

WHO'S ON FIRST?: THE ROLE OF THE OFFICE OF MANAGEMENT AND BUDGET IN FEDERAL INFORMATION POLICY

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Private sector information is the fuel on which the modern engine of regulatory government steams ahead. A growing demand for that fuel has caused extensive reexaminations of the federal government's ability to handle the information which it collects. The 1980 Paperwork Reduction Act¹ is a fuel conservation measure, imposing restraints on agency collections of information. But the engine of regulatory control also needs an emissions control, a federal policy on disclosure of private information.

Federal policies exist for many less important issues. Our national government is staffed with policy analysts, studied by students of public policy, and investigated for its policy failures. The current federal policy on the disclosure of federal information about non-federal persons' activities is no policy at all. There is no consistent policy to be analyzed, studied, or investigated.

While every democracy favors "openness," and the United States has historically led the world in open government, few nations would imitate the dispersed power and casual manner with which American government officials can decide the important questions of technology transfer, commercial and personal data dissemination, and records sharing. The issues involve a conflict between private rights, such as the right to innovate in a new but nonpatented process, and public rights to oversee the contents of federal filings. This article does not examine the larger debate of private versus public rights, but focuses instead on how formation of a coherent disclosure policy can reduce the conflicts between these rights. Antonin Scalia, an eminent scholar, government official, teacher, and recent appointee to the United States Court of Appeals for the D.C. Circuit, recently stated that our disclosure system is flawed and that our principal disclosure statute "has no clothes," as it gives the impression of freedom but the reality of signifi-

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1. Pub. L. No. 96-511, 94 Stat. 2812 (1980) (to be codified at 44 U.S.C. § 3500 et seq.).

cant administrative problems.² It has been said that governmental disclosures are now allowed for "everybody, practically anything, anytime, except . . .," with the exceptions expanding in confused proliferation.³ If policy formulation can resolve some of the inconsistencies and interpretative problems, and thereby make the Freedom of Information Act (FOIA)⁴ work more effectively, then such a policy should be established as soon as possible.

THE OFFICE OF MANAGEMENT AND BUDGET AND INFORMATION POLICY

A "policy" may be defined as an intentionally consistent analysis or pattern of issue resolution, for similar questions in a variety of contexts. For purposes of this discussion, policies are not forced upon an agency by statute, but are voluntary decisions within an agency's discretion—consistent of course with any clear statutory requirements. The federal policy on a given subject, if one can be said to exist, is the sum of the Presidential directives, Cabinet officer directives, regulations, and policy-related adjudications which occur in the executive branch agencies at any given time. "Information policy," therefore, is the conscious decision of the executive branch to approach issues of information collection and disclosure in a consistent manner.⁵

The results of extensive interviews of federal and nonfederal officials familiar with information policy suggest that a central information policy on dissemination of federal collections of private documents does not exist.⁶ Both the Office of Management and Budget (OMB) and the Department of Justice (DOJ) are prospective creators of such a federal policy. As this article discussed the DOJ has been held to account for its stewardship of an advisory role and has been found lacking as a policymaker and leader. Meanwhile, the OMB has left untouched a new set of powers which could fill the vacuum left by the DOJ, if OMB were inclined to take on the burden and potential opposition which information policy-making entails. Until OMB assumes

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2. Scalia, *The Freedom of Information Act Has No Clothes*, 6 REGULATION 14 (March 1982).
 3. Note, *Public Inspection of State and Municipal Executive Documents: Everybody, Practically Everything, Anytime, Except . . .*, 45 FORD. L. REV. 1105 (1977).
 4. Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (1976 & Supp. I 1979)).
 5. This article will concentrate upon the disclosure aspects of the Paperwork Reduction Act. The Act has many other aspects. The terms "information policy" and "information disclosure policy" when used in this article refer exclusively to information received from outside of the federal government. Practices related to agency dissemination of federally conducted studies or internal documents are not covered by this article. For a discussion of those issues see generally 2 J. O'REILLY, FEDERAL INFORMATION DISCLOSURE chs. 15, 17 (1977 & Supp. 1982).
 6. The author conducted numerous interviews in preparing this article, which will be referred to throughout this article. The 1981 interviews were conducted under the auspices of the Administrative Conference in research for its Freedom of Information Act study. The 1982 interviews were conducted specifically for this article. Several persons interviewed spoke from personal experience; the views expressed do not necessarily represent official policies of their institutions.

its responsibilities more fully, dispersed and divergent agency disclosure policies continue to exploit this power vacuum, and the public is ill served by inconsistent and unpredictable federal action concerning fragile and irretrievable private rights to the preservation of confidential information.

This article addresses the topic of an information policy as a coordination of choices among several lawful alternatives available to the OMB. It would be a misuse of the term "information policy" to use it to mask a suppression of dissent, as with Poland's martial law government's policy limiting information. Censorship and "managed" news about publicly known events are anathema to our First Amendment-conscious society.⁷ Policy choices have to be made in the much narrower area of how much of the federal agency file information which may lawfully be withheld, should be withheld.⁸ Congress creates the discretion; federal information policy directs the exercise of the delegated discretion.

The OMB is a policy coordination staff for the executive branch on a wide variety of issues.⁹ Units of the OMB review executive branch employees' testimony on legislation to assure consistency. The Office of Federal Procurement Policy coordinates important government purchasing issues.¹⁰ Under authority of Executive Order 12,291,¹¹ and perhaps a future statutory power as well,¹² the Office of Information and Regulatory Affairs in the OMB coordinates studies of the expense

7. Censorship concerning publicly known events or the activities of government in the military, diplomatic or other spheres is unfortunately a condition endemic in many countries of the world. The theme of this article is limited to the United States experience with a set of privately created information which is shared with federal agencies without expectation that the information is already or will be made public, e.g., a new product design or a tax return or a union's bargaining plan for 1984 negotiations.
8. Senator James Abourezk (D-S.D.), who headed the Subcommittee with Freedom of Information Act oversight responsibility, said it best extemporaneously in a hearing: "Government-wide leadership does not exist. It can only come directly from the President or a designee of his. You know as well as I do that the Justice Department only advises and that they don't direct government-wide implementation of the Freedom of Information Act. In reality Government-wide direction does not exist and, I think it probably should." *Freedom of Information Act: Hearings Before the Subcomm. on Administrative Practice and Procedure Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 149 (1977) [hereinafter cited as *1977 FOI Hearings*].
9. The Office of Management & Budget was created by Reorganization Plan No. 2 of 1970 from the former Bureau of the Budget. The House Committee on Government Operations voted to kill the Reorganization but the President was sustained in the full House, 193-164. Mansfield, *Reorganizing the Executive Branch: The Limits of Institutionalization*, in *THE INSTITUTIONALIZED PRESIDENCY* 66 (N. Thomas and H. Baade eds. 1972). For a history of OMB, see also L. LYNN, *MANAGING THE PUBLIC'S BUSINESS* (1981); L. BERMAN, *THE OFFICE OF MANAGEMENT & BUDGET AND THE PRESIDENCY, 1921-1979* (1979); F. MALEK, *WASHINGTON'S HIDDEN TRAGEDY: THE FAILURE TO GET GOVERNMENT TO WORK* (1978); R. ROSE, *MANAGING PRESIDENTIAL OBJECTIVES* (1976).
10. The Office of Federal Procurement Policy is a statutory agency placed within OMB. 40 U.S.C. § 471.
11. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981).
12. S. 1080 and H.R. 746, 97th Cong., 1st Sess. (1981), would have made the OMB role a statutory oversight role in regulatory analysis on new agency regulations. See Bliss, *Regulatory Reform: Toward More Balanced and Flexible Federal Agency Regulation*, 8 PEPPERDINE L. REV. 619 (1981).

of public compliance with new regulations.¹³

Central policy coordination of administrative regulations has been the principal task for the OMB and for its predecessor, the Bureau of the Budget, since the 1930's when the Bureau began to evolve away from strictly responding to budget requests of agencies and Congress toward a greater involvement with policy and its implementation.¹⁴ This role was enhanced by the Brownlow Commission study in the 1930's and by later government management studies.¹⁵ Officials at several levels of OMB stressed that their work was already so extensive and complex that the biggest current disincentive to central policy functioning is the sheer weight of projects already designated for OMB attention. While many OMB officials expressed strong feelings about the OMB role in information policy management, each coupled that desire with a recognition of OMB's staggering workload.¹⁶

A wider set of information policy roles resides in the OMB than in any other single agency. Its first statutory role in this field was the power to write the policy governing the purchases of information processing systems by federal agencies. The Brooks Act of 1965¹⁷ curbed the "computer revolution" in federal recordkeeping by making the OMB partially responsible for standards on the selection and use of information processing equipment by the federal government.¹⁸ It may appear easy to separate the information itself from the hardware used for its collection, but the Brooks Act is one of the OMB's first and most important linkages to the supervision of information collection through the wide variety of federal programs.

THE PRIVACY ACT AND THE ADVISORY COMMITTEE ACT

The OMB was given responsibility for developing guidelines to implement the Privacy Act of 1974 when that statute was adopted late in the 1974 session.¹⁹ That statute was an effort to construct a federal protection for personal information contained within federal files. Through many controversial compromises, and against the historic set-

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13. The Office of Information and Regulatory Affairs, a part of the Office of Management & Budget, is responsible for the review of regulations proposed by agencies, which undergo regulatory analysis, as well as for the Paperwork Reduction Act and other functions. Telephone interviews with Nat Scurry, Chief, Reports Management Branch, OMB (Aug. 1982).
 14. L. BERMAN, *supra* note 9.
 15. REPORT OF THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT (1937).
 16. Though the Paperwork Reduction Act issues are "enormously complex," the OMB finds the Act a "significant improvement in the centralization of information policy functions within the federal government." Interviews with M. Horowitz, Counsel to the Director, and N. Scurry, Chief, Reports Management Branch, OMB (July-Aug. 1982). But all the OMB officials noted the large existing workload of the agency.
 17. Brooks Act, Pub. L. No. 89-306, 79 Stat. 1127 (1965) (codified at 40 U.S.C. § 759 (1976)). The Act delegated "fiscal and policy control exercise" to what is now OMB.
 18. 40 U.S.C. § 759(g) (1976). The policy is set from time to time by OMB, *see* OMB Circular A-121 (Sept. 16, 1980), re Cost Accounting, Cost Recovery and Interagency Sharing of Data Processing Facilities, 41 C.F.R. pt. 101-35, 47 Fed. Reg. 33,960 (1982).
 19. Pub. L. No. 93-579 § 6, 88 Stat. 1909 (1974) (codified at 5 U.S.C. § 552a (1976 & Supp. I 1978)).

ting of the Watergate impeachment hearings, the Privacy Act became less comprehensive and more narrow than its advocates originally had expected.²⁰

The OMB assignment under the Privacy Act is "to develop guidelines and regulations for agencies to use in implementing the provisions of the Act and to provide continuing assistance to and oversight of the implementation of the provisions of this Act by the agencies."²¹ OMB was considered the proper coordination agency because of its experience in issuing policy circulars and in management oversight.²² In 1974, this experience could not be matched by any other agency or by any agency specially created to implement the Act.

The OMB role came as a last-minute compromise addition to the Privacy Act bills, in which the Senate originally had proposed the creation of a permanent Privacy Protection Commission.²³ The conference committee members deleted the proposal for a permanent Commission, and instead created a temporary study group to undertake a research study into privacy protection in the public and private sectors.²⁴ The study commission's recommendations were scholarly and comprehensive.²⁵ In retrospect, however, the delegation of many of the controversial issues to the study commission merely shelved them for the foreseeable future.²⁶ Though a few study commission recommendations have been adopted, for the most part the congressional constituency for passage of a stronger privacy control act had faded by the time the study was completed.²⁷ Like many other federal studies, the study commission's privacy papers have remained on the congressional shelf.

Congress delegated to OMB the authority over the records and administrative details of the thousands of federal advisory committees,

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20. The Privacy Act applies only if information concerns an "individual" and is present in a "record" which is within a "system of records" which then is not either an exempt system of records or possessed by an agency exempt from the access provisions of the Act. *See generally* 2 J. O'REILLY, *supra* note 5, chs. 20-22.
 21. Pub. L. No. 93-579 § 6(1), 88 Stat. 1909 (1974).
 22. *See, e.g.*, the current Brooks Act circular, OMB Circular A-121, *supra* note 18. OMB has produced a circular for Paperwork Reduction Act policies, after successful negotiations with opponents in the Justice Department regarding the PRA. Feaver, *OMB to Keep Firing in War on Paperwork*, *Washington Post*, Sept. 3, 1982, and Paperwork Reduction Act procedures, 47 *Fed. Reg.* 39,515 (1982) (to be codified at 5 C.F.R. § 1320.11).
 23. The Senate bill, S. 3418, 93d Cong., 2d Sess. (1974), had not delegated authority to OMB, but to an independent commission. The House bill provided no central agency. The compromise that emerged placed the OMB in charge. STAFF OF SENATE COMM. ON GOV'T OPERATIONS AND STAFF OF HOUSE COMM. ON OPERATIONS, 94TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE PRIVACY ACT OF 1974 S. 3418, SOURCEBOOK ON PRIVACY 993 (Joint Comm. Print 1976) [hereinafter cited as PRIVACY ACT LEGIS. HIST.].
 24. Pub. L. No. 93-579 § 5, 88 Stat. 1909 (1974).
 25. PRIVACY PROTECTION STUDY COMMISSION, PERSONAL PRIVACY IN AN INFORMATION SOCIETY (1977).
 26. Because the Privacy Act was an end of session bill, no Conference was possible between the Senate and House. Those issues which were too difficult to resolve without a contested Conference vote were passed along to the Commission. Pub. L. No. 93-579 § 5(c), 88 Stat. 1909 (1974).
 27. Little or none of the PPSC study's recommendations, apart from those related to credit legislation, have become law.

when it passed the Federal Advisory Committee Act (FACA) in 1972.²⁸ The FACA is a public access statute, similar to the Freedom of Information Act,²⁹ but applicable to quasi-federal advisors who assist federal agencies but whose deliberative meetings and recommendations previously had been secret.³⁰ After the OMB set up the FACA controls and assisted agencies to reduce the number of advisory committees,³¹ the role of day-to-day supervision of the committees was passed back to the General Services Administration.³²

Despite the OMB's involvement with the four corners of information policy—guidelines on agency disclosures under the Privacy Act, funding of affirmative publications, oversight of collection of data, and the shepherding of equipment and advisors—OMB has not yet undertaken to establish a central information policy for the federal government. This omission can be studied in several dimensions, with the same conclusion: diversity of information policies at the agency level creates problems which have been recognized for several years. A discussion of information policy, the predominance of the Freedom of Information Act and its omission-based diversities, must precede any effort to solve the tangled state of federal information policy.

EVOLUTION OF THE FREEDOM OF INFORMATION ACT

The Freedom of Information Act (FOIA)³³ was a very timely response to well-documented abuses by federal agencies. The 1958-63 legislative record, assembled by the newspaper trade associations with sponsorship by Rep. John Moss (D-Cal.) and Sen. Edward Long (D-Mo.), suggests a fragmented picture of many inconsistent, uncooperative agencies withholding information at random and often without explanation.³⁴ The agencies could withhold information under the provisions of section 3 of the 1946 Administrative Procedure Act (APA).³⁵ Section 3 limited public access to government records under

28. Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified at 5 U.S.C. app. I (1976)).

29. 5 U.S.C. § 552 (1976 & Supp. I 1978).

30. Pub. L. No. 92-463, 86 Stat. 770 (1972). See S. REPT. No. 1098, 92d Cong., 2d Sess. (1972). Criticism of FACA was aired at *Hearings on S. 2947, To Amend the Advisory Committee Act Before Senate Comm. on Govt. Operations*, 94th Cong., 2d Sess. 144 (1976). See Tuerkheimer, *Veto By Neglect: The Federal Advisory Committee Act*, 25 AM. U.L. REV. 53 (1975).

31. The Carter Administration made an extra effort to reduce the numbers of advisory committees. The improvement of advisory committees has been the subject of extensive study, see *Conference on Federal Advisory Committees*, KETTERING FOUND. PROC. (1981).

32. GSA received the Advisory Committee role in 1978. See 41 C.F.R. § 101-11.1201 (1981).

33. Pub. L. No. 89-487, 80 Stat. 250 (1966) (currently codified as amended at 5 U.S.C. § 552 (1976)).

34. The patterns of withholding were internally inconsistent within the Defense Department and were variable within a wide range for agencies generally. Sigma Delta Chi report in *Freedom of Information and Secrecy in Government: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 2d Sess. 548 (1958); see also Blanchard, *A History of the Federal Records Law*, U. MO. FREEDOM OF INFORMATION CENTER REPORT No. 189 (1967); *Freedom of Information: Hearings Before Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. (1963) [hereinafter cited as *1963 FOI Hearings*], and illustrative examples in 1 J. O'REILLY, *supra* note 5, § 2.02.

35. 5 U.S.C. § 1002 (1964).

a broad need-to-know standard which allowed great discretion to the government.³⁶

Management of the APA was decentralized,³⁷ since the Act was a process-oriented statute to be functionally implemented by each of the many different federal agencies.³⁸ The DOJ had a dominant non-statutory advisory role, however. The Attorney General's Committee on Administrative Procedure had produced a definitive study which eventually became the 1946 Act.³⁹ The DOJ had been intimately involved in all the negotiations on that omnibus procedure statute.⁴⁰ When the APA was adopted, the DOJ issued a manual which was the primary contemporaneous interpretation of the APA.⁴¹ The DOJ's view of disclosures required under section 3 was quite narrow.⁴² As the terms of section 3 were being revised to become the FOIA, the DOJ again was deeply involved as protector of the agencies.⁴³ An historical antecedent existed for the DOJ's non-statutory, agency-protective interpretative role with the emerging APA section 3 amendment which became the FOIA.⁴⁴

Because the statute from which the FOIA evolved had been an omnibus statute which all federal agencies applied to their own functions, the omission of a central administrative focus in the 1966 FOIA was understandable. Each agency approached the APA rulemaking requirements in a unique way, as they affected the agency's greater or lesser need for rules.⁴⁵ Congress had considered a central Office of Administrative Procedure but dropped the concept for lack of a political constituency.⁴⁶ Similarly, Senator Nelson had considered a central in-

36. To be released under § 3 of the APA, matters had to be of official record and the persons requesting access had to show that they were properly and directly concerned. Then the agency could refuse disclosure if the records were "confidential for good cause found."

37. Pub. L. No. 79-404, 60 Stat. 238 (1946).

38. No central agency has authority over the implementation of the APA. For background on the judicial consequences, see 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* (2d ed. 1978).

39. ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, *ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES* (1941).

40. See *ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY*, S. DOC. NO. 248, 79th Cong., 2d Sess. (1946) [hereinafter cited as *APA LEGIS. HIST.*].

41. DEPT. OF JUSTICE, *ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT* (1947).

42. "The great mass of material relating to the internal operation of an agency is not a matter of official record. . . . It is clear that section 3(c) is not intended to open up Government files for general inspection." *Id.* at 25.

43. The Justice Department was the principal voice for the agencies in opposition to the FOIA, see *1963 FOI Hearings*, *supra* note 34.

44. Section 3 became the Freedom of Information Act on July 4, 1967. Pub. L. No. 89-554, 80 Stat. 383 (1966); Pub. L. No. 90-23, 81 Stat. 54 (1967).

45. For example, the National Labor Relations Board did not adopt rules, while other agencies relied principally on rulemaking and did little adjudication. See 1 K. DAVIS, *supra* note 38. Agencies have discretion concerning their adjudication or rulemaking choices, see, e.g., *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). The disposition of a dispute concerning public access to private information is an informal adjudication, specific to a particular case, but is required to be subject to agency rules, 5 U.S.C. § 552(a)(4)(A) (1976).

46. ATT'Y GEN. COMM. ON ADMINISTRATIVE PROC., *ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES* ch. VIII (1941). See *APA LEGIS. HIST.*, *supra* note 40.

formation "ombudsman" in 1963.⁴⁷ But the new law was not expected to become administratively burdensome, so Congress and commentators expected each agency would approach the new FOIA as each had approached the APA. The courts were left to screen the abuses.⁴⁸

Management of the Information Disclosure Laws

The results of omitting a central functioning supervisory agency in the new FOIA were predictable. The DOJ issued a new manual on the revised section 3 of the APA⁴⁹ which was again criticized for over-protecting the agencies.⁵⁰ Agencies wrote their own FOIA implementing regulations.⁵¹ Congress was critical of the ways in which some agencies avoided the new legislative command by rules which "contain[ed] language showing that arrogant public-information policies still endure in agencies."⁵²

Though in presentation the FOIA looked like an offspring of the APA, it quickly developed a life and identity of its own. Litigation under the new FOIA put the DOJ to the test. In the *Consumers Union v. Veterans Administration*⁵³ hearing aids case in 1969, the DOJ sought the same deference from the court for its interpretation of the FOIA exemptions as other courts had given to other interpretations by responsible agencies which construed new laws. In a well-written opinion, the district court rejected the DOJ interpretation. Because the FOIA intentionally had not given a leadership role to one agency, the court held, no agency would be able to claim interpretive authority.⁵⁴

Rejection by the court of DOJ's central role was not taken lightly by the Department. The Department quickly moved to set up an internal advisory process which added some credibility to the agency's claim to interpretive deference.⁵⁵ The DOJ response to *Consumers Union* was

47. 1963 FOI Hearings, *supra* note 34 (remarks of Sen. Nelson).

48. The Act was to be enforced by litigation against each individual agency in each individual situation of withholding. There was no appeal mechanism in the statute outside of the agency which held the documents itself. 5 U.S.C. § 552(a)(3)-(4) (1976).

49. Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (1967).

50. *Freedom of Information: Hearings Before Senate Comm. on Judiciary and Senate Comm. on Gov't Operations*, 93d Cong., 1st Sess., vol. 2 at 122 (1973) [hereinafter cited as 1973 FOI Hearings]. The Manual was called a "roadmap to nowhere" by the St. Louis Globe. Kruger, *The Access to Federal Records Law*, U. Mo. FREEDOM OF INFORMATION CENTER REP. No. 186 (1967).

51. The first implementing regulations for each agency are reprinted in HOUSE COMM. ON GOVT. OPERATIONS, FREEDOM OF INFORMATION ACT (COMPILATION AND ANALYSIS OF DEPARTMENTAL REGULATIONS IMPLEMENTING 5 U.S.C. § 552), 90TH CONG., 2D SESS. (Comm. Print 1968) [hereinafter cited as 1968 FOIA ANALYSIS].

52. *Id.* The Committee's analysis contains acid disdain for several agency rules which creatively tried to evade the new law.

53. 301 F. Supp. 796 (S.D. N.Y. 1969), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971).

54. 301 F. Supp. at 801.

55. The Freedom of Information Committee of the Department received additional attention from the Department as a result of the 1973 challenges, and an informal advisory role began to evolve within the Office of Legal Counsel, led by Robert Saloschin. The 1977 hearings and the new Administration's greater willingness to disclose were catalysts for creation of the

the 1969 establishment of the Freedom of Information Committee. The Committee was created by an internal DOJ memorandum.⁵⁶ The function of the Committee would be to reduce litigation losses by selecting out those cases which should be administratively "settled" by disclosure, prior to any litigation.⁵⁷

It is notable that the advisory role of the DOJ was not "pushed" by statute, as, for example, the OMB was thrust into advising about the later Privacy Act.⁵⁸ The DOJ's role was "self-pulled" by dissatisfaction with the court's rejection of the Department's claims to deference for its administrative judgments. The court examined the FOIA and found nothing to indicate a DOJ supervisory role warranting a deferential respect;⁵⁹ the recognition of the omission of its powers from the FOIA led the DOJ to take action. It was natural for the Department, as for any bureaucratic organization, to make the effort to supply de facto legitimacy to a role denied it de jure by the Congress and courts. De facto legitimacy for the DOJ's advisory role would come from day to day advising, and that supervisory role was thereafter assumed by the DOJ for those agencies which had to, or wished to, seek the Department's advice.⁶⁰

Managing the FOIA proved to be much more expensive than originally estimated, but even after fifteen years there is no central source for an accurate expense estimate.⁶¹ The primary costs were those of administrative processing of the disclosure process—far greater than the government's costs of manpower for litigation.⁶²

Agency leadership in addressing FOIA issues was, on the whole, sadly lacking.⁶³ The best managed agencies tended to do a better job of

Office of Information Law & Policy in 1978. For a brief history of that work, see Braeman, *Overview of FOIA Administration in Government*, 34 AD. L. REV. 111 (1982).

56. Memorandum of Dec. 8, 1969, reprinted in *US Government Information Policies and Practices: Hearings before House Comm. on Govt. Operations*, 92d Cong., 2d Sess., pt. 4 at 1130 (1972) [hereinafter cited as *Info. Practices Hearings*]. See also ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT, H.R. REP. NO. 1419, 92d Cong., 2d Sess. 66 (1972) [hereinafter cited as ADMINISTRATION OF FOIA]. It is of anecdotal historical significance that the coauthor of the memorandum and the Justice Department's highest ranking policy official involved with the startup of the Freedom of Information Act in 1969-71 was later the author of several major FOIA decisions of the Supreme Court, Justice William Rehnquist.
57. *Id.* Justice's "policy" was not to risk losing. A matter of interest to an agency program would not be defended if other programs would be placed at some jeopardy from a loss of a defended case involving the particular agency in the dispute.
58. See Pub. L. No. 93-579 § 6(1), 88 Stat. 1909 (1974).
59. 301 F. Supp. at 801.
60. The only legislative recommendation of the role of the Committee was in oversight hearing report, which found a "salutary" effect but also noted administrative weaknesses. The House Committee did respond by giving the Justice group statutory status, however. ADMINISTRATION OF FOIA, *supra* note 56, at 69.
61. The Justice Department estimated a cost of \$47-57 million. *Freedom of Information Oversight: Hearings before House Comm. on Govt. Operations*, 97th Cong., 1st Sess. 202 (1981) [hereinafter cited as *1981 FOI Hearings*]. The OMB estimated the cost at \$250 million. Remarks of M. Horowitz, Counsel to the Director, OMB, to Administrative Conference, December 1981.
62. No central source of Justice's litigation of particular types of cases is available which would include all the direct costs of local and headquarters involvement with the FOIA case load.
63. ADMINISTRATION OF FOIA, *supra* note 56, at 17.

processing disclosure requests, but their substantive decisions to withhold a great deal of information brought complaints in the 1973 congressional hearings on FOIA reform.⁶⁴ In the absence of a central agency to mediate complaints, Congress found itself in the center of some early debates over the proper implementation of the FOIA.⁶⁵ Congressional oversight continued as the disagreements continued.⁶⁶

The OMB stepped into this vacuum on FOIA policy in a very small way in 1972. Agencies were charging a wide variety of fees to members of the public who requested documents under the FOIA. OMB Director George Schultz, with authority under the user charges powers of OMB,⁶⁷ ordered agencies to stop charging fees "at an excessive level for the purpose of deterring requests for copies of records".⁶⁸ But OMB retreated from that position and in later Senate testimony was criticized for its timidity.⁶⁹

Criticism of the DOJ was expressed in 1973 Senate hearings. Ralph Nader charged that the Department had "done almost nothing to insure voluntary compliance with the act."⁷⁰ The Freedom of Information Committee, charged Nader, did not advise agencies of recent developments in case law, and the DOJ had not updated its 1967 Memorandum. "The government has not been winning any greater a percentage of cases since the inception of this committee."⁷¹ To add to the critical view, Nader asserted that agencies "have been left to themselves without any government-wide guidance, and they have failed to comply with the letter and intent of the Act."⁷² Senate criticism was not taken lightly by the Department, but events in the press coverage of Watergate, the courts' interpretations of the FOIA, and the Congressional desire to revise the FOIA overshadowed these criticisms.⁷³

The 1974 FOIA Amendments and the Justice Department

Enactment of the 1974 amendments to the FOIA was a tremendous achievement for the advocacy and public interest groups which had strongly supported their passage.⁷⁴ These groups, which had been less

64. *1973 FOI Hearings, supra* note 50, vols. 1-2.

65. "During the first year of operation, as numerous questions of application and interpretation arose, the . . . Subcommittee was thrust into the unofficial role of an 'ombudsman' - or referee." 1968 FOIA ANALYSIS, *supra* note 51, at 7.

66. ADMINISTRATION OF FOIA, *supra* note 56, at 17. See *1973 FOI Hearings, supra* note 50, vols. 1-2.

67. 44 U.S.C.A. § 35 (West Supp. 1982).

68. Schultz to heads of executive departments, May 2, 1972, reprinted in *1973 FOI Hearings, supra* note 50, vol. 1, at 204.

69. *Id.* at 216.

70. *Id.* See *Info. Practices Hearings, supra* note 56, pt. 4, at 1250 *et seq.*

71. *1973 FOI Hearings, supra* note 50, at 217.

72. *Id.* at 216.

73. The Department was amply criticized by more people for more failings, making the FOI Committee a minor issue by contrast. *1973 FOI Hearings, supra* note 50; *Info. Practices Hearings, supra* note 56.

74. The advocates fought off a vigorous last-minute counterattack by the FBI and Sen. Hruska, and overcame a veto by President Ford. See STAFF OF SENATE COMM. ON THE JUDICIARY

of a political force during the Act's original debates in 1960-65,⁷⁵ readily took over the lobbying effort which press groups had carried for the original Act. The press sought the Act's passage, and supported the final bill⁷⁶ with its various changes to time limits,⁷⁷ awards of fees,⁷⁸ tightening of military⁷⁹ and law enforcement⁸⁰ exemptions, and other FOIA provisions. A barrage of editorials lamenting Watergate and viewing the legislative change as an antidote to the Watergate malaise helped Congress to override President Ford's veto of the 1974 amendments.⁸¹

The primary loser in the 1974 amendments was the DOJ. The Watergate period had not been the finest hour for either the Department or its law enforcement arm, the Federal Bureau of Investigation. Of those issues on which the DOJ opposed the legislation, virtually all fell against the Department's position.⁸² As noted earlier, the hearing testimony had been critical of both a lack of leadership and of the Department specifically.⁸³ It is not surprising that the 1974 revisions to the FOIA did not grant authority to the DOJ for management of government-wide information policy matters. Instead, Congress compelled each agency to write an annual statistical report on its FOIA activities, and compelled the DOJ to include in its report "efforts undertaken . . . to encourage agency compliance."⁸⁴ The command was a response to Ralph Nader's strong criticism of the Department's lack of leadership.⁸⁵ In the remainder of the Act, the DOJ, as litigator, suffered from shorter action deadlines, more narrow exemptions, and attorney fee awards which would more readily be given to the requesters who opposed withholding in court.⁸⁶

One interesting result of the tacit decision not to create an informa-

AND HOUSE COMM. ON GOVT. OPERATIONS, 94TH CONG., 1ST SESS, FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 SOURCEBOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS (Joint Comm. Print 1975) [hereinafter cited as FOIA SOURCEBOOK].

75. Compare the original 1963-65 hearings, *supra* note 34, with the 1973 hearings, *supra* notes 50 and 56. The burden of carrying the amendments was on the public interest groups and other advocacy groups with the press assisting those groups.
76. Pub. L. No. 93-502, 88 Stat. 1561 (1974).
77. *Id.* § 1(c).
78. *Id.* § 1(b) revising 5 U.S.C. § 552(a)(4)(F).
79. *Id.* § 2(a), revising 5 U.S.C. § 552(b)(1).
80. *Id.* § 2(b), revising 5 U.S.C. § 552(b)(7).
81. AMER. SOC. OF NEWSPAPER EDITORS BULL. (Nov./Dec. 1974, Jan. 1975). ASNE's president lauded "this historic juncture when the post-Watergate atmosphere of openness promised more than usual support in Congress."
82. 1973 FOI Hearings, *supra* note 50, vol. 2, at 229 (testimony of Att'y Gen. Richardson).
83. *Id.* at 216.
84. 5 U.S.C. § 552(d) (1976). The provision was added by Senate Subcommittee General Counsel Thomas Susman. The Justice Department's view of the section is found in Braeman, *supra* note 55, at 114.
85. 1973 FOI Hearings, *supra* note 50, vol. 2, at 216.
86. Justice had been lobbying for two "clients" within its Department, the U.S. Attorneys who had to handle the defense caseload and the Federal Bureau of Investigation, which preferred the favorable ambiguities of the pre-amendment exemption for law enforcement files. Neither prevailed, and as a consequence the litigation increased in both quantitative and qualitative difficulties after the 1974 amendments.

tion policy coordination agency after the adoption of the 1974 amendments, has been the inability of Congress to assess the impacts of those amendments. That inability has shown up frequently since 1974. The estimates of costs of the FOIA have varied within a large range, \$50 million to \$250 million.⁸⁷ Numbers of denials of access must be reported to Congress, but agencies vary in the quality of their statistics and the speed with which they have submitted the required reports.⁸⁸ Decentralization has also produced inconsistent approaches to similar issues among different agencies as well,⁸⁹ which may have contributed to more litigation—although, in the absence of a central administrative authority, it would be impossible to state general reasons for increased litigation among each of the hundred or more different agencies and units processing requests under the Act.⁹⁰

Litigation of access disputes under the FOIA increased dramatically after the 1974 amendments. At first, the DOJ's litigation had been supervised by a special group of attorneys who gave a continuity of interpretations to federal litigation in the FOIA and Privacy Act fields, at least for those cases on which DOJ counsel were involved.⁹¹ Other agencies, such as National Labor Relations Board and the Securities and Exchange Commission, were free to use their own counsel and did so.⁹² As the government's litigation coordinator, the DOJ actively supervised agency litigation to the extent possible within very small budget limits. Later, both the special litigation unit and a special advisory office on FOIA matters were reorganized into larger entities with broader functions.⁹³

During the hearings which preceded the 1974 FOIA amendments, the DOJ had promised that it would take four steps to improve admin-

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87. Cost estimates are inclusive of different factors for each estimator. The Justice Department's estimates were between \$47.8 million for fiscal 1978 and \$57 million for fiscal 1980. The OMB estimate was \$250 million. *1981 FOI Hearings, supra* note 61. And the Justice Department estimates are known to be low. DEPT. OF JUSTICE, 1 FOIA UPDATE 2 (Spring 1980).
 88. Reports must be filed with Congressional committees, 5 U.S.C. § 552(d), but the Committees then had analyses prepared by the Library of Congress. *See 1981 FOI Hearings, supra* note 61.
 89. For example, FDA has routinely released food plant inspection reports, 21 C.F.R. pt. 20, while USDA ceased such disclosures because of complaints about press accounts of the deficiency reports. *USDA Ends Release of Compliance Review Data on Individual Plants*, FOOD CHEM. NEWS 25 (July 5, 1982).
 90. There is no single count of the number of entities which have authority to make releases under the FOIA, but the number is over 200.
 91. *1977 FOI Hearings, supra* note 8, at 147-49.
 92. The Justice Department did not interfere with the independent litigating authority of the NLRB or the SEC when those agencies were involved with large numbers of FOIA cases. For example, about 200 cases were concurrently pending against the NLRB prior to the Supreme Court's decision in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1977). The NLRB handled most of that litigation through its own counsel and supervised its policy approaches internally without direction of the Justice Department. An all time FOIA litigation record was set by the NLRB with 94 new lawsuits in one month against the Board. *J. O'REILLY, UNIONS' RIGHTS TO COMPANY INFORMATION* 182 (1980).
 93. The litigation group was terminated and the FOIA caseload distributed among generalists in the Civil Division of Justice. The advisory role was disestablished and reestablished in 1982. The changes were reported in 7 ACCESS REPORTS 1 (Apr. 29, 1981) and the office was reestablished under new management in 1982. 47 Fed. Reg. 10,809 (1982).

istration of the FOIA. First, Civil Service Commission training in FOIA administration would be encouraged.⁹⁴ The training has been generally successful, and it continues to be assisted by many agencies.⁹⁵ Second, the DOJ promised to host, and did conduct, a 1973 symposium on the Act.⁹⁶ Several speakers from agencies represented at that symposium suggested better ways to organize the executive branch for compliance with the FOIA.⁹⁷ Some suggested an inter-agency task force on the FOIA to set a coordinated disclosure policy.⁹⁸ Third, the DOJ promised to create an internal task force on better organization of the information policy functions of the executive branch.⁹⁹ That task force started work, but ran out of steam in mid-1975 with its project director commenting: "I have a feeling a great amount of time is now being spent wastefully because each agency is grappling with the law on its own terms."¹⁰⁰ Fourth, the Department promised a reminder to agencies that the Freedom of Information Committee, composed of DOJ lawyers, was to be consulted before agencies made final denials of disclosure.¹⁰¹ Initial denials of access were made under one or more of the Act's exemptions.¹⁰² On the administrative appeal, an agency which planned to invoke an exemption was supposed to inform the DOJ. The Committee had no legal authority to change the minds of the agency managers to whom the appeals were made. The officials were expected to informally consult the Committee before the requester's access appeal was denied,¹⁰³ but few if any of the consultations led to differences of major impact.¹⁰⁴ Had the issues been close, the DOJ probably would have refused to defend an agency decision and the agency head would have appealed to the Attorney General, or used agency counsel where permitted to do so by statute.¹⁰⁵

Political and Structural Changes

Part of the reforming mantle of the Carter Administration when it took office in 1977 was openness. The Administration's approach was personified by William Bagley, Chairman of the Commodity Futures

94. *1973 FOI Hearings, supra* note 50, vol. 1, at 510.

95. Training is now provided by the Office of Personnel Management, successor to the Civil Service Commission.

96. Transcript of Inter-Agency Symposium on Improved Administration of the Freedom of Information Act, Dept. of Justice, Nov. 29, 1973.

97. *Id.*

98. *Id.* (statement by D. Drachsler).

99. *1973 FOI Hearings, supra* note 50, vol. 1, at 510.

100. Cohen, *Justice Report: New information law gets heavy use from public, businesses*, NAT'L J. July 5, 1975, at 985.

101. *1973 FOI Hearings, supra* note 50, vol. 1 at 510.

102. 5 U.S.C. § 552(b) (1976 & Supp. II 1978).

103. 28 C.F.R. § 50.9, Dept. of Justice Order 530-73 (July 11, 1973).

104. The consultations ranged from about 220 to about 440. *1977 FOI Hearings, supra* note 8, at 942.

105. *Id.* The agencies are generally limited in their ability to use their own counsel when Justice refuses. PRESIDENT'S REORGANIZATION PROJECT, STUDY OF FEDERAL LEGAL REPRESENTATION (1978). See Braeman, *supra* note 55, at 114.

Trading Commission and a California politician not unaware of the publicity benefits of open government, who threw the agency's "secret" rubber stamp markers into the Potomac River for the benefit of photographers.¹⁰⁶ But in a more tangible sense, the Carter Administration produced the first political directive on FOIA responsibility of the agencies. In a May 5, 1977 letter, Griffin Bell, the new Attorney General, ordered agencies to make public all information requested under the FOIA unless it would be "demonstrably harmful" to disclose the documents.¹⁰⁷ This expanded the category to be disclosed from the non-exempt documents to those which were exempt but whose release could not be "demonstrated" to be harmful. Even if there was a legal basis to withhold, Bell's order indicated, the agency should not use its legal authority "unless it is important to the public interest to do so."¹⁰⁸

In October 1978, the DOJ created a structure to put its earlier promises into effect. The Office of Information Law & Policy was assigned the duty to advise agencies about the FOIA, to act as executive secretary for the Freedom of Information Committee, and to instruct agency personnel about FOIA compliance.¹⁰⁹ The Office's Director, Robert Saloschin, was the acknowledged national expert on the FOIA. Under its new director, the Office expanded the DOJ's de facto control with an important policy statement in early 1979. The statement formally announced the earlier edict that government attorneys would not defend an agency which had failed to obtain DOJ clearance of its final denial.¹¹⁰ Subsequent policy statements described the Department's intent to permit fewer intra-agency memoranda to be withheld through a set of standards on withholding of such memoranda.¹¹¹ And the Office published policy newsletters instructing agencies on a variety of controversial topics, including attorneys fee awards for requesters, law enforcement records, and the policy responses of the DOJ to major Supreme Court decisions.¹¹² Despite a small staff¹¹³ and small budget, the Office of Information Law & Policy filled the vacuum of advisory

106. William Bagley, Chairman of the Commodity Futures Trading Commission, used this photogenic device to attract publicity for the openness of the CFTC. It unfortunately was swept up shortly thereafter in a major struggle involving the CFTC's need to withhold information. *Board of Trade of Chicago v. CFTC*, 627 F.2d 392 (D.C. Cir. 1980).

107. Letter of Atty. Gen. Bell to Heads of all departments and agencies, May 5, 1977, *reprinted in 1981 FOI Hearings*, *supra* note 61, at 912 (the reprinted version contains an incorrect date through transcription error).

108. *Id.*

109. 43 Fed. Reg. 45,991 (1978) (announcement of OILP establishment).

110. DEP'T OF JUSTICE, OFFICE OF INFORMATION LAW & POLICY, PROCEDURES & STANDARDS ON REFUSAL TO DEFEND FOIA SUITS (1979).

111. DEP'T OF JUSTICE, OFFICE OF INFORMATION LAW & POLICY, POLICY GUIDE: WHEN TO ASSERT THE DELIBERATIVE PRIVILEGE UNDER EXEMPTION (b)(5) (May 1979), *portions reproduced at 2 J. O'REILLY*, *supra* note 5, § 15.07A (1982 Supp.).

112. OFFICE OF INFORMATION LAW & POLICY, FOIA UPDATE, quarterly publication 1979-82.

113. The office was never larger than 6 or 7 professional staff members, and was more commonly 3 attorneys. Telephone interview with Robert Saloschin, former OILP Director (July 1982). The former staff departed with the disestablishment of the OILP in 1981. To the "clients," the agencies, most of those interviewed for this article appreciated the former staff's accessibility for advice. Treasury Department FOIA expert, Michelle Davis, noted that the primary

guidance. It was abolished in 1981 and reconstituted with new duties in 1982.¹¹⁴

Contrast with the Privacy Act

The 1974 Privacy Act¹¹⁵ had passed in the same time period as the FOIA, in many of the same committees, and through the efforts of the same legislative supporters.¹¹⁶ But unlike the 1974 FOIA amendments, the Privacy Act established the OMB as a central guidance agency with binding administrative power.¹¹⁷ Agencies reported to OMB rather than directly to Congress, as was the case under the FOIA.¹¹⁸ OMB guidelines controlled the agency regulations and policies,¹¹⁹ and OMB staff members advised agencies on their Privacy Act responsibilities.¹²⁰

The Privacy Act started life with a prediction of large costs, but the estimates proved too large.¹²¹ The 1974 amendments to the FOIA carried very low estimates of cost, which appear vastly understated.¹²² Whether from different coverages, different guidance, or other reasons, it was significant that Privacy Act administration was much less expensive than either the costs of the FOIA or predicted Privacy Act costs.

The rate of Privacy Act litigation has also been far below that experienced with the FOIA.¹²³ Reasons for these variations do not all trace back to central systemic guidance, but an enlightened approach by a central organization appears to have been a material help in setting up a smoother administration of the Privacy Act. There were still problems with the OMB interpretations,¹²⁴ of course, but conflict

benefit of a central resource would be stability in advice and ready access to advisors, regardless of the form taken by the central body.

114. Office of Information & Privacy, established 47 Fed. Reg. 10,809 (1982) (to be codified at 28 C.F.R. § 0.23a).

115. Pub. L. No. 93-579, 88 Stat. 1896 (1974) (currently codified as amended at 5 U.S.C. § 552a (1976 & Supp. I 1978)).

116. The Government Operations Committees of both House and Senate were involved in both bills. Senator Edward Kennedy (D-Mass.) and Representatives Frank Horton (R-N.Y.) and Bella Abzug (D-N.Y.) were active with both bills in the session preceding adoption.

117. Privacy Act, Pub. L. No. 93-579 § 6, 88 Stat. 1909 (1974). This OMB authority was separate from the study established for the Privacy Protection Study Commission, *id.* at § 5.

118. Compare *id.* § 6, with Freedom of Information Act § 552(d), 5 U.S.C. § 552(d) (1976).

119. The Privacy Act Guidelines of the OMB (July 1, 1975) are reprinted in full in PRIVACY ACT LEGIS. HIST., *supra* note 23, at 1015.

120. Interviews with OMB staff during 1982 suggest that the volume of Privacy Act consultations have lessened with time. Mr. Rob Veeder of OMB, one of the agency Privacy Act experts, observed that there are still ambiguities in the Privacy Act but that OMB had no immediate plans to revise its 1975 Guidelines. See also PRIVACY PROTECTION STUDY COMMISSION, THE PRIVACY ACT OF 1974: AN ASSESSMENT 17 (1977).

121. PRIVACY PROTECTION STUDY COMMISSION, *supra* note 120, at 39.

122. 1981 FOI Hearings, *supra* note 61, at 168.

123. See DEPT OF JUSTICE, FREEDOM OF INFORMATION CASE LIST 96 (Sept. 1981 ed.).

124. OMB's interpretation of an individual's record had excluded the entrepreneurial activities of individuals. This interpretation was challenged, and OMB repeatedly lost with courts squarely facing and rejecting the exclusion. 2 J. O'REILLY, *supra* note 5, § 20.05; *Metadure Corp. v. United States*, 490 F. Supp. 1368, 1373-74 (S.D.N.Y. 1980); *Florida Medical Ass'n v. Dept. of HEW*, 479 F. Supp. 1291 (M.D. Fla. 1979); *Zeller v. United States*, 467 F. Supp. 487 (E.D.N.Y. 1978); See also remarks of Sen. Ervin in debate covering "small businessmen," 120 CONG. REC. 36,896 (1974).

avoidance was easier to achieve with the Privacy Act than with the FOIA.

THE PAPERWORK REDUCTION ACT: NEW ROLE IN INFORMATION POLICY

The "Paperwork Issue" and Information Management Issues

The FOIA and the Privacy Act are important to managing the outflow of the government's paperwork. But the overall issue of controlling inflow, processing, cross-agency transfers, and the like, is much larger than the issue of restrictions upon dissemination of file documents. For several years up to and including passage of the 1980 Paperwork Reduction Act (PRA),¹²⁵ there was extensive discussion of a central management responsibility for paperwork control.¹²⁶ As the topic evolved, information management and paperwork control have become interlocked concepts. But there are qualitative differences between the "paperwork issue" and the problems of administering a disclosure policy.

"Paperwork" limitations generally look at the control of inflow, rather than output. Disclosure issues often arise ad hoc on a variable set of facts, with a problem initiated outside of the agency, by a request under the FOIA or the Privacy Act.¹²⁷ Paperwork limitations deal at the policy level with systemic problems. The issues are bridged somewhat in the broad powers of the PRA, which give the OMB a statutory guidance responsibility for both inflow and disclosure of information received by federal agencies.¹²⁸

The paperwork imposed on state and local governments and the private sector by federal agencies is enormous.¹²⁹ Much of its bulk is regulatory in nature, enforced by penalties requiring the submission of documents which are in turn used to produce adjudicative decisions or license renewals.¹³⁰ A significant amount of the submitted forms and

125. Pub. L. No. 96-511, 94 Stat. 2813 (1980) (to be codified at 44 U.S.C. § 3501 et seq.).

126. See the following works, all by the COMMISSION ON FEDERAL PAPERWORK: FINAL SUMMARY REPORT (1977); THE PROCESS CLEARANCE PROCESS (1977); CONFIDENTIALITY AND PRIVACY (1977); HISTORY OF PAPERWORK REFORM EFFORTS (1977); INFORMATION RESOURCES MANAGEMENT (1977). See also *The Federal Paperwork Burden: Identifying the Major Problems: Hearings Before Senate Comm. on Gov't Affairs*, 97th Cong., 1st Sess. (1981) [hereinafter cited as *1981 Paperwork Burden Hearings*].

127. COMMISSION ON FEDERAL PAPERWORK, CONFIDENTIALITY AND PRIVACY (1977). The agency cannot predict its own caseload because each FOI or Privacy Act request comes in from an outside source, and each carries the same 10-day response requirement, 5 U.S.C. § 552(a)(6)(A)(i) (1976). So a major merger will add to FTC request demands, while a new drug introduction attracts usually 25-30 new requests at FDA from competitors.

128. 44 U.S.C.A. § 3501 et seq. (West Supp. 1982).

129. COMMISSION ON FEDERAL PAPERWORK, FINAL SUMMARY REPORT 5 (1977).

130. *Id.* See also *Paperwork and Redtape Reduction Act of 1979: Hearings on S. 1411 Before Subcomm. on Federal Spending Practices and Open Gov't of the Senate Comm. on Gov't Affs.*, 96th Cong., 1st Sess. (1979); *The Federal Paperwork Burden: Identifying the Major Problems: Hearings Before Subcomm. on Federal Spending Practices and Open Gov't of the Senate Comm. Gov't Affs.*, 96th Cong., 1st Sess. (1979) [hereinafter cited as *1979 Paperwork Burden Hearings*]; and *Efforts to Reduce Federal Paperwork Burdens: Hearings Before the Subcomm.*

reports appears unnecessary from the standpoint of practical utility in an agency function. The Commission on Federal Paperwork conducted an excellent study of the issue in 1975-77 and its recommendations were widely acclaimed for their thoughtful and useful conclusions.¹³¹

The coincidence of paperwork and FOIA issues was in part personal and in part institutional. Rep. Frank Horton (R-N.Y.), most active legislative sponsor and Chairman of the Commission on Federal Paperwork was also an active sponsor of the 1974 FOIA amendments.¹³² OMB Director Bert Lance and Comptroller General Elmer Staats were also members of the Paperwork Commission, thus bringing active OMB and General Accounting Office (GAO) representation to the Commission's findings.¹³³ Institutionally, problems which the agencies had with collection of information were paralleled by policy problems concerning disclosure of that same information.¹³⁴

Some critics of the information disclosure policy of the agencies under the FOIA saw the Paperwork Commission as a forum for action. But the issues of process and of standards were differentiable. Charges were made that the Commission "suppressed" a staff member's draft report on disclosure policy, which had favored greater disclosure than the Commission members desired.¹³⁵ Revision of the disclosure policy draft was argued in the newspapers, but the final report on that issue appears to be a credible study.¹³⁶

The Paperwork Reduction Act

The PRA, despite its politically appealing title, was a legislative "long shot" in 1980 when it achieved passage.¹³⁷ Prime movers in obtaining passage were Sen. Lawton Chiles (D-Fla.), and Reps. Frank Horton (R-N.Y.) and Jack Brooks (D-Tx.). The bills they proposed would give the OMB considerably greater authority than it had under the former Federal Reports Act.¹³⁸ The key Senate control over bills affecting federal information administration was held by Sen. Abraham Ribicoff (D-Conn.), who did not share the views of the legislation's

on Federal Spending Practices and Open Gov't of the Senate Comm. on Gov't Affs., 95th Cong., 2d Sess. (1978).

131. COMMISSION ON FEDERAL PAPERWORK, FINAL SUMMARY REPORT (1977).

132. *Id.* See FOIA SOURCEBOOK, *supra* note 74.

133. The law which created the Commission on Federal Paperwork required the OMB to study implementation of the CFP findings. Pub. L. No. 93-556 § 3(d), 88 Stat. 1789 (1974).

134. See COMMISSION ON FEDERAL PAPERWORK, REPORT ON CONFIDENTIALITY AND PRIVACY (1977).

135. *Paperwork Panel Tones Down Secrecy Report*, Washington Star, Sept. 28, 1977, at A3.

136. COMMISSION ON FEDERAL PAPERWORK, REPORT ON CONFIDENTIALITY AND PRIVACY (1977).

137. By itself, the political history of the Paperwork Reduction Act is significant as an indication of the disputes which often arise toward the end of the legislative session, particularly with controversial bills.

138. The former act had many weaknesses and its deficiencies were studied extensively by the CFP. COMMISSION ON FEDERAL PAPERWORK, REPORT ON THE REPORTS CLEARANCE PROCESS (1977) and REPORT ON HISTORY OF PAPERWORK REFORM EFFORTS (1977).

sponsor in favor of central authority for clearing agency forms and for controlling acquisition of information.¹³⁹ Ribicoff's version of the regulatory reform legislation¹⁴⁰ held the primary attention of his committee, and limitation of OMB powers in the latter bills was a source of heavy debate.¹⁴¹

The PRA had Administration support, led by the OMB, which stood to gain in authority from its adoption.¹⁴² The groundwork for the passage of the PRA was completed,¹⁴³ but the bill stalled in the Senate before the November elections.¹⁴⁴ That 1980 election year marked the change from a Democratic to a Republican dominated Senate, so the Democratic majority had an incentive to pass the legislation before departing in 1980.¹⁴⁵ With the usual last-minute maneuvering, the bill was adopted.

No legislation of the magnitude of the PRA can go through without problems. While the PRA was pending for a floor vote in the Senate, Alan Morrison of Public Citizen Litigation Group became concerned that OMB authority might be abused.¹⁴⁶ He communicated his concern to Senator Edward Kennedy's (D-Mass.) staff; Patti Saris, legislative counsel for Kennedy, drafted a proposed Kennedy amendment.¹⁴⁷ The PRA, as it had passed in committee, would have given the OMB authority to overrule a regulation after it had been subject to the Administrative Procedure Act notice and comment procedures.¹⁴⁸ The veto authority worried Morrison and Saris, as it could give opponents of a rule yet another forum in which to kill a regulation,¹⁴⁹ and one

139. Interviews with several former committee staff aides suggested that Ribicoff was skeptical of the PRA concept, and preferred the Regulatory Reform Act, his bill, as a systemic change to agency practices.

140. S. 262, 96th Cong., 1st Sess. (1979).

141. See SENATE COMM. ON GOVT. AFFS. AND SENATE COMM. ON THE JUDICIARY, REFORM OF FEDERAL REGULATION, S. REPT. NO. 1018, 96th Cong., 2d Sess. (1980); Neustadt, *The Administration's Regulatory Reform Program*, 32 AD. L. REV. 129 (1980).

142. Senator Lawton Chiles, principal sponsor of the bill, worked closely with the Administration to unify the bill's supporters and move the bill ahead. Telephone interviews with Robert Coakley, Prof. Staff Member, Subcomm. on Federal Expenditures, Research & Rule, Senate Comm. on Gov't Affs. (July 1982).

143. The groundwork was an extensive set of hearings and the final report of the COMMISSION ON FEDERAL PAPERWORK, FINAL SUMMARY REPORT (1977). This was done and all preparations for passage were complete well before the elections. Interview with Coakley, *supra* note 142.

144. This decreased the chances of the bill's passage, but Democratic staff members, recognizing their upcoming change from majority to minority, redoubled efforts to move it promptly out of the Senate and into law. Interview with Coakley, *id.*; interview with James Graham, former aide to the Senate Comm. on Govt. Affs. (July 1982).

145. These views were shared also by the Kennedy staff. Telephone interviews with Patti Saris, former aide to Sen. Kennedy, and Thomas Susman, former General Counsel to the Administrative Practices Subcommittee chaired by Sen. Kennedy (July 1982).

146. Telephone interview with Alan Morrison (July 1982).

147. *Id.* and interview with Patti Saris, *supra* note 145.

148. The section of concern empowered OMB to "ensure that in developing rules and regulations, agencies" use efficient collection means, allow comment on the means of collection and assess consequences of alternative collection means. S. 1411, proposed 44 U.S.C. § 3504(h), 126 CONG. REC. S14684 (daily ed. Nov. 19, 1980).

149. Interview with Alan Morrison, *supra* note 146. For example, an opponent of a railroad regulation would attack it at OMB by arguing the means of collection of the rule-related

which was ex parte and outside of the public view.¹⁵⁰

Terms of the Kennedy amendment to the PRA were hammered out in tough negotiations late into a weekend evening. OMB would agree to limit itself to participation on the record in any notice and comment rulemaking which involved a PRA-regulated information activity.¹⁵¹ OMB could not veto the content of a rule after it has been made final simply because of dissatisfaction with that content, unless OMB follows specific procedures including publicly available comments.¹⁵² The OMB's comment procedures had been controversial and had been extensively studied, both by the Paperwork Commission¹⁵³ and by the congressional staffs which now handled the PRA.¹⁵⁴

During the legislative debate over the Kennedy amendment, the staff compromise which emerged was acceptable to both Kennedy and the OMB.¹⁵⁵ Though sponsors of the amendment to limit OMB power in the rulemaking field expected OMB to fight the result, the OMB acquiesced, perhaps because the load of regulations to be reviewed and resulting need to listen to the demands of any rule's opponents were seen as too heavy a burden for too slight a benefit.¹⁵⁶ The Kennedy amendment gives a pace and structure to the participation by OMB in agencies' informal rulemaking.¹⁵⁷ However, the amendment's less fortunate consequence is that it has fed ammunition to obstruction of the PRA on the part of political opponents of the OMB.¹⁵⁸

paperwork from railroads was too burdensome and an alternative should have been chosen. OMB would then decide about the alternative and whether agency consideration of it had been fair. Or reversal could be sought for procedural noncompliance.

150. Interview with Morrison, *id.* See C. Ludlam in REPORT BY ALLIANCE FOR JUSTICE—UNDERMINING PUBLIC PROTECTIONS (1981).
151. See final version at 44 U.S.C.A. § 3504(h) (West Supp. 1982).
152. *Id.* at § 3504(h)(4).
153. COMMISSION ON FEDERAL PAPERWORK, REPORT ON RULEMAKING (1977).
154. Those staffs were simultaneously working toward a compromise on Regulatory Reform Act, S. 262, 96th Cong., 2d Sess. (1980), but none was eventually reached.
155. Interviews with Morrison, *supra* note 146; Saris, *supra* note 145; Graham, *supra* note 144; Coakley, *supra* note 142; and Robert Bedell, Deputy General Counsel, OMB (June 1982).
156. This was the rationale offered by Senate Staff; no statement on the record was available from OMB on this issue.
157. The involvement has been generally successful. Interview with Nat Scurry, Chief, Reports Branch, Office of Information & Regulatory Affairs, OMB (August 1982). There have been occasional disagreements, see 1 INSIDE OMB NEWSLETTER July 2, 1982, at 4 (IRS disagreement with OMB); Feaver, *IRS and OMB Wage Paper War Over Turf*, Washington Post, May 12, 1981, at A21. See also Office of Legal Counsel, Dept. of Justice, Opinion Letter re Paperwork Reduction Act, to C. Boyden Gray, June 22, 1982. The opinion is excerpted in Moore, *DOJ Restricts OMB's Paper Review Power*, Legal Times of Washington, June 28, 1982, at 1. See also Noble, *Budget Office Accepts Tightened Bank Rules*, N.Y. Times, Sept. 8, 1982, at 27.
158. The restriction on rulemaking comments did not upset the OMB; that Office's public papers expressing opinions on new rules are available for public inspection in an agency reading room. Interview with Bedell, *supra* note 155. But OMB involvement with rulemaking has strong opponents. Alan Morrison, Director of Public Citizen Litigation Group, is in general agreement with the recent opinions of the Justice Department placing limitations on OMB authority, Office of Legal Counsel, interview with Morrison, *supra* note 146; former Carter White House Assistant Charles Ludlam is very critical of OMB, REPORT BY THE ALLIANCE FOR JUSTICE—UNDERMINING PUBLIC PROTECTIONS" (1981). See also *National Tank Truck Carriers Inc. v. OMB*, 1982 Fed. Carr. Cas. (CCH) ¶ 83,004 (D.D.C. May 28, 1982) (denying

Though the Kennedy amendment debate is secondary to the PRA's "privacy functions" for purposes of this article,¹⁵⁹ the debate illustrates how some members of the Congress were made sensitive to the ramifications of the new OMB authorities, and how Congress made conscious choices to preserve some OMB powers and limit others in the final PRA. Functions like the privacy powers of OMB were not mere accidents. And the Kennedy amendment incident teaches a lesson relevant to our study of disclosure policy: interesting policy choices attract OMB attention; tedious adjudicative assignments are likely to be shunned by OMB managers.

The DOJ was not an active participant in the PRA legislative development; its Office of Legal Counsel was concentrating on the Regulatory Reform Act at the time the PRA was passed.¹⁶⁰ The Department's non-involvement may have caused some lack of understanding of the PRA later, according to the DOJ's critics.¹⁶¹ In light of subsequent events, it is curious to note that much of the paperwork reduction power which the statute had given to OMB, with Sen. Kennedy's blessing,¹⁶² was later "interpreted away" from OMB by the DOJ's Office of Legal Counsel.¹⁶³ A residuum of bad feelings appears to exist over the DOJ's 1982 interpretations of the PRA.¹⁶⁴

The intrusions intended to be controlled by the PRA are not limited

disclosure of OMB staff memoranda). For a defense of OMB action on environmental rules, see *Profile—OMB's Jim Joseph Tozzi*, ENVTL. F., May, 1982, at 11.

159. The Kennedy amendment, 44 U.S.C. § 3504(h), follows the privacy functions segment, § 3504(f), but the privacy functions segment drew little attention in floor debates.
160. Justice was vigorously supporting some aspects and vigorously opposing some aspects of the Regulatory Reform Act, S. 262, 96th Cong., 2d Sess. (1980). See also O'Reilly, *Deference Makes A Difference: The Bumpers Judicial Review Amendment*, 49 U. CIN. L. REV. 739 (1980); Letter of Atty. Gen. Civiletti to Chmn. Peter Rodino, House Judiciary Comm., May 14, 1980 (discussing amendments to Regulatory Reform Act).
161. For example, the lengthy commentary against the OMB authority under the Paperwork Reduction Act appeared to ignore a vital piece of interpretative history. Justice found ambiguities in the legislative history but did not address at all Sen. Kennedy's Senate floor speech concerning his amendment, which appears to run contra to the positions taken by Justice. Office of Legal Counsel opinion letter, *supra* note 157. See Kennedy speech, 126 CONG. REC. S16,700 (daily ed. Dec. 15, 1980). There may be a different interpretation from the GAO. Interview with Coakley, *supra* note 142, and Letter of Sen. L. Chiles to Charles Bowsher, Comptroller General, July 1982.
162. Much of OMB's view of the Act centered upon its ability to control existing paperwork requirements in existing rules. The power to involve itself with new rules had been affected by the Kennedy amendment, 44 U.S.C.A. § 3504(h) (West Supp. 1981).
163. The Kennedy amendment, 44 U.S.C.A. § 3504(h), was the section most impacted by the Justice Department opinion. Where the OMB had considered it a basis for action, Justice did "not believe that § 3504(h) establishes a procedural mechanism for the review of existing regulations." Letter of Asst. Atty. Gen. Olson to C. Boyden Gray, Michael J. Horowitz, of the OMB, and Peter Wallison, of the Dept. of Treasury, June 22, 1982, accompanying Office of Legal Counsel opinion letter, *supra* note 157.
164. Interviews with OMB officials in July 1982, shortly after the opinion was received but before it became a public controversy, revealed a significant disagreement with the content and conclusions of the Justice letter. The strong feelings differed with the interpretation as a matter of statutory construction, with the failure to consider the overall intent of the PRA, and with the omission of several considerations deemed relevant by OMB. However, the strong feelings were not expressed for the public record because negotiations were underway to settle the disagreement. A settlement was reached and the Proposed Rule on the PRA was issued in the Federal Register, 47 Fed. Reg. 39,515 (1982).

to the context of the individual, as the Privacy Act language had appeared to limit that earlier statute.¹⁶⁵ Of significance is the PRA expansion of "privacy" from a concept of an *individual* personal privacy,¹⁶⁶ to that of an *entity* having privacy interests.¹⁶⁷ The privacy role has been expanded to business and labor and other institutions whose "privacy," in the broadest sense, is affected by information collections subject to the PRA.¹⁶⁸ This had been a subject of some controversy under the Privacy Act, with the courts overruling OMB and holding in favor of greater "privacy" for entrepreneurial activities.¹⁶⁹

Overall responsibility for the PRA was delegated by Congress to the OMB's Office of Information and Regulatory Affairs.¹⁷⁰ This Office was given important management powers by the Act¹⁷¹ and by the Executive Order entrusting regulatory reform efforts to OMB management.¹⁷² The guidelines adopted by OMB under its new PRA privacy functions would bind the agencies in their privacy protection functions. These guidelines could be an important foundation for a cohesive administration policy on disclosure.¹⁷³

165. 44 U.S.C.A. § 3502(14) (West Supp. 1982).

166. This was the Privacy Act's sole direction, 5 U.S.C. § 552a(a)(2) (1976).

167. The PRA is directed to institutional burdens as well as individual ones, in light of the Hearings record which underlay its adoption from which business complaints could be heard, *1979 Paperwork Burden Hearings, supra* note 130, and was part of the privacy concept of the pre-legislation. COMMISSION ON FEDERAL PAPERWORK, FINAL SUMMARY REPORT (1977).

168. Compare the statutory expansion from Privacy Act "individual," 5 U.S.C. § 552a(a)(2) (1976), to Paperwork Reduction Act, 44 U.S.C.A. § 3502(14) (West Supp. 1982).

169. *Metadure Corp. v. United States*, 490 F. Supp. 1368 (S.D.N.Y. 1980); *Florida Medical Ass'n v. Dept. of HEW*, 479 F. Supp. 1291 (M.D. Fla. 1979); *Zeller v. United States*, 467 F. Supp. 487 (E.D.N.Y. 1978). OMB will continue to oppose these types of cases and refuses to amend its 1975 decisions. Interview with C. Wirtz, OMB (June 1982); *but see* 2 J. O'REILLY, *supra* note 5, § 20.05.

170. 44 U.S.C.A. at § 3503 (West Supp. 1982).

171. *Id.* at § 3504.

172. Exec. Order No. 12,291, *supra* note 11.

173. 44 U.S.C.A. § 3504(f) (West Supp. 1982); and these guidelines are to be complemented by legislative proposals, *id.* at § 3505(3)(F).

OMB could deal with the tension of collection and security through the PRA. In a large number of cases, OMB could reduce information collection demands through the PRA. A rare item included in the Paperwork Reduction Act is a set of quantitative performance guidelines which OMB must meet. 44 U.S.C.A. § 3505(1) (West Supp. 1982).

As an example of how the OMB could use the PRA to reduce information demands, the average World War II veteran is now reaching an age at which Veterans Administration medical care benefits associated with diseases of the elderly can be important individual benefits. But recipients are as proud as any other Americans about their independence from intrusions on their family privacy. With the acquisition of Paperwork Reduction Act authority on top of the existing Privacy Act roles, for example, the OMB can affect the extent to which indigent veterans must supply family income statistics to the Veterans Administration as a precondition for admission to a VA nursing home. Or the VA may wish to disseminate information on its projection of county by county Oklahoma indigent nursing home aid recipients to stimulate the financing of new nursing homes in that state. OMB's privacy functions, combined with its overall sense of the informational "mission" given it in the PRA, make OMB an important privacy protector. The Privacy Act role is reconfirmed in express language in the Paperwork Reform Act, 44 U.S.C.A. § 3504(f)(3) (West Supp. 1982).

By questioning the proposed VA release either under the Privacy Act itself, if it applies (the VA would have to possess the records in a "system of records" for the Privacy Act to apply, 5 U.S.C. § 552a(a)(5)), or under the PRA delegation of privacy powers (44 U.S.C. § 3504(f)), the OMB exercises an affirmative privacy protection responsibility which it did not have under the 1974 Privacy Act alone.

Interaction of the Paperwork Reduction Act and the Freedom Of Information Act

During the consideration of the PRA, Comptroller General Elmer Staats, who had been a member of the Commission on Federal Paperwork, recommended to Congress that the OMB should be given authority over the FOIA, as well as over the PRA, the Privacy Act, and other relevant information legislation. Staats observed that "better oversight and executive direction can improve implementation" and that giving OMB "specific policy setting responsibility for the Freedom of Information Act will provide this much-needed executive direction and oversight."¹⁷⁴ The recommendation was based on a GAO study of the operation of the FOIA.¹⁷⁵

Congress came close to granting Staats' wish, with the House offering OMB an Office of Federal Information Policy¹⁷⁶ and the Senate vesting new "privacy powers" in OMB.¹⁷⁷ Congress also had before it various scholarly suggestions,¹⁷⁸ and a few legislative proposals for centralized FOIA management.¹⁷⁹ It is clear that before the PRA's adoption, Congress had considered on several occasions the issue of central control of information disclosure policy. Comptroller General Staats was not alone in considering OMB as a central focus of the FOIA. Indeed, centralization discussions were part of the 1979-80 Regulatory Reform Act debate.¹⁸⁰ The version of the Regulatory Reform Act which failed in late 1980, at the same time the PRA was adopted, would have centralized the FOIA, but in the Administrative Conference.¹⁸¹ That suggestion was not revived in 1981.¹⁸²

A contrast in FOIA and PRA legislative aspects is instructive. The DOJ was most active with the FOIA, and OMB was virtually silent.¹⁸³ OMB was most active with the PRA, and the DOJ was virtually silent.¹⁸⁴ For direct power, the FOIA gives none to any agency,¹⁸⁵ while

174. *Hearings on Paperwork Reduction Act of 1980 before House Comm. on Govt. Operations*, 96th Cong., 2d Sess. 36 (1980).

175. GENERAL ACCOUNTING OFFICE, AN INFORMED PUBLIC ASSURES THAT FEDERAL AGENCIES WILL BETTER COMPLY WITH FREEDOM OF INFORMATION/PRIVACY LAWS (1979) (No. LCD-80-8).

176. PAPERWORK REDUCTION ACT, H.R. DOC. NO. 835, 96th Cong., 2d Sess. 41 (1980).

177. 44 U.S.C.A. § 3504(f) (West Supp. 1982). The Senate bill was the dominant bill.

178. Miller & Cox, *On the Need for a National Commission on Documentary Access*, 44 GEO. WASH. L. REV. 213 (1976); Koch & Rubin, *A Proposal for A Comprehensive Restructuring of the Public Information System*, 1979 DUKE L.J. 1, 58 (1979).

179. S. 262 & S. 2147, 96th Cong., 2d Sess. (1980).

180. The statutory proposals, *id.*, were addressed in *Hearings on Regulation Reform Act of 1979 Before the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 1002 (1980).

181. S. 262, 96th Cong., 2d Sess. (1980).

182. The FOIA issues were deleted from the legislation which appeared in 1981. Regulatory Reform Act, S. 1080, 97th Cong., 1st Sess. (1981).

183. See the history of the 1974 amendments in FOIA SOURCEBOOK, *supra* note 74. OMB had a very small role regarding fees and user charges.

184. Involvement of Justice does not appear in the Senate hearings. Each of those interviewed in the Senate staff group which produced the final statute, and in OMB, were asked about Justice's role and none could recall any activity on the Department's part.

185. The FOIA gives no authority to any federal agency, except for the filing of reports of activity.

the PRA gives great power to the OMB.¹⁸⁶ For reporting obligations, the OMB and the DOJ must file FOIA reports, with the DOJ's report marginally larger.¹⁸⁷ The DOJ won rather cryptic statutory language in the FOIA amendments on its encouragement efforts in advising the reporting agencies, but no statutory power.¹⁸⁸ The DOJ included in the legislative history of the PRA an equally cryptic reservation of authority,¹⁸⁹ but again no statutory authority to go with the reservation. So cryptic was the PRA reference to the Department's prior work that none of the OMB officials interviewed and none of the 1980 active staff drafting team from the offices of Senators Chiles, Ribicoff, and Kennedy remembered any reference to the DOJ in the Senate Report.¹⁹⁰ The insertion was made at the behest of the Department to preserve its options when the PRA implementation began.¹⁹¹ The PRA was like a well-fortified OMB position; the bureaucratic guerilla attack which inserted the DOJ preservation comment may have been so silent an attack as to carry no historical weight, when and if future combat ensues.¹⁹²

The DOJ can still refuse to litigate and can threaten to dismiss its client's defense in court.¹⁹³ That threat is rarely executed.¹⁹⁴ The "encouragement" function promised in 1973 and delivered late in that dec-

186. See, e.g., 44 U.S.C.A. § 3504 (West Supp. 1982).

187. 5 U.S.C. § 552(d) (1976).

188. The function of the report in 5 U.S.C. § 552(d) appears to be to bring public attention to the numbers of cases which Justice had not prevented from coming to litigation. Justice was attacked by Ralph Nader and others; the reporting was agreed to as a step to lessen this lack of openness, and by spotlighting Justice, to give an incentive for more settlements and dispositions of disputes. The 1974 legislative history is anything but a ringing endorsement of the Department's FOIA role. AMENDING THE FREEDOM OF INFORMATION ACT, S. REP. NO. 584, 93d Cong., 2d Sess. 33 (1974).

189. "Section 3504(f) describes the functions related to . . . guidelines both on information disclosure and confidentiality . . . The Director is to provide advice and guidance to the agencies concerning information . . . disclosure, and monitor compliance with the Privacy Act and other related information management laws. The Director's privacy functions do not affect the responsibility of the Department of Justice to encourage agency compliance with the Freedom of Information Act as set forth in 5 USC 552(d)." PAPERWORK REDUCTION ACT OF 1980, S. REP. NO. 930, 96th Cong., 2nd Sess. 42 (1980), reprinted in 1980 U.S. CODE CONG. & AD. NEWS 6241.

190. Interviews, *supra* notes 142-146, with Coakley, Graham, Saris, Susman, Bedell, and Scurry.

191. Former Justice Department FOI Committee Chairman Robert Saloschin asked that the Justice legislative office insert the statement and it was inserted as an accommodation by someone at some time prior to the filing of the Report on September 8, 1980. Telephone interview with Saloschin, *supra* note 113.

192. Judicial deference to legislative history varies with the weight, pervasiveness, consistency with overall intent, and historical basis of the cited piece of legislative history. Apparently none of the Senators themselves knew of the clause in the Report, which is not atypical for reports filed immediately after the summer recess concludes, and none of the key staff members assigned to the bill recalled it. Because the content of the Justice insertion relates back to the 1974 legislative history, the content does not on its face exclude a policy role for the OMB in FOIA matters, but it would exclude OMB from filing a new piece of little-read paperwork, beyond the FOIA litigation reports required under 5 U.S.C. § 552(d). See the history of the 1974 amendments in FOIA SOURCEBOOK, *supra* note 74.

193. The 1979 policy statement, *supra* note 110, has apparently not been revoked, but the routine review of denials faded away in the late 1970's notwithstanding the published policy and the Department looked only at the "tough cases." Braeman, *supra* note 55, at 114.

194. Only four such cases existed in 1977 and apparently few if any such refusals occur now. 1977 FOI Hearings, *supra* note 8, at 933.

ade¹⁹⁵ is worth praise and preservation. But since the call for a policy role at OMB does not interfere with the litigators at the DOJ, there is doubt about what the Department was trying to preserve. In other areas of federal policy, such as lands and water policy and environmental control, the DOJ's ability to decline prosecution or recommend settling cases does not usurp the lead agency's role in policy formulation.¹⁹⁶

For future interpretative weight, then, the DOJ non-interference comment is curious. The Senate Report's obscure comment¹⁹⁷ was virtually invisible to the staff authors of the legislative compromise. Had the comment been focused better, the issue of relative OMB and DOJ roles might have been joined and statutory language in the PRA might have been included in the final text of the statute. When considering a legislative scheme as broad as the information policy powers of the PRA, an innocuous "does not affect" mention in a committee report bears little weight. And the comment has no resemblance to the commanding tones sometimes invoked for FOIA disclosure requirements by the Congress.¹⁹⁸

The DOJ had not been given central authority in the congressional enactments, but its staff cared about preserving the *de facto* advisory role.¹⁹⁹ It seems to be partly a case of bureaucratic self-preservation and partly a systemic suspicion of OMB. The "privacy powers" over disclosure granted to OMB in that PRA textual statement include powers to set guidelines on disclosure of information.²⁰⁰ No other statute has given a comprehensive disclosure control mandate to any centralized agency.²⁰¹ So what would the consequences be to federal information policy if OMB took on the new power, and what would be the consequences for the DOJ?

FUTURE OF THE INFORMATION POLICY AND PRIVACY FUNCTIONS

The future direction of the federal government's information policy boils down to three principal questions:

- (1) Is an information disclosure policy needed to implement the terms of the Paperwork Reduction Act?
- (2) If so, should a central agency establish that policy, and should a central agency monitor agency compliance?

195. *Id.*

196. The changes in policy which decided cases engender are not the same as having the litigation agency responsible for proactively setting the policy which is administered by the clients prior to litigation.

197. S. REPT. NO. 930, *supra* note 189.

198. Congress does not spare words when it wishes to address the right to know and the public policy implications of the FOIA. *See* FOIA SOURCEBOOK, *supra* note 74.

199. Telephone interview with Saloschin, *supra* note 113.

200. 44 U.S.C.A. § 3504(f) (West Supp. 1982).

201. The closest equivalent, the Privacy Act, 5 U.S.C. § 552a (1976 & Supp. II 1978), is a statute which uses OMB guidelines but which is delimited by narrow statutory definitions.

(3) If so, is legislation needed to designate such a central agency, and what agency should perform that role?

Is an Information Disclosure Policy Needed?

An information disclosure policy is a systematic determination of how the federal government should make decisions regarding disclosure of information received by government from outside sources such as state governments, unions, corporations, schools, individuals, etc. One who confesses a bias in favor of the rights of the person regulated over the powers of the regulator will probably endorse the creation of policies to control the irrevocable actions of the regulator.²⁰² Policies which systematize the actions of the regulator appear to produce a societal benefit.

Organizations, like people, learn from their experiences. If the federal agency's disclosure of the organization's information adversely affects one of its important interests, such as the recruitment of new members by a textile union,²⁰³ the future sharing of information with the federal government is likely to be inhibited.²⁰⁴ The discretion of the person submitting information, and the discretion of the agency receiving it are each affected by disclosure policy decisions. The Congress sometimes dictates that policy by law. The Privacy Act is a typical disclosure policy statute²⁰⁵ wherein discretion and its exercise vary among the agencies.²⁰⁶ For example, under OMB guidelines, and rules of the Centers for Disease Control, the government will not make public names of venereal disease patients treated in a CDC study.²⁰⁷

Students of the federal information laws would agree that no cen-

202. Secrets of a business firm are lost irrevocably when disclosed. *See, e.g., General Motors v. Marshall*, 654 F.2d 294 (4th Cir. 1981).

203. Union authorization cards, signed during a recruitment drive, have been a major source of FOIA disputes, in which the FOIA has been an unintended tool of discovery threatening the private communications of unions and their members prior to the public announcement of the unionization. *Madeira Nursing Center, Inc. v. NLRB*, 615 F.2d 728 (6th Cir. 1980), *American Airlines, Inc. v. Nat'l Mediation Board*, 588 F.2d 863 (2d Cir. 1978), *Committee on Masonic Homes v. NLRB*, 556 F.2d 214 (3d Cir. 1977). *See J. O'REILLY, UNIONS' RIGHTS TO COMPANY INFORMATION* 195 (1980).

204. *National Parks Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) set the principle followed by *Board of Trade of Chicago v. Commodity Futures Trading Comm'n*, 627 F.2d 392 (D.C. Cir. 1980), *Orion Research Inc. v. EPA*, 615 F.2d 551 (1st Cir. 1980) and *Miller, Anderson, Nash, Yerke & Wiener v. Dept. of Energy*, 499 F. Supp. 767 (D. Or. 1980).

205. The Privacy Act, 5 U.S.C. § 552a (1976 & Supp. II 1978), represents a conscious policy choice which, where it is applicable, precludes the exercise of disclosure discretion under one of the exemptions to the Freedom of Information Act, 5 U.S.C. § 552(b)(6) (1976). Note, *The Privacy Act of 1974*, 1971 DUKE L.J. 301 (1976); Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1303 (1975).

206. The agency position on exercise of disclosure discretion ranges widely across all agencies on related information, from the National Security Agency at one extreme to the Food and Drug Administration at the other. Agencies are free to disclose even though the information is exempt unless another statute prevented disclosure. *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979); 1 J. O'REILLY, *supra* note 5, § 9.05.

207. However, it would have discretion to do so if they were not in a "system of records," 5 U.S.C. § 552a(a) (1976 & Supp. II 1978).

tral information policy now exists.²⁰⁸ The FOIA contains the limits of discretion, compelling some information to be available to the public.²⁰⁹ But its exemptions are vague discretionary entitlements, beset with ambiguities.²¹⁰ Other specific statutes, like the Federal Trade Commission Act,²¹¹ require specific types of information to remain nondisclosed.²¹² Between the two extremes is the area for discretion, but that area has no central policy guidance. An information policy governs the standards by which discretion to disclose will be exercised. It is not an administrator's repeal of Congress' mandatory disclosure or mandatory confidentiality provisions.²¹³ Rather, it informs discretion and makes it more uniform in execution.

One frequently litigated omission from the FOIA has been any protection for the rights of private persons. The Act is an excellent disclosure vehicle for government generated information revealing government's workings and decisions.²¹⁴ The mass of private documents required to be filed are also agency records, but they are overlooked in the Act's current procedures.²¹⁵

The DOJ has argued against submitter challenges to agency discretionary disclosure.²¹⁶ In *Chrysler Corp. v. Brown*²¹⁷ and *Cell Associates v. National Institutes of Health*,²¹⁸ government counsel successfully asserted that the FOIA's business privacy exemption and its individual

208. "Government-wide direction does not exist and I think it probably should." 1977 FOI Hearings, *supra* note 8, at 149.

209. Disclosure is required unless the power to withhold is specifically stated in an exemption. 5 U.S.C. § 552(b) (1976 & Supp. II 1978); Dept. of Air Force v. Rose, 425 U.S. 352 (1976); County of Madison v. Dept. of Justice, 641 F.2d 1036 (1st Cir. 1981).

210. For example, the word "confidential" as a descriptor usually means that nondisclosure is expected. This was the content given the term by the 1965 Senate Report, S. REP. NO. 813, 89th Cong., 1st Sess. 9 (1965), as it appears in exemption 4, 5 U.S.C. § 552(b)(4) (1976). From its exemption standard based upon expectations, the courts moved the exemption standard into one of quantification of injuries. That produced such extensive economic proofs as seen in a 1981-82 lawsuit, 1981 FOI Hearings, *supra* note 61, at 620. Until the statute is revisited by Congress, and confirmed as an expectations standard, the exemption will continue to be quantification based. National Parks Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). For a statutory suggestion, see S. 1730, 97th Cong., 2d Sess. (1981) and Administrative Conference recommendation, 1 C.F.R. § 305.82-1.

211. 15 U.S.C. §§ 41 to 58 (1976, Supp. II 1978, & West Supp. 1982).

212. 15 U.S.C.A. § 57b-2 (West Supp. 1982) protects information obtained during FTC investigations.

213. An administrative agency can neither repeal a statute which precluded disclosure, 5 U.S.C. § 552(b)(3) (1976), nor repeal the disclosure mandate of the FOIA itself. So an information policy addresses the wide interstices between these two bounds of action but will not exceed them.

214. The Act had a very salutary effect on disclosure of internal operations and workings of federal agencies. As discussed at the outset of this article, an information disclosure policy would be directed, as the Paperwork Reduction Act is directed, to items coming in to the government from outside.

215. A debate about the extent and significance of the omission appears in a seminar issue on FOIA and commercial data, 34 AD. L. REV. 159-182; 207-314 (1982).

216. See Dept. of Justice, Office of Information Law & Policy, *Policy Discussion: Business Confidentiality after Chrysler*, 2 FOIA UPDATE 3 (Winter 1980).

217. Chrysler argued that the FOIA itself was a basis for a challenge against a proposed disclosure by an agency. The Court agreed, but found an Administrative Procedure Act remedy. *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

218. *Cell Associates, Inc. v. Nat'l Institutes of Health*, 579 F.2d 1155 (9th Cir. 1978).

privacy exemption do not provide a legal basis for a challenge to the agency's discretionary decision to disclose a piece of private information, such as a chemical formula required to be submitted by a private person to a regulatory agency. Challenges to agency discretion can be fought only with agency-by-agency litigation in federal district courts, as part of APA appeals of discretionary disclosure decisions.²¹⁹ These challenge the arbitrariness of the exercise of discretion, but are precarious assaults if the agency has ably covered its flanks on the matter of discretion.²²⁰

This FOIA omission affords private persons only an awkward and uncertain means of challenge against the vagaries of agency disclosure discretion. The form or report submitter must know that the disclosure is occurring, a matter not now included in the law.²²¹ The agency employee making disclosure decisions must have a policy of some sort to follow and must be capable of following that policy.²²² In a minority of cases, central control of discretion makes the conduct of both submitter and discloser predictable. Those who make a compelling case that the discretion has been eliminated by a specific statute, such as the Privacy Act,²²³ will fare slightly better in agency practice and in litigation against an agency. But as a systemic matter it would be much easier for all concerned to have a central policy on disclosure issues.

An information policy which takes into account business and personal privacy needs at both the collection stage and the disclosure stage would be a great improvement over the present state of federal information law. A central policy would have several advantages. It could be a vehicle for deciding which varieties of private documents will receive confidential treatment. It could uniformly apply procedural rights for private submitters.²²⁴ It could "clean up" many of the omissions in the FOIA. Because government usually loses nothing when disclosure of private documents occurs (the loss of licensable value or market advantage falls upon the owner,²²⁵ not the agency),²²⁶ a per-

219. *Chrysler*, 441 U.S. 281. However, the Justice Department was willing to ask Congress to amend the FOIA to bring in more procedural rights under that Act for submitters. S. 1751, 97th Cong., 1st Sess. (1981). That statutory change was less than the Hatch bill, S. 1730, 97th Cong., 1st Sess. (1981) and ultimately neither passed the Senate.

220. An agency can create a "record" via form letters which state the proper phrasing but reflect no conscientious assessment of the facts or policy underlying the disputed adjudication. That frustrates both the meaning of the process and the individual submitter. O'Reilly, *Regaining a Confidence: Protection of Business Confidential Data Through Reform of the Freedom of Information Act*, 34 AD. L. REV. 263 (1982).

221. Present law does not require notice to the submitter before disclosure occurs. See Recommendations of the Administrative Conference, 47 Fed. Reg. 30,701, 30,702 (1982).

222. The elements of executing any policy are a definition of goals, a rule to follow, and a level of implementing officials who are capable of carrying it out judiciously. To the extent that the agency subdelegates the disclosure decision to local office staff members, the variable outcomes will be even more diverse.

223. 5 U.S.C. § 552a (1976 & Supp. II 1978).

224. These procedural uniformity ideals are enhanced by the recommendations of the Administrative Conference, 1 C.F.R. § 305.892-1.

225. Among the anticipated losses are costs of development, loss of sales, opportunity cost of not having worked on a nonregulated (and hence nondisclosed product), and "lead time" in

ceived imbalance exists in the motivations of agency decision-makers who must choose whether to disclose or withhold.²²⁷ An information policy could give guidance signals from above. The PRA privacy functions appear to empower OMB to create such a policy.²²⁸

A central information policy should be general rather than specific. When agencies reexamine their FOIA rules, as all agencies are expected to periodically review rules which have an external impact,²²⁹ the agencies would have to amend their rules to take into account the OMB procedures.²³⁰ The costs of drafting the policy would be small relative to the costs of individual agencies reconsidering their current policies.²³¹ Those agencies not already in compliance would have a marginally greater burden of educating their FOIA officers. There is also a difference between the FOIA and the PRA in the source of stimuli for agency action. The PRA is best operated as a control on agencies and their practices,²³² whereas disclosure issues have traditionally been viewed as a matter of external stimulus, such as the FOIA request²³³ and demands for Sunshine Act meeting access.²³⁴

On balance, a single information disclosure policy would seem to be most fair, more efficient than current non-policies, and consistent with the Paperwork Reduction Act.

Should there be a central policy drafting and monitoring agency?

The power to establish a central policy is not necessarily the same as the enforcement of the policy. Litigation defense is the predominant enforcement system for information disclosure matters. The DOJ will remain in charge of litigation and pre-litigation counseling to help agencies apply the policy to pre-litigation dispute situations in a defensible manner.²³⁵ That role of the Department is not the creation of the

entering a market. For the best economic assessment, see *1981 FOI Hearings, supra* note 61, at 639 (testimony of Casey, Marthinsen, and Moss).

226. The Federal Torts Claims Act does not compensate for intentional torts such as discretionary disclosure of confidential private documents. 28 U.S.C. § 2680 (1976).

227. See the ABA seminar debates on this topic in 34 AD. L. REV. 159-82, 207-314 (1982).

228. 44 U.S.C.A. § 3504(f) (West Supp. 1982). The policy can be created now, *id.*, and legislation to expand that policy must be drafted and submitted before April 1, 1983.

229. Exec. Order No. 12,291, *supra* note 11.

230. The Paperwork Reduction Act applies to independent agencies whether or not they are subject to the Executive Order 12,291 on regulatory reform, *id.* See 44 U.S.C.A. § 3502(1) (West Supp. 1982).

231. Among the options other than formulation of a central policy would be a directive to agencies to propose such disclosure policies for acceptance by OMB. This would make OMB more of an informal adjudicator rather than a rule-maker.

232. The operations of the PRA will be internal to the federal government, for the most part. OMB will serve as a check upon agencies, and regulated persons will be beneficiaries rather than direct participants. That does not preclude the public from asking OMB's help, but OMB needs no external stimulus to act under the PRA.

233. 5 U.S.C. § 552(a)(3)-(6) (1976).

234. Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified at 5 U.S.C. § 552b(f)(2) (1976)).

235. The Paperwork Reduction Act contains no provision limiting the case selection and defense process.

client's policy, but its informed defense. There is a difference which ought not to be obscured.

The central nonstatutory involvement of the DOJ in acting de facto to fill the FOIA guidance vacuum has been useful. It can be argued that such a loosely decentralized, nondelegated power is satisfactory. As information technology issues blossom, information control issues become more complex and controversial. The episodic learning one acquires from a litigation defense may be a proper "pull" factor for policy, but it fails when asked to consistently and thoughtfully "push" as a central policy would do.²³⁶ From the agency viewpoint, a consistent central policy, with stability and sound advisors, is most important.²³⁷

Opponents of central policies would argue that disparate rules serve well the needs of the agencies' particular constituencies. An agency with an environmental constituency may best serve its constituents with a policy different from that of an agency making public economic policy choices. The latter are vulnerable to instant defeat from premature disclosures.²³⁸ Or it may be argued that a student loan program's release of financial statements of defaulting ex-students involves a different set of issues than an auditor's report of a union pension fund's projected deficits.²³⁹ Diverse discretion situations call for divergent implementation of the statute. And since the DOJ is the litigator it would make sense to leave that Department as the advisor as well.²⁴⁰

Proponents of central authority would note first that submissions of documents coming into the government from outside information sources are at issue.²⁴¹ Virtually all of these submitter sources deal

236. A choice to decide "rules" through adjudication only may lawfully be made, *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), but the agency must suffer a loss of communication ability when it makes the means of passage of "law" to those regulated so obscure (by case precedents) rather than so forthright by rules. See Huszagh and Huszagh, *Production and Consumption of Informal Law: A Model for Identifying Information Loss*, 13 GA. L. REV. 515 (1979). This communication difficulty is acute where agencies begin to pick up other agencies' adjudicated decisions as a premise for the recipient agency's later decisions, e.g. the USDA adjudicator operating on the basis of an EPA adjudicator's decisions, expanding the quantity of precedent which one must follow to be up to date on the "law" of the USDA.

237. Telephone interview with Michelle Davis, FOIA legal adviser to the Treasury Department (July 1982).

238. The immediate loss to the government from disclosure of the target purchase figures of the key group of Federal Reserve banking officials, was asserted to be great. The Supreme Court tailored a special exemption to the FOIA by reinterpretation of the intraagency memoranda exemption, so this set of material could be protected. *Federal Open Market Committee v. Merrill*, 443 U.S. 340 (1979).

239. The union's private records aid its opponents in bargaining, or in member recruitment, and the union has some expectation (wherever permitted under federal labor law) of private character for its records. A defaulter should expect that his or her default will be a matter of public record. *Miami Herald Pub. Co. v. United States Small Business Admin.*, 670 F.2d 610 (5th Cir. 1982).

240. Advice to an agency to litigate or settle, because of the facts of a particular case, will be solely within the control of the litigation managers at the Justice Department. The roles assigned to OMB by the Paperwork Reduction Act as they impact information disclosure do not require (and OMB does not wish) that OMB advise each agency on each disclosure issue. 44 U.S.C.A. §§ 3504(f), 3505(3)(F) (West Supp. 1982).

241. Government's own documents are not affected by this proposal. If government tested rifles

with more than one agency.²⁴² The dispersion of discretionary disclosure authority leads to friction about the proper withholding of private documents, some of which are withheld in one agency and disclosed in another.²⁴³ Expectations of how the government handles private submissions are difficult or impossible to satisfy since so many different policies apply. Since the PRA is directed to outsiders and their expectations in dealing with government handling of information,²⁴⁴ it makes sense to use the PRA to centrally define those external expectations. The policy must be flexible enough for different situations, but it also should not be a policy driven by winning specific cases or adopting a new policy as various Circuit's demands are factored into litigation goals.²⁴⁵

On balance, a central policy best serves those expectation interests to which the PRA was directed. The expectation is that the person submitting documents will be treated fairly.²⁴⁶ The information request will have been screened by OMB. It will be authorized by the agency after OMB clearance.²⁴⁷ Its scope will not intrude at the collection or dissemination stages upon privacy interests.²⁴⁸ If the expectation is not met, excessive paperwork demands would continue and excessive intrusions into personal and entrepreneurial privacy would continue.²⁴⁹

on its own ranges, rifle test results would not be covered by this PRA policy just as the Army's order to its arsenal to test the rifles would not be a PRA "information collection request," 44 U.S.C.A. § 3502 (West Supp. 1982).

242. The best microcosm study of the federal regulatory system is PRESIDENT'S REORGANIZATION PROJECT, THE VIEW FROM JANESVILLE, WISCONSIN (1978). See S. BREYER, REGULATION AND ITS REFORM (1982).
243. A pharmaceutical plant is closely studied by its competitors for information about process details and inactive ingredient identities, which are kept secret by the regulators at the Food and Drug Administration, 21 C.F.R. § 314.14 (1982). But the same data is routinely available in the EPA files as emission data detailing the process and chemical studies available under other EPA statutes.
244. PRA is aimed at reducing government's total demands for information from persons outside the government.
245. It is commendable for a litigator with a winning record to suggest ways to prepare cases so they, too, can be won. But is that all there is? Justice's own policy views have been directed to the winnable, not the policy oversight of the federal government, and the two should be distinguished by a detached policymaker. See DEPT. OF JUSTICE, FOIA UPDATE (issues 1979-82); 1977 FOI Hearings, *supra* note 8, at 933.
246. That goal is an implicit part of both the PRA and the Administrative Procedure Act, 44 U.S.C.A. § 3501 (West Supp. 1982), 5 U.S.C. § 551 et seq. (1976 & Supp. II 1978).
247. 44 U.S.C.A. § 3507 (West Supp. 1982); see 47 Fed. Reg. 39,515 (1982) (to be codified at 5 C.F.R. § 1320.11).
248. These privacy interests will be an appropriate part of the OMB calculation of approvability for a new form. 44 U.S.C.A. § 3504; see, e.g., Noble, *Budget Office Accepts Tightened Bank Rules*, N.Y. Times, Sept. 8, 1982, at 27; *Update on OMB approvals, Denials of Agency Requests for Data-Gathering*, 1 INSIDE OMB NEWSLETTER, July 2, 1982, at 17.
249. An exceptional case study of the divergent views is the battle between OMB and Treasury over IRS forms. IRS wanted to maintain the status quo ante; OMB needed to impact on IRS in order to achieve its goal of 15% reduction in paperwork demands. The legal issue was the status of pre-existing regulations under 44 U.S.C.A. §§ 3504, 3507 (West Supp. 1982). Justice's Office of Legal Counsel sided with IRS against OMB. See Office of Legal Counsel opinion to C. Boyden Gray, June 22, 1982, summarized in Moore, *DoJ Restricts OMB's Paper Review Power*, Legal Times of Washington, June 28, 1982, at 1; *Treasury's Next Move on Paperwork: Ask Justice to Overhaul OMB Policy Draft*, 1 INSIDE OMB NEWSLETTER, July 2, 1982, at 1. Copies of the Treasury correspondence and OMB's responses, which make

Policies which accomodate the expectations and yet allow for movement in the odd corners of the system are most desirable.

What Agency Should Fill the Central Role?

If there is to be a central agency, there are several candidates, including the DOJ, the Administrative Conference, the GAO, the OMB, or a newly created agency. The agency selected should be able to handle the policy drafting functions adequately, with little additional financial support.²⁵⁰ Second, the agency should have experience in program supervision because the information disclosure issue is part of an overall program. Third, it should have the credibility to win deference from the courts for its central policy role²⁵¹ because the principal cost savings may be in a unified policy to which courts would defer in the instance of a disputed disclosure or refusal of disclosure.²⁵² Finally, the agency (other than a wholly new creation) must have a desire to start on the project without additional statutory authority, for Congress has been slow to act on FOIA reforms.²⁵³ It is appropriate to weigh each agency's qualifications in turn.

The Department of Justice. The DOJ has more legal staff and more money available than any of the other agencies, but the Department's litigation defense orientation and its policy statements may skew its policy development toward what is most readily defensible under case law at the time the policy is set.²⁵⁴ The DOJ, apart from its incidental coverage of immigration and the like,²⁵⁵ rarely publishes policies. Occasional policy statements on mergers or antitrust policies have been

fascinating historical reading in this first PRA controversy, are available to the public from the Office of Legal Counsel at Justice or from congressional committees.

250. No funds have been available for the specific function of creating a privacy policy; costs of the Privacy Act and FOIA have come out of each agency's general overhead in the past, and a policy creation function would likewise not be usually separated out for budget allocation.
251. "Deference" in this context is the willingness of a court to construe the very ambiguous FOIA in a manner which accords great weight to the views of a certain agency. The court defers when it chooses to do so, to the agency which has a statutory role of interpreting the ambiguous statute. This PRA power of OMB is the power which had been lacking for the Justice Department and denied deference in *Consumers Union v. Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971).
252. The arbitrariness of the agency decision is an important factor in submitter suits. Central policies which themselves are rationally based can illuminate for the reviewing court the wisdom of the agency's action.
253. S. 1730, which passed through subcommittee and full committee before being interred by a political disagreement, came closer than any post-1974 bill to being adopted. S. 1730, 97th Cong., 1st Sess. (1981).
254. In the number of lawyers with FOIA familiarity, Justice's Civil Division exceeds all other agencies. But the policy creating would be done by the Office of Legal Policy, which was subject to some criticism for its handling of the Freedom of Information Act reform legislation in 1981-82. The Office of Legal Policy, the Civil Division, the Tax Division, and the Office of Legal Counsel (and perhaps more) would all have to concur before an institutional Justice Department position could move ahead. The inability of the behemoth to turn toward the FOIA issues and to take an institutional position appears to have been a primary reason why time expired in the 97th Congress without a compromise passage of FOIA reforms.
255. *See, e.g.*, 8 C.F.R. pt. 214 (1982), policy on nonimmigrant classes.

issued by the Department's Antitrust Division, but policy setting in the normal publication sense is rare.²⁵⁶ The DOJ has been denied a deferential acceptance of its policy guidance on the FOIA by the courts.²⁵⁷ Its work on the original Act and subsequent interpretations was roundly criticized and frequently debated in the courts.²⁵⁸ The credibility of a federal disclosure policy could lack persuasiveness if it were presented to the court as the litigator's version of the client's desires. Viewed from the perspective of current DOJ employees, the Department is not political.²⁵⁹ There would be critics outside, however, who would observe that its 1977 and 1981 policy letters on the FOIA are the most obvious indicators of the political control of information policy.²⁶⁰

The Administrative Conference. The Administrative Conference is tiny and is growing smaller with the 1982 budget reductions. The Conference has a politically appointed head, a very small staff and budget, and a large membership dominated as a matter of statute by administrative agency counsel and "alumni" in private practice.²⁶¹ The Conference operates by consensus and adopts recommendations reflecting both scholarship and political support.²⁶² The Conference receives heavy input from federal agency members, many of whom have long-time administrative law experience within the agencies. It is overtly very political, with recorded votes on a semi-annual basis.²⁶³ Conference consensus voting brings a detachment from direct political involvement, but a nontraditional substructure within the Conference's

256. The selection of cases by the Solicitor General, and his veto power over appeals, is a very important policy-killing power. Policy setting is more extraordinary and the issuance of a merger policy or the like will be an exception rather than a norm for the Department as a whole.

257. *Consumers Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969). FOI plaintiff's counsel have not been able to convince courts to give "backwards deference" either. Where Justice disagreed with the agency and plaintiffs learned that Justice did not support the agency's legal position, plaintiff invoked Justice as a putative ally. The court refused to consider that claim. *Nemetz v. Dept. of Treasury*, 446 F. Supp. 102 (N.D. Ill. 1978).

258. *See Jordan v. Dept. of Justice*, 591 F.2d 753 (D.C. Cir. 1978); *1973 FOI Hearings*, *supra* note 50, vol. 2, at 122 (testimony of Kass). Kass had been counsel to the responsible subcommittee who later asserted that Justice had threatened a 1966 veto in order to obtain modifications of the Act's legislative history on the House side.

259. Interviews with Justice Dept. attorneys, June and July 1982.

260. Letters to heads of all federal agencies from Atty. Gen. Bell (May 5, 1977) and Atty. Gen. Smith (May 4, 1981), *reprinted in 1981 FOI Hearings*, *supra* note 61, at 912-13.

261. 5 U.S.C. § 575 (1976).

262. *See, e.g.*, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 1980 (S. Boley, ed. 1981).

263. For example, the FOIA commercial data recommendation was tabled and referred to three committees in December 1981, then debated for almost three hours in June 1982, with about a dozen amendments, each of which were either accepted by the ACUS committee or defeated when pressed by an opponent of a portion of the recommendation. ACUS is prestigious because it puts its reports through the scholarly gauntlet and then exposes them to up-or-down votes in a politically mixed forum. 5 U.S.C. § 575 describes the assembly of the Conference, which passes upon each recommendation. *See* 47 Fed. Reg. 30,701 (1982) (to be codified at 1 C.F.R. § 305.82-1).

permanent staff²⁶⁴ (and perhaps no member voting opportunity)²⁶⁵ would be required to complete and update an information disclosure policy for all agencies. Much more funding would also be required to develop a central FOIA policy than the hard-pressed staff has available for the task.²⁶⁶

Congress considered giving FOIA oversight to the Administrative Conference in 1979. The Conference was mildly interested, but only if funds were available.²⁶⁷ But Congress provided neither the authority nor the funds. The Conference is even less of a contender to assume FOIA leadership in 1982 than it was in 1979. At this time, the Conference could not take on the FOIA policy responsibility without some express legislative decision on substance and more funding.²⁶⁸

The General Accounting Office. GAO also could handle the assignment.²⁶⁹ It studies the FOIA from time to time and often makes useful policy suggestions.²⁷⁰ But GAO in 1980 desired that OMB take over the information disclosure policy.²⁷¹ It is unlikely that GAO would wish to take it on. If it did so desire, Congress would need to specifically authorize that extensive involvement of the congressional auditors at GAO into day to day executive branch management.²⁷²

The Office of Management and Budget. The paperwork reduction functions of the Director of the Office of Management & Budget are actually one directive, divided into six parts. Information "policies, principles, standards and guidelines" are the directives explicitly under

264. The permanent staff, about a dozen, supports committees and outside scholars, but does not itself draft official government-wide policies without definite statutory direction that it must do so (and funding to support that diversion).

265. An information policy might not need to go through the Assembly if the policy tracks identically Recommendation 82-1; but the imposition upon other agencies would probably be such a change that it would need a separate vote, results of which are doubtful either way.

266. Cuts in budget have more severely affected the small ACUS staff than they have at other agencies.

267. *Hearings on Regulation Reform Act of 1979 Before the House Comm. on the Judiciary* 1016 (1979) (testimony of R. Berg). The reaction appears to have been lukewarm and conditional upon funds.

268. The author served as ACUS consultant on recommendation 82-1, research for which was the genesis of this article. The subjective prediction that the Conference could not take on the policy role without funding remains to be tested if ACUS were willing to take on the government-wide role with its current funding. 47 Fed. Reg. 30,701 (1982) (to be codified at 1 C.F.R. § 305.82-1).

269. The Government Accounting Office is a congressional support agency and not part of the executive branch. It is not an "agency" under 5 U.S.C. §§ 552(e), 552a(a)(1), or 44 U.S.C.A. § 3502(1).

270. See, e.g., GAO REPORT NO. LCD-80-8, *supra* note 175, and GENERAL ACCOUNTING OFFICE, IMPACT OF THE FREEDOM OF INFORMATION AND PRIVACY ACT ON LAW ENFORCEMENT AGENCIES (1978) (No. GGD-78-108).

271. *Paperwork Reduction Act of 1980: Hearings on H.R. 6410 Before a Subcomm. of the House Comm. on Govt. Operations*, 96th Cong., 2d Sess. 37 (1980) (testimony of Comp. Gen. E. Staats).

272. Congress defines GAO's jurisdiction and has never indicated a desire for GAO to take over that function.

OMB's control.²⁷³ The six functions are general information policy,²⁷⁴ collection request clearance (including paperwork control),²⁷⁵ statistical policy,²⁷⁶ records management,²⁷⁷ automatic data processing,²⁷⁸ and privacy.²⁷⁹ Of these, the "information disclosure and confidentiality" powers, under the privacy function,²⁸⁰ are most relevant to a discussion of the FOIA.²⁸¹ OMB will develop and implement policy applicable to all agencies, will continue to monitor compliance with the Privacy Act "and related information management law"²⁸²—unfortunately undefined in the PRA—and will provide guidance to agencies about information disclosure.²⁸³

The OMB's other new functions are too numerous to mention; indeed, a full execution of the PRA duties would require an agency as large as a full Department rather than the relatively tiny OMB.²⁸⁴ OMB would need a huge budget and manpower allocation to execute all of its possible statutory functions under the PRA.²⁸⁵ The priority project became the clearance of agency forms, because that carried a statutory deadline.²⁸⁶ Other missions will be taken up as priorities call for attention.²⁸⁷ Preliminary thinking has been given to the privacy role,²⁸⁸ and at least a tentative step was taken,²⁸⁹ but nothing concrete had occurred by the fall of 1982. Given the budget problems with

273. 44 U.S.C.A. § 3504(a) (West Supp. 1982).

274. *Id.* at § 3504(b).

275. *Id.* at § 3504(c).

276. *Id.* at § 3504(d).

277. *Id.* at § 3504(e).

278. *Id.* at § 3504(g), and this includes telecommunications activities policy.

279. *Id.* at § 3504(f).

280. *Id.*: "The privacy functions of the Director shall include—(1) developing and implementing policies, principles, standards and guidelines on information disclosure and confidentiality, and on safeguarding the security of information collected or maintained by or on behalf of the agencies; (2) providing agencies with advice and guidance about information security, restriction, exchange and disclosure; and (3) monitoring compliance with section 552a of title 5, United States Code and related information management laws."

281. 5 U.S.C. § 552 (1976).

282. 44 U.S.C.A. § 3504(f) (West Supp. 1982). Note that before April 1, 1983, OMB must "submit to the President and the Congress legislative proposals to remove inconsistencies in laws and practices involving privacy, confidentiality, and disclosure of information." 44 U.S.C.A. § 3505(3)(F). It can be presumed that the "laws . . . involving . . . disclosure of information" to be amended will include the Freedom of Information Act, 5 U.S.C. § 552 (1976).

283. The information disclosure function is defined in the privacy functions role, at 44 U.S.C.A. § 3504(f) (West Supp. 1982).

284. Interviews with several officials found them appreciative of the OMB's potential authority but doubtful that the management side of OMB could expand to meet the needs of the PRA, since the budget side was cutting so many other agencies.

285. The measures required to fully execute 44 U.S.C.A. § 3504 and to prepare the legislative plans called for in 44 U.S.C.A. § 3505 would be heroic, and are far beyond the reach of the small current staff of OMB.

286. No agency form could be required to be submitted, under any penalty, if the form was issued requesting the information after Dec. 31, 1981, and if the agency had failed to receive OMB approval.

287. OMB Interviews with Bedell, *supra* note 155, and Michael J. Horowitz (June 1982).

288. Because the PRA rules themselves were "enormously complex," Interview with Horowitz, *id.*, the privacy functions will be looked at "in the future." Those PRS rules were issued in proposed form in September 1982. 47 Fed. Reg. 39,515 (1982).

289. OMB asked Justice to send the deputy director of the Justice FOIA office on a temporary detail assignment, to organize the privacy functions of OMB, shortly after adoption of the

which government managers are faced, even the arrival of the new powers in the PRA does not guarantee that resources will be spent to wisely solve information policy problems.

OMB's weaknesses are political and resource ones. OMB often serves as a lightning rod for Presidential program.²⁹⁰ The OMB develops ideas and takes the lead in sponsoring Administration policy on controversial issues. Regardless of the mastery by OMB's leadership cadre of the role of central policy creation, they still must endure suspicion as the messenger carrying to agencies the news of the policy decisions made by White House staff and other Presidential appointees.²⁹¹

Being a lightning rod atop the executive branch affords the OMB an unparalleled policy view. Of the candidates for an information disclosure policy agency, OMB has the best experience for creation of a policy overview and the best ability to manage a cross-agency project without collapse of the effort.²⁹² The ready statutory power to take on the assignment under the PRA is a definite advantage. OMB authority can reach independent agencies as well.²⁹³

OMB roles on the budget side also are important to its management of information policy. Collection of information by the agencies aids agency programs but costs money. OMB has traditionally supervised the allocation of funds to agency missions, cutting funds and questioning the benefit of agency projects as necessary.²⁹⁴ Publication programs of an agency are part of overall federal disclosure policy; reducing funds for the publication of agency information in handbooks, flyers, etc. has been a theme of the Reagan Administration's OMB.²⁹⁵ That role has been roundly criticized by Ralph Nader as a suppression of helpful information flows.²⁹⁶

The OMB's funding for its own projects is slim,²⁹⁷ though it has the best position for allocation of more funds because it manages the funding of the entire PRA project. Opponents of a central information disclosure policy would attack its funding first, since this is the least visible

PRA in December 1980. The head of that Justice office refused, because he disagreed with OMB involvement in that area of law. Telephone interview with Saloschin, *supra* note 113.

290. L. BERMAN, *supra* note 9, at 125; see also L. LYNN, *supra* note 9.

291. L. BERMAN, *supra* note 9, at 125.

292. *Id.* For a perspective on project management, see L. LYNN, *supra* note 9, and F. MALEK, *supra* note 9.

293. An "independent regulatory agency" can be affected by the OMB powers under the Paperwork Reduction Act, 44 U.S.C.A. § 3502(1) (West Supp. 1982). OMB does not have the same authority over independent agencies under the regulatory reform executive order, Exec. Order No. 12,291, *supra* note 11.

294. See, e.g., R. ROSE, *supra* note 9.

295. Reductions in the number of publications as a costs savings measure has been a theme of the OMB in 1981-82.

296. R. Nader, Address to Assn. of Government Communicators, *reprinted in 1981 FOI Hearings*, *supra* note 61, at 343.

297. Interviews with OMB officials uniformly found that the agency is suffering on the management side from reductions in budget and personnel. See also reorganization of the offices within OMB under "very tight budget constraints," in *Wright Reorganizes OMB to Stress OMB Role on Policy Formulation, Oversight*, 1 INSIDE OMB NEWSLETTER, June 18, 1982, at 7.

Capitol Hill counterattack to a substantive program and can be managed with a relative handful of House members agreeing on the small phrase in a large appropriation bill.²⁹⁸ Though OMB is most vulnerable to charges of political control,²⁹⁹ in historical perspective the non-statutory DOJ guidance under the FOIA has had every bit as much political control.³⁰⁰ The DOJ has been less conscious of openness policy issues than OMB, when the two have worked on the openness question in the regulatory reform legislation.³⁰¹ Program supervision and policy circular direction has been the OMB's strength for decades, and on this aspect OMB is the strongest of the candidates. Reaching now to non-executive branch "independent agencies" under the PRA, OMB circulars can be more effective as a policy statement to all agencies than the DOJ's missives could be.³⁰²

The Commission or Ombudsman Alternatives. Independent creation of an FOIA Ombudsman or Commission is an old idea, dating back to Senator Gaylord Nelson's 1963 suggestions.³⁰³ It has been seriously considered in the past. A comprehensive suggestion by former DOJ expert Robert Saloschin was the best proposal offered,³⁰⁴ but at least two law review commentators have offered similar ideas.³⁰⁵

The two are different operating entities, usually seen as mutually exclusive proposals. A commission to set and implement policy appears to be more workable than an ombudsman to resolve disputes. The ombudsman would be an informal adjudicatory official acting as an appellate authority after a final agency denial. By setting some form

298. This end-run around the difficulty of substantive change to an agency's jurisdiction would be most difficult to run against OMB, however, since that agency must examine each appropriation change; this tactic works best when used against an agency without much political involvement with appropriation committee staffs.

299. The Nixon Presidency was disastrous for OMB's reputation as a solid, independent source of management advice. L. BERMAN, *supra* note 9, at 125, and the Reagan OMB has likewise been attacked for controversial substantive program proposals, see C. LUDLAM, UNDERMINING PUBLIC PROTECTIONS: THE REAGAN ADMINISTRATION REGULATORY PROGRAM (1981); *OMB Proposes Dropping FTC Antitrust Activity*, NAT'L J., Feb. 21, 1981, at 327. Political control charges come with the territory and do not worry those OMB officials responsible for PRA policy. See *Profile—OMB's Jim Joseph Tozzi*, ENVTL. F., May, 1982, at 11.

300. Letter of Att'y Gen. Bell and Letter of Att'y Gen. Smith, *supra* note 260. The Department's directives on disclosure policy have reflected the entering administration's political alliances rather than any concern about case law developments.

301. OMB has been more willing to accept public involvement, accepting the Kennedy amendment, discussed *supra* notes 146-59 and accompanying text, filing its comments on new rules under Exec. Order No. 12,291, *supra* note 11, in a public file, and rarely invoking FOIA exemptions except in unusual cases. *National Tank Truck Carriers Inc. v. OMB*, 1982 Fed. Carr. Cas. (CCH) ¶ 83,004 (D. D.C. 1982). Justice has vigorously opposed the ex parte recording or logging of contacts, in response to suggestions for such programs by Sen. Kennedy and others, S. 1291, 96th Cong., 1st Sess. (1979).

302. For a listing of OMB Circulars, see 5 C.F.R. pt. 1310 (1982). OMB Circulars are the usual standard for agency financial operations, and would be expected to have more of a following in the agencies than occasional Justice missives.

303. *1963 FOI Hearings*, *supra* note 34.

304. Robert Saloschin, Address to Federal Bar Assn., 8th Annual Conference on Openness in Government, Mar. 16, 1982.

305. Miller & Cox, *supra* note 178, and Koch & Rubin, *supra* note 178.

of a policy precedent with each adjudication, other agencies might learn from the ombudsman. But a policy creation role comes easier to a commission, which would set the policy, monitor its adoption by agencies, and assist in its implementation as an adviser to the agencies.³⁰⁶ A commission delivers more predictable outcomes faster, touches more agencies more consistently, and balances out the temptation to be a "captured" advocate. "Capture" is usually used in the industrial regulatory sense,³⁰⁷ but in the context of an ombudsman it is inevitable that a disclosure advocacy role will pull the new agency out of the balance which a policy establishment role demands.³⁰⁸

Students of the ombudsman concept would do well to watch the new official in Canada, the Information Commissioner.³⁰⁹ The new Access Law in Canada creates an administrative appeal, not to the agency but to an administrative officer with investigative and adjudicative powers.³¹⁰ The Information Commissioner's vast geographical and administrative agency jurisdiction in Canada will demand a large staff and travel budget. At present, it does not seem likely to have the necessary funding. If it does and if the work is generally accepted, then the commission or the ombudsman proposals may be seriously studied here.³¹¹

It is significant that Canada's procedures and substance are better crafted than any United States counterpart. Canada tried to learn from the United States experience, adopting instead a better commercial data standard than the United States court-created "substantial competitive harm" standards.³¹² It protects trade secrets per se, information of a private commercial nature "treated consistently in a confidential manner" by the submitter, contract negotiation information, and information which "could reasonably be expected to prejudice the competitive position" of the submitter.³¹³ The effort in the United States to adopt an equivalent to the Canadian method failed

306. This would have been the role of the Privacy Protection Study Commission had it been made permanent, but it lapsed in 1977. Pub. L. No. 93-579 § 5, 88 Stat. 1909 (1974).

307. The theory of capture asserts that the agency regulating in a particular field becomes an advocate of the constituents with whom it deals rather than the other interests which it should factor into its overall activities. Though the "capture" theory is not always followed, S. BREYER, *supra* note 242, at 10, the phenomenon would inevitably occur with a special agency advocating requesters against the government.

308. The advocacy of the requester inherent in an ombudsman approach will inevitably sway the perspective of the office away from competing interests such as the rationales for exempt information's nondisclosure.

309. Access to Information Act, § 54, Bill C-43, 32d Parliament, 1st Sess. (1982). The Act and its companion Privacy Act were passed by the House of Commons on June 28, 1982 and will be codified after Proclamation of the bill in 1982-83.

310. *Id.* §§ 35-36.

311. The Canadian Manufacturers Association and other trade groups which worked on the bill did not oppose the Information Commissioner. However, more funds will be needed and since provincial-federal disputes may be expected, the task of the Commissioner will be a difficult one.

312. Access to Information Act, *supra* note 309, § 18. O'Reilly, *Canada's Access Legislation*, FREEDOM OF INFORMATION CENTER REPORT NO. 438 (1981).

313. Access to Information Act, *supra* note 309, § 18.

in May 1982.³¹⁴ And until Congress chooses to legislate, there will be neither a clear policy nor an ombudsman to enforce it. Until more experience with Canada's system is available, the commission or ombudsman system is not ripe for use in the United States.

Likely Opponents of a Policy Drafting Agency

With so many suitors, the information policy role would seem to be a prize. But the creation of a policy attracts opponents. During the 1982 legislative process for reform of the FOIA, opponents of changes drew in the heavyweight press lobbying effort to stall any amendments.³¹⁵ The same attacks could occur with a policy drafting agency.

An agency which initiates an information disclosure policy would expect media opposition. The media has paid little attention to the PRA, and has been unwilling to accept change to the FOIA.³¹⁶ The dangers of diversity in agency disclosure discretion are dangers for any operating organization, including the press. Profit data filed in Newspaper Preservation Act³¹⁷ proceedings, new printing machinery described in Occupational Safety and Health Act reports, faster drying inks listed in chemical ingredient detail by the National Institute of Occupational Safety and Health,³¹⁸ and telecommunications expansion plans of broadcasters³¹⁹ are as much at risk of agency discretionary release as any other private person's sensitive information.

Talismanic defenses of the "right to know" often fall short of analysis of the operational problems of the FOIA itself. The ideal is short of the administrative reality. Lofty defenses have a fine tone but a myopic unreality in the context of haphazard federal discretion to release documents of individuals, unions, firms, and organizations about their private activities. All agree that the FOIA has not been administratively smooth in terms of operating difficulties at the headquarters and regional levels.³²⁰

Another problem for the policy creator is that courts have become

314. The substantive change was dropped in the May 1982 Senate Judiciary Committee passage of S. 1730.

315. The American Civil Liberties Union and Ralph Nader's numerous groups were the principal opponents of the reform legislation, S. 1730. Assistance from the newspaper trade associations aided the opposition to reverse the bill which had passed the Subcommittee on the Constitution of the Senate Committee on the Judiciary in December 1981.

316. Testimony of press groups was uniformly against amendment of the FOIA, in *1981 FOI Hearings, supra* note 61.

317. Pub. L. No. 91-353, 84 Stat. 466 (1970) (codified at 15 U.S.C. § 1801 (1976)).

318. NIOSH studies plant conditions for airborne mission exposure levels under the National Occupational Hazards Survey, 42 C.F.R. pts. 85 and 85a (1981). Ink emitted from newspaper printing plants during cleanout operations is a toxic pollutant, 40 C.F.R. pt. 403 App. C. So the competitor of the newspaper would be able to learn of its innovations from the federal data.

319. 47 C.F.R. § 21.17 (1981) would require filing of sensitive financial data for the news owner's broadcast affiliate.

320. The difficulties have ranged from ignorance to disagreement with the Act; the training functions of the Office of Personnel Management lessened the former but cannot change the latter.

accustomed to the free rein which Congress gave to the courts under the FOIA. Reining in agency discretion does not guarantee that the courts' adventuresome redefining of ambiguous statutory terms will stop.³²¹ A central policy would be very constructive and would go a long way to structuring the informational interactions of government, submitters, and requesters, but courts are unpredictable. What is certain is that a government body entrusted with the administration of the information policy is certain to face many of the same obstacles faced by the various agencies now responsible for FOIA implementation.

CONCLUSION

An information disclosure policy of the federal government simply does not exist. The current diversity of federal agencies' policies regarding the handling of private information grew without statutory rhyme or reason. The lack of direction contributes to a suspicion which renders the collection and use of private sector information more difficult for all federal agencies. The suspicion could be significantly alleviated by a uniform federal policy on disclosure standards.

Much of the current federal information policy is a transient response to a permanent, non-transient tension. Efficient administration requires decisions to be made on adequate documentation. Business owners regard multiple forms for multiple tax and regulatory programs as a deterrent from productive work and as an intrusion on business privacy.³²² Individuals affected by federal benefits often resist the ways in which government screens its potential recipients. The tension between collectors and sources endures; the responses vary.

A federal disclosure policy would address the circumstances under which agencies would or would not maintain confidential private information as confidential. Agencies would make personal information security and disclosure decisions under the uniform policy, except where the Privacy Act mandate eliminated discretion. Organizational privacy information not covered by the Privacy Act would be subject to uniform discretion standards, except where the FOIA or another statute dictated a specific disclosure or nondisclosure.

The Paperwork Reduction Act is a remarkable tool for development of a consistent federal policy on information because it combines in one place the functions of input of information to the agency, processing within the agency, and disclosure by the agency.³²³ Principal aspects of the PRA are the review of federal requests for informa-

321. Pub. L. No. 91-353, 84 Stat. 466 (1970) (codified at 15 U.S.C. §§ 1801-04 (1976)). No administrative policy change can alter the Article III constitutional power of federal courts to independently construe the FOIA during resolution of specific controversies under the FOIA.

322. This was uniformly the opinion expressed by the small business community in particular. *1979 Paperwork Burden Hearings*, *supra* note 130.

323. And this is the PRA's carefully constructed intention, agreed to by both Houses, *see* S. REPT. No. 930, *supra* note 189, H.R. REPT. No. 835, 96th Cong., 2d Sess. (1980), and stated in the PRA, 44 U.S.C.A. § 3501 (West Supp. 1982).

tion,³²⁴ screening of these request forms to lessen their burdens whenever possible,³²⁵ facilitation of inter-agency exchanges of information,³²⁶ and guidance by OMB in information gathering, storage, and disclosure.³²⁷

Of the agencies which are available, the Office of Management & Budget is most likely to do a comprehensive, prompt, and fair job on such a policy. OMB alone has current statutory power under its Paperwork Reduction Act "privacy functions" to control government-wide disclosure policy. That PRA power should be implemented promptly by the top management of the Office of Management & Budget, using current resources and enlisting an inter-agency group of contributors where needed to formulate the best possible central policy.

324. 44 U.S.C.A. § 3504(c)(1) (West Supp. 1982).

325. *Id.* and § 3504(c)(2).

326. *Id.* at § 3511.

327. *Id.* at § 3504(b).