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Holding Government Accountable:
The Amended Freedom of Information Act

An Article in Honor of Fred Rodell

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1. Yes, Fred, a footnote, but you don’t want to deprive the reader of an opportunity to look at your book, F. RODELL, HER INFINITE VARIETY (1969).

of great importance . . . an elephant trying to swat a fly,"3 who produces "turgid, legaldegooky garbage."4 A law journal article to honor Fred Rodell? Better to give an asthmatic a bouquet of ragweed. Yet the Editors have left me no choice. If by this betrayal, Fred, I have lost your good opinion, allow me two brief comments by way of explanation in the hope that I can retain your friendship.

First, in your putdown of the law journals you left a crack in the door.

With law as the only alternative to force as a means of solving the myriad problems of the world, it seems to me that the articulate among the clan of lawyers might, in their writings, be more pointedly aware of those problems, might recognize that the use of law to help toward their solution is the only excuse for the law's existence, instead of blithely continuing to make mountain after mountain out of tiresome, technical molehills.5

The downfall of the last two presidents has highlighted one problem of growing significance: the isolation and insulation of our government—now encompassing approximately 2,800,000 civilian workers6—from the people. Individuals in this vast bureaucracy can destroy the world by a wrong decision, while legions of nameless, faceless middle-level officials control such important if less cosmic questions as whose tax return to audit, what food is fit, whose phone to tap, the quantum of exhaust we can tolerate, which Monday in February will be decreed Abraham Washington's birthday, and on and on and on.

My topic, which I hope meets your criterion, Fred, is "the use of law to help toward the solution" of this problem through the Freedom of Information Act of July 4, 19677 (the Act) and the Amendments to it which become effective February 19 of this year.8 This statute is founded upon the philosophy that because governmental decisions belong to the public, the people, as of right, may claim access to them. The Rodellian prescription for the law's failures is to purge its language of all metaphysical refinements and make it understandable to the nonlawyer.9 As a necessary first step, the Freedom of Information
Act lets the citizen strip away the secrecy that surrounds the law-making process and discover who is making the law, for what purposes, to affect whom.

My second explanatory comment is to disclaim the phrase "law journal article" as a proper label for my efforts. My purpose is less grand. The law is still developing—the tentative regulations covering the new Amendments, for instance, are not due until mid-February, after this manuscript has left my hands—and therefore a discussion of the subject in depth is premature. The new Amendments do, however, bring a pause in the flow of litigation while those interested review where they stand under the amended statute. I want simply to comment on the first seven years of experience under the Act and to applaud the results that have been achieved, and then to make a few predictions about the effect of the Amendments in the future.

If, Fred, on peeking ahead you find an infrequent footnote, a polysyllabic word or two and an occasional circumlocution, stop right here. Alas, by your definition, you have here some "legal writing," and you know it's spinach. I got into this project to honor you. Let the effort rather than the text stand as a measure of my affection.

I. The First Seven Years of Experience under the Act

A. Passage and Reception

Despite its symbolically significant date of signing, the text of the Freedom of Information Act of July 4, 1967, does not suggest a call to arms, much less a modern Magna Carta. The language is technical rather than inspirational and provides none of the raw material for headlines. In fact, the Act has from the time of its enactment evoked a subdued and often skeptical reaction; its successes have come gradually and its startling disclosures only recently.

For purposes of description the Act (which applies only to the executive branch of the federal government) may be divided into three categories of provisions: those which require the agencies to give notice of what their files contain; those which grant to a person a right of access to the files and a remedy if the right is refused; and those which exempt certain information from disclosure.

First, to help searchers bewildered by the bureaucratic labyrinth discover where information is located and how to get it, each agency is required to publish and keep up to date in the Federal Register descriptions of its organization, method of functioning and procedures
for making information available. No machinery is included to police this requirement, but an agency cannot "adversely affect" a person by "a matter" which should have been published in the Federal Register but was not.

Second, the working sections of the Act direct each agency to make available final opinions, statements of policy, and staff manuals for inspection and copying when their contents affect the public. Following this specific listing comes a general residuary clause requiring the agency to make available to any person all other "identifiable records." The agency may control by published rules the time, place and cost to be charged for disclosures, but a refusal to make the record available is subject to de novo review by a court. The agency bears the burden of justifying the refusal and an uncooperative official risks a contempt citation if he defies a court order.

The final section lists categories of information which are exempted from disclosure. The first exception covers matters that are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." Under longstanding authority an executive order has designated the officials who may classify material and set the standards which govern what material may be classified. Congress was content to accept the product of this process as its definition of exempted state secrets. Of the subsequent exemptions, the most significant address personnel rules and files, internal docu-


11. "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." Id.

12. Id. § 552(a)(2).

13. Id. § 552(a)(3).

14. Id.

15. Id. § 552(b)(1). This provision was one of the major sources of dissatisfaction with the Act and has been amended. See pp. 782-9 infra.

16. Congress has authorized the head of an executive or military department to "prescribe resolutions for ... the custody, use, and preservation of its records, papers, and property," though with the restriction that "[t]his section does not authorize withholding information from the public or limiting the availability of records to the public." 5 U.S.C. § 301 (1970). The forerunners of this statute go back early in the history of the country and have been used as authority for withholding documents on security grounds. See Note, Reform in the Classification and Declassification of National Security Information: Nixon Executive Order 11,652, 59 Iowa L. Rev. 110 (1973). The process of classification of security material and the designation of the officers who may make the classifications are governed by Executive Order 11,652, which was issued by President Nixon on March 8, 1972. Exec. Order 11,652, 37 Fed. Reg. 5200 (1972), 3 C.F.R. 375 (1973). It has been estimated that the number of persons who are authorized to issue a Top Secret classification has been reduced under the Order from 5,100 to 1,860. Note, supra, at 121. The Order also makes significant progress in opening up material by establishing a mandatory declassification system which removes all classifications within ten years, unless a top level official finds that the material falls within one of four specified areas which allows for a continuation of the classification and also by setting up a mandatory review procedure for processing requests for classified information.
ments which do not reflect agency policy, investigatory files compiled for law enforcement purposes,\textsuperscript{17} business information given by an individual in confidence, and matters which are specifically exempted by other statutes.\textsuperscript{18}

Within this structure were several pronounced strengths and weaknesses. On the plus side were three quite remarkable features which have stood the Act in good stead but which Congress might easily have omitted or qualified into extinction. First, any person may request information. The Administrative Procedure Act of 1946 had said that only “properly and directly concerned” persons could make a request which had to be honored,\textsuperscript{19} and at least one expert recommended that a similar test be continued.\textsuperscript{20} By ignoring the precedent and the advice, Congress kept standing from being an issue, thereby quashing one device which would have been used effectively to slam the door in the faces of many applicants. Second, the Act as a whole established a presumption in favor of disclosure: Rather than dividing material between that to be disclosed and that to be kept secret, for example, the Act contained no bar to disclosure of even exempted material. The third positive feature is an application of this emphasis on disclosure in the remedy sector. The traditional presumption in favor of contested agency action is reversed; the Act states in unambiguous terms that the agency has the burden to justify a denial of a request in an independent court review.

The Act also presented problems, particularly in the exemption section. The draftsmen were trying to make specific in statutory terms the many strands of executive privilege which had been viewed in the past as bases for presidential control over information coming from the executive department. Although the term “executive privilege” was no stranger to the language of the law, it had never been precisely defined and its codification inevitably produced ambiguities. An inquiry into the legislative intent, therefore, was the necessary starting point for later analysis. This permitted very limiting constructions of the Act. Soon after its passage, for example, the Attorney

\textsuperscript{17} This provision became another source of dissatisfaction and was amended in 1974. See pp. 759-62 infra.

\textsuperscript{18} 5 U.S.C. § 552(b)(2)-(7) (1970). The list concludes with two exemptions which are designed to give protection to specific areas of information. The first exempts matters to be used by “an agency responsible for the regulation or supervision of financial institutions”; and the second “geological and geophysical information.” \textit{Id.} § 552(b)(8), (9).

\textsuperscript{19} Administrative Procedure Act of 1946, ch. 324, § 3(c), 60 Stat. 238.

\textsuperscript{20} Davis, \textit{The Information Act: A Preliminary Analysis}, 34 U. Cin. L. Rev. 761, 765-66 (1967). Professor Davis suggested that it is appropriate to require a balancing of the need of the party seeking the disclosure against the interest of a party adversely affected by disclosure. \textit{Id.} at 806.
General's office issued a version of the legislative history in which all doubts were resolved in favor of restricting access to information.21 This was a sample of the suspicion and hostility that logically were expected from the executive branch. Throughout the history of the country, practically all Presidents and many presidential associates have pledged their dedication to the principles of free and open government. Their brave words are never intended as absolutes. Each has understood his obligation to withhold information if the national interest requires, and talk is without great risk when he and his associates are the people who define the national interest.22 It is easy to see how self-interest becomes equated with the national interest. As the practical politician sees it, a discredited administration will undermine the stability of the government and its capacity to deal effectively with problems at home and abroad. It follows that everything must be done to protect the administration from being discredited. Presidents Johnson and Nixon spoke forthrightly of their commitment to the Act. The occasion for Johnson's speech was the signing of the Act on July 4, 1967, when he associated the objectives of the new law with the democratic principles celebrated on that day.23 At that time over a half million Americans were fighting in a war that Congress had never declared and the people little understood. Nixon made his pledge several days before his reelection in 1972 in a letter to a committee of the American Society of Newspaper Editors. He and his aides were already hard at work hiding every trace of their involvement in the Watergate break-in.24


22. Professor Davis cites an instance in which a Department of Justice representative testified in 1965 that in refusing to disclose information the Executive is only accountable to the electorate and that Congress cannot give the courts responsibility over executive records. Davis, supra note 20, at 764, citing Statement by Norbert Schlei, Ass't Att'y Gen., Hearings on the Administrative Procedure Act Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm., 89th Cong., 1st Sess. 192, 205 (1965).

23. "[A] democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest." Statement by President Johnson upon signing Public Law 89-487, July 4, 1967, reprinted in 20 AD. L. REV. 263-64 (1968) and in SOURCEBOOK, supra note 21, at 195.

Nor is there a natural tendency towards revelation at the lower echelons. The need to cover tracks is obvious in the case of the crook, liar and malingerer. But no one likes to conduct his or her business in a fish bowl. The first instinct is one of caution. There is risk to disclosure with no apparent prospect of offsetting benefit.

Recognizing that the new statute, burdened with exceptions and ambiguities, would face a hostile world, the early commentators expressed doubts about its capacity to do the job. Professor Kenneth Culp Davis, the preeminent scholar in the field of administrative law, concluded that the statute was badly flawed and practically unworkable. He said in pessimistic judgment, “The information the Act opens up that would otherwise be closed is minimal.” And few civil libertarians at the time would have disputed Professor Thomas I. Emerson’s assessment that the right-to-know laws, including the Freedom of Information Act, are “weak and easily evaded.”

Nor has the Act fared much better in recent years. Most of the comment in the journals has described the multiplicity of devices the agencies have invented to avoid disclosure and the instances where the courts have given the statute a narrow construction and upheld a denial of access to material. Ralph Nader summed it up in describing the experiences a task force under his direction had in obtaining information from a select group of agencies. Although conceding that many officials were cooperating, his overall conclusion was negative: “Government officials at all levels . . . have systematically and routinely violated both the purpose and specific provisions of the law.”

There are explanations for this poor press. At first there were genuine doubts as to what the courts might do to the statute and a cautionary tone was appropriate. Most of the writers since have, like Nader, been partisans on the side of open access to government information and may have been motivated, in accentuating the negative, by the need to build a record which would convince Congress of the

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25. Davis, supra note 20, at 803.
29. Id. at 2.
necessity of strengthening the Act through amendments. But the literature, from today’s vantage point, does seem to have unreasonably high expectations. To satisfy such critics the Act would have needed divine powers to reverse human nature and compel the silent to speak.

Instant maturity was of course beyond the capabilities of the fledgling statute. Now the Act has had almost seven years in operation and has emerged from its trial period intact. The record of the first stage of development gives no cause for gloom. A few details emerged which required congressional attention. For the most part, however, the record is one of solid achievement.

B. The Act in Practice: Three Successes

1. Reception by the Courts. Approximately 200 cases have been brought to obtain review of agency denials of requests for information.\(^{30}\) It is impossible to compile a box score of results. Some cases are unreported, the results of others are inconclusive, and many have been withdrawn because a favorable compromise has been reached. Observers of the system agree that the seekers of information have done well before the courts and have usually gotten most of the material they were after.\(^{31}\) Except for two lines of cases involving two of the exemptions—authority which has since been overruled by the Amendments\(^ {32}\)—the cases have reflected the policy that “exemptions from disclosure must be construed narrowly in such a way as to provide maximum access consonant with the overall purpose of the Act.”\(^ {33}\) Judicial encouragement and favorable precedents on many disputed points have contributed to the Act’s forward momentum.

2. Institutional Developments. The Act only goes to work if someone makes a request for information, but an individual citizen is not apt to know how, nor have the resources, to take advantage of its provisions. He is likely to need an attorney—which means, particularly if the information involves more than routine matters and litigation is a possibility, being prepared to spend $1,000 or more in fees and costs

30. A useful index and synopsis of all the reported cases until mid-1974 is set out in Sourcebook, supra note 21, at 115-90; an excellent review of the important cases appears in Note, The Freedom of Information Act: A Seven-Year Assessment, 74 Colum. L. Rev. 895 (1974).


32. See pp. 752-62 infra.

alone. Under such circumstances it might have happened that only wealthy business people who saw an opportunity to obtain, from the regulatory agencies, competitors' trade secrets or operators who planned to exploit sensational material now secured in government files would take the necessary initiatives under the Act. That the history of the first seven years has not been so sterile is a credit to the private, non-profit public service and good government groups who have been quick to realize how the Act could be put to work to get information and to increase public awareness of important national issues. Organizations such as the American Civil Liberties Union, Aviation Consumer Action Project, Center For National Policy Review, Consumers Union, Corporate Accountability Research Group, and Washington Research Project have been responsible, either through their own officers or by helping others, in opening up locked government files. A particularly significant event occurred in 1972 with the opening of the Freedom of Information Clearinghouse as a section of Nader's Center for the Study of Responsive Law. The Clearinghouse has as its mission the use of the Information Act and the 1973 Federal Advisory Committee Act, which opens up to the public advisory committee deliberations, to advance public causes generally. It offers a variety of services to individuals and groups: advising them on how to make requests for information, litigating refusals to access when a party needs help and the cause is appropriate, informing citizens of their rights under state government access laws, and encouraging people generally to take advantage of their right to be informed. With this kind of institutional help, each citizen has it in his or her power to make the government pay heed to a request for information.

Institutional adjustments have also occurred within the government agencies. Though much of the testimony heard at the congressional hearings in 1973 described the ingenuity of agency officials in avoiding compliance with the Act, many officials, either out of conviction that the Act was right or out of resignation that it was here to stay, began to create machinery within their agencies to process requests for information. It is now quite common for an agency to require

34. Testimony of Ronald Plesser of the Center for the Study of Responsive Law, House Hearings, supra note 24, at 346.
35. A Docket of Dec. 31, 1974, describes the activities of the Freedom of Information Clearinghouse including its active participation in 30 cases which are briefly summarized. (The Docket may be obtained on request, P.O. Box 19067, Washington, D.C. 20036.)
that a denial of a request be reviewed by a departmental lawyer and top authorities before being released. The regulations of the Justice Department serve as a prototype. They state that when the public interest dictates, records will not be withheld even though exempted, that assistance in identifying records must be given persons in making out requests, that action on requests must be taken within ten days, that denials must be explained and documented, that an administrative appeal to the Attorney General must be available within 30 days after a denial and that classified records must not be withheld after ten years unless a review committee directs otherwise. The Justice Department has also offered a variety of services to other agencies, including training for both lawyers and nonlawyers in the Act's obligations and advice to agencies facing requests for information, although it appears that to date few have taken advantage of this service.

3. Secrets Revealed. At first the information brought to light by the operation of the Act involved corporate matters, the disclosure of which did little to achieve the goal of broad public education on affairs of national concern. Meanwhile, requests for details from the Warren Commission report or the files of the Department of the Army concerning the My Lai massacre were stalled in court. It appeared that the more sensational the material the less prepared the courts were to order disclosure. One author sadly concluded: "The FOIA does little to unlock the quality knowledge of common public, as opposed to private corporate, interest."

Three highly publicized disclosures in November 1974 proved that judgment to be premature, for in each case the government, prodded by suits under the Act, revealed material it viewed as both sensitive and embarrassing. During that month the Atomic Energy Commission finished releasing documents, which it had suppressed over a ten-year period, setting out opinions of staff scientists that a major reactor

39. See generally Ass'n of the Bar of N.Y.C., Amendments to the Freedom of Information Act, Apr. 22, 1974, at 4. On December 8, 1969, the Justice Department sent a memorandum to the general counsels of all departments and agencies requesting them to consult the Department before finally denying a request for information if by that denial litigation might take place which would adversely affect the government. To carry out the consultation, a Freedom of Information Act Committee was created consisting of two lawyers from the Civil Division and three from the office of Legal Counsel. Saloschin, The Work of the Freedom of Information Committee of the Department of Justice, 23 Am. L. Rev. 147 (1971). Apparently, an invitation to use the Committee's services was not enough. On June 26, 1973, Attorney General Richardson, testifying in a hearing by three Senate subcommittees on various aspects of government secrecy added: "I will order our litigating divisions not to defend freedom-of-information lawsuits against the agencies unless the committee has been consulted." Saloschin, Administering the Freedom of Information Act: An Insider's View, in NONE OF YOUR BUSINESS: GOVERNMENT SECRECY IN AMERICA 189-90 (N. Dorsen & S. Gillers eds. 1974).
40. Note, supra note 30, at 959.
accident might kill up to 45,000 people and create a disaster area the size of Pennsylvania. On November 14 the Department of the Army gave up on holding back the Peers report describing the details of the My Lai massacre and of the failure of high-ranking officers to face up to their responsibilities. On November 17 the Internal Revenue Service surrendered to the Tax Reform Research Group memoranda, letters and other documents describing the activities of an investigative group of the IRS which had since 1969 been keeping “leftist organizations” under surveillance.

II. The 1974 Amendments

On May 2, 1973, Representative William S. Moorhead, Chairman of the House Foreign Operations and Government Information Subcommittee, banged his gavel and opened hearings on amending the Act. Testimony charged that agencies had avoided compliance by delay and by assessing excessive charges for services rendered in digging out and reproducing the materials, and that the executive departments had failed to create a positive attitude in support of open access. Disappointment was expressed that the press had not found the Act more useful, but newsmen claimed that the process was too slow and expensive to meet their needs and deadlines. The several representatives from the agencies blamed most of the problems on the difficulties they had had in adjusting to the substantial administrative burdens which the Act had suddenly thrust upon them; they asked for more time to perfect the procedures to comply with the existing requirements. New provisions, they claimed, would impose an additional burden which would be almost impossible to handle.

41. N.Y. Times, Nov. 10, 1974, at 1, col. 1. As the account indicates, the material became public over a period of time; some segments of it came out in leaks and the balance was released because of suits or threats of suits.

42. Id., Nov. 14, 1974, at 16, col. 4 (city ed.).

43. Id., Nov. 18, 1974, at 1, col. 5 (city ed.). The precedent for disclosure of information concerning domestic surveillance was established in Stern v. Richardson where the district court ordered the FBI to release documents relating to its counter-intelligence program entitled “Cointel-pro-New Left.” 367 F. Supp. 1316 (D.D.C. 1973).

44. House Hearings, supra note 24.

45. Id. at 91.

46. See, e.g., id. at 93, 346. The indictment was not new; Ralph Nader had put it in blunter terms a few years before, alleging that the agencies gave favored treatment to their friends while turning ordinary citizens away at the door, that wide variations existed in the interpretation of the exemptions and in the agency procedures that had to be exhausted before going to court, and that an array of devices had been developed to render material unavailable ranging from falsely claiming it to be covered by an exemption to denying its existence. See Nader, supra note 28.

47. House Hearings, supra note 24, at 46, 48.

Many changes in the wording of the Act were proposed, but in the end only a few appeared in the final drafts which were presented in the House and Senate. As the Senate Judiciary Committee explained, new language might increase rather than lessen confusion and this risk should not be run as long as the courts were interpreting the exemptions to favor public disclosure. Thus the basic Act was retained without substantive change. The Amendments were designed to correct unforeseen problems which had developed because the original wording had not fully achieved its intended goals. The Amendments are of three types: (1) substantive material designed to correct interpretations given by the courts to two of the exemptions which restrict disclosure, (2) a series of procedural directives which combine principles of sanction and reward to obtain a larger outflow of information, and (3) the further definition and expansion of several of the provisions which set out the reach and responsibilities of the Act.

A. Correction of Judicial Error

Everyone agreed that the courts had done well by the Act. Most sections had been construed to carry out the functions the proponents of full disclosure had in mind for them. There was dissatisfaction, however, with the judicial interpretation of two of the exemptions: those dealing with state secrets and with the privilege for investigative files. Much of the debate focused on these issues, and even included dire predictions of the imminent collapse of American democracy. But there is nothing in the text of either of the two amendments which eventually emerged to suggest they are of blockbuster quality. In truth, Congress simply restored the boundaries originally intended for each exemption.

1. "National Defense or Foreign Policy." The first exemption in the original Act had saved from disclosure matter "specifically required by the Executive order to be kept secret in the interest of national defense or foreign policy." Does this mean that the executive has exclusive control over this large and amorphous area of material and that the courts cannot review the executive action? In Environmental

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Fred Rodell

Protection Agency v. Mink. Justice White, speaking for a majority of the Court, seemed to give an affirmative answer. 55

Everyone conceded that the documents in Mink had been classified, that the classification had occurred before the request was made and that the classification had been supervised by an authorized official. The District of Columbia Court of Appeals had found that nonclassified material was mixed in with the classified material and ordered the district court to conduct an in camera review to separate and release the nonsecret portions of the documents. 56 Justice White, however, wrote that once a document has been classified by an authorized official under the governing executive order, it is put outside the reach of the Act and cannot be ordered disclosed. Court review of such executive decisions—even in camera—is foreclosed.

Subsequent decisions pecked away at the seemingly absolute bar of Mink, ordering documents to be reviewed to test whether they had in fact been classified, and, if so, whether the procedure of the executive order had been followed. 57 The Amendments, however, completely overrule the Mink holding. The new language now excepts from disclosure matters which are "(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." 58 In the grant of authority to a district court to review a denial, the court "may examine the contents of such agency records in camera" to see whether they are covered by "any of the exemptions." 59 In addition, any "reasonably segregable portion" of a classified record must be released. 60

In the course of the debates occasioned by the passage, presidential

57. Weisberg v. United States Gen. Servs. Admin., Civil No. 2052-73 (D.D.C. 1974), for example, held that the government had the burden of showing "procedural regularity" in that "the classification" was ordered by an individual authorized to do so under duly prescribed procedures. The court (though it held the material sought was exempt as an investigatory file) ruled that it was not enough that the government Archivist stated under oath that a transcript of an executive session of the Warren Commission had been classified "Top Secret." Similarly, in Schaffer v. Kissinger, 505 F.2d 389 (D.C. Cir. 1974), petitioner requested to see reports in the files of the State Department describing conditions in prisoner of war camps in Viet Nam. When refused because the reports were classified, he brought discovery proceedings to find out whether all copies of the reports had been stamped "Confidential," whether the classification had been made in accordance with proper procedures, and whether the classification came after the request for disclosure in order to thwart that request. The Appeals Court held that Mink did not require this initiative to be stopped by summary judgment, that it was open to the courts to decide whether the material is classified.
58. Amendments, supra note 8, § 2(a).
59. Id. § 1(b)(2)(A)(B).
60. Id. § 2(c).
veto, and re-passage of the amendments, this provision aroused the most concern. Discussion centered around charges that the Amendment was unconstitutional, that federal courts lacked the capacity to handle such a job, and that the provision might threaten national security. The exemption as passed seems to resolve each of these satisfactorily.

The Constitutional Challenge. President Ford made the changes in the national security exemption a major target of his veto message. He hypothesized a proceeding in which a district judge is examining a classification made by the Secretary of Defense on national security grounds. If the judge finds it equally reasonable to disclose as to suppress, he must, the President argued, find for the petitioner and against the Secretary because the burden of proof is on the government. "Such a provision would violate constitutional principles." 61 His suggested remedy was to shift the burden so that the governmental classification would stand if there were a reasonable basis to support it. 62

There is nothing on the face of the statute to support a claim of constitutional invalidity. In truth, the amendments don't purport to do very much. They do not remove or even limit the traditional protection for state secrets. All the new wording does is to require the executive department to comply with its own rules as set out by executive order and to give the court the authority to decide whether there has been such compliance. The Supreme Court, in United States v. Reynolds, approved a similar procedure. 63 There the widows of three civilian observers who were killed in a bomber crash sued the United States under the Tort Claims Act. In the preparation of their case they moved for production of the Air Force's accident report and the statements of three surviving crew members. The Air Force claimed that the matter was a privileged military secret which could not be released under departmental regulations. The Court held that the judge should stop short of ordering a personal viewing if convinced by other evidence that the information did involve national security. The Court did imply, however, that if necessary the judge could examine all the circumstances to satisfy himself that the claim of privilege was appropriate, even including an examination in chambers of the secret material. The amended exemption works in much the same way. There is nothing in Mink to suggest that the Constitu-

62. Id.
63. 345 U.S. 1 (1953).
tion disallows this procedure. Justice White conceded that Congress could make its own rules to control the classification process, and Justice Stewart, in a concurring opinion, seemed to be exhorting Congress to pass just the kind of legislation that it did.\textsuperscript{4}

Presumably, the government, if it is of a mind to challenge the procedure on constitutional grounds, will await a case involving a request for highly sensitive information. If, for instance, the Defense or State Department were asked to disclose their codes they might well respond that the material is so critically important that they cannot discuss it, let alone reveal enough of it to the court to make out the case for its exemption. Constitutional issues might be raised in such a context. An order requiring the delivery to the court of any of the material to facilitate review could be challenged as an unconstitutional interference with the President's authority to conduct foreign and military affairs and as such a violation of the separation of powers.\textsuperscript{5} Fortunately, such a case is not likely to develop to a point where the constitutional issues regarding the review procedure under this exemption will have to be decided. Under the Amendments, the judge is authorized, but not required, to examine the secret material to see whether it qualifies for the exemption. Under circumstances like those presented by a request for government codes, it is to be expected that exemption from disclosure would be established on proof that in no way compromised the integrity of the code.

\textit{Federal Court Capacity.} The capacity of the federal courts to cope with the responsibilities given them by the Amendments was questioned by opponents of the legislation on several grounds. First, there was the practical problem of whether the courts would be so swamped with material that a real examination of it would be impossible.\textsuperscript{6} Sec-

\textsuperscript{4} 410 U.S. at 83, 94-95.


\textsuperscript{6} In Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), the Court of Appeals for the District of Columbia criticized agencies who responded to requests for information by submitting masses of material to the court, claiming it all to be exempt under several of the exceptions to the Act. The Court called it a "tactical ploy" designed to compel the district court, overwhelmed by a "morass of material" which it must test against several "imprecise exemptions," \textit{id.} at 826, to accept the government's argument because it has no practical alternative. (Unfortunately courts cannot look to petitioner's counsel for help in this area; counsel does not have sufficient knowledge of the contents of the material the government has withheld, nor the means to discover it, to contest the claims of immunity under the exemptions.) The Court was flat-out in its condemnation: "[C]ourts will simply no longer accept conclusionary and generalized allegations of exemptions...but will require a relatively detailed analysis in manageable segments." \textit{id.} Henceforth an agency when withholding from public scrutiny a large amount of material or a long document must, at risk of having the whole mass ordered disclosed, separate out the pages which are claimed to be
ond, fears were expressed that a district court would never have the overall picture within which classification decisions must be made. Pro- 
security spokesmen alleged that, in contrast to a top official who makes a security judgment which is based on the national interest as he sees it against a global background of which only he or she is fully aware, a judge is an amateur passing judgment on professionals. He faces an infinite variety of unknowns which he can only understand if he leaves the bench and joins the department. Implicit in much of the debate, although no one wanted to be heard knocking the integrity of the federal bench, may have been a conviction that the process put the national security in jeopardy, that a secret which is widely shared soon becomes general knowledge.

During the hearings there was talk of establishing a nonpartisan, seven-member Freedom of Information Commission which would investigate denials of disclosure at the request of a federal court, Congress or one of its committees, the Comptroller General, one of the agencies, or, with the concurrence of three members of the Commission, a private citizen. The aim was to turn over the burdens to a panel of experts who, backed up by a staff of professionals, would bring organization to large lots of documents and would develop a capacity to bring uncooperative agencies in line. Yet many witnesses ranging from those representing agencies to those from press and public service groups were unenthusiastic about the idea of interposing another layer of bureaucracy before obtaining court review.

The proposal for a commission was shelved.

exempt and describe and index them in such a way that the court and opposing counsel have some idea of the nature of the material being withheld, its location in the overall mass and the specific exemptions which are said to save it from disclosure.

On remand John J. Lafferty, Deputy Director, Bureau of Personnel Management Evaluation of the Civil Service Commission, filed an affidavit stating that it would require 10,257.1 person-hours or 4.93 person-years, at a total cost of $96,176, to index all the documents in accordance with the court of appeals order. The parties agreed that the government should proceed by submitting nine representative samples with identifying details excised to be examined by the court to see whether the material was exempt under the Act. The judge released much of the material but ordered certain documents withheld under the sixth exemption which protects personnel and medical files, the disclosure of which constitutes an unwarranted invasion of personal privacy. Vaughn v. Rosen, 383 F. Supp. 1049 (D.D.C. 1974).


68. Cf. Epstein v. Resor, 421 F.2d 930, 933 (9th Cir.) ("As has been stated, the judiciary has neither 'the aptitude, facilities, nor responsibility' to review these essentially political decisions"), cert. denied, 398 U.S. 965 (1970); Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); Developments in the Law—The National Security Interest and Civil Liberties, 85 Harv. L. Rev. 1130, 1225-26 (1972).

69. For a draft of this proposal, see House Hearings, supra note 24, at 12-20.

70. Id. at 141-42 (spokesman from an agency), 338 (spokesman from the public sector).
In the end, the federal courts were left to make the review of security classifications. They supervised exemption claims generally, and there was no real alternative. If a court needs help, the judge has it in his discretion to appoint a special master to assist—processing voluminous material.\footnote{71}

One trace of the idea of a specialized tribunal to review agency denials remains. The original Act directs that matters be brought to the court in the district where the complainant resides or has his business or where the agency records are located.\footnote{72} The new legislation grants concurrent venue to the district courts in the District of Columbia.\footnote{73} A complainant is not compelled to abandon his home court but may at his option take advantage of the experience that the courts in the District have in this area. The invitation has its attractions. The Capitol has a bar familiar with the Act, courts which have favored disclosure, and an overall atmosphere in which state secrets are less apt to be treated as holy writ.

\textit{The Problem of National Security.} The Senate draft had said that if an agency head submitted an affidavit “certifying that he had personally examined the documents withheld and has determined after such examination that they should be withheld . . .”—in other words, a statement that this document is hot stuff and the agency is really serious about its classification—“the court shall sustain such withholding unless, following its in camera examination, it finds the withholding is without a reasonable basis . . .”\footnote{74} In short, this provision would have shifted the burden of proof from the government to the petitioner in cases involving national security. It is possible that Senator Kennedy, who authored the draft and who was steering it through the Senate, went along with this language to keep peace within a coalition which included a number of conservatives whose support was necessary to avoid a showdown over the provisions which imposed sanctions against officials who unreasonably withheld information.

Senator Muskie, who as Chairman of the Subcommittee on Intergovernmental Relations has had a long standing interest in the Information Act, had no such tactical encumbrances. He and a number of colleagues saw the provision as inconsistent with the spirit of the Act. They moved to delete it in its entirety.\footnote{75} The debate was not

\begin{footnotes}
\item[71.] \textit{Fed. R. Civ. P.} 53.
\item[73.] Amendments, \textit{supra} note 8, at § 1(b)(4)(B).
\item[74.] S. 2543, \textit{supra} note 49, § 1(b)(4)(B)(ii).
\item[75.] \textit{Id.} at S9318-20.
\end{footnotes}
lacking in passion. The security-minded argued that with the "gates wide open" the country was in dire peril because the courts lacked the experience to make "political judgments in the field of foreign affairs and national defense." The tide was, however, running the other way. Senator Ervin had the last word: "If a judge does not have enough sense to make that kind of a judgment and determine the matter, he ought not to be a judge . . . ." The offending language was removed from the bill.

The debate on the national security exemption thus ended in a victory for the advocates of open government. Mink was set aside and the federal courts are now authorized to review security classifications, with the burden remaining on the government to justify non-disclosure. Agency heads may, of course, introduce affidavits of personal concern to bolster their claims that security information should not be disclosed. It remains to be seen what weight the courts will give such declarations. On the one hand, the legislative history contains a specific rejection by the Senate of a proposal to codify a presumption in favor of governmental classification. However, in the conference report resolving the differences between the House and Senate drafts, the conferees went out of their way to discount implications from that fact. Because the executive departments had "unique insights" into the effects of disclosure of classified material, the conferees "expected" that federal courts would "accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record." It appears that a court will have a choice of which version of the legislative history it wishes to adopt.

The issue of national security generated the most heat and attracted the most attention, both in and out of Congress. It is, however, questionable whether the new law will significantly increase the number of successful applications for information about these matters. It is not written to be a remedy for over-classification. It will keep agencies from classifying material after a request for disclosure of that material has been made, from claiming the exemption for material because it is classifiable although it has not in fact been classified, and from withholding the whole because some of the parts are classified. Yet the criteria for classification will be established by the executive department. The new law does no more than to require the executive department to hold faithful to its own prescriptions. If over-classifi-

76. Id. at S9321 (remarks of Sen. Stennis); S9322-23 (remarks of Sen. Hruska).
77. Id. at S9326.
78. The vote was 56 yeas, 29 nays and 15 not voting. Id. at S9328.
cation is the problem, then Congress and the President must face it directly and develop new rules to govern the system of classification. But the legislation and the history of its enactment does have important symbolic significance. Fundamental to the Act is the location of the burden on the government. A determined effort was made to shift the burden to the petitioner. In beating it back, Congress preserved internal consistency and made clear its intention that the Act stand for disclosure first, permitting nondisclosure only when affirmative justification has been demonstrated.

2. Investigatory Files. The drafts of the Amendments left all the other exemptions unchanged when they came to the House and Senate floors for debate. But even as congressional attention focused on ways of making more information available, a series of decisions was coming down which greatly expanded the scope of the exemption protecting investigatory files.

As originally written, exemption seven kept from disclosure “investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency.” The interpretation of the exemption depended on the scope given to the term “law enforcement proceedings.” In the first big test of this provision, the Court of Appeals for the District of Columbia stuck close to the literal meaning and the exemption seemed safely confined to a narrow track. In 1967 the Bristol-Myers Company had requested certain documents amassed by the Federal Trade Commission in the course of an investigation of Bristol-Myers and other companies for false advertising. At the time of the request, the complaint against the company had been withdrawn for two years and no new action appeared to be contemplated. The district court sustained a denial of the request. The appeals court, however, saw the exemption as designed to prevent a litigant from learning more about the case against him than he would under the regular rules of discovery. So, the

80. Reform will not be easy to come by. See Henkin, supra note 65, at 278-80.
83. No clear understanding has emerged explaining the meaning of the trailing clause. Presumably, the exemption was not to cover material which a party in litigation with the agency could get by discovery. One commentator described it as a “quizzical constraint” which was often ignored by the courts. Note, supra note 30, at 948. It is gone from the revised law and its meaning need bother us no more.
86. 424 F.2d at 939.
court reasoned, if no further proceedings were imminent, the government's case would not be compromised by disclosure and the exemption was not available. The lower court was reversed and the agency admonished that it could not "protect all its files with the label 'investigatory' and a suggestion that enforcement proceedings may be launched at some unspecified future date."\(^{87}\) A different approach emerged in the Second Circuit. In *Frankel v. SEC*\(^{88}\) that court interpreted the exemption to include protection of investigatory techniques and the identity of informants. The court reasoned that Congress had wanted to protect the whole investigatory process and not just an agency's position in a single proceeding;\(^{89}\) the exemption was seen as general in content and indefinite in duration.

Because the bulk of the requests for information are reviewed in the courts of the District of Columbia, however, the principles which control there are of particular significance. If the court of appeals had held to its narrow construction of the exemption as set out in *Bristol-Myers*, it might have been argued that *Frankel* was an isolated aberration. But the advocates of open disclosure were in for bad luck in the District of Columbia. The next case, *Weisberg v. Department of Justice*,\(^{90}\) involved a request for spectrographic analysis of a bullet which was used in the assassination of President Kennedy. The court, reflecting the prevailing sentiment in the country that this file is best kept locked, treated the request with a measure of distaste. The case for disclosure under *Bristol-Myers* was strong (the information was in the investigatory files of the Warren Commission, but enforcement proceedings were not possible because Lee Harvey Oswald was dead and the assassination of a president was not a federal crime). The court, however, refused to limit the exemption to situations where proceedings were imminent. Though the court gave lip service to the idea that the Attorney General's "*ipse dixit* does not finalize the matter,"\(^{91}\) its reasoning was similar to that applied to the first exemption by the Supreme Court in *Mink*. It held that "[w]here the district court can conclude that the Attorney General's designation and classification are correct the Freedom of Information Act requires no more."\(^{92}\) It found such a conclusion "overwhelmingly" demonstrated by the record, and so refused a remand for an examination of whether the files would

\(^{87}\) *Id.*


\(^{89}\) 460 F.2d at 817-18.


\(^{91}\) *Id.* at 1202.

\(^{92}\) *Id.*
be used for law enforcement purposes or whether their disclosure would be in any way damaging to law enforcement mechanisms. The dissent, on the other hand, argued that the thrust of the Act was to keep an executive official from deciding by unilateral act what was or was not to be disclosed. Under the circumstances in the case, the dissent stated, the trial judge should be required to examine the material in chambers with the burden on the agency to demonstrate that disclosure was likely to lead to specific harm.\footnote{Id. at 1203-07 (Bazelon, C.J., dissenting).}

The paradoxical combination of verbal acknowledgment and practical curtailment of the district court's power of review in Weisberg established the pattern for several other cases which came before the D.C. court in 1974. Representative Aspin's request to see the Army's preliminary investigation of the My Lai incident was denied;\footnote{Aspin v. Department of Defense, 491 F.2d 24 (D.C. Cir. 1974).} though the courts-martial against 15 soldiers were completed, the court held that the disclosure of even inactive files might impair future investigations. It stated that the district court need not hold a hearing into the ways such investigations might be prejudiced. Rather, it was sufficient to base the order on affidavits from three Defense Department officials that the investigation "figured prominently in the initiation of subsequent court-martial proceedings." In like manner the Court held in Ditlow v. Brinegar that the agency need not prove how disclosure would harm its law enforcement efficiency.\footnote{494 F.2d 1073 (D.C. Cir. 1974).} It is enough to justify the exemption, it held, if the district judge finds that the material is in a file compiled for law enforcement purposes which might conceivably lead to a civil proceeding at some future date. Finally, in Center for National Policy Review on Race and Urban Issues v. Weinberger\footnote{502 F.2d 370 (D.C. Cir. 1974).} the court held that files involving agency review of discriminatory practices in northern areas were "investigatory files" and thus exempt. Though the court stated that the "investigatory" label was not conclusive, it refused to remand for further examination by the district court because appellees conceded the investigatory nature of the files, and argued merely that enforcement proceedings were not imminent.

By late May 1974, when the Senate was debating the Amendments, it was apparent that the seventh exemption had suffered the same fate as the first.\footnote{For a full analysis, see Note, The Investigatory Files Exemption of the FOIA: The D.C. Circuit Abandons Bristol-Myers, 42 Geo. Wash. L. Rev. 869 (1974).} In practice, files labeled as investigatory became ex-
empt, and it had become practically impossible to challenge the classification as unjustified under the purposes of the exemption. Because the hour was late, corrective action had to be taken from the floor. Senator Philip Hart and 15 of his colleagues moved to amend by eliminating the catchall phrase "compiled for law enforcement purposes" and spelling out in specific terms the areas the exemption was to protect. Under the new wording the exemption applies when the production of records will interfere with enforcement proceedings, deprive a person of a fair trial, constitute an invasion of privacy, reveal a confidential source, disclose investigative techniques, or endanger the safety of law enforcement personnel. Because this listing goes beyond the cases in setting out legitimate justifications for applying the exemption, its proponents were obviously not trying to restrict the exemption by substantive changes. Senator Hart conceded as much when he admitted that taken literally the new formula was broader than the original provision.

If there is an apparent paradox here, it is only on the surface. Neither the pro-disclosure people nor the security-minded were confused as to where their self-interest was located. At the close of the debate, Senator Kennedy asked Senator Hart if it was the intent of his amendment to override the Weisberg, Aspin, Ditlow and National Center cases. Senator Hart answered that it was. On that note the Amendment carried, and the FBI had suffered a seldom duplicated congressional setback.

Unfortunately, there may be uncertainty as to the meaning of the interchange between the two senators. The exemption was upheld in the cited cases because disclosure might reveal investigatory techniques or material which might be used in some future legal action. Because the Amendment continues to accept these as valid grounds for exemption, it cannot be said that the Amendment overrules the substantive principle used in those cases. Rather, the aim of the new law was to make the procedures described in the Weisberg dissent mandatory, to prevent an agency from claiming an exemption just

100. "One could argue that the amendment we are now considering, if adopted, would leave the Freedom of Information Act less available to a concerned citizen that [sic] was the case with the 1966 language initially." 120 Cong. Rec. S9336 (daily ed. May 30, 1974).
101. Id.
102. The vote was 51 yeas, 33 nays and 16 not voting. Id. at S9337.
by showing that information is in an investigatory file. Instead, an agency must now convince the judge that the disclosure of a document will cause the government harm in one of the areas set out in the statute.104

When the smoke had cleared, the substance of exemption seven, like that of exemption one, had not been fundamentally changed. Senator Kennedy was able in his summation to boast of the sensitivity to security displayed by the more detailed provisions of the amended section.105 A procedural revolution had occurred however. In the future, agencies will be required to invest vastly more time and money in searching their files, and even slight delay may lead to mandatory disclosure.106

B. Toward Automatic Disclosure

Much of the testimony at the hearings expressed disappointment that the agencies had not been more cooperative. The top administrators, witnesses alleged, had failed to push full implementation of the Act, while middle-level officials had no incentive to abandon past habits of caution. The safe course continued to be "when in doubt, deny."107

The Amendments were designed to change these conditions and to create an atmosphere in which officials disclose first and suppress only if they are personally prepared to defend their action. There being no magic wand to change humans into angels, the conversion can only be achieved by a combination of the whip and the carrot. The new Amendments contain substantial dosages of both.

Although congressional debate centered on the exemptions, it is

104. Future petitioners can be expected to request a page-by-page showing that the material is within one of the subsections of the exemption and that disclosure will cause real harm to the government's law enforcement processes. The Amendments leave open, however, the question of the extent of harm necessary to investigatory techniques or of interference with enforcement proceedings necessary to claim exemption. Amendments, supra note 8, § 2(3)(7). The Joint Explanatory Statement of the committee of conference, H.R. Rep. No. 1380, 93d Cong., 2d Sess. (1974) [hereinafter cited as Conference Report], stated as to investigative techniques that they "should not be interpreted to include routine techniques and procedures already well-known to the public, such as ballistics tests, fingerprinting and other scientific tests or commonly known techniques." Id. at 12. The record contains no explicit discussion of the question of imminence of law enforcement proceedings.

105. "[T]he amendment itself has considerable sensitivity built in to protect against the invasion of privacy, and to protect the identities of informants, and most generally to protect the legitimate interests of a law enforcement agency to conduct an investigation into any one of these crimes which have been outlined in such wonderful verbiage here this afternoon—treason, espionage, or what have you." 120 Cong. Rec. S9336 (daily ed. May 30, 1974).

106. See p. 764 infra.

likely that the provisions which will most significantly contribute to the opening of files are those to speed processes, increase agency and individual responsibility, and lower costs. Activity under the Act was already brisk. With the new law encouraging petitioners and punishing offenders, the volume will increase dramatically.

What we cannot predict now is whether the new vitality will come at a prohibitive price. There were dire predictions that the Amendments are administratively impossible. Others disagreed. Congress made no studies to test the reality of these concerns. The data would be unreliable in any event because the volume of future requests is unpredictable. Because Congress also failed to appropriate any money to meet the new expenses authorized in the law or to hire additional personnel to help with the increase in business, any problems that result will have to be remedied at a future date.

1. Speeding up the Process. Practically all the complaints about agency performance under the Act stressed delay. One study found that on the average 33 days elapsed before a request was answered and 50 days were required to get a response to an administrative appeal. The press, in particular, found the delays prejudicial. By the time information they sought was in hand, their stories often had lost all news value.

The Amendments set out a tight administrative timetable. An agency must reply to a request within 10 working days after its receipt either by releasing the information or by denying the request giving reasons and notice of the appeal procedure. A final determination on any appeal must be made within 20 days after the appeal has been filed. Allowance is made for one 10-day extension to be taken

108. The Immigration and Naturalization Service, for example, received during 1972 an average of 7,500 requests each month for records kept in 6,297,000 active files located in 57 field offices scattered throughout the country or in 5,988,000 inactive files stored in 10 Federal Records Centers. The typical request asks for the file of a single individual, and, because people have frequently moved from their original residences, the discovery of the office where the file is located may be a major undertaking without more. Statement of Robert G. Dixon, Jr., Ass’t Atty Gen., Office of Legal Counsel, Dep’t of Justice, House Hearings, supra note 24, at 115. In a dramatic summation, one witness envisioned future instances when buildings are bombed, nuclear plants go awry, airliners crash, the mail service is stalled and a shipment of heroin is not stopped because at a key time personnel of the FBI, AEC, FAA, Postal and Customs Services are occupied processing requests for information within the new time constraints. Id. at 117. The agencies who saw calamity ahead got little sympathy from spokesmen for the public sector, whose reactions can be summed up by an old observation of Nader’s that the agencies have ample time to respond to requests from their friends. Nader, supra note 28, at 10-12.

109. William Simon, when Federal Energy Administrator, promised that his agency would acknowledge requests in 24 hours, give an answer in 10 days and rule on an appeal within another 10 days. Senate Report, supra note 107, at 26. A number of agencies were already in substantial compliance.

110. Id. at 24.

111. Amendments, supra note 8, § 1(c)(6)(A), (B), (C).
for "unusual circumstances" either during the initial or appellate review periods. Circumstances are unusual when the search must be made at field offices, a voluminous amount of separate records is involved in a single request or consultation with another agency is required. Talking with the agency's legal staff or the Department of Justice is not grounds for an extension. If an agency misses a deadline, the petitioner is deemed to have exhausted the administrative remedies and may proceed to court.

The Amendments also expedite court review by requiring the agency to make a responsive pleading within 30 days after being served. Except as to "cases the court considers of greater importance," the district court may give cases under the Act precedence on the docket and shall conduct a hearing at "the earliest practicable date." On a showing of "exceptional circumstances," a court may allow an agency which is demonstrating "due diligence" more time to complete a review of its records.

2. Individual and Agency Responsibility. To provide incentive to disclose, the officials who make the decisions may no longer remain anonymous. They must now attach their names and titles to each denial. Nor is a routine denial a safe course. If a court makes a written finding that agency personnel acted "arbitrarily or capriciously" in withholding information, "the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted . . . ." The Commission's findings and recommendations are referred back to the agency for "corrective action." Suspensions probably will be few and far between. The mere fact that

112. Id. § 1(b)(4)(C).
113. Id. § 1(b)(4)(D).
114. Id. § 1(c)(9)(C).
115. Id.
116. Id. § 1(b)(4)(F). The Act has always authorized a contempt citation against any official who did not carry out a court order. See p. 744 supra. No instances of administrative discipline against an official who refused without a basis in law to release information upon request were cited in the hearings. The reverse has, however, occurred. The Office of Economic Opportunity suspended an employee because he allegedly released information about teachers' salaries at a private day care center. Statement by Ronald Plesser, House Hearings, supra note 34, at 349. Fifteen state information acts include criminal penalties. See Senate Report, supra note 107, at 63-64.
117. The Senate draft would have permitted the court to impose a 60-day suspension when information was withheld without reasonable basis in law. S. 2543, supra note 49, § (b)(2)(4)(F). This approach raised question in some minds as to whether the employee would receive due process in a civil action brought to force disclosure of information rather than to punish him. Office of Rep. John N. Erlenborn, Kennedy Provision Would Wreck Information Bill, Press Release, Aug. 12, 1974. While the safeguards of notice and opportunity to be heard were preserved in the draft, the channeling of the matter into the regular disciplinary procedures with which all federal employees are familiar seems a preferable approach. It is likely to achieve the legislative objective, it avoids the pitfalls which await any statute that imposes new and untested sanctions, and it is fairer to give
a denial is reversed by a court does not require a disciplinary response. The official's action must be found to be arbitrary or capricious. In fiduciary law these terms, when used in a will or trust instrument, significantly enlarge the trustee's discretion.\textsuperscript{118} Even if the preliminary threshold is surmounted, the Commission may not find cause for discipline. It is, after all, itself an agency and may be expected to have a measure of sympathy for employees.\textsuperscript{119} But whether anyone is suspended or not, the threat of sanctions must dramatically influence the whole psychology of the process. The first instinct cannot be to deny and hide. It will now be to disclose or find a higher official to take responsibility for the denial.

The agencies must also stand up and be counted, literally. By March 1 of each year they are required to report to Congress the number of and reasons for denials of requests for information, number and disposition of appeals from denials, names of persons responsible for denials, disciplinary action taken against any officials, relevant agency rules, a fee schedule for charges made for search and reproduction of records and the amounts collected, and any other information which demonstrates their efforts to administer the Act.\textsuperscript{120} In addition, the Department of Justice must summarize all court cases arising under the Act and efforts taken by the Department to "encourage agency compliance."\textsuperscript{121}

3. Complainant's Fees and Court Costs. It is estimated that it costs at least $1,000 in attorney's fees and court costs to secure a judicial review of a denial.\textsuperscript{122} Such obstacles are inconsistent with the theory that nonprivileged information belongs to the citizens. The Amendments reaffirm that right by authorizing the court to assess against the government reasonable attorney's fees and court costs in a case in which the complainant has "substantially prevailed."\textsuperscript{123} The fees are paid by the Treasury and not by the agency; plainly the objective is to encourage

the employee a hearing in which his conduct in office is the sole issue. In this instance the conference committee paid some heed to President Ford who had written: "Furthermore, placing in the judiciary the requirement to initially determine the appropriateness of an employee's conduct and to initiate discipline is both unprecedented and unwise."

\textit{Veto Message, supra} note 61, at 1061.

\textsuperscript{118} \textsuperscript{3} A. Scott, \textit{Trusts} § 187, at 1501-09 (3d ed. 1967).

\textsuperscript{119} During the hearings one witness described the Civil Service Commission: "There is no more outrageous agency in this city from the standpoint of coverup than the Civil Service Commission." Testimony of Clark Mollenhoff, \textit{House Hearings, supra} note 24, at 42.

\textsuperscript{120} Amendments, \textit{supra} note 8, § 3(d).

\textsuperscript{121} \textit{Id}.

\textsuperscript{122} See \textit{House Hearings, supra} note 24, at 346.

\textsuperscript{123} Amendments, \textit{supra} note 8, § 1(b)(2)(4)(E).
people to seek information rather than to levy an additional punishment against an uncooperative agency.\textsuperscript{124}

4. Search and Copying Fees. A table of agency fees for the production of documents listed the cost per page of photocopy as running from $0.05 at the Agriculture Department to $1 at Selected Service and the charge for clerical search varying among the agencies anywhere from $2 to $5 an hour.\textsuperscript{125} Separate stories were also heard at the hearings of one agency request for $85,000 and another for a prepayment of $20,000 to offset the costs of a preliminary search.\textsuperscript{126} The amended Act continues to leave it to the discretion of each agency to set uniform fees but requires that they be limited to "only the direct costs of such search and duplication." In addition, the agency is to furnish documents at reduced or no charge when "the information can be considered as primarily benefiting the general public."\textsuperscript{127} Each agency must give an accounting to Congress every year as to fees collected,\textsuperscript{128} which suggests that Congress intends to police any derelictions from the standards set out in the Act.

\textsuperscript{124} A number of important statutes make allowance for fees and costs to be paid by the federal government in efforts to encourage private litigation to vindicate national policy. Indeed, attorney fees have been awarded against the federal government even though not authorized by statute when the action has furthered congressional policy and been a financial burden. La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972). Generally, however, an award of fees requires statutory authorization; \textit{cf.} West Central Mo. Rural Dev. Corp. v. Phillips, 358 F. Supp. 60 (D.D.C. 1973). Congress has sometimes on occasion authorized the payment of fees. Civil Rights Act of 1964, 42 U.S.C. §§ 2000a 3(b), 2000e 5(k) (1970); Fair Housing Act of 1968, 42 U.S.C. § 3612(e) (1970); Clean Air Act of 1970, 42 U.S.C. § 1857h 2(d) (1970). One witness suggested a difference between such statutes and the Freedom of Information Act, however. In areas such as civil rights, the conditions which give rise to the litigation have been created by external forces beyond the parties' control. Under the Act, an attorney can make any number of requests hoping that one will be refused under circumstances which will give rise to a reversal and an award of fees. "The award of attorneys fees is particularly inappropriate in a type of litigation which can be started by anyone without the customary legal requirements of standing or interest or injury. Some lawyers might take turns in filing these suits for each other." Statement of Robert G. Dixon, Jr., \textit{House Hearings, supra} note 24, at 124-25.

But manufacturing Information Act cases is an unlikely source of income: The award of fees is not automatic. The court in determining fees will be governed by considerations of need and public benefit resulting from the disclosure. The Senate bill had set criteria to guide the court in awarding fees, including benefit to the public, commercial benefit to the plaintiff, and whether the government's withholding "had a reasonable basis in law." \textsc{S} 2543, \textit{supra} note 49, § 1(b)(4)(E). President Ford expressed the hope that "corporate interests will not be subsidized in their attempts to increase their competitive position by using the Act." \textit{Letter to Conference Chairman, supra} note 67. The Conference Report removed the criteria as unnecessary because existing law recognized such factors and the criteria "may be too delimiting."\textsuperscript{129} Conference Report, \textit{supra} note 104, at 10.

\textsuperscript{125} \textit{See} Table of Fees for the Production of Documents, \textit{House Hearings, supra} note 24, at 92.

\textsuperscript{126} Senate Report, \textit{supra} note 107, at 11.

\textsuperscript{127} Amendments, \textit{supra} note 8, § 1(b)(4)(A).

\textsuperscript{128} \textit{Id.} § 3(d)(6).
C. An Expanded Definition and Additional Indexing Requirement

1. Scope of the Act. An agency is defined in the Amendments to mean "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." The Amendment thus codifies the definition set out in Soucie v. David that an agency is any administrative unit with independent authority to exercise specific functions and makes it clear that the Act applies to the Postal Service and to other publicly funded corporations. The parenthetical in the definition suggests the possibility of a citizen making claims to tapes, letters and memoranda of some future President. The Conference Report disavows any such intent: The term "Executive Office of the President" is not to include the President's immediate personal staff whose "sole function is to advise and assist the President."

2. Publication of Indexes. Under the original Act the agencies were required to make available for inspection opinions, statements of policy and staff manuals and instructions that affect the public. The right to inspect is of limited value if the existence of the document is unknown. The Amendments now require the agencies to maintain an index identifying such documents and to publish and distribute copies of such index at least quarterly. If an agency feels that its work may not be of sufficient public interest to justify the cost of publishing and distributing an index, it may give notice that it will not publish its index but copies thereof must be made available upon request at cost.

Conclusion

The amended Act will affect fundamentally the way we govern ourselves. The individual citizen, either alone or in conjunction with others who share his concern, now has substantial access to information which was previously the exclusive possession of the handful of administrators who made the decisions on our behalf.

129. Id. § 3(e).
130. 448 F.2d 1067 (D.C. Cir. 1971).
132. Id. at 15.
134. Amendments, supra note 8, § 1(a).
135. Id.
Fred Rodell

The nation has before it a series of awesome problems involving national priorities. The alternatives are seldom appealing. The fuel crisis, for instance, poses to the ordinary citizen the choice of either paying an extorted price for foreign oil, which, he is told, may cause the collapse of the world economy, or of developing alternative sources of energy which opens up no less grim visions of runaway reactors, polluted air, contaminated beaches and unsettled ecology. There are studies in government files which shed light on these problems. They cannot be expected to give final answers. Indeed, because such studies are frequently technical, fragmented and conflicting in their judgments, disclosure may involve a risk that the issues will be misunderstood. Nevertheless, as a democracy, we are committed to the proposition that the people must decide where the truth lies. The experience of the Viet Nam War is a reminder of the calamitous consequences of secret decisionmaking. James Madison warned: "A popular government without popular information or the means of acquiring it is but a prologue to farce or tragedy or perhaps both." As a nation we have come perilously close in the last decade to demonstrating the truth of his prophecy, but the tragedy of Viet Nam and the farce of Watergate emboldened Congress first to enact and then to strengthen the Freedom of Information Act. The public now has at least one way to attempt to hold its government accountable.