THE FREEDOM OF INFORMATION ACT: FEDERAL LAW ENFORCEMENT IMPLEMENTATION

HEARING
BEFORE A
SUBCOMMITTEE OF THE
COMMITTEE ON
GOVERNMENT OPERATIONS
HOUSE OF REPRESENTATIVES
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WEDNESDAY, FEBRUARY 28, 1979

HOUSE OF REPRESENTATIVES,
GOVERNMENT INFORMATION
AND INDIVIDUAL RIGHTS 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. Richardson Preyer (chairman of the subcommittee) presiding.

Present: Representatives Richardson Preyer, Robert F. Drinan, David W. Evans, Ted Weiss, Thomas N. Kindness, M. Caldwell Butler, and John N. Erlenborn.

Also present: Timothy H. Ingram, staff director; Edward J. Gleiman, counsel; Maura J. Flaherty, clerk; and Thomas G. Morr, minority professional staff, Committee on Government Operations.

Mr. PREYER. The subcommittee will come to order.

The Government Information and Individual Rights Subcommittee begins today its hearings on the impact of the Freedom of Information Act on Federal law enforcement agencies.

During the course of the year we plan to take a close look at the procedures used by the investigative agencies to protect sensitive records, while complying with the disclosure requirements of the Freedom of Information Act and the Privacy Act of 1974.

We are pleased to have as our witness today FBI Director William Webster.

Today's hearing was, in large part, sparked by a letter received by the subcommittee on January 24 of this year, stating that "given the resources available, the FBI cannot now, nor in the foreseeable future, comply with the time limits of the Freedom of Information Act" or the Privacy Act regulations of the Department of Justice.

According to Director Webster's letter, it currently takes 4 to 6 months to answer Freedom of Information Act requests. The Freedom of Information Act's statutory deadlines provide 10 working days to reply to citizen document requests, and a maximum of 40 working days—or 8 weeks—to respond to both the initial request and appeal of denial.

The Freedom of Information Act was enacted in 1966 and established the general principle that any person should have access to records maintained by executive branch agencies.

Following hearings by the subcommittee in the early seventies, the act was amended in 1974 to tighten procedural requirements. Time

limits were added for the processing of requests, and the seventh exemption of the act was modified to allow disclosure of certain portions of inactive files of Federal law enforcement agencies.

Specific grounds were included to allow the withholding of information that might jeopardize ongoing investigations, and such important concerns as the identity of informants, special investigative techniques, and the safety of law enforcement personnel.

Last year, the General Accounting Office, at the request of Senator Eastland, was asked to examine the effect of the Freedom of Information Act and Privacy Act on Federal law enforcement. The GAO concluded "it was not possible to accurately document the total impact these two laws have had on the investigative operations of the FBI."

The GAO report observed that:

> Other laws or regulations, administrative policies, and a general distrust of law enforcement agencies may have had as much or more to do with the FBI's difficulties as the FOIPA—The Freedom of Information and Privacy Act.

These issues are obviously quite complex. We began an examination of FBI compliance with the Freedom of Information Act at a hearing last April 10, when we received testimony from the General Accounting Office. We proceed today with Director Webster's presentation.

Director Webster, in accordance with the traditions of this committee, we swear all of our witnesses.

Would you please stand and be sworn?

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

Mr. WEBSTER. I do.

Mr. PREYER. You may proceed in any way you prefer.

STATEMENT OF WILLIAM H. WEBSTER, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

Mr. WEBSTER. Thank you, Mr. Chairman.

I appreciate your invitation to appear before this subcommittee today.

As the chairman just noted, you referenced my letter of January 24 to the Honorable Jack Brooks, chairman of the full committee, and asked that I elaborate on certain matters that I addressed in that letter.

You particularly requested that I discuss the FBI's inability to comply with the time limits imposed by the Freedom of Information Act, the seventh exemption of that act, and our records destruction policies.

I am glad to have this opportunity to address these areas of concern today. I would also like to take the opportunity to discuss briefly some other areas of concern relating to the FOIA.

I will discuss first, time limits.

With regard to our inability to comply with the time limits of the FOIA and Privacy Act, the principal reasons are: one, the volume of the work involved; two, the extreme care necessary to process the requests; and, three, the limited resources available for this program.

Given these three factors, achieving a final response within the prescribed time frames, ranging from a minimum of 10 to a maximum of 20 working days under the FOIA, and 40 working days under regulations implementing the Privacy Act, is, as the General Accounting Office recognized, virtually impossible in many cases.

In its report to this subcommittee of April 10, 1978, entitled "Timeliness and Completeness of FBI Responses to Requests Under Freedom of Information and Privacy Acts Have Improved," the GAO included the recommendation that the present time limitations for certain responses be modified.

The report, however, did not make any recommendations which could be implemented to reduce the timelag in responding to requests.

I would emphasize, as I did in my letter, that criminal and national security investigative records must be processed with great care to protect valid law enforcement interests and sensitive issues of personal privacy.

These legitimate concerns require the time necessary to make good judgments regarding the disclosure of information.

Let me discuss briefly the impact judicial review has had on our ability to make timely responses. Personnel assigned to review, excise and disclose requested records are also required to participate in the preparation of detailed affidavits in defense of excisions from documents which have been challenged in litigation.

Time spent performing this function naturally results in time lost responding to an average of over 60 incoming requests per workday.

In one case we, with the concurrence of the Department of Justice, withheld 3 pages of requested material, and then had to submit over 150 pages of briefs and affidavits defending our actions.

We have also had court orders directing that a specified number of pages be processed within a specified time. This means reassigning personnel from the requests of others to the crash project instituted to meet court-imposed deadlines.

My comments regarding judicial review are not intended as an indication that such review of our actions is unwise. Rather, I want to suggest that it may well be time for a careful reexamination of the time constraints, as well as the accelerated docketing of FOIPA complaints.

Next, I want to address exemption seven of the act dealing with investigative records. More specifically, I want to discuss some of the problems we are encountering protecting information legitimately withholdable, pursuant to this exemption.

As you are aware, these exemptions are permissive and not mandatory. Furthermore, the exemptions must be read in conjunction with the one sentence paragraph which appears at the end of subsection (b). That sentence requires any reasonably segregable portion of a record be released after exempt portions have been deleted.

With that in mind, we turned to the first exemption under (b)(7). Subsection (A) permits withholding of investigatory records compiled for law enforcement purposes to the extent that the release of these records would interfere with law enforcement proceedings.

Notwithstanding the design of this exemption to protect ongoing investigations, we find at times it is difficult to respond to some requests in such a way that an investigation will not be harmed.

There are investigations, such as those covered by the racketeer influenced and corrupt organizations statute—the RICO statute—which logically require information from files which may have been closed for a period of time.

Furthermore, effective law enforcement demands that in certain situations the existence of an investigation not be disclosed.

If we invoke the exemption provided by (b)(7)(A), we effectively alert the requester to the fact he is the subject of an ongoing investigation.

The single most important investigative tool available to law enforcement today is the confidential informant. For this reason, our principal concern in working with FOIA is the protection of the informant's identity.

Authority to protect that identity is specifically provided for in the act. However, an inherent problem with this exemption is the parallel requirement that segregable, nonidentifying portions of records be disclosed.

In practice, this means that an FBI employee, even though he has learned to evaluate more carefully what information is reasonably segregable, does not know, cannot know, and has no way of learning the extent of a requester's foreknowledge of dates, places, and events.

Yet somehow he is expected to predict it. The consequences of erring in favor of disclosure, rather than withholding information, are severe.

Approximately 16 percent of FOIA requests are coming from prison inmates. This figure is an escalating one. An analysis conducted 15 months ago showed that only 6 percent of the requests were from prisoners.

Our experience tells us that in many instances these requests are being made for the purpose of identifying the informants who probably were responsible for their incarceration.

It can be assumed that many of these prisoners will not require proof beyond a reasonable doubt in identifying a person as an informant.

I might just say as an aside that not long ago I got a letter from a prisoner demanding, as a result of reading an article in the U.S. News and World Report, that I disclose the names of all our informants.

It is this type of prisoner that I am least worried about. What concerns me is the one who has developed skill in making the type of requests that the law requires we answer.

To our knowledge, no informant has suffered physical harm as a result of a FOIPA disclosure. I always make that statement when I talk about this.

But absence of a victim does not lessen our concern. We know that requesters are working together, pooling FOIA information, to identify sources. For example, we know that an organized crime group made a concerted effort to identify sources through the Freedom of Information Act.

Our sources of information are not convinced by the absence of identified victims that we are still guarantors of their confidential relationship with us. We can provide examples from a cross section of our society showing refusals to furnish information because of their perceived fear of disclosure under FOIA.

These are not merely uncooperative professional confidential informants. We are speaking here also of private citizens, businessmen,

and officials of municipal, State, Federal, and even foreign governments.

When I say they are fearful, it is not restricted to a fear of physical harm. What our agents in the field are finding is that citizens are reluctant to divulge derogatory information because they are afraid disclosure of their comments could result in embarrassment, or even civil suits directed against them.

Without cataloging all of our recent experiences with persons refusing to cooperate with us because of FOIA, let me at least illustrate the breadth of this problem.

Recently, a U.S. district judge, interviewed during the course of an applicant investigation, refused to furnish any information because he believed his identity could possibly be revealed as a source of that information.

I might say, Mr. Chairman, that I have been visited in my office by Federal judges, including appellate Federal judges, who have expressed a real concern, and wanted to be assured that their responses to the inquiries, particularly in light of the new judgeships, will not surface because of the Freedom of Information Act.

Problems have also arisen in regard to the interchange of information between State, local, Federal, and even foreign law enforcement agencies, which is absolutely essential to our investigative process.

In a southwestern city, FBI officials noted a trend to exclude agents working organized crime matters from key intelligence meetings in that area. State law enforcement officers mentioned to us that this was because of possible FOIA disclosures.

In one Northeastern State, the attorney general decided to follow the policy that in applicant investigation arrests records of applicant's relatives are not made available to us, that is, the FBI.

Our foreign liaison with law enforcement agencies around the world has been similarly weakened according to comments from officials in friendly countries.

Our ability to obtain information from the general public, including institutions such as banks, credit bureaus, hospitals, and educational institutions, has also been affected.

In one instance, a major airline in a northeastern city accepted a stolen check for airline passage. When its computers indicated that the check was stolen, the FBI was called in, but the airline would not turn the check over to the Bureau because of FOIA and its fear of civil liability.

These examples have largely been supplied to the General Accounting Office. Many of them are reflected in their report, which you received this spring. We have continued to ask our field offices to document other instances. The reports continue to flow in. I had an update as recently as last week of similar incidents and similar problems with the general community, as well as with our confidential informants.

I want to address one final item concerning FOIA. This is the failure of FOIA to specifically exempt our operating manuals of instructions and guidelines from disclosure.

I might say, Mr. Chairman, that the Department of Justice takes the position that these manuals are exempt and we will vigorously resist any efforts to disclose them.

But in connection with other hearings, such as the proposed FBI charter, concern has been broadly expressed that manuals such as an undercover agent manual, might be the subject of an FOIA disclosure.

We would like very much to see that these important tools of control of our operations be protected. As I said, the Department of Justice takes the position that they are. But there is no satisfactory language that any of us can find that clearly nails this problem down.

It is important that our investigative agents, who are being asked to go out on the point, have set out in writing, with as much specificity as possible, what is expected of them, and what investigative steps should be taken. These are the purposes of our manuals and guidelines.

Recent FBI history tells us that reliance on oral approvals and assumed inherent authority contributed to some of the sad events that have been fully chronicled.

And, yet, if we provide specific investigative guides to our agents and they are available to outside requesters, the effectiveness of our investigations and the safety of our agents could be affected.

Our undercover special agents, for example, on whom we are relying more and more, need detailed guidelines and instructions, as I have just mentioned. But the act, as presently written, would not specifically exempt them from disclosure to a requester.

Exemption 7 protects only investigatory records compiled for law enforcement purposes. Our manuals and guidelines, under present definitions, do not qualify as investigatory records.

I know you appreciate our reluctance to draft such detailed instructions when the game plan is not protected from disclosure.

Again, I repeat, the Department of Justice does take the position that they are protected, but we see this as a weakness in the draftsmanship which could be addressed and should be addressed.

Finally, I would like to address the question of records destruction by the FBI. Our entire records management program in this regard is conducted in accordance with the requirements in title 44 of the United States Code and the various guidelines established by the National Archives and Records Service—NARS.

Our records retention and records destruction policies are in no way responses to the disclosure burdens imposed by the FOIPA.

The current plan authorized by the Archivist for destruction of files at FBI headquarters is limited to certain records that do not have a continuing value for investigative research or historical purposes. We do not have authority to destroy substantive investigative matters at FBI headquarters.

However, in an effort to comply with Federal regulations to dispose of obsolete files that are no longer timely and relevant to FBI needs, the FBI has proposed a revised records retention plan for headquarters which would allow for the destruction of criminal files that are more than 10 years old and security-related and applicant-related files that are more than 30 years old.

The plan also provides for the retention of historical files, according to the criteria established by the Archivist. The Archivist has referred our plan to Congress.

Because all substantive matters from field office files are maintained at FBI headquarters, the Archivist has granted authority for the destruction of field office files that are over 5 years old in criminal

cases and over 10 years old in security-related and applicant-related cases.

The field, however, can retain those files that have a continuing value for investigative reference, even though they are beyond the time criteria.

I am aware there has been recent criticism regarding field office file destruction programs. This same criticism has been directed to the Archivist for allowing the FBI to destroy field office investigative files.

As a result, the Archivist conducted an in-depth survey by reviewing files in selected field offices and comparing those files to the files maintained at the FBI headquarters to determine if the FBI was pursuing file destruction according to the authority that was granted by the Archivist.

The results of the Archivist's survey have been completed and the Archivist concluded that the FBI file destruction program is being conducted according to the guidelines they have established.

If you desire, I will make available to you a copy of the final report prepared by NARS.

In conclusion, I want to emphasize that the FBI is not asking that you repeal the FOIPA. The objective of public disclosure aimed toward the goal of an informed citizenry is one to which the FBI is committed.

In calendar year 1978, the FBI made final responses to 19,982 Freedom of Information and Privacy Act requests, releasing 2.25 million pages to requesters.

Our public reading room contains over 600,000 pages of materials concerning major investigations of the assassinations of Dr. King and President Kennedy; Cointelpro; significant civil rights matters; major espionage cases; World War II; counterintelligence and sabotage cases; gangsters of the 1930's; and even historical matters preceding that period.

Any of these materials can be accessed and reviewed at no cost. The FBI's demonstrated response to the mandate of Congress in this area is one with which I am justifiably pleased.

This response has, however, been achieved at a substantial cost. Last year, we expended over $9 million and had over 300 employees assigned to our FOIPA program.

Please understand that these figures refer to the calendar year 1978. The $9 million represents total cost expended, Bureauwide, including what we paid to the Department of Justice for appeals.

The 300 employees refers only to those assigned to the FOIPA branch at FBI headquarters and does not include field personnel working on Freedom of Information and Privacy Act matters.

In the half decade that has elapsed since the Freedom of Information Act was amended, the FBI, the Congress, and others have observed the benefits of, and difficulties with, the 1974 amendments.

I am very pleased that you have announced plans, Mr. Chairman, to examine in detail during this session of Congress, the Federal law enforcement's ability to comply with the act in its present form.

Although I have not raised all the problems the FBI has encountered with the acts, I have raised some problems without offering any specific proposals designed to remedy them.

I would like to say to you that the Department of Justice currently has in operation a joint task force considering all the aspects of the Freedom of Information Act. It will, in due course, I am sure, offer for the consideration of the committee a number of suggestions.

During the past several months, I have had occasion to comment concerning the FOIA at various speaking engagements. Many of the things that I have said publicly represent my own views. For example, I mentioned a "moratorium" on the disclosure of closed criminal investigative files as a concept that may be considered a proper solution to the problem of balancing the public's right to know and the protection of legitimate law enforcement needs.

Although I have spoken in terms of a 10-year moratorium, I have always cautioned that there is nothing magical regarding the period of 10 years, and there indeed may be a more appropriate time period.

Similarly, I recognize there must be exceptions for records involving cases of public interest. There may be subjects of such national interest and concern that we should make files available.

That would be a subject not only for our discretion, but also for appellate process through the Department of Justice and perhaps even the courts.

As you may be aware, the Attorney General asked both the public and private sectors to provide the Department with their thoughts and opinions about the manner in which the FOIA can be improved.

The Bureau is working closely with other members of the Federal law enforcement community and the Department, and, hopefully, the day is not too far off when this committee will invite me back to present specific proposals for it to consider.

I again thank you for inviting me here today. I would like to answer any questions you may have.

Let me say, Mr. Chairman, that when I came down for my confirmation hearings and subsequently the first round of budget hearings, which introduced me to the congressional process, I was asked in all of the hearings to come to the oversight committees if we had problems.

That was the purpose of my letter to Chairman Jack Brooks. We have a problem in that we are unable to comply with the time constraints, with the budgets and the resources that have been made available to us.

I am uncomfortable in discharging my responsibilities when I know that we cannot perform in a particular area. I thought I had an obligation to call that to the committee's attention and enlist its help.

Mr. PREYER. Thank you very much, Director Webster. I will try to remember to call you "director," instead of "judge," although you have probably been called a lot worse things than "judge" since you have taken on this position. [Laughter.]

We appreciate your presentation and we appreciate the spirit in which you call these things to our attention rather than waiting for oversight committees to dig out the problems.

I have a few general questions before we get into more specific analyses.

You state in your testimony: "I want to emphasize that the FBI is not asking that you repeal the Freedom of Information Act."

Have the two acts—the Privacy Act and the Freedom of Information Act—been of some help to the FBI? Have these acts increased public confidence in the FBI?

You mentioned your reading rooms. I congratulate you for all you have done in that regard.

Has that had some beneficial effect on the way the FBI is regarded in this country?

Mr. WEBSTER. I suppose the candid answer is that it has been a mixed bag. Some of the materials that have surfaced through the Freedom of Information Act operated to carry over a bad taste of earlier years, most of which was fully explored and ventilated during the period of the Church committee and the Pike committee and so on.

The candid answer would be that while some of those disclosures were occupying front pages in the years of 1977 and early 1978, I think that is less of a problem today.

On the other hand, the balancing aspect is that those who have a real interest in the observation and a legitimate interest in the observation of what we do and how we do it have been reassured, I think, by the efforts of the FBI to comply fully with the act.

In many cases, historians and others examining investigations have been largely reassured.

Again, it is a mixed concern. Conclusions may be reached that we did or did not pursue a particular avenue as well as we should have, or in the way that we should have, but at least the observations that have come to me are that reviewers are pleased to see our thoroughness as they do review those files that can legitimately be made available.

Therefore, I would not for a minute suggest any modification simply to protect our backside. That would be absolutely wrong. It in no way motivates my letter to you.

Mr. PREYER. There was considerable criticism of the FBI during the latter years, particularly of Mr. Hoover's regime, that it was hermetically sealed and a closed door operation.

I think with the reading rooms and the opening up through the FOIA might have an effect on the image of the FBI and the respect with which it is held, although it would be hard to measure or quantify that, I agree.

Mr. WEBSTER. It is a concept of accountability that we are concerned with. I hope the committee, in the course of its study, will take into account the balance aspect. We should have as much public accountability as possible.

When we begin to step on areas, such as confidentiality of sources, which protect human lives and also affect our ability to get legitimately the information that we need for law enforcement, then we have to look for other means of accountability that will not abandon the principle of accountability, but, through the surrogate process, develop a means of satisfying the American people through our oversight groups that we are doing the job that we should be doing.

Mr. PREYER. I imagine one thing it has done is that it has called your attention to the problems of record retrieval; is that right?

Mr. WEBSTER. That is right.

Mr. PREYER. Has that not been useful to you in looking at the records management program? I take it that it takes a long time to retrieve a record whether it is being retrieved for use at the State and local law enforcement level, or for the purpose of the Freedom of Information Act.

Mr. WEBSTER. I think that is a fair statement, Mr. Chairman. We have made, as a result of that and some specific recommendations of

the General Accounting Office, efforts to increase the speed in retrieval.

We have 60 million index cards in our indexing system. We have developed some techniques for moving some of the older files or older references out of the principal system.

It is not susceptible at the present time to computerization, but we, in an effort to shorten the time, have devised automated techniques, computerized techniques, for keeping track of our records so that we do not lose time with a clerk going to the second floor for a file and finding it is not there and having to check to see where it is. We know where our files are as they move around in the building now.

So, we can shorten gaps in that way. The answer is "Yes." In our effort to comply with very tight time frames, we have increased our effectiveness mechanically.

Mr. PREYER. Thank you.

We will proceed under the 5-minute rule.

I recognize our ranking minority member, Mr. Kindness.

Mr. KINDNESS. Thank you, Mr. Chairman.

I join the chairman in welcoming the Director here today. We appreciate the spirit in which you have instigated, if I might say so, this section of inquiry and oversight.

I would like to try to get into better context the proportion of resources devoted to the FOIA and FOIPA effort.

Could you submit, for the record, if it is not available at this time, an approximation of the portion of resources compared to the whole of the FBI in Washington?

Mr. WEBSTER. I will be glad to do that. Let me look to see if I have something quickly to show you here.

Mr. PREYER. Without objection, that material will be made part of the record.

[See app. 2.]

Mr. KINDNESS. While you are looking through there, I wonder if you would also have any breakdown available with respect to what occurs within that area of effort, in terms of responding to litigation as contrasted or compared with that part of the effort devoted to searching records and maintenance of the effort otherwise?

Mr. WEBSTER. In other words, the percentage of time once it gets into the litigation process?

Mr. KINDNESS. Yes.

Mr. WEBSTER. I will be glad to furnish that for the record.

Our total percentages for FOIA now run about 1 percent of our total budget. There are various ways to describe that.

We have about 300 people, about 35 of whom are agents, working full time at headquarters. I do not know whether it is entirely fair to make the comparison, but we have about 17 supervisors and as many other support personnel running our entire organized crime effort at headquarters.

Mr. KINDNESS. That is the kind of comparison I wanted to get to. That is exactly what I was after.

You have 70 supervisory personnel and support personnel that would be proportionate to that number?

Mr. WEBSTER. Seventeen.

Mr. KINDNESS. Oh, I see—17.

Mr. WEBSTER. We have people in the field doing FOIPA work, but as far as the supervisory work at headquarters is concerned, we are getting by on about 35 agents and the total number of employees in the Freedom of Information Branch is running about 300.

I do not know that is entirely a fair comparison because the emphasis on organized crime work is in the field and the emphasis on the freedom of information is here at headquarters.

It is costing between $8 and $9 million to do FOIPA work.

I have not made the cost argument. I assume that the American people are willing to pay for whatever they feel is of value and which serves a useful value.

The two points that I hoped to make this morning have been that we simply cannot do what we have got to do with those 300 people and meet the deadlines.

We are slowly making inroads into our backlog, but it is just not possible to respond in 10 days, given the huge volume of requests that we are getting.

As time goes along you can see the shifts and trends from people who are asking for this information. More and more of them are getting more and more skilled so that a smaller and smaller percentage of the requests bounce back because we do not have a record, and more and more of the requests have records which require us to respond.

More and more of the requests are detailed and involve a large volume of data that requires increasing concern, both from the standpoint of classification and the time required to go through that material.

Mr. KINDNESS. Please allow me to express a theoretical question, or a hypothetical question, and ask your response to it.

It seems to me that a presentable proportion of the resources of the Bureau are devoted to responding to the litigation that arises in connection with these matters.

If it were possible somehow to cut down on the time of response, then we might eliminate a fair part of that litigation that is aimed at trying to obtain compliance by the Bureau with the time limits.

Would you care to respond to that?

Mr. WEBSTER. I am not sure I have data. If I do, I will supply it for the record as to how many law suits are precipitated because requesters are impatient with the results.

We routinely acknowledge within 10 days each request as it comes in, but then, of course, as the chairman pointed out, it backs up to 4 to 6 months.

I would hope that, given more time, we would be able to provide a response that would be less likely to generate unneeded litigation through the appellate processes.

Mr. KINDNESS. As an overall matter, would you comment as to whether the cost and devotion of resources to the FOIA compliance has had an adverse impact on the amount of resources available to pursue the Bureau's primary mission?

Or, conversely, is this an isolated application of resources that really has not impacted on the overall mission of the Bureau?

Mr. WEBSTER. Well, if I understand your question, we were reduced by, I believe, about 100 positions from what we had requested for our 1979 budget. This was largely through the administration's budget.

Our budget request, as it is coming to the Congress for 1980, is the same as 1979. In other words, we are about 100 down from what we thought we would need. Actually, we thought we would need about 450 more people than we have right now in order to comply with the law.

If the law is changed so that we can deal with requests in a longer time frame than the present statute, then the impact is not as adverse.

We have been receiving about the same number of requests for the last 2 years: a little over 60 every workday. In August it may go up to 114 a day. It is cyclical. It responds to publicity and a lot of other things that I cannot figure out.

Mr. KINDNESS. Phases of the Moon and so on? [Laughter.]

Mr. WEBSTER. It has been holding its own. It has not fallen off which was the original assumption under which OMB cut back our figures in this area. It has not fallen off.

I remember when the bill was first enacted, the estimates—not our estimates, but the estimates of those who reviewed the situation—was that it would probably cost the entire executive branch about $50,000 a year to comply with requests.

We were over $1 million for the first year and we were up to $9 million at one point. We are down to about $8 million now.

We brought a special task force into the operation and doubled the size. We call it Project Onslaught. I believe that came in around 1977. That made an enormous inroad in our backlog. The backlog, however, continues to mount.

There may be other areas that could be addressed that would materially improve our opportunity to comply with the time frame.

Two examples occur to me. One is the major projects. When a major project gets into the system, it is a tremendous drain on our manpower. Very often it is the subject of court orders and time frames.

I do not know what we can do about that in a statutory way, but if the projects could be recognized, that is, volume projects which account for an enormous percentage of the total paper going out, then perhaps they could be treated a little differently than the ordinary citizen requests.

The other requests that I think deserve some scrutiny, at least, are the 16 to 17 percent of our total requests coming from prisons. I am not sure that a convicted felon is entitled to impact so heavily upon our program.

Perhaps others would differ with me on that, but felons have lost other rights. I am not so sure that they ought to be prowling around in our files the same as anybody else. Perhaps there ought to be some restraint on their activity while in prison.

Addressing those two areas might give us some special and specific relief so that we can meet our time frame with the citizens.

We are trying to work out some team systems to take the major projects off a little to the right or to the left so that the short responses are not held up for 4 to 6 months.

Court decisions make it clear that we are safe if we take them on a first-in, first-out basis. On the other hand, there clearly are cases that we have to address immediately such as those in which somebody is on trial or there is a major problem at hand.

I interceded in the *Liuzzo* case because there seemed to be some need to expedite release of information with respect to the murder of Mrs.

Liuzzo. We did release 1,500 pieces of paper, even though State and Federal law enforcement people had protested the release. We honored the protests for another 1,500 that are still waiting. But we did manage to get the 1,500 out. They had been in line waiting their turn for several months.

I was able to do something there.

Mr. KINDNESS. Mr. Chairman, I suspect my time has expired. I have a lot of questions later on.

Mr. WEBSTER. I want to apologize for such a long-winded series of answers, but I thought your question opened up a number of areas.

Mr. KINDNESS. Surely. Thank you.

Mr. PREYER. Mr. Drinan?

Mr. DRINAN. Thank you, Mr. Chairman.

Director Webster, I am bitterly disappointed with the FBI for its reluctance to move forward in this program.

I have been involved in this program for 3 or 4 years, and in another subcommittee of this Congress, I complimented Mr. Powers of the FBI on June 27, 1977, for the FBI's performance. At that time the FBI had, in fact, complied with the arrangement that they had made with the subcommittee of the House Judiciary Committee. Mr. Clarence Kelley went forward with that work and showed that the FBI could, and did, comply with the FOIA.

I, therefore, feel that it is maladministration on the part of the present FBI to go back on the commitments that they made and solemnly carried out in this document.

As you know, this Congress checked out your contention that the number and quality of informants has declined as a result of the FOIA. The GAO found no substance in that.

Now you come back and say:

> We can provide examples from a cross-section of our society, showing refusals to furnish information because of their perceived fear of disclosure under FOIA.

As you know, sir, GAO said there is absolutely no way to demonstrate that this is a fact. It is the post-Watergate syndrome that apparently inhibits some people from coming forward.

Furthermore, how do you conclude that actually quantitatively and qualitatively you have less information? Two years ago the FBI, in 1976, had 11,000 informants. All of a sudden it dropped, so far as we know, to 2,800. So far as we know, $2.4 million was spent this particular year for informants.

How can you tell us, when the GAO did not concur in that, that as a result of FOIA, the 2,200 informants are giving less information, or information of a lower quality?

Mr. WEBSTER. You have handed me quite a bit there, Congressman Drinan.

First of all, very respectfully, I do not agree with your assessment of the General Accounting Office report. That report, if anything, praised the FBI for its efforts to comply in terms of timeliness.

Mr. Shea, who is in charge of the appeals process for the Department of Justice, has publicly testified that the FBI is one of the best, if not the best, of all the departmental components, with compliance of the Freedom of Information Act. No one has seriously questioned our earnest effort to comply with the act, especially the GAO.

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Second, with respect to the informants, Congressman Drinan, the General Accounting Office did not dispute our assertions that we were losing informants and losing informant information as a result of their concerns and fears about the Freedom of Information Act. They carefully documented those.

What they did say was that it was impossible to determine what impact that would have, but not the fact that we were getting less information.

Mr. DRINAN. They conceded that in your estimation and your perception you were getting less information, but they denied that getting less information was due to the Freedom of Information Act, which is the essential question before us.

Mr. WEBSTER. I thought that their response was that we had not shown that our effectiveness had been reduced.

Mr. DRINAN. Precisely.

And you are saying today, sir, in contradicting that GAO report, that your effectiveness has, in fact, declined precisely and exclusively due to the implementation of the FOIA. I challenge that.

Mr. WEBSTER. I do not think we are as far apart as it seemed at first.

Mr. DRINAN. I am afraid we are.

Mr. WEBSTER. Then let me say that we are far apart because I disagree with you, respectfully, that the GAO says that we have not lost inmportant and needed informant information.

They are simply saying there are no data to show effectiveness.

I do not know how you show effectiveness unless you stop your operations and start from a zero base. Every unit of law enforcement is concerned with the problem of the drying up of sources. If we lose one informant it may result in the loss of 1 case or 100 cases.

If we lose one informant, we do not know how many informants we may fail to develop because of the FOI/PA.

But the point I have made publicly has been that there is a perceptual problem here, a real, valid, perceptual problem, which is documented in the GAO report and documented in our files by a subsequent effort.

We are not getting the same number of informants to serve us and our agents are having difficulty in developing them because they do not believe that confidentiality can be assured.

Mr. DRINAN. May I go back to the central point and quote what the GAO said?

The GAO report observed:

> Other laws or regulations, administrative policies, and a general distrust of law enforcement agencies may have had as much or more to do with the FBI's difficulties as the FOI/PA (the Freedom of Information and Privacy Acts).

There it says that they deny what you are saying to us today that the FOIA has dried up the sources.

Let me come back to the equally essential matter this morning. As I read your letter, and as I hear your testimony, you give us no hope that the FBI, in the foreseeable future, may, in fact, comply with the law which says that you must, within 20 days, fulfill the requests of a person seeking this information.

I assume the FBI has not cut back in services in other public information areas. I assume they have the same number of agents giving the tours to guests and visitors in Washington that they always have.

If you are going to say you cannot do this, then you have to show, in my judgment, that you have done everything you can to cut back on other public information sources.

After all, we do not tell you people that you have to have a tour service for visitors coming from Peoria, Ill., but we do tell you that in 20 days you have to grant every request. The FBI made an honest effort and they were almost in compliance 2 years ago.

Now, the FBI has a backlog of 3,600 requests or more. I hear you saying there is no way by which that backlog can decrease and, in fact, it will increase.

Mr. WEBSTER. I believe my statement was that there is no way in the foreseeable future that we can come into compliance with the act, given the present resources allocated by the Congress on a line item budget basis for this program.

I am not in the position of asking for more money. I am simply trying to recognize a hard fact.

We were not that close to compliance, in my view, 1 year ago, or 2 years ago. We have never been in the position of responding in 10 days to a request.

Mr. DRINAN. But you are in less compliance now than you were 2 years ago.

Mr. WEBSTER. I am not even certain of that.

Mr. DRINAN. I wonder if the FBI would comply with the GAO recommendation that nonagents be used in connection with processing the requests. The FBI apparently was opposed to that. Is the FBI still opposed to this strong recommendation of the GAO that nonagents be used as processors?

Mr. WEBSTER. No; as a matter of fact, we are using special analysts on a pilot study basis to see their effectiveness.

If you will recall, the Department of Justice was likewise opposed to taking the law-trained person away from this subject. The compliance turns on compliance with tough legal questions, like privacy and the Freedom of Information Act.

We only have 35 special agents involved in this whole program. In answer to your question, we are on pilot programs trying to do what the General Accounting Office suggested to see whether it would work. We have worked at every one of the suggestions that the General Accounting Office has given.

Mr. DRINAN. One last point. It is not the Congress that has withheld the funds for this purpose. At no time did the Congress ever yield on the statutory obligation of your agency, or any agency, to comply with the FOIA. It is some faceless person, apparently, in the Office of Management and Budget.

I say it is not a line item. I repeat and conclude with this that the FBI has a duty to fulfill this law and live by its letter rather than to do all the other things they do in public information.

I thank you.

Mr. PREYER. Thank you.

Mr. Butler?

Mr. BUTLER. Thank you, Mr. Chairman.

Mr. Director, I appreciate your presence here today and your candor in telling us the problems that you are having.

I was privileged to serve on the Civil and Constitutional Rights Subcommittee of the Judiciary. I know the harassment that we have given you with reference to this. I have felt over the time that we have had our hearings that you have made a conscientious effort and have made real progress in this regard.

I have been able to observe my friend from Massachusetts during these hearings. I hope you will take some comfort from knowing that he is impartial and he treats all FBI Directors the same. [Laughter.]

Indeed, if we had to have a title for these hearings, it could be: "Look What Drinan Hath Wrought." [Laughter.]

Nevertheless, I do think that you are candid with us. You have suggestions for us. This places the responsibility on this subcommittee to do what we can to soften the impact.

I note your suggestions with reference to a moratorium or a cooling off period. Somewhere I had the impression that you were going to give us more detailed suggestions as to how we might accomplish this.

Are you awaiting some further invitation from this subcommittee or is there a possibility that you might give us some legislative suggestions now?

Mr. WEBSTER. When I first made the proposal, which was at the annual meeting of the Federal Bar Association, I stated then, and my purpose was, to invoke a rational dialog about this problem. I did not really think I should be wringing my hands without offering some type of an approach which might form the basis for that dialog.

I gave the reasons for a moratorium, that is, that it would put some age on criminal investigative files, and, therefore, make the likelihood of serious harm by disclosure of an informant less of a danger and less of a perceptual danger. It would have less of an impact on our ability to develop informants.

I carefully said, as I did this morning, that there would have to be exceptions and the Attorney General will certainly retain waiver authorities. But that might be a beginning.

I am reluctant to go beyond that at the present time until the Department of Justice task force has completed its study because it may come up with other alternative solutions that would be as good or better.

But at least the dialog has commenced. That was the purpose of my initial suggestion.

Mr. BUTLER. I appreciate that. I hope that will produce something more concrete in this dialog.

Let me turn to another area. I do not believe you touched on this too much.

The responsibility for foreign counterintelligence activity within this country lies solely with the FBI. Would you comment on the impact the act has had on the foreign counterintelligence?

Mr. WEBSTER. It has had an impact. I have to say that is our assessment of it based on illustrations. Whether the GAO would agree that we have detailed it in quantum or graphic way, I do not know beyond the impaired experience with it.

We have had a number of cases in which we have had former effective assets, as they are called in foreign counterintelligence, cease to supply information that was formerly available.

A good deal of concern has been expressed to me by visiting intelligence officers, chiefs of intelligence services around the world, who have come to this country to talk about problems.

As you know, it is often necessary for us to cooperate. They do cooperate with us because we do not have our operatives in their country and they are not allowed to have operatives in our country.

However, in following those who break the law and those who engage in counter or in foreign hostile intelligence gathering, we need a degree of cooperation.

There is really nothing like the Freedom of Information Act anywhere else in the world. It is very difficult to explain. It makes them very apprehensive.

Mr. BUTLER. I suspect also there are not wiretapping limitations in this area in the rest of the world; is that right?

Mr. WEBSTER. Yes; that is true.

Mr. BUTLER. Inasmuch as you have touched on the informant question several times, I judge that you are now charged with the responsibility of culling out the information which may identify the informant, and yet pass on a good deal of the file at that level.

Can a pretty sophisticated criminal, or criminal element, establish the identity of the informant by studying these releases with some degree of care?

Mr. WEBSTER. They certainly think they can because they are doing it at a pretty high rate.

We ran a war game within our office at headquarters with people who had no more information than anyone else on the streets had and had no special access to any special techniques.

By making two or three requests for documents involving multiple meetings and that type of thing, that is, the type of thing that organized crime figures might choose to do, invariably our task teams were able to go to the freedom-of-information people and say: "This is a symbol informant," or "This is the informant who supplied the information" for the particular investigation.

As a result of that, we were able to tighten up our procedures somewhat with respect to our interpretation of the act, which does permit us, under the exemption, to exclude materials which are attributed to confidential sources.

This has been done in concert, and in consultation with the Department of Justice. We will continue to run these tests because we have found that again and again by simple techniques like merely measuring the number of spaces in an excised portion and laying out the numbers of meetings and figuring out who was there, and so on, we are able to figure these things out.

There is the ever-present human failure risk also that we have. We will somehow fail to go all the way to the end of the word, or excise entirely. The mechanical part is an additional risk.

Much as we try to keep our people alert it can happen. That is one of the reasons that we are reluctant to see too many special agent lawyers disappear from the Freedom of Information Act branch.

But we are training specialists, and we have done everything that the GAO has suggested. We have tried to follow those techniques consistent with protecting the informants.

When we use that world, it sounds sometimes like we are talking about unsavory types. Some of them are unsavory in the sense that they have had criminal associations. That is probably the way that we best get access to criminal information.

However, many of them, as I mentioned in my statement, are private citizens wanting to do their duty by their country. They are deeply concerned that the information will not be maintained as confidential.

When I hear Federal judges, who ought to know that act better than anyone else, say they are not supplying information anymore, then that is a matter of concern.

Mr. BUTLER. I thank you very much.

It seems to me, with all due respect to others who have commented, that an intelligent, God-fearing potential informant, under these circumstances, would be somewhat inclined, or inhibited, at least, from helping you.

I appreciate your bringing this to our attention. I think it is our responsibility, and I think we ought to do something about it.

Mr. PREYER. Mr. Evans?

Mr. EVANS. Thank you, Mr. Chairman.

Director Webster, in your testimony on page 6, you noted, and as you were responding to Mr. Butler, you also noted that requesters often work together and pool freedom of information type information.

What type of information would be pooled? I am not sure that I understand how an individual in a pool of requesters might be able to obtain information that any other requester might not be able to obtain singularly.

Mr. WEBSTER. I will supplement my answer, if I am not complete here.

Given a criminal enterprise, for instance, there are various individuals who can request their own files and receive information about themselves under the Privacy Act provisions that an ordinary requester would not be able to see because of privacy considerations.

So, he is apt to get a more complete file, as I understand it.

Then if he requests his file—and we have even had instances where lower level organized crime figures have been directed by superiors to ask for their files in order to pool releases together—then they have the combination of the material gathered.

This provides a broader base for analysis in order to see who was where and who had access to that information. Therefore, who was, in fact, the informant in the case? Or, was there any informant?

You probably will recall in years past the instance of lower level organized crime figures going into grand jury rooms bugged by their superiors. There is a constant preoccupation among people within the organization over who might be supplying information to the Government for their own protection or for whatever reason.

As a matter of fact, I will put it on the record myself without being asked. In Cleveland last year, an employee of the Cleveland office sold a list of informants to the organized crime family unit in Cleveland

for $14,000. The amount paid and the facts support the intense interest that they have in knowing where the sources are coming from.

If it only succeeds in intimidating people from talking, then it serves a purpose for organized crime.

Mr. EVANS. I would also like to ask this: As you noted in your testimony, certain investigative manuals, guidelines, and internal papers of the Bureau are often available to those persons requesting information under the Freedom of Information Act.

Has the Bureau made any attempts to withhold such information under exemptions related to internal rules and practices, or interagency memorandums, or letters under the Freedom of Information Act.

Mr. WEBSTER. Yes; it is my understanding we have.

We have revealed nonsensitive portions of these manuals. I think there was just a case a few weeks ago in the eighth circuit in which a prisoner wanted to see the investigative manuals and was denied. He appealed and the eighth circuit said he was not entitled to that because it was not germane to his inquiry.

But there is always that kind of qualification that, in a given situation, he might be able to surface it out.

Once it is out, it is out.

Mr. EVANS. But so far that information and those manuals and those guidelines have not become——

Mr. WEBSTER. Readily available.

So far as I know, they have not surfaced out in any material degree, although in the last several years we have made them available to committees of the Congress and their staffs and so on.

Let me be clear on this. We do not have an undercover agent manual. This has been of great concern to me. We have directives which have been carefully reviewed and under my direction have been brought up to date. Each field office has been readvised on the current directives applicable to undercover agents.

The directives should be incorporated in a manual. Everyone who works in this tough and difficult field should have a very clear reading of his responsibilities.

The immediate problem presented is the Freedom of Information Act. The Department cannot give us any clear assurance that we will not have to divulge the undercover agent manual if we produce one.

However, they take the position that manuals are not discoverable, but the Department has not been able to give us that assurance. This was a subject of considerable concern during earlier testimony about the charter before a Senate committee last spring.

It seems to me it is not that difficult a question to address as a statutory measure rather than take the chance that we might lose in a lawsuit on the subject.

Mr. EVANS. One last question.

Given the problem, or potential problem, of information becoming available to persons, especially information as to the identity of informants, you are concerned that there is a potential threat under the Freedom of Information Act in terms of drying up informant sources.

However, how much of that is a problem, would you say, versus the problem, as you mentioned, of a Bureau employee who sold that information?

Would that not also tend to dry up informants, at least in the Cleveland area?

I was wondering how much the potential problem under the Freedom of Information Act relates to the real problem here that we are encountering.

Mr. WEBSTER. I think I understand your question. I do not want to be understood to say that the Freedom of Information Act is responsible exclusively for all the concerns about confidentiality.

Of course it is not. There are many other factors that come to play here. I readily agree with those that say there may be other considerations.

However, there are none that are as persistently and as pervasively on the minds of the informants. As reports come back to us, and as we log them in and make them available to the GAO and to our own people, this is the one dominant factor.

We can do something about the Cleveland case. We did. First of all, we prosecuted immediately the clerk and her husband who were responsible. They are in jail.

Second, it gave us a chance to overhaul our filing techniques for the protection of informants. We have done that.

We have taken a number of moves, like providing for more secure communication and segregated filing. We have protected the confidentiality for meetings between the informant and his operator. Those are called meets.

At each step of the way we have made this situation more and more clear to each field office. Our inspectors are checking out there to be sure that we have tightened up everything that we can do internally to protect the sources.

That gives the agents who develop informants and who operate them the assurance to make representations in this area.

But where we cannot effectively make representations is in the freedom of information area. We do our level best, but it is seen as a real problem.

Mr. EVANS. Thank you.

Thank you, Mr. Chairman.

Mr. PREYER. Mr. Erlenborn?

Mr. ERLENBORN. Thank you, Mr. Chairman.

Mr. Director, let me also, as my colleagues have, welcome you and thank you for your testimony today.

In 1974, when we repealed the exemption for investigative files, I do not know whether it was official policy and announced policy, but it certainly was apparent to members of this subcommittee that the Department of Justice and the FBI were opposed to the repeal of that exemption.

FBI representatives came to Congress not to seek a workable revision with time limits and so forth that you could comply with, but fairly strong efforts were made to convince this community and our sister committee in the Senate not to repeal the exemption so that none of your files would be opened up.

I get the impression that from your testimony today that is no longer the position of the Department or of the Bureau; that is even if you thought the committee were receptive, which I am not sure we

are, or would be, you would not be seeking a reinstatement of the exemption that existed prior to the 1974 amendments.

Is my impression correct?

Mr. WEBSTER. Of course. That would simplify my problem a great deal.

I think we have to recognize a legitimate value in our society that has come out of a lot of experiences that we hope will never be repeated. That value has to be served.

My own position is that what we ought to seek is a balance. When we find that the act is having an effect not contemplated and throwing something out of kilter or putting things in a state of imbalance, then it is time for some fine tuning. I think there has been a lot of experience since the amendment and enough data that has been developed to try to do some fine tuning.

On the side of the informants, I think the Congress can do something to protect them. There is no interest, and never has been an interest, so far as I know, in disclosing informants and in violating confidentality of informants.

That is a fundamental principal. No one has really agreed with that.

What we have been concerned about is whether or not the law causes us to disclose informants or run the risk of it, or is seen that way to the extent that we are not getting the information.

If it is so seen, as I deeply believe it is, then can the law be adjusted so that those perceptions can be moderated and we can get back to business again?

That is my view of it with respect to the informants.

The other side of the experience is that: Given a static resource to comply with the law, we are having trouble complying with it. People can take different views of what the General Accounting Office has said about our performance in its report last April, but I am very proud of that report. I think it shows an earned effort at compliance.

We have followed up on those suggestions. We are doing everything we can, but there is a "Catch 22" to be given a certain number of resources in a certain time frame which had no reference to anybody's analytical assumptions of what we could do.

Then when we cannot comply, there we are with an obligation. I believe in complying with the law, but I do not want to be in a Chinese torture chamber in the process.

I use that illustration of $50,000 as the estimated cost when the bill was amended. That shows how badly the estimates were at that time.

I think we ought to look at what we have right now and ask what we can do in order to comply. I want to comply. That is the whole purpose of my letter.

Mr. ERLENBORN. I would respectfully take issue with two of your statements. First of all, that it was not possible to predict the problems that you would face. I think it was possible. I think the FBI and the Department did predict many of the problems.

I think you overblew them in those days. I am not talking about you personally. But I think they were overstated. I think that compliance has not been as difficult as the Department thought nor as easy as some of my liberal friends on the committee thought it would be.

The other statement I would take issue with is that no one would want to violate the confidential sources. I have reference here to the

Privacy Act rather than the Freedom of Information Act. We are not talking about criminal investigations, but I think acquisition of information on a promise of confidentiality is just as important in a background check on a prospective Federal appointee as it is in the criminal cases.

Mr. WEBSTER. Yes.

Mr. ERLENBORN. When we considered the Privacy Act, there were members of the committee who wanted to wipe out entirely any protection of confidentiality, not only prospective in the future, but to open up the files and reveal the names of confidential sources from the past, as well.

So, there are people here in the Congress who have sought to violate the confidentiality. I think you probably are aware of that.

I think your comment had to do with the Freedom of Information Act in criminal investigations, but I wanted to get into the Privacy Act as well.

Mr. WEBSTER. I should have said that no one could reasonably predict the results.

Mr. ERLENBORN. I agree with you. I do not think it was reasonable but it was not an easy fight in this committee and in conference, to maintain the right of confidentiality in matters other than criminal investigations. It was very difficult because there were many influential members of this committee who were trying to repeal the right to confidentiality.

Let me ask you this about the Privacy Act and your responsibility for background checks. How important is that right of confidentiality in order to get the information that you must get served to this Congress?

Mr. WEBSTER. We have statutory duties there. We are supposed to be able to develop information with respect to employees, for instance, and prospective nominees that will demonstrate the presence or absence of unswerving loyalty to the United States.

In the case of judges with which I am most familiar and I guess because I came out of that background more of them feel free to share their concerns with me—they are often looking at someone who is going to be sitting alongside of them if he is confirmed. If they have derogatory information, they are hesitant about putting it into the files because they feel that will impair their relationship down the road.

On the other hand, they have an obligation to disclose that derogatory information if they have it. I am afraid that many of them have opted just to stand mute.

Mr. ERLENBORN. Is there a fear, under the Privacy Act and the Freedom of Information Act, that these confidential sources will be revealed? Is the law deficient in the respect to files other than the criminal investigation?

Mr. WEBSTER. Yes; it has to be said to apply to the name check files, background files, investigations, and things of that kind.

Mr. ERLENBORN. The Federal judge you referred to in your prepared testimony—was that a background check or a criminal investigation check?

Mr. WEBSTER. That was a background check. As a matter of fact, that was just one. I know of three or four in addition to that where it

is going on. Without naming the one I mentioned, I happen to know who he is and he is one of the most respected Federal judges in the United States. He is one of the most well known.

Mr. ERLENBORN. Do you feel that the language of the Privacy Act does not give you sufficient cause to withhold information that would lead to identifying the confidential source?

Mr. WEBSTER. Perhaps in terms of clarity it does not make clear that information will not be disclosed and that it cannot in any circumstances be surfaced. It just is not that clear.

I think the country, fortunately for agencies like the FBI, has other institutions in our society which have been going through this process. The *Stanford Daily* case gave the press and the media a searching opportunity to think through the principle of confidentiality.

Mr. ERLENBORN. They may sympathize with your position a little more than in the past?

Mr. WEBSTER. There is no question about that.

Incidentally, when that came down I immediately put out a general directive that regardless of the opinion no search warrant would be sought by the FBI without my prior approval because I realized the sensitivity in that area and the Attorney General subsequently followed up with a broader policy.

It seems to me that it is an ignoble act for the Government, through its agents, to promise confidentiality and then provide legislation in which that confidentiality is up for grabs.

Mr. ERLENBORN. I think that your observation that no reasonable man could disagree is one that I would endorse. I would seek your help and advice as to how we can amend the Privacy Act and the Freedom of Information Act so that the reasonable men and women of this Congress can give you the authority to protect those sources.

Thank you very much, Mr. Chairman.

Mr. PREYER. Mr. Weiss?

Mr. WEISS. Thank you, Mr. Chairman. Let me say at the outset that Mr. Kostmayer indicated he wanted very much to be here this morning. At the moment he is handling a rule change on the floor of the Democratic Caucus. He will try to get here as soon as he can.

Mr. Director, you alluded to this on one of the responses but I would like to underscore it. That is the national disgrace when it was discovered that the FBI, among other agencies, was wantonly conducting surveillance and keeping dossiers on citizens regardless of what their involvement may have been in the body politic. The FBI bitterly fought the 1974 amendments to the Freedom of Information Act, as Mr. Erlenborn recollects. Indeed, President Ford vetoed those amendments and the Congress overode the veto.

Is it your position that the agency is still opposed to the legislation?

Mr. WEBSTER. Still opposed to what legislation?

Mr. WEISS. The Freedom of Information Act Amendments of 1974.

Mr. WEBSTER. No. I think when the Congress has spoken that that is the law. The next observation is for me to see how the law works and not to go back to something I would rather have or that someone else would rather have, but to see how the law works.

That is why I brought our problems to the attention of this subcommittee because in the areas that I mentioned in my letter I did not feel that the law was working as it had been intended to work.

There were problems created in the execution of the law which were, if not anticipated, at least more severe and ought to be attended to. That was the spirit in which I approached this meeting.

Mr. WEISS. I am somewhat surprised within that context to find, upon reading the letter and upon listening to some of the testimony today, that nowhere do you suggest what would be an appropriate revision of the FOIA timetable requirements. Your suggestion would affect the workload itself but not the speed with which the agency responds to requests.

I assume that that was a deliberate omission on your part. I wonder whether, in fact, you have any suggestions or recommendations to make to this committee.

Mr. WEBSTER. As I recall, the GAO suggested maybe increasing the response time to, let's say, 60 days. I think that was the figure that the GAO used.

Mr. WEISS. I think they said 10 plus 30.

Mr. WEBSTER. All right, 10 plus 30.

Mr. WEISS. Let me ask you this. Would you find that to be a reasonable amendment?

Mr. WEBSTER. Down the road it might very well be. It would depend upon a number of factors which have to be explored to decide whether they have value or not. I mentioned one—do you want us to continue to respond to felons in penitentiaries?

Mr. WEISS. Pardon me, but without getting into the additional changes or proposals for changes, given the law as it is right now, I would like from you some indication as to whether you think the GAO recommendation makes sense. If not, then what time frame would you suggest?

Mr. WEBSTER. I want to study that further because I am not in the position to give you a time today. What I was trying to suggest was that in order to know the time, I have to know what the assumptions are. I mean like the number of people and so on.

Mr. WEISS. The only assumption is that we are working within the parameters of today's legislation.

Mr. WEBSTER. It is not the legislation. I want to know whether the assumptions are going to be the same number of people doing the work. If it is the same number of people——

Mr. WEISS. That is within your control, is it not? The executive branch has control. Congress has not told you how many people to use in this job. The Congress has written a piece of legislation and told the FBI to implement it. It has told other agencies to do it. It is up to the administration to determine how you are going to allocate your personnel to do the job. Is that right?

Mr. WEBSTER. It is not entirely up to me in terms of allocation. In addition to what we get on a line item budget basis, we also have priorities that we have to deal with. I don't think you want to put me in a position where I don't have the troops to do what you want me to do.

I realize that is a joint problem. I do not think you can put that off on the executive branch. It is one that we have to explore together.

Mr. WEISS. I would like to do that. However, I will not do it at this moment because there is another subject that I would like to pursue. I hope we will have time to get into that division of responsibility later.

I am concerned as a former prosecutor, as a Member of Congress, and as an American citizen, with the safety and security of people who cooperate with the law enforcement agencies of this country. Call them informants or call them what you will.

I am bothered, however, by what I perceive to be the FBI's exclusive focus on the Freedom of Information Act as the prime danger to the safety and security of informants. In fact, we have had repeated public disclosures of cases involving FBI employees, FBI agents, who have allegedly been responsible for dealing with organized crime figures. In October 1977, the New York Times Magazine did a story in which it reported there had been some 23 murders of informants and potential witnesses and raised the question as to whether FBI information was being made available in some way to organized crime by people inside the FBI. You referred to the Cleveland situation. However, there have been disclosures and allegations not only about Cleveland but about New York, and Newark, and Sacramento, and Detroit, and Las Vegas.

The impression I get in reading about these cases and in listening to the FBI's responses, is that you would rather not recognize the personnel problem involving agents of the FBI. I guess you operate on the theory that it is better to stick to the one rotton apple theory as in the case of Mr. Stabile, for example, than to recognize the general problem. I would feel much more confident about the concern you express regarding the Freedom of Information Act's ramifications if I felt the FBI were really going out full force to protect the security of informants from corrupt FBI employees—agents and otherwise. I would like your reaction to that.

Mr. WEBSTER. My reaction is that I really agree with you as far as our responsibility within the Bureau is concerned; that is, to protect the integrity of our informants.

Where I would disagree with you is the scope of the problem as an internal one. Those stories have all been carefully analyzed. The story about the number of informants alleged to be murdered is totally inaccurate. The references in New York are there. We have had corrupt activities from time to time in what you call disclosure of confidential records or dissemination of confidential records outside the Bureau. The one in New Jersey did not involve informants. It involved documents but not informants.

Really, the only one that has involved a disclosure of informants that I am aware of is the Cleveland case. I told you what we did about it. We prosecuted. We did not try to bury it. We dealt with it.

We have had the most intensive analysis going on of our security, partly in reference to that and partly because of the fallout from the *Kampiles* case to make sure we had the means to detect internal corruption. I could take all day to tell you the various reasons why I feel that that problem is less in the FBI than many other places.

Mr. WEISS. Could you submit to the subcommittee a detailed updating of agency investigations and findings of corrupt personnel involving the illegal disclosure of either informant identity or documental information across the country and what the results of those inquiries and investigations were, both administratively and judicially?

Mr. WEBSTER. I would be more than happy to do that. It is a matter of great concern, not because of its magnitude but because of its importance.

Mr. PREYER. Without objection, this material will be inserted into the record.

[See app. 2.]

Mr. WEISS. I think, as far as impact on potential informants is concerned, nothing would more quickly destroy the capacity of the FBI or other law enforcement agencies to secure the cooperation of witnesses—informants or otherwise—than the knowledge or the suspicion that, in fact, whatever they say has a good chance of being delivered back into the hands of the very people about whom they are talking.

Mr. WEBSTER. As a matter of fact, I am sure that you are aware that the FBI has been the beneficiary of information by people who would talk to no other agency than the FBI because of our historic efforts to protect confidentiality.

We treat our informants differently. They are not co-opted informants. They are not throwaway informants. We work with them. Many of them become witnesses. Others do not become witnesses. But we do, both in our internal procedures and in our operation with them, have a very deep and historic commitment to the protection of that confidentiality. I am glad that you are concerned about the problem, and I will be more than happy to document our efforts to tighten our ship to be sure that that type of thing is either eliminated or kept to a minimum.

Mr. WEISS. Thank you for that.

Mr. Webster, about a year ago there was a hearing of this subcommittee at which time Project Onslaught was described. It was in operation at that time and was supposed to resolve the problem of the backlog. At that point we were told that the situation was in hand and that, if we would bear with it a little longer, it would be taken care of.

I expressed some questions and concern even then. To learn the process I had made an FOIA request in November 1977. I got the information in September 1978. This indicated to me that Project Onslaught perhaps was not all that it was touted to be.

However, I am curious as to why an operation which seemed to be so successful a year ago suddenly fell apart.

Mr. WEBSTER. I do not think it would be accurate to say that it had fallen apart. It is simply that we made great progress—that is documented in the GAO report—with the doubling of our resources in pulling people from the field. We did cut into the backlog.

We are getting about 60 requests a day. We disposed of about 18,000 or 19,000 requests last year. We are trying to increase and we have increased our efficiency. We are continuing. We do not feel we have gotten as good as we can get at this, but we are trying to improve as fast as we can.

However, we did not have the momentum to reach a 10-day response. I do not think it takes much imagination to realize that when you analyze the nature of the inquiries that we are getting today that they are more refined. There is more and more from fewer and fewer people coming in and requiring more and more information.

We did a study—and I can document or supplement the record for this—there were some 675,000 pages during a 1-month period at the end of last year and we wanted to see where they were coming from. Over 85 percent of it was coming from about 12 percent of the people requesting. Eighty-five percent of the work was coming from about 12 percent of the people making the requests.

It is a skilled business now. There is a reporter system, a commercial system that advises people on how to do this. That is fine.

However, it simply means that the curiosity seeker is going down in numbers and the crack shooters are coming in and we have to do this work. Most of our work is classified and has to be reviewed and evaluated for classification and then for privacy.

I do not think you can ever mass-produce this material.

Mr. WEISS. I think I probably have exceeded my 5 minutes. I will ask one further question on this round, Mr. Chairman, with your permission.

As for the informants, you indicated that you have a feeling that your sources of information from informants may be drying up.

Do you have any statistical information to back that up? Do you have any systematic way of getting reports back from your field offices indicating that whereas last year at this time you had x number of sources of information, now you have x minus 50 percent?

Mr. WEBSTER. Yes, we have that information. Ed Sharp, who heads our Organized Crime Section, testified up here last year and talked about 2,800 informants. Congressman Drinan referred to that number. I was more specific in Atlanta last year when I said we had about 1,000 informants in organized crime and about 1,800 in general crimes and 42 in the old domestic security cases which were the cause of most of this concern, I think.

This was 42 compared with several thousand in years past.

I did not mention at that time the number of informants in foreign counterintelligence which includes the investigation of the Communist Party. I made clear that I was not including those informants.

However, in the organized crime and general crimes and domestic security area—we do not even call it that anymore because they are all pure terrorism cases—there are only 12 or 16 of those organizations and 40 to 60 individuals involved and in that category there have been significant reductions. It is so significant in some respects that I would prefer not to make that as matter of open testimony, but I would be glad to supply the information to the committee.

Mr. WEISS. Would you? I appreciate your doing that.

I seem to recall having read that one of the concerns of your office has been so-called phony or false informants, and that some of the agents had, in fact, been listing informants who never existed.

Mr. WEBSTER. That is right.

Mr. WEISS. The elimination of those would also reduce the number that seemed to have been available at one time but no longer are.

Mr. WEBSTER. That is true. That was achieved before the figure of 2,800 that we were talking about was achieved.

There had been a lot of pressure from headquarters to develop informants. There was so much pressure and it was handled in such a way historically that many people were adding the bartender and

the taxicab driver and everyone who said "It looks like rain outside" as a potential informant.

They also had possible sources of various types. We applied a professional ax to that type of informant collection. What we have now are the classic concept of confidential informants. Our symbol informants regularly supply information on a continuing basis to us with respect to criminal activities of which they are aware.

We have prided ourselves on keeping the proper kind of documentation of the activities of our informants We do not want our special agents to have hip-pocket informants and not tell us about them. We make it very clear that that is a breach of discipline in our organization.

So, what we have is what we need.

I know the Secret Service and others have complained because they are not getting the information that they used to get. Whether they are getting, as Congressman Drinan says, as valuable information as they used to get—in other words, whether they are getting the same amount of information from reliable informants—is going to be very hard to document.

I would like to think that is the case, but it is clear to me that our informants are dropping in numbers. And it is clear to me from specific examples from the field, from my own experience in some 27 cities that I visited last year and visits with agents, that it is a real problem to them. We are having a major problem in the development of informants because of the fear of disclosure.

We will do everything we can internally to protect the confidentiality of informants. I ask that this committee consider what it can do to eliminate the concern of American citizens supplying information on a confidential basis and having it be disclosed.

Mr. WEISS. Thank you, and thank you, Mr. Chairman.

Mr. PREYER. Thank you, Mr. Weiss.

Let me ask a couple of questions for the record in an area which we have not touched on yet. I am talking about the records destruction policy.

I understand that the records destruction policy at FBI headquarters here in Washington has not gone forward pending an informal approval from the House and Senate Intelligence Committees; is that right?

Mr. WEBSTER. That is right.

Mr. PREYER. Do you have any projected date as to when that program might begin?

Mr. WEBSTER. The program could begin just as soon as the Archivist has been satisfied by the oversight committees to whom he reports that the program is satisfactory. We are prepared to proceed with it.

There are all kinds of reasons why I would like to see the destruction plan go forward, both from the standpoint of records management and from the standpoint of finally getting rid of these things that have caused so much grief with their indiscriminate disclosure in the public. There is the apparent inability to differentiate between current news and ancient history.

So, I would like to see them go. Much of it we keep trying to find a way to put aside and use our index on current criminal investigations, but it does present a management problem for us.

Historians, I suppose, like all the rest of us who tend to be string savers, do not want anything to go; but the Archivist is the Nation's historian. If he approves the plan, then it seems to me we ought to be allowed to go forward with it. He is waiting on some indication that his congressional oversight committees approve the plan.

Mr. PREYER. In connection with your records destruction program, I served on the Select Committee on Assassinations and have been interested in the files and records in the Kennedy assassination.

As I recall that, a hold was placed on the destruction of those files both in Washington and in the various field offices, like Miami, New Orleans, and Dallas.

Mr. WEBSTER. That is correct, Mr. Chairman.

Mr. PREYER. Is that the current status of those records? Is that hold in effect?

Mr. WEBSTER. That is correct. As a matter of fact, except for some very insignificate useless records from ancient days, we have not destroyed anything pending the action of the Archivist. It is my understanding that our destruction plan contemplates several hold orders in the event of any type of investigation which is going to be of broad historic or national interest or which is apt to provide a useful tie-in to a current investigation where we need the background information.

Mr. PREYER. I am glad to hear that inasmuch as your current records destruction policy involves or envisages destroying records over 5 years old. That is, those held in field offices. I wonder what would be the situation on the Kennedy records, for example, in the next 2 years?

Mr. WEBSTER. As far as I can determine, I anticipate that that committee will file a report that would require further study on the part of at least the FBI and maybe other investigative agencies. There would be no immediate action to destroy those records. They would be part of an ongoing evaluation.

Mr. PREYER. As far as you know none have been destroyed at this time?

Mr. WEBSTER. That is correct.

When I said no records have been destroyed, I think for the record I have to be clear that we are talking about records. I do understand that some files were destroyed in the Bureau which were not part of the record system but were part of the "do not file" file approach some years ago. These became the subject of an internal inquiry. I am not talking about those. I do not know enough about those.

They were not a part of the records. They were materials that were kept around. We do not have that sort of thing anymore. Everything has a file. It either goes in the file or goes in the wastebasket. We do not have "do not file" files anymore.

Mr. PREYER. That is a very healthy improvement, I must say.

Let me ask a few questions to clear up areas that we have gone into earlier.

You mentioned to Mr. Kindness that you were not making the cost argument to rebut the Freedom of Information Act statutory requirements. Yet, it does seem to me implicit in much of what we have been saying here about allocation of resources and priorities that we inevitably are making the cost argument.

How much money do you estimate it would take to reduce your 4- to 6-month backlog to comply with the present statutory time limit?

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Mr. WEBSTER. There are two aspects of that question, Mr. Chairman. One is what would it take to reduce our backlog, and then the next part of that would be what would it take not to develop a new backlog, given no increase in numbers of requests.

I am not sure that I am prepared to give you those figures. If I may, I will file a supplement for the record with our best estimates on both those questions.

Mr. PREYER. I wish you would.

Without objection, the information referred to will be inserted into the record.

Along the lines of Mr. Kindness' questions and Mr. Drinan's questions, you have told us that the percentage of the FBI budget spent on handling FOIA requests was about 1 percent. Can you also give us what percentage is spent on other public information activities? Mr. Drinan mentioned public tours and the facilities and so forth.

Mr. WEBSTER. Yes, we will be glad to do that.

For 1978, the percent of our total budget for FOIA was 1.34 percent. For uniform crime reporting, it was 0.23 percent. That is a law enforcement function. I do not know that it is appropriate to compare it with the Freedom of Information, but anyway it is 1.34 percent compared to 0.23 percent.

Our Public Affairs Office is 0.33 percent for 1978 compared with 1.34 percent for FOIA.

Our correspondence and tours is 0.39 percent. Again, I do not know that is a proper comparison because correspondence includes responding to public inquiries. I do not know what part of that is broken out as being the tour and what part is correspondence. We do not initiate the correspondence. That is in response to public inquiries.

So, I now jump to 1979. The FOIA figure drops to 1.05 percent. The uniform crime reporting remains the same at 0.23 percent. Public Affairs is 0.35 percent. Correspondence and tours drops to 0.36 percent.

Our budget request for 1980 shows a slight increase in FOIA to 1.08 percent, and a slight increase for uniform crime reporting from 0.23 percent to 0.24 percent. There is a slight increase in public affairs from 0.35 percent to 0.36 percent. Correspondence and tours goes from 0.36 percent to 0.37 percent of our total budget.

Mr. PREYER. Thank you very much. If you could give us your best estimate on what it would cost to bring this backlog up to date, we would appreciate it.

In connection with the budget, you mentioned some 309, I think it was, positions in your freedom of information situation. How many of those are clerical and how many are agents?

Mr. WEBSTER. About 30 of those are agents.

Mr. PREYER. I think the General Accounting Office, when they made the report to us last April, recommended increased use of paralegals and trained clerks in place of the FBI agents. Have you found that this is feasible and workable?

Mr. WEBSTER. First, Mr. Chairman, let me say that it is 35 rather than 30 agents in that group. Let me correct myself.

We are running pilot tests now for special analysts. We are training them. I do not know that that will result in a significant monetary savings because of the skills involved. I am more concerned about freeing special agents to do investigative work than I am the actual cost differential here.

However, we are trying it. I do not want them to get too far away from legal background and experience because it is a narrow path between the criminal penalties for failing to disclose and the criminal penalties for disclosing too much.

Mr. PREYER. I hope that that would be a way to free up more agents.

Shifting to another area now, you mentioned very early in your testimony the results of an FBI task force which you indicate was able to identify, in some cases, the identity of informants through a review of FOIA documents. I think you said you had a war game. That is a very disturbing thought. Intelligent people might be able to identify the process or establish a process by which informants could be identified.

Could you give us any additional details on that study?

Mr. WEBSTER. I can, but what I prefer to offer instead is to perhaps invite members of the committee or their staffs to come down to the Bureau and have a demonstration, a visual demonstration, which would take about 50 minutes or an hour with those particular documents. We can show how it was done.

I have to say this. That formed the basis for our taking a tougher view on what we had to disclose. The Justice Department approved a tightening up of what we had to disclose in terms of informant information.

We have not run similar games since we put those changes into effect just a short while ago. We will, of course, analyze whether those positions which we believe are legally sustainable have gotten us over the major difficulties with analysis. But I still have concern that the problem is still there. It does, however, relate to procedures which have been modified to correct the problem as a result. So, we would like you to see both, if the committee is interested in doing that.

Mr. PREYER. Thank you. I appreciate that. I think that is an excellent thought. This is an important area. The committee would like to take advantage of a full review of that study. That would be very helpful. We will be in touch with you on that.

Let me ask you about one other area. There have been a number of questions. Mr. Erlenborn asked you a question about the judge, for example, who refused to give any information on a background check. Don't you think the judge was rather overrating on that? Are not our laws pretty clear that there is no real problem in that situation?

Mr. WEBSTER. I am not so certain of that, Mr. Chairman. If the judge or whoever is supplying the information states that a certain time this fellow did or did not do something, and describes an incident or a course of conduct, and if the law does not clearly exclude that material from recovery by the requester—and I am not convinced that it does—then the person giving the information can say "If I am the only person who knew that or if I am the only one of two or three who knew that," then it would not take too much imagination from the point of view of the requester to figure out who it was that supplied that information.

Mr. PREYER. Anything we can do by way of tightening that up I certainly think we should do. I suppose we can hardly draft a law in which you could think of some extreme case in which someone's hand would be tipped off. It is certainly the strong intent of the law that sort of information, as Mr. Erlenborn pointed out, would be entirely confidential.

Do you instruct or provide your special agents with any sort of information regarding the Freedom of Information Act so that they can dispel some of the misunderstandings about it? You cited the example of the southwestern city key intelligence people who refused to let FBI agents meet them because they were afraid of the situation. There should not be—we ought to dispel that sort of thing and those sorts of rumors; right?

Mr. WEBSTER. I agree with you. I am not sure that we are doing all we can in this direction. I will go back and have another look at it.

When I am out in the field. I try to impress on the people in the field that we are operating under a law that we must support and do the best we can so that no victim is killed as a result of disclosure under Freedom of Information Act. That is not a very comforting thing. It is not a very salable point, but we have told the agents the importance of developing the program and not going back to the old system of taxicab drivers and saloon keepers. We have told them the importance of rebuilding our badly debilitated informant system.

We are working with them to train them in techniques to do this.

As far as people like the Federal judges are concerned, I am not certain that we have given any specific instructions to the agents, but I will make sure that the areas of protection afforded by the act are made clear to the people such as the Federal judges and that they understand what kind of protections are available and given an opportunity to assert them.

I think they have a process where there is a waiver that they are asked to sign. but that is for full disclosure. It is the limited disclosure that they are most concerned about.

Mr. PREYER. I would like to ask that you provide for the record any memorandums or statements that the Bureau provides for special agents.

Mr. DRINAN. Director, I take it you are speaking on your own this morning and not for the Department of Justice because Deputy Attorney General Peter Flaherty said this a few months ago:

> We want to make it clear that we do not agree with those who suggest that we are being forced to release information which is damaging to the law enforcement process. By and large the present exemption is broad enough to enable us to protect that information which we must protect.

Is that still the position of the Department of Justice?

Mr. WEBSTER. I don't think so. I am speaking on my own.

Mr. DRINAN. Was your statement cleared by the Attorney General?

Mr. WEBSTER. Yes; it was.

I am speaking on my own. It was cleared. The statement that you are referring to by the then Deputy Attorney General Flaherty was not a few months ago. It was a few years ago. He was operating on a different base of facts. We know a great deal more about that than Mr. Flaherty knew at that time. We know more now than he knew then.

Mr. DRINAN. One of the things that you complain about is the slow process by which you people go to court in defense of excisions made. From past information I know that the rate of litigation is very high. Why are so many denials made and what is the rate of reversal in the courts?

Mr. WEBSTER. I am not sure about the rate of reversal in the courts——

Mr. DRINAN. Two years ago I asked that identical question and I got the identical answer. "We do not know the rate of reversals." How can we make any honest or fair assessment when I cannot find out a very key question? If you people are denying too much and if you are losing regularly in the courts, then that is obviously maladministration. All I can say is what I said 2 years ago—would you please furnish that information? It was not furnished then. Maybe you have it now.

Mr. WEBSTER. You interrupted me and that is your privilege. But, what I was about to say is that I don't know the precise answer in terms of plaintiff versus Department of Justice, and I don't know that it is possible for us to give it to you. I will certainly try.

There have been about 50 percent modification of appeals. I can show the number of appeals, I believe. The modification does not really tell us anything because a word or a comma is considered to be a modification, Congressman Drinan.

I have a period here from July 14, 1978, to February 15, 1979. That is roughly a 6-month period. Two hundred and ninety administrative appeal determinations were reviewed and categorized as follows: 43.4 percent were modified, 54.4 percent were affirmed.

That is 408 cases, appeal determinations. I think we could reasonably compare that with the 18,000 requests that we get per year. If it all came in a calendar period, then divide that by two. So you are talking roughly about 9,000 requests with 290 appeals, 43 percent of which were modified and 54 percent affirmed.

Mr. DRINAN. Is that a high rate of reversal? Is 43 percent a high rate? It seems high to me.

Mr. WEBSTER. It is only high if we know what they did. They are not reversed. They are modified. A comma, or a sentence, or a word, forms a modification.

I think you would have to study the cases and analyze them to see what kind of adjustments there were. It is modification. It is not a reversal. I cannot say without seeing those cases whether that is high or not. I will say this. Mr. Shea, who is in charge of the Appeal Section in the Department, says that the Bureau is as good or better than any other component of the Department of Justice and we have by far the biggest job to do here.

Mr. DRINAN. I thank you.

I have one last point. The 42 people who are informants in domestic security cases and that is down, as you said, from several thousand—have you noticed that the FOIA has inhibited any of these 42 from telling you things that you should know?

Mr. WEBSTER. Well, it is not 42 anymore. I prefer not to give that number in public. It is not 42 anymore. It is significantly less than that.

Just the fact that we have significantly fewer does not tell us specifically that the FOIA is responsible for that. We could have closed a domestic security investigation and lost informants in the process.

It is one of the factors. It is one of the important factors. It is also—I would have to say that it gets into the overall question of whether you want us to have adequate information coming from terrorist organizations.

We had the Mobil Oil Building in upstate New York bombed last night by a Puerto Rican terrorist organization. There was no advance information available to us.

I have never supported putting people in place to investigate first amendment organizations just to find out what they are saying or doing. I think my record is clear on that.

That makes it all the more important that when we have bona fide terrorist organizations working in this country, we have a few sources of information where we can legitimately use informants that we do nothing to hamper the flow of that information. I approach it more from that point of view than being able to say that it is attributable to the Freedom of Information Act versus three or four other different things.

Mr. DRINAN. Do you expect to ask for a supplemental appropriation so you can carry out your duties under the law and fulfill all requests under the FOIA?

Mr. WEBSTER. I have not been authorized to make that statement.

Mr. DRINAN. Thank you very much.

Mr. PREYER. Mr. Weiss?

Mr. WEISS. Thank you, Mr. Chairman.

Let me ask a question of the Chair, if I may. Would it be appropriate to submit questions to the Director in writing and ask for the response back to the subcommittee and to the Chair? I would like to submit some additional questions, and I'm sure that Mr. Kostmayer would like to do so as well, since he never made it back from the House floor.

Mr. PREYER. Yes. That would be appropriate. I was going to ask Mr. Webster if it would be appropriate if we would submit follow-up questions which he could answer in writing with more statistical-type answers.

Mr. WEBSTER. I would be glad to do that.

Mr. PREYER. Without objection, the information referred to will be inserted into the record.

Mr. WEISS. A little while ago you said that to the Bureau's knowledge no informant has been killed as a result of Freedom of Information Act disclosures. On page 6 of your testimony you stated that, to the agency's knowledge, no informant had suffered physical harm as a result of Freedom of Information or Privacy Act disclosures. Both of those statements are accurate; is that right?

Mr. WEBSTER. That is true.

Mr. WEISS. So, as of now, the danger that any informant may or may not be subjected to is purely speculative and hypothetical. This fear is not based on actual information that you or anyone else in the Bureau has?

Mr. WEBSTER. If you are talking about physical harm, then that is true.

Mr. WEISS. That is what I am talking about.

Mr. WEBSTER. I cannot add to what you have said, but I want to supplement that by saying that the drying up of information and the

willingness of people to supply information is what concerns us. This is quite aside from the numbers of people.

Mr. WEISS. Yes, let me follow up briefly on exactly that point. I think we have established our mutual concern for the safety and security of informants, be it because of Freedom of Information Act disclosures or because of abuses within the agency by any of its personnel.

Given the large amount of national publicity that the alleged abuses within the agency have received and compared to the lack, I think, of broad public information about the potential for freedom of information disclosures, would you not say that there is at least an equal likelihood that whatever drying up has taken place in the course of recent years has emanated from concern of disclosures by FBI personnel as much as from disclosures with regard to the Freedom of Information Act?

Mr. WEBSTER. I cannot agree with you there. I base most of my information on the reports from the field and the relationships between the informants and their operators. The information that they report back to me is 99 percent freedom of information and 1 percent the other.

Mr. WEISS. In the information that you have agreed to submit to us indicating this drying-up process, will you list, on a percentage or numerical basis, the instances in which you have been told of informants who have indicated to a field office that, because of the Freedom of Information Act provisions, they will not continue to inform?

Mr. WEBSTER. I will be glad to. I will have to poll the field for that information because in our previous polls we were trying to track the Freedom of Information Act is connection with the audit by the GAO.

Mr. WEISS. Yes. I wonder if, in the course of any kind of followup or survey that you take, you would also track the areas, locales, cities, and districts where there have been public allegations of misconduct and abuse related to the disclosure or sale of information on the part of FBI personnel.

Mr. WEBSTER. Yes. If I understand that question, I will be glad to do that. They are so minimal that there should not be any difficulty.

Mr. WEISS. I have information that I would be glad to supply to you, although I imagine you have seen it since your Office of Professional Responsibility has been given this information. There have been public allegations in six or seven major cities across the country and it seems to me that, in order to get an objective reading of the problem, not just for our benefit but for your own as well, you would want to know the impact of these broad allegations that it is not safe to give information to the FBI because there is somebody inside who may be in the pay of the mob.

Mr. WEBSTER. I would not want to let that statement go without my saying this. In my many visits to the field and in our in-depth discussions of this problem, that has never been indicated to me as being of any significance.

I think you have a right to know whatever we know about it. We will develop that for you.

There have been so few instances, given the number of special agents and the long years of the Bureau, that I cannot believe that that has

become at all a factor. I still believe that the FBI is the one institution in which informants have the greatest confidence.

Mr. WEISS. That may be so. All that I am interested in finding out is to what extent these disclosures and allegations have impacted on that record.

Let me ask you this. You referred in the course of your testimony to the fact that the problems in filling out and supplying information and providing for disclosures not originally intended usually come about because of human error in the agency itself.

Mr. WEBSTER. Not usually. That was another risk I said which occurred.

Mr. WEISS. All right.

What kind of training program do you have for the people who search out the requests and exercise the information which they think may be sensitive or which comes within the exemptions? Do you provide any kind of formalized training for those people?

Mr. WEBSTER. Yes. I will supplement that in detail for the record.

Mr. WEISS. I would appreciate that.

Mr. PREYER. Without objection, the information referred to will be inserted into the record.

Mr. WEISS. Finally, Mr. Chairman, let me say this. The Director has mentioned on a number of occasions in his testimony and in speeches elsewhere, his thought that if we had a moratorium—whether it be 10 years or 5 years—we might reduce the workload.

My understanding is that there have been two things suggested. Correct me if I am wrong. One is a 10-year moratorium insuring that information would not be available until 10 years had passed. The second suggestion is that information would be destroyed at the end of 5 years.

If, in fact, that is accurate, do you not find yourself in the impossible "catch-22" position that by the time it is possible to make that application, at the end of the 10-year moratorium, a requester would be given the answer that the information was destroyed 5 years ago?

Mr. WEBSTER. Yes. I can see the argument for a "catch-22." The 5-year figure relates to field records. I would say that there is not much doubt that almost every material record that is in the field is retained at headquarters. There are some routing-slip-type materials that you find in the field. Maybe about a third more paper in the field on a particular case than we have at headquarters but it is not of consequence. It is the nonmaterial part of the record that does not come to Washington.

Mr. WEISS. The chairman would recollect this better than I, but I seem to recall that during the course of the recent assassination investigation there was some information which should have been at the central office that, in fact, had been misfiled in some field office. Is that right?

Mr. WEBSTER. It was filed properly but it was not filed in enough places. It was filed in the informant's file but it was not put into the King murder file where it should have been. I do not think that would have been affected one way or another by the subjects that we are talking about.

I do not mean to create any kind of "catch-22" situation. You have to decide how much time historians or others have in which to plow

through investigative files. There has to be that gap opportunity, obviously. We don't want to destroy them before someone has a chance to look at them. All I want to do is put a reasonable amount of age on them.

Mr. WEISS. Would you think that, perhaps as an alternative to the broad extension of time or the moratorium to reduce the workload, some effort to create categories based on the numbers of pages requested might be a constructive approach? Let's say you had an application which would require the review of some 3,000 pages. You could have triple the amount of time that you would normally have to be able to go through that.

Mr. WEBSTER. We are talking about two things at the same time. That would certainly help the workload aspect, that is, the impact on the workload.

The moratorium was not intended to help the workload. The moratorium was intended to give greater assurance of confidentiality to informants. That was the only purpose for advancing that suggestion.

But the suggestion you have would certainly offer some potential for helping us on the workload, at least to get the little questions from the John Q. Citizen who wanted a quick answer and keep the pipes flowing in his direction. Then you would have to tell the requester with the big project to wait awhile.

Mr. WEISS. Thank you very much.

Mr. PREYER. Thank you very much, Mr. Weiss.

As for your suggestion of the moratorium, I am not quite clear whether that is your suggestion or the Department suggestion.

Mr. WEBSTER. Mr. Chairman, that is entirely my suggestion advanced at an early date. I still think it has merit for consideration. There may be alternatives to it like tightening the clauses that permit us to withhold information in which an informant is involved, for example. These would be equally effective, maybe, for the goal that I seek.

It is purely my suggestion. As you can tell, it is not formalized. I said that 10 years was not a magic number. There was no intention to keep all information forever from the public domain.

Mr. PREYER. Just so I understand it, you are not proposing other alternatives?

Mr. WEBSTER. If there is a better idea around, I am looking for it. The joint task force is exploring this.

Mr. PREYER. I think the testimony today has indicated one point and that is that there is some misunderstanding in the field concerning just what the requirements of the Freedom of Information Act and the Privacy Act are. I was pleased at your willingness to make efforts to clarify what the acts actually say and do. I will look forward to the next few months to see what kind of progress we have been able to make on that.

If we can get the acts clear in everyone's minds regarding what is really required and what is not required, then it seems to me we can get at the real problems underneath and solve them better without being distracted by rumors of this, that, and the other, or misinterpretations of the acts.

This is an important area. I appreciate your calling it to our attention. We certainly will be continuing to look into these questions. I hope that we might be able to ask you to visit with us again and testify, let's say, during the latter part of this year.

Mr. WEBSTER. I would be delighted to.

Mr. PREYER. We will have a few more concrete thoughts about it at that time.

Mr. WEBSTER. Thank you.

Mr. PREYER. We appreciate your being here and your straightforward testimony. It has been very helpful.

The subcommittee stands adjourned.

[Whereupon, at 12:30 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIXES

APPENDIX 1.—LETTER FROM HONORABLE PETER H. KOSTMAYER TO CHAIRMAN RICHARDSON PREYER, SUBCOMMITTEE ON GOVERNMENT INFORMATION AND INDIVIDUAL RIGHTS DATED MARCH 26, 1979

PETER H. KOSTMAYER
8TH DISTRICT, PENNSYLVANIA

Congress of the United States
House of Representatives
Washington, D.C. 20515

March 26, 1979

Dear Mr. Chairman:

As you may recall, I was unable to attend the hearing of the Subcommittee on February 28, 1979 at which FBI Director William Webster testified on FBI compliance with the Freedom of Information Act because of a simultaneous meeting of the Democratic Caucus. I had spoken to you of my interest in expanding the scope of the February 28th hearing by raising a peripheral issue -- the Bureau's policy regarding oversight of the domestic intelligence program and the use of informers. I wrote Director Webster on February 27th concerning my interest in raising this issue at the hearing.

It's my understanding that unanimous consent was given at the hearing for members to submit additional questions to Director Webster, and I would like to avail myself of the opportunity of doing so. I request that this letter to you and the accompanying documents be made a part of the official record for the February 28th hearing, as well as the responses of Director Webster to my questions which follow.

In June 1974 the Chairman of the House Judiciary Committee requested the General Accounting Office to review operations of the FBI on a continuous basis. This was requested so that the GAO could assist the Judiciary Committee in its legislative oversight responsibilities over the Department of Justice and provide the Committee with information on the efficiency, effectiveness, and economy of FBI operations. The chairmen of the Judiciary Committee specifically requested that the GAO first review the FBI's domestic intelligence operations.

The GAO review of domestic intelligence operations was undertaken in response to allegations of abuse by the FBI in its conduct of domestic intelligence operations. "Domestic intelligence" applies generally to the FBI's efforts to detect and gather information on individuals within the United States who allegedly attempt to overthrow the government or deprive others of their civil liberties or rights. At the time the GAO review was ordered, it was contended by many that the FBI was indiscriminate in initiating and overzealous in carrying out domestic intelligence operations. Since domestic intelligence investigative techniques include the use of informants, mail covers and electronic surveillance there are obvious civil liberty issues at stake.

GAO began its review by examining recently active domestic intelligence cases totaling 898 in number. These were investigated in calendar year 1974 at 10 of the 59 FBI field offices. The GAO reported back to the Congress in a report dated February 24, 1976 entitled, "FBI Domestic Intelligence Operations -- Their Purpose and Scope: Issues That Need to be Resolved."

One thorny problem for the GAO was its ability to verify the accuracy and completeness of information provided by the FBI without compromising on-going investigations and sensitive information (such as the names of informants) in the files. The GAO stated in its report that it was perfectly willing to allow certain information in those files such as the names of informants to be protected. Therefore, in lieu of reviewing raw investigative files, the GAO agreed with the FBI director to let FBI special agents prepare summaries of the information in each case selected, provided the GAO could randomly verify the accuracy and completeness of the summaries against information in the corresponding raw files. The GAO devised a format which included the process of randomly selecting certain documents from the FBI case files and comparing them to the summaries provided by the agents through interviews. The GAO submitted this proposal for verifying the summaries to the FBI on February 4, 1975. However, the attorney general and the FBI director rejected the GAO's verification proposal because it would allow the GAO to see raw investigative files.

The chairman of the House Judiciary Committee in a protracted exchange of correspondence with the attorney general supported the position of the GAO. The chairman cited voluminous legislative authority granting the GAO the right to "assist committees to develop statements of legislative objectives and goals and methods to assess and report actual program performance in relation to such objectives and goals." (Section 1154 (b), Title 31 U.S. Code).

The GAO and the Judiciary Committee also cited Title 31, U.S.C. 53, Section 312 of the Budget and Accounting Act, 1921, which provides that the comptroller general investigate all matters relating to the receipt, disbursement, and application of public funds and that he or she make investigations and reports as ordered by either House of Congress or by congressional appropriation committees. Furthermore, 31 U.S.C. 54, Section 313 of the 1921 Act says that the comptroller general shall have access to and the right to examine all the books, documents, papers, and records of all departments and agencies and that they shall furnish to him the information he requires regarding the powers, duties, activities, organization, financial transaction, and methods of business of their respective offices.

The chairman of the Judiciary Committee stated that the GAO had both the need for and the authority to independently verify information in FBI files. Chairman Rodino also noted that the essence of legislative oversight is lost if the agency being investigated makes its own investigation to the exclusion of an independent body.

Nevertheless, the FBI and the Justice Department have continually resisted the GAO's authority and cited: (1) the government's need to avoid disclosure to prospective defendants of information in their cases; (2) the need to protect its informants; (3) the need to prevent the release of unevaluated and unverified data; (4) the belief that the GAO's charter does not include the power to allow GAO personnel to examine investigative files.

In further correspondence the GAO and the Judiciary Committee objected to the Department of Justice's position on this matter but the issue was left unresolved at the time the GAO published their report in February 1976. The GAO report has a whole section on the problem of verification and the dispute between the FBI and the GAO on the issue.

The FBI is justifiably sensitive about releasing to any outside source information about its informant network. The FBI claims that its informant network is an essential part of its domestic intelligence operation. The Bureau will not provide information of the number and payments to informants used by field offices and the number of payments to informants targeted against each organization or group. The GAO in its report stated that because of this it could not determine and evaluate the efficiency of the FBI informant coverage in terms of number and quality, the contribution informants make toward investigative accomplishments, and the FBI's efficiency and effectiveness in developing, managing, paying, and targeting informants.

The issue of informants is particularly important in domestic intelligence oversight since informants are the most common source of information resulting in initiating investigations of individuals. GAO found that informants were the initiating force in launching 48 percent of the 898 cases they examined.

The battle between the GAO and the Congress and the FBI and Justice Department on the issue of access to files persists to this day. I am attaching a letter from the comptroller general to the Chairman of the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, Don Edwards, stating that the FBI had refused the most recent methodology proposal of the GAO for reviewing the FBI's informant program.

Since the Government Operations Committee will be taking up legislation later this year on granting the GAO subpoena power to conduct its investigations, and since I understand that you will be testifying before Chairman Brooks on behalf of our Subcommittee on this issue, I believe it would be useful to explore this issue with Director Webster at this time. I suggest the following questions:

1. Why will the FBI not permit the GAO to confirm its audit of the domestic intelligence program by randomingly verifying data in investigative files with the proviso -- as outlined in the GAO methodology -- that informants' identities could be withheld?

2. What is the basis for the FBI's contention in their October 3, 1978 letter to Comptroller General Elmer B. Staats that such an audit by the General Accounting Office would heighten concern among informants about the FBI's ability to maintain their confidentiality?

3. What legal authority does the FBI cite to bar GAO access to investigative records?

4. What alternative means are there for the Congress to effectively oversee the conduct of the FBI in its domestic intelligence operations?

5. Does the director see any other way to guarantee public confidence in the activities of the FBI after the recent years' adverse publicity of allegedly illegal FBI activities than through oversight by Congress and the GAO?

6. Is the FBI still negotiating with the GAO over an acceptable methodology or are the parties at an "impasse?"

7. There is currently a bill before the Government Operations Committee to give GAO power to subpoena records from government agencies. Under GAO's existing access authority, would GAO in the FBI's opinion be able to subpoena records from the FBI if explicit subpoena power were provided?

8. Does the director object to giving GAO subpoena authority for FBI records?

9. Does the director agree with the GAO contention that without access to raw investigative files it cannot conduct a meaningful review of some FBI operations, including informant operations?

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Finally, Mr. Chairman, I might add that I believe there has been great improvement in the FBI's operations and image of late, as well as great improvement in the FBI's conduct of its domestic security and terrorism investigation. I note that in last year's House Judiciary report on the authorization for the Department of Justice (Report 95-1148, Parts 1 and 2) it was noted that the number of individuals and organizations under investigation in the domestic security and terrorism program had been reduced from a total of 626 in fiscal year 1976 to the then current total of 73. During the same period the number of informants had been reduced from 645 to 42 and investigative matters from 27,402 to 8,306. The domestic intelligence program certainly seems to have been brought under control.

Nevertheless, I do believe that the Congress should have the right through its investigative arm, the GAO, to audit the raw files for verification, so long as precautions are made to protect informants' identities. The FBI has authorized expenditures of $1.2 million in the last year for the remaining 42 informants. This is nearly $30,000 per informant and certainly this seems worth auditing.

Regardless of the financial aspects of the program, however, I think a basic issue of legislative authority is at stake in this matter. It is the elected legislature's right -- within reasonable limits -- to oversee the functions of the executive. The FBI should protect its informants, but Congress has the obligation to conduct effective oversight. Certainly, there must be a way to achieve this without compromising sensitive information. I would hope, therefore, that the FBI and the GAO would continue to seek a compromise to develop a system for independent verification through access to files. If such a system cannot be negotiated, however, I would reluctantly recommend that the Government Operations Committee insure such independent verification through appropriate legislation.

Sincerely,

Hon. Richardson Preyer
Chairman
Committee on Government Operations
Subcommittee on Government Information
and Individual Rights
B349 Rayburn HOB
Washington, D.C. 20515

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

NOV 20 1978

The Honorable Don Edwards
Chairman, Subcommittee on Civil
and Constitutional Rights
Committee on the Judiciary
House of Representatives

Dear Mr. Chairman:

In your letter of May 17, 1978, you asked the General Accounting Office to analyze the use of informants by the Federal criminal justice establishment. In accordance with your request and subsequent discussions with your office, we developed a methodology (see enclosure I) for reviewing the Federal Bureau of Investigation's informant program.

Our methodology was provided to the Bureau in June 1978. Since then we have been trying to work out an arrangement with the FBI which would enable us to perform a meaningful review. Unfortunately we have reached an impasse and on October 3, 1978, (see enclosure II) the FBI Director informed us that the FBI could not allow us to review its informant program. The Director said he could not allow any review that would lend the impression of any type of access to the information in informant files. The Director took the position that the Bureau must protect the confidentiality of informants' identities and files to maintain credibility with those persons whose assistance is vital to the FBI's investigative mission. While our review methodology did not call for access to informants' identities and files, it did, of necessity, call for access to certain information in those files; thus, the basis for the FBI's rejection.

The Director did express a desire to be cooperative and a willingness to continue discussions to arrive at a mutually acceptable position. Accordingly, we continued discussions but it became apparent that the FBI would not agree to a GAO review of any kind. Instead, the FBI would prefer to conduct its own study of the informant program. Bureau officials told us that if a study is conducted, its results would most likely be made available to us for review.

We regret our inability to be more responsive. As can be seen we encountered more than our usual problems of access. If you should find the prospect of an internal FBI study acceptable, a direct expression of your interest would be instrumental in getting a study underway.

Sincerely yours,

(SIGNED) ELMER B. STAATS

Comptroller General
of the United States

Enclosures - 2

ENCLOSURE I

OBJECTIVES AND METHODOLOGY FOR GAO REVIEW OF FBI INFORMANT PROGRAM

(Request of House Subcommittee On Civil and Constitutional Rights)

Objectives:

1. To determine how informants are developed.

--GAO will inquire into the background and characteristics of informants, how they are identified and selected, what information or services are expected of them, their motivations (e.g. money, egotism, fear), how they were determined to be reliable, how they could provide information and services that were not available through regular enforcement techniques; what assessments are made of the potential benefits and risks.

2. To determine informant activities and controls exercised.

--GAO will inquire into what informants do and how they do it. This will basically cover the type of information gathered and the informants' sources and means of securing information. Regarding controls, GAO will inquire into the specific instructions provided to informants, frequency of contacts, efforts made to insure

ENCLOSURE I

conduct conforms to legal and administrative requirements, and notifications of violations to appropriate authorities.

3. To determine what evaluations are made of the usefulness of informants' information and services.

--GAO will inquire into such things as who evaluates informant activities, the type and frequency of evaluations, conclusions drawn on the value of information or services, and other results of evaluations. GAO will also review studies conducted by the Office of Inspections and Office of Planning and Evaluation.

4. To test the fiscal controls over the transfer and custody of funds and the payments made to informants.

--GAO will examine the adherence to established payment policies and procedures used to equate value of information received with the payment amount. GAO will also review the work already performed by the Department's Office of Management and Finance in an attempt to limit the scope of the GAO inquiry.

ENCLOSURE I

5. To determine informants' accomplishments.

--GAO will inquire into the uses made of informants' information or services and verify specific accomplishments such as arrests and merchandise recovered.

METHODOLOGY

To fully evaluate FBI's Informant Program, GAO would need full and complete access to FBI informant and investigative files. Recognizing the sensitivity of the informant area and the existing May 21, 1976, agreement between Comptroll. General Staats and former FBI Director Kelley, GAO proposes the following review methodology.

Excluding foreign counterintelligence, GAO will select a random sample of active informants and informants terminated within the last year (size, strata, and field offices to be determined). For comparison purposes, GAO will also inquire into the scope and magnitude of undercover operations. It is not anticipated that GAO will require access to informants' names.

Short of full and complete access, GAO will base much of its evaluation on specific documents provided by the FBI and on interviews with special agents and their supervisors. Documents to be provided include quarterly and annual progress and evaluation reports on informants sampled, payment records, and related serials from investigative files. Also, GAO will

ENCLOSURE I

be provided excised copies of serials in informant files when quarterly and annual progress reports do not contain information necessary to satisfy the previous listed review objectives and for verification purposes. Excisions will generally be limited to names and any other specific data related to protecting the identities of the sources of information. GAO will be permitted to discuss the general nature of any excisions.

ENCLOSURE 11
TO THE DIRECTOR

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

October 3, 1978

Honorable Elmer B. Staats
Comptroller General of the
United States
441 G Street, N. W.
Washington, D. C. 20548

Dear Mr. Staats:

The FBI has thoroughly discussed with your representatives the proposed General Accounting Office review of the FBI informant program on behalf of the United States House of Representatives Subcommittee on Civil and Constitutional Rights. My considered opinion is that the FBI cannot allow any informant review or audit which would lend the impression of any type of access to the information in informant files.

The success we have enjoyed in the operation of informants has been based primarily on the ability to maintain the confidentiality of informants' identities and files. Informants and other persons have expressed strong concern regarding the FBI's ability to maintain their confidentiality. The publicity surrounding certain civil suits and the Freedom of Information Act have contributed to their concern which would undoubtedly be heightened by knowledge of further proliferation of this sensitive data by a General Accounting Office review. The FBI must protect this confidential relationship to maintain credibility with those persons whose assistance is vital to our investigative mission and this position is consistent with that taken in pending civil litigation.

ENCLOSURE 11

ENCLOSURE 11

Mr. Elmer B. Staats

It is my earnest desire to be as cooperative and forthcoming as possible in assisting you in carring out your responsibilities. In this regard, we have had discussions with Philip B. Heymann, Assistant Attorney General of the Criminal Division in the Department of Justice, and we are continuing to explore possibilities short of full disclosure. Please let me assure you of our willingness to continue discussions with your representative in an effort to arrive at a mutually acceptable position.

Sincerely yours,

William H. Webster

William H. Webster
Director

Appendix 2.—Supplemental Material Submitted to the Record by Director William H. Webster, Federal Bureau of Investigation

SUPPLEMENTS TO THE RECORD OF
DIRECTOR WILLIAM H. WEBSTER'S TESTIMONY
BEFORE THE HOUSE SUBCOMMITTEE ON
GOVERNMENT INFORMATION AND INDIVIDUAL
RIGHTS OF HOUSE COMMITTEE ON GOVERNMENT OPERATIONS
February 28, 1979

The following material is submitted in response to Director Webster's offer to supplement his testimony with additional information.

(56)

Question: What is the portion of resources committed to Freedom of Information and Privacy Acts (FOIPA) matters as compared to all of FBI Headquarters resources?

Answer: The great majority of our FOIPA processing and disclosure is performed at FBI Headquarters. The FOIPA Branch is staffed with 34 Special Agent supervisors and 275 support employees. All of the Special Agents are lawyers. This commitment represents one-fourth of our entire Special Agent attorney strength in FBI Headquarters. There are ten more Special Agent attorneys in our Legal Counsel Division who are assigned FOIPA litigation matters.

The nonagent employees entrusted with the disclosure analysis of our files are some of the Bureau's most competent and experienced nonagent employees. Many were reassigned from other Headquarters functions to the FOIPA Branch on the basis of their analytical abilities and other talents. Over one-third of the Bureau's GS-11 nonagent Headquarters employees and nearly 15 percent of our GS-9 Headquarters employees are assigned to the FOIPA Branch.

Financially, our 8.7 million dollar compliance cost for FY 1979 is over four percent of our estimated two hundred million dollar FY 1979 Headquarters expenditures.

The FOIPA Branch has more employees than 51 of the 59 FBI field offices.

Question: What is the cost of responding to Freedom of Information-Privacy Acts (FOIPA) litigation in comparison with other FOIPA costs?

Answer: In calendar year (CY) 1979, we spent $8,078,865 on our FOIPA operational and disclosure program. Our FOIPA litigation costs for the same period were $546,516. Included in our FOIPA operational and disclosure costs were $442,000 in payments to the Department of Justice for FOIPA appeals and related legal services.

Based on data collected during the third and fourth quarters of FY 1979, we estimate that $568,475 represents that portion of research analyst salaries spent strictly on litigation related matters.

Question: What are the number of law suits filed by requesters who are "impatient" with the FBI?

Answer: Although the Freedom of Information Act does not require a plaintiff to state a reason for filing suit, those who allege lack of "due diligence" on the part of the FBI may be considered as being impatient with the FBI's ability to respond to a request within the statutory period. We reviewed 115 pending and 123 closed lawsuits, all selected at random. Thirty-four percent of the pending cases and twenty-four percent of the closed cases were litigated primarily on the basis of "due diligence."

Question: Explain how requesters can and do work together and pool information to identify sources.

Answer: Groups of requesters seek the identity of Government sources by collecting and carefully comparing the information released to them by the FBI against information and records within their own knowledge and control. In addition, it can be anticipated that in many instances prison inmates, who make about 12 to 16 percent of our Freedom of Information Act requests, are doing so for the purpose of identifying informants. We know that in one instance an organized crime group made a concerted effort to identify sources through the Freedom of Information Act. It must also be recognized that hostile foreign governments, terrorist and organized crime groups not only have the motive to subject our releases to detailed analysis, but also have the resources to finance such an examination by knowledgeable and skilled analysts.

One particular group publishes advertisements seeking individuals willing to create a "Peoples' History" by making the group a repository for a copy of their individual Freedom of Information Act releases. The group advises its members to "...request the informer files pertaining to the area of your request" and follows by advising which of our classification numbers refer to informant files.

Answer (continued)

Groups seeking the identity of Government sources examine all available released FBI documents, comparing and charting the reported activities, times, places and personalities. Common items found in several files are carefully noted and compared to other information in the group's possession, such as organizational minutes or membership records. Documents showing FBI investigative interest at a specific time and place may then be tied to other facts within the group's knowledge and reveal considerably more than intended. Sometimes the assertion of the confidential s urce exemption itself, particularly at critical junctures in an investigation, or with regard to critical activities or locations where those activities occurred, confirms for the requester the presence of informant data where not readily apparent before. While this may not actually pinpoint the source's identity, it does sharpen the requester's focus to an intolerably close degree.

The FBI analyst may unknowingly assist the hostile analyst in responding to the requester. Seldom can an FBI employee learn the extent of a requester's knowledge of dates, places and events. The person most knowledgeable about what particular information may lead

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Answer (continued)
to a source's identity is, unfortunately for us, oftentimes the requester who is the subject of investigation. What appears to our analysts to be innocuous or harmless information may provide the group a missing piece of the puzzle. When the records pertain to investigations of organizations and the members have the opportunity to pool and compare the information furnished to them, the danger is magnified.

Question: Would you provide an update of FBI investigation and findings of "corrupt" personnel involved in the illegal disclosure of either informant identity or "documental information" across the country, and the administrative and judicial results of the investigations? In addition, would you provide documentation of the efforts of the FBI to "tighten the ship" to be sure incidents such as these either are eliminated or kept to a minimum?

Answer: (1) Former Special Agent--Now Retired

This Special Agent was determined to be a close associate of an individual who had suspected organized crime ties and was alleged to have been taking bribes. His name was overheard on a Federal Title III authorized wiretap in conversations between subjects of a Racketeer Influenced and/or Corrupt Organization (RICO) investigation. Intensive investigation conducted by the FBI Inspection Staff failed to substantiate the allegation that he was taking bribes from a high-level Detroit hoodlum.

Action Taken: The Special Agent was censured, placed on probation, and transferred for insubordination, lack of candor during interviews by FBI Inspectors and furnishing misleading information during the administrative inquiry. He subsequently retired.

Answer (continued)

(2) Former Clerk

This employee furnished advance information to a cousin, a bookmaker, about a gambling raid. In addition, she made indices searches on individuals as requested by her husband, as well as obtaining Department of Motor Vehicle registration information on selected individuals. She extracted information from FBI records and furnished this information to her husband. She denied in a sworn statement receiving any money for information furnished from FBI sources.

Action Taken: The employee was dismissed. A departmental attorney declined prosecution, noting that she was several months pregnant at the time of her dismissal.

(3) Former Clerk

This employee admitted furnishing Title III wiretap information, a copy of an organized crime report, an itemized list of the description of the entire Cleveland Division automobile fleet, and at least two lists containing the identities of criminal, organized crime, and intelligence asset informants possibly totaling 56 names, to organized crime figures. She received cash in the amount of approximately $16,300.

Answer (continued)

Action Taken: She was immediately terminated on March 9, 1978, taken into protective custody on March 22, 1978, and pled guilty to a two-count indictment charging both her and her husband with violation of Title 18, USC, Section 201. Both were convicted and sentenced to 2½ years on each count (total of 5 years) in custody of the Attorney General.

(4) Special Agent (Resigned)
Brooklyn-Queens Metropolitan Resident Agency
New York Office

This Special Agent was alleged to have accepted a $10,000 bribe from a New York organized crime figure in exchange for assistance in getting a gambling case dismissed against this person. An exhaustive internal inquiry failed to substantiate this allegation in 1973. An allegation surfaced during the inquiry that the agent had furnished the identity of one and possibly more informants of the New York Office to organized crime figures. A 1978 grand jury proceeding, directed by the Attorney-in-Charge of the Brooklyn Strike Force, Eastern District of New York, surfaced his involvement with unaccounted for monies which he claimed were loans from a relative. The relative later denied these "loans."

Answer (continued)

Action Taken: He voluntarily resigned, and subsequently pled guilty to one count of a six-count indictment charging Obstruction of Justice. He was sentenced to one year and one day (a felony) and began serving his sentence at the U. S. Prison Camp, Maxwell Air Force Base, Alabama, February 7, 1979.

(5) Gangland Murders

In March 1978, the FBI conducted an inquiry into allegations that FBI personnel made unauthorized disclosure of information to the news media, particularly to Time Magazine, in connection with an ongoing investigation involving the killing of a number of individuals connected with organized crime. Key FBI personnel were interviewed in Washington, D. C., San Francisco, Los Angeles, and San Diego in an effort to resolve these allegations. The investigation revealed that the information disclosed was known to a number of agencies and individuals and the news media could have obtained it from a number of sources. FBI personnel who were interviewed furnished signed sworn statements denying any unauthorized disclosure of information to the news media.

Answer (continued)

Action Taken: The investigative results were furnished the Office of Professional Responsibility, Department of Justice. No administrative action was taken against any FBI personnel as none was warranted.

The FBI has taken action to see that incidents such as these are either eliminated or kept to a minimum. The Office of Inspections reviews the security of informant files in each division during annual inspections, at which time employees are reminded of the confidential nature of FBI work. Any allegations of this nature brought to the attention of the Agent in Charge and other divisional heads are immediately referred to the Office of Professional Responsibility and investigation instituted for a prompt resolution. Where warranted, cases are referred to the Department of Justice for criminal prosecution. Informant data and records are treated on a strict need-to-know basis and careful internal controls are maintained to secure confidentiality of the informant's identity and information.

In addition, on October 19, 1979, all field offices were instructed to modify their file jackets for informant files to be readily recognizable and not confused with other investigative and personnel files. Special treatment is to be

Answer (continued)
afforded information transmitted to and from field offices regarding informants and their identities. Finally, access to confidential file rooms is to be recorded on a "sign in/sign out" basis.

These changes in procedure and equipment were made to assist in controlling the flow of informant data and limiting access to its storage.

Question: Would you supplement or update the study taken last year wherein 85 percent of 675,000 pages of material were processed for 12 percent of the requesters?

Answer: An "update" study was done based on newly assigned cases originating in January and continuing through August, 1979. This study was done by sampling 2,199 requests reflecting the actual page count to be processed.

Size of Request	Number of Requests	Percent of Requesters	Total Pages Count	Percent of Pages Processed	Average Pages Per Request
0-100	1,587	72	49,532	10	31
101-250	391	18	67,278	13	172
251-500	119	5	47,077	9	396
501-3,000	91	4	100,429	20	1,104
3,000+	11	1	240,008	48	21,819
	2,199	100	504,234	100	

This survey indicates that of the 2,199 requesters surveyed, 102 sought quantities of materials in excess of 500 pages. This means that 68 percent of the pages processed by our analysts was done for only five percent of our requesters.

Question: What are the reasons for the reduction in the number of informants in terrorism cases?

Answer: The number of informants utilized in domestic security investigations has dropped significantly since the implementation of the Attorney General's Guidelines. Under previous investigative policy the FBI investigated many individuals and organizations within the domestic security area that would not qualify under current guidelines, nor would they be characterized as terrorists. A concurrent reduction in the number of informants utilized occurred.

Today's investigations are limited to individual groups whose terrorist activities are clearly substantiated. Informant penetration of such groups is extremely difficult. Most are organized into small cells consisting of individuals with shared backgrounds. Individual members of the group or cell are educated, politically informed and zealous. Rarely will they talk about their activities outside the cell.

Such terrorists, in some instances suspected of being supported in their efforts by hostile foreign intelligence services, pose a sophisticated threat to the recruitment and/or use of informants against them.

Disclosure, or the risk of disclosure due to FOIA releases adds an additional inhibitor to cooperation by any person associated with, or in a position to furnish information regarding members of such groups, their

Answer (continued)
activities or contacts.

Terrorism investigations necessitate effective source coverage, particularly if containment of terrorist activities is to be achieved. As with confidential sources targeted against other criminal conspiracies, where the perpetrators are ruthless and intelligent, the FBI has lost actual and potential sources against terrorists because of fear of disclosure due to the FOIA.

Question: What is the amount of money required to reduce the existing 4-6 month backlog to enable the Bureau to comply with the present time limits?

Answer: The experience of the FBI in dealing with FOIPA requests contraindicates achieving compliance with existing statutory time limits by adding additional resources. The volume of requests, and, in particular, the voluminous number of documents requested in certain individual requests virtually precludes compliance regardless of the resources applied to the request. As more personnel are dedicated to the processing of a single request, the process of coordinating the analyses to achieve uniform application of exemptions grows more complex, negating time saved by subdividing the total number of pages to be reviewed among an excessive number of personnel. While economies of scale preclude assigning an overly large task force to a single request, the FBI does strive to maximize production by using the team approach to project (3,000+page) requests.

Secondly, the FBI operates and maintains essentially a manual indices, referencing primarily hard copy bound volume records. Some microfilmed records which must be converted to hard copy for FOIPA processing are also maintained. In most instances more than ten days elapse before we can identify, locate and assemble requested documents, much less process the records for release. We do respond within ten days acknowledging the request and

Answer (continued)
indicating if there may be identifiable records or advising if the indices search revealed no record.

Third, the sensitivity of investigative records necessitates a page-by-page, line-by-line review. No short cut exists for this exercise of reasonable care to insure that classified information, protectable law enforcement interests and third-party privacy considerations are not jeopardized.

Given the care that must be exercised, our manual records system and the limitations on task force processing of voluminous requests, I do not believe any realistic figure can be proffered that would permit FBI compliance with existing time limits.

Question: The Subcommittee requested information concerning the results of more recent tests to see if our change in processing has resolved the major difficulties surfaced in the mosaic study.

Answer: The results of our studies indicate that serious vulnerabilities in our records systems continue as a result of processing investigative data for Freedom of Information Act (FOIA) requests.

While we have assumed the responsibility of withholding virtually all information furnished by a confidential source, the possibility that an FOIA release may identify a source still exists.

No analyst can know the extent of the requester's knowledge of dates, places and events. Consequently, what appears to the FBI employee as innocuous or harmless information may instead provide the requester the key to an informant's identity.

The vulnerability of our records becomes even more apparent when members of an organization pool and compare the information furnished them from FBI files with information of their own. In addition, approximately 12 to 16 percent of our FOIA requests come from prison inmates whose interest in developing informant identities is documented.

Our studies indicate that the assertion of the confidential source exemption itself, particularly at

Answer (continued)
critical junctures in an investigation or with regard to critical activities or locations where the activities occurred, confirms for the requester informant coverage which might not have been readily apparent otherwise.

Revealing the absence of information in our files is also damaging. The lack of any investigative activity in a particular place at a particular time conveys in clear and unmistakable terms our limitations. That we do not possess records showing FBI investigative activity in a certain city is to announce we have no knowledge of what transpired there.

Our analysts have adopted a more conservative disclosure approach since the development of the mosaic study. Recent FBI analysis indicates that using a more conservative disclosure approach does lessen, but cannot eliminate, the potential of recipients to identify FBI confidential sources from record disclosures. The obligation to segregate and release portions of recently generated investigatory records involving criminal conspiracies, terrorist organizations or hostile foreign intelligence services operating within the United States continues to create a substantial hazard that careful analysis will identify FBI sources.

Finally, there is absolutely nothing the FBI can do under the existing statute to prevent alerting a subject

Answer (continued)
of a pending investigation that we have an interest in that person if he or she makes a request. As written the statute compels disclosure of FBI interest even when no records are in fact released. This dilemma is potentially one of the most damaging aspects of the FOIA.

Question: What is the FBI doing to dispel some of the misunderstanding of Special Agents and the public about the Freedom of Information Act? Please include copies of memoranda and statements that FBIHQ has provided Special Agents to inform them of the various provisions of the Act.

Answer: Training and instruction in the FOIA is regularly given New Agents' Classes at Quantico as part of their overall instruction prior to assignment in the field. In addition, National Academy police officers are given similar familiarization with the Acts, with particular emphasis placed on those portions that concern state and local police authorities.

Our own executives are given briefings as part of the top management conferences periodically held at Quantico and at FBIHQ.

In April, 1979, each field division was called upon to designate one of its law-trained Special Agents as its Field Privacy Control Officer (FPCO). This individual, responsible for instructing and advising his or her colleagues in the provisions of the Privacy Act dealing with the collection and storage of personal information, was also

Answer (continued)

made responsible for the management of the FBI "records systems" at the field office level. In short, this individual has become our "compliance coordinator" for the particular field office to which he or she is assigned. Additionally, this person has the responsibility for supervision of the research analysts that process the Freedom of Information and Privacy Acts (FOIPA) requests received by that office.

The Field Coordination and Appeals Unit at FBI Headquarters is in constant contact with the FPCO in each office and thereby assures consistent and timely implementation of FOIPA policies and practices throughout the FBI. All FPCOs and their non-Agent analyst assistants are trained at our Quantico facility during an in-service session, and periodically retrained at regional conferences. These are regularly supplemented by instructions and information sent out by FBI Headquarters, samples of which I have included at the end of this answer.

On a biweekly basis, a memorandum outlining recent developments in information and privacy law is published by the FOIPA Branch and distributed to the field offices and FBI Headquarters' analysts. Revisions to the FOIPA Manual generally follow policy changes brought about by changes in the law, significant court decisions or Departmental guidance.

Answer (continued)

Annually, each field office holds a conference during which the FPCO, among others, is given the opportunity to update all Agents in the office with current privacy and information policy and procedure.

(Rev. 7-27-76)

TRANSMIT VIA: AIRTEL

PRECEDENCE:

CLASSIFICATION:

DATE: 1/13/78

To: SAC, Albany
From: Director, FBI

PRIVACY ACT OF 1974;
DISSEMINATION TO OTHER AGENCIES
PURSUANT TO "ROUTINE USE"

Recently, a question was raised by the New York Field Division relative to making a determination whether or not a requesting Federal agency has both the "right and need" to access particular information about an individual from our central records system so as to permit disclosure to the agency as a routine use.

A routine use as defined by the Privacy Act is one which is compatible with the use for which it originally was collected. The explanation of our central records system routine uses published annually in the Federal Register states in general that information from this system is disseminated to other government agencies for any legitimate purpose. Information in our central records system was collected originally for use by this Bureau in accomplishing its overall investigative mandate, inherent in which is the responsibility to effect appropriate dissemination from our files to other government agencies pursuant to a legitimate request.

Each Federal agency requesting from us information concerning an individual is bound by all the provisions of the Privacy Act, including those governing the legitimacy of the request and the uses which will be made of the information. For this reason, we do not require each requesting Federal agency to submit detailed data describing the legitimacy of a request. Where we are satisfied the request is authentic, information requested by another

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2 - Each Field Office
1 - Each Legat

Airtel to SAC, Albany
Re Privacy Act of 1974;
Dissemination to Other Agencies
Pursuant to "Routine Use"

Federal agency may be disclosed to the agency so long as such disclosure is in compliance with our own dissemination regulations. It then is the responsibility of the recipient agency to effect compliance with the Privacy Act relative to the use of the information.

While we normally will consider a request from a Federal agency pursuant to the above policy, it would be advisable to evaluate more closely a request submitted from a state, local or foreign agency, none of which are affected by Federal privacy legislation. In such a case, where it is unclear from the wording of the request why the information is needed and/or to what use it will be put, effort should be made to insure the disclosure is pursuant to a stated routine use.

The soon to be published revisions of the Manual of Rules and Regulations, to be known as the Manual of Administrative Operations and Procedures, will contain a more detailed explanation of our dissemination policy.

This communication may be reproduced as necessary to insure its contents are made known to appropriate personnel.

FD-9 (Rev. 7-27-76)

TRANSMIT VIA: AIRTEL

PRECEDENCE:

CLASSIFICATION:

DATE: 5/8/79

To: SAC, Albany ATTENTION: Field Privacy Control Officer

From: Director, FBI

FREEDOM OF INFORMATION/PRIVACY ACTS (FOIPA);
PRESERVING FIELD DIVISION RECORDS RESPONSIVE
TO REQUESTS FOR ACCESS

The possibility exists that simultaneous to receipt of an FOIPA request, the subject records in an office may be in the process of being destroyed pursuant to Section 2-4.5 of the Manual of Administrative Operations and Procedures. In view of this, upon receipt of an FOIPA request the following procedures should be implemented.

(a) Immediately conduct search of all field indices to identify records sought.

(b) Promptly retrieve such records, both main files and references, from file storage and place in secure location pending FOIPA review/processing.

(c) Appropriately mark processed records and/or files in accordance with applicable records destruction schedules to prevent premature destruction.

(d) The above procedure also must be followed where main investigative files were not processed as described in Title 28, CFR, 16.57(c). Such records must be retained in accordance with the FOIPA records retention schedules, even though initial processing of the Headquarters main investigative file will be conducted by FOIPA Branch at Headquarters.

2 - All Field Offices

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FD-9 (Rev. 7-27-76)

TRANSMIT VIA: AIRTEL

PRECEDENCE:

CLASSIFICATION:

DATE: 5/26/78

To: SAC, Albany

From: Director, FBI

FREEDOM OF INFORMATION-PRIVACY ACTS (FOIPA)
PROTECTION OF CONFIDENTIAL SOURCE DATA

Continuing review of FOIPA field processed records has shown instances where information provided by a source on a confidential basis has been released to a requester to a degree exceeding that which is required.

The Office of Privacy and Information Appeals (OPIA), Department of Justice, agrees with and supports our concern for the protection of confidential sources.

It is essential that we exercise a high degree of care when processing information furnished by informants and other confidential sources. Each record must be analyzed carefully to permit as accurate an understanding of the circumstances surrounding the informant data as necessary to insure confidentiality. Where there exists any reasonable doubt in the mind of the analyst, it is to be resolved in favor of excising the questionable material.

Such data as the date the information was furnished and the locale of the informant contact, as well as specific details surrounding the obtaining by the source of the information, should be excised. Substantive information concerning the requester may be released if it would not tend to identify the source or the informant; however,

2 - Each Field Office

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Airtel to SAC, Albany
Re FOIPA
Protection of Confidential Source Data

under Freedom of Information Act processing all information from a live informant, regardless of whether or not it might tend to identify the source, can and should be excised where the source could have been the sole origin of the information, i.e., the information emanated from no other source.

Any questions arising during processing can, most likely, be resolved by referring to exemption (b)(7)(D) in the FOIPA Reference Manual. Any doubt should be resolved by contact with the Field Coordination, Corrections and Appeals Unit, FOIPA Branch, FBI Headquarters.

This communication may be duplicated for use of Agents or analysts handling FOIPA matters as well as other appropriate personnel.

FBI

Transmit in (Type in plaintext or code) Via AIRTEL (Precedence)

To: SAC, Albany 7/28/76 (Date)

From: Director, FBI

PRIVACY ACT OF 1974;
ACCOUNTING OF CERTAIN DISCLOSURES
AND MISCELLANEOUS PROBLEMS

On 6/28/76, the Los Angeles Division raised several questions concerning compliance by FBI personnel with subsection (c) of the Privacy Act, which requires a written accounting be kept of certain disclosures. The following responses to these questions are being furnished to all field divisions for guidance and future reference:

Questions 1 and 2 submitted by the Los Angeles Division concern accounting for dissemination of fugitive information, consisting of an All Points Bulletin, wanted flyer or a photograph, to either the general public or to other Federal, state or local law enforcement agencies.

Such an accounting is unnecessary, the reason being that it is public source information (a Federal fugitive warrant being a public document), thus, required to be disclosed under the Freedom of Information Act (FOIA), which is one of the exceptions (b)(2), to the accounting requirements of (c)(1).

Questions 3 and 4 pertain to false identity investigations and the accounting of dissemination to appropriate agencies.

2 - Each Field Office

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A document containing information about an individual, whose true identity is unknown, but who is currently operating with false identification papers, is not considered to be a "record," as defined in (a)(4); hence, it is not subject to the (c)(1) requirement. It is not considered to be a record because it contains no personal identifier referring to the subject of the information. The identifier it does contain, the person's name, does not refer to the subject of the information, it refers to someone else, in most cases, a deceased person.

However, in false identity cases, as in all other cases, once an "unsub" has been identified, he is an individual with a personal identifier, and any dissemination of information so identified must be accounted for pursuant to (c)(1).

Questions 5 and 7 concern information disseminated to the United States Secret Service, pursuant to an interagency agreement, concerning information of possible interest to that agency.

Again, if the information is about an individual, and not an unsub, (c)(1) requires an accounting of dissemination to other agencies, Federal, state, local and foreign.

Question 6 pertains to complaints received by local FBI field divisions, concerning violations of law under the jurisdiction of another agency, which complaints are immediately referred by letter to the appropriate agency.

No accounting need be kept of such a dissemination if there is no record of the complaint maintained in the field division files. In other words, if the agent receiving the complaint simply writes it out in a letter and sends it to another agency without keeping a copy or other notation of the complaint, he need not keep an accounting of the dissemination.

If, however, he does maintain a complaint form, memorandum or other type record of the nature of the complaint, containing the subject's name, and/or the complainant or victim's name, he must also maintain an accounting of the dissemination pursuant to (c)(1).

Question 8 pertains to furnishing to the referring agency a copy of our letter to the United States Attorney acknowledging his declination concerning a violation of Title 18, United States Code, Section 1001, in some classifications, such as Fraud Against the Government.

The furnishing of such information to another Federal agency, to the extent that it does pertain directly to the subject of the record, is a disclosure under the Act and, as such, is subject to the (c)(1) requirement. A copy of such a letter, showing the agency to which it was furnished, would suffice as an accounting of the disclosure; it would not be necessary to execute a separate FD-159 in this case.

Question 9 concerns whether or not a copy of the cover page to a report can be used in lieu of an FD-159 to account for the dissemination of the entire report.

The FD-159 is merely an internal device used to record dissemination of information to another agency. There is no statutory requirement to use this particular form. Any type document or form can be used to maintain an accounting of the disclosure, as long as it contains the required data set forth in (c)(1)(A) and (B).

Question 10 concerns dissemination of information about an organization, and whether or not such information constitutes a "record," as described in (a)(4).

Because a "record" contains information about an individual, including a personal identifier, information about an organization, without any reference to a named individual, would not conform to the description of "record" found in (a)(4); hence, dissemination of such information would not be subject to the (c)(1) requirement.

Airtel to Albany
Re: PRIVACY ACT OF 1974;
ACCOUNTING OF CERTAIN DISCLOSURES
AND MISCELLANEOUS PROBLEMS

Question 11 concerns the administrative handling and storage of those FD-159 forms which might be classified because of the nature of the information thereon recorded.

In all but rare cases, the data on the FD-159 can be worded in such a manner as to preclude the necessity of classification. If, however, the only possible wording would require some classification of the FD-159, under current procedures, it still can be filed routinely in the regular office control file.

In addition to the above, the Los Angeles Division submitted two miscellaneous questions concerning the Privacy Act:

The first pertains to a case which might begin as an investigation of a criminal nature, but subsequently evolves into a civil-type inquiry, such as anti-trust and some civil rights violations. As a result, individuals interviewed during the course of the criminal investigation will not have been provided the opportunity to solicit a promise of confidentiality, pursuant to the provisions of the Privacy Act, while those persons interviewed during the course of the civil investigation will have been provided such an opportunity.

The Bureau anticipates no problems with this type situation because those records reporting the results of the criminal segment of the investigation can only be processed for release to the subject of the file pursuant to the exemptions specified in the FOIA. Under such processing, no express promise of confidentiality is needed to conceal the identity of a source of information. The balance of the file, that part dealing with the civil law violation, will be processed pursuant to the provisions of the Privacy Act, and the express promise, where provided in response to such a request, will be honored when processing the file for release to the subject.

Airtel to Albany
Re: PRIVACY ACT OF 1974;
ACCOUNTING OF CERTAIN DISCLOSURES
AND MISCELLANEOUS PROBLEMS

The second question pertains to Federal Tort Claims Act cases, conducted on behalf of another Government agency, where the employee of the other agency is interviewed.

The Privacy Act requires in all cases, other than criminal, domestic security and foreign counterintelligence investigations, that an individual being interviewed for the purpose of soliciting information about himself and/or his activities be apprised of our authority for seeking the information, whether furnishing the information is mandatory or voluntary, what our purpose is in asking for the information, what use will be made of the information, and what will be the effect on him of not furnishing the information (subsection (e)(3)).

This question also raised the point of the necessity of apprising an investigator for the other agency in the above example, who has conducted a preliminary investigation into the matter and who has furnished the results to our office, of the provisions of the Privacy Act.

There is nothing in the Act which would have to be furnished to him, other than that information he requires for his own accounting requirements under (c)(2).

Once again you are reminded that these responses are not to be construed as proven legal doctrine, as there is still no case law interpreting the myriad provisions of the Privacy Act. Once such judicial decisions are rendered, all field divisions will be apprised promptly of the impact on Bureau field operations.

This communication should be sufficiently duplicated to insure all appropriate personnel are made aware of its contents.

CONTINUED

1 OF 3

1-27-78)

TRANSMIT VIA: AIRTEL

PRECEDENCE:

CLASSIFICATION:

DATE: 12/1/78

To: SAC, Albany ATTENTION: PRIVACY CONTROL OFFICER

From: Director, FBI

FREEDOM OF INFORMATION ACT (FOIA)
PROTECTION OF FBI INFORMANTS

A serious and long recognized concern of law enforcement officials at every level is the potential created by the FOIA for the exposure of criminal and intelligence informants and their information, particularly when it reveals our ability to cope with ongoing criminal conspiracies. In processing FOIPA requests, the decision as to what information might tend to identify an informant must be made by those who have not had the benefit of personally participating in the particular investigation and, therefore, may not be aware from a review of the file of the sensitivity of the informant's relationship to the requesting individual or group.

The FOIA recognizes and attempts to resolve this problem by allowing under (b)(7)(D) for withholding all "confidential information furnished only by the confidential source", thereby eliminating the need for agency personnel to engage in a guessing game.

Effective immediately, any record reporting information from a living informant, paid or unpaid, who is furnishing or has in the past furnished information on a continuing and confidential basis by virtue of his proximity to the subject of the information, whether individual or group, and who is a true "informant" in every sense of the word, i.e., furnishing information on a confidential basis and not expected to testify

2 - All Field Offices

1 - All Legats

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Airtel to SAC, Albany
Re: Freedom of Information Act (FOIA)
Protection of FBI Informants

in court or otherwise expose his/her relationship with the FBI, should be withheld in its entirety pursuant to (b)(7)(D). In addition, peripheral information on other serials, e.g., dates, initials and miscellaneous administrative markings referring to the informant information, is to be excised.

Emphasis is on express confidential sources and their information. Of particular concern are organized crime investigations, wherein the life and safety of an informant could be jeopardized by the information released to the requester. Similarly, informants in many groups, previously investigated by the FBI, could be harassed, threatened and quite possibly harmed, physically or economically. The FBI cannot afford to risk the reputation or lives of these individuals or jeopardize the flow of information obtained from them. In processing this type of information, there is no excuse for failure to apply applicable exemptions or inattention to detail.

It is realized a field division does not process many criminal investigative files because of 28 CFR, 16.57(c). However, references to criminal files are processed in the field, and the same risks exist with these releases.

An additional tool sometimes not utilized is the application of (b)(7)(A) to closed investigations, which contain information applicable to open, related matters. This is particularly true in closed organized crime or membership investigations, mentioning organizations or individuals still under scrutiny. Where the information reveals the scope of our investigation or penetration of the criminal conspiracy, not only are informants jeopardized, but also our ability to effectively investigate those groups. Therefore (b)(7)(A) is available to protect information, from informants or otherwise, which has continuing value to our efforts, regardless of the status of the requested investigation.

The Field Privacy Control Officer (FPCO) is to consider informant security and ongoing investigations his primary concerns. He should consistently remind all investigative personnel that information obtained from an informant

Airtel to SAC, Albany
Re: Freedom of Information Act (FOIA)
Protection of FBI Informants

should clearly be described as such, especially in sensitive criminal and intelligence investigations where informant safety is at stake. Recording of information which might tend to identify the informant must be kept to a minimum. And the FPCO should be extremely careful before approving any release to assure that all (b)(7)(A) ramifications have been considered.

This communication may be duplicated as necessary for appropriate distribution to concerned personnel.

Question: What are the rates with which Freedom of Information lawsuits are reversed?

Answer: Based on a survey of 96 closed FOIA lawsuits, we found none to be "reversals" in the legal sense of complete rejections. On the other hand, our survey did show that we frequently are awarded outright "wins" in the sense that we are given summary judgment on the merits or a dismissal in our favor.

Our policy is to apply the exemption provisions of the FOIA based on the harm test rather than a technical legal argument that the exemption may be applicable. For this reason, we, in effect, are avoiding needless litigation. Most of our litigation involves matters that have already undergone, or are then undergoing, administrative appeal. At the appeal stage we carefully re-examine our initial determinations and make supplemental releases as appropriate and as mutually agreed upon with the Department of Justice Office of Information and Privacy Acts Appeals. During our affidavit preparation we again re-examine our harm test determinations with a view toward litigating only those considered vital, thus reducing needless litigations. For these reasons, reversals should not occur.

The table below shows the litigation results of a statistically valid sample drawn from our experience during

Answer (continued)

the last four calendar years. Those cases won outright are placed in one category, modifications or settlements in the other.

Year Closed	Total Cases	Dismissals (Wins)	Modifications/ Settlements	Percent Wins	Percent Modified
1976	19	15	4	79	21
1977	30	23	7	77	23
1978	30	16	14	53	47
1979	18	10	8	55	45

Question: What is the percent or numerical basis of informants who have indicated they will not provide us information because of the Freedom of Information Act (FOIA) as opposed to some other reason?

Answer: During the last quarter of 1979, over 500 FBI informant files were closed. The percentage of those files closed due to the informant's perception of the FOIA as a threat to his or her anonymity or physical safety is unknown. Specific reasons are not always provided and explanations cannot be compelled. Further, most of the closings were initiated by the Agent handling the informant based on his or her opinion that the informant was no longer effective or productive.

Consequently, while less than ten sources were known to have ceased cooperating with the FBI during this same time frame, specifically citing the FOIA as their reason for noncooperation, comparison of these figures is not considered a valid indication of the Act's impact on informant development or retention of productive sources.

The Report of the Comptroller General captioned, "Impact of the Freedom of Information and Privacy Acts (FOIPA) on Law Enforcement Agencies," dated November 15, 1978, contains specific examples of documented instances wherein established or potential sources of information declined to assist us in our investigations due to FOIPA disclosure risks. At page 14 of that Report, the GAO asserted:

Answer (continued)

> We believe that the examples provided by the FBI show that in some specific cases, it has taken the FBI longer to apprehend a criminal, that the FBI has had to spend additional agent hours collecting and/or verifying information, that the public has been increasingly reluctant to cooperate, and that some criminals are using the acts to try to obtain sensitive information from law enforcement agencies. (Emphasis added)

We consider this perception by the public to be a serious impairment to our development and use of confidential sources.

Question: What training program is provided our analysts and Agents who search our records and excise information?

Answer: At FBIHQ, our analysts receive 40 hours of formal instruction provided by the Training and Research Unit, FOIPA Branch. Primary emphasis is placed on the practical aspects of processing FBI records for FOIA requesters. Our instruction acquaints the employee with the organization of the FBI's FOIPA Branch, its mail and operational structure, and its services and functions. The training then moves to a general discussion of the FOIA and Privacy Acts, their historical development, as well as their disclosure mandates and exemptions.

A more detailed discussion follows, dealing with particular "topics and questions" that routinely arise when processing FBI records for release. Topics stressed are those dealing with classification, privacy rights, and confidentiality of FBI and Government sources.

Finally, the various administrative duties customarily performed by FOIPA Branch personnel are set out, including an explanation of the forms and procedures used in FOIPA processing.

Sixteen (16) to twenty (20) hours are spent in practice exercises using sample documents to assist the new analyst in "warming" into his or her new duties. The training is performed primarily by members of the FOIPA Branch and Legal Counsel Division.

Answer (continued)

In addition, our FOIPA reference manual is periodically updated to reflect changes in the law and procedural streamlining in the Branch.

The FOIPA Branch publishes a "Bi-Weekly Developments Memorandum" which covers recent developments, court decisions and legislation in the Information and Privacy field.

Units within the Branch have monthly "re-training" exercises and conferences wherein one or more analysts specializing in a particular area take turns "teaching" the other members of the unit in that particular specialty or skill.

The Training and Research Unit maintains a library of opinions, texts, law-review articles, training aids and renders personal assistance to those involved in their unit conferences and training.

Finally, we have monthly sessions with other executive agencies' FOIPA personnel to keep abreast of developments encountered by others in the same field.

The Field Coordination and Appeals Unit sends messages to our field offices of an instructional nature dealing with questions posed by the Field Office Privacy Control Officers and items coming to FBIHQ attention that would be pertinent to those in the field.

Question: Are FOIA expenses a line item in the budget? If not, how and when does it appear in the budget?

Answer: FOIA expenses are not a "line" item in the budget, but appear as a program under the Executive Direction and Control Decision Unit. (Records Management generally is under a different decision unit.)

Question: What effect did Project Onslaught have on the backlog? What was the backlog before Onslaught and after?

Answer: Project Onslaught is credited by GAO in their report entitled "Timeliness and Completeness of FBI Responses to Requests Under the Freedom of Information and Privacy Acts Have Improved," (April 10, 1978) with reducing but not eliminating the backlog. Quoting from page 37 of that report: "When Project Onslaught ended on September 30, 1977, 2,059 of the nonproject cases processed by the first group had been closed. Additionally, on the basis of the work done by the second group, 33 nonproject cases were closed and 1,615 volumes of material were released which related to 47 project cases."

Although Project Onslaught did not accomplish its objective of eliminating the backlog, it was successful in reducing it. When the project began, the FBI had 7,566 requests on hand. From May 2, 1977, through September 30, 1977, the FOIPA Branch received 7,892 new requests; when Project Onslaught ended, the FBI had 4,910 requests on hand. Thus, during the 5-month period, the FBI closed 10,548 requests for a net reduction in the backlog of 2,656 cases.

Furthermore Project Onslaught, coupled with reorganization of the FBI's total FOIPA effort, have reduced substantially the time lag between receipt of a request and a dispositive response for the average nonproject

Answer (continued)
request. The time lag dropped from 10 to 12 months to 4 to 6 months for such requests.

The GAO's conclusion however, in the "Timeliness" report cited earlier, was that Project Onslaught was not successful and merely reduced the backlog. At page 39, the GAO advised "This project was very costly and any similar efforts in the future should be carefully studied before being implemented."

APPENDIX 3.—LETTER FROM DIRECTOR WILLIAM H. WEBSTER DATED JUNE 19, 1979, TO CHAIRMAN RICHARDSON PREYER, SUBMITTING LEGISLATIVE PROPOSALS TO AMEND THE FREEDOM OF INFORMATION ACT

OFFICE OF THE DIRECTOR

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

June 19, 1979

BY LIAISON

Honorable Richardson Preyer
Chairman
Subcommittee on Government Information
and Individual Rights
Committee on Government Operations
House of Representatives
Washington, D. C.

Dear Mr. Chairman:

During my appearance before your Subcommittee on February 28, 1979, you requested me to provide you with the Bureau's legislative proposals to amend the Freedom of Information Act.

Enclosed are our proposed amendments.

Sincerely yours,

William H. Webster

William H. Webster
Director

Enclosure

OFFICE OF THE DIRECTOR

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

June 19, 1979

To make the 1966 Freedom of Information Act more effective and responsive to an open society, Congress amended the law in 1974. Because some of the amendments required law enforcement agencies to disclose information in their files, Congress, recognizing the sensitive nature of those files, included provisions which permit law enforcement agencies to withhold certain types of information. Thus, enactment of the amendments was an effort to strike a balance between the disclosure of sensitive information and the need to withhold from public disclosure information which the national security and effective law enforcement demand be held in confidence.

When President Lyndon B. Johnson signed the Freedom of Information Act into law on July 4, 1966, he said, "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." I am as convinced today of the undeniable validity of that proposition as President Johnson was more than a decade ago.

The objective of public disclosure aimed toward the goal of an informed citizenry is one to which the FBI is committed. For example, although the Privacy Act provides for the exemption of files compiled for law enforcement purposes, the Bureau processes first-person requests under the Freedom of Information Act to afford the requester the maximum possible disclosure. In 1978 the FBI made final responses to 20,000 Freedom of Information-Privacy Acts requests. We have placed in our public reading room over 600,000 pages of materials concerning such matters as our investigations of the assassinations of President Kennedy and Dr. Martin Luther King, Jr.; Cointelpro; and many significant cases of historical interest. The public can review any of these materials at no cost. I am well pleased with the FBI's demonstrated response to the mandate of Congress in this area.

It should be noted our response has been achieved at a substantial cost. With over 300 employees at FBI Headquarters assigned full time to Freedom of Information-Privacy Acts matters, the Bureau expended over nine million dollars in the program last year. Furthermore, we have learned that because of the Act the FBI is not now receiving vital information previously provided by persons throughout the

private sector, foreign, state and municipal law enforcement organizations, informants and other sources.

I have described the FBI's experience with the Freedom of Information Act in testimony before Committees of Congress. Several of our Oversight Committees asked me to submit to them proposed changes in the Act. In response to those requests, I have prepared some amendments.

My proposals, which do not necessarily represent the views of the Department of Justice or the Administration, endeavor to refine the Act, not to repeal it. As you consider them, I ask you to observe not only what they would do, but also what they would not do. They would not, for example, diminish the rights and privileges a criminal defendant or civil litigant now enjoys under the rules of civil and criminal procedure, nor would they limit or restrict in any way the power of the Department of Justice or the Congress or the Courts to oversee any activity of the FBI. What they would do, I submit, is make those adjustments to the Act suggested by reason and experience.

Existing time limits for responding to requests would be changed to establish a relationship between the amount of work required in responding to requests and the amount of time permitted to do the work. The proposals also would change the law to permit, not require, us to disclose our records to felons and citizens of foreign countries. We

also propose deleting the requirement a record be an investigatory record before it can be protected under existing exemption (b)(7). This proposal would enable the FBI to protect such noninvestigatory records as manuals and guidelines to the extent the production of them would cause any of the harms specified in existing exemptions (b)(7)(A) through (F).

The proposals would divide all FBI records into two categories. The first category would consist of the most sensitive information the FBI possesses: records pertaining to foreign intelligence, foreign counterintelligence, organized crime, and terrorism. The proposals would exempt them from the mandatory disclosure provisions of the Act. Title 28, Code of Federal Regulations, Section 50.8, which provides for access to files over 15 years old of historical interest, will remain in effect.

All other FBI records would be in the second category and subject to the Act's mandatory disclosure provisions.

Several proposals are designed to reestablish the essential free flow of information from the public to the FBI. We propose the statute specify that state and municipal agencies and foreign governments merit confidential source protection when they provide information on a confidential basis. To make clear we are permitted to withhold seemingly innocuous information which standing alone may not identify

a source, but which could do so when combined with other information subject to release under the Act or known to the requester, we propose we be permitted to withhold information which would tend to identify a source. This proposal would adopt the comments of several courts and make the language of the exemption conform more closely to the original intent of Congress.

To increase our ability to protect confidential sources, we are proposing a seven-year moratorium on law enforcement records pertaining to law enforcement investigations. The FBI will not use the moratorium in concert with a file destruction program to frustrate the Freedom of Information Act.

Because the proposals are permissive in nature, they would not prohibit releasing information. To insure fundamental fairness and to address matters of public interest, the FBI will draft with the Department of Justice a policy for disclosing information even though the law would permit withholding it.

These proposals would protect legitimate law enforcement interests while carefully preserving the basic principle underlying the Freedom of Information Act. In my view they merit your consideration.

Sincerely yours,

William H. Webster

William H. Webster
Director

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TIME LIMITS

Existing Law

Subsection (a)(6)(A) requires each agency upon any request for records to make the records available within 10 days.

Subsection (a)(6)(B) permits the agency in narrowly defined unusual circumstances to extend the time limits for no more than 10 additional days.

If an agency fails to comply with the time limits, subsection (a)(6)(C) enables the person who made the request to file suit in United States District Court to enjoin the agency from withholding documents. The subsection provides that if the Government can show exceptional circumstances exist and the agency is exercising due diligence, the court may allow the agency additional time.

Observations

Every working day the FBI receives approximately 60 new requests for records. Although we do not have any records pertaining to the subject matter of some requests and others require processing only a few pages, some requests encompass thousands of documents. In most instances more than ten days elapse before we can identify, locate and assemble

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the requested documents, much less process them for release. Contrary to what some may imagine, there is no machine which reproduces in a matter of minutes all the requested information contained in any one or more of the millions of FBI files. Often we must review many documents which contain information concerning other individuals as well as the requester.

The ability to respond to requests within an extremely short time period depends largely on the sensitivity of the records the agency's duties and functions require it to maintain. The FBI must review its records with extreme care prior to releasing them. That review entails a page-by-page, line-by-line examination of each document. To proceed in any other manner would jeopardize classified data, valid law enforcement interests, and third-party privacy considerations.

The volume and nature of work involved and, to an extent the limited resources available, render it impossible for the FBI to meet the 10-day time limit. As the General Accounting Office concluded after a 14-month review of our operations, "Considering the nature of the information gathered by the FBI, the processing of requests within 10 working days will probably never become a reality." "Timeliness and Completeness of FBI Responses to Freedom of Information and Privacy Acts Requests Have Improved," page 12

of a Report to the Congress by the Comptroller General of the United States, April 10, 1978.

The General Accounting Office determined the FBI appeared to be making every effort to reduce the response time and it is noteworthy the Comptroller General did not recommend any administrative or managerial changes to reduce that time.

Our failure to meet the time limits does more than place us in the unseemly posture of failing to be in strict compliance with the law. It creates a vicious circle. When we miss a deadline the person who requested the records can file a lawsuit. Time spent responding to the lawsuit naturally results in time lost responding to the requests of others. That in turn delays even more our responding to those other requests.

The conclusion appears inescapable. The time limit provisions should be modified.

Proposal

We propose subsection (a)(6)(A) be amended to read: "Each agency, upon any request for records made under paragraphs (1), (2), or (3) of this subsection shall --

"(i) notify the person making the request of the receipt of the request and notify the person making the request within 30 days after receipt of the request of the number of pages encompassed by the request and the time limits imposed by this subsection upon the agency for responding to the request; determine whether to comply with the request and notify the person making the request of such determination and the reasons therefor within 60 days from receipt of the request (excepting Saturdays, Sundays and legal public holidays) if the request encompasses less than 200 pages of records with an additional 60 days (excepting Saturdays, Sundays and legal public holidays) permitted for each additional 200 pages of records encompassed by the request, but all determinations and notifications shall be made within one year; and notify the person making the request of the right of such person to appeal to the head of the agency any adverse determination;

and

"(ii) ....

"(B) ....

"(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in attempting to respond to the request, the court shall allow the agency additional time to complete its review of the records...."

Commentary

Our proposal has two main features. It would establish a relationship between the amount of work required to respond to a request and the amount of time permitted to do the work. It would insure we would be granted additional time to respond to requests if exceptional circumstances exist and if we are exercising due diligence.

Our current practices of acknowledging receipt of the request promptly and notifying the requester at the outset if we do not have any records concerning the subject matter of his request would not be affected.

The proposal would require us to notify the requester within 30 days of the number of pages encompassed by his request and to inform him of the applicable time limits.

In the absence of exceptional circumstances the proposal would permit no more than 60 working days to process every 200 pages of records encompassed by the request. Because some requests require the review of thousands of pages and the proposed schedule could result in a prolonged response time, we suggest the imposition of a maximum time limit of one year, absent exceptional circumstances.

Although we are convinced making the time limits proportional to the amount of work required is a sound idea, we are not wedded either to the 60-day:200-page ratio or the one year maximum limitation. We propose that schedule with the realization the subsection under consideration applies to all Executive agencies, not just to those which, like ours, must review extremely sensitive records in a detailed, careful, and time-consuming manner.

If we were able to begin working on requests as soon as they are received, we could process most, but not all of them within the proposed time limits. Because we could not meet the 60-day:200-page deadline in exceptionally complex cases, or the one year maximum limit in exceptionally large requests, or either when confronted with other exceptional circumstances, our proposal would make clear we will be given additional time if we can show the court there are exceptional circumstances and that we are exercising due diligence in attempting to respond to the request.

Unfortunately, we are not currently in a position to begin working on a request soon after it is received. We note, indeed we underscore, the number of requests now on hand and awaiting processing and the volume and scope of incoming requests and pending litigation are so great, that four to six months usually elapse between the time a request is received and the time we are able to furnish the records to the requester.

We propose the 60-day:200-page schedule, with the exceptional circumstance provision intact, as a reasonable alternative to existing law, notwithstanding the four- to six-month delay imposed mainly by the backlog of work. The proposal relies on Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976). In that case the court found the deluge of requests in excess of that anticipated by Congress is a factor to be considered in determining the existence of exceptional circumstances.

CERTAIN ALIENS; FELONS

Existing Law

Subsection 552(a)(3) requires each agency upon any request for records to make the records promptly available to any person.

Observations

Although only a citizen of the United States or an alien lawfully admitted for permanent residence may make a request for records under the Privacy Act, the Freedom of Information Act imposes upon the FBI the duty to furnish records to any person in the world who asks for them.

At present about 16 percent of our Freedom of Information Act requests are made by or on behalf of prisoners. The actual figure could be higher because only those requests which bear the return address of a prison or which state the requester is a prisoner are counted in our statistical tabulation. The percentage of requests from prisoners is growing. A little more than a year ago only six percent of the requests were made by prison inmates.

Although we do not know how many requests are made by convicted felons, it may be assumed we are receiving requests from persons who have been convicted of a felony but

are no longer under sentence. Members of organized crime families, for example, despite having been convicted of felonies, are free to request FBI documents. We do receive requests from organized crime figures.

Furthermore, because the present statute requires us to furnish FBI records to "any person," a citizen of a foreign country, even a citizen of a hostile foreign country, may demand and receive FBI documents. We have had requests from individuals who reside in foreign countries.

Because every request must be honored and because we receive more requests than we can process immediately, it is our policy to respond to requests in the order in which they are received. The result is the requests of most citizens must wait their turn while the Bureau responds to requests for FBI documents from felons and residents of foreign countries.

Proposal

We propose amending existing subsection (a)(3) by adding the following sentence:

> "This section does not require a law enforcement or intelligence agency to disclose information to any person convicted of a felony under the laws of the United

States or of any state, or to any person acting on behalf of any felon excluded from this section."

We propose subsection (e) be amended to define "person" as "a United States person as defined by the Foreign Intelligence Surveillance Act of 1978."

Commentary

The Foreign Intelligence Surveillance Act of 1978 defines "United States person" as "a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3)."

Subsection (a) reads, "Foreign Power" means --

"(1) a foreign government or any component thereof, whether or not recognized by the United States;

"(2) a faction of a foreign nation or nations, not substantially composed of United States persons;

"(3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;"

The legislative history of the Freedom of Information Act makes clear the passage of the law was prompted in no small part on the premise that the opportunity to obtain information is essential to an informed electorate. Our proposal would tailor the Act to serve that purpose, while carefully preserving the rights of the electorate. The definition of "person" is sufficiently broad to insure the rights of public interest groups and associations would not be affected.

Some of those the proposal could exclude from the Act are not a part of the electorate because they are citizens of foreign countries. The proposal also would preclude felons from demanding as a matter of right the benefits of the Act at taxpayers' expense. That would have two advantages. First it would enable the FBI to respond more promptly to the requests of those for whom the Act primarily was designed. Indeed, most felons have lost their right to vote and thus are not part of the electorate. Secondly, it would put to an end the current practice of convicts who are making requests for the purpose of identifying those who probably

were responsible for their conviction. /It can be assumed many of these felons do not require proof beyond a reasonable doubt in identifying a particular person as a source of information./ If felons can be prohibited from voting in elections, a right lying at the very heart of our democracy, the law should permit their being excluded from FBI files as well as the voting booth.

The proposal would not limit existing habeas corpus or civil and criminal discovery procedures, all of which will remain as they are today. Furthermore, the proposal does not prohibit the Bureau from responding to requests of felons and those who are not United States persons. It provides we would not be required to respond to those requests. Thus, the FBI would be permitted to make records available and we shall work with the Department of Justice to draft guidelines governing access under the Act to a law enforcement or intelligence agency's information by felons and those who are not United States persons.

PROTECTION OF LAW ENFORCEMENT INTERESTS

Existing Law

Subsection 552(b) provides the Act does not apply to matters that are --

"(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

"....

"....

"Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

Observations

The FBI observes there are difficulties in applying this exemption in such a way that legitimate law enforcement interests receive adequate protection. Those interests include protecting highly sensitive information, ongoing investigations, manuals and some other noninvestigatory records, and confidential sources.

Proposal

We propose subsection (b)(7) be amended to read as follows:

"(b) This section does not apply to matters that are--

"(7) records maintained, collected or used for foreign intelligence, foreign counterintelligence, organized crime, or terrorism purposes; or records maintained, collected or used for law enforcement purposes, but only to the extent that the production of such law enforcement records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy or the privacy of a natural person who has been deceased for less than 25 years, (D) tend to disclose the identity of a confidential source, including a state or municipal agency or foreign government which furnished information on a confidential basis,

and in the case of a record maintained, collected or used by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by the confidential source including confidential information furnished by a state or municipal agency or foreign government, (E) disclose investigative techniques and procedures or (F) endanger the life or physical safety of any natural person; PROVIDED, however, this section shall not require a law enforcement or intelligence agency to (i) make available any records maintained, collected or used for law enforcement purposes which pertain to a law enforcement investigation for seven years after termination of the investigation without prosecution or seven years after prosecution; or (ii) disclose any information which would interfere with an ongoing criminal investigation or foreign intelligence or foreign counterintelligence activity, if the head of the agency or in the case of the Department of Justice, a component thereof, certifies in writing to the Attorney General, and the Attorney General determines, disclosing the information would interfere with an ongoing criminal investigation or foreign intelligence or foreign counterintelligence activity."

We also propose the following definitions be added to subsection (e):

"Foreign intelligence" means information relating to the capabilities, intentions and activities of foreign powers, organizations or persons.

"Foreign counterintelligence" means information gathered and activities conducted to protect against espionage and other clandestine intelligence activities, sabotage, international terrorist activities or assassinations conducted for or on behalf of foreign powers, organizations or persons.

"Terrorism" means any activity that involves a violent act that is dangerous to human life or risks serious bodily harm or that involves aggravated property destruction, for the purpose of --

(i) intimidating or coercing the civil population or any segment thereof;

(ii) influencing or retaliating against the policies or actions of the government of the United States or of any State or political subdivision thereof or of any foreign state, by intimidation or coercion; or

(iii) influencing or retaliating against the trade or economic policies or actions of a corporation or other entity engaged in foreign commerce, by intimidation or coercion.

"Organized crime" means criminal activity by two or more persons who are engaged in a continuing enterprise for the purpose of obtaining monetary or commercial gains or profits wholely or in part through racketeering activity."

Commentary

Our proposal would divide all FBI records into two categories. The first category would consist of the most sensitive information the FBI possesses: records pertaining to foreign intelligence, foreign counterintelligence, organized crime, and terrorism. The proposal would exempt them from the mandatory disclosure provisions of the Act. All other FBI records would be in the second category and subject to the Act's mandatory disclosure provisions.

Title 28, Code of Federal Regulations, Section 50.8, will remain in effect. That section, based on an Order dated July 17, 1973, provides for access to files of historical interest. The complete text is in the appendix.

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The proposal substitutes for the Freedom of Information Act's "compiled," the definition of "maintained" used in the Privacy Act of 1974, 5 U.S.C. § 552a (a)(3). Not only would the proposed change aid the consistency of the two related statutes, it also would preclude any gap in protection resulting from a narrow interpretation of "compiled." The thrust should go to the purpose for which the records are maintained, collected or used, and not soley the purpose for which they originally were compiled.

The FBI's Most Sensitive Records

The FBI is charged with the responsibility for foreign intelligence, foreign counterintelligence, terrorism and organized crime investigations within the United States. Our activities in these four areas invariably are among the most sensitive the FBI conducts and the records we maintain, collect and use in connection with these matters are our most sensitive. The degree of sensitivity of information is directly proportional to the degree of harm resulting from the disclosure of that information to the wrong person.

Most of our investigations in these areas are detailed, complex and extensive. Thus, of all our records our most sensitive are also the most vulnerable to examination by those motivated by other than legitimate reasons to

identify sources and determine the scope, capabilities and limitations of our efforts.

Although one of the purposes of the Freedom of Information Act was to compel disclosure of agency information to assist in informing the electorate, one cannot conclude all citizens request and receive the FBI's most sensitive information for the purpose of making themselves a more informed electorate.

This is not to intimate all persons who desire to examine these records have evil motives. A few, no doubt, do. We know, for example, of an organized crime group which made a concerted effort to use the Freedom of Information Act to identify the FBI's confidential sources.

In these types of cases revealing the absence of information in our files is most damaging. The lack of any investigative activity in a particular place at a particular time conveys in clear and unmistakable terms our limitations. That we do not possess records showing FBI investigative activity in a certain city is to announce we have no knowledge of what transpired there. It is important to remember under the Freedom of Information Act we are required to explain why information is being withheld, identify with as much specificity as possible the nature of the information, and describe document not being disclosed.

It must be recognized that hostile foreign governments, terrorist and organized crime groups not only have the motive to subject our releases to detailed analysis, they have the resources to finance such an examination by knowledgeable and skilled analysts.

Risks surface internally as well. The FBI traditionally has operated on the "need-to-know" principle: sensitive information is provided only to those FBI employees who have a need-to-know the information. It would not be uncommon for a veteran Special Agent assigned to the Criminal Investigative Division to have no knowledge about a foreign counterintelligence case, and for an employee assigned foreign counterintelligence responsibilities to know only a portion of the details of that same case. Yet, to respond to a Freedom of Information Act request all relevant records must be assembled in one place. Throughout the response, appeal and litigation stages the records receive much more exposure than they otherwise would.

We must remember, too, it is human beings in the FBI who review our records and try to decide what must be released and what properly should be withheld. Human beings have made mistakes in the past; they will make them in the future. Furthermore, there is a limit to human knowledge. FBI employees do not know, cannot know and have no way of learning the extent of a requester's knowledge of names, dates

and places. The Freedom of Information Act analyst in the FBI may have no way of knowing or learning the significance to a hostile analyst of a particular item of information. Yet, somehow, the FBI employee is suppose to make an intelligent judgment.

To our knowledge no confidential source has ever experienced physical harm as a result of one of our releases, but one of the most alarming aspects of this entire area is that the greatest danger lies in a hostile foreign government identifying an FBI source and leaving that source in place. We are heartened by the absence of an identifiable victim; we remain concerned.

We have not lost sight of our commitment to be as open as possible. To that end we have defined the four highly sensitive categories in an effort to strike a proper balance between openness in government and keeping secret those things which are fit to be kept secret from the world.

Through its elected representatives the public has placed upon the FBI our foreign intelligence, foreign counterintelligence, terrorism and organized crime responsibilities. We recognize the American people have a right to know how the FBI is discharging those responsibilities. The Act does not require any person who desires to receive a document to show a need for the information or to express a reason for requesting it. We do not suggest the Act be changed to impose any

such requirements. What we are proposing is that the public's right to know about these highly sensitive matters be channeled through the existing powers of its courts, its Congress, and its other representatives.

The FBI must account to the public for its activities in these particularly sensitive areas. We should give our accounting not to the world, but to the public's courts, Congress, and Executive. All other FBI records would remain subject to direct public access.

All Other FBI Records

Existing subsection (b)(7) clearly does not protect law enforcement manuals because they are not "investigatory records." With the law in its present form, we are unable to reduce to writing in a manual, training document or similar paper those items of information we want our Special Agents in the field to know without running the risk of having to provide our game plan to those who would use our own information to avoid detection or capture.

The manner in which the courts have struggled to find some basis to justify withholding those portions of law enforcement manuals which deserve protection may be seen in such cases as Cox v. Department of Justice, 576 F.2d 1302 (8th Cir. 1978); Cox v. Department of Justice, ___F.2d___

(8th Cir. 1979); Caplan v. Bureau of Alcohol, Tobacco and Firearms, 445 F.Supp. 699 (S.D.N.Y. 1978); aff'd on other grounds, 587 F.2d 544 (2nd Cir. 1978).

The difficulty the courts have had in relying on existing exemption (b)(2), which protects all records relating solely to the internal personnel rules and practices of an agency, lies in part in the difference between the House and Senate Reports on the scope of exemption (b)(2). The House Report would allow manuals to be procected; the Senate Report would not.

We propose deleting the requirement the record be an investigatory record before it can be protected under exemption (b)(7). The proper test ought to be whether the production of the record would cause any of the harms subsections (b)(7)(A) through (F) are designed to prevent. Ginsburg, Feldman and Bress v. Federal Energy Administration, Civ. Act. No. 76-27, 39 Ad. L.2d (P & F) 332 (D.D.C. June 18, 1976), aff'd, No. 76-1759 (D.C. Cir. Feb. 14, 1978), vacated pending rehearing en banc (D.C. Cir. Feb. 14, 1978), aff'd mem., No. 76-1759 (D.C. Cir. 1978).

If our proposal were enacted, exemption (b)(7) would protect all FBI records to the extent the production of them would cause any of the harms addressed in exemptions (b)(7)(A)

through (F). See Irons v. Bell, et al., ___F.2d___ (1st Cir. 1979). Remaining portions of records would be disclosed under the Freedom of Information Act.

Ongoing Investigations

Effective law enforcement demands that in certain situations the existence of an investigation not be disclosed. Although existing exemption (b)(7)(A) permits the withholding of information to the extent that the production of records would "interfere with enforcement proceedings," we know of no way to respond to a Freedom of Information Act request without alerting the requester there is an ongoing investigation. Subsection (a)(6)(A)(i) requires us to inform the requester the reasons for our determination whether to comply with his request. Thus, we are required by the statute to cite (b)(7)(A) to protect an ongoing investigation and by citing that exemption we confirm the existence of the investigation.

The General Accounting Office found, "(I)f requesters, unaware that they are under investigation, seek access to their records, they would immediately realize the situation once the agency cited the (b)(7)(A) exemption to withhold information that may harm a pending investigation. Thus, the agency faces a dilemma. It cannot lie to requesters by saying that no records exist, nor can it choose to ignore the

requesters.... Because the use of the (b)(7)(A) exemption puts the agency in a 'no-win' situation, some feasible procedure is needed by which the Government's and public's interests are served fairly and efficiently." "Timeliness and Completeness of FBI Responses to Freedom of Information and Privacy Acts Requests Have Improved," pages 57-58 of a Report to the Congress by the Comptroller General of the United States, April 10, 1978.

Our proposal would solve this dilemma. It would enable us to avoid alerting a requester only in those instances in which alerting him would interfere with an ongoing criminal investigation or foreign intelligence or foreign counterintelligence activity. To insure the provision would be employed only when absolutely necessary, our proposal would require the Director of the FBI to certify in writing to the Attorney General and for the Attorney General to make the determination that disclosing the information would interfere with the ongoing criminal investigation or foreign intelligence or foreign counterintelligence activity.

Personal Privacy

Exemption (b)(7)(C) permits the FBI to withhold information in its investigatory records which would "constitute an unwarranted invasion of personal privacy." This

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exemption does not protect any interests of deceased individuals because personal privacy considerations do not survive death.

Our proposal would extend the privacy interests protected by this exemption for 25 years after death.

Confidential Sources

Although exemption (b)(7)(D) is designed to protect confidential sources, there are difficulties with making the exemption do that for which it is intended. It is essential these difficulties be minimized or eliminated because the confidential source is indispensable; he is the single most important investigative tool available to law enforcement. "The courts have also recognized the danger that citizen cooperation with law enforcement agencies will end if such confidential sources are not protected." May v. Department of Justice, Civil Action No. 77-264SD (S.D. Me. 1978).

In responding to a request for information from an investigative file, we must review each record to determine if we can release the information. The duty is ours to establish the need to withhold, and we must demonstrate that records being withheld contain no "reasonably segregable" information; that is, information not specifically protected by exemption (b)(7)(D) or any of the other eight exemptions.

In practice this means that an FBI employee, even though he has learned to evaluate more carefully what information is reasonably segregable, does not know, cannot know, and has no way of learning the extent of a requester's knowledge of dates, places and events. The person most knowledgeable about what particular information may lead to source identity is, unfortunately for us, oftentimes the requester who is the subject of the investigation. What appears to us to be innocuous or harmless information may provide the requester the missing piece of the puzzle. Stassi v. Department of Justice, et al., Civil Action No. 78-0536 (D.D.C. 1979). When the records pertain to investigations of organizations and the members have the opportunity to pool and compare the information furnished to them, the danger becomes more apparent.

We have further concern for the inadvertent disclosure which may result from human error. That is a risk present whenever a page-by-page review of thousands of documents is undertaken.

Still, an FBI employee must review the relevant materials and predict what information can be released. The consequences of erring are severe.

Approximately 16 percent of our Freedom of Information Act requests are coming from prison inmates. Our experience tells us that in many instances their requests

are being made for the purpose of identifying informants. We know that an organized crime group made a concerted effort to identify sources through the Freedom of Information Act.

The FBI's ability to discharge its responsibilities depends in large measure upon the willingness of human beings to furnish information to us. To the extent the Freedom of Information Act or any other statute or event or circumstance inhibits someone from telling the FBI what he knows, our ability to do our job is made more difficult.

We have found that there are those in many segments of society who are refusing to provide us information because they fear their identity may be disclosed under the law. These people are not only confidential informants, but also private citizens, businessmen and representatives of municipal and state governments. Included as well are officials of foreign governments. The FBI is not suggesting that every person who is reluctant to provide us information does so solely because of the Freedom of Information Act. We are saying we do have examples -- actual case histories -- of people who have told us they do not want to provide information to us because they fear disclosure under the Act. Several of these examples are in the appendix.

The Report of the Comptroller General captioned, "Impact of the Freedom of Information and Privacy Acts on Law Enforcement Agencies," dated November 15, 1978, contains

several specific examples of documented instances wherein established or potential sources of information declined to assist us in our investigations. This General Accounting Office Report points out our belief that the Acts have had the greatest impact on informants in the organized crime and foreign counterintelligence areas, two of the areas in which the FBI currently concentrates its greatest efforts. Our sources of information in the foreign counterintelligence field are usually well educated, sophisticated and informed about the laws, court decisions and media coverage concerning the release of information from FBI files. They are very sensitive to the fact that Freedom of Information-Privacy Acts disclosure of their cooperation with us could jeopardize their community standing or livelihood, or more seriously, given the appropriate situation, their life or physical safety.

We consider this perception by the public to be a serious impairment to our capabilities. The Comptroller General's Report concluded the various law enforcement agencies surveyed almost universally believe that the ability of law enforcement agencies to gather and exchange information is being eroded, but the extent and significance of the information not being gathered because of the Freedom of Information Act and the Privacy Act cannot be measured. It is true quantitative measurement of the loss of information is most

difficult to ascertain. In many cases we will never be sure why a source or potential source of information declined to provide vital information to us, but the Freedom of Information Act has been specifically cited by many as the reason for their refusal to cooperate.

The practical problems that confront us in applying the existing (b)(7)(D) exemption and the risks present whenever sensitive records are reviewed for public disclosure place us in the position of not being able to dispel as completely mythical or imagined the perceptual problem which exists among the citizenry. Our proposal addresses the practical and perceptual problems.

The first part of exemption (b)(7)(D) permits the FBI to withhold information which "would" identify a confidential source. The second part protects any confidential information the source furnished to the FBI in the course of a criminal or lawful national security investigation. To make clear we are permitted to withhold seemingly innocuous information which in and of itself would not identify a source, but which could identify a source when combined with other information subject to release under the Freedom of Information Act, we propose amending subsection (b)(7)(D) to permit withholding information would would tend to identify a source.

Changing the exemption from "would disclose the identity of a confidential source" to "would tend to disclose the identity of a confidential source" adopts the comments of the courts in such cases as Nix v. United States of America, 572 F.2d 998 (4th Cir. 1978), Church of Scientology v. Department of Justice, 410 F.Supp. 1297 (C.D. Cal. 1976), and Mitsubishi Electric Corp., et al., v. Department of Justice, Civil Action No. 76-0813 (D.D.C. 1977).

The proposal also would make the language of the exemption conform more closely to the original intent of Congress. The author of the exemption, Senator Hart, stated, "The amendment protects without exception and without limitation the identity of informers. It protects both the identity of the informer and information which might reasonably be found to lead to such disclosure. These may be paid informers or simply concerned citizens who give information to law enforcement agencies and desire their identity be kept confidential," 120 Congressional Record 17034 (emphasis added).

Our proposal would make clear state and municipal agencies and foreign governments whicn furnish information on a confidential basis are confidential sources within the meaning of the exemption. The proposal would be consistent with Nix, supra; Church of Scientology, supra; Lesar v. Department of Justice, 455 F.Supp. 921 (D.D.C. 1978);

May, supra; and Varona Pacheco v. F.B.I., et al., 456 F.Supp. 1024 (D. Puerto Rico 1978).

Our proposal also would eliminate the requirement that the information be furnished "only" by the confidential source before it may be protected. Striking the word "only" would preclude the possibility of a successful demand the information must be released because the same information was furnished by two or more confidential sources.

Moratorium

The Act should include a moratorium provision. The requester who has as his purpose identifying FBI sources can review an FBI release while names, dates, places and relationships are relatively fresh in his mind. That recollection, undimmed by the passage of time, is of no small aid to the individual endeavoring to identify a confidential source by subjecting an FBI release to a detailed analysis.

We propose we not be required to release law enforcement records pertaining to a law enforcement investigation for seven years after termination of the investigation without prosecution or seven years after prosecution.

We will not use the moratorium provision in concert with a file destruction program to frustrate the Freedom of Information Act.

Because some investigations are ongoing for extended periods, records pertaining to them could be withheld for a long time. Since our proposal is worded to permit, not prohibit, our releasing information during the moratorium, we will be able to and we shall work with the Department of Justice to formulate a policy for access to records of public interest and to information pertaining to protracted investigations.

Physical Safety

Exemption (b)(7)(F) permits the FBI to withhold information which would endanger the life or physical safety of law enforcement personnel.

Our proposal would permit protecting the life or physical safety of any natural person.

PUBLIC RECORDS

Existing Law

Subsection 552(b), after itemizing those matters to which the Act does not apply, reads,

> "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

Observations

This provision prevents an agency from withholding an entire document when only a portion of it is exempt. It necessitates our making a line-by-line review of records to determine if any portion should be released. Such a review requires a great deal of effort and expense with very little corresponding benefit to the requester in some cases, especially those involving requests for records pertaining to ongoing investigations.

Proposal

We propose the last sentence of subsection 552(b) be amended to read,

> "Any reasonably segregable portion of a record not already in the public domain which contains information pertaining to the subject of a request shall be provided to any person properly requesting such record after deletion of the portions which are exempt under this subsection."

Commentary

Exemption (b)(7)(A) allows an agency to withhold investigatory records compiled for law enforcement purposes, but only to the extent that their release would interfere with enforcement proceedings. The FBI uses this exemption most often in responding to requests for records about pending, ongoing investigations. Of course, the (b)(7)(A) exemption, like all others, must be applied with the reasonably segregable clause in mind. The General Accounting Office concluded, "As a result requesters would probably not receive any information they were not already aware of, while the agency would have devoted many useless hours deciding what information could be released." "Timeliness and Completeness of FBI Responses to Freedom of Information and Privacy Acts Requests Have Improved," page 57 of a Report to the Congress by the Comptroller General of the United States, April 10, 1978.

Our proposal would harmonize the (b)(7)(A) and "reasonably segregable" provisions without striking discord in the design of either.

IN CAMERA REVIEW

Existing Law

Subsection 552(a)(4)(B) empowers United States District Courts to order the production of any agency records improperly withheld from the person who requested the records. It requires the court to determine the matter de novo and permits the court to examine agency records in camera to determine whether the records should be withheld under any of the exemptions set forth in subsection (b) of the Act. The subsection places the burden on the agency to sustain its action.

Observations

To meet the burden of justifying our withholding information, the FBI often must submit detailed affidavits describing the information being withheld and explaining with specificity why that information fits within the exemptions of the Act. The filing of a public affidavit in litigation may result in more harm than releasing the documents themselves.

In Kanter v. Internal Revenue Service, et al., 433 F.Supp. 812 (N.D.Ill. 1977), the court observed, "The government is correct in noting that a detailed index would be a cure as perilous as the disease. Such an index would

enable the astute defendants in the criminal case /who were the plaintiffs in this Freedom of Information Act lawsuit/ to define with great accuracy the identity and nature of the information in the possession of the prosecution. 433 F.Supp. at 820.

"...(T)he principal problem with a standard ... index is the government's fear that detailed itemization and justification would enable the objects of its investigation to 'fill in the blanks,' i.e., that it would impede its enforcement almost as seriously as complete disclosure .... (T)he court acknowledges the validity of the government's concern." 433 F.Supp. at 823.

In recognition of the danger, agencies are permitted to submit more detailed affidavits to the court in camera when a public affidavit would harm governmental interests. Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976); Kanter v. IRS, et al., supra; S.Rep. No. 93-854, 93d Cong., 2d Sess. Affidavits submitted for in camera review usually contain as much information or more than the documents themselves, an analysis of the information and an assessment of the damage its release would cause. For example, the affidavit may explain exactly how the release of certain information would identify an informant or harm national security. Yet one court recently

ordered the release of all but two paragraphs of an affidavit which an agency had submitted in camera. Baez v. National Security Agency, et al., Civil Action No. 76-1921 (D.D.C. Memorandum and Order Filed November 2, 1978). The case is being appealed.

Furthermore, some reservations have been expressed over the use of in camera inspections. The critics maintain in camera inspections defeat the adversary process because the plaintiff and his attorney are not permitted to examine the documents. See, for example, the concurring opinion in Ray v. Turner, 587 F.2d at 1199. (D.C. Cir. 1978).

Proposal

We propose the second sentence in subsection 552(a)(4)(B) be amended to read as follows:

"In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action; but if the court examines the contents of a law enforcement or intelligence agency's records withheld by the agency under exemptions

(b)(1), (b)(3), the introductory clause of exemption (b)(7), or exemption (b)(7)(D), the examination shall be in camera. The court shall maintain under seal any affidavit submitted by a law enforcement or intelligence agency to the court in camera."

/The phrase "the introductory clause of exemption (b)(7)" refers to a clause we propose be added to existing subsection (b)(7)./

Commentary

Under this proposal the burden would remain on the agency to sustain its action, and the power of the court to make de novo determinations and inspect agency records in camera would not be affected.

The proposal would make clear that if a court decides to review the records of a law enforcement or intelligence agency, the review of some of those records must be in camera. Records which could be reviewed only by the court would include those being withheld under exemption (b)(1) -- properly classified information; exemption (b)(3) -- information required by some other statute to be kept confidential; the introductory clause of exemption (b)(7) -- foreign intelligence, foreign

counterintelligence, terrorism and organized crime information; and/or exemption (b)(7)(D) -- information identifying a confidential source.

The proposal also would insure that affidavits submitted by law enforcement or intelligence agencies for in camera examination are reviewed only by the court.

Adoption of this proposal would dismiss the suggestion that a plaintiff or his attorney should examine highly sensitive documents, which are being reviewed by a court in camera, so the plaintiff can assist the court in determining whether the documents should be disclosed to the plaintiff. Congress, in enacting the de novo determination and in camera inspection provisions of the Act, was adamant in its conviction that the courts could be entrusted to make intelligent decisions about highly sensitive Government documents. Our proposal rejects the notion the courts have shown themselves incapable of making in camera determinations without the assistance of the plaintiff or his attorney.

As to affidavits submitted for in camera review, the proposal adopts the philosophy of Kanter, supra at 824, "The method of a detailed index was devised by the court in Vaughn v. Rosen for the benefit of the court rather than the plaintiffs. There is no reason why the court cannot consider

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such an index in camera, thereby preventing undue disclosures to the plaintiffs. While in camera consideration will deprive the court of the benefit of plaintiffs' critique of the index, it does have certain advantages. It is preferable to the laborious task of scrutiny of the documents themselves. Furthermore, a properly drawn index will summarize documents, and put into relief their fundamental facts and importance. An index will also focus the court's attention on the basis of the government's claim that each document is covered by /one of the exemptions./" See also Lesar v. Department of Justice, 455 F.Supp. 921 (D.D.C. 1978).

ANNUAL REPORT

Existing Law

Subsection 552(d) requires each agency to submit to Congress on or before March 1 of each calendar year a report covering the preceding calendar year. It also requires the Attorney General to submit an annual report on or before March 1 for the prior calendar year. Both reports must include statistical compilations for various aspects of the processing of Freedom of Information Act requests.

Observations

We are required to keep two sets of statistics: one for the calendar year report required by the statute and another for programs operating on a fiscal year basis. The administrative burden and unnecessary expense which result from these duplicative efforts could be eliminated if the existing statute required a fiscal year report.

Proposal

We propose the first sentence of existing subsection 552(d) be amended to read,

"On or before December 1 of each calendar year, each agency shall submit a report covering the preceding fiscal year to...."

and the last paragraph of subsection 552(d) be amended to read,

"The Attorney General shall submit an annual report on or before December 1 of each calendar year which shall include for the prior fiscal year a listing of...."

APPENDIX

SURVEY OF IMPACT OF THE FREEDOM OF INFORMATION ACT (FOIA) AND PRIVACY ACT (PA) ON LAW ENFORCEMENT ACTIVITIES

INTRODUCTION

On April 25, 1978, the General Accounting Office (GAO) requested Federal Bureau of Investigation (FBI) participation in a GAO study on the impact of the Freedom of Information Act (FOIA) and the Privacy Act (PA) of 1974 on law enforcement activities. To compile data for the GAO request, the FBI canvassed its Headquarters components and 59 field divisions. The following examples include instances of perceived and/or actual impact reported by FBI field offices and Headquarters divisions in response to the GAO request and subsequent to the GAO study. Examples which involve classified matters are not included.

A. STATE AND MUNICIPAL LAW ENFORCEMENT AGENCIES

An FBI office noted a trend to exclude Agents working organized crime matters from key intelligence meetings in their area. Several state law enforcement officers have mentioned a concern for the security of information in connection with Freedom of Information-Privacy Acts (FOIPA) disclosures as the reason for the closed meetings. The office undertook efforts through meetings with state and local law enforcement agencies to improve their understanding of the FOIA and PA legislation. These efforts have not met with complete success.

*

The Attorney General for a certain state has advised he intends to follow a policy concerning the release of state records to be in conformity with the FOIPA. Consequently, in applicant background investigations, state police arrest records concerning relatives of applicants are not made available to the FBI.

*

Due to the FOIPA, difficulty has been experienced on several occasions in obtaining information from a certain police department. Some officers have stated their reluctance to make information available concerning subjects of local investigation because of these Acts. The organized crime control bureau and the intelligence division of the police department have expressed concern over the FBI's ability to protect sources of information.

*

In a civil rights investigation in which the subject was a former employee of a law enforcement agency, the head of that agency advised subject's personnel file contained several previous complaints concerning his alleged brutality. However, the agency refused to make the personnel file or information contained in it available to the FBI, out of fear the subject would have access to this information under the PA.

*

In a recent civil rights investigation, an effort was made to obtain a copy of a police department report of the victim's death. Local authorities would make the report available for review but declined to provide a copy for inclusion in the FBI's investigative report. Anticipating a civil suit would be filed against the city and police department arising from the victim's death, they questioned the ability of the FBI in view of the FOIA and PA to maintain the local report in confidence.

*

A representative of a certain police department intelligence division has stated he is very reluctant to furnish information regarding possible domestic revolutionaries. He is fearful such information could inadvertently be released pursuant to the FOIPA.

*

A detective of a prosecutor's office was contacting his local sources relative to the whereabouts of a former resident who was a Federal fugitive charged with murder. The detective said his sources and contacts in the Cuban community were reluctant to provide information in this case or others because of the fear of disclosure under the FOIA.

The following letter was written by the Chief of Police of a major city:

"With respect to FBI files being made accessible to persons or organizations pursuant to the Privacy Act or the Freedom of Information Act, I request that all investigative records of information, from whatever (deleted) Bureau of Police source (including the (deleted) Police Bureau as an organization, its employees, etc.), in your files be protected and kept confidential.

"If such protection cannot be assured to this organization by the FBI, we will only be able to cooperate in the exchange of non-sensitive, non-confidential information. The (deleted) Bureau of Police would not be able to pass on sensitive information to the FBI without this assurance of confidentiality, and the effectiveness of the working relationship between our organizations would be greatly diminished."

*

A chief of police stated in the early part of 1977, that if any information is released by Federal law enforcement agencies as a result of a request under the FOIPA, which indicated that the source of information was his police department, he would no longer allow his department to furnish information to any Federal law enforcement agencies.

*

A representative from the criminal conspiracy section of a certain police department has stated his section is very reluctant to discuss information concerning possible intelligence operations. The representative stated he feared this information could inadvertently be released by the FBI to an individual pursuant to an FOIPA request.

*

In civil rights matters, officers of a certain police department have been cautioned by their departmental attorneys that, when interviewed as subjects by FBI Agents, they should respectfully decline to furnish any information based on the 5th Amendment. They have been cautioned further that any statement they do make to the FBI would be subject to disclosure under the FOIPA.

*

Two police departments in a certain state will not share their informants and, more importantly, a substantial amount of their informant information on Federal violations, for fear an informant will be disclosed accidentally by the FBI through a request in connection with the FOIPA.

*

It has been observed the exchange of information among local police, state and Federal investigators at the

monthly meetings of a police intelligence organization has decreased substantially. Because of uncertainty over what information may meet FOIA or PA disclosure criteria, there is very little information exchanged at these meetings.

*

Since the spring of 1976, a southern office of the FBI has encountered an express reluctance by a police department and a sheriff's office's intelligence unit to cooperate in furnishing written information to the FBI on security, as well as criminal, matters. A member of the intelligence unit stated that, despite past FBI assurances that all intelligence information would be considered confidential, it had been learned a former black activist, who had made an FOIA request to the FBI was furnished a copy of an intelligence report previously furnished to the FBI by the police department. Although this document did not reveal the identity of any informant, that local agency advised it had no choice but to decline to furnish further written information to the FBI, in order to prevent this situation from arising again.

*

In the course of a fugitive investigation, an FBI Agent was denied information contained in city employment records, due to the PA. Subsequently, the Agent was able to obtain these records through a Federal search warrant which was served on City Hall. However, because of delays required to obtain the search warrant, the Agent missed apprehending the fugitive at his place of employment.

B. FOREIGN LIAISON

In recent conversations with two members of a foreign police agency in an investigation concerning copyright matters, these officers stated they did not furnish all information to the FBI as they had in the past, due to the FOIA.

*

On April 11, 1978, an individual who has some contact with foreign police department officers declined to actively assist the FBI because of the fear of seeing his name in the newspapers. He advised the promise of confidentiality by law enforcement in today's political environment is worthless.

*

A citizen who has close contact with a foreign police agency discontinued his association with the FBI because he feared that, under the FOIA, information might be released which would identify either himself or this foreign police agency.

*

In the past two years, several Agents have had contact with foreign police representatives visiting the United States. These representatives have come from Western countries, some of which have experienced internal problems with terrorism. These police representatives generally offered the observation that, despite their high regard for the reputation and professionalism of the FBI, they believed (one said it was sadly amusing) all of the fine efforts of the FBI are sometimes diluted, if not negated, when the investigative results have to be furnished under the FOIPA to subjects of investigations. This same dismay over restrictions on the FBI was relayed by a person who traveled to another foreign country and visited that country's national police force.

C. ABILITY OF LAW ENFORCEMENT PERSONNEL TO OBTAIN INFORMATION FROM THE GENERAL PUBLIC

1. AIRLINES

In an FBI case an airline company accepted a stolen check for airline passage. As their computers indicated to the ticket agent the check was stolen, the airline refused to issue the ticket which had been completed by the ticket agent. During the course of FBI investigation, the airline was requested to surrender the completed but unused ticket as evidence; however, the company declined to make the ticket available to the FBI due to the FOIPA.

2. BANKS

Citing the PA, a large bank would not make available details of a particular financial transaction without a subpoena, although the bank was the vehicle in a possible 2.2 million dollar fraudulent Interstate Transportation of Stolen Property transaction.

*

A former president of another bank obtained loans using fraudulent financial statements. The former employee's bank would not make available to the FBI the personnel file, the loan file, or the results of the internal audit regarding the president's activities, based on the PA. This information was not available from other sources.

*

During an investigation concerning the disappearance of $1,000 from a bank, investigating Agents contacted a senior vice president to request background information on a particular suspect bank employee. The vice president advised that, due to recent Federal and state privacy legislation, he could not furnish personnel information concerning this employee, as he feared the employee might then have grounds to file a lawsuit for invasion of privacy.

*

In an investigation involving false statements to an estimated 50 to 65 banks resulting in 3.8 million dollars in lawsuits, an FBI office served a subpoena for bank records on a bank and made request to interview bank officers who had been personally contacted by subjects. The bank, a victim of the scheme, would not permit the requested interviews without additional subpoenas directed to the officers involved. By way of explanation, the bank advised the PA prevented discussion of any information concerning a bank customer without subpoena.

*

A certain bank was the victim in a Bank Fraud and Embezzlement - Conspiracy case. Losses suffered in this case were approximately $476,000. Bank officials advised that under bank policy, which was based on the FOIPA, they would furnish no information to the FBI without a subpoena duces tecum.

3. HOSPITALS AND PHYSICIANS

In an applicant investigation a waiver was provided the FBI to obtain medical records concerning hospitalization at the health center of an educational institution. The school physician refused to provide any information either to the FBI or to the applicant, even

after the latter personally went to the health center to sign a second waiver drawn by the school. The office of the school president advised refusal to release information was due to the PA.

*

An individual identified as operating a check-kite scheme with banks in several states had been hospitalized. Investigation determined this individual had initiated his check-kite scheme from a hospital telephone. Nevertheless, hospital officials, citing the FOIPA, refused to verify his hospitalization or dates of confinement.

*

In a fugitive case, an FBI Agent attempted to obtain background data on the fugitive from a private hospital where he had been a former patient. Hospital officials expressed the belief that Federal privacy law inhibited them from verifying the subject's status as a former patient, much less releasing background information on him.

4. HOTELS

A hotel which is a part of a large nationwide hotel chain refused to furnish information on guests, including foreign visitors, without a subpoena due to the enactment of the FOIPA.

*

During a fugitive investigation of a subject wanted by Federal and local authorities for extortion and firearms violations, an Agent contacted the security officer at a hotel. The purpose of this contact was to develop background information on a former employee of the hotel, an associate of the fugitive, who had knowledge of the fugitive's current whereabouts. Security officials at the hotel refused to furnish any information from their files without a subpoena because they felt they were open to civil litigation under the provisions of the PA.

*

Numerous hotels and gambling casinos in the State of Nevada, which would formerly furnish information from their records on hotel guests and gambling customers during

routine investigations, now require a subpoena before they will release any information to the FBI. The reason given by hotel officials is for hotel protection, in the event of a lawsuit following an FOIPA release to these subjects of investigation.

5. INSURANCE COMPANIES

Information submitted to Medicare through an insurance company, which would show Medicare fraud perpetrated by the staff of a hospital, was withheld by the company, citing the PA. It was necessary to obtain a Federal Grand Jury subpoena for the desired information.

*

In the field of arson investigations, major insurance companies and the Fire Marshal Reporting Service have stated they will provide no information to Federal law enforcement agencies except under subpoena. They advise their legal departments believe this position is necessary for protection against civil suit, in the event of an FOIPA disclosure.

*

In a Racketeer Influenced and Corrupt Organizations investigation involving numerous subjects in an arson-for-profit scheme in which insurance companies are defrauded after the insured property is burned, at least 15 insurance companies, numerous insurance claims adjusting firms, and insurance agents have refused or have been most reluctant to furnish files regarding losses and coverage because of the universal fear that the information furnished could be obtained by the insured in an FOIPA disclosure which the insured might use against the insurance company or firm in a civil suit. FBI recourse has been the obtaining of Federal Grand Jury subpoenas to obtain the desired information, which in every instance caused delay in the investigation. Many of these firms cited widespread news publicity resulting from FOIPA disclosures as cause for their total lack of confidence in the FBI maintaining any information confidential.

6. LEGAL PROFESSION

On May 5, 1977, a nationally known U. S. District Court judge refused to be interviewed on an applicant matter because he wanted any information furnished about the

applicant to remain confidential. It was the judge's opinion the FBI could not prevent disclosure of this information at a later date to the applicant under the PA.

*

In response to an FBI inquiry concerning an applicant, a former Assistant United States Attorney (AUSA) confided that significant information, meaningful and derogatory, would not be forthcoming concerning the applicant because of the FOIPA. When pressed by the FBI Agents upon this point, the former AUSA stated that he would counsel his clients not to furnish the FBI with derogatory information in applicant-suitability matters.

*

During an investigation in March, 1978, by a mid-western FBI office, private attorneys were interviewed concerning the qualifications of a candidate for a Government position. These private attorneys initially declined to furnish derogatory information in their possession concerning the candidate, in view of the provisions of the PA. They did furnish pertinent information on a promise of confidentiality, and it is unknown what information they withheld due to fear of the effect of the PA.

*

A Federal district judge was interviewed in a background investigation concerning a departmental applicant. The judge stated he did not feel that the FBI could provide confidentiality concerning his statements. He declined to furnish candid comments concerning the applicant and stated he did not wish to be interviewed concerning any FBI applicant investigations in the future.

*

A prominent attorney was contacted concerning an applicant. He indicated he was in a position to furnish uncomplimentary information concerning the applicant, but advised the interviewing Agent that due to the FOIPA he would not do so. Thereupon, he furnished a brief, neutral commentary.

*

In connection with a suitability investigation concerning a nominee for U. S. district judge, two attorneys

contacted in July, 1976, expressed extreme reluctance to furnish their true opinion regarding the qualifications of the candidate. They indicated they were fearful that, should the candidate be appointed to a judgeship and later learn of their statements, he would find a way to punish them professionally through his position. The attorneys eventually provided their comments after receiving an express promise of confidentiality; however, there is no assurance that they were as candid as they might have been.

*

In a recent background investigation conducted pertaining to a Federal judgeship, one attorney contacted advised he had derogatory information concerning the judicial candidate. However, he declined to furnish this information to the FBI stating he felt the information would eventually be disclosed to the applicant under the PA. He felt that, if this disclosure ever occurred, he would be unable to practice before the applicant's court.

7. NEWSPAPERS

In a Corruption of Public Officials case, consideration was being given for change of venue to another city. The local FBI office was requested to review newspaper clipping files to determine the amount of publicity the corruption matter had received. On April 10, 1978, a newspaper editor advised that, in light of the FOIPA, no information from newspaper clipping files would be made available to the FBI except upon service of a subpoena.

8. POLITICIANS

Recently in a southern state, the state chairman on one of the state's two major political parties was interviewed regarding a presidential appointment. This individual was advised of the provisions of the PA at the outset of the interview and requested confidentiality. He made one or two statements of a derogatory nature and then requested that these statements be disregarded. He advised that, although he was aware his identity could be protected under the PA, he was not confident this protection would be effective. After the above statement, the interviewee would provide only a general statement regarding the appointee's honesty and terminated the interview.

*

In a southwestern state, a highly placed political figure offered to furnish information to the FBI concerning a multimillion dollar act of political corruption. The information was never received because the Agent could not guarantee that his identity would not later be inadvertently disclosed through sophisticated querries sent to the FBI through the FOIA. This source feared that the adversary in this matter could collect pieces of information from the FBI through the FOIA, then assemble the information, possibly using a computer and identify the source.

*

During the course of a public corruption investigation, the interviewing Agent in a southern office detected reluctance of witness police officers to provide complete information, subsequent to a discussion of the FOIPA. It was the opinion of the interviewing Agent this reluctance was based on apprehension by the police officers this information could be made available to the subject, a trial judge before whom the police officers frequently appeared.

9. PRIVATE COMPANIES

During a routine investigation, a Special Agent sought the cooperation of a company personnel manager to determine the subject employee's residence from company records. Citing the restrictions of the PA, the personnel manager would neither confirm the subject's employment with his company nor provide any background information.

*

During a recent national security investigation involving a possible Foreign Agents Registration Act violation, a lead was set out to interview the owner of an electronics firm regarding the purchase of loudspeakers and other electronics used by foreign nationals in a public demonstration. The owner of the electronics firm refused to disclose this information unless a subpoena was issued, stating he feared the customers who rented his equipment might learn of his cooperation, under the FOIPA, and bring a civil action against the electronics firm for breach of confidentiality.

*

In connection with bank fraud matters being investigated in a certain city, an auto dealer refused to furnish time cards of employees because he would violate the PA.

*

Because of the FOIPA, the policy of an oil company limits the type and amount of information that the company will provide to the FBI regarding an applicant for employment. The personnel clerk for that company advised that, even when an applicant has executed a waiver form, the only information the company will furnish regarding the applicant's employment is as follows: verification of employment, dates of employment, position and salary.

*

During the course of an investigation, Agents sought to review employment records at a department store and were advised that employment records were no longer available because of the PA. Agents also attempted to secure information concerning the subject from two other stores and were advised that this information was not available without a court subpoena.

*

In an investigative matter regarding an electronics company, a former employee of the company, who was a principal witness, became fearful that he would be sued by the subjects of the investigation and the company if he provided information to the FBI. He was reluctant because he believed this information would be available through the FOIPA; if the criminal allegation was not ultimately resolved in court, he feared he would become civilly liable. On several occasions, this witness asked what his civil liability would be and expressed reluctance in providing information of value to the investigating Agent.

*

Another investigative matter was based on information furnished by businessmen in a small town. When they initially furnished the information, these sources asked that they not be called upon to testify. Being businessmen in a small town, they expressed fear the information they provided would be used against them and harm their businesses. When these sources learned information which they furnished

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might be obtained through the provisions of the FOIPA by the investigation subjects, they stated they would not furnish any further information to the FBI.

*

In a fugitive investigation, information was developed that the subject was a former employee of an oil company. When contacted, the oil company management declined to furnish any background information from their personnel files concerning subject's former employment. The stated reason for not furnishing this information was concern for possible future company liability should the fact of FBI cooperation become known to the subject under the FOIPA.

10. PRIVATE LENDING COMPANIES

An Equal Credit Opportunity Act case involved a limited investigation based on a Department of Justice memorandum which directed that 14 former employees of a loan company be identified and interviewed. Citing the PA, the loan company's legal counsel declined to identify to the FBI the 14 former employees. Instead, he had his current employees make personal contact with these 14 individuals to request their permission to release their names to the FBI. This indirect process delayed the investigation for a one-week period. The company was also asked to release loan applications of certain individuals who had been granted loans within the past 18 months. On the basis of the PA, the loan company declined to release the[illegible]e financial documents.

11. PUBLIC UTILITIES

During a recent security investigation, a lead was set forth requesting utility checks to be made to obtain information regarding certain individuals. Officials of a utility were contacted and advised that checks of their records would not be possible due to the provisions of the PA.

*

A local security office of a telephone company referred an illegal telephone call case to an FBI resident agency. However, the company refused to furnish any data concerning the principals involved in the violation without a subpoena for telephone company records.

*

In a fugitive investigation, an FBI office was given reliable information concerning the nonpublished telephone number of the fugitive's location on the Christmas holiday. The FBI holiday supervisor tried in vain to obtain the location of the number from various officials at the telephone company and the fugitive was not apprehended. The company insisted a subpoena was needed, based on FOIPA considerations, before this type of information could be released to the FBI.

12. QUASI-LAW ENFORCEMENT

The disciplinary board of a state supreme court advised that, because of FOIPA considerations, all requests for information by the FBI must be in letter form and a release authorization signed by the applicant must be enclosed with the request letter. It was intimated that a written request might not elicit all information if the disclosure could cause difficulties for the board.

*

An association will no longer provide any information to law enforcement agencies or investigators unless served with a subpoena. This association has in the past assisted the FBI in coverage of aspects of the racing industry. The association has advised its current restrictive policy is the direct result of FOIPA legislation.

13. TRAVELER'S AID

A kidnapping case involved a 65-year-old victim who had been brutally beaten, stabbed and left for dead in a rural area of one state. The victim could only provide nicknames for the kidnappers. Investigation revealed that the subjects had attempted to gain transportation from the Traveler's Aid Society. The Society, after being advised of the urgency of the matter, nevertheless refused to supply information on December 20, 1977, from records which would identify one of the subjects and possibly reveal the whereabouts of both subjects. This information was subsequently obtained the next day by subpoena duces tecum and teletyped to an FBI office within a few hours after receipt. Both subjects were arrested in another state on December 26, 1977. However, a few hours prior to the arrest, one subject shot and killed an individual in that other state.

14. UNIONS

On alleged privacy grounds, an international union will no longer provide information to law enforcement agencies unless served with a subpoena.

*

During the course of a Racketeer Influenced Corrupt Organizations case involving certain union members and company officials, the investigating Agent contacted nonunion employees concerning alleged harassment by union members and the firing of several rifle shots at nonunion members. A prospective witness to a particular incident declined to furnish any information to the FBI, on FOIPA grounds, stating that, "the Government just can't keep a secret anymore."

*

In a similar FBI case, a labor union official refused to furnish information to the FBI. He claimed he would have no confidence in the security of his information in view of the ability of individuals to obtain their files under the FOIPA.

15. WESTERN UNION

During the course of an investigation to locate and apprehend a fugitive, a Special Agent and a cooperating witness attempted to obtain information from a Western Union office, concerning a telegraph money order and message sent to the cooperating witness from the subject. Employees at the Western Union Company advised they could not disclose any information regarding the money order or message, due to "privacy concerns," without a court order.

16. MISCELLANEOUS

In an investigation regarding an escaped Federal prisoner, a man telephoned an FBI office and advised he knew the location of the fugitive. The caller stated he was concerned that the fugitive would find and kill him if he furnished the FBI the information. The caller was given assurances that his identity and any information he gave would be considered confidential. The caller refused to give his name, specifically stating, "I know about the FOIA. Anything I tell you guys will get back

to him." When asked the location of the fugitive, the caller stated he was in a motel on a certain street and then hung up the phone. After contacting numerous motels on that street, the fugitive was located and apprehended.

*

In a bank robbery investigation a high school student was identified as a suspect. When officials at the high school were approached in an attempt to obtain necessary information concerning the suspect (descriptive data, address, whereabouts, etc.), the officials declined to furnish the information due to the FOIPA. After the loss of precious time, the school principal was finally convinced that the student posed a threat to the community, in view of the fact he was armed and probably desperate. He eventually provided the information and the student was arrested.

*

During the course of another bank robbery investigation a warrant was obtained for a female subject. The investigation determined the subject had applied for a job through the state unemployment office. That office refused to provide any information, advising it was protected by state and Federal privacy acts. It was necessary to obtain a subpoena to force the unemployment office to disclose the requested information. During the period of time between the service of the subpoena and its return, the subject committed another bank robbery. The FBI believes that if the information had been disclosed at an earlier time, the second bank robbery would not have occurred, as the subject would have been arrested more promptly.

*

One FBI office received information from an AUSA indicating a woman had information concerning ghost employees and other frauds within the Comprehensive Employment and Training Act (CETA) program. When contacted, the woman refused to be interviewed because she feared that her identity might be disclosed through an FOIPA request.

*

Two individuals in a position to furnish important information regarding a series of train wrecks refused to do so because they feared the FOIA would force the FBI to reveal

their identities. This attitude existed even after assurances were given by the Agents regarding the FOIA.

D. IMPACT ON CURRENT INFORMANTS OR POTENTIAL INFORMANTS RESULTING FROM PRESENT FOIPA DISCLOSURE POLICIES

Three individuals were separately contacted in an effort to obtain their cooperation in organized crime matters. Each of these individuals advised the contacting Agent they felt their confidentiality could not be maintained due to current FOIA legislation. It is believed these individuals would have been cooperative had they not feared the FOIA and they would have been valuable FBI informants. Because of the wide publicity which the FOIA has received, these individuals were well aware of the public's ability to gain access to information in FBI files.

*

Shortly after a skyjacking began, an unidentified caller stated to a Special Agent that he was a medical doctor and that the skyjacker was probably identical to an individual who was an outpatient at the psychiatric clinic where the caller was employed. He stated the individual was schizophrenic and was dangerous to himself and to other persons. The caller suggested that a psychiatrist should be available during all negotiations with the skyjacker. The caller's identity was requested since he was obviously knowledgeable concerning the skyjacker and could furnish possible valuable information in an attempt to have the skyjacker peacefully surrender. Despite the fact that several lives were in jeopardy, the caller stressed that he was unable to furnish his name because of FOIPA requirements and terminated the call. Because of this telephone call, the FBI did have a psychiatrist available during negotiations with the skyjacker (who had been correctly identified by the caller) and the skyjacker's surrender was accomplished without loss of lives or property.

*

For approximately three years, a telephone caller known to the FBI Agent only by a code name furnished information in a wide variety of cases, from drug-related matters to terrorism. The caller never identified himself and advised he could never testify since to do so would risk death. The caller finally terminated his relationship, expressing fear that an inadvertent release of information by the FBI, under the FOIA, might identify him.

*

An individual in a position to know information about an FBI subject stated to a Special Agent that she would not furnish any information lest it and her identity appear in the newspapers. She made reference to information which was being published in the press as a result of an FOIPA request.

*

An Agent was recently in contact with an individual believed capable of providing reliable direct and indirect information regarding high-level political corruption. This individual advised his information would be furnished only if the contacting Special Agent could guarantee that the individual's identity would never be set forth in any FBI files. The contacting Agent attributed this individual's reluctance to have his identity set forth in FBI files to a fear of the FOIPA and its effect on the FBI's ability to maintain confidentiality of information from informants.

*

In August, 1976, an FBI field office contacted a source to determine why he was not now providing the FBI with information as he had been in the past. This source replied that he was in fear of losing his job and of retaliation by individuals about whom he might furnish information. The source asked if the FBI could guarantee the confidentiality of his relationship and of the information he furnished. He stated he was particularly concerned about confidentiality in light of the FOIA. In view of his apprehensions, this individual is no longer being contacted by the FBI.

*

A particular organized crime case involved an investigation to identify male juveniles being transported interstate for homosexual activity. Due to fear of reprisals stemming from FOIA disclosures and PA problems, various school officials would not cooperate in the investigation to verify the identity of the juveniles. In the same case, prominent citizens in a community displayed reluctant cooperation with the FBI out of fear of FOIA disclosure.

*

A potential source advised he would not cooperate with the FBI due to fear his identity would be publicly revealed, which would be detrimental to his profession.

This potential source referred to news accounts in the local press regarding material made available under the FOIA, which had disclosed the names of several individuals in professional capacities who had assisted the FBI and the nature of their assistance. This type of publicity, according to the potential source, would be detrimental to any individual in business who elected to cooperate with the FBI.

*

A Special Agent advised that an individual in a high management position in a state agency wished to provide information to the FBI on a confidential basis. During one of the Agent's initial conversations with this source, confidentiality was requested, specifically that the source's name never be mentioned in FBI files due to "past legislation, FOIPA, etc." This person was in a position to furnish information concerning white-collar crime and political corruption; however, the potential source subsequently refused to cooperate with the FBI, in spite of the Agent's assurances.

*

An FBI office has had success in developing a number of valuable informants from a group of loanshark victims. Recently, upon interview, several of these individuals stated a desire to cooperate, but have refused to do so for fear of the subjects of the investigation learning their identities through an FOIPA release.

*

A criminal informant, who furnished very significant information in an automobile theft ring case, advised he feared for his life after reading in various newspapers of disclosures made under the FOIPA. As a result, this source will no longer furnish information which is singular in nature.

*

Several attempts have been made to reactivate a former source, who had been extremely cooperative and productive. Current attempts to persuade the source to once again aid the FBI have been negative. The former informant refuses to cooperate, as he believes his identity cannot be kept secure due to FOIPA disclosure policy.

*

An informant was recently closed inasmuch as the source advised he believed the FBI could not efficiently protect the confidentiality of his relationship and his identity, due to the FOIPA. This source has previously provided excellent information regarding gambling and organized crime. He stated that he is afraid, if his name ever surfaced as providing information to the FBI, he would lose his business and everything he has worked for in his life.

*

In 1976, an active informant stated he would no longer continue in that capacity because it was his belief, as a result of the FOIPA, his identity and confidentiality could no longer be protected.

*

In an Interstate Transportation In Aid of Racketeering investigation, an individual was successfully developed as a potential source of information concerning racketeering and political corruption. However, upon learning of the provisions of the FOIPA, this individual requested that his conversations not be recorded and refused further cooperation.

*

Another field office informant related a conversation which occurred between himself and several organized crime figures. One individual commented that within the next few years the FBI will be severely restricted in its efforts to obtain information from confidential sources. He stated that he fully expected the provisions of the FOIPA would be successfully utilized in identifying FBI informants. Agents subsequently contacting this valuable source have noted a subtle reluctance on his part to more fully penetrate the particular organized crime activities which he is in a position to cover.

*

An FBI office in a major city has received information from several reliable informants that most organized crime members in the area have been instructed to write to FBI Headquarters requesting file information pertaining to themselves. These informants have advised the sole purpose of this process is to attempt to identify informants who have supplied information to the FBI on organized crime

matters. Requests have been submitted by virtually every organized crime figure in the area.

*

An informant who has a great deal of knowledge concerning a violent group is reluctant to furnish information on the gang because of the FOIPA. He has considerably reduced the amount of information he furnishes to the FBI.

*

An informant who has furnished considerable information concerning a terrorist organization advised that he is very upset about the FOIA. He has learned through conversations that former and current extremists are writing to FBI Headquarters under the FOIA in an effort to identify and expose informants. The informant indicated he is apprehensive about the Bureau's ability to properly safeguard information furnished by him.

*

A long-time confidential informant stated, "I can't help you any more due to the Freedom of Information Act." This informant had previously furnished valuable information which led to arrests and recovery of Government property. Even though the promise of confidentiality was explained to the informant, he still refused to furnish further information.

*

A former informant regularly furnished information resulting in recovery of large amounts of stolen Government property and the arrest and conviction of several subjects. In a pending case, the former informant refused to cooperate because of his fear of the FOIPA, which he felt would in fact jeopardize his life should he continue cooperating with the FBI.

*

In January, 1978, an office of the FBI received information one prime bombing suspect was applying under the FOIA for his file. Sources close to the suspect advised he was seeking to discover the FBI's knowledge of his activities and the identities of Agents who were investigating him.

*

In a western field office, a former highly productive confidential informant advised that he did not feel secure, due to widespread publicity concerning FBI informants and the FOIA legislation. He stated that, although he continued to maintain his confidentiality regarding his relationship with the FBI, he was not sure that the FBI could do the same. Due to this source's feelings, he discontinued all contact with the FBI.

*

An informant furnished information concerning organized crime figures and on organized crime conditions. Subsequently, the source acquired the conviction that no guarantee could be given that his identity would be protected. Accordingly, the source declined to furnish any further information to the FBI.

*

The Drug Enforcement Administration (DEA) was advised that an informant of one FBI office might be in a position to provide timely information concerning large narcotics shipments, in exchange for a reward from DEA and the guarantee of confidentiality. A local representative of DEA responded that confidentiality could be guaranteed by DEA only in instances where the informant was operated by DEA as a source. DEA reward money could be paid to any individual supplying information; however, the true identity of an FBI source would be reflected in DEA records for such payment. The FBI source was advised of the results of the inquiry with the DEA. The source subsequently furnished the identities of the drug subjects of which he had knowledge. This information was disseminated to DEA. However, the source declined to have further contact with these subjects, for fear his identity would be made known at some later date under an FOIA request to DEA.

*

An FBI informant is well connected to the organized crime element. Over the past year the informant's productivity has dramatically decreased. Consequently, this decrease was discussed with the informant, who stated that he had begun to doubt the FBI's ability to protect the contents of its own files and information provided by its informants. He had learned that an organized crime figure had received over 300 pages of FBI documents and was unquestionably trying to identify informants.

*

The criminal informant coordinator of a northeast office has been told by an individual, who would potentially be an excellent source of criminal information on the waterfront, that even though he had cooperated with law enforcement personnel in the past he would never do so again. He stated that he was afraid that one day, as the result of FOIPA, he might "see his name in the newspaper."

*

An informant who has been furnishing information to Special Agents of the FBI since 1953, regarding gambling, prostitution, stolen goods, and criminal intelligence information, when last contacted by an Agent, indicated he would no longer furnish any information to the FBI due to the fact it could be disclosed under the FOIPA. The informant felt his personal safety could be jeopardized by the disclosure of his identity, and he no longer wanted to take the personal risk and provide information regarding criminal activities.

*

An organized crime informant has expressed great concern over his safety due to the recent disclosure of information released under the FOIPA. A Special Agent has advised that he believes the informant will terminate his relationship with the FBI because of his concern.

*

A confidential source stated he was fearful his name would become known to certain individuals. He cited their possible access through FOIPA requests to the information he has provided. The source became unproductive and contact with him was discontinued.

*

A confidential source advised that "general street talk" was that one should not provide information to the Government since this information would eventually be publicized as a result of the FOIPA.

*

A long-time informant announced that he felt his confidentiality could no longer be guaranteed and refused to furnish further information. Provisions of the FOIPA were explained to the informant, particularly relating to

disclosure of informants and informants' information; however, this informant still wishes to sever contacts with the FBI.

*

Agents recently contacted a former criminal informant who associated with several individuals currently under investigation. The source, who displayed knowledge of the FOIA, expressed extreme concern of the disclosure provisions. The two Agents spent approximately one-half hour discussing this with the source. Both Agents were of the opinion that the FOIA prevented them from obtaining details of value.

*

An asset advised that, while talking with an individual who is a known intelligence officer of a foreign country, he was advised that certain officials of that country were using the FOIA law to obtain information from the files of the FBI and other agencies through intermediaries. The official expressed some humor over the fact that such information is available.

*

An individual, who is in a position to furnish possible foreign counterintelligence information, expressed the opinion the Federal Government could not protect his identity in view of the constant scrutiny by Congress of the FBI and CIA and the subsequent news media leaks. This individual also stated he would be fearful that his identity would be revealed through access to records by the public under the FOIA, as well as extensive civil discovery proceedings exemplified by the Socialist Workers Party civil lawsuit. In addition, this individual expressed concern over former intelligence agency officers who were publishing books, possibly jeopardizing the confidentiality of sources.

*

In another FBI security investigation, an individual was located who was in a unique position to act as an operational asset in foreign counterintelligence activities. While willing to assist the U. S. Government for patriotic reasons, this individual felt his identity might be revealed under the FOIPA. He therefore felt compelled to report a

pending highly sensitive undercover operation concerning national security to his employment supervisors, thereby jeopardizing that most sensitive operation.

*

An informant expressed deep concern over security and possible disclosure of his relationship with the FBI, noting recent instances in which FBI sources had been identified in the press. The informant, who had provided critical information for many years in matters of the highest sensitivity, requested that his relationship with the FBI be terminated and that his name be deleted from the FBI records.

*

One informant is a well-known and highly respected individual with many dealings with certain foreign countries. The informant has repeatedly voiced concern over possible disclosure of his identity through the FOIA. The source has now requested that all contacts be minimized in frequency and duration, that all information furnished be paraphrased, that his real or code names never be used, and that access to his information be severely restricted within the FBI. It has become apparent also, that while the informant's dealings with certain foreigners are known to have increased, the frequency of his FBI contacts, the length of these contacts, and the amount of substantive information furnished have declined.

*

A former source of excellent quality was recontacted, since his background was such that he could develop information of value concerning a terrorist group. After three hours of conversation, the former source agreed to cooperate with the FBI but only in a very limited manner. He stated that due to the FOIA he no longer believes that FBI Agents can assure his complete protection. He made it clear that he will never again function as he had previously in behalf of the FBI, noting that disclosure of his identity would most assuredly cost him his life.

*

An individual who has requested his identity be protected and who has provided information pertinent to a suspected foreign government intelligence officer, has also expressed concern pertinent to revelation of his

identity as furnishing information to the FBI. This individual querried the Special Agent involved in the investigation as to whether his identity could be protected and stated that he was concerned because of future business dealings with certain foreign countries. He felt that should his identity become known to foreign government officials, it would cause damage to his business relationships. Because of the above, this individual stated that he did not wish to be contacted on a regular basis by the FBI.

*

In September, 1977, a former Special Agent advised an FBI Agent that an informant had contacted him upon learning that an FBI subject had obtained documents under the FOIPA. The informant expressed the fear that his identity as a confidential source against this subject would be revealed. This subject was trying to identify individuals who had provided information to the FBI concerning his activities.

*

In a western FBI office, an individual was contacted in a recent foreign counterintelligence investigation, as he was in a position to furnish valuable information on a continuing basis regarding the subject. Although this potential source displayed an otherwise cooperative attitude, he stated he would not furnish information for fear his identity might be revealed at some future date due to provisions of the FOIA.

*

Members of an organization dedicated to bringing about a movement based on Marxism-Leninism, recently discussed the FOIA. A decision was reached to direct inquiries to both the FBI and the CIA under provisions of the FOIA requesting information concerning the organization. It was anticipated that a comparison of information concerning individuals, including dates, times and activities, would identify informants in the organization.

*

In 1976, a most valuable and productive FBI informant ceased his activity in behalf of the Bureau. His reason for this decision was his concern over the FOIA, which he believed offered the distinct possibility of

disclosing his identity as an informant. This source provided coverage on two major subversive- and/or violence-oriented groups of investigative interest.

*

Recently an informant, who is furnishing information regarding certain foreign visitors to the United States, expressed great concern over the possibility of his identity being disclosed. The source stated that he recently read in a local newspaper that foreign visitors could gain access to FBI records through the FOIPA.

*

A businessman was being approached by an intelligence officer of a foreign government. Upon interview by the FBI, the asset stated that were it not for the FOIPA, he would be willing to be operated against this and other hostile intelligence officers. However, because of FOIPA, he felt a real danger that his identity would be divulged which would in turn seriously and detrimentally effect his business overseas. For this reason, asset has refused to become involved in a foreign counterintelligence operation.

*

Since the advent of the FOIPA, numerous documents containing information furnished by an FBI asset of long-standing have been released under provisions of these laws. These releases have had a deleterious effect upon an asset's relationship with the FBI. There has been a noticeable decrease in the volume of information furnished by the asset, who has been frank to state that he no longer has his former confidence that the FBI can maintain the confidentiality of his relationship. On numerous occasions, the asset has expressed reluctance to furnish information which he fears might be released under the FOIA, resulting in his physical jeopardy or leaving him open to civil suit. This asset has not yet terminated his relationship with the FBI, but the relationship is now a very tenuous one.

*

A source who previously furnished information on a timely basis relating to foreign terrorist activities has expressed reluctance to furnish additional information because of the possibility of his identity being exposed due to the FOIPA.

*

A southwestern confidential source, who is in a position to furnish information concerning Middle East terrorist matters, advised that he did not desire to continue contact with any representative of the FBI or to furnish information because of fears that his assistance might become known. The source stated that his concern was due to various media articles relating to actual or potential FOIPA disclosure of information furnished confidentially to law enforcement agencies.

*

An informant of one FBI office has expressed concern that individuals about whom he was providing information were requesting their FBI files under the FOIPA. This informant expressed fear for his personal safety and that of his family. This source had in the past provided reliable and corroborating information about individuals who have been convicted of Federal crimes. There has been a recent reduction in amount and quality of the source's information.

*

On several occasions in the recent past, an informant voiced his concern for his safety out of fear that his identity would in the future be revealed under the FOIPA. He stated that when he began assisting the FBI it was his understanding that his identity and the information he furnished would always remain confidential.

E. MISCELLANEOUS (OTHER RELEVANT EXAMPLES)

1. SUITABILITY INVESTIGATIONS

In an applicant investigation, an official of a police department refused to be candid in his remarks pertaining to the applicant in view of the FOIPA.

*

In a recent applicant case, a source expressed concern less he be identified as the provider of derogatory information. He clearly indicated he was aware that the applicant would have access to this information through the PA. Other officers interviewed simply refused to be candid regarding the applicant, due to their awareness that the information might be released to him.

*

In a suitability investigation, a local police department refused to make a record check on the applicant's brother without a waiver from the brother, because it was believed there was a possible PA violation.

*

Special Agents have recently observed a general reluctance by local law enforcement officers to furnish derogatory hearsay information in suitability investigations. Members of the law enforcement community have been apprised of the access and disclosure provisions of the FOIPA.

*

A former high official of one city was being considered for a White House staff position. An individual in that municipality refused to comment since he believed the candidate would be able to obtain this information through the PA. The official, who was aware of the Act's provisions, stated he still believed someone in the White House would have access to comments made.

*

During a 1978 Special Inquiry investigation in one city, the interviewee advised he was a business competitor acquainted with the appointee. He inquired as to what degree of confidentiality could be provided if he furnished information regarding the appointee. The PA provisions were explained to the interviewee. This was not a sufficient degree of confidentiality and he would have nothing to say about the appointee.

During the same investigation, a police officer advised he had derogatory background information concerning the appointee. He said he did not want to "go on record" with the FBI concerning this information in view of the PA. He stated that he considered the information so pertinent that it required his direct contact with the Congressional Committee, which had requested the investigation. After receiving the officer's information, the Committee requested the FBI to discontinue the suitability investigation.

2. LAWSUITS

A $600,000 civil suit was filed by a Honolulu plaintiff against a neighbor regarding derogatory information provided the FBI approximately 20 years ago concerning the

plaintiff in a suitability investigation. The FOIPA request made by the plaintiff allegedly had enabled her to identify the defendant as the source of the derogatory information, which she claimed in her lawsuit was defamatory. The civil action required the defendant to retain private counsel at great personal expense and resulted in personal trauma. The defendant's retained counsel was successful in obtaining dismissal of the suit on the technical defense of "Statute of Limitations." The primary issue of whether or not a person could sue an individual who had provided information to the FBI was not addressed.

*

In early 1978, an employer contacted one FBI office concerning certain derogatory information furnished in 1967, on an employee who was then seeking a position with the White House staff. This individual, who has subsequently made a PA request to the FBI, determined that the former employer had provided derogatory information concerning her, and threatened to sue the employer if correction of this information was not forwarded to the FBI. The employer's written retraction of the previous information was subsequently submitted to the FBI.

*

An unsuccessful applicant for the position of Federal Bankruptcy judge obtained his file under the FOIPA. He subsequently decided that several former employers and law partners had furnished derogatory information to the FBI concerning him. He filed civil suit against these former employers and law partners and also filed an FOIPA civil suit against the FBI.

*

A subject found guilty in a criminal case, subsequently filed a civil action against witnesses who testified against him in that matter. He made several FOIPA requests to discover the identities of additional witnesses whom he may join in his civil suit.

THE PROPOSED

FREEDOM OF INFORMATION ACT

If our proposals are enacted, the Freedom of Information Act will read as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

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

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

CONTINUED

2 OF 3

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person. This section does not require a law enforcement or intelligence agency to disclose information to any person convicted of a felony under the laws of the United States or of any state, or to any person acting on behalf of any felon excluded from this section.

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

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records 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 may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action; but if the court examines the contents of a law enforcement or intelligence agency's records withheld by the agency under exemptions (b)(1), (b)(3), the introductory clause of exemption (b)(7), or exemption (b)(7)(D), the examination shall be in camera. The court shall maintain under seal any affidavit submitted by a law enforcement or intelligence agency to the court in camera.

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

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

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

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

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

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

(i) notify the person making the request of the receipt of the request and notify the person making the request within 30 days after receipt of the request of the number of pages encompassed by the request and the time limits imposed by this subsection upon the agency for responding to the request; determine whether to comply with the request and notify the person making the request of such determination and the reasons therefor within 60 days from receipt of the request (excepting Saturdays, Sundays and legal public holidays) if the request encompasses less than 200 pages of records with an additional 60 days (excepting Saturdays, Sundays and legal public holidays) permitted for each additional 200 pages of records encompassed by the request, but all determinations and notifications shall be made within one year; and notify the person making the request of the right of such person to appeal to the head of the agency any adverse determination; and

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

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

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

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

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

(C) Any person making a request to any agency for records under paragraphs (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in attempting to respond to the request, the court shall allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are--

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

(2) related solely to the internal personnel rules and practices of an agency;

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

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

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

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

(7) records maintained, collected or used for foreign intelligence, foreign counterintelligence, organized crime, or terrorism purposes; or records maintained, collected or used for law enforcement purposes, but only to the extent that the production of such law enforcement records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy or the privacy of a natural person who has been deceased for less than 25 years, (D) tend to disclose the identity of a confidential source, including a state or municipal agency or foreign government which furnished information on a confidential basis, and in the case of a record maintained, collected or used by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by the confidential source including confidential information furnished by a state or municipal agency or foreign government, (E) disclose investigative techniques and procedures or (F) endanger the life or physical safety of any natural person;

PROVIDED, however, this section shall not require a law enforcement or intelligence agency to

(i) make available any records maintained, collected or used for law enforcement purposes which pertain to a law enforcement investigation for seven years after termination of the investigation without prosecution or seven years after prosecution; or

(ii) disclose any information which would interfere with an ongoing criminal investigation or foreign intelligence or foreign counterintelligence activity, if the head of the agency or in the case of the Department of Justice, a component thereof, certifies in writing to the Attorney General, and the Attorney General determines, disclosing that information would interfere with an ongoing criminal investigation or foreign intelligence or foreign counterintelligence activity;

(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.

Any reasonably segregable portion of a record not already in the public domain which contains information pertaining to the subject of a request shall be provided to any person properly requesting such record after deletion of the portions which are exempt under this subsection.

(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.

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

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

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

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

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

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

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

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

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

(e) For the purpose of this section--

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

(2) the term "person" means a United States person as defined by the Foreign Intelligence Surveillance Act of 1978;

(3) the term "foreign intelligence" means information relating to the capabilities, intentions and activities of foreign powers, organizations or persons;

(4) the term "foreign counterintelligence" means information gathered and activities conducted to protect against espionage and other clandestine intelligence activities, sabotage, international terrorist activities or assassinations conducted for or on behalf of foreign powers, organizations or persons;

(5) the term "terrorism" means any activity that involves a violent act that is dangerous to human life or risks serious bodily harm or that involves aggravated property destruction, for the purpose of --

(i) intimidating or coercing the civil population or any segment thereof;

(ii) influencing or retaliating against the policies or actions of the government of the United States or of any State or political subdivision thereof or of any foreign state, by intimidation or coercion; or

(iii) influencing or retaliating against the trade or economic policies or actions of a corporation or other entity engaged in foreign commerce, by intimidation or coercion;

(6) the term "organized crime" means criminal activity by two or more persons who are engaged in a continuing enterprise for the purpose of obtaining monetary or commercial gains or profits wholely or in part through racketeering activity.

TITLE 28

CODE OF

FEDERAL REGULATIONS

SECTION 50.8

Policy with regard to criteria for discretionary access to investigatory records of historical interest.

(a) In response to the increased demand for access to investigatory files of historical interest that were compiled by the Department of Justice for law enforcement purposes and are thus exempted from compulsory disclosure under the Freedom of Information Act, the Department has decided to modify to the extent hereinafter indicated its general practice regarding their discretionary release. Issuance of this section and actions considered or taken pursuant hereto are not to be deemed a waiver of the Government's position that the materials in question are exempted under the Act. By providing the exemptions in the Act, Congress conferred upon agencies the option, at the discretion of the agency, to grant or deny access to exempt materials unless prohibited by other law. Possible releases that may be considered under this section are at the sole discretion of the Attorney General and of those persons to whom authority hereunder may be delegated.

(b) Persons outside the Executive Branch engaged in historical research projects will be accorded access to information or material of historical interest contained within the Department's investigatory files compiled for law enforcement purposes that are more than fifteen years old and are no longer substantially related to current investigative or law enforcement activities, subject to deletions to the minimum extent deemed necessary to protect law enforcement efficiency and the privacy, confidences, or other legitimate interests of any person named or identified in such files. Access may be requested pursuant to the Department's regulations in 28 CFR Part 16A, as revised February 14, 1973, which set forth procedures and fees for processing such requests.

(c) The deletions referred to above will generally be as follows:

(1) Names or other identifying information as to informants;

(2) Names or other identifying information as to law enforcement personnel, where the disclosure of such information would jeopardize the safety of the employee or his family, or would disclose information about an employee's assignments that would impair his ability to work effectively;

(3) Unsubstantiated charges, defamatory material, matter involving an unwarranted invasion of privacy, or other matter which may be used adversely to affect private persons;

(4) Investigatory techniques and procedures; and

(5) Information the release of which would deprive an individual of a right to a fair trial or impartial adjudication, or would interfere with law enforcement functions designed directly to protect individuals against violations of law.

(d) This policy for the exercise of administrative discretion is designed to further the public's knowledge of matters of historical interest and, at the same time, to preserve this Department's law enforcement efficiency and protect the legitimate interests of private persons.

[Order No. 528-73, 38 FR 19029, July 17, 1973]

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