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AN FBI VIEWPOINT REGARDING THE FREEDOM OF INFORMATION ACT

*William H. Webster**

INTRODUCTION**

When former President Lyndon B. Johnson signed the Freedom of Information Act (FOIA) into law on July 4, 1966, his action inaugurated a new era of public access to records maintained by the federal government's executive branch.¹ "This legislation," Johnson stated, "springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the [n]ation permits . . ." ²

Although the Act became effective one year later, initially few people used it to obtain government records because the public was probably unfamiliar with its provisions or even its existence.³ Also, the Act exempted many records from dissemination. The FBI seldom received a processable FOIA request since the statute exempted investigatory files.

By the early 1970's, popular concerns about government secrecy in general, and bureaucratic intractability in complying with the FOIA in particular, sparked Congressional debate regarding the Act. Ultimately, to make the FOIA more effective and responsive to public desires, Congress amended the law in 1974.⁴ As a result of these amendments, federal law enforcement agencies⁵ were required to disclose records that had been exempted from FOIA disclosure.

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**To preclude the possibility of violating the privacy rights of individuals whose identity would not otherwise be widely known, the FBI has adopted a policy of not disseminating the specific details of any given case whenever possible. In addition, in those instances in which the FBI's experience or internal records serve as the basis for a fact or statement set forth within the article, no citation has been used. While the article which follows is therefore not footnoted in the traditional manner, in the opinion of the FBI and the editors its utility is not adversely impaired.

1. 5 U.S.C.A. § 552 (1976 and Supp. 1979).
2. President's message: "Availability of Government Records and Information," 2 Weekly Comp. of Pres. Doc. 895 (July 11, 1966).
3. Requests for information from the FBI pursuant to the FOIA for the years 1967 through 1972 totaled approximately fifty. Requests for the subsequent years are as follows:

1973	64	1977	18,026
1974	447	1978	18,084
1975	13,881	1979	14,925
1976	15,778		
4. 5 U.S.C. § 552(b)(7) (1976) (originally enacted as Pub. L. No. 93-502, 88 Stat. 1561). This amendment substituted "investigatory records" for "investigatory files." Also, segregable portions of records no longer fell under the exemptions.
5. *E.g.*, the FBI, the Bureau of Alcohol, Tobacco and Firearms, the Drug Enforcement Administration and the United States Secret Service.

Congress intended the 1974 Amendments to strike a better balance between the need to disclose information to ensure an informed citizenry and the need to protect information in the interests of national security and effective law enforcement.

Our experience establishes that the 1974 amendments have not met that goal. Instead, the balance favors disclosure. While the FBI is committed to the basic concept of public disclosure, the FOIA continues to have a debilitating effect on FBI investigative operations. Undeniably, the release of information has produced a better understanding of FBI activities; but the requirement that we review and disclose information from raw investigative files increases the danger of releasing sensitive information. Moreover, responding to FOIA requests has placed overwhelming demands on FBI resources, which, in turn, adversely impacts both on our FOIA responses to the public and on our investigative capabilities.

THE FOIA—ITS HISTORY AND APPLICABILITY TO FBI RECORDS

Legislation addressing maintenance of government records in this country can be traced at least as far back as passage of the Housekeeping Acts of 1789.⁶ These laws, which gave all federal offices the authority to establish recordkeeping and retrieval systems, were not significantly altered until passage of the Administrative Procedure Act of 1946 (Section 3) which addressed access to records.⁷ None of these laws, however, provided broad public access to federal records. In 1958, to extend public access, Congress passed a law amending the original 1789 records legislation to state that it did “not authorize withholding information from the public or limiting the availability of records to the public.”⁸

Despite this legislation, most agencies continued to adhere to individual interpretations of both the “housekeeping statute” and Section 3, and refused to release any records unless a person could present a compelling “need to know.” Determined to ensure more liberal access, Congress, in 1966, passed the Freedom of Information Act as an amendment to the Administrative Procedure Act. The legislation was codified in 5 U.S.C.A. § 552 and, for the first time, there were workable standards concerning just what records were available and how the records could be obtained. The “need to know” test was replaced with the “right to know” standard. Additionally, there were judicial remedies for persons illegally denied access.⁹ To prevent public access

6. Later incorporated into 5 U.S.C. § 301 (1976) by Pub. L. No. 89-554, 80 Stat. 379.

7. 5 U.S.C. §§ 551-559 (1976).

8. 5 U.S.C. § 301 (1976) (originally enacted as Pub. L. No. 85-619, 72 Stat. 547, amending 5 U.S.C. 22 (1946)).

9. 5 U.S.C.A. § 552(a)(4) (1976 and Supp. 1979).

from going too far, the Act contained nine specific exemptions to the mandatory release of information to protect certain data such as national defense secrets, confidential business information, and investigatory files.¹⁰

Under one of the nine exemptions, 5 U.S.C. § 552(b)(7), the FBI's investigatory files were exempted from the Act's provisions. As a result, the Bureau seldom received an FOIA request to which we were required by the law to respond, and we were able to meet our responsibilities with fewer than ten full-time employees.

Congress, in the early 1970's, moved by what it perceived as major shortcomings in federal compliance with the FOIA, conducted a series of hearings.¹¹ The Congress decided that FOIA problem areas, such as bureaucratic delay in complying with requests and the charging of excessive fees for locating and copying documents, could best be remedied by even more definitive legislation.

In 1974, Congress passed a series of amendments to the FOIA of 1966, thus revising 5 U.S.C. § 552. When the amended law took effect in February, 1975, it was, as before, to apply only to agencies of the federal government's executive branch.¹² As a result of the amendments, these agencies were now required, for example, to answer requests for information faster and more completely, and to charge standardized and reasonable fees for those services.¹³ In addition, language was revised in the nine exemptions. Changes in Exemption (b)(7), designed to cover law enforcement records, greatly affected the FBI. Now, investigatory records could be withheld only if the dissemination could result in any of six harms listed below. More important, the language of the provisions was changed to cover investigatory "records" rather than

10. 5 U.S.C. §§ 552(b) (1976). This provision reads as follows:

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

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

(2) related solely to the internal personnel rules and practices of an agency;

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

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

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

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

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

11. *U.S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act* (Parts 4-6): *Hearings Before the Subcomm. of the House Comm. on Government Operations*, 92d Cong., 2d Sess. (March-April 1972).

12. 5 U.S.C. § 551 (1976).

13. 5 U.S.C. § 552(a)(6) (1976) as amended by Pub. L. No. 93-502, 88 Stat. 1561.

investigatory "files." Entire files no longer were exempted; they had to be reviewed as to each record they contained, and any harmless record or portion thereof that could be reasonably segregated from potentially harmful data had to be provided to any requester.

The amended provision, which remains in effect today, exempts from disclosure

. . . investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.¹⁴

THE IMPACT OF THE FOIA ON THE FBI

The FOIA, for all of the benefits it has provided, has engendered substantial administrative and investigative problems impacting both on the FBI and on the American public.

A. Administrative Problems

The FBI has experienced great difficulty in responding to requests within the time presently required by the Act. This has produced public dissatisfaction and caused the FBI temporarily to reallocate needed investigative manpower to ease backlogs of requests.

Federal agencies are required to respond to FOIA requests within ten working days regardless of the amount of work required to respond.¹⁵ In some instances a ten-day extension is possible.¹⁶ Requests can come not only from American citizens but from "any persons," including even citizens of hostile foreign countries.

Given the number of people assigned to handle FOIA matters at the present time, our ability to respond to requests within the specified time depends principally on the volume of requests we receive and the amount of searching and review required to meet the requests.

The FBI receives an average of sixty new requests for records daily. Some requests can be handled quickly and easily since we either do not have the data the requester is seeking or it is a very simple matter to search Bureau files for pertinent data and to review it for release. However, in other instances, such as the Julius and Ethel Rosenberg case, we must retrieve and review thousands of documents.

14. 5 U.S.C. § 552(b)(7) (1976).

15. 5 U.S.C. § 552(a)(6)(A) (1976).

16. 5 U.S.C. § 552(a)(6)(B) (1976).

The FBI has no computer system in use through which we can instantly retrieve records for FOIA processing. Both the searching of our card index system and the retrieval of records are done manually. Moreover, there is no machine that can conduct the tedious and careful review of documents – a line-by-line review to ensure that the requester receives all the information to which he or she is entitled but that no exempted information is inadvertently disclosed.

Despite the fact that we have in excess of 300 persons at FBI Headquarters handling FOIA matters, the volume of requests has become overwhelming. This is due principally to requests requiring extensive file searches and reviews that cannot reasonably be completed within the ten-day or within the twenty-day response period. Such requests create a backlog because, under the first-in, first-out system we employ, we must complete them before we handle any other requests, whether they are easy or complex. A 1978 study¹⁷ by the General Accounting Office (GAO), the investigative arm of Congress, stated that the regular ten-day time limit did not appear to be sufficient, but it offered no recommendations indicating how we could speed up our responses.

Citizens understandably become dissatisfied when they do not promptly receive requested data. This dissatisfaction sometimes precipitates lawsuits which themselves aggravate our response problems.¹⁸ The time spent responding to lawsuits represents time lost in responding to FOIA requests.

Our administrative problems have precipitated investigative problems. In order to alleviate the backlog of overdue requests, we have been forced temporarily to reallocate agents from our already limited investigative complement. In addition, some sensitive information, such as that which could identify a confidential source, may be disseminated by mistake when the all-important review process is hastily conducted to meet a deadline.

B. Investigative Problems

Aside from the impact that administrative problems have on investigations, the FOIA impinges on the FBI's investigative capabilities in two other significant ways. First, it affords criminals and hostile foreign governments access to investigative "trade secrets." Second, it inhibits the vital free flow of information to the FBI from the public and especially from confidential sources.

Under the law in its present form, any person can request information from the internal FBI manual that outlines the manner in which our investigations are conducted. The courts disagree on whether FOIA exemptions may be cited to protect such information.¹⁹ Therefore, it is possible that a criminal intending to avoid detection or arrest would use the FOIA to learn FBI investigative procedures and techniques. For example, we have received many requests for

17. General Accounting Office, "Report by the Comptroller General of the United States: Timeliness and Completeness of FBI Responses to Requests Under Freedom of Information and Privacy Acts Have Improved" (April 10, 1979).

18. *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976). *Cleaver v. Kelly*, 415 F. Supp. 174 (D.D.C.), *vacated and remanded per curiam* No. 76-1831 (D.C. Cir. Nov. 23, 1976), *on remand* 427 F. Supp. 80 (D.D.C. 1976). *Exner v. Federal Bureau of Investigation*, 542 F.2d 1121 (9th Cir. 1976).

19. *See, e.g. Sladek v. Bensinger*, 605 F.2d 899 (5th Cir. 1979), *Caplan v. Bureau of Alcohol, Tobacco and Firearms*, 587 F.2d 544 (2nd Cir. 1978), *Cox v. Department of Justice*, 601 F.2d 1 (D.C. Cir. 1979), *Cox v. Department of Justice*, 576 F.2d 1302 (8th Cir. 1978), *Cox v. Levi*, 592 F.2d 460 (8th Cir. 1979), and *Jordon v. Department of Justice*, 591 F.2d 753 (D.C. Cir. 1978).

information from our manuals from prisoners – persons who might be requesting the information for legitimate purposes but who could also use it to defeat our law enforcement efforts. Other criminals, foreign governments, and terrorists can obtain this same information.

Perhaps a more pressing investigative problem the FOIA poses for the FBI is the declining flow of information to the FBI from potential sources. The FBI's ability to discharge its responsibilities, which include sensitive investigations in terrorist, organized crime, and foreign counterintelligence activities, depends in large measure on the willingness of people to furnish information to us. To the extent that the FOIA inhibits persons from providing crucial criminal or counterintelligence information, even if the individual's perception of the disclosure possibilities is exaggerated, our effectiveness is impaired.

We are not suggesting, of course, that every person who is reluctant to provide us with information is intimidated by the FOIA. However, we have found that many potential sources refuse to provide us with information because they fear disclosure under the FOIA. These people are not only confidential informants, but also private citizens, businessmen and representatives of municipal and state governments, including police departments.

The possible disclosure of a source's identity is a particularly grave concern to the FBI. Despite the presence of Exemption (b)(7), many potential informants are reluctant to provide information because they fear that FOIA provisions permit release of enough information so that a requester can deduce the identity of an informant. This fear is not unfounded. We have learned of instances of prisoners attempting to use the data they receive to identify informants. About 15.3 percent of our FOIA requests in Fiscal Year 1979 were made by or on behalf of prisoners, persons who may or may not have been attempting to identify informants. The number of these requests is growing as evidenced by the fact that just over a year ago only nine percent of requests were made by or for inmates. Nothing in the present FOIA prevents organized crime groups, terrorist organizations, or representatives of hostile foreign governments from engaging in similar source identification efforts. Any requester who possesses the time and resources can examine documents for clues that could identify an informant.

The FOIA-related reluctance of potential informants to cooperate with the FBI is illustrated in the following examples:

A confidential source in a position to furnish information concerning Middle East terrorist matters advised that he did not desire to continue contact with any representative of the FBI or to furnish information because of fears that his assistance might become known. The source stated that his concern was due to various media articles relating to actual or potential FOIA disclosure of information furnished confidentially to law enforcement agencies.

An informant of one FBI office expressed concern that individuals about whom he was providing information were requesting their FBI files under the FOIA. This informant also expressed fear for his personal safety and that of his family. He had provided reliable and corroborating information about individuals who have been convicted of federal crimes, but recently there has been a reduction in amount and quality of his information.

Another field office informant related a conversation that occurred between himself and several organized crime figures. One individual commented that within the next few years the FBI will be severely restricted in its efforts to obtain information from confidential sources. He stated that he fully expected

the provisions of the FOIA would be successfully utilized in identifying FBI informants. Agents subsequently contacting this valuable source have noted a subtle reluctance on his part to more fully penetrate the particular organized crime circles which he is in a position to cover.

In addition, some state and local law enforcement agencies have become reluctant to share information with the FBI as is evidenced by the following case:

An FBI office noted a trend to exclude agents working organized crime matters from key intelligence meetings in their area. Several state and local law enforcement officers mentioned a concern for the security of information in connection with the FOIA disclosure as the reason for the closed meetings. The office undertook efforts through meetings with state and local law enforcement agencies to improve their understanding of the FOIA legislation. These efforts have not met with complete success.

By the late 1970's, some members of Congress recognized that federal law enforcement agencies were experiencing problems obtaining information due to the FOIA as well as the Privacy Act of 1974,²⁰ which was designed to control the federal government's collection and use of information about private citizens. Therefore, in April, 1978, Congress requested a special GAO report on the effects of the FOIA and the Privacy Act upon these agencies.

The GAO solicited information from the FBI, the Drug Enforcement Administration, the Bureau of Alcohol, Tobacco and Firearms, the United States Secret Service, and the Civil Service Commission (now known as the Office of Personnel Management). Each agency was requested to comment upon the Acts and to document its problems, where possible, with actual cases. The GAO also contacted state and local law enforcement agencies in three states to determine how the FOIA and the Privacy Act were affecting their interactions with the above federal agencies. The GAO report was issued on November 15, 1978.²¹ In part, it said:

We believe that the examples provided by the FBI show that, in some specific cases, it has taken the FBI longer to apprehend a criminal, that the FBI has had to spend additional agent hours collecting and/or verifying information, that the public has been increasingly reluctant to cooperate, and that some criminals are using the acts to try to obtain sensitive information from law enforcement agencies. The examples, however, do not show that the FBI or other law enforcement agencies have been unable to fulfill their investigative responsibilities.²²

It is difficult for us to conclusively prove that the FOIA has caused a significant drop in the amount of investigative assistance we receive from informants, concerned citizens, law enforcement agencies and others. In many cases we will never be sure why a source, or a potential source, of information declined to provide vital information to us. We have offered, however, substantial documentation to support this belief in our submission to the GAO and in our proposals for amendments to the FOIA.

20. 5 U.S.C. 552(a) (1976).

21. General Accounting Office, "Report of the Comptroller General of the United States: Impact of the Freedom of Information and Privacy Acts on Law Enforcement Agencies" (November 15, 1978).

22. *Id.* at 14.

**THE FBI'S PROPOSALS
TO AMEND THE FOIA**

In order to remedy the administrative and investigative problems outlined, the FBI drafted, in response to Congressional inquiries and interest, a set of proposals²³ to amend the FOIA. In June, 1979, with the consent of the Attorney General, the proposals were submitted for review by the Bureau's various oversight committees on Capitol Hill.

The proposals represent an endeavor to refine the FOIA, not to repeal it. While the proposals do not necessarily represent the views of the Department of Justice, which may formally propose its own set of modifications, the FBI and the Department will work together with Congress toward a balanced solution of FOIA problems.

None of our proposals suggests more changes than necessary to protect fundamental law enforcement interests. For example, existing time limits for responding to requests would be changed to establish a relationship between the amount of work required in responding to requests and the amount of time permitted to do the work. The proposals also would change the law to permit, rather than require, the FBI to disclose its records to felons and citizens of foreign countries. Additionally, the FBI proposes deleting the requirement that a record be an investigatory record before it can be protected under Exemption (b)(7). This proposal would enable the FBI to protect such noninvestigatory records as manuals and guidelines to the extent the production of them would cause any of the harms specified in Exemption (b)(7), such as the disclosure of investigative techniques or interference with enforcement proceedings.

The proposals would divide all FBI records into two categories. The first would consist of the most sensitive information the FBI possesses: records pertaining to foreign intelligence, foreign counter intelligence, organized crime, and terrorism. The proposals would exempt them from the mandatory disclosure provisions of the Act. To protect the interests of historical researchers, Title 28, Code of Federal Regulations, Section 50.8²⁴ which provides for access to files over fifteen years old of historical interest, will remain in effect with respect to these sensitive records.

All other FBI records would be in the second category and subject to the Act's mandatory disclosure provisions.

Several proposals are designed specifically to reestablish the essential free flow of information from the public to the FBI. Our proposal specifies that state and municipal agencies and foreign governments merit confidential source protection when they provide information on a confidential basis. Additionally, in order that informants' identities may be protected to a greater extent through the passage of time, the FBI has proposed a moratorium on the release to anyone of law enforcement records pertaining to law enforcement investigations. Under this plan the FBI will not be required to release such records for seven

23. Many of the proposals, along with some related suggestions offered by the Central Intelligence Agency, have been incorporated into H.R. 5129, 96th Congress, 1st Session, introduced on August 2, 1979. The FBI proposals have also been incorporated into S. 2086 and S. 2087, 96th Congress, 1st Session, introduced on November 29, 1979.

24. 28 C.F.R. § 50.8 (1979).

years after termination of the investigation without prosecution or seven years after prosecution. The FBI will not use the proposed moratorium in concert with a file destruction program in order to frustrate the FOIA.²⁵ Finally, to clearly permit us to withhold seemingly innocuous facts which standing alone may not identify a source, but which could do so when combined with other information, our proposal would allow us to withhold information which would *tend* to identify a source. This proposal is consistent with the suggestion of several courts²⁶ and conforms closely to what we believe was the original intent of Congress.²⁷

The FBI proposals are not overly restrictive. They would not diminish the rights and privileges a criminal defendant or civil litigant now possesses under the rules of civil and criminal procedure, nor would they limit or restrict in any way the power of the Department of Justice, Congress, or the Courts to oversee any FBI activity. What they would do is make those adjustments to the Act that reason and experience suggest are needed to alleviate administrative and investigative problems impacting on both the FBI and the public.

CONCLUSION

We do not question the need for the FOIA. However, Congress must ensure that it operates for the greatest good of the American public. As long as the FOIA continues to inhibit effective law enforcement, we will not have the proper balance between the public's right to know and the public's right to be secure. Unless the FOIA is amended to correct this imbalance, the best interests of the American people will not be served.

25. Since 1946, the FBI, with the approval of the National Archives and Records Service (NARS), has been engaged in a systematic destruction of obsolete records located in the FBI field offices. While no comparable program has ever existed for FBI Headquarter files, a proposed record retention plan was submitted to NARS by the FBI in May, 1977. Pursuant to Federal Law, NARS submitted the proposed plans to Congress, which has not acted on the plans up to the present time. On June 25, 1979, suit was filed in the Federal District Court for the District of Columbia seeking both preliminary and permanent injunctions halting the destruction of all FBI files and records (American Friends Service Committee, *et al.* v. William H. Webster, *et al.*, No. 79-1655, (D.D.C. filed June 25, 1979) (order granting preliminary injunction granted January 10, 1980). On January 10, 1980 Judge Harold H. Greene issued a preliminary injunction in the case and ruled in a memorandum opinion that the FBI field office and proposed Headquarters' file destruction programs did not meet the requirements of the Federal Records Management Statute. (44 U.S.C. § 2103, *et seq.* (1976)).

The order issued in this lawsuit requires the Archivists of the United States (NARS) and his staff with the assistance of the FBI to formulate a retention plan for FBI records meeting the statutory standard as interpreted in the memorandum opinion, and it requires the FBI to formulate records controls schedules consistent with that plan. The court noted that the preliminary injunction will remain in effect until the court approves the plans and schedules as formulated by the FBI and the NARS.

The preparation of this new plan will of necessity take into account the FOIA to ensure that the purpose and intent of the FOIA are not frustrated.

26. *Nix v. United States*, 572 F. 2d 998 (4th Cir. 1978), *Church of Scientology v. Department of Justice*, 410 F. Supp. 1297 (C.D. Cal. 1976), and *Mitsubishi Electric Corp., et al., v. Department of Justice*, No. 76-0813 (D.D.C., 1977).

27. The original intent of Congress concerning sources was summed up by the author of Exemption (b)(7)(D), the late Senator Philip A. Hart, who stated that the Exemption "protects without exception and without limitation the identity of informers. It protects both the identity of the informer and information which might reasonably be found to lead to such disclosure. These may be paid informers or simply concerned citizens who give information to law enforcement agencies and desire their identity to be kept confidential." For full text see 120 Cong. Rec. 17034 (1974).