The Heritage Foundation Backgrounder

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TO RESTORE THE BALANCE: FREEDOM OF INFORMATION AND NATIONAL SECURITY

INTRODUCTION

The American tradition favors open government to the maximum extent consistent with the demands of reason and common sense. It is fundamental to the American political consensus that self-government presupposes an informed electorate. Wrote James Madison: "A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." From the belief that "Knowledge will forever govern ignorance" flowed his dictum that "a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."

It follows from this proposition that excessive secrecy in government poses an unacceptable bar to the acquisition of information on the workings of government essential to a popular understanding of the issues before the country. As observed by Patrick Henry, "To cover with the veil of secrecy the common routine of [government] business is an abomination in the eyes of intelligent men."

It was precisely because of the natural tendency of government to shroud its operations in such a "veil of secrecy" that Congress, in 1966, passed the Freedom of Information Act. FOIA's "basic purpose," in the words of the Supreme Court, "is to insure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." Such intent is, of course, unexceptionable; but in the real world, "to insure an informed citizenry" cannot mean--and the Freedom of Information Act manifestly was not intended to confer--an unrestricted right of public access to government information. Instead, FOIA was designed to strike a reasonable and workable balance between two legitimate but competing interests: the need of the people to

know how their government works and the sometimes countervailing need of government to observe secrecy so that it can act effectively in maintaining the national security, without which all the rights of the people would be in serious jeopardy.

Unfortunately, the intervening years have seen a growing erosion of this sense of balance. In many cases, requestors of government information have been able to use the Act for purposes clearly beyond the scope of its original intent, especially with respect to data related to legitimate and well-established law enforcement and internal security concerns. As a result, during the 97th Congress, there has been a serious effort, supported by the Reagan Administration and certain members of the Senate in particular, to amend the Freedom of Information Act so that its original balance can be restored. It appears that this goal will not be realized during this session of Congress; nevertheless, the issues involved are sufficiently important, and the situation created by abuse of FOIA sufficiently menacing to the national interest, to warrant serious examination with a view to corrective action.

BACKGROUND

The Freedom of Information Act, which became effective one year after it had been signed into law by President Lyndon Johnson on July 4, 1966, was enacted as an amendment to Section 3 of the Administrative Procedure Act of 1946, under the terms of which, unless otherwise required by statute, "matters of official record shall, in accordance with public rule, be made available to persons properly and directly concerned except information held confidential for good cause found." As described by Mr. Justice White in his majority opinion in the 1973 Supreme Court case of EPA v. Mink,

> Section 3 was generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute.... The section was plagued with vague phrases, such as that exempting from disclosure "any function of the United States requiring secrecy in the public interest." Moreover, even "matters of official record" were only to be made available to "persons properly and directly concerned" with the information. And the section provided no remedy for wrongful withholding of information.

FOIA, on the other hand, was clearly meant to be a "disclosure statute." It provided for access to identifiable records of the Executive Branch and independent agencies by "any person," rather than merely by "persons properly and directly concerned," and without a requirement that a requestor demonstrate a specific reason or need.

The Act broadened the range of information available to the public; provided standards for what records should be open to public inspection; and made it clear beyond dispute that, except for nine specific categories of permissible exemptions, government agencies must allow the fullest possible public access to their records. The excepted categories were (1) information classified pursuant to executive order; (2) information related solely to an agency's internal rules and practices; (3) information specifically exempted from disclosure by statute; (4) trade secrets and confidential commercial or financial information; (5) agency memoranda that would not be available by law; (6) files whose disclosure would constitute a clearly unwarranted invasion of privacy; (7) investigatory records compiled for law enforcement purposes; (8) certain information related to regulation or supervision of financial institutions; and (9) geological and geophysical data. The extent to which FOIA was weighted in favor of disclosure is evident from the declaration that nothing in the exemptions "authorizes withholding of information or limiting the availability of records to the public except as specifically stated in this section." Under an additional proviso, moreover, these exemptions did not constitute "authority to withhold information from Congress."

For those potential requestors who might feel themselves aggrieved by wrongful denial of access to government records, the Act provided for judicial review which places the burden of proof on federal agencies to justify any withholding of data being sought. The importance of this provision cannot be overestimated, for it conveys the essence of what FOIA was fashioned to accomplish. As summarized in 1977 by the House Committee on Government Operations,

> With the passage of the FOIA...the burden of proof was shifted from the individual to the government: the "need to know" standard was replaced by the "right to know" doctrine and the onus was upon the government to justify secrecy rather than the individual to obtain access.

No matter how great the desire to promote the maximum feasible disclosure of government information, however, the unmistakable intent of the law was to provide a balance between disclosure and the legitimate need of the government for secrecy in certain instances. This is clearly indicated by the following passage from a 1965 report of the Senate Committee on the Judiciary:

> At the same time that a broad philosophy of "freedom of information" is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records. It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation.

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

It was perhaps inevitable that legislation of this sort, necessarily experimental in nature, would fail to satisfy those who tend to favor extreme disclosure and abhor all secrecy in government. Thus, while the range of exemptions in behalf of confidentiality in particularly sensitive areas of government might well seem to most people to be both sensible and prudent, and therefore not at all inconsistent with "fullest responsible disclosure" as contemplated by the language of the Senate report, sentiment in favor of liberalization of FOIA quickly developed. "Identifiable records," for example, came to be regarded as an excessively precise formulation and thus as far too easy a pretext for denial of access to information.

The gist of this dissatisfaction was expressed in 1972 by the Foreign Operations and Government Information Subcommittee of the House Committee on Government Operations. After a series of oversight hearings on how federal agencies were administering FOIA, the Subcommittee proposed procedural and substantive ch anges in the Act and concluded that the "efficient operation of the Freedom of Information Act has been hindered by 5 years of foot-dragging by the Federal bureaucracy."

Two years later, Congress adopted a series of amendments to the 1966 Act which, it is widely felt, effectively vitiated the original balance between necessary secrecy and the "right to know." In October 1974, President Gerald Ford vetoed the amended FOIA, which had been passed by overwhelmingly large margins in both the House and the Senate. He justified his veto on the grounds that the new version, despite its "laudable goals," would have an adverse effect on the ability of the government to retain military and intelligence secrets, would compromise the confidentiality of investigatory law enforcement files, would burden government agencies to an unreasonable degree in imposing specific deadlines for response, and, by empowering the courts to overrule the executive in matters of classification, was otherwise "unconstitutional and unworkable." One month later, on November 20, 1974, the House of Representatives voted by 371 to 31 to override the President's veto; the Senate followed suit the next day by a vote of 65 to 27.

The amended FOIA no longer included the original "indentifiable records" qualification; instead, it specified that a request pursuant to the Act need only "reasonably describe" the material being sought. The exemption for investigatory files was modified to permit the withholding of only those files pertaining to

active investigations; henceforth, literally every paragraph of every page of every document in a file would have to be checked carefully so that all "reasonably segregable" portions of a document not otherwise falling under the Act's allowable exemptions could be released in the interests of maximum possible disclosure. Exemptions were to be allowed only in situations where production of requested records would interfere with enforcement proceedings; deprive a person of his right to a fair trial; constitute an unwarranted invasion of personal privacy; disclose confidential sources or, in certain circumstances, information provided by confidential sources; disclose investigative techniques and procedures; or endanger law enforcement personnel.

COSTS AND IMPACT

The costs of the Freedom of Information Act have been considerable from a number of perspectives.* The U.S. General Accounting Office reported in 1978 that 35 government agencies had reported FOIA costs totalling $11,800,000 in calendar 1975 and that 37 agencies reported costs of $20,800,000 in 1976. For the 13 agencies for which the GAO sought to obtain three-year cost estimates, the total, including start-up cost, was $35,900,000

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*There is no dearth of information available to document the costs and abuses of the Freedom of Information Act. Certain sources, however, proved particularly useful in preparing the present study, among them the following: Proceedings, Law, Intelligence and National Security Workshop, December 11-12, 1979, Washington, D.C., sponsored by the Standing Committee on Law and National Security of the American Bar Association; statement of Senator Orrin Hatch, "Freedom of Information Act Improvements Act of 1981," Congressional Record, October 20, 1981, pp. S11702-S11713; American Bar Association Standing Committee on Law and National Security, Law and National Security Intelligence Report, Vol. 3, No. 8, August 1981, which includes extended extracts from testimony before the Senate Select Committee on Intelligence and the Subcommittee on the Constitution of the Senate Committee on the Judiciary (as of this writing, the staff of the Judiciary Committee advises that its hearings on legislation to reform FOIA are not yet in print); and undated "Statement of Francis J. McNamara, Executive Director, the Hale Foundation, on S. 1235, 'Intelligence Information Protection Act,'" before the Subcommittee on the Constitution. The statement presented by Mr. McNamara, the most meticulous of researchers and one of the nation's foremost experts on matters of intelligence and subversion, includes a detailed appendix on the nature and activities of the principal components of the anti-intelligence complex; it also demonstrates persuasively the need for exemption of the Central Intelligence Agency from the strictures of disclosure legislation like FOIA. Absolutely essential to an informed grasp of the issues involved is a report on The Erosion of Law Enforcement Intelligence and Its Impact on the Public Security, Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary, U.S. Senate, 95th Congress, 2nd Session, 1978, the appendix of which includes a November 15, 1978, report by the U.S. General Accounting Office on the Impact of the Freedom of Information and Privacy Acts on Law Enforcement Agencies.

for 1975 through 1977. In August 1980, Associate Attorney General John Shenefield testified that the Office of Information Law and Policy of the United States Department of Justice "estimates that in 1978 some $47.8 million was expended government-wide." In 1980, according to Assistant Attorney General Jonathan Rose of the Justice Department's Office of Legal Policy, "direct costs to the government were approximately $57 million." As noted by Shenefield, however, such figures may "be a gross underestimate, not accounting for such hidden costs as personnel, travel, training and materials as well as those very real efforts each agency makes to accord FOIA processing highest priority."

The number of requests for information under the terms of the Act appears staggering. While no definitive figures are available, according to an FOIA specialist with the Congressional Research Service, it is probable that federal agencies must deal with close to a million requests per year. In at least some notable instances, this has caused serious problems.

In 1980, for example, the Department of Defense received 57,053 FOIA requests, of which only 2,829 were denied, either in whole or in part, pursuant to statutory exemptions. In one case, a large Washington, D.C., law firm requested all documents generated in connection with the Trident submarine; it was estimated that compliance with this request would have required a search of 12,000 linear feet of files, amounting to approximately 24,000,000 pages, and the consumption of at least 350,000 man-hours.

The Department of Justice received an estimated 30,000 FOIA requests in 1980. Of these, about 2,000 were directed specifically to the Drug Enforcement Administration, while more than 15,000 were directed specifically to the Department's other criminal investigatory agency, the Federal Bureau of Investigation. The FBI alone has reported that it employs no fewer than 270 people just to process FOIA requests at an annual cost of $10,000,000. Particularly troublesome, revealed Assistant Attorney General Rose during a July 1981 hearing before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, is that

> a large number of these requests [received in 1980] were from convicted felons or from individuals whom the FBI and DEA believe to be connected with criminal activities. Such requesters have made extensive use of FOIA to obtain investigatory records about themselves or to seek information concerning on-going investigations, government informants, or government law enforcement techniques....

The impact of FOIA on the Central Intelligence Agency appears to have been especially acute. In 1980, the Agency logged 1,212 new FOIA cases and, according to the July 1981 testimony of Admiral B.R. Inman, Deputy Director of Central Intelligence, devoted "257,420.5 actual man-hours of labor (or 144 man-years)"

to processing "Freedom of Information Act, Privacy Act, and mandatory classification review requests, appeals, and litigation, as compared with the 110 man-years of labor devoted in 1979." Of these resources, "More than half" were consumed by "the processing of requests for subject matters information [sic] under the FOIA." At the same time, approximately two-thirds of the more than $3,000,000 "expended in personnel costs for processing, appeals, and litigation related to these requests" was spent on FOIA cases (Admiral Inman revealed that the Agency "has been sued for denying information in response to FOIA requests in 198 lawsuits").

CIA records are maintained in a highly compartmented and segregated fashion, at least partly because of the Agency's necessary adherence to the "need to know" principle. Thus, a routine request under FOIA may mean a search of as many as 21 record systems. The search for documents through so many systems gives access to compartmented information to people who otherwise would never be permitted to see it under prevailing CIA practices. In summarizing the unique problems faced by the Agency under FOIA, Admiral Inman stated:

> In most other government agencies the review of information for possible release under the FOIA is a routine administrative function; in the Central Intelligence Agency it can be a matter of life or death for human sources who could be jeopardized by the release of information in which their identities might be exposed. In some circumstances mere acknowledgment of the fact that CIA has any information on a particular subject could be enough to place the source of that information in danger.
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> It must be remembered that the primary function of the CIA is intelligence gathering, an activity which frequently takes place in a hostile environment, and which must take place in secrecy. The mere disclosure that the CIA has engaged in a particular type of activity or acquired a particular type of information can compromise ongoing intelligence operations, cause the targets of CIA's collection efforts to adopt countermeasures, or impair relations with foreign governments. Agency records must be scrutinized with great care because bits of information which might appear innocuous on their face could possibly reveal sensitive information if subjected to sophisticated analysis or combined with other information available to FOIA requesters.
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> This review is not a task which can be entrusted to individuals hired specifically for this purpose, as is the case with many other government agencies whose information has no such sensitivity. The need for careful professional judgment in the review of CIA information surfaced in response to FOIA requests means that this review requires the time and attention of intelligence officers whose primary responsibilities

> involve participation in, or management of, vital programs of intelligence collection and analysis for the president and our foreign policymaking establishment. Experienced operations officers and analysts are not commodities which can be purchased on the open market. It takes years to develop first-class intelligence officers....

The diversion of personnel from tasks essential to their primary responsibilities has been a problem for other agencies as well. During 1977, for instance, requests for investigatory records of the Internal Revenue Service consumed 23,347 hours by professional employees other than freedom of information specialists in IRS field offices: 10,514 in the Intelligence Division and 5,893 in the Audit Division. In a situation similar to that faced by the FBI and DEA, a Deputy IRS Commissioner has stated that

> these figures suggest a significant incident [sic] of use of the Freedom of Information Act by the subjects of IRS law enforcement activities to secure investigatory files concerning themselves.
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> While the diversion of staff resources to process Freedom of Information Act and Privacy Act requests clearly has a negative impact on our enforcement capabilities, this direct reduction does not represent the only effect of these statutes upon law enforcement. There are significant but intangible costs of processing FOI Act requests which cannot be captured statistically. For instance, when a request is made for an open investigatory file, the steps necessary to process that request will tend to disrupt the investigation and will generally require the temporary diversion of investigative staff.

In general, as IRS has reported to the General Accounting Office, "the value of the resources withdrawn from the investigatory effort may be far more costly in terms of lost revenue opportunities than the direct cost ascribed to processing the FOIA requests."

The Drug Enforcement Administration appears to have fared no better. As noted in an April 1976 internal DEA memorandum:

> When the Freedom of Information Act was passed, no funds were appropriated to the Executive Branch to administer the Act. Therefore, all positions in the Freedom of Information Division were taken from the ceilings allotted to other units or activities within DEA.
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> Some comparative figures on the commitment of resources to administer the Act, as opposed to the

resources committed to accomplishing our primary mission are startling.

The fifteen employees assigned full time to the Freedom of Information Division represent fifty percent (50%) of our investigative commitment in the Republic of Mexico, twenty-nine percent (29%) in Europe, twenty-eight percent (28%) in South America, thirty-eight percent (38%) in Southeast Asia, sixty percent (60%) in the Near East, one hundred percent (100%) in the South Pacific, and two hundred-fourteen percent (214%) in Canada.

In addition, the Freedom of Information Division is larger than any of our six (6) Internal Security Field Offices, equals or is larger than the agent commitment of eighty (80) of our domestic District Offices, is larger than the individual sections within the Enforcement and International Training Divisions, and is larger than the resources committed to the various sections of the Office of Intelligence.

"Generally," added a subsequent internal memorandum, "DEA field offices feel that enactment of the Freedom of Information and Privacy Acts has diminished DEA's ability to fulfill its mission, both in terms of conducting criminal investigations and collecting intelligence." A similar note is struck by Admiral Inman's observation that "Efforts to fulfill our intelligence missions while subject to the provisions of the FOIA have placed the CIA in a vicious cycle" in which the "need for up-to-the-minute information" by the President, Cabinet officials, and Congress "frequently prevents the review of FOIA documents from taking place in keeping with the time requirements of the Act." The result is, of course, that CIA is then "sued for failure to comply with the Act, which, in turn, requires an even greater amount of time and effort to be expended in the litigation process."

Perhaps the best-known example is that of former Agency employee Philip Agee, whose case has cost the CIA more than 25,000 hours and over $400,000 for the retrieval and review of no fewer than 8,699 Agency documents. The Agee case vividly illustrates the potential harm to the national interest that now exists under FOIA. As Judge Gerhard Gesell of the United States District Court for the District of Columbia observed in his July 1981 decision upholding the right of the Agency to withhold certain documents in the case, it is the first FOIA "case where an individual under well-founded suspicion of conduct detrimental to the security of the United States" had invoked the terms of the Act "to ascertain the direction and effectiveness of his effort to subvert the country's foreign intelligence program." As Judge Gesell further observed, "It is amazing that a rational society tolerates the expense, the waste of resources, the potential injury to its own security which this process necessarily entails." In such circumstances, it is perhaps hardly surprising

that Admiral Inman has publicly expressed his concern over "how much better our intelligence product might have been in some key areas had the time and effort devoted to FOIA litigation by senior intelligence officers been focused instead on crucial intelligence missions."

The same situation confronts the Federal Bureau of Investigation. Release of 46,000 pages of documents in the case of Alger Hiss, for example, entailed careful screening of 147,000 pages, while the more than 160,000 pages of documents relating to the Rosenberg spy case which were released to one requestor required a review of more than 480,000 pages by more than 50 Bureau agents. The problems faced by the FBI, as well as by other government agencies charged with law enforcement and intelligence functions, are summed up in a recent decision by the U.S. Court of Appeals for the Third Circuit:

> What concerns us particularly is that a law enforcement agency, the FBI, is being required to expend sorely needed resources, not to deal with the burgeoning problems of crime which seriously besets all our citizens, but to devote a large number of hours of exacting labor sorting out affidavits that were collected to apprehend crimes [sic] and prosecute offenders. Moreover, informants, once aware that copies of affidavits submitted to law enforcement agencies can be made public, might be inhibited from future cooperation.
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> A further concern is that the use of the FOIA, in the fashion employed here, will impose an additional burden on the trial courts that are already overworked. It will make it necessary for them to review large numbers of records, such as had been requested here, in camera. And the fact that this procedure will be placed in an adversarial context will further prolong the process and add to its vexatious nature.
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> Perhaps when Congress is made aware of the problems spawned by the use of the Act which we have identified here...it will attempt to accommodate the concerns which we have expressed....

PATTERNS OF ABUSE

One of the most serious problems caused by FOIA has been the sharp reduction in the ability of government agencies to gather intelligence through informant coverage. As one Drug Enforcement Administration employee has said, "The real costs and effects of the FOI and Privacy Acts cannot be measured in terms of man-years or dollars, but by the increasing difficulty of collecting information and keeping our sources confidential." This problem is felt throughout the law enforcement and intelligence commmunities.

DEA has estimated that 40 per cent of the requests it receives are from convicted felons; another 20 percent come from individuals who, while not incarcerated, are known to be connected with criminal drug activity. In many cases, these requests have been notably repetitive and duplicative; in some, the result has been forced release of extremely sensitive information. One convicted felon, for instance, used FOIA to force DEA to release to him information contained in a DEA intelligence brief used in the training of its own personnel detailing the procedures used by criminal elements in the manufacture of liquid hashish.

Pressures from journalists to retain FOIA in its present form notwithstanding, most FOIA requests actually do not come from members of the press or other researchers who communicate information to the public. A much greater share of requests received by many government agencies comes from business interests, many of them seeking data on competitors. It is estimated, for example, that more than 85 percent of the requests received under FOIA by the Food and Drug Administration, which received over 33,000 during 1980 alone, are from regulated industry, their attorneys, or FOIA request firms believed to be acting in behalf of regulated industry. These requests are usually for information submitted by competitors.*

Only 20 percent of the requests received by the office of the Secretary of Defense since 1975 have been from private individuals; 14 percent have been from special interest lobbying

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*Senator Orrin Hatch has cited the example of an unnamed government agency which released to one company confidential information originally provided by a competitor company on a new technique used to mask offensive odors produced by gamma ray sterilization of medical devices. Similarly, according to the U.S. Chamber of Commerce,

> In early 1979, an aircraft company withdrew from competing for a multimillion-dollar contract to produce helicopters for the U.S. Coast Guard.
>
> A major factor in its decision was a requirement that the firm submit information to the Coast Guard on its commercial helicopters.
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> Under the Freedom of Information Act, this information would be available to other companies and nations.
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> The aircraft manufacturer decided it could not give away design data on its highly successful commercial helicopters, which were developed entirely with corporate funds.

Precisely how disclosure of proprietary corporate information to a firm's competitors comports with legitimate facilitation of access by the American people to information on the workings of their government, which is presumably what FOIA was meant to accomplish, is at best unclear.

groups, while 55 percent have come from businesses and law firms. The situation confronting the Department of Justice is even more extreme; only about seven percent of its estimated 30,000 annual requests are received from press or other researchers.

But while the extent to which FOIA is used by the press and other individual researchers is perhaps exaggerated in the public mind, it is hard to exaggerate the way the Act has helped crimin al and extremist--including terrorist--elements. Senator Orrin Hatch (R-Utah), chairman of the Senate Subcommittee on the Constitution, has warned that FOIA "is so broadly written that it is endangering informant information and testimony [so that] we only have about 25 percent of the domestic intelligence information we used to have."

The Justice Department notes a definite pattern of criminal exploitation. In criminal cases, a defendant who seeks discovery information usually must demonstrate that the information being sought is relevant and that the request is "reasonable" and within the scope of criminal discovery. Also, a defendant's request for discovery may occasion a government right to reciprocal discovery. Frequently, however, criminal defendants have been able to skirt these restrictions by making FOIA requests, often close to scheduled trial dates, to disrupt preparation of the prosecution's case or to delay trial while disputes over the requests are resolved by the court. While most courts have ruled that use of FOIA to supplant normal discovery procedure is improper, some have ruled that related FOIA requests are acceptable during a criminal trial. As the Department has stated, "This ability to make requests before and during criminal trials disrupts trial proceedings and upsets the discovery scheme established under the Federal Rules of Criminal Procedure."

There is one imprisoned felon, for instance, reputedly a "hit man" for the Mafia, who has submitted 137 requests to the FBI under the Act and is currently pursuing a 35-count lawsuit against the Bureau under the Act. Another case has been reported by Mrs. Lynne K. Zusman, Special Litigation Counsel in the Civil Division of the Justice Department. This case illustrates, according to Mrs. Zusman, the

> back-and-forth interplay of the Freedom of Information Act in information that is obtained through other sources of discovery. I saw it quite clearly in a case that is pending in California in which a large number of "Weather Underground" files are involved. The plaintiffs in the FOIA action had been indicted on State of California criminal conspiracy charges. Discovery was going on in the criminal proceeding. Through information obtained in the state criminal proceeding, the plaintiffs modified their FOIA requests through their counsel because of a large administrative burden on the Bureau in facing the prospect of producing an affidavit on roughly 250,000 pages of documents.

> The FBI was motivated to try and negotiate with opposing counsel to see if there could be some withdrawal of that request. In exchange, the FBI offered to, in essence, amend the FOIA request and give access to files that were not originally included in it. In this back-and-forth discussion, one of the requests that plaintiff's counsel made was for the security files of a source which had been identified in the criminal discovery document releases as such and such a source, number such and such, and, in essence, an FOIA request was being made simply for information from that source who, it had been revealed, had been an undercover agent for some period of time.

Steven R. Dornfeld of the Society of Professional Journalists, Sigma Delta Chi, has scoffed that "the FBI is unable to cite a single instance in which an investigation has been hampered due to an FOIA disclosure." The fact is, however, that there is a widespread perception among potential informants that to provide information on what should be an entirely confidential basis is to run serious risk of disclosure under FOIA--not only of the information, but also of the source himself. To make the point, FBI Director William Webster revealed in 1979 that there had been no fewer than 125 recent cases in which individuals, among them a federal judge, had refused to provide information for FBI investigations specifically because they feared their identities might be disclosed under either FOIA or the Privacy Act.

The Central Intelligence Agency faces the same impasse. As Admiral Inman has testified, FOIA "further impedes the CIA's ability to do its job through the perception it has created overseas." In many cases, "individuals have refused to cooperate with us, diminished their level of cooperation with us, or totally discontinued their relationship with our people in the field because of fears that their identities might be revealed through an FOIA release."

Are such perceptions valid, or are they "scare tactics" by agency heads lobbying for relief from the financial and manpower burdens imposed by FOIA? Admiral Inman has stated flatly that, "even with the kind of quality resources we devote to the review process, human error is always a possibility" and that "Such errors have in fact occurred, resulting in the inadvertent disclosure of sensitive CIA and NSA information." Further, the "handling of FOIA requests involving CIA and NSA information by other agencies has also resulted in some serious compromises of classified information relating to intelligence sources and methods [emphasis added]." And to compound these difficulties, there "are attempts by requesters to gain additional classified information based upon these compromises."

As for the FBI, in one case, an organized crime informant of demonstrated reliability became concerned by newspaper accounts

of FBI information disclosures under FOIA. Having furnished information to the Bureau over a number of years, he concluded that his identity could be discovered by piecing together this information. Thus, when asked to provide information in a major political corruption case, he refused to do so. In like manner, as reported by the General Accounting Office,

> A former source of excellent quality information was recontacted because his background was such that he could develop information of value concerning a ter rorist group. He initially refused to cooperate for fear that through an FOIA disclosure his identity could eventually be revealed. He believed his information would be of such quality that anyone outside of the FBI upon reading it would easily be able to identify him. He was reminded that he had functioned as a valued source for several years and that his identity had never been disclosed. He acknowledged this was true; however, he stated that due to FOIA he no longer believes that FBI agents can assure his complete protection even though they would make every effort to do so. The source also cited recent court cases, particularly the Socialist Workers Party lawsuit, which convinced him that his identity could not be protected. After 3 hours of conversation, the former source agreed to cooperate but only in a very limited way. He made it clear he would never again function as extensively as before because of FOIA, similar laws, and court decisions. He added that disclosure of his identity would most assuredly cost him his life.

These cases are not unique. Assistant Attorney General Jonathan Rose has stated that "criminal requesters" may well "be able to piece together segregated bits of information in ways unknown to the FBI employee responding to the request and use the information to identify the existence of a government investigation or an informant." According to Rose, "It has been [the Justice Department's] experience that some criminals, especially those involved in organized crime, have both the incentive and the resources to use FOIA to obtain bits of information which can be pieced together." This is confirmed by former Deputy Attorney General Laurence Silberman, based both on the statements of knowledgeable FBI sources and on his own successful attempt to secure copies of the three FBI security investigations on him prior to his appointments to three sensitive government posts over the years. Though the Bureau had properly eliminated the names and other specific data identifying all persons interviewed during these investigations, Mr. Silberman had no trouble identifying them simply by analyzing who knew what about him, as well as who did not know, in conjunction with information revealed in the interviews. Knowing more about himself and the interviewees than was known to the Bureau, he was able to determine who the specific interviewees were and what each had said about him.

This danger was emphasized in testimony before the Senate Subcommittee on the Constitution by Francis J. McNamara, a widely respected expert on domestic and foreign intelligence and subversion. He reminded the Senators of the existence of the "human error factor" and added:

> I have seen FBI documents released under the FOIA in which certain names that should have been eliminated were not, I am sure inadvertently. There is at least one case in which the names of FBI agents who carried out intelligence assignments should have been deleted from FOIA documents, but were not. As a result, they ended up as defendants in a lawsuit. FBI documents turned over to the National Caucus of Labor Committees (U.S. Labor Party) revealed the AFL-CIO had given the FBI information on the group and also contained the name of a university professor who had been a Bureau source ---- with the result that he came under attack by the group.

One wonders what might have been the result had the professor provided information on the Symbionese Liberation Army or the Weather Underground--or perhaps the Palestine Liberation Organization or the Ku Klux Klan.

As some of these examples indicate, exploitation of FOIA is of considerable value to the radical left. The Agee case is particularly well-known and illustrates how someone can entangle an intelligence agency in protracted legal proceedings that impair its ability to perform its primary duties in protecting the country. Also, to make matters worse, application of FOIA is not limited to American citizens. As FBI Director Webster told the American Bar Association in June 1980, "foreign intelligence agencies are using the Freedom of Information Act to obtain information about the United States."

Other examples include requests directed to the CIA by foreign sources. Some of these requests, explained former Deputy CIA Director Frank Carlucci, "clearly" come from people seeking information that "would do harm to this nation's interests overseas." During the mid-1970s, the National Aeronautics and Space Administration expressed concern over a regular series of requests it received from AMTORG, the Soviet trading company widely regarded as operating for six decades as a cover for Soviet espionage activity.

A number of domestic organizations use FOIA with considerable frequency. Among them are the National Lawyers Guild and National Emergency Civil Liberties Committee, which have been identified repeatedly as fronts for the Communist Party, U.S.A.; the Political Rights Defense Fund, identified as an adjunct of the Trotskyite Communist Socialist Workers Party; the Center for National Security Studies, an apparatus in which activists from the NLG, Institute for Policy Studies, Fund for

Peace, and several other left groups have played leading roles; and the Campaign for Political Rights,* a coalition comprised primarily of overtly leftist organizations including the NECLC and NLG. Boasted one of the organizers of the Campaign for Political Rights at a National Organizing Conference to Stop Government Spying that was held in Ann Arbor, Michigan, during September 1978:

> This [the FOIA] is a very important law to us....We have obtained just tons of information....These government documents tell us exactly what the agencies did; how they planned; how they carried out their plans; what they responded to; and what information they obtained and by what means....it's been critical to our fight.

Indeed. Among the "how to" documents sought under FOIA have been rosters of investigative personnel, materials on investigative techniques and procedures, and several types of hitherto confidential government manuals. An example of how potentially dangerous this can be is provided by the August 12, 1982, testimony of Detective Arleigh McCree, Officer in Charge of the Firearms and Explosives Unit of the Los Angeles Police Department, before the Subcommittee on Security and Terrorism of the Senate Judiciary Committee. Detective McCree, who has investigated some 500 bombings committed by terrorist and other criminal elements, was questioned by Samuel T. Francis, legislative assistant to Senator John P. East (R-N.C.), a member of the Subcommittee:

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*An undated promotional flyer disseminated by the Campaign for Political Rights lists 51 "Member Organizations" and 30 "Cooperating Organizations." Included in the first category are several church related groups and other organizations fairly characterized as being on the political left, among them the American Civil Liberties Union; American Friends Service Committee; Black Panther Party; Center for Constitutional Rights; Center for National Security Studies; Clergy and Laity Concerned; Counterspy; CovertAction Information Bulletin [sic]; Middle East Research and Information Project; Puerto Rican Socialist Party; Women's International League for Peace and Freedom; Women Strike for Peace; and four organizations officially cited by Congressional committees as fronts for the Communist Party, U.S.A.: the National Alliance Against Racist and Political Repression, National Committee Against Repressive Legislation, National Emergency Civil Liberties Committee, and National Lawyers Guild. "Cooperating Organizations" range from the Libertarian Party and the Cato Institute to others like Ralph Nader's Critical Mass; the Democratic Socialist Organizing Committee; Environmental Action and EA's affiliated Environmental Action Foundation; and the International Longshoremen's and Warehousemen's Union, described in the 1970 annual report of the House Committee on Internal Security as an organization "which has long been controlled by identified members of the CPUSA."

Mr. Francis. Do you have any instances you can cite in which groups have been known to manufacture nerve gas?

Mr. McCree. Yes, I do.

Mr. Francis. Could you describe that?

Mr. McCree. Yes. As far as fixing the time frame, it was some time back. We had an individual who had all the ingredients he needed to make nerve gas, with the exception of one....He had it on "Will Call" at L.A. International Airport, and was trying to sell a pump shotgun for $80 so he could gain the sufficient amount of money to go down and get it from "Will Call."

There have been other attempts, as well. The "alphabet bomber", for example, was very near synthesizing nerve gas....

So there have been a number of attempts to do it, and I might add, very near successful ones.

Mr. Francis. Do you know whether the information that these individuals used to try to produce this nerve gas, whether this was obtained through the Freedom of Information Act?

Mr. McCree. Yes, it was. It was declassified originally by, I understand, mistake, but he procured it after it was published in another document, again, one of the attempts, I guess, on the part of some misguided member of the news media, attempting to think he was serving the public. But that is how he came by it, yes, sir.

The plain fact is that, despite its good intentions, the Freedom of Information Act is being used in "unintended ways [that] interfere unduly with important governmental activities," in the words of Deputy Attorney General Edward C. Schmults. Asks Robert L. Saloschin, former Director of the Justice Department's Office of Information Law and Policy:

> how do you measure the costs to the nation of a law with chilling effects on sources who have important information for foreign intelligence or law enforcement or other federal functions, but hesitate to provide it because they fear possible disclosure under FOIA may seriously hurt them? How do such costs relate, for example, to the national cost of interstate theft, or to the cost of a serious international setback in economic or strategic matters? And how can you measure the costs in dollars, morale, and effects on the public of diverting agency staffs away from the work which Congress expects them to perform by making them process large and burdensome FOIA requests made for purely private purposes in order to obstruct, harass and delay legitimate agency activity which the requester or his principal opposes?

WHAT NEXT?

Several proposals to correct FOIA abuses have been introduced in the House and Senate. In addition to legislation drafted and introduced by members of both houses, a major legislative package was introduced in behalf of the Reagan Administration as S. 1751 on October 20, 1981, by Senator Orrin Hatch. The Administration proposal, presented as a series of amendments to FOIA, was summarized by Senator Hatch:

> The amendments would clarify several of the act's exemptions and procedures to strengthen the protection given to information where disclosure would result in an unwarranted invasion of personal privacy, harm the public interest in law enforcement, injure the legitimate commercial interests of private parties who have submitted proprietary information to the Government, or impede the effective collection of intelligence.
>
> The amendments would preclude the use of the Freedom of Information Act as a means to circumvent discovery rules by parties in litigation. The admendments would provide for expedited processing of requests from the media and others seeking information for broad public dissemination while establishing realistic time requirements for agencies to respond to requests and decide appeals.
>
> The amendments would establish procedures enabling submitters of confidential commercial or financial information to object to the Government's release of such information.
>
> The amendments would permit the Government to charge requesters fees that more closely reflect the actual costs of the Government's search and review of documents.
>
> The amendments would add two new exemptions from the act for records generated in legal settlements and records containing technical information the export of which is controlled by law.

On May 20, 1982, the Senate Judiciary Committee approved a compromise bill, S. 1730, after several months of negotiations among Senators Hatch and Leahy, Senate aides, and lobbyists for business, news media, civil liberties, and other interests. As approved, S. 1730 would

*allow the Attorney General to seal files on organized crime investigations for up to eight years;

*expand protection for government informants by limiting access to records that "could reasonably be expected" to disclose the identity of a confidential source;

*exclude Secret Service records related to the Service's protective role from the Act's public disclosure rules;

*create a new exemption for technical data that may not be exported from the United States without a license:

*require an agency to notify a business when anyone requests information which the business had designated as sensitive when it submitted the data to the government;

*give businesses new rights, at the agency level and in court, to challenge agency decisions to release such records;

*change the time limits for an agency to release requested documents to allow for an extra 30 days to answer an FOIA inquiry while also expediting access to files by anyone who can show a compelling need for the information being sought;

*allow agencies to charge individuals for the cost of processing requested documents over and above the fees now charged for searching out and duplicating files;

*permit the government to charge royalty fees for commercially valuable technological data obtained by the government at substantial cost to taxpayers;

*bar release of records that "could reasonably be expected to constitute a clearly unwarranted invasion of personal privacy";

*allow the Attorney General to issue regulations restricting the use of FOIA by imprisoned felons;

*permit agencies to turn down requests by foreigners; and prevent use of FOIA to circumvent judicial discovery rules by giving an agency the right not to respond to an FOIA request from a litigant in a pending government case.

Other legislation before the Committee had provided for greater protection of business information, the closing of government files on terrorism and foreign counterintelligence, and even an outright exemption for the Central Intelligence Agency from the terms of FOIA and removal of the disclosure of CIA records from the jurisdiction of the courts. As finally approved, however, the Senate measure omits these stronger provisions.

Senator Hatch is known to feel that "None of us accomplished all that we desired." On the other hand, critics of earlier reform proposals have expressed approval of the compromise version. Allan Adler, legislative counsel for the American Civil

Liberties Union, has avowed that "On the whole, we are very happy they protected the core of the Freedom of Information Act, which would have been severely [e]viscerated if they went ahead with the other versions." And Richard M. Schmidt of the American Society of Newspaper Editors has stated that "It really preserves the essence of the Freedom of Information Act" and "helps preserve the people's right to know."* A spokesman for the National Association of Manufacturers, however, has vowed that "What we have done this year is just going to be the starting point for discussion in the next Congress." In general, business appears disappointed by the failure of the compromise bill to include wider exemptions for business data, although there is approval for the new procedures that have been included. A Justice Department spokesman has indicated Department approval for the new protections for records dealing with confidential informants, organized crime, and use of the Act by imprisoned felons, although the Department still would prefer additional restraints on the release of records related to investigations of terrorism.

Despite this compromise, it is increasingly apparent that meaningful revision of the Freedom of Information Act is unlikely to occur during this Congress. Though it has approved its compromise bill, the Senate Judiciary Committee has yet to approve its formal report; and action in the House is highly unlikely in view of the position expressed by Representative Glenn English (D-Okla.), chairman of the House subcommittee with jurisdiction over FOIA reform legislation. Representative English has made it clear that he intends to take no formal action until the Senate has disposed of its own bill: "We're waiting on the Senate. That's where all the interest seems to be in making changes" in FOIA. "On the House side, we didn't see the pressing need to make major changes that Senator Hatch and the administration saw."

CONCLUSION

Proponents of disclosure often speak in terms of the "people's right to know" and the goals of "open government" and "a fully informed public in a democratic society." The more extreme opponents of secrecy in government go even further. For example, Center for National Security Studies Director Morton Halperin, who has made a career of harassing the American intelligence community, has claimed that "Secret operations are anathema to democracy." And the late Supreme Court Justice Hugo L. Black,

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*According to the National Emergency Civil Liberties Committee (Rights, Vol. 28, No. 2, June-Aug., 1982), "On the positive side, the Freedom of Information Act remains largely intact thanks to the Senate Judiciary Committee which unanimously voted down an effort by Sen. Orrin Hatch to substantially weaken the law. Some restrictions were tightened, but civil libertarians generally hailed the vote as a big victory."

in his opinion in the Pentagon Papers case, stated flatly that "Secrecy in government is fundamentally anti-democratic." Such formulations, however, while perhaps appealing to those of a more purely libertarian cast of mind, must be rejected as at best facile, especially by those who place a premium on recognition of the realities of governmental power, secrecy being but one of the many attributes of that power.

The issue is not one of evil versus good; it is one of competing interests, both legitimate and both within the bounds of our political tradition. Put another way, the issue is between the desirability of an informed body politic and the need for secrecy to the extent necessary for the protection of government's ability to safeguard its existence and govern effectively within those areas legitimately assigned to it under the Constitution. So viewed, it becomes apparent that secrecy, like power generally, is neither good nor evil in absolute terms; it is simply neutral, and may be good or bad depending on the circumstances of its application. As observed by the late Professor Willmoore Kendall, one of the most brilliant expositors of the American tradition, "The essence of the American political tradition" lies "in limited government...not...in any mystique about power in the spheres assigned, rightfully, to government...." Thus, we "must learn to regard power as morally neutral [emphasis in original]...."

Although such a conception may be offensive to ardent civil libertarians, it appears to have been shared, at least implicitly, by those who approved the Freedom of Information Act. The House report on the bill which eventually became the Freedom of Information Act of 1966 stated unambiguously that "It is vital to our way of life to reach a workable balance between the right of the public to know and the need of government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy." Similarly, in signing FOIA into law on July 4, 1966, President Lyndon B. Johnson stated that "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." Echoing Patrick Henry's reference to the "veil of secrecy," the President declared that "No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest."

Precisely so, but the Freedom of Information Act as currently written has demonstrated a potential for serious harm to the conduct of government activity essential to the overriding security interests of the nation; and it is a well-established principle, affirmed by the U.S. Supreme Court in its June 1981 decision in the case of Haig v. Agee, that "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." Especially with regard to its application to the Central Intelligence Agency and its demonstrated value as a tool of harassment against domestic and other intelligence gathering, FOIA cries out for revision.

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