ACCESS TO GOVERNMENT INFORMATION: THE AMERICAN EXPERIENCE

GLEN O ROBINSON*

1 INTRODUCTION

Enactment of the United States Freedom of Information Act ("FOI Act")[1] in 1966 was a landmark event in the history of American administrative law. Among the most important of American administrative law reforms, the FOI Act has engendered a veritable cottage industry devoted to securing access to government-held information.[2] In the sixteen-plus years since the Act went into effect[3] Congress has twice amended the Act[4] and is currently considering yet another round of amendments.[5] Each occasion has engendered a new round of studies and commentaries on the Act, its purposes and effects.

The attention given to the subject by Congress pales in comparison to the attention given it by the courts. A September 1981 list[6] shows more than 1300 decisions construing the FOI Act, and companion laws:[7] the Privacy Act,[8] Sunshine Act[9] and Federal Advisory Committee Act.[10] These decisions in turn have been responsible for an endless stream of commentaries and monographs;

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* AB(Harvard); JD(Stanford); John C Stennis Professor of Law, University of Virginia.

[1] 5 USC § 552.

[2] On the private FOI Act "industry" see "Lifting the Curtain From Government Secrets", US News & World Report, 5 February 1973, 50 ("more than 15,000 lawyers and other representatives of 1,600 business and professional associations are employed at digging out hard-to-get information"); "Government Business and the People's Right to Know" (1978) 3 Media Law Reporter 20-21 (discussing the growth of FOI Act service bureaus). On the public sector counterpart to this private sector "industry" see, *eg*, "Bureaucracy's Great Paper Chase", Time (19 December 1977), 23-24 (the FBI employs 379 full time FOI Act staffers, the Department of Defence ("DOD"), 90, the CIA, 65).

[3] The Act was passed into law in July 1966 but implementation was delayed for a year in order to allow agencies time to promulgate regulations.

[4] Amendments were made in 1974 and in 1976. See James T O'Reilly, *Federal Information Disclosure* § 3.08 (1977, updated through 1982). ("O'Reilly Treatise")

[5] See Hearings on Freedom of Information Act before The Subcommittee on the Constitution of the Senate Judiciary Committee, 97th Congress 1st Session, vols 1 and 2 (1981) ("1981 FOI Act Hearings"). While the 97th Congress adjourned without passing legislation, a bill (§ 774), similar to the leading bill in that Congress (§ 1730), has been introduced in the current Congress.

[6] See US Department of Justice, *Freedom of Information Case List* (1981) 1-89. The Case List, published annually, cites all reported and unreported cases and indexes them by general topics.

[7] I do not deal with these laws in this paper, though they are all part of the same family of "open government" legislation.

[8] 5 USC § 552a. Essentially the Act mandates record keeping requirements for personal information of a private character, including notice to the individual about whom records are maintained, a right of the individual to obtain such records — subject to certain exemptions — and a right to challenge the contents of such records and have inaccuracies corrected. The Act also limits disclosure of personal information without the consent of the individual except where disclosure is required by the FOI Act or certain other conditions are met.

[9] 5 USC §662b. The Act requires that meetings of multi-membered agencies, at which agency deliberations determine agency action, be open to the public, except to the extent the meeting deals with matters exempt from disclosure under the FOI Act. (The same legislation also amended the FOI Act, as will be noted; and the APA provisions governing adjudicatory hearings forbidding *ex parte* contacts in such hearings.)

[10] 5 USC — Appendix. The Act requires that meetings of officially established "federal advisory committees" be conducted in public except to the extent the committee deals with matters exempt from disclosure under the FOI Act.

as of September 1981 the number of law review articles alone exceeded 300.[11] To these law review treatments must be added uncounted monographs and articles on the FOI Act in non-legal publications.

Perhaps needless to say, the agencies' involvement has been greater still. Current estimates put the total number of FOI Act requests at about one million annually.[12] That figure, however, is not very useful by itself. What one wants is information about the character of the requests, and more particularly the time and effort devoted to servicing them. Unfortunately, no one to my knowledge has compiled reliable data on the aggregate amount of administrative effort spent in FOI Act related activities, though we have some overall estimates, and some scattered data for individual agencies. That data suggest the administrative workload is not trivial, even though in overall budgetary terms the burden is not large *relative to other administrative costs.*[13]

With more than 15 years of active use and observation of the FOI Act one might reasonably suppose the American experience would provide a wealth of reliable insights into the effects, good and bad, of open access to government files. And so it does, I suppose, if one does not put too much emphasis on the word "reliable". Unfortunately, as is often the case in such matters, "hard" evidence is hard to obtain. Most of the reports on effects tend to support the quip that in social science the plural for "anecdote" is "data". As well, many of the reports are from advocates who have sifted the evidence for a purpose other than neutral study. Given the intangible nature of objectives and interests at stake, and given their value-laden character, it is understandable — if disappointing — that the ratio of rhetoric to evidence is high. To make matters more difficult the very structure of the Act makes some important questions — who uses the Act and for what purpose — very difficult to answer.[14]

Notwithstanding the above disclaimer I shall attempt to pull together in very general fashion what I think we know about the American experience and to offer some personal impressions about that experience. It will be useful to

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[11] See *Freedom of Information Case List*, *supra* n 6, 107-127.

[12] See Swallow, "Has the Freedom of Information Act Worked — Or Has It Worked Too Well", National Journal (15 August 1981) 1470.

[13] There is a large number of reports of the burdens created for particular agencies. Much of this information consists of "horrible case" anecdotes. See, *eg*, 1981 FOI Act Hearings, *supra* n 5, Vol 1 at 106 (report of a single request to DOD requiring a search of 24 *million* pages to locate the requested documents, requiring some 350,000 man hours); *ibid* at 984 (report of single request to FBI, resulting in a court order to produce 40,000 documents a month). However, some agencies have reported specific manpower and cost data. See, *eg*, *ibid* at 105, 627 (estimated $6.8 million in annual costs for DOD; $11 million FBI). Cost to all agencies has been estimated at around $57 million for 1980, a figure that does not include judicial enforcement costs. See, *ibid*, vol 2 at 3.

[14] One of the key features of the FOI Act was its elimination of the former limitation on disclosure to persons "properly and directly concerned" and its exception for documents that were deemed to be confidential "for good cause". Eliminating these limitations removed any legal basis on which agencies could ask requesters to identify for whom and for what purposes the information is sought. Of course, since the agencies cannot refuse to disclose non-exempt information regardless of how or by whom it will be used, requesters need not conceal their purposes. Thus, in many cases it is possible to ascertain from the request itself who is seeking information and for what use. However, it is not possible to ascertain the real parties interested or the ultimate uses of the information with any statistical precision. Estimates on these matters are necessarily rough, and may not be fully reliable.

begin with a brief survey of the American Act and its implementation. The salient features must be well known to Australian administrative lawyers — so I presume from the fact that the 1982 Australian Freedom of Information Act ("Australian FOI Act") incorporates many of the features of the United States FOI Act, as interpreted by our courts. However, a brief outline will provide a basis for highlighting comparisons and contrasts. Though my purpose in doing so is to provide a *basis* for comparing the United States and Australian Acts, I have not attempted to make extensive comparisons in this paper. Inspection of the two enactments will quickly reveal the similarities and contrasts between the two FOI Act schemes, and I will call attention to these in some of the footnotes,[15] but a careful, detailed comparative evaluation would require a more elaborate exegesis than is here possible.

It is always a difficult task to translate one country's experience into terms that make it meaningful for another, even when the two countries share common values, and similar social institutions. Certainly I could not claim the requisite familiarity with Australia's political, social and legal system to say that the United States experience with access to government information is directly transferable to Australia.

Nevertheless, the fact that Australia has passed a freedom of information Act remarkably parallel to that of the United States, even to the point of incorporating some of the judicial glosses on the United States law, indicates that Australian lawmakers have made a judgment that the American experience is relevant. Those lawmakers should know better than I what the value of that experience is, so I feel comfortable in proceeding on the *assumption* that what I report about the American experience will be of some interest to Australians. By the same token I also assume that in years to come we in the United States will be able to learn from the Australian experience with freedom of information. To date we have had to depend on our own experience. We have, I think, taught ourselves a few things, but such self-taught lessons are always a bit uncomfortable. I am mindful of a piece of ancient wisdom: it is good to learn from your mistakes; it is better to learn from someone else's mistakes.

With that homily to guide us let me survey the United States experience, beginning with a brief overview of the Freedom of Information Act and its interpretation, thence proceeding to an assessment of the major controversies it has generated.

2 THE UNITED STATES FREEDOM OF INFORMATION ACT: A PRIMER

A *The Ancien Regime*

Before any enactments established a right of public access to government information, a long tradition of departmental control of information control

[15] Discussion of the Australian FOI Act is based on the Act as passed in 1982. A number of proposed amendments were being considered at the time this paper was completed. I have noted a few of the more important proposed changes when pertinent. No attempt is made to analyse the Australian FOI Act in full. I have merely cited major features of the Act that, more or less, parallel those of the US Act.

flourished in the federal government. This tradition was founded on claims of executive privilege which, if amorphous, were of ancient lineage.[16]

The first attempt to guarantee public access to government information was s 3 of the Administrative Procedure Act of 1946 which required all agencies to make certain administrative materials available. Because of the weakness and vagueness of the language of s 3, the statute was used more to support withholding information an agency did not wish to disclose than as authority in support of citizens' successful claims for disclosure.[17]

Section 3 mandated publication of a variety of information about agency decision-making, except in a situation "requiring secrecy in the public interest". This provision for "secrecy in the public interest" permitted agency evasion of publication requirements. Secondly, s 3(b) required agencies to make available "all final opinions or orders in the adjudication of cases". But this requirement did not extend to opinions or orders "required for good cause to be held confidential". The vagueness with which this exception was phrased made it susceptible to inappropriate application. This same "good cause" language was repeated in s 3(c), which provided access to public records generally. These records were to be available to "persons properly and directly concerned except information held confidential for good cause found". In addition to the invitation to evasion presented by a "good cause" exception, this sub-section also provided another route to nondisclosure by allowing agencies to determine the standing of persons wishing access to information. A fourth weakness of s 3 was that it supplied no remedy to a citizen wrongfully denied access to information. The lack of any remedy made possible a too heavy reliance on the vague language of the section to withhold government records.

Legislative efforts to increase public access to information began in 1955, spearheaded by California Congressman John Moss. These bills received little consideration in Congress before 1963. In 1958 Congress did amend the federal housekeeping statute to state explicitly that this statute did not authorise withholding information or records from the public,[18] but this amendment effected no real change in departmental disclosure policies. It simply limited authority for nondisclosure to the loop-holes of s 3 of the Administrative Procedure Act.

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[16] See generally R Berger, *Executive Privilege: A Constitutional Myth* (1974). Berger's treatment is primarily concerned with legislative access to executive secrets, hence it focusses heavily on the constitutional discussions of the privilege. The common law bases of the privilege are, however, briefly discussed in chapter 7 of his book. In general terms the executive privilege encompassed several more or less distinctive privileges: (1) A privilege for military secrets and secrets of state, one generally regarded as absolute. See *United States* v *Reynolds* (1953) 345 US 1. (2) An "informer's privilege", a qualified privilege not to disclose the identity of informers except upon a showing that the public interest requires disclosure. See *Roviaro* v *United States* (1957) 353 US 53. (3) Assorted statutory privileges either forbidding or restricting disclosure of information given to the agency in confidence or protecting certain kinds of information gathered by the agency, such as trade secrets, financial information and the like. See, *eg* Federal Trade Commission Act, § 6(f), 15 USCA § 46(f); 18 USCA § 1905. (4) A qualified privilege for so-called "internal management" matters. See, *eg*, *Appeal of the United States Securities and Exchange Commission* (1955) 226 F 2d 501; *cf United States* v *Nixon* (1974) 418 US 683.

[17] On old s 3 of the APA see Note "Comments on Proposed Amendments to Section 3 of the Administrative Procedure Act: The Freedom of Information Bill" (1965) 40 Notre Dame Lawyer 417.

[18] See generally Johnson, *The Government Secrecy Controversy* (1967) 120-121.

In 1963 a Senate subcommittee began hearings on proposed access legislation, from which the FOI Act eventually emerged. Eventually the Freedom of Information Bill passed through Congress virtually unopposed despite universal departmental hostility to its broad disclosure principles and its new remedy for requesters of information. Two groups allied to support passage of this law allowing public access to government information. Bar groups and other administrative reformers pressed for the Bill in order to secure publication of agency rules and opinions. These groups were joined by the press which pushed even harder for the FOI Act to gain access to more newsworthy documents disclosing agency activities.[19] The American Society of Newspaper Editors had commissioned a study, published in 1953 as *The Public's Right to Know*, which outlined press opinion on government secrecy.[20] Publicity, supplied by the press, of reform efforts throughout the long period of FOI Act's gestation was also important to its ultimate passage.

B *The Revolution*

The new Act was revolutionary in its basic approach to the question of government disclosure and public access. The FOI Act established a broad norm of disclosure and access with relatively narrow exceptions. It removed all restrictions on who was entitled to information or the purpose for which it may be obtained. "Any person" may request access to, or disclosure of, agency records or information without regard to purpose or need and it provided for *direct* and *immediate* judicial enforcement at the instance of anyone denied access. The latter provision proved to be especially important, particularly given the "liberal"-pro-access attitudes of the federal courts that have been most often called upon to enforce the Act.[21]

The coverage of the FOI Act is co-extensive with the Administrative Procedure Act ("APA") itself and extends to virtually every executive department, bureau, agency or official, the Office of the President being a notable exception.[22] Congress and the courts are not agencies within the meaning of the APA and hence are not within the Act.[23]

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[19] O'Reilly Treatise, *supra* n 4, § 2.03.

[20] H Cross, *The People's Right to Know* (1954).

[21] The District Court and Court of Appeals of the District of Columbia Circuit have accounted for a majority of decisions. In part this fact reflects venue convenience for suits against Washington-based federal agencies. In part it probably also reflects a familiarity on the part of the administrative law segment of the bar with those courts. Finally, the general philosophy of those courts in matters such as this has undoubtedly been influential. Except for reverse-FOI Act cases the initiative in FOI Act review cases is, of course, determined by persons who want to overturn agency refusal to disclose records. It is a common perception of administrative lawyers that the DC Circuit has, in recent years at least, been more aggressive than most circuits in overseeing federal agency decisions. Thus, litigants expect a more sympathetic treatment in the DC Circuit. Whether that perception is accurate is perhaps debatable, but it is the perception, not the reality, that dictates venue choices.

[22] In *Kissinger* v *Reporters Committee For Freedom of the Press* (1980) 445 US 136, the Court distinguished between the "Executive Office of the President" and the "Office of the President", the latter being limited to the President, his immediate personal staff and other executive Office staff whose *sole* function is to advise the President. Compare the exemptions for Cabinet and Executive Council documents in the Australian FOI Act ss 34, 35. There are some notable differences in coverage between the US and Australian Acts. The Australian Act contains a series of general exemptions for certain agencies, such as Australian intelligence agencies and various public corporations: see s 7. The US Act, in marked contrast, covers virtually all government agencies, corporations, and institutions other than Congress and the Courts. See 5 USC § 551(i) and § 552(e).

[23] 5 USC § 551(1)(A)&(B). The Australian FOI Act, s 5, allows access to court documents of an *administrative* nature.

In general terms the Act imposes three distinct obligations with respect to disclosure of, or access to, agency records and information:

The first is to publish in the Federal Register descriptions of its organisation; methods of operation; general substantive rules and policies; and rules of procedure.[24]

The second is to make available for public inspection and copying, agency opinions and orders, statements of general policy and interpretation not published in the Federal Register, administrative staff manuals and staff instructions that affect a member of the public.[25]

The third is to disclose agency records to any person who requests and reasonably describes such records.[26] Agencies may charge reasonable fees for document search and duplication but are admonished to waive or reduce fees where disclosure benefits the general public.[27] Deadlines are prescribed for responding to such requests.[28] Disciplinary action is authorised for arbitrary denials of requests.[29] Judicial enforcement of the disclosure requirement is provided in the form of immediate *de novo* review of agency denials of disclosure requests;[30] including *in camera* review of the documents requested

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[24] 5 USC § 552(a)(1). The publication provisions of the Australian FOI Act s 8, appear to be generally similar.

[25] 5 USC § 552(a)(2). Comparable provisions in the Australian FOI Act appear in s 9.

[26] 5 USC § 552(a)(3) and (b). The parallel provisions of Part III of the Australian FOI Act are rather more detailed, but broadly similar to those of the US FOI Act. One notable general difference is that the Australian disclosure provisions are applicable only to documents created or acquired by the agency after the FOI Act enactment date, except where an individual seeks access to documents concerning his personal affairs in which case access extends to records created or acquired as much as five years before the enactment date or where the requested document is necessary to understand a current document properly obtained by the requester. No such time limitation applies to the US disclosure scheme. Proposals are pending to amend the Australian FOI Act to extend the application of the disclosure provisions to all documents created or acquired after 1978, with no limit for requests for personal documents.

[27] 5 USC § 552(a)(4)(A). The Australian FOI Act ss 29, 30 similarly provide for waivable fees.

[28] 5 USC § 552(a)(6). The Australian FOI Act s 19 similarly prescribes deadlines but s 21, authorising deferral for public interest reasons, finds no counterpart in the US Act. In *Federal Open Market Comm* v *Merrill* (1979) 443 US 340 the Court found authorisation for deferral in exemption five of the US FOI Act. See *infra* n 48. But this was an exceptional, limited authorisation which is unlikely to be applied beyond the very special circumstances of that case.

[29] 5 USC § 552(a)(4)(F). No comparable provision appears in the Australian FOI Act. I am unaware of any case imposing disciplinary sanctions under the US FOI Act.

[30] 5 USC § 552(a)(4)(B-G). Part VI of the Australian FOI Act contains a somewhat more complex review scheme than is found in the US FOI Act. The additional complexity in the Australian FOI Act largely concerns review of exemptions for documents pertinent to national security/defence, for Cabinet and Executive Council documents and for internal working documents when a ministerial certificate that disclosure is contrary to the public interest is conclusive, and may not be overridden. See ss 33(2); 34(2); 35(2); 36(3). Although the government's determination cannot be overturned by the reviewing body, the Administrative Appeals Tribunal, it can be referred to a special Documents Review Tribunal which is authorised to review the government's claim and to render an opinion on whether the claim is reasonable. For this purpose the DRT is authorised to inspect the exempt documents *in camera* — a power denied the AAT in these cases. However, the DRT opinion is purely precatory; as with the AAT it may not overturn the government's claim of exemption in these cases. The current government proposals to amend the Act would abolish the DRT and allow the AAT to assume its functions — without, however, changing the ministerial prerogatives in case of these exemptions.

where the court deems it necessary to determine their exempt status.[31] The disclosure and access requirements are subject to nine specific exemptions for different classes of records or information.[32]

C *Interpretive Issues and Controversies*

(1) *Publication and Access*

Of these three obligations, the third is clearly paramount in importance and has been the central object of attention, and controversy. The one major controversy over the first two obligations has arisen over public access to staff manuals that concern law enforcement techniques, procedures and policies. The controversy is too complex to discuss here in detail. The debate includes, among other things, some rather fine points of statutory interpretation as to whether the governing provisions are those relating to public access to staff manuals or those relating to disclosure of public records, whether the manuals are within exemption two, covering internal personnel rules, or exemption seven, covering investigatory files, or other exemptions expressed or implied.[33] In somewhat oversimplified summary, the courts have been responsive to claims by law enforcement officials that access to, or disclosure of, information about investigative techniques or enforcement policies and practices could facilitate circumvention and impede law enforcement generally; on varying rationales, they have generally exempted such sensitive information.[34] One notable exception to this generally conservative attitude, a decision by the

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[31] 5 USC § 552(a)(4)(B). This authorisation to compel production of documents for *in camera* inspection extends to all documents. The Australian FOI Act, s 64, gives the AAT similar power in all cases other than those where such documents are claimed to fall within the exemptions for documents pertinent to national security/defence, Cabinet and Executive Council documents, and for internal working documents. However, the special DRT is authorised to conduct *in camera* inspection of such documents and if the Act is amended as now proposed this function will be assumed by the AAT. Both Acts by their terms only authorise *in camera* review, not compel it. See *National Labor Relations Board* v *Robbins Tire and Rubber Co* (1978) 437 US 214, 224.

[32] 5 USC § 552(b). Compare Australian FOI Act Part IV, ss 32-52. The US FOI Act has been construed to permit, but not compel withholding of exempt documents. See *Chrysler Corporation* v *Brown* (1979) 441 US 281. The Australian FOI Act s 14 explicitly grants the agency discretion to disclose "where they can properly do so or are required by law to do so". This latter qualification appears to parallel the *Chrysler* decision that, while the FOI Act does not forbid disclosure, other laws may do so. In all cases the agency's exercise of discretion is reviewable by the courts.

[33] For a detailed discussion see Note, *The Status of Law Enforcement Manuals Under the Freedom of Information Act* (1980), 75 Nw UL Rev 734.

[34] The cases generally fall into two categories: (1) cases holding that law enforcement manuals are *implicitly* exempted by (a)(2)(C) (covering access/copying of staff manuals, *etc*) to the extent disclosure would risk circumvention of the law or impede law enforcement, see, *eg*, *Cox* v *United States Department of Justice* (1978) 576 F 2d 1302; (2) cases holding that such material is within (a)(2)(C) but is exempted by exemption two, applicable to internal personnel files, *eg*, *Hardy* v *Bureau of Alcohol, Tobacco & Firearms* (1980) 631 F 2d 653. In addition some decisions have emphasised that exemption seven, (protecting investigatory records, disclosure of which would interfere with enforcement proceedings) is at least corroborative of an exemption for such material even though it would not literally apply to manuals since they are not "investigatory records". See *ibid* at 656.

Court of Appeals for the District of Columbia,[35] has recently been repudiated by that court.[36]

(2) *Exemptions*

Most of the attention and most of the controversy over the FOI Act has centred on the disclosure of agency records. Interpretive problems can be conveniently aggregated into two general categories: those specifically concerned with the scope of the nine exemptions, and those involving general issues of definition, implementation and enforcement. A comprehensive treatment of the interpretive problems is out of the question here; it is available elsewhere in any case.[37] I will simply sketch some of the major problems, focussing on the most important exemptions, and some of the critical problems of general implementation and enforcement.

Exemption one embraces what is sometimes called "state secrets", in its narrowest sense: information required to be kept secret in the interest of national defence or foreign policy. As amended in 1974 the exemption is limited to information that is *properly* classified pursuant to Executive Order,[38]

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[35] See *Jordan* v *United States Department of Justice* (1978) 591 F 2d 753.

[36] *Crooker* v *Bureau of Alcohol, Tobacco & Firearms* (1981) 670 F 2d 1051. The court exempted two protected portions of a manual on investigative techniques. The court professed not to reject its earlier *Jordan* decision, but only its sweeping rationale insofar as it suggested that all law enforcement manuals must be disclosed. In fact, however, *Crooker* repudiated the most important, and controversial, part of *Jordan*.

[37] See, *eg*, O'Reilly Treatise, *supra* n 4.

[38] See Executive Order No 12356, 47 Fed Reg 14874 (1982). The current Executive Order, issued by President Reagan in April 1982, tightens somewhat the classification criteria and processes of previous orders. See *infra* nn 99 and 100 and accompanying text. However, the general criteria and procedures are not changed from those prescribed by the Carter Administration in Executive Order 12065, 43 Fed Reg 28949 (1978).

The classification scheme prescribes three levels of classification:

(1) "Top Secret" shall be applied to information, the unauthorised disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security.

(2) "Secret" shall be applied to information, the unauthorised disclosure of which reasonably could be expected to cause serious damage to the national security.

(3) "Confidential" shall be applied to information, the unauthorised disclosure of which reasonably could be expected to cause damage to the national security.

(The only change from prior classification criteria is the elimination of the word "identifiable" qualifying "damage" in the confidential classification scheme.) Information shall be classified if it concerns:

(1) military plans, weapons, or operations;

(2) the vulnerabilities or capabilities of systems, installations, projects, or plans relating to the national security;

(3) foreign government information;

(4) intelligence activities (including special activities), or intelligence sources or methods;

(5) foreign relations or foreign activities of the United States;

(6) scientific, technological, or economic matters relating to the national security;

(7) United States Government programmes for safeguarding nuclear materials or facilities;

(8) cryptology;

(9) a confidential source; or

(10) other categories of information that are related to the national security and that require protection against unauthorised disclosure as determined by the President or by agency heads or other officials who have been delegated original classification authority by the President.

(The principal changes here are the addition of items 2, 8 and 9.)

Classifications remain in effect for as long as required by security considerations. (The principal change here was elimination of the process for automatic declassification after six years. However, automatic declassification determinations under prior order remain in effect unless classification is extended.)

which has been interpreted to permit judicial review of the substantive reasonableness as well as the procedural regularity of individual classifications.[39] For this purpose *in camera* examination of specific documents is authorised, but discretionary in the district court.[40] Given the indefinite constitutional dimensions of executive privilege it remains uncertain how far courts may go in ordering disclosure of classified information.[41] A similar ambiguity arises in connection with exemptions five (inter/intra agency memoranda) and seven (investigatory files) which also involve aspects of the executive privilege.[42]

Exemption two, relating to personnel rules or practices, requires only passing notice.[43] Its purpose was to prevent disclosure of matters such as vacations, pay, hours of work, *etcetera* that might be used to harrass agencies about trivial housekeeping functions.[44] Consistent with its limited purpose it has been rather narrowly confined to those matters in which the public "could not reasonably be expected to have an interest".[45]

Exemption three, covering all information which Congress in other statutes has required or permitted to be held confidential, also requires little attention. As amended in 1976 the exemption embraces only those statutes that are directed at the particular type of information in question or that specify par-

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[39] S 33 of the Australian FOI Act appears generally parallel to the US provision except that a government certificate that disclosure would be contrary to the public interest is conclusive and may not be overridden by the reviewing court. By contrast there is full judicial review under the US Act. As originally drafted, exemption one of the US FOI Act was interpreted to preclude judicial review of the reasonableness of the classification. See *Environmental Protection Agency* v *Mink* (1973) 410 US 73. The 1974 amendments overruled *Mink* and provided for *de novo* review of classifications and *in camera* scrutiny of documents themselves where necessary to determine the reasonableness of the classifications. See Attorney General's Memorandum on the 1974 Amendments to The Freedom of Information Act (1975) 1-4 ("Attorney General's Memorandum"). However, legislative history indicates that "*de novo* review" in this context requires courts to give "substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record". See Attorney General's Memorandum 3. See also *Military Audit Project* v *Casey* (1981) 656 F 2d 724, 738.

[40] See *Ray* v *Turner* (1978) 587 F 2d 1187.

[41] The Court's decision in *Environmental Protection Agency* v *Mink* (1973) 410 US 73, that courts could not review the reasonableness of executive classifications, was explicitly a matter of statutory interpretation. The Court acknowledged that Congress had the power to overturn its ruling, but noted that such power was subject to an undefined constitutional executive privilege, at 83.

[42] We know from *United States* v *Reynolds* (1951) 345 US 1, that it includes matters of national security; as to such sensitive matters the privilege is absolute. Beyond this core area, however, both the scope of the privilege and the level of protection (whether absolute or conditional) are nebulous. In *United States* v *Nixon* (1974) 418 US 683, the Court took as established that the privilege included confidential communications beyond those implicating national security interests, but ruled that the President's "generalised interest in confidentiality" had to give way to the due process rights of a criminal defendant who demanded the information in order to prepare a defence. See generally Symposium: *United States* v *Nixon* (1974) 22 UCLA L Rev 1; P Freund, "Forward: On Presidential Privilege" (1974) 88 Harvard L Rev 13.

The scope of the nonconstitutional, common law, executive privilege outside the area of national security interests is also vague. See, *NLRB* v *Sears Roebuck & Co* (1975) 421 US 132; *Federal Open Market Comm* v *Merrill* (1979) 443 US 340. It is a reasonable inference from *EPA* v *Mink*, *supra* note 41, that the nonconstitutional privilege is broader than the constitutional privilege, but such is the nebulousness of the entire subject that we cannot do more than guess how much broader.

[43] Compare the parallel exemption in s 40 of the Australian FOI Act.

[44] See O'Reilly Treatise, *supra* n 4, at § 12.03.

[45] *Department of the Air Force* v *Rose* (1976) 425 US 352, 369.

ticular criteria by which confidentiality shall be determined.[46] Uncertainty continues to exist as to the degree of specificity required of statutes to qualify under exemption three.[47] Despite the number of statutes that may be relevant to exemption three the problem of interpretation does not seem to me a very great one, and it should decline markedly as the major categories of statutes are interpreted.

Exemption four, covering trade secrets and confidential commercial or financial information, has been among the most controversial of the nine exemptions. Unlike exemption three the number and variety of cases calling for interpretation is essentially open-ended. The trade secret portion of the exemption is not so troublesome. Though it draws on a vaguely defined common law, it is susceptible to a more or less fixed meaning.[48] However, for confidential commercial or financial information the courts have construed the confidentiality element as turning on an evaluation of facts that can differ considerably from case to case. For commercial/financial information[49] submitted to an agency[50] to be deemed confidential it must be shown that disclosure would (1) impair the ability of the government to obtain necessary information in the future (deterring voluntary submission of information by private parties) or (2) would substantially harm the competitive position of the person from whom the information was obtained.[51] Of these two criteria the second has generated the greater controversy. Unlike most of the exemptions it turns on facts that the agency may not have when a request is made; also, except where condition (2) implicates condition (1), the agency may lack strong incentive to withhold the information even though it would be entitled to do so.

These factors have given rise to the so-called "reverse-FOI Act" problem: attempts to prevent disclosure of exempt information.[52] The Supreme Court has ruled that the FOI Act *itself* does not prohibit agency disclosure of exempt

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[46] The 1976 amendment, enacted as a rider to the Sunshine Act, narrowed the scope of exemption three. The amendment was intended to overrule *Federal Aviation Administration* v *Robertson* (1975) 422 US 255, where the Supreme Court construed the exemption to cover statutes that gave broad discretion to agencies to withhold documents. The parallel exemption in the Australian FOI Act, s 38, appears to reflect a similar view of the required specificity for statutory exemptions.

[47] See, *eg*, *Baldrige* v *Shapiro* (1982) 102 S Ct 1103 (Census Act within class of statutes covered by exemption 3; resolving conflicting circuit opinions). The process is unavoidably *ad hoc*. For a discussion of relevant criteria see O'Reilly Treatise, *supra* n 4, § 13.04.

[48] See, *Public Citizen Health Research Group* v *FDA* (1983) 704 F 2d 1280 choosing a restrictive interpretation which limits protection to information about the "productive process" itself as opposed to more general matters of commercial confidentiality.

[49] For lists of particular items that have been found to be "commercial" and "financial" under the US FOI Act see O'Reilly Treatise, *supra* n 4, § 14.07.

[50] Confidential commercial information generated within the agency itself, as distinct from information submitted to it, is not covered by exemption four. See *Federal Open Market Commission* v *Merrill* (1979) 443 US 340, where the Court was forced to employ a rather creative interpretation of exemption five to protect the sensitive confidential strategies of the Federal Reserve Board's open-market operations. The Australian FOI Act, s 44, handles this directly in its exemption for documents affecting the national economy.

[51] See *National Park & Conservation Association* v *Morton* (1974) 498 F 2d 765. The Australian FOI Act, s 43, incorporates similar tests within its exemption for documents relating to business affairs.

[52] For useful recent discussions see Note, "Protecting Confidential Business Information from Federal Agency Disclosure After *Chrysler Corp* v *Brown*" (1980) 80 Columbia L Rev 109; Note, "A Procedural Framework for the Disclosure of Business Records Under the Freedom of Information Act" (1980) 90 Yale L J 400.

information and does not provide a private cause of action to prevent it; however, disclosure is subject to judicial review under the arbitrary and capricious standard of the APA and an unauthorised disclosure contrary to the other statutory protection of confidentiality violates that standard.[53] Still to be resolved, however, is whether agencies must give notice and an opportunity to be heard to submitters before releasing exempt data. Some agencies provide such notice,[54] but this practice has yet to be universallly adopted,[55] and probably will not be until it is mandated by general statute applicable to all agencies.

Exemption five, covering intra-agency and inter-agency memoranda and letters, was intended to incorporate the broad common law executive privilege for confidential internal communications. Unfortunately, the contours of that privilege have never been well defined, presenting substantial interpretive problems as to the scope of the exemption. The Supreme Court has narrowed the scope substantially, interpreting the common law privilege to protect only *pre-decisional* communications affecting the deliberative process.[56] One essential distinction recognised by the Court is the distinction between advice or deliberative communications on the one hand and factual information on the other; another critical distinction is between communications about prospective agency action and explanations or reasons for that action.[57] Consistent with the assumed antipathy of Congress for "secret law", any information, advice or recommendation that is expressly relied on, or any opinion or reasons explaining an action adopted by the agency, cannot be protected.[58] The FOI Act does not require an agency to issue an opinion to make any explanation of its actions; it only requires it to be divulged where it has been made.[59]

Exemption six, protecting personnel and medical files whose disclosure

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[53] *Chrysler Corporation* v *Brown* (1979) 441 US 281.

[54] See 1981 FOI Act Hearings, *supra* n 5, vol 1 at 263 (testimony of senior counsel for Proctor and Gamble). Congress has recently amended some agency charters to forbid disclosure of material covered by exemption four, and to require advance notice to information submitters as well as opportunity to be heard on the confidential status of the information. See 15 USC § 57a(b)(2) (Federal Trade Commission); 15 USC § 2055 (Consumer Product Safety Commission). Compare s 27 of the Australian FOI Act providing for notice to submitters and an opportunity for them to argue in support of nondisclosure.

[55] For example, the FDA, by regulation, refuses to notify submitters of requests for confidential information except where the agency is uncertain whether the information is confidential. See *Pharmaceutical Manufacturers Association* v *Weinberger* (1976) 411 F Supp 576 (affirming agency regulations against).

[56] See *National Labor Relations Board* v *Sears Roebuck & Co* (1975) 421 US 132. The Australian FOI Act, s 36, incorporates a generally similar standard in its exemption for internal working documents. In one respect the Australian exemption is narrower than the US insofar as it specifically adds the condition that disclosure "would be contrary to the public interest". Under US law this condition is assumed but not required to be established in a particular case. In another, more important, respect, however, the Australian exemption is much broader: under s 36(3), a government certificate that disclosure would be contrary to the public interest is conclusive and may not be overridden by the court.

[57] *Ibid.* See also Australian FOI Act s 36(5).

[58] *Ibid.* See also Australian FOI Act s 36(6). Any document incorporated by reference into an agency opinion cannot be exempt under the US FOI Act. See *American Mail Line Ltd* v *Gulick* (1969) 411 F 2d 696.

[59] *Renegotiation Board* v *Grumman Aircraft Engineering Corp* (1975) 421 US 168, 192. However, other provisions of the APA require opinions for formal adjudications, 5 USC § 557, and a statement of basis for "informal" rulemaking, 5 USC § 553. Even where the APA does not require a formal opinion or statement, some explanation of agency action is the minimum prerequisite of judicial review. See *Citizens to Preserve Overton Park* v *Volpe* (1971) 401 US 402.

would cause unwarranted invasion of personal privacy, is similar to exemption four in several respects. As with exemption four, the *primary* thrust of the exemption is to protect the interests of persons outside the agency about whom the information is pertinent (though in both cases the agency may have an interest in maintaining confidentiality as a means of protecting its ability to obtain information) and the exemption is essentially open-ended in requiring evaluation of the harm of disclosure to the individual in each case. Exemption six has been interpreted to require an explicit balancing of the interest in privacy against the interest in disclosure.[60] Thus, predictability is sacrificed for greater refinement in measuring the competing interests. One odd feature of the exemption is that it is limited to private information found in medical, personnel and "similar" files. Personal information found in other records is not protected except to the extent it is within another exemption, such as exemption seven which explicitly protects personal privacy in the context of investigatory records.[61]

Exemption seven protects investigatory records compiled for law enforcement purposes where disclosure would harm any of several specified interests: enforcement proceedings generally, impartial adjudication, personal privacy, confidentiality of investigative sources, or techniques and safety of enforcement personnel. The law enforcement exemption has been the subject of recurrent controversy. Responding to what it perceived as an overly expansive judicial interpretation of the scope of the exemption Congress narrowed its scope in 1974 by specifying particular interests to be protected.[62] However, that narrowing of the exemption has in more recent years led to proposals looking in the opposite direction, as we will note later. The greater specificity added in 1974 did not, needless to say, resolve all interpretive problems. It did perhaps focus the issues somewhat, but there is still considerable room for open-ended interpretation. For example, the privacy-protection part of exemption seven incorporates all of the uncertainty of exemption six. Similarly the interference-with-enforcement portion of the exemption appears to be very elastic — at least so one would judge from the Supreme Court's interpretation.[63]

Exemption eight, pertaining to reports of financial regulatory agencies, and exemption nine, protecting geological information, warrant only passing notice. Both are very limited, specialised exemptions that have not figured prominently in the history of the FOI Act.[64]

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[60] See, *eg*, *Department of Air Force* v *Rose* (1976) 425 US 352. The parallel exemption in Australian FOI Act s 41 is not explicit on the balancing though this may be implicit in the "unreasonable" standard of s 41.

[61] The Australian FOI Act, s 41, is not limited to particular files. The Supreme Court has recently diminished the significance of the limitation by giving an expansive interpretation to what qualifies as a "similar" file. *United States Dept of State* v *Washington Post* (1982) 102 S Ct 1957.

[62] See Attorney General's Memorandum, *supra* n 39, 4-13; *National Labor Relations Board* v *Robbins Tire & Rubber Co* (1978) 437 US 214. The Australian FOI Act s 37 is generally similar to the amended US FOI Act.

[63] See *National Labor Relations Board* v *Robbins Tire & Rubber Co*, *supra* n 62.

[64] See O'Reilly Treatise, *supra* n 4, at §§18.01-18.02. These exemptions would be largely embraced within the Australian FOI Act s 39, (documents affecting financial or property interests of Commonwealth) and s 44 (documents affecting national economy, including regulation of financial institutions).

(3) *Disclosure: Implementation and Enforcement*

As might be expected, substantive issues concerning the scope of disclosure (or, equivalently, the scope of the exemptions) have been the paramount concern over the years. At least they have claimed the lion's share of attention from courts and academic commentators. Given both the importance and the variousness of these issues one cannot say this attention is misplaced. However, it does tend to obscure procedural problems of implementation and enforcement, problems that are in a sense more fundamental to the actual working of the disclosure system.

It was observed earlier that provision for direct and immediate judicial enforcement was among the most important, if not the most important, reforms wrought by the 1966 Act. Faithful to the active role of the judiciary throughout American public law, the courts have been more than mere enforcement agents of Congress assuring compliance with statutory directives, they have been "creative" interpreters of public policy — indeed virtual lawmakers in their own right.

This judicial creativity can be seen in some of the interpretations of the substantive content of the Act, as noted; it is also evident in the courts' procedural rulings. Some of these rulings are directed as facilitating agency responsiveness, others are focussed on judicial review and enforcement. In the former category, a notable illustration is an early judicial interpretation of the original Act's "identifiable record" pre-requisite for disclosure, to denote merely that the *agency* be able with reasonable effort to identify the documents.[65] Congress in 1974 incorporated this interpretation into the Statute.[66] In the latter category a noteworthy illustration of "creative" interpretation is a judicial rule that agencies may be required, upon motion to the court, to prepare a detailed index of information concerning the nature and general content of withheld documents (now labelled the "Vaughn" list).[67]

While the general thrust of judicial interpretation has been to expand the role of the courts, the courts have sometimes limited their own discretion in one notable respect: they have denied themselves any equitable discretion in regard to compliance orders. Regardless of the equities in an individual case, unless information is exempt, it must be ordered to be disclosed.[68] (Another example of judicial self-abnegation is the Supreme Court's ruling that courts did not have discretion to conduct *in camera* review of the bases for exemption one claims of state secret privilege.[69] However, Congress explicitly overruled that denial of discretion in 1974.[70])

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[65] See *eg National Cable Television Association* v *FCC* (1973) 479 F 2d 183.

[66] See Attorney General's Memorandum, *supra* n 39, 22-23.

[67] *Vaughn* v *Rosen* (1973) 484 F 2d 820; *cert denied* (1974) 415 US 977.

[68] *Soucie* v *David* (1971) 448 F 2d 1067. Compare *Federal Open Market Comm* v *Merrill* (1979) 443 US 340 where the Court construed exemption five to authorise a delay in disclosure where immediate disclosure would jeopardise government activities requiring confidentiality. On the one hand the Court seems to have incorporated a degree of equitable discretion into exemption five (in special cases); on the other hand, the very fact that it sought flexibility in the substance of a particular exemption implies that there is no *general* equitable discretion in enforcing the Act.

[69] *Environmental Protection Agency* v *Mink* (1973) 410 US 73.

[70] See *supra* n 39.

3 EFFECTS AND PERCEPTIONS

The foregoing summary suggests the number and variety of legal controversies that have arisen over interpreting and enforcing the Act. But they only faintly hint at the more general political and social controversies over the purposes and effects of the bold "experiment" in open government.

With more than 15 years of experience one might think the word "experiment" is misleading. And, indeed, perhaps that word is too provocative insofar as it might imply that the very commitment to access and disclosure made in 1966 is still tentative. The basic commitment is quite firm; only the exact scope of that commitment remains the subject of active debate — a debate that has been fuelled by a growing perception that the liberal disclosure policy of the Act has had some unintended and undesired effects. Unfortunately, as I indicated earlier, information about how the Act has worked has not been systematically collected or analysed. There are numberless critical commentaries about particular problems that have surfaced in implementing the Act, but few have provided sufficient information to support reliable generalisations.

The commentary is, however, a fair guide at least to critical perceptions, and perceptions have their own important reality. Indeed, it is a commonplace that legal rules and social organisation are governed as much by appearance as by factual reality. What follows is a review of those perceptions as much as the underlying reality, though I shall offer my own perceptions about what the reality is.

A *The Formative Years*

For any legal reform as basic as the FOI Act effected, one naturally expects a period of uncertainty, conflict and adjustment. It was, for example, to be expected that the agencies, confronted with a radically new set of rules, would seek to minimise the cost and inconvenience of adjustment. Given their behaviour before 1966 one would reasonably expect that agencies would not be fully sympathetic towards early demands for access to information not heretofore in the public domain. At the very least one would expect agencies to force a testing of the dimensions of their new mandate. The fact that the government, by one estimate, lost about half of the cases litigated in the first five years[71] does suggest that agencies were not liberal in their disclosure policy.

However, one should not read too much into such a statistic for several reasons. It is only a rough estimate of wins and losses. More importantly, it does not identify the nature of the cases being litigated — whether they involved issues of basic statutory ambiguity or simply a grudging interpretation by agencies of their disclosure mandate. It is perhaps more revealing that a 1972 survey of the 29 largest agencies reported that less than 15 per cent of the original denials of disclosure requests by those agencies were appealed administratively within the agency and nearly one-third of those original denials appealed were reversed by the agency authority to whom appeal was taken.[72]

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[71] See Subcommission on Administrative Practice and Procedure of the Senate Commission on the Judiciary, Freedom of Information Act and Amendments of 1974 S Doc, No 93-82 93d Congress 2d Session 70 (1974).

[72] *Ibid* 72 (citing data from 1972 hearings).

These data suggest, first, that very few of the original denials were thought to be sufficiently challengeable to warrant a relatively inexpensive internal agency appeal, and second, that the higher authorities within the agency were exercising significant independent judgment in those appeals that were brought to them.

The courts for their part were, and have continued to be, quite vigorous in enforcing the Act according to its spirit of full disclosure. As is evident from the discussion of the Act earlier the courts have generally given a broad construction to the publication and access requirements while narrowly construing the scope of the nine disclosure exemptions. And they have fashioned the implementation and enforcement procedures to promote full disclosure.

Despite liberal judicial enforcement, proponents of open government were not entirely satisfied with implementation in the early years.

Major sources of unhappiness to so-called "public interest" advocates were the delays and the costs to requesters of obtaining information. Complaints were made that many agencies dragged their feet in responding to requests and then again in responding in court to enforcement complaints.[73] Particularly distressing to such groups in light of their typically hand-to-mouth financial conditions was the alleged practice of demanding unreasonable administrative fees for producing the document.[74] The evidence in support of these complaints was anecdotal and selective, warranting scepticism from the neutral observer. Nevertheless Congress was sufficiently impressed to respond to the complaints with several measures.

First, Congress responded to what it perceived to be unduly broad judicial interpretations of several of the exemptions. As noted earlier,[75] Congress amended exemption one in 1974 to provide for substantive review of the propriety of classifications; and it restricted the categories of cases under exemption seven; in 1976 it amended exemption three, limiting the criteria for statutes authorising confidential treatment of agency information.

Apart from these amendments that were focussed on correcting specific judicial interpretations, Congress in 1974 adopted a number of measures dealing with administration and enforcement. It prescribed, among other things, time limits for administrative responses to requests and to enforcement complaints, uniform agency fees for production of information — limited to direct search costs and duplication; disciplinary proceedings against agency officials for arbitrary denials and award of attorney fees for requesting parties who prevail in judicial enforcement actions.[76] It is interesting to note that eight years later many of these measures are being challenged as Congress now considers softening its own previous demands for strict compliance. But I defer for

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[73] *Ibid* 15, 20-59.

[74] *Ibid* 15, 60-66.

[75] See *supra* nn 39, 46, 61 and accompanying text.

[76] On these and other 1974 changes see Attorney General's Memorandum, *supra* n 39. Other changes in 1974 were: modifications in exemptions 1 and 7, discussed previously; a requirement for disclosure of all material that is "reasonably segregable" from exempt material (again, incorporating existing judicial interpretation); a requirement that agencies publish periodic indexes of agency materials to which public access is mandated under 5 USC § 552(a)(2); a specific definition of "agency" (incorporating existing judicial interpretation); and a requirement that requests "reasonably describe" records requested (incorporating existing judicial interpretation of the identifiable records requirement).

the moment the question which of the two sets of claims, those of 1974 or those of 1982, are the more credible.

If one sets aside a few focussed legal issues which were responsive to specific judicial interpretations Congress deemed wrong, the actions of Congress could fairly be described as attempting to fill enforcement "gaps"in the Act. The effects were of unknown efficacy. In truth it cannot be said for certain that there was ever a "gap" to be filled. Evidentiary support for the perception of Congress of a gap consists largely of anecdotes of bureaucratic delay and arbitrariness selectively compiled by advocates of stronger enforcement.

Of course, the Watergate experience played no small role in the mood of Congress to force upon executive agencies the full measure of strict compliance — and it helps explain the particular concern of Congress with narrowing the scope of exemptions one and seven insofar as both might be thought to facilitate just the kind of deceptions perpetrated by the Nixon Administration.

As a reaction to the frauds perpetrated by the Nixon Administration, congressional fervour for more vigorous enforcement was quite understandable. But it was overdone. The FOI Act played no role in securing information about Watergate. Nor, so far as appears in the public records, were FOI Act exemptions ever major impediments to discovery of information about Watergate, or other nefarious activities of the era. The ability of Congress to obtain information is not affected by the FOI Act in any case.[77])

The real issues of enforcement are more homely than the Watergate problem would suggest. They relate to such matters as administrative costs of disclosure, and benefits of confidentiality of private and governmental information versus the benefits of openness — these are the important elements to be weighed. Unfortunately the high rhetoric and emotions of competing ideological claims pre-empted careful consideration of such matters in the early years of the FOI Act. It does so equally today, although the fading of Watergate memories, political changes, and greater experience with the FOI Act have somewhat altered congressional and public moods in recent years.

B *Current Perspectives and Future Reforms*

To speak of a public and congressional "mood" is a bit misleading insofar as it implies a degree of consensus about the FOI Act and its effects that has not yet been demonstrated. Despite several proposals in the 97th Congress intended to curb the liberal disclosure policies of the past, none was enacted. Perhaps more noteworthy than the fact that no reform legislation was adopted is the fact that more far-reaching reform proposals were considerably moderated in response to widespread opposition.[78]

Despite the absence of an established consensus for major changes, in the coverage of enforcement of the FOI Act, it is evident that congressional and public attitudes have become more restrained about the unalloyed virtues of access to government information.

Whether or not any specific legislative reforms will be forthcoming is hard

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[77] See 5 USC §552(c): ". . . This section is not authority to withhold information from Congress". Except where constitutional executive privilege is implicated, the right of Congress to obtain information from agencies is plenary.

[78] See "Final FOIA Action Unlikely Despite Panel's Compromise", *Congressional Quarterly* (May 29, 1982) 1267-68.

to predict; among other things it depends on unknowable political circumstances that have little to do with the merits of the reforms. (The symbolic content of the FOI Act makes it especially sensitive to the swings in political attitudes and fortunes.)

Nevertheless, present reform proposals do reflect some of the current disquiet about the full disclosure policies of the past, and on that account are worth noting regardless of their prospects for adoption into legislation. For this purpose the Bill reported out of the Senate Judiciary Committee (S 1730 — the so-called Hatch Bill) at the close of the 97th Congress is a useful point of departure.[79] I shall ignore much of the detail and focus on the major issues.

In general terms the Hatch Bill addressed three broad concerns: (1) administrative cost of implementation; (2) disclosure of confidential business information; (3) information related to national security or domestic law enforcement.

(1) *Administrative Costs*

The concern over administrative costs is not new; the agencies have for some time complained of the burdens imposed by the heavy volume of requests generated by the liberal disclosure policies and the strict compliance requirements imposed by Congress and the courts. Responding to those complaints the Hatch Bill proposed several changes. First, it would relax the present tight deadline for agency responses to information requests; secondly, it would authorise fees designed to ensure more complete recovery of administrative costs; thirdly, it would authorise an additional fee designed to recoup part of the profit realised from the sale of commercially valuable information obtained by FOI Act requests.

Earlier I mentioned that the administrative workload of implementing the FOI Act was not trivial. Nevertheless, the common complaint that the fiscal burden is unacceptably high seems to me somewhat overdrawn. We do not have sufficiently detailed cost accounts for FOI Act related activity, but a recent estimate puts the aggregate annual administrative costs at more than 50 million US dollars.[80] It is not clear what functions the estimate covers, but it is probably an underestimate; for example, the above estimate does not include judicial enforcement *or* other "indirect" costs.[81] Suppose to allow for all unaccounted costs we estimate the costs at 100 million US dollars. To those who balance their cheque books each month, this will seem a royal sum, but in the mega-dimensional budgetary world in which the United States Government

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[79] See 1981 FOI Act Hearings, *supra* n 5, for a detailed discussion of this and other proposed amendments. § 1730 appears in vol 1 at 30-52 and is explained in vol 2 at 1-52. In March, 1983 Senator Hatch introduced a Bill (S 774) generally similar to § 1730 but with some changes in detail. For my purposes a review of the earlier proposed legislation will adequately expose the points of important controversy.

[80] See 1981 FOI Act Hearings, *supra* n 5, vol 2 at 3 (estimate by Constitution Subcommittee of $57 million for 1980). Some portion of the agency costs is recouped by FOI Act fees. However, charges can only be assessed for search and copying costs which the subcommittee estimated to be a trivial four per cent of the total, the rest being processing costs (reviewing documents, editing exempt material, etc).

[81] *Ibid.* Again, some of the judicial enforcement costs would be covered by court fees; however, this would be trivial compared to the unrecoverable costs of government attorneys' time involved in enforcement actions.

operates,[82] 100 million dollars is a trifle. It is indeed far less than the United States Government spends annually in support of programmes to disseminate information abroad.[83] If one supposes that the information needs of United States citizens are entitled to the same respect as those of foreigners, one would have to imagine a large adjustment to the present estimate before costs would warrant serious concern in terms of budgetary impact.

Moreover, one would still not be in a position to declare the budgetary burden to be an important problem without some attention to the benefits of public access to information. To date no one has devised any method for measuring these intangible benefits in quantitative terms. The first economist who develops a credible measure for quantifying, even in orders of magnitude, the benefits of public information, will deserve, and I am confident will receive, a Nobel Prize. Absent some quantitative measure about all one can do is to list the kinds of information revealed,[84] and form a rough qualitative judgment as to whether their social and political importance is commensurate with the ascertained costs of producing it. Perhaps needless to say, this is work for political and social philosophers (lawyers, of course, included), not for accountants or economists.

The real case for increasing the fee level — or for other cost-related administrative reforms — is not a macroeconomic budgetary argument. It is unfortunate that proposals for structure modification have rested on general budgetary rationales, for in that context they lose much of their force. The real case for cost recovery is more in the nature of a microeconomic rationale of forcing a cost discipline on particular kinds of requests. In this context, the proposal to recoup some of the profits earned by the sale of commercially valuable information by FOI Act requesters is especially noteworthy.

Part of the FOI Act-spawned cottage industry that I mentioned earlier is the thriving business in merchandising FOI Act services or information obtained through the FOI Act, particularly trade secrets or other confidential business information about competitors.[85] While commercialisation is in the best

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[82] US budget outlays for fiscal year 1982 were slightly over $728 billion. Budget of the US Government Fiscal Year 1984, 98th Congress 1st session H Doc No 98-3 p 9-3.

[83] Budget outlays for the USIA in fiscal year 1982 were $486 million, of which about $111 million was devoted to the VOA alone. *Ibid* at p 9-21 and Appendix p 1-V141.

[84] See, *eg*, 1981 FOI Act Hearings, *supra* 5, vol 2 at 431, 441-45 (statement by legislative director of ACLU listing articles and books based in whole or in part on information disclosed under FOI Act). See also Swallow, "Has The Freedom Of Information Act Worked — Or Has It Worked Too Well?" *National Journal* (15 August 1981) 1470, 1471 (information about campaign contributions, highway safety information, fall-out from nuclear testing, FBI surveillance of student activity, nuclear power plant safety).

[85] See "Government, Business and the People's Right to Know" (1978) 3 Media Law Reporter 20-21 (discussion FOI Act service bureaus). See also Montgomery, Peters & Weinburg, "The Freedom of Information Act: Strategic Opportunities and Threats" (1978) Sloan Management Review 1-2 (use of FOI Act to obtain trade secrets and other information about competitors).

The merchandising of FOI Act services and information is not, of course, confined to obtaining business secrets. One enterprising company promotes its "Freedom of Information Kit" with an advertisement that promises: "Here's How to Find Out Which 'Enemies List' You're On — Within 10 Working Days". Weinstein, "Open Season on 'Open Government' " (19 June 1979) New York Times Magazine, 32, 85-86. This appeal to paranoia would seem to appeal to a large audience. See Hougan, "Pandora's Box" *Harpers* (August 1976) (log of FOI Act requests to CIA is an "index to the suspicions, insights, fantasies, and fears of those seeking information"; most requests seek personal files on submitter which are usually imaginary).

tradition of Yankee entrepreneurship, it is also a minor embarrassment to the public interest objectives that supposedly guided Congress. A 1982 editorial in the New Republic is illustrative:

> Passed in 1966, the FOIA was designed to help inform the public of its government's activities. Over the years it has been exploited in ways that Congress never foresaw. For example, although the Act was intended to provide information to journalists, authors and, through them, the public, a General Accounting Office report showed that only about 5 percent of requests for files were made by scholars and writers. The vast majority of FOIA users are law firms seeking evidence in litigation, and businesses trying to obtain information about their competitors.[86]

The observed discrepancy between the noble purpose of Congress and the actual use of the FOI Act seems to me a bit ingenuous. No great acumen was required in 1966 to foresee that allowing any person access to government files (subject only to the limited exemptions), for any purpose, would be used for purposes having little if andy colouration of the "public interest" (at least as Congress ostensibly defined it).

The real point is that whatever Congress contemplated about the public or private uses to which information would be put, it surely did not intend, through the FOI Act, to put its processes of information gathering at the *free* disposal of private interests except where the information had public benefits over and above those reflected in commercial information markets. After all, it is one thing to demand full information from the government about the conduct of public affairs as a means of keeping the democratic ship of state on the right course (or at least afloat); it is quite another to demand from the government information about the conduct of one's competitors in order to steer one's own private merchant ship. The distinction between merchant vessels and ships of state is not always recognisable in practice,[87] but surely some distinctions can be drawn between private and public benefits. I do not suggest that disclosure requirements themselves be redefined in terms of public versus private purpose — that disclosure be restricted to those who seek to use it "in the public interest". In the abstract such a distinction would be hard to observe if not wholly meaningless. There is no necessary *conflict* between public and private welfare. The conflict arises when, in the name of public welfare, one group is able to secure *special, distinctive* private benefits at the public expense.

Thus the proper concern is not whether someone obtains private benefits from the information but whether they do so at the expense of the public. To the extent that the benefits derived from the information disclosed are *distinctively* private — and particularly where the benefits are measurable in terms of

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[86] "Secrecy Mania", *The New Republic* (28 April 1982) 7-8.

[87] Sometimes not even in theory. One student of the public sector, after reviewing various economic theories of "public goods", concludes that scope of the public sector (public goods) is ultimately "defined by . . . the exercise of legitimate governmental decision processes" — Steiner, "Public Expenditure Budgeting" in A Blinder & R Solow (eds), *The Economics of Public Finance* (1974) 251. The difficulty comes, of course, in defining the realm of legitimacy where the process is used ("captured") to produce benefits for particular private groups, at the expense of the larger public. See generally Aranson, Gellhorn & Robinson, "A Theory of Legislative Delegation" (1983) 68 Cornell Law Review 1; J Mashaw, "Constitutional Deregulation: Notes Toward a Public, Public Law" (1980) 54 Tul L Rev 849.

commercial profit — it is both fair and efficient for a government to tax those benefits. In this respect the Hatch Bill proposal is squarely in line with other accepted measures for publicly conferred private benefits.[88]

(2) *Confidential Commercial Information*

The existence of a private market for commercially valuable information obtained from the government highlights a more basic complaint about the FOI Act than the *free* access to commercially valuable information. The more basic complaint is that the FOI Act has been used to obtain confidential commercial information the disclosure of which is harmful to legitimate business interests. Congress did not intend that the FOI Act would become a vehicle for overriding recognised private rights of confidentiality as for example by permitting business firms to access the confidential files of their competitors. That much at least is made plain by exemption four.

Exemption four has not, however, prevented some "leakage" of legitimately privileged business information. We do not have reliable evidence as to the magnitude of the problem. The very existence of an apparently successful business devoted to selling commercially valuable information is some evidence that the problem is not imaginary, but as with other claims of FOI Act abuse, the evidence of serious injury from disclosure of confidential commercial information is a bit thin — certainly it is less robust than the expressions of concern by businessmen.[89]

Some of the "leakage" of legitimately confidential information is unintended — the product of careless treatment by agency personnel.[90] But the

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[88] The Independent Offices Appropriation Act of 1952, 31 USC § 483 admonishes federal agencies to prescribe fees to recover the value of any "work, service . . . benefit . . . license . . . or similar thing of value or utility performed" by the agency to "any person (including . . . corporations)". The Supreme Court has held that the 1952 statute did not authorise regulatory agencies to tax regulated firms for the incidental benefits from regulation on the theory that regulation was assumedly for the benefit of the general public. *National Cable Television Association* v *United States and Federal Communications Commission* (1974) 415 US 336. Moreover, there are many regulatory schemes whose essential public purpose is to confer *private* benefits at public expense. See, *eg*, Posner, "Taxation by Regulation" (1971) 2 Bell Journal of Economic & Management Science 22; Stigler, "The Theory of Economic Regulation" (1971) 2 Bell Journal of Economic & Management Science 3. Where government programmes are *purposefully redistributive* in this respect, it would make no sense to tax the recipients of the benefits thus lavished upon them by the government's generosity. But both of these situations are distinguishable from the case where the government confers *specific*, private benefits that are separable from a general public interest objective and are not purposefully redistributive in character.

An analogy is the sale of public land resources to private individuals. No one seriously challenges, for example, the appropriateness of charging private timber firms for timber removed from public lands — even though there is some general public purpose served by periodic cutting of the forest (as a sylvicultural measure) and by the public consumption of timber.

[89] The evidence and the statements of concern are scattered throughout the 1981 hearings on FOI Act amendments. See, *eg*, 1981 Hearings on FOI Act, vol 1 at 260-79 (statement of counsel for Proctor & Gamble, Inc); 428-53 (statement of Honeywell Inc); vol 2 at 121-210 (memorandum of Machinery and Allied Products Institute). One study of business information disclosure concluded that there was "a great deal more smoke than fire". *Ibid* vol 1 at 209, 215 (statement of Professor Russell B Stevenson). See generally RB Stevenson, *Corporations and Information* (1980 Johns Hopkins Uni Press).

[90] See, *eg*, "EPA Lets Trade Secret Loose in Slip-up, to Firm's Dismay", Washington Post (18 September 1982) A1, A6 (release of trade secret formula for best-selling pesticide; attributed to inadvertent failure to black out confidential portions of document when it was copied for release).

more significant problem appears to be deliberate disclosure by agencies. Under present interpretation of the coverage of the exemption four[91] there is considerable room for disclosure, particularly given the general presumption in favour of disclosure. Then there is some agency discretion — still undefined — to disclose information even though it is exempt. As noted earlier, there is no statutory requirement for prior notice to submitters, but many agencies do provide it. The larger problem here is defining the scope of agency discretion. Agency discretion in "reverse FOI Act" cases is subject to judicial review, but the review standards are not as demanding as for judicial determination of the scope of the exemption itself.[92] The asymmetry between judicial review of agency action in FOI Act and reverse-FOI Act cases thus favours disclosure.

There is not much that can be done against inadvertent disclosure caused by failure to recognise the confidential character of information. Notice to the submitter of requests for business information is responsive to those cases where information has been identified as confidential. The submitter is then able to bring the agency's attention to the confidential nature of certain information and make appropriate claims of privilege, *etcetera*. But cases where sensitive information is not marked or recognised as such are probably unavoidable without overburdening the system with administrative precautions. Until it can be demonstrated that these error-costs are substantial — on which evidence is lacking — it does not seem necessary to consider system-wide measures to avoid random mistakes.

With regard to deliberate disclosure, the Hatch Bill proposed (a) to broaden the scope of exemption four, (modifying current judicial interpretations); (b) to require that submitters be given notice and an opportunity to object to release of information; (c) to limit agency discretion to disclose exempt information to cases where *failure* to disclose would injure the public interest; (d) to give them a right of action under the FOI Act, thereby subjecting reverse-FOI Act claims to the same level of judicial scrutiny as FOI Act claims.[93] The proposals seem to me moderate; they would at most make marginal changes in present rules and practices. One can imagine that the courts could independently make these changes with only modest re-interpretation of existing precedent.

Some of the concerns over disclosure of confidential business information implicate broad national "privacy" concerns, in that they involve information about critical technology the disclosure of which is prejudicial to national security interests.[94] To meet this problem the Hatch Bill proposed a new exemption directed specifically at such information.[95]

The problem here is, of course, part of a larger concern over release of "state secrets".

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[91] See *National Parks and Conservation Association* v *Morton* (1974) 498 F 2d 765.

[92] Under *Chrysler* v *Brown* (1979) 441 US 281 submitters have no right, *under the FOI Act*, to challenge agency disclosure. Thus the *de novo* review provisions of the FOI Act are inapplicable. Instead the submitter must proceed under the general review provisions of the APA, where the more deferential "arbitrary and capricious" standard applies.

[93] See 1981 FOI Act Hearings, *supra* n 5, vol 2 at 12-13, 17, 25-29.

[94] See, *eg, ibid* vol 1 at 104, 110-123 (statement of Department of Defence General Counsel).

[95] See, *ibid* vol 2 at 41-42.

(3) *Executive Secrets: National Security and Law Enforcement*

The image of Russian KGB agents — or disaffected American intelligence agents — demanding access to Central Intelligence Agency files has excited the imagination of FOI Act critics and reformers.[96] Some have become so excited by the threat that they have proposed to exempt CIA files altogether.[97] Such a bold measure has not attracted much support to date, and is unlikely to do so in the near future. For good reason: the possibility that such a measure might reduce the risk of harmful disclosure through the offices of the FOI Act presumes that the *FOI Act risk* is substantial. That has not been demonstrated. The present classification and related security mechanisms are not foolproof against prejudicial leakage of sensitive intelligence. But it has not been shown that any failures in present security arrangements are the product of the FOI Act. Possibly the FOI Act does increase the risk of inadvertent disclosure in the course of processing the thousands of demands for information.[98] And one must allow for the possibility of some "errors" by courts in the process of judicial review. But no one has yet shown that the risk of such errors, by agency or by court, are serious enough to outweigh the general benefits of disclosure.

Again, the benefit side of the ledger proves to be a difficult matter to calculate. The case for disclosure rests essentially on an intuition that some information in these sensitive files ought to be in the public domain and the real reason for its being withheld by the agency is to prevent public knowledge of agency failures.

Short of exempting intelligence files completely there are intermediate possibilities for tightening present disclosure policies. Some tightening is possible without statutory change. Insofar as the relevant information involves classified information within the scope of exemption one, the scope of disclosure is determined by the classification criteria prescribed by executive order. The President thus has discretion to broaden or narrow the definition of what is "in the interest of national defence or foreign policy" within the meaning of the FOI Act. The trend of executive orders over the past 30 years has been to tighten classification procedures and to narrow classification criteria.[99] In 1982 President Reagan halted that trend by broadening the criteria and expanding administrative discretion for classifying various

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[96] See, *ibid* vol 1 at 973-1040 (testimony of FBI Director, with lists of instances where sources have become uncooperative because of fears of disclosure under FOI Act). FOI Act critics seem to have been particularly traumatised by the efforts of Philip Agee — an ex-CIA agent who has been engaged in a campaign to expose covert CIA agents and activities around the world and to obtain CIA documents to aid in this campaign. See *Agee* v *Central intelligence Agency* (1981) 517 F Supp 1335. It is estimated that Agee's FOI Act demands cost the government more than $400,000 to process, 1342.

[97] See, *eg*, S 1235, *ibid* vol 1 at 14-18 (sponsored by Senators D'Amato, Goldwater and Nickles).

[98] See, *eg*, "Opening Federal Files" Newsweek (19 June 1978) 85 (disclosure of information in CIA file revealing belief that Israel has produced nuclear weapons inadvertently released as part of document on US atomic aid to India). See also 1981 FOI Act Hearings, *supra* n 5, at 984 (testimony of FBI Director).

[99] See Relyea, "The Rise and Fall of the US Freedom of Information Act" (1983) 10 Govern Public Rev 19, 27-28.

records.[100] It is too early to say how substantially this expansion of the scope of security classification will affect disclosure of sensitive information. The effect will depend not only on how the new classification criteria are implemented by security agencies but also on the degree of deference given by courts in reviewing the application of the new criteria to specific information[101]. I am inclined to think that the changes in disclosure will be marginal, but perhaps even a marginal change will ameliorate some of the concerns that have animated proposals for legislative changes in the FOI Act.

As to the legislative changes, it seems unlikely that we will see wholesale changes such as an exemption for all CIA files, as mentioned above. More modest changes have been proposed, however. The Hatch Bill proposed, for example, a modest change in judicial review of exemption one classifications.[102] It also proposed to limit FOI Act requests to citizens and lawfully admitted aliens, and would also allow agencies to require requesters to identify the person on whose behalf the information is sought.[103]

The first proposal seems appropriate. In my view there is no reason for requiring *de novo* review of *any* exemption, and certainly not exemption one. At the same time there is little reason to believe that the ostensible *de novo* review of classifications has created any significant problem for the government.[104] The second set of reforms seems to me rather foolish. It almost goes without saying that these provisions would not prevent the KGB — or anyone else — from obtaining sensitive information. They are simply unenforceable against the type of requester whose demands the reformers seek to block.

Perhaps the real purpose of such provisions is symbolic — a representation to those who supply such information that the government is taking measures to protect it. It has been claimed by intelligence agents and by domestic law

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[100] Executive Order 12356, 47 Fed Reg 14874-84 (1982). See *supra* n 38. Among other things the new Executive Order eliminates the requirement that there be "identifiable damage" to national security, substituting in its stead the standard, "reasonably could be expected to cause damage". It also eliminates the automatic declassification process established under prior administrations. In its place the classification continues for as "long as required" unless the classifying authority establishes a specific date for termination. The new Executive Order expands the categories of documents that can be classified, including information concerning "capabilities of systems, installations, projects", concerning "cryptology and confidential sources". Other changes include provision for reclassifying previously unclassified information.

[101] See *supra* n 39. The reviewing court's task is to match a particular classification against the classification criteria of the executive order. However, since exemption one is limited to classifications necessary in the "interest of national defense or foreign policy", a court might in an appropriate case inquire into the question whether the *criteria interpreted by the classifying agency* were appropriate. I am unaware of any decision so holding. Quite possibly such a decision would raise a constitutional issue, but it seems to me a permissible interpretation of what the FOI Act implies.

[102] See 1981 FOI Act Hearings, *supra* n 5, vol 2 at 18-19.

[103] *Ibid* at 45.

[104] In 1981 The Justice Department was asked to produce a list of cases in which classifications had been overturned. Of eight cases reported, four were reversed on appeal or on rehearing; a fifth appeal was still pending but the court had stayed disclosure pending appeal; a sixth rejected the classification but still exempted the material under exemption 7; and in a seventh the agency conceded that disclosure would not be harmful. In sum, of eight cases only one was even arguably a problem. See 1981 FOI Act Hearings, *supra* n 5, vol 1 at 157-58. Even in that case it could not be said that it would have made any difference whether judicial review was *de novo* or under an arbitrary-capricious standard. Indeed, as noted earlier, the "*de novo*" review specified by the Act is in practice a deferential form of review given the legislative history admonishing the courts to give "substantial weight" to the agency's determination. See *supra* n 39.

enforcement agencies that the *appearance* of easy access to confidential files seriously hinders their ability to obtain information under a pledge of secrecy.[105] But if that is the rationale for these proposed reforms, it is very naive in supposing that confidential sources will place any reliance upon such palpably weak protective measures.

Indeed, the fears of intelligence and law enforcement agencies may be a self-fulfilling prophecy. The more the agencies complain about possible breaches of confidentiality, the greater the fears created in the minds of informers. I do not suggest that agencies refrain from expressing genuine complaints about *demonstrable* problems of unwarranted disclosure, but public expressions of general anxiety do little but feed the *perceptions* which, by the agencies' own claims, are the core of the problem.

And even if the protective measures were made stronger, it is doubtful that this would solve the problem. To the extent the present exemption for properly classified information is deemed by information sources to be an inadequate assurance of protection, it probably reflects a general distrust of an inherent inability to keep a secret in Washington, rather than any particular shortcoming of the FOI Act. As is well known, the Pentagon Papers were not obtained through the FOI Act.[106]

A parallel concern over disclosure of confidential information sources underlies proposals to restrict access to investigatory files of law enforcement agencies — most notably the Federal Bureau of Investigation. The concern, again, is twofold: first, a fear that criminals (particularly organised crime) are gaining access to investigative files for the purpose of thwarting law enforcement — *inter alia*, by retaliating against informers — and, secondly, that the very perception that such files will be disclosed is deterring informers.[107] The leading reform proposal, the Hatch Bill, proposed a relatively minor expansion of the scope of exemption seven, a prohibition of the use of FOI Act information for civil or criminal discovery, and an authorisation of regulations to restrict access to FOI Act information by felons and to exempt information related to organised crime, terrorism and foreign counter-intelligence.[108]

I am sympathetic to the notion that the FOI Act was not intended as a discovery tool for felons, just as I believe it was not intended for the benefit of KGB agents. But it is hard to see the efficacy, and hence the justification, of these proposed changes. A relaxation of some of the restrictions on exemption seven might be a useful corrective to the overly strict limitations that Congress imposed on that exemption in 1974. But the Hatch proposals affect disclosure only in the marginal case. As for restrictions on FOI Act use by felons, it

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[105] This is the most prominent complaint made by enforcement agencies, who have offered fairly plausible evidence that it is a real problem. See, *ibid* at 852-64; 973-89 (testimony of FBI chief); *ibid* at 963-73 (head of CIA). A list of specific cases where information was withheld, *purportedly* because of a fear of FOI Act disclosure, is given in *ibid* at 990-1440.

[106] The Papers — a "History of US Decision-Making Process on Vietnam Policy" — were classified, but were leaked to the New York Times and the Washington Post which published them after the government's unsuccessful attempt to enjoin them from doing so. See *New York Times Co* v *United States* (1971) 403 US 713. Daniel Ellsberg was indicted for divulging the Pentagon Papers, but charges were dismissed for "improper Government conduct", N Dorsen, P Bender, B Neuborne, *Emerson, Haber and Dorsen's Political and Civil Rights in the United States* (4th ed 1976) 223.

[107] See, *eg*, 1981 FOI Act Hearings, *supra* n 5, vol 1 at 847-65 (testimony of FBI Director).

[108] See *ibid* vol 2 at 1, 32-46.

would be all but impossible to enforce. Requiring requesters to file affidavits that the information is not for unauthorised persons, and will not be made available to them, seems as unlikely to prevent access by felons as it is to prevent access by the KGB. At most, such restrictions might calm public apprehensions about the FOI Act undermining law enforcement. They are not likely to fool law enforcement agents' informers or others who have significant personal interests at stake.

4 CONCLUSION

Despite the sometimes excited controversy that the FOI Act has created in its first sixteen-plus years the access and disclosure policies of the Act have been quite firm, and are likely to remain so in the foreseeable future. Judicial interpretation together with some legislative changes have marginally expanded the original conception of the scope of access and disclosure perhaps, but on balance they appear not to have altered the basic structure set by Congress in 1966. It is especially noteworthy that despite recent strong criticism about the adverse affects of disclosure the only reform proposals that have any realistic promise of adoption are quite modest. Indeed, as suggested above, some of the provisions seem likely to have no practical effect on the problems to which they are addressed, raising a question as to whether their chief purpose is simply symbolic.

For all of the complaints — by private persons and public bureaucrats alike — the FOI Act has been reasonably successful in meeting the objective of increasing public access to government files. At least in terms of a simple increase in the *quantitative* flow of information from government agency files to the public I do not think there can be much question about the effectiveness of the FOI Act.

As to whether the public has significantly benefitted from that information, this is more problematical. As I emphasised earlier, we have no means by which such benefits can be calibrated. We can better count the costs — at least the administrative costs. But the administrative costs, as noted, are relatively minor. The larger costs are the "error" costs of unwarranted disclosure that harms private or public interests. But these, like the benefits of warranted disclosure, are largely unmeasurable.

Absent a calculus for quantitative measurement we must resort to general "principles" — faith informed by intuition. It has always been a professed article of faith that an informed public is vital to democratic society. Of course, not all information is equally useful to political, economic or social choice. Some types of information, or too much information, can be dysfunctional to rational choice by individuals. A brain can only process so much information. To add more information than can be processed may be counterproductive: the resulting "information overload", as Alvin Toffler has called it,[109] becomes paralysing. However, that risk has generally not been thought to justify censorship of private flows of information. One may ask then why it is more persuasive as a justification for government "censorship" of information within

[109] A Toffler, *Future Shock* (1970) 311-315. See also H Simon, *Administrative Behavior* (3rd ed 1976) 279-287.

its possession. In short, given our social, political commitment to open, even relatively indiscriminate dissemination of information generally, it is hard to make government disclosure of information dependent on some *specified* positive benefit to the individual or to the society. We simply take that as an axiom of our political and social system that information is good and more information is better.

To be sure, in neither the private nor the public sector are we so committed to the free flow of information as to be indifferent to the costs of unrestrained dissemination. In the private sector we have a complex set of laws designed to limit various kinds of information in order to protect a variety of interests from being injured (suffering costs). Protection of trademarks and copyrights, business "secrets", personal privacy; protection against various forms of misleading or otherwise injurious information (defamation) are illustrative of efforts to prevent certain costs caused by free flow of information. To the extent that these restrictions on information are recognised in the private sector they are properly protected in the public sector. The government should not allow itself to be the vehicle for undermining protected interests in the name of promoting "open government".

This much seems plain. Less plain is the recognition to be given to secrets about the government processes themselves. To what extent should democratic government be forced to operate in a fishbowl?

Again we proceed largely from faith. Few will be so naive as to think there is much relevant "science" in this area of political science. However, some intuitions seem more plausible than others.

One of those plausible intuitions is that government politicians and bureaucrats are close kin to ordinary people; their personal preferences are very similar to those of people outside government, as are the motives that drive their behaviour. In particular, they probably have about the same mixture of self-interest and "public interest" motivation as others.[110] Of course, politicians and bureaucrats operate in a different environment, with different kinds of freedoms and constraints than those that others confront. Bureaucrats in particular are not subject directly or indirectly to market discipline. Their behaviour is subject to the control of official superiors, or public constituents, but performance standards lack objective measures.[111]

In any environment individuals have a natural self-interest incentive to control information about themselves in order favourably to influence other persons' perceptions of them and of their behaviour.[112] If there is anything distinctive about the public sector environment in this respect, it is the degree to which bureaucrats or politicians are able to control information about their

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[110] The literature on the subject of political and bureaucratic incentives and motivations is vast. A general overview is given in Aranson, Gellhorn & Robinson, "A Theory of Legislative Delegation" (1983) 68 Corn L Rev 1. A more extended review is given in P Aranson, *American Government: Strategy and Choice* (1981).

[111] See Aranson, Gellhorn & Robinson, *supra* n 110, for an elaboration of this point. On the absence of market discipline particularly in the case of bureaucrats see, *eg*, A Downs, *Inside Bureaucracy* (1967) 29-30. See also W Niskanen, *Bureaucracy and Representative Government* (1971), advancing the thesis that bureaucrats seek to maximise their budgets as a means of enhancing their characteristic preferences (utility functions).

[112] See, *eg*, Downs, *supra* n 111, at ch 10.

activities and the extent to which evaluations of them and their performance depends on information within their control.

In the private sector, consumer evaluation of the firm's product does not typically depend on public perusal of intracorporate records. Direct experience of the product, measured against competitive substitutes, is normally considered a better measure of the firm's "output". Evaluation of the "output" of the "public firm" of bureaucrats and politicians is not so easily measured by external criteria. Indeed, we need some internal information from the "public firm" even to determine what the relevant output is.[113] It follows that a degree of access to government information, concerning its activities in particular, is essential in order to make the political "marketplace" work.

The above argument merely restates in the somewhat stilted style of academic theory the homely common sense of elementary civics: there are no better guarantees that entrusted power will be well used than an *informed* and critical public *attitude*. The FOI Act makes a positive, if modest, contribution to that guarantee.

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[113] For a further elaboration of the difficulty of defining relevant "output" of bureaucracies in particular see Aranson, Gellhorn & Robinson, *supra* n 110. The output definition problem in part reflects the ambiguities of purpose and function in legislative mandates of most agencies, and of the inherent conflicts among different constituent interests.

For example, is the purpose of the Interstate Commerce Commission to promote efficient transportation or to smooth the rough edges of competition through allocation of market shares? Most modern students of regulation agree that the latter is more consistent with the evidence than the former. See, *eg*, Posner, "Theories of Economic Regulation" (1974) 5 Bell Journal of Economic & Management Science 335. Even so there are ambiguities as to the form such allocation should take — how market shares should be determined, etc — making agency "output" almost impossible to define.

Even where there are few uncertainties about the general mandate of the agency, and the constituent interests to be served, the vagaries of defining a measurable output are vexing. For example, how does one measure the output of the Justice Department's Antitrust Divsion — by the cases filled or tried, "won" (itself an ambiguous term), number of injunctions, divestiture orders, or other "significant" sanctions, degree of reduction in concentration, reduction in other antitrust offences, *etcetera*?