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# ADMINISTRATIVE MECHANISMS FOR RESOLVING FREEDOM OF INFORMATION ACT DISPUTES

by

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## Summary

This study evaluates the desirability and feasibility of establishing an administrative mechanism for resolving Freedom of Information Act disputes. It is presented in three parts. The first part describes briefly the existing dispute resolution structure and presents statistical data reflecting its operation. The second part reports in narrative form the results of informal interviews with a large number of individuals from widely-differing perspectives who have substantial experience in this field. The third part presents an analysis of the study data and identifies the principles that should govern consideration of any change in the present dispute resolution structure. It then presents an administrative tribunal model that illustrates how the present structure might be modified to create on balance a more effective system. The study recommends that an independent administrative structure along the lines of the model be established to divert as many cases as practicable from the now exclusive *de novo* federal court process into a system tailored to the needs of access dispute resolution. Alternatively, the study considers and recommends the implementation of a form of the ombudsman model to ameliorate the burdens of an exclusively judicial dispute processing system without affecting the availability of court review.

## I. INTRODUCTION AND OVERVIEW OF THE CURRENT STRUCTURE FOR ACCESS DISPUTES RESOLUTION

### A. Background

Of the generally-applicable statutes governing federal administrative practice, none has rivaled the Freedom of Information Act (FOIA)[1] as a source of controversy or target of reform in recent years.[2] The Act's basic command that any non-exempt agency record be made available to any person upon request has spawned a complex and intricate body of law and a multi-level decisional process culminating in a de novo proceeding in federal district court.[3] Most of the policy controversy has focused on the substance of particular exemptions and certain agency practices in administering the Act.[4] Little attention has been given to the question of how exclusive reliance on court enforcement has affected the overall administration of the statute.

From time to time, informal proposals have been made that an administrative tribunal be established to resolve FOIA and other public access disputes.[5] Interest in the possible use of an administrative structure stems largely from three concerns with long-standing reliance on federal court adjudication in these cases. These concerns are (1) delay, (2) cost and (3) quality of decisionmaking.[6] A central objective of this study has been to determine whether these or other related concerns are well-founded. It has also been an aim of this study to assess whether, to the extent these concerns are well-founded, an administrative structure could be expected to relieve them significantly and, if so, what form it should take.

These are complex and important questions, but ones for which there is little hard data. They are also questions, which if not confined through the drawing of somewhat arbitrary lines, would tend to reach into every aspect of federal access law. For these reasons, it necessary to mark clearly at the outset the scope of this study. First, the study is not a reaction to any particular proposal that has been advanced. It addresses the concept of using an administrative structure. Second, it accepts as a given the substantive provisions of current law and does not address pending legislation, which in any event is generally unrelated to the issue of dispute processing.[7] Third, it assumes that any reasonable enforcement structure would include requirements for agency processing similar to those provided by current law and that the tribunal would act formally, if at all, only after agency disposition of a matter. Thus, it does not independently address agency case processing, but instead focuses on dispute processing after agency action. Finally, while the study uses access disputes under the Freedom of Information Act as the model for analysis, access disputes under the Privacy Act,[8] are generally affected by the same considerations and may be amenable to the same treatment.[9]

B. The Current Process

FOIA establishes a two-tier process for agency decision-making. Within ten working-days of a request for records, an agency is required to determine whether to comply with the request and to notify the requester of the determination, the reasons therefor, and the right of the requester to appeal to the head of the agency any adverse determination.[10] If an appeal is taken, the agency head is required, within twenty working-days, to determine the appeal and notify the requester of the decision.[11] If on appeal, the initial denial of records is upheld in whole or in part, the agency is further required to notify the requester of the provisions for judicial review under the Act.[12]

In "unusual circumstances," the statutory time limits may be extended by written notice from the agency to the requester for a period not to exceed ten working-days.[13] Such circumstances are defined in the Act as:

> (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 ... 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.[14]

A requester is deemed to have exhausted his administrative remedies with respect to a particular request if the agency fails to comply with the time limits, including any proper extension of time.[15]

Upon receipt of an agency denial on appeal or after having exhausted his administrative remedies, a requester may pursue his request for the records through a civil action in federal district court.[16] The court is required to determine the matter de novo and the burden is upon the agency to sustain its action.[17] The court may examine the contents of the agency records in camera.[18] If the court determines that any record or part thereof has been improperly withheld, it is authorized to order its disclosure.[19] The court may also assess against the United States reasonable attorney fees and other litigation

costs in an action in which the requester has substantially prevailed.[20]

The venue provision of FOIA permits the action to be brought in the district court "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."[21] The government is given 30 days, rather than the usual 60, to answer the complaint.[22] The court may, "if good cause therefor is shown," expedite the case on the docket.[23] In cases that reach litigation before a final agency determination on appeal, the effect of the Act's constructive exhaustion provision is limited by a further provision authorizing the court to retain jurisdiction while allowing the agency additional time to complete its review of the records in "exceptional circumstances" and where the agency is exercising "due diligence" in responding to the request.[24] A leading Court of Appeals decision[25] construing this provision holds that generally an agency should be deemed to be exercising "due diligence" if it is processing requests in the order in which it receives them and is not "lax overall in meeting its obligations under the Act with all available resources."[26] Thus, unless a requester can show "exceptional need or urgency,"[27] the judicial proceeding will normally be stayed until agency processing has been completed.

The most distinctive feature of FOIA litigation is that the agency seeking to withhold requested records has full knowledge of their content and the requester does not. Thus, the statutory question of whether or not the record is exempt can never be subject to adversarial testing in the purest sense. The Act responds to this problem by authorizing the district court, as noted above, to examine the disputed records in camera.[28] Yet as the Court of Appeals observed in Vaughn v. Rosen,[29] the leading case addressing this procedural dilemma, the solution is limited at best:

> ...Such an examination, however, may be very burdensome, and is necessarily conducted without benefit of criticism and illumination by a party with the actual interest in forcing disclosure. In theory, it is possible that a trial court could examine a document in sufficient depth to test the accuracy of a government characterization, particularly where the information is not extensive. But where the documents in issue constitute hundreds or even thousands of pages, it is unreasonable to expect a trial judge to do as thorough a job of illumination and characterization as would a party interested in the case.

* * *

> Such an investment of judicial energy might be justified to determine some issues. In this area of the law, however, we do not believe it is justified or even permissible.[30]

The court's solution was to require the agency to prepare an index of the withheld records, correlating the records or portions thereof with specific exemptions and the agency's justification for nondisclosure.[31] The court required that the index be as detailed as possible without disclosing the information sought to be withheld. Subsequent cases have indicated that the "degree of specificity of itemization, justification, and correlation required in a particular case will depend on the nature of the document at issue and the particular exemption asserted."[32] The preparation and submission of some form of a Vaughn index has now become a critical procedural component of most FOIA litigation.

FOIA cases are commonly adjudicated by summary judgment.[33] Discovery is relatively restricted.[34] Summary judgment is normally based upon the pleadings and the affidavits in the form of Vaughn indices.[35] Where discovery against the government is used, it is generally taken after the submission of the Vaughn index to pursue issues raised by that document.[36] In some circumstances, discovery may be had against the requester.[37] Whether adjudicated by summary judgment or otherwise, a court order requiring disclosure will ordinarily be stayed if the government appeals.[38] On appeal, the court reviews the factual basis for the district court's determination and decides whether it was "clearly erroneous."[39]

While the foregoing description of the current FOIA structure focuses, as does most commentary,[40] on the agency process, this study primarily addresses the method for processing disputes that persist after final agency action. Yet it proceeds with an awareness that any extra-agency dispute processing mechanism can have an effect, direct or indirect, on the agency process itself. The focal point for the study is nevertheless that pool of cases either that have moved through both the initial and appeal stages of the agency FOIA process and remain in dispute because the request has not been fully granted or that have not yielded an agency decision within the time periods provided for in the Act. Under FOIA, the cases in either group become subject to the de novo proceeding in federal district court.[41]

### C. The Caseload and Case Processing

As an initial matter it is helpful to have a general sense of the dimensions of the FOIA caseload. Public perceptions of

the caseload are closely tied to the dramatic increase in FOIA litigation following the 1974 Amendments.[42] It is less widely understood that case volume appears to have peaked roughly between 1979 and 1980. Since that time, the caseload has remained relatively constant. While this apparent leveling trend is contrary to the common perception that the volume of cases in litigation continues to increase, it nevertheless reflects a substantial and persistent caseload.[43]

1. The District Court Caseload

In the period since 1979, the number of FOIA cases filed and terminated in the federal district courts were as follows:[44]

| Year | Filed | Terminated |
|---|---|---|
| 1980 | 627 | 558 |
| 1981 | 507 | 530 |
| 1982 | 381 | 450 |
| 1983 | 454 | 429 |
| 1984 | 479 | 466 |
| 1985 | 565 | 573 |
| Total | 3013 | 3006 |

New case filings thus average slightly over 500 per year. Filings and terminations for the overall period are almost precisely balanced, indicating the absence of a developing backlog. Yet the size and persistence of the caseload make it a prominent component of the federal court dockets. In the United States District Court for the District of Columbia, the most common forum for these actions, FOIA cases account for roughly 12% of the civil actions filed in which the United States is a party.[45]

The concentration of the actions in the District of Columbia is another distinctive feature of the FOIA caseload. For the six-year, post-1979 period, the percentages of FOIA cases filed in the District of Columbia were as follows:[46]

| Year | Total Filings | D.C. Filings | Percent |
|---|---|---|---|
| 1980 | 627 | 218 | 34.8 |
| 1981 | 507 | 209 | 41.2 |
| 1982 | 381 | 171 | 44.9 |
| 1983 | 454 | 199 | 43.8 |
| 1984 | 479 | 190 | 40.0 |
| 1985 | 565 | 235 | 41.6 |

Because roughly 40% of all FOIA actions are filed in the D.C. district court, the case processing statistics, as well as the general development of FOIA caselaw, are heavily influenced by this court.[47]

For the purposes of this study, the most significant case processing statistics are those which reflect the time intervals from filing to disposition in FOIA cases. The tables below show the median time in months and the range for the middle 80% of the cases terminated in the six-year, post-1979 period. The first table is for all district courts, including the district court for the District of Columbia.[48] The second is for the District of Columbia alone:[49]

ALL DISTRICT COURTS

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 |
|---|---|---|---|---|---|---|
| TOTAL CASES | | | | | | |
| Number of Cases | 558 | 530 | 450 | 429 | 466 | 573 |
| 10% Less Than | 2 | 2 | 2 | 2 | 2 | 2 |
| Median | 7 | 8 | 10 | 8 | 7 | 8 |
| 10% More Than | 21 | 23 | 31 | 33 | 26 | 54 |
| NO COURT ACTION | | | | | | |
| Number of Cases | 224 | 191 | 149 | 143 | 181 | 270 |
| 10% Less Than | 2 | 1 | 2 | 1 | 1 | 1 |
| Median | 6 | 5 | 7 | 6 | 5 | 6 |
| 10% More Than | 19 | 19 | 28 | 29 | 25 | 57 |
| BEFORE PRETRIAL | | | | | | |
| Number of Cases | 278 | 281 | 259 | 239 | 250 | 273 |
| 10% Less Than | 2 | 2 | 3 | 2 | 3 | 3 |
| Median | 8 | 9 | 11 | 9 | 8 | 9 |
| 10% More Than | 18 | 23 | 30 | 33 | 22 | 54 |
| DURING OR AFTER PRETRIAL | | | | | | |
| Number of Cases | 46 | 41 | 30 | 41 | 30 | 24 |
| 10% Less Than | 5 | 3 | 6 | 4 | 4 | 4 |
| Median | 12 | 8 | 16 | 13 | 15 | 14 |
| 10% More Than | 27 | 24 | 42 | 37 | 38 | 29 |
| TRIAL | | | | | | |
| Number of Cases | 10 | 17 | 12 | 6 | 5 | 6 |
| 10% Less Than | 1 | 8 | 2 | 6 | * | * |
| Median | 11 | 16 | 13 | 9 | * | * |
| 10% More Than | 27 | 32 | 21 | 12 | * | * |

DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 |
|---|---|---|---|---|---|---|
| TOTAL CASES | | | | | | |
| Number of Cases | 214 | 221 | 188 | 180 | 178 | 211 |
| 10% Less Than | 2 | 2 | 2 | 1 | 2 | 1 |
| Median | 6 | 6 | 8 | 7 | 6 | 7 |
| 10% More Than | 15 | 20 | 29 | 29 | 19 | 22 |
| NO COURT ACTION | | | | | | |
| Number of Cases | 88 | 92 | 61 | 66 | 74 | 103 |
| 10% Less Than | 2 | 1 | 2 | 1 | 1 | 1 |
| Median | 5 | 4 | 6 | 5 | 5 | 4 |
| 10% More Than | 14 | 19 | 23 | 29 | 19 | 24 |
| BEFORE PRETRIAL | | | | | | |
| Number of Cases | 115 | 118 | 125 | 109 | 99 | 100 |
| 10% Less Than | 2 | 3 | 3 | 2 | 3 | 3 |
| Median | 8 | 8 | 9 | 9 | 7 | 8 |
| 10% More Than | 16 | 22 | 30 | 29 | 20 | 20 |
| DURING OR AFTER PRETRIAL | | | | | | |
| Number of Cases | 10 | 8 | 1 | 4 | 4 | 8 |
| 10% Less Than | 4 | 6 | * | 1 | * | * |
| Median | 10 | 7 | * | 4 | * | * |
| 10% More Than | 25 | 15 | * | 14 | * | * |
| TRIAL | | | | | | |
| Number of Cases | 1 | 3 | 1 | 1 | 1 | * |
| 10% Less Than | 1 | 1 | * | 1 | * | * |
| Median | 2 | 15 | * | 11 | * | * |
| 10% More Than | 2 | 16 | * | 11 | * | * |

For all courts, the median processing time over the period ranged from 7 to 10 months; for the D.C. district court it ranged from 6 to 8 months. The time interval is, of course, lower for cases that were terminated without court action. In these cases, which account for roughly 40% of the total cases, the median times for all courts ranged from 5 to 7 months and for the D.C. district court ranged from 4 to 6 months. Correspondingly, the time interval is higher in cases that received court action. The largest category of these cases--those terminated before pretrial--constitute roughly 50% of the total cases. In these cases the median time for all courts ranged from 8 to 11 months; for the D.C. district court, from 7 to 9 months. In the relatively few cases that were not terminated until or after pretrial, the median time for all courts ranged from 8 to 16 months; in the D.C. district court median time ranged from 2 to 15 months, but is not computed for some years because the number of cases is so small. Notably, while roughly 7% of the cases for all courts were not resolved until this stage, in the D.C. district court less than 3% of the cases

reached this stage. Finally, in the category of cases that reached trial the median time was not computed for the entire period because the number of cases was so small--less than 2% in all courts.

Because the vast majority of FOIA cases are settled or are decided on summary judgment, time intervals in the first two categories are most important.[50] From the median intervals in these categories, some extremely general observations can be made. In neither category are any trends perceptible over the six-year period. The time intervals are neither increasing nor decreasing. Most cases are terminated within 6 to 9 months. Cases that are decided on motion typically take a few months longer than settled cases. Cases in the D.C. district court are normally terminated somewhat more expeditiously when compared to terminations by all courts. Similarly, a somewhat larger percentage of D.C. cases are terminated before pretrial. These observations, however, are based exclusively on the median statistic. Consideration of the range of the time intervals for the middle 80% of the cases presents a more complex picture.

For all courts, the range of the middle eighty percent for all cases varied from a low of 2 to 21 months in 1980 to a high of 2 to 54 months in 1985. Apart from the range in 1985 (which appears to be an aberration), the range was relatively stable over the six-year period, averaging 2 months at the low end and approximately 27 months at the high end. From the available statistics it is not possible, however, to determine how evenly the cases are distributed in the middle eighty-percent range.[51]

The ranges in the middle eighty percent for cases terminated with no court action or on motion were quite similar and were only slightly narrower than the ranges for all cases. Cases terminated with no court action averaged at the lower end of the range one and one-third months and averaged at the upper end of the range (again excluding the aberrational year) 24 months. Cases terminated with court action before pretrial (presumably on motion) averaged at the lower end of the range two and one-half months and averaged at the upper end of the range (excluding the aberrational year) 24 months. Cases terminated during or after pretrial averaged at the lower end of the range four and one-third months and averaged at the upper end of the range just under 33 months. For the relatively small number of cases terminated at or after trial, the ranges were higher and more varied.

For the District of Columbia, the ranges for the middle eighty percent were somewhat lower and narrower. For all cases, the range averaged at the lower end one and one-third months and at the upper end just over 22 months. Because the cases terminated in the District of Columbia with no court

action or on motion before pretrial constituted 96.5% of all cases for that court, the averages of the high and the low ends of the ranges over the six-year period in these two categories were virtually identical with the average ranges for all cases. For the same reason, the median and range for most years is not computed for cases terminated at or after pretrial or trial.

The middle eighty percent of cases for both all courts and the District of Columbia reflect a substantially larger spread between the median and the higher end of the range than the median and the lower end. Stated differently, the variability in the time from filing to termination for the slower half of the cases was notably greater than for the faster half of the cases. As noted earlier, the distribution of the cases above and below the median is not available. Assuming a generally normal distribution, however, there would be large numbers of cases well in excess of the median.[52] Thus, for the total number of cases for all courts over the six-year period, if the cases are normally distributed, a relatively large number of cases will be well above the median of eight months but somewhat below the 27 month average at high end of the middle eighty percent. Without making any assumption as to distribution, the most that can be said is that eighty percent of cases above the median fall in the 8 to 27 month range.

The most distinctive feature of FOIA litigation is the high proportion of cases that are settled or are decided on summary judgment. The following table reflects the procedural progress at termination for all cases terminated in the six-year, post-1979 period:[53]

PROCEDURAL PROGRESS AT TERMINATION

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 |
|---|---|---|---|---|---|---|
| Before Issue Joined | 100 | 76 | 58 | 71 | 81 | 118 |
| Motion Decided But Before Issue Joined | 93 | 75 | 63 | 75 | 69 | 55 |
| Issued Joined, No Other Court Action | 121 | 114 | 90 | 70 | 97 | 132 |
| Issue Joined, After Judgment of Court On Motion | 186 | 206 | 196 | 164 | 183 | 236 |
| Issue Joined After Pretrial But Before Trial | 46 | 41 | 30 | 41 | 29 | 24 |
| During Court Trial | 2 | 3 | 0 | 1 | 0 | 1 |

| | | | | | | |
|---|---|---|---|---|---|---|
| During Jury Trial | 0 | 0 | 0 | 0 | 0 | 1 |
| After Court Trial | 8 | 13 | 12 | 5 | 5 | 4 |
| After Jury Trial | 0 | 1 | 0 | 0 | 0 | 0 |
| Other | 2 | 1 | 1 | 2 | 2 | 2 |
| TOTAL | 558 | 530 | 450 | 429 | 466 | 573 |

While there is some variation in the proportion of cases terminated in particular categories over the six-year period, it is relatively insubstantial. Clearly, there are no trends in any of the categories over the period. Of the 3006 cases terminated in this period, approximately 92% were terminated before pretrial. Only 7% of the cases reached pretrial. And roughly only 1% of the cases were tried. The procedural progress at termination statistics for FOIA cases do not, however, vary widely from the corresponding statistics for all civil cases.[54]

The distinguishing feature of FOIA litigation is demonstrated more clearly through statistics reflecting the nature of the disposition of the actions. The following table reflects the nature of the disposition in all FOIA cases terminated in the six-year, post-1979 period:[55]

DISPOSITION OF ACTION

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 |
|---|---|---|---|---|---|---|
| Transfer | 29 | 13 | 6 | 10 | 4 | 11 |
| Remand | 3 | 1 | 1 | 1 | 0 | 1 |
| Dismissed, Want of Prosecution | 19 | 8 | 22 | 11 | 16 | 15 |
| Dismissed, Discont'd, Settled, Withdrawn | 230 | 259 | 199 | 215 | 246 | 360 |
| Judgment on Default | 1 | 0 | 0 | 0 | 1 | 0 |
| Judgment on Consent | 9 | 6 | 5 | 7 | 2 | 7 |
| Judgment on Motion Before Trial | 253 | 224 | 204 | 177 | 182 | 170 |
| Judgment on Jury Verdict | 0 | 1 | 0 | 0 | 0 | 0 |

| | | | | | | |
|---|---|---|---|---|---|---|
| Judgment on Directed Verdict | 0 | 0 | 0 | 0 | 0 | 1 |
| Judgment on Court Trial | 10 | 13 | 11 | 5 | 4 | 5 |
| Other | 4 | 5 | 2 | 3 | 11 | 3 |
| TOTAL | 558 | 530 | 549 | 429 | 466 | 573 |

As with the procedural progress data, there is some variation over the period, but no trends are discernible. Of the 3006 FOIA cases terminated in the period, 1548 or 52.0% are reflected in the "dismissed-settled-withdrawn" category. This percentage is somewhat higher than the roughly 48% of all civil cases that fall into this category.[56] Far more importantly, the category "judgment on motion" reflects 1210 cases or 40.3% of the cases for the period. This proportion is significantly higher than the corresponding proportion of 16.5% for all civil cases in this category.[57] Thus, for FOIA cases that are not settled, disposition by summary judgment is clearly the norm.

The final available data useful in obtaining a general overview of judicial case processing in FOIA matters identifies the party for whom judgment was rendered. The following table reflects this data for all cases terminated in the six-year, post-1979 period:[58]

JUDGMENT FOR

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 |
|---|---|---|---|---|---|---|
| Plaintiff | 37 | 27 | 22 | 30 | 23 | 17 |
| Defendant | 242 | 214 | 197 | 166 | 146 | 139 |
| Both | 14 | 24 | 24 | 9 | 11 | 8 |
| Unknown | 275 | 265 | 207 | 223 | 286 | 409 |
| TOTAL | 568 | 530 | 450 | 428 | 466 | 573 |

Of the total 3006 cases terminated in the period, the party for whom judgment was rendered is identified in only 1350. Of the remaining 1656 cases, or 55.1% of the total, the designation is "unknown." These cases primarily represent those in which no judgment was rendered.[59] For the 1350 or 44.9% of cases in which there was a judgment, the judgment was for the plaintiff in only 156 or 11.6% of the cases. Judgment was for the defendant in 1104 or 81.8% of the cases and for "both" parties in 90 or 6.7%. While there is a continuous decline over the period in the absolute number of cases in which judgment was for the defendant, the percentage those cases represent of the total number of cases in which a judgment was rendered remained constant. No other trends are apparent.

2. The Appellate Caseload

The appellate FOIA caseload is only a small fraction of the total district court caseload. The table below reflects the number of cases and median time intervals in months for all FOIA appeals terminated after hearing or submission in the six-year, post-1979 period:[60]

APPELLATE TIME INTERVALS/ALL CIRCUITS

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 | Total |
|---|---|---|---|---|---|---|---|
| Number of Cases | 36 | 72 | 59 | 38 | 50 | 49 | 304 |
| From Filing Notice to Filing Last Brief | 5.9 | 5.4 | 5.2 | 4.5 | 4.6 | 4.5 | |
| From Filing Last Brief to Hearing or Submission | 1.7 | 1.9 | 2.8 | 2.4 | 2.8 | 2.8 | |
| From Hearing or Submission to Final Disposition | 1.0 | 1.8 | 1.3 | 1.7 | 2.3 | 1.5 | |
| From Filing Notice of Appeal to Final Disposition | 11.0 | 10.4 | 10.3 | 9.8 | 10.2 | 10.5 | |
| From Filing in Lower Court to Final Disposition in Appellate Court | 21.8 | 22.5 | 25.3 | 25.5 | 22.0 | 22.8 | |

These 304 cases represent approximately 10% of the 3006 cases terminated in the district courts in this period. Of the 304 cases, 137 or 45.1% were terminated in the Court of Appeals for the District of Columbia Circuit. From the filing of the notice of appeal to final disposition, the median time for all circuits over the six-year period ranged from 9.8 to 11.0 months. In the District of Columbia Circuit, this interval ranged from 9.2 to 11.6 months. For all circuits, the median time from the filing of the original district court action to final appellate disposition ranged in this period from 21.8 to 25.5 months. For the District of Columbia Circuit, this interval ranged from 21.8 to 25.8 months. Over the period, no trends are apparent for either all circuits or the District of Columbia Circuit in particular.

For the same six-year period, the following table reflects the nature of the disposition and reversal rate in all FOIA appellate cases terminated after hearing or submission:[61]

APPEALS DISPOSED OF AFTER HEARING OR SUBMISSION

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 |
|---|---|---|---|---|---|---|
| NUMBER OF CASES | 59 | 67 | 58 | 37 | 47 | 44 |
| AFFIRMED OR GRANTED | 26 | 48 | 39 | 29 | 33 | 31 |
| DISMISSED | -- | -- | 1 | -- | 3 | 1 |
| REVERSED OR DENIED | 12 | 11 | 15 | 7 | 11 | 8 |
| OTHER | 6 | 8 | 3 | 1 | -- | 4 |
| PERCENT REVERSED | 20.3 | 16.4 | 25.9 | 18.9 | 23.4 | 18.2 |

Over this period, the reversal rate ranged from 16.4% to 25% and averaged 20.5%. While these rates cannot readily be correlated with the "judgment for" table set out earlier, assuming the district court judgments "for the plaintiff" and "for the defendant" are appealed proportionately, a high proportion of the reversals are in cases in which the government prevailed in the district court. In this same period the reversal rate for all civil appeals terminated after hearing or submission ranged only from 18.4% to 19.3%.

3. The Government-Wide Agency Caseload

To complete this statistical overview, it remains only to describe the nature and extent of the government-wide FOIA caseload with the potential for becoming subject to post-agency dispute processing. For at least two important reasons it is not possible to present an entirely meaningful statistical picture of the total agency FOIA caseload. First, the statutory reporting provisions of FOIA do not require agencies to report the total number of requests received.[62] Second, among the agencies that voluntarily report this statistic there are no uniformly-applied principles for identifying requests for information as "FOIA" requests, and often routine provision of information inflates the reported statistic.[63] These deficiencies in the available data, however, do not pose a serious problem for identifying the portion of the total caseload that may remain in dispute after final agency processing.

Agencies are required to report the number of requests that are denied by application of one of the Act's nine exemptions.[64]

These cases are reported separately from those requests denied either because the records do not exist or for procedural reasons.[65] Also, the number of these cases appealed after initial denial and the number of these appealed denials granted in full is separately reported.[66] By subtracting the number of appeals granted in full from the total number of appeals, one obtains (subject to one qualification noted below) the number of cases which may remain in dispute after agency processing.

Focusing on appeals rather than initial requests appears sound, as well as convenient. Regardless of the number of total requests, the simplicity and low cost of an appeal--merely the posting of a letter--coupled with the statutory requirement for providing notice to the requester of the right of appeal make it reasonable to assume that virtually any requester with any serious disagreement or dissatisfaction with the initial agency disposition will appeal. Ungranted appeals (ungranted in full or in part) may, thus, with some confidence be said to include all cases in which a requester remains unsatisfied after a final agency disposition.[67]

For the three most recent calendar years for which this data is available, the table below summarizes the appeal statistics compiled from the reports of the twenty-eight agencies reporting the largest number of exemption-based denials:[68]

EXEMPTION BASED DENIALS AND APPEALS

| | 1982 | 1983 | 1984 | Total |
|---|---|---|---|---|
| Exemption-Based Denials | 32,689 | 33,207 | 35,451 | 106,445 |
| Appeals of Exemption Based Denials | 5,420 | 5,098 | 5,050 | 15,568 |
| Appeals Granted In Full | 431 | 305 | 332 | 1,068 |
| Appeals Denied In Full | 1,950 | 1,749 | 1,539 | 5,238 |
| Appeals Denied In Part | 1,028 | 1,125 | 1,069 | 3,222 |

Over the three year period, 15,568 or 14.6% of the total 106,445 exemption-based denials were appealed. Of these appealed denials, 1068 or 6.9% were granted in full, leaving 14,494 or an average of 4831 cases per year that had the potential for dispute after the disposition of the agency appeal. It should be noted, however, that the number of appeals disposed of in each year is less than the total number of appeals for that year. This difference reflects appeals not disposed of in the calendar year in which they were received and is also affected by the inclusion of dispositions of appeals filed in prior years. Nevertheless, even

if the total number of appeals from exemption-based denials is used instead of the smaller number that excludes appeals granted in full, the total number is 15,568 or an average of 5189 cases per year. By either method the number of cases annually with potential for further dispute processing is roughly 5000.[69]

4. Summary

It is not possible to capture the complete picture of FOIA case processing with only numbers. And to undertake to summarize the many statistics presented here poses the additional risk of over-generalization. Nevertheless, it seems useful to attempt to draw together the basic data.

Of the roughly 5000 FOIA cases with the potential for further processing after final agency disposition, approximately 500 lead to suits under the Act in federal district court. These cases are disposed of by the courts in a median time of roughly 8 months. For the faster half of the middle eighty percent of the cases, the time to disposition ranges from 2 to 8 months; for the slower half of the middle eighty percent, the time ranges from 8 to 27 months. Of the roughly 500 cases annually, approximately 40% are brought in the District Court for the District of Columbia and move somewhat more quickly to disposition. For all courts, approximately 52% of the cases are settled or otherwise dismissed at an early stage in the proceeding; and approximately 40% are disposed of by summary judgment. Only roughly 1% of the cases are tried. The government prevails in just under 82% of the cases for which a judgment is recorded. Approximately 50, or 10% of the 500 cases lead to appeals to a United States Courts of Appeals requiring disposition on the merits. Of these, the median time from filing to disposition is roughly 11 months; the reversal rate is approximately 20% and just over 45% are filed in the District of Columbia Circuit.

## D. Existing Non-Judicial Compliance Mechanisms

Under FOIA, after final agency denial, the only formal mechanism for relief for a requester is the federal district court action. Other less case-specific mechanisms for promoting agency compliance do, however, exist. Their presence and operation becomes part of the milieu in which individual disputes are decided and some awareness of their role is helpful in understanding the overall issues of the study.

1. Congressional Committees

The committees of Congress with oversight responsibility in the FOIA area have traditionally taken a close interest in case processing at the agency level, apart from their more general concern with legislative policy matters in the access field.[70] The case processing reports required by the Act to be filed with Congress are maintained by the Subcommittee on Government Information, Justice and Agriculture of the House Committee on Government Operations and the Subcommittee on the Constitution of the Senate Judiciary Committee. The staffs of the committees review these reports and make follow-up inquiries to the agencies. These committees, as well as individual members of Congress, also receive case-specific complaints in the FOIA area, which are handled in a manner similar to other constituent inquiries. Through these and other more traditional oversight functions, the agencies are made aware that their overall case processing activities are subject to continuing congressional scrutiny. Nevertheless, the cases that remain in dispute after agency processing and become subject to litigation would rarely benefit directly from this process.

2. Department of Justice

Such cases are more likely to be influenced by the work of the Department of Justice. In part out of its general role as legal counselor to the agencies and in part out of its responsibility for defending agencies in FOIA litigation, Justice serves, to a limited degree, as a centralized compliance authority.[71] For over ten years, there existed within the Department a Freedom of Information Committee made up of representatives from the counseling and litigating divisions.[72] The Committee's function was to review informally proposed agency final denials under the Act as a precondition to the Department's defense of those actions should litigation ensue.[73] It also became used by the agencies as a source for informal FOIA advice.[74] As the relationship between Department's litigation function and the development of FOIA policy came to be better understood, the Department's compliance role became more formalized. The 1974 amendments to the Act explicitly recognized this function by requiring the Attorney General to report annually to Congress the details of FOIA litigation and "a description of the efforts undertaken by the Department to encourage agency compliance" with the Act.[75] In the exercise of this responsibility, the Department took the position in 1977 that it would not defend FOIA cases unless the claim of exemption could be supported by a showing of "demonstrable harm" to the government.[76] This policy was revoked in 1981 by a policy which now provides that the Department will defend:

> all suits challenging an agency's decision to deny a request submitted under the FOIA unless it is determined that: (a) the agency's denial lacks a substantial legal basis; or (b) defense of the agency's denial presents an unwarranted risk of adverse impact on other agencies' ability to protect important records.[77]

The Department continues to exercise its counseling function, now through the Office of Information and Privacy, a component of the Office of Legal Policy. Apart from collecting and maintaining compliance data and giving case-specific advice, OIP formulates and disseminates to the agencies general guidance on the administration of the Act.[78]

3. Information Security Oversight Office

In one category of cases--those involving classified national security information--there is a somewhat different case processing opportunity, although large numbers of cases in this category follow the standard FOIA process. Under the series of executive orders governing national security classification, the current being E.O. 12356, a requester can seek agency review of classified records for possible declassification.[79] A declassified document may, however, still be subject to other FOIA exemptions.[80]

The process is used primarily by academic researchers interested in older records.[81] For the fiscal year 1984, 4,650 such requests for review were filed and 4,401 requests were acted upon.[82] Of the latter, 51% were granted in full, 40% were granted in part and 9% were denied in full. These cases consisted of over 100,000 documents comprising a total of more than 400,000 pages of records. Under a predecessor executive order, E.O. 11652, denials in the mandatory review process could be appealed to an interagency body known as the Interagency Classification Review Committee (ICRC) which had authority to order declassification.[83] The appeal function performed by the ICRC under E.O. 11652 is now performed by the Information Security Oversight Office (ISOO) under E.O. 12356 for presidential papers and records only.[84] The ISOO, an administrative component of the General Services Administration that receives its policy direction from the National Security Council, is also empowered to consider and act on complaints that other information is improperly classified.

4. Office of Special Counsel--Merit Systems Protection Board

A provision of the Civil Service Reform Act of 1978[85] provides one other case-specific, non-judicial mechanism for requester relief in a FOIA case. This provision authorizes the Special Counsel of the Merit Systems Protection Board to "conduct an investigation of any allegation concerning--arbitrary or capricious withholding of information prohibited under [FOIA], except that the Special counsel shall make no investigation under this subsection of any withholding of foreign intelligence or counter-intelligence information the disclosure of which is specifically prohibited by law or Executive Order."[86] The Special Counsel has no authority, however, to order disclosure of withheld records. This authority is distinct from the duty imposed upon the Special Counsel by FOIA to determine whether disciplinary action is warranted in cases in which a court makes a finding of an "arbitrary or capricious" withholding of records.[87] The investigatory power of the Special Counsel, assigned along with more traditional civil service-related functions, has not been prominently exercised.[88]

5. Office of Management and Budget

Less case-specific, but nonetheless important, is the authority of the Office of Management and Budget (OMB) to provide guidelines for and oversight of agency implementation of the Privacy Act.[89] Exercise of this authority has drawn OMB into issues of access policy not only under the access provisions of the Privacy Act, but also under FOIA because of the inter-relationship between the two statutes. It also stands as a limited experiment with the concept of using centralized authority to formulate and implement information policy.[90] In the latter regard, the broad information management authority granted OMB in 1980 under the Paperwork Reduction Act[91] may prove to be especially important. At the present time, however, the effect of that grant of authority on the processing of information access disputes is unclear.[92]

6. Summary

Neither individually nor collectively do the public access functions of the entities briefly described here represent a comprehensive scheme for effecting access dispute resolution short of judicial proceedings. They do reflect, however, long standing recognition of the possible value of non-judicial mechanisms.

### E. Comparative Administrative Structures for Access Dispute Resolution

Reliance upon the courts for the resolution of access disputes is common under state law, as well as foreign law. In two states, Connecticut and New York, and Canada, a country that drew heavily upon the American experience in enacting its own information access law, significant reliance is also placed on administrative structures. The approaches of New York and Connecticut as well as that of Canada, though based in circumstances that differ widely from the U.S. system, provide some useful comparative insight.

#### 1. Connecticut

Under the Connecticut access laws a Freedom of Information Commission is established to adjudicate appeals from denials of information by state and local government agencies.[93] The Commission also possesses the power to issue advisory opinions and impose civil penalties upon agency officials.[94] The Commission's adjudicatory power is exercised through the conduct of relatively informal hearings at which the parties may present evidence and examine and cross-examine witnesses.[95] A single member of the Commission presides at the hearing and issues a initial decision consisting of findings of fact and law which is reviewable by the full Commission, but only on the record built at the hearing.[96] Commission decisions are subject to limited review in state court.[97]

The Commissioners are appointed by the Governor for staggered terms and are removable only for cause.[98] The Commission is directed by statute to hold a hearing within 20 days of a notice of appeal and decide the appeal within 30 days of the hearing.[99] Generally, the time required to adjudicate a case from the filing of an appeal to the final order is two and one-half months, or roughly three weeks beyond the time contemplated by the statute.[100] Judicial review of the Commission's order can extend the delay.[101] The cases are, however, given docket priority, and the Commission usually issues a stay of its order pending appeal.[102] The Commission does not review agency records *in camera*, and instead relies upon witness characterization and indices.[103] While the primary activity of the Commission is adjudication, it has used its other powers to influence agency practice and procedure.[104]

#### 2. New York

The New York Committee on Open Government stands in sharp procedural contrast to the Connecticut Commission. It

has no investigatory or adjudicatory power. Its function is exclusively advisory.[105] The Commission is required by statute to give any person (including state and local government officials) an advisory opinion regarding the state freedom of information law.[106] It can issue its opinion orally or in writing, and bases its opinion on the characterization of the circumstances given by the person requesting the opinion.[107]

The advisory opinions operate, in effect, to place the Committee in an ombudsman role in access disputes.[108] The advisory opinion can from the outset influence the agency decision and, in cases in which the initial agency denial is appealed, the Committee is formally given an opportunity to comment on the appeal prior to the agency decision.[109] The Committee's opinions are also given weight by the courts in interpreting the freedom of information statute.[110] The influence of the Committee's opinions is further enhanced by their careful indexing and wide distribution.[111]

Some members of the Committee are appointed by the Governor, some by the Legislature, and some serve by virtue of governmental position.[112] The members of the Committee serve part-time and the staff of the Committee is headed by an Executive Director who serves at the pleasure of the Secretary of State.[113] While the administration of the New York freedom of information law, like FOIA, is based primarily upon agency case processing and judicial review, the ombudsman role of the Committee significantly augments the dispute resolution process.[114]

3. Canada

The Canadian Access to Information Act establishes the Information Commissioner as an officer of Parliament.[115] Any individual denied access to information by an agency under the Act can complain to the Commissioner.[116] The Commissioner is authorized to conduct an investigation of the matter complained of, and if the complaint is determined to be well-founded the Commissioner provides a copy of the investigative report to the agency head along with a recommendation for action.[117] The agency is then given an opportunity to reply by informing the Commissioner of any action taken or proposed or of the reasons for taking no action.[118] The Commissioner then reports the result to the complainant.[119]

Proceeding through the Commissioner is a prerequisite to bringing a court action under the Act to compel disclosure.[120] The object of the Commissioner structure is to minimize the number of cases that require court adjudication by interposing a neutral evaluation between the agency and court levels of case processing.[121] Under certain circumstances, the commis-

sioner can apply for review of an agency decision to withhold information or can appear in a court proceeding on behalf of a complainant.[122] The Commissioner also reports to Parliament annually and may make special reports on access matters.[123]

4. Application to FOIA

A comprehensive study of the Connecticut and New York systems captures well the dilemma posed by the comparative method in this area:

> Application of the experiences of Connecticut and New York to the federal Freedom of Information Act requires caution. Freedom of information provisions and practices vary from state to state and often differ significantly from the provisions and practices of the federal government. The size of the federal bureaucracy creates difficulties and problems that have not confronted New York and Connecticut. The federal government is also more likely to acquire or create politically sensitive records. The states possess little information related to national security, and state criminal law enforcement agencies are likely to be significantly smaller than their federal counterparts. Also, the regulatory emphasis of federal agencies is more likely to generate documents or records that contain financial or commercial data of third parties. Furthermore, the political setting in which a freedom of information law operates reflects the geography, economy, history, and population of each state.
>
> * * *
>
> Yet, while the differences between state and federal agencies suggest caution, the similarities offer insights into the federal Freedom of Information Act.[124]

The Canadian experience, though based upon agency activities on the scale and of the scope of the United States government, also is grounded in a different political structure and experience. Moreover, while the two state agencies have operated for roughly ten years, the Canadian Information Commissioner is only in her third year.[125] Whatever the differences, however, the important consideration for the purposes of this study is that functioning administrative entities for access dispute resolution exist, and

that structured within their unique political contexts, appear to serve an important role.

## II. INTERVIEWS: PERCEPTIONS AND VALUES

### A. Introduction

The individuals interviewed for the study fell into essentially five categories. The first category consisted of federal agency officials, primarily lawyers, who have had substantial litigation or counseling experience (within or without the Department of Justice) in the FOIA area. The second category consisted of representatives of organizations, primarily public interest groups, that make frequent use of FOIA. The third category consisted of private attorneys who either by virtue of their past experience or present practice have substantial familiarity with FOIA matters. The fourth category consisted of staff of congressional committees that have FOIA jurisdiction. The fifth category consisted of federal judges, at the trial and appellate levels, whose caseloads have a significant FOIA component. A total of 27 in-person interviews were conducted and well over 100 interested persons were given an opportunity to react to the study in two distinct forums.[126]

The interviews were not intended as a poll of individuals or groups on the questions of the study. They were conducted informally for the purpose of obtaining frank, informed views on the operation of the current structure for access dispute resolution and the prospect for improving it through the use of an administrative mechanism. While the persons interviewed were selected on the basis of their professional association or activity, they did not purport to speak other than as individuals. Likewise, although each person interviewed fell within one of the groups indicated above, the views expressed were not necessarily consistent within those groups. The narrative summary below undertakes to identify areas of consensus and difference, generally without regard to these groupings.

The interviews focused primarily on the three issues of delay, cost and quality of decisionmaking. These issues are to some extent interrelated and could also be framed in somewhat different terms. Nevertheless, they provide a convenient and relatively comprehensive organizing principle for this section. A fourth issue headed "access philosophy" is included to take account of views that bear importantly on the overall inquiry, but do not fit appropriately within any of the other categories. Finally, some important ideas expressed in the course of the interviews related directly to particular proposals for an

access dispute resolution mechanism and are reflected in later discussion of those proposals.

## B. Delay

The importance of timely decisionmaking in information access disputes is a matter about which there is little disagreement. For the purposes of this study the important question is where and to what extent delay now occurs. Delay at the agency level has been a widely-discussed problem.[127] It is generally attributed to the number of requests received, the volume of records requested, the complexity of the issues involved in the requests, the extent of resources devoted to processing requests and sometimes to agency intransigence.[128] Delay at the litigation stage has received less attention. It is generally attributed to the factors that affect all federal court litigation--caseload and limited judicial resources.

Delay at the agency level can affect any case and therefore is a more prominent concern than post-agency delay, which affects only the relatively small number of cases litigated. There was a clear consensus among the persons interviewed that while agency delay remained a fundamental problem in the administration of FOIA, it generally was not a problem amenable to treatment through the use of a separate administrative structure.[129] Here, the most commonly made point was that the speed of case processing at the agency level is affected primarily by the factors noted above and that any large-scale formal intervention by an outside body, prior to final agency disposition, would be subject to the same delay-producing factors. It was, however, frequently suggested that some cases might, at the agency level, benefit from the availability of an agency or individual serving in an "ombudsman" capacity. It was also suggested in a few instances that the existence of a prominent, credible administrative entity serving in an "inspector general" capacity could promote more timely case processing by the agencies. Moreover, it was suggested that for some issues the exercise of rulemaking power by a centralized policy agency could reduce delay. Finally, it was suggested that the speed of case processing was often a function of the substance of the exemptions, leading to a conclusion that a substantive, rather than a procedural, solution would more directly address the problem of delay prior to final agency denial.

Delay after final agency denial is, as noted above, largely a function of the same factors affecting all federal court litigation. As originally enacted, FOIA provided that:

> 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.[130]

This provision was repealed by the Federal Courts Improvement Act of 1984,[131] as part of a consolidation of the large number of expediting provisions that had been enacted over the years. The new legislation generally permits expediting in the discretion of the court "if good cause is shown."[132] The legislative history contains a reference suggesting that FOIA cases should not be adversely by affected by this change.[133] It appears too early to assess the actual impact, and there has always been some feeling that the original expedition provision had little practical effect. The fact remains, however, that the formal rule has changed.

There was a consensus among the persons interviewed that FOIA litigation took longer than was desirable. But there was little agreement as to the cause for delay apart from the general factors affecting all federal court litigation.[134] Many suggested that the use of generalist judges, rather than access specialists was responsible for part of the delay. Others suggested that delay was sometimes simply a function of the volume of records at issue or other unique factors affecting the particular case. Some suggested that procedural formality and government procedural tactics were occasionally factors. Still others suggested it was due in part to tactical maneuvering by certain classes of requesters or by the actions of interested third parties. Nevertheless, most persons interviewed who expressed concern about delay in litigated cases tended to speak in terms of the entire decisional process, including delay at the agency level. It even appeared that from some perspectives the sharp break represented by having a case move from the agency to an independent decisionmaker diminished the sensitivity to the delay in the judicial proceeding.[135]

### C. Cost

Attempts to identify costs in FOIA administration have generally proved difficult. Cost estimates vary widely and disparate methods of accounting have generated considerable controversy.[136] Commonly reported estimates for annual costs of administration vary from $50 to $250 million.[137] These estimates, however, are intended primarily to reflect the costs of agency processing. There are no published reports of efforts to isolate costs to the government or requesters attributable to enforcement after final agency denial. While reliable estimates along these lines would be helpful in evaluating the

central issue in this study, the necessary raw data for calculating these costs is not available. Yet the nature of these costs, as much as their precise amount, is important to an understanding of the economics of the present enforcement structure.

Most persons interviewed who were familiar with the FOIA litigation process, characterized it as relatively low-cost litigation.[138] From the standpoint of sophisticated (either experienced or well-financed) requesters, the initial costs consist of the preparation of a rather straightforward "form" complaint and the payment of a modest filing fee. The action can be undertaken with a high degree of confidence that the matter will likely be settled or decided in a summary proceeding and that the plaintiff will not likely be subjected to discovery by the government. Likewise, the need for discovery against the government will ordinarily be minimal. And, as in the case of requester perspectives on delay noted above, the costs tend particularly to be viewed by sophisticated requesters as modest for a shift from an interested forum to a disinterested one.

Beyond the minimal initial expenditure, the costs are largely a function of representational costs associated with negotiation or further formal proceedings. Typically, the plaintiff will seek a Vaughn index, again through the filing of a "form" motion. Most importantly, whether or not the Vaughn motion is filed or granted, there was general agreement that even the filing of the suit increases significantly the likelihood that the plaintiff will ultimately obtain access beyond that granted in the final agency disposition. Thus, again for sophisticated requesters, absolute cost is only a part of what amounts to an informal cost-benefit analysis.[139]

For the less experienced or less well-financed requester, the cost considerations are somewhat different.[140] First, there was substantial agreement that some requesters are deterred from pursuing their claims beyond the agency level by the perceived or real cost of federal court litigation. Second, it was suggested that the cost may be relatively greater for less sophisticated requesters who tend to rely upon counsel less familiar with the uniqueness of FOIA litigation in federal court. Third, the uncertainties associated with the award of attorneys fees in FOIA litigation was seen to diminish generally the value of that device for requesters who could not bear more than minimal costs. Finally, for the requester who for reasons of cost chooses to proceed pro se, it was generally agreed that federal district court was not a desirable forum.

From the government's perspective, cost is closely related to the factors that affect cost to the sophisticated requester. It was generally agreed that the regularized nature of the FOIA practice lends itself well to the government's structure for litigation. Much of the practice relies upon "form" pleadings.

The preparation of a Vaughn index was, however, recognized as a relatively costly undertaking because of the detailed, case-specific nature of the document.[141]

While the Department of Justice maintains and reports detailed statistics concerning its costs in administering the Act with respect to requests made for Department records, it does not undertake to estimate the costs of its representation of itself and other agencies in defense of FOIA suits.[142] Moreover, at the point of litigation not only is the Department of Justice devoting resources to the matter, but also the agency whose records are at issue is usually substantially involved in the defense, including the preparation of affidavits or Vaughn indices. These costs are generally not accounted for in agency reports. It was suggested, however, that the concentration of litigation in the District of Columbia makes this working relationship more efficient, and presumably less of a cost consideration than it might otherwise be.

Finally, it would seem plausible that useful litigation cost data could be obtained from cases in which attorneys fees were awarded. Yet for at least two reasons this is not practical. First, in a high proportion of those cases in which fees are awarded the fee issue is settled rather than litigated and there is no official report of the underlying data. Second, in the few reported decisions in which the fees issue was litigated, the disparity in the factors that would bear upon the award render the numbers essentially anecdotal.[143] This provides no sounder basis to generalize from than the statement made in various forms by a number of persons interviewed that litigation of a FOIA case can easily cost "several thousand" dollars. If, however, one accepts all cases in which attorney's fees are awarded as representative of FOIA litigation generally, then the fee awards reported by the Department of Justice provide some basis for evaluating typical litigation costs for a plaintiff.[144] For the five-year period, 1980-1984, the Department reported a total of 221 distinct cases in which attorney's fees were awarded.[145] The median award was $2443. The range of the middle 50% of the awards was from $585 to $8017. At the extremes were awards under $100 and awards approaching--and one exceeding--$100,000. Assuming an equivalent median cost to the government (discounting for the economy of scale but recognizing the offsetting premium of a Vaughn index) the combined median would be $4886. Multiplied by the roughly 500 cases filed annually, the median statistic would yield a total litigation cost of nearly $2,500,000. To this could be added roughly another $1,100,000 for cost to the judiciary of FOIA cases based on a formula used by the Administrative Office of the Courts.[146] The approximate total cost would thus be $3,600,000 or roughly $7200 per case. While this data is clearly imperfect, it does tend to confirm the impressions of cost conveyed in the interviews.

### D. Quality of Decisionmaking

Any assessment of the quality of decisionmaking under the current enforcement structure is, of course, highly subjective. Yet, as it developed, the product of the interviews in this area was more revealing and reflected greater consensus than on any other issue.

Significantly, there was virtual unanimity in the view that judicial enforcement has been critical in the development of federal access policy.[147] The courts are seen as having molded, in the face of agency resistance, a vague and far-reaching statute into a generally manageable set of substantive and procedural rules for access. While the 1974 amendments to FOIA reflected congressional dissatisfaction with some early policy development in the courts,[148] far more of the overall development was embraced in the legislative process than was criticized.[149] Equally important, the courts are unquestionably perceived as a force of independence in the disposition of FOIA cases.[150]

This broad agreement as to the significance of the courts' role in the development of FOIA policy is tempered somewhat by a number of subsidiary considerations that taken together bear importantly on the question of the present quality of decisionmaking in this area. First, the expertise that has developed in the courts over the years is concentrated in the District of Columbia.[151] It was frequently suggested that adjudications in cases outside the District, particularly in districts that hear relatively few FOIA cases, are somewhat erratic substantively and tend to proceed more slowly. Secondly, it was observed that the document review function of the courts in FOIA case processing has been less important than the policymaking function. In turn, as the body of caselaw has expanded and been refined, judicial resources are seen as being used less appropriately to the extent they are being devoted to document review. This process--essentially a factfinding function--was frequently viewed as one less suited to the capacities and resources of the federal courts than to those of a specialized adjudicator. Moreover, some viewed the *ex parte* nature of the proceeding in cases in which heavy reliance is placed on *in camera* review and advocacy as presenting a particularly awkward role for the courts. Finally, a more subtle, but extremely important observation was common throughout the range of perspectives represented in the interviews. Given the mature state of the caselaw development and the administrative burden imposed by the undifferentiated mass of FOIA cases that reach the courts, judges are perceived by many close to the process as having "lost interest" in the area. Clearly, the basis for this perception is difficult to document and it was rarely expressed in terms of a failure of the courts to perform properly. Rather, it was generally a forward-looking concern

that the courts might not reasonably be expected to perform indefinitely the major FOIA enforcement responsibility.[152]

### E. Access Philosophy

It is common to view participants in the FOIA process as either pro or anti-disclosure in their outlook. Yet virtually all observers in the field make plain their commitment to the principle of openness in government subject only to legitimate needs for secrecy. Why then the general perception of two warring camps? One answer, which is beyond the scope of this study, lies in differences as to the appropriate substantive refinement of the general principle.[153] The other, which is critical to this study and not entirely distinct from the first lies in disagreement as to who can and should be "trusted" to perform the fact-finding and law-applying function in access cases. The interviews were particularly helpful in assessing how the answer to this question bears on the overall inquiry.

There is general agreement that any public access law requires a mechanism external to the agency's decisionmaking process to review agency compliance with the law in particular cases. From the outset, FOIA has provided that such review was to occur de novo in a federal district court.[154] This choice reflected a desire both to assign the review function to a "disinterested" branch of government and to limit deference to the most "interested" decisionmaker. This form of review has come to be seen in some quarters as indispensible to fair administration of the Act.

A derivative view of the indispensibility of judicial decisionmaking sees the entire executive branch (as well as independent agencies) as collectively "interested." Taken to its extreme, this view holds that no decisionmaker who is connected even loosely to the executive branch can reliably perform the review function. This view is also extremely sensitive to actual or perceived conflict in functions within the executive branch. The most common example cited in this regard is the dual guidance-providing and litigation defense function of the Department of Justice. Most significantly, this view is sensitive to the perceived access philosophy of the administration in power at any particular point.[155]

Apart from the concern with decisionmaker bias, it is apparent that the courts, even when perceived as less than vigorous in the enforcement of FOIA, hold attraction as a known quantity. The uncertainty that would be associated with any reassignment of the decisional role limits its appeal. This is particularly true in the context of the ongoing debate over substantive reform of the Act. While some observers view the question of such a change as a politically-neutral procedural

issue, others see it as part of an effort to "dismantle" FOIA.[156]

For the purposes of this study, the consequence of these factors is twofold. First, it seems clear that some evaluation of the efficacy of the present structure for decisionmaking is tempered by concern for not putting at risk the known judicial mechanism. Secondly, and far more importantly, any consideration of change in this area must proceed from a recognition of how integrally the availability of the de novo court action is connected to perceptions of fairness in administration of the Act.

One final issue of access philosophy also leads to a particularly notable divergence of views on the question of how well the current dispute resolution structure is working. The issue, simply put, is whether "core" users of the Act (journalists, academics, public interests groups, among others) deserve preferred treatment over "non-core" users (commercial interests, litigators, prisoners, among others). For the most part, any such differences would be inconsistent with the "any person" standard of the Act.[157] For some purposes, however, core requesters tend to be favored--for example, with respect to fee waivers and attorney's fees.[158] Current proposals for FOIA reform would extend the dichotomy even further.[159]

In the context of this study, the question of the desirability of a new mechanism for access dispute resolution poses a further choice along those lines. Should the mechanism exist only for core cases, only for non-core cases, or for both? The opinion expressed in the interviews along these lines fell basically into two categories. One view was that any new mechanism would function more effectively if it had the capacity to process cases on different tracks depending on factors generally associated with the dichotomy between core and non-core cases. This view was tempered in some instances by an expression of concern over further departures from the "any person" principle. The other view, based on more parochial interests, reflected concern that the principles for categorizing cases would unjustly advantage or disadvantage certain requesters. Here, as elsewhere, the matter of individual access philosophy tends to control.[160]

## F. The Significance of the Interviews

Ultimately, the significance of the interviews lies not as much in the insight they provide into the day-to-day functioning of the current access dispute resolution structure, as in their reflection of the range of perceptions and values that surround FOIA. Were no shared interests or concerns revealed, it would be difficult to proceed to the question of alternatives mech-

anisms. The interviews suggest, however, enough common ground to guide a more focused inquiry.

## III. ANALYSIS AND RECOMMENDATION

### A. The Problem and the Objectives of a Solution

From the outset, a basic aim of this study has been to determine whether exclusive reliance upon the de novo judicial proceeding is responsible for delay, cost, or qualitative deficiencies in the resolution of access disputes that could be minimized through the use of an alternative mechanism. It is important to understand, however, that to identify burdens associated with the judicial process is not to suggest that all classes of users are affected equally by those burdens or would benefit equally from an alternative system. Nor is it to suggest that it will be possible to project with a high degree of confidence the extent to which a particular mechanism could reduce the overall burden. At this stage it is sufficient to recognize that both the quantitative and interview data indicate that the current dispute resolution structure imposes significant, though varying, burdens.

To follow substantial agency processing delay with months and sometimes years of costly and delay-ladened federal court litigation hardly seems the most desirable method for disposing of a media request for timely information on an issue of vital interest to the public. Nor does it seem the best use of the federal courts to impose with no limitation the duty to resolve the hundreds of less pressing claims for access to federal records. Similarly, from the viewpoint of the unsophisticated requester the spectre of federal court litigation to resolve a relatively modest request for access seems unduly imposing. And for the requester whose interest is in using the Act for harrassment or to satisfy commercial interests, the judicial forum is either perversely attractive or simply worth the cost. The question remains, however, whether the use of an administrative agency can meaningfully relieve these burdens in a manner consistent with the concerns and values that have developed around the FOI concept in the United States.

A useful first step in addressing this question is to attempt to develop a taxonomy of the FOIA case remaining in dispute after final agency action. Ideally, one might develop several different taxonomies to reflect the substantial variation in access disputes represented by distinct classes of requesters with differing objectives and with interest in diverse categories of records. For the purposes of this study, however, it is more helpful to identify the common features of access disputes generally, taking note of relevant differences

where they exist. The common structure for such a taxonomy, reflected in the growing body of dispute resolution literature, would include consideration of: (1) the nature of the dispute, (2) the relationship between the parties, (3) the amount in dispute, (4) the need for speed in resolution, and (5) the cost of the process.[161]

1. The Nature of the Dispute and Relationship of the Parties

The typical FOIA case remaining in dispute after final agency processing is a sharply focused controversy. There remains an unsatisfied request for identifiable records and the only issue in dispute is whether one or more of the statutory exemptions is applicable. If so, the requester has no right of access; if not, the records must be released. The dispute centers on a seemingly uncompromisable position. Either the records are available publicly or the statute recognizes a governmental or third-party interest that would justify withholding.[162] It is not ordinarily the unmanageable "polycentric" dispute with a wide range of possible resolutions, each having "proliferating ramifications."[163] Rather, it is relatively well-suited to a process that identifies interests and declare rights based on proof and argument measured against precedentially-refined statutory standards.[164]

FOIA cases remaining in dispute after final agency denial are also highly distilled. They have been subject to two levels of agency decisionmaking by access specialists normally well-versed in the large and complex body of caselaw that has developed over the years and familiar with the agency programs that generate the records. While on novel or particularly sensitive issues agency decisionmaking is likely to reflect narrowly parochial views, the more routine cases will generally reflect good faith observance of established precedent, if for no reason other than to ensure a defensible litigation position. Thus, the cases which may become subject to further dispute processing will generally fall into one of two categories. Either they will involve the relatively routine application of prevailing caselaw to the particular requests or they will raise novel or unusually delicate issues the resolution of which is less predictable on the basis of precedent. It would appear that the former category represents a large group of litigated FOIA cases and that the government prevails in ligitation at an extremely high rate in this group.[165]

There are a number of possible reasons that FOIA cases that appear to have a highly predictable legal outcome would be litigated at a relatively high rate. First, the request may arise out of another distinct dispute with or interest in the agency or a third party, and the intensity with which the FOIA dispute is pursued may reflect more the intensity of the under-

lying interest than the merits of the FOIA claim. Second, the inherent imbalance in knowledge between the agency and the requester of the facts relevant to the resolution of the dispute generates distrust that often can be overcome only by placing the matter in the hands of a neutral decisionmaker. Third, because the litigation process undertakes to ameliorate--through the use of Vaughn indices--the unavailability of true adversarial testing of an agency's position, it may often represent the first point at which the requester has a detailed statement of the agency's position, as well as an opportunity to gain more information about the requested records. Finally, counsel or pro se plaintiffs who lack experience in this relatively specialized field may simply miscalculate their chances of success.[166]

Nevertheless, the typical FOIA dispute is a discrete controversy. While it may be related to another matter involving the parties, it is ordinarily a single transaction and is not a function of an ongoing relationship between the parties.[167] Thus, for the most part, there is no relational interest to protect, or at least none that would be harmed seriously by the institution of litigation. Moreover, because the denial of access represents a sheer assertion of governmental authority and because there may be no alternative source for the information sought, the typical requester stands in a relatively weak position to effect any change in the agency posture short of litigation.[168]

2. The Amount in Dispute

With rare exception, the FOIA dispute is a non-monetary controversy. The potential loss to the government or a third party or the potential gain to the requester from a particular disclosure generally has no calculable value.[169] Thus, while each side frequently views its interest as vital, the convenience of a dollar amount for categorizing the magnitude of a controversy is simply unavailable for access disputes. Nevertheless some approximation of "stake" may be modeled. Requesters who have merely a personal curiosity about the records in dispute might be viewed as standing at one end of a non-monetary scale of stake. Media and public interest requesters would then be placed at the other end of the scale. The stake of the historical researcher would in many cases be seen to lie closer to a midpoint, while the stake of commercial interests or parties in litigation with the government would often approach the media position. Other cases, too diverse to classify, would lie at still other points on the scale. With the exception of cases in which the government is only a "stakeholder" for other parties, the fact of denial of access on appeal ordinarily would indicate that the agency perceives that it has a significant stake in the outcome. Thus, in most

FOIA disputes, the agency stake would lie at the high end of the scale. Stake in FOIA disputes, however, remains something far more closely related to party perceptions and intended use than the intrinsic value of the information.[170]

3. The Need for Speed

Evaluating the need for speed in resolving FOIA disputes poses problems similar to those involved in evaluating amount at stake. Speed is not an absolute consideration. The difference between two weeks and two months will be critical in some cases, while the difference between two months and two years will make little practical difference in others. It would be possible to develop a scale similar to the stake scale to represent the need for speed in resolving FOIA disputes. Media requests would, of course, generally be viewed as having the greatest need for speed. Nevertheless, because all information is considered "perishable" to some extent, the breadth of the scale would likely be narrower than the stake scale. Moreover, because there is no practicable way to compensate a requester for delay in obtaining disclosure, prompt resolution of the dispute is even more important. Finally, because the agency position, i.e., nondisclosure, prevails unless and until it is reversed, the burden of delay falls exclusively on the requester.[171]

4. The Cost

The cost of resolving FOIA disputes also affects various classes of requesters differently. Some requesters are simply well-financed or well-staffed for FOIA litigation; for them the relatively moderate costs of a FOIA proceeding are insignificant. For other less well-supported but experienced requesters, the anticipated recovery of statutory attorney's fees in meritorious cases likewise may make cost a less significant consideration. Yet for still other requesters litigation costs may represent a significant deterrent to pursuing a claim beyond final agency denial. Nevertheless, given the overall policy of the Act and the difficulty of attributing any specific monetary value to a FOIA dispute, it appears fundamental regardless of who the requester is that the dispute be resolved in the most cost-effective manner possible.[172] Moreover, given that the government incurs significant costs in all FOIA litigation, a cost-effective process for resolving access disputes provides general public benefit as well.

5. Procedural Models

The taxonomy of a FOIA dispute may next be evaluated against the processes available for dispute resolution. While the range possible processes is virtually limitless, certain core models provide the most convenient framework for analysis. The charts below, adapted from a leading text on dispute resolution, identify the primary characteristics of five procedural models that might be considered suitable for access dispute resolution.[173] Two of the five--adjudication and arbitration--are normally considered binding procedures. The other three--mediation, fact-finding and ombudsman intervention are normally considered non-binding. Any of the five models, or a combination of certain of them, could be implemented through the use of an administrative entity; only the first--adjudication--would be consistent with the traditional role of a federal court, although certain others could be considered appropriate adjuncts to the judicial process.[174] Excluded from the chart are models that would be inconsistent with the governmental character of an access dispute, such as private judging. Also excluded are models that do not involve the use of a third-party neutral, such as negotiation.

BINDING PROCESS

| Characteristics | Adjudication | Arbitration |
|---|---|---|
| Voluntary/ Involuntary | Involuntary | Voluntary |
| Binding/ Nonbinding | Binding, subject to appeal | Binding, subject to review on limited grounds |
| Third Party | Imposed, third-party neutral decisionmaker, generally with no specialized expertise in dispute subject | Party-selected third party decisionmaker, usually with specialized subject expertise |
| Degree of Formality | Formalized and highly structured by predetermined, rigid rules | Procedurally less formal; procedural rules and substantive law may be set by parties |
| Nature of Proceeding | Opportunity for each party to present proofs and arguments | Opportunity for each party to present proofs and arguments |

| | | |
|---|---|---|
| Outcome | Principled decision, supported by reasoned opinion | Sometimes principled decision supported by reasoned opinion; sometimes compromise without opinion |

NON-BINDING PROCESS

| Characteristics | Mediation | Fact-Finding | Ombudsman |
|---|---|---|---|
| Voluntary/ Involuntary | Voluntary | Voluntary or involuntary | Voluntary |
| Binding/ Nonbinding | If agreement, enforceable as contract | Nonbinding but results may be admissible | Nonbinding |
| Third Party | Party-selected outside facilitator, usually with specialized subject expertise | Third-party neutral with specialized subject matter expertise; may be selected by the parties or the court | Third-party selected by institution |
| Degree of Formality | Usually informal, unstructured | Informal | Informal |
| Nature of Proceeding | Unbounded presentation of evidence, arguments and interests | Investigatory | Investigatory |
| Outcome | Mutually acceptable agreement sought | Report or testimony | Report |

Apart from the fundamental need to use a third-party neutral in resolving access disputes, the most basic issue in structuring a dispute resolution system for access cases is the choice between the use of a binding or a non-binding procedure. It is, of course, essential that at some point a mechanism exist to render final, principled, and reasoned determinations of rights and duties in access cases and that these determinations be available as precedent to guide future decisionmaking.

The question remains, however, whether resort to that mechanism should immediately follow final agency denial or whether submission of the dispute to a less formal, non-binding process should be a prerequisite to use of the binding procedure. While the answer is not free from doubt, the dominant considerations militate in favor of the immediate availability of a binding procedure.[175]

As suggested earlier, the FOIA dispute is ordinarily a highly contentious, single transaction that inherently produces binary results. Agency decisions on appeal are the distilled product of tens of thousand requests, and at the point they issue, represent the end of a process that easily has consumed a month or two of time and considerable governmental resources. The slim prospect that a dispute in this posture will yield meaningful compromise through purely facilitative techniques makes the imposition of a mandatory layer of non-binding process too costly both as a matter of time and resources. This conclusion dictates the rejection of either mediation, fact-finding, or ombudsman intervention as a prerequisite to more formal FOIA dispute processing and focuses attention on the choice of a binding procedure. It leaves these processes available, however, for non-mandatory use.[176]

The differences between the remaining procedures--adjudication and arbitration--are relatively subtle and largely a function of the arenas in which they have been used.[177] Adjudication is normally considered involuntary and arbitration, voluntary. Yet arbitration can be made involuntary. Both are binding, with somewhat problematic differences between the extent to which they are reviewable.[178] They differ primarily in the degree to which the third-party neutral possesses specialized expertise and the formality of the procedure. Importantly, these differences are two of the traditionally-perceived differences between judicial and administrative decisionmaking. To put the matter differently, the choice in the case of a binding process for FOIA dispute resolution is essentially a choice between judicial and administrative adjudication.[179]

The issue thus turns to the difference between a judicial or an administrative forum for binding FOIA dispute resolution. Most of the contemporary dispute resolution literature poses the procedural choice as one between court adjudication and non-adjudicative alternatives and is consequently not particularly helpful at this stage of the analysis.[180] One theme emerges, however, that transcends all issues of procedural choice. There is a prominent view that the federal courts are overburdened with controversies that do not merit the attention of an Article III body and that would be handled more appropriately by specialized, non-Article III tribunals.[181] On the other hand, courts generally, and the federal courts particularly, are viewed as uniquely capable of providing independent, objective

decisionmaking.[182] Any process choice made must take account of these perceptions and make the most effective use of the limited resource Article III courts represent.

Virtually every other consideration militates in favor of using an administrative agency rather than a court for the primary resolution of FOIA disputes. First, an administrative structure permits the development and use of specialized, expert decisionmaking. In the FOIA area, this expertise would relate not only to the large and complex body of access law, but also to agency programs and operations that generate the records at issue. Second, centralization of the adjudicative function should promote greater consistency in decisionmaking. Third, two key features of federal court practice--notice pleading with procedures aimed at narrowing ill-defined issues over time and broad discovery--are simply inapt for FOIA cases. Fourth, the flexibility of administrative procedure would permit the development of rules and practices tailored to the particular needs of access disputes. Fifth, a specialized administrative forum would free access cases from the crowded federal court dockets and at the same time provide a structure in which docket management could be used meaningfully to provide expedited treatment for cases warranting it. Finally, the use of traditional judicial review of administrative action would provide a means of preserving a law-interpreting role for the federal courts in FOIA disputes--as well as a check on arbitrary decisionmaking--while preserving the fact-finding and law-applying function for the specialized body.[183]

This view of the choice between reliance upon the courts and reliance upon an administrative entity for binding FOIA dispute resolution draws heavily on the traditionally-perceived benefits of administrative agencies. It consciously omits, however, one aspect of the traditional view--that the agency serve as the primary policymaking body within its field. Policymaking in the FOIA area over the nearly two decades of the Act's existence has reflected a unique blend of legislative, executive and judicial sharing of responsibility.[184] In light of that history it would be somewhat unrealistic to expect that a credible adjudicative agency could at the outset assume a significant part of that overall responsibility. Reform of the structure for general access policymaking is a question that deserves additional attention, but the central question of this study--the desirability and feasibility of a mechanism for access dispute resolution--has independent importance.[185]

In the final analysis this question may be one that can be answered only by a process of experimentation. Yet it seems clear from the evidence gathered in this study and the foregoing analysis of FOIA disputes that any such undertaking would require the observance of certain principles:

1. The agency should be established in a manner that ensures the highest reasonable degree of independence.

2. The process of the agency should preserve the valuable features of the current judicial proceeding while taking advantage of the opportunity to tailor procedural rules to the needs of access dispute processing.

3. The agency should be structured primarily as a case processing entity rather than a policymaking body.

4. The agency's docket should be restricted in some fashion that insures that its workload does not preclude prompt decisionmaking.

5. The agency should have discretion to process cases of different classes on different procedural tracks.

6. The staffing of the agency should ensure the development of substantial decisional expertise.

7. The agency should be accessible to all requesters regardless of geographical location or resources.

8. The agency should be designed to provide an opportunity for informal resolution of access disputes.

9. The relationship between the agency and the courts should be structured to make the most appropriate use of judicial resources while preserving the integrity of the agency decisionmaking process.

10. The agency should be structured with sensitivity to the need to avoid undue bureaucratization and administrative cost in access dispute resolution.

## B. An Agency Model for Analysis

### 1. The General Framework

Most, if not all, of these objectives could be attained through the creation of an administrative authority either within a compatible existing agency or as a separate agency. The agency, hereafter referred to for convenience as the Information Access Authority, would be empowered to adjudicate access disputes under FOIA. It would also be authorized to provide conciliation services in access disputes. The head of the Authority would be appointed by the President with the advice and consent of the Senate for a term of years and be subject to removal only for cause. The primary adjudicative function of the authority would be performed by administrative

law judges. Apart from administrative support for the Authority head and for the administrative law judges, the only other personnel essential to the Authority's functions would be a staff of conciliators.

The Authority would have two primary sources of jurisdiction for adjudications: (1) by consent of the parties and (2) by certification from a federal district court. The Authority's consent jurisdiction would arise after a final agency denial of access, upon the filing of a consent agreement by the parties. The Authority's certification jurisdiction would arise upon the granting by the district court of a motion for certification filed by a party to an access action within the time provided for answer, if final agency processing has been completed. The status of third-party submitters in the Authority's proceedings would be resolved by the same principles now being developed in the area of "reverse" FOIA policy. The Authority's consent jurisdiction would be plenary; its certification jurisdiction would be limited to cases evaluated against the specified standards for certification. Access actions in which no motion for certification is filed or in which the motion is denied would proceed in the district court. Upon the granting of the motion to certify, the underlying district court action would be dismissed. The Authority would then have exclusive jurisdiction to adjudicate the dispute, and its final order would be subject to limited review by a United States Court of Appeals.

2. Submission by Consent

Anytime after final agency processing, the agency and the requester could by agreement submit their remaining dispute for adjudication by the Authority. Submission of the matter to the Authority would preclude the filing of a court action during a fixed period of time. The time period would be subject to an opportunity for the agency and the requester to agree to a longer or shorter time in unusual circumstances. A final decision by the Authority in a consent adjudication would have the same binding effect as a decision in an adjudication following certification. If the Authority does not determine the matter within the required time period, the requester would be free to file the normal de novo action in federal court, or could await the Authority decision. Should the requester sue after the expiration of the time period, the court would not require the requester to exhaust the consented-to Authority proceeding.

The provision for submission by consent accomplishes several objectives. First, it reflects, for the particular controversy, the parties' recognition that the Authority is a desirable and appropriate forum for resolution of the dispute. This serves to legitimate the Authority's function and should

assure each side of the other's willingness to respect the proceeding. Second, because the parties will be free to submit by agreement only so much of their controversy as remains in dispute, it provides an opportunity--short of the institution of suit--for the parties to attempt to narrow their disagreement. Put differently, the prospect of agreeing to submission provides an occasion to discuss compromise, with the outlet of non-judicial determination of those matters that cannot be settled. Finally, and perhaps most controversially, it places some "docket control" for the Authority in the agencies. By refusing to consent, an agency would force the requester who wished to pursue the matter, to file a federal court action. An agency would most likely take that position on one of two grounds--that the particular matter should be determined by a court or that the matter does not warrant further formal processing. While it may be desirable for the agencies to seek to eliminate further wasteful processing in frivolous cases by imposing upon requester the barrier of a federal court proceeding, the power to refuse to consent for that purpose would best be used sparingly if for no other reason that its exercise may lead the persistent requester to file the federal court action in any event. For those cases an agency believes should be determined by a court, the opportunity to refuse to consent provides a mechanism by which the agency can assert its position. The agency decision not to consent should not be directly reviewable. If after an agency refusal to consent the requester sues under the Act, the court will have the opportunity under the certification procedure, in effect, to overrule the agency's position.

While the parties should not generally be permitted to control the scheduling of cases on the Authority's docket, it seems appropriate in unusual circumstances, most commonly where a prompt determination is essential, that the parties be allowed to condition their submission on an expedited processing schedule. The parties' agreement could be made subject to acceptance by the Authority. Even in the case not requiring expedition, a fixed time limit after which the agency would lose jurisdiction would appear necessary to assure requesters willing to submit their disputes to the Authority that they would not languish on the docket. In the long run, of course, the general reputation of the Authority for timeliness in processing cases will be an important factor in determining its attractiveness to requesters for voluntary submission.

3. Submission by Certification

Within the period for filing an answer, any party to an access action would be free to file with the district court a motion to certify the matter to the Authority for adjudication,

if final agency processing has been completed. The motion to certify should be granted unless the case presents (1) unusually complex legal questions, (2) unusually significant issues of access policy, or (3) is determined, in the discretion of the court, otherwise to be more appropriate for judicial resolution. The court should also be free to certify a matter, consistent with these standards, on its own motion. The court should also have authority to certify a case in part where to do so would promote efficiency in the resolution of the dispute. Upon certifying the matter, the court would dismiss the underlying action.

The provision for submission by certification, like the provision for certification by consent, accomplishes several objectives. First, and most importantly, it represents a determination that the Authority should not be merely an available alternative to to the traditional de novo federal court action, but rather the preferred and primary mechanism to resolve access disputes. While it might be suggested that the Authority should attain that status by proving its fairness and impartiality through cases taken by voluntary submission, there is significant risk that if it functioned only at the sufferance of requesters, its credibility with agencies and third parties might be jeopardized. Likewise, it would be difficult for the Authority to attain stature generally and provide a source of consistent decisionmaking, if it were merely a "competitor" of the district courts. Secondly, and virtually as important, the arrangement preserves the opportunity for the de novo court action in the special circumstances where that appears warranted. Concommittantly, in deciding the questions raised under its certification authority, the district court would have some opportunity to assess the quality of the Authority's management of its caseload. Ideally, over time, the number of cases in which certification is an issue would diminish, and even in the interim the certification proceeding itself should consume only a minimal amount of time and resources. Finally, the combination of the agency's power to refuse to submit a matter to the Authority voluntarily and the requester's continued right to bring a court action gives to both parties the opportunity to argue that the matter should remain in court, and where neither party objects, that would be the normal course. The court should remain free, however, to certify a matter on its own motion.

Limiting certification to cases in which final agency processing has been completed avoids exacerbating the problem of agency backlogs, while reserving for court resolution those cases in which the "due diligence" standard is not being met. As in the case of submission by consent, after certification the requester should be free to refile and proceed de novo if the Authority has not determined the matter within the fixed period of time. Also as in the case of consent, that right should not be subject to a "due diligence" claim. This

approach reflects a balance of the Authority's primacy as the access decisionmaker against the need to ensure that its caseload is timely managed.

4. Venue

The Authority should be headquartered in Washington, D.C. In adjudications, whether by consent or certification, the administrative law judge should preside--where a formal proceeding is necessary--in the geographical location most convenient for the particular case. The presumptively appropriate location should be the District of Columbia. Upon a showing by either the requester or the agency that the District would be inconvenient, the administrative law judge should be assigned to preside at an appropriate alternative location. In conciliations, there would ordinarily be no need for the requester and the agency to be physically present, and these matters should be handled by correspondence and telephone to the greatest extent possible. Where in person sessions are necessary, a conciliator should be assigned for that purpose in the District of Columbia or at an alternative location.

Concentrating the physical presence of the Authority in the District of Columbia, but not making the District the exclusive forum, serves several purposes. First, it accepts the primacy of the District as the forum for FOIA dispute processing, and the soundness of the reasons underlying that de facto result. Second, it avoids the enormous cost and, in turn, the dilution of available resources that would result from establishing regional components throughout the country. Third, it nevertheless preserves the opportunity, in appropriate cases, to extend the presence of the Authority to distant forums. Finally, it helps ensure that the work of the Authority that can best be accomplished without in person proceedings will not be compromised by the perception that an Authority representative must be present to perform a meaningful function.

5. Adjudication

Adjudications should proceed de novo in a manner essentially similar to the current district court proceeding, but with an effort to use the flexibility of the administrative process to minimize cost and delay and improve the quality of decisionmaking. In adjudications by consent, documents in the nature of a complaint and answer should accompany the submission agreement. In adjudications by certification, the complaint and the answer (if filed) would be transmitted to the Authority by the district court as part of the certification order. In either case, once the matter is lodged with the Authority, it

would be assigned to an administrative law judge for hearing. Either party would then be free to make preliminary motions, including motions to compel the production of a Vaughn index and motions for summary judgment. Most importantly, however, by practice and by procedural rules the Authority should encourage the use of less formal techniques to determine the issues in controversy or promote settlement.

The prospect of using relatively comprehensive document review by the ALJ as a substitute for detailed Vaughn affidavits in appropriate cases illustrates one method of substituting substantive analysis for procedural formality. After the issue is joined, whether through pleadings or less formally, the case could be advanced through flexible procedures. Certain cases would simply not require disposition on the merits. For cases reaching the merits, where characterization of the records is not at issue, the matter would proceed by prompt summary disposition of the legal questions. Where the characterization of the records or portions thereof is in dispute, the necessary initial fact finding could proceed by the preparation and submission of an oral or written Vaughn index or by immediate submission of the records for in camera review. At the same time, the proceeding must retain sufficient formality to provide the parties a well-defined "shadow" in which to attempt to settle their dispute and to provide inducement to do so. Put differently, the proceeding should be structured to preserve the well-understood change in the complexion of a case as it moves from agency processing to a neutral forum.

The adjudication procedures should also be structured to provide for docket management consistent with the needs of access disputes. The most obvious illustration would be procedures for placing cases of different classes on different tracks for processing. Cases of particular urgency could be given expedited treatment. Cases involving large volumes of records but serving an important public function, as in the case of historical research, could be given priority over large volume cases involving a personal or commercial interest without full scale expedition. At this point, the range of possibilities need not be enumerated. The important consideration is that the use of these techniques would be available in the administrative process.

In cases requiring formal determination, the administrative law judge should decide, as in the district court proceeding, whether the records or any segregable portions thereof were improperly withheld and the burden to sustain the action should be on the denying agency. As suggested above, the administrative law judge should have authority to examine withheld records in camera. The administrative law judge should also have authority to order the disclosure of improperly withheld records and to award litigation costs and attorney's fees to a requester who substantially prevails.

The decision of the administrative law judge would become the final decision of the Authority unless reviewed on the record by the head of the Authority pursuant to a discretionary appeals procedure available to the requester or the agency. The discretionary review opportunity comports with traditional administrative practice and provides a mechanism for fostering sound and consistent decisionmaking within the Authority. To ensure that the determination can proceed with the required dispatch, the standard should be strictly limited to exceptional questions of law or fact.

After the period for seeking judicial review of an Authority decision has expired or after a judicial affirmance, a final decision requiring disclosure would, if not complied with, become enforceable through contempt proceedings in federal district court. This provides a meaningful enforcement mechanism in the unlikely event that an agency refuses to release the records.

6. Judicial Review

The final decision of the Authority granting or denying, in whole or in part, access to records should be reviewable in the United States Court of Appeals for the circuit in which the adjudication took place or in the United States Court of Appeals for the District of Columbia. The requester, the agency, or both should be entitled to obtain review of an Authority decision. A petition for review should be required to be filed within a short period after the final decision of the Authority. An Authority decision ordering disclosure would ordinarily be stayed pending review. Review proceedings should be expedited in accordance with the "good cause" standard of the Court Improvement Act of 1984. The decision of the Authority should be reviewed under essentially the same standard now used by Courts of Appeals to review District Court decisions in FOIA cases.

Providing for Court of Appeals review of Authority decisions not only preserves for an Article III body the determination of questions of law under FOIA, but also channels Authority decisions to the same forums that will review those cases that remain in the district courts, notwithstanding the availability of the Authority process. While the latter consideration alone might justify applying the same standard of review to both classes of cases, there is another important reason. The diversion of cases from the district courts to the Authority poses the uncertainty of a new system for requesters and agencies. Given the vagaries of the traditional formulations of the standards of judicial review of administrative agency decisions, it seems desirable to refer to a standard that is understood and accepted even if it is theoretically

imperfect for describing judicial review of an administrative agency decision.

Review of final decisions of the Authority after certification should also include the question of the propriety of the certification by the district court. Any possible encumberance of the process by the availability of such review would appear justified by the need to ensure consistent application of the certification standard.

7. Conciliation

The Authority should make available, at any stage in the FOIA process, the services of a trained conciliator upon the agreement of the agency and the requester that the informal assistance of a neutral party would aid in the resolution of the dispute. The services of the conciliator in each matter should be tailored to the needs of the particular controversy. It could include, in appropriate cases, examination of the disputed records.

The term "conciliation" is used here to distinguish the process from the similar process of "mediation":

> Conciliation is a weak form of mediation. Unlike the mediator, the conciliator has no authority to propose his own solutions or suggest new ideas as a means of breaking an impasse in negotiations. In essence, the conciliator is a facilitator of negotiation between the parties. Like the mediator, the conciliator will pass on the parties' positions and priorities and will facilitate the search for common ground.[186]

Given the nature of the FOIA dispute--particularly its general non-amenability to formal compromise--the more subtle connotation of the conciliator function seems apt. This is best explained by illustration. In many cases, a requester seeks records on the assumption that they contain certain information when in fact the information of interest to the requester is simply not there. The records may well be exempt, but the requester's strong interest in the presumed contents drives him to actively contest the case. If a neutral third party was informed of the requester's interest and had access to the records, the matter could likely be resolved by a report to the requester from the neutral that the records did not contain the information the requester was seeking. The role of the conciliator might also go beyond document review to probing with an agency representative the basis for an exemption claim.[187]

Whatever the role of the conciliator, he must have the confidence of both the requester and the agency if the conciliation function is to be performed effectively. At a minimum this requires the agreement of both parties that the service would be useful in a particular case and, from the requester's perspective, that the service would be provided by an individual truly independent of the agency. The concilation staff should maintain a separateness from the adjudication staff and nothing said or done in the conciliation process should be admissible in a subsequent formal proceeding. Above all, the role of the conciliator should not be narrowly defined at the outset, but rather allowed to develop as the needs of particular cases are presented, bearing in mind that the purpose of the service would be not only to minimize the formality necessary to fulfill the basic policies of the Act, but also to protect the more formal dispute resolution process from an unmanageable caseload.[188]

8. Other Functions

In addition to the dispute-specific functions of adjudication and concilation the Authority ultimately could be assigned functions of a more general policy-oriented nature. These include most importantly the (1) formulation of government-wide policy through informal rulemaking, (2) the provision of informal advice and guidance to agencies and requesters and (3) the exercise of general investigatory authority with respect to government-wide FOIA compliance. Each of these functions offers promise for improving the overall administration of the Act and thus minimizing the number of disputes requiring post-agency processing. Yet each also represents a substantial undertaking and could impair initially the effective implementation of the adjudication and conciliation functions. On balance it would appear appropriate to consider assigning such additional functions to the Authority only after it has demonstrated its capacity to effectively discharge its primary dispute resolution duties.

9. Structure and Staff

The choice between establishing the Authority within a compatible existing agency and creating a separate agency involves both the question of independence and efficiency. The convenience and possible cost-savings that might be attained by using an existing agency structure must be weighed against the possibility of loss of independence and, in turn, against perceptions of loss of impartiality in decisionmaking.

As a matter of independence, appointment for a term of years with a cause limitation on removal seems a minimal

requisite for the head of the Authority. Because the Authority would exercise significant law enforcement functions, it would appear necessary, for constitutional reasons,[189] that the appointment power be vested in the President. Unless the head of the Authority were to serve as an independent, but subordinate officer, in an agency headed by a politically-responsive presidential appointee, there would be no practical choice but to create a separate agency. Yet most agencies with politically-responsive heads would be considered inappropriate entities for housing the Authority, even if the Authority head had political independence.

One exception may be the National Archives and Records Administration (NARA), since 1984 an "independent establishment within the executive branch" headed by the Archivist of the United States appointed and subject to removal by the president.[190] The Authority, with a separately appointed head, could be established within NARA. The general archival and records management function of NARA[191] would seem at least substantively compatible with the access dispute resolution function of the Authority. There would remain, however, the administrative and political awkwardness of having an independent, but budgetarily and structurally subordinate, entity in NARA. This problem could be solved by having the Archivist, himself, serve as the head of the Authority, but the president's removal power with respect to the Archivist as presently granted is not as strictly circumscribed as with most independent appointees.[192] In any event, the consideration of independence in assessing the desirability of using an existing structure must be evaluated along with the possible administrative benefit of integrating the Authority.

This issue is best considered by attempting to gauge the staff size and structure that would be necessary to implement the Authority concept. Admittedly, this is a speculative undertaking. Regardless of methodology it cannot produce precise, highly reliable results. It can, however, offer a framework for analysis. Apart from this value, it also provides a basis for making a general assessment of the cost of establishing the Authority.

The obvious difficulty in estimating the resources that would be required to enable the Authority to perform its adjudicative function in a timely and effective manner is that no federal administrative entity has ever performed as the Authority would. Consequently, there is no directly comparable historical data. The courts, of course, now perform the post-agency dispute resolution function. Yet none of the readily-available data concerning the courts' performance of this function reflects active processing time, i.e., the time a judge and his support staff actually devote to handling access cases. Of the total time a FOIA case spends on the court docket--the median ranging from 7 to 10 months for the six-year

period reported in this study--only a tiny fraction of the time actively involves the court.[193] The procedural progress of a case at its termination[194] and the nature of its disposition[195] reflect to some extent the nature and degree of the court's involvement, but the image is superficial at best and the active processing time remains obscure. The state access agency that performs the functions most closely analogous to those that would be performed by the Authority encounters many cases substantially different from those posed by access requests in the federal government. Its experience is of limited comparative significance.[196] Interestingly, the FOIA appeals offices in the agencies perform the most similar, though not perfectly analogous, function to that which the Authority would perform.[197] Unfortunately, little hard data concerning the active processing time involved in the performance of that function is available. Nevertheless by using a combination of certain court and agency data, it is possible to make a reasonable estimate of the active case processing time, and in turn the staff resources that would be required by an independent entity.

The simple starting point is to recognize that each case will not require the same amount of active processing time. Primarily three factors will account for the differences. The first is the degree to which the case relies upon the adjudicatory function. Cases that settle or are resolved in a summary proceeding will generally consume less time than more contentious cases. The second is the size and complexity of the case. Cases involving large numbers of records or unusually difficult legal issues will generally consume more time than simpler cases. The third is the expertise of the decisionmaker. An experienced, specialized decisionmaker will ordinarily be able to process cases more rapidly than a generalist.

There is some useful data available to approximate the effect of the first two of these factors; the third can reasonably be assumed.[198] Of all FOIA cases terminated in the six-year period covered by this study, 52.0% were "dismissed, discontinued, settled or withdrawn;" 40.3% were decided by summary judgment or other "judgment on motion before trial;" 1.5% were decided on "judgment after trial" and the remaining 6.2% were terminated in various other ways, all presumably less time-consuming than judgment after trial.[199] In three FOIA appeals offices in three distinctive agencies--Justice, Defense, and HHS--the active processing time for FOIA appeals, including document review, staff recommendation and drafting, averaged from 5 to 30 hours in cases requiring a decision on the merits.[200] Cases moved from the lower end of the range to the higher end of the range largely on the basis of the degree formality of the internal documentation and approval process, although case size and complexity made some difference.[201]

Assuming a rough correspondence between the nature of the appeals processing function and the function of the Authority,

these data can be combined to produce a rough estimate of the active processing time for 500 FOIA cases in the Authority--the average number of FOIA cases now being handled annually by the federal courts.[202] The estimate also assumes that the 52% of cases dismissed, settled or withdrawn correspond to the low end of the processing time scale; that the 40.3% decided by summary judgment correspond more closely the middle of the scale; and that the 6.2% and 1.5% terminated in other ways or by trial correspond, respectively, to points at the high end of the scale. Using the calculations reflected in the chart below, this method produces the result of 3696 hours of active processing time for 500 cases:

ESTIMATED ACTIVE PROCESSING TIME FOR 500 CASES

| | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Range of Processing Time (hours/case) | 0 | ----- | 5 | ----- | 15 | ----- | 30 | ----- | 60 | | |
| Percent of Cases | | 52.0% | | 40.3% | | 6.2% | | 1.5% | | | |
| Number of Cases | | 260 | | 201 | | 31 | | 8 | | | |
| | | x 2.5 | | x 10 | | x 22.5 | | x 45 | | | |
| Hours | | 650 | | 2010 | | 698 | | 338 | | = | 3696 TOTAL |

Attributing all of the 3696 hours of processing time to the work of an administrative law judge and assuming a work-year of approximately 2000 hours, a 500 case workload would require 1.85, or in whole positions roughly two, ALJs. The relative accuracy of this estimate can be confirmed using a workload formula developed by the Administrative Office of the United States Courts.[203] From the results of a comprehensive study, the Administrative Office assigned a weighting to civil cases in over 100 case classifications on the basis of processing time demands. The weighting for FOIA cases was 1.5827.[204] Multiplying this weight times 500 case filings yields 791 "weighted filings." This number is then divided by 400, the number of weighted filings the Administrative Office estimates indicate the need for an additional district judgeship.[205] The resulting quotient is 1.98, or again in whole positions roughly two, judges.

The most significant unaccounted for variable in this estimate is the time related to travel that would be involved in hearing cases outside the District of Columbia.[206] Presently, only 60% of the total FOIA filings are made outside D.C.[207] Of these, less than half, on the basis of the above estimate, have even the potential to require the attendance of an ALJ at a live proceeding.[208] Assuming, notwithstanding the availability of document review by the ALJ and a process for written rather than oral submissions, that half of these cases require travel, the number is only 75, or 15% of the 500 case workload. The approximate active processing time of 4000 hours for the 500 cases includes a cushion of 304 hours, i.e., the calculated estimate is 3696 hours. This accounts for just over 7.5% of the 4000 hours. Adding this cushion to that which would be created by providing a clerk-assistant and a secretary for each ALJ position would create a combined effect that should accommodate travel time within the estimated requirement for 500 cases.[209]

Given the active processing time estimate, there still remains one major imponderable in evaluating the adjudicative staffing requirements for Authority. The two judge (with support staff) estimate is based upon 500 cases--the average annual FOIA district court filings over the past six years. It is entirely possible that the availability of the Authority as a dispute resolution forum would increase the caseload. A significant increase in the caseload would naturally require additional adjudicative staffing. As noted earlier, roughly 5000 FOIA cases annually have the potential for post-agency dispute processing.[210] These are cases processed through appeal within the agency in which the initial denial is affirmed in whole or in part. Theoretically, then, the caseload could increase tenfold, requiring twenty ALJs rather than two.

This extreme result seems highly unlikely for several reasons. First, it seems reasonable to assume that some portion of the requesters in these cases are satisfied by the appellate decision and drop out for that reason at that stage. Many simply accept the agency's appellate decision as correct and reasonable even though it denies them the full access they sought. Others, who receive greater access through the appeal than in the initial decision, accept that result as a form of compromise. Second, some requesters have availed themselves of the appellate process because it is a virtually no-cost opportunity for review, requiring only a simple appeal letter. Any additional cost or formality would be a deterrent to proceeding further. Third, the requirement for agency consent for direct submission of a case to the Authority for adjudication would mean that in those cases in which the agency withholds its consent the federal court proceeding needed to obtain certification would deter some requesters. Finally, and most importantly, a significant number of the remaining cases should

be diverted from the Authority's adjudication docket by the availability of conciliation.[211]

Nevertheless, it simply is not possible to quantify these effects precisely. To provide a reasonable margin of safety one might assume that notwithstanding these effects the caseload would double. This increase from 500 to 1000 cases would require increasing the number of ALJs from two to four. Even if this assumption overstates the likely increase in caseload, given the uncertainties in the estimation of active processing time, the larger caseload assumption would compensate for an underestimation of processing time requirements. Ultimately, the most accurate estimate of the adjudicative staffing requirements should be put as two to four ALJs plus support staff.[212]

The two remaining staffing requirements for the Authority would be the conciliator positions and the administrative and support staff for the Authority head. Neither, however, is susceptible to approximation along the same lines as the ALJs.

The number of conciliator positions that would be needed is particularly difficult to gauge. The conciliation function is, of necessity, vaguely defined. Experience alone would determine more precisely the content of the function. Initially, the position might be staffed in a 1:2 ratio with the ALJ positions. Thereafter, staffing could be relatively easily adjusted to meet the demonstrated need.[213]

As long as the Authority head's functions are limited to agency management and discretionary review of ALJ decisions, a small administrative support group and a small personal staff should suffice for that office. If broader policymaking functions were assigned to the Authority head, a larger staff would be needed.[214]

The total staffing requirement for the Authority would thus be something on the following order:

| | |
|---|---|
| Head | 1 |
| Personal Staff | 2 |
| Counsel | 1 |
| Administrative Group | 2 |
| ALJs | 2-4 |
| Clerk | 2-4 |
| Secretarial | 2-4 |
| Conciliators | 1-2 |
| Sec/Clerical | 1-2 |
| TOTAL | 14-22 |

It would be entirely reasonable to conclude that an agency of this scale could most efficiently be established within a compatible existing agency, such as NARA. That benefit, however, is difficult to quantify and thus to weigh against possible real or perceived loss of independence. Given that limitation, creating the Authority as a separate establishment may best serve the overall objective of using an adjudicative entity.

### C. The Ombudsman Model as an Alternative

The proposal for the establishment of an Information Access Authority contemplates an entity that would have both adjudicatory and conciliatory functions. This aspect of the proposal proceeds from the premises (1) that any formal administrative alternative to de novo judicial determination could be overwhelmed by its workload without the availability of some mechanism for informal dispute processing, and (2) that certain forms of informal processing could have independent value in access disputes.[215] A shift of the primary adjudicative function from the courts to an administrative agency, however, itself represents so fundamental a change in the access system that it is also useful to consider whether a purely non-adjudicative dispute resolution mechanism could minimize some of the burdens identified in this study.[216] Or to put the matter only slightly differently, would it be desirable and feasible to establish an entity having only a case-specific conciliation function while maintaining the adjudicatory function in the courts exclusively?

To evaluate conciliation as a primary rather than ancillary administrative responsibility requires a somewhat more detailed analysis of the function than has been presented thus far. Realistically, it may also require a change in nomenclature. While the rather vaguely defined term "conciliation"[217] is probably broad enough to encompass any case-specific, non-adjudicatory, informal dispute resolution mechanism that might be applied to access disputes, it is rarely used to describe a federal agency function, particularly one related to the resolution of claims by individuals against the government.[218] With no intention of assigning a controlling role to nomenclature, it would appear that the terms "ombudsman" or "ombudsman-like function" would better capture the nature of informal action that might be considered independent of adjudication of access disputes.

1. The Department of Justice Functions as Historical Antecedents

As noted earlier, the Department of Justice currently performs a number of functions in the access field that can bear upon the resolution of individual access disputes either before or after the initiation of a judicial proceeding.[219] When the performance of these functions serves to bring a particular dispute to a conclusion short of a formal judicial determination of the claim, the Department's role become particularly relevant to consideration of the ombudsman function. To understand the form and extent of the Department's current activity in this area it is necessary to review first its historical development.

The FOIA as originally enacted in 1966 made no provision for any special role for the Department in the implementation of the statute.[220] Formally, the Department was only another covered agency. As a practical matter, however, two well-established existing Justice functions formed the foundation for the development of a unique role for the Department. First, the Department served traditionally as legal adviser to other executive departments and agencies, particularly with respect to the implementation of generally-applicable legislation such as the Administrative Procedure Act (APA).[221] Inasmuch as the FOIA was formally an amendment to the APA, a legal advisory role for the Department evolved naturally. Second, the Department bore responsibility for representing most federal agencies in litigation.[222] In the exercise of this responsibility, the Department from the outset provided litigation defense in most suits against agencies under the FOIA.

These two functions were initially performed by separate components of the Department. The advice function was performed by the Office of Legal Counsel, the litigation defense function by the Civil Division. With growth in the use of the Act in the late 1960s and early 1970s, the number of court cases significantly increased.[223] A concern developed within the Department that the FOIA practices of many agencies failed to meet even its own relatively narrow views of what the Act required and that the defense of such cases in litigation not only would be inconsistent with the Department's express advisory positions, but also would produce precedent unfavorable to interests of the executive branch.[224] This concern evolved into a Departmental decision to more closely coordinate its advisory and litigation functions. In 1969, the Attorney General established the Freedom of Information Committee, composed of representatives from both the Civil Division and the Office of Legal Counsel, and requested that all agencies consult with the Committee before issuing a final denial of access "if there is any substantial possibility that such denial might lead to a court decision adversely affecting the government." Through the Committee, the proposed denial would receive "timely and careful review in terms of litigation

risks, governmentwide implications and the policy of the Act, as well as the agency's own interests."[225] The combination of pre-litigation review and counseling prior to a final denial represented an effort by the Department to influence agency decisionmaking in individual cases by implicitly suggesting that denials that failed to meet minimal, though unstated, standards might not be defended in litigation. Four years later the implicit threat was made explicit through the announcement of a Departmental policy not to defend agency decisions to withhold records unless the agency had consulted with the Committee prior to making a final denial.[226] The policy did not, however, elaborate the standards that would be used by the Committee in consultations or by the Department in determining whether to defend.

In the period 1969 through 1974, the Committee conducted several hundred consultations.[227] Many consultations dealt with issues that were by then becoming relatively settled and were often handled by telephone or through an exchange of correspondence. Others dealt with more complex or novel issues and frequently led to face-to-face meetings between agency officials and committee members. A report of the results of the 120 face-to-face consultations that had been held through 1972 reflected that roughly 40 cases led to a conclusion that the disputed records were "clearly or very probably exempt," that another 40 led to less certain conclusions as to the exempt status of the records, that 15 cases led to the conclusion that some records were exempt and some were not, and that in the remaining 25 the records were not exempt or that the case for withholding "was very weak."[228] While there is no readily available documentation of the extent to which the Committee's recommendations were followed by the agencies, it appears that in the "vast majority" of cases in which the Committee took a strong position that the subject records should be disclosed the agency aquiesced.[229] Only anecdotal evidence reflects the apparently rare case in which the Department declined to represent an agency because it disregarded the Committee's firm views or failed altogether to consult with the Committee.[230]

Between 1972 and the enactment of the Freedom of Information Act amendments of 1974, the Department's government-wide FOIA activity came under closer scrutiny. In the course of oversight hearings on FOIA in this period, the Department's de facto compliance-monitoring role was criticized.[231] The thrust of the comment, however, was directed primarily to the quality and effectiveness of the Department's overall FOIA activity, rather than the desirability of the Committee process. Nevertheless the resulting legislation did not institutionalize the Committee function. The 1974 amendments, as noted earlier, simply directed the Attorney General to report annually the details of FOIA litigation and "a description of the efforts undertaken by the Department to encourage agency compliance."[232] While this language gave the compliance function

a form of de jure status, it left the Attorney General wide discretion as to nature and scope of its performance.

The only immediate change in the Department's compliance role following the 1974 amendments was a significant increase in the volume of work precipitated by a growing awareness and use of the Act by the public. From 1974 to 1977, the Department as well as all other agencies labored under the management of a vastly greater caseload.[233] The Committee's case-specific consultation function continued, but was diluted by sheer volume and by Departmental efforts to provide general guidance as to the implementation of the amendments. By 1976, the Attorney General announced that the combination of the amendment-imposed time limits for response and the developing case volume necessitated revocation of the requirement of agency consultation with the Committee prior to final denial.[234] While the case-specific litigation defense activity of the Department increased, the advisory function grew in its more generalized dimensions.[235]

With the change in administration in 1977, the Department's compliance-promoting activity took on for the first time an explicitly substantive character. The Attorney General announced that the Department would defend agencies in FOIA actions "only when disclosure is demonstrably harmful, even if there is some arguable legal basis for the withholding."[236] Although the initial charter of the Freedom of Information Committee had suggested that factors other than the bare legal basis for the denial would be considered in Committee consultations, "demonstrable harm" had never explicitly been made a condition to Department defense. Under the Department's new position, at least conceptually the Committee made a determination as to harm that would become the basis for the representational decision.[237]

At the same time this prospective standard was announced, the Attorney General ordered a review of the roughly 600 FOIA cases then pending in litigation to determine whether any should be settled.[238] On its face, this action represented a more potent exercise of authority by the Department than did the Committee consultation requirement. The Civil Division was in the position to alter immediately the defense posture in any case. The actual outcome of the review, however, is not precisely documented. It appears that a few cases were dismissed outright and that in a number of others disclosures beyond the agencies' prior positions were made.[239] Inasmuch as the Civil Division attorneys had in the past encouraged such changes at the litigation stage on an ad hoc basis, the comprehensive review directive arguably represented less a change in approach than a highly visible reminder to the agencies that the Department would in some cases exercise the threat of non-defense implicit in the Committee process.[240]

A little more than a year later, in 1978, the Attorney General established the Office of Information Law and Policy (OILP) as a discrete advisory component within the Department for FOIA matters.[241] The Freedom of Information Committee was incorporated into OILP and the Chairman was made the Director. In addition to maintaining the function of the Committee, OILP provided government-wide guidance and coordination on FOIA matters, as well as internal advice for the Department. As a practical matter, the establishment of OILP reflected an institutional maturation of the Department's statutorily-identified responsibility to promote compliance with the Act.[242]

Three years later, again with a change in administration, the Attorney General announced a revised substantive standard for implementing the Department's compliance-promoting function through the "refusal to defend" mechanism. The 1981 policy statement, generally understood to abandon the "demonstrable harm" standard, provided that the Department would defend all suits "unless it is determined that: (a) The agency's denial lacks a substantial legal basis; or (b) Defense of the agency's denial presents an unwarranted risk of adverse impact on other agencies' ability to protect important records."[243] The following year OILP was abolished and its functions along with those of the Office of Privacy and Information Appeals (responsible for processing appeals from initial FOIA denials made by Departmental components) were transferred to a newly-created Office of Information and Privacy (OIP) in the Office of Legal Policy. Although OIP retained the agency counseling function, the Freedom of Information Committee was disbanded.[244] The FOIA litigation and advisory functions thus lost the structural connection that had existed since 1969. OIP nonetheless maintained an informal consultative relationship with the Civil Division.[245]

The compliance-promoting function of the Department today remains vested in OIP.[246] The Office, headed by two co-directors, has a staff of approximately 40, consisting of 18 attorneys, 13 paralegals, and roughly 7 secretaries and law clerks. Of the total Office resources, approximately 70% are devoted to the function transferred from the abolished Office of Information and Privacy Appeals.[247] This function consists of processing appeals from initial denials of access made by components of the Department under FOIA and the Privacy Act. Of the remaining 30%, the Office resources are devoted roughly equally between providing FOIA advice and guidance to other agencies and providing assistance to the Civil Division with respect to cases in litigation.[248]

The advice and guidance function is primarily carried out through government-wide distribution of guidelines and other published commentary and compilations, as well as through responses to both general and case-specific informal inquiries

from other agencies.[249] Departmental regulations now provide that an agency that intends to deny any FOIA request "raising novel issues should consult with [OIP] to the extent practicable."[250] The litigation assistance function, performed at the request of the Civil Division in particular cases, consists of "reviewing the issues and proposed litigating positions and strategy ... from both legal and policy standpoints and developing positions promoting uniformity and agency compliance."[251] The Office's counseling function is thus exercised both through the rendering of case-specific advice to other agencies and to the Civil Division and through government-wide dissemination of general policy guidance.

Apart from advice wholly internal to the government, OIP and its predecessor entities have, at least since 1978, received and acted upon citizen complaints of agency failures to comply with FOIA.[252] The complaint is "discussed with an agency representative and, where appropriate, a recommendation [is] made as to the steps that should be taken by the agency to bring it into proper compliance."[253] This "ombudsman-like" function is not formally assigned to OIP and is not publicized at all. The only official reference to it appears in the Attorney General's annual report to Congress of the Department's compliance efforts. OIP processes only a handful of citizen complaint cases each year.[254]

Despite numerous changes in the form and scope of the Department's compliance-promoting FOIA role over the years, the reports to Congress filed by the Attorney General since 1979 show a steady numerical growth in the activity of OIP (and its predecessor entities) and a relatively constant distribution of resources among the several case-specific functions:[255]

| Function | 1979 | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 |
|---|---|---|---|---|---|---|---|
| Summary Informal Advice | 581 | 859 | 950 | 1140 | 1325 | 1570 | 1753 |
| In-Depth Consultation | 10 | 7 | 9 | 12 | 15 | 15 | 15 |
| Litigation Advice | 20 | 48 | 30 | 75 | 80 | 100 | 100 |
| Citizen Complaints | 30 | 35 | 25 | 9 | 7 | 8 | 14 |

The quantitative summary of the activity over this period of course provides no insight into the substance of the advice given or the general policy perspective from which the functions are approached. The Department has always been understood to have an institutional character naturally more disposed to the operational, as well as the political, interests of the agencies than to broad principles of openness in government.[256] Nevertheless, given its general law enforcement orientation and its distance from most administration, the Department has long been

assumed to have a capacity to perform a moderately disinterested compliance-promoting function under FOIA.[257] Beyond wide agreement as to the delicate basis of this capacity and its effect generally on Departmental FOIA policy, it is difficult to identify any consensus, either positive or negative, with respect to overall quality of the compliance effort unrelated to common perceptions of the political posture of the Department at the highest levels.[258] The broad terms and purposes of the Act, even after 20 years of court decisions, remain susceptible to interpretative dispute and their implementation continues to depend on the exercise of discretion. Thus, fixed views of a particular administration can be reflected in the guidance process.

2. The Ombudsman Concept

Serious consideration of the use of an ombudsman in the American administrative process can be traced to the pioneering studies of Walter Gellhorn in the mid-1960s.[259] This work spurred tremendous interest in the ombudsman model and provided the conceptual foundation for a number of ambitious proposals for implementing the function in American government.[260] While many ombudsman-style offices were established in state governments in the years immediately following Professor Gellhorn's work, the concept did not take hold strongly at the federal level.[261] These studies and some related work from the same period by the Canadian political scientist, Donald C. Rowat, nevertheless remain the standard references.[262]

Subsequent implementation of the ombudsman concept, as well as the later literature, often departs sharply from the Scandinavian-based model explored most closely by Gellhorn and Rowat.[263] Some ombudsman or "citizen advocate" offices that exist today bear only the loosest resemblance to this classic model. This is not to suggest that such offices are in any way flawed. Rather, it is simply to recognize the need to establish a working definition for a concept that is inherently imprecise and a term that is often used casually. Departures from the model should not be assumed to be undesirable, but instead points that warrant closer analysis in deciding whether the generally-assumed values of the system will be realized in the particular application.[264] Given the parliamentary system origin of the concept, it is virtually certain that some modification would be necessary in any American implementation.

A three-part description formulated by Professor Rowat represents a strong and, therefore analytically valuable, definition of the office:

> (1) The Ombudsman is an independent and non-partisan officer of the legislature,

> usually provided for in the constitution, who supervises the administration;
>
> (2) he deals with specific complaints from the public against administrative injustice and maladministration; and
>
> (3) he has the power to investigate, criticize and publicize, but not to reverse, administrative action.[265]

Reduced to its essential features and modified to eliminate the parliamentary system base, the American version of the Ombudsman would be an independent officer with authority, on the basis of citizen complaints, to investigate specific administrative action and to criticize but not compel a change in the result.[266]

Beyond this description lie seemingly endless issues of detail: the source and nature of the appointment, the qualifications for appointment, the formality of the complaint-handling process, the scope of the investigative power, and the relationship of the function to other institutions and processes. Even more perplexing are numerous questions related to the basis for the essential institutional ability to produce results through persuasion rather than compulsion. Much of the recent literature in the area is abstract and theoretical.[267] The dearth of empirical research in the field makes the gap between theory and practice even more difficult to bridge.[268] Finally vast differences in the types of administrative problems to which the ombudsman function has been applied often make comparisons problematic and analogies tenuous at best.[269]

The essence of the concept--both its potential awkwardnesses and its appealing simplicity--is well captured by Professor Gellhorn's rhetorical exchange. He asks:

> Could the complexities of public administration be grasped by outsiders? Would external critics constitute simply a further thickness of bureaucracy, adding to government cost but not capabilities? Would this country's political temper permit appointment of entirely apolitical observers of inner workings? Could external critics, armed only with the power of reason, hope to prevail over intransigent officials?[270]

He answers:

> External critics function most effectively when governmental administration is already reasonably good and when a consensus of expectations already exist about ethical and qualitative standards in the public service....

> They would not be propounders of wholly untried ideas inspired by novel attitudes toward governmental responsibilities. They would instead be commentators upon departures from established norms, advisers about how to achieve widely desired ends.... [T]he critic would have no operating responsibilities and no power to formulate initial judgments or to revise those made by others. The critic's authority would not be that of super-administrator, capable of bending administration to suit his will. Persons aggrieved by administrative action or inaction would not encounter the critic as an added layer of administration, through which they would have to struggle to reach the courts. They could, if they chose, ignore the critic altogether in order to pursue whatever remedies, judicial or otherwise, they thought more advantageous. The critic would be accessible, but not obtrusive. Those who might desire an objective inquiry under the auspices of an authority detached from the administrative establishment could call upon the critic. That is all.[271]

Little else can be said with assurance; more detail only encumbers the basic operating principle.

It is tempting to suggest that the only precondition for consideration of the use of an ombudsman should be an administrative system that yields a significant number of citizen complaints that are not resolved through other dispute resolution mechanisms or that burden such other mechanisms. After that, the question might simply be whether given the particular characteristics of the system, use of the ombudsman model offers a reasonable prospect of resolving efficiently a meaningful number of the outstanding complaints in light of experience with the concept elsewhere. Realistically, the ombudsman function would tolerate no more precise standard.[272]

Some portion of FOIA cases decided against the requester that are not pressed beyond the administrative appeal, as well as all cases that enter the judicial process, represent a pool of unresolved complaints against the government that may be amenable to treatment by an ombudsman.[273] To an extent, the earlier discussion of the Authority conciliation function suggests how the dispute resolution process could be advanced in this fashion.[274] The possible use of this function unassociated with an adjudicative agency, however, warrants a fuller analysis. Consideration of the use of ombudsmen in other federal settings will be helpful for this purpose, but given the uniqueness of the access dispute, assessment of the use of

the ombudsman model in other freedom of information systems, most notably in Canada, offers the most helpful comparisons.[275]

3. Current Federal Agency Use of the Ombudsman

Any attempt to survey the existing ombudsman schemes immediately encounters the problem that some complaint-handling mechanisms that closely follow the classical model are not described as ombudsman systems and that some that depart significantly from that model are.[276] Moreover, an apparent longstanding reluctance at the federal level to use officially the term "ombudsman," makes it particularly difficult to identify complaint-handling mechanisms that have many, but not necessarily all, of the classical features. Virtually every federal agency receives citizen complaints and, under certain circumstances, responds to them through an ombudsman-like mechanism: someone outside the routine of administration makes an informal inquiry on behalf of the complainant. There is every reason to believe that these mechanisms produce desirable results, but their complete informality, and often their institutional obscurity, make it impossible to evaluate meaningfully their success as complaint processors.[277]

Two federal agency complaint-handling offices are statutorily termed "ombudsmen" and one major agency complaint office is termed by regulation an "ombudsman." These offices provide a structure and regularity for the function that makes it possible to assess, at least tentatively, their fit with the federal establishment. Additionally, there is one federally-mandated, and thus agency-monitored, program for a special-function state ombudsman. Finally, the House-passed Social Security Reform Act of 1986 establishes an Office of Beneficiary Ombudsman with the revamped Social Security Administration.[278]

a. The Taxpayer Ombudsman (1977)

The largest and most active federal ombudsman office is the Taxpayer Ombudsman in the Problem Resolution Program (PRP) of the Internal Revenue Service. The PRP was established in 1977 "to handle taxpayer complaints that were not promptly or properly resolved through normal procedures, or those problems which taxpayers believed had not received appropriate attention."[279] Additionally, the PRP is responsible "for identifying the causes of problems so corrective action can be taken" and "for representing taxpayers' interest and concerns within the Service during program development and implementation."[280] Complaints within the jurisdiction of the PRP include late or missing refunds, erroneous billings, unclear notices and

letters, and certain examination and collection issues.[281] The PRP does not undertake to handle substantive technical or legal issues that are intended to be resolved through normal appeals procedures.[282] In fiscal 1984, the office received 326,000 taxpayer complaints, and in fiscal 1985, problems associated with a new computer system pushed the number over 500,000.[283]

Complaints otherwise within the jurisdiction of the PRP are accepted into the program on the basis of criteria that take account of the length of time that has past since the taxpayer could reasonably expect a response or corrective action based on a filing with or complaint made to an operational office. Each complaint is documented, given a control number, and entered into a computer system. The complaint is then forwarded to the IRS component responsible for the matter. The taxpayer is kept informed of the progress of the case and the PRP complaint file remains open until PRP determines that the problem has been resolved. Surveys conducted by PRP indicate a 90% rate of public satisfaction with the program.[284]

The Taxpayer Ombudsman, who is on the Commissioner's immediate staff, is the head of the PRP.[285] The PRP at the National Office level is a part of the Taxpayer Service Division. The Ombudsman office was established in 1980 to give the existing PRP greater visibility and independence.[286] The program is publicized through television, radio, magazine and newspaper ads, as well as in IRS taxpayer publications. Largely as the result of internal publicity, the majority of PRP cases are referred by IRS employees.[287]

The Problem Resolution Staff of the Office of the Ombudsman consists of a Director, a Special Projects Coordinator, a supervisory Program Analyst and eight program analysts.[288] Among other functions, this National Office level staff monitors the overall program that consists of only 195 budgeted positions in the district and regional offices.[289] The program is thus able to handle the several hundred thousand complaints received annually only by channeling the complaints to the source of the problem and then monitoring the response of the source. Unlike the classical ombudsman who performs an independent review and then seeks to persuade on the basis of his conclusions from the review, the Taxpayer Ombudsman normally sets in motion a reexamination at the operational level and monitors the outcome. Because the problems handled in the program generally arise from mechanical errors in filing or processing rather than legal or policy judgments, this approach seems entirely adequate.[290]

The Taxpayer Ombudsman is non-statutory. The function has, however, received Congressional encouragement and praise. In fact, it is widely assumed that if the office were administratively discontinued, it would be legislatively reconstituted.[291]

b. The Panama Canal Ombudsman (1979)

The Panama Canal Act of 1979, implementing the Panama Canal Treaty, establishes within the executive branch a Commission to maintain and operate the canal and its related facilities.[292] In addition to various Commission administrative positions, the Act establishes within the Commission an Office of Ombudsman. The Ombudsman is authorized "to receive individual complaints, grievances, requests, and suggestions of employees (and their dependents) of the Commission and other departments and agencies of the United States ... conducting operation before October 1, 1979 [in the Canal Zone] concerning administrative problems, inefficiencies, and conflicts caused within the departments and agencies of the United States ... as a result of the implementation of the Panama Canal Treaty of 1977 and related agreements."[293] The ombudsman is appointed by the Commission and has authority to "make findings" and "render assistance" with respect to any complaint and "make appropriate recommendations to the Commission."[294] The legislation also provides that establishment of the office "shall not affect any procedures for grievances, appeals, or administrative matters in any ... provision of law or ... regulation."[295]

The office was apparently established to handle anticipated problems resulting from the transfer of functions and employees from the Panama Canal Company and the Canal Zone government to the Commission. The jurisdiction of the ombudsman is thus extremely limited and the problems extraordinarily specialized. The Ombudsman is physically located in the Canal Zone and reported handling 1962 matters in fiscal year 1985.[296] The Office terminates upon the expiration of the Panama Canal Treaty.

c. The Resource Conservation and Recovery Act Ombudsman (1984)

The Resource Conservation and Recovery Act directs the Administrator of the Environmental Protection Agency to establish an Office of Ombudsman "to receive individual complaints, grievances, [and] requests for information submitted by any person with respect to any program or requirement under [the hazardous waste management laws and Superfund].[297] The Ombudsman is authorized to "render assistance" with respect to complaints and to "make appropriate recommendations to the Administrator."[298] The legislation also provides that the establishment of the Office "shall not affect any procedures for grievances, appeals, or administrative matters in any other provision ... of law or ... regulation."[299]

Because of administrative delay within EPA, the Office was not established and filled until May 12th of this year. The Office, which has only begun to operate, consists of the

Ombudsman, a part-time professional, and clerical support. It is in the process of establishing an operating system and has begun to publicize its existence, including the availability of toll-free telephone number.[300] Under the legislation, the Office ceases to exist four years after November 8, 1984, the date of enactment.[301]

d. Federally-Mandated State Ombudsman for Long-Term Care for the Elderly

Certain federal financial assistance to state supported facilities for long-term care for older individuals administered by the Department of Health and Human Services[302] is conditioned upon the state establishing a "long-term care ombudsman program" which provides an individual who will:

> (i) investigate and resolve complaints made by or on behalf of older individuals who are residents of long-term care facilities relating to administrative action which may adversely affect the health, safety, welfare, and rights of such residents;
>
> (ii) monitor the development and implementation of Federal, State, and local laws, regulations, and policies with respect to long-term care facilities in that State;
>
> (iii) provide information as appropriate to public agencies regarding the problems of older individuals residing in long-term care facilities;
>
> (iv) provide for training staff and volunteers and promote the development of citizen organizations to participate in the ombudsman program; and
>
> (v) carry out such other activities as the Commissioner [on Aging] deems appropriate.[303]

While the general duties assigned to these officials are traditional ombudsman-like functions, the settings in which they act are quite removed from typical federal administration. The mandate arose largely from the success of some state-initiated programs in the area. It appears that the quality of the programs varies from state to state, but on the whole the mandate is desirable.

e. The Proposed Social Security Beneficiary Ombudsman

The House-passed version of the Social Security Reform Act of 1986 establishes the Social Security Administration as an independent agency in the executive branch.[304] Under the bill, a Presidentially-appointed Board governs the Administration. Within the Administration there is created an Office of the Beneficiary Ombudsman, headed by an ombudsman appointed by the Board. The Ombudsman is directed to:

> (A) to represent within the Administration's decisionmaking process the interests and concerns of beneficiaries under the old-age, survivors, and disability insurance program under title II and the supplemental security income program under title XVI;
>
> (B) to review the Administration's policies and procedures for possible adverse effects on such beneficiaries;
>
> (C) to recommend within the Administration's decisionmaking process changes in policies which have caused problems for such beneficiaries;
>
> (D) to help resolve the problems under such programs of individual beneficiaries in unusual or difficult circumstances as determined by the Commissioner; and
>
> (E) to represent within the Administration's decisionmaking process the views of beneficiaries in the design of forms and the issuance of instructions.[305]

The functions assigned by the bill are similar to those of the Taxpayer Ombudsman. The systems of administration are similar in both the volume of actions taken and their importance to the affected parties and in the potential for error or misunderstanding. The proposed Beneficiary Ombudsman, like the Taxpayer Ombudsman, would act on individual complaints only in certain circumstances and would seek to identify systemic problems and represent affected interests in the policymaking process. The legislation also directs the Board to assure sufficient staff for the office and contemplates field as well as central office personnel.[306]

4. Use of the Ombudsman in Access Disputes

The ombudsman model, as such, is not used in any state freedom of information scheme. The New York State Committee on Open

Government, discussed earlier,[307] does however function in some ways as an ombudsman. The most fully developed ombudsman schemes for access disputes are foreign. The Canadian and Australian freedom of information acts were based in large part on the United States act and experience in its administration. Both use an ombudsman as a dispute processor.

a. The Canadian Commissioner of Information

An earlier section of this study describes briefly the dispute resolution structure of the Canadian Access to Information Act and broadly the role of the Information Commissioner, an ombudsman office based closely on the classical model.[308] The experience of the Commissioner's Office in the first three years of operation under the Canadian Act provides a valuable opportunity to consider in some detail the ombudsman function applied to access disputes.

Under the Canadian Act, a party may complain to the Commissioner of the failure of a government institution (agency) to comply with a substantive or procedural aspect of the access law, including time requirements and fee provisions.[309] A complaint to the Commissioner is a prerequisite to seeking judicial review under the Act of the agency action. The Commissioner is obliged to investigate every complaint.[310] Complaints are initially received in person, by toll-free telephone, or in writing, but are always reduced to writing when a file is opened. Each opened file is immediately assigned to an investigator and entered into a computerized tracking system.[311] When the investigation is begun, the investigator undertakes to collect informally from the complainant and the agency as much additional information concerning the complained-of action or inaction as is possible. Where required by the nature of the complaint, the records in question are normally examined in the course of an investigation.

When a complaint appears justifiable, attempts are made to resolve it during the investigation.[312] This may include sending a report of tentative findings to an agency official. Successfully resolved complaints of this type are classified by the Commissioner as "Supportable--Resolution Negotiated."[313] When a complaint is justifiable, but not amenable to informal resolution, a report is sent to the agency, and these cases are classified "Supportable--Report to Minister."[314] Many of these complaints are thereafter resolved by the agency, particularly complaints of delay where the records are ultimately released. If the complaint does not appear supportable, the complainant is notified and given an opportunity to "make representations." Unless the argumentation of the complainant persuades the Commissioner, the complaint is dismissed and classified "Unsupportable--Dismissed."[315]

In the three year period since the act became effective, the number of complaints closed and their dispositions were as follows:[316]

1983

| Finding | Well-Founded | Not Supportable | No Finding | Total |
|---|---|---|---|---|
| Number | 6 | 15 | 25 | 46 |
| Percent | 13.04% | 32.61% | 54.35% | 100% |

1984

| Finding | Well-Founded | Supportable | Not Supportable | Total |
|---|---|---|---|---|
| Number | 21 | 55 | 113 | 189 |
| Percent | 11.11% | 29.10% | 59.79% | 100% |

1985

| Finding | Well-Founded | Supportable | Not Supportable | Total |
|---|---|---|---|---|
| Number | 55 | 41 | 194 | 290 |
| Percent | 18.97% | 14.13% | 66.90% | 100% |

For the complaints closed in the last two years, the government action taken was as follows:[317]

Well-Founded Complaints

| | 1984 | | | 1985 | | |
|---|---|---|---|---|---|---|
| Category | Report to Minister | | | Report to Minister | | |
| | Resolved | | | Resolved | | |
| Substantive | in full | in part | Disputed | in full | in part | Disputed |
| | 3 | 1 | 3 | 6 | 13 | 4 |
| Delay | Not Disputed | | Disputed | Not Disputed | | Disputed |
| | 14 | | -- | 26 | | 4 |

Supportable Complaints

| | 1984 | | | 1985 | | |
|---|---|---|---|---|---|---|
| Category | Negotiated | | Discontinued | Negotiated | | Discontinued |
| | Resolved | | | Resolved | | |
| Substantive | in full | in part | No Action | in full | in part | No Action |
| | 19 | 22 | 3 | 5 | 27 | 3 |
| Delay | Late Disclosure | | No Action | Late Disclosure | | No Action |
| | 2 | | 1 | -- | | 1 |

Not Supportable Complaints

| | 1984 | | 1985 | |
|---|---|---|---|---|
| Category | Dismissed | Discontinued | Dismissed | Discontinued |
| Substantive | No Action | | No Action | |
| | 54 | 4 | 109 | 5 |
| Delay | No Action | | No Action | |
| | 22 | 2 | 28 | 3 |

These figures only provide a skeletal view of quantity and impact of the Commissioners. The details would provide insight as well. Yet within the limitations of assessing the results

only statistically, it appears that the Commissioner has succeeded in bringing some cases to a more favorable resolution for the complainant that the original agency action. There is, however, only limited data available that would reflect what proportion of the well-founded or supportable cases were subsequently taken to court or, also importantly, what proportion of the non-supportable cases reached court.[318] Either figure would be helpful in assessing the success of the system in limiting the number of cases that require judicial treatment. In any event, it is arguable that the relatively few access cases totally that have reached the Canadian courts thus far would not represent a reliable sample. It is clear nonetheless that in three years the Information Commissioner has produced significant case-specific, if not systemic, results.[319]

The Commissioner's office consists of the Commissioner, two Assistant Commissioners, a Legal Counsel, a Director of Complaint Investigations, eight investigators, an administrative assistant to the Commissioner and a five-person support staff.[320] The Commissioner is appointed for a term of seven years by the Governor in Council, after approval by a vote of both the Senate and the House of Commons. Administrative staff in the financial, personnel, and communications areas is shared with the Office of the Privacy Commissioner.

The workload of the Office is affected significantly by the volume of records at issue in a particular complaint, as well as by factors of complexity and novelty. Investigators carry a caseload of 20-40 complaints and open the investigations in the order in which the complaints are received.[321] The order is not necessarily preserved as the investigation proceeds. Newer, but easier, cases are often resolved ahead of older, but more difficult ones. Of the 645 complaint files opened between July 1, 1983 and March 31, 1986, the range of elapsed time between receipt of a complaint to a report to the complainant was roughly from one month to twenty-five months; the median elapsed time was approximately four months; and the mean time five months.[322] For files closed in the fiscal year ending March 31, 1986, investigator time averaged roughly 25 hours per case.[323] The Commissioner's expressed goal for processing time is two to three months.[324]

In addition to the complaint-processing function, the Commissioner is authorized to bring, on behalf of a complainant, an action for judicial review of an agency decision on a complaint found to be supportable where the agency has rejected the report.[325] This function departs significantly from the classical ombudsman model. As of May, 1986, the Commissioner had exercised this authority in four cases and had intervened in three others. The Commissioner is also authorized to make special reports to the Parliament.

The Access to Information Act is currently undergoing a mandatory three-year Parliamentary review. It appears that the Commissioner will receive high marks for putting into operation a previously untested procedural system under new and controversial substantive legislation. The thoroughness and firm impartiality that the Commissioner has come to stand for, however, also forms the basis for some criticism. With rapidly growing numbers of complaints, acting on each complaint fully has produced a degree of delay that even the Commission considers undesirable.[326] This appears to be largely a resource problem. Additionally, the Commissioner has been criticized in some quarters for taking too neutral a posture. These critics argue that the Commissioner should function primarily as a requester advocate.[327] Both from the standpoint of the traditional ombudsman model and the nature of the access dispute, the Commission argues that the role would be inappropriate.[328]

b. The Australian Commonwealth Ombudsman

The Australian Freedom of Information Act,[329] which became effective in December 1982, follows the American model of two-levels of agency consideration of a request before external review. External review, as in both the American and the Canadian systems, culminates with a judicial proceeding. Unlike either the American or Canadian systems, however, an additional level of review is available in most cases through the Administrative Appeals Tribunal.[330] For the classes of cases not subject to this level of intermediate review, a form of advisory review is available through the Documents Review Tribunal.[331] Before proceeding in either forum, a requester may complain to the Commonwealth Ombudsman.[332] A complaint to the Ombudsman, however, is not a prerequisite either to intermediate administrative reivew or final judicial review.

The Commonwealth Ombudsman, unlike the Canadian Information Commissioner, is a general rather than special purpose ombudsman. His office, established under the Ombudsman Act of 1976,[333] follows the Scandinavian model. His freedom of information functions flow in part from his general authority and in part from special provisions of the Freedom of Information Act. These functions are (1) investigating complaints concerning agency performance under the Act, (2) reporting to the Public Service Board certain matters of misconduct, (3) representing requesters before the Administrative Appeals Tribunal and (4) reporting annually to Parliament.[334]

The FOI functions of the Ombudsman are conducted under the supervision of a Deputy Ombudsman whose jurisdiction includes matters other than freedom of information.[335] The staff consists of approximately seven investigators and two administrative/clerical employees.[336] Roughly 20% of the staff

resources are devoted to freedom of information matters, and virtually all of these resources are devoted to complaint processing.[337] In the period since the Act became effective the number of FOI complaint files opened annually were as follows:[338]

| 1983 | 1984 | 1985 | 1986 |
|---|---|---|---|
| 35 | 70 | 142 | 91 |

In addition to these "formal" (written) complaints, roughly 1500 oral complaints were also received, as well as a number of formal complaints that had an FOI component but which dealt primarily with other matters within the Ombudsman's jurisdiction.[339]

Once an FOI complaint file has been opened an investigator makes an initial contact with the agency, by letter or telephone depending on the nature of the complaint, to advise of the complaint and to obtain a preliminary response. "[W]hen matters [can] be resolved informally over the phone, with little or no paperwork, that course [is] followed; where matters [can] not be resolved in this manner, an investigation might typically involve correspondence with both agency and complainant (e.g., to clarify issues, test agency propositions, or explore whether any consensus existed), examination of files concerning the agency's processing of the request, and examination of documents to which access has been refused."[340] In the course of the investigation, the matter is often brought to an informal resolution. If the matter cannot be resolved informally, the office usually reports by letter the results of the investigation. Rarely does the office issue a formal report.[341]

The Ombudsman describes the value of complaint processing function in FOI cases as follows:

> Before the parties even consider having the AAT resolve a dispute, Ombudsman investigation of the applicant's complaint can offer tangible benefits to both applicant and agency. Like the AAT, my office is expected to make an impartial and objective assessment of the documents and the alleged interests of both parties. Our investigation should clarify exactly what documents are required, and at least lead to greater precision in the reasons advanced for the refusal to give access and in articulating the countervailing public interest served by release. Inspection of the relevant documents permits my office to offer constructive advice to both parties which often narrows

> the dispute and in some cases has resolved it.
>
> * * *
>
> Our intervention can prevent disputes from unnecessarily going to the AAT; and, in those cases where there are issues best resolved by a tribunal or court, it is possible, should we first investigate, that there may result better identification of relevant evidence and greater precision in defining the issues.[342]

Of the complaints processed to conclusion from among the total 339 complaints received through June 30, 1986, the results have been categorized by the Ombudsman as follows:[343]

| Outcome | Percentage |
|---|---|
| Further explanation or clarification of matters in dispute | 32% |
| Process expedited following complaint of delay | 8 |
| Increased access to documents | 15 |
| Procedure improved/criticized/reviewed | 16 |
| Finding of no defective administration | 19 |
| Charges reduced/refunded | 1 |
| Mediation role | 9 |

Of these complaints, approximately half involved questions of exemptions and the remainder involved complaints of delay or other failures in administration.[344] Normally, the office does not intervene in cases until agency processing has been completed. Where special "disadvantage" to the requester would result from the delay, the office may proceed before final agency action.[345] The office does undertake or complete investigations where the requester has appealed to the AAT.[346] Only on one occasion has the Ombudsman exercised his authority to represent a requester before the AAT. The Ombudsman has never exercised his authority to report misconduct directly to the Public Service Board.

5. A Proposal for an FOIA Ombudsman

As suggested earlier in this study, exclusive reliance on judicial proceedings for resolution of access claims remaining in disputes after final agency action limits the practical availability of neutral intervention to those parties who can afford the cost and delay inherent in that process and forces, in many cases, even those parties to use a mechanism more complex and formal than may be necessary to resolve their particular claim.[347] If the establishment of an administrative tribunal as a court substitute is, on balance, considered undesirable or infeasible, the implementation of a variant of the Canadian information ombudsman may provide some relief from the burdens of judicial proceedings and should be considered as an alternative to the Authority.

a. The Functions of an American FOIA Ombudsman

Given the variety of settings in which the ombudsman is used and the variation in functions assigned to different ombudsmen, adaptation of the model to FOIA requires consideration not only of the particular needs of an access case but also of the governmental structure in which the dispute arises. The goals of the system should be to provide: (1) an objective evaluation of disputes now excluded as a practical matter from the judicial process or forced into that process because of the lack of an alternative, (2) an opportunity for possible informal resolution of those disputes, and (3) a mechanism for the identification of systemic access problems.[348] These goals could be accomplished only by a system with a jurisdiction and scope of authority sufficiently limited to preclude the generation of an unmanageable workload and to avoid the perception of the ombudsman as a primary decisionmaker in the FOIA process. Moreover, accomplishment of these goals would depend upon an institutional capacity to differentiate among the needs of categories of complaints and deploy resources on the basis of those differentiations. Finally, their accomplishment would require an office of sufficient stature and independence to both warrant requester confidence and assure agency respect.

b. Jurisdiction and Scope of Authority

As discussed earlier, a large proportion of complaints with respect to agency implementation of FOIA concern processing delays. These complaints are not now effectively dealt with by the courts and there is little reason to believe that any action other than a reallocation of resources would produce different results systemically.[349] On occasion, however, delay is attributable to factors other than those which have become

acceptable in FOIA administration. Delay for the purpose of undermining the time-value of information, for example, is a flagrant abuse. These situations are more susceptible to case-specific intervention. For these reasons, as well as for workload control and considerations of primary jurisdiction, ombudsman intervention should not occur until the conclusion of agency processing, unless a complaint alleges an extraordinary issue of delay or asserts that a dispute concerning a substantive, but ancillary, issue such as fee or fee waiver is delaying the processing of the request.[350] Thus, in most cases the ombudsman will be addressing a complaint in a case in which a final agency determination has been made and a fully-developed case file exists at the agency.

The ombudsman would nevertheless find it necessary to process every complaint in a limited fashion to make the jurisdictional determination. While this could represent a significant administrative task, it would seem entirely justifiable not only as a essential step in limiting jurisdiction but also as an auditing mechanism that could identify general problem areas.[351] A considerable number of contacts with the ombudsman would likely be in the nature of inquiries rather than complaints. These "where" or "how to" questions should also be handled and would probably consume little time of an experienced staff.[352]

In complaints within the scope of his jurisdiction, the ombudsman's formal authority should be limited to investigating and reporting. He should have access to knowledgeable persons within the complained-against agency and, when necessary, to the case file and the disputed records, which the ombudsman would be required to keep confidential. In cases that are not resolved in the course of the investigation, the ombudsman would report his findings to the complainant and the agency official responsible for the action. He would possess no power to compel agency adherence to his views, nor should his report be given deference in any subsequent judicial proceeding.[353] Complaining to the Ombudsman would not be a prerequisite to the judicial remedy and the Ombudsman would have no authority to sue on behalf of a complainant.[354]

c. Informal Resolution

At any point in an investigation that the ombudsman deemed it appropriate to do so, he would be free to seek to persuade the agency or the requester informally of the desirability of a particular resolution of the dispute.[355] In the case of persuasion directed toward an agency, the ombudsman's position might be based on his conclusion, for example, that the requested records are non-exempt or that partial discretionary disclosure of arguably exempt records could satisfy the

requester without harm to the agency or another protected interest. In the case of persuasion directed toward the requester, the ombudsman's position might be based on his view that the records the requester seeks are of a category so broadly exempt that the little information that might ultimately be released would not justify the processing fees or that a mass of records that the requester seeks does not contain any (or any non-exempt) information of the kind sought. Under certain circumstances the ombudsman might even bring together the requester and an agency official to better focus the complaint and to exchange views on how to bring the matter to a fair and expeditious conclusion. No useful purpose would be served by confining the ombudsman to particular methods for resolving a complaint short of reporting. Experience would establish the boundaries.[356]

d. The Posture of the Ombudsman

Ombudsmen are sometimes referred to as "citizen advocates." If in the FOIA context that translates to "requester advocate," the ombudsmen will have difficulty maintaining sufficient credibility with the agencies to persuade effectively. If on the other hand the ombudsman becomes "agency apologist," public confidence in the integrity of the process will be lost. It is tempting to suggest that the proper posture for the ombudsman to assume is "advocate for the policies of the Act." If the neutral implication of that phrase had meaning, then that standard would be the desirable one--a commitment to openness in government subject to respect for the legitimate interests protected by the exemptions. In practice, the content of those words is often in doubt and if sought to be used seriously by the ombudsman to guide his conduct could involve him in the resolution of fundamental questions of policy.[357] It is generally agreed that an ombudsman must "eschew controversial questions of momentous policy; [his] function is not that of the policymaker, innovator or advocate of social change, but that of testing administration by accepted standards."[358] The FOIA ombudsman would have at his disposal a well-developed, if complex, body of caselaw to apply to the issues presented to him. When acting under his reporting authority, he should generally limit himself to those standards and, where there appears to be no controlling standard, he should acknowledge the uncertainty. Even when acting less formally he should be sensitive to the important relationship between the accepted norm and his persuasive authority.

e. The Position of the Ombudsman in Government

The two most important institutional characteristics of the FOIA ombudsman would be independence and stature--independence to promote the objective consideration of complaints and stature to enhance the persuasive authority of the office. Inasmuch as the office exercises no binding decisional authority, stature is arguably the more important of the two characteristics.

A free-standing ombudsman appointed by the President or the Congress to fill a statutorily-created office represents one extreme of positioning the ombudsman in government.[359] Independence would depend to some extent upon the nature of the appointment. Stature would flow from the high-level appointment and the office itself, as well as from the individual's background and experience. At the other extreme lies the creation of an office by executive order or agency regulation and the placement of the office within an existing administrative structure.[360] Upon reflection the extremes may not be as far apart as might be first assumed. What is sacrificed in terms of independence with the non-statutory ombudsman may be compensated for by the stature that would flow from a strategically-placed office having the support of the administration. This seems particularly important where the FOIA Ombudsman, unlike, for example, the Taxpayer Ombudsman, is not an institutional official but rather a cross-institutional official.[361] Whether statutory or non-statutory, legislative or executive, the additional consideration of efficiency makes desirable the placement of the office in an existing administrative structure.[362] While the advantages and disadvantages of these permutations can be addressed in broad terms, it is difficult to decide on the basis of those abstractions. A more practical approach is to consider whether an existing structure could provide a suitable setting for the office, and if not, why?

f. The Ombudsman Within the Department of Justice

The Department of Justice currently performs two major functions under FOIA on essentially a government-wide basis. It defends most agencies in FOIA litigation, and it counsels most agencies with respect to their obligations under the Act. As noted above, incident to those functions and its implicit statutory compliance-promoting function, it performs on an extremely limited scale an access ombudsman-like function through the Office of Information and Privacy (OIP). Could that function be expanded and modified to attain within the Department an effective FOIA Ombudsman? To answer that question, it is necessary as a preliminary matter to understand how current OIP citizen complaint activity falls short.

First, the complaint function is not performed on a scale sufficient to have any meaningful impact. Even recognizing the imprecision and possible inconsistencies in accounting method over the years, it seems fair to say that the number of citizen complaints handled by OIP and its predecessors has been miniscule, ranging from roughly 10 to 20 per year.[363] Undoubtedly, this is due in large part to the absence of any complaint soliciting activity. In turn the apparent reluctance to publicize the availability of the service is due, in part, to the long-standing absence of a clear delineation within the Department of a repsonsibility to perform the service.[364]

Second, the function is performed on essentially an ad hoc basis and thus lacks the regularization that a meaningful complaint-handling system demands. In large part, this simply reflects the extremely small scale on which the activity is conducted. Nevertheless, basic questions such as the authority of the office to examine documents, the channels through which formal agency communications are to be made, and even the scope of the process itself are administratively finessed.[365]

Third, the function cannot effectively be performed by the Department given the current structure for carrying out its FOIA compliance-promoting role. Apart from the provision of general guidance in various forms, OIP gives case-specific advice to the agencies and the Civil Division. The advice is given in what is essentially an attorney-client or house counsel relationship. Without questioning the consistency of the activity with the policies of the Act, the existence of the relationship undermines at least the appearance of the performance of a neutral, complaint-handling function contemplated by the ombudsman model--not simply in specific cases that reach the office in both forms, but generally. Not as an ethical matter, but rather as a matter of necessary independence and public confidence in the integrity of the process, the two functions can not be performed under the same immediate supervision.

If Justice is otherwise a suitable setting for the ombudsman office, then these shortcomings are relatively easily correctable within the Department.[366] If Justice is not, then the modest ombudsman-like function now performed there should be terminated in favor of a more substantial system external to the Department. The issue, thus, should be the suitability of the Department as an institutional home for the FOIA ombudsman rather than of the sufficiency of the current ombudsman-like activity in OIP.

This question, as noted earlier, revolves around concerns of independence and stature. If the paramount concern were independence, then the Department should not be chosen; the appointment of a free-standing ombudsman by the President for a term of years with removal limited to cause would best serve that interest. But unlike the overriding need for independence

in the case of a decisional substitute like the Authority, the persuasive capacity upon which the ombudsman depends can be enhanced by association with the highest authority in the administrative structure in which he operates. While no one official (not even the President) can be said to head a government-wide FOIA administrative hierarchy, the Attorney General bears the broadest responsibilities. His various FOIA roles give force to the views that are expressed by his subordinates. There are, of course, very real practical limits to this authority. Yet unless those limits are constantly tested by the work of a FOIA ombudsman, his association with the Attorney General should be advantageous.

If the ombudsman seeks only to encourage adherence to FOIA norms and avoids policy controversies, the need to resort to the authority of the Attorney General should be minimal. In fact, an ombudsman operating outside the chain of Departmental authority could find his positions to be at odds with the counseling or litigating positions of the Department. This is not to suggest, however, that the ombudsman's persuasive role should be limited to agency action that would trigger a Department "refusal to defend." The formal reporting authority itself has some force and, realistically, the ombudsman's opportunity for informal persuasion can never be more than that--an opportunity for persuasion.

The advantage that the ombudsman may gain from the association with the Department in dealing with the agencies could, of course, be offset in the overall process if the connection is perceived as evidence of disabling bias. This problem transcends FOIA policy changes at the Department that reflect political changes, though it may be exacerbated by them. It is the tension created by the combination of compliance and defense functions in the Department. If, in the long run, the Department's compliance role is considered valuable notwithstanding this tension, then it would seem ironic to allow the difficult-to-quantify risk of such perception to discourage the establishment of an office that could lead to a fuller and more visible performance of this function. On balance, the Department seems a reasonable choice.

The Office of FOIA Ombudsman could be established as a separate office reporting through the same channels as the Office of Information and Privacy which should maintain its current agency guidance and litigation support functions. The Attorney General presumably has authority to effect what would amount to a reorganization and expansion of a function now performed in OIP.[367] Given the need, however, for increased budgetary support and arguably for authority to conduct investigations, some legislative action may be necessary. With the possible exception of a Presidentially-established office, the creation of any such office outside the Department of Justice would clearly require legislation.

D. A Pilot Project

Any proposal for procedural reform, particularly a proposal that significantly alters the status quo, raises innumerable questions of detail and necessarily treads in areas of uncertainty. The Authority structure suggested earlier clearly fits that characterization. Even the alternative Ombudsman approach sets out only the rough contours. Apart from the prospect for refinement and improvement of the proposals through the process of criticism, consideration should be given to testing them through pilot projects.

For the Authority, a modest project of this nature could be structured by assigning an administrative law judge and an individual who could function as a conciliator to the Office of the Archivist of the United States. The ALJ and the conciliator would receive staff support from that office and the Archivist would function as the "Authority" head. Requesters receiving final denials from certain selected agencies would be informed of the existence of the project and of the opportunity to seek the consent of the agency for submission of the matter to the "Authority" rather than seeking de novo district court review. By agreeing to submit the matter, however, the requester would not waive the right to bring the court action if he remained unsatisfied after the "Authority" proceeding. Similarly, the agency would be free to refuse to comply with the decision if it was unsatisfied, thus forcing the requester to sue if he wished to pursue the matter.[368]

Rules of procedure for the "Authority" would have to be developed and a research method for the project defined. In this regard much could be learned from the court-annexed arbitration projects now operating in several federal court districts.[369] The major limitations of the project for the purposes of testing the Authority concept would be the non-binding nature of the proceeding and absence of any mechanism for forcing cases into the process. Yet these limitations would be difficult to overcome in a true pilot program.

For the Ombudsman, a pilot project simply could be established by the Department of Justice with the cooperation of few other agencies. Unlike the pilot project for the Authority, the project could operate under conditions that would be virtually identical to the full scale program, without requiring the waiver of any rights. The cooperating agencies would notify requesters by an acknowledgement letter in response to a request of the availability of the ombudsman. The Departmentally-established Ombudsman would then act on complaints received by investigation and reporting.

Apart from testing the particular proposals, either pilot would be a source of valuable data concerning access dispute processing. Without such projects much critical data for access

policymaking simply cannot be obtained. Any pilot undertaken should be designed carefully to produce that information.[370]

## E. Conclusion

At the heart of post-agency access dispute processing is the need for objectivity, some opportunity for document or index review, and careful application of a specialized body of law. This need is often in tension with the further need for prompt and cost-effective resolution of the dispute. The adjudicative entity recommended here offers a meaningful prospect for fulfilling these needs in a manner superior to that now provided by the federal district courts. The basic structure and function of the entity, rather than every detail of its operation, is the essence of the recommendation. The ombudsman function recommended alternatively likewise offers a meaningful prospect for meeting these needs in many cases short resort to adjudication but without any restriction of the existing judicial remedy. Within these recommendations lies the opportunity for improving the administration and ensuring the continued vitality of the public access system.

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### FOIA Caseload and Case Processing


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TABLE 1

Court Filings and Terminations

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 | Total |
|---|---|---|---|---|---|---|---|
| Filed | 627 | 507 | 381 | 454 | 479 | 565 | 3013 |
| Terminated | 558 | 530 | 450 | 429 | 466 | 573 | 3006 |

TABLE 2

Time Intervals/All Circuits

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 |
|---|---|---|---|---|---|---|
| TOTAL CASES | | | | | | |
| Number of Cases | 558 | 530 | 450 | 429 | 466 | 573 |
| 10% Less Than | 2 | 2 | 2 | 2 | 2 | 2 |
| Median | 7 | 8 | 10 | 8 | 7 | 8 |
| 10% More Than | 21 | 23 | 31 | 33 | 26 | 54 |
| NO COURT ACTION | | | | | | |
| Number of Cases | 224 | 191 | 149 | 143 | 181 | 270 |
| 10% Less Than | 2 | 1 | 2 | 1 | 1 | 1 |
| Median | 6 | 5 | 7 | 6 | 5 | 6 |
| 10% More Than | 19 | 19 | 28 | 29 | 25 | 57 |
| BEFORE PRETRIAL | | | | | | |
| Number of Cases | 278 | 281 | 259 | 239 | 250 | 273 |
| 10% Less Than | 2 | 2 | 3 | 2 | 3 | 3 |
| Median | 8 | 9 | 11 | 9 | 8 | 9 |
| 10% More Than | 18 | 23 | 30 | 33 | 22 | 54 |
| DURING OR AFTER PRETRIAL | | | | | | |
| Number of Cases | 46 | 41 | 30 | 41 | 30 | 24 |
| 10% Less Than | 5 | 3 | 6 | 4 | 4 | 4 |
| Median | 12 | 8 | 16 | 13 | 15 | 14 |
| 10% More Than | 27 | 24 | 42 | 37 | 38 | 29 |
| TRIAL | | | | | | |
| Number of Cases | 10 | 17 | 12 | 6 | 5 | 6 |
| 10% Less Than | 1 | 8 | 2 | 6 | * | * |
| Median | 11 | 16 | 13 | 9 | * | * |
| 10% More Than | 27 | 32 | 21 | 12 | * | * |

TABLE 3

Time Intervals/D.C. Circuit

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 |
|---|---|---|---|---|---|---|
| TOTAL CASES | | | | | | |
| Number of Cases | 214 | 221 | 188 | 180 | 178 | 211 |
| 10% Less Than | 2 | 2 | 2 | 1 | 2 | 1 |
| Median | 6 | 6 | 8 | 7 | 6 | 7 |
| 10% More Than | 15 | 20 | 29 | 29 | 19 | 22 |
| NO COURT ACTION | | | | | | |
| Number of Cases | 88 | 92 | 61 | 66 | 74 | 103 |
| 10% Less Than | 2 | 1 | 2 | 1 | 1 | 1 |
| Median | 5 | 4 | 6 | 5 | 5 | 4 |
| 10% More Than | 14 | 19 | 23 | 29 | 19 | 24 |
| BEFORE PRETRIAL | | | | | | |
| Number of Cases | 115 | 118 | 125 | 109 | 99 | 100 |
| 10% Less Than | 2 | 3 | 3 | 2 | 3 | 3 |
| Median | 8 | 8 | 9 | 9 | 7 | 8 |
| 10% More Than | 16 | 22 | 30 | 29 | 20 | 20 |
| DURING OR AFTER PRETRIAL | | | | | | |
| Number of Cases | 10 | 8 | 1 | 4 | 4 | 8 |
| 10% Less Than | 4 | 6 | * | 1 | * | * |
| Median | 10 | 7 | * | 4 | * | * |
| 10% More Than | 25 | 15 | * | 14 | * | * |
| TRIAL | | | | | | |
| Number of Cases | 1 | 3 | 1 | 1 | 1 | * |
| 10% Less Than | 1 | 1 | * | 1 | * | * |
| Median | 2 | 15 | * | 11 | * | * |
| 10% More Than | 2 | 16 | * | 11 | * | * |

TABLE 4

Time Intervals/1st Circuit

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 |
|---|---|---|---|---|---|---|
| TOTAL CASES | | | | | | |
| Number of Cases | 18 | 15 | 20 | 15 | 20 | 10 |
| 10% Less Than | 4 | 2 | 2 | 1 | 2 | 2 |
| Median | 7 | 9 | 13 | 8 | 8 | 8 |
| 10% More Than | 27 | 32 | 35 | 39 | 52 | 13 |
| NO COURT ACTION | | | | | | |
| Number of Cases | 7 | 2 | 6 | 3 | 5 | 5 |
| 10% Less Than | 2 | 1 | * | 1 | * | * |
| Median | 7 | 1 | * | 1 | * | * |
| 10% More Than | 10 | 5 | * | 1 | * | * |
| BEFORE PRETRIAL | | | | | | |
| Number of Cases | 6 | 9 | 10 | 8 | 12 | 5 |
| 10% Less Than | 5 | 2 | 1 | 4 | 2 | * |
| Median | 7 | 9 | 13 | 10 | 5 | * |
| 10% More Than | 13 | 20 | 35 | 28 | 52 | * |
| DURING OR AFTER PRETRIAL | | | | | | |
| Number of Cases | 3 | 3 | 3 | 4 | 3 | * |
| 10% Less Than | 1 | 1 | * | 1 | * | * |
| Median | 5 | 13 | * | 6 | * | * |
| 10% More Than | 40 | 40 | * | 39 | * | * |
| TRIAL | | | | | | |
| Number of Cases | 2 | 1 | 1 | * | * | * |
| 10% Less Than | 1 | 1 | * | * | * | * |
| Median | 15 | 32 | * | * | * | * |
| 10% More Than | 27 | 32 | * | * | * | * |

TABLE 5

Time Intervals/2nd Circuit

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 |
|---|---|---|---|---|---|---|
| TOTAL CASES | | | | | | |
| Number of Cases | 71 | 46 | 35 | 28 | 22 | 102 |
| 10% Less Than | 1 | 1 | 3 | 3 | 1 | 7 |
| Median | 5 | 7 | 16 | 20 | 8 | 54 |
| 10% More Than | 23 | 21 | 36 | 44 | 36 | 68 |
| NO COURT ACTION | | | | | | |
| Number of Cases | 19 | 22 | 14 | 12 | 15 | 47 |
| 10% Less Than | 1 | 2 | 2 | 2 | 1 | 6 |
| Median | 5 | 6 | 16 | 19 | 14 | 55 |
| 10% More Than | 23 | 21 | 34 | 44 | 40 | 69 |
| BEFORE PRETRIAL | | | | | | |
| Number of Cases | 43 | 19 | 17 | 9 | 5 | 50 |
| 10% Less Than | 1 | 1 | 3 | 3 | * | 7 |
| Median | 4 | 11 | 17 | 27 | * | 54 |
| 10% More Than | 18 | 26 | 29 | 46 | * | 66 |
| DURING OR AFTER PRETRIAL | | | | | | |
| Number of Cases | 9 | 5 | 3 | 7 | 2 | 5 |
| 10% Less Than | 4 | 1 | * | 8 | * | * |
| Median | 12 | 4 | * | 20 | * | * |
| 10% More Than | 24 | 18 | * | 37 | * | * |
| TRIAL | | | | | | |
| Number of Cases | * | * | 1 | * | * | * |
| 10% Less Than | * | * | * | * | * | * |
| Median | * | * | * | * | * | * |
| 10% More Than | * | * | * | * | * | * |

TABLE 6

Time Intervals/3rd Circuit

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 |
|---|---|---|---|---|---|---|
| TOTAL CASES | | | | | | |
| Number of Cases | 9 | 11 | 23 | 26 | 17 | 20 |
| 10% Less Than | 1 | 1 | 1 | 3 | 1 | 1 |
| Median | 5 | 8 | 9 | 7 | 6 | 7 |
| 10% More Than | 11 | 12 | 19 | 17 | 24 | 21 |
| NO COURT ACTION | | | | | | |
| Number of Cases | 3 | 4 | 5 | 4 | 5 | 13 |
| 10% Less Than | 1 | 1 | * | 1 | * | 1 |
| Median | 4 | 1 | * | 6 | * | 3 |
| 10% More Than | 8 | 2 | * | 15 | * | 9 |
| BEFORE PRETRIAL | | | | | | |
| Number of Cases | 4 | 6 | 13 | 16 | 8 | 6 |
| 10% Less Than | 1 | 8 | 1 | 3 | * | * |
| Median | 5 | 11 | 11 | 7 | * | * |
| 10% More Than | 18 | 12 | 18 | 17 | * | * |
| DURING OR AFTER PRETRIAL | | | | | | |
| Number of Cases | 1 | * | 4 | 6 | 4 | 1 |
| 10% Less Than | 1 | * | * | 5 | * | * |
| Median | 11 | * | * | 8 | * | * |
| 10% More Than | 11 | * | * | 13 | * | * |
| TRIAL | | | | | | |
| Number of Cases | 1 | 1 | 1 | * | * | * |
| 10% Less Than | 1 | 1 | * | * | * | * |
| Median | 2 | 5 | * | * | * | * |
| 10% More Than | 2 | 5 | * | * | * | * |

TABLE 7

Time Intervals/4th Circuit

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 |
|---|---|---|---|---|---|---|
| TOTAL CASES | | | | | | |
| Number of Cases | 28 | 14 | 21 | 19 | 13 | 19 |
| 10% Less Than | 4 | 1 | 2 | 1 | 1 | 1 |
| Median | 9 | 9 | 7 | 7 | 4 | 3 |
| 10% More Than | 20 | 20 | 25 | 44 | 11 | 9 |
| NO COURT ACTION | | | | | | |
| Number of Cases | 11 | 4 | 6 | 3 | 7 | 10 |
| 10% Less Than | 2 | 1 | * | 1 | * | 1 |
| Median | 5 | 3 | * | 24 | * | 3 |
| 10% More Than | 10 | 40 | * | 60 | * | 9 |
| BEFORE PRETRIAL | | | | | | |
| Number of Cases | 12 | 7 | 11 | 12 | 5 | 8 |
| 10% Less Than | 5 | 1 | 2 | 1 | * | * |
| Median | 10 | 10 | 11 | 6 | * | * |
| 10% More Than | 19 | 13 | 28 | 44 | * | * |
| DURING OR AFTER PRETRIAL | | | | | | |
| Number of Cases | 5 | 2 | 4 | 3 | 1 | * |
| 10% Less Than | 10 | 1 | * | 1 | * | * |
| Median | 21 | 9 | * | 6 | * | * |
| 10% More Than | 31 | 17 | * | 8 | * | * |
| TRIAL | | | | | | |
| Number of Cases | * | 1 | * | 1 | * | 1 |
| 10% Less Than | * | 1 | * | 1 | * | * |
| Median | * | 9 | * | 9 | * | * |
| 10% More Than | * | 9 | * | 9 | * | * |

TABLE 8

Time Intervals/5th Circuit

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 |
|---|---|---|---|---|---|---|
| TOTAL CASES | | | | | | |
| Number of Cases | 19 | 33 | 32 | 35 | 34 | 21 |
| 10% Less Than | 2 | 1 | 1 | 3 | 1 | 2 |
| Median | 12 | 9 | 12 | 15 | 7 | 11 |
| 10% More Than | 14 | 19 | 24 | 28 | 31 | 24 |
| NO COURT ACTION | | | | | | |
| Number of Cases | 5 | 10 | 11 | 13 | 9 | 7 |
| 10% Less Than | 1 | 1 | 1 | 1 | * | * |
| Median | 7 | 4 | 5 | 15 | * | * |
| 10% More Than | 10 | 13 | 18 | 21 | * | * |
| BEFORE PRETRIAL | | | | | | |
| Number of Cases | 12 | 17 | 19 | 18 | 21 | 12 |
| 10% Less Than | 1 | 2 | 7 | 2 | 1 | 3 |
| Median | 11 | 12 | 15 | 9 | 6 | 11 |
| 10% More Than | 13 | 19 | 24 | 32 | 19 | 24 |
| DURING OR AFTER PRETRIAL | | | | | | |
| Number of Cases | 1 | 3 | 1 | 3 | 4 | 2 |
| 10% Less Than | 1 | 1 | * | 1 | * | * |
| Median | 25 | 11 | * | 18 | * | * |
| 10% More Than | 25 | 16 | * | 26 | * | * |
| TRIAL | | | | | | |
| Number of Cases | 1 | 3 | 1 | 1 | * | * |
| 10% Less Than | 1 | 1 | * | 1 | * | * |
| Median | 4 | 18 | * | 16 | * | * |
| 10% More Than | 4 | 30 | * | 16 | * | * |

TABLE 9

Time Intervals/6th Circuit

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 |
|---|---|---|---|---|---|---|
| TOTAL CASES | | | | | | |
| Number of Cases | 19 | 31 | 25 | 21 | 31 | 26 |
| 10% Less Than | 1 | 3 | 2 | 2 | 2 | 1 |
| Median | 9 | 8 | 15 | 7 | 8 | 15 |
| 10% More Than | 25 | 23 | 29 | 29 | 24 | 51 |
| NO COURT ACTION | | | | | | |
| Number of Cases | 6 | 4 | 6 | 4 | 11 | 10 |
| 10% Less Than | 1 | 1 | * | 1 | 1 | 1 |
| Median | 1 | 11 | * | 2 | 5 | 15 |
| 10% More Than | 5 | 31 | * | 25 | 6 | 69 |
| BEFORE PRETRIAL | | | | | | |
| Number of Cases | 11 | 21 | 16 | 11 | 16 | 11 |
| 10% Less Than | 5 | 2 | 3 | 3 | 2 | 1 |
| Median | 13 | 9 | 17 | 7 | 11 | 17 |
| 10% More Than | 18 | 20 | 28 | 13 | 21 | 48 |
| DURING OR AFTER PRETRIAL | | | | | | |
| Number of Cases | 2 | 6 | 2 | 6 | 3 | 3 |
| 10% Less Than | 1 | 4 | * | 2 | * | * |
| Median | 25 | 5 | * | 14 | * | * |
| 10% More Than | 26 | 8 | * | 29 | * | * |
| TRIAL | | | | | | |
| Number of Cases | * | * | 1 | * | 1 | 2 |
| 10% Less Than | * | * | * | * | * | * |
| Median | * | * | * | * | * | * |
| 10% More Than | * | * | * | * | * | * |

TABLE 10

Time Intervals/7th Circuit

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 |
|---|---|---|---|---|---|---|
| TOTAL CASES | | | | | | |
| Number of Cases | 30 | 28 | 17 | 23 | 36 | 24 |
| 10% Less Than | 2 | 4 | 5 | 1 | 3 | 1 |
| Median | 7 | 10 | 20 | 9 | 6 | 4 |
| 10% More Than | 27 | 27 | 37 | 33 | 20 | 10 |
| NO COURT ACTION | | | | | | |
| Number of Cases | 6 | 6 | 4 | 8 | 10 | 8 |
| 10% Less Than | 2 | 1 | * | 1 | 1 | * |
| Median | 14 | 6 | * | 2 | 3 | * |
| 10% More Than | 27 | 11 | * | 7 | 8 | * |
| BEFORE PRETRIAL | | | | | | |
| Number of Cases | 20 | 16 | 11 | 13 | 23 | 14 |
| 10% Less Than | 1 | 5 | 5 | 1 | 4 | 1 |
| Median | 5 | 9 | 9 | 15 | 9 | 5 |
| 10% More Than | 28 | 26 | 30 | 35 | 27 | 9 |
| DURING OR AFTER PRETRIAL | | | | | | |
| Number of Cases | 4 | 4 | 1 | 1 | 3 | 1 |
| 10% Less Than | 1 | 1 | * | 1 | * | * |
| Median | 10 | 13 | * | 11 | * | * |
| 10% More Than | 27 | 33 | * | 23 | * | * |
| TRIAL | | | | | | |
| Number of Cases | * | 2 | 1 | * | * | 1 |
| 10% Less Than | * | 1 | * | * | * | * |
| Median | * | 17 | * | * | * | * |
| 10% More Than | * | 27 | * | * | * | * |

TABLE 11

Time Intervals/8th Circuit

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 |
|---|---|---|---|---|---|---|
| TOTAL CASES | | | | | | |
| Number of Cases | 19 | 15 | 18 | 14 | 16 | 17 |
| 10% Less Than | 3 | 4 | 2 | 1 | 1 | 3 |
| Median | 12 | 10 | 10 | 6 | 6 | 7 |
| 10% More Than | 27 | 23 | 15 | 28 | 16 | 51 |
| NO COURT ACTION | | | | | | |
| Number of Cases | 6 | 5 | 10 | 5 | 8 | 7 |
| 10% Less Than | 2 | 4 | 1 | 1 | * | * |
| Median | 9 | 5 | 5 | 4 | * | * |
| 10% More Than | 12 | 20 | 13 | 28 | * | * |
| BEFORE PRETRIAL | | | | | | |
| Number of Cases | 10 | 8 | 7 | 8 | 6 | 8 |
| 10% Less Than | 3 | 3 | * | 5 | * | * |
| Median | 10 | 13 | * | 13 | * | * |
| 10% More Than | 21 | 23 | * | 17 | * | * |
| DURING OR AFTER PRETRIAL | | | | | | |
| Number of Cases | 1 | 2 | 1 | 1 | 2 | 2 |
| 10% Less Than | 1 | 1 | * | 1 | * | * |
| Median | 37 | 5 | * | 5 | * | * |
| 10% More Than | 37 | 26 | * | 5 | * | * |
| TRIAL | | | | | | |
| Number of Cases | 2 | * | * | * | * | * |
| 10% Less Than | 1 | * | * | * | * | * |
| Median | 27 | * | * | * | * | * |
| 10% More Than | 29 | * | * | * | * | * |

TABLE 12

Time Intervals/9th Circuit

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 |
|---|---|---|---|---|---|---|
| TOTAL CASES | | | | | | |
| Number of Cases | 56 | 48 | 30 | 36 | 67 | 85 |
| 10% Less Than | 2 | 2 | 4 | 1 | 3 | 2 |
| Median | 8 | 9 | 16 | 6 | 9 | 6 |
| 10% More Than | 24 | 19 | 37 | 31 | 19 | 17 |
| NO COURT ACTION | | | | | | |
| Number of Cases | 32 | 22 | 14 | 12 | 27 | 43 |
| 10% Less Than | 2 | 1 | 2 | 1 | 1 | 1 |
| Median | 6 | 8 | 8 | 5 | 5 | 6 |
| 10% More Than | 25 | 15 | 34 | 40 | 17 | 11 |
| BEFORE PRETRIAL | | | | | | |
| Number of Cases | 19 | 22 | 10 | 20 | 38 | 40 |
| 10% Less Than | 2 | 3 | 2 | 1 | 3 | 3 |
| Median | 8 | 10 | 17 | 6 | 10 | 7 |
| 10% More Than | 19 | 23 | 51 | 17 | 17 | 17 |
| DURING OR AFTER PRETRIAL | | | | | | |
| Number of Cases | 3 | 2 | 5 | 2 | 1 | 1 |
| 10% Less Than | 1 | 1 | * | 1 | * | * |
| Median | 22 | 6 | * | 3 | * | * |
| 10% More Than | 22 | 19 | * | 33 | * | 1 |
| TRIAL | | | | | | |
| Number of Cases | 2 | 2 | 1 | 2 | 1 | 1 |
| 10% Less Than | 1 | 1 | * | 1 | * | * |
| Median | 11 | 8 | * | 6 | * | * |
| 10% More Than | 24 | 33 | * | 9 | * | * |

TABLE 13

Time Intervals/10th Circuit

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 |
|---|---|---|---|---|---|---|
| TOTAL CASES | | | | | | |
| Number of Cases | 15 | 27 | 17 | 10 | 15 | 14 |
| 10% Less Than | 2 | 1 | 2 | 1 | 4 | 1 |
| Median | 7 | 3 | 9 | 4 | 7 | 9 |
| 10% More Than | 14 | 23 | 20 | 27 | 23 | 27 |
| NO COURT ACTION | | | | | | |
| Number of Cases | 6 | 3 | 4 | 5 | 1 | 3 |
| 10% Less Than | 1 | 1 | * | 1 | * | * |
| Median | 2 | 3 | * | 4 | * | * |
| 10% More Than | 7 | 30 | * | 27 | * | * |
| BEFORE PRETRIAL | | | | | | |
| Number of Cases | 4 | 18 | 8 | 3 | 10 | 9 |
| 10% Less Than | 1 | 1 | * | 1 | 1 | * |
| Median | 6 | 1 | * | 4 | 6 | * |
| 10% More Than | 27 | 15 | * | 19 | 15 | * |
| DURING OR AFTER PRETRIAL | | | | | | |
| Number of Cases | 5 | 3 | 3 | 2 | 2 | 1 |
| 10% Less Than | 5 | 1 | * | 1 | * | * |
| Median | 9 | 6 | * | 25 | * | * |
| 10% More Than | 14 | 12 | * | 32 | * | * |
| TRIAL | | | | | | |
| Number of Cases | * | * | 2 | * | 2 | 1 |
| 10% Less Than | * | * | * | * | * | * |
| Median | * | * | * | * | * | * |
| 10% More Than | * | * | * | * | * | * |

TABLE 14

Time Intervals/11th Circuit

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 |
|---|---|---|---|---|---|---|
| TOTAL CASES | | | | | | |
| Number of Cases | 60 | 41 | 24 | 22 | 17 | 24 |
| 10% Less Than | 2 | 3 | 6 | 1 | 3 | 1 |
| Median | 7 | 10 | 12 | 7 | 11 | 8 |
| 10% More Than | 10 | 16 | 29 | 23 | 16 | 47 |
| NO COURT ACTION | | | | | | |
| Number of Cases | 35 | 17 | 8 | 8 | 9 | 14 |
| 10% Less Than | 2 | 2 | * | 1 | * | 1 |
| Median | 5 | 9 | * | 7 | * | 7 |
| 10% More Than | 10 | 15 | * | 19 | * | 47 |
| BEFORE PRETRIAL | | | | | | |
| Number of Cases | 22 | 20 | 12 | 12 | 7 | 10 |
| 10% Less Than | 1 | 2 | 6 | 1 | * | 1 |
| Median | 7 | 10 | 11 | 6 | * | 8 |
| 10% More Than | 12 | 16 | 32 | 22 | * | 33 |
| DURING OR AFTER PRETRIAL | | | | | | |
| Number of Cases | 2 | 3 | 2 | 1 | 1 | * |
| 10% Less Than | 1 | 1 | * | 1 | * | * |
| Median | 14 | 11 | * | 33 | * | * |
| 10% More Than | 14 | 11 | * | 33 | * | * |
| TRIAL | | | | | | |
| Number of Cases | 1 | 1 | 2 | 1 | * | * |
| 10% Less Than | 1 | 1 | * | 1 | * | * |
| Median | 1 | 27 | * | 12 | * | * |
| 10% More Than | 1 | 27 | * | 12 | * | * |

TABLE 15

Disposition of Action

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 |
|---|---|---|---|---|---|---|
| Transfer | 29 | 13 | 6 | 10 | 4 | 11 |
| Remand | 3 | 1 | 1 | 1 | 0 | 1 |
| Dismissed, Want of Prosecution | 19 | 8 | 22 | 11 | 16 | 15 |
| Dismissed, Discont'd, Settled, Withdrawn | 230 | 259 | 199 | 215 | 246 | 360 |
| Judgment on Default | 1 | 0 | 0 | 0 | 1 | 0 |
| Judgment on Consent | 9 | 6 | 5 | 7 | 2 | 7 |
| Judgment on Motion Before Trial | 253 | 224 | 204 | 177 | 182 | 170 |
| Judgment on Jury Verdict | 0 | 1 | 0 | 0 | 0 | 0 |
| Judgment on Directed Verdict | 0 | 0 | 0 | 0 | 0 | 1 |
| Judgment on Court Trial | 10 | 13 | 11 | 5 | 4 | 5 |
| Other | 4 | 5 | 2 | 3 | 11 | 3 |
| TOTAL | 558 | 530 | 450 | 429 | 466 | 573 |

TABLE 16

Procedural Progress at Termination

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 |
|---|---|---|---|---|---|---|
| Before Issue Joined | 100 | 76 | 58 | 71 | 81 | 118 |
| Motion Decided But Before Issue Joined | 93 | 75 | 63 | 63 | 69 | 55 |
| Issued Joined, No Other Court Action | 121 | 114 | 90 | 90 | 97 | 132 |
| Issue Joined, After Judgment of Court On Motion | 186 | 206 | 196 | 164 | 183 | 236 |
| Issue Joined After Pretrial But Before Trial | 46 | 41 | 30 | 41 | 29 | 24 |
| During Court Trial | 2 | 3 | 0 | 1 | 0 | 1 |
| During Jury Trial | 0 | 0 | 0 | 0 | 0 | 1 |
| After Court Trial | 8 | 13 | 12 | 5 | 5 | 4 |
| After Jury Trial | 0 | 1 | 0 | 0 | 0 | 0 |
| Other | 2 | 1 | 1 | 2 | 2 | 2 |
| TOTAL | 558 | 530 | 450 | 429 | 466 | 573 |

TABLE 17

| | Judgment For | | | | | |
|---|---|---|---|---|---|---|
| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 |
| Plaintiff | 37 | 27 | 22 | 30 | 23 | 17 |
| Defendant | 242 | 214 | 197 | 166 | 146 | 139 |
| Both | 14 | 24 | 24 | 9 | 11 | 8 |
| Total Known | 293 | 265 | 223 | 205 | 180 | 164 |
| Unknown | 275 | 265 | 207 | 223 | 286 | 409 |
| TOTAL | 568 | 530 | 450 | 428 | 466 | 573 |

TABLE 18

Appellate Time Intervals/All Circuits

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 | Total |
|---|---|---|---|---|---|---|---|
| Number of Cases | 36 | 72 | 59 | 38 | 50 | 49 | 304 |
| From Filing Notice to Filing Last Brief | 5.9 | 5.4 | 5.2 | 4.5 | 4.6 | 4.5 | |
| From Filing Last Brief to Hearing or Submission | 1.7 | 1.9 | 2.8 | 2.4 | 2.8 | 2.8 | |
| From Hearing or Submission to Final Disposition | 1.0 | 1.8 | 1.3 | 1.7 | 2.3 | 1.5 | |
| From Filing Notice of Appeal to Final Disposition | 11.0 | 10.4 | 10.3 | 9.8 | 10.2 | 10.5 | |
| From Filing in Lower Court to Final Disposition in Appellate Court | 21.8 | 22.5 | 25.3 | 25.5 | 22.0 | 22.8 | |

TABLE 19

Appellate Time Intervals/D.C. Circuits

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 | Total |
|---|---|---|---|---|---|---|---|
| Number of Cases | 13 | 42 | 31 | 15 | 20 | 16 | 137 |
| From Filing Notice to Filing Last Brief | 6.1 | 5.8 | 5.2 | 4.9 | 4.9 | 5.0 | |
| From Filing Last Brief to Hearing or Submission | 1.4 | 2.0 | 2.0 | 2.1 | 2.8 | 2.8 | |
| From Hearing or Submission to Final Disposition | 0.8 | 1.6 | 0.8 | 1.7 | 3.5 | 1.2 | |
| From Filing Notice of Appeal to Final Disposition | 10.2 | 11.6 | 9.2 | 9.9 | 11.3 | 10.0 | |
| From Filing in Lower Court to Final Disposition in Appellate Court | 21.8 | 23.3 | 25.8 | 22.7 | 22.1 | 22.1 | |

TABLE 20

Appellate Time Intervals/1st Circuit

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 | Total |
|---|---|---|---|---|---|---|---|
| Number of Cases | 2 | 4 | - | 1 | 4 | 4 | 15 |
| From Filing Notice to Filing Last Brief | - | 2.6 | - | 2.8 | 2.7 | 3.5 | |
| From Filing Last Brief to Hearing or Submission | - | 0.7 | - | 2.5 | 0.7 | 0.4 | |
| From Hearing or Submission to Final Disposition | 0.0 | 3.0 | - | 1.3 | 2.3 | 3.0 | |
| From Filing Notice of Appeal to Final Disposition | 0.4 | 7.5 | - | 6.6 | 6.4 | 9.4 | |
| From Filing in Lower Court to Final Disposition in Appellate Court | 11.7 | 22.5 | - | 29.0 | 11.7 | 20.7 | |

TABLE 21

Appellate Time Intervals/2nd Circuit

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 | Total |
|---|---|---|---|---|---|---|---|
| Number of Cases | 4 | 6 | 2 | 4 | 2 | 1 | 19 |
| From Filing Notice to Filing Last Brief | 3.8 | 3.7 | 2.0 | 3.6 | 3.3 | 2.8 | |
| From Filing Last Brief to Hearing or Submission | 0.4 | 0.6 | 0.3 | 1.4 | 0.5 | 1.3 | |
| From Hearing or Submission to Final Disposition | 0.2 | 0.2 | 1.1 | 0.1 | 0.8 | 0.1 | |
| From Filing Notice of Appeal to Final Disposition | 4.4 | 4.5 | 3.7 | 4.8 | 5.3 | 4.2 | |
| From Filing in Lower Court to Final Disposition in Appellate Court | 8.9 | 12.4 | 19.9 | 11.5 | 26.6 | 11.4 | |

TABLE 22

Appellate Time Intervals/3rd Circuit

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 | Total |
|---|---|---|---|---|---|---|---|
| Number of Cases | - | - | 3 | 3 | 3 | 4 | 13 |
| From Filing Notice to Filing Last Brief | - | - | 4.3 | 3.9 | 3.5 | 2.2 | |
| From Filing Last Brief to Hearing or Submission | - | - | 3.8 | 3.2 | 2.3 | 0.2 | |
| From Hearing or Submission to Final Disposition | - | - | 2.3 | 0.3 | 1.3 | 0.3 | |
| From Filing Notice of Appeal to Final Disposition | - | - | 11.3 | 7.4 | 8.7 | 7.6 | |
| From Filing in Lower Court to Final Disposition in Appellate Court | - | - | 36.0 | 21.2 | 14.9 | 13.6 | |

TABLE 23

Appellate Time Intervals/4th Circuit

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 | Total |
|---|---|---|---|---|---|---|---|
| Number of Cases | 3 | 2 | 1 | 1 | 2 | 1 | 10 |
| From Filing Notice to Filing Last Brief | 5.6 | 2.7 | 4.1 | 9.3 | - | 3.5 | |
| From Filing Last Brief to Hearing or Submission | 10.4 | 3.6 | 0.5 | 0.5 | - | 2.6 | |
| From Hearing or Submission to Final Disposition | 0.3 | 3.1 | 3.9 | 1.3 | 2.4 | 1.8 | |
| From Filing Notice of Appeal to Final Disposition | 17.1 | 11.4 | 8.5 | 11.1 | 8.6 | 7.9 | |
| From Filing in Lower Court to Final Disposition in Appellate Court | 26.9 | 22.1 | 18.2 | 17.2 | 15.1 | 12.2 | |

TABLE 24

Appellate Time Intervals/5th Circuit

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 | Total |
|---|---|---|---|---|---|---|---|
| Number of Cases | 4 | 2 | 4 | 1 | 4 | 4 | 19 |
| From Filing Notice to Filing Last Brief | 5.9 | 2.7 | 5.1 | 2.9 | 3.0 | 3.5 | |
| From Filing Last Brief to Hearing or Submission | 3.2 | 3.6 | 2.9 | 2.4 | 0.8 | 1.7 | |
| From Hearing or Submission to Final Disposition | 4.5 | 3.1 | 1.5 | 3.1 | 0.4 | 0.5 | |
| From Filing Notice of Appeal to Final Disposition | 13.4 | 11.4 | 10.3 | 8.4 | 8.5 | 6.0 | |
| From Filing in Lower Court to Final Disposition in Appellate Court | 20.9 | 22.1 | 20.9 | 33.7 | 14.5 | 10.3 | |

TABLE 25

Appellate Time Intervals/6th Circuit

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 | Total |
|---|---|---|---|---|---|---|---|
| Number of Cases | 2 | 1 | - | 2 | 5 | 3 | 13 |
| From Filing Notice to Filing Last Brief | 7.4 | 5.0 | - | 4.5 | 3.0 | 3.0 | |
| From Filing Last Brief to Hearing or Submission | 0.5 | 6.0 | - | 8.3 | 8.0 | 6.4 | |
| From Hearing or Submission to Final Disposition | 0.6 | 0.2 | - | 2.9 | 2.5 | 0.8 | |
| From Filing Notice of Appeal to Final Disposition | 25.4 | 11.2 | - | 19.4 | 13.9 | 12.5 | |
| From Filing in Lower Court to Final Disposition in Appellate Court | 29.6 | 39.3 | - | 37.1 | 24.6 | 33.6 | |

TABLE 26

Appellate Time Intervals/7th Circuit

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 | Total |
|---|---|---|---|---|---|---|---|
| Number of Cases | - | 1 | 4 | 3 | 1 | 1 | 10 |
| From Filing Notice to Filing Last Brief | - | 18.7 | 9.8 | 3.7 | 2.5 | 2.2 | |
| From Filing Last Brief to Hearing or Submission | - | 5.4 | 1.3 | 2.4 | 11.4 | 0.3 | |
| From Hearing or Submission to Final Disposition | - | 16.1 | 1.2 | 1.9 | 0.6 | 3.3 | |
| From Filing Notice of Appeal to Final Disposition | - | 29.4 | 23.5 | 10.5 | 14.5 | 5.8 | |
| From Filing in Lower Court to Final Disposition in Appellate Court | - | 42.3 | 36.5 | 25.6 | 38.7 | 49.1 | |

TABLE 27

Appellate Time Intervals/8th Circuit

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 | Total |
|---|---|---|---|---|---|---|---|
| Number of Cases | 2 | 2 | 1 | - | 1 | 1 | 7 |
| From Filing Notice to Filing Last Brief | 3.4 | 2.5 | 3.1 | - | 7.8 | 3.5 | |
| From Filing Last Brief to Hearing or Submission | 2.7 | 0.9 | 7.6 | - | 0.2 | 1.0 | |
| From Hearing or Submission to Final Disposition | 0.2 | 0.8 | 0.2 | - | 0.7 | 3.1 | |
| From Filing Notice of Appeal to Final Disposition | 9.6 | 6.3 | 10.9 | - | 8.7 | 7.6 | |
| From Filing in Lower Court to Final Disposition in Appellate Court | 16.1 | 17.1 | 22.7 | - | 25.6 | 17.5 | |

TABLE 28

Appellate Time Intervals/9th Circuit

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 | Total |
|---|---|---|---|---|---|---|---|
| Number of Cases | 2 | 5 | 7 | 5 | 5 | 8 | 32 |
| From Filing Notice to Filing Last Brief | 5.7 | 7.4 | 5.6 | 6.9 | 6.3 | 5.4 | |
| From Filing Last Brief to Hearing or Submission | 6.7 | 8.5 | 3.0 | 3.5 | 3.0 | 3.0 | |
| From Hearing or Submission to Final Disposition | 0.5 | 3.8 | 1.3 | 2.1 | 2.6 | 1.5 | |
| From Filing Notice of Appeal to Final Disposition | 17.4 | 18.7 | 10.3 | 12.5 | 13.2 | 11.7 | |
| From Filing in Lower Court to Final Disposition in Appellate Court | 28.9 | 26.7 | 23.4 | 41.8 | 18.5 | 28.0 | |

TABLE 29

Appellate Time Intervals/10th Circuit

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 | Total |
|---|---|---|---|---|---|---|---|
| Number of Cases | 1 | 1 | 2 | - | - | 3 | 7 |
| From Filing Notice to Filing Last Brief | 19.3 | 1.6 | 2.5 | - | - | 5.1 | |
| From Filing Last Brief to Hearing or Submission | 13.1 | 0.1 | 4.3 | - | - | 5.8 | |
| From Hearing or Submission to Final Disposition | 2.0 | 3.9 | 0.2 | - | - | 2.7 | |
| From Filing Notice of Appeal to Final Disposition | 34.4 | 5.6 | 7.2 | - | - | 17.2 | |
| From Filing in Lower Court to Final Disposition in Appellate Court | 42.2 | 6.5 | 13.0 | - | - | 26.9 | |

TABLE 30

Appellate Time Intervals/11th Circuit

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 | Total |
|---|---|---|---|---|---|---|---|
| Number of Cases | 3 | 7 | 4 | 3 | 3 | 3 | 23 |
| From Filing Notice to Filing Last Brief | 6.2 | 6.3 | 6.5 | 6.0 | 5.5 | 3.5 | |
| From Filing Last Brief to Hearing or Submission | 2.6 | 1.2 | 4.1 | 5.5 | 3.8 | 4.9 | |
| From Hearing or Submission to Final Disposition | 3.9 | 2.6 | 2.4 | 1.1 | 0.8 | 7.1 | |
| From Filing Notice of Appeal to Final Disposition | 11.0 | 12.7 | 11.8 | 11.9 | 9.8 | 15.9 | |
| From Filing in Lower Court to Final Disposition in Appellate Court | 18.8 | 21.6 | 23.1 | 31.1 | 23.0 | 21.4 | |

TABLE 31

APPEALS DISPOSED OF AFTER HEARING OR SUBMISSION

| | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 |
|---|---|---|---|---|---|---|
| NUMBER OF CASES | 59 | 67 | 58 | 37 | 47 | 44 |
| AFFIRMED OR GRANTED | 26 | 48 | 39 | 29 | 33 | 31 |
| DISMISSED | -- | -- | 1 | -- | 3 | 1 |
| REVERSED OR DENIED | 12 | 11 | 15 | 7 | 11 | 8 |
| OTHER | 6 | 8 | 3 | 1 | -- | 4 |
| PERCENT REVERSED | 20.3 | 16.4 | 25.9 | 18.9 | 23.4 | 18.2 |

TABLE 32

Exemption-Based Denials and Appeals - 1982

| Agency | Exemption Based Denials | Appeals of Exemption Based Denials | Appeal Granted | Appeal Denied In Full | Appeal Denied In Part |
|---|---|---|---|---|---|
| C.I.A. | 334 | 72 | 0 | 33 | 31 |
| O.M.B. | 36 | 11 | 2 | 3 | 6 |
| Agric. | 1,056 | 101 | 26 | 58 | 13 |
| Commerce | 268 | 73 | 15 | 19 | 23 |
| Defense | 11,531 | 433 | 42 | 254 | 137 |
| Educ. | 189 | 25 | 6 | 9 | 8 |
| Energy | 772 | 87 | 14 | 23 | 32 |
| H.H.S. | 885 | 156 | 16 | 93 | 47 |
| H.U.D. | 126 | 29 | 1 | 17 | 11 |
| Interior | 365 | 81 | 7 | 15 | 27 |
| Justice | 2,977 | 1,982 | 4 | 318 | 62 |
| Labor | 1,281 | 340 | 44 | 30 | 169 |
| State | 1,274 | 171 | 7 | 38 | 27 |
| Transp. | 1,805 | 78 | 10 | 30 | 36 |
| Treas. | 4,964 | 575 | 65 | 253 | 257 |
| C.P.S.C. | 207 | 28 | 4 | 12 | * |
| E.P.A. | 940 | 165 | 1 | 9 | 20 |
| E.E.O.C. | 1,215 | 93 | 3 | 38 | 46 |
| F.C.C. | 109 | 18 | 0 | 4 | 7 |
| F.T.C. | 414 | 72 | 8 | 32 | 32 |
| G.S.A. | 211 | * | * | * | * |
| M.S.P.B. | 96 | 16 | 1 | 12 | 3 |
| N.A.S.A. | 382 | 16 | 5 | 8 | 2 |
| N.L.R.B. | 718 | 83 | 9 | 74 | * |
| N.R.C. | 103 | 25 | 1 | 14 | 10 |
| O.P.M. | 172 | 43 | 9 | 16 | 18 |
| S.E.C. | 621 | 97 | 2 | 32 | 19 |
| Postal Serv. | 1,018 | 153 | 24 | 86 | 14 |
| V.A. | 1,382 | 27 | 6 | 9 | 13 |
| Nat'l Arch. | * | * | * | * | * |
| TOTALS | 35,451 | 5,050 | 332 | 1,539 | 1,069 |

TABLE 33

Exemption-Based Denials and Appeals - 1983

| Agency | Exemption Based Denials | Appeals of Exemption Based Denials | Appeal Granted | Appeal Denied In Full | Appeal Denied In Part |
|---|---|---|---|---|---|
| C.I.A. | 352 | 34 | 0 | 27 | 17 |
| O.M.B. | 31 | 6 | 0 | 2 | 4 |
| Agric. | 1,239 | 136 | 32 | 65 | 33 |
| Commerce | 240 | 62 | 9 | 15 | 19 |
| Defense | 4,791 | 567 | 55 | 382 | 130 |
| Educ. | 172 | 20 | 0 | 4 | 10 |
| Energy | 590 | 92 | 10 | 25 | 31 |
| H.H.S. | 1,384 | 150 | 13 | 102 | 32 |
| H.U.D. | 147 | 44 | 8 | 20 | 16 |
| Interior | 406 | 103 | 2 | 19 | 13 |
| Justice | 3,387 | 1,997 | 28 | 322 | 180 |
| Labor | 2,314 | 212 | 12 | 38 | 126 |
| State | 1,092 | 111 | 5 | 42 | 51 |
| Transp. | 1,664 | 106 | 12 | 56 | 31 |
| Treas. | 5,643 | 546 | 42 | 271 | 233 |
| C.P.S.C. | 737 | 56 | 0 | 22 | 0 |
| E.P.A. | 904 | 129 | 1 | 16 | 6 |
| E.E.O.C. | 2,156 | 117 | 4 | 47 | 66 |
| F.C.C. | 66 | 12 | 0 | 10 | 1 |
| F.T.C. | 425 | 61 | 7 | 18 | 23 |
| G.S.A. | 216 | 80 | 8 | 15 | 17 |
| M.S.P.B. | 19 | 7 | 0 | 5 | 2 |
| N.A.S.A. | 388 | 23 | 7 | 9 | 3 |
| N.L.R.B. | 504 | 83 | 4 | 74 | 0 |
| N.R.C. | 152 | 37 | 10 | 14 | 10 |
| O.P.M. | 398 | 50 | 9 | 25 | 13 |
| S.E.C. | 1,532 | 87 | 3 | 24 | 15 |
| Postal Serv. | * | 133 | 19 | 65 | 26 |
| V.A. | * | 37 | 5 | 15 | 17 |
| Nat'l Arch. | 8,470 | * | * | * | * |
| TOTALS | 33,207 | 5,098 | 305 | 1,749 | 1,125 |

TABLE 34

Exemption-Based Denials and Appeals - 1984

| Agency | Exemption Based Denials | Appeals of Exemption Based Denials | Appeal Granted | Appeal Denied In Full | Appeal Denied In Part |
|---|---|---|---|---|---|
| C.I.A. | 271 | 24 | 0 | 14 | 10 |
| O.M.B. | 31 | 8 | 0 | 6 | 2 |
| Agric. | 1,218 | 154 | 17 | 89 | 26 |
| Commerce | 258 | 52 | 8 | 8 | 15 |
| Defense | 5,439 | 830 | 77 | 612 | 141 |
| Educ. | 221 | 38 | 7 | 9 | 19 |
| Energy | 491 | 61 | 12 | 10 | 22 |
| H.H.S. | 1,508 | 172 | 22 | 112 | 38 |
| H.U.D. | 127 | 52 | 7 | 29 | 16 |
| Interior | 438 | 85 | 3 | 19 | 15 |
| Justice | 3,587 | 2,130 | 37 | 371 | 138 |
| Labor | 2,787 | 331 | 13 | 27 | 114 |
| State | 1,036 | 133 | 4 | 55 | 42 |
| Transp. | 1,640 | 112 | 21 | 54 | 27 |
| Treas. | 5,649 | 531 | 161 | 284 | 190 |
| C.P.S.C. | 509 | 35 | 0 | 22 | * |
| E.P.A. | 852 | 128 | 1 | 12 | 15 |
| E.E.O.C. | 2,334 | 152 | 7 | 43 | 77 |
| F.C.C. | 96 | 13 | 0 | 7 | 3 |
| F.T.C. | 381 | 48 | 4 | 12 | 26 |
| G.S.A. | 421 | * | * | * | * |
| M.S.P.B. | 105 | 17 | 0 | 7 | 10 |
| N.A.S.A. | 447 | 13 | 2 | 4 | 5 |
| N.L.R.B. | 501 | 74 | 3 | 65 | 6 |
| N.R.C. | 232 | 45 | 0 | 15 | 17 |
| O.P.M. | 70 | 54 | 8 | 21 | 14 |
| S.E.C. | 433 | 90 | 2 | 26 | 24 |
| Postal Serv. | 816 | * | * | * | * |
| V.A. | 746 | 38 | 5 | 17 | 10 |
| Nat'l Arch. | 45 | * | * | * | * |
| TOTALS | 32,689 | 5,420 | 431 | 1,950 | 1,028 |

TABLE 35

Nonexemption-Based Denials and Appeals - 1982

| Agency | Nonexemption Based Denials | Appeals of Nonexemption Based Denials |
|---|---|---|
| C.I.A. | 707 | * |
| O.M.B. | 31 | * |
| Agric. | 92 | * |
| Commerce | 237 | * |
| Defense | 7,318 | 70 |
| Educ. | 174 | * |
| Energy | 600 | 32 |
| H.H.S. | * | 2 |
| H.U.D. | * | * |
| Interior | 105 | 3 |
| Justice | 10,103 | 164 |
| Labor | 598 | 13 |
| State | 673 | * |
| Transp. | 587 | 1 |
| Treas. | 4,105 | 31 |
| C.P.S.C. | * | * |
| E.P.A. | * | * |
| E.E.O.C. | * | * |
| F.C.C. | 43 | * |
| F.T.C. | 281 | 6 |
| G.S.A. | * | * |
| M.S.P.B. | 38 | 1 |
| N.A.S.A. | 126 | * |
| N.L.R.B. | 159 | * |
| N.R.C. | * | * |
| O.P.M. | 14 | 6 |
| S.E.C. | 311 | 1 |
| Postal Serv. | * | * |
| V.A. | 580 | 4 |
| Nat'l Arch. | * | * |
| TOTALS | 26,882 | 334 |

TABLE 36

Nonexemption-Based Denials and Appeals - 1983

| Agency | Nonexemption Based Denials | Appeals of Nonexemption Based Denials |
|---|---|---|
| C.I.A. | 435 | * |
| O.M.B. | 18 | * |
| Agric. | 151 | * |
| Commerce | 229 | * |
| Defense | 7,085 | * |
| Educ. | 210 | 6 |
| Energy | 390 | 18 |
| H.H.S. | 328 | 3 |
| H.U.D. | * | * |
| Interior | * | * |
| Justice | 9,782 | * |
| Labor | 541 | 24 |
| State | 371 | * |
| Transp. | 699 | 4 |
| Treas. | 857 | 155 |
| C.P.S.C. | * | * |
| E.P.A. | * | * |
| E.E.O.C. | 211 | * |
| F.C.C. | 9 | * |
| F.T.C. | 294 | 3 |
| G.S.A. | 726 | * |
| M.S.P.B. | 51 | 4 |
| N.A.S.A. | 160 | 0 |
| N.L.R.B. | 256 | * |
| N.R.C. | 6 | * |
| O.P.M. | 0 | 0 |
| S.E.C. | 365 | 0 |
| Postal Serv. | * | 0 |
| V.A. | 648 | 0 |
| Nat'l Arch. | 936 | 0 |
| TOTALS | 24,758 | 355 |

TABLE 37

Nonexemption-Based Denials and Appeals - 1984

| Agency | Nonexemption Based Denials | Appeals of Nonexemption Based Denials |
|---|---|---|
| C.I.A. | 583 | * |
| O.M.B. | 18 | * |
| Agric. | * | * |
| Commerce | 193 | * |
| Defense | 8,954 | 93 |
| Educ. | 56 | 3 |
| Energy | 402 | 24 |
| H.H.S. | 281 | 6 |
| H.U.D. | * | * |
| Interior | 161 | 4 |
| Justice | 10,520 | * |
| Labor | 341 | 25 |
| State | 256 | * |
| Transp. | 675 | 2 |
| Treas. | 8,361 | 155 |
| C.P.S.C. | * | * |
| E.P.A. | * | * |
| E.E.O.C. | 226 | * |
| F.C.C. | 28 | 1 |
| F.T.C. | 403 | * |
| G.S.A. | 734 | * |
| M.S.P.B. | 39 | 3 |
| N.A.S.A. | 227 | 1 |
| N.L.R.B. | 166 | * |
| N.R.C. | * | * |
| O.P.M. | * | * |
| S.E.C. | * | 1 |
| Postal Serv. | * | * |
| V.A. | 506 | 2 |
| Nat'l Arch. | 1,137 | * |
| TOTALS | 34,267 | 320 |

TABLE 38

Exemption 1 Denials and Appeals - 1982

| Agency | Initial Denials Based on Exemption 1 | Appeal Denials Based on Exemption 1 |
|---|---|---|
| C.I.A. | 265 | 80 |
| O.M.B. | 1 | 0 |
| Agric. | 2 | 0 |
| Commerce | 20 | 0 |
| Defense | 547 | 85 |
| Educ. | 0 | 0 |
| Energy | 37 | 2 |
| H.H.S. | 0 | 0 |
| H.U.D. | 0 | 0 |
| Interior | 0 | 0 |
| Justice | 1,443 | 105 |
| Labor | 0 | 0 |
| State | 553 | 40 |
| Transp. | 3 | 0 |
| Treas. | 52 | 3 |
| C.P.S.C. | 0 | 0 |
| E.P.A. | 3 | 0 |
| E.E.O.C. | 0 | 0 |
| F.C.C. | 0 | 0 |
| F.T.C. | 0 | 0 |
| G.S.A. | 3 | 0 |
| M.S.P.B. | 3 | 1 |
| N.A.S.A. | 0 | 0 |
| N.L.R.B. | 0 | 0 |
| N.R.C. | 4 | 1 |
| O.P.M. | 0 | 0 |
| S.E.C. | 0 | 0 |
| Postal Serv. | 0 | 0 |
| V.A. | 0 | 1 |
| Nat'l Arch. | 0 | 1 |
| TOTALS | 2,936 | 317 |

TABLE 39

Exemption 1 Denials and Appeals - 1983

| Agency | Initial Denials Based on Exemption 1 | Appeal Denials Based on Exemption 1 |
|---|---|---|
| C.I.A. | 217 | 43 |
| O.M.B. | 2 | 0 |
| Agric. | 0 | 0 |
| Commerce | 16 | 0 |
| Defense | 814 | 86 |
| Educ. | 0 | 0 |
| Energy | 14 | 3 |
| H.H.S. | 0 | 0 |
| H.U.D. | 0 | 0 |
| Interior | 1 | 0 |
| Justice | 1,134 | 143 |
| Labor | 24 | 0 |
| State | 441 | 72 |
| Transp. | 4 | 0 |
| Treas. | 71 | 7 |
| C.P.S.C. | 0 | 0 |
| E.P.A. | 1 | 0 |
| E.E.O.C. | 0 | 0 |
| F.C.C. | 0 | 0 |
| F.T.C. | 0 | 0 |
| G.S.A. | 0 | 0 |
| M.S.P.B. | 0 | 0 |
| N.A.S.A. | 0 | 0 |
| N.L.R.B. | 2 | 0 |
| N.R.C. | 0 | 0 |
| O.P.M. | 9 | 1 |
| S.E.C. | 0 | 0 |
| Postal Serv. | 2 | 0 |
| V.A. | 1 | 0 |
| Nat'l Arch. | 48 | 0 |
| TOTALS | 2,801 | 355 |

TABLE 40

Exemption 1 Denials and Appeals - 1984

| Agency | Initial Denials Based on Exemption 1 | Appeal Denials Based on Exemption 1 |
|---|---|---|
| C.I.A. | 540 | 21 |
| O.M.B. | 2 | 0 |
| Agric. | 3 | 0 |
| Commerce | 17 | 0 |
| Defense | 1,257 | 194 |
| Educ. | 0 | 0 |
| Energy | 10 | 1 |
| H.H.S. | 0 | 0 |
| H.U.D. | 0 | 0 |
| Interior | 1 | 0 |
| Justice | 1,202 | 125 |
| Labor | 28 | 0 |
| State | 627 | 72 |
| Transp. | 8 | 1 |
| Treas. | 74 | 0 |
| C.P.S.C. | 0 | 0 |
| E.P.A. | 2 | 0 |
| E.E.O.C. | 0 | 0 |
| F.C.C. | 0 | 0 |
| F.T.C. | 0 | 0 |
| G.S.A. | 1 | 0 |
| M.S.P.B. | 0 | 0 |
| N.A.S.A. | 0 | 0 |
| N.L.R.B. | 0 | 0 |
| N.R.C. | 8 | 2 |
| O.P.M. | 0 | 0 |
| S.E.C. | 0 | 0 |
| Postal Serv. | 4 | N/A |
| V.A. | 0 | 0 |
| Nat'l Arch. | 34 | 0 |
| TOTALS | 3,818 | 416 |

NOTES

1. 5 U.S.C. § 552 (1982).

2. The nature and scope of the continuing controversy is well-reflected in the hearings on recent FOIA reform proposals. Freedom of Information Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97 Cong., 1st Sess. (1981) [hereinafter cited as 1981 Senate Hearings]; Freedom of Information Reform Act: Hearings Before the Subcommittee on Information, Justice and Agriculture of the House Committee on Government Operations, 98th Cong., 2d Sess. (1984) [hereinafter cited as 1984 House Hearings].

3. The size and complexity of the body of law and procedure that has grown up around the Act has generated numerous efforts to summarize and clarify. Among the most prominent of these is a two-volume loose-leaf treatise, J. O'Reilly, Federal Information Disclosure: Procedures, Forms and the Law (1985) [hereinafter cited as Information Disclosure]; Department of Justice, "Freedom of Information Case List and Short Guide to the FOIA" (1985 ed.) [hereinafter cited as Justice Guide] and "Litigation Under the Freedom of Information Act and Privacy Act," Center for National Security Studies (10th ed. 1985) [hereinafter cited as FOIA Litigation].

4. The controversy surrounding the status of confidential commercial information under exemption 4 and the procedural rights of third-party submitters of such information is a particularly prominent example. See generally 1981 Senate Hearings and 1984 House Hearings. See also Recommendation 82-1, Administrative Conference of the United States, 1982 ACUS 1 (June 17, 1982).

5. The most detailed proposal was made by Robert L. Saloschin, former Director of the Office of Information Law and Policy, Department of Justice. "Proposal for an Independent Body." Remarks before the Federal Bar Association, 8th Annual Conference on Openness in Government, March 16, 1982. A comprehensive study of two state administrative schemes by Professor Robert G. Vaughn contains general suggestions for adapting those schemes to federal law. Vaughn, Administrative Alternatives and the Freedom of Information Act, 45 Ohio St. L.J. 185 (1984). The possible use of an administrative entity for FOIA case processing or policymaking is addressed in varying degrees of detail in the following: O'Reilly, Who's on First?: The Role of the Office of Management and Budget in Federal Information Policy, 10 J. of Legis. 95 (1983); Koch & Rubin, A Proposal for A Comprehensive Restructuring of the Public Information System, 1979 Duke L.J. 1 (1979); Miller & Cox, On the Need for a National Commission on Documentary Access, 44 Geo. Wash. L. Rev. 213 (1976); Freedom of Information Act: Hearings before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97 Cong., 1st Sess. 55 (1981) (Statement of Sen.

Sasser); Freedom of Information Act: Hearings Before the Subcomm. on Information, Justice, and Agriculture of the House Comm. on Govt. Operations, 98th Cong., 2d Sess. 1036 (Statement of the American Society of Access Professionals).

The use of an information "ombudsman" had been suggested in the legislative process leading the passage of FOIA. Freedom of Information: Hearings Before Senate Comm. on the Judiciary, 88th Cong., 1st Sess. (1963). See O'Reilly, supra note 5, at 130 n.303. In the legislative process leading to the 1974 amendments, a commission to review agency denial was proposed. H.R. 4960, 93d Cong., 2d Sess. (1973). See Information Disclosure at 3-24. In the context of recent FOIA legislative reform proposals, a bill providing for centralized administrative supervision of agency compliance has been introduced. H.R. 3313, 99th Cong., 1st Sess. (1985).

6. Other similar concerns, of course, exist with respect to FOIA administration generally, for example the extent of agency resources available for and devoted to the processing of requests. These matters ultimately affect FOIA cases reaching the courts. The three concerns identified above also tend to subsume these once a court is involved.

7. The focal point of recent reform efforts has been S. 774, a bill which passed the Senate by a voice vote in 1984, 130 Cong. Rec. S1822 (daily ed. Feb. 27, 1984) but stalled in the House. The bill, entitled the "Freedom of Information Reform Act," primarily would have (1) altered the standards for fee charges and waivers to requesters, (2) extended the time limits for agency processing in "unusual circumstance" and amended the definition of that term in the Act by adding three new categories to the existing three, (3) added a provision establishing procedures that would permit submitters of commercial or financial information to present claims of confidentiality and (4) modified certain exemptions, particularly the law enforcement records exemptions.

8. 5 U.S.C. § 552a.

9. See Information Disclosure at 22-3 to 22-8 and FOIA Litigation 239-245.

10. 5 U.S.C. § 552(a)(6)(A)(i).

11. 5 U.S.C. § 552(a)(6)(A)(ii).

12. Id.

13. 5 U.S.C. § 552(a)(6)(B).

14. Id.

15. 5 U.S.C. § 552(a)(6)(C).

16. 5 U.S.C. § 552(a)(4)(B).

17. Id.

18. Id.

19. Id.

20. 5 U.S.C. § 552(a)(4)(E).

21. 5 U.S.C. § 552(a)(4)(B).

22. 5 U.S.C. § 552(a)(4)(C).

23. Federal Courts Improvement Act of 1984, Pub. L. No. 98-620, § 402, 98 Stat. 3335, 3357 (1984) (repealing 5 U.S.C. § 552(a)(4)(D), a provision that required expedition for all FOIA cases "except as to cases the court considers of greater importance"). See infra notes 130-33 and accompanying text.

24. 5 U.S.C. § 552(a)(6)(C).

25. Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976).

26. Id. at 615.

27. Id. at 616.

28. 5 U.S.C. § 552(a)(4)(B).

29. 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

30. Id. at 825.

31. Id. at 826-28.

32. Information Acquisition Corp. v. Department of Justice, 444 F. Supp. 458, 462 (D.D.C. 1978).

33. See infra notes 55-57 and accompanying text. See also Justice Guide at 352-53.

34. See infra notes 138-39 and accompanying text. Discovery requests that seek in effect disclosure of the withheld information are obviously inconsistent with the purpose of the proceeding. See, e.g., Pollard v. FBI, 705 F.2d 1151 (9th Cir. 1983). Permissible discovery could include, for example, questions concerning the thoroughness of the agency

search for the requested records. Exxon Corp. v. FTC, 384 F. Supp. 755 (D.D.C. 1974).

35. See, e.g., Hayden v. National Security Agency, 608 F.2d 1381 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980).

36. See, e.g., Citizens for Environmental Quality, Inc. v. U.S. Dep't of Agriculture, Civil No. 83-3763, slip op. at 2 (D.D.C. May 24, 1984). See also Hydron Laboratories, Inc., 560 F. Supp. 718 (D.R.I. 1983); Exxon Corp. v. FTC, 384 F. Supp. 755 (D.D.C. 1974).

37. See, e.g., Weisberg v. Department of Justice, 749 F.2d 864,868 (D.C. Cir. 1984).

38. See, e.g., Providence Journal Co. v. FBI, 595 F.2d 889, 890 (1st Cir. 1979).

39. Lame v. Department of Justice, 767 F.2d 66, 69-70 (3d Cir. 1985).

40. Most of the important literature on the FOIA structure for case processing appeared either prior to 1974 and related to the need for procedural reform of the type represented by the 1974 amendments, or shortly after those amendments and assessed their effect. See, e.g., Katz, Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act, 48 Texas l. Rev. 1261 (1970); Nader, Freedom From Information: The Act and the Agencies, 5 Harr. C.R.-C.L. L. Rev. 1 (1970); Giannella, Agency Procedures Implementing the Freedom of Information Act: A Proposal for Uniform Regulations, 23 Ad. L. Rev. 217 (1971); Clark, Holding the Government Accountable: The Amended Freedom of Information Act, 84 Yale L.J. 741 (1975); Relyea, The Freedom of Information Act a Decade Later, 39 Pub. Ad. Rev. 310 (1979).

41. See supra note 16 and accompanying text.

42. Between 1967 and 1972 a total of approximately 200 FOIA cases were filed. U.S. Government Information Policies: Hearings Before the House Comm. on Govt. Operations, 92d Cong., 2d Sess. 1177 (1972). The Administrative Office of the United States Courts began coding and collecting data on FOIA cases in 1977. That year alone, the number of filings recorded was 142. The next year the number had reached 532 and by the third year, 1979, the number reached 627, the same number filed in 1980. See also infra notes 43-44 and accompanying text.

43. The caseload and case processing statistics presented in this section were compiled primarily from data provided to the author by the Statistical Analysis and Reports Division of the Administrative Office of United States Courts. The remaining statistics were compiled from agency reports filed

with Congress. All compilations are set out in the tables that comprise the Appendix to this report. For convenience, most footnotes in this section refer to the applicable Appendix table as "Table ___, Appendix." The reporting periods for the court data are "statistical years," ending June 30, and for the agency data are calendar years.

44. Table 1, Appendix.

45. In statistical year 1984, of 1587 civil actions filed in the District of Columbia in which the United States was a party 190 were FOIA cases. Annual Report, Director, Administrative Office of the United States Courts, 256 (1984) and Table 3, Appendix.

46. Tables 1 and 3, Appendix.

47. See infra note 151 and accompanying text.

48. Table 2, Appendix.

49. Table 3, Appendix.

50. See infra notes 55-57 and accompanying text.

51. The Administrative Office of the United States Court calculates only the range of the time intervals in the middle 80% of the cases. There is no obvious reason to expect other than that the time intervals would follow a standard normal distribution; however, because the standard deviation for the intervals is not calculated, it is not possible to utilize that concept to model the distribution of the cases. See F. Herzon and M. Hooper, Introduction to Statistics for the Social Sciences 165 (1976).

52. But see id.

53. Table 16, Appendix.

54. For example, for statistical year 1985, of 269,848 civil cases terminated in the federal courts, 10,658 or 3.9% were terminated after court or jury trial, 33,404 or 12.4% reached pretrial and the remaining 225-786 or 83.7% were terminated before pretrial. Administrative Office of the United States Courts.

55. Table 15, Appendix.

56. For example, for statistical year 1985, of the 269,848 civil cases terminated in the federal courts, 127,919 or 47.4% were "dismissed, discontinued, settled or withdrawn." Administrative Office of the United States Courts.

57. For example, for statistical year 1985, of the 269,848 civil cases terminated in the federal courts 41,437 or 16.5% were terminated by "judgment on motion." Administrative Office of the United States Courts.

58. Table 17, Appendix.

59. See notes 57-58 and accompanying text.

60. Table 18, Appendix.

61. Table 31, Appendix.

62. See 5 U.S.C. § 552(d).

63. For example, the Department of Defense and the Department of Health and Human Services report individual requests for military or social security records, respectively, that routinely would have been granted prior to the Act.

64. 5 U.S.C. § 552(d)(1).

65. Id.

66. 5 U.S.C. § 552(d)(2).

67. This method excludes appeals from non-exemption based denials, i.e., denials based on procedural ground or such other factors as the absence of any record satisfying the request. While such denials range from roughly 25,000 to 35,000 per year, see Tables 35-37, Appendix, they are appealed at a much lower rate than exemption-based denials (14.6% versus 1.2%), see Tables 32-37, Appendix, and amount to roughly 300-350 per year or 6% of the total number of appeals. See id. Given the relatively small number of the cases, coupled with their widely varying but typically non-substantive content, they seem best put to one side for purposes of estimating the number of cases in which requester might reasonably be said to be dissatisfied with the final agency disposition. Some of these cases, however, do lead to court action. See, e.g., Brumley v. U.S. Dept. of Labor, 767 F.2d 444 (8th Cir. 1985).

68. Tables 32-34, Appendix.

69. Id.

70. See FOIA Litigation, supra note 4, at 18. See generally Information Disclosure, supra note 4, at 3-1 to 3-20.

71. See O'Reilly, supra note 5, at 100-109.

72. See id. at 102-104. See also Braeman, Overview of FOIA Administration in Government, 34 Ad. L. Rev. 111 (1982);

Saloschin, The Work of the Freedom of Information Committee of the Department of Justice, 28 Ad. L. Rev. 147 (1971).

73. Id.

74. Id.

75. 5 U.S.C. § 552(d).

76. Letter of Attorney General Bell to Heads of All Departments and Agencies, May 5, 1977, reprinted in 1981 Senate Hearings, supra note 2, at 912.

77. Memorandum from Attorney General William French Smith to the Heads of All Departments and Agencies, May 5, 1981, reprinted in FOIA Update, June 1981, at 3.

78. OIP's work in this regard is summarized in the Department's annual report to Congress under FOIA. See, e.g., 1984 Annual Report at 152-56.

79. Executive Order 12356, 47 Fed. Reg. 14874, 3 C.F.R. 166 (1982 Comp.), April 6, 1982.

80. For example, all or part of a previously-classified intra-agency memorandum may still be exempt under exemption 5 even though its disclosure would not cause the national security harm contemplated by the Executive Order.

81. Information Security Overnight Office, 1984 Annual Report to the President at 11-14.

82. Id. at 12-13.

83. Section 7(A), Executive Order 11652 (March 8, 1972) as amended by Executive Order 11714 (April 24, 1973).

84. Section 8, Executive Order 12356, supra note 79.

85. 5 U.S.C. § 1206(e)(1)(C).

86. Id.

87. 5 U.S.C. § 552(a)(4)(F).

88. Developments in the Law--Public Employment, 97 Harv. L. Rev. 1643-44 (1984):

> ... [Under 5 U.S.C. § 1206(e)] the OSC bears responsibility for investigating and prosecuting before the Board violations of the Hatch Act and arbitrary and capricious

noncompliance with requests under the Freedom of Information Act.

These seemingly broad powers are greatly circumscribed in practice, both by the Special Counsel's lack of authority to require either the Board or other agencies to do its bidding and by the political, budgetary, and staffing problems that have plagued the Office since its inception.

89. 5 U.S.C. § 552(a), The Privacy Act of 1974, Pub. L. No. 93-579 §6, 88 Stat. 1909 (1974).

90. See O'Reilly, supra note 5, at 98-100 and 109-10.

91. 44 U.S.C. §§ 3501-3520 (1982), Pub. L. No. 96-511, 94 Stat. 2812.

92. "Management of Federal Information Resources," OMB Circular No. A-130, 50 F.R. 52730 (December 24, 1985). See also O'Reilly, supra note 5, at 110-118, Relyea et al., "Management of Federal Resources: A General Critique of the March 1984 OMB Draft Circular, Congressional Research Service, Library of Congress (July 5, 1985).

93. Conn. Gen. Stat. § 1-21j(a) et seq. (West Supp. 1983). The description of the Connecticut Commission and the New York Committee in this section is summarized from Vaughn, supra note 5, at 192-209. The author also conducted telephone interviews with the Executive Directors of both these state agencies. See infra note 126.

94. Id. at 193-94.

95. Id. at 194-95.

96. Id. at 195.

97. Id. at 196.

98. Id. at 198.

99. Id. at 199.

100. Id.

101. Id.

102. Id.

103. Id. at 200.

104. Id. at 196-98.

105. N.Y. Pub. Off. Law § 89(1)(a) et seq. (McKinney's Supp. 1982-83). See Vaughn, supra note 5, at 200-09.

106. Id. at 200.

107. Id. at 201-02.

108. Id. at 202.

109. Id. at 203.

110. Id.

111. Id. at 204.

112. Id. at 207.

113. Id.

114. Id. at 208-09.

115. An Act to enact the Access to Information Act and the Privacy Act, to amend the Federal Court Act and the Canada Evidence Act, and to amend certain other Acts in consequence thereof, S.C. 1980-81-82, c. 111. See Rankin, The New Access to Information and Privacy Act: A Critical Annotation, 15 Ottawa L. Rev. 1 (1983); Annual Report, Information Commissioner, 1983-84 at 5.

116. Id. at 6.

117. Id.

118. Id.

119. Id.

120. Id. at 7.

121. Id.

122. Id.

123. Id. at 6.

124. Vaughn, supra note 5, at 209-10.

125. The Canadian Access to Information Act became effective July 1, 1983.

126. The interviewees in the indicated categories were as follows:

First Category:

John O. Birch, Deputy Chief, Civil Division, D.C. United States Attorney's Office.

Steven Garfinkel, Director, Information Security Oversight Office, General Services Administration.

*Robert L. Gilliat, Assistant General Counsel, Office of the Secretary of Defense, Department of Defense.

Barbara L. Gordon, Assistant Director, Federal Programs Branch, Civil Division, Department of Justice.

Richard L. Huff, Co-Director, Office of Information and Privacy, Office of Legal Policy, Department of Justice.

Daniel J. Metcalfe, Co-Director, Office of Information and Privacy, Office of Legal Policy, Department of Justice.

Russell M .Roberts, Director, Information and Privacy Division, Office of Public Affairs, Office of the Secretary, Department of Health and Human Services.

Leonard Schaitman, Assistant Director, Appellate Staff, Civil Division, Department of Justice.

Second Category:

Allan Adler, Legislative Counsel, American Civil Liberties Union.

Eric Glitzenstein, Attorney, Public Citizen Litigation Group.

Mark H. Lynch, Counsel, American Civil Liberties Union, Project on National Security.

*Alan B. Morrison, Director, Public Citizen Litigation Group.

David C. Vladeck, Attorney, Public Citizen Litigation Group.

Third Category:

Burt A. Braverman, Cole, Raywid & Braverman.

Ronald L. Plesser, Blum & Nash.

Robert L. Saloschin, Lerch, Early & Roseman.

*Thomas M. Susman, Ropes & Gray.

Fourth Category:

Robert M. Gellman, Counsel, Subcommittee on Information, Justice and Agriculture, House Committee on Government Operations.

Randall R. Rader, Counsel, Subcommittee on the Constitution, Senate Judiciary Committee.

Fifth Category:

Gerhard A. Gesell, United States District Judge.

Joyce Hens Green, United States District Judge.

*Carl McGowan, Senior United States Circuit Judge.

John H. Pratt, United States District Judge.

*Antonin Scalia, United States Circuit Judge.

Patricia M. Wald, United States Circuit Judge.

Two other persons interviewed do not fall within any of the indicated categories:

James A. McCafferty, Chief, Statistical Analysis and Reports Division, Administrative Office of the United States Courts.

Harold C. Relyea, American National Government Specialist, Library of Congress.

* Denotes persons affiliated with the Administrative Conference either as a government or a public member, a liason representative, or a senior fellow. With respect to one of these, Thomas M. Susman, the author discussed the study in person only in connection with the work of the Conference's Committee on Judicial Review and thereafter in a telephone interview.

Additionally, telephone interviews were conducted with the following:

Robert J. Freeman, Executive Director, State of New York Committee on Open Government.

Inger Hansen, Information Commissioner, Canada.

James T. O'Reilly, Senior Counsel, Proctor and Gamble, and Lecturer in Law, University of Cincinnati.

Mitchell W. Pearlman, Executive Director, State of Connecticut Freedom of Information Commission.

The first of the two forums referred to was a meeting of the Washington Ad Hoc Media Group, chaired by Richard M. Schmidt, counsel to the American Society of Newspaper Editors, and attended by the following 15 other media representatives: Steve Bookshester--NAB, Patrick Butler--Times Mirror, Patrick Carome--Washington Post, Diane Cohn--RTNDA, Elaine English--RCFP, Karla Grave--NCTA, Jim Grossberg--SPJ,SDX, Nancy Hendry--PBS, Claudia James--ANPA, Mark Johnson--CBS, Dick Kleeman--AAP, Alice Leff Lucan--Gannett Co. Inc., Molly Parker--NBC, Anita Small--Time, Inc., Ann Tonjes--NPR. The second was a panel session of the Annual Symposium of the American Society of Access Professionals attended by over 100 symposium registrants.

A number of additional telephone interviews were conducted to obtain certain statistical data. These interviews are cited in other parts of the report.

The identification of individuals and organizations in this note is not intended to indicate their agreement with the narrative summary of the interviews or with the conclusions or recommendations of this report.

127. Much of the concern that underlay the 1974 amendments to the Act was agency delay. See generally Freedom of Information: Hearings before the Subcomm. on Intergovernmental Relations of the Senate Government Operations Comm. and the Subcomms. on Administrative Practice and Procedure and Separations of Powers of the Senate Judiciary Comm., 93d Cong., 1st Sess. (1973) [hereinafter cited as 1973 Senate Hearings]. More recent consideration of possible FOIA reform continues to reflect concern over delay at the agency level. See, e.g., 1984 House Hearings at 128-131 (Statement of the Reporters Committee for Freedom of the Press).

128. In part these considerations are reflected in the provisions for extension of the 10 and 20 day time limits under the Act, supra notes 13-15 and accompanying text, as well as in the caselaw with respect to the constructive exhaustion

requirement; see Open American v. Watergate Special Prosecution Force, supra notes 24-27 and accompanying text.

129. The authority of the Special Counsel of the Merit Systems Protection Board to investigate "arbitrary and capricious" withholding of information under the Act represents one form such a structure might take; however, the narrow experience under that model limits its utility as a frame of reference for the broader problems of agency delay. See supra notes 85-88 and accompanying text. Moreover, because of its indirect association with the disciplinary provision of FOIA, 5 U.S.C. § 552(a)(4)(F), its connotations are sanction rather than incentive-oriented and thus not generally understood as a dispute resolution mechanism.

130. 5 U.S.C. § 552(a)(4)(D).

131. Pub. L. 98-620, Title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3335, 3357.

132. Id.

133. H.R. Rep. No. 98-985, 98th Cong., 2d Sess. at 5-6:

> The Committee recognizes in Section 2(a) the special nature of Freedom of Information Act cases. This section recognizes the need to expedite hearings upon the showing of "good cause" and defines good cause as including a right under Section 552 of Title 5, the Freedom of Information Act (FOIA).
>
> The Freedom of Information Act is a major tool through which the public and the press obtain information about their government. Prompt review of decisions denying access to government information is critical to FOIA users and to the purposes of the Act. Without such prompt review, government officials can delay access to public records, and extended delays in court can encourage unjustified refusals to disclose information. Frequently the value of disclosed information is transitory. If this information is not released in a timely manner, it may be of no value at all. Further most FOIA cases do not involve extended discovery or testimony and therefore do not burden court dockets for extensive periods of time. Expedited action by the courts in these cases can reduce the opportunities to hamper reporting of governmental activities, and it

> is the intent of the Committee that the "good cause" provision be liberally construed by the courts in granting requests for expedited consideration under the Freedom of Information Act.

134. See Council on the Role of the Courts, The Role of Courts in American Society 45-67 (Lieberman, J. ed. 1984) [hereinafter cited as Role of Courts].

135. In cases in which the final agency disposition satisfies the requester, the matter of actual or potential delay in a court proceeding is not an issue. In cases in which the requester is not satisfied and chooses to proceed in court, any additional delay represented by the court proceeding becomes part of the total time cost in the access process. Where time is critical, the prospect of additional delay may simply deter the requester from seeking court review. If the requester is not deterred, the independence of the forum is to some extent an offsetting consideration in accepting court delay.

136. See Report to the Chairman, Subcommittee on the Constitution, Senate Committee on the Judiciary, "Guidance Needed If Better Freedom of Information Act Cost Reports Are Desired," General Accounting Offices GGD-83-71 (June 22, 1983) [hereinafter cited as GAO Cost Report].

137. Freedom Information Oversight: Hearings before House Comm. on Government Operations, 97th Cong., 1st Sess. 202 (1981); O'Reilly, supra note 5, at 103 n.61.

138. The point of comparison is ordinarily large scale federal court litigation, but there is, of course, a wide range of cost in the spectrum of federal civil cases. Role of Courts at 60-61.

139. While the costs and benefits are not easily quantified even for the sophisticated requester, it seems clear that considerable value is attached to moving the case from the mass of cases receiving "ordinary" agency treatment to the few that are subject to the rigors of disinterested, external decisionmaking.

140. Because this group of users of the Act is extremely diverse and by definition not specifically represented by identifiable individuals or organizations, it is difficult to assess the actual experience of such requesters in seeking to have access claims resolved after final agency disposition. Many of the interviewees in this study expressed concern for the barrier federal court litigation may represent for these users. The text reflects these concerns.

141. The language of the Vaughn opinion itself suggests that the purpose of the index is not merely to aid the court in decisionmaking, but also to bring focus to and impose some administrative burden in the assertion of exemption claims:

> The procedural requirements we have spelled out herein may impose a substantial burden on an agency seeking to avoid disclosure. Yet the current approach places the burden on the party seeking disclosure, in clear contravention of the statutory mandate. Our decision here may sharply stimulate what must be, in the final analysis, the simplest and most effective solution--for agencies voluntarily to disclose as much information as possible and to create internal procedures that will assure that disclosable information can be easily separated from that which is exempt. A sincere policy of maximum disclosure would truncate many of the disputes that are considered by this court. And if the remaining burden is mostly thrust on the Government, administrative ingenuity will be devoted to lightening the load.

484 F.2d at 828.

142. See GAO Cost Report at 12-15.

143. Apart from the statutory requirement that the plaintiff "substantially" prevail to be eligible for attorney's fees, the court must consider in its discretion whether to award fees in light of four factors based in the legislative history of the fee award provision: "(1) the benefit to the public, if any, derived from the case; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether the government's withholding of the records had a reasonable basis in law." Fenster v. Brown, 617 F.2d 740, 742 (D.C. Cir. 1979). Finally, the calculation of the appropriate fee involves a complex of factors applied to FOIA and other (e.g., Title VII) fee awards claims:

> The initial task in determining an appropriate fee award under Copeland III is to establish the "lodestar": the number of hours reasonably expended multiplied by a reasonable hourly rate. 641 F.2d at 891. A reasonable hourly rate was defined in Copeland III as that prevailing in the community for similar work. Id. at 892. Once established, the lodestar may be

> adjusted to reflect various other factors. The Court noted that a premium should generally be awarded if counsel would have obtained no fee in the event the suit was unsuccessful or if the fee award is made long after the services were rendered. Id. at 892-93. In addition, it indicated that the lodestar figure may be either increased or reduced to recognize legal representation of unusually superior or inferior quality. Id. at 893-94.

National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1323 (D.C. Cir. 1982), reh'g en banc denied, Nos. 81-1364, 82-1424 (D.C. Cir. Aug. 26, 1982). See also FOIA Litigation at 175-86; Justice Guide at 356-60.

144. Many factors may call into question whether this class of cases can be considered representative of FOIA litigation. The class includes only those cases in which the plaintiff prevailed (or in settled cases would likely have prevailed) and cases that have the "public" quality suggested by the discretionary standards for making a fee award. See supra note 143. On the other hand, this class of cases tends to be the one generally focused upon in assessments of how well the FOIA is working. In any event no other meaningful data is readily available. See supra note 136 and accompanying text.

145. 1980-1984 Department of Justice Annual Freedom of Information Act Reports to Congress.

146. See infra notes 203-05 and accompanying text. (The calculation is based on the Administrative Office of the Courts' estimate of the annual recurring costs of a federal district judgeship--$413,000--and a federal circuit judgeship--$421,000--times the district and circuit staffing requirement based on the weighted caseload factor. Cost to the Judiciary, Administrative Office of the United States Courts, Budget Branch, March 8, 1985.)

147. The role of the courts in this development is seen as having essentially three components (1) defining the scope of the exemptions, (2) establishing procedural requirements, and (3) providing a neutral forum for access disputes.

148. For example, the 1974 amendment to the seventh exemption reflected dissatisfaction with a series of D.C. Circuit decisions construing that exemption. E.g., Weisberg v. Department of Justice, 489 F.2d 1195 (D.C. Cir. 1973), cert. denied, 416 U.S. 993 (1974). See generally Information Disclosure at 3-21 to 3-31.

149. For example, the 1974 amendment requirement that "any reasonably segregable" non-exempt portion of an otherwise exempt record be released had been developed in the courts. E.g., Bristol Meyers Co. v. FTC, 424 F.2d 939, 939 (D.C. Cir. 1970); Grumman Aircraft Engineering Corp. v. Renegotiation Board, 425 F.2d 578 (D.C. Cir. 1970).

150. There are, however, limitations on the role courts can play in the FOIA process. See, e.g., Vaughn, supra note 5, at 192 n.43:

> The judicial role is necessarily limited for several reasons. Among these are: (1) the concerns created by the separation of powers doctrine that the courts not intrude improperly into the operations of a coordinate branch of government; (2) the role of courts in Freedom of Information Act litigation limiting the courts primarily to ordering the release of documents; (3) the episodic case by case nature of litigation reducing the courts' ability to provide effective administrative oversight; (4)the expenses and costs of litigation restricting the information brought to the courts and the opportunity to act; and (5) the lack of familiarity with the details of a range of agency practices and policies.

151. See supra note 46 and accompanying text.

152. The mature state of FOIA caselaw reflects judicial processing of roughly 4000 cases over a period of nearly twenty years.

153. These differences are reflected throughout the hearings or proposed FOIA amendments considered by Congress over the last several years. See supra note 2. For an interesting contrast in views outside the legislative process; compare Scalia, The Freedom of Information Act Has No Clothes, Regulation, 14-19 March/April 1982, with Wald, The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values, 33 Emory L. J. 649 (1984).

154. 5 U.S.C. § 552(a)(4)(B).

155. The announced shift in Department of Justice policy with respect to the defense of agencies in FOIA litigation from the Carter Administration to the Reagan Administration, see supra notes 76-77 and accompanying text, was a highly visible development seen to mark different access philosophies.

156. The proposed FOIA Reform Act has spawned charges and responses that speak in terms of "dismantling" the Act as opposed to performing needed "corrective surgery." The metaphors are even refined to a choice between using "a screwdriver rather than a crowbar," 1981 Senate Hearing at 155 (remarks of Senator Hatch) as opposed to "a microscope and a scalpel," id. at 165 (statement of Judge Renfrew).

157. 5 U.S.C. § 552(a)(3).

158. See, e.g., supra note 143 (standards for awarding attorney's fees).

159. See, e.g., S. 774, 98th Cong., 2d Sess. § 1 (amending 5 U.S.C. § 552(a)(4)(A) to provide relief from fees otherwise imposed by the bill "where the agency determines that the information is not requested for a commercial use and the request is being made by or on behalf of (a) an individual, or educational, or noncommercial scientific institution, whose purpose is scholarly or scientific research; (b) a representative of the news media; or (c) a non-profit group that intends to make the information available to the general public").

160. An access dispute resolution mechanism perceived as having less stature than a federal district court would, from some perspectives, be suitable for "small claims," but not others. The distinction, however, appears to rest at that level of generality.

161. See Sander, Varieties of Dispute Processing, 70 F.R.D. 111, 118-26 (1976). See also S. Goldberg, E. Green, & F. Sander, Dispute Resolution 10-13 (1985) [hereinafter cited as Dispute Resolution].

162. This distinction is, of course, subject to the statutory requirement that "reasonably segregable" non-exempt portions of a record be made available. 5 U.S.C. § 552(b). The determination here likewise is between segregability and non-segregability.

163. See Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 393-402 (1979) (illustrating the unsuitability of the polycentric dispute for resolution by adjudication).

164. This essentially describes the process of adjudications of FOIA claims in the de novo judicial proceeding. Apart from the limitations addressed by the Vaughn index, the process when fully invoked is rather straightforward adjudication. See id. at 364.

165. See supra notes 58-59 and accompanying text.

166. When these factors exist in combination in particular cases they may even better explain the intensity with which some claims are pursued.

167. While in many cases there is a relationship of sorts between the agency and the requester, e.g., that of "regulator" and "regulatee," it is not of the kind that would require mediative rather than imposed resolution of the FOIA claim in the interest of the relationship.

168. The combination of these factors tends to indicate the need for a strictly adjudicative resolution of many FOIA cases. See Dispute Resolution at 10-11.

169. In some cases, of course, governmentally generated or procured information or third-party submitted information has significant monetary value. Even in these cases, however, the value is not easily calculated.

170. As long as a party significantly values obtaining or protecting the information, its intrinsic value is irrelevant. Thus, the normal shorthand for identifying "amount" in controversy must yield to an essentially unquantifiable perception.

171. The two latter factors affect all cases. Unless the post-agency process lends itself to the promotion of prompt resolution of the dispute the delay seems intractable.

172. Cost-effectiveness as a goal is, of course, unobjectionable. The difficulty lies in the evaluative process. The limitations of the available data with respect to the cost-effectiveness of the existing access structure, and many-fold with respect to untested alternatives, seriously burden the evaluation.

173. Dispute Resolution at 8-9.

174. For example court-annexed arbitration. See E. Lind and J. Shapard, Evaluation of Court-Annexed Arbitration in Three Federal District Court, Federal Judicial Center (rev. ed. 1983).

175. See supra notes 162-168 and accompanying text.

176. To indicate that these processes could be available for non-mandatory use should not be understood as deprecating their potential value. The conclusion is based not only on a concern for avoiding costly layering in the process, but also on a recognition of the importance of consent to the effective use of these processes from both the requester and agency perspectives. See also infra note 186.

177. As the use of arbitration expanded beyond the field of labor relation into various commercial fields the rationale of and form for the proceeding has changed and there remains some question as to transferability of the traditional labor model. See, e.g., Getman, Labor Arbitration and Dispute Resolution, 88 Yale L.J. 916 (1979).

178. Conceptually "appeal" of an adjudication suggests broader reviewability than is available from a traditional arbitration. See United Steel Workers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

179. The term "adjudication" is used here to describe both the process in its fully invoked form and its less formal adjuncts. The combined process has been described as "litigotiation" or the "process of disputing in the vicinity of official tribunals." See Galanter, Worlds of Deals: Using Negotiation to Teach About Legal Process, 34 J. of Legal Educ. 268 (1984). Clearly this occurs in the FOIA post-agency process. See supra notes 53-57 and accompanying text.

180. Again it should be noted that non-adjudicative alternatives may be made available in addition to the formal, binding process. See infra note 186 and accompanying text.

181. See, e.g., Bork, Dealing with the Overload in Article III Courts, 70 F.R.D. 231, 237-39 (The Pound Conference 1976). See also R. Posner, The Federal Courts: Crisis and Reform (1985). Greater use has also been made of decisionmakers adjunct to Article III bodies such as United States Magistrates. See generally Hearing: Judicial Conference of the United States before Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 98th Cong., 1st Sess. (1983). As these adjunct decisionmakers themselves become burdened with new assignments their ability to relieve the burden on Article III courts is diminished. Moreover, despite their Article III association, U.S. Magistrates continue to labor under a cloud of second-class status because of their lack of Article III protections. See Note, Federal Magistrates and the Principles of Article III, 97 Harv. L. Rev. 1947 (1984).

182. Role of Courts at 102-105.

183. The significance of these considerations for particular classes of requesters or disputes would vary along the lines of the taxonomy developed, but the focus here is on the overall process.

184. See Information Disclosure at 3-1 to 3-31.

185. See generally O'Reilly, supra note 5. In the privacy area centralized administration has been recommended. Privacy

Protection Study Commission, Personal Privacy in an Information Society (1977). See also H.R. 1721, 99th Cong., 1st Sess. (1985) ("A bill to establish a Data Protection Board, and for other purposes.")

186. Role of Courts at 97. The conciliation function incorporates into the overall Authority structure a limited and modified form of the ombudsman function that has long been considered a desirable dispute resolution mechanism in certain settings. See generally W. Gellhorn, Ombudsman and Others: Citizen's Protectors in Nine Countries (1966); The Ombudsman (D. Rowatt ed. 1965); Verkuil, The Ombudsman and the Limits of the Adversary System, 75 Colum. L. Rev. 845 (1975). As indicated earlier, see supra notes 105-123 and accompanying text, variations on the ombudsman theme have been used in access dispute resolution. See also Vaughn, supra note 5, at 212-214; and note 131 and accompanying text.

187. See supra note 129 and accompanying text.

188. See infra note 211 and accompanying text.

189. Buckley v. Valeo, 424 U.S. 1, 118-143 (1976).

190. 44 U.S.C. §§ 2102-03.

191. 44 U.S.C. §§ 2104-11.

192. Rather than directly limiting removal to "cause," the statute provides:

> The Archivist may be removed from office by the President. The President shall communicate the reason for any such removal to each House of the Congress.

Id. § 2103(b).

193. The time would be a matter of hours or days, rather than months or even weeks, except in extraordinary cases.

194. See supra notes 53-54 and accompanying text.

195. See supra notes 55-57 and accompanying text.

196. See supra notes 93-104 and accompanying text.

197. The agency appeals process ordinarily involves review of the withheld records rather than merely the initial decision-maker's characterization of the records and the reasons for withholding.

198. Apart from the assumption, some evidence exists in the study data that post-agency FOIA case processing can be handled more rapidly by more experienced decisionmakers. The overall median time intervals to termination in the District Court for the District of Columbia were somewhat faster than in all district courts combined. See supra note 49 and accompanying text (6 to 8 months in the District compared to 7 to 10 months for all courts over the six year period).

199. See supra notes 55-57 and accompanying text.

200. Telephone interviews with Richard L. Huff, Department of Justice; Col. Charles Talbott, Department of Defense, and Ross Cirrincione and Douglas Guerdat, Department of Health and Human Services.

201. Id.

202. See supra note 44 and accompanying text.

203. See The Weighted Caseload Studies: 1946-80, Annual Report of the Director, Administrative Office of the United States Courts, 290-97, Table X-Z (1980).

204. Id.

205. Report of the Judicial Conference Committee on Court Administration to the Chief Justice, Chairman, and Members of the Judicial Conference of the United States 4 (July 1980). For circuit judges the number is 450 filings. Id. at 1.

206. This time would include not only actual travel time, but also various time costs associated with case processing away from a central facility.

207. See supra notes 46-47 and accompanying text.

208. Cases "dismissed, settled or withdrawn" account for 52% of the total.

209. The workload relief provided by the two support positions is difficult to estimate. If each provided only a 15% relief the total reduction would more be than 500 hours per ALJ.

210. See supra note 62-69 and accompanying text.

211. The availability of conciliation may have the effect of reducing the active adjudication docket below 500 cases per year inasmuch as that figure is the product of a structure with no informal post-agency dispute resolution mechanism.

212. This estimate would cover either a caseload ranging from 500 to 1000 or a caseload of 500 with 100% underestimation in required processing time. Above these ranges, additional staffing would likely be required.

213. Adding or even removing a conciliator should pose fewer administrative problems than adjusting the number of ALJs.

214. These requirements are not estimated and would depend upon the particular functions assigned.

215. See supra notes 176 and 188 and accompanying text.

216. See supra notes 127-146 and accompanying text.

217. See supra note 186 and accompanying text.

218. Only in the last several years has the term "ombudsman" been formally used by a federal agency to describe a complaint-handling official. See infra notes 276-306 and accompanying text. The most prominent of these is the Taxpayer Ombudsman in the IRS.

219. See supra notes 71-68 and accompanying text.

220. The use of an central information ombudsman was considered, but dropped, in the legislative process leading to the 1966 act. Freedom of Information: Hearings Before Senate Comm. on the Judiciary, 88th Cong., 1st Sess. (1963). See O'Reilly, supra note 5, at 130 n.303.

221. The interpretative manual issued by the Department upon the passage of the APA, Attorney General's Manual on the Administrative Procedure Act (1947), became the model for a similar interpretative document issued upon the passage of the "freedom of information" amendments to the APA in 1966. Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (1967).

222. The Department's general authority is expressed in 28 U.S.C. § 516 (1982):

> Except as otherwise provided by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party or is interested, and securing evidence therefor, is reserved to the officers of the Department of Justice under the direction of the Attorney General.

A few agencies are statutorily granted authority to conduct their own litigation, including freedom of information actions. See, e.g., 42 U.S.C. § 2000e-4(b) (1982).

223. While the most dramatic increase in litigation occurred after the 1974 amendment, by the early 1970s the number of FOIA cases filed had reached 200. See supra note 42, and accompanying text.

224. See Sellers, Public Enforcement of the Freedom of Information Act, 2 Yale L. & Pol. Rev. 78, 90-91 (1983); O'Reilly, Who's on First?: The Role of the Office of Management and Budget in Federal Information Policy, 10 J. of Legis. 95, 102-103 (1983).

225. Memorandum to General Counsel of All Federal Departments and Agencies Re Coordination of Certain Administrative Matters Under the Freedom Act (Dec. 8, 1969).

226. 38 Fed. Reg. 19123 (July 18, 1973).

227. See Sellers, supra note 224, at 92-93.

228. United States Government Information Policies and Practices--Administration and Operation of the Freedom of Information Act: Hearings Before the Subcomm. on Government Information of the House Comm. on Government Operations, 92 Cong., 2d Sess., Pt. 4 at 1182 [hereinafter cited as 1972 House Hearings].

229. See Sellers, supra note 224, at 93.

230. Id. at 93 n.73.

231. See 1972 House Hearings at 29-33; see also Staff of the House of Gov't Operations Comm., 92d Cong., 2d Sess., Administration of the Freedom of Information Act: An Evaluation of Gov't Information Programs Under the Act, 1967-72, at 69 (1972).

232. 5 U.S.C. § 552(d).

233. See supra note 42.

234. 41 Fed. Reg. 10222 (March 10, 1976).

235. See Sellers, supra note 224, at 94 n.77.

236. Letter of Attorney General Bell to Heads of Departments and Agencies, May 5, 1977, reprinted in 1981 Senate Hearings, supra note 2, at 912.

237. Id.

238. Id.

239. See Sellers, supra note 224, at 96.

240. The Civil Division's opportunity for compliance-promoting activity extends beyond an initial decision to defend throughout all phases of the defense process as a case develops.

241. Dept. of Justice Order 803-78, "Establishment of the Office of Information Law and Policy" (September 27, 1978), codified as 28 C.F.R. §§ 0.28-29 (1979).

242. See generally Sellers, supra note 224, at 90-99.

243. Memorandum from Attorney General William French Smith to the Heads of All Departments and Agenices, May 5, 1981, reprinted in FOIA Update, June 1981, at 3.

244. Dept. of Justice Order No. 973-82, 47 Fed. Reg. 10809 (March 4, 1982), codified as 28 C.F.R. 0.28 (1983).

245. See infra note 251 and accompanying text.

246. While the function has over the years been assumed by various components of the Department, it has coexisted with other FOIA-related activities carried out in those components.

247. Interview with Daniel J. Metcalfe and Richard L. Huff, Co-Directors, Office of Information and Privacy, Dept. of Justice, July 21, 1986 [hereinafter cited as Metcalfe-Huff Interview]; telephone interview with Daniel J. Metcalfe, September 19, 1986.

248. Id.

249. Id.

250. 28 C.F.R. 0.2_ (1986).

251. See, e.g., 1985 Attorney General's Annual Freedom of Information Report at 187.

252. See 1978-1985 Attorney General's Annual Freedom of Information Report.

253. This description of the citizen complaint-handling function has appeared in the Attorney General's annual reports since 1979. See, e.g., 1985 Annual Report at 190.

254. See infra text accompanying note 255.

255. Compiled from 1979-1985 Attorney General's Annual Freedom of Information Reports.

256. See, e.g., Information Disclosure at 3-11 to 3-16.

257. The most formal recognition of this capacity is the statutory reporting requirement for efforts undertaken to "encourage agency compliance," 5 U.S.C. § 552(d), and its legislative history, Staff of Senate Committee on the Judiciary and House Comm. on Govt. Operations, 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 Sourcebook: Legislative History, Texts, and Other Documents (Jt. Comm. Print 1975).

258. See, e.g., supra note 155 and accompanying text.

259. W. Gellhorn, Ombudsman and Others: Citizens' Protectors in Nine Countries (1966); W. Gellhorn, When Americans Complain: Governmental Grievance Procedures (1966).

260. See, e.g., S. 1195, 90th Cong., 1st Sess. (March 7, 1967) (a bill to establish an administrative ombudsman with jurisdiction over the social Security Administration, the Veterans Administration, the Internal Revenue Service and the Bureau of Prisons).

261. See Verkuil, The Ombudsman and the Limits of the Adversary System, 75 Colum. L. Rev. 845, 847 (1975).

262. The Ombudsman: Citizen's Defender (D. Rowat ed. 1968).

263. See Verkuil, supra note 261, at 846-47.

264. The mechanisms for ensuring independence, for example, may vary depending upon the characteristics of the system of administration in which the ombudsman operates.

265. Rowat, supra note 262, at xxiv.

266. See generally Caiden, MacDermot, & Sandler, "The Institution of Ombudsman," 11-15, Hill, "The Self-Perception of Ombudsmen," 43-44, Mills, "The Ombudsman in the American Constitutional, Legal and Political Structure," 209-212, in International Handbook of the Ombudsman (Caiden ed. 1983).

267. See, for example, an observation in Danet, Toward a Method to Evaluate the Ombudsman Role, 10 Admin. & Soc. 335, 338 (1978) that a recent bibliography on ombudsmen and quasi-ombudsmen contains nearly five hundred entries "but only a handful address the question of how well the ombudsman idea works in practice."

268. Id. But see, e.g., Miewald and Comer, Complaining as Participation: The Case of the Ombudsman, 17 Admin. & Soc. 481 (1986).

269. See, for example, the three current federal uses of ombudsmen, infra notes 278-301 and accompanying text.

270. W. Gellhorn, When Americans Complain, supra note 259, at 224-25.

271. Id. at 225-26.

272. Caiden, MacDermot, and Sandler, "The Institution of Ombudsman," 9-19, in International Handbook of the Ombudsman (Caiden ed. 1983) [hereinafter cited as Institution of Ombudsman].

273. See supra note 69 and accompanying text.

274. See supra notes 186-188 and accompanying text.

275. See infra notes 307-28 and accompanying text.

276. Institution of Ombudsman at 9-12.

277. One of the most far-reaching mechanisms for citizen complaint handling is the referral of constituent complaints by members of Congress to the complained-against agency. The referral normally generates an agency response that is in turn forwarded to citizen. Most agencies have well-established procedures for handling such matters, but the effect of this mechanism on administration generally would be extremely difficult to evaluate. A bill to centralize the "casework" process by the establishment of a congressional office of "Administrative Counsel" was introduced in 1963 by Congressman Reuss. H.R. 7593, 88th Cong., 1st Sess., July 16, 1963. This bill was precursor of some broader, and more explicit "ombudsman" proposal made after the appearance of the Gellhorn studies. See generally Rowat, Citizen's Defenders, supra note 262, at 194-200 and 235-63.

278. See infra notes 279-306 and accompanying text.

279. "Problem Resolution Program Taxpayer Ombudsman," Internal Revenue Service (1986) [hereinafter cited as Problem Resolution Program]. See also Problem Resolution Program Handbook, Internal Revenue Manual (1986) [hereinafter cited as PRP Handbook].

280. Id.

281. Id.

282. Id. See PRP Handbook at 1279-37.

283. Id.

284. Id.

285. Id.

286. Id.

287. Id.

288. Telephone Interview with Linda Martin, Director, Problem Resolution Staff, August 27, 1986.

289. Id.

290. Id.

291. Id.

292. Pub. L. No. 96-70, 93 Stat. 455 (1979), codified as 22 U.S.C. § 3601 et seq.

293. 22 U.S.C. § 3623(a).

294. 22 U.S.C. § 3623(b).

295. 22 U.S.C. § 3623(c).

296. 1985 Annual Report of the Panama Canal Commission 25 (1985).

297. Pub. L. No. 98-616, Title I, § 103(a), 98 Stat. 3225, codified as 42 U.S.C. § 6917(a).

298. 42 U.S.C. § 6917(b).

299. 42 U.S.C. § 6917(c).

300. Telephone Interview with Robert Knox, RCRA Ombudsman, August 22, 1986.

301. 42 U.S.C. § 6917(d).

302. See 42 U.S.C. § 3024(a).

303. 42 U.S.C. § 3027(a)(12)(A)(i-iv).

304. H.R. 5050, 99th Cong., 2d Sess. (1986); Cong. Rec., July 22, 1986, H4692-96.

305. Id. § 102(F)(4)(A-E).

306. Id. at § 102(f)(5). See also H.Rep. No. 99-680, 99th Cong., 2d Sess. 14 (1986).

307. See supra notes 105-114 and accompanying text. See also Loeb, "Open Government in New York," Freedom of Information Center, School of Journalism, University of Missouri-Columbia (Rep. No. 512, June 1985).

308. See supra notes 115-23 and accompanying text.

309. S.C. 1980-81-82, c. 111 § 30.

310. Id.

311. The description of the structure and operation of the Office of the Information Commissioner is taken from: (1) 1983-1985 Annual Reports of the Information Commissioner [hereinafter cited as "IC Annual Report"]; (2) Brief to the House of Commons Standing Committee on Justice and Legal Affairs submitted by the Information Commissioner in connection with three year review required under section 75 of the Access to Information Act dated May 7, 1986 [hereinafter cited as IC Brief]; and (3) Interview with Inger Hansen, Q.C. Information Commissioner, July 23, 1986 [hereinafter cited as IC Interview].

312. IC Brief § 5.1 et seq.

313. IC Brief § 2.5. See also IC Annual Report (1983-1985).

314. Id.

315. Id.

316. IC Annual Report (1983-1985).

317. Id.

318. IC Brief § 10.2. Through May 1, 1986 only 47 were brought by third parties to prevent disclosure of their information. Of the 17 non-reverse cases, 6 were commenced by the Information Commissioner on behalf of complainants and 11 were commenced by complainants in cases where investigations by the Information Commissioner had determined that positions taken by the government were correct. Id.

319. See supra note 317 and accompanying text.

320. IC Brief § 2.1.

321. Id. § 2.2.4.

322. Id. § 2.4.

323. IC Interview.

324. Id.

325. Access to Information Act § 42. See also IC Brief § 10.1-10.3.

326. IC Brief § 2.2.4.

327. E.g., Rubin, Suggested Changes to Canada's 1982 Access to Information Act, 72-78 (1986).

328. IC Brief § 1.5.

329. Freedom of Information Act 1982 (Cth).

330. Id. Part VI.

331. Id.

332. The description of the authority and activity of the Commonwealth Ombudsman in the freedom of information field is taken from: (1) the 1983-1985 Annual Reports of the Commonwealth Ombudsman [hereinafter cited as "CO Annual Report"]; (2) the Submission by the Commonwealth Ombudsman's Office to the Senate Standing Committee on Constitutional and Legal Affairs Re Freedom of Information Legislation (1986) [hereinafter cited as "CO Submission"]; and (3) telephone interview with Lindsay Shaw, Senior Assistant Ombudsman, October 8, 1986 [hereinafter cited as CO Interview].

333. Ombudsman Act 1976 (Cth).

334. 1983-84 CO Annual Report at 24.

335. CO Interview. The other major area of responsibility for this Deputy Ombudsman arises from the Complaints (Australian Federal Police) Act of 1981.

336. Id. See also CO Submission (statistical Data Appendix) at 6.

337. CO Interview.

338. Id. 1983-1985 Annual Report; CO Submission (Statistical Data Appendix) at 1.

339. Id. CO Submission at § 2.1.

340. CO Submission at § 1.4.

341. CO Interview.

342. 1983-84 CO Annual Report at 26; 1984-85 Annual Report at 170.

343. CO Submission (Statistical Data Appendix) at 1-2.

344. CO Submission at §§ 2.6 and 2.10.

345. CO Submission at §§ 2.13 at 2.14.

346. Id. at § 2.15.

347. See supra notes 127-152 and accompanying text.

348. The third goal is less an independent goal than a recognition of the opportunity that an external complaint processing entity has for identifying systemic problems.

349. See supra notes 24-27 and 127-29 and accompanying text.

350. It is difficult to formulate a general standard that would distinguish ordinary from extraordinary issues of delay. The length of the delay or the time-value of the information alone would not normally be dispositive. Perhaps the most that can be said is that specific allegations in a complaint that provide a reasonable basis for believing that an agency is failing to meet the "due diligence" standard in processing a request should be subject to investigation.

351. In the case of complaints determined to be outside the jurisdiction of the ombudsman, the nature of the complaint and the reason for the determination should be maintained.

352. Both the Canadian and Australian Ombudsman handle such questions. The Department of Justice Office of Information and Privacy also responds to such inquiries. While assistance of this type is also available from other agencies and non-governmental sources, an information ombudsman office would naturally attract these inquiries and should undertake to provide this service so long as its volume does not seriously interfere with its primary complaint processing function.

353. The primary purpose of the ombudman's report would be to provide a statement of views that could assist the parties in the resolution of their dispute. In cases that are not resolved informally, the practical effect of the report may be to influence a position taken by one party or the other in litigation. But any judicial deference to the report would misconceive the nature of ombudsman function and likely undermine the ability of an ombudsman to operate in a conciliative capacity. Ideally, the report would be excluded altogether from the judicial process.

354. As noted earlier, a complaint to the Canadian Information Commissioner is a prerequisite to suit in Federal Court. This provision was largely premised on the view that a mandatory informal process would hold the volume of access litigation in Canada below the U.S. levels. Given the limited usage of the Canadian Act thus far and the absence of a Canadian base volume for comparison, it is difficult to assess how well

the requirement serves this objective. Whatever its benefits, the cost of the requirement is to restrict access to the courts and then impose the informal process on some cases that have little if any promise of non-adjudicative resolution. These considerations, as well as workload constraints, and the very concept of the ombudsman militate against allowing availability of the ombudsman to limit the opportunity to adjudicate the dispute in the U.S.

While both the Canadian and Australian Ombudsmen may represent complainants in judicial proceedings, this authority is again inconsistent with the traditional concept of the ombudsman and is not widely used by either. It would be particularly inapt in the U.S.

355. This would be the preferred means for resolving a complaint. It would obviate the need for the ombudsman's making a report (other than a pro forma one acknowledging that the complaint had been resolved). While the ombudsman must have the authority to issue a critical report, the less frequent the resort is made to that authority the more respect a report is likely to command.

356. Even if it were possible to catalog the various methods theoretically available to the ombudsman, some would require the consent and cooperation of both the requester and the agency. The willingness of the parties to proceed in particular ways may set the practical boundaries for the ombudsman's methods.

357. Apart from broad questions of access policy, the application of certain provisions of the Act, e.g., exemption 6, requires a weighing of competing interests. See Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976).

358. Cramton, A Federal Ombudsman, 1972 Duke L.J. 1, 6 (1972).

359. Each component of this approach--explicit statutory authority, presidential or congressional appointment, and structural separation--contributes to independence and stature. It is thus the combination of these elements rather than any one of them that supports the characterization of this approach as representing "one extreme" in positioning the ombudsman.

360. The characterization of this approach as representing the "other extreme" depends upon the absence of all three rather than the absence of any one of the components noted above. See supra note 359 and accompanying text.

361. While the Internal Revenue Service is concededly a complex bureaucracy with semi-autonomous regional and district components, the ultimate hierarchical structure of the Service

provides a position for the Taxpayer Ombudsman (a member of the Commissioner's immediate staff) that at least implicitly cuts across other organizational lines. Arguably, only at the presidential level would the FOIA Ombudsman have similar stature. Assuming the ombudsman would hold a lesser organizational position, other institutional indications of administration support become more important.

362. The considerations of efficiency are similar to, but perhaps less complex than, those discussed earlier in connection with the structure and staffing of an adjudicative authority. See supra notes 189-214 and accompanying text.

363. See supra notes 254-55 and accompanying text.

364. See supra notes 252-53 and accompanying text.

365. The scale on which this activity is conducted more than any other factor explains the absence of a clearly defined office procedure. Because there is no discrete intake mechanism, a focused complaint may evolve from what began as a routine telephone inquiry from a requester about "where to" or "how to." It may also take the form of a letter of complaint or develop from a referral. The identification of cases for "ombuds" handling from the various sources is informal and highly discretionary. While the Office never becomes involved in a case in which the agency appears to be processing the request in good faith and the essence of the complaint is delay, there is no other absolute criterion for exclusion, and there are no established criteria for inclusion. The approach appears to be largely a practical one, the unstated standard being does the complaint on its face seem justified and is it of the type on which the Office might provide meaningful assistance with a minimal commitment of resources. Some of the factors that affect this judgment include the seriousness of the conduct being complained of, the ease with which the merits can be assessed from the complaint itself and a simple inquiry to the agency, the level within the agency at which the matter rests, and the extent to which document review or some other form of direct monitoring would be required to resolve the complaint.

When the case otherwise "seems appropriate," the Office proceeds by contacting the agency at the level where the matter is pending. The complaint is explained and the agency is asked for its views. If the agency response indicates that there is a compliance problem, the Office explains the position of the Department on the matter and asks for appropriate corrective action. Ordinarily, given the approach used in selecting cases for inquiry, this informal and deferential approach leads to a resolution of the complaint consistent with the position taken by the Office.

The Office does not maintain detailed records of this activity. Apart from the annual statistical listing, the data can be reported only anecdotally. A "typical" case involved a complainant whose requests were being entirely ignored at the initial processing level. The official responsible had taken the position that the requests were merely part of a pattern of harassment surrounding the requester's personnel grievance and therefore should not be processed. Once the Office determined "what the facts were," it informed the official of the impropriety of his position, and he agreed to take corrective action. Metcalfe-Huff Interview, supra note 247.

366. See infra note 367.

367. As noted earlier, the current Department orders under which OIP operates, Order No. 973-82, 47FR 10809, March 12, 1982 and Order No. 1055-84, 49FR 12253, March 29, 1984, codified as 28 C.F.R. § 0.23a, do not explicitly assign an ombudsman function. The orders do, however, authorize OIP generally to "coordinate ... compliance with the [FOIA] with the executive agencies..." and "[a]dvise executive agencies on questions relating to the interpretation and application of the [FOIA]...." Apparently, this authority provides the basis for OIP's current ombudsman activity. The Attorney General could reassign this function and allocate resources to the organizational unit assigned the activity. See 5 U.S.C. § 301 and 28 U.S.C. § 510.

368. A binding determination, if practicable at all in a pilot project, would require some form of waiver of statutory rights by parties to the proceeding.

369. See supra note 174.

370. Apart from such experimentation, the available data is limited to less apt state or foreign experiences.