

# Administrative Alternatives and the Federal Freedom of Information Act

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## I. INTRODUCTION

Criticisms of the coverage of the federal Freedom of Information Act<sup>1</sup> are reflected in recently proposed amendments to the Act. The amendments would alter several of the exemptions of the Act and although the amendments specifically address substantive criteria,<sup>2</sup> they also concern procedural issues.<sup>3</sup> Although even supporters of the Act have argued that it has failed to provide timely access to government documents and records and that review procedures further complicate and delay enforcement, the proposed amendments do not principally address these criticisms.<sup>4</sup>

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1. 5 U.S.C. § 552 (1982).

2. The proposed amendments modify the (b)(2) exemption, dealing with records "related solely to the internal rules and practices of an agency," by incorporating case law limiting access to certain types of agency manuals. S. REP. NO. 221, 98th Cong., 1st Sess. 44-45 (1983) [hereinafter cited as 1983 SENATE REPORT]. The amendments also adopt a more generic statement of the (b)(6) exemption, concerning clearly unwarranted invasions of personal privacy, and broaden the scope of the (b)(7) exemption, involving law enforcement records, to protect the release of information that could endanger informants. *Id.* at 45-46. The amendments add new exemptions for technical data prohibited for exportation and for Secret Service records. *Id.* at 46. Moreover, the amendments give agencies greater discretion in determining which records are reasonably segregable. *Id.*

3. The amendments would establish new criteria for determining fees under the Act, providing for the waiver of fees and allowing agencies to retain one-half of the fees collected if the agency was in compliance with the time limits of the Act. *Id.* at 38-39. The amendments establish new time limits for the Act, *Id.* at 42-43, require requesters to bring suit within 180 days of final agency action, *Id.* at 39, and limit requests to those made by citizens of the United States or an alien lawfully admitted. *Id.* at 47-48.

The most important procedural changes concern the rights of persons who have submitted information to the government. The amendments would give submitters important procedural rights, including notification of a request regarding information that the submitter has designated as consisting of trade secrets or commercial, research, financial, or business information and a right to contest the release in the agency and before the courts. *Id.* at 39, 43-44.

4. The amendments would establish new time limits for agency response. An agency must still respond within 10 working days of receipt of a request and complete an appeal within 20 working days of receipt of an appeal. An agency, however, may now extend determinations of either an initial request or an appeal for an aggregate of no more than 30 working days for unusual circumstances. Such circumstances include: (1) the need to search field facilities and other establishments for the records; (2) the need to collect separate and distinct records to meet a voluminous request; (3) the need for consultation with another agency or of components of the agency to which the request is made; (4) the need for additional time to prevent significant obstruction or impairment of the timely performance of a statutory agency function (the head of the agency must so state in writing); (5) the need for notification of submitters; and (6) a backlog of requests of appeals resulting from an unusually large volume of requests or appeals. *Id.* at 43-44. The Act now provides for a 10-day extension based on the need to search and collect records from field offices, the need to search a voluminous amount of distinct records as part of a single request, and the need to consult with another agency or parts of the agency itself. 5 U.S.C. § 522(a)(6)(B) (1982). The amendments require the promulgation of regulations providing for expedited access to requesters showing a compelling need. 1983 SENATE REPORT, *supra* note 2, at 44.

State freedom of information provisions offer examples of alternative methods for securing public access to government documents and records. The statutes of Connecticut and New York suggest administrative alternatives to the judicial enforcement upon which the federal Act relies.

This Article explains the enforcement structure of the federal Act and the methods and techniques used to insure agency compliance. This Article then examines the administrative alternatives in Connecticut and New York and assesses the effectiveness of these systems. The examination of these systems allows evaluation of administrative alternatives to the federal Freedom of Information Act. This Article concludes that portions of the administrative procedures and experiences of Connecticut and New York can be applied effectively to the federal Act.

## II. ENFORCEMENT STRUCTURE OF THE FEDERAL FREEDOM OF INFORMATION ACT

### A. *The 1966 Act and the 1974 Amendments*

The Freedom of Information Act as enacted in 1966<sup>5</sup> relied principally upon agency compliance with the mandates of the Act to provide timely and effective access to government documents and records. Congress passed the legislation in part because of the ambiguity of previous laws that federal agencies had characterized as "housekeeping" statutes and because federal agencies had interpreted narrowly the public disclosure provision of the Administrative Procedure Act.<sup>6</sup> Reservations about agency compliance with the mandate for access<sup>7</sup> led Congress to emphasize judicial enforcement by providing *de novo* review of agency decisions to withhold information.<sup>8</sup>

In 1974, Congress amended the Act to respond to judicial interpretations,<sup>9</sup> to reaffirm the concept of *de novo* review,<sup>10</sup> and to address concerns regarding agency delay and intransigence.<sup>11</sup> A substantial portion of the 1974 amendments modified

5. Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (1982)).

6. See generally, H.R. REP. NO. 1497, 89th Cong., 2d Sess. (1966), reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2418, 2427.

7. *Id.* The reluctance of agencies to comply with the Freedom of Information Act does not rest necessarily upon a desire to hide evidence of wrongdoing or inefficiency. All organizations are reluctant to disclose detailed information about their operations.

8. 5 U.S.C. § 552(a)(4)(B) (1982).

9. In *EPA v. Mink*, 410 U.S. 73 (1973), the Supreme Court, interpreting the (b)(1) exemption, stated that Congress had chosen to follow the executive's decisions in the classification of information and that the power of the courts to disregard the executive determination was limited. The 1974 amendment added the language, "in fact properly classified pursuant to such executive order," to emphasize that judicial review under the (b)(1) exemption was *de novo*. H.R. REP. NO. 1380, 93d Cong., 2d Sess. 4 (1974) (Conference Report) [hereinafter cited as 1974 CONFERENCE COMMITTEE REPORT].

A series of opinions of the United States Court of Appeals for the District of Columbia Circuit acted to create a blanket exemption for investigatory files compiled for law enforcement purposes. *Center for National Policy Review v. Weinberger*, 502 F.2d 370 (D.C. Cir. 1974); *Ditlow v. Brinegar*, 494 F.2d 1073 (D.C. Cir.) (per curiam), cert. denied, 419 U.S. 974 (1974); *Aspin v. Department of Defense*, 491 F.2d 24 (D.C. Cir. 1973); *Weisberg v. United States Dep't of Justice*, 489 F.2d 1195 (D.C. Cir. 1973) (en banc), cert. denied, 416 U.S. 993 (1974). The 1974 amendments modified the (b)(7) exemption to focus on the harm likely to be suffered and to override the D.C. Circuit decisions. See 120 CONG. REC. 517,014 (daily ed. May 30, 1974).

10. See discussion of the (b)(1) exemption, *supra* note 9.

11. Provisions responding to these concerns included time limits for agency response, attorney's fees authorization, the requirement to release documents and portions of documents that could be segregated, and the sanctions provision. See *infra* text accompanying notes 13-15.

the procedures of the Act to require agencies to respond timely and fairly to requests. Following the 1974 amendments, agencies must respond within ten days of the receipt of a request either by granting or denying access.<sup>12</sup> If an agency does not do so, a requester may immediately seek judicial review.<sup>13</sup> A requester may appeal a denial to a higher official within the agency, and the amendments require a response to the appeal within twenty days.<sup>14</sup> Congress emphasized the importance of these time periods for agency response by setting out limited criteria under which an agency might extend the time for responding.<sup>15</sup> Again, if an agency does not meet the deadline for responding to the appeal, a requester can seek judicial review in a federal district court. Any case brought under the federal Freedom of Information Act is entitled to priority on the docket of the appropriate United States district court and court of appeals.<sup>16</sup>

To further encourage use of the Act by individuals and by the media, Congress attempted to reduce the costs associated with requests. The amendments regulate agency fees that can be charged<sup>17</sup> and allow agencies to waive these fees.<sup>18</sup> An important provision encouraging resort to judicial enforcement is the statutory authorization to the courts to award attorney's fees.<sup>19</sup>

The 1974 amendments also responded to evidence of agency bad faith and arbitrary conduct in administering the Act. The amendments established a sanctions provision allowing a court to refer certain cases to an administrative process that could culminate in disciplinary action against an agency official.<sup>20</sup>

The 1974 amendments implicated another procedural difficulty in judicial enforcement. The Act had been subject to varying judicial interpretations caused in part by the number of United States district courts in which actions could be

12. 5 U.S.C. § 552(a)(6)(A)(i) (1982).

13. *See id.* § 552(a)(6)(C). A requester need not file an administrative appeal if there is no timely response to the initial request. *Jenks v. United States Marshals Service*, 514 F. Supp. 1333 (S.D. Ohio 1981). A possible interpretation of the Act would require a requester to have also appealed within the agency before seeking judicial review. This interpretation would further frustrate the congressional desire to expedite freedom of information requests.

14. 5 U.S.C. § 552(a)(6)(A)(ii) (1982).

15. *See supra* note 4.

16. 5 U.S.C. § 552(a)(4)(D) (1982). The provision requires the priority "[e]xcept as to cases the court considers of greater importance."

17. *Id.* § 552(a)(4)(A). The fees of an agency were limited to direct costs, which were not to include overhead charges. The agency was not to charge for time spent in examining records to determine whether the information falls under an exemption nor for time spent in deleting exempt material from records that must be released. 1974 CONFERENCE COMMITTEE REPORT, *supra* note 9, at 7.

18. 5 U.S.C. § 552(a)(4)(A) (1982); *see* 1974 CONFERENCE COMMITTEE REPORT, *supra* note 9, at 7. Courts differ over the standard of review of agency denials of requests for fee waivers. Some courts apply the arbitrary and capricious standard, *e.g.*, *Allen v. Federal Bureau of Investigation*, 551 F. Supp. 694 (D.D.C. 1982), whereas others have applied the *de novo* review standard applicable to withholding, *e.g.*, *Rizzo v. Tyler*, 438 F. Supp. 895 (S.D.N.Y. 1977).

19. 5 U.S.C. § 552(a)(4)(E) (1982). To recover attorney's fees, a plaintiff must have "substantially prevailed." A plaintiff may substantially prevail even if the documents are released by the agency without an order of the court as long as a substantial causal connection exists between commencement of the action and delivery of the information. *Vermont Low Income Advocacy Council, Inc. v. Useery*, 546 F.2d 509 (2d Cir. 1976). The Senate Report on the 1974 Amendments suggests four criteria to be considered in determining whether to award attorney's fees: (1) the public benefit deriving from the case; (2) the plaintiff's commercial benefit; (3) the nature of the plaintiff's interest in the record sought; and (4) whether the withholding had a reasonable basis in law. S. REP. NO. 854, 93d Cong., 2d Sess. 19 (1974) [hereinafter cited as 1974 SENATE REPORT].

20. 5 U.S.C. § 552(a)(4)(F) (1982). *See generally* Vaughn, *The Sanctions Provision of the Freedom of Information Act Amendments*, 25 AM. U.L. REV. 7 (1975); *infra* note 33.

brought.<sup>21</sup> The amendments made the District of Columbia an appropriate venue for suits under the Act.<sup>22</sup> One of the purposes of this change was to allow complainants to bring actions in a court with substantial expertise with the Act.<sup>23</sup>

The 1974 amendments did not alter the basic structure of the Act; agencies remained responsible for the administration of the Act, and review rested in the courts. The amendments contained only procedural changes designed to address difficulties resulting from the reliance upon agency administration and judicial review.

### B. Implementation of the Act

Implementation of the 1974 amendments and judicial attempts to impose additional procedural requirements upon agencies demonstrate flaws in the structure of the Act. The time periods provided in the Act have limited practical significance. The number of requests, combined with allocation of inadequate resources to the processing of requests, insures substantial backlogs. The courts recognize this problem by staying judicial action when an agency is processing its backlog in good faith.<sup>24</sup> That requesters now argue that special circumstances justify moving a particular request to the front of the line and seek judicial intervention in determining their place in the queue<sup>25</sup> illustrates the extent to which the courts and requesters have acknowledged the practical impossibility of agency compliance with the time limits of the Act.

Judicial review has failed to insure timely compliance, since however long an agency delay may be, judicial resolution of the case is likely to be as long.<sup>26</sup> Courts

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21. The legislative history of the 1974 amendments noted that courts had differed on whether they retained discretion to deny the production of documents that the Act required to be released. H.R. REP. NO. 1419, 92d Cong., 2d Sess. 77 (1972).

22. 5 U.S.C. § 552(a)(4)(B) (1982). At the time of the amendments, approximately one third of the Freedom of Information Act cases litigated had been brought in the District of Columbia. 1974 SENATE REPORT, *supra* note 19, at 11.

23. 1974 SENATE REPORT, *supra* note 19, at 12-13.

24. *See, e.g.*, *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976). The proposed amendments now pending to the Freedom of Information Act would allow a court to retain jurisdiction and allow the agency additional time to complete its review if the agency was exercising due diligence in exceptional circumstances. 1983 SENATE REPORT, *supra* note 2, at 43. As one district court has said, "To be sure, the court deplors the ten month delays between plaintiffs' request and the agency's action on their appeal, but the staggering practicalities of the 'FOIA explosion' render [other judicial action] both unrealistic and probably unenforceable." *Globe Newspaper Co. v. United States Dep't of Justice*, 2 GOV'T DISCLOSURE SERV. (P-H) ¶ 82,002 (D. Mass. 1980).

In a study of the processing of requests in six units of the Department of Justice, the General Accounting Office found that most requests took longer than 10 days to complete. GENERAL ACCOUNTING OFFICE, DOC. NO. GGD-83-64, FREEDOM OF INFORMATION ACT OPERATIONS AT SIX DEPARTMENT OF JUSTICE UNITS 1-2 (May 23, 1983) [hereinafter cited as GAO REPORT]. Most of the requests processed quickly were those for which no records existed. *Id.* For example, excluding those requests for which no records were available, the average time for processing a request in the FBI was 191 days and in the Office of Information and Privacy, 270 days. *Id.* at 6-7. Five of the six units studied had a backlog of requests and one office, the Office of Information and Privacy, estimated that nine months would be required to clear the existing backlog. *Id.* at 10.

25. *See, e.g.*, *Exner v. FBI*, 443 F. Supp. 1349 (S.D. Cal. 1978). The General Accounting Office found that the determinations of priority in processing requests were informal but that short, simple requests received preference over long, complex ones. GAO REPORT, *supra* note 24, at 5-6.

26. A study by the Administrative Office of the United States Courts examined the time intervals from filing a complaint to disposition of the case in federal district court during chosen 12-month periods. The median times for these periods were: (1) ending June 30, 1976—3 months; (2) ending June 30, 1979—6 months; (3) ending June 30, 1980—7 months; (4) ending June 30, 1981—8 months. During these periods 10% of the cases took respectively (1) more than 10 months; (2) more than 15 months; (3) more than 21 months; (4) more than 23 months. The statistics do not include additional time that might have been consumed on appeal. *Freedom of Information Act: Appendix, Vol. 2: Hearings on S. 587 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 798-808 (1981) [hereinafter cited as 1981 Senate Hearings].

cannot be expected to invest limited judicial resources in cases that can be resolved routinely without judicial intervention. Courts are reluctant to evaluate the reasons for a backlog or to order modification of administrative practices. In addition, the number of docket priority provisions in federal statutes reduce the impact of the priority provision for Freedom of Information Act cases.<sup>27</sup>

Confronted with delay in agency response, the costs of seeking judicial review, and the courts' treatment of agency delay, requesters are left to bargain with agencies over release of the requested information. While requesters believe that agencies will eventually release all or a substantial part of the information, little is gained by seeking judicial review, and agencies have no incentive to invent methods for more rapid compliance.

The costs of a request nonetheless remain substantial, particularly if a requester must seek judicial review in order to vindicate his or her rights under the Act. Search and copying costs can be high, and some agency regulations now require notification to the requester when costs exceed twenty-five dollars and require that the requester pay or agree to pay a portion of the cost before access is provided.<sup>28</sup> Application of the standards for the waiver of fees can exclude many requesters.<sup>29</sup>

The grant of attorney's fees does encourage requesters to pursue meritorious actions. The courts have generally interpreted the attorney's fees provision liberally,<sup>30</sup> but the criteria for the award of attorney's fees restricts the circumstances in which such awards may be granted.<sup>31</sup> Moreover, the uncertainty of awards may act to restrain many requesters from seeking review of agency decisions.<sup>32</sup>

27. The proposed Federal Courts Civil Priorities Act lists nearly ninety priority provisions. H.R. 3256, 98th Cong., 1st Sess., 129 CONG. REC. H 3787 (daily ed. June 8, 1983). The proposed Act would eliminate all known civil priorities and require expedition of habeas corpus, recalcitrant witness, and injunctive actions only. *Id.*

28. *See, e.g.*, 28 C.F.R. § 16.9(c)(1983). A requester may be held to have failed to exhaust administrative remedies by a refusal to pay a portion of the fees in advance. A failure to comply with the fee requirement suspends the administrative process. *See, e.g.*, *Lykins v. United States Dep't of Justice*, 3 GOV'T DISCLOSURE SERV. (P-H) ¶ 83,092 (D.D.C. 1983).

29. Recently issued fee waiver guidelines emphasize the public benefit to be derived rather than the financial status of the requester. 1 GOV'T DISCLOSURE SERV. (P-H) ¶ 300, 815 (Feb. 8, 1983). Prior to the issuance of the new guidelines, units within the Department of Justice varied in application of fee waiver criteria. GAO REPORT, *supra* note 24, at 12. The General Accounting Office noted that units within the department have used the ability to waive fees to negotiate a reduction in the volume of records sought. *Id.*

30. For example, the interpretation of the term "substantially prevailed" has emphasized the purpose of the Act and the attorney's fees provision. *See supra* note 19. In addition, the District of Columbia Circuit allows unrepresented plaintiffs to recover under the attorney's fees provision. *Crooker v. United States Dep't of Treasury*, 663 F.2d 140 (D.C. Cir. 1980) (*per curiam*). Other circuit courts restrict, *Crooker v. United States Dep't of Treasury*, 634 F.2d 48 (2d Cir. 1980), or prohibit unrepresented plaintiffs from recovering attorney's fees. *Crooker v. United States Dep't of Justice*, 632 F.2d 916 (1st Cir. 1980).

31. *See supra* note 19. The courts have followed the Senate explanation of the criteria for the award of attorney's fees under the 1974 amendments. The Senate Report gave, as an example of a public benefit, a reporter seeking information for the public or a public interest group "seeking information to further a project benefitting the general public." 1974 SENATE REPORT, *supra* note 19, at 19. The Senate Report stressed the benefit of the action to the public rather than to a specific group. The Senate Report also suggested that although large corporate interests or its representatives might be precluded by the award of attorney's fees, *id.*, "[N]ews interests should not be considered commercial interests." *Id.* The only circumstance in which a corporate interest could recover attorney's fees is if the agency withheld the information without a reasonable basis in law. *Id.* at 20.

32. Given the discretion a district court enjoys in determining whether to award attorney's fees, a requester can never be certain that fees will be awarded. Moreover, district courts exercise considerable discretion in determining the amount of the attorney's fees. *See Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (*en banc*).

Additionally, judicial application of the sanctions provision prevents this already cumbersome provision from being effective.<sup>33</sup> The courts have been reluctant to issue the written findings necessary to trigger the disciplinary process,<sup>34</sup> and some courts have held that the provision is inapplicable if the agency releases the requested document any time before a final judicial order.<sup>35</sup> Such an interpretation allows the agency to escape application of the sanctions provision even if the arbitrary conduct of agency personnel forced the requester to seek judicial review.

Furthermore, the case law of the last four years suggests continuing executive intransigence. Significantly, in many cases, federal judges have commented on agency bad faith or impropriety, agency delay, delay by the government in the litigation of the case, and agency unwillingness to accept the principles of the Act.<sup>36</sup>

33. Under the sanctions provisions a court may order the Office of Special Counsel to begin a disciplinary proceeding against the agency employee primarily responsible for the withholding. Three requirements must be satisfied before the court can order the commencement of such disciplinary proceedings: the court must order the production of agency records, the court must assess attorney's fees against the United States, and the court must issue a written finding that the circumstances surrounding the withholding raise questions whether agency personnel have acted arbitrarily or capriciously. 5 U.S.C. § 552(a)(4)(F) (1982).

34. The Civil Service Reform Act of 1978 allows the Special Counsel to commence a disciplinary action against an agency official without an order from the court. 5 U.S.C. § 1206(e)(1)(C) (1982) extends the investigatory power of the Office of Special Counsel to arbitrary and capricious withholding of information under the Freedom of Information Act. Subsection 1206(g)(1)(A) authorizes the Special Counsel to commence a disciplinary action after any investigation under § 1206. Any investigation under § 1206 therefore includes an investigation of arbitrary and capricious withholding of information. A reasonable interpretation of the statutory language is that the Special Counsel may commence an investigation leading to disciplinary action without a referral by a court. The legislative history of the Civil Service Reform Act supports this interpretation, as the conference report states: "[T]his provision [§ 1206 (e)(1)(C)] is not intended to require that an administrative or court decision be rendered concerning withholding of information before the Special Counsel may investigate allegations of such a prohibited practice." H.R. REP. NO. 1717, 95th Cong., 2d Sess. 137, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 2860, 2870.

35. *Aviation Data Serv., Inc. v. Federal Aviation Admin.*, 2 GOV'T DISCLOSURE SERV. (P-H) ¶ 81,113 (D. Kan. 1979); *Emery v. Laise*, 421 F. Supp. 91 (D.D.C. 1976). Although this interpretation is inconsistent with the courts' interpretation of "substantially prevailed," *supra* note 19, it is based upon the statutory language requiring the court to have ordered the release of the documents.

36. *See, e.g., Long v. United States Internal Revenue Serv.*, 693 F.2d 907, 910 (9th Cir. 1982) (agency abused the administrative scheme by imposing delay on requesters and by indicating that delays would occur in the future); *Perry v. Block*, 684 F.2d 121, 123 (D.C. Cir. 1982) (Privacy Act and FOIA claims; "manifest" from the record that agency has "been less than forthcoming" in its dealings with requester); *Sweatt v. United States Navy*, 3 GOV'T DISCLOSURE SERV. (P-H) ¶ 82,352 (D.C. Cir. 1982) (per curiam) (Privacy Act and FOIA claims; court disapproves in "no uncertain terms" the conduct of the agency and its "cavalier tone" and "unacceptable" behavior toward requestor, as agency demonstrated the "finest in bureaucratic mazes" and "hide the file"); *Cazalas v. United States Dep't of Justice*, 660 F.2d 612, 623 (5th Cir. 1981) (Government "exceeded severely" time limits for initial response, and its tactics of piecemeal revelation frustrated the release of documents); *Barrett v. Bureau of Customs*, 651 F.2d 1087, 1088 (5th Cir. 1981) (agency delay constituted an arbitrary and unreasonable withholding; district court holding unchallenged on appeal, *cert. denied*, 455 U.S. 950 (1982); *Coastal States Gas Corp. v. Department of Energy*, 644 F.2d 969, 976 (3d Cir. 1981) (court does not condone the agency's "lack of celerity in this proceeding"); *Long v. Bureau of Economic Analysis*, 2 GOV'T DISCLOSURE SERV. (P-H) ¶ 81,183 (9th Cir. 1981) (per curiam) (Government's delay in raising defenses unreasonable); *Crooker v. United States Dep't of the Treasury*, 663 F.2d 140, 142 (D.C. Cir. 1980) (per curiam) (lack of diligence in responding to requester's letters); *Lovell v. Alderete*, 630 F.2d 428, 436 (5th Cir. 1980) (Clark, J., dissenting) (facts of Government's conduct egregious); *Irons v. Bell*, 596 F.2d 468, 470 (1st Cir. 1979) (agency moved with "glacial celerity"); *Milic v. United States Dep't of State*, 3 GOV'T DISCLOSURE SERV. (P-H) ¶ 83,068 (D.D.C. 1983) (despite assertions of urgency by requester, agency provided "no helpful response" to requester until suit filed; Government trial counsel praised for mediating release after suit filed); *Des Moines Register and Tribune Co. v. FBI*, 3 GOV'T DISCLOSURE SERV. (P-H) ¶ 83,194 (D.D.C. 1983) (delay of three years between request and suit "not reasonable" agency conduct, despite large backlog); *Ferris v. Internal Revenue Serv.*, 3 GOV'T DISCLOSURE SERV. (P-H) ¶ 82,462 (D.D.C. 1982) (agency acted without a reasonable basis in law and its lack of response to initial request evidenced an attempt by the agency to frustrate requester); *Diamond v. FBI*, 548 F. Supp. 1158 (S.D.N.Y. 1982) (agency's reasons for refusing to waive fees lack merit); *Allen v. FBI*, 551 F. Supp. 694, 697 (D.D.C. 1982) (refusal to waive fees arbitrary and capricious); *Crooker v. United States Dep't of the Treasury*, 2 GOV'T DISCLOSURE SERV. (P-H) ¶ 82,210 (D.D.C. 1982) (agency's failure to forward documents without deletions to plaintiff after court decision resulted from a lack of due diligence, but was not intentional);

A number of judicial decisions, particularly from the District of Columbia Circuit Court of Appeals, reflect judicial frustration with the agencies' administration of

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*Biberman v. FBI*, 528 F. Supp. 1140, 1144 (S.D.N.Y. 1982) (failure to search all available indexes reasonably likely to contain references to the requester displayed attitude of limiting search unless requester knowledgeable enough to request search of a specific index); *Frydman v. Department of Justice*, 3 Gov't DISCLOSURE SERV. (P-H) ¶ 82,345 (D. Kan. 1981) (Government may have acted in bad faith by disclosing one document only after finding that its existence could not be concealed); *Long v. Internal Revenue Serv.*, 3 Gov't DISCLOSURE SERV. (P-H) ¶ 82,435 (W.D. Wash. 1981) (case raised questions as to whether agency personnel had acted arbitrarily and capriciously); *Exxon Corp. v. Department of Energy*, 2 Gov't DISCLOSURE SERV. (P-H) ¶ 81,253 (D.D.C. 1981) (agency argued documents not reasonably described even though its employees able to find documents responsive to the request); *Jenks v. United States Marshals Serv.*, 514 F. Supp. 1383 (S.D. Ohio 1981) (lengthy agency delay); *Jaffe v. CIA*, 516 F. Supp. 576, 587 (D.D.C. 1981) (the litigation reveals a history of agency delay and recalcitrance); *Continental Casualty Co. v. Marshall*, 520 F. Supp. 56, 57 (N.D. Ill. 1981) (agency conduct demonstrated a "lack of cooperation and evasive and dilatory tactics"); *Griffin v. United States Dep't of Labor*, 3 Gov't DISCLOSURE SERV. (P-H) ¶ 82,340 (N.D. Ill. 1981) (documents should have been released promptly after initial request; instead six months of working through administrative channels proved "fruitless"); *Crooker v. United States Dep't of Justice*, 2 Gov't DISCLOSURE SERV. (P-H) ¶ 81,069 (D.D.C. 1981) (Government delay unexplained by any dispute over the application of the Act); *Wooden v. Office of Juvenile Justice*, 2 Gov't DISCLOSURE SERV. (P-H) ¶ 81,123 (D.D.C. 1981) (no reasonable basis in law for withholding the documents); *Roy Bros. Carpentry and Construction Co. v. Marshall*, 2 Gov't DISCLOSURE SERV. (P-H) ¶ 81,211 (D. Conn. 1981) (agency's prelitigation recalcitrance in opposing a reasonable request for information); *Bird v. United States Dep't of Treasury*, 2 Gov't DISCLOSURE SERV. (P-H) ¶ 81,215 (D.D.C. 1981) (no reasonable basis for withholding and no attempt to disclose reasonably segregable portions of the records); *Readers Digest Ass'n v. FBI*, 524 F. Supp. 591, 595 (S.D.N.Y. 1981) (events diminished the court's confidence in the ability of the FBI and CIA to prepare proper affidavits); *Dunaway v. Webster*, 519 F. Supp. 1059, 1066 (N.D. Cal. 1981) (court comments on long delay and Government's unwillingness to provide additional justifications for withholding and other dilatory tactics; characterized as a "dangerous litigation strategy" making FOIA proceedings as lengthy and costly as possible to discourage others from pursuing their rights under the Act); *Weisburg v. Department of Justice*, 2 Gov't DISCLOSURE SERV. (P-H) ¶ 82,055 (D.D.C. 1981) (court notes that agency deliberately ignored requester's 1969 letter and later letters requesting information); *Binion v. United States Dep't of Justice*, 2 Gov't DISCLOSURE SERV. (P-H) ¶ 82,148 (D. Nev. 1981) (court states case delayed and court's decision made more difficult by Government conduct including contradictory affidavits); *Gedden v. United States Postal Serv.*, 2 Gov't DISCLOSURE SERV. (P-H) ¶ 81,369 (S.D. Iowa 1980) (Privacy Act case; unreasonable agency conduct in denying access); *Henry v. Office of Educ.*, 2 Gov't DISCLOSURE SERV. (P-H) ¶ 81,085 (D. Colo. 1980) (no reasonable basis for withholding documents nor for agency's "delay, foot dragging, obduracy and lack of candor" in responding to attempts of requester to acquire information under the Act); *Education-Instruction, Inc. v. United States Dep't of Housing and Urban Development*, 87 F.R.D. 112, 117 (D. Mass. 1980) (agency delayed for months in turning over documents after the agency conceded that any exemption applicable to the documents had ended); *Associated General Contractors v. EPA*, 488 F. Supp. 861, 864 (D. Nev. 1980) (agency failed to follow clear case authority of which it was aware); *Population Action Council v. United States Dep't of State*, 2 Gov't DISCLOSURE SERV. (P-H) ¶ 81,062 (D.D.C. 1980) (material originally deleted by the agency was either insignificant or deleted in such a way to give a misleading impression of the contents of the documents); *Robinson v. Dep't of Labor*, 3 Gov't DISCLOSURE SERV. (P-H) ¶ 82,275 (D. Or. 1980) (Government withheld records without a reasonable basis in law for the withholding; magistrate's findings adopted by the court); *Westinghouse Electric Corp. v. NLRB*, 497 F. Supp. 82, 85 (W.D. Pa. 1980) (court notes that agency did not release material until after litigation although four cases in that district required release of the material); *Mole v. United States Customs Serv.*, 1 Gov't DISCLOSURE SERV. (P-H) ¶ 80,127 (E.D. Pa. 1980) (Government recalcitrant in failing to notify requester of delay, and documents that allegedly could not be found located almost immediately after the commencement of suit); *Founding Church of Scientology, Inc. v. United States Marshals Serv.*, 516 F. Supp. 151 (D.D.C. 1980) (inadequacy of initial agency search for documents); *Ehlschide v. United States Dep't of Labor*, 2 Gov't DISCLOSURE SERV. (P-H) ¶ 82,228 (E.D. Ky. 1980) (instead of being responsive to legitimate requests of citizens, the agency gave them the "run-around"); *Globe Newspaper Co. v. United States Dep't of Justice*, 2 Gov't DISCLOSURE SERV. (P-H) ¶ 82,002 (D. Mass. 1980) (deplores ten month delay between request and agency's action on requester's appeal); *Founding Church of Scientology, Inc. v. Miller*, 490 F. Supp. 144, 150 (D.D.C. 1980) (Government's general practice was to engage in "dilatory tactics"; "It ill-behooves the United States Government to participate with such cunning creativity in what can only be seen as an attempt to frustrate the will of Congress in enacting the Freedom of Information Act and this court in enforcing it."), *rev'd on other grounds*, 670 F.2d 1158 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 976 (1982); *Peck v. FBI*, 1 Gov't DISCLOSURE SERV. (P-H) ¶ 79,168 (N.D. Ohio 1979) (initial request four years old and "difficult to believe" that information in central files did not suggest references to requester in field offices); *Public Citizen Health Research Group v. United States Dep't of Labor*, 2 Gov't DISCLOSURE SERV. (P-H) ¶ 81,031 (D.D.C. 1979) (agency had only a "questionable" basis for withholding documents); *Wolfson v. Department of Justice*, 1 Gov't DISCLOSURE SERV. (P-H) ¶ 79,111 (D.D.C. 1979) (agency recalcitrant and uncooperative to the point that contempt citations were seriously considered); *Crooker v. United States Dep't of Justice*, 1 Gov't DISCLOSURE SERV. (P-H) ¶ 79,160 (D.D.C. 1979) (Government offered "not one scintilla of evidence" to indicate that the civil division of the department was processing request with due diligence or that the delay was justified).

the Act.<sup>37</sup> These decisions demonstrate the courts' attempts to respond to the advantages government agencies enjoy in Freedom of Information Act litigation because of their control of the documents and knowledge of their character and content. The availability of *in camera* inspection<sup>38</sup> and the requirement that agencies explain the character of the documents and the application of exemptions<sup>39</sup> seeks to reduce the advantages enjoyed by the government.

The decisions also illustrate a desire to structure the administrative process to encourage release. The requirement for agency indexes of documents rests upon an articulated desire by the courts to structure the administrative process to provide an incentive for the release of information.<sup>40</sup> Recently, the District of Columbia Circuit established guidelines for agencies to follow in processing requests for the records of other agencies that the requested agency has in its possession, and for establishing cut-off dates for searches.<sup>41</sup> The court's opinion demonstrated a recognition of the importance of administrative practice to the success or failure of the Act.<sup>42</sup> Although the courts also have creatively used appropriate judicial power to influence administrative practice and procedures, this judicial power is limited. The courts are not able to perform like an administrative oversight agency.<sup>43</sup>

The implementation of the Act demonstrates flaws in the structure of the Act. Judicial application of the Act also highlights the limitations of judicial review as the principal enforcement method under the Act. These conclusions point to the need for an examination of administrative alternatives.

### III. STATE ADMINISTRATIVE AGENCIES

The statutes of two states, Connecticut and New York, provide a substantial role in the implementation of a state freedom of information law for an administrative

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37. See *infra* notes 38–41 (citing cases).

38. In *Allen v. CIA*, 636 F.2d 1287 (D.C. Cir. 1980), the District of Columbia Circuit summarized the factors that support *in camera* inspection. The court emphasized the congressional intent to provide such inspection and suggested that when the volume of documents is small, *in camera* inspection may save more time than the presentation and evaluation of other evidence. The court listed six considerations in determining the propriety of *in camera* inspection: judicial economy, the character of agency affidavits, agency bad faith, dispute about the contents of the documents, agency consent to *in camera* inspection, and the public interest in disclosure.

39. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). A *Vaughn* index must itemize the documents withheld, analyze the character of the documents and separate the portions of the documents for which exemption is claimed from other portions. Each portion should show what exemption is claimed and the justification for claiming the specific exemption.

40. Our decision here may sharply stimulate what must be, in the final analysis, the simplest and most effective solution—for agencies voluntarily to disclose as much information as possible and to create internal procedures that will assure that disclosable information can be easily separated from that which is exempt. A sincere policy of maximum disclosure would truncate many of the disputes that are considered by this court. And if the remaining burden is mostly thrust on the Government, administrative ingenuity will be devoted to lightening the load. *Id.* at 828 (footnote omitted).

41. *McGehee v. CIA*, 697 F.2d 1095 (D.C. Cir. 1983).

42. The court suggested administrative procedures and emphasized that requesters must be informed of cut-off dates and that agencies must take responsibility for properly processing a request. *Id.* at 1100–03, 1109.

43. The judicial role is necessarily limited for several reasons. Among these are: (1) the concerns created by the separation of powers doctrine that the courts not intrude improperly into the operations of a coordinate branch of government; (2) the role of courts in Freedom of Information Act litigation limiting the courts primarily to ordering the release of documents; (3) the episodic case by case nature of litigation reducing the courts' ability to provide effective administrative oversight; (4) the expenses and costs of litigation restricting the information brought to the courts and the opportunity to act; and (5) the lack of familiarity with the details of a range of agency practices and policies.



agency. The approaches of Connecticut and New York, however, vary significantly. Connecticut has adopted an administrative agency with adjudicatory and enforcement powers, and New York has chosen an agency with advisory powers resembling an ombudsman. These two approaches to administrative regulation require different practices and procedures.

#### A. *State of Connecticut Freedom of Information Commission*

The Connecticut Freedom of Information Commission,<sup>44</sup> established in 1975,<sup>45</sup> possesses a wide range of powers to enforce the Connecticut freedom of information provision and open meeting laws.<sup>46</sup> These powers include broad investigatory powers<sup>47</sup> and substantial adjudicatory and enforcement authority, including the power to impose civil penalties upon agency officials who have withheld information without a reasonable basis in law.<sup>48</sup> It conducts training of agency personnel and public education<sup>49</sup> and comments upon agency regulations implementing the state

44. The Connecticut Commission consists of five members appointed by the Governor with the advice and consent of either house of the general assembly, in this case, the Senate. CONN. GEN. STAT. § 1-21j(a)(c) (West Supp. 1983). Vacancies are also filled by the Governor with the consent of the Senate. *Id.* § 1-21j(f). Each member serves four years, with one term expiring in each of three consecutive years and two terms expiring in the fourth year. The system of Commissioner appointment was a compromise. The Commission wanted a four-year term, with each term expiring over consecutive years during a five-year period. *See* Act of July 1, 1977, 1977 CONN. ACTS 863, § 7 (Reg. Session).

Without this compromise, the Commissioners and the Executive Director would have been appointed by the Governor with the consent of the legislature for four-year terms running with that of the Governor. This proposal would also have allowed the Governor to remove the Commissioners without cause. The need for independence, however, supported the final adoption of staggered terms with the Commissioners removable only for cause. Letter from Mitchell W. Pearlman, Executive Director and General Counsel of the State of Connecticut Freedom of Information Commission, to Robert G. Vaughn (Aug. 3, 1983) (with appended notes) [hereinafter cited as Pearlman Letter]. No more than three members may be of the same political party. CONN. GEN. STAT. § 1-21j(a) (West Supp. 1983). A quorum of three members. *Id.* § 1-21j(f). The members receive fifty dollars each day they are present at meetings, plus necessary expenses. *Id.* § 1-21j(b). The Commission is to maintain a permanent office in Hartford. *Id.* § 1-21j(c). The Commission is an autonomous body located within the Office of the Secretary of State for administrative purposes only. *Id.* § 1-21j(a). It is not considered a commission or board within the executive branch, *id.* § 1-21j(i), and thus is not subject to the appointment and other provisions, such as terms conterminous with the Governor, applicable to executive commissions. *Id.* § 4-9. The Governor appoints from the members the chairperson of the Commission. *Id.* § 1-21j(c).

45. The Commission came into existence as a result of the 1974 gubernatorial campaign of Ella Grasso, who made open government an important issue. The organized media of the state, acting through the Connecticut Council of Freedom of Information, played an important role. The media were concerned that the freedom of information and open meeting laws would spawn a large number of cases, which would create considerable delay in the courts. A Commission with adjudicatory powers was seen as a more economical approach. Letter from Bice Clemow, Secretary-Treasurer of the Connecticut Council on Freedom of Information, to Robert G. Vaughn (July 6, 1983). Despite the interest of the media, only 14% of the contested cases docketed with the Commission have involved media complaints. CONNECTICUT FREEDOM OF INFORMATION COMMISSION, STATISTICAL SURVEY OF COMMISSION BUSINESS, OCTOBER 1, 1975-DECEMBER 31, 1982 at 4 (1983) [hereinafter cited as CONNECTICUT STATISTICAL SUMMARY]. The media have also requested an advisory opinion on only one occasion. *Id.* at 3. The Statistical Survey contains data both for the freedom of information law and the open meetings law. Of the cases decided by the Commission, approximately 62% concern access to records. *Id.* at 1. The data is not further divided by records or meeting access. Because almost two-thirds of the cases concern access to records, the statistical summary gives a good sense of the Commission's performance in cases involving the freedom of information law.

46. Although this Article focuses on freedom of information, state agencies also have jurisdiction over open meeting and privacy laws. Many of the conclusions of this Article might apply to these laws as well.

47. CONN. GEN. STAT. § 1-21j(d) (1981). The investigatory power includes the power to hold a hearing, administer oaths, examine and subpoena witnesses, receive oral and documentary evidence, and compel examination of documents if necessary.

48. *Id.* § 1-21i(b). The civil penalty may range from \$20.00 to \$1,000.00. The Commission may enforce its order by imposing a penalty through the superior court.

49. *Id.* § 1-21j(e). The Commission must conduct training sessions at least annually for members of public agencies.

freedom of information law.<sup>50</sup> The Commission's jurisdiction extends not only to state agencies but also to local government. The Connecticut Administrative Procedure Act empowers the Commission to issue advisory opinions<sup>51</sup> and to establish its own rules and procedures,<sup>52</sup> and requires it to publish its decisions and make them available to the public.<sup>53</sup> The adjudication of appeals from agency decisions denying access to documents and records, however, remains the Commission's principal function.

### 1. *The Adjudicatory Powers of the Commission*

Under the Connecticut freedom of information law, an agency must notify a person of a denial of a request for information within four business days of receipt of the request.<sup>54</sup> If the agency does not comply with the request within four business days, the delay is treated as a denial and the requester may appeal to the Commission.<sup>55</sup>

In an appeal to the Commission the agency has the burden of persuasion to demonstrate that the records were properly withheld under one of the exemptions to the freedom of information law.<sup>56</sup> An appeal includes a hearing at which the parties may present evidence and testimony as well as cross-examine witnesses.<sup>57</sup> An appeal must be filed within thirty days of an agency's denial of the request.<sup>58</sup>

The regulations of the Commission<sup>59</sup> and its practice<sup>60</sup> stress the relative informality of its appeals hearings. The hearings are informal because most appeals are

50. The Commission has no formal authority to review and comment upon regulations, but does so as a matter of practice. The Commission's review of agency regulations is discussed *infra* text accompanying note 87.

51. The power to issue advisory opinions is the power to issue "declaratory rulings" under the state's version of the Uniform Administrative Procedure Act. CONN. GEN. STAT. § 4-176 (1981). See also REPORTS OF THE CONNECTICUT FREEDOM OF INFORMATION COMMISSION, REGULATIONS OF THE FREEDOM OF INFORMATION COMMISSION, *Rules of Practice*, Art. 4, pt. 2, at B-16, -17 [hereinafter cited as COMMISSION REGULATIONS]. A discussion of the Commission's advisory opinion practice is found *infra* text accompanying notes 82-84.

52. The power to establish its own rules and procedures comes from the State's Uniform Administrative Procedure Act. CONN. GEN. STAT. § 4-167 (1981).

53. *Id.* § 1-21j(h). The Commission's regulations and decisions are contained in REPORTS OF THE CONNECTICUT FREEDOM OF INFORMATION COMMISSION (updated annually) [hereinafter cited as COMMISSION REPORTS].

54. CONN. GEN. STAT. § 1-21i(a) (1981). The freedom of information law states that an agency must make the documents available "promptly." *Id.* §§ 1-15, 1-19(a). The Commission has interpreted the term "promptly" to mean that the documents must be made available quickly and without undue delay. State of Connecticut Freedom of Information Commission, Advisory Opinion #51 (Jan. 11, 1982); Interview with Mitchell W. Pearlman, Executive Director and General Counsel of the State of Connecticut Freedom of Information Commission, in Hartford, Connecticut (June 14, 1983) [hereinafter cited as Pearlman Interview]. Of course, "quickly and without undue delay" varies depending upon the circumstances. State of Connecticut Freedom of Information Commission, Advisory Opinion #51 (Jan. 11, 1982).

55. CONN. GEN. STAT. § 1-21i(a), (b) (1981).

56. The freedom of information law makes all agency records public records, unless the records fall within one of the exemptions of the law. *Id.* § 1-19. Consistent with this policy, the burden of persuasion that documents and records fall under the exemptions rests with the agency. *Wilson v. Freedom of Information Comm'n*, 181 Conn. 324, 329, 435 A.2d 353, 357 (1980).

57. COMMISSION REGULATIONS, *supra* note 51, at Art. 2, pt. 3, § 1-21j-35, at B-11, -12.

58. CONN. GEN. STAT. § 1-21i(b) (1981) amended by Act of Aug. 3, 1983, No. 31, Conn. Legis. Serv. 2244 (effective July 1, 1984). The Commission interprets the requirement as jurisdictional. In freedom of information cases, if a person fails to meet the deadline, the person need only make a second request for the information and be denied.

59. COMMISSION REGULATIONS, *supra* note 51, at Art. 2, pt. 3, §§ 1-21j-33 to -40, at B-11 to -14.

60. COMMISSION REPORTS, CITIZEN'S GUIDE TO THE FREEDOM OF INFORMATION COMMISSION C-1 [hereinafter cited as CITIZEN'S GUIDE]. The hearings are usually held around a conference table to stress informality. The informality arises in part because most hearings are straightforward, focusing on one or two issues. Interview with Judith Lahey, Chair of

made by individuals<sup>61</sup> who are not represented by counsel.<sup>62</sup> A staff attorney of the Commission appears at each hearing to represent the interests of the full Commission in the proceedings.<sup>63</sup> Individual members of the Commission preside over the hearings and issue an initial decision consisting of proposed findings of fact and law and a recommended order.<sup>64</sup> An initial decision must be confirmed by the full Commission,<sup>65</sup> but the Commission's decision rests upon the factual record established at the hearing.<sup>66</sup>

Although the Commission does very little mediation,<sup>67</sup> a number of appeals are withdrawn prior to hearing.<sup>68</sup> A study by the Commission of the reasons why complainants withdrew cases<sup>69</sup> suggests that the major reason was that the agency had satisfactorily supplied the requested information before the hearing. Of the withdrawals studied, almost all resulted from resolutions favorable to the complainant.<sup>70</sup> Indeed, complainants prevail in approximately seventy-two percent of the appeals before the Commission.<sup>71</sup> The Commission perceives itself as having special responsibilities for insuring open government, and its unofficial motto, which it urges upon all public agencies, might well be, "When in doubt, give it out."<sup>72</sup> The attitude of the Commission, its adjudicatory powers, and its informal procedures encourage use of the statute by individuals.

Recently, the Commission has begun to impose civil penalties upon public

the State of Connecticut Freedom of Information Commission, in Hartford, Connecticut (June 15, 1983) [hereinafter cited as Lahey Interview]. Most hearings take about half a day. *Id.*

61. Of the cases docketed before the Commission, 73% involved complaints by citizens. CONNECTICUT STATISTICAL SUMMARY, *supra* note 45, at 4.

62. Pearlman Interview, *supra* note 54. Mr. Pearlman estimates that only about 5% of the individual complainants are represented by counsel.

63. *Id.* The staff attorney generally does not cross-examine witnesses, but plays an important function in a hearing process in which most complainants are not represented. The staff attorney seeks to insure the development of a clear and adequate hearing record and to insure that lay parties are not disadvantaged by technical legal matters. The staff also describes in plain language the nature of the proceedings.

64. CITIZEN'S GUIDE, *supra* note 60, at V, VI, at C-3 to C-6. The statute states that the "Commission" shall hold a hearing.

65. COMMISSION REGULATIONS, *supra* note 51, at Art. 2, pt. 4, § 1-21j-38, at B-13. Anyone who would be adversely affected by the initial decision is given an opportunity to file exceptions, present briefs, and make oral arguments before the Commission. The Administrative Procedure Act mandates this procedure when less than a quorum of the agency has heard the case or read the entire record. CONN. GEN. STAT. § 4-179 (1981).

66. COMMISSION REGULATIONS, *supra* note 51, at Art. 2, pt. 4, § 1-21j-39, at B-13. See CONN. GEN. STAT. §§ 4-178(g), 4-183 (1981).

67. The limited role in mediation results in part from the Commission's adjudicatory power. Separate meetings with the parties in the context of litigation threaten the judicial role and violate prohibitions against *ex parte* contacts. COMMISSION REGULATIONS, *supra* note 51, at Art. 1, pt. 1, § 1-21j-20, at B-6.

68. Of the cases docketed October 1, 1975 through calendar year 1982, 510, or 30%, of the cases were withdrawn by complainants. CONNECTICUT STATISTICAL SUMMARY, *supra* note 45, at 3.

69. From January 1, 1983 to August 1, 1983, 163 cases were docketed with the Commission, of which 31 were withdrawn. The Commission clerk scheduling hearings asked each complainant withdrawing a case to indicate the reason for withdrawal. Pearlman Letter, *supra* note 44.

70. Of the 31 cases withdrawn, 29 were withdrawn "because complainants received satisfactory compliance by the agencies against whom they complained." Two cases were withdrawn because complainants "no longer wished to pursue their complaints." *Id.*

71. CONNECTICUT STATISTICAL SUMMARY, *supra* note 45, at 4. The Commission treats complainants as winning if they receive any document that otherwise would not have been received. Pearlman Interview, *supra* note 54.

72. Pearlman Interview, *supra* note 54.

officials who deny access to information without reasonable grounds.<sup>73</sup> The Commission's decisions suggest that it is willing to attach responsibility to a number of officials for the withholding in a single case.<sup>74</sup> Among the factors considered in determining whether a civil penalty should be imposed are the number of violations, the experience of the public officials concerned, the clarity of the law, and the impact of the decision upon the public.<sup>75</sup> The penalty provision provides an important sanction necessary to encourage agency compliance, but its application to part-time and untrained officials raises issues of fairness and equity.<sup>76</sup>

Decisions of the Commission are subject to review in superior court.<sup>77</sup> The court, however, reviews the decisions of the Commission under a limited standard of review that gives great weight to the Commission's determinations.<sup>78</sup> The limited standard of review insures that the Commission remains the entity principally responsible for adjudication of claims under the freedom of information law.<sup>79</sup>

## 2. Other Powers and Responsibilities of the Commission

Aside from its adjudicatory power, the power to investigate is the source of the Commission's greatest potential influence.<sup>80</sup> The investigatory powers of the Commission are broad<sup>81</sup> and extend beyond those powers needed to support the adjudica-

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73. At one time the statute required willful or intentional conduct. The statute now requires only that there were no reasonable grounds for withholding. CONN. GEN. STAT. § 21i(b) (1981). When the imposition of a penalty is requested specifically in a complaint, the Commission determines on the basis of the record of its hearing whether a penalty should be imposed and, if so, what the penalty should be. If the Commission determines that a penalty may be appropriate even when the imposition of a penalty has not been requested specifically in a complaint, it will issue a show cause order and conduct a separate hearing on the imposition and amount of the prospective penalty.

74. See, e.g., *In re* complaint by Dennis Bixler v. East Windsor Police Commission, Docket No. FIC82-95 (Dec. 23, 1982); *In re* complaint by Christian Wihtol v. Tract 1701 Recovery Committee, Docket No. FIC82-198 (Apr. 29, 1983).

75. *In re* complaint by Dennis Bixler v. East Windsor Police Commission, Docket No. FIC82-95 (Dec. 23, 1982); *In re* complaint by Christian Wihtol v. Tract 1701 Recovery Committee, Docket No. FIC82-198 (Apr. 29, 1983).

76. Many of these officials find it difficult to obtain advice of counsel. Although the penalties are small, their imposition can adversely affect the political career of a public official.

77. CONN. GEN. STAT. § 1-21i(d) (1981). A party appealing from the Commission must give notice to all parties of record, including the government agency involved. *Id.* § 4-183(b); see *Royce v. Freedom of Information Comm'n*, 177 Conn. 584, 418 A.2d 939 (1979). Initially under the law, the attorney general represented both the state agency and the Commission. Although the Connecticut Supreme Court found this practice proper, *Connecticut Comm'n on Special Revenue v. Connecticut Freedom of Information Comm'n*, 174 Conn. 308, 387 A.2d 533 (1978), the law now provides that legal counsel retained by the Commission represent it in appeals. CONN. GEN. STAT. § 1-21i(d) (1981).

78. CONN. GEN. STAT. § 4-183(g) (1981). The court is not to substitute its judgment for any agency's on issues of fact. The court may overturn a decision if the party appealing is prejudiced by any agency's decision that is a violation of a constitutional or statutory provision, in excess of statutory authority, made upon unlawful procedures, affected by other error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or arbitrary, capricious, or characterized by abuse of discretion. The Connecticut Supreme Court has emphasized that review of the Commission's decisions is limited. *Board of Trustees of Woodstock Academy v. Freedom of Information Comm'n*, 181 Conn. 544, 436 A.2d 266 (1980).

79. Fifteen percent of the Commission's decisions have been appealed to the courts; 9% of the appeals were brought by complainants and 91% by government respondents. Twenty percent of the appeals were withdrawn; in 54% of the appeals not withdrawn, the Commission was upheld or the appeal dismissed. The Commission was overruled in 8% of the appeals not withdrawn and 36% of the appeals not withdrawn are still pending. CONNECTICUT STATISTICAL SUMMARY, *supra* note 45, at 4.

80. The Commission has not used its investigatory authority. Staff limitations and the emphasis on adjudication have left little time or resources for investigation. Pearlman Interview, *supra* note 54.

81. See *supra* note 47.

tory process. For example, the Commission could focus on individual agencies and conduct an extensive review of the agency's stewardship of the law. The Commission could likewise target specific local jurisdictions, moving the geographical focus of the Commission's work if necessary.

Although the Commission has authority to give advisory opinions,<sup>82</sup> it has issued very few such opinions.<sup>83</sup> Rather, it has focused on contested cases to interpret the freedom of information law. The Commission's criteria for an advisory opinion require a purely hypothetical situation and an issue of broad, general applicability.<sup>84</sup>

The Commission's obligation to make available at cost printed reports of its decisions and related materials allows the Commission to inform the public of its views and to convey its policies toward freedom of information. Likewise, its obligation to conduct training sessions for members of public agencies permits it to influence the attitudes of agency officials toward the law.<sup>85</sup> These obligations are important opportunities for the Commission; training conducted by an agency with enforcement authority provides a way of defining perspectives and establishing expectations.<sup>86</sup>

Other powers of the Commission rest upon its influence rather than upon specific statutory provisions. For example, the staff of the Commission responds informally to thousands of inquiries concerning the application of the freedom of information law.<sup>87</sup> The staff also reviews the regulations of agencies for compliance with the law. The Commission's reply to an inquiry by an agency or its comments on regulations are likely to be followed even though it enjoys no formal authority in these areas. The Commission's adjudicatory and other powers insure a receptive and attentive audience.

The Commission also plays an important role in legislative modification of the freedom of information law.<sup>88</sup> The Commission's familiarity with the Act combined with the perception of its role as an advocate for open government provides the

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82. See *supra* note 51.

83. Since 1976, the Commission has received 223 requests for advisory opinions and has issued 52. CONNECTICUT STATISTICAL SUMMARY, *supra* note 45, at 3. This compares with 1,692 docketed cases during the same period. *Id.* Of the requests for advisory opinions, 102 came from individuals, 85 from local government, and 20 from state agencies. *Id.* The advisory decisions are found in COMMISSION REPORTS, *supra* note 53, at E-1.

84. In some early cases, hypothetical situations turned out to be real controversies. As a general matter an advisory opinion must apply to all similarly situated agencies or have application to all government agencies. Pearlman Interview, *supra* note 54.

85. The Commission holds an annual workshop for government officials and members of boards and commissions. The workshop is held after each November election to attract newly elected and appointed officials and agency members. The Commission has not issued formal guidelines for agencies. *Id.*

86. Education and training may have affected agency compliance and served to limit the caseload of the Commission. As agencies come to understand the law and realize that they must comply with it, the number of contested cases may decline. *Id.* The greatest number of cases docketed was 263 in 1978. In subsequent years the number of docketed cases declined to 204 in 1982. CONNECTICUT STATISTICAL SUMMARY, *supra* note 45, at 1.

87. Pearlman Interview, *supra* note 54.

88. The Commission has supported numerous subsequently adopted bills, including legislation that conferred authority on the Commission to appoint counsel in judicial appeals, CONN. GEN. STAT. § 1-21i(d) (1981), and overruled a state supreme court's decision. *Id.* Pearlman Interview, *supra* note 54.

legislature with knowledgeable and authoritative views distinct from those that might be advocated by individual agencies or by the State Attorney General.<sup>89</sup>

### 3. *Assessment of the Connecticut Approach*

The Connecticut Freedom of Information Commission offers a unique example of a powerful administrative agency charged with enforcement of a freedom of information law. Although assessment of the Commission's performance must be based on limited data, some conclusions can be drawn.

#### a. *The Commission's Independence*

The Commission has retained its independence and its commitment to access to government records. The experience of Congress in seeking to secure the independence of federal regulatory agencies suggests the difficulties inherent in protecting an important and powerful agency from executive encroachment.<sup>90</sup> Given the frustration surrounding congressional attempts to insulate federal regulatory agencies from executive pressures, the factors contributing to the Commission's continuing independence present some intriguing lessons.

As with many federal regulatory agencies, the Commissioners of the Connecticut Freedom of Information Commission serve staggered terms and can be removed only for cause.<sup>91</sup> The Executive Director and General Counsel of the Commission holds a civil service position.<sup>92</sup> Although the chairperson of the Commission is appointed by the Governor, custom and practice limit the administrative duties of the chairperson to presiding at meetings; administrative power is vested primarily with the Executive Director.<sup>93</sup> The Commissioners serve part-time.<sup>94</sup> Part-time service increases the influence of staff and also prevents an appointment to the Commission from becoming a political plum.

Aside from these formal protections, the political setting in which the Commission operates also acts to preserve its independence. Although the Commission's budget is submitted through the Governor's Office of Policy Management, that office has not used the budget to punish regulatory conduct.<sup>95</sup> The Commission has a strong and powerful constituency in the state's media. The media obviously have a continuing interest in the viability of the Commission and an ability to mobilize resources on a state-wide basis as well as to focus publicity upon individual members of the legislature and the executive.

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89. A previous Attorney General of the State of Connecticut frequently issued advisory opinions at odds with the interpretation given to the law by the Commission. An agency that requests an advisory opinion from the Attorney General is bound to follow it until ordered by the Commission or the courts to do otherwise. Pearlman Interview, *supra* note 54.

90. See generally, *Regulatory Agency Budgets, Pts. 1-2: Hearings on S. 448 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 92d Cong., 2d Sess. (1972).

91. CONN. GEN. STAT. § 1-21j(a) (1981).

92. Pearlman Interview, *supra* note 54.

93. *Id.*

94. See CONN. GEN. STAT. § 1-21j(b) (1981).

95. Pearlman Interview, *supra* note 54.

The Commission has also retained its commitment to public access. The Commissioners have not represented partisan interests, and people with media experience and backgrounds, including the Commission's first chairperson, have been members of the Commission.<sup>96</sup> Moreover, the structure of the Commission, which increases the influence of staff, has provided a stable perspective.<sup>97</sup>

#### b. *Delay and Characterization of Documents*

The Connecticut approach relies upon administrative adjudication and presumes that such adjudication will occur rapidly. The Connecticut law provides that the Commission shall hold a hearing within twenty days of a notice of appeal and decide the appeal within thirty days of the hearing.<sup>98</sup> The time limits, however, are directory and not mandatory;<sup>99</sup> the Commission now takes approximately two and one-half months to adjudicate a case from the filing of an appeal to a final order.<sup>100</sup>

Additional delay in the process results from judicial review. Two layers of courts review the Commission's decisions as a matter of right, with a discretionary appeal to the Connecticut Supreme Court.<sup>101</sup> Although review of Commission decisions is to receive docket priority,<sup>102</sup> the judicial backlog, particularly of criminal cases, reduces the effectiveness of the docket provision.<sup>103</sup> Moreover, upon request the Commission usually grants a short stay of its final order, and the courts have established criteria for judicial stays that make them routine pending judicial review.<sup>104</sup> The fear that agencies would abuse this system motivated a recent amendment that provided for the payment of costs and fees by a party filing a frivolous appeal from the Commission.<sup>105</sup>

Although delay occurs under the Connecticut approach, the vast majority of cases are decided rapidly even when an agency has not been cooperative.<sup>106</sup> The

96. The first chairman of the Commission was Herbert Brucker, the editor of the Hartford Courant. Brucker was a highly respected journalist and author of one of the first books on freedom of information, published in 1949. See H. BRUCKER, *FREEDOM OF INFORMATION* (1949). The media background of some Commissioners can be the source of controversy. For example, a city sought to disqualify a commissioner who had worked for the newspaper requesting information and bringing the action before the Commission. This relationship was held insufficient to invalidate a decision of the Commission on the basis of conflict of interest. *Town of Bloomfield v. Freedom of Information Comm'n*, No. 145422-6, (Conn. C.P. Hartford County Apr. 26, 1978).

97. The Executive Director and General Counsel of the Commission has served the Commission since its formation.

98. CONN. GEN. STAT. § 1-21i(b) (1981).

99. *Giordano v. Freedom of Information Comm'n*, 36 Conn. Supp. 117, 413 A.2d 493 (Conn. Super. Ct. 1979) (failure to comply with deadlines does not deprive Commission of jurisdiction).

100. Pearlman Interview, *supra* note 54. This period is approximately three weeks beyond the deadline.

101. CONN. GEN. STAT. §§ 1-21i(d), 4-183(a)-(b), 4-184, 51-197b (1981); see also Act of June 29, 1983, No. 29, 1983 Conn. Legis. Serv. 2194 (West) (particularly §§ 3, 4, and 7).

102. CONN. GEN. STAT. § 1-21i(d) (1981).

103. Pearlman Interview, *supra* note 54.

104. *McCarthy v. Freedom of Information Comm'n*, 35 Conn. Supp. 186, 402 A.2d 1197 (Conn. Super. Ct. 1979) (normal stay requirements not applicable since information, once released, cannot be recalled).

105. Act of May 16, 1983, No. 129, 1983 Conn. Legis. Serv. 260 (West) (amending CONN. GEN. STAT. § 1-21i(d) (1981)). Local government officials may also have a practical incentive not to appeal, because if the appeal is unsuccessful, the cost of the appeal may become a political issue. Pearlman Interview, *supra* note 54. Only 9% of all appeals are brought by complainants. CONNECTICUT STATISTICAL SUMMARY, *supra* note 45, at 4. Since most complainants are not represented, see *supra* note 62, since most complainants prevail, see *supra* text accompanying note 71, and since appeals are costly, the low percentage of complainants appealing is not surprising.

106. See *supra* text accompanying note 100.

availability of an effective administrative alternative to agency delay in responding to requests encourages requesters to seek redress for delay and encourages agencies to comply with the time limits.<sup>107</sup>

The procedures, however, have been less successful in balancing the advantage the state agency enjoys in the control and characterization of documents. The Connecticut Supreme Court has criticized the Commission for failing to examine documents in appeals before it.<sup>108</sup> The Commission, however, refuses to conduct an *in camera* inspection of agency documents.<sup>109</sup> The Commission believes that in the straightforward cases that tend to reach the Commission, the character of the documents can be ascertained adequately through other techniques in the hearing process.<sup>110</sup>

To summarize, the Connecticut law provides an administrative alternative to the federal Act that deals effectively with agency delay. The Commission also possesses supervisory and oversight powers, including the power of civil sanction, that can be used to influence agency conduct and practice.

## B. State of New York Committee on Open Government

The New York Committee on Open Government,<sup>111</sup> established in 1978,<sup>112</sup> lacks any enforcement or adjudicatory authority and serves only as an advisory body. In practice, however, the Committee performs much like an ombudsman and acts like a law revision commission in advising the executive and the state legislature. The Committee's principal function is the issuance of oral and written advisory opinions.

### 1. The Committee's Advisory Function

The New York statutes require the Committee to give any person an advisory opinion or appropriate information regarding the State's freedom of information law.<sup>113</sup> A separate provision requires that the Committee provide any government agency, upon request, with guidelines, opinions, or appropriate information regard-

107. Pearlman Interview, *supra* note 54.

108. *Wilson v. Freedom of Information Comm'n*, 181 Conn. 324, 339-41, 435 A.2d 353, 362-63 (1980).

109. The Commission has split 3-2 on whether to hold *in camera* inspection. Lahey Interview, *supra* note 60. The prevailing argument has been that since the Commission is not a court, it lacks authority to maintain secret documents that would violate the mandate of open government by the agency committed to its preservation.

110. Such techniques include specific characterization of the records by witnesses who are under oath and subject to cross-examination, and use of an index requirement similar to that imposed by federal courts. Pearlman Interview, *supra* note 54. See also *supra* note 39 (discussing the index requirements applied in many federal courts).

111. The Committee consists of eleven members appointed in a variety of ways. See *infra* notes 170-72; N.Y. PUB. OFF. LAW § 89(1)(a) (McKinney's Supp. 1982-83). The Commissioners serve part-time and receive reimbursement for actual expenses incurred in the discharge of their duties. *Id.* For administrative purposes, the Committee is located in the Office of the Secretary of State.

112. The Committee discussed in this Article began to function in 1978, with revision of the freedom of information law. A Committee on Public Access to Records had operated since 1974 and was continued under the 1978 revision to become later the State of New York Committee on Open Government. STATE OF NEW YORK COMMITTEE ON PUBLIC ACCESS TO RECORDS, FIFTH ANNUAL REPORT TO THE GOVERNOR AND THE LEGISLATURE ON THE FREEDOM OF INFORMATION LAW 13 (1982) (discussing the proposed change in name) [hereinafter cited as FIFTH ANNUAL REPORT].

113. N.Y. PUB. OFF. LAW § 89(1)(b)(ii) (McKinney's Supp. 1982-83). The Committee also has responsibility for the state's open meeting law. This discussion focuses on the Committee's freedom of information responsibilities. Some of the statistical data, as noted, relate to the open meeting law as well.



ing the law.<sup>114</sup> The scope of the freedom of information law<sup>115</sup> applies both to State agencies and to local government, thereby giving the Committee responsibility for advisory opinions regarding all levels of government in New York. The Committee issues a substantial number of written advisory opinions and gives oral advice<sup>116</sup> to State and local officials, private citizens, and representatives of the media.<sup>117</sup>

The written opinions vary in length from a single page<sup>118</sup> to nineteen pages.<sup>119</sup> The advisory opinions generally are well-written and well-reasoned discussions of the applicable provisions of the freedom of information law.<sup>120</sup> The opinions, issued by the staff on the Committee's behalf,<sup>121</sup> clearly state the positions of the Committee and indicate the grounds upon which the staff's decisions rest. Thus, advisory opinions are simply that; the opinions rest upon the facts given by the person requesting

114. *Id.* § 89(1)(b)(i).

115. *Id.* § 87(1)(a).

116. For example, between January 1 and November 9, 1982, the Committee issued 371 written advisory opinions and made 3,722 oral communications regarding the freedom of information law. FIFTH ANNUAL REPORT, *supra* note 112, at 6. The statistics for previous years are: 1981, 429 written advisory opinions and approximately 4,118 oral communications, STATE OF NEW YORK COMMITTEE ON PUBLIC ACCESS TO RECORDS, FOURTH ANNUAL REPORT TO THE GOVERNOR AND THE LEGISLATURE ON THE FREEDOM OF INFORMATION LAW 4 (1981) [hereinafter cited as FOURTH ANNUAL REPORT]; 1980, 496 written advisory opinions, 4,200 oral communications, *id.*; 1979, 354 written advisory opinions, approximately 3,000 oral communications. STATE OF NEW YORK COMMITTEE ON PUBLIC ACCESS TO RECORDS, SECOND ANNUAL REPORT TO THE GOVERNOR AND THE LEGISLATURE ON THE FREEDOM OF INFORMATION LAW 1 (1979) (reporting period November 1, 1978 to October 31, 1979) [hereinafter cited as SECOND ANNUAL REPORT]. Appendix I of the FIFTH ANNUAL REPORT, *supra* note 112, summarizes this data.

117. For 1982, written advisory opinions were comprised as follows: Public, 283 (76%); state agency officials, 11 (3%); local government officials, 47 (12%); state legislators, 3 (1%); commercial interests, 14 (4%); news media, 13 (4%). For oral communications, the numbers were as follows: public, 1,108 (30%); state agency officials, 895 (24%); local government officials, 706 (19%); state legislators, 176 (4.5%); commercial interests, 65 (1.5%); news media, 772 (21%). FIFTH ANNUAL REPORT, *supra* note 112, at 6.

For 1981, written advisory opinions were comprised as follows: Public, 309 (72%); state agency officials, 29 (7%); local government officials, 73 (17%); news media, 18 (4%). For oral communications, the numbers were as follows: public, 1,256 (31%); state agency officials, 1,410 (34%); local government officials, 757 (18%); news media 695 (17%). FOURTH ANNUAL REPORT, *supra* note 116, at 4-5.

For 1980, written advisory opinions were comprised as follows: Public, 298 (70%); state agency officials, 28 (7%); local government officials, 74 (17%); news media, 26 (6%). For oral communications, the numbers were as follows: public, 1,242 (32%); state agency officials, 1,267 (33%); local government officials, 626 (16%); news media, 734 (19%). STATE OF NEW YORK COMMITTEE ON PUBLIC ACCESS TO RECORDS, THIRD ANNUAL REPORT TO THE GOVERNOR AND THE LEGISLATURE ON THE FREEDOM OF INFORMATION LAW 2 (1980) [hereinafter cited as THIRD ANNUAL REPORT].

The Committee did not maintain a breakdown of users of advisory services before 1980. Many of the oral communications involved representatives of government seeking to comply with the law. The public, however, made the overwhelming number of requests for written opinions. The Committee speculates that this may be due to the cost of long distance telephone calls and the possibility that members of the public may be intimidated by government and therefore seek information by letter rather than by phone. FIFTH ANNUAL REPORT, *supra* note 112, at 7.

118. *See, e.g.*, State of New York Committee on Public Access to Records, Advisory Opinion FOIL-AO-1608 (July 3, 1980).

119. *See, e.g.*, State of New York Committee on Public Access to Records, Advisory Opinion FOIL-AO-2474 (May 21, 1982). The Executive Director of the Committee described this as the Committee's longest opinion. Interview with Robert J. Freeman, Executive Director of the Committee on Open Government, in Albany, New York (June 16, 1983) [hereinafter cited as Freeman Interview].

120. The evaluation of the opinions rests upon the author's reading of approximately 100 opinions that he chose from the index of written advisory opinions and then pulled from the files of the Committee.

121. The New York Court of Appeals noted that a delegation of authority from the Committee to the Executive Director was not clear on the record. *John P. v. Whalen*, 54 N.Y.2d 89, 95 n.2, 429 N.E.2d 117, 120 n.2, 444 N.Y.S.2d 598, 601 n.2 (1981). The opinions of the Committee now indicate that the staff or the Committee is authorized to issue advisory opinions.

the opinion,<sup>122</sup> and the opinions do not require compliance by any public official or agency.

Oral advice is given over the telephone. Much of the oral advice is sought by government officials deciding how to respond to requests for documents and records.<sup>123</sup> Like written opinions, the advice rests on the situation as characterized by the person seeking advice<sup>124</sup> and, like the written opinions, carries no mandate for compliance.

The ability to give any person an opinion on the law is an important part in the Committee's role as an ombudsman.<sup>125</sup> Although the term "ombudsman" suggests a number of functions,<sup>126</sup> the Committee uses its duty to issue advisory opinions to mediate disputes and to aid citizens in obtaining compliance from state agencies.

In addition, the advisory opinions of the Committee increase the chances of agency compliance with the New York law and reduce the likelihood that a party whose request for information has been denied will seek additional relief. An advisory opinion stating that the documents or records should be released makes it more difficult for an agency to deny access, since the Committee possesses special expertise, and because if the request comes from the news media, significant publicity of the opinion may follow. The opinion of the Committee may strengthen the resolve of the requester and increase the likelihood that the agency will face additional challenges in court from disappointed requesters. Likewise, if the advisory opinion concludes that the agency does not have to release the documents, a requester is more likely to abandon further attempts to obtain them. In such circumstances, the agency's resolve to resist release is probably strengthened.

Moreover, the Committee consciously uses its advisory function to mediate disputes. The staff of the Committee often sends a copy of its advisory opinion to the agency in the dispute.<sup>127</sup> Many potential disputes are also resolved by the staff communicating with the involved agency when a request for an advisory opinion is received. This communication allows the staff to obtain the agency's view of the situation and of the character of the documents. More importantly, in a case involving documents that clearly should be released, the communication provides the opportunity to persuade the agency that it should comply with a request.<sup>128</sup>

The New York freedom of information law provides for an administrative appeal within each agency of an initial denial of a request for documents and records.<sup>129</sup> The

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122. The opinions expressly indicate that the "advisory opinion is based solely upon the facts presented in your correspondence, unless otherwise indicated." State of New York Committee on Public Access to Records, Advisory Opinion FOIL-AO-2474, at 1 (May 21, 1982).

123. See *supra* note 117.

124. Freeman Interview, *supra* note 119.

125. See, e.g., FIFTH ANNUAL REPORT, *supra* note 112, at 3.

126. Some ombudsmen enjoy prosecutorial powers; many use investigatory powers to correct and expose bureaucratic inefficiency or wrongdoing. All seek to resolve disputes through informal as well as formal means. See generally W. GELLHORN, OMBUDSMAN AND OTHERS: CITIZEN'S PROTECTORS IN NINE COUNTRIES (1966); THE OMBUDSMAN (D. Rowatt ed. 1965).

127. Freeman Interview, *supra* note 119.

128. *Id.* The Executive Director notes that knowledge of and experience with state agencies allows the staff to judge who within the agency should be called and to evaluate the prospects for informal resolution.

129. N.Y. PUB. OFF. LAW § 89(4)(a) (McKinney's Supp. 1982-83).

law seeks to give the Committee a role in each case in which an initial denial is appealed. The agency is to forward immediately to the Committee records of an appeal.<sup>130</sup> If timely forwarded, the Committee can comment on the appeal prior to an agency's determination of the issue.<sup>131</sup> In practice, many agencies have forwarded the appeal with their final determination, thereby denying the Committee an opportunity to respond.<sup>132</sup> To the extent that the Committee does have an opportunity to respond, its opinion is likely to carry some weight in the agency's final determination.<sup>133</sup> The statutory provision, therefore, envisions a substantial role for the Committee in the most serious administrative actions regarding the freedom of information law.

The decisions of several lower courts in New York have increased the influence of the Committee's opinions. Because of the Committee's expertise in the interpretation of the freedom of information law, the courts have given its opinions great weight in judicial interpretation of the statute.<sup>134</sup> The decision of the New York Court of Appeals in *John P. v. Whalen*,<sup>135</sup> however, suggests that the weight given to the Committee's advisory opinions may be limited. In *Whalen*, the requester sought to use the freedom of information law as a substitute for discovery in the course of an administrative investigation of a physician. The requester sought medical records, patient interviews, and interviews with other doctors that were collected during the investigation.<sup>136</sup> The agency denied the request, and the requester brought an action before the courts. The action was dismissed without prejudice to allow a new request to be made under the recently revised freedom of information law.<sup>137</sup> The requester then filed a new request for essentially the same documents. The agency denied the request and upheld the denial on appeal.<sup>138</sup> After these denials, the requester sought an opinion from the Committee, which interpreted the freedom of information law and the public health law to require that portions of the documents should be released.<sup>139</sup>

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130. *Id.*

131. Freeman Interview, *supra* note 119.

132. The statute states that "each agency shall immediately forward to the Committee on Public Access to Records a copy of such appeal and the determination thereon." N.Y. PUB. OFF. LAW § 89(4)(a) (McKinney's Supp. 1982-83). The Committee seeks an amendment of the language to make clear the obligation to forward appeals in a timely manner before final determination and to extend slightly the time for appeals to guarantee the Committee an opportunity to supply an advisory opinion. FIFTH ANNUAL REPORT, *supra* note 112, at 19-20.

133. The Committee's opinion is likely to carry weight for several reasons. First, the opinions of the Committee are likely to receive deference from the courts in subsequent review of the agency decision. Second, the opinion may cause the agency to reassess its position, either because of the force of the logic or because the opinion brings a new perspective to senior officials within the agencies. Third, the agency's continuing refusal to release the information brings it into conflict with the Committee and may lead to a perception that the agency has acted improperly or in disregard of the spirit and letter of the law.

134. *See, e.g.*, Sheehan v. City of Binghamton, 59 A.D. 808, 398 N.Y.S.2d 905 (1977) (Committee's interpretation should be followed if not irrational or unreasonable); MacHacek v. Harris, 106 Misc. 2d 388, 431 N.Y.S.2d 927 (N.Y. Sup. Ct. 1980); Kwitny v. McGuire, 102 Misc. 2d 124, 422 N.Y.S.2d 867 (N.Y. Sup. Ct. 1979).

135. 54 N.Y.2d 89, 429 N.E.2d 117, 444 N.Y.S.2d 598 (1981).

136. *Id.* at 93, 429 N.E.2d at 119, 444 N.Y.S.2d at 600.

137. *Id.*

138. *Id.*

139. *Id.*

The Court of Appeals remarked that in judicial review of agency denials, Committee advisory opinions "carry such weight as results from the strength of the reasoning and analysis that they contain but no more."<sup>140</sup> The Court noted that the situation was different from those in which the Committee agrees with the agency, since in such a situation the Committee has confirmed the agency's interpretation.<sup>141</sup>

The *Whalen* decision, however, does not necessarily prevent a lower court from giving substantial weight to a Committee opinion holding that an agency's denial was improper under the freedom of information law. The Court emphasized that although the Committee had been given oversight of the freedom of information provision, it had no special responsibility or expertise for interpretation of the public health law that played an important role in the agency's decision.<sup>142</sup> Therefore, the *Whalen* decision could be read as limiting the weight given to the Committee's opinions only when the Committee is interpreting a statute other than the freedom of information law.<sup>143</sup>

Independent of the weight given to the Committee's advisory opinions by the courts in challenges of agency denials of documents and records, the Committee's advisory function gives it considerable influence. When the Committee's opinions are accurate, well-reasoned interpretations of the freedom of information law, agencies and requesters are likely to credit the Committee's interpretations.<sup>144</sup>

The Committee has acted to increase the influence of its opinions not only by insuring their quality but also by other methods. These methods include sending copies of the Committee's written opinions to public libraries throughout the state,<sup>145</sup> providing a detailed and useful index to the opinions,<sup>146</sup> describing the freedom of information law to lay persons,<sup>147</sup> speaking to a wide range of groups and organizations,<sup>148</sup> and training public officials.<sup>149</sup> Public knowledge of the law and of the Committee's function increases the Committee's influence.

The Committee has used effectively its advisory function to provide a unity of perspective on the freedom of information law. The Committee's advisory function has become a technique for insuring agency compliance and for aiding citizens and expediting access.

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140. *Id.* at 96, 429 N.E.2d at 121, 444 N.Y.S.2d at 602 (footnote omitted).

141. *Id.*

142. *Id.* at 95, 429 N.E.2d at 120, 444 N.Y.S.2d at 601.

143. As a practical matter, this interpretation would still place considerable limitations on the weight given to the Committee's opinions, since in many circumstances the availability of information requires interpretation of some other provision of law as well as the freedom of information law.

144. The Committee believes that the continued use of the Committee, particularly by public officials, demonstrates confidence in the Committee and in its opinions. FIFTH ANNUAL REPORT, *supra* 112, at 7.

145. Freeman Interview, *supra* note 119.

146. The index uses key words to guide users to the advisory opinions. Each annual report includes an index to advisory opinions.

147. The Committee has issued approximately 160,000 copies of a publication entitled "The Freedom of Information and Open Meetings Laws . . . Opening the Door," designed to explain the freedom of information law and other laws. FIFTH ANNUAL REPORT, *supra* note 112, at 8.

148. The staff members of the Committee, primarily the Executive Director, make a number of speeches. A listing of the speaking engagements for 1982 is found in FIFTH ANNUAL REPORT, *supra* note 112, at 9-10.

149. These training sessions enable the Committee to persuade agency officials of the importance of the law and to present the Committee's interpretation of the law.

On the other hand, though, the Committee lacks some of the powers associated with an ombudsman. The Committee can request agencies to provide assistance, services, and information,<sup>150</sup> but it has no subpoena power and does not assert that it possesses any investigatory power.<sup>151</sup> The Committee believes that subpoena power would alter the character of the Committee and reduce the influence of its advisory function.<sup>152</sup> The Committee also lacks the power to intervene in judicial proceedings to present its views.<sup>153</sup>

## 2. Other Functions of the Committee

The Committee serves two additional important roles. Although the Committee's principal function is advisory, it exercises many of the functions of a law revision commission. The Committee also issues model regulations for agency procedures under the freedom of information law.

The New York statute requires that the Committee issue annual reports to the governor and to the state legislature; these reports must describe the Committee's activities and findings, including recommendations for changes in the law.<sup>154</sup> An important part of the Committee's reports has been discussions of shortcomings in the law and proposed legislative modifications.<sup>155</sup> The Committee's annual reports demonstrate that the Committee has taken seriously its responsibility to review the freedom of information law and the court decisions interpreting it.<sup>156</sup>

Like other public laws subject to judicial interpretation, a freedom of information law can become unduly complex or even contrary to the principles of the legislation. In addition, administration of the law often discloses difficulties and problems not anticipated at the time that the legislation was passed. Legislatures often find it extremely difficult to trace such developments, to understand their significance, and to frame amendments that respond appropriately to them. Information that a legislature receives is often incomplete or unreliable. On the other hand, the Committee's advisory function requires it to keep abreast of judicial interpretations and administrative practices. Because the requests for opinions identify areas of difficulty

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150. N.Y. PUB. OFF. LAW § 89(1)(b)(iv) (McKinney's Supp. 1982-83).

151. Freeman Interview, *supra* note 119.

152. *Id.*

153. The Committee has requested the power to sue to seek compliance with the open meeting law. STATE OF NEW YORK COMMITTEE ON PUBLIC ACCESS TO RECORDS, SEVENTH REPORT TO THE LEGISLATURE ON OPEN MEETING LAW 16 (1983). The Committee did not deem authority to sue under the freedom of information law as important; unlike a violation of the freedom of information law, a violation of the open meeting law in closing a meeting may forever foreclose the public from hearing the deliberations of the public body. *Id.* at 17. In its Second Annual Report on the freedom of information law, some members of the Committee suggested limited authority of the Committee to bring suit upon a finding of continual violations by a particular agency. Others suggested annual reports by agencies to the Committee. SECOND ANNUAL REPORT, *supra* note 116, at 5.

154. N.Y. PUB. OFF. LAW § 89(1)(b)(v) (McKinney's Supp. 1982-83).

155. A substantial portion of each of the Committee's annual reports regarding the freedom of information law has concerned proposals for legislative change. FIFTH ANNUAL REPORT, *supra* note 112, at 11-20; FOURTH ANNUAL REPORT, *supra* note 116, at 7-19; THIRD ANNUAL REPORT, *supra* note 117, at 7-19; SECOND ANNUAL REPORT, *supra* note 116, at 4-14; STATE OF NEW YORK COMMITTEE ON PUBLIC ACCESS TO RECORDS, FIRST ANNUAL REPORT TO THE GOVERNOR AND THE LEGISLATURE ON THE FREEDOM OF INFORMATION LAW 1-11 (1978) [hereinafter cited as FIRST ANNUAL REPORT].

156. For example, each annual report contains a case digest of New York judicial decisions construing the freedom of information law.

in the administration of the law, the Committee possesses a unique ability to understand and evaluate developments. Thus, although the Committee's legislative recommendations have not always been accepted,<sup>157</sup> some have been adopted, including an attorney's fees provision in the New York law.<sup>158</sup> The Committee has also prepared special reports for the legislature on information-related topics.<sup>159</sup>

The New York statute requires the Committee to issue procedural regulations for agency practice under the freedom of information law.<sup>160</sup> The Committee issues model regulations that establish minimum standards with which agency regulations must comply.<sup>161</sup> The Committee's power to issue model regulations is its only non-advisory function. Although the regulations are procedural and not substantive, this power to influence agency practice is important.<sup>162</sup>

Despite its lack of enforcement or adjudicatory authority,<sup>163</sup> the Committee has functioned like an ombudsman. The Committee operates within a system with an enforcement structure similar to that of the federal Freedom of Information Act, which rests upon agency administration and judicial enforcement.<sup>164</sup>

### 3. *Assessment of the New York Approach*

The New York Committee on Open Government is an example of an administrative agency without enforcement authority that nevertheless exercises considerable influence. The success of the Committee, therefore, depends upon its reputation for fairness and its independence. Although the Committee can issue binding procedural regulations, the impact of the Committee on the enforcement of the freedom of information law rests principally upon the success of its advisory function.

157. The Committee has never been granted the litigation authority that it sought under the open meeting law. *See supra* note 153. Likewise, it has not obtained procedural changes in the law. *See FIFTH ANNUAL REPORT, supra* note 112, at 17.

158. *FIFTH ANNUAL REPORT, supra* note 112, at 11.

159. *See, e.g., STATE OF NEW YORK COMMITTEE ON PUBLIC ACCESS TO RECORDS, SPECIAL REPORT TO THE GOVERNOR AND THE LEGISLATURE ON CHAPTER 677 OF THE LAWS OF 1980 CONCERNING THE PROTECTION OF PRIVACY (1981); STATE OF NEW YORK COMMITTEE ON PUBLIC ACCESS TO RECORDS, SPECIAL REPORT: ELECTRONIC REPRODUCTION OF PUBLIC PROCEEDINGS (1979).*

160. N.Y. PUB. OFF. LAW § 89(1)(b)(iii) (McKinney's Supp. 1982-83). The model regulations require designation of a public access officer charged with administration of the law, including assistance to requesters. *STATE OF NEW YORK COMMITTEE ON OPEN GOVERNMENT, Model Regulations regarding Public Access to Records, § 2.* The regulations also require that the agency notify the public as to where records shall be made available, direct how the agency responds to requests for records, mandate the maintenance of a subject matter list to aid requesters, prescribe procedures for denials and appeals, and regulate the charging of fees. *Id.* §§ 3, 5-7.

161. *FIFTH ANNUAL REPORT, supra* note 112, at 17. The model regulations are published by the Committee, and copies may be obtained through requests to the Committee.

162. The First Annual Report of the Committee notes the failure of many agencies to modify their regulations to satisfy minimum requirements. *FIRST ANNUAL REPORT, supra* note 155, at 3. The Fifth Annual Report emphasizes that the problem of noncompliance continues. *FIFTH ANNUAL REPORT, supra* note 112, at 17.

163. Some people would argue that the Committee's success is not in spite of, but rather because of its lack of enforcement and adjudicatory authority. Freeman Interview, *supra* note 119.

164. Administration of the law is left to individual agencies. A denial of a request for information is appealable within the agency. N.Y. PUB. OFF. LAW § 89(4)(a) (McKinney's Supp. 1982-83). Appeal may be taken to court, where the agency has the burden of establishing that the records are exempt from disclosure. *Id.* § 89(4)(b).

a. *The Committee's Independence*

The Committee has retained its independence and commitment to open government. For example, it continues to recommend legislative changes and impose procedures likely to increase the administrative burdens on agencies,<sup>165</sup> encourages agencies to release information initially denied,<sup>166</sup> and supports efforts to educate the public concerning the freedom of information law.<sup>167</sup> The Committee's lack of enforcement or adjudicatory authority plainly reduces threats to its independence.<sup>168</sup> Still, the Committee remains an important and powerful advocate of open government and potentially is subject to encroachment by an executive department unsympathetic to public access to government documents and records.

The Committee, although located in the Office of the Secretary of State, is an autonomous body.<sup>169</sup> Some of the members of the Committee serve by reason of their government positions,<sup>170</sup> some are appointed by the governor,<sup>171</sup> and some are appointed by the Speaker of the Assembly and the temporary President of the Senate.<sup>172</sup> A number of the Committee members must come from the media and from local government.<sup>173</sup> The members appointed by the governor serve fixed terms,<sup>174</sup> but other members do not. The Executive Director of the Committee serves at the pleasure of the Secretary of State.<sup>175</sup> All members of the Committee serve part-time.<sup>176</sup> The part-time nature of the Committee increases the influence of staff and reduces the chance that a position on the Committee could become a patronage appointment.

The chairperson of the Committee is chosen by the members of the Committee and traditionally is one of the "public" members.<sup>177</sup> The formal protections of the independence of the Committee leave some room for executive manipulation. The

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165. See *supra* text accompanying notes 155-56, 158, 160, 162.

166. See *supra* text accompanying notes 127-33.

167. See *supra* text accompanying notes 145-48.

168. Freeman Interview, *supra* note 119.

169. The Secretary of State could influence the Committee because of the Secretary's administrative responsibilities. Since the Secretary of State is a member of the Committee, the Secretary could probably become a "more equal" member of the Committee if that was his or her desire.

170. These members are the Secretary of State, the Lieutenant Governor, the Commissioner of the Office of General Services, and the Director of the Division on the Budget. N.Y. PUB. OFF. LAW § 89(1)(a) (McKinney's Supp. 1982-83). The terms of these officials on the Committee terminate when they leave office. The statute allows them to designate a delegate and, as a result, some of the same individuals represent these officials through more than one administration. Freeman Interview, *supra* note 119.

171. Five members are appointed by the Governor, two of whom must be representatives of the news media and one of whom shall be an elected officer of local government. N.Y. PUB. OFF. LAW § 89(1)(a) (McKinney's Supp. 1982-83). These members serve four-year terms, except the representative of local government, who is a member only as long as he or she remains an officer of local government.

172. One member is appointed by each. These members serve only during the term of the officials who have appointed them. *Id.*

173. See *supra* note 171.

174. *Id.*

175. Telephone interview with Robert J. Freeman, Executive Director of the State of New York Committee on Open Government (June 24, 1983).

176. *Id.*

177. Freeman Interview, *supra* note 119.

administrative role of the Secretary of State and a potential for change in the composition of the Committee suggest the possibilities. For example, the Secretary of State could use his or her administrative authority and control over staff to frustrate the policies of a majority of the Committee. Like the Connecticut Commission, however, the political setting in which the Committee operates protects its independence, and, as in Connecticut, members of the media have been advocates of freedom of information legislation and have a continuing interest in the Committee.<sup>178</sup> The news media work closely with both state and local government and have much to lose from a weakening of the Committee.<sup>179</sup> Thus, to the extent that the Committee has been accepted by both government and private citizens, its influence helps insulate it from executive encroachment. Consequently, the Committee has retained its commitment to open government. Its composition and the stability of its staff have contributed to the Committee's consistent approach.<sup>180</sup>

b. *Effectiveness of the Advisory Function*

In New York, enforcement of the state freedom of information law rests upon agency administration and judicial review.<sup>181</sup> This system is similar to the enforcement structure of the federal Act and poses the same problems of agency delay in response to requesters.<sup>182</sup> Arguably, the New York Committee on Open Government has responded to this problem by reducing the likelihood of litigation. The availability of advisory opinions and the ability to mediate disputes provide for expeditious resolution of complaints.<sup>183</sup> The ombudsman function of the Committee, in the Committee's view, reduces judicial enforcement to an important but secondary means of securing public access to documents and records.

Although evaluation of the Committee's own assessment of its performance is difficult,<sup>184</sup> the Committee's view is reasonable if the function of an agency like the Committee is to reduce the number of cases litigated and to provide some relief to individual requesters who would otherwise not be inclined to seek judicial review. Given such an assumption, the Committee's assessment of its impact is highly credible.

On the other hand, the ombudsman function of the Committee seems less effective against agency bad faith or arbitrary conduct than the adjudicatory function. The approach of the Committee relies heavily upon the good faith of agency officials,

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178. *Id.*

179. *Id.*

180. *Id.* This consistency reflects in part the stability of staff and committee membership. As with the Connecticut Commission, The Executive Director of the New York Committee has been with the Committee for several years. The membership of the Committee has also remained stable. In part this is because the state officials serving on the Committee designate the same delegates to the Committee through several administrations. *See supra* note 170. Moreover, a careful reading of the Committee's annual reports demonstrates a consistency in perspective and policy.

181. *See supra* text accompanying note 164.

182. *See supra* text accompanying notes 24-27.

183. *See supra* text accompanying notes 125-28.

184. The statistics necessary to evaluate the contention are unlikely to exist since the proposition requires a comparison of the existing situation with a hypothetical one.



since the Committee's lack of enforcement powers places enforcement responsibilities with the courts, which are unable to fashion sanctions and responses that deal effectively with agency misconduct. Exposure of bad faith and the influence of the Committee, however, provide useful powers.

Lacking investigatory powers, the Committee must rely upon the requester's or the agency's characterization of the documents. Although characterization often is not a problem, the New York structure lacks a method to effectively balance this advantage enjoyed by the government in freedom of information litigation. Thus, even though the Committee's knowledge of the freedom of information law and its authority to issue binding procedural regulations give it a role in administrative practice, the Committee's lack of enforcement powers appears to have reduced agency compliance with model regulations, and, while the advisory function of the Committee, combined with its power to recommend legislative change, helps to provide a unity of interpretation to the freedom of information law, the ultimate role of the courts in interpreting the Act allows for considerable variation in interpretation. Moreover, the ability of an ombudsman to alter perceptions suggests that the ultimate success of the Committee may be difficult to measure. The strongest evidence of its ability to alter perceptions is the substantial use made of the Committee's services.

In sum, the New York law provides an administrative alternative to the federal system, relying largely upon persuasion and influence. The Committee appears to have accomplished a great deal using that approach.

#### IV. IMPLICATIONS FOR THE FEDERAL FREEDOM OF INFORMATION ACT

Application of the experiences of Connecticut and New York to the federal Freedom of Information Act requires caution. Freedom of information provisions and practices vary from state to state and often differ significantly from the provisions and practices of the federal government.<sup>185</sup> The size of the federal bureaucracy creates difficulties and problems that have not confronted New York and Connecticut.<sup>186</sup> The federal government is also more likely to acquire or create politically sensitive records. The states possess little information related to national security, and state criminal law enforcement agencies are likely to be significantly smaller than their federal counterparts. Also, the regulatory emphasis of federal agencies is more likely to generate documents or records that contain financial or commercial data of third parties.<sup>187</sup> Furthermore, the political setting in which a freedom of information law operates reflects the geography, economy, history, and population of each state. These variations make what is an excellent system for one state less than ideal in

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185. Many of the differences are summarized in FIFTH ANNUAL REPORT, *supra* note 112, at 1-3.

186. Among these are the difficulties of locating records in field offices or in other parts of the agency. The proposed amendments to the Federal Act consider these difficulties. See *supra* note 4. The General Accounting Office found that among the principal reasons for delay of the processing of requests within six units of the United States Department of Justice were decentralization of records, the need to consult with field officials, and the need to evaluate sensitive or classified information. GAO REPORT, *supra* note 24, at 7-9.

187. Despite a statutory provision giving submitters a number of procedural rights, N.Y. PUB. OFF. LAW § 89(5) (McKinney's Supp. 1982-83), very little use has been made of the provision. Freeman Interview, *supra* note 119.

another, and suggest careful evaluation of any state administrative alternative to be applied to the federal government.

Yet, while the differences between state and federal agencies suggest caution, the similarities offer insights into the federal Freedom of Information Act. The administrative systems suggested by New York and Connecticut practice present both adjudicatory and advisory alternatives to the federal system.

#### A. *An Adjudicatory Alternative*

The Connecticut experience has much to offer. An administrative agency with adjudicatory and enforcement authority has successfully administered the Connecticut law and reduced agency delay. The Connecticut law gives the Connecticut Freedom of Information Commission a number of enforcement powers that can be used to insure agency compliance and to modify agency perspectives and practices. The Connecticut Commission stresses informal access and individual use of the Act.

Application of the Connecticut model to the federal Act, however, would create several difficulties. An adjudicatory agency modeled after the Connecticut Commission would require a number of regional offices with adjudicatory authority.<sup>188</sup> If a federal adjudicatory agency were to offer the same accessibility to individuals as the Connecticut Commission, the number of regional offices would have to exceed greatly those of existing federal agencies with adjudicatory responsibilities.<sup>189</sup> Moreover, the Commission's emphasis on informality in its adjudication might not fit easily into the pattern of federal administrative law.<sup>190</sup>

Also, for the Connecticut approach to be applied to the federal government, any federal freedom of information agency must become the principal adjudicatory and enforcement agency under the Act. This preeminence would suggest a significant alteration in the role of the federal courts, including the replacement of *de novo* review with limited judicial review.<sup>191</sup> Yet, such an alteration in the courts' enforcement role would emphasize the need to preserve the independence of a freedom of information agency. Although a number of techniques designed to protect the independence of the Connecticut Commission would be available in the federal government,<sup>192</sup> the political setting and the experience with federal regulatory agencies indicate that the independence of a federal administrative agency might be difficult to preserve.<sup>193</sup>

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188. All hearings are held in Hartford, Connecticut. Hartford is centrally located, within about a two-hour drive of any portion of the state.

189. For example, the United States Merit Systems Protection Board is almost entirely an adjudicatory agency. The Board has eleven regional offices.

190. Of particular concern may be the practice of Commissioners sitting as hearing officers and, as such, occasionally taking an active part in the proceedings. See 5 U.S.C. §§ 556-57 (1982) (setting out the more formal requirements for hearings by federal agencies).

191. See *supra* note 78.

192. These include: (1) staggered terms; (2) members removable only for cause; (3) election of the chairperson by members of the agency; (4) civil service status for senior staff; and (5) part-time appointment. See *supra* text accompanying notes 90-94.

193. See *supra* text accompanying note 90.

The Connecticut approach, however, could be applied while preserving the principal enforcement role of the courts. Although the courts would retain *de novo* review, requesters could seek review of agency denials from the freedom of information adjudicatory agency. A requester would not have to appeal to the adjudicatory agency before going to the courts and would have a right to proceed to the courts if the adjudicatory agency did not decide the appeal within a specified time.<sup>194</sup> A requester dissatisfied with a decision of the adjudicatory agency could still obtain *de novo* review of the original denial of access. The independence of the adjudicatory agency would remain important, but not as crucial as when the agency served as the principal avenue of redress for requesters.

Under such a scheme, the adjudicatory agency would only attract cases to the extent that it was perceived as a fair and efficient adjudicator of claims. It would thus have an incentive to expedite appeals and structure procedures to encourage use by requesters. The adjudicatory agency also would have an incentive to interpret the Freedom of Information Act fairly and accurately. Its reputation and influence would rest upon its expertise. Moreover, fair and well-reasoned opinions would be likely to reduce the number of appeals both by requesters and by agencies.<sup>195</sup> Agency appeals could be further reduced in other ways.<sup>196</sup>

Regardless of the performance of the adjudicatory agency, dual adjudication of the same controversy would surely occur. Such adjudication wastes time and resources, but the costs would probably be offset by savings in the rapid and less expensive adjudication of a large number of requesters' actions by the adjudicatory agency, although such a judgment is difficult to make without direct experience. If the adjudicatory agency were successful, it would expeditiously decide a large number of claims including many that requesters do not currently take to the courts. More difficult and complex cases probably would never go to the agency and would be resolved in the courts as they are now. The availability of a more expeditious and less costly enforcement alternative might also modify use of the federal Act, encouraging greater use by individuals.

An agency modeled after the Connecticut Commission would also exercise other powers. The freedom of information agency could assume responsibility for applica-

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194. This is the approach of the Civil Rights Act of 1964 as applied to federal employees. If an administrative determination is not made within 120 days, an employee may sue directly in a United States District Court. *See* 5 U.S.C. § 7702(e)(1)(A) (1982).

195. The parties would often judge that the possibility of prevailing did not justify the additional costs. Moreover, it would not be surprising if some federal agencies agreed to be bound by the decision of the Commission, thereby waiving their right to appeal to the courts. The power of the adjudicatory agency to award attorney's fees and costs would be necessary to make it a forum as attractive as the courts.

196. Among the techniques could be the award of attorney's fees to the requesters if the agency's court action was unsuccessful (the proposed amendments to the federal Act allow an agency to retain one-half of the fees charged requesters). Likewise, attorney's fees could be charged against the agency's budget, an additional monetary penalty could be imposed for frivolous appeals, and the venue choices for federal agencies could be limited.

Also, the standard of review of an agency appeal need not be the same as that provided to requesters. Appeals by agencies could be directed to a court of appeals, which would review the adjudicatory agency's decision on the record. Such a scheme of review would preserve the ability of the government to appeal on an important issue of law while reducing the number of circumstances in which dual adjudication of a claim would occur. The justifications for applying a different standard of review to agency appeals rests upon the ample opportunity of an agency to evaluate the request and an agency's unique understanding of the character of the documents requested.

tion of meaningful sanctions for arbitrary and capricious withholdings of information.<sup>197</sup> This agency could also conduct and issue studies of the Freedom of Information Act and other information laws.

### B. *An Advisory Alternative*

The New York approach, like aspects of the Connecticut system,<sup>198</sup> would fit easily into the present enforcement structure of the federal Act. The New York approach, however, also would rectify some of the flaws in that enforcement structure.

A federal administrative agency modeled after the New York Committee on Open Government could, at a small cost, perform a useful advisory function.<sup>199</sup> The federal agency could provide advisory opinions to any person requesting them. The advisory agency's influence would rest almost entirely upon the persuasiveness of its opinions. The Freedom of Information Act could be modified easily to give the advisory agency a role similar to that of the New York Committee regarding appeals of initial agency denials. Additionally, as the advisory agency acquired experience and expertise, its ability to mediate many disputes would increase substantially, and, although federal agency officials might be less likely than state officials to request advisory opinions,<sup>200</sup> an advisory agency would still be likely to deal with a significant number of requests from federal officials. As the advisory agency thereby established its credibility, its case load probably would increase even more.

As an independent body possessing considerable expertise, an advisory agency could influence the development of the federal Freedom of Information Act. Its advisory opinions could do much to affect the way agencies and individuals perceive the Act and undoubtedly would play some role in judicial interpretation of the Act. Moreover, the advisory agency could provide Congress with proposals for modifications of the Act.<sup>201</sup> If successful, the agency could help to give a unity to interpretation of the Act.<sup>202</sup>

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197. See *supra* notes 33–35. Although sound reasons exist for giving the adjudicatory agency this power, the detrimental effects of placing this authority within the adjudicatory agency should be understood. To preserve its impartiality and to emphasize that it provides only an alternative form of adjudication, the adjudicatory agency is not made a party to appeals of its decisions. The power to sanction may interfere with the establishment of the relationship it must have with other federal agencies. An alternative would be for the adjudicatory agency, like a court, to refer cases to the Office of Special Counsel. The adjudicatory agency might be more likely to do so than the courts, which may have concerns about interference with a coordinate branch of government, and the adjudicatory agency's power of referral should allow it to do so even if an agency has voluntarily released the information.

198. The Connecticut Commission makes proposals for legislative change and exercises some influence over agency practice. See *supra* notes 85–89. That Commission also provides an advisory function and plays a role in proposing legislative changes.

199. The New York Committee on Open Government now operates with a staff consisting of the Executive Director and one administrative assistant. Freeman Interview, *supra* note 119. A federal agency would require a somewhat larger staff, but with a toll-free phone number, the information agency need only be located in Washington, D.C.

200. For example, many of the requests for oral advice in New York come from local government officials, some of whom serve part-time. See *supra* note 117.

201. The Office of Information Law and Policy within the Department of Justice, now reorganized as the Office of Information and Policy, issued a number of memoranda regarding interpretation of the Act for federal agencies. Since the Department of Justice acts as an advocate for agencies in litigation and is often the representative of agency perspectives before Congress, any office in the Department, regardless of its quality, lacks the impartiality and trust that an independent agency would bring to its legislative proposals.

202. The information agency could perform much of the law revision function performed by the Committee on Open Government in New York. See *supra* text accompanying notes 154–59.

Indeed, recent congressional evaluation of the Freedom of Information Act suggests the importance of central guidance in agency administration.<sup>203</sup> Proposals to unify administrative practice also reflect this general concern.<sup>204</sup> An advisory agency with authority to issue regulations controlling agency procedure would offer a significant possibility for overseeing and influencing agency administration, and for unifying agency practice on a number of important procedural issues.<sup>205</sup> An advisory agency also possesses the unique ability to study the operations of the Act and to report its findings and conclusions. Congressional consideration of proposed amendments to the federal Act illustrates the importance of such studies and the need for an independent advisory agency to conduct them.<sup>206</sup>

A federal advisory agency patterned after the New York Committee would also address two other general criticisms of the Act made by federal officials: the unanticipated and substantial costs of administering the Act,<sup>207</sup> and the use of the Act by groups other than individuals and the media, the parties for whose benefit the Act was adopted by Congress.<sup>208</sup> Such criticisms are supported by evidence that the costs of administration have far exceeded the original congressional estimates,<sup>209</sup> and that many requests under the federal Act do not come from individuals,<sup>210</sup> but from interest groups and businesses.<sup>211</sup>

In contrast, the New York experience supports the conclusion that an advisory agency would reduce the costs of administration of the federal Act. Resolution of disputes without litigation reduces costs,<sup>212</sup> and the influence of the advisory agency on administrative practice may likewise lead to substantial savings.

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203. In his statement to a Senate Committee, Senator Sasser stressed the need for detailed studies of the Act, uniform guidelines concerning a variety of procedural issues, provision of training to agency personnel, enhancement of public understanding of the FOIA, and development of a user's guide. *Oversight of the Administration of the Federal Freedom of Information Act: A Personal Report, 1981 Senate Hearings*, *supra* note 26, at 53-103. In New York, all these functions are now performed by the Committee on Open Government.

204. For example, the proposed amendments to the Act require uniform guidelines for fees and fee waivers. 1983 SENATE REPORT, *supra* note 2, at 5-6.

205. These issues include fee waivers, processing time, expedited treatment of certain requests, guidance on record management, uniform statistical reporting regarding the use and costs of the Act, and minimum training requirements for agency personnel implementing the Act. In the federal government, the members of an entity with such powers would have to be appointed by the President. Therefore, the appointment provisions of the New York statute would require modifications.

206. Throughout the Senate hearings on proposed amendments to the Act, questions about the use of the Act reflected the need for an impartial agency charged with providing such information. *See, e.g., supra* notes 203-14.

207. *See, e.g., 1981 Senate Hearings, supra* note 26, Vol. 1, at 104 (statement of William H. Taft, III, General Counsel, Department of Defense); *id.* at 159, 175 (statement of Jonathan C. Rose, Assistant Attorney General, Department of Justice, placing the 1980 direct costs of the Act at 57 million dollars).

Other witnesses questioned the accuracy of these figures, *e.g., id.* at 772, 785-86 (prepared statement of Jack Landau, Director of the Reporter's Committee), compared them to public information budgets, *id.* (FOIA costs 5% of the government's costs of public affairs offices), or emphasized the public importance of the Act compared to other government expenditures. *Id.* at 124, 127 (statement of Steven Dornfeld, Washington Correspondent, National Secretary of the Society of Professional Journalists) (Department of Defense estimated approximately eight million dollars per year spent on FOIA compliance while 100 million dollars per year spent on military bands).

208. *See, e.g., 1981 Senate Hearings, supra* note 26, Vol. 1, 159, 160, 174 (statement of Jonathan C. Rose, Assistant Attorney General, Department of Justice).

209. The 1974 estimate on the government-wide costs of the 1974 amendments was between \$40,000 and \$100,000. *Id.* at 174.

210. *Id.* at 169 (use by prisoners), 172 (use by persons dedicated to undermining the CIA).

211. *Id.* at 174.

212. Mediation after an agency's denial of a request can speed release and avoid litigation. *See, e.g., Milic v. United States Department of State*, 3 Gov't DISCLOSURE SERV. (P-H) ¶ 83,068 (D.D.C. 1983).

With respect to the second criticism, easily available advisory opinions and education of individuals on the use of the Act<sup>213</sup> should increase the number of individuals who do use the Act. A number of considerations, including the character of documents maintained in the federal government and the role of organized interests in disseminating information, make unrealistic any expectation that the creation of a federal advisory agency will lead to a user pattern identical to that of either Connecticut or New York. Yet, an attempt to involve individuals more directly in the acquisition of documents and records would significantly promote the use of the Act by individuals and perhaps by the media as well.

## V. CONCLUSION

The experiences of Connecticut and New York provide interesting administrative alternatives for the administration of the federal Freedom of Information Act. Although the Connecticut model has much to offer, its application to the federal system would require substantial modification of the present structure of the federal Act, and such modifications would be expensive and would present a risk of losing the independent review presently provided by the courts. On the other hand, the New York approach fits easily into the structure of the federal Act; adaptation of the New York approach to the federal system would entail only limited costs and would promise considerable benefits and savings in the administration of the Act and in the development of law under the Act.

Although the New York approach offers specific advantages for the administration of the Freedom of Information Act, the lessons of the New York experience apply to a range of open government and information laws.<sup>214</sup> The principles of open government will soon require an emphasis on information management, which the courts cannot perform and which should not be left with individual agencies. Creation of an agency patterned after the State of New York Committee on Open Government would prudently begin the development of the administrative alternatives necessary to preserve the concept of freedom of information.

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213. See *supra* text accompanying notes 145-49; note 203.

214. Although this Article has focused on the Freedom of Information Act, an advisory agency should also have jurisdiction over the Federal Privacy Act, 5 U.S.C. § 552a (1982), the Sunshine in Government Act, *id.* § 552b, and the Federal Advisory Committee Act, *id.* app. §§ 1-15. While the advisory function of the agency will serve to protect its independence, a new and effective agency may face challenges to its independence. The independence of the advisory agency may be protected structurally as are other independent agencies. Moreover, if the agency is successful in establishing its reputation for expertise and fairness, the agency will have done much to protect itself. Still, the question of the agency's independence remains an important one.

# OHIO STATE LAW JOURNAL

Volume 45, Number 1, 1984

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