U.S. Department of Justice

Office of Legal Policy

Office of the
Deputy Assistant Attorney General

Washington, D. C. 20530

BY HAND

September 15, 1981

Francis S.M. Hodsoll, Esquire
Deputy Assistant to the President
The White House
Washington, D.C. 20500

Dear Frank:

Attached is a copy of a draft of possible amendments to FOIA. OLP would appreciate your comments as soon as you have had a chance to review the draft. To the extent it is feasible, we would very much like to have your comments in writing by the end of this week.

The attached draft does not represent the official or final position of the Department of Justice, nor is OLP, by this letter, soliciting the official views of the Defense Department. Instead, we are merely seeking informal comments from the various parties who have shown an active interest in a legislative effort to amend FOIA.

I realize we are not affording you a great deal of time to review the draft. Should you need more time to make adequate comments then take the additional time.

Our proposed schedule is as follows: The Department is scheduled to present its proposed amendments on October 15 before the Subcommittee on the Constitution of the Senate Judiciary Committee. We hope to forward a bill to OMB for clearance on September 25. Please feel free to have anyone in your office contact either Tim Finn (633-4604) or me (633-4606) with any questions you may have.

Needless to say, all of the attached material is highly confidential and has only been reviewed by a few people. Thus, please be careful to keep the material confidential.

Many thanks.

Sincerely,

Stephen J. Brogan

Attachment

DRAFT
September 9, 1981

THE FREEDOM OF INFORMATION ACT

5 U.S.C. 552

(Added words are underlined; deleted words are bracketed.)

§552. Public Information: agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases[;], <u>if the final opinions or orders may be relied on, used, or cited as precedent by the agency;</u>

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent an [clearly] unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request by any United States person except a fugitive from justice for records which [(A)] (i) reasonably describes such records and [(B)] (ii) is made in accordance with published [rules] regulations stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to [any person] the requester.

(B) A requester may not make or maintain a request for information under this paragraph relating to the subject matter of any ongoing judicial or adjudicatory administrative proceeding (civil or criminal) to which the requester, or any person upon whose behalf the requester acts in making the request, is a party. An agency may promulgate regulations to implement this subparagraph.

(C) An agency may require by regulation that each request for records under this section include an affirmative statement by the requester that the requester, or any person upon whose behalf the requester is making the request, is:

(1) a United States person as defined by this section,

(2) not a fugitive from justice, and

(3) not barred by subsection (a)(3)(B) from making a request.

A requester's refusal to make such a statement is adequate grounds to deny the request.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. The schedule shall provide for the payment of all costs reasonably attributable to responding to the request, including the costs of searching for, reviewing, and duplicating requested records. [Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication.] If the requested records contain commercially valuable technological or reference information, generated or acquired by the government at substantial cost to the public, fees may be charged which reflect the fair market value or royalties or both, in addition to or in lieu of any processing fees otherwise chargeable, taking into account such factors as the estimated commercial value of the information, its cost to the government, and any

public interest served by its disclosure. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public. Notwithstanding any other provision of law, an agency may retain fees collected pursuant to this paragraph.

(B) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying procedures by which--

(i) the agency shall forward a notification to the submitter within a reasonable time prior to a final decision to release materials under subsection (a)(6) of this section that a request for disclosure of records containing commercial or financial information provided by the submitter has been made;

(ii) the submitter may submit to the agency written objection to such disclosure specifying all grounds upon which it is contended that the information should not be disclosed; and

(iii) the agency shall notify the submitter of any final decision to release the materials.

(C) An agency is not required to notify a submitter pursuant to subparagraph (B) if--

(i) the agency determines, prior to giving such notice, that the request should be denied;

(ii) the disclosure is required by law (other than this section); or

(iii) the information lawfully has been published or otherwise made available to the public.

(D) The agency may not release records that are exempt from disclosure under the provisions of subsection (b)(4) if the submitter has objected to disclosure pursuant to subparagraph (B)(ii) unless the failure to disclose the records would injure an overriding public interest.

[(B)](E) On complaint filed by a requester within 90 days from the date of final agency action or by a submitter prior to the release of the requested information, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction:

(i) to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from [the complainant.] the requester; or

(ii) to enjoin the agency from any disclosure of records which was objected to by a submitter under subparagraph (B)(ii) or which would have been objected to had notice been given as required by subparagraph (B)(i).

(F) The agency that is the subject of the complaint shall promptly, upon service of a complaint--

(i) seeking the production of records, notify each submitter that the complaint was filed; and

(ii) seeking the withholding of records, notify each requester of the records that the complaint was filed.

(G) In an action based on a complaint--

(i) by a requester, the court shall have jurisdiction over any submitter of information contained in the requested records, and any such submitter may intervene as of right in such action; and

(ii) by a submitter, the court shall have jurisdiction over any requester of records containing information which the submitter seeks to have withheld, and any such requester may intervene as of right in such action.

(H) In a case in which a record is withheld under exemption (b)(1), the court shall not enjoin the

agency from withholding such records unless the use of such exemption is arbitrary or capricious. In [such a case] all other cases, the court shall determine the matter de novo. [and][t]The court may examine the contents of [such] requested 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 court shall maintain under seal any affidavit or record submitted in camera to the court in support of the applicability of any exemption. In addition, any order requiring the release of records shall be stayed automatically by the district court pending final judicial resolution.

[(C)] (I) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[(D)] (J) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all

cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

[(E)] (K) The court may assess against the United States, or any complainant or intervenor, reasonable attorney fees and other litigation costs reasonably incurred in any case under this section [in which the complainant], in favor of any party which has substantially prevailed.

[(F)] (L) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether the agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee

or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

[(G)] (M) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request [for records] made under paragraph (1), (2), or (3) of this subsection[,] for records which are sufficiently identified and limited that no more than eight working hours of agency search and review time is required to respond to the request and which do not contain commercial or financial information provided by a submitter, shall--

(i) determine within ten working days [(excepting Saturdays, Sundays, and legal public holidays)] after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty working days [(excepting Saturdays, Sundays, and legal public holidays)] after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

[(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request--

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate

and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.]

(B) Except as provided in subparagraph (A), each agency, upon any request for records made under paragraph (1), (2) or (3) of this subsection, shall--

(i) within thirty working days after the receipt of the request--

(a) determine whether to comply with such request, in whole or in part, and immediately notify the requester of such determination and the reasons therefor, and of the requester's right to appeal to the head of the agency any adverse determination; or

(b) notify the requester of the estimated time period required for such determination, and the reasons therefor, such time period to be established in accordance with agency regulations promulgated hereunder but not to exceed one year; and

(ii) within thirty working days after the receipt of an appeal--

(a) make a determination of the appeal; or

(b) notify the requester of the estimated time period required for such determination, and the reasons therefor, such time period to be established in accordance with agency regulations promulgated hereunder but not to exceed six months.

If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the requester of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(C) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the time periods under subparagraph (B). Such regulations shall provide for the shortest practicable time periods and shall take into account all relevant factors, including but not limited to--

(i) the volume of requests and appeals received by the agency;

(ii) the resources available to the agency for the processing of such requests and appeals;

(iii) the volume of records required to be searched to locate all records responsive to the request or appeal;

(iv) the volume of responsive records required to be reviewed for release pursuant to the request or appeal;

(v) the need to search for or review records maintained in field facilities or other establishments that are separate from the agency office processing the request or appeal;

(vi) the character of the records requested;

(vii) the need for consultation, which shall be conducted with all practicable speed, with another agency or among two or more components of the agency having substantial subject matter interest therein.

(viii) the need for notification of submitters of information concerning the potential disclosure of records containing commercial or financial information, and for consideration of any objections to disclosure made by such submitters.

(D) Each agency shall promulgate regulations by which a requester who demonstrates a compelling need for expedited access to records and whose request for information will primarily benefit the general public may, as a matter of the agency's sole administrative discretion, be given processing priority over other requesters.

(E) Each agency may prepare and furnish a standardized written response to any person making a request for records under this section, to be used if--

(i) the agency does not maintain requested records; or

(ii) the records requested are exempt from disclosure and disclosure of even the existence of records would reveal (1) that a criminal investigation or national security intelligence investigation is in progress, or (2) that a specified person has provided information to the agency on a confidential basis.

However, such a response shall not be given to a request for existing records unless the head of the agency certifies in writing to the head of the agency's record processing unit that disclosure of the existence of records would reasonably be expected to interfere with the investigation or result in the identification of a confidential source.

[(C)](F) Any [person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection] requester shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If a requester files a complaint under paragraph (4)(B), the administrative remedies of a submitter of information contained in the records which are the subject of the

request shall be deemed to have been exhausted. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to [such person making such request.] the requester, except that if the disclosure of records is objected to by a submitter pursuant to paragraph (4)(B)(ii), the agency shall not disclose the records for fifteen working days after notice of the final decision to release the requested information has been forwarded to the submitter. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(7) An agency is not required to produce any material requested under this subsection which consists entirely of newspaper clippings, magazine articles, court records, or any similar items which are in the public record or otherwise publicly available.

(8) An agency is not required to produce requested information received from another agency, if it notifies the

requester that such information may be requested from the originating agency, unless the originating agency no longer possesses the information.

(b) This section does not apply to matters that are--

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency[;], including such materials as (A) manuals and instructions to investigators, inspectors, auditors, and negotiators, and (B) examination material used solely to determine individual qualifications for employment, promotion, and licensing;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information, or other commercially valuable information, obtained from [a] any person and privileged or confidential if release may impair the legitimate private competitive, financial or business interests

of any person or if release may inhibit the government's ability to obtain such information in the future;

(5) inter-agency or intra-agency memorandums or letters, including factual analyses prepared directly in aid of a decision-making process of an agency, which would not be available by law to a party other than an agency in litigation with the agency;

(6) [personnel and medical files and similar files the disclosure] information concerning individuals the release of which would constitute an [clearly] unwarranted invasion of personal privacy;

(7) [investigatory records] information [compiled] collected, maintained, or used for law enforcement purposes, but only to the extent that the production of such records would (A) interfere in any way with enforcement proceedings, or the conduct of any investigation or prosecution thereof, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) tend to disclose the identity of a confidential source, including any foreign, state or other public agency or authority, or any private institution, which furnished information on a confidential basis, and, in the case of [a record] information [compiled,] collected, maintained, or used by a criminal law enforcement authority in the course of a criminal investigation, or by

an agency conducting a lawful national security intelligence investigation, [confidential] information furnished [only] by a confidential source, (E) disclose [investigative] techniques, [and] procedures, guidelines, or priorities for law enforcement investigations or prosecutions, [or] (F) endanger the life or physical safety of [law enforcement personnel] any natural person, or (G) disclose information relating to such investigations of terrorism, organized crime or foreign counterintelligence as are specified by the Attorney General by regulation or order;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; [or]

(9) geological and geophysical information and data, including maps, concerning wells[.];

(10) records generated by any party to a legal action with the United States in connection with the settlement of that action; or

(11) technical data that may not be exported lawfully outside the United States without an approval, authorization, or a license from an agency, unless the requester has obtained the appropriate approval, authorization, or license.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding fiscal [calendar] year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. This report shall include--

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)[(F)](L), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior [calendar] fiscal year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)[(E)](K), [(F)](L), and [(G)](M). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section[;].

(e) For purposes of this section [, the term]:

(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, independent regulatory agency, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), [or any independent regulatory agency] but excludes the President, the immediate Office of the President, and any member of the cabinet (or subordinate official acting on such cabinet member's behalf) when advising the President;

(2) "submitter" means any person who voluntarily submits, or is required by law to submit, trade secrets, commercial or financial information, or other commercially valuable information to an agency;

(3) "requester" means any person who makes or causes to be made, or on whose behalf is made, a proper request for disclosure of records under subsection (a);

(4) "United States person" means a citizen of the United States or alien lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a

corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in section 101(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(a));

(5) "working days" means every day excluding Saturdays, Sundays, and holidays;

(6) "record" means the documentation of information in any form, including computer tapes and discs, if the documentation is:

(A) required to be maintained by statute or regulation; or

(B) integrally related to or reflective of an agency or government function;

and is under the physical custody and complete control of the agency and was not created for the personal convenience of any government employee or official.

* * * * * * * *

97th Congress
1st Session

A BILL

To amend the National Security Act of 1947

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled,

That title I of the National Security Act of 1947 (50 U.S.C. 401 et seq.) is amended by adding the following new section: "Sec. 104. The Central Intelligence Agency, the National Security Agency and the Defense Intelligence Agency are exempt from the provisions of any law, except properly applicable rules of administrative and judicial discovery, which require the publication or disclosure, or search or review in connection therewith, of records they create or maintain, except that a request for information by United States citizens or by aliens lawfully admitted for permanent residence in the United States for information concerning themselves made pursuant to any provision of law shall be processed in accordance with such provision. The provisions of this section shall not be superseded except by a provision of law which is enacted after the date of enactment of this section and which specifically repeals or modifies the provisions of this section."

SEC. 2. The amendment made by this Act shall apply with respect to any requests for records, whether or not such request was made prior to the effective date of this Act, and shall apply to all cases and proceedings pending before a court of the United States on the effective date of the Act.

U.S. Department of Justice

Office of Legal Policy

File
FOIA

Washington, D.C. 20530

July 21, 1981

Mr. Frank Hodsoll
Deputy Assistant to
the President
The White House
Washington, D.C. 20500

Dear Frank:

Attached is a copy of Jonathan Rose's testimony which he gave last week before the relevant House and Senate subcommittees. I apologize for not having sent you a copy earlier, but even at this point I wanted to make sure you are abreast of where we stand on FOIA.

You will see that the testimony sets forth the problem areas. It does not comment on specific proposals to amend the Act. We hope to have a draft set of proposed amendments ready for your review at the beginning of next month.

If you wish to discuss any of the foregoing, please call.

Sincerely,

Stephen J. Brogan
Deputy Assistant Attorney General

Department of Justice

STATEMENT

OF

JONATHAN C. ROSE
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

BEFORE

THE

SUBCOMMITTEE ON THE CONSTITUTION
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

AND

SUBCOMMITTEE ON GOVERNMENT INFORMATION
AND INDIVIDUAL RIGHTS
COMMITTEE ON GOVERNMENT OPERATIONS
HOUSE OF REPRESENTATIVES

CONCERNING

FREEDOM OF INFORMATION ACT

JULY 15, 1981

Mr. Chairman and Members of the Committee:

I am pleased to appear before you today to explain the views of the Department of Justice concerning the need for amendment of the Freedom of Information Act (FOIA).

I.

The Administration and the Department of Justice believe that there are significant problems with implementation of some of the provisions of the current FOIA which urgently require legislative solutions. We strongly support the basic purpose and philosophy of the Act: to inform the public as fully as possible of the conduct of its government in order to protect the integrity and effectiveness of the government itself. Unfortunately, the Act has, in practice, often proven ineffective as a means of providing the public with information in a timely fashion. Only a small fraction of FOIA requests are from the press or other researchers who actually communicate information to the public (only about 7% of the 30,000 annual requests received by the Department of Justice are from such requesters). The Act has, however, been widely used by various private interests in ways which tend to harm rather than promote the public's interests in good and open government.

There has been a consensus for some time now that the Act needs revision so as to limit its adverse effects and eliminate, where possible, its abuse. Possible ways of revising the Act have been under study by the Department of Justice for several years. Judge Charles B. Renfrew, who served as Deputy Attorney General in the prior administration and is here today, can comment more specifically on the review of the Act and the proposals developed by the Justice Department during the Carter Administration.

Pursuant to a request by Attorney General Smith, the Department of Justice recently solicited comments from all government agencies on the operation of FOIA and requested suggestions on how the Act could be improved. The Department is in the process of analyzing the comments as they are received and drafting possible amendments based on these comments, on past and current legislative initiatives, and on various proposals developed by the Department of Justice during the previous administration. The Department is seeking to develop approaches which will ameliorate the problems which have been identified, while, at the same time, preserving FOIA as an effective tool for keeping the electorate as informed as possible without unduly inferfering with effective government.

The Department of Justice does not, at this time, have any specific amendments to propose, nor does it wish to comment specifically on any of the FOIA amendments which are currently before Congress and this committee. The Department intends to present to Congress a comprehensive package of Administration amendments to

the Act within the next two months. We would at this time, however, like to share with this committee our perception of the most important problems presented by the current provisions of FOIA, which should be addressed by legislation.

I should say before I continue further that the Administration comes to this task of reviewing the operation of the Act fully conscious of the many hours devoted to this subject by this subcommittee, its predecessors, the other House of Congress and many prior administrations. We have come a long way from the period prior to those efforts when the public seemed to have the right to know nothing about the operations of its government. We are also fully aware of the maxim that the best is often the enemy of the good in government. Thus, the Reagan Administration is not seeking perfection in the operations of the FOIA. However, it does believe that the success of the Act to date must be tested against two standards: (1) the standard of an open government; and (2) the standard of an effective government. In our view the imposition of these two standards of judgment does not always lead to the same conclusions.

II.

The Department of Justice believes that there are several pressing problems arising from the current structure and implementation of the Act.

First, the current application of the Act to criminal law enforcement agencies has significantly impaired the investigatory abilities of those agencies. It has also imposed very substantial administrative burdens and does not appear, on balance, to be serving the public's interests in its current impact on those agencies.

Second, the current application of the Act to national security intelligence agencies, such as the Central Intelligence Agency (CIA) and the National Security Agency (NSA), appears to have substantially impaired the ability of those agencies to gather confidential information. Compliance with the Act appears, in addition, to have diverted valuable intelligence-gathering resources, while providing little countervailing benefit to the public.

Third, the use of the Act by commercial interests to obtain information submitted by other businesses to the government appears to have impaired the government's ability to collect needed information from businesses and may result in the unfair disclosure of confidential business information submitted to the government.

Fourth, the misuse of FOIA as a discovery device by private litigants results in the circumvention of judicial and administrative rules which should control such discovery. In addition, such misuse of FOIA creates substantial and unjustified administrative burdens on the government, and can result in the delay and disruption of an agency's primary functions.

Fifth, the government's present inability under the Act to collect the full costs of FOIA requests, even from requesters

using FOIA for private commercial or financial purposes, results in excessive and sometimes frivolous use of FOIA for private purposes at substantial cost to the taxpayer.

While this is by no means a comprehensive list of the problems inherent in the administration of FOIA which deserve legislative consideration, these appear from our own study to be the areas of greatest government-wide concern.

A. The Effect of FOIA on Criminal Law Enforcement Agencies.

The Department of Justice has extensive experience with the problems caused by the application of FOIA to criminal law enforcement agencies. In 1980, the Department received about 30,000 FOIA requests. The majority of these were directed specifically to the Department's criminal investigatory agencies, the Federal Bureau of Investigation (FBI) (which received over 15,000 requests) and the Drug Enforcement Administration (DEA) (which received about 2,000 requests). Significantly, a large number of these requests 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.

To comply with requests for investigatory information, investigatory files must be reviewed line-by-line to segregate exempt from non-exempt information. The principle exemption under FOIA which may be applied to law enforcement records is 5 U.S.C. § 552(b)(7), which authorizes the withholding of law enforcement investigatory records only to the extent the government can demonstrate that one or more of six specific categories of harm will be caused by the release. While this exemption is intended to protect the government's important law enforcement interests, it is, in practice, inadequate, because the exemption is too narrowly written and the government is obliged to segregate non-exempt information from information which falls within the terms of the specific categories of harm stated in exemption (b)(7).

The present requirements result in a very complicated and time-consuming review of law enforcement records. Moreover, it is often very difficult for an analyst to determine whether the release of even segregable information may have an adverse effect on important law enforcement interests. The release of what appears on the surface to be innocuous information may prove damaging when viewed within a broader context of information known by criminal requesters. Such requesters may 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.

It has been our 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. Some have shown great persistence in using the Act. The FBI, for instance, received 137 requests from one imprisoned felon who is reported to be an organized crime "hit man." This relentless user of the Act, and there are many others (some of whom have made more requests), is presently pressing a 35 count suit against the FBI under FOIA.

We have no way of knowing the exact extent to which criminals have been successful in using FOIA to uncover on-going investigations or government informants. But whether or not damaging information has been inadvertently released through FOIA, or informants have been uncovered through FOIA requests, it is very clear from the experiences of the FBI and DEA that gathering law enforcement information has become more difficult as a result of the Act. The perception is widespread that federal investigators cannot fully guarantee the confidentiality of information because of FOIA. This perception exists not only among individual "street" informants, who have become increasingly aware of the existence of FOIA, but also among institutional information sources, including local law enforcement agencies.

Even where confidential information or a confidential source can clearly be protected under existing law, this perception is difficult to dispel. It is no easy task for an FBI or DEA agent

to explain to an informant exactly what information must be disclosed and what information may be withheld, or to adequately assure a confidential source that sensitive information will be properly segregated from the non-exempt information. As a result, it has quite clearly become much more difficult for our federal law enforcement agencies to gather needed information from sources who demand confidentiality. The FBI and the DEA have reported a large number of incidents in which potential informants have cited FOIA as their reason for declining to cooperate with the government.

It should be noted, finally, that the administration of FOIA entails a significant commitment of the limited resources of our criminal law investigatory agencies. The processing of investigatory files is extremely time-consuming, since they must be reviewed line-by-line to segregate exempt from non-exempt information. In 1980, the FBI alone received over 15,000 requests, which were processed by a unit of approximately 300 full-time employees. The direct cost of processing these requests was about $11.5 million. The DEA expended approximately $2 million in 1980 in processing FOIA requests.

In a time of tight budgetary constraints, the value of such expenditures can certainly be questioned, particularly when viewed in light of the substantial use of the Act which is made by prisoners or individuals connected with criminal activity. The DEA has estimated that 40 percent of its requests are from prisoners and

another 20 percent are from individuals who are not in prison but are known to the DEA to be connected with criminal drug activities. Eleven percent of the FBI's total requests are from prisoners (over 1,600 last year). These requests consume far more than 11 percent of the FBI's processing expenses, because they are not generally requests which result in "no records" responses, but, rather, require substantial file review. By contrast, only about 5 percent of all the requests to the FBI and DEA are from the media, scholars, or public interest research groups.

B. The Impact of FOIA on National Security Agencies.

FOIA also presents very serious problems to those government agencies concerned with national security intelligence-gathering functions. Confidentiality is obviously of paramount importance to intelligence information sources, whether they are individual sources or foreign governments. But the agency processing and judicial review requirements of FOIA, along with the mandate to release "reasonably segregable" material which is not properly classified, make it impossible for a national security intelligence agency to offer the clear and certain guarantees of confidentiality which national security intelligence often requires. Our intelligence agencies can demonstrate that there is a belief among some important foreign sources that FOIA makes it impossible for our government to adequately protect sensitive

information from disclosure. That belief significantly impedes our intelligence activities abroad.

Moreover, the FOIA imposes upon the intelligence agencies administrative burdens which interfere substantially with their ability to carry out their primary functions. Because of the nature of their missions and the indisputable need for secrecy and security, intelligence agencies, particularly CIA and NSA, are extremely decentralized organizations. Information is provided to personnel on a "need to know" basis only. As a result, the processing of an FOIA request by CIA or NSA intrudes more directly on the performance of the their primary operations and functions than in other government agencies. Compliance with FOIA requests within national security agencies is not a routine administrative task which can be delegated to individuals designated expressly to handle FOIA requests. Within an agency such as the CIA, no single individual or even any single unit has access to a comprehensive crosssection of files which would permit a complete and timely response to broad FOIA requests. Line personnel are forced to respond to FOIA requests while continuing to attempt to fulfill their regular duties. Our intelligence agencies have no excess

of trained intelligence agents, and their time is of great value to the United States. The line-by-line review of documents requested under FOIA seems a very poor use of their time, particularly in light of the fact that, even though a great deal of material must be reviewed, very little can ultimately be released by intelligence agencies.

In addition, the problem of determining by review what information may be deemed harmless and reasonably segregable from properly classified material presents analytic difficulties similar to those experienced in processing criminal law enforcement files. Information which appears innocuous on its face, in fact may be damaging when viewed in context with information known by a foreign intelligence agency. It is often difficult for even the most experienced analyst to know with certainty what use might be made of a piece of information, and this problem is greater still for a reviewing court.

There is, of course, nothing in the Act to prevent its use by those whose interests are directly contrary to the national security. Mr. Phillip Agee, for example, has made extensive use of FOIA in his personal crusade to undermine the CIA abroad. The response to one request from Mr. Agee for all CIA records containing mention of him cost the American taxpayer over $300,000. That is a government expense which many citizens and members of Congress might justifiably question, particularly in a time of severe budgetary constraints. However, under existing law, CIA had no choice but to expend the money.

We recognize that, in the view of some, FOIA may appear to provide some protection against any improper use of intelligence agencies. We believe, however, that Congressional oversight of the intelligence agencies, established in its present form after the 1974 amendments to the Act, is more than adequate to protect against any possibility of future intelligence agency misconduct. Such oversight has proven a far more effective protection of the public's interests in this area than FOIA could conceivably be, and it has not resulted in comparable administrative burdens, questionable expenditures of resources, or the creation of a serious perception problem among sources of needed intelligence.

C. Use of FOIA as a Litigation Discovery Device.

There are, of course, no limits under existing law on who may utilize FOIA or on the circumstances or purposes for which it may be used. As a result, it is common practice for parties in litigation with the United States to request information under the Act, even where they have compulsory process available under the rules of civil or criminal procedure or under agency regulations. It is likewise common for parties involved in private litigation to use FOIA rather than available discovery procedures to obtain government information concerning their case. Such requests are often nothing more than attempts to circumvent applicable discovery rules or, in some cases, to harass the government.

Discovery rules attempt to draw a careful and fair balance between the needs of the requester and the burdens imposed on the discovery target. They generally require a showing that the

requested matter is relevant and material to the proceeding, that there is a need on the part of the requester, and that the burden on the respondent is not excessive. A requester under FOIA is not required to make any such showing. Thus a requester/litigant can, through FOIA, freely pursue, at taxpayer expense, "fishing expeditions" and impose excessively burdensome document production requirements which are, for good reason, impermissible under the applicable discovery rules.

Discovery rules also contain response time schedules which are far more tolerant than those in FOIA and which can be adjusted by a court to respond to the needs of a particular situation. By contrast, FOIA's short, mandatory and inflexible time limits force agencies to give FOIA requests the highest priority. Responding to requests can often interfere substantially with an agency's ability to pursue an enforcement action. It is often necessary for the government attorneys responsible for a government litigation to themselves take time from their case preparation to review documents in response to a FOIA request from an opposing litigant. There is considerable evidence that many in the private bar are aware of the potential for disruption and delay of litigation afforded by FOIA and deliberately use the Act to harass a prosecuting agency.

The use of FOIA as a litigation discovery device has become an increasingly common problem for a number of departments and agencies, including the Department of Health and Human Services,

the Environmental Protection Agency, the Equal Employment Opportunity Commission, the Securities and Exchange Commission and the Antitrust Division of the Department of Justice. The Antitrust Division, for example, estimates that more than half of the FOIA requests it receives are made by actual or potential litigants in antitrust suits. These are often extremely burdensome requests, seeking Division information covering whole industries.

We do not believe that Congress intended FOIA to be so used as a means of disrupting law enforcement or avoiding the rules of discovery in judicial or administrative proceedings, and we believe Congressional action to prevent such misuse of the Act should be seriously considered.

D. Disclosure of Confidential Business Records Through FOIA.

Effective government requires a constant flow of reliable business information from private enterprises. This flow will clearly be impeded if the government cannot maintain the confidentiality of valuable proprietary and competitively sensitive information submitted to it. It is clear that Congress intended to fully protect the legitimate interests of business submitters through the (b)(4) exemption, which permits agencies to withhold "trade secrets and commercial or financial information" which is obtained from an outside party and is "privileged and confidential." However, this exemption has been given a narrowing construction by the courts, which have required a showing that the release would either (1) result in a substantial risk of

competitive injury to the submitter or (2) impair the agency's ability to collect similar information in the future. Unfortunately, this test has not proven as adequate as it might first appear. This is principally so because agencies frequently lack an adequate awareness of all factors in a particular business setting necessary to predict accurately the competitive harm caused by disclosure.

The extent to which FOIA has in fact resulted in financially damaging releases of information submitted by a third party is unclear. However, it is apparent that commercial interests have made great use of FOIA in many agencies to obtain information submitted by competitors. For instance, over 85% of the FOIA requests to the Food and Drug Administration, which received over 33,000 FOIA requests last year, are from the regulated industry, their attorneys, or FOIA request firms who are believed to be operating on behalf of the regulated industry. The requests most often are for information submitted to the FDA by competitors.

While it is unclear what damage may have been done to business submitters by FOIA releases, the persistent use of FOIA by businesses to obtain information submitted by competitors itself suggests strongly that FOIA releases have some competitive value and are not altogether harmless to the submitter. But, whether or not this is so, there is at least a perception in parts of the business community that commercially valuable information submitted to the government is vulnerable to FOIA requests. As a

result, there is evidence that businessmen are more reluctant to make such information available to the government, and the quality of information received from the business community has deteriorated. This is clearly an unforseen and undesirable result of the Act's operation.

This increasing reluctance of the business community to trust the government with confidential information is very evident from the experience of the Antitrust Division of the Justice Department. The Division relies heavily upon voluntary submissions of business information. It is therefore vital that nothing in FOIA jeopardize its ability to withhold genuinely confidential business information and to offer promises of confidentiality to submitters of sensitive business information. Because of the fears within the business community regarding the potential disclosure of submitted information, investigation targets and third parties have become increasingly more reluctant to comply with voluntary production requests. This has forced the Division to rely more heavily upon the use of compulsory process which is not only more time consuming and expensive, but also results in less forthright cooperation from the submitting party. In fiscal year 1976, the Division issued only 66 Civil Investigative Demands (CID's). In fiscal 1978 this figure rose to 359 and in fiscal 1980 to 910. Knowledgeable persons within the Division attribute this rise in the need to invoke CID's to the uncertain protection afforded submitters of confidential business information under FOIA and the complete exemption from FOIA allowed for information submitted pursuant to a CID.

Separate from the issue of whether the substantive scope of (b)(4) should be expanded or clarified, is the issue of whether a submitter of business information should be afforded some procedural protection by the Act's own terms. The current terms of the FOIA do not provide the business submitter with an adequate procedural means to assert and protect his interests either before the agency or in court. There is currently no statutory requirement that agencies give notice to submitters of information before releasing information they have provided. Nor does FOIA give submitters the right to prevent the discretionary release of business information which is exempted from mandatory disclosure under (b)(4). The Supreme Court's decision in Chrysler v. Brown, 441 U.S. 281 (1979), allows submitters only a right to challenge a discretionary release as an abuse of discretion if the release is prohibited by the Trade Secrets Act, 18 U.S.C. § 1905. However, the scope of the protection afforded by the Trade Secrets Act is quite unclear. Moreover, the rights afforded by the Chrysler decision are of little use unless a submitter is notified in advance of an agency's intention to release its documents.

It would seem to be in the clear interests of the government as well as of the business submitters that such submitters be afforded greater assurance than they have now that their confidential information will not be disclosed through FOIA.

E. Financial Cost of Compliance With FOIA and Fee Collections.

Congress clearly did not contemplate that FOIA implementation would be as expensive as it has become. Little attention was paid

to cost when the Act was passed in 1966. During the deliberations over 1974 amendments, Congress estimated annual government-wide costs of these amendments between $40,000 and $100,000. S. Rep. No. 93-854, 93d Cong. 2d Sess. (1974); H.R. Rep. No. 93-876, 93d Cong., 2d Sess. (1974).

A Justice Department survey estimated the direct cost of FOIA compliance in 1979 at $47.8 million. A more recent survey by the Department's Office of Information Law and Policy indicated that 1980 direct costs to the government were approximately $57 million. Both of these surveys were limited to direct costs, and did not attempt to quantify the indirect lost "opportunity costs" or the costs of the disruption of agency business caused by FOIA. We believe that the direct cost figures, though substantial, greatly understate the real costs of FOIA to the taxpayer.

Separate from the question of total cost is the question of who is paying for FOIA. At present, it appears that agencies collect, through fees charged to the requester, only about 4 percent of the direct cost of responding to FOIA requests. The Act presently allows agencies only to charge for time spent searching for records and for duplication expenses, and it requires waiver or reduction of fees for requests which can be considered in the public interest. By far the most significant agency cost, however, is the time which must be devoted by agency personnel to reviewing the requested material to determine whether an exemption should be asserted and to segregate exempt from non-exempt information. Under the present law, this expense is non-chargeable.

It should be noted, in addition, that the Act contains no provision to allow an agency to charge the market value for information which may have a substantial commercial value, such as technological information or reference materials, which may have been compiled by the government at substantial expense to the taxpayer.

It is important to re-examine the fee collection authority under FOIA in light of the considerable cost of FOIA compliance and the extensive use which has been made of the Act by private, commercial interests. There is no reason why those who are using the Act to serve private commercial and financial interests should not be required to pay the full costs of FOIA processing and, when appropriate, the fair market price for commercially valuable information. The failure to do so not only results in the unnecessary expenditure of considerable taxpayer money to serve the narrow interests of private requesters, but also tends to encourage frivolous or unnecessarily broad requests. So long as FOIA requests are virtually free, we can expect sophisticated commercial users to make extensive and unnecessary use of the system.

The scope of the publication and indexing requirements imposed by subsection (a)(2) of the Act must also be reexamined in light of the substantial costs of compliance incurred by some agencies and, in some cases, the minimal resulting public benefits. Subsection (a)(2) of the Act requires agencies to index and make available to the public all final decisions and orders of an agency. Some agencies issue tens of thousands of such decisions

yearly which are of virtually no interest to the public. They must, nevertheless be indexed and made available to the public under FOIA. The National Labor Relations Board, for instance, spent over $110,000 for the preparation of indexes of final decisions last year. The NLRB reports that there has been only one request in eight years for a document located through one of its indexes which contains entries for over 50,000 representation decisions by the Board's Regional Directors. Ninety percent of another NLRB file containing more than 125,000 documents, which is indexed and made available under FOIA, is comprised of Regional Director complaint dismissal letters. In eight years there has not been a single public request for a copy of any of these letters. We doubt Congress intended to impose such meaningless bureaucratic chores, but such results are required by the present terms of FOIA.

III.

The problems outlined above constitute the primary areas of concern to the Administration. The Act presents, of course, a number of other problems which I have not discussed today and which can be usefully addressed by legislation. We expect that our legislative proposals will address some of these, including the difficulties of complying with the current time limits in the Act. Some Agencies -- and some divisions within the Justice Department -- have simply been overwhelmed by the volume and the difficulty of the requests they have received and, consequently,

are experiencing processing backlogs of over a year. This, obviously, renders the Act virtually useless for requesters who need a timely response, such as the current events media on whom the public relies primarily for its information. We are interested in exploring ways in which this problem can be ameliorated and the Act made a more useful and timely public information device.

In this regard, I would note also that Congress may wish to reconsider its own complete exclusion from the Act. Nothing in our review of the Act to date has convinced us of the wisdom or necessity for this complete and total Congressional exclusion. Certainly no body of the federal government has more to do with how key decisions affecting our citizens are made. Why then, should the files of Congress be totally exempt? Since the judiciary operates on a public record, there is no comparable need to subject the judiciary to the Act. However, we would urge that the Congress reexamine the rationale which underlies its own exemption.

We wish to stress again that the Administration and the Justice Department are fully committed to the purpose and philosophy of this Act. An informed electorate is the best guarantee of a good and effective government. But the end which we seek through this Act is, it must be emphasized, good government in the public's interest and not the disruption of essential government functions or the waste of government resources to serve only private interests. It is clear from our experience that this is an Act which can and has been easily exploited by those whose goals are only to interfere with the government's efforts to

protect public interests, such as law enforcement and national security, which are vital to this country. We do not believe that this was the intent of Congress in enacting FOIA. We believe that, with the benefit of the experience which we have now acquired in administering this statute, such abuses can be prevented while the Act is, at the same time, made a more effective and useful vehicle for public communication. We look forward to working with this Committee in this common effort.

THE WHITE HOUSE

WASHINGTON

June 20, 1981

NOTE FOR: JAB

FROM: FSMH

SUBJECT: Freedom of Information/Privacy Act Reforms -- Possible Relation to Crime Package

In follow up to your request to investigate Allan Ryskind's letter to you on the Levi Guidelines and the Freedom of Information and Privacy Acts, I met last week with Jon Rose, Tim Finn and Steve Brogan of Justice. Justice is exploring the possibility of FOIA/Privacy Act reform in the following areas:

-- Exemption for CIA/NSA (Casey has bill on Hill)

-- Exemption of investigatory files for a period of years plus housekeeping improvements

-- Exemption for confidential business records submitted to government

-- Prevention of using FOIA as a discovery device

Justice believes greater effort at getting evidence of FOIA/Privacy Act abuse will be needed. Senate and House planning hearings in mid-July; Hatch is for reform; English (on House side) will work with you but not for blanket exemption. Mid-July hearings could be record setting (evidence of abuse) with introduction of legislation in Fall. If we decide to move on this issue, we will need to prepare the ground carefully with the media who are very sensitive on this issue.

Since FOIA/Privacy Act provisions impede criminal investigations, we may wish to consider combining an effort in this area with the crime package Ed Meese has discussed with the AG for a Fall initiative. I gather the crime package could include some or all of the following elements:

-- Federal Criminal Code

-- Death Penalty

-- Reform of the exclusionary rule regarding searches and seizures

-- Violent crime demonstration program (Violent Crime Commission reports 8/15)

-- New prison construction

-- FBI/DEA merger

I shall be talking with Rudi Guliani this week about the Levi Guidelines.

RECOMMENDATION

That you discuss this with Ed Meese and schedule a special meeting with Justice to develop a strategy on FOIA/Privacy Act. Mike Uhlman believes we should move quickly in the Fall. The Levi Guidelines are quite separate; I shall provide you with a separate memo on them.

NOTE: On 5/5/81, the AG released a letter indicating that Justice would no longer review FOIA/Privacy Act determinations by other agencies.

U.S. Department of Justice

Office of Legal Policy

Washington, D.C. 20530

June 18, 1981

Mr. Frank Hodsoll
Deputy Assistant to
the President
The White House
Washington, D.C. 20500

Dear Frank:

Jon Rose, Tim Finn and I enjoyed meeting with you and Joan Abrahamson regarding strategies for revising FOIA. It was certainly a profitable and important starting point from our perspective. We look forward to working with you and others at the White House on this matter, and no doubt other matters as well in the future.

Sincerely,

Stephen J. Brogan
Deputy Assistant Attorney General