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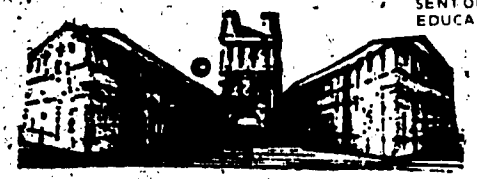
ABSTRACT

The Freedom of Information Act amendments, which became effective in February 1975, have so far yielded mixed results. This report provides an account of how different federal agencies are implementing this amended statute. Among the topics discussed are modifications of the original 1966 Freedom of Information Act, which were made in the attempt to eliminate the law's loopholes; the interpretations of the Judicial Review Section; the effect of Attorney General Edward H. Levi's memorandum to federal agencies; implementation of the amendments by agencies; and guidelines established by the Federal Bureau of Investigation, the Central Intelligence Agency, and the Internal Revenue Service. A summary of the current employment of the act is presented, and an appendix provides a listing of the "Federal Register" citations of agency procedures for implementation of the amended act. (KS)



SCHOOL OF JOURNALISM, UNIVERSITY OF MISSOURI AT COLUMBIA
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FREEDOM OF INFORMATION CENTER REPORT NO. 343

IMPLEMENTING THE AMENDED FOI ACT

This report was written by Wallis McClain, an M.A. candidate in the School of Journalism and editor of the Center publications.

Careful drafting of legislation with precise wording is in itself no guarantee that the legislation will achieve its intended purpose. Interpretations of a law's intent by those responsible for its administration and by the judiciary clearly affect the law's impact. Certainly the stated intent of the Congress in passing the Freedom of Information Act in 1966 was to guarantee access to the public documents of the federal government without bureaucratic harassment.

Agency bureaucrats publicly complained about the FoI Act. Because those same individuals were responsible for carrying out the provisions of the act, it would not be illogical to assume that some attempt would be made to subvert the purpose of the law or at least to lessen the blow of some of its more unpopular sections. Development of techniques, then, which tended to discourage use of the FoI Act was, in a sense, normal in the evolution of implementation procedures.

Instrumental in the initial interpretation and implementation of any law are its legislative history and the precise wording not only of the law itself but of the various conference reports in which the exact purposes of the law are thrashed out. The attorney general takes these factors into consideration as he prepares, in the form of a memorandum issued to all agencies and departments affected by the new legislation, a set of guidelines to follow in effecting the law. Former Attorney General Ramsey Clark prepared such a memorandum, released in June, 1967, entitled "Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act."[2] Initial agency interpretation of the law relies heavily on such memoranda. Later, as court cases lead to judicial refinement of the law, agencies may be forced to comply with somewhat different standards of interpretation. In the beginning, however, the attorney general's list of guidelines "is the law in the sense that it guides the government's practices under the (Freedom of Information) Act, but it is not the law in the sense of binding the courts."[3]

Not surprisingly, the June, 1967 memorandum on the FoI Act "reflects the point of view of the agencies, all of whom opposed the enactment."[4] Much of the ineffectiveness of the FoI Act derived from the officially sanctioned tactics of the agencies in discouraging requests. Clark wrote, for example, that searching and copying fees charged in filling information requests could

> discourage frivolous requests, especially for large quantities of records the production of which would uselessly occupy agency personnel to the detriment of the proper performance of other agency functions as well as its service in filling legitimate requests for records (emphasis added).[5]

The wording of this statement gave almost total freedom to individual agencies to distinguish between "frivolous" and "legitimate" requests; moreover, it sanctioned by implication the charging of prohibitively large fees in cases in which an agency, for whatever reason, desired to thwart a request for information.

It soon became apparent that there were serious deficiencies in the law. A 1972 report of the House Committee on Government Operations, issued after a series of hearings into the law's shortcomings, concludes that

> . . . since there was general opposition to the legislation throughout the Federal bureaucracy, the agencies would not be expected to administer the law so that public access to public records is a simple process.
>
> And they have not.[6]

Public access was being stymied by seemingly endless delays in responding to requests, unconscionably large fees for locating documents and almost capricious decisions by agency bureaucrats to exempt certain clearly public documents from disclosure.

> Nearly all agencies move so slowly and carefully in responding to a request for public records that the long delay often becomes tantamount to denial.
>
> Dozens of agencies have set up complicated procedures for requesting public records.
>
> Many will respond only to repeated demands for information, filed formally and in writing. Others require detailed identification of the records sought, so that only those who have complete knowledge of an agency's filing system can identify properly the records sought.[7]

Furthermore, there was little if any standardization of agency implementation under the 1966 act. Charges for copying records ranged from $0.05 per page at the Department of Agriculture to $1.00 per page at the Selective Service System. Similarly, charges for searches of requested

Summary: The FoI Act amendments, which became effective in February, 1975, have so far yielded mixed results. The author provides an account of how different federal agencies are implementing the amended statute.

material by clerical personnel ranged from $3.00 an hour at the Veterans' Administration to $7.00 an hour at the Renegotiation Board. [8]

Agencies varied, too, in the average time taken to answer requests. The Small Business Administration averaged the shortest time by answering initial requests in eight days. The Federal Trade Commission, on the other hand, took an average of 69 days to respond initially. There is an even wider range of time taken to answer appeals, from 13 days at the Department of the Air Force to 127 days at the Department of Labor. [9]

Numerous abuses of the 1966 FoI Act have been reported, but one in particular, the case of Harrison Wellford, showcases all the worst loopholes in the law. Wellford, on the staff of the Center for the Study of Responsive Law, requested information from the Department of Agriculture. Wellford's initial request was rejected on the grounds that he had not given precise enough description of the records he sought. In order to comply with the department's demands for specificity, Wellford asked to see indices of agency documents. These were denied him because they were interagency memoranda and therefore exempt under the law from disclosure. Although eventually given access to the indices by a federal court decision, Wellford's attempt to get the desired records was again frustrated. The records, he was told, were still not available because they were mixed with confidential company information. Then, as if the delays it had caused Wellford to suffer were not enough, the department informed him that it would cost $91,840 to prepare the requested files for viewing. [10]

All in all, it was clear that agency opposition to the 1966 act had rendered it essentially ineffectual. That they were able to use fees and delays to discourage use of the law by all but the most persistent researchers seemed a clear indication that changes were needed. Loopholes had to be tightened, if not eliminated altogether. In short, most analysts shared the opinion of Martin Arnold, who wrote (New York Times, 2-16-75) that the 1966 Freedom of Information Act "simply didn't work."

The New Law and New Memoranda

Stung by the failure of the 1966 Act and spurred by the public response to the inexorable unraveling of the Watergate affair, Congress sought to remedy the law's deficiencies. Active opposition came (New York Times, 6-31-74) not only from the President and executive and regulatory agencies but also from the office of the attorney general. The law nonetheless passed both houses in October, 1974. Then, after President Gerald Ford had vetoed the act, Congress reaffirmed its commitment to open government by passing the law, "the objections of the President of the United States to the contrary notwithstanding."

All in all, seventeen amendments were made to the 1966 law. Of these, the most important are: requiring that each agency establish a uniform schedule of fees for searching and copying, which fees are to be limited to the actual costs to government; placing a ten-day time limit on agencies to respond to initial requests, a twenty-day limit on responses to appeals of agency denials, and a maximum total delay of ten days in exceptional cases; opening investigative files, except when disclosure would interfere with law enforcement, court action or personal privacy; providing for judicial review of classification of documents when that classification is invoked by an agency as a basis for denial of access; making it mandatory for agencies to guarantee access to indices of available material; removing the rigid requirements for precise definition of requested material and making it possible for the Civil Service Commission to initiate disciplinary action against any government employee who "arbitrarily or capriciously" withholds information from the public.

But, as in the case of the earlier law, it is essentially up to the agencies to determine how effective the law will be. So, too, is it essential for the public to use the law. Even in the face of agency recalcitrance, a persistent and determined public can force court cases which result in legally binding interpretations. In 1974, agencies were still opposed to the sweeping reforms of governmental secrecy; moreover, the Justice Department and the attorney general had actively opposed (Washington Post, 8-14-74) several provisions of the new law. This same Justice Department which had fought the law would now be charged with enforcing it. Indeed, it would be issuing new guidelines for agencies to follow in the implementation of the law.

On Dec. 11, 1974, Attorney General William B. Saxbe issued his preliminary guidelines. [11] Then, in February, 1975, new Attorney General Edward H. Levi came out with his memorandum to all federal agencies. Levi, himself, had not been involved in the Justice Department lobbying against the FoI Act, but, as Richard Dudman noted (St. Louis Post-Dispatch, 2-21-75), his memorandum "has pointed to fresh loopholes." It is also significant to note that these loopholes in most cases end up benefiting agencies at the public expense. Ralph Nader wrote (Washington Star, 3-2-75) almost optimistically that it would "be easier, though not easy" to gain access to records under the new law.

Interpretation of the Judicial Review Section

One of the major objections to the old law was pinpointed (Congressional Record, 5-16-74) by Sen. Edward Kennedy (D-Mass.), who said it gave agencies the opportunity to withhold information solely on the basis of classification. A 1973 Supreme Court case, Environmental Protection Agency et al v. Patsy T. Mink et al (410 U.S. 73) resulted in the ruling that the public had no statutory authority to demand a review of an agency's classification of documents. Thus, the court held, any refusal of the government to disclose records because of their classification would be sustained, the only evidence required being an affidavit from the government that the classification was essential and had been done properly. The loophole in the 1966 law, as Justice Potter Stewart noted in his dissent, "provides no means to question an executive decision to stamp a document 'secret', however cynical, myopic, or even corrupt that decision might have been." [12]

The 1974 law attempts to close the loophole. Section 552(a)(4)(B) guarantees the right of a citizen to seek a judicial review of the propriety of agency classification which has been cited by the agency as the basis for denial of access to records:

> 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.

The wording of the provision is, however, cautious and is in no way an absolute guarantee that an independent judge will actually examine the documents to determine whether they have been properly classified. The law provides that a judge may order in camera review. That decision is entirely discretionary. Furthermore, the conference report on the

FoI amendments adds another dimension to the provision. It holds that "before the court orders in camera inspection, the Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure." [13] The reason for this, the report continues, is that "the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects (sic) might occur as a result of public disclosure of a particular classified record." [14]

Another factor in any assessment of this provision is the Feb. 7, 1975, decision by the United States Court of Appeals for the Fourth Circuit. Although the case was not filed under the Freedom of Information Act and was issued before the amendments went into effect, the decision nonetheless took the act into account in formulating its opinion. [15] In the opinion of the court, which was essentially upheld by the Supreme Court on May 25, 1975, when it denied certiorari in the case, Judge Clement F. Haynsworth, Jr. said, "There is a presumption of regularity in the performance by a public official of his public duty . . ." The opinion continues with the observation that the judicial chambers are not an appropriate or secure place in which to make a classification decision and that

> national interest requires that the government withhold or delete unrelated items of sensitive information ... in the absence of compelling necessity. It is enough, as we have said, that the particular item of information is classifiable and is shown to have been embodied in a classified document. This approach is consistent with the Freedom of Information Act which, as we have noticed, provides the judge only with discretionary authority even to require production of the document for his in camera inspection; he may find the information both classified and classifiable on the basis of testimony or affidavits. [16]

Haynsworth suggests that any citizen who thinks a document is not properly classified or should be declassified take his case to the Interagency Classification Review Committee, established by Executive Order 11652, which is "an available administrative remedy which is far more effective than any the judiciary may provide, which can function without threat to the national security and which can act within the Executive's traditional sphere of autonomy." [17]

The attorney general takes note of this decision in his memorandum. Furthermore, he states that the amendment does not deal with that part of the **Mink** decision which acknowledges the right of the President to protect executive materials. [19] Thus, presumably, protection could be afforded certain executive documents, including those of such executive agencies such as the CIA and the Justice Department (FBI), by order of the President. All that is required under Section 552 (b)(1)(B) for a document to achieve exempt status is that it be "properly classified pursuant to such Executive order."

Although the burden clearly remains on the agencies to show that classification has been properly done, the conference report, the court decisions in **Mink** and **Knopf** and the attorney general's memorandum suggest that the agencies may have a relatively easy time of it. The memorandum makes it apparently acceptable for an agency to rely upon the original classification as basis for denial, and the other available data seem to indicate that the classification may be upheld on the basis of persuasive testimony and affidavits. Thus, as in the case of most controversial legislation, it will still take time and many court cases to define the law's intent. Until then, it may perhaps not be known just how effective the judicial review section of the law will be.

The Memorandum and Investigatory Files

In section (b)(7), the 1974 FoI Act also exempts "investigatory records compiled for law enforcement purposes" if, and only if, disclosure of those records would

> (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and ... confidential information furnished only by a confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel. . . .

Levi's memorandum thoroughly analyzes this section, representing as it does one of the most objectionable of all the amendments. The analysis begins with an official definition of investigatory records, which are

> those which result from investigative efforts. The latter may include not merely activities in which agencies take the initiative, but also the receipt of complaints or other communications indicating possible violations of the law, where such receipt is part of an overall program to prevent, detect or counteract such violations, or leads to such an effort in the particular case. [20]

According to the memorandum, there was no change in the definition of "law enforcement," which under the 1974 act as under the 1966 act applies "to the enforcement of law not only through criminal prosecutions, but also through civil and regulatory proceedings, so that investigations by agencies with no criminal law enforcement possibilities were included." [21]

Section (b)(7)(C) exempts investigatory files which would "constitute an unwarranted invasion of personal privacy." The wording of the provision is almost identical to exemption (b)(6): "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy (emphasis added)." The deletion of the word "clearly" is of great significance to Levi, who says it "renders the government's burden somewhat lighter." [22] The distinction between "clearly unwarranted" and "unwarranted" is perhaps murky. It should be obvious, however, that it gives agencies greater opportunity for withholding. Although the conference report simply notes the deletion of "clearly" in the phrase, Levi interprets it to mean that an agency could even withhold a person's home address. Moreover, he continues, private information "must be deemed generally to include information about an individual which he could reasonably assert an option to withhold from the public at large because of its intimacy or its possible adverse effects upon himself or his family."

Protecting the identity of confidential sources or any information supplied only by a confidential source is the basis of exemption (b)(7)(D) of the investigatory file section. The conference report makes it clear that

> the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could reasonably be inferred. [23]

Levi interprets this clause to mean that "in most circumstances it would be proper to withhold the name, address and other identifying information regarding a citizen who submits a complaint or report indicating a possible violation of the law." [24] To the extent that the attorney general's wording is less exact than that of the conference report, it may reasonably be assumed that it gives greater discretion to the agencies to determine when information may be withheld.

Perhaps one of the best examples of the attorney general's expansive interpretation of the law relates to section (b)(7)(F), which relates to the "life or physical safety of law enforcement personnel." His approach would apparently give agency bureaucrats great freedom to use this section in denying access to investigatory files requested under the FoI Act. Levi writes, "It is unclear whether the phrase 'law enforcement personnel' means that the endangered individual must be technically an 'employee' of a law enforcement organization; arguably it does not." [25] Moreover, although he concedes that the language of clause (F) does not pertain to the safety of the family of an employee of such a law enforcement organization, he indicates that clause (A), which exempts the release of records which might interfere with law enforcement, might be understood to include any record which might cause danger to any person at all. [26]

In issuing guidelines on the implementation of section (b)(7), Levi again creates a new loophole. The section, as noted, prevents disclosure of investigatory files which would do any of the six specific things listed in paragraph (7). Levi rejects any interpretation of the word "would" which implies mandatory action—e.g., defining the word to mean "will." He instead adopts a more flexible definition. Thus, he concludes, "The legislative history suggests that denial can be based upon a reasonable possibility, in view of the circumstances, that one of the six enumerated consequences would result from disclosure." [27]

In his veto message to Congress, President Ford objected (Congressional Quarterly, 10-26-74) to the investigatory records provision and suggested

> that more flexible criteria govern the responses to requests for particularly lengthy investigatory records to mitigate the burden which these amendments would otherwise impose, in order not to dilute the primary responsibilities of these law enforcement activities.

It should be apparent that Levi's memorandum attempts to give the agencies the called-for flexibility. Certainly there is no way the attorney general could or would want to encourage noncompliance with the law; he cannot reverse the trend toward open government, nor can he use his interpretation of the law to authorize agencies to withhold clearly public information. But Levi can attempt to "mitigate the burden" on the agencies. His guidelines on the investigatory files seem to do just that.

The Memorandum and the Remaining Amendments

Levi's guidelines concerning other of the amendments show the same liberal interpretation of the law for the benefit of the agencies as do his guidelines on the investigatory files. He notes, for example, that the new requirement that a requester of information need only "reasonably describe" the requested material rather than provide an "identifiable" description does not substantively change the law. The amendment "serves basically to clarify rather than to alter the law as it has been understood by several courts and many agencies." [28] A reasonable description, then, is one which enables a record "to be located in a manner which does not involve an unreasonable amount of effort." [29] For all practical purposes, agencies may still be able to demand precise descriptions of much information in their possession.

Levi's recommendations for interpretation also tend to limit the effectiveness of the administrative penalties section of the act. That section, which would enable the Civil Service Commission to take action against any employee who "arbitrarily and capriciously" withholds releasable material, had been proclaimed a necessary provision of any truly effective information act. Levi seems to imply that to find an employee guilty of such wilfull withholding would be tantamount to the impossible task of linking that employee to a firm and premeditated motive to subvert the purposes of the FoI Act. "It is thus clear," he argues, "that to justify commencement of a Civil Service Commission proceedings, much more is required than a judicial determination that an agency has erred in its interpretation of the act." [30]

In the area of fees, Levi refers for the most part to a preliminary memorandum to the agencies issued on Dec. 11, 1974, by former Attorney General William B. Saxbe. [31] There had been, under the old FoI Act, numerous complaints that agencies stifled FoI requests by charging outrageous fees. Harrison Wellford, whose case has been referred to earlier charged, for example, that fees "have become toll gates on public access to information." [32] In addition to the statutory limitation on fees charged, which in no case are to exceed the actual costs to the agency, Saxbe suggested that each agency must notify and receive authorization from each requester in every case in which copy and search fees are expected to be substantial. He also suggested a system by which the agency could demand a deposit or full advance payment in these cases. [33] He also told the agencies that "search fees are assessable even when no records responsive to the request, or no records not exempt from disclosure, are found." [34] Furthermore, the statutory time limits of ten days for initial requests and twenty days for appeals are not deemed to have started until the requester has given his approval for the estimated charges and made whatever advance payments the agency might require. [35] Levi responds in his memorandum to the provision to waive or reduce fees in cases in which the public interest would be substantially served by the disclosure of information. He urges the agencies to consider each request for waiver of fees on its own particular merits and takes great pains to point out that "there is no doubt that waiver or reduction of fees is discretionary." [36]

It should be noted that neither Saxbe's preliminary memorandum nor Levi's later memorandum is intended to make a shambles of the FoI Act. The agencies do have legitimate interests and do have enormous files of records. The memoranda are intended, in a way, to insure, on the other hand, that the FoI Act does not make a shambles of the agencies; furthermore, the FoI Act is now the law of the land

and the memoranda take every opportunity to urge that the agencies comply with the act to the fullest extent possible. There is nothing essentially devious about the guidelines issued by the former and present attorneys general. If they do seem to favor the agencies, it is only because the language of the act permits them to do so. However precisely drafted any piece of legislation, it will still be open to interpretation. The attorneys general have attempted to do that in a way that will serve the public and yet not be burdensome to the agencies.

Implementation of the Amendments by the Agencies

All federal agencies, both executive and regulatory, were required to publish in the **Federal Register** before Feb. 19, 1975, at the order of the attorney general, a set of public guidelines for implementing the provisions of the new FoI Act. Their guidelines derive for the most part from the two memoranda briefly examined above. Following is a general survey, an overview of the way in which agencies are implementing the 1974 law. (A portion of this report has already appeared in the Freedom of Information Digest, May-June, 1975.) [37]

Fee schedules: As already noted, the amendments to the FoI Act require each federal agency or commission to establish a uniform schedule of fees for searching and copying records under the provisions of the act. The amendments require, furthermore, that such fees be limited to the actual costs to the agency. Schedules published in the **Federal Register** indicate little, if any, interagency attempt to achieve even a modicum of standardization. Costs for copying one page of a record, of a size up to 8½ X 14 inches, range from $0.03 at the Commission on Civil Rights to $0.25 at the American Revolution Bicentennial Administration and the Federal Reserve System, among others. In general, most agencies seem to have established charges between $0.10 and $0.20 per page.

Some agencies do not charge for copying if costs incurred are under a certain amount; but it seems, again, that there is little uniformity from agency to agency. The Department of Commerce waives all copying fees which amount to less than $1.00, while the Federal Reserve System waives those totaling less than $2.00. The Federal Trade Commission does not charge for fees under $10.00. Other agencies, on the other hand, have minimum copying charges. At the General Services Administration, for example, there is a $2.00 minimum. The Department of Defense, including its various subagencies such as the Departments of the Navy and Air Force, charges a basic fee of $2.00, to which the $0.05 per page copying costs are added. The agency charge to a citizen seeking a copy of a 20-page request would therefore be $3.00. A 40-page request would cost $4.00.

Search fees vary even more widely than fees for duplication. At least one agency, the Civil Aeronautics Board, has no fees whatsoever in connection with searches for requested documents. Some agencies — including the Tennessee Valley Authority, the Occupational Safety and Health Review Commission, the Renegotiation Board and the Federal Communications Commission — charge a flat hourly rate for searching, whether that searching is done by clerical or by professional-managerial personnel. That rate usually falls within the $5.00 to $10.00 range, although some agencies, such as TVA, which charges $4.15 per hour, have lower rates.

More common, however, is the practice of charging separate fees for clerical and professional-managerial searches. In some cases, the charges for professional-managerial search are as much as three times as great as fees for clerical search. At the National Science Foundation, for example, clerical rates are $1.25 per quarter-hour while professional rates are $3.75 per quarter-hour. This range is extreme, however, and the professional charges at the NSF are the highest of any agency. On the other hand, the Delaware River Basin Commission has the lowest rates, at $1.80 per quarter-hour, for professional-managerial searches. It also charges — along with the National Aeronautics and Space Administration and the National Transportation Safety Board — the lowest rates ($4.00 per hour) for clerical searches. These fees represent, according to Saxbe's preliminary guidelines, an approximation of the average salaries of all those personnel who might be expected to perform a search and do not necessarily reflect the salary of any one grade of agency employees. [38] The Commission on Civil Rights seems to have figured its average rate more precisely, charging $4.09 per hour for clerical searches and $8.88 for professional-managerial. None of the agencies specifies under what circumstances professional-managerial services would be needed to locate material. This could in some circumstances result in the higher fee being charged without the requester's being aware of it.

Some agencies will provide for certification of records as true copies for a fee, usually between $1.00 and $3.00. Most agencies do not state whether this service is available.

The Department of Commerce and the Renegotiation Board permit the requester to hand-copy or use agency coin-operated machines to copy original documents. Others do not mention such a provision. Although it is not yet clear, it is possible that some agencies will not permit inspection of original documents and will permit a requester to examine only copies. In such cases, a requester may be charged for search and copying fees just to inspect documents. The Federal Reserve System, for example, demands that "a person requesting access to or copies of particular records shall pay the costs of searching and copying such records. . . ." The wording of this statement seems to indicate that mere examination requires payment of copying costs. Apparently some individual requesters of information have found this to be the case. William G. Florence, who requested public information from the Office of the Assistant Secretary of Defense for Public Affairs, was charged copying fees although he protested that he did not need copies of the documents. [39]

Rates for copies of microfiche, microfilm and other special techniques for reproduction vary widely. Some agencies simply state that rate schedules are available upon request. Computer costs are usually given in vague terms and said to be available upon request. The Department of Commerce gives the rate for retrieving information stored in computers as $4.50 per minute (maximum). Any necessary reprogramming is done at a charge of $10.00 per hour. (The Department of the Navy will not even retrieve material stored in the computer unless it can be obtained "in approximately the form desired without substantial reprogramming.") With increasing use of computers for data storage, new problems of access and fee charges could result.

The Civil Service Commission, the Department of Commerce and NASA are among those agencies which will charge for searching even if records are not found or are exempt from disclosure. The Import-Export Bank has decided to waive fees if the records are located but not releasable. Fees will still be charged in those cases in which

requested records are not located. A requester may, then, be liable for large fees if, within the permissible time limits of the FoI Act, agency personnel say they cannot locate requested materials. Search fees are charged in all cases in which records are found and are available, unless the agency specifically waives all fees.

Most, if not all, agencies list general terms for the waiver of fees. In most cases, the agencies follow the attorney general's recommendation and state that the final determination on waiver will be made at the discretion of the director of the agency on a case-by-case basis.

Payment of Fees: In general, if the total fees are less than $25 and the requester has agreed to pay that amount in his request, agencies will make information available. At some agencies, deposits are required if anticipated fees are in excess of $25. Such a deposit is required at the Renegotiation Board, although the published guidelines do not specify the exact amount. At the Import-Export Bank, an advance deposit of 25 per cent of the total for charges which are anticipated to be more than $25, or a deposit of $25, whichever is the greater, is required before the request will be processed. The Civil Aeronautics Board requires prepayment of fees of more than $100. At the Department of Defense, the General Services Administration and the Council on Wage and Price Stability, fees must be prepaid before the agency will release any information. At the Department of Commerce, the requester must pay search fees before the agency will even begin to look for the records. Others may simply require that the requester indicate the maximum amount that he is willing to pay, figured from the published agency fee schedules. If there is a balance due on a previous request, payment in full is usually required before any new request will be considered.

Indices: Quarterly indices of available information are usually available upon request and at a cost not to exceed the actual costs of copying, but most agencies seem to have adopted the position that publication in the **Federal Register** is "unnecessary and impracticable." Many, however, including the Commission on Civil Rights, the FTC and the Defense Department, will publish such an index.

Form of Requests: In general, the form of the request is specified in great detail. Agencies make it clear that unless precise form is followed, the request will not be considered a request under the provisions of the FoI Act. It is usually demanded that the requester identify, both on the request and on the envelope, that the communication is an FoI request. The request should reasonably describe the materials requested. A willingness to pay fees should be indicated and, in necessary cases, a deposit included.

Agencies have apparently decided that tightened administrative procedures and rigid formats will facilitate the handling of an expected increase in requests. Indeed, if the requester follows the published guidelines precisely, his request should not be stalled for any procedural questions. Agencies have warned, however, that the time limits specified in the act will not begin until, 1.) the request is properly identified; 2.) the request reaches the proper agency desk; and 3.) all difficulties involving identification of documents and payment of fees are resolved.

At the smaller agencies and many of the large ones, the director usually designates one person to act as the Freedom of Information officer. At some of the larger agencies, though, and especially at the decentralized agencies such as the Department of the Navy, each division and branch may be responsible for handling its own requests. The Department of the Navy has published a list of several dozen separate officials and subdepartments to which requests should be forwarded, along with a general description of the types of records for which such subdepartments may be responsible.

Although agencies may no longer demand an exact description of records, they have worded their requirements for "reasonable descriptions" so vaguely that they may still be able to deny records on the basis of inadequate identification. The Federal Reserve System, for example, asks that the requester "describe records in a manner reasonably sufficient to permit their identification without undue difficulty." No definition of "undue difficulty" is offered, however.

Denials and Appeals: If information is denied, the requester is in all cases to be informed of his right to an administrative appeal and to the form the appeal should take. The requester must usually appeal within a certain period of time, but that time limit varies greatly, from 10 days at the Federal Reserve System to a presumably unlimited period of time in the case of the Import-Export Bank. Most agencies require that a requester appeal his denial within a 20- to 30-day period.

Appeal format is as important as the format for the original request, and the same caveats apply to the filing of appeals. Properly identify the communication as an FoI request appeal; send the appeal to the proper appeal authority; include a copy of the denial; and state the reasons and precise legal grounds for appealing the decision.

Availability of Releasable Records for Use: The FCC and the Federal Mediation and Conciliation Service make requested and releasable information available for seven days, after which they will be returned to storage. The Economic Development Administration of the Department of Commerce permits the requester only five days within which to examine records. A requester will incur new costs if he does not inspect the records within the specified time limits and still desires access. Most agencies simply require that the requester be informed when and where the records will be available for inspection. In such cases, a requester would be advised to ask how long the agency will make the records available.

Guidelines at the FBI, CIA and IRS

Most of the federal agencies expected (Wall Street Journal, 2-19-75) an increase in the number of requests for information under the FoI Act. That increase came. At some agencies, the number of information requests was almost overwhelming. The FBI, for example, reported (St. Louis Globe-Democrat, May 24-25, 1975) that the agency had, through April, 1975, received 2,494 requests for information. Of those, 1,789 came in April alone. The Central Intelligence Agency had received 1,613 in the first four months of 1975. The main reason that the FBI and the CIA, along with the Internal Revenue Service, a third agency which has received a huge response to the FoI Act, have received so many requests is that these three agencies are those with the bulk of personal files on individuals. Because most of the requests have been for such files, these agencies have borne the brunt of the barrage of FoI queries. It is, then, important to see how these agencies have responded to the task of putting the law into effect.

At the CIA, most of the obvious guidelines are consistent with those of other agencies. Photocopies are $0.10 per page. Clerical searches are done at the rate of $1.00 per quarter-hour; professional searches, at $2.00 per quarter-hour. If a computer must be used for searching for material, the charge will be $55 per hour. Requests, as at the other agencies, must be clearly labeled and must give sufficiently detailed descriptions of requested information to enable agency staff to locate it without undue difficulty. The CIA has also made it clear that it will provide only "reasonably" accessible information. The most unusual of the CIA demands is a requirement that historical researchers who use the act to obtain information must establish their right to the material by proving that "serious or scholarly research project is contemplated." Classified material at least ten years old may be released, if he can prove such intent. The researcher must be willing to authorize prior review of his manuscript. Should he fail to do so, he may well be denied access to information. These requirements, the agency suggests, are to prevent any disruption of the national security. Requests should be made in writing and addressed to: CIA Freedom of Information Coordinator, Central Intelligence Agency, Washington, D.C. 20505. Appeals must be in writing within 30 days to the same address.

Rules of the IRS are essentially the same as those for its parent agency, the Department of Treasury. Fees at the Department of Treasury are about or somewhat below the average for other agencies. Copying fees are $0.10, which is what many agencies charge. No fees for copying will be charged if the requester makes his own copies. Search fees are only $3.50 per hour "or fraction thereof." Not only is this fee low for any agency, but it seems to cover both clerical and professional searches. The request must

> describe the records in reasonably sufficient detail to enable the Department of the Treasury employees who are familiar with the subject area of the request to locate the records without placing an unreasonable burden on the constituent unit. While no specific formula for a reasonable description of a record can be established, the requirement will usually be satisfied if the requester gives the name, subject matter, and, if known, the date and location of the requested record. However, it is requested that the person making the request furnish any additional information which will more clearly identify the requested records.

The regulations list the persons to whom FoI requests should be addressed, both at the national and IRS district levels. Persons requesting information from the national office should make the request in writing to: Assistant to the Commissioner (Public Affairs), Internal Revenue Service, 1111 Constitution Avenue NW, Washington, D.C. 20224. Appeals must be made in writing within 35 days to: Commissioner of Internal Revenue, c-o Ben Franklin Station, P.O. Box 929, Washington, D.C. 20044.

The FBI has suffered perhaps the most severe blow from the 1974 FoI Act. Requests for personal files have been unexpectedly large.[40] In addition, the bureau has been faced with the problem of complying with exemption 7, the so-called investigatory file exemption, and still maintaining the confidence of its various informants and confidential sources.[41] Although the FBI has not published separate guidelines in the Federal Register, it uses the general guidelines of its parent agency, the Department of Justice. (The guidelines published in Federal Register on Jan. 13, 1975 and Feb. 19, 1975 are additions to and amendments of the previously published guidelines of Feb. 14, 1973 — Title 28 of the Code of Federal Regulations, Chapter 1, Parts 0 and 16.)

Charges for copying at the FBI will remain $0.10 per page. Under the new law, search fees will be reduced from the previous levels of $1.25 per quarter-hour for clerical searches and $3.75 per quarter-hour for professional-managerial searches to $1.00 and $2.00 respectively. Computer time costs will be at a rate of $188 per hour. Fees for searching and copying will be charged, even when a requester only desires to examine the records. When expected fees are more than $25 and the requester has not agreed to pay an amount that large, the bureau will write the requester and ask for confirmation of willingness to pay any fees. The guidelines also note that "(I)n such cases, a request will not be deemed to have been received until the requester is notified of the anticipated cost and agrees to bear it." The meaning of this last statement is that the ten-day time limit for responding to the request will not begin until the bureau has the requester's assurance that he will pay all costs.

All requests for information are expected to conform to the Justice Department's general definition of reasonably described records, i.e., those which make it possible for "records requested to be identified by any process that is not unreasonably burdensome or disruptive of Department operations." No definition is offered, however, of "unreasonably burdensome" or "disruptive." Requests must be in writing and may be sent either to the Deputy Attorney General, Department of Justice, Washington, D.C. 20530 or to Clarence Kelley, Director, Federal Bureau of Investigation, Washington, D.C. In either case, the guidelines specify that both the envelope and the request should be clearly marked "Freedom of Information Request" or "Information Request." Appeals must be made in writing within 30 days, either to the attorney general or to Director Kelley.

How the Act is Working

There have been some successes under the new law. The CIA has said (**Wall Street Journal**, 5-16-75) it rejects outright only one per cent of the requests it receives. Prof. Allen Weinstein of Smith College has, after years of effort, received (**New York Times**, 8-30-75) 725 pages of material from the heretofore tightly sealed files on Julius and Ethel Rosenberg. Alger Hiss has been (**Newsday**, 5-28-75) successfully using the FoI Act to dislodge, albeit slowly, information and government documents relating to his perjury trial more than 20 years ago.

Responding to an FoI request by the New York Times, the Departments of State and Defense have declassified (**New York Times**, 8-3-75) documents which reportedly disclose that the United States had considered during the Korean War overthrowing then-President Syngman Rhee.

But there were successes under the old law, too. And, as with the old law, there are some disappointments and some outright failures under the new law. What is more, when the CIA says that only one per cent of the requests to that agency are rejected outright, it does not speak at all to the issue of delays, deletions and large fees. And with the large number of requests to see personal files, a number which is (**Washington Post**, 5-29-75) as much as 75 per cent of the total number of requests at the FBI, many of those will be defined

as successes under the FoI Act. Many of the successes in the area of personal files may not be so much attributable to the FoI Act, however, as to the Privacy Act of 1974. Though the act does not go into effect until Sept. 27, 1975, agencies have already begun to feel the impact of its requirement that citizens be guaranteed access to their personal files.

It is becoming apparent, too, that many of those personal files contain material which should never have been collected. In one case, for example, Robert M. McElwain, a Massachusetts junior high school teacher, wrote (Kansas City Star, 6-12-75) to the CIA to discover if the agency had a file on him. Not expecting that there would in actuality be anything, he was surprised to learn that there was, indeed, a file containing only one item. A letter of reply informed McElwain that his file was "classified and divulges intelligence sources and methods" and could not, therefore, be released. McElwain sought help from his congressman, Rep. Robert F. Drinan (D-Mass.), who finally obtained a copy of the file. What the classified document turned out to be was a 64-word personal letter from a Russian school teacher whom McElwain and his wife had met on a tour of the Soviet Union eight years ago. The case raises several provocative questions. Had Drinan not intervened, would the CIA have eventually yielded the innocuous letter? Was the original denial based on a desire to avoid embarrassment? If so, how many other denials are still being made simply to save an agency's face?

Even with some of the "successes" there are often still disturbing signs of noncompliance. What is perhaps most significant about the Hiss and Weinstein successes, for example, has been the difficulty both men had, even under the amended law, in getting the desired information. Both men were forced to file lawsuits before the agencies began to release significant materials. Even so, Weinstein has only a miniscule portion of the estimated 48,000 pages of government information on the Rosenbergs. The St. Louis Post-Dispatch, too, has had to sue the FBI in an attempt to obtain agency files on Richard Dudman, the paper's chief Washington correspondent.

If requesters are to be rewarded, it is in many cases the result of such suits, or the threat of suit. Persistence and prodding seem essential elements of any successful request. Louise Brown, of the Public Citizens Tax Reform Research Group, tells (Washington Star, 8-19-75) a familiar tale. She received, after many months of delays, 800 pages of material the group had requested from the IRS. When she complained that essential information was still lacking, the IRS then, and only then, released an additional 2000 pages. She said, "This is just another way of keeping secrets. They give you a partial answer but they really keep the significant documents."

Nor have charges about excess fees disappeared now that the law prohibits any but actual costs to the government. Janice Mendenhall, president of Federally Employed Women, asked (Washington Post, 5-29-75) for information about sex discrimination in employment by the Civil Service Commission. She specifically requested from the commission a list of those jobs which were exempt from nondiscriminatory employment guidelines. More than two weeks after her request was made, Wendell G. Mickle, the commission's director of recruiting and examining, told her that the cost for getting the information she had requested would be $39,500 and demanded a 20 per cent deposit before the search would continue.

Another growing difficulty may be in the area of investigatory files and privacy. The full effects of the Privacy Act of 1974 have not yet been felt, either by the agencies or the public. Recently, Attorney General Levi denied (New York Times, 5-13-75) the General Accounting Office access to some of the FBI investigative files. The GAO has been investigating the way in which the FBI conducts its intelligence-gathering operations. In making the denial, Levi said that individuals, whose identities might be disclosed by releasing the files, have a right to privacy. Furthermore, he argued, confidentiality is essential to the operation of some phases of government and law enforcement. To that extent, he said, privacy and public openness "are not always consistent or fully compatible."

In addition to other difficulties with the law, Orr Kelly has written (Washington Star, 8-19-75) that there are differing standards of interpretation from agency to agency. Kelly points out that the Pentagon departments are generally among the most efficient and reasonable in the handling of requests, a point with which Morton Halperin agrees (Los Angeles Times, 5-22-75). But Kelly also writes that the "FBI, along with the CIA and the Internal Revenue Service, is among the worst in complying with the law. . . ."

Moreover, at least two separate bills have already been introduced to amend the FoI Act again. One, by Sen. Edward Kennedy (D-Mass.) would protect (New York Times, 6-13-75) agency employees who incur agency wrath for releasing information. Although the FoI Act currently provides administrative penalties for employees who "arbitrarily and capriciously" withhold information, it appears unlikely that such action will ever be taken. On the other hand, employees can be disciplined by agencies for releasing information against the wishes of his employer. It is this possible threat to the effective use of the FoI Act that Kennedy hopes to eliminate.

Rep. Alan Steelman (R-Tex.) has also introduced a bill, H.R. 8591, entitled "Freedom of Information Act Amendments of 1975," to give Congress the power to decide what categories of information may be withheld for security reasons. This bill would apparently eliminate the possibility that the President could, on the basis of one executive order, give agencies discretion to withhold information in the name of national security.

About all that one can say about the act, which has been in effect for only seven months, is that it is a better law than the previous one. It does not eliminate bureaucratic noncompliance, but it does reduce the available opportunities for agency bureaucrats to use delay and fee charges to discourage requests. Martin Arnold has written (New York Times, 2-16-75) that

> no one really expects the government to live easily with the new amendments. But under the new act, information will be more accessible to the public even if it takes a year or more of constant law suits to get the bureaucracy to begin to cooperate.

Law suits have been filed. In the first half of 1975, 222 such suits were filed (Washington Star, 8-19-75) under provisions of the act.

Until the law is given shape by such court decisions, agency bureaucrats can be expected to take every available opportunity to find ways to lessen the impact of the law on their agencies. Barbara Ennis, chief of the State Department Freedom of Information Office, has suggested (Los Angeles Times, 5-22-75), for example, that a principle of putting as little in writing as possible might be one agency response to the law. In that way, many otherwise public

documents and memoranda would not even exist.

Joseph Tierney, an FBI special agent in the bureau's FoI section, has said that the bureau often negotiates a time extension with requesters. He said the public is understanding of the bureau's problems and in approximately 75 per cent of the cases has actually acknowledged in the initial request a willingness to extend the ten-day time limit for responding. "Most people have been eminently reasonable," he said, "considerably more reasonable from our standpoint than the people who drafted the statute."

The law should be able to enable the bureaucrats to live with the right of the public to public documents. Certainly the present law allows the agencies a great deal of discretion in handling cases without resorting to the kinds of abuses which characterized their implementation of the 1966 act. Already, however, abuses of the 1974 FoI Act are being recorded. If the agencies do not want a law which is even more rigid and less discretionary, they might find it worthwhile to ponder Ralph Nader's assessment of the new law:

> It is important to remember that the executive branch made the bed in which it now finds itself. Congress did not enact the 1974 amendments willy-nilly or in a fit of anti-executive emotion, but only after the rights guaranteed under the 1966 act had been systematically denied for eight long years, and a careful, complete record of the abuses of the 1966 act had been compiled.

FOOTNOTES

1. Kenneth Culp Davis, "The Information Act - A Preliminary Analysis," University of Chicago Law Review, XXIV (Summer 1967), p. 761.
2. U.S., Department of Justice, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, by Ramsey Clark, (Washington, D.C.: Government Printing Office, 1967). The memorandum will hereafter be referred to as Clark.
3. Davis, op. cit.
4. Ibid.
5. Clark, op. cit., pp. 26-27.
6. U.S., Congress, House, Committee on Government Operations, Administration of the Freedom of Information Act, H. Rep. 1419, 92d Cong., 2d sess., 21st rep., p. 20.
7. Ibid.
8. U.S., Congress, Senate, Committee on the Judiciary, Amending the Freedom of Information Act, S. Rep. 854, 93d Cong., 2d sess., 1974. Contained in U.S., Congress, Joint Committee Report, The Freedom of Information Act and Amendments of 1974 (P.L. 93-502), Joint Committee Print (Washington, D.C.: Government Printing Office, 1975), p. 163.
9. H. Rep. 1419, op. cit., p. 16.
10. Ibid., pp. 21-22.
11. U.S. Department of Justice, Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act, by Edward H. Levi, (Washington, D.C.: Government Printing Office, 1975), p. 2. This memorandum will hereafter be referred to as Levi.
12. Environmental Protection Agency, et al, v. Patsy T. Mink, et al, 41 LW 4201 (1973) at 4208, 410 U.S. 73.
13. U.S., Congress, Joint Committee Report, Freedom of Information Act and Amendments of 1974 (P.L. 93-502), Joint Committee Print (Washington, D.C.: Government Printing Office, 1975), p. 114. Hereafter referred to as Joint Committee Report.
14. Ibid., p. 115.
15. Alfred A. Knopf, Inc., et al, v. William Colby, et al, case no. 74-1748 and 74-1479, Fourth U.S. Circuit Court of Appeals.
16. Ibid., p. 12.
17. Ibid., p. 14.
18. Levi, op. cit., p. 3.
19. Ibid., p. 4.
20. Ibid., p. 6.
21. Ibid.
22. Ibid., p. 9.
23. Joint Committee Report, op. cit., p. 230.
24. Levi, op. cit., p. 10.
25. Ibid., p. 12.
26. Ibid.
27. Ibid., p. 13.
28. Ibid., p. 22.
29. Ibid.
30. Ibid., pp. 23-24.
31. U.S. Department of Justice, Attorney General's December 11, 1974 Preliminary Guidance Memorandum, by William B. Saxbe, contained in Joint Committee Report, op. cit., pp. 539 ff. Hereafter referred to as Saxbe.
32. Joint Committee Report, op. cit., p. 163.
33. Saxbe, op. cit., p. 10 (Joint Committee Report, p. 548).
34. Ibid., p. 11.
35. Ibid., p. 10.
36. Ibid., p. 15.
37. See Appendix A for the list of agency guidelines published in the Federal Register. Facts and figures in the following section refer to those published regulations.
38. Saxbe, op. cit., p. 12.
39. Letter from William G. Florence to Elritt Nettles, March 17, 1975. For a more complete discussion of Florence's problems, see Edward Karam, "The FoI Act Gets Teeth," Freedom of Information Center Report No. 337, May 1975, p.
40. Joseph Tierney, Special Agent for the FBI, telephone interview held on July 29, 1975.
41. Ibid. Tierney said, for example, that some sources have been reluctant to divulge information, whether on subjects such as bank robberies or subversive activities. Informants in some high crime areas are especially fearful for their safety and are concerned that their identities might become known in the community. Tierney even said, "We're losing a bit of our own confidence. We're not sure we can protect them." The Privacy Act of 1974 will undoubtedly have an impact on the agency's guarantees of confidentiality. Under that law, investigative agencies are permitted to honor requests by an informant that both his identity and any information he volunteers remain secret.

Appendix

Agency procedures for implementation of the amended FoI Act were required to be published in the Federal Register. The Federal Register citations for selected agencies follow:

Feb. 19, 1975:			
Agency for International Development	40	FR	7327
Department of Agriculture	40	FR	7341
Central Intelligence Agency	40	FR	7294
Civil Aeronautics Board	40	FR	7241
Department of Defense	40	FR	7242
Import-Export Bank	40	FR	7238
Federal Communications Commission	40	FR	7311
Federal Power Commission	40	FR	7251
Federal Trade Commission	40	FR	7251
Department of the Interior	40	FR	7304
Department of Justice	40	FR	7261
Department of Labor	40	FR	7266
NASA	40	FR	7244
NLRB	40	FR	7290
National Security Agency	40	FR	7303
National Security Council	40	FR	7303
	40	FR	7316
Department of State	40	FR	7256
TVA	40	FR	7325
Department of the Treasury	40	FR	7337
Wage and Price Stability Council	40	FR	7233
Feb. 21, 1975:			
Federal Reserve System (part)	40	FR	7620
Feb. 24, 1975:			
Federal Reserve System	40	FR	7896
General Services Administration	40	FR	7924
	40	FR	7927
Internal Revenue Service	40	FR	7934
Nuclear Regulatory Commission	40	FR	7893

Office of Economic Opportunity	40	FR	7929
Small Business Administration	40	FR	7898
Department of Transportation	40	FR	7915
	40	FR	7947
March 3, 1975:			
Securities and Exchange Commission	40	FR	8797
U.S. Information Agency	40	FR	8805
March 12, 1975:			
Department of Commerce	40	FR	11551
March 20, 1975:			
Veterans Administration	40	FR	12656
March 21, 1975:			
National Science Foundation	40	FR	12793
April 2, 1975:			
TVA (search, duplication fees)	40	FR	14749
April 18, 1975:			
Commission on Civil Rights	40	FR	17267
May 1, 1975:			
Health, Education and Welfare	40	FR	18997
May 29, 1975:			
Federal Trade Commission (revision)	40	FR	23278
June 16, 1975:			
National Endowment for the Arts	40	FR	25522