleged unfair labor practice. Defendant has previously refused such request stating that it would follow its normal procedures making investigation affidavits and statements of witnesses available to plaintiffs during any hearing before the Agency but only after the witnesses had testified on direct examination. Defendant contends that refusal is supported by the specific exemptions contained in the new Act, particularly Sections 3(e)(7) and (4).

HELD: For Defendant (motion to dismiss granted).

(1) In enacting public information section of the Adm. Procedure Act, Congress did not intend to give private parties charged with violation of federal regulatory statutes any greater right to inspect investigative file material than has been granted to persons accused of violating federal criminal laws.

(2) If disclosure, as urged by Plaintiffs, is allowed, persons interviewed by Board agents in future investigations will not be as cooperative as they are now if they know that the information they give to the Board agents would be subject to public disclosure at any time before they have actually testified at a public hearing.

(3) Defendant (NLRB) has shown a better right to keep its commitment to the persons giving such confidential statements, than have Plaintiffs made for the disclosure of said documents prior to the hearing.

Benson v. *General Services Administration*, 289 F. Supp. 590 (W.D. Wash. 1968), aff'd 415 F. 2d 878 (9th Cir. 1969).

Action under the information act to enjoin the General Services Administration from withholding certain agency records dealing with a sale of real estate and negotiations surrounding the sale. The property purchased by plaintiff's partnership from GSA, and to which the requested information relates, has been resold. Plaintiff, and other members of the partnership as well treated the profits from the resale as long-term capital gains on their income tax returns. The Internal Revenue Service is questioning this characterization, and the information contained in the requested documents is needed to clarify the nature of the transaction.

GSA argues that the withholding of the records sought was proper because each one was exempt from disclosure under one or more of three exemptions described in subsection (b) of the Act. The paragraphs relied upon as making disclosure inapplicable describe matters:

(2) related solely to the internal personnel rules and practices of an agency;

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

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

HELD: For Plaintiff. Affirmed by U.S. Court of Appeals.

(1) With respect to paragraph (2) of the Act, none of the information sought related to internal personnel rules and practices.

(2) With respect to paragraph (4) of the Act, this exemption is meant to protect information that a private individual wishes to keep confidential for his own purposes, but reveals to the government under the express or implied promise by the government that the information will be kept confidential. The appraisal report on the other hand, is kept confidential by the appraiser on the client's behalf, not on his own behalf, and the client here is GSA. Thus the exemption does not apply to the appraisal report.

(3) With respect to paragraph (5) of the Act, the House Report interpreted this language to say that "any internal memorandum which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public."

Benson v. *United States*, 309 F. Supp. 1144 (D. Neb. 1970).

This action is filed pursuant to Section 552 of Title 5, United States Code. Plaintiff faces the possibility of being discharged from the Air Force under provisions of the Air Force Regulations. [AFR 39–12]. Plaintiff specifically requests the U.S. District Court to enjoin the defendants from withholding from him certain statements which he claims will aid him in preventing his discharge.

It is the government's contention that these statements requested, which were the result of an OSI [Office of Special Investigation] investigation and are being utilized at present by an administrative board reviewing the possibility of plaintiff's discharge, fall within an exception to sec. 552 which allows a refusal to produce the documents. The exception to which the government refers is sec. 552(b)(7) which states "This section [sec. 552(a)] does not apply to matters that are * * * investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than the agency."

HELD: Complaint dismissed.

It is the decision of the Court that the government is entitled to withhold the documents because of the exemption previously stated. The legislative history of this statute indicates that it is not the intent of the statute to hinder or in any way change the procedures involved in the enforcement of any laws including "files prepared in connection with related government litigation and adjudicative proceedings." H.R. Report #1497, 89th Cong., 2d Session, pg. 11.

Quote from case on intent and scope of the Act

"S. 1160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings."

Bristol-Myers Company v. *Federal Trade Commission*, 283 F. Supp. 745 (D.D.C. 1968), aff'd in part, rev'd in part, 424 F. 2d 935 (D.C. Cir. 1970), cert. den. 400 U.S. 824 (1970).

The Bristol-Myers Company seeks an order compelling the Federal Trade Commission to produce certain documents relevant to a rulemaking proceeding initiated by the Commission on the basis of "extensive staff investigation,* * * accumulated experience and available studies and reports. * * *" The Commission refused to produce the documents, and the District Court dismissed the complaint, ruling that the material sought did not constitute "identifiable records" whose production is required by statute, and furthermore that many of the documents sought fell within the statutory exemptions for trade secrets, internal agency documents, or investigatory files compiled for law enforcement purposes.

HELD: With regard to production of records under the Freedom of Information Act, the order of the District Court is reversed and remanded. Other claims not related to the Act are affirmed.

The District Court failed to examine the disputed documents, and explain the specific justification for withholding particular items. A bare claim of confidentiality will not immunize files of a government agency from scrutiny.

Quote from case on intent and scope of the Act

"Before 1967, the Administrative Procedure Act contained a Public Information Section 'full of loopholes which allowed agencies to deny legitimate information to the public.' When Congress acted to close those loopholes, it clearly intended to avoid creating new ones."

Clement Brothers Company v. *National Labor Relations Board*, 282 F. Supp. 540 (N.D. Ga. 1968).

Action brought by employer against the National Labor Relations Board, *inter alia*, under the Public Information Section of the Administrative Procedure Act in an effort to compel the N.L.R.B. to permit the inspection and copying of documents obtained by the Board in its investigation of alleged unfair labor practices arising out of a representation election.

The pertinent portion of the Freedom of Information Act upon which the plaintiff relies provides as follows:

"* * * (E)ach agency, on request for identifiable records made in accordance with published rules * * * shall make the records promptly available to any person. (5 U.S.C. 552(a)(3))."

The above cited general directory is limited in application by several specific exemptions, one of which states:

"This section does not apply to matters that are * * * investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency. 5 U.S.C. sec. 552(b)(7)."

The plaintiff contends that this exemption is not applicable because it refers only to law enforcement of a criminal nature.

HELD: Plaintiff's request for an injunction ordering the protection of the employee statements is denied.

(1) In addition to the common sense necessity of protecting the investigatory function and procedures of the Board, the legislative history of the Act itself makes it clear that the exemption in question is not limited solely to criminal law enforcement but rather applies to law enforcement activities of all natures.

(2) The Court is of the opinion that the plaintiff has placed unwarranted reliance on the Freedom of Information Act; the Court cannot accept the plaintiff's position that the Act opened for employers the Pandora's box of accessibility to employee statements given to the Board in furtherance of its investigatory function.

Committee For Nuclear Responsibility v. *Seaborg* 3 ERC 1210 (D.C. Cir. 1971).

Action brought by environmental groups to halt the Amchitka Island underground nuclear test. The District Court held that plaintiffs had presented a cognizable claim, which the courts were obligated to determine, that the Atomic Energy Commission had failed to carry out the mandate of Congress in the National Environmental Policy Act (NEPA), 42 U.S.C. secs. 4331 et seq. (1970), to set forth all pertinent environmental effects of the project, and thus to provide the disclosure which is indispensable to informed appraisal of the project by the Executive, Congress, and the public. The government filed a motion to dismiss the lawsuit and the plaintiffs appealed to the Circuit Court of Appeals. The Circuit Court of Appeals remanded the case to the District Court so that plaintiffs might present evidence in support of their allegations, and continue the pretrial discovery that had been untimely curtailed by the government's motion to dismiss the lawsuit.

On remand, plaintiffs sought to have the government produce documents in its possession allegedly containing information needed by plaintiffs for substantiation of their claim. The government resisted and raised a claim of executive privilege. To resolve the question of privilege, the District Court ordered the government to submit the documents at issue for personal *in camera* inspection by the District Court. The government filed an application for allowance of an immediate appeal, challenging the order on the grounds that executive privilege precludes even *in camera* screening by the District Court.

HELD: Affirmed.

Executive privilege does not prevent federal district court from ordering *in camera* inspection of documents, except those reflecting military and diplomatic secrets. The court exercises its authority with due deference to the position of the executive. It will take into account all proper considerations, including the importance of maintaining the integrity of executive decision-making processes. But no executive official or agency can be given absolute authority to determine what documents in his possession may be considered by the court in its task. Otherwise the head of an executive department would have the power on his own say-so to cover up all evidence of fraud and corruption when a federal court or grand jury was investigating malfeasance in office.

Consumer Union of United States, Inc. v. *Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969), appeal dismissed as moot, 39 LW 2419 (1971).

The Veterans Administration (VA) hearing aid testing program was initiated as a means of evaluating hearing aids for procurement and distribution to veterans. Consumer Union of the United States, Inc. brings this action to compel the VA to make the raw scores, scoring schemes and quality point scores regarding the testing available to it. The raw scores are objective measures of the samples performance. The quality point scores represent the ratings for each sample. In the past, the results of the test and the evaluation based thereon have been primarily for VA use only, without regard to any other governmental or private agency.

HELD: Injunction issued enjoining the defendants from withholding records of the raw scores but information regarding quality point scores should not be released.

Although neither the raw scores or quality point scores come within exemption (2) of the Act, matters related solely to the internal personnel rules and practices of an agency; exemption (3), matters which are * * * specifically exempted from disclosure by statute; exemption (4), matters that are * * * trade secrets and commercial and/or financial information obtained from a person and privileged or confidential; exemption (5), matters that are * * * inter-agency or intra-agency memorandums or letters to a party other than an agency in litigation with the agency, the court is not bound under the Act to automatically order the disclosure. Therefore, the rule that will be followed based upon the equity jurisdiction conferred by the Act is: where agency records are not exempted from disclosure by the Freedom of Information Act, a court must order their disclosure unless the agency proves that disclosure will result in significantly greater harm than good. In view thereof, the evidence presented indicates that the benefits of releasing the raw scores outweigh any harm, but the danger of the public being misled by releasing the quality point scores and the disruption of the VA programs that releasing the scoring scheme would cause outweighs any benefits.

Cook v. *Willingham*, 400 F. 2d 885 (10th Cir. 1968).

Action by prisoner against warden of a United States penitentiary for a copy of his presentence report. District court held that the presentence report is made for the use of the sentencing court and thereafter remains in the exclusive control of that court despite any joint utility it may eventually serve.

HELD: Affirmed.

The Freedom of Information Act does not apply to "the courts of the United States." A presentence investigation is made and the report submitted to the sentencing court pursuant to Rule 32(c) of the Federal Rules of Criminal Procedure. A presentence report is clearly not an agency record and is therefore not available to the public under the Act.

Cooney v. *Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708 (E.D. Pa. 1968).

Civil suit for damages arising out of the accidental death of plaintiff's decendent, an employee of defendant, Sun Shipbuilding and Drydock Company. The plaintiff seeks by discovery motion to compel production of a report of the accident prepared immediately after its occurrence by investigators representing the Office of Occupational Safety, Bureau of Labor Standards, U.S. Department of Labor. The report is purported to consist of statement of witnesses, factual findings made by the investigators, and their conclusions as to the causes of the accident.

The witnesses were permitted to testify as to what they personally did and observed while investigating the accident, but only on the strength of their personal recollection and without the opportunity to refresh their recollection by referring to their written reports.

The government purports to find justification for withholding the report:

(1) In one of the exemptive provisions of sec. 552(b)(7). This section [regarding disclosure] shall not be applicable to matters that are * * * (7) investigatory files compiled for law enforcement purposes, except to the extent available by law to a private party * * *.

(2) The revised disclosure regulation of the Department of Labor, 29 CFR. sec. 70(3)(g) and

(3) It argues that the plaintiff has failed to make the proper showing of good cause required to compel production under Rule 45 as well as under Rule 34 F.R. Civ. P.

(4) The reports are subject to "executive privilege."

HELD:

(1) The plaintiff has not alleged any factual circumstances which make production of the investigator's report necessary to the adequate presentation of his case.

(2) However, it is appropriate to order that the accident report be available to the investigators for the purpose of refreshing their recollections if they are called upon to give further depositions.

(3) The report was not subject to absolute immunity from disclosure; rather, only those portions representing statements of witnesses and deliberations or recommendations by the federal official were exempted from disclosure. 5 U.S.C.A. sec. 552(b)(7); Fed. Rules Civ. Proc., Rule 45 (d), 28 U.S.C.A.

Cowles Communications, Inc. v. *Department of Justice, 325 F. Supp. 726.* (N.D. Cal. 1971).

Action under the Freedom of Information Act to obtain records in the office of the Director of the Immigration and Naturalization Service relating to one Salvatore Marino. The Government contends that the files are exempt under the Act (5 U.S.C. sec. 552(b)(7)) as investigatory files compiled for law enforcement purposes. The plaintiff contends that the exemption does not apply since there are no proceedings pending against Marino.

HELD:

(1) Investigatory files compiled for law enforcement purposes are protected by the Act. "A file is no less compiled for law enforcement purposes because after the compilation it is decided for some reason there will be no enforcement proceeding."

(2) There are at least two reasons why investigation files should be kept secret. "The informant may not inform unless he knows that what he says is not available to private persons at their request, but more important in this day of increasing concern over the conflict between the citizen's right of privacy and the need of the Government to investigate it is unthinkable that rights of privacy should be jeopardized further by making investigatory files available to private persons."

(3) The Government should not be allowed to file an affidavit that a given file is an investigatory file and by so doing foreclose any other determination of the fact. Thus, the Government will be required to deliver the file to the court for an *in camera* inspection.

Epstein v. *Resor*, 296 F. Supp. 214 (N.D. Cal. 1969), aff'd 421 F. 2d 930 (9th Cir. 1970), cert. den. 398 U.S. 965 (1970).

Plaintiff, an historian, brings this action pursuant to section 3 of the Administrative Procedure Act, 5 U.S.C. sec. 552, to enjoin the Secretary of the Army from withholding a file described as "Forcible Repatriation of Displaced Soviet Citizens—Operation Keelhaul." The file has been classified Top Secret since 1948 pursuant to the provisions of Executive Order 10501, 3 C.F.R. 484. Plaintiff contends that the Top Secret classification on the file he seeks, is unwarranted and that the Court has the power to hold a trial de novo on the merits of this classification.

HELD: Motion to dismiss the complaint denied, and the motion for summary judgment granted in favor of the defendants. Affirmed by United States Court of Appeals. Certiorari denied. 398 U.S. 965.

Section 3 of the Administrative Procedure Act, 5 U.S.C. sec. 552 provides that the section does not apply to matters that are "*specifically required* by Executive order to be kept secret in the interest of the national defense or foreign policy." Therefore, the jurisdiction of the District Court does not apply to information that falls within the exemptions set forth in subsection (b) of Section 3. To hold that the agencies have the burden of proving their action proper even in areas covered by the exemptions, would render the exemption provision meaningless.

Dictum: The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.

Evans v. *Department of Transportation*, 446 F. 2d 821 (5th Cir. 1971).

Action under the Freedom of Information Act by a pilot seeking disclosure of certain letters written by another in 1950 to the Federal Aviation Agency which described his alleged problems of behavior disorder and mental abnormality as related to his qualifications to fly. The first letter did not identify the pilot. In response, the Agency wrote that the letter would be kept confidential. In response to that, the pilot was identified and details given. After an *in camera* inspection of the letters, the District Court granted the defendant's motion for summary judgment, finding that the material is exempted from disclosure by 5 U.S.C. sec. 552(b) (3) and (7) and 49 U.S.C. sec. 1504.

HELD: Affirmed.

(1) The efforts of the Federal Aviation Agency to investigate and take appropriate action as to the mental and physical health of pilots would be seriously jeopardized if individuals could not confidentially call facts to the attention of the Agency which might affect the safety and lives of millions of passengers. It was just such situations as this which prompted Congress to exempt from the terms of the Act "investigatory files compiled for law enforcement purposes" set forth in 5 U.S.C. sec. 552(b)(7). "We are of the further opinion that Congress could not possibly have intended that such letters should be disclosed once an investigation is completed. If this were so, and disclosure were made, it would soon become a matter of common knowledge with the result that few individuals, if any, would come forth to embroil themselves in controversy or possible recrimination by notifying the Federal Aviation Agency of something which might justify investigation."

(2) By virtue of 5 U.S.C. sec. 552(b) (3) matters that are specifically exempted from disclosure by statute are exempt from the terms of the Freedom of Information Act. 49 U.S.C. sec. 1504 provides that any person may make written objection to the public disclosure of information contained in a document filed pursuant to the Federal aviation program. It further provides that whenever such objection is made, the board or administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public. Here, assurances of confidentiality were made.

Farrell v. *Ignatius*, 283 F. Supp. 58 (S.D.N.Y. 1968).

Ex parte order obtained requiring the Secretary of the Navy to show cause why an order should not be made pursuant to the Freedom of Information Act enjoining him from withholding a certain aircraft accident report. Cross-motion to dismiss the action for lack of jurisdiction because no action has been commenced in court.

HELD: Order to show cause vacated.

The District Court obtains jurisdiction under the Act only "*on complaint*" of the party aggrieved. Here, since no complaint was filed and no summons was issued, no action was commenced and the court has no jurisdiction to act.

Getman v. *NLRB* No. 71–1097 (D.C. Cir. 1971) aff'd.

Two law professors undertaking a study of labor representation elections, applied for and obtained an order from the District Court requiring the NLRB to provide them with names and addresses of employees eligible to vote in approximately 35 elections to be designated by them. The Board argued that the Freedom of Information Act does not require it to furnish information sought by appellees because the requested information falls within Exemptions "(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential"; "(6) personnel and medical files and similar files the

disclosure of which would constitute a clearly unwarranted invasion of personal privacy"; and "(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."

HELD: Affirmed. The excelsior lists failing to fall within any of the act's enumerated exceptions, and there being no equitable discretion in a district court to create new exemptions appellees are entitled to disclosure.

Exemption 4—Obviously, a bare list of names and addresses of employees which employers are required by law to give the Board, without any express promise of confidentiality, and which cannot be fairly characterized as "trade secrets" or "financial" or "commercial information" is not exempted from disclosure by subsection (b)(4).

Exemption 6—We find that, although a limited number of employees will suffer an invasion of privacy in losing their anonymity and in being asked over the telephone if they would be willing to be interviewed in connection with the voting study, the loss of privacy resulting from this particular disclosure should be characterized as relatively minor. Exemption (6) requires a court *de novo* to balance the right of the public to be informed; and the statutory language "clearly unwarranted" instructs the court to tilt the balance in favor of disclosure.

Exemption 7—The excelsior lists are not files prepared primarily or even secondarily to prosecute law violators, and even if they ever were to be used for law enforcement purposes, it is impossible to imagine how their disclosure could prejudice the Government's case in court.

Grumman Aircraft Engineering Corp. v. *Renegotiation Board*, 425 F. 2d 578 (D.C. Cir. 1970).

This is an appeal to the United States Court of Appeals from a summary judgment refusing to order production of documents under the Freedom of Information Act 5 U.S.C. sec. 552. The issue in the case is the scope of the statutory exemption for confidential information furnished to a federal administrative agency. Appellant, an aerospace contractor, seeks an order compelling the Renegotiation Board to produce (1) the orders and opinions issued during the years 1962 to 1965, and (2) certain documents relating to Grumman's own renegotiations for 1965. The Board contends that the documents are exempt from disclosure because they contain trade secrets and other confidential information. The U.S. District Court for the District of Columbia granted the Board's motion for summary judgment, without opinion.

HELD: Reversed and remanded.

5 U.S.C. sec. 552(b)(4) was designed to prevent the unwarranted invasions of personal privacy which might be caused by the Government's indiscriminate release of confidential information. The statutory history does not indicate, however, that Congress intended to exempt an entire document merely because it contained some confidential information (H.R. Rep. No. 1497). On the contrary, should data which falls within exemption (4) appear in any board opinion or order, both the Act and the Board's regulations (5 U.S.C. sec. 552(a)(2)) recognize that the interests of confidentiality can be protected by striking identifying details prior to releasing the document.

Quote from case on intent and scope of the Act

"Congress intended that sec. 522 would make available to the general public any agency records which would routinely be disclosed to a private party through the discovery process in litigation with the agency."

International Paper Company v. *Federal Power Commission*, 438 F. 2d 1349 (2d Cir. 1971).

This appeal from a decision of the Federal Power Commission (FPC) claims that the Commission unlawfully attempted to extend its jurisdiction beyond its statutory authority; and that in the performance of its duties, it not only had violated "the separation of functions" provisions of the Administrative Procedure Act, 5 U.S.C. sec. 554(d) but also the Freedom of Information Act, 5 U.S.C. sec. 552. Consolidated in the appeal, is a related court decision from the Southern District of New York, dismissing the International Paper Company's (International's) separate court action requesting the production of certain Commission records alleged to have been wrongfully withheld under FIA sec. 552(a)(3) which requires: "(E)ach agency on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by

statute, and procedure to be followed shall make the records promptly available to any person."

International requested in the District Court case that the Commission should be ordered to disclose all staff memoranda because it claimed the Commission's action in four other cases favored the legal position taken by International.

The Commission took the position that it had the right to reject this request pursuant to FIA sec. 552(b)(5), which provides: "This section does not apply to matters that are—(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

HELD: The Commission's decision and the judgment of the District Court are affirmed.

(1) A company which transported its own natural gas, which it had purchased at processing plant, through its own pipeline across state lines for its own use, was engaged in transportation of gas in interstate commerce within the Natural Gas Act, and was thus properly subject to regulation by the Federal Power Commission.

(2) The appellants requested discovery must be denied under the fifth exception of the FIA because it seeks the disclosure of items used in the FPC's deliberation processes. To allow disclosure of these documents would interfere with two important policy considerations on which sec 552(b)(5) is based: encouraging full and candid intra-agency discussion; and shielding from disclosure the mental processes of executive and administrative officers.

Irons v. *Schuyler*, 321 F. Supp. 628 (D.D.C. 1970).

Action to compel patent office to make available "all unpublished manuscript decisions of the patent office and to require the patent office to maintain and make available for public inspection and copying a current index of manuscript decisions" citing the authority of the Freedom of Information Act, 5 U.S.C. sec. 552(a)(2)(A), 5 U.S.C. sec. 552(a)(3) and 5 U.S.C. sec. 552(a)(2).

HELD: Defendant's motion to dismiss granted.

The request in the instant case "for all unpublished manuscript decisions" is not a reasonable request for identifiable records, but rather a broad, sweeping, indiscriminate request for production lacking any specificity. It may be true that some of these opinions could be made available under the provisions of the Act if a specific request for an identifiable opinion were made, but a request for all is not specific enough to decide if any particular decision or decisions can be made available.

Quote from case on intent and scope of the Act

"This court is not required to examine every manuscript decision of the past 100 or more years to decide in each case if there is trade secret or other material which should be excluded. The legislative history of the Act indicates that it was not the intent of Congress to add materially to the burden of overworked courts."

Long v. United States Internal Revenue Service., (West Dist. Wash. 1971) No. 9782.

Long filed this complaint pursuant to 5 U.S.C. sec. 552, to compel the production of all files of the Internal Revenue Service relating to the business activities of Long and his corporations, and an IRS manual and certain "code books."

Long's sole purpose in seeking IRS files is to obtain under the Freedom of Information Act, matters relating to current proceedings before the Tax Court.

The IRS filed a motion to dismiss the cause.

HELD:

(1) The defendant's motion is granted with respect to the request for IRS files on Long and his affiliated corporations and IRS memoranda and letters. However, with respect to plaintiff's request to see the manual and code books, the motion is denied.

(2) Relative to IRS files on Long and the affiliated corporations which he controls, the statute provides that such "investigatory files" need not be produced "except to the extent available by law to a party other than an agency", 5 U.S.C., sec. 552(b)(7). And as to IRS memoranda and letters, production is not necessary if they "would not be available by law . . ." 5 U.S.C., sec. 552(b)(5).

(3) The request to see those investigatory files relating to Long and his corporate affiliates must be denied for an additional reason. The statute provides that request for information must be "identifiable" 5 U.S.C. sec. 552(a)(3). Long's request is much too vague.

(4) If the manual and code books are "instructions to staff that affect a member of the public" sec. 552(a)(2)(c), and are neither "related solely to the internal . . . practices of" the IRS (sec. 552(b)(2)) nor "intra-agency memorandums" (sec. 552(b)(5)), then Long may properly sue to gain access to them.

Quote from case on intent and scope of the Act

". . . The legislative history of this statute indicates that it is not the intent of the statute to hinder or in any way change the procedures involved in the enforcement of any laws including 'files prepared in connection with federal government litigation and adjudicative proceedings'."

Miller v. Smith, 292 F. Supp. 55 (S.D.N.Y. 1968).

Plaintiff was charged with negligence in connection with a collision between two vessels (on one of which plaintiff was acting as pilot) in New York Harbor. The examiner found that plaintiff was guilty of negligence and ordered that his license be suspended for two months. On appeal, the Commandant of the Coast Guard appointed from his staff three members to hear oral argument for the plaintiff. Two of the members made and signed a memorandum . . . recommending that the examiner be upheld. The third member made and signed a memorandum recommending that the examiner be reversed. It is these two memorandums of members of the board which plaintiff demands to see.

HELD:

(1) It seems perfectly clear that the public information section of the Act does not give plaintiff any right to the memorandums of the board. They are plainly "intra-agency memorandums" and . . . would not be available in ordinary litigation.

(2) It would inhibit the free expression and interchange of views within the commandant's staff if staff memorandums were available to the public.

(3) The court stated that 5 U.S.C. sec. 552 (b)(5) applied and repeated a statement appearing in part in H.R. No. 1497 (1966) 3 U.S. Cong. & Adm. News, p. 2427):

> "Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fishbowl'."

Mink v. *EPA* 3 ERC 1166 (D.C. Cir. 1971).

This is a suit brought by 33 members of Congress, in both their official and private capacities, under the Freedom of Information Act, 5 U.S.C. 552 (1970), to obtain several documents pertaining to an underground nuclear test explosion which had been scheduled to take place on Amchitka Island, Alaska. The documents contain information relative to the environmental, national defense, and foreign relations consequences of the planned test.

As a result of an apparent leakage of certain portions of the report that suggested some agency disapproval of the test, Representative Mink asked the White House for copies of the report. The request was denied and this suit followed, with 32 other members of Congress joining Representative Mink as plaintiffs. They sought summary judgment to compel disclosure of the requested documents.

The District Court dismissed the complaint insofar as plaintiffs sought to maintain their action in their capacity as members of Congress, on the ground that they failed to state a justiciable case by virtue of the Separation of Powers doctrine. Insofar as plaintiffs proceeded in their private capacity, the District Court refused to compel disclosure on the grounds that the documents fell within two of the nine exemptions contained in the FOIA, 5 U.S.C. 552(b)(1) (national defense and foreign affairs secrets) and 5 U.S.C. 552(b)(5) (inter-agency memoranda).

HELD:

The summary judgment denying all relief to plaintiffs must be reversed, and the case remanded for further consideration by the District Court with respect to: (a) whether, and to what extent, the file contains documents that are now

within the umbrella of a secret file but which would not have been independently classified as secret. Such documents are not entitled to the secrecy exemption of subdivisions (b)(1) solely by virtue of their association with separately classified documents. (b) similar treatment must be accorded on remand to the Government's claim for exemption under subdivision (b)(5). It suffices to say that while the exemption protects the decisional processes of the President, or other policy-making executive officials, it does not prevent the disclosure of factual information unless it is inextricably intertwined with policymaking processes.

Moss/Reid/Fisher v. *Laird*. (D. D.C. 1971) Civil Action No. 1254–71.

Two congressmen and the Director of the Freedom of Information Center have brought this action against the Department of Defense and the Secretary seeking acces to portions of the Pentagon Papers under the Freedom of Information Act. 5 U.S.C. sec. 552.

The government contends that if the papers are disclosed, it could result in serious damage to the nation by jeopardizing the international relations of the United States and cause the compromise of intelligence operations vital to the naional defense and thereby cause exceptionally grave damage to the nation. There was nothing to suggest that the administrative decision was arbitrary or capricious.

Plaintiffs nonetheless urge that the court personally review, *in camera*, the withheld documents and make its own independent *de novo* determination.

HELD: Summary judgement granted for defendants.

(1) The Freedom of Information Act exempts from public inspection matters "specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy."

(2) The Act was not designed to open all government files indiscriminately to public inspection. Obviously, documents involving such matters as military plans, and foreign negotiations are peculiarly the type of documents entitled to confidentiality.

(3) Under the circumstances here presented, no *in camera* inspection is necessary.

National Labor Relations Board v. *Getman*, 404 U.S. 1294, 40 LW 2070 (1971).

Two law professors undertaking a study of labor representation elections, applied for and obtained an order from the District Court requiring the NLRB to provide them with names and addresses of employees eligible to vote in approximately 35 elections to be designated by them. The claim was based on 5 U.S.C. sec. 552(a)(3). The Government filed an application in the Supreme Court for a stay of the order on the ground that the order requiring the Board to comply with the Freedom of Information Act and deliver the records in question would interfere with the representation election procedures under the National Labor Relations Act.

HELD: Application denied.

"The board was created by Congress and Congress has seen fit to make identifiable records of the board and other Government agencies available to any person upon proper request. I find no exception in the Freedom of Information Act which would authorize the board to refuse promptly to turn over the requested records." Justice Black.

Polymers, Inc. v. *National Labor Relations Board*, 414 F. 2d 999 (2d Cir. 1969), cert. den. 396 U.S. 1010 (1970).

In action involving a petition by an employer to review, and a cross-petition by the NLRB to enforce, an order of the Board that a union was duly certified as collective bargaining representative and that the employer's refusal to bargain with the union constituted an unfair labor practice, one subordinate question was whether the Board was justified in refusing the company's request to inspect a Board document entitled "A Guide to the Conduct of Elections".

HELD: Under the circumstances of this case the Board was justified in refusing to produce the Guide.

(1) The Freedom of Information Act requires an agency to make available "administrative staff manuals and instructions to staff that affect a member of the public" (5 U.S.C. sec. 552(a)(2)(c)). However, this provision is subject to certain limitations, e.g., 5 U.S.C. sec. 552(b)(2) excepts from the operation of the statute matters that are "related solely to the internal personnel rules

and practices of an agency." The House Report interpreted this exception to cover operating rules, guidelines and manuals of procedure for government investigators or examiners.

(2) This Guide is said to be an internal advisory document for the use of Board personnel and plays no significant role in the Board's adjudication of election disputes. As such it appears to fall within the further exception specified in 5 U.S.C. sec. 552(b)(5) as an "intra-agency memorandum".

(3) "While the interest of the Board in refusing to produce the Guide is not clear, its relevance to the instant controversy is even less clear. We do not hold that under no circumstances would the Board be required to produce the Guide; but in the context of the instant case we will not disturb the refusal of the Board to produce the Guide."

Reinoehl v. *Hershey*, 426 F. 2d 815 (9th Cir. 1970).

Action to have declared invalid a Selective Service System Regulation (32 CFR sec. 1606.57), which provides that before indictment or a habeas corpus proceedings, a registrant or his representative may review the file at the draft board office, and receive a copy by paying one dollar per page, or $5.00 per hour for an employee to monitor the file while the registrant copies the file himself, and to compel issuance without charge of a copy of the Selective Service file. The district court dismissed the complaint.

HELD: Affirmed.

31 U.S.C. sec. 483a authorizes such a charge and 5 U.S.C. sec. 552 does not change this result.

Shakespeare Co. v. *United States*, 389 F. 2d 772 (Ct. Cl. 1968), cert. den. 400 U.S. 820 (1970).

In a suit brought by a manufacturer to contest computation of manufacturer's excise tax, the manufacturer attempted to get copies of all private rulings and letter rulings issued by the Internal Revenue Service since August, 1954, under certain provisions of the Internal Revenue Code. On the Government's motion to quash, or in the alternative, to modify, the trial commissioner ordered that, *Inter alia*, all letter rulings in the precedent file since 1954, classified and digested under Section 4216(b)(2) of the Code be made available for inspection and copying. It had been maintained by the Government that it would take approximately 2 weeks for a tax law specialist in the Internal Revenue Service to search and identify the documents in the precedent file. The production of these documents was the subject of review in the Court of Claims. The plaintiff maintained its right to the documents by the subpoena and also the Freedom of Information Act.

HELD: Reversed; Government's motion to quash granted.

(1) A subpoena duces tecum will be granted when a party has sufficiently identified the documents sought and has shown "good cause" for production. The rulings here must be identified with sufficient particularity so that their extraction from the files may reasonably be made by the employee responsible for them. "In other words, something more than a fishing expedition must be shown."

(2) There is nothing shown in the record here to indicate that the documents sought are material to the issues.

(3) There is nothing in the Freedom of Information Act which would entitle this plaintiff to engage in a hunt for something which might aid it in this action. Even if inspection could be had under the Act, the same rules as to identification of the particular documents sought should be adhered to.

Skolnick v. *Parsons*, 397 F. 2d 523 (7th Cir. 1968).

Action under the mandamus provisions of 28 U.S.C. sec. 1361 to compel President's Commission on Law Enforcement and Administration of Justice and one of its members to release a certain report submitted to them. The Executive Committee of the District Court dismissed the complaint *sua sponte*.

HELD: Affirmed.

By virtue of the 1967 Public Information amendment to the Administrative Procedure Act, the complaint, by interpreting the allegations of suppression of the report as equivalent to a "request", stated a cause of action justiciable in the district court. The plaintiff does have standing under this statute because the records are to be made available "to any person". However, since the Commission terminated before the complaint was filed, the court is without jurisdiction.

Soucie v. *David*, 448 F. 2d 1067, 2 ERC 1626 (D.C. Cir. 1971).

Action under the Freedom of Information Act to compel the Director of the Office of Science and Technology (OST) to release to plaintiffs a document, known as the Garwin Report, which evaluates the Federal Government's program for development of a supersonic transport aircraft. OST had indicated that it would not release the Report to members of the public because it was a Presidential document over which the OST had no control and was "in the nature of inter- and intra-agency memoranda which contained opinions, conclusions and recommendations prepared for the advice of the President." The District Court dismissed the complaint stating that the Report is a Presidential document, and consequently, that the court has neither authority to compel its release nor jurisdiction over a suit to obtain relief. At the hearing the trial judge stated as the basis for his ruling that the OST was not an "agency" for the purposes of the Freedom of Information Act, but rather a part of the Office of the President, and that the report is protected from compulsory disclosure by the doctrine of executive privilege.

HELD: Reversed and remanded.

(1) The statutory definition of "agency" is not entirely clear, but the Administrative Procedure Act apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions. By virtue of its independent function of evaluating Federal programs, the OST must be regarded as an agency subject to the Administrative Procedure Act and the Freedom of Information Act. Therefore, the report is a record of that agency.

(2) Congress did not intend to confer on district courts a general power to deny relief on equitable grounds apart from the exemptions in the Act itself. However, there may be exceptional circumstances in which a court could fairly conclude that Congress intended to leave room for the operation of limited judicial discretion, but there is no such circumstance here.

(3) The exemption protecting inter-agency and intra-agency memorandums or letters was intended to encourage the free exchange of ideas during the process of deliberation and policy-making. It has been held to protect internal communications consisting of advice, recommendations, opinions, and other material reflecting deliberative or policy-making processes, but not purely factual or investigatory reports. "Factual information may be protected only if it is inextricably intertwined with policy-making process. Thus, for example, the exemption might include a factual report prepared in response to specific questions of an executive officer, because its disclosure would expose his deliberative processes to undue public scrutiny. But courts must be aware of 'the inevitable temptation of a government litigant to give [this exemption] an expansive interpretation in relation to the particular records at issue.'"

(4) The exemption protecting trade secrets and commercial or financial information obtained from a person as privileged or confidential is intended to encourage individuals to provide certain kinds of confidential information to the Government, and it must be read narrowly in accordance with that purpose.

(5) To expedite the proceedings, the district court can most effectively undertake a determination whether the report is protected by any statutory exemption by an *in camera* inspection of same. "Even if the Government asserts that public disclosure would be harmful to the national defense or foreign policy, *in camera* inspection may be necessary. In such a case, however, the court need not inspect the report if the Government describes its relevant features sufficiently to satisfy the court that the claim of privilege is justified."

Quote from case on intent and scope of the Act

"Congress passed the Freedom of Information Act in response to a persistent problem of legislators and citizens, the problem of obtaining adequate information to evaluate federal programs and formulate wise policies. Congress recognized that the public cannot make intelligent decisions without such information, and that governmental institutions become unresponsive to public needs if knowledge of their activities is denied to the people and their representatives. The touchstone of any proceedings under the Act must be the clear legislative intent to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests. The policy of the Act requires that the disclosure requirement be construed broadly, the exemptions narrowly.

The public's need for information is especially great in the field of science and technology, for the growth of specialized scientific knowledge threatens to outstrip our collective ability to control its effects on our lives."

Sterling Drug Inc. v. *Federal Trade Commission*, 531, ATRR (D–1) (D.C. Cir. 1971).

Shortly after issuing a complaint charging that the acquisition by Sterling Drug of Lehn & Fink violated Section 7 of the Clayton Act, 15 U.S.C. sec. 18 (1964), the FTC approved without opinion a divestiture plan in another case calling for the sale of the S.O.S. Company to Miles. In the proceedings before the Commission, Sterling has taken the position that the approval of the Miles-S.O.S. merger demonstrates that its acquisition of Lehn & Fink did not violate the Clayton Act. Sterling seeks disclosure of certain documents in order to show that both mergers involve factors which require application of the same policy and result. Sterling contends that the documents are subject to disclosure under the Freedom of Information Act, 5 U.S.C. sec. 552. The Commission refused disclosure on the grounds that the documents fall within the Act's exemptions for intra-agency memoranda, or confidential financial information.

HELD: Remanded to district court for proceedings consistent with the U.S. Court of Appeals' opinion.

The court divided the Commission memoranda into three categories stating: (1) The documents prepared by the Commission staff should not be disclosed because the probable effect of a decision requiring disclosure of the staff memoranda would thus be to inhibit "a full and frank exchange of opinions" at least in that class of cases where opinions are not, and as practical matter cannot be, issued. (2) Since different commissioners may have approved the merger for different reasons, the two memoranda at issue may provide only the individual Commissioner's reasons for approving the decision, not the reasons of the commission as a whole. Both memoranda contain comparisons of the Miles-S.O.S. and Sterling-Lehn & Fink cases, and it may well be that in making their comparisons the Commissioners emphasized certain principles underlying the earlier decision while neglecting others. In sum, it is questionable whether the memoranda prepared by the individual Commisioners accurately reflect the grounds for the Commission's decision in Miles-S.O.S. (3) The memoranda issued by the Commission should be disclosed. The policy of promoting the free flow of ideas within the agency does not apply here. These are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be made available to the public. Thus, to prevent the development of secret law within the Commission, we must require it to disclose orders and interpretations which it actually applies in cases before it. On remand, the District Court judge should re-examine the memoranda issued by the Commission to determine whether they do in fact contain such material. If they do, this material must be made available to Sterling.

Talbott Construction Co. v. *United States*, 49 F.R.D. 68 (E.D. Ky. 1969).

In a suit to recover a tax refund, the plaintiff moved for the production of certain intra-agency documents of the Internal Revenue Service.

HELD:

"It is clear that if the documents sought by the plaintiff are policy and theory oriented, they are privileged under 5 U.S.C. 552(b)(5). If they contain factual data they are subject to production. . . . Since the facts upon which the defendant based its decision of not allowing the interest deduction are exclusively in plaintiff's control, any difference in opinion would be the result of theory or policy differences. Plaintiff has, therefore, failed to show that the documents are not privileged under 5 U.S.C. 552(b)(5). If the documents are factual, plaintiff has failed to show good cause for their production."

Tuchinsky v. *Selective Service System*, 294 F. Supp. 803 (N.D. 111. 1969), aff'd 418 F. 2d 155 (7th Cir. 1969).

Action brought in the United States District Court by a draft counselor under the Public Information Act against the Illinois State Director of the Selective Service System to have certain personnel information as to members of the Selective Service System and appeal board made available to him. The plaintiff also desires copies of current Illinois State memoranda on deferments, exemptions, and associated procedures.

HELD: As to the State memoranda, the defendant's motion to dismiss is granted since the issue was mooted by the defendant's agreement to permit inspection and copying provided the plaintiff pay the reasonable expense.

In view of the violence that has been directed at Local Board officers and members, plaintiff would be entitled to only the names of the local Selective Service Board officials, but not personal information in regard to such things as their home addresses, occupations, races, dates of appointment, military affiliations, and citizenships, under the Public Information Act; such information being available only if the local board chairman, after consultation with the persons involved consents and it is determined that such disclosure would not harm the person and would not be an unwarranted invasion of that person's personal privacy. However, this aspect of plaintiff's complaint was dismissed because he had not appropriately exhausted his administrative remedies by requesting this information from any of the local boards.

Wellford v. *Hardin*, 315 F. Supp. 768 (D.D.C. 1970, aff'd 44 F. 2d 21 (4th Cir. 1971).

Action under the Freedom of Information Act, to enjoin the Secretary of Agriculture and other officials of the Department from withholding certain specified records from plaintiffs, members of the public. The records in question are those maintained by Pesticides Regulation Division of the Agricultural Research Service, Department of Agriculture (hereafter PRD). Plaintiffs are associated with the Center for Study of Responsive Law.

PRD's argument that because certain information on the documents is allegedly exempt from public inspection, the entire card is exempt.

HELD: Injunction for plaintiff granted.

(1) It is a violation of the Freedom of Information Act to withhold from the public the means for requesting an "identifiable record" when those means are exclusively within the control of the agency possessing the sought after records.

(2) It is a violation of the Act to withhold documents on the ground that parts are exempt and parts nonexempt. In that event, "suitable deletions" should be made so as to bare nonexempt portions of the documents and avoid divulging exempt material.

Quote from case on intent and scope of the Act

"The Department of Agriculture is admonished that freedom of information is now, by statute, the rule, and secrecy is the exception."

(From Appellate Court) "The Freedom of Information Act was not designed to increase administrative efficiency, but to guarantee the public's right to know how the Government is discharging its duty to protect the public interest."

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LEGISLATIVE HISTORY OF THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT—THE FREEDOM OF INFORMATION ACT (5 U.S.C. SECTION 552)

(By Daniel Hill Zafren, Legislative Attorney, American Law Division, July 29, 1971)

The Freedom of Information Act, P.L. 89-487, 80 Stat. 250 (1966), 5 U.S.C. section 552 (1970), was signed by President Lyndon B. Johnson on July 4, 1966 and went into effect on July 4, 1967. This is the Federal public records statute and requires the availability, to any member of the public, of all of the executive branch records described in its requirements, except those involving matters which are within nine stated exemptions. At the time of the signing, the President then stated (in part):

"This legislation springs from one of our most essential principles: 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 curtains of secrecy around decisions which can be revealed without injury to the public interest."

This recognition of the people's right to know what their government is doing by having access to government-held information was not new with the enactment of the Freedom of Information Act. The notion can be traced back to the early days of our nation. For example, in a letter written by James Madison in 1822 the following often-cited expression can be found:

"A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And the people who mean to be their own Governors, must arm themselves with the power, which knowledge gives." [1]

A case has even been made that at the time our Constitution was written the people's "right to know" was such a fundamental right that it was taken for granted and not explicitly included therein, and that some express terms in the Constitution nevertheless can be pointed to as demonstrating an intent to keep secrecy in government at a minimum and implying a recognition of the people's right to information about their Government.[2]

The first Congressional attempt to formulate a general statutory plan to aid in free access occurred in 1946 with the enactment of section three of the Administrative Procedure Act.[3] It provided:

"Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

"(a) Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and content of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

"(b) Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

"(c) Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

The Congressional intent seems apparent from the report of the House Judiciary Committee:

"The section has been drawn upon the theory that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know or have ready means of knowing with definiteness and assurance." [4]

The section was to become effective on September 11, 1946. On July 15, 1946, the Department of Justice distributed to all agencies a twelve-page memorandum interpreting this section. In 1947, this memorandum, together with similar memorandums interpreting other sections of the act, were issued in an Attorney General's Manual and declared that the aim of this section was "to assist the public in dealing with administrative agencies to make their administrative materials available in precise and current form." [5] Significantly, it noted that Congress had left up to each agency the decision on what information about the agency's actions was to be classified as "official records." [6]

Soon after the 1946 enactment, it became apparent that, in spite of the clear intent of the Congress to promote disclosure, some of its provisions were vague and that it contained disabling loopholes which made the statute, in effect, a basis for withholding information. Critics pointed to the broad standards of the section, such as, "[a]ny function . . . requiring secrecy in the public interest,"

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[1] Letter from James Madison to W. T. Barry, Aug. 4, 1822, in *The Complete Madison* (Padover ed. 1953) at 337.

[2] Hennings, Jr. *Constitutional Law: The People's Right to Know*, 45 A.B.A.J. 667 (1959).

[3] June 11, 1946 ch. 324, Section 3, 60 Stat. 238.

[4] H. Rep. No. 752, 79th Cong. 1st Sess. 198 (1945). See also, S. Rep. No. 752, 79th Cong. 1st Sess. 12 (1945) and H.R. Rep. No. 1980, 79th Cong., 2d Sess. 17–18 (1946).

[5] Attorney General's Manual on the Administrative Procedure Act (1947) at 17.

[6] *Id.*, at 24.

"any matter relating solely to the internal management of an agency" "required for good cause to be held confidential," "matters of official record." "persons properly and directly concerned" and "except information held confidential for good cause found" as leaving the departments and agencies in a position to withhold information for any purpose.[7] One commentator has attributed the failure of the 1946 enactment to two reasons:

"First, the former section three failed to provide a judicial remedy for wrongfully withholding information, thus allowing capricious administrative decisions forbidding disclosure to go unchecked. Second, and more importantly, section three of the APA imposed several major restrictions on free disclosure. Acting under "color of law," an administrator was empowered to withhold information "requiring secrecy in the public interest;" when the person seeking disclosure was not "properly and directly concerned," or where the information was "held confidential for good cause found;" and when the information sought was related to the "internal management" of a government agency or department. These four restrictive and nebulously drafted clauses provided agencies and departments with pervasive means of withholding information." [8]

The Administrative Procedure Act had been in operation less than ten years when a Hoover Commission task force recommended minor changes in the public information section. Two bills were introduced in the 84th Congress to carry out the minimal task force recommendations,[9] but the bills died without even a hearing. In the 85th Congress, the first major revision of the public information provisions was introduced,[10] based on a detailed study by Jacob Scher, Northwestern University expert on press law, who was serving as special counsel to the House Government Information Subcommittee. No action was taken on these bills, but in 1958 a statute was passed amending the Federal "housekeeping" statute, which provides that the head of each department may prescribe regulations not inconsistent with law for governing his department, so as to provide that the statute does not authorize withholding information or records from the public.[11] In the 86th and 87th Congresses, a number of versions of these bills were introduced,[12] and although interest was aroused and some hearings held, none appear to have received serious consideration in either house.

In the 88th Congress, the movement to amend section 3 can be said to have begun in earnest. On June 4, 1963, two bills were introduced in the Senate. The first of these was S. 1663[13] which, if it had passed, would have replaced the entire Administrative Procedure Act. The second bill S. 1666[14] was identical to section 3 of S. 1663, and aimed at amending only section 3 of the Act. The reason for introducing both bills was to focus attention on the need to make the revision and to expedite action in that regard.[15] Senate hearings were held on S. 1666 and section 3 of S. 1663 in October, 1963.[16] To remedy the weakness of existing law, the Senate Report stated the purpose of S. 1666 as: ". . . to eliminate such phrases, to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may

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[7] Caron, Jr. *Federal Procurement and the Freedom of Information Act*, 20 Fed. B.J. 271 (1968). Also, see S. Rep. No. 1219, 88th Cong., 2d Sess. 10 (1964).

[8] Comment, *The Freedom of Information Act: A Critical Review*, 38 Geo. Wash. L. Rev. 150, 151–152 (1969).

[9] S. 2504, 84th Cong., 1st Sess. (1955) introduced by Senator Wiley, and S. 2541, 84th Cong., 1st Sess. (1955) introduced by Senator McCarthy.

[10] H.R. 7174, 85th Cong., 1st Sess. (1957) introduced by Representative Moss; S. 2148, 85th Cong., 1st Sess. (1957) introduced by Senator Hennings; and S. 4094, 85th Cong., 2d Sess. (1958) introduced by Senators Ervin and Butler.

[11] P.L. 85–619, 72 Stat. 547 (1958), now found at 5 U.S.C. section 301 (1970).

[12] For example, S. 186, 86th Cong., 1st Sess. (1959) introduced by Senator Hennings (this bill was the same as S. 4094, 85th Cong.), S. 1070, 86th Cong., 1st Sess. (1959) introduced by Senators Ervin and Butler; S. 2780, 86th Cong., 2d Sess. (1960) introduced by Senator Hennings (a revision of S. 186); S. 1887, 87th Cong., 1st Sess. (1961) introduced by Senator Ervin; S. 1567, 87th Cong., 1st Sess. (1961) introduced by Senators Hart, Long, and Proxmire; S. 1907, 87th Cong., 1st Sess. (1961) introduced by Senator Proxmire; S. 3410, 87th Cong., 2d Sess. (1962), introduced by Senators Dirksen and Carroll; and H.R. 9926, 87th Cong., 2d Sess. (1962) introduced by Representative Walter.

[13] S. 1663, 88th Cong., 1st Sess. (1963) introduced by Senators Dirksen and Long.

[14] S. 1666, 88th Cong., 1st Sess. (1963) introduced by Senator Long and co-sponsored by Senators Bartlett, Bayh, Boggs, Case, Dirksen, Ervin, Fong, Gruening, Hart, Keating, Kefauver, Metcalf, Morse, Moss, Nelson Neuberger, Proxmire, Ribicoff, Smathers, Symington, and Walthers.

[15] 109 Cong. Rec. 9958 (1963) (remarks of Senator Long).

[16] *Hearings on the Administrative Procedure Act Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 88th Cong., 1st Sess. (1963).

obtain information wrongfully withheld."[17] Following the 1963 hearings, several revisions were made in S. 1666, and after additional hearings were conducted in July of 1964,[18] the bill underwent further modifications.[19] This revised version of S. 1666 was passed by the Senate on July 28, 1964,[20] but no action was taken by the House thereon before adjournment. In the 89th Congress, on February 17, 1965, a further modified form of S. 1666 was introduced in the Senate as S. 1160[21] and in the House of Representatives as H.R. 5012.[22] The House held hearings on March 30, 31, April 1, 2, and 5, 1965[23] and the Senate on May 12, 13, 14, and 15, 1965.[24] The Senate passed S. 1160, as amended, on October 13, 1965.[25] The House of Representatives then passed this bill on June 20, 1966.[26] The House Report on S. 1160 states the purpose of the bill as follows:

Section 3 of the Administrative Procedure Act (5 U.S.C. 1002) requires every executive agency to publish or make available to the public its methods of operation, public procedures, rules, policies, and precedents, and to make available other "matters of official record" to any person who is properly and directly concerned therewith. These requirements are subject to several broad exceptions discussed below. The present section 3 is not a general public records law in that it does not afford to the public at large access to official records generally.

S. 1160 would revise the section to provide a true Federal public records statute by requiring the availability to any member of the public, of all of the executive branch records described in its requirements, except those involving matters which are within nine stated exemptions. It makes the following major changes:

1. It eliminates the "properly and directly concerned" test of who shall have access to public records, stating that the great majority of records shall be available to "any person." So that there would be no undue burden on the operations of Government agencies, reasonable access regulations may be established and fees for record searches charged as is required by present law.

2. It sets up workable standards for the categories of records which may be exempt from public disclosure, replacing the vague phrases "good cause found," "in the public interest," and "internal management" with specific definitions of information which may be withheld. Some of the specific categories cover information necessary to protect the national security; others cover material such as the Federal Bureau of Investigation files which are not now protected by law.

3. It gives an aggrieved citizen a remedy by permitting an appeal to a U.S. district court. The court review procedure would be expected to persuade against the initial improper withholding and would not add substantially to crowded court dockets.[27]

P.L. 90–23, 81 Stat. 54, was enacted on June 5, 1967 in order to incorporate into title 5 of the United States Code, without substantive change, the provisions of P.L. 89–487.[28] Technical changes in language were made to conform therewith.

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[17] S. Rep. No. 1219, 88th Cong., 2d Sess. (1964); 110 Cong. Rec. 17089 (1964) (remarks of Senator Mansfield).

[18] *Hearings on the Administrative Procedure Act Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary,* 88th Cong., 2d Sess. (1964).

[19] *Note, Comments on Proposed Amendments to Section 3 of the Administrative Procedure Act: The Freedom of Information Bill,* 40 Notre Dame L.417, 419 (1965).

[20] 110 Cong. Rec. 17089 (1964).

[21] S. 1160, 89th Cong., 1st Sess. (1965) introduced by Senators Long, Anderson, Bartlett, Bayh, Boggs, Burdick, Case, Dirksen, Ervin, Fong, Hart, Metcalf, Morse, Moss, Nelson, Neuberger, Proxmire, Ribicoff Smathers Symington, Tydings, and Yarborough.

[22] H.R. 5012, 89th Cong., 1st Sess. (1965) introduced by Representative Moss. The following identical bills were also introduced in the House on the same day or early in the session: H.R. 5013, introduced by Representative Fascell; H.R. 5014 by Representative Macdonald; H.R. 5015 by Representative Griffin; H.R. 5016 by Representative Reid; H.R. 5017 by Representative Rumsfeld; H.R. 5018 by Representative Edmondson; H.R. 5019 by Representative Ashley; H.R. 5020 by Representative McCarthy; H.R. 5021 by Representative Reid; H.R. 5237 by Representative Gibbons; H.R. 5406 by Representative Leggett; H.R. 5520 by Representative Schener; H.R. 5583 by Representative Patten; H.R. 6172 by Representative Mosher; H.R. 6739 by Representative Edwards; H.R. 7010 by Representative Widnall; and H.R. 7161 by Representative Erlenborn.

[23] *Hearings on Federal Public Records Law Before a Subcommittee of the House Committee on Government Operations,* 89th Cong., 1st Sess. parts 1 and 2 (1965).

[24] *Hearings on Administrative Procedure Act Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary,* 89th Cong., 1st Sess. (1965). See S. Rep. No. 813, 89th Cong., 1st Sess. (1965).

[25] 111 Cong. Rec. 26821 (1965).

[26] 112 Cong. Rec. 13661 (1966).

[27] H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966); 1966 U.S. Code Cong. & Adm. News 2418, 2418–2419. This Report also contains a detailed description of the provisions of the bill.

[28] S. Rep. No. 248, 90th Cong., 1st Sess. (1967). The complete text of 5 U.S.C. section 552 (1970) is reproduced in the Appendix, *infra.*

In June, 1967, the Attorney General issued a detailed and comprehensive memorandum for the executive departments and agencies to assist them in fulfilling their obligation under the new Act and to correlate the text thereof with its relevant legislative history.[29] The Foreword to this document reads, in part, as follows:

"If government is to be truly of, by, and for the people, the people must know in detail the activities of government. Nothing so diminishes democracy as secrecy. Self-government, the maximum participation of the citizenry in affairs of state, is meaningful only with an informed public. How can we govern ourselves if we know not how we govern? Never was it more important than in our times of mass society, when government affects each individual in so many ways, that the right of the people to know the actions of their government be secure.

"Beginning July 4, a most appropriate day, every executive agency, by direction of the Congress, shall meet in spirit as well as practice the obligations of the Public Information Act of 1966. President Johnson has instructed every official of the executive branch to cooperate fully in achieving the public's right to know.

"Public Law 89–487 is the product of prolonged deliberation. It reflects the balancing of competing principles within our democratic order. It is not a mere recodification of existing practices in records management and in providing individual access to Government documents. Nor is it a mere statement of objectives or an expression of intent.

"Rather this statute imposes on the executive branch an affirmative obligation to adopt new standards and practices for publication and availability of information. It leaves no doubt that disclosure is a transcendent goal, yielding only to such compelling considerations as those provided for in the exemptions of the act.

"This memorandum is intended to assist every agency to fulfill this obligation, and to develop common and constructive methods of implementation.

"No review of an area as diverse and intricate as this one can anticipate all possible points of strain or difficulty. This is particularly true when vital and deeply held commitments in our democratic system, such as privacy and the right to know, inevitably impinge one against another. Law is not wholly self-explanatory or self-executing. Its efficacy is heavily dependent on the sound judgment and faithful execution of those who direct and administer our agencies of Government.

"It is the President's conviction, shared by those who participated in its formulation and passage, that this act is not an unreasonable encumbrance. If intelligent and purposeful action is taken, it can serve the highest ideals of a free society as well as the goals of a well-administered government.

"This law was initiated by Congress and signed by the President with several key concerns—

that disclosure be the general rule, not the exception;

that all individuals have equal rights of access;

that the burden be on the Government to justify the withholding of a document, not on the person who requests it;

that there be a change in Government policy and attitude."

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

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

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

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

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

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

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[29] Attorney General, United States Department of Justice, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (June 1967). Reproduced in Appendix E of *Foreign Operations and Government Information Subcommittee, House Committee on Government Operations, 90th Cong., 2d Sess., Freedom of Information Act (Compilation and Analysis of Departmental Regulations Implementing 5 U.S.C. 552) 263* (Comm. Print 1968).

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

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

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

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

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

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

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

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

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

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

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

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

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

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

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

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

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

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

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

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

(c) This article does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress. (Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 363; Pub. L. 90–23, § 1, June 5, 1967, 81 Stat. 54.)

Mr. Moorhead. I want to thank each and every one of you for helping the subcommittee. We look forward to cooperating with you to try to make this act more effective and generally educate the executive branch that when the Congress passed the law, we meant what we said. We have got to inform people of the assistance the law can provide in obtaining Government information. I think it can be of help.

The subcommittee will meet next Monday, March 20, at 10 a.m. in room 2154, when we will hear testimony from a panel of lawyers who have handled freedom of information cases in the courts.

The subcommittee now stands adjourned.

(Whereupon, at 1 p.m., the subcommittee adjourned, to reconvene at 10 a.m., Monday, March 20, 1972.)

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