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THE 1974 AMENDMENTS TO THE FREEDOM OF INFORMATION ACT: THE SAFETY VALVE PROVISION § 552(a)(6)(C) EXCUSING AGENCY COMPLIANCE WITH STATUTORY TIME LIMITS—A PROPOSED INTERPRETATION

Marc I. Steinberg*

I. Introduction

In 1974, Congress amended the Freedom of Information Act.¹ The overriding purpose of this legislation was to secure more efficient, timely, and complete disclosure of information.² With respect to this goal, Congress recognized that excessive delay by an agency in responding to a request was frequently tantamount to a denial of the request.³ To remedy this defect, legislation was enacted which required the affected agencies to reply to inquiries and administrative appeals within specified time periods.⁴

Thus, 5 U.S.C. § 552(a)(6)(A) was amended to provide:

Each agency, upon any request for records . . . shall—

(i) determine within ten [working] days . . . after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination. . . .

(ii) make a determination with respect to any appeal within twenty [working] days . . . after the receipt of such appeal. . . .

These time limits of § 552(a)(6)(A) were first qualified by subparagraph (B). Subparagraph (B) provides that when "unusual circumstances" are present, such as where records must be collected from field facilities which are separate from the processing office, or where the request entails the need to search for and examine a voluminous number of records, then the applicable time limits may be extended for a period not exceeding an additional ten working days.⁵ Thereafter,

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¹ Act of November 21, 1974, Pub. L. No. 93-502, § 1(G), 88 Stat. 1561, *amending* 5 U.S.C. § 552(a) (1970).

² Thus, one of Congress' primary interests in enacting the amendments was to "expedite the handling of requests from Federal agencies in order to contribute to the fuller and faster release of information, which is the basic objective of the Act." H. R. REP. NO. 93-876, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6267.

³ *Id.* at 6271.

⁴ See 5 U.S.C. § 552(a)(6)(A)-(C) (Supp. IV. 1974).

⁵ In full, 5 U.S.C. § 552(a)(6)(B) provides:

In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

an applicant who has neither received the information requested nor had his request denied "shall be deemed to have exhausted his administrative remedies with respect to such request"⁶ and shall be entitled to file suit in federal district court pursuant to § 552(a)(4)(B).

In order to relieve the affected agency from complying with subparagraph (B)'s short extensions under narrow circumstances, Congress further qualified § 552(a)(6)(A) by subparagraph (C), a "safety valve" provision, which states:

If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records.

Thus, even under § 552(a)(6)(C), the safety valve provision, ultimate access to the records requested is never the question.⁷ Rather, the issue is the time within which the agency must comply with or deny an informational request. Thus far, only a very few courts have been presented with an opportunity to construe § 552(a)(6)(C).⁸ Even though these courts relied upon the same legislative history, they have nevertheless reached opposite conclusions.⁹

A proper construction of § 552(a)(6)(C) is vital for the 1974 amendments to achieve their intended purpose. As Congress recognized, "information is often useful only if it is timely."¹⁰ With this statement in mind, it becomes evident that an overly broad construction of the safety valve provision would hinder Congress' goal of achieving prompt public access to official information.¹¹ Drawing from this congressional purpose and judicial decisions which have already interpreted the safety valve provision, this article attempts to provide the proper approach for construing § 552(a)(6)(C). In developing this approach, it must be emphasized that there exists no simplistic solution to this troublesome question. Rather, the solution rests on interpreting vague legislative history to satisfy, as much as is pragmatically possible, the fundamental goal which Congress clearly expressed when enacting the 1974 amendments—"the goal of more efficient, prompt, and full disclosure of information. . . ."¹²

II. Proper Construction of § 552(a)(6)(C)

This portion of the article provides an approach for interpreting §

6 5 U.S.C. § 552 (a)(6)(C).

7 Although ultimate access is not the question, as Congress recognized, excessive delay by the agency often can be equivalent to the agency denying the request. *See* H. R. REP. NO. 93-876, *supra* note 2, at 6271. This consequence attending excessive delay is elaborated upon throughout the article.

8 *Exner v. FBI*, 542 F.2d 1121 (9th Cir. 1976); *Open America v. Watergate Special Prosecution Force*, No. 76-1371 (D.C. Cir. July 7, 1976); *Cleaver v. Kelly*, 415 F. Supp. 174 (D.D.C. 1976); *Hayden v. United States Dep't of Justice*, 413 F. Supp. 1285 (D.D.C. 1976); *Fonda v. United States Dep't of Justice*, No. 76-0289, (D.D.C. —, 1976).

9 *Compare* *Exner v. FBI*, 542 F.2d 1121 (9th Cir. 1976) and *Hayden v. United States Dep't of Justice*, 413 F. Supp. 1285 (D.D.C. 1976); *with* *Open America v. Watergate Special Prosecution Force*, No. 76-1371 (D.C. Cir. July 7, 1976) and *Cleaver v. Kelly*, 415 F. Supp. 174 (D.D.C. 1976).

10 H. R. REP. NO. 93-876, *supra* note 2, at 6271.

11 This point was astutely recognized by Judge Leventhal in his concurring opinion in *Open America*.

12 H. R. REP. NO. 93-876, *supra* note 2, at 6271.

552(a)(6)(C). Under § 552(a)(6)(C), the government must satisfy two criteria before the court may consider granting it additional time to comply with or deny an informational request. First, the government must show exceptional circumstances exist. Second, the affected agency must prove that it is exercising due diligence in responding to the request. Once the government fulfills these two requirements, the question arises whether the court still has discretion to deny the agency additional time or whether it *must* allow such an extension of time.

A. *Logistical Obstacles Excusing Compliance with § 552(a)(6)(A) and (B)*

Before the merits of these questions are examined, a preliminary issue must be considered. The Dept. of Justice, and particularly the FBI, have indicated that even if they are unable to show the existence of exceptional circumstances and the exercise of due diligence, the large number of informational requests and the lack of available personnel have made it virtually impossible for them to comply with the time periods provided under the amendments.¹³ Hence, a court order requiring strict compliance with the relevant time limits would render the Dept. of Justice and the FBI incapable of complying with such an order.

Under such circumstances, noncompliance would not necessarily subject these defendants to a contempt order.¹⁴ As the Supreme Court and the circuit courts have recognized, "[i]t would be unreasonable and unjust to hold in contempt a defendant who demonstrated that he was powerless to comply."¹⁵ It must be stressed, however, that the ability of an equity court to refrain from exercising the contempt sanction when the defendant is incapable of performing, must not influence that court's obligation to interpret the applicable statute to fulfill its legislative intent.¹⁶

13 See *Open America v. Watergate Special Prosecution Force*, No. 76-1371; *Cleaver v. Kelly*, 415 F. Supp. at 175. See also Brief for Appellants at 19-20, *Exner v. FBI*, 542 F.2d 1121 (9th Cir. 1976).

14 *Open America v. Watergate Special Prosecution Force*, No. 76-1371, slip op. at 5-6 (Leventhal, J., concurring in the result). It is arguable, however, that the affected agency should be ordered to reallocate additional funds and personnel to process informational requests. See notes 53-55, 118-28 *infra* and accompanying text.

15 *Nat'l Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1975). *Accord*, *Maggio v. Zeitz*, 333 U.S. 56, 72-73, 73 n.6 (1948). As stated in the *Train* decision:

A federal equity court may exercise its discretion to give or withhold its mandate in furtherance of the public interest, including specifically the interest in effectuating the congressional objective incorporated in regulatory legislation. We think the court may forbear the issuance of an order in those cases where it is convinced by the official involved that he has in good faith employed the utmost diligence in discharging his statutory responsibilities. The sound discretion of an equity court does not embrace enforcement through contempt of a party's duty to comply with an order that calls him "to do an impossibility."

Nat'l Resources Defense Council, Inc. v. Train, 510 F.2d at 713.

16 See *Public Serv. Comm'n of N.Y. v. Federal Power Comm'n*, 511 F.2d 338 (D.C. Cir. 1975). The court stated that "the reviewing court's duty to 'assure fidelity to the functions assigned to the regulatory agency by Congress' requires that it hold the agency to its duty to give reasoned consideration to the facts and issues material to its determinations." *Id.* at 354, quoting *Public Serv. Comm'n of N.Y. v. Federal Power Comm'n*, 487 F.2d 1043, 1079-80 (D.C. Cir. 1973).

B. Guidelines for Analyzing § 552(a)(6)(C)

Since courts must construe § 552(a)(6)(C) according to its congressional mandate even though noncompliance would not necessarily subject the defendant to contempt, one should analyze the statutory provision within the following organizational guidelines. First, are exceptional circumstances present? Second, is the affected agency exercising due diligence in responding to the request? Third, does the court have discretion to deny the agency additional time even though the above two requirements have been satisfied? Fourth, what remedies may the court impose if the agency is not relieved from complying with the statutory time limits? Because all of the cases thus far decided have concerned informational requests from the files of the FBI, this article confines itself to examining the procedures utilized by that particular agency. The principles enunciated, however, apply not solely to the FBI, but to all agencies covered by the Freedom of Information Act.

C. Factual Background of Cases Involving the Interpretation of § 552(a)(6)(C)

In order to better comprehend the requirements of exceptional circumstances and due diligence within § 552(a)(6)(C), however, it is first necessary to supply a brief factual account of the cases which have been decided under this provision. Included within this list are two circuit and two district court holdings.¹⁷

1. *Exner v. FBI*

The most recent decision rendered was by the Ninth Circuit in *Exner v. FBI*.¹⁸ In that case, Judith Exner sought access to all records possessed by the FBI which contained information about her. After receiving no response to this inquiry within the ten-day period set forth in § 552(a)(6)(A), she notified the Dept. of Justice that such failure to respond was considered a denial of her request. Four days later, FBI Director Clarence Kelly replied to the Exner inquiry, seeking additional time to process her application.¹⁹ Asserting that the delay was inevitable, Director Kelly remarked:

The FBI has 5,964 [Freedom of Information/Privacy Act] requests on hand. Processing has begun and is in various stages of completion on 991 of those cases. In an effort to deal fairly with any request requiring the retrieval, processing and duplication of documents, each request is being handled in chronological order based on the date of receipt. Please be assured that your request is being handled as equitably as possible and that all documents which can be released will be made available at the earliest possible date.²⁰

17 *Exner v. FBI*, 542 F.2d 1121 (9th Cir. 1976); *Open America v. Watergate Special Prosecution Force*, No. 76-1371 (D.C. Cir. July 7, 1976); *Cleaver v. Kelly*, 415 F. Supp. 174 (D.D.C. 1976); *Hayden v. United States Dep't of Justice*, 413 F. Supp. 1285 (D.D.C. 1976). The district court's order in *Fonda v. United States Dep't of Justice*, No. 76-0289, (D.D.C. —, 1976), was a short two-paragraph disposition granting the agency's motion for a stay to not exceed six months in order to permit it to process the plaintiff's informational request. The *Fonda* decision will not be discussed in the text of this article.

18 542 F.2d 1121 (9th Cir. 1976).

19 Brief for Appellants at 3, *Exner v. FBI*, 542 F.2d 1121.

20 *Id.* at 4. Mr. Kelly's remark here appears to be a form letter sent to all applicants demanding that their requests be processed within the statutory time limits.

After receiving the Director's response, Exner requested that Mr. Quinlin Shea, Chief of the Freedom of Information and Privacy Unit of the Office of the Deputy Attorney General, give her inquiry priority status on the basis that "she has been so prominent in the media lately that she is in *physical danger* until such time as all her recollections are committed to a writing" and that "the document which will be produced will be of *historical significance*."²¹ Mr. Shea refused to expedite handling of Exner's request on this ground, indicating that her arguments were without substance.²² He nevertheless forwarded her request for priority status to Director Kelly. The Director likewise declined Exner's priority handling request.²³ Thereafter, Exner brought suit in district court pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B) and the Privacy Act, 5 U.S.C. § 552a(g)(3)(A).²⁴

2. *Open America v. Watergate Special Prosecution Force*

The other circuit court which has construed § 552(a)(6)(C) is the District of Columbia Circuit. In *Open America v. Watergate Special Prosecution Force*,²⁵ the plaintiffs, a law professor and students at a Washington, D.C. law school,²⁶ sent identical letters to, among others, Attorney General Levi and FBI Director Kelly. These letters demanded access to all records which contained information regarding the role that former FBI Acting Director, L. Patrick Gray, played in the Watergate affair.²⁷ After the FBI failed to process this inquiry within the statutory time limits of § 552(a)(6)(A), the plaintiffs filed suit seeking to compel the agency to immediately comply with or deny their request.²⁸

3. *Cleaver v. Kelly* and *Hayden v. United States Department of Justice*

The two district courts which have considered this question are both in the District of Columbia Circuit.²⁹ In *Cleaver v. Kelly*,³⁰ Eldridge and Kathleen

21 *Id.* at 4 (emphasis in original).

22 *Id.*

23 In so doing, Director Kelly advised her counsel that "[I]f your client believes she is in physical danger or has any evidence regarding threats against her life, I strongly urge you to bring this information to the attention of the proper authorities." The district court disagreed with Director Kelly's response to the Exner request. See note 100 *infra*.

24 See 542 F.2d at 1122.

25 No. 76-1371 (D.C. Cir. July 7, 1976).

26 *Id.* slip op. at 5, n.9.

27 *Id.* slip op. at 2-3. These letters warned that "[f]ailure to reply to this request within the ten-day period provided by the Act will be treated as a denial of the request, and appeal will be sought." Nearly a month later, the Director replied to the request, noting that it had been received. Shortly thereafter, Open America appealed, stating that "[i]f you do not act upon my request within 20 working days, I will deem our request denied." This letter was acknowledged, the reply informing the plaintiff that its request would be processed in due course. *Id.* slip op. at 3.

28 *Id.* slip op. at 3-4.

29 An argument can be made that the two district court decisions still remain good law despite the circuit court's decision in *Open America*. Concurring in the result reached by the court, Judge Leventhal stated that the majority had gone "beyond the holding which . . . requires this case to be remanded to the district court for further proceedings, delivers dictum accepting the broad premise for relief asserted by the Department of Justice, dictum in which I do not join." *Open America v. Watergate Special Prosecution Force*, No. 76-1371, slip op. at 2 (Leventhal, J., concurring in the result). Judge Leventhal's assertion that much of the majority's decision was dictum was quoted by the Ninth Circuit in *Exner v. Federal Bureau of Investigation*, 542 F.2d 1121, 1123 (9th Cir. 1976).

30 415 F. Supp. 174 (D.D.C. 1976).

Cleaver filed an inquiry with the Dept. of Justice pertaining to any records or files which related to them or their activities. Expedited status was requested on the ground that this material was relevant to Mr. Cleaver's imminent trial in the California state courts. The FBI refused the Cleavers' request, stating that the agency was processing the inquiries in chronological order determined by the date that the request was received. Thereupon, the Cleavers filed suit, arguing that they should be furnished this information on an expedited basis.³¹

Similarly, in *Hayden v. United States Department of Justice*,³² Tom Hayden sought all records from the FBI relating to or concerning himself. Well after the FBI failed to comply with the time limits of § 552(a)(6)(A), Hayden brought suit in an effort to compel disclosure rather than wait any longer for the release of this information.³³

It is interesting to note that in each case the government contended that the large number of informational requests rendered it impossible for it to process the complaining party's request within the statutory time limits without giving that request preference over others which had been filed at an earlier time. Therefore, in order to maintain the agency's chronological processing policy, it was necessary for that party to wait its turn. Phrased another way, the government argued that it had exercised due diligence in responding to all informational inquiries but that exceptional circumstances, created by a massive deluge of requests, had prevented the agency from complying with or denying these requests within the statutory time periods. Under these extremely difficult conditions, the government asserted that this situation was the very type of circumstance for which § 552(a)(6)(C), the safety valve provision, was designed.³⁴

D. The Exceptional Circumstances Requirement of § 552(a)(6)(C)

To determine whether a given situation falls under the safety valve provision of § 552(a)(6)(C), a court first must consider whether the government has shown that exceptional circumstances exist. The question arises, however, whether this requirement applies only to an agency's handling of a single, complex or voluminous request, or whether it also includes the situation in which an agency is flooded with an overwhelming number of informational requests.

Two courts have strongly implied that exceptional circumstances are present only when an agency is faced with processing a particularly troublesome request, and not when an overly large number of requests have been filed.³⁵ The other

³¹ *Id.* at 175.

³² 413 F. Supp. 1285 (D.D.C. 1976).

³³ *Id.* at 1287. Before filing suit, Hayden waited an additional five months after the statutory time limits had expired. In replying to Hayden's complaint, the FBI requested an indefinite stay, informing the court that under the agency's work load, it would take an additional four years to process Hayden's request. *Id.* at 1287-88.

³⁴ See, e.g., *Open America v. Watergate Special Prosecution Force*, No. 76-1371, slip op. at 7.

³⁵ See *Hayden v. United States Dep't of Justice*, 413 F. Supp. 1287 (D.D.C. 1976); *Exner v. FBI*, No. — (S.D. Cal.), remanded, 542 F.2d 1121 (9th Cir. 1976). As stated by the *Hayden* court:

While the Court agrees that under certain conditions an abnormally large number of responsive documents might constitute an exceptional circumstance, it is not entirely persuaded that . . . many unfilled requests and several court orders compelling compliance, constitutes such circumstances within the meaning of the Act.

Hayden v. United States Dep't of Justice, 413 F. Supp. at 1288.

courts which have considered the question, however, including the District of Columbia and Ninth Circuits, have stated that such exceptional circumstances exist if an agency is faced with an overwhelming number of informational requests.³⁶ The legislative history on this question, unfortunately, fails to provide a definitive answer. The clearest pronouncement appears in the Senate Report on the 1974 amendments. That Report states that exceptional circumstances will *not* be found "where the agency had not, during the period before administrative remedies had been exhausted, committed all appropriate and available personnel to the review and deliberation process."³⁷ Hence, the question remains whether "the review and deliberation process" refers to the handling of requests received *in toto* or to only the particular request at hand.

Although far from clear, the conclusion should be reached that this process should be interpreted to extend to an agency's difficulties in handling *all* informational requests, taking into account the volume, number, and complexity of these requests. There are several reasons supporting this contention.

First, § 552(a)(6)(C) provides that the government must show "exceptional circumstances exist." The exceptional circumstances requirement is not modified by any other conditions. The due diligence requirement, however, does mandate that the agency exercises due diligence "*in responding to the request*."³⁸ Hence, it is certainly plausible to conclude that if Congress desired exceptional circumstances to exist only when an agency was confronted with a particularly complex or voluminous request, it would have worded the exceptional circumstances requirement in the following manner: "If the Government can show exceptional circumstances exist with respect to the request. . . ."³⁹

Second, the Senate Report specifically provides that the agency must commit "all appropriate and available personnel" to the decision-making process. Utilizing this language, a strong argument can be advanced that if only one particular request is involved, there rarely would be a situation where exceptional circumstances would exist. Since only one request is at issue, the government would be in an extremely difficult position to prove that it did not have adequate manpower to either comply with or deny that particular request within the statutory time limits. But if the phrase, "all appropriate and available personnel" refers to the processing of informational requests *in toto*, then the language in the Senate Report takes on an entirely different and more logical meaning. Under this interpretation, if the agency could prove that it was employing all available and appropriate manpower to scrutinize all informational requests but, because of the huge number and volume of these inquiries, could not complete review of the plaintiff's request within the statutory time periods, then that agency would

36 See *Exner v. FBI*, 542 F.2d at 1123; *Open America v. Watergate Special Prosecution Force*, No. 76-1371, slip op. at 20.

37 S. REP. NO. 93-854, 93rd Cong., 2d Sess. 26 (1974).

38 5 U.S.C. § 552(a)(6)(C) (emphasis added).

39 Another question is the role of § 552(a)(6)(B). That provision provides that under certain limited circumstances, an agency may have up to an additional ten working days to process the request. See note 5 *supra* and accompanying text. As pointed out by Judge Leventhal and by Judge Bryant in the *Hayden* decision, this provision was specifically intended to encompass the "voluminous material" request. The provision was not designed to be employed by an agency which simply processed large volumes of requests. See *Open America v. Watergate Special Prosecution Force*, No. 76-1371, slip op. at 4-5 (Leventhal, J., concurring in the result); 413 F. Supp. at 1288.

have shown that exceptional circumstances exist. Such an approach, since it provides significant meaning to the Senate Report, should accordingly be adopted.⁴⁰

Third, applying this definitional concept of exceptional circumstances to the procedures utilized by the FBI, it has contended that its allotment of personnel, together with the overwhelming number of informational requests, sufficiently proves that it has carried its burden of showing the existence of exceptional circumstances.⁴¹ Legislative history indicates that Congress, in enacting the 1974 amendments, did not contemplate that their effect would be to substantially increase costs and the need for additional manpower in a particular agency.⁴² The House Committee calculated the total additional expenditure of the 1974 amendments for all agencies at \$50,000 during 1974 and at \$100,000 for each of the following five years.⁴³ However, it is now clear that Congress grossly miscalculated the number of requests for information which would be made and the financial and personnel resources necessary to process these requests.⁴⁴ The FBI has since reallocated personnel and expended additional funds to meet this overwhelming burden.⁴⁵ Nevertheless, it still is unable to comply with or deny informational requests within the statutory time limits. In view of the fact that Congress has appropriated neither adequate funds nor personnel to remedy this situation, the District of Columbia Circuit declared:

40 Not surprisingly, such an interpretation would receive the government's support. The Dept. of Justice has contended that "the language of subsection (a) (6) (C) . . . is sufficiently broad to permit a court to find that an overwhelming volume of separate requests received by a single agency can constitute 'exceptional circumstances'" Brief for Appellants at 18, *Exner v. FBI*, 542 F.2d 1121.

41 *Id.* at 18-19.

42 The House Report states:

[T]he committee finds with respect to fiscal year 1974 and each of the five fiscal years following that potential costs directly attributable to this bill should, for the most part, be absorbed within the operating budgets of the agencies.

This legislation merely revises information procedures under the Freedom of Information Act but does not create costly new administrative functions. Thus, activities required by this bill should be carried out by Federal agencies with existing staff, so that significant amounts of additional funds will not be required. It may be necessary, however, for some agencies to reassign personnel, shift administrative responsibilities, or otherwise restructure certain offices to achieve a higher level of efficiency.

H. R. REP. NO. 93-876, *supra* note 2, 6274-75.

43 *Id.* at 6275.

44 One year prior to the enactment of the amendments, the FBI had a staff of eight people to process these informational requests which were received at a rate of approximately one request per day. *Cleaver v. Kelly*, 415 F. Supp. at 176.

As to the number of requests received during 1975, this figure rose to an average number of 53 requests per workday. In the first two months of 1976 alone, this already large number of requests again increased so that a total number of 2,288 inquiries were received during this period. "'Exceptional circumstances' are demonstrated by the increase in requests from approximately one per day in 1973 before the Amendments . . . to 13,875 in 1975." *Id.* See Brief for Appellants at 19, *Exner v. FBI*, 542 F.2d 1121.

In fiscal year 1974, that agency's cost for implementing the amendments was \$160,000. In fiscal year 1975, this figure rose to \$462,000 and for fiscal year 1976, the cost is estimated at \$2,675,000. For fiscal year 1977, the FBI approximates that the cost for the amendments will be the same as in 1976, \$2,675,000, plus another \$725,000 to implement the Privacy Act of 1974. *Open America v. Watergate Special Prosecution Force*, No. 76-1371, slip op. at 12.

45 In 1975, the FBI increased the number of personnel handling information requests to 191. *Id.* at 13. The staff now includes 23 law-trained agents. Brief for Appellants at 19, *Exner v. FBI*, 542 F.2d 1121. This total number is comparable to the number of agents who are employed at the headquarters' general investigatory section. 415 F. Supp. at 176.

If Congress' anticipation of the burden thrust upon all agencies by its 1974 [Freedom of Information Act] amendments is to be taken as a measuring stick, then surely the demands placed on this one agency by Congress' action may reasonably be viewed as "exceptional circumstances."⁴⁶

But as Judge Leventhal indicated in his concurring opinion in *Open America*,⁴⁷ the safety valve provision of § 552 (a)(6)(C) was carefully drafted to place a substantial burden on an agency to justify any noncompliance with relevant time limits imposed by the 1974 amendments.⁴⁸ Hence, in order to show the existence of exceptional circumstances, an agency must satisfy a rigorous standard. It must prove that it has "committed all appropriate and available personnel to the review and deliberation process."⁴⁹ Further, an agency's burden to show these circumstances is an ongoing one. A short-term inability to timely comply with or deny informational requests, due to a huge increase in the number of these requests, will not necessarily excuse the agency in the future. In each case, the agency cannot rely upon prior cases to show the existence of exceptional circumstances but must affirmatively prove that it is employing all appropriate and available personnel in the decision-making process.

Has the FBI satisfied this heavy burden? An argument can be made that the employment of "all appropriate and available personnel" means exactly what it says, namely, that the agency must reassign as many of its employees as necessary to meet the pertinent statutory time limits. Whether this reallocation of personnel entails 10 percent or 90 percent of the total number of employees is immaterial under this view. The more logical approach, however, is to recognize that an agency has important functions assigned to it other than the processing of informational requests. In the case of the FBI, it is uncontroversial that this agency has vital law enforcement duties to perform.⁵⁰ To interpret the existence

46 *Open America v. Watergate Special Prosecution Force*, No. 76-1371, slip op. at 12. In finding the existence of exceptional circumstances, the *Cleaver* court stated that "the backlog with which the Agency is now faced was not predictable or expected; indeed, it is exceptional." 415 F. Supp. at 176.

47 *Open America v. Watergate Special Prosecution Force*, No. 76-1371 (Leventhal, J., concurring in the result).

48 *Id.* at 3. In so recognizing, Judge Leventhal noted that the 1974 amendments were enacted to compel increased agency expedition in processing informational requests.

49 S. REP. NO. 93-854, 93rd Cong., 2d Sess. 26 (1974) (emphasis added).

50 In vetoing the bill, President Ford expressed his concern that law enforcement agencies would be overburdened with processing informational requests:

I believe that confidentiality would not be maintained if many millions of pages of FBI and other investigatory law enforcement files would be subject to compulsory disclosure at the behest of any person unless the Government could prove to a court—separately for each paragraph of each document—that disclosure "would" cause a type of harm specified in the amendment. Our law enforcement agencies do not have, and could not obtain, the large number of trained and knowledgeable personnel that would be needed to make such a line-by-line examination of information requests that sometimes involve hundreds of thousands of documents, within the time constraints added to current law by this bill.

Therefore, I propose that more flexible criteria govern the responses for particularly lengthy investigatory records to mitigate the burden which these amendments would otherwise impose, in order not to dilute the primary responsibilities of these law enforcement activities.

10 WEEKLY COMP. OF PRES. DOC. 1318 (Oct. 17, 1974).

Responding to this criticism, Congressman Morehead, one of the sponsors of the bill, reassured the President that "[n]o one wants to burden law enforcement agencies or to take their attention away from the difficult job of fighting the growing menace of crime in America." 129 CONG. REC. 10865 (1974).

of exceptional circumstances to signify the deployment of all personnel to complete the review and deliberation process within statutory time limits would leave the FBI with time to do little else. Under such a construction, the FBI would be incapable of performing its law enforcement obligations in a satisfactory manner.

Taking the above considerations into account, the term "all appropriate and available personnel" must signify the placement of as many employees as possible in the review and deliberation process while still maintaining a high level of efficiency for the accomplishment of the agency's other objectives. Applying this principle to the FBI, that agency has reassigned a large number of its employees from other departments within the agency to process requests filed pursuant to the Freedom of Information Act. Such reallocation of personnel, however, does not by itself indicate that the FBI is unable to transfer additional employees to process these informational requests. Rather, in order to show the existence of exceptional circumstances, the FBI must show that the reassignment of any additional personnel would render the operation of the agency's other functions significantly less efficient. In the cases thus far decided, the FBI has not made such a showing. Thus under the above formulated approach, without such proof, the FBI has failed to satisfy its burden under the safety valve provision of § 552(a)(6)(C).⁵¹

E. The Exercise of Due Diligence Requirement of § 552(a)(6)(C)

1. Chronological Processing Policy of the FBI

In order to determine whether a particular agency is exercising due diligence within the meaning of § 552(a)(6)(C), one must first examine the agency's procedure for processing informational requests. In the case of the FBI, that agency employs a "two-track" system which separates simple ("non-project") from more complicated and time-consuming requests ("project"). After placing the requests into these two categories, the FBI processes them in chronological sequence.⁵² In defending this first-come first-served policy in the courts, the FBI has asserted a number of reasons. First, the agency claims that the primary reason it adheres to chronological processing is that it treats all requesters equitably.⁵³ Second, the FBI contends, when courts order that particular requests

51 Surprisingly, the cases thus far decided have examined the agency's backlog, number of requests filed, cost expenditures, and number of employees assigned to process informational requests. On these factors alone, exceptional circumstances have been found to exist. *See, e.g.,* *Open America v. Watergate Special Prosecution Force*, No. 76-1371, slip op. at 20. But query whether such circumstances can be deemed exceptional if the agency's ability to reallocate additional funds and personnel is never scrutinized.

52 *See* *Open America v. Watergate Special Prosecution Force*, No. 76-1371, slip op. at 12-13. "While the 'two-track' system expedites simple requests and identifies those matters which will be more difficult and time-consuming, on each track, the FBI attempts to proceed on a strictly first-in, first-out basis and to maintain approximately the same rate of progress." *Id.* at 13.

53 Brief for Appellants at 23, *Exner v. FBI*, 542 F.2d 1121. This argument had the greatest impact upon the *Open America* court: "The real parties at interest here may not be the Attorney General and the Director of the FBI at all, but the 5,137 other persons or organizations who made requests prior to plaintiff *Open America*." *Open America v. Watergate Special Prosecution Force*, No. 76-1371, slip op. at 17. For reasons stated later in this section, the policy of equal treatment among all requesters should be an irrelevant consideration under the due diligence concept. *See* notes 73-75 *infra* and accompanying text.

be given priority status, such favorable treatment disrupts the efficiency of the agency's procedure.⁵⁴ Further, the FBI argues that the upholding of its chronological processing approach would minimize the number of suits filed when the agency fails to comply with the ten- and twenty-day period permitted for responses under § 552(a)(6)(A).⁵⁵

2. Judicial Reactions to the Chronological Processing Policy of the FBI

Upon examining the FBI's chronological processing policy, the District of Columbia Circuit, in *Open America*, approved of that policy with the exception that if a genuine urgency was attached to the inquiry, then that inquiry should receive expedited treatment. The majority stated:

We believe that Congress intended to guarantee access to Government agency documents on an equal and fair basis. Good faith and due diligence call for a procedure which is fair overall in the particular agency. We believe also that Congress wished to reserve the role of the courts for two occasions, (1) when the agency was not showing due diligence in processing plaintiff's individual request or was lax overall in meeting its obligations under the Act with all available resources, and (2) when plaintiff can show a genuine need and reason for urgency in gaining access to Government records ahead of prior applicants for information. . . .⁵⁶

Concluding that the FBI had exercised due diligence, that the agency had shown the existence of exceptional circumstances, and that the plaintiffs were unable to prove any need or reason to justify expedited status, the court held that the

54 Brief for Appellants at 24, *Exner v. FBI*, 542 F.2d 1121. Although the government claims that this consideration is secondary to the objective of treating all requesters equitably, it appears that maintenance of chronological processing under all circumstances is extremely important for the government to maintain efficient operation. Thus, the government argues that any priority treatment given to certain individuals renders the affected agency less efficient. The *Open America* majority agreed with this contention. *Open America v. Watergate Special Prosecution Force*, No. 76-1371, slip op. at 17-18. On the other hand, it can be argued that giving certain requesters priority status should not disrupt the agency's efficiency. In this situation, all the agency is doing is moving a certain request "up the line," hence moving other requests "down the line." Thus, the agency is merely substituting one request for another.

55 This argument primarily is designed as a tactic to warn the courts that the failure to uphold the agency's chronological processing approach will result in their being overburdened with requesters seeking expedited status:

[I]f chronological processing is upheld by the courts of appeals and stays under 5 U.S.C. 552(a)(6)(C) are encouraged, suits brought at the end of the ten- and twenty-day period allowed for responses under 5 U.S.C. 552(a)(6)(A) without further exhaustion of administrative remedies will be minimized. Thus courts will be spared the necessity of entertaining and giving expedited consideration to many [Freedom of Information Act] suits in which no genuine case or controversy may ever exist. If on the other hand, expedited consideration is automatically accorded litigants at the expense of other requesters despite the provisions of 5 U.S.C. 552(a)(6)(C), plainly all requesters will be encouraged to litigate, particularly since if they prevail in their suits they may seek court costs and attorneys' fees pursuant to 5 U.S.C. 552(a)(4)(E).

Brief for Appellants at 24-25, *Exner v. FBI*, 542 F.2d 1121. For further discussion on this subject, basically disagreeing with the government's argument, see notes 75-82 *infra* and accompanying text.

56 *Open America v. Watergate Special Prosecution Force*, No. 76-1371, slip op. at 20. Thus, the *Open America* court made it manifestly clear that the burden is upon the plaintiff to allege an exceptional need and urgency for the information he seeks. This approach has been highly criticized. See notes 76-82 *infra* and accompanying text.

plaintiffs were not entitled to relief.⁵⁷

Although concurring in the result reached by the majority in *Open America*, Judge Leventhal severely criticized its reasoning.⁵⁸ His opinion has been praised and approved by the Ninth Circuit in its *Exner* decision.⁵⁹ While the Ninth Circuit held, as Judge Leventhal had expressed, that the chronological processing policy utilized by the FBI ordinarily seems reasonable,⁶⁰ Judge Leventhal remarked that an effective demonstration of due diligence might depend as well upon other considerations.⁶¹ These factors include: (1) whether the agency has requested additional funds to meet the unexpected increase in informational inquiries; (2) whether it has allowed partial release of records rather than permitting release only when the request has been totally processed; and (3) whether the agency has deferred determining whether it will voluntarily disclose material clearly outside the scope of the Freedom of Information Act, for the purpose of expediting release of information expressly covered by the Act.⁶²

But what particularly upset Judge Leventhal was the majority's interpretation of the due diligence concept.⁶³ By placing the burden upon the plaintiff to show a genuine need and reason for urgency, Judge Leventhal concluded that the majority had misconstrued the purpose underlying the 1974 amendments:

What the majority dictum would contemplate . . . is a scheme that turns the burden of proof mandated by Congress upside down. No longer must the Government make out a case of exceptional circumstances; instead the plaintiff will be required to show a "genuine need and reason for urgency." . . . This seems to me a clear departure from the very premise of the section we are engaged in interpreting. It is not supported by statutory language, and indeed seems in conflict with the entire remedial thrust of the 1974 amendments. . . .⁶⁴

Referring to a letter from Deputy Attorney General Tyler to Congresswoman Abzug, Chairwoman of the Government Information and Individual Rights

57 *Open America v. Watergate Special Prosecution Force*, No. 76-1371, slip op. at 21. Compare the problems raised by § 552(a)(6)(A)-(C) with those arising from Rule 26(b) of the Federal Rules of Civil Procedure. This rule provides for discovery of "the existence, description, nature, custody, condition and location of any books, documents, or other tangible things," qualified by the provision that the request must be regarding matter "which is relevant to the subject matter involved in the pending action. . . ." For a discussion of this rule and relevant cases interpreting its applicability, see 4 J. MOORE, *FEDERAL PRACTICE* ¶ 26.58 (2d ed. 1976).

58 *Open America v. Watergate Special Prosecution Force*, No. 76-1371 (Leventhal, J., concurring in the result).

59 542 F.2d at 1123.

60 *Open America v. Watergate Special Prosecution Force*, No. 76-1371, slip op. at 7-8 (Leventhal, J., concurring in the result).

61 *Id.* at 8-9.

62 *Id.* at 5. Whether the due diligence concept also includes notifying the requester that information sought by him is located in the files of another agency providing is an open question. There is every reason to place this responsibility on the agency. Otherwise, the requester, who is unaware that pertinent information is located elsewhere, will never obtain access to this material. The burden on the agency is minimal. It need only inform the applicant of facts which it already knows or should know. The agency's responsibility terminates at that point. On the other hand, for the requester, the benefits to be derived from placing this minimal burden on the agency are enormous.

63 Disagreeing with the majority's interpretation, Judge Leventhal observed: "The safety valve provisions of § 552(a)(6)(G) were carefully crafted to put a substantial burden on the government to justify to the courts any noncompliance with [Freedom of Information Act] time limits." *Id.* at 3.

64 *Id.*

Subcommittee, Judge Leventhal has strong authority to support his position. In that letter to Congresswoman Abzug, Deputy Attorney General Tyler argued:

Absent some *wholly arbitrary* refusal to expedite a particular request or appeal when exceptional circumstances exist, each individual should be required to wait his or her turn in line. *The law as presently written places the burden on the Government to prove that a case should not receive preferential, expedited treatment.* This imbalance should be corrected, in fairness to other requesters and to eliminate an unnecessary contribution to the congestion of court dockets in the Federal Judicial System.⁶⁵

Nevertheless, Judge Leventhal notes that in the present case the FBI may have shown that exceptional circumstances exist.⁶⁶ If that were true, then in order for the plaintiffs to receive expedited status, they must make "a special allegation of urgency in processing. . . ."⁶⁷ Otherwise, the government would be able to take advantage of the safety valve provision of § 552(a) (6) (C).⁶⁸

3. Analysis of Judicial Reactions to the Chronological Processing Policy of the FBI

Is the *Open America* majority or the *Exner-Leventhal* view correct in defining the concept of due diligence, or are both approaches incorrect? To reach the proper conclusion, analysis must begin with the following question: Does an agency's exercise of due diligence apply only to the particular request at hand or to requests received *in toto*? The statutory language contained in § 552(a) (6) (C) provides the proper answer: the agency must show that it "is exercising due diligence in responding to the request. . . ."⁶⁹ Thus, unlike the existence of exceptional circumstances, in exercising due diligence the agency must show

65 Letter from Deputy Attorney General Harold Tyler to the Honorable Bella Abzug, Chairwoman, Government Information & Individual Rights Subcommittee, Committee on Government Operations, March 15, 1976, *reprinted in, id.* at 1 n.1 (emphasis added). In that letter, Deputy Attorney General Tyler also argued:

One of the provisions in the amendments to the Act that certainly has not worked out as anyone intended is the imposition of very short time limits for the processing of requests. I fully understand and accept the desire of Congress to demonstrate the importance it attached to the reasonably expeditious processing of requests for access to records. In my opinion, however, any time limit that does not take into consideration the number and complexity of the records within the scope of the individual request is both unrealistic and wholly unworkable.

* * * *

There is one additional serious problem I desire to bring to your specific attention. That is the situation created by those cases in which we are sued before the administrative review process has been completed. Although the number of such cases is not particularly great, this unfortunate provision in the Act usually results in the individual who has sued receiving preferential consideration over the far greater number of other [usually prior] requesters and appellants who choose not to file suit, or who cannot do so.

Id.

66 *Id.* at 3.

67 *Id.* at 5. In so stating, Judge Leventhal strongly implied that the applicant must provide reasons to justify his request being granted expedited status. This interpretation is contrary to the principles advanced by both the Act and the 1974 amendments. For further analysis suggesting a proposed correct approach, see notes 76-82 *infra* and accompanying text.

68 *Open America v. Watergate Special Prosecution Force*, No. 76-1371, slip op. at 11-12 (Leventhal, J., concurring in the result).

69 5 U.S.C. § 552(a) (6) (C) (emphasis added).

that it is responding diligently to the request at hand, not to all requests in general.⁷⁰

The fact that the agency must exercise due diligence in responding to the request is important in determining whether the implementation of a chronological processing policy comports with the philosophy underlying the safety valve provision of § 552(a)(6)(C). Due diligence under this provision signifies that the agency has the burden to justify noncompliance with statutory time limits.⁷¹ As the House Report expressly recognized, the intent of the 1974 amendments was to require the affected agency "to respond to inquiries and administrative appeals within specific time limits."⁷² At first glance, a chronological processing system appears incongruous with this congressional objective. Under such a system, the agency adopts a policy that, once an informational request is filed, the numerous other requests filed beforehand must be processed prior to the subject request. While this policy appears to promote equal treatment among all requesters,⁷³ whether this result is at all relevant under the due diligence concept is another question. The answer is that any consideration of equal treatment is wholly irrelevant. The reason underlying this conclusion is clear. Due diligence is concerned only with the agency's conduct in responding to the request at hand, not to all requests in general. Hence, each request must be viewed separately rather than in conjunction with other requests. Because of this fact, the agency cannot viably argue that it is exercising due diligence because it is treating all requests equally. Rather, the agency can only successfully assert due diligence if it is responding to the particular request in a manner which satisfies the congressional intent underlying § 552(a)(6)(C), namely, that despite the agency's good faith efforts and efficient allocation of available resources, circumstances render it impossible to process the subject request within the statutory time limits.⁷⁴

4. Proposed Approaches for Processing Requests

On the other hand, it is evident that the agency must devise some sort of

70 The government, not surprisingly, has argued that the due diligence concept applies to requests received *in toto*. Criticizing the district court's interpretation, the government's appellate brief to the *Exner* court asserted:

There is nothing in the Act or the legislative history of [Section 552(a)(6)(C)] . . . to warrant the assumption made by the court below that the terms "exceptional circumstances" and "due diligence" must relate to an agency's handling of a single complex or voluminous request.

Brief for Appellants at 18, *Exner v. FBI*, 542 F.2d 1121. With respect to due diligence, the government's argument is clearly incorrect. See *Hayden v. United States Dep't of Justice*, 413 F. Supp 1285, 1288 (D.D.C. 1976); *Exner v. FBI*, No. — (rep. trans. at 14-15, S.D. Cal.), *remanded*, 542 F.2d 1121 (9th Cir. 1976).

71 Thus, the Ninth Circuit's and Judge Leventhal's interpretations are correct in placing the burden upon the noncomplying agency. Judge Leventhal's approach, however, is incorrect to the extent that it requires the applicant to provide reasons explaining why his request should receive expedited status. For a discussion elaborating on this subject, see notes 76-82 *infra* and accompanying text.

72 H. R. REP. NO. 93-876, *supra* note 2, at 6271.

73 The policy of treating all requesters on an equal basis has been the primary argument that the government has used to persuade the courts that its chronological processing approach should be upheld. See Brief for Defendant at 23, *Exner v. FBI*, 542 F.2d 1121. See also note 57 *supra* and accompanying text.

74 See notes 80-85 *infra* and accompanying text. This burden is not an overly harsh one to impose upon the agency. Any agency which efficiently utilizes its personnel and financial resources should have no difficulties in complying with the proposed approach.

system to process informational requests. The FBI has adequately shown that, at least in the short run, available personnel and funds make it impossible to process each request immediately after it is filed.⁷⁵ Hence, the question must be raised whether each requester must wait his turn in line, or whether some requests may be processed before others. The answer to this inquiry may be derived from the prevailing theme underlying the concept of due diligence: the principle that due diligence concerns only the particular request at hand. With this principle in mind, two conclusions may be reached. First, so long as the requester makes no allegation of urgency in submitting his inquiry, the agency may utilize a chronological processing policy provided it operates this system in an efficient manner, taking into account the agency's personnel and financial resources. Second, if, however, the requester alleges urgency, such an allegation merits expedited treatment. In this situation, the agency must process the request prior to others which, though filed earlier, included no allegation of urgency.

Must such allegation of urgency contain the basis for the right to expedited status and must the requester allege, or perhaps even show, the specific reasons for which he needs the relevant material? The rationale for compelling such allegations rests on distinguishing between those requesters who have a need to examine their own files as opposed to those who are merely satisfying personal curiosity.⁷⁶ Although this argument appears meritorious, it must be rejected because it is contrary to the spirit and policy underlying the Freedom of Information Act. That policy is to compel the disclosure of all government information, not subject to specific exemptions, to the general public, without inquiring into an individual's "need to know."⁷⁷ As phrased by the House Committee on Government Operations:

It was not the intent of Congress that any person should have a stated reason for wishing to see any particular Government document or record,

⁷⁵ This point is not disputed. Rather, the issue is whether some requests may be processed before others which were filed earlier in time. In the courts, the government has adhered to the position that the chronological processing sequence must be utilized in all circumstances and each requester must at all times wait his turn in line. See Brief for Appellants at 20, *Exner v. FBI*, 542 F.2d 1121.

⁷⁶ As stated in *Exner*:

[T]he observation is made . . . that there are thousands of requests, that Mrs. Exner should just wait her turn in line. I would hazard to guess that many, many of those thousands of requests may be trivial, may be curiosity seekers, may be persons who want information for various reasons. I think with regard to Mrs. Exner, she is a person who is herself directly concerned, and I don't think that under the circumstances she should just have to wait in line.

Exner v. FBI, No. — (rep. trans. at 19-20 S.D. Cal.), *remanded*, 542 F.2d 1121 (9th Cir. 1976).

⁷⁷ See *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), where the court recognized that:

Congress passed the Freedom of Information Act in response to a persistent problem of legislators and citizens, the problem of obtaining adequate information to evaluate federal programs and formulate wise policies. Congress recognized that the public cannot make intelligent decisions without such information, and that governmental institutions become unresponsive to public needs if knowledge of their activities is denied to the people and their representatives. The touchstone of any proceedings under the Act must be the clear legislative intent to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests. The policy of the Act requires that the disclosure requirement be construed broadly, the exemptions narrowly.

Id. at 1080.

nor should that motivation be a matter for courts to concern themselves with during litigation under the Act.⁷⁸

Although the Committee's statement was in reference to a requester's *right of access* to government records, the same principles should apply when establishing *priority of access* to these records. This assertion is particularly true in view of Congress' express determination that "excessive delay by the agency in its response is often tantamount to denial."⁷⁹ Hence, because priority of access is so interrelated to the right of access itself, it is illogical to permit inquiry into a person's need to know in either circumstance.⁸⁰

The drawback to this proposed approach is that requesters, recognizing that they will receive priority status merely by alleging urgency, will naturally opt for expedited status. As a result, the affected agency will be overwhelmed by claimants demanding preferential treatment. This consequence, however, is less serious than it may appear. It must be remembered that the agency's safety valve of due diligence is still available as a defense against noncompliance with statutory time limits. Thus, in order to assert an effective defense in this situation, the agency must show that it is processing the subject request in an efficient manner, considering the agency's personnel and financial resources, and that this request has been given priority status over other inquiries which were received earlier in time but with no allegation of urgency.

What will be accomplished by interpreting the concept of due diligence in this manner? First, this interpretation recognizes that the affected agency must exercise due diligence in responding to the request at hand, not to requests *in toto*. Second, the approach provides a requester with the opportunity to demand expedited status without compelling him to divulge his "need to know." Third, this interpretation, which is consistent with the legislative history, excludes the authority of such agencies as the FBI to inquire into a person's interest in gaining access to the requested information.⁸¹ Fourth, the number of requesters seeking preferential status may be surprisingly small. Many applicants may reasonably believe that by waiting their turn in line they will receive more complete material from the agency, for example, when the agency releases certain information which may be technically exempt.⁸²

One important criticism of this interpretation is that those individuals who

78 H. R. REP. No. 92-1419, 92nd Cong., 2d Sess. 76-77 (1972).

79 H. R. REP. No. 93-867, *supra* note 2, at 6271.

80 In arguing that its chronological processing sequence should be upheld, the government has adopted this approach. Thus, in *Exner*, the assertion was made that the FBI's processing policy is "consistent with the principle that a requester's right to know is entirely independent of his need to know." Brief for Appellants at 26, *Exner v. FBI*, 542 F.2d 1121.

81 The idea of permitting governmental agencies, particularly the law enforcement arm of the state, to demand why a citizen seeks information is repugnant to the principles advanced by a democratic society. Further, permitting an agency to inquire into a person's need to know leaves open the possibility that the agency may deny the applicant's request for political reasons. Although the *Hayden* case apparently did not involve political motives, the Bureau nevertheless told Hayden that it would take *four years* to process his request. As the district court properly held, such an extensive time period is not even remotely compatible with the purposes advanced by the Act and 1974 amendments. *Hayden v. United States Dep't of Justice*, 413 F. Supp. 1285, 1287-89 (D.D.C. 1976).

82 Also, "[t]he merely curious may well be motivated enough to write a letter, but not to file a law suit." *Open America v. Watergate Special Prosecution Force*, No. 76-1371, slip op. at 9 (Leventhal, J., concurring in the result).

have a real exigent need for immediate access to government material will be in the same position as those who demand expedited status but do not in fact have urgent need. This problem is not irremediable, however, and a discussion of its solution will follow.

F. Judicial Discretion Under § 552(a)(6)(C)

1. Existence of Judicial Discretion Under § 552 (a) (6) (C)

Section 552(a)(6)(C) provides that if the agency can show the existence of exceptional circumstances and that it is exercising due diligence in responding to the informational inquiry, then "the court *may* retain jurisdiction and allow the agency additional time to complete its review of the records."⁸³ Does the word, "may," signify that the court has discretion to deny the government's motion for additional time even though exceptional circumstances exist and the agency is exercising due diligence? Surprisingly, only one court has explicitly dealt with this question. In *Exner v. FBI*, the Ninth Circuit stated: "It is obvious that [§ 552(a)(6)(C)] gives the district court discretion to allow the government additional time to comply."⁸⁴

Disagreeing with the Ninth Circuit's interpretation, the government contended that the section does not vest a court with discretion.⁸⁵ As authority, the government relied upon the Senate Report which provides that, if the exceptional circumstances and due diligence standards are met, "[t]his final court-supervised extension of time *is to be allowed*. . . ."⁸⁶ Countering this statement are the views espoused by the sponsors of the 1974 amendments. Senator Kennedy implicitly recognized the court's discretionary role, stating that, if both exceptional circumstances and due diligence are present, "[t]he agency may ask for, and the court *is authorized to grant*, additional time. . . ."⁸⁷ Likewise, Senator Bayh asserted: "[T]he court *still has the discretion* to grant the agency more time. . . ."⁸⁸ During the House debate, Congressman Morehead, another sponsor of the bill, also stated that language was inserted into the section "*to authorize the*

83 5 U.S.C. § 552(a)(6)(C) (emphasis added).

84 542 F.2d at 1112. The other courts which have construed § 552(a)(6)(C) have ignored the discretionary aspect of the statute. For reasons stated later in this section, the Ninth Circuit's recognition that the court has discretion to deny the government's motion for additional time, even though the exceptional circumstances and due diligence standards have been met, is correct.

85 See Brief for Appellants at 13, *Exner v. FBI*, 542 F.2d 1121.

86 S. REP. NO. 93-854, 93rd Cong., 2d Sess. 26 (1974).

87 In fuller detail, Senator Kennedy stated:

[T]here is the issue of time limits. Our bill provides an agency 10 working days to respond initially to a request for information, 20 working days on appeal, and an additional 10 working days where unusual circumstances are present. That gives the agency 40 working days, or almost two calendar months—more than enough time for any agency to complete the process of finding and reviewing requested documents.

If a person sues the agency after that time, and the agency is still diligently trying to complete review of the materials under exceptional circumstances, then we have another escape valve in the bill—added by specific request of the administration during our conference. The agency may ask for, and the court *is authorized to grant* additional time pending completion of such review.

120 CONG. REC. 19807 (1974) (emphasis added).

88 *Id.* at 19818 (emphasis added). Similarly, Senator Bayh expressed at greater length:

[T]he bill *permits* a court in exceptional circumstances to delay its review of a case until an agency has had sufficient time to review its records. In other words,

courts to grant a Federal agency additional time to respond to a request. . . ."⁸⁹

Thus, legislative history exists which supports both the Ninth Circuit and government views. Due to this conflict, the better approach is to scrutinize the words of the section in an attempt to discover the congressional intent. The pertinent language provides that "the court may retain jurisdiction and allow the agency additional time. . . ." First, it could be argued that the word, "may," modifies only the retaining of jurisdiction, and not the granting of additional time. Under this construction, the court *may* retain jurisdiction and *shall* allow the agency additional time. Under the second interpretation, "may" modifies both of these terms. Thus, the pertinent language would provide: The court *may* retain jurisdiction and *may* allow the agency additional time.

For a number of reasons, the second construction is the correct approach. Employing a literal reading of the section, "may" is utilized as a verb. Without its presence, the second part of the pertinent language would be incomplete, reading "the court . . . allow the agency additional time." Moreover, Congress no doubt was aware of the language it employed in the section. To insert the term "shall," where it is neither stated nor implied, would be judicial legislation in clear contravention of express congressional intent. Additionally, Congress deliberately utilized the word "may," representing that the court has discretion to grant or deny the agency additional time. If Congress had desired otherwise, it would have inserted the terms "shall" or "must." An examination of the language of § 552(a)(6)(C) reveals that the Ninth Circuit's interpretation is correct. Thus, although the agency may meet the exceptional circumstances and due diligence requirements, the court has discretion to either grant or deny the agency's motion for additional time.

2. Proposed Approaches in the Exercise of Judicial Discretion Under § 552(a)(6)(C)

In exercising this discretion, what considerations should be relevant to the court? In the preceding section of this article, the argument was made that when interpreting the concept of due diligence, courts should prohibit an agency from inquiring into an individual's interest in obtaining access to requested information.⁹⁰ However, one drawback to this approach exists: those individuals with an exigent need for immediate access are compelled to wait with others who demand expedited status though they do not have urgent need.⁹¹ The concept of judicial discretion, however, may be construed so as to provide a solution to this problem. Under this suggested approach, the court may consider the individual's motive for requesting the information when determining whether to grant favorable treatment.

after the 2 months of administrative deadlines have lapsed and after a complaint has been filed with the court, the court *still has the discretion* to grant the agency more time if exceptional circumstances warrant. . . .

Id. (emphasis added).

⁸⁹ 120 CONG. REC. 10865 (1974) (emphasis added).

⁹⁰ See notes 76-82 *supra* and accompanying text.

⁹¹ See note 81 *supra* and accompanying text. It is certainly equitable that an individual who must have access to certain material within the very near future should have priority over other requesters who have no such urgency. See notes 100-04 *infra* and accompanying text.

But why should the court, in exercising its discretion, be entitled to inquire into the requester's motive for seeking access while the agency, under the concept of due diligence, cannot so inquire? Undoubtedly, the argument can be made, as it was in the preceding section of this article, that the Freedom of Information Act prohibits inquiry into a person's "need to know."⁹² It further can be plausibly asserted that this policy extends to the judiciary as well as to the affected agency.⁹³ However, in enacting the time limits imposed by the 1974 amendments, Congress was unaware of the massive complications which were to arise.⁹⁴ Because of the overwhelming number of requests and the inadequate allocation of financial and personnel resources, agencies, as with the FBI, have had great difficulties in complying with the statutory time limits.⁹⁵ Under such circumstances, it is logical to assume that, if it had the opportunity to confront this problem, Congress would grant priority status to those individuals who had an urgent need for the requested information. Such need for expedited treatment can only be uncovered if the individual requester is willing to divulge to the court his motive for obtaining access.

The question remains, however, why the agency should not as well be entitled to inquire into the requester's motive under the due diligence concept. First, unlike the judiciary, the affected agency is a biased party. By interpreting the due diligence provision so that only the most urgent reasons justify expedited treatment, the agency's burden in showing that it is exercising due diligence is significantly lessened. Under this approach, the agency enjoys immense power to arbitrarily reject a request for expedited status on the mere ground that the agency does not believe the applicant, or deems the request to be frivolous.

Two examples will suffice to illustrate this point. In *Exner*, the FBI rejected Judith Exner's request on the basis that the agency found that her fear for her security was without substance.⁹⁶ Likewise, in *Cleaver*, Eldridge Cleaver sought expedited treatment in order to obtain information which could be utilized for his imminent California trial. The FBI denied his application without providing Cleaver any explanation other than that the agency was overwhelmed

⁹² See notes 76-82 *supra* and accompanying text.

⁹³ Thus, the requester's motive for obtaining access would not be "a matter for courts to concern themselves with during litigation under the Act." H. R. REP. NO. 92-1419, 92nd Cong., 2d Sess. 76-77 (1972).

⁹⁴ See H. R. REP. NO. 93-876, *supra* note 2, at 6274-75. As discussed earlier in the article, Congress believed that the 1974 amendments could be effectively implemented with little increase in an agency's personnel and cost expenditures. This prediction has proved to be incorrect. See notes 42-50 *supra* and accompanying text.

⁹⁵ It is arguable, of course, that the FBI would be able to process all informational requests within the statutory time limits if it would reassign additional personnel from other divisions within the agency. Such reallocation, however, might hinder the efficiency of the agency's other functions. See notes 52-55 *supra* and accompanying text.

⁹⁶ See Brief for Appellants at 4, *Exner v. FBI*, 542 F.2d 1121. Referring to the government's characterization of Exner's fear as being without substance, the district judge in *Exner* replied:

The Government observes that with regard to any possible death threats against her on threats of harm, that there is no evidence of that. Well, threats of that kind frequently, or at least sometimes, do not manifest themselves until some harm occurs. Whether her fears are genuine or just imaginary, I think she should be at least given the opportunity to see the non-exempt materials in her file so that she can perhaps be on her guard against harm, or perhaps these materials would set at rest her possible fears.

Exner v. FBI, No. — (rep. trans. at 20 S.D. Cal.), *remanded*, 542 F.2d 1121 (9th Cir. 1976).

with informational requests.⁹⁷ From these cases, the conclusion must be reached that there exists no justifiable reason why an agency should be given this vast arbitrary authority, and, on this basis alone, an agency should not be permitted to inquire into a requester's motive for seeking access. Moreover, providing a governmental agency with this power of inquiry would dissuade individuals from applying for expedited status. Realizing that the agency can compel the applicant to divulge his motive, the citizen is likely to wait his turn rather than be subjected to governmental coercion. The same consequence, however, does not follow if a court is authorized to inquire into the applicant's reasons for seeking preferential treatment. Unlike the affected agency, a court is an impartial decision-maker having the reputation among the populace of administering justice evenhandedly.⁹⁸ Thus, there is no threat of coercion and, in all probability, no attending result that individuals will be deterred from applying for expedited status. For these reasons, the exercise of judicial discretion under § 552(a)(6)(C) should be construed so as to permit a court, once the agency has satisfied the exceptional circumstances and due diligence requirements, to inquire into an applicant's motive for seeking preferential status.

Another consideration that may be relevant in the exercise of judicial discretion is whether the filing of suit by itself should be a priority-indicating factor of significance. Concurring in *Open America*, Judge Leventhal contended that the bringing of a court action "is not a fool proof way of assigning priority, but it is material and by no means unprecedented."⁹⁹ The Ninth Circuit agreed with the Leventhal approach, holding that "the filing of suit by a person demanding information can (but does not necessarily) move such petitioner 'up the line'"¹⁰⁰ The majority in *Open America*, however, disagreed. The court stated that the filing of suit is irrelevant since, if this approach is adopted, the courts would be flooded with applicants seeking expedited status. As a result, because of the huge number of lawsuits that would be brought, the litigating applicants would be no better off than if their priorities were fixed by the agency.¹⁰¹

97 *Cleaver v. Kelly*, 413 F. Supp. at 175 (D.D.C. 1976). Even more surprising is the failure of the district court to even consider whether the Cleavers' allegation of urgency should be a relevant factor in the court's determination. *Id.* at 176; see *Open America v. Watergate Special Prosecution Force*, No. 76-1371, slip op. at 5 n.4 (Leventhal, J., concurring in the result).

98 Wasserstrom has stated this principle most eloquently:

In a society such as ours, the legal system is called upon to resolve a multiplicity of problems and to settle innumerable controversies. It is also its function to ensure that certain standards are given effect in the deliberative dealings of man with man. The judiciary is entrusted with a delicate but almost boundless power over the lives of those persons who have been accused of transgressions against the community; it is also given the authority to decide what shall be done in those cases in which the parties have quite inadvertently worked themselves into a position from which voluntary extrication is impossible. These situations may all involve considerations of the greatest import to the litigants; they all surely demand that the judiciary function in such a way that each case is justly decided.

R. WASSERSTROM, *THE JUDICIAL DECISION* 84-85 (1961). See also A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 103-04 (1976); L. FULLER, *THE MORALITY OF LAW* 157-59 (1969); H. HART, *THE CONCEPT OF LAW* 153-63 (1961).

99 *Open America v. Watergate Special Prosecution Force*, No. 76-1371, slip op. at 8 (Leventhal, J., concurring in the result).

100 *Exner v. FBI*, 542 F.2d at 1123.

101 *Open America v. Watergate Special Prosecution Force*, No. 76-1371, slip op. at 18. "[E]ven those with the dimmest of eyesight could look ahead a few months and see that the regulation in all agencies, not just the FBI, would very shortly become the function of the courts." *Id.* (emphasis in original).

Furthermore, giving preferential treatment to those individuals who file suit would be discriminating against others who could not afford to hire an attorney and bring such an action.¹⁰² Responding to the majority's second point, Judge Leventhal argued that no discrimination exists on the basis of wealth since Congress provided for litigation costs and attorney fees.¹⁰³

Which view is correct? The answer is that neither view is entirely correct. The *Open America* majority's assertion that assigning priority to those applicants who file suit would result in the flooding of court calendars ignores the content of Judge Leventhal's concurring opinion. Judge Leventhal stated that filing suit is a material factor in assigning priority, but not necessarily a conclusive one.¹⁰⁴ Further, granting priority to litigants promotes the legitimate purpose of distinguishing between those requesters who have a genuine need for expedited status, as opposed to those who are merely curious.¹⁰⁵ In all likelihood, only those individuals with a genuine urgency would seek court redress. On the other hand, Judge Leventhal contended that granting priority to those applicants who file suit does not discriminate against the poor, since Congress provided for the award of litigation costs and attorney fees.¹⁰⁶ The pertinent statute, however, provides that "[t]he court *may* assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has *substantially prevailed*."¹⁰⁷ Hence, there are two unpredictable consequences which must follow before the requester recovers his litigation expenses. First, he must substantially prevail in his lawsuit. Second, the court, in exercising its discretion under the statute, must determine that his expenses should be assessed against the government. These consequences surely do not necessarily result from bringing a court action. Those individuals who do not have sufficient financial resources to hire an attorney and file suit will still be deterred from taking appropriate action. For the poor, therefore, the statute presents too many questionable variables. Rather than possibly lose their lawsuits or have the court decline to assess litigation expenses against the government,

102 *Id.*

103 *Id.* at 9-10 n.10 (Leventhal, J., concurring in the result).

104 It is plausible to interpret Judge Leventhal's opinion as granting litigants an automatic preference. If so, then granting such automatic priority would indeed, as the majority asserted, result in the flooding of court calendars. The Ninth Circuit expressly confronted this inquiry by holding that filing suit is a relevant, but not necessarily a conclusive, factor in assigning priority. 542 F.2d at 1123.

105 *Open America v. Watergate Special Prosecution Force*, No. 76-1371, slip op. at 9-10 n. 10 (Leventhal, J., concurring in the result). *But see* Brief for Appellants at 20, *Exner v. FBI*, 542 F.2d 1121, where the assertion was made that the chronological processing approach must be upheld by the courts:

[T]he most significant legal issue involved here is . . . whether the chronological sequence system utilized by the FBI should be forced to give way when a requester resorts to litigation. It is, of course, the Government's position that *chronological sequence must be maintained under all circumstances* to assure that all requesters are treated even-handedly. . . .

Id. (emphasis added).

106 *Open America v. Watergate Special Prosecution Force*, No. 76-1371, slip op. at 9-10 n.10 (Leventhal, J., concurring in the result).

107 5 U.S.C. § 552(a)(4)(E). The legislative history of the 1974 amendments also indicates that the award of attorney fees and court costs is at the court's discretion. *See* H. R. REP. No. 93-876, *supra* note 2, at 6272.

these individuals will be reconciled to wait their turn in line.¹⁰⁸ Hence, the *Open America* majority's conclusion in this respect is correct. The assigning of priority to applicants merely because they file suit discriminates against those who are financially unable to afford these litigation expenses.

Because of this fact, courts should refuse to give preferential status to requesters merely because they file suit. Thus, the filing of suit, by itself, should not be a priority-indicating factor of significance. It may be true that the bringing of court actions will be primarily undertaken by those individuals who have a genuine urgency for receiving preferential treatment. But this consideration, under the analysis proposed¹⁰⁹ has already been taken into account. Under this approach, courts in exercising their discretion under § 552(a)(6)(C) may inquire into the applicant's motive for seeking preferential status.

In conclusion, under § 552(a)(6)(C), the court has discretion to deny the agency's motion for additional time even though exceptional circumstances exist and the agency is exercising due diligence. In exercising this discretion, the question arises as to what considerations should be relevant to the court. Two such considerations are proposed. Under the first, a court, in determining whether to grant preferential treatment, is entitled to inquire into an individual's motive for requesting the material. The second queries whether the filing of a lawsuit by itself should be a priority-indicating factor of significance. For reasons advanced in the analysis of each of these two considerations, the conclusion must be reached that only the former consideration is relevant to the court's determination.

III. Remedies Available Under § 552(a)(6)(C)

A. Contempt Power of the Courts

Assuming that the agency fails to show the existence of exceptional circumstances or the exercise of due diligence, or, a court in its discretionary authority declines to grant the agency additional time to process the request, the question arises as to what remedies are available to the court to ensure agency compliance with its order. First, consider the situation where the agency is capable of processing the request within the time limits imposed by the court. This situation creates no unusual difficulties, since the agency should be treated as any other defendant who is able to comply with the court's order. If the agency disobeys

¹⁰⁸ See generally Cahn & Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L. J. 1317 (1964):

The poor live in a legal universe which has, by and large, been ignored by legal scholars. Low visibility decisions decide their destiny; official discretion determines their fate. . . . All of us are subject to the law's delay, to official obtuseness and to unreasoned discretion. But persons with resources can avert the hardship these factors work. Status affords protection. Businessmen and officials alike take pause and reflect before acting to the detriment of persons who are not defenseless. The poor have no such protection against unreasoned, or unprincipled, thoughtless action. And for this very reason, there is a greater need for clarification of legal status, policies and rights in those areas of the law which affect the poor most frequently and adversely.

Id. at 1340-41.

¹⁰⁹ See notes 90-98 *supra* and accompanying text.

the order, then it should be held in contempt to coerce compliance.¹¹⁰

On the other hand, suppose the agency clearly does not have the requisite financial and personnel resources to comply with the court's order. Under present authority, the agency would not be subject to contempt. As stated in the *Train* decision, "[i]t would be unreasonable and unjust to hold in contempt a defendant who demonstrated that he was powerless to comply."¹¹¹

B. Reallocation of Agency's Resources by the Courts

May the court order the agency to reallocate funds and manpower from other divisions within the agency to the Freedom of Information Act division to guarantee that the agency will have sufficient resources to comply with the statutory time limits? For instance, if the agency is allocating one hundred employees and one million dollars to process informational requests, may the court order the agency to reassign another one hundred workers from other divisions within the agency and rechannel an additional one million dollars which would be otherwise spent for different purposes? This question has not yet been considered by the courts, but is certainly a crucial issue in ascertaining what remedies may be available under § 552(a) (6) (C).

In analyzing this question, the first inquiry is whether the affected agency has attempted to implement the pertinent congressional program or whether it has ignored that policy. Recent decisions hold that, if the agency neglects to comply with the congressional intent, the judiciary may intervene to redress this wrong.¹¹² As phrased by one court:

It is not [the agency's] prerogative to disagree with Congressional policy and refuse to implement it. An administrative agency is required to effectuate, not ignore, Congressional intent, whether the agency agrees with Congress or not. The judicial branch has the function of requiring the executive (or administrative) branch to comply with requirements set up by the legislative branch.¹¹³

Applying this principle to those agencies within the scope of the Freedom of Information Act, the question is whether these agencies have reassigned personnel and other resources in an effort to comply with the statutory time limits.¹¹⁴

110 See *Open America v. Watergate Special Prosecution Force*, No. 76-1371, slip op. at 5-6 (Leventhal, J., concurring in the result).

111 *Nat'l Resources Defense Council, Inc. v. Train*, 510 F.2d at 713. *Accord*, *Maggio v. Zeitz*, 333 U.S. 56, 72-73, 73 n.6 (1948). See notes 13-16 *supra* and accompanying text.

112 See *Campaign Clean Water, Inc. v. Train*, 489 F.2d 492, 498 (4th Cir. 1973), *vacated on other grounds*, 415 U.S. 36 (1975); *National Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 695 (D.C. Cir. 1971). As stated by the Fourth Circuit:

When the executive exercises its responsibility under appropriation legislation in such a manner as to frustrate the Congressional purpose, either by absolute refusal to spend or by a withholding of so substantial an amount of the appropriation as to make impossible the attainment of the legislative goals, the executive trespasses beyond the range of its legal discretion and presents an issue of constitutional dimensions which is obviously open to judicial review. . . .

489 F.2d at 498.

113 *Ross v. Community Services, Inc.*, 396 F. Supp. 278, 286 (D. Md. 1975).

114 This question must be raised because Congress anticipated some reallocation of agency resources in implementing the 1974 amendments. See H. R. REP. NO. 93-876, *supra* note 2, at 6275.

In the case of the FBI, by reassigning large numbers of employees and expending enormous sums of money, that agency has displayed a good faith intent to process informational requests as soon as feasibly possible.¹¹⁵ As such, the FBI has adequately shown that it has attempted to implement the congressional policy advanced by the 1974 amendments.

The second inquiry is whether constitutional rights are at stake. Emerging authority holds that if an administrative agency, or for that matter a state legislature or Congress, administers a program in such a manner so as to deprive individuals of their constitutional rights, then the courts will intervene to correct this situation.¹¹⁶ Referring to conditions in an Alabama state mental institution which denied patients their constitutional right to treatment, Judge Wisdom answered Governor Wallace's argument that the duty of allocating funds among competing state programs is reserved solely for the state governor and legislature by replying:

[S]tate legislatures are ordinarily free to choose among various social services competing for legislative attention and state funds. But that does not mean that a state legislature is free, for budgetary or any other reasons, to provide a social service in a manner which will result in the denial of individuals' constitutional rights.¹¹⁷

At first glance, Judge Wisdom's insightful comments are not applicable here. The right to obtain access to information within a specified number of days is a right which is statutorily, rather than constitutionally, created. An argument can be made, however, that the principles enunciated by Judge Wisdom should be extended to encompass the instant situation. Although not a constitutional right, Congress made it manifestly clear in enacting the statutory time limits to the 1974 amendments that excessive delay by an agency in processing an informational request frequently has the same effect as denying that request.¹¹⁸ Hence, these time limits seek to ensure access to official information which has been unnecessarily withheld from the public.¹¹⁹ In this respect, the 1974 amendments

115 Both the District of Columbia and Ninth Circuits agree that the FBI is attempting in good faith to comply with the statutory time limits. See 542 F.2d at 1123; *Open America v. Watergate Special Prosecution Force*, No. 76-1371, slip op. at 20. Whether this effort shows the existence of exceptional circumstances or the exercising of due diligence, however, raises a totally different question.

116 See *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974), modifying *Wyatt v. Stickney*, 344 F.Supp. 387 (D. Ala. 1972); *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974), cert. denied, 417 U.S. 976 (1974); *Campbell v. Beto*, 460 F.2d 765 (5th Cir. 1972); *Holt v. Sarver*, 442 F.2d 304 (8th Cir. 1971), aff'd 309 F. Supp. 362 (E.D. Ark. 1970); *Davis v. Watkins*, 384 F. Supp. 1196 (N.D. Ohio 1974). As stated by the district court in *Holt*:

Let there be no mistake in the matter; the obligation of the Respondents to eliminate existing unconstitutionality does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what Respondents may actually be able to accomplish. If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States.

309 F. Supp. at 385.

117 503 F.2d at 1314-15. "Inadequate resources can never be an adequate justification for the state's depriving any person of his constitutional rights." *Id.* at 1315, quoting *Hamilton v. Love*, 328 F.Supp. 1182, 1194 (E.D. Ark. 1972).

118 See H. R. REP. No. 93-876, *supra* note 2, at 6271.

119 *Environmental Protection Agency v. Mink*, 410 U.S. 73, 80 (1973); see *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971).

comport with the established principle that in a democratic society the populace has the right to be informed.¹²⁰

Thus, the 1974 amendments, although not presently viewed as reaching constitutional magnitude,¹²¹ are nevertheless vitally important in securing public access to government information. As such, they represent a fundamental statutory entitlement for the American people.¹²² It may be plausibly argued that when an administrative agency declines to employ sufficient funds and personnel to comply with the time limits imposed by the amendments, the court should order that agency to restructure its resources. Although rearrangement by the agency may result in less efficient operation of its other functions, the goal of securing prompt public access may be worth that cost. Further, it may be contended that only by decreasing the agency's resources in its other areas will Congress be provided with the impetus to allocate additional funds. For example in the case of the FBI, ordering the agency to devote additional expenditures and manpower to process informational requests may very well diminish that agency's abilities to effectively administer its law enforcement duties. However, this may be the only way to impel Congress to recognize and promulgate a solution to the problem.

It must be remembered, however, that the process of ordering an administrative agency to reallocate personnel and funds from other departments within the agency, in order to secure a statutory entitlement, raises a number of questions regarding the separation of powers and the proper role of the judiciary. In this respect, the above proposal is not necessarily a recommendation for courts to adopt but an important alternative which they should carefully consider in devising remedies under § 552(a)(6)(C).

IV. Conclusion

The assurance of more efficient, prompt, and complete disclosure of information was the objective Congress made manifestly clear in enacting the 1974 amendments. With this goal in mind, this article attempted to provide a construction of § 552(a)(6)(C) which comports with congressional intent. Although the interpretation advanced places a substantial burden upon the agency to justify noncompliance with the statutory time limits, such a construction is wholly consistent with Congress' goal of securing prompt public access to official information. Thus, although the adoption of the suggested statutory interpretation may cause hardship to the affected agency, the courts must not substitute expedience for proper statutory construction. More important than agency inconvenience and hardship is the accomplishment of the objectives of the Freedom of Information Act and its 1974 amendments. That purpose relates

120 The principles underlying the enactment of open meeting statutes. Many of the concepts applicable to the "sunshine laws" are relevant as well to the purposes advanced by the 1974 amendments to the Freedom of Information Act. Note, *Open Meeting Statutes, The Press Fights for the "Right to Know,"* 75 HARV. L. REV. 1199, 1203 (1962).

121 It must be remembered that the Constitution is not a static document but rather is "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. . . ." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (Marshall, C.J.) (emphasis in original).

122 See generally *Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970).

to the basic concept that, in a democratic society, the citizenry has the right to be informed. In promoting this principle, Congress explicitly recognized that information frequently is useful only if it is timely, and that excessive delay in processing a request may well be tantamount to denial of the request. The judiciary, in striving to preserve this congressional objective, may properly impose a substantial burden upon an agency to justify noncompliance with statutory time limits.