

Report in Support of Recommendation 71-2 (As published in: 23 Administrative Law Review (May 1971)).

## AGENCY PROCEDURES IMPLEMENTING THE FREEDOM OF INFORMATION ACT: A PROPOSAL FOR UNIFORM REGULATIONS

DONALD A. GIANNELLA\*

Supporters of the Freedom of Information Act believed that its passage would usher in a new era in which information concerning government operations would be freely and easily accessible to all citizens. Prior to its enactment the Public Information Section of the Administrative Procedure Act had not provided for public access to government records generally. It had permitted withholding of agency records if secrecy was needed either in the public interest or for good cause found, and it had required disclosure only to persons properly and directly concerned with the subject matter of an inquiry. The new Act, which went into effect in July 1967, did away with these requirements. Any citizen is now legally entitled to have access to any record held by a federal agency unless it contains certain kinds of information specified in the Act. Except for this exempt information, a person whose request for a record has been denied can bring suit in a federal district court to compel its production. In such an action the burden is on the agency to sustain its decision to withhold the record.

A number of charges have been made that contrary to the Act agencies are improperly invoking statutory exemptions to withhold records, are delaying action on requests and are generally taking steps designed to frustrate public access to government information. This article is based on research undertaken for the Committee on Information, Education and Reports of the Administrative Conference of the United States to determine the existence and extent of problems in implementing the Freedom of Information Act. The research included a comprehensive study of agency regulations, a limited survey of persons who have requested records from federal agencies, and personal interviews with officials in several federal agencies and departments.\*\* On the basis of

---

\*Professor of Law, Villanova Law School; A.B. Harvard, 1951. L.L.B., 1955.

\*\*Interviews were conducted at the Office of Economic Opportunity, the Civil Aeronautics Board, the Federal Trade Commission, the Department of Agriculture, the Department of the Interior, the Department of Transportation, the Department of Health, Education and Welfare and the Department of Defense and its component departments.

this research a proposal was drafted recommending that agencies adopt certain regulations governing procedures for the handling of requests for records. Recommended guidelines for such regulations appear in Appendix A. The reasons supporting the recommendations are set out in the body of the article.<sup>†</sup>

### THE PROBLEM

The main purpose of the Freedom of Information Act<sup>1</sup> is the public dissemination of information relating to government activities. The Senate report on the Act referred to Madison's observation that "popular government" requires "popular information" and stressed the importance "of having an information policy of *full* disclosure."<sup>2</sup> In signing the bill into law President Johnson stated that "a democracy works best when the people have *all* the information that the security of the nation permits."<sup>3</sup>

In line with this purpose of a reasonably complete and open information policy, the Act gives any citizen the right to examine records held by government agencies except for materials falling into one of nine specifically listed categories.<sup>4</sup> The exempt categories were designed to

---

<sup>†</sup>At its plenary session on May 7 and 8 the Administrative Conference of the United States adopted as Recommendation No. 24 the proposal as it appears in appendix A. The Conference did not evaluate or approve the contents of the instant article. The author bears sole responsibility for the views expressed. The contents of the article were made available to the members of the Conference in support of the recommendation.

<sup>1</sup>81 Stat. 54, 5 U.S.C. § 552 (1964 ed. Supp. IV).

<sup>2</sup>S. Rep. No. 813, 89th Cong., 1st Sess. 2-3 (1965) (emphasis added) [hereinafter cited as S. Rep.].

<sup>3</sup>Statement by President Johnson Upon Signing Public Law 89-487 on July 4, 1966, as reproduced in 20 Ad. L. Rev. 263 (1968) (emphasis added).

<sup>4</sup>These exemptions are found at 5 U.S.C. § 552(b) (1964) and read as follows:

This section does not apply to matters that are —

- 1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;
- 2) related solely to the internal personnel rules and practices of an agency;
- 3) specifically exempted from disclosure by statute;
- 4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- 5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- 6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.
- 7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;
- 8) contained in or related to examination, operating, or condition reports prepared

protect military secrets, internal instructions to agency staff, and confidential commercial, financial, or personal information about private parties that has found its way into government files; they were also intended to prevent premature disclosure of investigatory files and to preserve the confidentiality of internal memoranda where appropriate. These exemptions have been criticized as being generally too broad and yet too narrow where personal privacy is involved.<sup>5</sup> To date there is little evidence that the Act has resulted in significant invasions of personal privacy.<sup>6</sup>

No suits are known to have been brought under the Act by members of the press as of the date of this article, even though the Act was largely the product of their efforts.<sup>7</sup> This might indicate that a steady flow of records is being made available to the press and that the Act has served its main purpose. However, the absence of litigation does not of itself warrant this conclusion. Newsmen do not generally dig out stories relating to current events from government files; they are more likely to rely on information provided to them officially by the agencies or unofficially by knowledgeable contacts, as was the case prior to the Act.<sup>8</sup> Even when they do seek government records in relation to a current event, the legal right created by the Act is of little direct and immediate assistance because of the time pressure to get the story. It may be that the press has benefited substantially from the Act to the extent that it stands as a potential club and to the extent that it has liberalized agency attitudes generally, but this is a difficult matter to measure.

Recently Ralph Nader and his associates have leveled serious public criticism at agency implementation of the Freedom of Information Act.<sup>9</sup>

---

by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

9) geological and geophysical information and data, including maps, concerning wells.

5. See Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 802-04 (1967); for a discussion of invasion of privacy problems that might arise under the Freedom of Information Act, see Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 Mich. L. Rev. 1089, 1193-1200 (1969).

<sup>6</sup>The agency officials interviewed all indicated that great care is taken to avoid unwarranted invasions of personal privacy or disclosure of confidential or privileged commercial information.

<sup>7</sup>H.R. Rep. No. 1497, 89th Cong., 2nd Sess. 2-3 (1966) [hereinafter cited as H. Rep.].

<sup>8</sup>See Archibald, *Whose FOI Law?* The Bulletin of the American Society of Newspaper Editors, Dec., 1969, p. 10.

<sup>9</sup>Nader, *Freedom from Information: The Act and the Agencies*, 5 Har. Civ. R.-Civ. Lib. L. Rev. 1 (1970); Nader, *A Status Report on the Responsiveness of Some Federal Agencies to the People's Right to Know about their Government*, statement released publicly on

This criticism was based on the experience of various "study groups" in attempting to obtain access to the records of various agencies in the spring and summer of 1969. The criticism dealt in large part with the expansive view reportedly taken by agencies of the broad exemptions listed in the Act and with the consequent withholding of records that should have been released. Interpretation of the broad and ambiguous exemptions written into the statute has been a predictable and recurring cause of difficulty.<sup>10</sup> The ambiguity of the exemptions has been heightened by a sketchy and contradictory legislative history.<sup>11</sup> The resulting uncertainty has been compounded by the doctrine that a court of equity will not grant specific performance where, on balance, the benefits derived from the relief sought are outweighed by its harmful consequences.<sup>12</sup> At least one court has invoked this doctrine to grant only limited relief where unqualified application of the Act as written would have led to a contrary result.<sup>13</sup>

The continuing uncertainty built into the Act gives credence to the claim that the various agencies are interpreting the exemptions inconsistently. The Justice Department has taken some steps to secure uniform administration of the Act.<sup>14</sup> It is possible, however, that nothing short of statutory amendment can bring about an effective and lasting

---

August 29, 1969, and reproduced in 115 Cong. Rec. H7480 (daily ed. September 3, 1969); Note, *The Freedom of Information Act and The Federal Trade Commission: A Study in Misfeasance*, 4 Harv. Civ. R.-Civ. Lib. L. Rev. 345 (1969).

<sup>10</sup>See Davis, *supra* note 5.

<sup>11</sup>*Id.* at 762-63, 809-810. Professor Davis points out that the "Senate Committee is relatively faithful to the words of the Act," but that the House Committee seems "to pull away from the literal statutory words" in some cases, "almost always in the direction of nondisclosure." *Id.* at 763.

<sup>12</sup>Professor Davis, in accord with the *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*, reprinted in 20 Ad. L. Rev. 263, 296 (1968), concludes that the court may refuse to grant relief under the Act on equitable principles. 34 U. Chi. L. Rev. at 767. He appears to welcome the exercise of broad judicial discretion to remove from the reach of the Act non-exempt records that nonetheless should not be disclosed. *Id.* at 802. Others would have the courts exercise only minimal equitable discretion in enforcing the Act, urging them to withhold the production of non-exempt records "only for those clearest equitable considerations for which Congress did not establish standards" in the Act. Note, *Freedom of Information: Court May Permit Withholding of Information not Exempted from Disclosure under Freedom of Information Act*, 5 Har. Civ. R.-Civ. Lib. L. Rev. 121 (1970).

<sup>13</sup>*Consumers Union v. Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969).

<sup>14</sup>Shortly after passage of the Act the Attorney General issued a 47 page memorandum interpreting the Act as a guide to its application. *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*, reprinted at 20 Ad. L. Rev. 263 (1968). [hereinafter cited as *Att'y Gen. Memo.*]. The Justice Department has formed an internal committee on Freedom of Information matters to give advice to agencies on difficult questions arising under the Act. It has encouraged all agencies to consult with the committee before issuing a final denial in cases raising substantial doubts.



solution to the problem. Neither the proposed guidelines nor this article deal with the large and fundamental problems created by the broad exemptions in the Act. They deal instead with the more limited matter of uniform procedural guidelines to implement the basic policy of the law. The problems surrounding the exemptions do, however, provide relevant background and give added weight to other difficulties which are the subject of the instant proposal.

Critics have charged that agency delay, evasion, favoritism, commingling of exempt with non-exempt material to insulate the latter from production, and other practices have created barriers to a free information policy.<sup>15</sup> These charges may overstate the case to the extent that they are based on the limited, somewhat unique experience of the study groups. Sweeping requests by the groups for records may have generated resistance because of the burdens entailed, particularly where agency personnel may have viewed the groups as "raiding parties" primarily intent on searching out what was wrong with their operations. However, there is some contrary evidence indicating that members of the study groups were able to obtain records that would have been withheld in the case of lesser known requesters because of the unfavorable publicity that the groups could generate in the case of a refusal. Members of one group claimed to have received records that had been previously denied them, but only after they revealed their affiliation.<sup>16</sup> One member reported in an interview that a group was able to obtain records which the wife of another member had earlier been told did not exist.

To determine whether the difficulties reported by the study groups are truly representative, a questionnaire was sent to approximately four hundred organizations that might be interested in obtaining records from the federal government. The results of the survey, which are set out in Appendix B, are of limited value because only ten per cent of the questionnaires were returned; and of these, twenty-five per cent indicated that the respondents had had no experience in requesting records from the federal government. The survey does, however, support the conclusion that the difficulties encountered by the study groups are not isolated occurrences.

On the basis of this survey, reported and publicized cases, interviews with individuals who have requested records, and information provided by the agencies in interviews or in responses to Congressional inquiries, it appears that the following kinds of difficulties have been encountered in implementing the Freedom of Information Act:

---

<sup>15</sup>See note 9, *supra*.

<sup>16</sup>Nader, *Freedom from Information: The Act and the Agencies*, 5 Harv. Civ. R.-Civ. Lib. L. Rev. 1, 12 (1970).

*Equal Access to Records—Informing the Public.* There are practical problems in realizing the Act's goal that all citizens should have equal access to government information. The charge has been made that the agencies display favoritism with regard to freedom of information matters. It is claimed that the agencies compile information useful to those having cordial contacts with them while refusing to collect data of comparable interest to the general public, and that records made quickly available to these insiders are held up when requested by others.<sup>17</sup> The Act, in making information available primarily on the initiative of the private citizen, fully serves only those with sufficient knowledge, interest and resources.<sup>18</sup> This naturally places persons having established contacts with agencies in a more favorable position, if for no other reason than their great familiarity with agency operations and personnel. Short of eliminating existing social and economic inequalities, completely equal access to government information cannot be achieved as a practical matter. However, procedures and practices implementing the Act should seek to limit such disadvantages as far as possible.

*Evasive and Obstructive Practices—Formal Requirements for Requests.* In response to questionnaires or in interviews a few disappointed requesters have voiced the suspicion or conviction that agency officials have hidden records, giving misleading information or engaged in similar practices. To date our investigation has not revealed widespread complaints about these kinds of practices apart from the experience of the Nader "study groups," some of which claim to have encountered the deliberate secretion of records, false information and other deceptive practices.<sup>19</sup> However, some agency regulations tend to inhibit requests because of excessive and unnecessary requirements as to the form of the request.<sup>20</sup> Some agency regulations and practices appear to require as unnecessarily high degree of specificity that goes beyond the statutory requirement that the records requested be "identifiable."

<sup>17</sup>Nader, *supra* note 16, at 11-12.

<sup>18</sup>As a report of the House Committee on Government Operations observes, "The public, as well as the Government, has an obligation to know the law." Freedom of Information Act 8, 90th Cong. 2d Sess. (Comm. Print 1968). The Output Systems Corporation is helping private citizens and corporations to meet that obligation in a two-volume publication entitled "Legally Available U.S. Government Information as a Result of the Public Information Act." The price of the publication, which is primarily aimed at persons interested in procurement information, is \$84.00. Although for the most part the material is reproduced verbatim from sources available to the public, notably the Code of Federal Regulations and the Federal Register, it would require considerable time and research ability for an individual to collect all this information by himself.

<sup>19</sup>Nader, *supra* note 16, at 10-13.

<sup>20</sup>See text *infra* at notes 35-37.

Insistence on such specificity can effectively defeat many valid requests for information where the requester does not know just what records are in existence but does know precisely the kind of information he is seeking. In this connection, the treatment of broad categorical requests has given rise to somewhat inconsistent regulations among the agencies, to special problems with regard to handling exempt information and records, and to judicial decisions in conflict with agency practices and regulations concerning whether broad categorical requests come within the Act's "identifiable" records requirement.<sup>21</sup>

*Delay.* Interviews at two agencies revealed that action on some requests had been pending for months while the legal basis and policy reasons for possibly withholding the records were being studied. The primary reason for the delay appeared to be difficulty in getting the necessary officials to turn away from other matters and review the request. In one case a final decision had not yet been made on a request submitted more than a year prior to our visit. Concern that hasty action would release controversial material that "might be exempt" caused the delay. The Consumers Union of the United States waited for ten months to obtain a final determination on a request made under the Act.<sup>22</sup> At another agency rather extensive delay has arisen at the appeal stage. It was attributed to a change-over in high level officers, a development that creates general difficulties rather than special freedom of information problems.

*Commingling of Exempt and Non-Exempt Information.* To the extent that exempt and non-exempt information and records are indiscriminately and unnecessarily commingled, this can have the effect of sealing off non-exempt information that the agencies are unable or unwilling to segregate from exempt material in response to a request. The Nader study groups have charged the agencies in specific instances with deliberately combining non-exempt and exempt matters in the same record, or non-exempt and exempt records in the same file, so that the entire record or file could be withheld.<sup>23</sup> Three other charges of suspected commingling of exempt with non-exempt material to ensure the secrecy of the latter were made by disappointed requesters in interviews. The prevalence of unnecessary commingling will naturally be difficult to determine and even requesters who suffer as a result of it may be unaware of its presence in their particular cases. All the agencies interviewed acknowledged that

---

<sup>21</sup>See text *infra* at notes 67-68.

<sup>22</sup>*Prices of Hearing Aids, Hearing Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary Pursuant to S. Res. 258, 87th Cong., 2d Sess. 257-58 (1968)* (paras. 10-18 of plaintiff's complaint in *Consumer's Union v. Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969).

<sup>23</sup>Nader, *supra*, note 16 at 9-10.



there would be substantial but innocent commingling of exempt and non-exempt information following normal filing procedures. Whether deliberate or accidental, commingling presents a potentially serious barrier to implementing the Freedom of Information Act that calls for procedures to keep its restrictive effects on the flow of information at a minimum.

*Resistance to Act by Lower Level Staff.* There is a problem of unknown dimensions concerning how lower level personnel are responding to requests for records, particularly in the case of large departments. One year after the Act went into effect the House Committee on Government Operations found "numerous instances" of lower level officials refusing to release information that could not be withheld under the Act.<sup>24</sup> One officer revealed in a recent interview that contrary to agency policy and regulations the staff in charge of procurement matters were somewhat uncooperative in producing non-exempt records relating to existing contracts where they believed that the requester did not have a proper interest in the information. Most of the agency officials interviewed suggested that there were probably no serious problems at the operating level at the present time but based this conclusion on the relative absence of appeals or complaints brought to their attention. This conclusion is hardly warranted. In response to the most recent questionnaire on freedom of information circulated by the Senate Subcommittee on Administrative Practice and Procedure, one large department reported finding that records had been denied by various offices holding them without any knowledge by the office designated in departmental regulations to handle the requests. There may be considerable departures of this kind from published agency regulations and policies that do not come to the knowledge of the agency's officers principally concerned with implementing the Freedom of Information Act. We have come across two instances where lower level officials denied access to records of a kind that had been recently declared non-exempt in a court decision.<sup>25</sup> In one instance the initial denial was reversed within the agency, and in the other, reversal appeared to be imminent at the time the matter was studied. Delay, evasiveness and a generally uncooperative attitude on the part of operating staff are less likely to come to the attention of high level officials than outright denials for which an avenue of intra-agency appeal exists.

---

<sup>24</sup>House Committee on Government Operations, Freedom of Information Act 8, 90th Cong., 2d Sess. (Comm. Print 1968).

<sup>25</sup>The cases involved different departments, but both involved the withholding of land appraisals of property sold or purchased by the federal government. The non-exempt status of these appraisals was established in *Benson v. General Services Administration*, 415 F. 2d 878 (9th Cir. 1969).



*Uniform Fees.* The fees charged by agencies for locating and copying records are obviously relevant to the attainment of an open information policy. Unreasonably high fees can operate as obstacles that tend to accentuate sharply the advantage enjoyed by those with an abundance of economic resources. Variation in fees from agency to agency is also disturbing since it may reflect differing valuations of the public interest in making government records freely available, a development not in keeping with the policy of the Act.

Despite these instances of difficulties, one former government official who was interviewed gave his opinion that the Freedom of Information Act operates tolerably well since sustained efforts to obtain non-exempt records will usually be rewarded. Others have voiced somewhat similar views.<sup>26</sup> However, the absence of persistence may reflect a lack of sophistication and money, not a want of interest. If one examines the court cases in which parties have succeeded under the Act, one notes that the successful plaintiffs have usually been organizations with substantial resources or parties with a significant financial interest in the records involved.<sup>27</sup> The ideal goal of a free and open information policy which underlies the Act requires all information requests to be treated equally. The judicial remedy written into the Act will not assure this goal as a practical matter. Agency policies, regulations and practices will be more important in realizing it. The guidelines proposed are derived from this basic policy goal with an eye to the practicalities of agency operations. Although they are tailored to meet certain problems that have arisen under the Act, they are primarily put forward as an attempt to develop reasonable and practical procedures for agencies to adopt to implement the Freedom of Information Act.

### *1. Informing the Public of the Availability of Information*

Achievement of the ideal behind the Freedom of Information Act presumes a degree of sophistication on the part of the interested citizen that is exceedingly difficult, perhaps impossible, to attain. In order to afford ready and open access to information held by the government, the Act permits anyone to go beyond what government agencies and departments decide to publish and to examine records in government files.

---

<sup>26</sup>Cf. Archibald, *supra* note 8.

<sup>27</sup>*General Services Administration v. Benson*, 415 F.2d 878 (9th Cir. 1968) (records containing information relevant to a tax claim). *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696 (D.C. Cir. 1969) (memorandum containing reasoning of Maritime Subsidy Board in claiming that plaintiff had to reimburse Government for \$3,000,000.00 excess subsidy payments); *Consumers Union v. Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969); *Tobacco Inst. v. FTC*, Civ. Act. No. 3035-67, U.S.D.C. Dist. Col., April 11, 1968; *Shell Oil v. Udall*, Civ. Act. No. 67-C-321, U.S.D.C. Dist. Col., Sept. 18, 1967.

To do this the requester must first know what kind of unpublished information is legally available to him, the kinds of records in which he is apt to find that information, and the agency or department having custody of the relevant records. Only an unusually sophisticated and enterprising car purchaser would be able to ferret out most of the helpful information available from the government, published as well as unpublished, relating to the safety, performance and economy features of the various makes in which he is interested. To inform the public effectively requires positive programs that bring to their attention the general availability of certain kinds of information. More centralized, elaborate and expensive procedures for analyzing and indexing government information and for then publicizing effectively what is available would have to be established. For instance, in the area of consumer information some agency or department might act as a clearinghouse collecting and disseminating all information collected by the federal government relating to consumer products. In October, 1970, President Nixon issued Executive Order No. 11566 which establishes a Consumer Product Information Coordinating Center in the General Services Administration.<sup>28</sup> As its name suggests, the Center is to act as a clearinghouse of consumer product information gained by government agencies in their various testing programs.

The development of such positive programs is beyond the present requirements of the Freedom of Information Act, and the issues raised by them are beyond the scope of this study. However, there are two affirmative steps that can be taken in implementing the Act and they are embodied in the guidelines (I): 1) the public listing of officers in charge of records; and 2) adoption by the agencies of an express policy of assisting all citizens in translating their requests for information into requests for identifiable records.

#### *A. Listing of Officers in Charge of Records*

Ideally, the public should be given maximum information about the records that can be found in the various agencies. This could be achieved by having the agencies each compile and publish a directory of records. The listings of necessity could not cover every kind of internal document or body of correspondence that would be open to examination under the Act. Agencies with a more easily manageable set of files could provide a rather extensive listing of important records in their custody. The CAB compiled such a listing in a systematic manner by requesting its various offices to inventory the records held by them. From these inventories it

---

<sup>28</sup>35 Fed. Reg. 16675, October 28, 1970.

compiled a master list of records with accompanying information as to their location within the agency. This list was then published as an index to the regulations adopted for implementation of the Freedom of Information Act.<sup>29</sup> In its regulations the FCC also sets forth specific kinds of records available to the public and the offices where they may be located.<sup>30</sup>

It is difficult to assess the value of such a list. It probably is of limited value to the average citizen but could be of considerable help to an attorney or a person who is not too familiar with an agency's operations and regulations but who is concerned with a particular problem. It is possible that it may even be of significant assistance to the specialist in some cases since an orderly guide to an agency's records may reveal the existence and location of information never before brought to his attention. Along these lines, it may prove to be of value as a helpful internal guide to agency staff.

A basic question is whether the estimated value of such a directory of information justifies the burden of compiling it. A regulatory agency overseeing a circumscribed area, such as the CAB or FCC, can probably compile an inventory of important records more readily than executive departments with broad and varied concerns, such as the Departments of Agriculture, Interior, or of Health, Education and Welfare. Officials interviewed in these large departments questioned the advisability of such a directory. Because it is doubtful that the value of such a directory would outweigh its cost to the agency in all cases, no recommendation is made on this point in the guidelines. However, if an agency finds that there is considerable public interest in certain types of records, it should consider the desirability of compiling a directory selectively listing those records. The Department of Transportation, despite its varied responsibilities and extensive files, has compiled a partial listing of the records within its subunits as an appendix to the regulations adopted pursuant to the Freedom of Information Act.<sup>31</sup>

The proposed guidelines require each agency to compile a brief directory containing the names or titles of officers in charge of records at the various offices of the agency and their respective addresses. This should place a relatively small burden on the agencies and achieve the minimum in informing the public where they can get additional information concerning records available to them.

---

<sup>29</sup>14 C.F.R., part 200 at 430 (1970).

<sup>30</sup>47 C.F.R. § 0.455 (1970).

<sup>31</sup>49 C.F.R., part 7 at 27 (1970).



*B. Agency Assistance*

The second step calling for informal agency assistance to the public is essentially hortatory. It involves motivating agency staffs to offer positive assistance in reducing a request for information to one for identifiable documents. Frequently, this can be done with little effort because of the staff's familiarity with the agency's files. In such a case, a passive, uncooperative attitude could frustrate efforts to obtain information even though the relevant records could easily be identified and readily obtained.

There is little that can be done in the way of concrete procedures to inculcate cooperative attitudes. It would be helpful, however, to convey clearly and forcefully to lower-level personnel the agency's commitment to positive policies for the handling of information requests. Agencies could issue directives to their staff requiring them to assist in the formulation of information requests. These directives could be issued internally through staff memoranda and manuals or could be incorporated into formal published regulations, as some agencies have done.<sup>32</sup> Incorporation into published regulations is preferable since it tends to lead the public to expect and solicit assistance when necessary.

*II. Requests for Identifiable Records**A. Requirements as to Form of Requests*

The Freedom of Information Act only compels the honoring of requests for "identifiable" records. This requirement was added at the recommendation of the Senate Judiciary Committee to avoid an intolerable burden on the agencies.<sup>33</sup> Its purpose is to enable government agencies to locate the records requested without unduly burdening agency operations. It is clear that "this requirement . . . is not to be used as a method of withholding records."<sup>34</sup>

Some agency regulations can be read to call for unnecessarily high standards of identification inconsistent with the policy and legislative history of the Act. One agency requires the requester to supply the date, addressee and "title or subject matter" of the record sought or to give an explanation for the failure to specify each of these matters. The regulations of some other agencies, although not as rigid, could be read to require with some inflexibility that the requester supply specific details such as date, author, addressee and topic.<sup>35</sup> Other agencies require

---

<sup>32</sup>E.g., Office of Economic Opportunity, 45 C.F.R. § 1005.7 (a) (1970); General Services Administration, 41 C.F.R. § 105-60.401 (1970).

<sup>33</sup>S. Rep. at 2, 8.

<sup>34</sup>*Id.* at 8.

<sup>35</sup>Renegotiation Board, 32 C.F.R. § 1480.6(b) (1970).

<sup>36</sup>Department of Health, Education, and Welfare, 45 C.F.R. § 5.51(c) (1970); Department

requests for documents to be submitted on prescribed forms that call for such specific details.<sup>37</sup>

Those agencies that were interviewed do not insist on all these specific details, regardless of how their regulations read, where the information given by the requester is sufficient to identify and permit reasonably prompt location of the records. This may well be the general practice, or at least should be, in light of the statutory intent behind the requirement of identifiability. Even though agency practices may be reasonably flexible in this regard, apparently inflexible regulations or forms may mislead and discourage potential requesters and should be modified. This observation is applicable to what appears to be only a minority of the agencies. Many regulations are not misleading on this point; they provide that requests need only be specific enough to permit the finding of the records with reasonable effort.<sup>38</sup> A regulation could properly go further than this and point out that certain specific information regarding dates, addresses or document number would be most helpful and should be given if available, as long as it were made clear that such information would not be essential where the record was otherwise adequately described. The regulations of the Internal Revenue Service and the Department of Transportation are of this latter type.<sup>39</sup>

Apart from the above objection, the requirement of a form tends to be contrary to the spirit of the Act. It appears to be a kind of red tape tending to inhibit requests even though it may not have been designed for that purpose. This interpretation of the form requirement as a deliberate nuisance is reinforced when the form must be accompanied by an application fee that is non-refundable even if the agency does not produce the requested record.<sup>40</sup> When requests are made by mail, the necessity of obtaining and filling out the form can create substantial delay.<sup>41</sup>

Although prescribed forms do serve some useful functions, the reasons favoring them do not outweigh their disadvantages. The use of a well-designed form may assist an applicant to sharpen up his request. This

---

of Housing and Urban Development, 24 C.F.R. § 15-13(a) (1970); Civil Aeronautics Board, 14 C.F.R. 310.6(b) (1970).

<sup>37</sup>E.g., Department of Commerce, 15 C.F.R. § 4.6(c) (1970).

<sup>38</sup>E.g., Department of Defense, 32 C.F.R. § 286.7(c)(1) (1970); Department of Agriculture, 32 Fed. Reg. 10118, July 8, 1967; Farm Credit Administration, 12 C.F.R. § 604.1 (1970); Federal Home Loan Bank Board, 12 C.F.R. 505.4(d) (1970).

<sup>39</sup>26 C.F.R. § 601.702(c)(4) (1970) (Internal Revenue Service); 49 C.F.R. § 7.43(d) (1970) (Department of Transportation).

<sup>40</sup>Department of Commerce, 15 C.F.R. § 4.6(c)(d) (1970) (\$2.00); Department of Justice, 28 C.F.R. §§ 16.3(a), 16.4(a) (1970) (\$3.00).

<sup>41</sup>The author waited over two weeks just to receive a copy of a form requested from one of the departments.

benefit may be obtained by making such a form available at the option of an applicant. Where a vague request requiring more precise details is received, the agency could send an optional form back to the requester to assist him. Some of the forms are also designed to direct and record agency action on the request. This advantage could easily be retained by designing a form for internal use only which could be attached to any written request upon receipt.

The proposed guidelines permit an agency to insist that requests be in writing, as the regulations of some agencies now provide.<sup>42</sup> Several agencies are currently very liberal as to the medium used in making requests, to the point of accepting them over the telephone.<sup>43</sup> There is no reason to discourage this practice and create unnecessary paperwork for an agency that is willing and able to make the records available. However, where a telephone request is denied, the requester should be orally informed of the opportunity of making a written request which can then provide the basis for an appeal.

One agency, the FTC, requires the requester to state in writing and under oath the nature of his interest in all but "public records" and the purposes for which they will be used.<sup>44</sup> This requirement contradicts the clear congressional purpose in dropping the prior limitation in the Public Information Act that information in government files be made available to "persons properly and directly concerned." One justification offered by the FTC for retaining this requirement is that practically all its records are "confidential" ones that fall into categories exempt from production, as in the case of investigatory files and the internal memorandums exemptions.<sup>45</sup> However, the Commission's own regulations indicate that this explanation is not completely satisfactory. After listing records exempt under the Freedom of Information Act as "confidential" records to be made available only on a proper showing, it adds to this list "all records of whatever nature not clearly identifiable as public records."<sup>46</sup> "Public records" are those required by § 552(a)(2) to be indexed and made readily available for public inspection and copying, notably agency opinions, policy statements and administrative staff manuals, and also all other records that the Commission decides to list and index as public ones, such as published reports on economic surveys.<sup>47</sup> In effect the Commission

---

<sup>42</sup>Department of Labor, 29 C.F.R. § 70.4(a) (1970); Department of Transportation, 49 C.F.R. § 7.43(a) (1970).

<sup>43</sup>E.g., Civil Aeronautics Board, 14 C.F.R. § 310.6(a) (1970); Securities and Exchange Commission, 17 C.F.R. § 200.80(d) (1970).

<sup>44</sup>16 C.F.R. § 4.11(b) (1970).

<sup>45</sup>This explanation was given to the author in the course of an interview.

<sup>46</sup>16 C.F.R. § 4.10(c) (1970).

<sup>47</sup>16 C.F.R. § 4.9(e)(8) (1970).



classifies non-exempt documents, such as unpublished reports, as confidential simply by not listing them as "public records". Although the Commission is considering removing the requirement that requests be made under oath, it should also drop the requirement of a written statement of interest and intended use.

### *B. Treatment of Categorical Requests*

Broad categorical requests for documents have created some problems in the past and are a potential source of continuing difficulty. Some agency regulations refuse to honor any "blanket" or "general" requests.<sup>48</sup> These regulations appear to reject all categorical requests, and in doing so they take a highly questionable position. They assume that a general request is not one for "identifiable" records under the Act. Some support for this view is found in the Attorney General's Memorandum, which interprets the Act as requiring the requester to describe "the particular materials" he wants and which concludes that "Congress did not intend to authorize 'fishing expeditions.'"<sup>49</sup> The most vociferous critics of current agency practices under the Act would probably take sharp exception to the Memorandum on this point. The Nader study groups, for example, have attempted to use the Act for exactly the purpose of finding out what is going on in the various government agencies; in this sense their investigations are "fishing expeditions."

The term "fishing expeditions," however, has certain connotations that may not be fully appropriate where government records are concerned. The term has been used to condemn broad investigations into private records not based on a showing of "probable cause" as required by the Fourth Amendment.<sup>50</sup> The Freedom of Information Act clearly intends to remove any burden of showing probable cause or a special interest in, or need for information in government files. In so doing the Act proceeds on the premise that records in government files do not come within the interest of privacy that is at the heart of the Fourth Amendment. This premise seems reasonable in the case of a great many, perhaps most, records in government files. It is true, of course, that confidential

---

<sup>48</sup>E.g., Civil Aeronautics Board, 14 C.F.R. § 310.6(b) (1970) (Blanket or general requests need not be honored and may be returned to requester); National Aeronautics and Space Administration, 14 C.F.R. § 1206.602(a) (1970); Department of the Navy, 32 C.F.R. § 701.1(g)(3)(i)(a) (1970).

<sup>49</sup>*Att'y Gen. Memo.* at 292.

<sup>50</sup>*FTC v. American Tobacco Co.*, 264 U.S. 298, 305-06 (1924). The earlier proscription against "fishing expeditions" into private files was later relaxed by the Supreme Court in the case of administrative agencies conducting investigations within the scope of their regulatory powers. *United States v. Morton Salt Co.*, 338 U.S. 632 (1950); *CAB v. Hermann*, 353 U.S. 322 (1957).

information relating to private individuals may be found in government records. This information should not be made freely available to the public. The Act recognizes the need to preserve the confidentiality of such government records by exempting from disclosure certain kinds of information, including that found in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."<sup>51</sup> Preservation of personal privacy can be accomplished by the intelligent and sensitive application of these exemptions. If experience indicates that they are not sufficiently broad enough to preserve personal privacy, the Act can and should be amended. However, where a citizen seeks access to government records that do not contain private information, there is no reason to guard against the kind of "fishing expedition" repugnant to the values underlying the Fourth Amendment.

It is significant to note that the Act does not use "specific", "particular" or any other word requiring that the records sought must be actually *identified* by the requestor. The records need only be "identifiable," i.e., capable of being identified on the basis of the information presented by the requester. As long as the records sought can be identified from the language in the request, this literal requirement of the Act is met. The Senate report also supports the acceptability of broad categorical requests by stating that the Act contemplates as an appropriate guideline the identification standards used for discovery in judicial proceedings.<sup>52</sup> Rule 34 of the Federal Rules of Civil Procedure governs the examination and copying of documents in a judicial proceeding. At the time the Act was passed Rule 34 simply required the moving party to "designate" the documents requested. There was a split of judicial opinion on the question of how specific the designation had to be. Some cases adopted a narrow view and required each document to be specifically identified so that the party served could go to his files, pick out the particular document and say, "here it is."<sup>53</sup> The broader view would have permitted a party to designate documents by category as long as the category was described with reasonable particularity.<sup>54</sup>

The broad view is the better view. It is the one adopted by the Federal

---

<sup>51</sup>See note 4 *supra*.

<sup>52</sup>S. Rep. at 2.

<sup>53</sup>United States v. National Steel, 26 F.R.D. 607 (S.D. Tex. 1960); Lundberg v. Welles, 11 F.R.D. 136 (S.D.N.Y. 1951); Stewart-Warner Corp. v. Staley, 4 F.R.D. 333 (W.D. Pa. 1945); United States v. American Optical Co., 2 F.R.D. 534 (S.D.N.Y. 1942).

<sup>54</sup>Scuderi v. Boston Ins. Co., 34 F.R.D. 463 (D. Del. 1964); Connecticut Mut. Life Ins. Co. v. Shields, 17 F.R.D. 273 (S.D.N.Y. 1955); State Theatre Co. v. Tri-States Theatre Corp., 11 F.R.D. 381 (D. Neb. 1951); United States v. U.S. Alkali Export Ass'n., 7 F.R.D. 256 (S.D.N.Y. 1946).

Court of Appeals for the District of Columbia in one of the very few appellate court decisions interpreting this aspect of Rule 34 prior to its recent amendment.<sup>55</sup> The broad view was also adopted by the commentators.<sup>56</sup> It is grounded on pragmatic considerations and recognizes that a person seeking information known to exist may not have sufficiently exact and definite knowledge to identify the specific documents in which it can be found. Under this view the description need only be "sufficient to apprise a man of ordinary intelligence what documents are required, and . . . the court . . . to ascertain whether the request has been complied with."<sup>57</sup> The newly amended Rule 34 has clarified matters. It expressly permits documents to be designated "by category." Designated categories must be described with "reasonable particularity." The proposed guidelines (B-2-b) adopt essentially the same standard in requiring the categories to be "reasonably specific."

Examination of the reasons why some courts insisted on great particularity in designating documents under old Rule 34 reinforces the conclusions that the broad view is the appropriate one in the case of government documents. Three reasons emerge from the cases for the particularity requirement: 1) to guide both the party served with the order and the issuing court supervising compliance with it;<sup>58</sup> 2) to prohibit a sweeping and indiscriminate search of a party's private papers—i.e., to prohibit "fishing expeditions" and their unjustifiable intrusion into privacy;<sup>59</sup> 3) to protect the party served from an unreasonable and oppressive burden.<sup>60</sup>

The first reason, that of securing compliance with a court order, does not apply as strongly in the case of a request for government records because the initial response by the official in charge of the records is not subject to a court order.<sup>61</sup> As long as the official can reasonably be able to

---

<sup>55</sup>Roebling v. Anderson, 257 F.2d 615 (D.C. Cir. 1958).

<sup>56</sup>2A Barron & Holtzoff (Wright ed.) § 796; Wright, Procedure in District Courts § 87 (2d ed. 1970).

<sup>57</sup>Wright, *supra* note 56 at § 87.

<sup>58</sup>United States v. American Optical Co. 2 F.R.D. 534 (1942).

<sup>59</sup>Stewart-Warner Corp. v. Staley, 4 F.R.D. 333 (W.D. Pa. 1945); Archer v. Cornillaud, 41 F. Supp. 435 (W.D. Ky. 1941).

<sup>60</sup>De Meulenaere v. Rockwell Mfg. Co., 13 F.R.D. 134 (S.D.N.Y. 1952); Wagner Mfg. Co. v. Cutler-Hammer Co., 10 F.R.D. 480 (S.D. Oh. 1950). (These cases involved subpoenas pursuant to Rule 45, which requires that documents be "designated" as does Rule 34; the standards applied in the case of both rules tend to be interchangeable.)

<sup>61</sup>Before a requester seeks a court order there would usually be an opportunity for the agency to suggest a refinement of the request, limiting it to certain files, etc., in order to cure any serious problem of uncertainty. Where the agency can demonstrate the perils of uncertainty, a court of equity could refuse to enforce the request unless the requester stipulated to limitations that would remove unfair risks of good faith non-compliance. *But*



decide whether a specific record comes within the request and can be reasonably certain that the examination of certain files will bring most if not all the requested records to light, the request is not too vague to be honored. The official can indicate the extent of his search to the requester and the latter can restate his request to include other files if he so desires.

The second reason, the protection of privacy, is not at all applicable where the records requested have little or no chance of including confidential information about private individuals. With regard to protecting privacy, it is interesting to note that old Rule 34 cases condemning "fishing expeditions" usually attacked broad requests not only for the lack of precise designation but also for the failure of the moving party to establish "good cause" for examining the records.<sup>62</sup> Congress deliberately struck the parallel "direct and proper interest" requirement from the Public Information section of the Administrative Procedure Act. It is also interesting to note that amended Rule 34 has dropped the good cause requirement.

Of particular relevance in applying judicial standards for the description of records to the Freedom of Information Act is the ability of a litigating party to learn of both the existence of private papers and their precise identification by depositions under Rule 26. Some cases taking the narrow view of old Rule 34 pointed out that the moving party can learn the precise description of documents relevant to his case by taking depositions.<sup>63</sup> This, of course, is not true in the case of a party requesting documents under the Freedom of Information Act. This lack of discovery suggests that a party should be permitted by categorical request to ask for non-exempt government documents that he cannot be sure are in existence, a step that takes us closer to "fishing expeditions."

The third reason for precise designation, the avoidance of unreasonable and oppressive burdens, applies in the case of government records. It is inconceivable that Congress intended to require compliance with sweeping categorical requests that would so burden agency operations as to disrupt their primary service to the public. However, the Freedom of Information Act does not expressly authorize rejection of requests because of the difficulties or costs that will be incurred by the agencies. The Act does expressly provide that the requester be charged for the services rendered to him.<sup>64</sup> Aside from this practical limitation, any Congressional policy

---

see *Bristol-Myers v. F.T.C.*, 284 F. Supp. 745, 747 (D.D.C. 1968), rev'd, 424 F.2d 935 (D.C. Cir. 1970).

<sup>62</sup>See footnote 59 *supra*.

<sup>63</sup>*United States v. National Steel*, 26 F.R.D. 607 (S.D. Tex. 1960); *Stewart-Warner Corp. v. Staley*, 4 F.R.D. 333 (W.D. Pa. 1945).

<sup>64</sup>U.S.C. § 552(a)(3) (1964 ed. Supp. IV.).

limiting burdensome requests will have to be read into the Act. Since the clearly dominant purpose of the Act is to give ready access to government held information, any implied limitation must rest on an equally clear overriding policy. For this reason, any agency that rejects a categorical request because compliance would be unduly burdensome should be ready to demonstrate that the request calls for an improper diversion of agency time and resources from its primary responsibilities.

As a practical matter, even extremely broad categorical requests can often be met without an undesirable diversion of agency resources if the requester is willing to accept gradual production of the records over a period of time. The proposed guidelines (B-2-b) would have the agency confer with the maker of a burdensome request. Through such conferences a compromise calling for refinement of the request or a relaxed production schedule could be worked out to the mutual benefit of both the agency and the requester.

The few cases under the Act dealing with categorical requests hold that they must be honored if the agency can readily ascertain what records come within their scope. The cases also suggest that such requests cannot be rejected because of the burdens and difficulties of collection they impose on the agency. However, a leading case can be read to suggest that at some point a request can become so burdensome that an agency can refuse to divert resources to handle it.

Initially, the Federal District Court for the District of Columbia looked with disfavor on broad categorical requests. In *Matonis v. Food and Drug Administration*, Civ. Act. No. 479-68, March 19, 1968, the court refused to give the plaintiff relief where she had asked "for all records . . . pertaining to the review of claims of the effectiveness of drugs for human use containing rutin, quercetin, hesperidin or biflavonoid." The court found that the records sought were not sufficiently identified.

In *Bristol-Myers v. F.T.C.*, 284 F. Supp. 745 (D.D.C.1969) Judge Holtzoff refused to enforce a general request for records relating to certain analgesic medicines and to a proposed rule relating to them. At one point in his opinion Judge Holtzoff's reasoning was reminiscent of that used by courts requiring specific designation of documents pursuant to old Rule 34; he referred to the possibility of a court order and the necessity to know with certainty what specific documents were requested.<sup>65</sup> However, his main concern was over the disruptive effects that compliance with the request might entail. He believed the request was apt to contain many records exempt from disclosure under the Act, and his opinion strongly

---

<sup>65</sup>284 F. Supp. at 747.

implies that considerable time of high level officials would be consumed in screening out exempt records that should be kept confidential.<sup>66</sup>

On appeal the decision in *Bristol-Myers* was reversed.<sup>67</sup> The test used by the Court to determine the propriety of the request was whether the sought for records could be ascertained and located from the description given. Subsequently, this test was applied in *Wellford v. Hardin*, 315 F. Supp. 175 (D. Md. 1970) to require agency compliance with an allegedly burdensome request. The plaintiff had asked the Department of Agriculture to produce letters of warning sent by the Compliance and Evaluation Staff of the Consumer Marketing Service to non-federally inspected meat or poultry processors suspected by the staff of engaging in interstate commerce. The Department rejected this request on the ground that collection of the records would require the search of many files and be extremely burdensome. The court interpreted this reason for rejection as an admission that the agency knew exactly what was being sought and was complaining only about the effort that would have to be made to collect the documents. The court went on to say:<sup>68</sup>

The fact that to find the material would be a difficult or time-consuming task is of no importance [in determining identifiability]; an agency may make such charges for this work as permitted by statute. To deny a citizen that access to agency records which Congress has specifically granted, because it would be difficult to find the records, would subvert Congressional intent to say the least. Therefore, this court finds the defendant's assertion that this requested information is not an "identifiable record" within the meaning of the statute to be totally without merit.

The *Wellford* opinion does not consider the possibility that some categorical requests might be so burdensome that compliance with them would put an undesirable strain on efficient administrative operations. No judicial decision has dealt squarely with this question. However, the decision of the Court of Appeals in the *Bristol-Myers* case could be construed as giving some recognition to the possibility that some categorical requests would place so great a burden on agency operations that they could be rejected.

In that case the court broke down the broad request into two parts. The request had sought "the extensive investigation . . . accumulated experience and available studies and reports" referred to as the basis for the proposed FTC rule in the notice announcing it. In addition, the

---

<sup>66</sup>*Id.* at 746-47.

<sup>67</sup>424 F.2d 935 (D.C. Cir. 1970).

<sup>68</sup>315 F. Supp. at 177.



plaintiff had asked for records pertaining to the effects of analgesics as well as records pertaining to the accuracy of the plaintiff's claims of benefits derived from its own products. The circuit court held that records containing the materials relied on by the Commission in promulgating the proposed rule and referred to generally in the notice of the proposed rulemaking proceeding were adequately identified. It did go on to indicate that the records relating to the effects of analgesics generally and the accuracy of the plaintiff's claims for its own products might not all be encompassed in the materials pertaining to the proposed rulemaking. If this were the case, the court said, "the claim of failure to meet the identification requirement may be more plausible." It directed the trial court to consider this part of the request separately on remand to determine if it in fact did pose problems of adequate identification.

In treating the two parts of the request differently the court may very well have had in mind the practical difficulties in locating and collecting responsive documents rather than interpretive difficulties in ascertaining which ones would come within the request. That part of the request calling for records relating to the effects of analgesics generally does not seem to pose any difficult problems of interpretation. But the responsive records could be spread throughout a large number of files, and the Commission may never have had occasion to collect them for its own purposes. Because of the burden in assembling documents never before collected, this part of the request could in fact create far greater difficulties than the part calling for the materials that the Commission had so recently studied and collectively referred to in promulgating the proposed rule.

Agency practices also reflect an interpretation of the Act that treats categorical requests as ones for "identifiable" records where it is practical to locate and collect the materials requested. Some agency regulations call for the honoring of a categorical request if it will not entail an unreasonable burden.<sup>69</sup> From information gained in interviews it also appears that even agencies with regulations flatly rejecting all general requests usually grant categorical ones that do not cause undue interference with agency operations. This approach, which is embodied in the guidelines, leaves much to the discretion of the agency. This would be true even under a rule providing that only clear and substantial interference with an agency's primary operations will warrant the rejection of a categorical request. In the case of a potentially most burdensome request an agency can go out of its way to minimize costs and

---

<sup>69</sup>Those regulations honoring requests couched in terms that permit location of records with no more than a reasonable amount of effort (see note 38 *supra*) in effect recognize categorical requests as ones for "identifiable records" as long as they can be located without imposing an undue burden on the agency.

difficulties while giving the requester full access to the information he seeks.

Whether it will do so depends on a number of factors. For instance, if an agency believes it can entrust the entire contents of numerous files to a particular requester, it will grant very liberal access to records. Accordingly, an agency is apt to grant a request from a scholar to examine all the documents relating to a particular topic covering the ten-year period from 1920 to 1930 if the records requested can be located in readily identifiable files. With relatively little effort the agency can produce the files from storage and present the requester with a mass of documents to examine. He, rather than agency personnel, will have to go through the files to find the specific documents that interest him most. There will be little diversion of staff time and no disruption of files currently in use. Nor would there be much concern that the researcher might come across records of a confidential nature that are exempt from production under the Act. Investigatory files would have long been closed, internal memoranda would not compromise existing agency programs or personnel and there would be little risk of revealing trade secrets or currently confidential personal or commercial information obtained from private citizens.

A request calling for many documents that are located in current files can present substantial difficulties in some cases. First of all, the general request may relate to documents that are scattered through a large number of actively used files. It may be difficult to determine which files must be examined to find all documents. Where the number of documents potentially subject to the request is great, it may be unduly burdensome to expect agency staff to extract the documents responsive to the general request from these files. The alternative of turning over the files to the requester for his perusal may be out of the question, particularly where there is a probability that exempt and confidential material may be located in these files.

In some cases an agency will be able to tell from the nature of even current files that their contents most likely will not include exempt information that should be kept confidential. In such cases some agencies permit the requester to search the files himself in order to locate the specific documents that are of interest to him. However even in such a case the agency may take some precaution to insure that important records in the file are not removed or destroyed. For example, a clerk from the agency may be stationed in the same room as the requester when a contract file is made available for examination.

In some cases the agency may conclude that it must have a knowledgeable member of the staff screen the file to remove exempt

records from it before turning it over to the requester. Some agencies appear to take a rather strong stand on this point, insisting on prior examination of any file that might possibly contain exempt material. They point out that some material must be kept confidential by statute and that officials who disclose such material are subject to criminal sanctions.<sup>70</sup>

The circuit court's decision in the *Bristol-Myers* case also dealt with the problem of screening out exempt records in complying with a broad categorical request. It rejected the trial court's approach of denying an entire request because of the likelihood that it included some exempt information. Instead it required the trial court to pass on the exempt status of each particular record sought to be withheld. Records coming within the broad request not found to be exempt were to be produced. Here again arises the question of whether at some point an agency can reject a broad categorical request because the screening out of exempt records would be unduly burdensome and disruptive.

At least one department has refused a broad categorical request by a "study group" because of the burden of screening out confidential records exempt under the Act and has asked the requester to indicate with greater particularity the documents that he was seeking. Agency action of this sort appears to have inspired the charge that exempt records are commingled with non-exempt ones to insulate the entire file from public scrutiny. The clear implication is that the agency has done this deliberately. It is not so clear that the implication is justified in all cases of commingling. It is possible that a rational filing system, designed primarily for efficient internal use will lead to a substantial commingling of exempt and non-exempt records.

It has been recommended that non-exempt material be kept in separate files from exempt material. The shortcomings of this approach are discussed within in connection with the guideline on commingling (B-3). The requirement that refusal of a categorical request must specify reasons for denial, as included in the proposed guideline (B-2-b), may provide a less burdensome and more effective way of dealing with improper commingling than the policy of systematic segregation of exempt and non-exempt materials. As Professor Davis has recommended, one means of structuring discretion to insure its more responsible exercise is to require that written findings and opinions accompany agency decisions.<sup>71</sup> Elaborate opinions and findings need not accompany refusals of

---

<sup>70</sup>E.g., 18 U.S.C. § 1905 (1964 ed.) (criminal penalties for the improper revelation of trade secrets or confidential economic or other data by government officials); 49 U.S.C. § 322(d) (1964 ed.) (criminal penalties for improper disclosure by ICC agent of information obtained during an official examination of private papers).

<sup>71</sup>K. Davis, *Discretionary Justice* 103-06 (1969).



burdensome categorical requests in order to achieve the salutary benefits of such an approach. A summary explanation of the kind of search that would be required to meet the request and of the kinds of difficulties that could be encountered should be sufficient. The explanation might identify the kinds of files in which records responsive to the request would be found and the difficulty involved in collecting them from these diverse sources. Where an agency unjustifiably rejects a broad request on the ground it would include many exempt records, an agency might have a difficult time explaining why it would be too burdensome to screen out possibly exempt records if the explanation included even a minimum of detail. The requirement of an explanation should also reveal blatant examples of improper commingling. In a clear case it might provide the basis for judicial relief in an action brought under the Act.

It should be recognized, however, that no procedures can guarantee an exercise of discretion that will accord absolutely equal treatment in all cases. There will be situations involving obviously burdensome requests in which agencies will feel it is in the public interest to make an extra effort. This means that in practice decisions may turn upon the different interests that requesters have in the records. It would be very difficult to capture these distinctions in any formula. None of the agencies interviewed believed that discrimination should be made between requesters where non-exempt records were involved. They referred to the difficulty of making distinctions that could withstand justification in light of a free and open information policy. But it is hard to believe that the importance and seriousness of a request will not carry weight in deciding how far an agency will go out of its way to accommodate it. The distinctions now being made by agencies, although somewhat imponderable, may be justified in many cases. An agency would be well within its discretion to reject a burdensome categorical request because of the requester's apparently minimal and casual interest in the matter. A clear case in point would be a sweeping request made by a high school student in connection with a civics term paper. One fear expressed by agency officials was the possibility in such a case that a requester might never bother to make use of the records collected for him.

One technique commonly used to discourage frivolous categorical requests is to have the requester bear the full costs of searching for the records and requiring prepayment of the estimated charge. The fee might even include an amount for the staff time involved in screening out exempt records where a great deal of professional time would be used for this purpose.

### III. *Partial Disclosure of Exempt Records and Files*

The Freedom of Information Act can be read to permit an agency to withhold a record because some small part of it contains exempt information.<sup>72</sup> Although the Act expressly permits an agency to delete identifying details in publishing and making available opinions, statements of policy, interpretations, or staff manuals and instructions,<sup>73</sup> no similar provision exists with regard to production of records. However, the language providing for exemption from disclosure does not speak of records but refers to "matters."<sup>74</sup> The word matters suggests that only the exempt information can be withheld rather than the entire record itself. But the specific exemption relating to inter-agency records refers to "memorandums or letters."<sup>75</sup> In discussing most of the exemptions, both the Senate and House reports and the Attorney General's Memorandum refer to "records" and "matters" interchangeably. In addition, the sixth and seventh exemptions relating to personnel and investigatory files respectively can be read to exclude from the Act both exempt and non-exempt records within the files.<sup>76</sup> The Attorney General's Memorandum appears to adopt this interpretation.<sup>77</sup>

Although the withholding of a twenty page record that has exempt information on only one or two pages may be within the literal scope of the Act, it is clearly contrary to the free and open information policy behind it. In recent decisions the Federal Court of Appeals for the District of Columbia has looked to this policy in remanding two cases with directions to the trial court to order production of records containing trade secrets or confidential commercial or financial matters if the exempt information could be effectively deleted.<sup>78</sup> Relying on one of these cases, a lower court has ordered an agency to produce records containing exempt material.<sup>79</sup> The court held that the Act authorizes only the deletion of the exempt material, not the withholding of the entire records.

The proposed guidelines follow the line taken by these cases, requiring all agencies to produce records containing exempt information after appropriate deletions have been made. (B-3) Adoption of the guidelines by regulation would strengthen the case for granting judicial relief ordering

<sup>72</sup>Davis, *supra* note 5, at 799.

<sup>73</sup>U.S.C. § 552(a)(2) (1964 ed. Supp. IV).

<sup>74</sup>U.S.C. § 552(b) (1964 ed. Supp. IV).

<sup>75</sup>U.S.C. § 552(b)(5) (1964 ed. Supp. IV).

<sup>76</sup>See Davis, *supra* note 5, at 798.

<sup>77</sup>*Att'y Gen. Memo.* at 305-06. See also discussion at note 81, *infra*.

<sup>78</sup>*Bristol-Myers v. F.T.C.*, 424 F.2d 935, 938-939 (D.C. Cir. 1970); *Grumman Aircraft Engineering Corp. v. Renegotiation Bd.* 425 F.2d 578, 582 (D.C. Cir. 1970).

<sup>79</sup>*Wellford v. Hardin*, 315 F. Supp. 768 (D.C. Cir. 1970).

production of records whenever deletion of the exempt material is feasible. The courts would most likely regard such a regulation as binding on the agency.<sup>80</sup>

Adoption of the guidelines would also help with the commingling problem since they require an agency, in response to a request, to pick out and produce non-exempt records in a file. Here again, adoption of the guideline would tend to ensure judicial enforcement of such a policy. However, a requester can probably get an order requiring production of non-exempt records within a file even without the guidelines.<sup>81</sup>

The proposed guidelines do not go as far as other proposals that would require non-exempt material to be kept in separate files from exempt material. The logical extension of these more ambitious proposals appears to be that all subject files should be broken down physically into two parts with one folder containing records open to the public and the other

<sup>80</sup>*General Services Administration v. Benson*, 415 F.2d 878, 880 (9th Cir. 1969). This case is discussed in the text *infra* at notes 117-120.

<sup>81</sup>The conclusion that the Act requires production of a file from which exempt records can be removed rests on a reading of § 552(a)(3) which requires "identifiable records" to be made available on request and § 552(b) which exempts from this requirement specified "matters." These sections read together would seem to forbid an agency from withholding a set of records identified by file simply because one or two that could be easily separated from the rest were exempt. (For an alleged agency refusal to segregate easily identifiable exempt records from a requested file see Nader, *supra* note 16, at 11 fnote. 33(i).) This interpretation should apply even in the case of the seventh exemption which applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." The modifying clause regarding unwarranted invasions of privacy could be read to exempt only those parts of the files that would constitute the intrusion into privacy. Both the Senate and House reports seem to read the exemption in this manner and they appear to extend this qualification to personnel and medical files as well as "similar files" because both would exclude from the exemption "facts concerning the award of a pension or benefit." S. Rep. at 9; H. Rep. at 11.

The Attorney General's Memorandum reads as though the entire contents of personnel and medical files are exempt; it states that the following need not be produced: "... all personnel and medical files, and all private or personal information contained in other files which, if disclosed to the public, would amount to a clearly unwarranted invasion of the privacy of any person. . . ." 20 Ad. L. Rev. at 305.

Where investigatory files are involved, however, the position advanced in the text does not appear to be applicable since the exemption by its terms requires production of only those parts of the file "available by law to a private party." As a matter of grammatical construction the exemption includes the remainder of the file. Besides, it is difficult to formulate a standard to separate out other supposedly non-exempt records from the file in addition to those made "available by law." The main purpose of the exemption is to protect a government investigation from premature disclosure (see Sen. R. at 8); the application of this broad objective to particular records in an investigatory file does not suggest judicially reviewable standards. It would seem necessary to leave the matter of disclosure, in the case of at least active files, to the unqualified discretion of the agencies except for the non-exempt items "available by law to a private party."



containing exempt ones closed from view. This method of segregation presents an impossible task if it is to include the rearrangement of material in existing files. Even if it is to be limited to the filing of new material, it poses a formidable task. New additions to the files would have to be evaluated to determine whether they were legally exempt. The amount of staff time that would be consumed in filing could result in serious interference with more important work in some offices.

In all offices it would impose a burden extremely hard to justify because the procedure tends to be self-defeating and could result in more records being withheld as exempt than would occur without segregation. Although the Act permits exempt records to be produced at the agency's discretion, practically all exempt records would be mechanically inserted into the closed files; only in the clearest cases where assertion of the exemption would serve no valid purpose would an exempt record find its way into the open file. Accordingly, records that an agency might make available in response to a specific request after careful evaluation would escape a categorical one. Also, in the case of any doubt as to the exempt status of certain documents, they would automatically be filed in the closed folder. It might be urged that even so there would be a net gain because all the documents in the open files would now be more accessible to an investigator making broad inquiry into agency operations. However, if the main reason for this burdensome procedure is the circumvention of deliberate efforts made to commingle embarrassing records with exempt ones, as is intimated by some of the proponents of this procedure, it is doubtful that it will solve such a problem. Determined resisters of freedom of information would be ingenious enough to raise doubts in their own mind as to the exempt character of embarrassing records and would always be so scrupulous as to put these doubts to rest by dropping the troublesome records into the closed exempt file.

#### *IV. Time to Reply to a Request*

Delay in responding to the requests for records can result from many causes. Some of them constitute legitimate reasons; others are questionable and reveal a generally unsympathetic attitude toward information requests. An improper reason for delay is the very low priority that may be given to requests for records by the busy administrator and his staff. Where this attitude prevails, such requests may be put aside for unreasonably long periods of time, perhaps until something prods the agency into action, such as a follow-up letter by the requester. An unfortunate but natural tendency may develop to give better and quicker service to persons having well established cordial contacts with agency officials than to some unknown citizen. At least one staff

member of an agency admitted during an interview that requests from prominent national and Washington law firms would ordinarily receive prompter attention than ones from out-of-town persons unknown to the agency. A deadline will act as a prod that clearly indicates the relative importance of freedom of information matters and encourage uniform treatment of all requests.

Another reason why an agency may be inclined to drag matters out is the hope that the passage of time will exhaust the requester's interest in documents that the agency is reluctant to produce. The harshest critics of agency practices have charged that delay is frequently used as a deliberate stalling tactic. They claim that after delaying any kind of reply for a substantial period of time some agencies reject the request for a reason that should have been apparent at the time it was received.<sup>82</sup> Sometimes, it is charged, the request is not denied outright but is deemed inadequate for lack of specificity, with the result that final action on the unpopular request is delayed while the requester attempts to reformulate it with more particularity.<sup>83</sup> The *Consumers Union* case is an example of protracted dealings between the requester and the agency in a case where it was subsequently found that the records were being withheld improperly.

Factors other than dilatory tactics may explain the delay in arriving at a final, judicially reviewable decision in some cases. The request may have raised knotty legal issues or serious questions of policy that required measured deliberation by the agency, or the requester may have opted to negotiate with the agency rather than force a showdown as soon as possible. Whatever the actual reasons in particular cases, instances of delay are open to the interpretation of deliberate evasion and invite procedures to minimize such a possibility, particularly when the Act specifies that requested records be made "promptly available."<sup>84</sup>

The proposed guidelines attempt to translate the prompt response requirement of the statute into a deadline that is generally workable for the agencies. At first, a seven-day deadline was considered. There was divided opinion among the agencies interviewed concerning the tightness of a seven-day deadline for the initial response to a request. The majority believed that it was too confining unless accompanied by a very broad escape clause. There was broader agreement on a ten-day deadline with a relatively easy escape clause. The proposed guidelines adopt this deadline for the initial response. (B-4) Some agency regulations have already adopted a ten-day guideline for either responding to or acknowledging a request.<sup>85</sup>

<sup>82</sup>Nader, *supra* note 16, at 8.

<sup>83</sup>*Ibid.*

<sup>84</sup>5 U.S.C. § 552 (a)(3) (1964 ed. Supp. IV).

<sup>85</sup>E.g., Defense Supply Agency, 32 C.F.R. § 1260.6(b)(3) (1970).

The escape clauses specified in the guidelines attempt to include the substantial and justifiable reasons put forward by the agencies as recurring causes for delay. Once the agencies have been given adequate time to deal with these specified difficulties, ten working days should be enough to deal with an uncomplicated routine request. With such a deadline the requester may still have to wait about three weeks for a reply if mailing time is taken into account.

Turning to the escape clauses, one recurrent justification put forward for delay was that requests are frequently sent to an office that does not have the records in its charge. Any tight deadline would have to take this factor into account by tolling the period for response until such time as the request is received by the proper office. However, the tolling period should be limited. The office receiving the misdirected request should forward it to the proper office within ten days. At the same time it should also notify the requester of its action, something that can be done quickly by means of a standard form.

Once the proper office receives the request, it must act within ten days unless it reports to the requester that one of five specific reasons renders the deadline inapplicable. The first four reasons all relate to rather definite situations: 1) the physical location of records elsewhere; 2) a request for many records; 3) a categorical request and 4) a tracer search. When the agency invokes one of these reasons, it must also give some indication of when the records will be produced. Taken together, the specification of definite reasons for delay and the self-imposition of a new deadline should tend to limit the possibility of abuse, particularly where the first, second and fourth reasons are concerned; an unreasonably extended deadline should be more or less self-evident in these cases. In most cases the amount of time required to respond to a categorical request will depend on factors known only to persons familiar with the constitution of an agency's files. With regard to this escape clause, extended deadlines must be left primarily to the agency's responsible exercise of discretion.

The proposed guideline does enable requesters to utilize the appeal machinery within an agency to remedy improper delays connected with these first four reasons for extended deadlines. Where lower level officials impose unreasonable extensions or do not meet an applicable deadline, including the initial one of ten days, the requester can petition the officer in charge of appeals to take corrective action immediately.<sup>86</sup> If the officer

---

<sup>86</sup>Where lower level officials have not even acknowledged the request within the initial ten day deadline, the appeals officer can require that "appropriate steps" be taken. The "appropriate step" may be the sending of an acknowledgement and the self-imposition of an extended deadline where the request falls within one of the five groups which permit of this treatment.



fails to do so, the requester can seek judicial relief, a possibility discussed more fully below.

Delay caused by the necessity to evaluate the possibly exempt status of the records requested, the fifth and last reason for extending the ten-day period, could prove troublesome. There might be great temptation to protract unduly the consideration given to the matter of exemption, particularly in the case of an unwelcome request. The guidelines propose to deal with this situation by giving the requester the ability to accelerate the administrative process when he encounters this difficulty. If an agency fails to meet an extended deadline adopted to consider the matter of exemption the requester can petition the appeals officer to take appropriate action. The action must be taken within ten days. Failure to do so permits the requester to treat his request as denied and to file an appeal. (B-6-d). If the agency adopts an unreasonably extended deadline and the appeals officer does not remedy the situation upon petition by the requester, the latter can treat his request as denied and file an appeal after a reasonable period of time has elapsed from the time of his initial request. (B-6-d). Permitting the requester to challenge an extended deadline as unreasonable by filing an appeal is necessary in the first instance if he is to be able to take the initiative in moving the agency. The Department of Transportation's regulations similarly permit a requester to push for final action on the appeal level when the initial decision has been unreasonably delayed.<sup>87</sup>

The guideline does provide some sort of limit in the case of extended deadlines adopted to consider the matter of exemption. A ten day period is set as the usual limit. This should provide sufficient time for consultation with legal staff even where a close question is involved. A more extended deadline would permit the continuation of unnecessarily time-consuming procedures now followed by some agencies that refer all cases of initial denials involving any exercise of discretion to the highest level within the agency. This creates unnecessary delay since the requester will have to retrace the same route on appeal if an initial denial is forthcoming. Officials below the top rank should be able to make relatively prompt initial decisions in the great majority of cases, even when they exercise some discretion in deciding whether to assert an exemption. It is interesting to note that the first intra-agency appeal to the executive director of the Civil Aeronautics Board must be disposed of within seven working days after receipt,<sup>88</sup> yet this appears to be the first stage at which there is a significant exercise of discretion in deciding whether to assert a legal exemption.

---

<sup>87</sup>49 C.F.R. § 7.71 (b) (1970).

<sup>88</sup>14 C.F.R. § 310.9 (d) (1970).

The guidelines do recognize that there will be circumstances in which more time than two weeks will be needed to pass on difficult questions; but it expresses the presumption that this will not be the usual case. Where a requester challenges an extended deadline in excess of ten additional working days by filing an appeal after the passage of what he considers to be a reasonable time, the burden rests on the agency to come forward and specify "special circumstances" that warrant the additional delay. The kind of special circumstances contemplated would be exemplified by a categorical or similarly broad request that raises several difficult legal or policy questions. If the requester wishes to challenge the adequacy of the special circumstances advanced by the agency he could reassert his intention to stand by his appeal. If he does this and the agency does not take final action within the next twenty working days, he could bring suit in the federal district court under § 552(a)(3) to compel production of the record.<sup>89</sup> One of the defenses that the agency could raise would be the prematurity of the suit because the petitioner has not waited to exhaust his administrative remedies completely, and this would raise the issue of whether the extended deadline in excess of ten days was reasonable or not.

The above discussion suggests that agency regulations based on the proposed guideline might make judicial relief more accessible in cases of improper delay. Courts have in some cases required agencies to follow procedures set out in their own regulations even when they have not been mandated by statute or standards of constitutional due process.<sup>90</sup> Some have not only set aside agency action taken without observance of self-prescribed procedures, they have even issued orders in the nature of mandamus to compel compliance with them.<sup>91</sup> However, courts have on occasion refused to treat self-imposed time limitations as binding on agencies even when they have been formalized in regulations.<sup>92</sup>

---

<sup>89</sup>As a practical matter an agency need only come up with an initial reply within the twenty day period to deter the requestor from filing suit at the end of it. If the reply should be a denial issuing from the officer in charge of the initial request rather than the officer in charge of appeals, the cautious requestor would reassert his appeal at this point to establish without question his exhaustion of administrative remedies.

<sup>90</sup>*Yellin v. United States*, 374 U.S. 109 (1963); *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *Peters v. Hobby*, 349 U.S. 331 (1955); *Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

<sup>91</sup>*Smith v. Resor*, 406 F.2d 141 (2d Cir. 1969). The Ninth Circuit has indicated in the recent case of *General Services Administration v. Benson*, 415 F.2d 878, 880 (1969) that it will hold an agency bound by its own substantive regulations implementing the Freedom of Information Act even when they may go beyond what the law requires. For discussion of this case see the text *infra* at notes 108-12.

<sup>92</sup>*M.G. Davis & Co. v. Cohen*, 369 F.2d 360, 363, (2d Cir. 1966). (Refusal by court to regard proceedings instituted after time limitation prescribed by agency regulation as in excess of agency's jurisdiction so as to warrant injunction that would terminate them prior to their completion.)

Nonetheless, one would expect the courts to enforce the time limitations adopted pursuant to the proposed guidelines, not simply because they would be embodied in formal regulations, but because they give precise form to rights implied by the Freedom of Information Act and other laws. Even if an agency did not adopt implementing regulations, a requester encountering unreasonable delay could obtain relief in the courts. The proposed guideline would not give rise to a remedy otherwise unavailable; it would do no more than make clearer, and perhaps accelerate, the time at which that relief might be sought.

The following statutes provide a basis for judicial relief to correct agency inaction on a request for records: 1) 5 U.S.C. § 552(a)(3) which provides that identifiable records will be made "promptly available" to any person and that federal district courts have jurisdiction "to order the production of any agency records improperly withheld from the 'complainant'"; 2) 28 U.S.C. § 1361 which authorizes federal suits in the nature of mandamus to compel government officials to perform a duty; 3) 5 U.S.C. § 555(b) which requires an agency "to conclude a matter" before it "within a reasonable time"; 4) 5 U.S.C. § 706(1) which authorizes a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed."

Since delay in coming to a decision results in a literal "withholding" of a record for the period of time necessary to make a decision, it can be argued that unnecessary delay results in a record being "improperly withheld" within the meaning of § 552(a)(3). This argument for judicial relief is reinforced by the statute's requirement of a prompt decision. Reliance on § 552(a)(3) alone, however, presents some difficulties. The word "withholding" can be interpreted to require an actual refusal to grant access to the record. Such a reading is most consistent with the legislative history of the Act as interpreted by the Attorney General's Memorandum, which finds in the House Report the implication that court review "is designed to follow final action at the agency head level."<sup>93</sup> However, unless a requester can obtain some kind of judicial relief where an agency refuses to make any decision, then all an agency need do to avoid judicial review entirely is to procrastinate interminably when presented with a distasteful request. It can be urged persuasively, then, that the right to obtain judicial relief in cases of delay is implied from the express judicial remedy provided in § 552(a)(3) in cases of denial.<sup>94</sup>

Even if § 552(a)(3) by itself does not afford a remedy in cases of delay, it can provide the basis for seeking relief in the nature of mandamus under 28 U.S.C. § 1361. This latter statute confers jurisdiction on federal

<sup>93</sup>*Att'y Gen. Memo.* at 296.

<sup>94</sup>*Environmental Defense Fund v. Ruckelshaus*, \_\_\_\_ F.2d \_\_\_\_ (D.C. Cir. 1970).



district courts to compel a federal agency to perform a duty owed the plaintiff. Section 552(a)(3) establishes a clear duty on government agencies to produce non-exempt records on request. For the most part the duty is ministerial. The only exercise of discretion that could ever arise in cases involving non-exempt records would come about in the determination of their non-exempt status. With regard to many requests, perhaps most, the non-exempt character of the records is so clear that mandamus seems particularly appropriate.<sup>95</sup> Even where a difficult question of interpreting an exemption arises, there is room for mandamus, at least to compel the agency to take expeditious action. By expressly requiring that the agency make records "promptly available," § 552(a)(3) establishes the duty that an agency handle a request for records without unreasonable, perhaps without unnecessary, delay.<sup>96</sup> A requester can enforce this duty even where difficult legal questions are involved. It is well settled that mandamus will lie not only to compel ministerial acts but also to compel the exercise of discretion; what it may not be used for is to determine or influence the exercise of that discretion.<sup>97</sup> In enforcing § 552(a)(3), mandamus can go beyond simply ordering the agency to make a prompt decision. It should be available to compel production of any non-exempt record, including one whose non-exempt status is not readily apparent. This point will be explored more fully below.

Another basis for a judicial remedy is found in 5 U.S.C. § 555(b) which carries forward in slightly different language the requirement originally found in § 6(a) of the Administrative Procedure Act that an agency act with "reasonable dispatch." The current formulation provides that "within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 706(1) affords a judicial remedy to enforce this provision in language identical to that used in the original formulation of § 10(e) of the Administrative Procedure Act: "The reviewing court shall compel agency action unlawfully withheld or unreasonably delayed." In the leading case of *Deering Milliken v. Johnson*, 295 F.2d 856 (4th Cir. 1961) the court held that § 6(a) of the

---

<sup>95</sup>Skolnick v. Parsons, 397 F.2d 523 (7th Cir. 1968). In this case the court took the position that a suit in the nature of mandamus brought pursuant to 28 U.S.C. § 1361 to enforce legal rights arising under 5 U.S.C. § 552 (a)(3) stated a good cause of action.

<sup>96</sup>Congressional intent to create a legal right to have one's requests for records handled expeditiously is evidenced not only by the express requirements that records be made available "promptly" but also by the provision that suits brought to compel their production take precedence on the district court's docket. 5 U.S.C. § 552 (a)(3) (1964 ed. Supp. IV).

<sup>97</sup>National Anti-Vivisection Society v. F.C.C., 234 F. Supp. 696 (N.D. Ill. 1964); Indiana & Michigan Elec. Co. v. F.P.C., 224 F. Supp. 166 (N.D. Ind. 1963).

Administrative Procedure Act gave rise to a legal right to have agencies act with "reasonable dispatch" and that this right could be enforced in an action seeking relief pursuant to § 10(e) of the Act. Writing for the court, Judge Haynsworth dealt with the problem presented by § 10(c) of the Administrative Procedure Act (now codified in 5 U.S.C. § 704), which states that "final agency action" is subject to judicial review. He found that "final agency action" in the usual sense of these words was not necessary where an agency had been considering a matter for an unreasonably long period of time. Since violation of § 6(a) gave rise to a "legal wrong," it was necessary to provide judicial relief even where an agency had not acted finally; otherwise the "legal wrong" suffered would not be subject to an adequate remedy.<sup>98</sup>

The petitioner in *Deering Milliken* was threatened with substantial injury because of the delay. Unfair labor practice proceedings had been in progress for more than four years when the petitioner brought suit to enjoin the NLRB from remanding the case to the trial examiner for a second time in order to reopen an issue already litigated. Not only would petitioner have incurred additional expense and inconvenience if the proceeding were to be drawn out any longer, the continuing uncertainty of outcome would have had a sharp dollars and cents impact because damages would have continued to accrue throughout the proceeding. It could be argued that absent such damage a party does not face the kind of "unreasonable delay" that warrants judicial intervention pursuant to § 706(1). This argument is not persuasive in a government records case. Although the requirement of irreparable harm might well be necessary where judicial intervention will tend to disrupt the orderly development of the administrative process in a matter within the special competence and jurisdiction of an administrative agency,<sup>99</sup> the production of agency records does not involve such disruption.

Taken by themselves §§ 555(b) and 706(1) of Title 5 would justify judicial relief when an unreasonably long period of time has elapsed. The proposed guideline might require an agency to act well before that time. But since the guideline is designed to translate the statutory requirement of prompt action into specific standards, it can be maintained that failure to observe these standards constitutes both "unreasonable" and "unlawful" delay. On this basis one may arguably maintain that relief can be sought pursuant to § 706(1) to compel adherence to the time limitations imposed by regulations.

In a suit to compel delayed agency action on a request it is conceivable,

---

<sup>98</sup>295 F.2d at 864-65.

<sup>99</sup>See generally, 3 Davis, Administrative Law § 20.06 (1958).

but not likely, that a court would limit its relief to an order requiring the agency to respond promptly to the request. With regard to other kinds of agency proceedings more integral to the administrative process, it would ordinarily be inappropriate for a court to remedy improper delay by an order influencing the outcome of the proceedings; the proper order would limit itself to expediting them.<sup>100</sup> Similar judicial restraint is not appropriate where the Freedom of Information Act is concerned. There is little reason to defer to administrative discretion where a request is made for non-exempt records. Although the question of whether a record is exempt under the Act may often raise difficult issues of statutory interpretation, these can be appropriately resolved by the courts without first referring them to the agency.

It is true that authority can be found for the proposition that a statute directing administrative action should be interpreted and applied by the agency in the first instance, particularly where the decision turns "on matters of doubtful or highly debatable inference from loose statutory terms,"<sup>101</sup> as would often be the case where the exemptions listed in the Freedom of Information Act are concerned. But the cases taking such a position involve the application of statutes relating to the agency's primary area of concern and competence; responsible participation by the agencies in the elaboration of these statutory norms is thought necessary for the proper development of the administrative scheme of regulation. This is not the case with regard to the statutory exemptions under the Freedom of Information Act which apply to all agencies more or less uniformly. Section 552(a)(3) on its face indicates that little weight is to be given to the agency's interpretation and application of the statutory exemptions. In an action to obtain records withheld by the agency the court is to determine the matter *de novo* "and the burden is on the agency to sustain its action." The language, purpose and history of the Act all indicate that Congress intended to place on the courts rather than the agencies primary responsibility for interpreting the scope of a citizen's rights to obtain access to government records. This being so, the more relevant case authority is that which holds *mandamus* will even lie where the duty involved becomes clear only after the relevant statute has been construed.<sup>102</sup>

To summarize the above discussion concerning judicial remedies, it can be said that even without adoption of the proposed guidelines and implementing regulations a person whose request for records is completely

<sup>100</sup>M.G. Davis & Co. v. Cohen, 256 F. Supp. 128, 133 n.7 (S.D.N.Y. 1966).

<sup>101</sup>Panama Canal Co. v. Grace Lines, Inc. 356 U.S. 309, 317-18 (1958); R.E.A. v. Northern States Power Co., 373 F.2d 686, 695 n. 14 (8th Cir. 1967).

<sup>102</sup>Carey v. Local Bd. No. 2, 297 F. Supp. 352 (D. Conn. 1969).



ignored or sidetracked by agency inaction can now bring a successful suit to compel production. The guideline recommends regulations that set definite limits within which the agency must act, thereby clarifying the time at which resort can be had to the courts. The proposed deadlines might well have the effect of accelerating the time when judicial intervention can be sought. This possibility might give rise to the objection that a court may require an agency to act more quickly than the circumstances warrant. But this is an unlikely eventuality. If the agency makes a showing that it requires additional time to produce the requested records, the court will undoubtedly grant the agency a reasonable period to comply with its order.<sup>103</sup> Where the agency needs more time to evaluate the legal questions and policy considerations involved in deciding whether to assert a statutory exemption, it still has 60 days before the United States has to file an answer to the complaint.<sup>104</sup> More significantly, with regard to many requests the agency can easily obtain additional time prior to the filing of a complaint by taking appropriate steps when the requester complains to the appeals officer about improper delay.

In calling for a procedure that will enable a requester to seek relief from delay within the administrative agency itself, the guidelines permit an expeditious exhaustion of remedies within the agency. Most agencies do not presently have comparable procedural regulations. In their absence a requester complaining of improper delay might claim that he could resort to the courts without first seeking relief at the head level of the agency.<sup>105</sup> The chance that such an argument would prevail is not great. The courts will probably be disposed to give the agencies an opportunity to correct the improprieties of their operating staff, particularly since the requester can make an effort in this direction at slight cost and with little burden. Certainly an impatient requester would be ill advised to file suit charging improper delay without first petitioning the agency head or the appeals officer in charge of records for relief. The proposed guideline would clarify the need and means for thus exhausting administrative remedies.

<sup>103</sup>Cf., *Kurio v. United States*, 281 F. Supp. 252 (S.D. Tex. 1968).

<sup>104</sup>*Martin v. Neuschel*, 396 F.2d 759 (3d Cir. 1968). The court held that the trial court could not enter judgment in the plaintiff's favor where the Government had not been given an opportunity to file an answer in accordance with Federal Rule 12 (a).

<sup>105</sup>In *Sunshine Publishing Co. v. Summerfield*, 184 F. Supp. 767 (D.D.C. 1960) the court rejected the argument that the plaintiff had failed to exhaust its administrative remedies where its application for second class mailing privileges had been held up for an unreasonably long time (15 mos.) by the Post Office. The court itself ruled on the application, taking the position that exhaustion was not necessary where the agency's procedure was either inadequate or unavailable.

*V. Initial Denials of Requests**A. Form of Denial*

The proposed guidelines (B-5-a) require an initial denial to be in writing and to include both a reference to the specific exemption invoked by the agency and a brief explanation of how the exemption applies to the record withheld. As originally formulated, this guideline also would have required each initial denial to include a brief written statement of why the exempt record was being withheld as a matter of agency discretion. The purpose of the original requirement was in large part to inform the requester of the basis for the agency's initial action so that he would have an opportunity to challenge it on appeal within the agency. Comments from a number of agencies suggested that this requirement placed an unnecessary burden on agencies in the many cases where a requester would not bother to appeal an initial denial. For this reason the guideline was amended to provide that an agency be required to specify its reasons for withholding initially only when asked to do so by the requester. However, in all cases of a final agency denial on appeal, the guidelines (B-6-c) require a written specification of the reasons for withholding the record. This requirement is discussed at greater length below.

The guideline would also require inclusion of a statement outlining the opportunity for appeal within the agency and subsequent review in the courts. Current regulations of some agencies require that the requester be informed of his right to an intra-agency appeal at the time of the initial denial.<sup>106</sup> Very little more of a burden is involved in requiring the agency to bring to the requester's attention the opportunity he has to bring a legal action eventually. Although there is a natural disinclination to invite litigation, the purpose of the Act suggests that every opportunity be used to insure that the individual citizen is aware of his legal rights.

*B. Collection of Denials*

The guideline calling for centralized collection of initial denials is a form of internal control designed to achieve two ends: 1) stricter compliance with agency regulations and policies by operating staff; 2) uniformity in the assertion of exemptions at the initial denial stage. An incidental benefit derived from the practice will be the compiling of a readily available record of agency performance under the Freedom of Information Act. In a few interviews the objection was raised that the accumulation of the centralized file would be unduly burdensome. It is difficult to appreciate the merits of this objection, since the procedure will

---

<sup>106</sup>E.g., Internal Revenue Service, 26 C.F.R. § 601.702 (8) (1970); Department of Defense, 32 C.F.R. § 601.703 (8) (1970).

only require the making of an additional carbon of the denial and the periodic transmittal of this to a centralized point. Some rather large departments already provide for such an agency-wide file of denials or for some equally centralized control over denials.<sup>107</sup>

## VI. Intra-Agency Appeals

### A. Single Level of Appeals

The guidelines (B-6-b) provide that there should be only one level of intra-agency appeal. A large number of agencies, including some of the large departments like Health, Education and Welfare, or Interior, provide for only one level of appeal from an initial denial. Other agencies provide for two levels of appeal from the initial denial. The second level of appeal can operate as a delaying strategy and this charge has been made.<sup>108</sup>

It is clear that one agency, the Civil Aeronautics Board, adopted two levels of appeal not as a delaying tactic but as a device to weed out frivolous requests.<sup>109</sup> The initial decision to deny a record is made at decentralized points within the CAB at the level of the office holding the record. This initial decision is made largely on the basis of established practice. The requester must appeal to the Executive Director for a decision to release a record of the kind regarded as exempt by the agency and traditionally withheld from the public. It is at this stage that discretion is first exercised in applying fixed policy to border-line cases. If a requester wishes to achieve a change in basic policy he must appeal to the Board itself. But a safeguard against delay is built into the regulations. The Executive Director must render a decision within seven working days after receiving the appeal.<sup>110</sup>

This appellate structure is designed to obviate unnecessary expenditure of time on a discretionary decision at the initial denial stage in cases where the requester would not have enough interest to file an appeal. The fact that so many agencies, including large ones, have only one level of appeal would indicate that this form of discouragement is not necessary. However, in a large agency the handling of requests may have to be

<sup>107</sup>General Services Administration, 41 C.F.R. § 105-60.403 (b) (1970) (agency-wide file); Department of Defense, 32 C.F.R. § 286a.6 (c) (1)-(7) (1970) (centralized control for the office of the Secretary).

<sup>108</sup>Nader, *A Status Report on the Responsiveness of Some Federal Agencies to the People's Right to Know about their Government*, statement released publicly on August 29, 1969, and reproduced in 115 Cong. Rec. H7400 (daily ed. September 3, 1969.)

<sup>109</sup>The reason given in the text for the adoption of two levels of appeals was provided in an interview with a CAB official.

<sup>110</sup>14 C.F.R. § 310.9 (d) (1970).



decentralized to such a degree that one cannot expect the exercise of discretion envisaged by the guidelines (B-4-e) at the initial reply stage. The ten-day extension for a reply provided by the guidelines can be used to refer the matter to a higher level for decision. Some agencies specifically provide that an initial denial based on a legal exemption must come from a higher administrative level than the office at which the request is made<sup>111</sup> or that knowledgeable legal personnel participate in the decision.<sup>112</sup> How the matter is handled internally is left up to each agency under the guideline as long as the requester has to deal with only one level of appeal.<sup>113</sup>

### *B. Form of Final Denials*

The proposed guidelines require a final denial to give written reasons for the discretionary withholding of exempt records. (B-6-c) They also require the denials to be collected in a file readily available to the public and indexed according to the exemptions asserted by the agency. A denial is agency action affecting the requester's legal rights under the Freedom of Information Act. In taking such action agency personnel should give sufficient consideration to the request to formulate and make available to the public its reasons for withholding specific records.

Some agency representatives who were interviewed questioned the advisability of having agencies bind themselves to giving reasons for the exercise of their discretion. They have suggested that such regulations invite judicial review of the agency's exercise of discretion. These critics assume that agency discretion in withholding exempt records is not subject to review. Although this assumption is warranted on a literal reading of the Act, it is not one that is universally accepted. At least one commentator assumes that the discretion is reviewable.<sup>114</sup> He points to the language in the Act requiring the agency "to sustain its action" in an enforcement proceeding. But the language introducing the exemption states that "this section [§ 552 in its entirety] does not apply" to exempt matters, implying that the judicial remedy set out in § 552(c) is not applicable to exempt records.

The legislative history is ambiguous on this point, although the Senate report has some language that might be stretched to imply judicial review

---

<sup>111</sup>*E.g.*, Department of the Navy, 32 C.F.R. § 701.1 (j) (4)(ii) (1970).

<sup>112</sup>*E.g.*, Department of the Army, 32 C.F.R. § 518.7 (a) (1970); Department of Housing and Urban Development, 24 C.F.R. § 15.52 (1970); Atomic Energy Commission, 10 C.F.R. § 910 (b), (c) (1970).

<sup>113</sup>It is possible that an agency might provide that lower level officials could grant requests raising no problems of confidentiality but denials could only come from higher level officials to whom questionable cases would be referred during the ten day extension.

<sup>114</sup>Nader, *supra* note 16, at 4.

of agency discretion. The report notes that the court review of a denial must be de novo in order to prevent it "from becoming meaningless judicial sanctioning of agency discretion."<sup>115</sup> Literally read, this language supports the conclusion that the court should review the agency's discretionary withholding of exempt records to see that clearly arbitrary decisions are not made. In context, the language may only be taking into account the fact that application of some of the broadly defined exemptions requires the exercise of judgment, as in the case of exemption five which relates to "inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency."<sup>116</sup> What the Senate report clearly has in mind is avoidance of judicial deference to agency determination of what is and what is not exempt under such a provision. If the Senate report meant to imply more than this, one would have expected it to be more explicit. The Attorney General's Memorandum adopts the more restricted interpretation of the scope of judicial review. It states: The "agency . . . has the burden to justify the withholding, which it can satisfy by showing that the record comes within one of the nine exemptions in subsection (e)."<sup>117</sup>

The decision in *General Services Administration v. Benson*, 415 F.2d 878 (9th Cir. 1969) might appear to point in the opposite direction since it advanced as an alternative holding the proposition that the defendant agency had the burden of showing a compelling reason for not producing even an exempt record. However, the court based this result on the General Services Administration's regulation that provides exemptions will not be asserted "unless there is a compelling reason to do so."<sup>118</sup> Absent such a regulation it is not at all clear that a court will review the exercise of an agency's discretion in invoking an exemption.

If the courts conclude that the exercise of discretion in withholding exempt records is generally unreviewable, an agency regulation calling for specification of the reasons for withholding such records need not have the consequence of subjecting the agency's discretionary action to judicial review, as occurred in the *Benson* case. It all depends on how the regulation is worded. The regulation may expressly provide that the decision to withhold is within the sole discretion of the agency,

---

<sup>115</sup>S. Rep. at 8.

<sup>116</sup>The fifth exemption raises some difficult problems of interpretation. See generally, Davis, *supra* n. 5, at 794-97. Even where courts have given this language a restricted reading, its application to the facts of a particular request requires an exercise of judgment. *E.g.*, *Consumers Union v. Veterans Administration*, 301 F. Supp. 796, 804-06 (S.D.N.Y. 1969).

<sup>117</sup>*Att'y Gen. Memo.* at 295.

<sup>118</sup>41 C.F.R. § 105-60.105-2 (1970).

notwithstanding the specification of reasons. In accord with the dominant purpose of the Freedom of Information Act<sup>119</sup> most agencies now expressly follow a policy of favoring disclosure of even exempt records.<sup>120</sup> Exemptions are only asserted where the reasons behind the exemptions, or similarly valid reasons, are served by non-disclosure. In most cases where this policy is embodied in regulations, the language used indicates that the agency means to retain sole discretion in dealing with exempt records.<sup>121</sup> A regulation clearly making this point would seem to run little risk of providing a basis for judicial review if it is finally determined that the Act itself does not call for it.

It might be suggested that agencies fully committed to the free information policy underlying the Act should be ready to submit their decisions to judicial scrutiny and should adopt regulations similar to that of the General Services Administration involved in the *Benson* case. Although such regulations are to be encouraged, the proposed guidelines do not recommend their uniform adoption. The various agencies face different problems in this area because of the wide diversity of their records. In some cases detailed justification of the assertion of an exemption in a lawsuit, as opposed to a general explanation to the requester, might compromise the confidentiality that should be accorded the records involved. It was thought more appropriate to have each agency decide this matter in light of its own particular problems.

Some deadline on appeals is necessary to give point to the elaborate deadlines at the initial request stage. The twenty working-day deadline proposed by the guidelines (B-6-b) amounts to about a full month. This period of time should be enough in even very difficult cases. It must be recalled that in a case involving any difficulty the agency can take at least an additional two weeks to decide at the initial refusal stage. In more complicated cases additional time can be taken at this point. The fruits of

---

<sup>119</sup>*Att'y Gen. Memo.* at 269.

<sup>120</sup>E.g. Office of Economic Opportunity, 45 C.F.R. § 1005.9 (b) (1970); Department of Defense, 32 C.F.R. § 286.4 (b) (1970).

<sup>121</sup>*Compare* OEO's regulation, which provides that "the office will invoke these exceptions (exemptions) as sparingly as possible, consistent with its obligation to administer the laws for which it is responsible fairly and effectively" (45 C.F.R. § 1005.9 (b)) and DOD's regulation, which provides that "information exempt from public disclosure . . . should be made available to the public . . . when component officials determine that no significant purpose would be served by withholding the information . . . (which determination) is within the sole discretion of the component" (32 C.F.R. § 286.4(b)) *with* the GSA's regulation, which provides that: "(A)uthority for nondisclosure will not be invoked unless there is a reason to do so. In the absence of such compelling reason, records and other information will be disclosed although otherwise subject to exemption." (41 C.F.R. § 105-60.105-2.).



the deliberations at this stage in framing and exploring the issue can be preserved for consideration on appeal. Therefore, even with a twenty-day deadline on appeal over two months of time can be devoted to a highly complicated case before final agency action will be taken. Finally, to cover novel and very complicated cases, the guidelines permit the agency to extend the deadline on the appeal for a reasonable period. But the agency must supply in writing the reasons necessitating such an extension.

As indicated above,<sup>122</sup> adoption of the proposed guidelines might accelerate judicial review. Where an agency does not take final action on an appeal within twenty days as required by its regulations, there is a good chance that a court may permit the requester to pursue his judicial remedy without further delay. The pressure felt by an agency because of this possibility will be salutary rather than detrimental in view of the total period of time available to it to consider the matter of an exemption.

### VII. Fees

Regulations fixing fees for the production and copying of records vary widely from agency to agency, reflecting the wide discretion each one has in setting user charges. The primary source of agency authority to set user fees is found in 31 U.S.C. § 483(a) (1964 ed.) which provides:

It is the sense of Congress that any . . . service . . . document, report . . . or similar thing of value or utility . . . provided . . . by any Federal Agency . . . shall be self-sustaining to the full extent possible, and the head of each Federal Agency is authorized by regulations (which, in the case of agencies in the executive branch, shall be as uniform as practicable . . .) to prescribe therefore such fee . . . , if any, as he shall determine . . . to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined . . . shall be collected and paid into the Treasury as miscellaneous receipts . . . .

In *Aeronautical Radio, Inc. v. United States*, 335 F.2d 304 (7th Cir. 1964) the court upheld the statute, which was under attack as an unconstitutional delegation of authority because it expressly permits agencies to forego the charging of any fees and because the standards set out in it—i.e., cost to the government, value to the recipient and the public interest served—were too broad, diverse and conflicting. The court indicated that the wide discretion given agencies in this matter was necessary and appropriate in view of the diverse benefits and agencies covered.

---

<sup>122</sup>*Supra* text at notes 89 to 103.

The Attorney General's Memorandum stresses the language in the statute seeking to make such services self-sustaining and recommends charges based on total costs.<sup>123</sup> To support this position it also quotes from Bureau of the Budget Circular No. A-25, September 23, 1959, which provides that if "a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to cover the full cost to the Federal Government of rendering that service." However, it is questionable whether production or copying of government records falls within the category of a "special benefit" as contemplated by the Circular, which sets forth three general illustrations of a special benefit: 1) services that enable the beneficiary to obtain more immediate or substantial gains or values than the general public, as with patents or business licenses; 2) services that provide business stability or assure public confidence in the business activity of the beneficiary, as with safety inspections of crafts; or 3) services performed at the request of the recipients above and beyond the services regularly received by others of the same group, as with passports or airmen's certificates.

The Circular goes on to contrast "special benefits" with services "primarily considered as benefitting broadly the general public," where the "ultimate beneficiaries . . . are obscure," as with the licensing of new biological products. These latter services should be rendered free of charge. Some requests for records fall more readily within this general benefit category than the special benefit one. For instance, records provided to a newspaper reporter or an author concerning a matter of wide interest ultimately benefit the general public.

A highly refined user fee policy would discriminate among requests on the basis of their intended use. Persons requesting records for private commercial gain would be charged the full direct and indirect costs; persons requesting records to inform the public about matters of general concern would be charged nothing. However, an attempt to apply such a policy faithfully in all cases would probably be unworkable administratively and hardly likely to lead to uniform practice within an agency, much less among agencies. Circular No. A-25 does suggest a limited number of distinctions that ultimately relate to use, but they are based primarily on the character of the user. Thus it recognizes the propriety of waiving fees in the case of groups engaged in nonprofit activities for the public safety, health and welfare. Except for such special cases of waiver it would be more feasible as a matter of administration

---

<sup>123</sup>Att'y Gen. Memo. at 293-94.

and more desirable as a matter of policy to have all other fees set uniformly.

It is also desirable as a matter of policy to achieve uniformity between the fees set by the various agencies. The statute itself calls for as much uniformity among the agencies as is practicable, and Bureau of the Budget Circular No. A-25, setting forth general policies relating to user charges, reiterates this theme. Uniformity with regard to fees for disseminating government held information is particularly desirable since differences among agencies may reflect differing valuations of the public interest served by this function. The Freedom of Information Act implies that a high, uniform value should be given to this interest by all agencies.

Even if the agencies were to adhere to the Attorney General's recommendation of recovering full costs, the charges should be as uniform as possible. In many cases one expects that the process of retrieving and reproducing documents will be more or less standardized. However, there may be some variations in costs from agency to agency because of different methods of filing and storing documents. An even greater reason for variations in costs could be the differing salary levels of the employees engaged in searching. These costs might not only vary from agency to agency but might even vary within an agency for different kinds of records.

Because of these complexities, it may not be feasible to establish uniform fees for all agencies with regard to the various aspects of record production and duplication. For this reason, the proposed guidelines, instead of calling for uniform fees, call for the establishment of uniform criteria to be used in establishing fees. The matter is to be studied and the criteria are to be formulated by a committee composed of representatives from the Office of Management and the Budget, the Department of Justice and the General Services Administration. The guidelines go on to direct the committee to recommend adoption of uniform fees and policies "where feasible."

Examination of existing fee schedules reveals the need for at least uniform criteria. The present fee schedules show wide variations that cannot possibly be explained on the ground of differing labor or other costs. With regard to copying charges, they range from ten cents per page or less in some agencies<sup>124</sup> to forty<sup>125</sup> and even fifty cents<sup>126</sup> per page in others, with twenty-five cents the most popular charge.<sup>127</sup> Some agencies

<sup>124</sup>E.g., Office of Economic Opportunity, 45 C.F.R. § 1005.13 (1970); Securities and Exchange Commission, 17 C.F.R. § 200.80e (b)(1) (1970).

<sup>125</sup>Department of State, 22 C.F.R. § 6.8 (a) (3) (1970).

<sup>126</sup>Department of Transportation, 49 C.F.R. § 7.85 (b)(1) (1970).

<sup>127</sup>E.g., The Renegotiation Board, 32 C.F.R. § 1480.1 (1970); Equal Employment



have a special charge for the first page copied that goes up to \$1.00 per page.<sup>128</sup> There is just as great a variation among the agencies with regard to the scheduled fees for time spent on searching for documents, running from a low of \$2.50 per hour in the case of the Veterans Administration<sup>129</sup> up to \$8.00 per hour in the Post Office,<sup>130</sup> with the hourly charges of \$3.50<sup>131</sup> and \$5.00 showing about equal popularity.<sup>132</sup> The Department of Transportation has a uniform search charge for each record of \$3.00.<sup>133</sup>

In light of these variations there can be no doubt that the agencies differ in the extent to which they include indirect costs in their fees. Those agencies charging ten cents or less per page for the copying of documents are not recovering much more than direct costs, while the others are recovering in varying degrees such indirect costs as a proportionate allocation of rent, management and supervisory costs, maintenance, operation and depreciation of buildings and equipment, as well as for such personnel costs as retirement credits and employee insurance. Bureau of the Budget Circular No. A-25 suggests that indirect costs such as these be taken into account when a special benefit is involved. In the case of agencies with the highest fees it appears that some even take into account such elements as the average time that a secretary may have to wait in line at the duplicating machine.<sup>134</sup>

A policy of discouraging "frivolous requests" explains why some agencies favor a broad inclusion of indirect costs. The Attorney General's Memorandum suggests that such discouragement is an appropriate consideration in setting fees,<sup>135</sup> but neither the language of the Act nor its legislative history supports such a policy; if anything, they reflect a contrary spirit.

The published schedules do not reveal the full extent of the variation in fees actually charged by different agencies because of widespread

---

Opportunity Commission, 29 C.F.R. § 1610.17 (a) (3) (1970); Atomic Energy Commission, 10 C.F.R. § 9.9 (b)(1) (1970); Economic Development Administration, 13 C.F.R. § 301.63(e) (iii) (a) (1970); Department of Labor, 29 C.F.R. § 70.6 (b) (1970); Internal Revenue Service, 26 C.F.R. § 601.702 (c)(5) (1970).

<sup>128</sup>*E.g.*, Renegotiation Board, 32 C.F.R. 1480.12 (1969).

<sup>129</sup>38 C.F.R. § 1.526 (i)(2) (1970).

<sup>130</sup>39 C.F.R. § 113.5 (a)(2) (1970).

<sup>131</sup>*E.g.*, Internal Revenue Service, 26 C.F.R. § 601.702 (c)(5) (1970); Department of State, 22 C.F.R. § 6.8 (a)(1) (1970).

<sup>132</sup>Department of Commerce, 15 C.F.R. § 4.8(b)(2) (1970); Department of Housing and Urban Development, 24 C.F.R. § 5.4(a)(2) (1970).

<sup>133</sup>49 C.F.R. § 7.85 (a) (1970).

<sup>134</sup>The officer who had set the fee in a particular agency indicated in an interview that he had taken secretarial time spent in waiting at the duplicating machine into account in setting the fee.

<sup>135</sup>*Att'y Gen. Memo.* at 294-95.

departure from them in practice. The interviews revealed that some agencies will provide free of charge copies of as many as twenty or thirty pages of documents, and perhaps more. Some make no charge for searches unless they run more than a few hours. There are two reasons for these departures from the published schedules. First, the agencies do not immediately benefit from the collections, which must go into the Treasury's general fund as miscellaneous receipts. As a result, the processing and collecting of fees only adds to the real costs incurred by the agencies without a directly compensating benefit. Some agencies, therefore, do not feel compelled to recover the costs incurred by the Government except in those cases where the requests make a substantial claim on agency time. Second, some agencies are disposed to make information as freely available as possible. A few have written this policy into their regulations by providing that, to the extent practicable, no charges will be made for locating or copying records.<sup>136</sup> Many others have adopted this policy in practice despite apparently contrary regulations.

The proposed guidelines also indicate some of the policy considerations that should guide the proposed committee in setting uniform criteria for fees generally and, where feasible, uniform specific fees and policies. These policy considerations can be inferred from the proposals in the guidelines calling for uniformity with regard to copying fees and for the absence of a fee for a routine search or for limited screening out of exempt records and material.

These proposals indicate that all agencies should depart from setting fees on the basis of a full cost policy with regard to most document requests. It recognizes that production of most kinds of government documents confers in many cases the general benefit of informing the public. Therefore, a uniform fee for producing and copying such documents should not be based on a full cost policy. A good case can be made for the recovery of only direct costs. Most of the indirect costs attributable to the production and copying of records would be incurred by the agencies even without the passage of the Freedom of Information Act. This is certainly true of the building depreciation and maintenance charges that are proportionally allocated to the production of records by some agencies. It could be true even of some of the direct fixed costs, such as the rental or depreciation charges for the duplicating equipment itself. It is likely that some agencies would have to purchase this equipment for

---

<sup>136</sup>Office of Economic Opportunity, 45 C.F.R. § 1005.13 (1970). The Department of Housing and Urban Development does not charge for the first full hour of search time spent on a request. 24 C.F.R. § 15.14 (a)(1) (1970). The Securities and Exchange Commission does not charge for the first one-half hour of search time spent on a request. 17 C.F.R. § 200.80e (a) (1970).

their internal needs, and the copying or records for the public only has increased the rate of usage of the equipment. Because of this possibility, it would be difficult to come up with a direct cost attributable to the copying of records for the public if that cost were to be limited only to what is marginally incurred in duplicating records for the general public.

*Copying Fees.* In recognition of these policy considerations, where the copying of ordinary documents is concerned the guidelines turn away from average direct costs incurred by the agencies to the market place for a standard norm. The guidelines would have all agencies charge the going commercial rate for copying ordinary documents. The average commercial charge, of course, covers not only overhead costs like depreciation of duplicating equipment but also includes a profit factor. Consequently, one expects that this fee should cover at least the direct labor and material costs involved in copying documents. It may not be enough, however, to cover the fixed direct costs involved in copying documents or all direct handling costs related to such copying because the agencies are not primarily geared to the business of duplicating documents for the public as are private profit-making firms. Even though the going market rate may not cover all direct costs of copying, it is still appropriate to adopt it as the norm. The public interest served in making copies of government records available at no greater charge than in the case of private papers justifies a fee that covers less than all direct fixed and variable costs. Use of the going commercial rate for copying fees would allow agencies to contract out the duplication of requested records to private firms, as long as the fees charged were in line with the going rate. Several agencies utilize the contracting out procedure, but in some cases the fees charged are clearly excessive when measured against the proposed guidelines.<sup>137</sup> The FPC contracts out, but the fees charged are in line with the proposed guidelines.<sup>138</sup> A charge of seven cents is made for each page reproduced. There also is a minimum charge of one dollar for each order. Such a reasonable minimum charge would appear to be in order where work is subcontracted out.

*Searching Fees.* The guidelines recommend that all agencies not charge a fee in the case of a routine search for a specific document. This recommendation is based on existing practice. Some agencies by regulation omit a charge for initial search time. This period varies from fifteen minutes<sup>139</sup> to one hour<sup>140</sup> according to published schedules.

---

<sup>137</sup>In some cases the fee is twenty-five cents for each page copied.

<sup>138</sup>A fee of seven cents per page is charged for copying, with a minimum charge of \$1.00 for each order.

<sup>139</sup>Department of Justice, 28 C.F.R. § 16.4(b) (1970); however, a \$3.00 application fee is charged.

<sup>140</sup>Department of Housing and Urban Development, 24 C.F.R. § 15.14 (a)(1) (1970).



Variations in actual practice range more widely than this. It seems appropriate that some part of the search time be subsidized by the taxpayer in order to implement a free and open information policy. The guideline does not specify any number of minutes. It refers to "routine searches," for which there should be no charge. Search fees are limited to cases where the circumstances indicate that a substantial amount of time will be involved, as when the request asks for a number of documents.

The agencies also vary among themselves with regard to computing the time charge; some charge by the hour while others charge by a fraction thereof. Computation by the hour can result in a larger fee in some cases. Here again there can and should be uniformity among the agencies.

*Screening Out Exempt Documents.* One cost that is incurred by the agencies arises where competent staff must screen documents to determine whether they are exempt, and if so, whether they should nonetheless be disclosed. As a theoretical matter it would seem that these costs should be borne entirely by the agency in all cases. Certainly the requester is not deriving any benefit, special or otherwise, from this screening. Presumably the general public interest is being served when the exemptions are asserted and the agency time spent on these matters should be viewed as a public service. For this reason the guideline provides that in a routine case no charge shall be made for the time spent screening documents to protect exempt information.

However, where the screening process would be very burdensome, as in the case of very broad categorical requests, it would be appropriate to negotiate with the requester a fee to cover these costs. Such a charge would be particularly appropriate where the requester is seeking the records primarily for his own use and benefit. Where the intended use of the records would relate to the general public interest, there would be good reason not to charge for the screening out of exempt records. The proposed guidelines would permit the agencies in their discretion to omit charges for screening out in these cases.

## APPENDIX A

RECOMMENDATION 24: Principles and Guidelines for  
Implementation of the Freedom of Information Act

Adopted by the Administrative Conference of the United States  
May 8, 1971

The Freedom of Information Act, 5 U.S.C. § 552, expresses important policies with respect to the availability to the public of records of Federal agencies. To achieve free access to and prompt production of identifiable government records in accordance with the terms and policies of the Act, each agency\* should conform to the statutory policy encouraging disclosure, adopt procedural regulations for the expeditious handling of information requests, and review the fees charged for providing information.

## RECOMMENDATION

A. *General Principles*

Agencies should conform to the following principles in handling requests for information:

1. Each agency should resolve questions under the Freedom of Information Act with a view to providing the utmost information. The exemptions authorizing non-disclosure should be interpreted restrictively.

2. Each agency should make certain that its rules provide the fullest assistance to inquirers, including information relating to where requests may be filed. It should provide the most timely possible action on requests for information.

3. When requested information is partially exempt from disclosure the agency should, to the fullest extent possible, supply that portion of the information which is not exempt.

4. If it is necessary for an agency to deny a request, the denial should be promptly made and the agency should specify the reason for the denial. Procedures for review of denials within the agency should be specified and any such review should be promptly made.

5. Fees for the provision of information should be held to the minimum consistent with the reimbursement of the cost of providing the information. Provision should be made for waiver of fees when this is in the public interest.

---

\* The term agency as used herein denotes an agency, executive department, or a separate administration or bureau within a department which has adopted its own administrative structure for holding requests for records.

### B. *Guidelines for Handling of Information Request*

Each agency should adopt procedural rules to effectuate the principles stated in Part A. To assist in this task the following guidelines are set forth as a model of the kinds of procedures that are appropriate and would accomplish this purpose.

#### 1. *Agency assistance in making request for records.*

Each agency should publish a directory designating names or titles and addresses of the particular officer and employees in its Washington office and in its various regional and field offices to whom requests for information and records should be sent. Appropriate means should be used to make the directory available to members of the public who would be interested in requesting information or records.

Each agency should direct one or more members of its staff to take primary responsibility for assisting the public in framing requests for identifiable records containing the information that they seek. The names or titles and addresses of these staff members should be included in the public directory referred to above.

#### 2. *Form of request.*

##### a. *No standard form.*

No agency should require the use of standard forms for making requests. Any written request that identifies a record sufficiently for the purpose of finding it should be acceptable. A standard form may be offered as an optional aid.

##### b. *Categorical requests.*

i. Requests calling for all records falling within a reasonably specific category should be regarded as conforming to the statutory requirement of "identifiable records" if the agency would be reasonably able to determine which particular records come within the request and to search for and collect them without unduly burdening or interfering with agency operations because of the staff time consumed or the resulting disruption of files.

ii. If any agency responds to a categorical request by stating that compliance would unduly burden or interfere with its operations, it should do so in writing, specifying the reasons why and the extent to which compliance would burden or interfere with agency operations. In the case of such a response the agency should extend to the requester an opportunity to confer with it in an attempt to reduce the request to



manageable proportions by reformulation and by outlining an orderly procedure for the production of documents.

3. *Partial disclosure of exempt records and files.*

Where a requested file or record contains exempt information that the agency wishes to maintain confidential, it should offer to make available the file or a copy of the record with appropriate deletions if this can be done without revealing the exempt information.

4. *Time for reply to request.*

Every agency should either comply with or deny a request for records within ten working days of its receipt unless additional time is required for one of the following reasons:

a. The requested records are stored in whole or part at other locations than the office having charge of the records requested.

b. The request requires the collection of a substantial number of specified records.

c. The request is couched in categorical terms and requires an extensive search for the records responsive to it.

d. The requested records have not been located in the course of a routine search and additional efforts are being made to locate them.

e. The requested records require examination and evaluation by personnel having the necessary competence and discretion to determine if they are: a) exempt from disclosure under the Freedom of Information Act and b) should be withheld as a matter of sound policy, or revealed only with appropriate deletions.

When additional time is required for one of the above reasons, the agency should acknowledge the request in writing within the ten-day period and should include a brief notation of the reason for the delay and an indication of the date on which the records would be made available or a denial would be forthcoming.

The ten-day time period specified above should begin to run on the day that the request is received at that office of the agency having charge of the records. When a request is received at an office not having charge of the records, it should promptly forward the request to the proper office and notify the requester of the action taken.

If an agency does not reply to or acknowledge a request within the ten-day period, the requester may petition the officer handling appeals from denials of records for appropriate action on the request. If an agency does not act on a request within an extended deadline adopted for one of the reasons set forth above, the requester may petition the officer handling appeals from denials of records for action on the request without

additional delay. If an agency adopts an unreasonably long extended deadline for one of the reasons set forth above, the requester may petition the officer handling appeals from denials of records for action on the request within a reasonable period of time from acknowledgement.

An extended deadline adopted for one of the reasons set forth above would be considered reasonable in all cases if it does not exceed ten additional working days. An agency may adopt an extended deadline in excess of the ten additional working days (i.e. a deadline in excess of twenty working days from the time of initial receipt of the request) where special circumstances would reasonably warrant the more extended deadline and they are stated in the written notice of the extension.

#### 5. *Initial denials of requests.*

##### a. *Form of denial.*

A reply denying a written request for a record should be in writing and should include:

i. A reference to the specific exemption under the Freedom of Information Act authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld.

ii. An outline of the appeal procedure within the agency and of the ultimate availability of judicial review in either the district in which the requester resides or has a principal place of business, or in which the agency records are situated.

If the requester indicates to the agency that he wishes to have a brief written statement of the reasons why the exempt record is being withheld as a matter of discretion where neither a statute nor an executive order requires denial, he will be given such a statement.

##### b. *Collection of denials.*

A copy of all denial letters and all written statements explaining why exempt records have been withheld should be collected in a single central-office file.

##### c. *Denials; protection of privacy.*

Where the identity of a requester, or other identifying details relating to a request, would constitute an unwarranted invasion of personal privacy if made generally available, as in the case of a request to examine one's own medical files, the agency should delete identifying details from copies of the request and written responses to it that are made available to requesting members of the public.

6. *Intra-agency appeals.*

a. *Designation of officer for appeals.*

Each agency should publicly designate an officer to whom a requester can take an appeal from a denial of records.

b. *Time for action on appeals.*

There should be only one level of intra-agency appeal. Final action should be taken within twenty working days from the time of filing the appeal. Where novel and very complicated questions have been raised, the agency may extend the time for final action for a reasonable period beyond twenty working days upon notifying the requester of the reasons for the extended deadline and the date on which a final response will be forthcoming.

c. *Action on appeals.*

The grant or denial of an appeal should be in writing and set forth the exemption relied on, how it applies to the record withheld, and the reasons for asserting it. Copies of both grants and denials on appeal should be collected in one file open to the public and should be indexed according to the exemptions asserted and, to the extent feasible, according to the type of records requested.

d. *Necessity for prompt action on petitions complaining of delay.*

Where a petition to an appeals officer complaining of an agency's failure to respond to a request or to meet an extended deadline for responding to a request does not elicit an appropriate response within ten days, the requester may treat his request as denied and file an appeal. Where a petition to an appeals officer complaining of the agency's imposition of an unreasonably long deadline to consider assertion of an exemption does not bring about a properly revised deadline, the requester may treat his request as denied after a reasonable period of time has elapsed from his initial request and he may then file an appeal.

C. *Fees for the Provision of Information*

Each agency should establish a fair and equitable fee schedule relating to the provision of information. To assist the agencies in this endeavor, a committee composed of representatives from the Office of Management and Budget, the Department of Justice and the General Services Administration, should establish uniform criteria for determining a fair and equitable fee schedule relating to requests for records that would take into account, pursuant to 31 U.S.C. § 483a (1964), the costs incurred by



the agency, the value received by the requester and the public interest in making the information freely and generally available. The Committee should also review agency fees to determine if they comply with the enunciated criteria. These criteria might include the following:

1. *Fees for copying documents.* In view of the public interest in making government information freely available, the fee charged for reproducing documents in written, typewritten, printed or other form that permits copying by duplicating processes, should be uniform and not exceed the going commercial rate, even where such a charge would not cover all costs incurred by particular agencies.

2. *No fee for routine search.* In view of the public interest in making government held information freely available, no charge should be made for the search time and other incidental costs involved in the routine handling of a request for a specific document.

3. *No fee for screening out exempt records.* As a rule, no charge should be made for the time involved in examining and evaluating records for the purpose of determining whether they are exempt from disclosure under the Freedom of Information Act and should be withheld as a matter of sound policy. Where a broad request requires qualified agency personnel to devote a substantial amount of time to screening out exempt records and considering whether they should be made available, the agency in its discretion may include in its fee a charge for the time so consumed. An important factor in exercising this discretion and determining the fee should be whether the intended use of the requested records will be of general public interest and benefit or whether it will be of primary value to the requester.

## APPENDIX B

SURVEY OF PERSONS WHO MAY HAVE REQUESTED RECORDS FROM  
FEDERAL AGENCIES

Approximately 400 questionnaires were sent to organizations that are likely to request records from federal agencies. Public interest groups, trade associations, newspapers and a sample of 20 law firms having a substantial Washington administrative law practice were included in the mailing. The questionnaire asked how often the responding parties encountered difficulties in requesting federal records. This general question was succeeded by specific ones asking how often the responding parties met with delay, evasiveness, rejections because of allegedly inadequate identification of the documents, denials because of allegedly exempt subject matter and refusals to comply with categorical requests. Finally, the responding parties were asked to indicate whether they noted any improvement in public access to government records after passage of the Freedom of Information Act.

Only 44 of the questionnaires were completed and returned, including one half of the 20 questionnaires sent to law firms. In view of both the low rate of return and the relatively small number of completions the results of the survey are of limited value. One of the reasons for the low rate of return may be the relatively small number of organizations that have sought to obtain records from federal agencies since 1967. Of the 44 returns, exactly 25% reported that the responding parties had asked for no records since 1967. Although the questionnaire was designed to elicit returns indicating a complete lack of experience in requesting records from federal agencies, it is possible that organizations with no experience to report may have ignored the questionnaire on the assumption that they could contribute nothing of value to the survey.

Whatever the reason for the low rate of return, it is clear that reports from 33 requesters of government records selected more or less at random do not provide a sufficient sample for an accurate survey of the public's experience generally in obtaining government records. Despite the limitations of the survey it does provide some information from which limited conclusions can be drawn.

The returns support the conclusion that the publicized difficulties in obtaining records from federal agencies do not represent isolated cases. Of the 33 parties responding who had some experience in requesting records, 8 reported regularly recurring difficulties, 7 reported a noticeable frequency, 5 reported occasional difficulties and 13 reported few if any. Almost half of the replies (15) reported at least frequent difficulties. As might be expected, those respondents who frequently request records

reported a higher rate of difficulty than those who only submit occasional requests, while those who had made only a few requests reported a low rate of difficulty.

Seven (7) respondents reported frequent delays in obtaining an initial reply from the agencies and 10 reported occasional delays. The problem of delay was underscored in a few of the returns that reported a generally favorable experience. As one respondent who reported favorably put it, "The main obstacle to date has been the inherent foot dragging of the federal bureaucracy upon receipt of such requests." The experience with evasive agency replies was about the same as with delay. Seven (7) respondents reported frequent instances of confusing and contradictory statements and 10 reported occasional instances.

Proper identification of records did not create frequent difficulties for most respondents. Only 3 reported frequent difficulties in this regard and 7 reported occasional ones. More difficulty was encountered in connection with categorical requests. Fourteen (14) returns reported having made such requests and 8 reported denials in such cases. In some of the cases either the burdensome nature of the request or the difficulty in screening out exempt records was assigned as the reason for refusal.

An important reason assigned by the parties for the difficulty in getting records was the assertion initially by the agency that the records sought were exempt. Seven (7) respondents indicated that this was a frequent cause of difficulty and 11 reported that it was an occasional one. Although in many cases the denials were reversed on appeal in the agency, the respondents complained of the delay caused by the initial refusals. Seven (7) respondents encountered frequent delay in having an agency initially determine whether a record was exempt and 5 encountered occasional difficulties in this regard.

Most of the respondents concluded that the practices of the agencies in making records available to the public had improved to some extent with the passage of the Act. Although 12 returns reported no change in agency practices, 6 of these also reported few if any difficulties in obtaining records. Thus, only 6 of those who saw no change were of the opinion that change was required. Twelve (12) respondents saw some change. Of these 7 nonetheless reported either regularly recurring overall difficulties in getting records, or at least frequent ones, indicating that they could clearly see room for improvement. Only 4 respondents saw a marked improvement in agency practice after passage of the Act.