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A PROPOSAL FOR A COMPREHENSIVE RESTRUCTURING OF THE PUBLIC INFORMATION SYSTEM

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THE FOLLOWING CITATIONS WILL BE USED IN THIS ARTICLE:

SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., FREEDOM OF INFORMATION ACT SOURCE BOOK, (Comm. Print 1974) [hereinafter cited as Sourcebook I];

HOUSE COMM. ON GOVERNMENT OPERATIONS & SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (Joint Comm. Print 1975) [hereinafter cited as Sourcebook II];

K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES (1976) [hereinafter cited as K. DAVIS, SEVENTIES].

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I. INTRODUCTION

After more than ten years of legislative, judicial and bureaucratic tinkering, the public information system created by the Freedom of In-

formation Act (FOIA)¹ is still far from satisfactory.² The present public information system has not been successful because its drafters lacked imagination and failed to do the basic work necessary to create a sound foundation for such a comprehensive program. They failed to analyze the realistic goals of a public information system; they ignored the ultimate goals of improved government performance; they misrepresented the system's costs, both in monetary expense to taxpayers and in diminished government performance. They considered neither alternative techniques nor the problem of designing the public information system as an integral part of the total governmental structure. Actual open government for the benefit of the general populace will be possible only if the basic weaknesses of the present system are explored in depth. This Article is an appeal to Congress to undertake the careful analysis necessary to construct a workable, useful public information system.

It is misleading to assume that the release of information in government files is per se beneficial; ultimately, a public information system is beneficial only if it improves government. If the system detracts from the performance of government, then the system fails even if it offers access to great quantities of information in government files. In short, the amount of information released by the functioning of the system is not the true measure of the system's value; the true measure is whether the government benefits its citizenry more as a result of the system than would be the case without it.

This Article attempts to explain why, after over ten years of thoughtful judicial opinions, creative scholarly comments and voluminous congressional proceedings, the public information system has not been a success. The total blame for this breakdown has been placed on the bureaucracy,³ detracting from any incentive to investigate the real causes of the breakdown. The contention of this Article is that the weaknesses of the Act are the result of the absence of any analysis of realistic goals for a government information access program and the

1. 5 U.S.C. § 552 (1970), as amended by Pub. L. No. 93-502, 88 Stat. 1561 (1974). Legislative history of both the original act and the amendments can be found in two "sourcebooks," Sourcebook I and Sourcebook II.

2. In Oct. 1977, Congressman Preyer remarked: "Disclosure of public information remains an unsolved mystery to Congress." 123 CONG. REC. H10581-2 (daily ed. Oct. 4, 1977).

3. See, e.g., *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 710 (D.C. Cir. 1977); *Rocap v. Indiek*, 539 F.2d 174, 179 (D.C. Cir. 1976); 2 *Freedom of Information, Executive Privilege, Secrecy in Government: Hearings on S. 1142 Before the Subcomm. on Adm. Practice and Procedure and Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 55 (1973) (statement of Peter Schluck, Consumers Union); Katz, *The Games Bureaucrats Play: Hide and Seek under the Freedom of Information Act*, 48 TEX. L. REV. 1261 (1970); Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. C.R.-C.L. L. REV. 1 (1970).

alternative mechanisms available to accomplish such goals. The Article attempts to delineate the major goals of a public information system and then probe the weaknesses of the Act in terms of these goals.⁴ Although recommendations are offered, the authors will be satisfied if the Article serves to encourage new thinking about access to government information based on clearly articulated and realistic goals and on the assumption that a public information system must represent a workable and affordable part of the total government system.

II. PUBLIC INTEREST FAILURE: THE FAILURE TO INTEGRATE THE PUBLIC INFORMATION SYSTEM INTO THE OPERATION OF GOVERNMENT

Although the drafters of the FOIA recognized the necessity of balancing the need for a smoothly operating government against the needs of public access,⁵ they made no effort to integrate the public information system into the overall functioning of the government. Consequently, perhaps the greatest failure of the present information system is the unnecessary friction between it and other government operations. The public information system created by the Act, as interpreted by the courts, focuses only on the release of documents in government files. The irrebuttable presumption is that free-wheeling disclosure of information will always be in the public interest. The drafters did not leave room for either the courts or the agencies to modify or individualize this broad public interest determination.⁶

The only provisions recognizing the necessity of protecting government operations are the Act's exemptions. Some of the exemptions, especially those involving internal documents and investigatory files, were the result of government operations analysis.⁷ These exemptions

4. The authors identified two major goals: providing informal discovery for those directly affected by agency action and informing citizens to enable them to evaluate the performance of government.

5. 112 CONG. REC. 13007 (1966) (remarks of Rep. Moss), *reprinted in* Sourcebook I, at 46.

6. *Halperin v. Department of State*, 565 F.2d 699, 706 (D.C. Cir. 1977) (even where there is danger to national security, except in "extreme circumstances"); *Wellman Indus., Inc. v. NLRB*, 490 F.2d 427 (4th Cir.), *cert. denied*, 419 U.S. 834 (1974); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971); *Wellford v. Hardin*, 444 F.2d 21, 25 (4th Cir. 1971) ("It is not the province of the courts to restrict that legislative judgment under the guise of judicially balancing the same interests that Congress has considered"); S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965), *reprinted in* Sourcebook I, at 36. *But see* *Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 445 F. Supp. 699 (S.D.N.Y.), *aff'd on other grounds*, 587 F.2d 544 (2d Cir. 1978) (court held that exceptional circumstances exist wherein the agency can withhold information not within any exemption).

7. The internal documents exemption attracted the most debate and yet may not be that important to successful government. Generally, the national security exemption and the statutory exemption also permit some consideration of the impact of disclosure on government operations.

could have been used to enable the courts to merge the Information Act access system into overall government operations. However, even with a sensitive approach to the needs of government, the Act does not provide sufficient flexibility to allow the courts to integrate disclosure of information into the machinery of government.⁸ Curing this failure will require thoughtful legislative analysis. Initially, Congress must recognize that evaluation of the Act's performance requires consideration not only of the public interest but also of the Act's overall impact on the performance of government. At present, the Act interferes with the government's ability to react to the needs of its citizenry and it has an adverse impact on individual agency functions. It thus prevents officials from performing primary duties that Congress has also deemed to be in the public interest.

A. *Questioning the Costs of the Act.*

Much of the cost of the system, both in monetary expenses and harm to government performance, results from the myopic approach of the legislative plan. At present, the agencies are placed in a public interest dilemma because the drafters of the Act decreed that disclosure takes precedence over all other possible expenditures and operations. In a sense, this prime directive makes the cynical bureaucrat's choice easy: allocation of resources for public disclosure must be given priority over any other activity. If bureaucrats balk at the present public information system, it is often because they cannot in good conscience ignore the value of other functions that this prime directive demands that they neglect.

Estimating the cost of the public information system is difficult,⁹ but there can be no doubt that the present information system imposes a tremendous drain on the public treasury.¹⁰ Advocates of both the

8. *But see* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978) (Court expanded the potential for more sensitivity to other agency functions under exemption seven); Federal Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill, 99 S. Ct. 2800, 2814 (1979) (recognizing exemption five protection of information when release would "significantly harm the Government's monetary functions or commercial interests").

9. Efforts to consider costs versus benefits were made by an Administrative Conference study, Giannella, *Agency Procedures Implementing the Freedom of Information Act: A Proposal for Uniform Regulations*, 23 AD. L. REV. 217 (1971). Emphasis on disclosure was so strong then that a balanced approach to the problem was impossible.

10. *See* Hanus & Relyea, *A Policy Assessment of the Privacy Act of 1974*, 25 AM. U.L. REV. 555, 590-91 (1976). The costs of the present system are enormous and increasing. In the 1977 annual reports, four agencies reported costs of over \$5 million, with the Justice Department leading at a cost of almost \$13 million. 4 ACCESS REP. 11 (May 2, 1978). (Experience suggests that such reported costs greatly understate the real costs.) The costs are not recaptured through fees. In a 1976 annual report, for example, HEW reported costs of over \$5 million but showed fees collected of only \$135,611. 3 ACCESS REP. 8 (May 4, 1977). Fees are paid into the general treas-

original FOIA and the 1974 amendments successfully covered up the cost problem.¹¹ Now the expense of the system has come to light, partly through annual reports and through agency arguments attempting to explain unsatisfactory compliance.¹² Even these estimates must greatly understate the actual cost, because much of the cost is hidden. Accurate estimates of other expenses not specifically allocated to FOIA compliance are nearly impossible. For example, much of the cost involves the time of operating staff who are not part of the public information apparatus and whose time is rarely included as a FOIA expense. In addition, the loss of efficiency forced by the interruption of normal operations for FOIA compliance represents an unknown monetary cost.¹³

ury and are not returned to the agencies. 31 U.S.C. § 483(a) (1976). The most extreme example of the costs created by the current system involves the Federal Bureau of Investigation and its attempt to respond to the flood of requests occasioned by the 1974 amendments:

A year ago the bureau began its Project Onslaught, which was designed to reduce the backlog, which by then had grown to almost 8,000 cases. In addition to its other FOIA and Privacy Act staff, the bureau used as many as 282 special agents at a time and spent \$2.8 million to attack the growing backlog. Although it did not eliminate it, the project succeeded in reducing it from 7,556 to 4,910 requests in five months.

4 ACCESS REP. 3 (Apr. 18, 1978); see "Timeliness and Completeness of FBI Response to Requests Under Freedom of Information and Privacy Acts Have Improved," GAO Report No. 78-51, Apr. 10, 1978.

11. Neither the House nor the Senate Committee report on the original Act contains any discussion of cost or even a conclusory statement to the effect that the benefits outweigh the costs. Congress simply has never recognized that the public information system will result in the expenditure of tax dollars. Congressional investigators concluded: "[A]ctivities required by this bill should be carried out by Federal agencies with existing staff, so that significant amounts of additional funds will not be required." H.R. REP. NO. 876, 93d Cong., 2d Sess. 9 (1974), *reprinted in* Sourcebook II, at 129. See also S. REP. NO. 854, 93d Cong., 2d Sess. 41 (1974), *reprinted in* Sourcebook II, at 193. The most superficial investigation would have uncovered actual, quantifiable cost at substantially more than this unrealistic estimate. The discussion of cost to the public treasury in the Committee report fills a mere one-half page, most of which discusses compensation for attorney's fees. As to general costs: "Some additional administrative and salary expenses may also ensue. . . . It is expected that for the most part the cost of these items can be absorbed by the agencies' present operating budgets." S. REP. NO. 854, *supra* at 41, *reprinted in* Sourcebook II, at 193; similar statement in H.R. REP. NO. 876, *supra* at 9, *reprinted in* Sourcebook II, at 129. These statements can only be the result of intentional misrepresentation. See also *Congressional Review of Administrative Rulemaking: Hearings on H.R. 3658, 8231, and Related Bills Before the Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary, 94th Cong., 1st Sess.* 253, 269 (statement of Prof. Charles Gellhorn noting Congress' apparent failure to evaluate accurately the costs of the Privacy Act, which amount to over \$1 billion, as opposed to the original estimated cost of several thousand dollars).

12. *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 612 (D.C. Cir. 1976). The court noted that the cost of FOIA compliance by the FBI was \$2,675,000 in 1976. When this cost is multiplied by the number of federal agencies, the total taxpayer cost is startling. Even this figure must be regarded as low because the FBI is a very small agency with fairly easily identifiable files. See 4 ACCESS REP. 9-12 (May 2, 1978).

13. Other unnecessary costs result from inefficiency in the request mechanisms. See, e.g., *Mason v. Callaway*, 554 F.2d 129, 131 (4th Cir.), *cert. denied*, 434 U.S. 877 (1977) (noting the agencies' good faith effort to comply); *Irons v. Gottschalk*, 548 F.2d 992 (D.C. Cir. 1976), *cert.*

Inattention to the cost factor has created a system that cannot fairly allocate costs to users of the system, but places the entire burden indiscriminately on all taxpayers. For example, the search fee provision could be used to impose greater costs on those using the Act for private interests, but because no distinction is drawn between types of users—corporations versus individuals—or between uses—citizenry education versus discovery—the search fee recapture has not been rationally related to the public interest value of the request. All fee issues should be settled by a comprehensive program that considers the public interest value of each requester and type of request.¹⁴

Inattention to the drain on the public treasury and the problem of fair allocation of cost is found throughout the entire public information system. Section 11 of the Advisory Committee Act¹⁵ imposes costs on the government for private interest access. That section provides that upon request, the government must supply copies of transcripts at copying costs. The purpose of the provision is to make inexpensive transcripts available to public interest advocates, but the result is much different. Before this provision was enacted, large corporations paid virtually the entire cost of transcripts while the government could obtain transcripts for free. Now, under section 11, the public treasury is used to subsidize the corporations' litigation expense for transcripts—a cost of millions of dollars unnecessarily imposed on the public by poorly drafted legislation. Access to transcripts for public interest advocates could have been provided by more limited legislation. These examples suggest only a few of the ways in which the failure to consider cost factors has unnecessarily increased the cost of the information system to the public.

B. *Questioning the Prime Directive Approach of the Act.*

In addition to the monetary expense, the real cost of the Act in-

denied, 434 U.S. 965 (1977) (part of six year quest for patent office unpublished manuscripts in which the burden of the initial request forced the court to find it unreasonably broad; this case found the request had been sufficiently narrowed).

14. Such distinctions are, perhaps, even more appropriate for the award of attorney's fees. Most FOIA litigation does not involve the "noble and deserving champion of the public interest who comes into court . . . to vindicate the public's right to know and vanquish bureaucratic secrecy." *Hearings on H.R. 5425 and H.R. 4960 Before the Foreign Relations and Government Information Subcomm. of the House Comm. on Government Operations, 95th Cong., 1st Sess. 24 (1977)* (statement of Robert G. Dixon, Jr., Assistant Attorney General). Some courts have suggested that the exercise of judicial discretion to award attorney's fees should be guided by the private requests' benefits to the public interest. *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 711 (D.C. Cir. 1977), following *H.R. REP. No. 1380, 94th Cong., 1st Sess. (1974)*, reprinted in *Sourcebook II*, at 227.

15. Federal Advisory Committee Act, Pub. L. No. 92-463, § 11, 86 Stat. 770 (1972).

cludes a less tangible factor—the burden imposed on each agency's ability to perform its primary public interest function. The Act instructs agencies that their primary duty is to disclose information. No matter what other functions may suffer, disclosure of information takes precedence.¹⁶ It has priority over antitrust enforcement, over educational grants, over welfare policy, over the apprehension of criminals and over assuring pure foods and drugs. Disclosure of information is the prime directive. Because of the persistence of the Act's incursion into the process of government, a number of very useful activities are interrupted by pedestrian FOIA activities.

*Open America v. Watergate Special Prosecution Force*¹⁷ forced the District of Columbia Circuit to recognize and attempt to come to grips with the practical problems that have been thrust upon the agencies. The requester challenged the FBI's failure to respond to its FOIA request within ten days. The district court was sympathetic to the agency's inability to respond promptly to a backlog of 5,137 requests.¹⁸ Although the appellate court continued to take a draconian view of the agency's plight, it had to recognize that it could not order the impossible. The court found that an agency could be excused from an inflexible application of the time limits where it showed "exceptional circumstances" and "due diligence."¹⁹ The court found further that the existence of "exceptional circumstances" may be presumed from overall operating difficulties and the additional burden imposed by information requests.²⁰ This general finding of unusual circumstances does not correspond with the language or legislative history of the time limit provision, but it does recognize the practical limitations of the agencies' ability to comply.²¹ "We believe that Congress intended to guarantee access to Government agency documents on an equal and fair basis. Good faith and due diligence call for a procedure which is fair overall

16. This predominant emphasis on disclosure extends even to the courts, which are commanded to give precedence to FOIA cases. 5 U.S.C. § 552(a)(4)(D) (1976). The exemptions serve as the sole source of flexibility. See note 8 *supra*.

17. 547 F.2d 605 (D.C. Cir. 1976). See also *Cleaver v. Kelley*, 415 F. Supp. 174 (D.D.C. 1976); *Hayden v. Department of Justice*, 413 F. Supp. 1285 (D.D.C. 1976); Note, *Developments Under the Freedom of Information Act—1976, 1977* DUKE L.J. 532, 533-38.

18. 547 F.2d at 613. In *Cleaver v. Kelley*, 415 F. Supp. 174, 176 (D.D.C. 1976), the FBI stated that the number of requests had increased from one per workday in 1973 to 53 per workday in 1975 and personnel had increased from eight to 161 during that period. Even Attorney General Levy had to admit that the burden is enormous with some 92 requests each workday. *Washington Post*, Apr. 29, 1975, at A2, col. 6. See note 10 *supra*.

19. 547 F.2d at 610-15; *accord*, *Exner v. FBI*, 542 F.2d 1121 (9th Cir. 1976).

20. 547 F.2d at 612.

21. See *Hamlin v. Kelley*, 433 F. Supp. 180, 182 (N.D. Ill. 1977) (large number of files is not an "exceptional circumstance").

in the particular agency."²² Judge Leventhal, in his concurring opinion, found physical impossibility to be irrelevant in evaluating compliance with the FOIA. Taking a literal approach which more accurately reflects the congressional intention, he construed the Act to mandate an interpretation that ignores the impact on governmental operations. "A court considering a prayer for relief against an agency normally acts in relation to the case before it without inquiring into the impact of its order on other activities of the agency."²³ If the courts are not to concern themselves with "the impact . . . on other activities of the agency," then Congress must do so. Thus, Judge Leventhal's approach would reach the technically correct, but practically absurd, result of enjoining all other FBI activities until the requests were processed.²⁴ No other FBI function carries so clear a congressional mandate requiring action within a specific time frame.

C. *Need for Broader Perspective.*

Many factors lead to inattention to the operation of government, but the major cause of the neglect is the perspective of designers and critics of the system. Legislators, commentators and courts stand outside and hence see only the problems of one seeking information. In view of this narrow perspective, it is not surprising that any failures in the system are attributed to the bureaucracy. This viewpoint permits judgment of government performance only by results and does not compel searching inquiry into the reasons for these results. To be sure, recalcitrant officials have diminished the promise of the present system, but bureaucratic attitudes were never the real problem. Indeed, a great deal has been accomplished in reforming bureaucratic attitudes toward information disclosure,²⁵ but the system still does not work satisfactorily.²⁶

22. 547 F.2d at 615.

23. *Id.* at 621.

24. One commentator suggested that the courts should not worry about the debilitating effect of the Act on government operations because the breakdown will force Congress to deal with the problem. Comment, *Open America v. Watergate Special Prosecution Force: Relief from the Strict Time Limits of the Freedom of Information Act*, 1976 UTAH L. REV. 603, 614-15. It is hoped that Congress can be awakened with somewhat less drastic harm to government.

25. See *Weissman v. CIA*, 565 F.2d 692, 698 (D.C. Cir. 1977), where the court refused to order in camera inspection of documents, relying on the "conscientious manner" and "good faith" of the agency. "In view of the evident substantial and good faith compliance with the requirements of the law . . . the Court will take the Commission at its word and not require *in camera* inspection." *Bristol-Myers Co. v. FTC*, 1976-2 Trade Cas. ¶ 61,231, (D.D.C. 1976); accord, *DiViao v. Kelley*, 571 F.2d 538 (10th Cir. 1978); *Bell v. United States*, 563 F.2d 484 (1st Cir. 1977).

26. In the experience of the authors, the assumption the outsider makes about bureaucrats is not only incorrect, but also illogical. Logic would suggest that a cynical bureaucrat would not

There are serious weaknesses in the Freedom of Information Act that are not attributable to the motives of government officials. The major problems stem from structural breakdowns brought about by the poor design of the system. A broader perspective will provide the depth of understanding required to devise an access system that efficiently disseminates useful information and optimizes overall public interest. Improving the design of the public information system depends, to a large extent, on striking the crucial balance between public information and other public interest goals.²⁷ The major reason for the imbalance in the present system is the unwillingness of Congress and the courts to consider the agencies' difficulties and dilemmas.²⁸

Preliminary factual examination, therefore, must attempt both to avoid the typical anti-government prejudice and to evaluate the present system's public interest performance. This can be accomplished by considering the actions of a hypothetical "right-thinking" agency official who wants nothing more than to serve the public and to comply with the letter and intent of the FOIA. Through this hypothetical bureaucrat, analysis must focus on the structural defects that cannot be attributed to government employees.

*Ash Grove Cement Co. v. FTC*²⁹ is a case that demonstrates the need for this new framework. Counsel for the company made extensive FOIA requests relating to FTC antitrust litigation against their client. They pursued this request all the way to the Court of Appeals for the District of Columbia. One judging the agency's performance based on the circuit court's opinion could not resist the impression that the

oppose disclosure under the present public information system. A cynical bureaucrat would revel in the FOIA. For him, the Act not only means a larger staff but it also means favorable performance evaluations from Congress and the public without requiring any action that would disturb the agency's clientele. Furthermore, the information disclosed does not concern the bureaucrat, since internal opinions are protected, but deals only with private individuals and companies. In short, the FOIA means larger staffs, less clientele friction and no real danger to the bureaucrat's position. The stereotypical bureaucrat depicted in FOIA lore should appreciate the present system. If bureaucrats' reactions to the present system were consistent with traditional characterization, they would be responding enthusiastically.

27. Gellhorn, *The Right to Know: First Amendment Overbreadth?*, 1976 WASH. U.L.Q. 25, 27-28.

28. Some cases in which practical difficulties were considered include: *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976) (number of requests was large enough to indicate a general "exceptional circumstance"); *Vermont Low Income Advocacy Council v. Usery*, 546 F.2d 509 (2d Cir. 1976) (problem of compiling the files requested); *Weisberg v. Department of Justice*, 543 F.2d 308 (D.C. Cir. 1976) (district court found some of the requests oppressive, but appellate court disagreed); *Cleaver v. Kelley*, 415 F. Supp. 174 (D.D.C. 1976) (request for an estimated 5,800 pages of documents); *Hayden v. Department of Justice*, 413 F. Supp. 1285 (D.D.C. 1976) (request for an estimated 18,000 pages of documents). *But see Hamlin v. Kelley*, 433 F. Supp. 180 (N.D. Ill. 1977).

29. 511 F.2d 815 (D.C. Cir. 1975).

agency had “stone-walled” the requester in an effort to cover up some impropriety. Without a hint of the background of the case, the appellate opinion states that “the agency released *some* documents to Ash Grove for inspection, but balked at releasing forty-two to which plaintiff’s demand had been narrowed.”³⁰ The natural conclusion from this statement must be that the agency reluctantly parted with “some” documents and that the company greatly pared down or “narrowed” its request. In fact, the company’s request encompassed thousands of documents, nearly all of which were released in response to the original request. The company did not avail itself of the opportunity to view these documents until the FTC attorneys mentioned the company’s lack of interest to the district court. The agency found approximately two hundred documents exempt and sought to withhold those documents. At the insistence of the district court, the agency permitted the company to choose from descriptions of exempt documents those it particularly wanted. This process further “narrowed” the company’s request to forty-two documents rather than the thousands originally requested. The company continued to request access to the exempt documents withheld, even though no interest had been shown in the documents already released. Yet, the appellate court’s summation of the FTC efforts states that the agency gave up “some” of the documents and suggests that the company, rather than the agency, narrowed the controversial group of documents.

The company here was not interested in open government. It was using a traditional offensive tool—burdensome demands for irrelevant and useless information.³¹ Administrative discovery was denied for these documents because they were not found relevant. Furthermore, the company made no effort to use the information nor would it have been able to do so.³² The apparent intent of the request was to disable the FTC’s ability to enforce the antitrust laws.³³

While counsel for the company had a right to use the Act in this fashion, evaluation of the present public information system must question whether the public interest is served in such cases. An attorney charged with enforcing the antitrust laws stands defenseless while attorneys for alleged violators of the antitrust laws use the FOIA for a

30. *Id.* at 816-17 (emphasis added).

31. See Roomkin & Abrams, *Using Behavioral Evidence in NLRB Regulation: A Proposal*, 90 HARV. L. REV. 1441, 1458 (1977) (parties habitually use motions and petitions to encumber agency proceedings).

32. Even if the material proved the allegations, the allegations did not show illegal prejudgment. *FTC v. Cement Inst.*, 333 U.S. 683, 701 (1948).

33. An interview with SEC personnel suggests that they also believe that the FOIA is used for harassment.

purpose other than the one for which it was intended. If an antitrust case is stalled or damaged, the agency bears the blame for lack of diligence or competence. If the agency ignores the prime directive of the FOIA, it is criticized on that account. Thus, the access problem looks quite different from the perspective of the agency. This perspective cannot be ignored in a public information system.

The Act presents the government official with several dilemmas. When special interests use the Act contrary to the public interest, the official must comply with the disclosure prescription of the Act while other public interest functions suffer. In other cases, compliance with the Act forces an official to ignore a moral duty to protect the privacy of an individual against the incursions of the Act.³⁴ Thus, in many cases, noncompliance with the Act may be the alternative actually more likely to serve the public interest. The net result of the present Act's insistence on disclosure may well be poorer government than would result from a better conceived public information system.

The fact that large economic interests benefit most by the Act is not a conclusive indictment. In economic regulation, the bias against strong economic powers may result in opposition to anything that aids powerful economic interests, but to the extent that these interests uncover malfeasance in government, they serve the public interest. The public might be willing to give this advantage to special economic interests in order to improve the participatory rights of attorneys for individuals less favored by the system, such as veterans or disability beneficiaries. In any event, the adverse effect of the present system should be brought into the open. Covert action is not in itself misgovernment. Misgovernment results when the government will not or cannot serve its citizens. Thus, if the Act produces a breakdown in the overall system, it produces misgovernment. If it provides another tool whereby special interests can further their goals at the expense of the general community interest, then the underlying purpose of the Act has been violated.

The authors' survey³⁵ suggests that the present public information system does indeed adversely affect the ability of the government to act in the public interest. Unfortunately, the survey does not have the kind of factual integrity necessary to support any firm conclusions. The design of the Act made it impossible to obtain the kind of information necessary for a complete study.³⁶ The survey did uncover enough

34. See text accompanying notes 163-99 *infra*.

35. See notes 54-55 *infra* and accompanying text.

36. The Freedom of Information Act does not require agencies to prepare material and hence, as private citizens, the authors were unable to request the agencies to accumulate the infor-

proof to confirm the authors' own experience and to urge a special investigation of the extent to which the present system results in poorer government. This investigation must examine the manner in which the system is manipulated for use against the general public. Those who benefit most from the Act, whether through abusive or legitimate practices, are large economic interests resisting regulation and law enforcement or those seeking some benefit from the government. The Act appears to have subsidized this segment of the public in its conflicts with government operations. If this is true, then the structure of the present public information system should be revised. At the least, an affirmative decision should be made that the public is willing to pay this price for access to agency documents.

D. *Failure to Integrate Various Parts of the Public Information System.*

In recent years, open government has been the goal underlying several efforts to reform government procedures. The legislative efforts committed to disclosing the processes of government include the Freedom of Information Act,³⁷ the Privacy Act,³⁸ the Sunshine Act,³⁹ the Advisory Committee Act⁴⁰ and legislation dealing with congressional committee meetings.⁴¹ These various legislative efforts should be molded together to form a single public information system. Substantial monetary savings and smoother government operations will result if these separate public information statutes can be merged.

The most glaring failure of integration exists with respect to the Freedom of Information Act and the Privacy Act. These two Acts have disparate purposes: the FOIA, disclosure of information; the Privacy Act, largely the protection of information. Nevertheless, careful drafting would have coordinated these legislative efforts. For example, when read literally, section 552a(b) of the Privacy Act abrogates its privacy protection,⁴² because, if limited to the exemptions of the FOIA,

mation needed to draw clearly valid conclusions. Some agencies had existing records that hint at the way the public information system is used.

37. 5 U.S.C. § 552 (1976).

38. *Id.* § 552a.

39. *Id.* § 552b.

40. 5 U.S.C. app § 11 (1976).

41. 2 U.S.C. § 190a-1(b) (1970) (repealed, S. Res. 9, § 2, 94th Cong., 1st Sess., 121 CONG. REC. 19337 (1975)); H. R. Res. 259, 93d Cong., 1st Sess., 119 CONG. REC. 6713 (1973) (amending House rules to provide for open committee meetings).

42. 5 U.S.C. § 552a(b) (1976): "No agency shall disclose . . . unless disclosure of the record would be —

. . . .

(2) required under section 552 of this title [The Freedom of Information Act]." Professor

the Privacy Act can only protect citizens against "clearly unwarranted" invasions of privacy. Fortunately, this literal interpretation has not been followed and the Privacy Act has been used to protect citizens' rights to confidential dealings with the government. Nevertheless, this example serves to demonstrate the need for a comprehensive public information system in which various goals are related to the different types of information. All of the public information legislation must be integrated into a coherent system that will interfere as little as possible with other functions of government and with citizens' rights.

E. *Modifying the Judicial Role.*

The FOIA also fails to integrate the judiciary into the public information system. Because the drafters did not trust bureaucrats to administer the system fairly, the Act provides for de novo review. Other, perhaps more weighty, administrative determinations are subject to very limited judicial review, rarely including substitution of the court's judgment on factual issues. The present system, however, expends considerable judicial resources second guessing the agencies on both fact and law.⁴³ Perhaps, in the beginning, the benefits of de novo review justified the expense.⁴⁴ It compelled the courts to give the agencies specific guidance regarding what information must be released, and it did not permit them the luxury of abstract opinions or ad hoc rationale. Now, however, even this value of de novo review has been substantially diminished. The judicial review provision should be changed from de novo redetermination to limited review so that the courts may assume their proper function of supervision, rather than duplication of agency actions.

Not only should the burden on the courts be lessened by narrow-

Davis states that this section eliminates all conflict between the two acts. K. DAVIS, *ADMINISTRATIVE LAW: CASES—TEXT—PROBLEMS* 589 (6th ed. 1977). However, it appears to increase the conflict between the two components of the public information system. "[T]here is a clear conceptual incompatibility between the two acts which has been resolved in favor of the FOIA. Compared with the mandates for disclosure under the FOIA, the protections of individual privacy under the Privacy Act are weak indeed . . ." Hanus & Relyea, *A Policy Assessment of the Privacy Act of 1974*, 25 AM. U.L. REV. 555, 590 (1976). See also Comment, *The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1974*, 11 HARV. C.R.-C.L. L. REV. 596, 631 (1976).

43. See *Seafarers Int'l Union AFL-CIO v. Baldwin*, 508 F.2d 125, 129 (5th Cir. 1975). Some courts blame the judicial burden on the agencies. See *Vaughn v. Rosen*, 484 F.2d 820, 825-26 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

44. The legislative history merely states that de novo review is provided to prevent the judicial function from becoming a "meaningless judicial sanctioning of agency discretion." S. REP. NO. 813, *supra* note 6, at 8, reprinted in Sourcebook I, at 43. There was no discussion of why review under one of the traditional standards of review would become "meaningless" in this context as opposed to other areas of judiciary/agency relations.

ing their factual review responsibility, but judicial enforcement should be replaced by more administrative monitoring and enforcement.⁴⁵ Perhaps an administrative agency should be created to assume responsibility for the public information system.⁴⁶ The Act also fails to integrate the judiciary by denying it the flexibility necessary to develop law. There is no equitable power to go beyond a semantic interpretation of the Act.⁴⁷ Professor Davis has argued that the courts should be permitted discretion to refuse to order disclosure.⁴⁸ By cutting off that discretion, the drafters of the Act have eliminated an important source of legal development.

F. Conclusion.

The most important step Congress must take is a study of the manner in which the Act is actually being used. The Congress has the benefit of over ten years of experience with the Act. This experience, however, will serve the public interest only if the analysis abandons the previous myopic perspective and looks at the public information system as part of the overall process of government. Careful investigation and analysis must focus on coordinating public access with existing governmental operations. The system should advise officials as to priorities and should include statutory language that would add both flexibility and certainty. The public information system should be designed to provide the most effective access with the least infringement on the processes of government and on individual rights.

III. THE GOAL OF INFORMAL DISCOVERY AND A BETTER SYSTEM FOR ACHIEVING THIS GOAL

Although the rhetoric accompanying the Act extols the virtues of informing the public as to governmental operations in general, an often overlooked but equally important goal of the Act was to provide a mechanism for informal discovery in particular cases,⁴⁹ "[t]o insure

45. Judicial enforcement has been unsatisfactory from the beginning. Giannella, *Agency Procedures Implementing the Freedom of Information Act: A Proposal for Uniform Regulations*, 23 AD. L. REV. 217, 225 (1971).

46. Koch, *The Freedom of Information Act: Suggestions for Making Information Available to the Public*, 32 MD. L. REV. 189, 220-21 (1972); Miller & Cox, *On the Need For a National Commission on Documentary Access*, 44 GEO. WASH. L. REV. 213, 228-31 (1976).

47. K. DAVIS, SEVENTIES 61.

48. Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 767 (1967). On rare occasions, the court will support the obvious need for such discretion. *Rose v. Department of the Air Force*, 495 F.2d 261, 269 (2d Cir. 1974), *aff'd*, 425 U.S. 352 (1976); *Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 445 F. Supp. 699 (S.D.N.Y.), *aff'd on other grounds*, 587 F.2d 544 (2d Cir. 1978).

49. Clearly, other goals were contemplated, including improved participant access in infor-

that no citizen will be denied full access to data that may be of crucial importance to his case."⁵⁰ Much of the factual material uncovered in the congressional hearings prior to passage of the Act concerned denials of individual requests for specific information necessary to deal with an agency or information that was being used by the agency for some action concerning that individual.⁵¹ This record suggests that Congress was concerned with providing an individual with information necessary to protect his interests in dealings with the government.

Under prior law, an individual citizen dealing with the government could not obtain information relevant to certain governmental actions having a direct impact on his case. The excuses available under old section 3 of the Administrative Procedure Act (APA) were used to shield the government against informed challenge by such citizens.⁵² The elimination of these exemptions was designed to achieve open government and also to provide a means by which persons affected by informal government processes could obtain the information necessary to participate in those informal proceedings and to defend their private interests.

To a large extent, however, a system for providing citizens with general information about the way government operates differs from an access system designed to satisfy the need for informal discovery. A major structural weakness of the FOIA lies in the fact that it represents an attempt to solve two very different information problems through one scheme. Access necessary to participation can be limited for the sake of effective government without denying meaningful participation. These limitations may be inappropriate to a citizen education system. Consequently, this Article examines the goal of informal discovery and alternative mechanisms for achieving that goal independent of the other goals of a public information system.

A. *Use of the Act to Provide Informal Administrative Discovery.*

Regardless of the drafters' intent, the Act is in fact used primarily

mal proceedings. K. DAVIS, SEVENTIES 62-63. *But see* *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1 (1974), suggesting that the "stress" of the legislative history behind the Act was an informed public. *Accord*, *NLRB v. Hardeman Garment Corp.*, 557 F.2d 559, 561 (6th Cir. 1977); *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1368 (D.C. Cir. 1977) ("The FOIA was fundamentally designed to inform the public and not to benefit private litigants").

50. 112 CONG. REC. 13645 (1966) (remarks of Rep. King).

51. The salient features of the legislative history are an over-abundance of rhetoric and a dearth of factual material. One can readily support the rhetoric but condemn the drafters for not insisting on more specific information regarding the use of the various exemptions.

52. H.R. REP. NO. 1497, 89th Cong., 2d Sess. 5-6 (1966), *reprinted in* Sourcebook I, at 26-27.

as a device for informal discovery.⁵³ The authors found this to be overwhelmingly the case in their experience at the Federal Trade Commission. A survey of other selected agencies confirmed that the Act is much more often used as a discovery device by those having some dealing with the government than it is used to obtain general information about the functioning of the government.⁵⁴ The FDA, the SEC and the

53. *Hearings on S. 1142, supra* note 3, at 101 (statement of Harrison Wellford, Center for the Study of Responsive Law) (survey of litigation indicates that the primary beneficiaries are private corporate interests, and secondary public interest representatives; the press and average citizens rarely use the Act). Examples from 1977 FOIA litigation include: *Charlotte-Mecklenburg Hosp. Auth. v. Perry*, 571 F.2d 195 (4th Cir. 1978); *AMF Head Div. of AMF, Inc. v. NLRB*, 564 F.2d 374 (10th Cir. 1977) (employee affidavits); *Robbins Tire & Rubber Co. v. NLRB*, 563 F.2d 724 (5th Cir. 1977), *rev'd*, 437 U.S. 214 (1978); *United States v. Brown*, 562 F.2d 1144 (9th Cir. 1977) (defendant in narcotics prosecution could obtain records from Bureau of Prisons under FOIA); *Cooper v. Department of the Navy*, 558 F.2d 274 (5th Cir. 1977) (request by attorney for crash victim investigating possible wrongful death action against manufacturer); *NLRB v. Hardeman Garment Corp.*, 557 F.2d 559 (6th Cir. 1977) (company requested employee affidavits obtained in conjunction with an unfair labor practice investigation); *Committee on Masonic Homes v. NLRB*, 556 F.2d 214 (3d Cir. 1977) (employer attempted to obtain employee union authorization cards in order to challenge support for a union); *Mason v. Callaway*, 554 F.2d 129 (4th Cir.), *cert. denied*, 434 U.S. 877 (1977) (employee discharged from the Panama Canal Corporation requested documents from various agencies); *Cuneo v. Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977) (request for information from the Defense Contract Audit Agency); *New England Medical Center Hosp. v. NLRB*, 548 F.2d 377 (1st Cir. 1977) (employer asked for Board's open and closed investigative files relating to an unfair labor practice charge); *United States v. Murdock*, 548 F.2d 599 (5th Cir. 1977) (request for IRS documents to show selective enforcement); *Deering Milliken, Inc. v. Irving*, 548 F.2d 1131 (4th Cir. 1977) (employer guilty of unfair labor practice requested NLRB documents in order to determine amount of back pay due). The predominance of the NLRB as a defendant in FOIA cases can best be explained by the fact that the Board has almost no discovery procedures.

54. In order to obtain the necessary information, representative agencies were surveyed. Agencies chosen were: Justice Department (Civil Rights Division and Antitrust Division); Patent Office; Federal Power Commission (now Federal Energy Regulatory Commission, Department of Energy); Department of Commerce (Economic Development Administration); Civil Aeronautics Board; Federal Communications Commission; Internal Revenue Service; Food and Drug Administration; National Endowment for the Humanities; National Science Foundation; Department of Health, Education and Welfare (Office of Education and Office of Human Development); Veterans Administration; Bureau of Indian Affairs; Department of Agriculture (Food and Nutrition Service); Federal Maritime Administration; International Trade Commission; Consumer Product Safety Commission; Interstate Commerce Commission; National Labor Relations Board; and Securities and Exchange Commission. The following information was requested:

- (1) Copies of annual reports submitted to Congress pursuant to 5 U.S.C. § 552(d) (Supp. V 1975) for calendar years 1975 and 1976;
- (2) Breakdown of requests received in the past calendar year (or any convenient record period) according to the following categories:
 - a. Types of information requested.
 - b. Types of requests broken down, if possible, into the following categories:
 1. Media, including trade journals;
 2. Individuals and corporations, the subject of agency proceedings, investigations or other activities, including their attorneys;
 3. General public;
 4. Organizations or individuals holding themselves out as representing the general public or acting as "private attorneys general";
 5. Scholars;

FCC all reported that an overwhelmingly high percentage of requests come from regulated corporations and those representing corporations.⁵⁵ While the survey was biased in favor of agencies that deal primarily with business enterprises, the authors nevertheless feel that the conclusions are justified. Large economic special interests receive the bulk of the Act's benefit. They not only use the Act to protect themselves against government regulation but also to interfere with govern-

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6. Corporations or business entities.
 - c. Types of information requested, broken down, if possible, into the following categories:
 1. Internal agency memoranda;
 2. Commercial, financial, or other information submitted to the agency by individuals or corporations, the subject of agency proceedings, investigations or other activities;
 3. Other categories of requested information.
 - (3) Copies of examples of typical requests and agency responses thereto, both initially and on appeal. If "typical" requests could not be provided conveniently, copies of the 25 most recent requests decided by the agency, including copies of the responses, were requested.

Many of these agencies cooperated with the requests, especially the Department of Justice and the Food and Drug Administration. A few agencies, notably the FDA, offered data in substantial compliance. However, most agencies could not supply the information broken down according to the requested categories. Due to the purpose of the study, the authors were particularly interested in data with respect to who was using the Act and for what purpose. Instead, the agencies offered what they had, including copies of their own logs which were very useful in deriving information of sufficient accuracy.

From this admittedly inadequate evidence, it was found that the primary beneficiaries of the Act are large corporations and their representatives who have some business with the government. The study also suggests that the Act is not used to acquire general information about how the government is working, but rather for discovery relating to particular controversies with the government. At the FDA, 81% of the requests come from members of regulated industry. Strong support for this theory also came from interviews with the agencies' public information specialists. It was noted that the agencies that do not have recognizable clientele groups or that have unsophisticated and underfinanced clientele groups had little contact with the FOIA. If it were true that the Act is used to gain general information regarding governmental operations, some of these agencies, for example, HEW, would be natural targets of the Act. However, one agency spokesman concluded that the Act worked well in HEW. Given the agency, it may be that the Act fills the need, noted above, for some discovery in informal action. Regardless, this agency has no large economic interests to contend with and hence its experience can be contrasted with that of the economic regulatory agencies. That the Act benefits large economic interests would seem predictable: these citizens most often deal with the government and have the resources to use the inefficient process of the FOIA.

55. *FDA Figures*

Nature of party making request	Percentage of total
FOI service companies	34%
Industry	36
Lawyers	11
Individuals	8
Public Interest Groups	4
Press	3
Other	4

ment officials in the performance of their duties.⁵⁶ While private individuals are not precluded from using the Act in this manner, practicality dictates against widespread use by ordinary citizens. They have neither the knowledge nor the resources to use the Act in this manner,

SEC Figures

Nature of party making request	Number of requests	Percentage of total
Law firms	429	58%
Individuals	118	16
Corporations	99	13
Media	55	7
Public Interest	10	1.36
Universities	10	1.36
State and local government	6	.82
Congressional committees or independent members	3	.41

Total FCC figures—172 total requests, 109 (63%) from law firms or corporations. This information was compiled by these regulatory agencies in response to a questionnaire sent by the Senate Committee on Government Operations.

The less complete information from other agencies also supports conclusions as to the identity of requesters. The chart below shows a percentage breakdown of FOIA user data.

Agency	Subject Agency Proceeding+	Corp. (Not Subject of Agency Proc.)	General Public	Private Attorney General	Media	Scholar
FDA*°	11%	70%	8%	4%	3%	0% (0)
SEC°	58% (429)	13% (99)	16% (121)	2.2% (16)	7% (55)	1.4% (10)
FCC°	53% (92)	10% (17)	19% (33)	10% (17)	7.5 (13)	0% (0)
FPC**	4% (1)	52% (13)	20% (5)	0% (0)	8% (2)	16% (4)
CAB**	26% (6)	13% (3)	39% (9)	13% (3)	4% (1)	4% (1)
HEW**	10% (4)	29% (12)	27% (11)	0% (0)	17% (7)	17% (7)
NSF***	6% (9)	15% (21)	12% (17)	2% (3)	37%°°(53)	28% (41)
USDA**	29% (7)	12.5 (3)	42% (10)	0% (0)	85 (2)	8% (2)
COMMERCE** (Econ. Develop.)	21% (4)	32% (6)	11% (2)	5% (1)	32% (6)	0% (0)
Commerce*** (Maritime)	21% (6)	32% (9)	43% (12)	0% (0)	4% (1)	0% (0)
Int'l Trade***	72% (31)	16% (7)	9% (4)	0% (0)	2% (1)	0% (0)
CPSC**	60% (6)	10% (1)	10% (1)	0% (0)	20% (2)	0% (0)
ICC**	83% (5)	0% (0)	0% (0)	16% (1)	0% (0)	0% (0)
Civil Rights***	4.5 (18)	2% (8)	82% (328)	9.5 (38)	1% (5)	.2 (1)

+ Includes requests from attorneys and law firms.

* Agency did not supply raw data. Figures did not indicate whether all requestors were subjects of agency proceedings, thus column #2 includes requests from corporations and FOI service companies presumably servicing regulated corporations.

** Figures compiled by Mary A. Magnuson, Research Assistant, from sample letters provided by agency.

*** Figures compiled by Mary A. Magnuson, Research Assistant, based on daily log supplied by agency.

° Data compiled for Senate Committee on Government Operations covering period 7/1/75 through 6/30.

°° Included many requests from same individual.

°°° The Federal Power Commission policy is to treat each request for information as a FOIA request, thus distorting the information received.

56. See text accompanying notes 25-35 *supra*.

and could not afford the time or expense of having someone sort through massive numbers of documents for relevant information. Consequently, the FOIA has become an informal discovery device used primarily to the advantage of small groups with economic power and to the disadvantage of the general public.⁵⁷

The use of the Act as a discovery tool is the result of the general lack of adequate discovery in the administrative process. Participants in agency proceedings must otherwise rely on the discovery rules of those agencies that have deigned to permit discovery. Denial of informal discovery does not appear to be a denial of due process, at least where there is no harm to participatory rights.⁵⁸ Thus, at present, the failure of an agency to provide for compulsory process, even in formal adjudication, does not violate due process,⁵⁹ nor is there any general statutory guarantee making compulsory process or other forms of discovery available.⁶⁰ The APA neither guarantees compulsory process nor empowers agencies to issue subpoenas, but merely provides that a subpoena shall be issued to a party where an agency already has subpoena authority.⁶¹ This provision is designed to place the agency and private parties on an equal footing.⁶²

57. *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 712 (D.C. Cir. 1977). The court attributed this result to the imbalance of financial resources. It is argued below that the whole scheme of the Act dictates this result. It cannot be adjusted merely by awarding attorney fees in a vain attempt to restore a financial balance.

58. *See Silverman v. Commodity Futures Trading Comm'n*, 549 F.2d 28, 34 (7th Cir. 1977) (denial of information available under the FOIA did not deprive a participant of due process in a formal adjudicative proceeding).

59. *See Low Wah Suey v. Backus*, 225 U.S. 460, 470-71 (1912); *Ubiotica Corp. v. FDA*, 427 F.2d 376, 381 (6th Cir. 1970).

60. *See NLRB v. Seine & Line Fishermen's Union*, 374 F.2d 974, 982 n.10 (9th Cir.), *cert. denied*, 389 U.S. 913 (1967) (refusal to issue a subpoena not necessarily prejudicial); *Campbell v. Eastland*, 307 F.2d 478, 490-92 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963) (trial court abused its discretion by rendering judgment for taxpayer simply because the government would not allow discovery). *But see FTC v. United States Pipe & Foundry Co.*, 304 F. Supp. 1254, 1259 (D.D.C. 1969) (in FTC adjudication, party has right to a subpoena "on a showing of general relevance and reasonable scope of the evidence sought"). *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 8.15 (1958); K. DAVIS, SEVENTIES 298.

61. 5 U.S.C. § 555(d) (1976). Agencies uniformly lack power to enforce their own subpoenas and must seek enforcement in the courts. The Constitution and considerations of fundamental fairness require this bifurcation of power. *United States v. Security State Bank & Trust*, 473 F.2d 638, 641 (5th Cir. 1973). *See also* Note, *Discovery in Federal Administrative Proceedings*, 16 STAN. L. REV. 1035, 1076 (1964). Sanctions for failure to comply with a discovery order are unclear under APA § 9(a), 5 U.S.C. § 558(b) (1976), and depend on individual enabling acts. Note, *supra*, at 1051, 1054-55.

62. The purpose of this provision is to make agency subpoenas available to private parties to the same extent as to agency representatives. It should be emphasized that § 6(c) of the APA, 5 U.S.C. § 555(d) (1976), relates only to the existing subpoena powers conferred upon agencies; it does not grant power to issue subpoenas to agencies that are not so empowered by other statutes.

However, even this equality is somewhat illusory, because agencies may possess investigative powers to compel disclosure of information or filing of reports that are not available to private persons.⁶³ The APA expressly recognizes that many agencies are empowered to make investigative demands that are separate and distinct from any compulsory process available in conjunction with specific proceedings.⁶⁴ These investigative powers may be exceedingly broad,⁶⁵ with little provision for judicial supervision.⁶⁶

The FOIA provides de facto discovery for participants in informal administrative processes since the agency cannot limit access to information that falls within the scope of the Act. The judicial opinions construing the Act show a much greater inclination to allow access to agency files than do judicial interpretations of the ordinary discovery provisions. On the other hand, while use of the FOIA for discovery purposes has not been proscribed, some courts have taken a dim view of efforts to use the Act as a substitute for discovery.⁶⁷ Nevertheless, in

ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 67-69 (1947). See Tomlinson, *Discovery in Agency Adjudication*, 1971 DUKE L.J. 89, 104 n.65.

63. See Tomlinson, *supra* note 62, at 124-25. See also *Papercraft Corp. v. FTC*, 307 F. Supp. 1401, 1404 (W.D. Pa. 1970) (participant has no right to reports furnished to agency under authority separate from subpoena power, even though participant alleged that the FTC investigative powers had been used as a "tool of litigation" in the particular agency adjudication).

64. 5 U.S.C. § 555(c) (1976).

65. While the APA limits the scope of investigative demands by the language "as authorized by law," many agencies possess broad authority to issue investigative requests. See, e.g., *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (an agency's investigative request will be enforced even if motivated by "nothing more than official curiosity"); *EEOC v. University of N.M.*, 504 F.2d 1296, 1303 (10th Cir. 1974) (administrative subpoenas enforceable unless "plainly incompetent or irrelevant to any lawful purpose").

66. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 214 (1946); *FTC v. Feldman*, 532 F.2d 1092, 1095-96 (7th Cir. 1976). See generally K. DAVIS, SEVENTIES 296-302.

67. See, e.g., *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978); *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 24 (1974); *Columbia Packing Co. v. USDA*, 563 F.2d 495, 499 (1st Cir. 1977) (FOIA should not be used for discovery purpose, but for purposes with broader public interest); *Roger J. Au & Son, Inc. v. NLRB*, 538 F.2d 80, 83 (3d Cir. 1976); *Title Guarantee Co. v. NLRB*, 534 F.2d 484, 492 (2d Cir.), *cert. denied*, 429 U.S. 834 (1976) ("It is significant that it is never suggested in the legislative history of the 1974 amendment to the FOIA that any such modification of agency discovery rules was intended"); *Freuhauf Corp. v. Thornton*, 507 F.2d 1253, 1254 (6th Cir. 1974) ("the Freedom of Information Act was not intended to serve as a substitute for criminal discovery"); *National Cable Television Ass'n v. FCC*, 479 F.2d 183, 193 (D.C. Cir. 1973); *Lincoln Nat'l Bank v. Lampe*, 421 F. Supp. 346 (N.D. Ill. 1976); *Verrazzano Trading Corp. v. United States*, 349 F. Supp. 1401, 1403 (Cust. Ct. 1972); *accord*, *United States v. Murdock*, 548 F.2d 599, 601-02 (5th Cir. 1977). But see K. DAVIS, SEVENTIES 63 (contending that FOIA was intended to benefit party in an agency proceeding as well as to compel disclosure to the electorate); Comment, *Taxpayers Discovery in Civil Federal Tax Controversies*, 51 NEB. L. REV. 290, 294 (1971). See also *Federal Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 99 S. Ct. 2800 (1979) (incorporating ordinary discovery exemption into FOIA through exemption five).

The FTC attempts to separate the FOIA from discovery by channeling discovery through administrative law judges (in accordance with traditional procedures) and FOIA requests through

agency proceedings where discovery is limited, the FOIA may fill an important void.⁶⁸

Clearly, there is a substantial need to cure the massive gaps in discovery available under the current administrative process. However, it is unfortunate that the FOIA has assumed this role. Unlimited discovery has never been advocated even in formal proceedings. Many of the defects in the present public information system could be cured by considering the public education problem separately from the discovery problem.⁶⁹

B. *Improving the Public Information System by Separate Treatment of Informal Discovery.*

1. *The FOIA and Discovery for Informal Actions.* Discovery is necessary for effective participation in agency proceedings;⁷⁰ it maximizes the ability of an interested person to represent his interest and consequently assures greater information upon which an agency may base its decision. Compulsory process not only provides a tool whereby an interested person may gather more information, it also permits an interested person the opportunity to confront the information which is to be used against him. Yet, the power to compel the availability of information is denied to most persons who participate in agency proceedings. The Supreme Court has required that the targets of all varieties of informal administrative action be given essential participatory rights;⁷¹ a means of compelling information would seem to be a necessary complement to this right.⁷²

Although the ability to obtain information is essential to participation, it is equally important that the mechanisms by which participants obtain information be compatible with the administrative process. In-

agency-wide FOIA processes. For an example of this procedure, see *J.J. Newberry Co.*, 30 Ad. L.2d 816 (FTC 1972); *Hearst Corp.*, 30 Ad. L.2d 92 (FTC 1971). A similar approach is suggested in Hamilton, *Rulemaking On A Record by the Food and Drug Administration*, 50 TEX. L. REV. 1132, 1175 (1972). But see *United States v. Brown*, 562 F.2d 1144, 1152 (9th Cir. 1977) (court refused to require a criminal defendant to undertake separate civil FOIA litigation to obtain access).

68. See *Bannercraft Clothing Co. v. Renegotiation Bd.*, 466 F.2d 345, 352 (D.C. Cir. 1972), *rev'd*, 415 U.S. 1 (1974) (the renegotiation process does not include the availability of discovery).

69. See text accompanying notes 70-96 *infra*.

70. See *NLRB v. Hardeman Garment Corp.*, 557 F.2d 559, 563 (6th Cir. 1977) (court recognized the unfairness of withholding employee affidavits from employer/litigant).

71. See *Goss v. Lopez*, 419 U.S. 565 (1975); *Goldberg v. Kelly*, 397 U.S. 254 (1970). See generally Note, *Procedural Due Process After Goss v. Lopez*, 1976 DUKE L.J. 409.

72. See K. DAVIS, TREATISE, *supra* note 60, at § 8.15 (citing cases for both sides of the proposition that discovery is a requisite element of fairness). The need for compulsory mechanisms would seem to vary with each individual informal process. *Id.*

formal discovery must have practical boundaries. The present disclosure system intentionally provides virtually no boundaries. Nor does it provide any room for either the agencies or the courts to integrate the discovery system into the agency process.⁷³ The FOIA does not permit the agency to distinguish between requesting parties: it requires disclosure to "any person."⁷⁴ From a requesting party's point of view, the Act is the perfect discovery device: the agency cannot limit access to information by requiring a showing of need,⁷⁵ reasonable scope or relevancy to a proceeding. This breadth is a disaster from an agency, and a public interest, point of view. It burdens the public treasury with considerable expense and interferes with the agencies' abilities to perform their primary functions.

The paramount public interest dictates that discovery in informal actions should not be permitted to interfere with or interrupt the normal administrative process.⁷⁶ Discovery related to informal processes must be limited in the same way as discovery in formal adjudications—by balancing the potential needs of participants against the needs of the process. Because the drafters of the Act were committed to informing the electorate at all costs, they did not consider the implications of an unbridled discovery system. No other discovery mechanism exists without boundaries. For example, the drafters of the Administrative Procedure Act restricted administrative discovery by explicitly requiring relevance and proper scope.⁷⁷ And, in a formal adjudicative process, the presiding officials, even without explicit authority, can protect the process from destructive discovery.⁷⁸ Yet, with respect to informal decisionmaking where efficiency is often the essence of fairness, the

73. Neither the courts nor the agencies have discretion to withhold documents. K. DAVIS, SEVENTIES, 61. *But see* Caplan v. Bureau of Alcohol, Tobacco & Firearms, 445 F. Supp. 699 (S.D.N.Y.), *aff'd on other grounds*, 587 F.2d 544 (2d Cir. 1978) (in exceptional circumstances, court of equity has discretion to deny disclosure).

74. 5 U.S.C. § 552(a)(3) (1976).

75. *Robbins Tire & Rubber Co. v. NLRB*, 563 F.2d 724, 730 (5th Cir. 1977), *rev'd*, 437 U.S. 214 (1978) ("anyone's case is as strong (or as weak) as anyone else's"); *Cooper v. Department of the Navy*, 558 F.2d 274, 276 (5th Cir. 1977) (court noted that the agency supplied all the information needed for discovery but that need could not limit the access). *But see* *Federal Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 99 S. Ct. 2800 (1979) (using exemption five to delay release of information if immediate release would significantly harm Government's monetary functions or commercial interests); *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976), and its progeny which reinstate need as an excuse relative to deadlines.

76. *See, e.g., New England Medical Center Hosp. v. NLRB*, 548 F.2d 377, 384 (1st Cir. 1976) (*in camera* inspection should not be ordered if it would "trap the Board into foregoing all claims to exemptions under FOIA if it is not to accept crippling delays in the prosecution of unfair practice cases while litigating the exemptions in court").

77. 5 U.S.C. § 555(d) (1976).

78. *Id.* § 556(c).

FOIA discovery system has no bounds and the processes are in no way protected from its excesses.

Old section 3 of the APA⁷⁹ was clearly intended to provide informal discovery for those "properly and directly concerned" with agency action. Proposals to amend section 3 were precipitated by the realization that section 3 had become not a disclosure provision, but rather a statutory excuse for withholding government records.⁸⁰ Agencies could withhold information if secrecy was required "in the public interest" or if the records related "solely to the internal management of an agency."⁸¹ Information could also be held confidential "for good cause found," and even where no good cause could be found for secrecy or confidentiality, the records were available only to persons "properly and directly concerned."⁸² These broad phrases were not defined in the section nor in its legislative history, and there was no provision for review of an agency's wrongful denial of access to the records. In sum, section 3 was a disclosure statute only to the extent desired by the agencies, and they were not so inclined. There was nothing, however, inherently wrong with these limitations. Indeed, they represented a clear understanding that informal discovery must be closely confined. What was lacking was action by the agencies and the courts to incorporate in these general standards the discovery necessary to provide "persons properly and directly concerned"⁸³ with adequate information to participate in the great variety of informal processes.

In response to bureaucratic abuse of that provision, no concept of "need" or participation was included in the Freedom of Information Act amendment to the APA.⁸⁴ Yet, the drafters of the FOIA did not

79. Act of June 11, 1946, ch. 324, § 3, 60 Stat. 237. Section 3 provided:

Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(c) PUBLIC RECORDS.—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to *persons properly and directly concerned except information held confidential for good cause found.* (emphasis added).

80. SENATE COMM. ON THE JUDICIARY, APA, LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess. 251 (1946). "Section 3 of the Administrative Procedure Act . . . though titled 'Public Information' and clearly intended for that purpose, has been used as an authority for withholding, rather than disclosing, information. Such a 180° turn was easy to accomplish given the broad language of [section 3]." H.R. REP. NO. 1497, *supra* note 52, at 4, *reprinted in* Sourcebook I, at 25. *See also* Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (1967), *reprinted in* Sourcebook I, at 194.

81. Act of June 11, 1946, ch. 324, § 3, 60 Stat. 237.

82. *Id.*

83. *Id.*

84. Davis, *supra* note 48, at 765-66 (criticizing broad access without requiring a reason).

totally ignore practical governmental problems. Concern for the compatibility of the information system with the entire operation of government manifests itself in the Act's exemptions.⁸⁵ The Act grants complete information access to any person and then withdraws, through the exemptions, specific categories of documents. The exemptions represent Congress' intuitive sense of the protection necessary for governmental operation. The weakness of this approach is that it focuses on types of documents rather than on specific needs of participants in various decisionmaking processes. Consequently, a person may have access to masses of government documents regardless of the damage it may do to the decisionmaking process, but may not have access to exempt documents even if great need or substantial impact can be shown.

By separating the question of participant access, interested persons could have much greater access, limited by standards developed from notions of need, interest, relevancy and reasonable scope. An access system designed specifically for informal discovery would serve participants at considerable savings to the public treasury and would result in more efficient agency decisionmaking. Similarly, another system designed specifically for citizen education functions would result in more information actually reaching the public with far less damage to government.⁸⁶

The Privacy Act, for example, is a more effective legislative effort than the FOIA, because Congress focused more closely on a single access problem. While the Privacy Act is still too broad in concept,⁸⁷ it does demonstrate that sound access legislation requires separate treatment of individual access needs. The drafters attempted to strike a balance between the requester's need for the information and the effect of that access upon government operations. The Privacy Act's advantage over the FOIA is that the Privacy Act focuses on specific types of information and those with a specific need for that information.

In addition to the unnecessary burdens imposed on government operations and the failure to provide access based on need, the FOIA is deficient as a discovery device because it fails to provide protection for those supplying information to the government. The disclosure of confidential information is not only unfair, but also damages the decision-

85. 5 U.S.C. § 552(b) (1976). See, e.g., *Federal Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 99 S. Ct. 2800 (1979).

86. See text accompanying notes 106-62 *infra*.

87. Experience teaches that at least the personal access provision could have been limited to intelligence and criminal justice agencies. Belair, *Less Government Secrecy and More Personal Privacy? Experience with the Freedom of Information and Privacy Acts*, 4 CIV. LIB. REV. 10, 18 (1977).

making process. A viable discovery system must include methods for protecting confidential information, especially where the information must come from voluntary sources. Yet, there is no room for developing these devices in the informal discovery scheme of the FOIA. No assurance of confidentiality is per se enforceable under the Act.⁸⁸

2. *Designing a System for Discovery in Informal Actions.* Many problems could be cured by agency procedural rules specifically designed to create an informal discovery system that meets the particular needs of each individual agency's informal process.⁸⁹ Unfortunately, the present Act does not provide sufficient flexibility to permit the development of such rules. However, cases demonstrate that judicial review of agency FOIA rules offers a viable means of both permitting the necessary discretion to develop participant access and confining and controlling that discretion.⁹⁰

An access system used primarily as a discovery tool should be designed for that purpose. Concepts such as relevancy and reasonable scope must be incorporated. Officials and the courts should be permitted to protect the public interest from abusive discovery. On the other hand, improved access for participants in informal administrative processes is also required. In some circumstances, for example, agencies should be required to answer questions,⁹¹ and in some cases par-

88. *Pharmaceutical Mfrs. Ass'n v. Weinberger*, 411 F. Supp. 576 (D.D.C. 1976); *Tax Analysts and Advocates v. IRS*, 362 F. Supp. 1298 (D.D.C. 1973), *modified*, 505 F.2d 350 (D.C. Cir. 1974) (the government's promise of confidentiality does not override the disclosure provisions). *But see Nichols v. United States*, 325 F. Supp. 130 (D. Kan. 1971), *aff'd*, 460 F.2d 671 (10th Cir.), *cert. denied*, 409 U.S. 966 (1972); S. REP. No. 813, *supra* note 6, at 9, *reprinted in Sourcebook I*, at 44; H. REP. No. 1497, *supra* note 52, at 10, *reprinted in Sourcebook I*, at 31. In *Usery v. Whittin Machine Works, Inc.*, 554 F.2d 498, 503-04 (1st Cir. 1977), the court even refused to grant a declaratory judgment that the agency's assurance of confidential treatment covered exempt materials and hence would protect the information subpoenaed by the agency in an enforcement proceeding. The persons submitting the material must gamble that if they disclose information which they consider confidential, a future FOIA proceeding will hold the information to be exempt.

89. 5 U.S.C. § 553 (1976). Procedural rulemaking is exempt from notice and comment procedure, but this is a situation where notice and comment should be provided.

90. *Westinghouse Elec. Corp. v. NRC*, 555 F.2d 82 (3d Cir. 1977) (court reviewed agency rules providing for public inspection of arguably exempt information). *See, e.g., Harvey's Wagon Wheel v. NLRB*, 550 F.2d 1139, 1141 (9th Cir. 1976) (the court was able to review the agency's disclosure policy as to a specific group of documents because it had a disclosure rule to review).

91. The FOIA does not require an agency to create records, but only to disclose those in existence. *See Nolen v. Rumsfeld*, 535 F.2d 890 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977) (in an effort to require disclosure of missing records, the court found that the FOIA only compelled disclosure of existing records). However, contrary to the clear language of the Act and these interpretations, some courts have ordered the agency to answer interrogatories submitted pursuant to the FOIA. *Weisberg v. Department of Justice*, 543 F.2d 308 (D.C. Cir. 1976). There is a fine line between responses to questions and legitimate interrogatories used as a discovery device.

ticipants should be able to obtain essential information not contained in government files. Neither of these types of information is available to participants under the present Act.

An informal discovery system should incorporate public interest priorities that weigh the needs of the participant against the need for fair and efficient governmental decisionmaking. Because no distinction has been drawn in the present Act between general groups of requesters, the agencies and courts have been forced to formulate priorities in the less rational context of individual cases.⁹² In *Open America v. Watergate Special Prosecution Force*,⁹³ the court, while approving a "first in, first out" approach to handling the overwhelming load, stated that priority should be given to requesters who "show a genuine need and reason for urgency."⁹⁴ This "genuine need" is generally based on a finding that the requested information will be used in some proceeding in which the requester has a direct interest.⁹⁵ Considerations of need have also been compelled in the exemption six cases, and in several recent exemption seven cases. Thus, despite the clear intent of Congress, courts simply have not been able to avoid considerations of need.

An informal discovery system can improve government decision-making: the more information participants have, the better equipped they will be to represent their interests and, hence, agency decisions will be based upon a more complete record. However, the mere creation of devices to open up relevant government files to participant access is not enough. The devices must insure that this access does not interfere with the agencies' public interest functions.⁹⁶ The solution lies in examining each agency's process, or groups of very similar agency processes, and cautiously building the new discovery procedures into each system. The undertaking must begin by having each agency examine its various processes and recommend mechanisms for improving participant access. Specifically focused administrative rulemaking and legislation should fill the gaps found in the current administrative discovery system. A separate solution will be required for the citizen education problem.

92. Note, *Developments Under the Freedom of Information Act—1976, 1977* DUKE L.J. 532, 537-38.

93. 547 F.2d 605 (D.C. Cir. 1976).

94. *Id.* at 615-16.

95. *But see* Mitsubishi Elec. Corp. v. Department of Justice, 39 Ad. L.2d 1133 (D.D.C. 1976). In *Kramer v. Antitrust Div., Dep't of Justice*, 40 Ad. L.2d 7 (D.D.C. 1976), *Kramer* requested the material in order to comment on a consent order negotiated by the Department of Justice.

96. Weighing this balance is a necessity for strong informal procedure. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1976).

C. *Other Overlooked Problems with the Present Informal Discovery System.*

The commingling of disparate access goals has created another serious practical problem related to discovery. The link between inadequate discovery and the FOIA has resulted in efforts to stay the proceedings for purposes of which the information is sought.⁹⁷ In view of the link between the request and a specific process, the requester may argue that the proceeding should be held in abeyance until the information is received.⁹⁸ It is surprising that some courts, most notably the District of Columbia Circuit, have ordered such stays even though it is well established that interlocutory appeals of denial of discovery are usually improper. Substantial controversy has arisen over whether courts should stay agency proceedings until a final determination of the FOIA request has been made. Although the Supreme Court has not yet stayed any proceedings, it has refused to eliminate the possibility that it might do so in a proper case.⁹⁹ This position is probably correct: stays should be considered, but only reluctantly granted. A court should be reluctant to encumber informal adjudications with discovery mechanisms that bring them to a halt. The long term solution to this problem lies with development of a separate informal discovery system.

Unfortunately, two extremely complex access problems that should be left to individualized discovery devices have been incorporated into the public education system: access to criminal investigatory files and the policing of the designation of classified information. The drafters of the Act failed to recognize the natural distinction between criminal investigatory files and civil files,¹⁰⁰ and consequently, did not provide any special treatment for criminal files. However, an important public policy rationale exists for affording greater protection to criminal investigatory files¹⁰¹ through a restrictive exemption. Not only must the government's criminal investigatory function be pro-

97. The absence of adequate discovery processes even in formal proceedings has resulted in a rash of FOIA requests in the nature of discovery against the NLRB. See note 53 *supra*.

98. *E.g.*, *Columbia Packing Co. v. Department of Agriculture*, 563 F.2d 495, 500 (1st Cir. 1977) (district court had enjoined the proceeding until a FOIA decision could be made in court).

99. "As a general rule, it is agreed that courts considering FOIA requests possess the jurisdiction to enjoin agency proceedings pending disposition of the FOIA claim." Note, *Developments Under the Freedom of Information Act—1976*, 1977 DUKE L.J. 532, 555 (citations omitted). See *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 17-20 (1974).

100. See H. REP. NO. 1497, *supra* note 52, at 11, *reprinted in* Sourcebook I, at 32; Note, *The Freedom of Information Act—A Potential Alternative to Conventional Criminal Discovery*, 14 AM. CRIM. L. REV. 73 (1976).

101. *Black v. Sheraton Corp. of America*, 50 F.R.D. 130, 132-33 (D.D.C. 1970).

tected, but the individual rights of those involved in criminal investigations must also be safeguarded. No valid reason exists for allowing public access to files compiled in the investigation of a possible individual criminal activity.¹⁰² Only the individuals actually covered by the investigation need access to these files,¹⁰³ and the Privacy Act fulfills this need. Different policy considerations are involved in the question of whether to release civil investigatory files.

Similarly, the classified document problem is much too sophisticated to be handled by a few lines in exemption one of the Freedom of Information Act.¹⁰⁴ The Act contains no provision for requester justification. However, where potential state secrets are involved, some balancing must precede release. Because it is not always clear whether certain information should be classified as a state secret, need is a factor that should be considered in determining whether to release the information. In addition, discovery includes numerous devices that would allow a person to obtain the benefits of confidential information without actually releasing that information. For example, special access could be given to independent, but "cleared," experts who could then testify based upon the information made available. The general public should not be denied access to information by precipitous use of the "secret" stamp. The optimal solution would provide internal procedures for granting "secret" status and adequate procedures for policing that status. Congress should, of course, continue to monitor this process.

Under exemption one, the courts have shown admirable restraint in refraining from involvement in the classification process.¹⁰⁵ Courts have traditionally been reluctant to review executive determinations of the need for secrecy and that policy appears to be based upon sound judgment. While the federal judiciary can certainly be trusted with sensitive material, the courts do not have the top security machinery

102. *See, e.g.,* *Aspin v. Department of Defense*, 491 F.2d 24 (D.C. Cir. 1973). Criminal investigatory files should not be available to the general public unless the parties wish to make them available. Some special access should be available to the target of the criminal investigation.

103. *See, e.g.,* *Weissman v. CIA*, 565 F.2d 692 (D.C. Cir. 1977); *Bell v. United States*, 563 F.2d 484 (1st Cir. 1977) (although the documents involved were thirty years old, the court did not feel comfortable in making a national security decision, and refused *in camera* inspection); *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976).

104. *See, e.g.,* *EPA v. Mink*, 410 U.S. 73 (1973); *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953); *Weissman v. CIA*, 565 F.2d 692, 698 (D.C. Cir. 1977); *Wolfe v. Froehlke*, 510 F.2d 654, 655 (D.C. Cir. 1974). The Fifth Circuit was reluctant to release sensitive information that might have an impact on foreign affairs when such information did not fall within the "state secret" concept. *Stone v. Export-Import Bank of United States*, 552 F.2d 132 (5th Cir. 1977).

105. *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1369 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975).

required to provide adequate protection for secret information. Even affidavits cause problems because it is often difficult to describe the material adequately for purposes of argument and of judicial review without disclosing the contents of the material. Thus, administrative review by expert government officials under judicially reviewable administrative standards should be preferred over de novo judicial review. This problem should also be dealt with in a separate legislative and administrative program.

IV. THE GOAL OF AN INFORMED PUBLIC AND THE STRUCTURAL WEAKNESSES IN THE SYSTEM FOR ACHIEVING THIS GOAL

Although the drafters did not preclude other purposes, it is clear that the primary goal of the Freedom of Information Act was education of the public regarding governmental operations.¹⁰⁶ Upon signing the Act into law, President Johnson stated:

This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury to the public interest. . . . I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded.¹⁰⁷

Similarly, in *Renegotiation Board v. Bannerkraft Clothing Co.*,¹⁰⁸ the Supreme Court noted that the "stress" of the Act is on educating the public and keeping it informed as to government performance. In *NLRB v. Robbins Tire and Rubber Co.*,¹⁰⁹ the Court went even further by stating that the "FOIA was *not* intended to function as a private discovery tool."¹¹⁰ Although the goal of citizen education has emotional appeal and constitutes a fundamental concept in any public information system, it is clear that the drafters also sought to effectuate other open government values. Of these, enhancing public confidence in government and limiting official discretion appear to be the most important.

106. See, e.g., S. REP. NO. 813, *supra* note 6, at 2-3, *reprinted in* Sourcebook I, at 37-38.

107. Statement of President Lyndon B. Johnson, Sourcebook I, at 1.

108. 415 U.S. 1, 22 (1974).

109. 437 U.S. 214 (1978).

110. *Id.* at 242 (emphasis in original); *cf.* *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("Discovery for litigation purposes is not an expressly indicated purpose of the [Freedom of Information] Act"). The legislative history of the FOIA neither expressly includes nor disclaims discovery as a purpose of the statute. S. REP. NO. 813, *supra* note 6, at 3, 7, *reprinted in* Sourcebook I, at 38, 42.

There is a natural distrust of covert government.¹¹¹ Regardless of the justifications for a particular governmental decision, there appears to be an instinctive suspicion of secretive decisionmaking. The size and complexity of the bureaucracy provide anonymity, and the resulting distrust leads to increased demands for devices that will assure proper decisionmaking. Openness, therefore, becomes one device for fostering confidence. The drafters of the FOIA clearly intended that disclosure should serve to improve the appearance of government decisionmaking.¹¹²

In addition to improving appearance, openness has been strongly advocated as a device for assuring fair informal procedure.¹¹³ Open decisionmaking becomes a particularly attractive means of providing fair informal procedure where no formal procedures are contemplated or appropriate. Such actions are found throughout the bureaucracy: decisions not to act; decisions to investigate or to examine persons, groups or subject matter; and issuance of informative or educational material. Rarely do these decisions lend themselves to a formal decisionmaking process or to judicial review, but it is believed that discretion exercised under the scrutiny of public disclosure is more likely to be fair. In many cases, openness may provide the only practical check on agency discretion.

However, an abstract commitment to open government must not be permitted to inhibit careful scrutiny of the present legislation's success in achieving this goal. The emotional appeal of open government must not be allowed to immunize the public information system from criticism.

A. *The Informed Public Goal of the Freedom of Information Act.*

1. *A System for Educating the Public.* The FOIA compels release of all non-exempt information in specified government files to "any person," and a requesting party need not show good cause or need.¹¹⁴ Thus, the Act attempts to educate the public by indiscriminately disclosing disorganized and uncondensed masses of information. The information varies greatly in quality and relevance; much of it is of no value whatsoever in understanding or judging the government. If

111. *Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976) (a basic purpose is "to open agency action to the light of public scrutiny"); *accord*, *Committee on Masonic Homes v. NLRB*, 556 F.2d 214, 220 (3d Cir. 1977).

112. The Senate Report concludes: "A government by secrecy . . . breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty." S. REP. NO. 813, *supra* note 6, at 10, *reprinted in* Sourcebook I, at 45.

113. K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 98 (1969).

114. 5 U.S.C. § 552(a)(3) (1976).

the request is not carefully drawn, the mass of material disclosed may be largely superfluous, concealing a small amount of useful information and making that information as inaccessible as if it had not been disclosed.¹¹⁵

The present system does not consider the quality of the information released because it is based on the assumption that the more information released, the more citizens will know about their government. However, the quality of information is directly related to the ability of the system to educate citizens about the operation of government. The present system does not release the information in a useable form. Only a very small percentage of the information contained in government files actually discloses the functioning of government. The public will not digest these huge masses of information in order to obtain information relating to government performance. The focus of the Act is on documents rather than actual communication. Hence, the present public information system weighs total bulk—gross tonnage of government paper released—rather than effectiveness of communication.

The FOIA has failed to educate the public as to governmental performance because it does not distinguish between quality and quantity. At present, quantity is the greatest obstacle to real citizen education. The recent release of information relating to the Kennedy assassination, for example, overwhelmed even the media. The first half of the file contained 80,000 pages. Newsweek, which had a pecuniary interest in examining the file, admitted that it read only 600 pages.¹¹⁶ If Newsweek read only 600 of 80,000 pages, it seems safe to assume that few members of the public will read the full 160,000 pages of the Kennedy file. It is even more unlikely that the public will read a similar file about natural gas pipelines or milk market orders or any of the thousands of mundane matters which are found in government files.

The only limitation upon this broad disclosure requirement is found in the Act's exemptions.¹¹⁷ These exemptions remove small categories of information from the general disclosure requirement and provide the exclusive means for withholding information. Despite the wide variety of types of information accumulated by various agencies, the agencies have no discretion to withhold information. The Act goes so far as to deny judicial discretion to permit the withholding of infor-

115. As the antitrust bar knows, one way to defeat actual discovery of useful information is to supply unrestricted quantities of business documents. *The Delaying Game, Use of Stalling Tactics by Corporate Lawyers Appears to Be Growing*, Wall St. J., May 26, 1976, at 1, col. 6. The FOIA does this in hopes of making information realistically available.

116. *Opening the JFK File*, NEWSWEEK, Dec. 12, 1977, at 34-35.

117. 5 U.S.C. § 552(b) (1976).

mation not covered by an exemption, even where nondisclosure is clearly in the public interest.¹¹⁸

Thus, FOIA litigation has centered around the scope of the exemptions and has only rarely involved the usefulness of the disclosure or the public interest to be served by the disclosure.¹¹⁹ Congress did not intend to allow consideration of the quality of access or the realities of access by either the agencies or the courts. Consistent with that intention, the courts have taken a very inflexible approach to the disclosure problem. Even the abstract policy indicated by the exemptions has not been regarded as controlling. The exemptions have been read literally and without any adjustment for individual circumstances or the public interest, or in furtherance of the goal of citizen education. Despite the glaring need for practical experimentation and analysis, the drafters' structure has prevented pragmatic adjustment and has stifled any useful developments in the public information system. Instead, almost all of the judicial thinking and scholarly comment involves semantic analysis of the exemptions.

2. *General Citizen Education—A Rational Goal?* Practical considerations suggest that educating the citizenry about the functions of government is a very idealistic and probably unattainable goal. Substantial political science research discloses the depth of citizen apathy toward the government.¹²⁰ Less than half of the citizens vote in non-presidential elections.¹²¹ Most citizens cannot identify the major agencies.¹²² Congress unrealistically assumed that citizens would read the files of agencies they cannot even name.¹²³ Most citizens probably judge the performance of the government by results, or more likely, by

118. K. DAVIS, SEVENTIES 58.

119. An exception is the balancing against privacy interests under exemption six. *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133, 135 (3d Cir. 1974); *Getman v. NLRB*, 450 F.2d 670, 674-77 (D.C. Cir. 1971). In addition, there may be some weighing of divergent public interests under the law enforcement exemption of 7(A). Compare *Title Guarantee Co. v. NLRB*, 534 F.2d 484 (2d Cir.), cert. denied, 429 U.S. 834 (1976), with *Robbins Tire & Rubber Co. v. NLRB*, 563 F.2d 724 (5th Cir. 1977), rev'd, 437 U.S. 214 (1978).

120. For a general discussion of citizen apathy and its impact on political institutions, see E. SCHATTSCHEIDER, *THE SEMI-SOVEREIGN PEOPLE* (1960); A. CAMPBELL, P. CONVERSE, D. STOKES & W. MILLER, *ELECTIONS AND THE POLITICAL ORDER* 209-10 (1966); A. CAMPBELL, P. CONVERSE, W. MILLER & D. STOKES, *THE AMERICAN VOTER* (1964); Jones, *The Role of the Campaign in Congressional Politics*, in *THE ELECTORAL PROCESS* (M. Jennings & L. Zeigler eds. 1966).

121. R. RIPLEY, *CONGRESS: PROGRESS AND POLICY* 170 (1975).

122. One study found that only 19% of the citizens could name the three branches of government. R. LANE & D. SEARS, *PUBLIC OPINION* 61 (1964).

123. See Belair, *Less Government Secrecy and More Personal Privacy? Experience with the Freedom of Information and Privacy Acts*, 4 CIV. LIB. REV. 10, 18 (1977) (tentative evidence suggests that people are not even interested in government files about them, except those in intelligence and criminal justice agencies).

conditions such as employment or inflation, which may or may not be the result of government action.¹²⁴

Congress must have been aware of the lack of public interest in the mundane functions of the federal bureaucracy, but it voted overwhelmingly in favor of the FOIA.¹²⁵ It was simply politically impossible not to do so; the notion of mass disclosure of government information is too politically compelling. Neither Congress nor the public was aware of the cost of useless disclosure. If this cost had been known, the Act would not have been so politically attractive. The public might have chosen to spend federal funds on such things as unemployment benefits, consumer protection or criminal law enforcement. Ironically, public apathy and lack of sophistication, along with conscious misrepresentation, protect the present inefficient information system from criticism. If the public were aware of the waste of funds for a system it does not or cannot use, it would likely protest.

B. *Integration of Traditional Information Disseminators into the System.*

The test of a sound public information system is not the number of government documents released, but the amount of useful information that actually reaches the general population and the relative cost of that system, both in dollars and in governmental efficiency. The present system does not fare very well under this test. To actually inform the public the system must deliver the information in digestible form and manageable quantity. Therefore, the system must provide for digestion and dissemination of information contained in government files, either by existing agencies or by an agency established for that particular purpose. The only way the system can accomplish its public information function without disrupting the government is by identifying certain important classes of decisions and making key information regarding those decisions public.

An attractive alternative would be to give special access to the institutions that have traditionally been the disseminators of information to the public. Although there are possible problems with such a solution, an examination of the present system will be helpful in designing better mechanisms for integrating these institutions into a new information-disclosure system. The major agents are: the media; scholars and other researchers; interest group representatives; proprietary informa-

124. In reality, the general population aggressively avoids even that information about the government that is readily available. R. LANE & D. SEARS, PUBLIC OPINION 65-66 (1964).

125. The Act and the amendment passed with virtually no opposition. See 111 CONG. REC. 26820-21 (1965).

tion companies; and the government itself as a public information agent.

1. *The Press and Other Media.* The most obvious potential vehicle for disseminating public information is the media, and the legislative history for the original Act and the 1975 amendments indicate a desire to place government documents in the hands of the media.¹²⁶ The media have been the most ardent supporters of the Freedom of Information Act, and the design of the system tacitly incorporates the working media as agents for converting government material into useful information for the general public.¹²⁷ The language of the Act does not, however, provide special treatment for any group such as the media.¹²⁸ The drafters of the 1974 amendments were puzzled by the inability of the media to use the present access system.¹²⁹ This confusion was the result of the drafters' inability to recognize the flaws in the design of the system itself. The media cannot consistently benefit from the public information system in its present form.¹³⁰ The major priorities of the news media are marketable information and speed.¹³¹ The present information system, even with the 1974 deadlines,¹³² cannot serve either of these goals. The information cannot be compiled and released quickly enough to be useful. Newsmen continue to accumulate information through contacts and interviews with knowledgeable people.¹³³ They rarely have the time to sort through massive government files for a news story. Human sources can provide them with both

126. H.R. REP. NO. 1497, *supra* note 52, at 2-3, *reprinted in* Sourcebook I, at 23-24.

127. 118 CONG. REC. 9950 (1972) (remarks of Rep. Morehead).

128. *Robbins Tire & Rubber Co. v. NLRB*, 563 F.2d 724, 730 (5th Cir. 1977), *rev'd on other grounds*, 437 U.S. 214 (1978): "[T]o hold that certain groups—members of the news media, for example—are the real beneficiaries of FOIA is to create a pecking order unjustified by the language of the statute."

129. H. REP. NO. 1419, 92 Cong., 2d Sess. 38 (1972), *reprinted in* Sourcebook II, at 38. "I am surprised, however, that the reporters, editors and broadcasters . . . have made so little use of the Freedom of Information Act." 118 CONG. REC. 9949, 9950 (1972) (remarks of Rep. Morehead), based on data at Sourcebook II, at 38 n.112. See Kohlmeier, *The Freedom of Information Act and the Agencies: The Journalist's Viewpoint*, 23 AD. L. REV. 143 (1971).

130. The media have found the Act "burdensome and costly." Sigma Delta Chi, The Society of Professional Journalists, *Freedom of Information/1977*, Report of the Advancement of Freedom of Information Committee 9. Cf. Belair, *Less Government Secrecy and More Personal Privacy? Experience with the Freedom of Information and Privacy Acts*, 4 CIV. LIB. REV. 10, 15 (1977) (Privacy Act is making it even harder for press to use public information systems).

131. See *Hearings on S. 1142, supra* note 3, at 20 (statement of Courtney Sheldon, Joint Media Committee) (in the context of discussing the Act's virtues even when infrequently used, Mr. Sheldon noted "we [the media] do not use it, because of time factors, money factors, bureaucratic factors of our own").

132. 5 U.S.C. § 552(a)(6) (1976).

133. Interview with Ed Pound, *Washington Star* investigative reporter (Oct. 25, 1977).

information *and perspective* quickly enough to meet the demands of the industry.

The media have a basic cost/benefit problem in using FOIA devices. Even where a story might exist, the newsmen cannot afford the time commitment required by the FOIA. Moreover, there are competitive reasons for not devoting resources to use of the FOIA. If a member of the media compels disclosure, the information becomes public and is available to "any person." The value of exclusivity is lost. The "free rider" problem makes information obtained under the Act economically unattractive.

Most government files are of interest only to government employees specifically required to deal with them. Clearly, a media organization could not justify monitoring or scanning government records in an effort to uncover the rare interesting document. FOIA disclosure is helpful only in documenting long range investigative reporting. It is likely that agency press releases are much more useful to the media than access under the Act. The media should be recognized as a necessary component of any successful public information system, but they must be fully integrated into such a system. If a public information system is to serve the media, it must provide access to government information very quickly and in a far more concise form than is possible under the FOIA. Designing such a system will require a better understanding of the industry.

The media could serve the public information system more effectively if agency cooperation were improved. Agencies should be compelled to develop more detailed, unbiased and accurate releases. The media could also be integrated into the public information system by granting them special status. The media have traditionally been given special access to many sources of information.¹³⁴ For example, the media question politicians at press conferences. The reason for this special access is expedience. All interested citizens cannot be accommodated at the source of information. To a certain extent, government documents may constitute another source of raw information to which direct access for all is not feasible. This may be another area in which the media could perform an intermediary function. The result would be improved communication and elimination of one costly mode of access by private citizens.

On the other hand, the granting of special rights to the media raises numerous questions. First, the public will instinctively oppose granting special access to one group, even if that group is the press.

134. *E.g.*, *Halperin v. Department of State*, 565 F.2d 699, 706 (D.C. Cir. 1977).

Second, there is a problem of definition. Does the term "media" include trade association publications or consumer newsletters? Defining the media to include a trade association would create the same problems found under the present Act; defining media to exclude some publications may create first amendment problems. If agencies are required to make such a distinction, they may commit abuses even more serious than those occurring under the present Act. A third problem arises because the media cannot be bound to any agreement limiting the right to disclose information.¹³⁵ Although a system granting the media special access as a public trustee should be considered, it is recognized that such an approach may be politically and practically impossible to implement.¹³⁶

2. *Scholars and Other Researchers.* Like the media, scholars are not effectively utilized by the public information system to further the citizen education goal. Researchers have both special needs and special services to offer the system. A successful system must recognize and incorporate these attributes.

Independent researchers require free access to information; they cannot tolerate gaps in their research that may result from the nine exemptions. On the other hand, they have more time than most requesting parties, and need not put time pressures on the agencies. They are a recognizable and easily confined group, and their research often serves the public by developing comprehensible information about the government.

As requesting parties, scholars need not rely on the broad "any person" access. They serve the public indirectly and should therefore be able to satisfy any "good cause" requirement.¹³⁷ Scholars can be allowed the same access to information that is given to agency employees. Complete access could be exchanged for promises to protect the integrity of the agency files.¹³⁸ Many agencies, including the Federal Trade Commission, have maintained a special status for scholars. The agency can determine the legitimacy of the research effort and allow

135. A possible model for restricting the use of information obtained by the media is the recently enacted Ethics in Government Act of 1978, P.L. No. 95-521, 92 Stat. 1824. That statute requires certain high level government employees to file financial statements which are then made publicly available. Nevertheless, it is a violation of the Act for any person to use that information for commercial purposes. *Id.* § 205(c).

136. This solution is more attractive to Mr. Koch than to Mr. Rubin.

137. See *Getman v. NLRB*, 450 F.2d 670, 674-76 (D.C. Cir. 1971).

138. Such promises would not serve the ends of the media since they would presumably be incompatible with the duty to inform the public rather than to decide what information the citizen should receive.

free access to this small group of people. Researchers can do their own searches and follow their own leads—false or fruitful—thereby relieving the agency staff of a substantial burden.

Properly utilized, researchers could substantially aid the process of public education. They have the time and motivation necessary to conduct careful research and to synthesize the information in a useable form. On the other hand, they cannot tolerate important gaps in their research and should be allowed access to information that is properly withheld from the general public. For example, researchers could be allowed access to the opinion portions of internal memoranda for use in their research without creating government in a "fish bowl."

The value of the services researchers could perform in a public information system is demonstrated by the Getman, Goldberg and Herman study,¹³⁹ which was made possible by the landmark case of *Getman v. NLRB*.¹⁴⁰ These scholars wished to conduct a study of labor union organization elections. For this purpose, they sought the names and addresses of employees, but the Board denied access in order to protect the employees' privacy. The court found that under the "clearly unwarranted invasion of privacy" test, exemption six did not protect the material. Unlike other parts of the Act, the court held that this exemption compelled a balancing of interests. An invasion of privacy was permitted by the Act if it was warranted; indeed, if it was not "clearly unwarranted." The admitted invasion of privacy by these researchers was found to be warranted in the interests of scholarship. The information was used to support some rather extraordinary findings and conclusions that contradicted some of labor's most cherished assumptions.¹⁴¹ The court recognized that scholars perform a service to the general public and hence struck the privacy balance in their favor.¹⁴² The ironic result of the *Getman* case is that it contributed to a study that has been quite useful to the NLRB. The NLRB might have served itself and the public better by providing special "resident scholar" status to these individuals in order to facilitate their study.

The NLRB was not so much concerned that the addresses sought would be available to one or two recognized scholars, but that release to one person under the Act necessarily would require release to "any

139. See note 141 *infra*.

140. 450 F.2d 670 (D.C. Cir. 1971).

141. J. GETMAN, S. GOLDBERG & J. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976). This study has prompted the Board to consider changes in basic policies. See Roomikin & Abrams, *Using Behavioral Evidence in NLRB Regulation: A Proposal*, 90 HARV. L. REV. 1441 (1977).

142. *Cf.* Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 137 (3d Cir. 1974) (disclosure of names of potential customers for commercial business does not overcome privacy interests).

person." Under the present system, after the balance has been struck in favor of release to a particular requester, access may not be denied to any other requester, even if the balance would have been struck in the opposite direction had that person filed the initial request. Granting special status to certain requesters, although not contemplated under the present Act, would be one solution to this dilemma.

An improved information system would provide special access to legitimate independent researchers while limiting the general access of the public. Certainly the system would be more rational if it treated the two access problems separately. This approach would not only decrease government costs—both in money and operational efficiency—but it would result in a substantial increase in the amount of useful and meaningful information actually reaching the public.

The major problem with this approach would be in adequately and fairly defining the size of this special access group. Only independent researchers should be included—those representing parties engaged in dealings with the government would not be granted special status. Degree candidates and recognized scholars, except those who serve as consultants to private interests, should be included. Unlike the media, scholars may be willing to obtain access to certain data conditioned on their agreement not to disclose any specific information obtained from the agency.

3. *Special Interest Groups.* Information gathering and dissemination is one of the most important functions of an interest group's representative. Information is often the primary source of a representative's ability to influence legislation or regulation; interpretation of information is an important means of serving and controlling representatives' constituents.¹⁴³ Thus, access to government information is important for representatives of noneconomic special interest groups as well as for representatives of large economic interests. Congress recognized that the FOIA could serve the public by enhancing the impact of interest group representatives. Clearly, Congress meant to provide a tool for public interest representatives,¹⁴⁴ but it must have also recognized that this tool would be used by economic interest groups.

Despite the aversion to lobbyists, students of government agree that they serve an essential function in the operation of government. Representatives of special interests have incentives to communicate

143. L. DEXTER, *HOW ORGANIZATIONS ARE REPRESENTED IN WASHINGTON* 104, 113, 130 (1969).

144. Nader representatives dominated the legislative activity relating to 1974 amendments.

constituent sentiments to legislators and regulators; by serving their special interest, they help decisionmakers maintain contact with the governed. They also have incentives to digest and distribute information regarding certain government operations. Thus, with a few changes, special interest representatives could be utilized to enhance the education potential of a public information system.

However, no matter how evenly the system distributes public information, ninety percent of the citizens are left out of the power structure.¹⁴⁵ Consequently, the value of the services performed by group representatives in the system must be weighed against the danger of affording them additional leverage to resist government efforts to protect the general public. Recent legislation that exposes administrative decisionmaking may serve to increase the power of special interests to the detriment of the public interest.

Although interest group representatives could be used to deliver information to segments of the public, they should remain end-use consumers. On balance, incorporating special interest representatives as agents to digest and disperse information does not seem justified and would not serve the same goals as incorporation of the media. Special interest representatives do not disperse information widely enough to benefit the general public. Indeed, the major criticism of the present system is that such representatives do, in fact, have far greater access to government information than the general public.

4. *Proprietary Information Gatherers.* Some entrepreneurs have recognized the existence of a market for digested government information and have established businesses to carry out this function in specialized areas. The most obvious of these are the companies that use government sources to develop sophisticated mailing lists. Other companies maintain and distribute information released by certain agencies.¹⁴⁶

These organizations are not yet significant enough to allow evaluation of their proper role in a public information system. Clearly, they could be used to make government information available to customers. Nonetheless, no special access should be provided for these organizations. They should be confined to the more limited "any person" access provided for the general public and further confined to certain classes of documents.

145. E. SCHATTSCHNEIDER, *THE SEMI-SOVEREIGN PEOPLE* (1960).

146. Montgomery, Peters & Weinberg, *The Freedom of Information Act: Strategic Opportunities and Threats*, 19 *SLOAN MANAGEMENT REV.* 1 (1978); see, e.g., *Information Acquisition Corp. v. Department of Justice*, 444 F. Supp. 458 (D.D.C. 1978).

5. *Government as a Public Information Medium.* The institution with the greatest potential for making the public information system work is the government itself. At present, the agencies are passive participants in the system; they accumulate information and distribute it. They have no duty under the FOIA to create documents and cannot be forced to make information available in a useful form. The agencies are merely conduits through which information flows.

Indeed, the greatest practical weakness of the Freedom of Information Act is its failure to trust the bureaucracy to transform amorphous public records into material that would be useful to the public.¹⁴⁷ The bureaucracy has special access and knowledge that would enable it to accomplish this task. However, there is a general lack of confidence in the bureaucracy's propensity for furthering public information goals. This is the result of misplaced blame for the failure of the system. When judging the performance of government officials in the present system, all of the reasons for a poor system must be noted; for along with innate bureaucratic diffidence and secrecy, there are many public interest explanations for the failure of government officials to respond to the Act with satisfactory fervor. A system can be devised that would impose an affirmative duty on the agencies to insure that the public is informed about official activities. Realistically, citizen education must depend to a large extent on the agencies themselves to edit and distribute public information. Congress should not focus on releasing existing documents but should compel agencies to provide useable information. For example, Congress could earmark funds in each agency's budget to be used exclusively for purposes of making information available to the public in a useable form. Thus, in order to tap these funds, the agencies themselves would have to devise a means for informing the public. The device chosen would be suited to each agency's unique circumstances. Legislative budget and oversight review would ensure development of a viable approach to citizen education.

Agencies could adopt several alternatives for carrying out such a mandate. More complete press releases and other general distributions hold substantial potential for informing the public and making information available in a form that can be used by the media. If releases are to replace partially indiscriminate access, Congress must compel disclosure of such things as internal decisions and background mate-

147. "Moreover, by enacting the Freedom of Information Act, Congress rejected the contention that voluntary agency disclosure is sufficient to guarantee 'the right of persons to know about the business of their government . . .'" *Rocap v. Indiek*, 539 F.2d 174, 180 (D.C. Cir. 1976).

rial.¹⁴⁸ Agencies should also be required to maintain public information libraries that would make certain government files readily available to the public. The present system offers access to most government documents only after a request and file search. Such a process is slow and quite costly, especially in relation to the usefulness of the information released.¹⁴⁹ Establishment of libraries would force the agencies to organize and screen the documents prior to any request. Thus, the documents would be available almost immediately, and at a much lower cost to both the requester and the government.¹⁵⁰ In addition, individuals could search the available files themselves if unsure of the information required.¹⁵¹ This process would necessarily give the agency control over the information available, but policing procedures could ensure the accessibility of information necessary for purposes of evaluating agency performance.

Similarly, agencies should make better, although not necessarily more, use of publications. Recently, congressional committees have published much of the information submitted to them in their investigations. Agencies, too, could compile and publish significant material relevant to the most important decisions. Again, the agency would have to be trusted to edit and organize the material because, in any agency action, only a small amount of the material is significant. The agency staff would be most qualified to compile such material.

Federal Register publication presents another problem that clearly calls for considerable reform.¹⁵² The direction for reform, as in the rest of the public information system, should be toward decreasing the

148. See S. 2490, 95th Cong., 2d Sess. (1978) (a bill to reform administrative procedure including an increase in agencies' duty to inform the public).

149. The six most common complaints discussed by the administrative confereuce study relate to this mechanism. Giannella, *Agency Procedures Implementing the Freedom of Information Act: A Proposal for Uniform Regulations*, 23 AD. L. REV. 217, 221-25 (1971).

150. If the information is already in libraries, then search fees will be inappropriate. Note, *The Freedom of Information Act: A Seven Year Assessment*, 74 COLUM. L. REV. 895, 903 (1974). Cf. *SDC Dev. Corp. v. Mathews*, 542 F.2d 1116 (9th Cir. 1976) (library reference materials stored in National Library of Medicine's computer data bank were not "records" required to be made available at nominal charge under FOIA). Nonetheless, under current judicial decisions, it is highly unlikely that an agency will be able to use fees to recapture any but a small portion of the cost.

151. Provision should also be made for cost recapture where the government information system accrues to the benefit of a private interest that should bear the expense rather than the general public. *E.g.*, *SDC Dev. Corp. v. Mathews*, 542 F.2d 1116 (9th Cir. 1976). The fees should be returned to the budget of the agency concerned, not the United States Treasury, as is required under the User Fee Statute, 31 U.S.C. § 483(a) (1976).

152. It is presently very difficult to determine what must be published. K. DAVIS, *SEVENTIES 72-75*; accord, *Anderson v. Butz*, 550 F.2d 459, 462-63 (9th Cir. 1977) (instruction held void for failure to publish because policy pronouncements clearly must be published where they have "significant impact"); *Lewis v. Weinberger*, 415 F. Supp. 652, 658-61 (D.N.M. 1976).

amount of information disclosed while increasing the usefulness of that information.¹⁵³ Publication in the Federal Register in a meaningful form will enhance the public educational impact of the information system. To this end, careful study of a modification of section (a)(1) of the present Act should be made. A modest language change would clear up some ambiguity and limit the publication requirement.¹⁵⁴ A major legislative investigation is recommended, however, as a foundation for a total reworking of the requirements for publication in the Federal Register and the Code of Federal Regulation.

Not only should agencies be assigned an active role in informing the public about their own operations, but they should also be required to do more to further the other open government goals. Mere disclosure of documents may, to some extent, serve the appearance of public decisionmaking, but even this appearance is illusory if the weight of disclosure actually hides most decisionmaking. The Sunshine Act, for example, has been a failure because only special interests have the time or inclination to attend the myriad of agency meetings.¹⁵⁵ While broad disclosure has helped somewhat to create an appearance of open government, it does not enlighten the public as to the reasons for various government decisions.

This goal could be achieved by requiring agencies to provide the rationale for their decisions whenever feasible. Disclosure of documents showing the basis for a decision will rarely interfere with the decisionmaking process. Only by requiring the government itself to focus on the reasons for its informal action will real openness result. The FOIA cannot be used to compel agencies to provide reasoned opinions.¹⁵⁶ Therefore, realistically open decisionmaking will be promoted by legislation that provides for greater disclosure of the reasons for informal action and for other efficient processes such as notice and writ-

153. The publication requirement suffers from the same defect as the rest of the Act: there is so much indiscriminately disclosed information that there is, in essence, no notice. Johnson, *A New Fidelity to the Regulatory Ideal*, 59 GEO. L.J. 869, 880-81 (1971). In 1977, the Federal Register contained 65,603 pages. In 1978, the total was 61,261 pages.

154. See the proposal set out in the Appendix.

155. Similarly, Congress opened up such traditionally closed proceedings as committee "markup" sessions. The Senate: Legislative Reorganization Act of 1970, 2 U.S.C. § 190a-1(b) (1970) (*repealed*, S. Res. 9, § 2, 94th Cong., 1st Sess., 121 Cong. Rec. 19337 (1975)); The House: H.R. Res. 259 (93d Cong., 1st Sess., 119 Cong. Rec. 6422 (1973)). "Markup" is the meeting among committee members in which they revise the bill in light of the hearings before reporting to the full chamber. This program has also had predictably negative results in terms of better government. F. CUMMINGS, *CAPITOL HILL MANUAL* 46-47 (1976).

156. *Grumman Aircraft v. Renegotiation Bd.*, 421 U.S. 168 (1975); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).

ten comment.¹⁵⁷ The agencies must be placed under an affirmative duty to explain their actions rather than merely providing interested persons with inasses of documents.

All of these proposals incorporate the bureaucracy into the process of transforming the information from an amorphous inass into concise, meaningful parcels. Although the propensity of bureaucrats to ignore specific congressional mandates is vastly overstated, policing of their performance in the system is essential. This policing can be effective. The work of the Justice Department's Freedom of Information Committee was very effective in monitoring agency information policy,¹⁵⁸ and the Justice Department, through its role as attorney for the government, continues to take an aggressive role in increasing public access to information.¹⁵⁹ Administrative enforcement of a public information policy is more effective and efficient than judicial enforcement and should be more widely used.

Ironically, the most concise information regarding governmental performance is contained in the policymaking portion of internal government documents, and this information is protected from disclosure by exemption five. Immunity under this exemption is one of the few established notions under the Freedom of Information Act.¹⁶⁰ How-

157. Open reasoning also improves government decisionmaking. *See generally* K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969). Nonetheless, adding procedures to informal decisionmaking is dangerous business, requiring subtle analysis, for procedures can destroy the efficiency of the process and in the area of informal action, efficiency is usually the equivalent of fairness. *See generally* Verkuil, *supra* note 96. This danger can be overcome by tailoring each process to the individual informal decisionmaking and not by any generalized requirement.

158. H.R. REP. NO. 1419, *supra* note 129, at 68, *reprinted in* Sourcebook II, at 75.

159. Letter from Attorney General Bell advising the agencies that the Department of Justice will not defend agency decisions in cases where it is not in the public interest to do so. 3 ACCESS REP. 1-2 (May 17, 1977).

160. Inter-agency and intra-agency memoranda may be withheld subject to two limitations: factual, non-privileged material generally must be released, and policy material that constitutes secret agency law must be released. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975). Factual material may be protected only if inextricably intertwined with policymaking material. *EPA v. Mink*, 410 U.S. 73, 90-92 (1973). There are two reasons for the fact/opinion distinction: first, the drafters wished to protect the free flow of ideas; second, the last phrase of the exemption is said to incorporate the discovery laws, and government information is privileged only to the extent that it relates to policymaking. Professor Davis finds that Congress emphasized the former, the protection of free flow of ideas, and not the more conceptual rationale based on the official document privilege. K. DAVIS, SEVENTIES 92-93.

Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to "operate in a fishbowl."

H.R. REP. NO. 1497, *supra* note 52, at 10, *reprinted in* Sourcebook I, at 31. The District of Columbia Circuit agreed: "In the Federal Establishment, as in General Motors or any other hierarchical giant, there are enough incentives as it is for playing it safe, and listing with the wind; Congress

ever, the need for protection of all internal memoranda is overstated. The free flow of ideas rationale loses its vitality as time passes after a final determination is made on the matter for which the document was drafted. Furthermore, if agency staffs were aware that their work product would become a matter of public record at some future time, the quality of their work might improve.¹⁶¹ Staff members will continue to give agency officials their opinions because it is their job to do so. The decisionmaking process as a whole may benefit from criticism of the internal work product or the decisional process that resulted in an official decision.

The electorate would be better informed as to the rationale for a particular decision if important internal documents were subject to disclosure at some future date. Agencies would find such a requirement feasible as compared to the present system, which consumes substantial editing resources under the fact/opinion distinction. The limitation placed on the fifth exemption should be founded on the relevancy of the document to government policymaking.

The Federal Trade Commission has adopted a policy favoring release of all parts of internal memoranda. Even the policy portions of the memoranda are released three years after the file in which they are contained has been closed.¹⁶² None of the paralysis that was predicted under such an approach has resulted. Indeed, decisionmaking at the FTC appears to be totally unaffected. Three years may be too long a period, but there may be good reasons for delaying the disclosure for some period of time after the decision. As a compromise, release of internal memoranda is recommended one year after the decision to which they relate became final. Of course, agencies would be free to adopt a shorter time period.

Agencies have raised substantial opposition to the universal release of internal opinions, and Congress and most commentators have agreed with the arguments opposing such release. Arguments in favor of release revolve around the fact that opinion portions of government memoranda are the best source of information regarding agency performance.

clearly did not propose to add to them the threat of cross-examination in a public tribunal." *Ackerly v. Ley*, 420 F.2d 1336, 1341 (D.C. Cir. 1969).

161. *Tennessean Newspapers, Inc. v. FHA*, 464 F.2d 657, 660-61 (6th Cir. 1972). The Government in the Sunshine Act, 5 U.S.C. § 552b (1976), requires that agency meetings be conducted in public with certain exceptions. When an agency employee prepares a memorandum, he cannot be certain that his recommendation will not be disclosed in connection with an open meeting. The traditional "government privilege" is thereby substantially lessened.

162. To a large extent this policy was the result of a practical judgment that segregation of fact from policy was not worth the resources after the passage of a number of years.

In light of the opposition to release of all internal memoranda, a more limited alternative is offered. Release of internal documents, including opinion portions, would be compelled only when a document relates to a decision defined under categories similar to subsections (a)(2)(A) or (B). The one year hiatus for such release would be retained if Congress finds, after careful study, that sound internal decisionmaking demands a time lapse between the use of the internal memorandum and its disclosure to the public. This limited approach would still disclose the information necessary to evaluate the agency's decisionmaking process but would not require the burdensome disclosure of internal documents that are merely the transmission of paper unrelated to any constructive process of the bureaucracy.

On the other hand, since the fact/policy segregation appears to be an unfruitful waste of agency resources, if this limited alternative is adopted, it should be in lieu of a fact/policy distinction and not in addition to that distinction. Internal memoranda disclosed under the public information system should be available in their entirety.

Release of internal memoranda merely opens up government information already formulated. The real solution lies in agencies actually working to educate citizens regarding the agencies' individual performances. The disclosure of internal documents is merely a safeguard against the withholding of information important to evaluation of agency performance.

6. *Conclusion and Preliminary Suggestion for Improving the Performance of the System Through Informational Media.* Access to raw government documents does not actually enable the public to evaluate governmental performance. For a citizen education system to be successful, it must compress the raw material into concise, manageable units. At present, the government is a passive instrument in making the information realistically available to the public. Agencies should be required to do much of the work necessary to make information available to the general public in a useful form. Such a process would require the public to place its trust in the agencies. However, this trust can be supported by special appropriations with attendant congressional subcommittee oversight and by more administrative enforcement.

V. PUBLIC INTEREST FAILURE: FAILURE TO CONSIDER THE RIGHTS OF THOSE WHO DEAL WITH THE GOVERNMENT

When Congress amended the Administrative Procedure Act in 1967¹⁶³ by enacting the Freedom of Information Act, one of its principal aims was the elimination of broad agency discretion to withhold documents and to determine who should have access to them.¹⁶⁴ The FOIA provides that, subject to nine specific exemptions, each agency shall make available to any person, on request, all agency records.¹⁶⁵ Numerous records submitted to the government, either voluntarily or under compulsion, now fall within the purview of the FOIA. It cannot be in the public interest to subject all of these records to disclosure without regard to their relevance to a particular decision or their role in the decisionmaking process. Nevertheless, this is the effect of the Act.

Despite the fact that personal or proprietary information submitted to the government is subject to disclosure under the FOIA, individuals and business entities continue to risk public disclosure by submitting information. Only a discrete class of this information should be subject to the disclosure requirements of the Act; the remainder should be exempted from disclosure. There is insufficient public interest in these essentially private records to require public disclosure merely because they are contained in the files of a federal agency.¹⁶⁶ Such a limitation is necessary to correct the excesses of the free-wheeling access approach that encompasses all records submitted to an agency. It is only when a decision itself must be disclosed through the public information system that the underlying records should be subject to disclosure.

Fundamentally, a balance must be struck, not only between the

163. Pub. L. No. 90-23, 81 Stat. 54 (amending 5 U.S.C. § 552 (1970)). The FOIA was subsequently amended in 1974 (Pub. L. No. 93-502), but the changes effected by that amendment (principally in establishing time limits for agency action and in narrowing the scope of exemption seven) are not within the scope of this Article.

164. The Public Information section of the Administrative Procedure Act provided in pertinent part: "(c) Public records—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found." Administrative Procedure Act of 1946, Pub. L. No. 79-404, § 3(c), 60 Stat. 237. As Congress later recognized, "Under the present section 3, any Government official can under color of law withhold almost anything from any citizen under the vague standards—or, more precisely, lack of standards—in section 3." S. REP. NO. 1219, 88th Cong., 2d Sess. 10, *reprinted in* Sourcebook I, at 95.

165. 5 U.S.C. § 552(a)(3), (b) (1976).

166. One of the authors has previously urged the recognition of a "citizen-government privilege." Koch, *The Freedom of Information Act: Suggestions for Making Information Available to the Public*, 32 MD. L. REV. 189, 217-19 (1972); *accord*, Miller & Cox, *supra* note 46, at 229. Such a privilege, like many other discovery privileges, would require balancing of competing interests.

public interest and the government's interest, as in exemption five,¹⁶⁷ for example, but also between the public's interest and the privacy interest of the person submitting the information. Thus, three factors must be considered: the effect of disclosure on the government, the perceived public benefit of disclosure and the possible harm to the submitter of the information.

A. *The Absence of Sufficient Protection for Private Information.*

In order to determine what personal or commercial information submitted to the government should be subject to disclosure, it is first necessary to recognize the various types of information submitted, the reasons for the submissions and the purposes for which the information is to be used. Individuals who submit information to the government do not always do so voluntarily. Even when production of information cannot be compelled, in many cases the submission of that information is not truly voluntary. For example, many persons are required to submit personal information to the government in order to obtain social security or medicaid benefits. The fact that one must either submit the information or forego the benefit belies the "voluntary" nature of the submission.

Often, proprietary information must be submitted in order to obtain a government contract¹⁶⁸ or to be selected as a government concessionaire.¹⁶⁹ In addition, personal information is often obtained by the government from someone other than the person concerned.¹⁷⁰ For ex-

167. Exemption five, 5 U.S.C. § 552(b)(5) (1976), protects government memoranda "which would not be available by law to a party other than an agency in litigation with the agency." This language has been held to include the traditional privilege available to the government in litigation, often called "executive privilege," which protects the internal deliberations of the agency as well as the attorney-client privilege. *Federal Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 99 S. Ct. 2800, 2809 (1979); see *EPA v. Mink*, 410 U.S. 73 (1973); *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), *opinion after remand*, 523 F.2d 1136 (D.C. Cir. 1975); *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958) (Recd. J.). The *Merrill* case also recognized a qualified privilege for confidential commercial information, based on civil discovery principles. 99 S. Ct. at 2810-12. Exemption five recognizes that a balance must be struck between the public's need for information concerning the government and the government's need to protect some of its deliberations. Thus, courts have recognized that purely factual information must be released, while deliberative matter may be withheld. See *Vaughn v. Rosen*, 484 F.2d at 824, 826.

168. *E.g.*, *Burroughs Corp. v. Schlesinger*, 403 F. Supp. 633 (E.D. Va. 1975); *Robertson v. Department of Defense*, 402 F. Supp. 1342 (D.D.C. 1975).

169. *E.g.*, *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (National Parks I), *opinion after remand sub nom.*, *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (National Parks II).

170. The Privacy Act, 5 U.S.C. § 552a(e)(2) (1976) requires that such information be collected from the person concerned, to the extent practicable, when it may result in adverse determination of an individual's rights, benefits and privileges under federal programs.

ample, an employer may be required to submit detailed information concerning his employees.¹⁷¹ Information is also submitted in response to compulsory process or the threat thereof.¹⁷²

Information submitted is used for a variety of purposes by the numerous government agencies. It is commonly used to determine whether a violation of law has been committed. In the event that no violation is found, the investigation may be closed, but the documents will generally be retained by the government for a certain period of time.¹⁷³ Thus, personal or business information that merely happens to be in the possession of the government is often the subject of FOIA requests. Prior to determining the applicability of an exemption, the fundamental question arises of whether public access to essentially private information is warranted. Such a determination must be based upon an examination of the purposes served by public access to private documents in the possession of the government.

Although the basic purpose of the FOIA is to inform the public with regard to governmental operations, the public's right to information is not unlimited. It is generally balanced against the agency's ability to conduct effective investigations if the documents are disclosed (*e.g.*, exemption 7(A)¹⁷⁴ and portions of exemption four¹⁷⁵), the agency's ability to carry on meaningful internal decisionmaking (*e.g.*, exemption five¹⁷⁶) or the government's ability to maintain essential national security (exemption one¹⁷⁷). Thus, regardless of the importance of an investigation or adjudication to the public, an agency is generally able to protect most information contained in active law enforcement files even when no further legal action on the files "is in prospect."¹⁷⁸

171. *E.g.*, Metropolitan Life Ins. Co. v. Utery, 426 F. Supp. 150 (D.D.C. 1976).

172. *E.g.*, income tax returns.

173. The regulations of the National Archives and Records Service, General Services Agency, allow destruction of records after a period of five years.

174. 5 U.S.C. § 552(b)(7)(A) (1976). Investigatory records compiled for law enforcement purposes are exempt to the extent that production would "interfere with enforcement proceedings." *E.g.*, New England Medical Center Hosp. v. NLRB, 548 F.2d 377 (1st Cir. 1976); Title Guarantee Co. v. NLRB, 534 F.2d 484 (2d Cir.), *cert. denied*, 429 U.S. 834 (1976).

175. Exemption four, 5 U.S.C. § 552(b)(4) (1976), has been construed to exempt "commercial or financial" information "if disclosure . . . is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnote omitted). Only the first part of the test is directly related to the agency's ability to function.

176. See note 167 *supra* and accompanying text.

177. Exemption one protects properly classified national security information. 5 U.S.C. § 552(b)(1) (1976).

178. National Pub. Radio v. Bell, 431 F. Supp. 509, 512 (D.D.C. 1977).

Similarly, it is generally accepted that government cannot "operate in a fish bowl," and thus regardless of the importance of expression of individual views, exemption five recognizes that the right of public access to government records is limited by the needs of the government and by the public interest in enabling the government to function efficiently.¹⁷⁹

For information submitted to the government by persons or businesses, Congress has created exemptions four and six, which recognize that not all such information should be subject to disclosure. Documents that are essentially private may come into the temporary possession of the government,¹⁸⁰ and Congress has recognized the need for a balancing test that weighs the legitimate interest of the public against the interest of the provider of information. Thus, commercial information is exempt if it is "privileged or confidential,"¹⁸¹ and personal information is exempt where disclosure would constitute "a clearly unwarranted invasion of personal privacy."¹⁸²

The current procedure for balancing competing interests is inadequate for several reasons. First, it is difficult to apply. Since a balance must be struck for each of the records in the government's possession, an agency and a court on *de novo* review¹⁸³ often must conduct a full-scale evidentiary inquiry into the nature and extent of any possible harm resulting from the disclosure. In addition, the public interest, and possibly the private interest of the requester, should be considered.¹⁸⁴ The person submitting the document or information contained in the record has the paramount interest in nondisclosure but often is not a party to the agency "proceeding"¹⁸⁵ that determines whether a request for that document will be granted or denied. Although the submitter may receive notice of a FOIA request, which is generally a matter of public record, he will have no effective means of participation in the decision, due to the *ex parte* nature of the decisionmaking process. Indeed, the requirement that initial requests be processed within ten

179. See generally Davis, *supra* note 48, at 794-97.

180. There is another class of confidential information that consists of information (rather than private documents) submitted to the government. The distinction is between government forms (such as census or the 10K forms) containing information extracted by the submitter from his own records and the wholesale transfer of private documents to the government.

181. 5 U.S.C. § 552(b)(4) (1976).

182. *Id.* § 552(b)(6).

183. *Id.* § 552(a)(4)(B).

184. Such a hearing was held in *Thrifty Drug Stores Co. v. FTC*, 1976-2 Trade Cas. ¶ 61,194 (D.D.C. 1976); *cf.* *Planning Research Corp. v. FPC*, 555 F.2d 970 (D.C. Cir. 1977) (hearing before an administrative law judge).

185. The proceeding is nonadjudicative, there are no formal parties and there is no opportunity to respond to the arguments of the agency staff against disclosure.

working days and appeals within twenty working days simply does not allow an agency to afford a meaningful opportunity for participation in the decision to grant or withhold records to anyone outside the agency.

It is curious to note that on de novo review courts now routinely make more searching inquiries—including holding hearings, taking depositions, and affording the right to cross-examine¹⁸⁶—than are possible for any agency.¹⁸⁷ Thus, by filing a law suit, a requester, or possibly the submitter seeking to prevent disclosure, will obtain both a fuller analysis of the issues and quite possibly the first complete presentation of all of the issues because the district court is not operating under the same time restraints. After the district court proceeding is completed, the agency may realize that its initial decision was incorrect. In view of the massive volume of requests and the strict time deadlines, the agencies cannot possibly comply with the procedural formalities that must be observed in a court proceeding.

Second, the major deficiency of the present interpretation of exemption four is that, in the abstract, it fails to provide any guidance whatsoever. Unlike the other exemptions in the FOIA, an agency's decision to withhold records under exemption four cannot be based upon a mere analysis of the data itself. The courts have required that the agency determine whether disclosure will cause substantial competitive injury. Although some agencies may have the expertise necessary to make this determination, most do not. For any agency, such a determination can be made only after an analysis of the requested data, the structure of the relevant business or industry, and the company's competitive position within that industry. Even those agencies that have some experience in these matters will encounter great difficulties in making such a determination in the abstract context in which it arises under the Act. Another major flaw in exemption four is the absence of any requirement that the real party in interest—the submitter of the information—be allowed to participate in the determination.

B. *Judicial Attempts to Protect Private Information in Government Files.*

In response to the problem of protecting private information, several courts allowed "reverse-FOIA" suits in which information submit-

186. *E.g.*, *Thrifty Drug Stores Co. v. FTC*, 1976-2 Trade Cas. ¶ 61,194 (D.D.C. 1976).

187. In one instance, an agency did assign a FOIA appeal to an administrative law judge for a hearing. The hearing stage lasted 39 days (with two days of actual hearings); review by the agency consumed an additional 52 days. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FEDERAL ADMINISTRATIVE LAW JUDGE HEARINGS, 158-59 (1977). See *Planning Research Corp. v. FPC*, 555 F.2d 970 (D.C. Cir. 1977).

ters challenged the propriety of the disclosure.¹⁸⁸ As a result of the Supreme Court's decision in *Chrysler Corp. v. Brown*,¹⁸⁹ this option is no longer available. The Court held "that Congress did not limit an agency's discretion to disclose information when it enacted the FOIA. It necessarily follows that the Act does not afford [submitters of information] any right to enjoin agency disclosure."¹⁹⁰ Chrysler was, however, permitted to base its challenge of the agency's disclosure on section 10(e) of the APA¹⁹¹ and the Trade Secrets Act.¹⁹²

The pressure created by the inequity of the present disclosure system compelled lower courts to recognize the reverse-FOIA suit. The same pressure may be seen as a factor behind the Court's construction of the Trade Secrets Act. The usefulness of the APA section 10-Trade Secrets action remains to be seen. But, like the reverse-FOIA suit, the Trade Secrets solution is a stop-gap measure. It does not attempt to solve the underlying problem—determining the instances in which the public right to access should be balanced against the right of privacy and the factors which should be used in striking that balance.

C. *Some Existing Proposed Solutions.*

One possible solution that has not been explored by the courts in depth is the possibility of interpreting the FOIA to exclude from its coverage most private records submitted to the government. One might argue that the definition of agency records subject to disclosure under the Act should be interpreted to exclude ordinary personal and corporate records submitted to agencies in response to agency subpoenas.¹⁹³

188. See generally Note, *Protection from Government Disclosure—The Reverse-FOIA Suit*, 1976 DUKE L.J. 330. See *Consumers Union v. Consumer Prod. Safety Comm'n*, 565 F.2d 721 (D.C. Cir. 1977), cert. granted, vacated and remanded sub nom. *GTE Sylvania, Inc. v. Consumers Union*, 434 U.S. 1030, remanded 590 F.2d 1209 (D.C. Cir. 1978). *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), cert. denied, 431 U.S. 924 (1977); *Charles River Park "A", Inc. v. Department of Hous. and Urban Dev.*, 519 F.2d 935 (D.C. Cir. 1975).

189. 99 S. Ct. 1705 (1979).

190. *Id.* at 1714.

191. 5 U.S.C. § 702 (1976).

192. 18 U.S.C. § 1905 (1976).

193. Under the FOIA, an agency need only make "records" available on request. 5 U.S.C. § 552(a)(3) (1976). Documents such as handwritten notes, *Porter County Chapter of the Izaak Walton League of America, Inc. v. United States Atomic Energy Comm'n*, 380 F. Supp. 630 (N.D. Ind. 1974), and personal papers, *Nixou v. Sampson*, 389 F. Supp. 107 (D.D.C.), order stayed sub nom., *Nixon v. Riehey*, 513 F.2d 430 (D.C. Cir. 1975), dismissed as moot, 437 F. Supp. 654 (D.D.C. 1977), have been held not to constitute agency records within the meaning of the FOIA. Most courts faced with FOIA requests for business documents contained in agency files have regarded the documents as nonexempt, and have ordered disclosure without pausing to consider whether the documents actually constitute records under the FOIA. *Consumers Union of United States, Inc. v. Saxbe*, 1974-1 Trade Cas. ¶ 75,057 (D.D.C. 1974); *M.A. Schapiro & Co. v. SEC*, 339 F. Supp. 467 (D.D.C. 1972); *Frankel v. SEC*, 336 F. Supp. 675 (S.D.N.Y. 1971), rev'd on other

Forms or questionnaires specially prepared for a government agency would constitute agency records subject to disclosure under the Act. There are several flaws in this interpretation that would confirm the essentially private nature of records surrendered to the government. First, it does not attempt to explain the applicability of the disclosure requirement to *some* private records contained in government files; instead, it seeks to distinguish between various records on the basis of property law concepts of possession and bailment, which are inadequate to serve the fundamental purpose of the FOIA. In addition, such an interpretation would require that protected private documents be returned to the submitter at the close of the relevant investigation in order to prevent the use of those documents in a later or connected proceeding. This would have the unfortunate result of preventing public access to the records supporting the governmental decision.¹⁹⁴

Another possible approach would give agencies the authority to make commitments of confidentiality which would then be recognized under the FOIA.¹⁹⁵ Such promises could be recognized under subsection (b)(3) as a statutory exemption from disclosure. However, such a grant of authority to the agencies would not be consistent with the FOIA goal of limiting agency discretion. Indeed, it would be tantamount to a return to the "double-barreled loophole"¹⁹⁶ of the 1946 version of the FOIA, providing access only "to persons properly and directly concerned except information held confidential for good cause found."¹⁹⁷

grounds, 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972). *But see* Levi Strauss & Co. v. FTC, No. C76-735 (N.D. Cal. July 9, 1976); *Green v. Kleindienst*, 378 F. Supp. 1397 (D.D.C. 1974). *Cf.* 44 U.S.C.A. § 3301 (West Supp. 1979) (archival definition of records). It is the position of the Office of Legal Counsel of the Department of Justice that such documents are indeed agency records subject to disclosure under the FOIA. R. Saloschin, T. Newkirk & D. Gavin, A Short Guide to the Freedom of Information Act 32-33 (Dec. 1977), *reprinted in* FREEDOM OF INFORMATION COMM., OFFICE OF LEGAL COUNSEL, U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION CASE LIST app. E (Feb. 1978). Nevertheless, in the recent case of *Goland v. CIA*, 43 Ad. L.2d 407 (D.C. Cir. 1978) (Bazelon, J., dissenting), the dissent stated that the court held that certain documents in the possession of an agency were not agency records, but rather congressional records on loan to the agency and, thus, not subject to the Act.

194. An individual's right to information concerning governmental operations may often be as important as the right to privacy and the right to confide in the government. H.R. REP. NO. 1497, *supra* note 52, at 6, *reprinted in* Sourcebook I, at 27.

195. *Hearings on S. 1142, supra* note 3, at 225 (statement of Elliot Richardson). The disfavored House Report on the 1960 amendments indicated that such commitments would exempt documents under subsection (b)(4). H. REP. NO. 1497, *supra* note 52, at 10, *reprinted in* Sourcebook I, at 31. That appraisal has been rejected by the courts, presumably since it would allow agencies to create precisely the same exemption that existed under the 1946 law. *See* *Petkas v. Staats*, 501 F.2d 887 (D.C. Cir. 1974); *Robles v. EPA*, 484 F.2d 843 (4th Cir. 1973).

196. S. REP. NO. 1219, *supra* note 164, at 10, *reprinted in* Sourcebook I, at 95.

197. Administrative Procedure Act of 1946, Pub. L. No. 79-404, § 3(c), 60 Stat. 237.

A final, almost desperate solution would require revision of the *National Parks & Conservation Association v. Morton*¹⁹⁸ standard that compels the agencies to weigh the possible business harm resulting from a decision to claim exemption four.¹⁹⁹ Efforts to simplify the application of this standard are not likely to succeed. A test that would require an agency to make a decision based on information not in its possession is not feasible. In addition, the test is fundamentally ambiguous, requiring a case-by-case, document-by-document determination. These ad hoc solutions cannot replace a thoughtful examination of the problem by the only branch of government capable of producing a comprehensive solution—the legislature.

D. *Towards a Solution for Protecting Private Information.*

Most of the problems involved in administering the Act could be solved by narrowing the scope of private documents subject to disclosure. Disclosure would then be automatic and the problems associated with exemption four would not arise. The government obtains many different types of documents from various persons and for a variety of purposes. Only when decisions are based on these documents should the public have access to the underlying documents. The public's interest is in knowing whether government action taken on the basis of the documents was justified, consistent with past or future actions and in the public interest.

The first step in determining whether the underlying documents need be disclosed is an examination of the agency decision based on the documents. If that decision does not fall within the class of decisions similar to those defined in subsections (a)(2)(A) and (B) of the present FOIA, there is little public interest in disclosure. If the decision is one the agency need not publicly disclose, there is no reason to disclose the underlying documents. Certainly, if the private documents are merely a part of the agency's files, the public has no interest in their disclosure. The invasion of privacy which might result from such disclosure, even though very slight, cannot be justified.

Furthermore, not all documents submitted to an agency in the course of a subsection (a)(2)(A) or (B) type decision should be subject to disclosure. The public's interest is in knowing the *basis* for the decisionmaker's determination in a particular case. There is only a marginal interest in acquiring access to the complete file compiled by the

198. 498 F.2d 765 (D.C. Cir. 1974) (National Parks I), *opinion after remand sub nom.*, National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976) (National Parks II).

199. See note 175 *supra*.

agency in the course of its investigation. This interest is greatly outweighed by the burden imposed on the government by broad access. Thus, only those documents actually reviewed by an agency for purposes of a subsection (a)(2)(A) or (B) type decision should be subject to disclosure. By so limiting the class of documents subject to disclosure, the exemption concept may be completely eliminated. Rather than requiring interested persons to request access to such documents, agencies should be required to make them routinely available at the time the decision is made.

The thrust of this proposal is to compel the government to release the information necessary to citizen evaluation of agency performance. Private information that finds its way into government files—whether through actual compulsion, the submitter's self-interest or voluntary submission—does not serve this purpose and need not be released. This approach eliminates disclosure of private information in cases where there is no legitimate public interest. All other private information would be subject to automatic disclosure.

The only situations in which private information relating to important agency decisions should be protected are those involving a grant of assurance of confidential treatment. Such grants must be carefully limited and monitored. Thus, they should only be permitted where the agency has established, by rule, a carefully confined system. Both the rule and the agency's implementation of the rule should be subject to judicial and legislative review.

VI. TOWARDS A SOLUTION

In the Appendix, new draft legislation is set forth that would improve disclosure under the Freedom of Information Act. This proposal imposes an affirmative duty on the government to disclose information directly related to government decisionmaking. This approach would require legislation identifying those documents necessary for citizen evaluation of governmental performance and compelling disclosure of such documents. Federal Register publication under subsection (a)(1) already takes this kind of an affirmative duty approach. Several specified groups of documents must be published. The primary weakness of the Federal Register provision is the fact that it requires too much, not too little, publication.²⁰⁰ An amendment to subsection (D) of the list is suggested because the need for change here is so great. The amendment would make it clear that only legislative rules must be published

200. Although improvement in this list is no doubt possible, recommendations for such improvement are beyond the scope of this Article.

in the Federal Register.²⁰¹ Publication would be required for purposes of identifying and announcing the availability of nonlegislative rules and final opinions in formal adjudications. In addition, there should be an amendment to section 557 providing that copies of final opinions in formal adjudications be made available, and to section 553 requiring publication of statements of the basis and purpose for legislative rules.

The goal is to insure government disclosure of important information without the need for affirmative action by the public. Therefore, the legislative proposal incorporates the categories of subsections (a)(2)(A) and (B) and expands these categories to require disclosure of related background information.²⁰² Agencies would be compelled to make such information automatically available for public inspection and copying. Documents related to these categories of agency action contain most of the important information necessary for evaluation of an agency's performance. Under current interpretations, these two categories would include any action affecting the public and not relating solely to internal management. Since this provision discloses background information as well as the decision itself, disclosure under subsection (B) would include the "record" for all rulemaking.²⁰³ The provision compels the agency to make public, with or without request, all information in its files relating to significant agency action.

The public interest in the release of private information, including information relating to important government decisions, may not always outweigh the potential harm to privacy or to business interests. Therefore, Congress may wish to retain some protection for private information contained in agency files. The best approach to this problem would involve the use of individualized systems, developed by the agencies themselves, for granting assurances of confidential treatment. Circumstances under which assurances could be granted must be carefully limited; blanket grants or automatic form grants should not be

201. K. DAVIS, SEVENTIES 72-73.

202. 5 U.S.C. § 552(a)(2) (1976) requires the agency to make available, even without a request:

- (A) final opinions . . . made in the adjudication of cases;
- (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and
- (C) administrative staff manuals and instructions to staff that affect a member of the public.

There is less need for the documents relating to subsection (a)(2)(C) decisions. In contrast to subsections (a)(2)(A) and (B), which are intended to inform the public as to the substantive law of the agency, including so-called "secret law," the purpose of subsection (a)(2)(C) is to inform affected citizens of the administrative or procedural decisions of the agency. It is most important to disclose the existence of procedural rules; it is much less important to determine the alternatives explored and the reasons for their rejection. Therefore, publication of background information related to subsection (a)(2)(C) decisions does not appear to be necessary in this disclosure scheme.

203. *See* *Camp v. Pitts*, 411 U.S. 138 (1973).

established. The allegations of harm should be weighed in individual cases and confidentiality should be assured only after individual determinations. Even then, grants of confidentiality should be limited in duration. Business information, in particular, loses its importance quickly and should only be protected for a brief period of time.

Congress may also wish to provide special treatment for internal memoranda. In any event, agencies should be required to make all information previously withheld, including internal documents, available no later than one year after the final decision. Such an approach would balance the traditional need for free and frank discussion within the agency against the public right to access to agency records relating to important decisions. Agencies would be free to waive this exception and promptly disclose all memoranda in their possession. Automatic release of all information related to significant governmental decisions should adequately provide for public evaluation of governmental performance at a substantial savings to the public treasury. Nevertheless, it is recommended that some back-up release be provided by two provisions: periodic release of all internal memoranda and a mandate to establish individualized public information access programs.

Disclosure of only those documents related to significant agency decisions will adequately serve to inform the general public. However, if the validity of this conclusion is doubted, Congress may adopt the proposed provision making all internal memoranda available for public inspection and copying after the expiration of a five year period.

It is strongly recommended that Congress authorize and encourage agencies to develop their own access systems. The budgetary process provides the most effective means of assuring the effectiveness of these individual programs. The agencies themselves could establish programs for informing the public about their operations and decisions. Funding for these access programs would be available only if the agency established a viable system for conveying information. Periodic review by Congress and the Office of Management and Budget would prevent degeneration of the programs into mere public relation schemes.

Special access to governmental information should be granted to certain groups. It seems clear that programs allowing special access to scholars should be implemented. Consideration should also be given to providing special access to the media.

A brief provision for informal discovery, or access to participants, is included in this proposal. However, the problem is exceedingly complicated and a major, separate effort should be made in this direction. This effort might begin with a study by the Administrative Conference

of the United States. While the informal discovery problem should be treated separately from the citizen education problem, this proposal might serve as a temporary solution until Congress can produce a comprehensive and permanent legislative solution.

Enforcement of the proposed legislation requires careful analysis. Special provision for judicial review should eliminate any problem of standing, exhaustion or reviewability. The *de novo* standard of judicial review should be abandoned and agency action should be examined only for arbitrary or capricious behavior or abuse of discretion.²⁰⁴ The right of the general public under this proposal would be limited to insuring that the agency carries out the required access functions. Any person would be authorized to seek an injunction in federal district court to prevent noncompliance by an agency. Review of agency action would be available in the courts of appeal under sections 701-706 of the APA. Agencies would be required to promulgate rules designating which decisions are to be subject to automatic disclosure and to disclose the identity of any entities other than the agency that are responsible for decisions. Review of these rules, and all other implementing rules, would be available under a similar mechanism.

Administrative enforcement should be preferred over judicial enforcement. Perhaps an administrative agency should be established to assume responsibility for the public information system. At least two commentators have constructed a comprehensive proposal,²⁰⁵ and it should be weighed carefully in any restructuring of the public information system. This Article is not an attempt to improve on that scheme, but merely suggests temporary administrative audit and enforcement through the General Accounting Office.

The present subsections (c) and (e) have been retained. Because the proposal would omit the exemptions, the problem of congressional access should not arise. However, the retention of subsection (c) will effectively prevent such a problem. Subsection (e) is arguably more inclusive than the definition of "agency" in section 551 and hence should be retained. Disclosure requirements should have as broad a coverage as possible.

Subsection (d) would be repealed. Annual report provisions are very much in vogue but experience shows that annual reports to Congress are generally a waste of public funds. The budget request oversights are much more effective and should be relied on for effective congressional audit.

204. See text accompanying notes 43-44 *supra*.

205. Miller & Cox, *supra* note 46.

This proposal relies on the bureaucracy to perform functions that many have seen to be against their interest. However, the notion that the bureaucracy will "stonewall" any disclosure provisions is inaccurate; provisions for routine disclosure of discrete classes of information will encourage agencies to comply with a reasonable statute designed to accommodate the interests of government, persons dealing with the government and the public at large. Indeed, the proposal can be seen as a logical extension of the Sunshine Act.

VII. CONCLUSION

Congress has constructed a public information system by enacting the Freedom of Information Act, the Privacy Act and the Sunshine Act, and through House and Senate Rules and disclosure legislation referring to specific agencies such as the IRS. This piecemeal legislation has failed to create a unified system. A major congressional effort should be made to develop a comprehensive public information system. This will require a new approach to the disclosure problem. The authors have seen the problem from the perspective of those who attempt to release information under the Act. The present system fails, not only with regard to adequate dissemination of information about government, but also in terms of the overall public interest. It has not improved the quality of government or the ability of the government to operate in the public interest, and it cannot do so without disproportionate cost to those same values.

An amended version of the present Freedom of Information Act follows. These amendments attempt to cure only a few of the problems of the present public information system. The adoption of these proposals would be only a beginning. The entire public information system must be subjected to careful scrutiny and substantial reform. The operations of the government have changed dramatically since the last comprehensive review of the public information delivery system in 1946. This Article proposes that Congress step back and determine the goals of the system and design a comprehensive scheme to provide the maximum public information with the minimum disruption of government.

APPENDIX

To Amend the Public Information Section of the Administrative Procedure Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

Sec. 1. *Short Title.* This Act may be cited as the "Public Information Act of 19—."

Sec. 2. *Purpose.* Congress intends to improve the efficacy and efficiency of the mechanism for making information about the performance of government available to citizens and the mechanism for providing access to information necessary to participation in administrative proceedings.

Part I

Sec. 3. *Federal Register.* Subsection (a)(1)(D) of Section 552 of Title 5 of the United States Code is repealed and in its place:

"(D) rules which the agency states will have the force of law when such rules are authorized by statute; and the means by which a person may obtain interpretative rules and general statements of policy, and obtain final opinions in adjudication conducted pursuant to 554."²⁰⁶

Repeal of the Public Access Provision

Sec. 4. Subsections (a)(2) and (3) and Subsection (b) of Section 552 of Title 5 of the United States Code are repealed.

Sec. 5. Section 552 of Title 5 of the United States Code is amended to read as follows:

After Subsection (a) add:

"(b)(1) Each agency, in accordance with published rules made pursuant to Subsection (f), shall make available for public inspection and copying:

(A) All final orders and opinions resulting from an adjudicative process, either formal or informal, and all records relating to such final orders or opinions;

(B) All rules or statements of policy, either general or specific, which are not published in the Federal Register and all records relating to such rules or statements of policy;

(C) All records relating to agency action which are published in the Federal Register;

(D) Administrative staff manuals and instructions to staff that affect the public;

(E) An index of final orders resulting from any adjudication, rules, statements of policy, all matters which must be published in the Federal Register, and administrative staff manuals and instructions to staff that affect the public. The index shall list these actions and decisions by relevant statutory provisions, if any, and by subject matter. The index shall give the specific location of records made available by this Subsection.

206. 5 U.S.C. §§ 553, 554 (1976) are amended in Part II *infra*.

(2) This provision may be enforced in any way provided by law. In addition, a final order, opinion, rule, statement of policy, or staff manual or instruction that affects the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if it is indexed and made available for public inspection and copying pursuant to (b)(1), even if the affected person has actual notice.

(3) Each agency shall promulgate regulations, in accordance with published rules made pursuant to Subsection (f), identifying types of agency actions subject to this Subsection.

[Optional:

(4) Each agency may provide, in accordance with published rules made pursuant to Subsection (f), for the protection, not in excess of one year, of inter-agency or intra-agency memorandums or letters, which would not be available by law to a party other than an agency in litigation with the agency.

(5)(i) To the extent required to prevent an unwarranted invasion of personal privacy, an agency may delete identifying details in any material made available under this Subsection;

(ii) An agency, in accordance with published rules made pursuant to Subsection (f), may provide for assurances of confidentiality for personal information, the release of which would constitute an invasion of personal privacy, and for information, the value of which would be substantially lessened by release to the public.]

(c) Each agency, in accordance with published rules made pursuant to Subsection (f), shall make available for public inspection and copying inter-agency or intra-agency memoranda and letters five years after their completion. To the extent required to prevent an unwarranted invasion of personal privacy, an agency may delete identifying detail.

(d) Each agency may provide by rule, made pursuant to Subsection (f), for special access to information for scholarly research by bona fide scholars or for other uses by those who will assist in informing the public. The regulations will prescribe criteria defining scholars and other categories of persons who will be given special access. Bona fide scholars may, in accordance with rules assuring confidentiality, be given total access to agency files if the public interest is served by their access. All other persons granted special access should not have access to information, the value of which would be substantially lessened by release to the public; private information which would be privileged in federal court, or information which would constitute an invasion of personal privacy, including that information protected by Section 552a.

(e) Each agency shall, by rule made pursuant to Subsection (f), provide for the availability of information to those directly affected by an agency action upon a showing of need for information relevant to use in the specific proceeding. The rules may not deny access to relevant factual material but may consider appropriate protections to preserve the confidentiality of information obtained from a person and possible interference with the law enforcement functions of the agency. Denial of relevant information to one directly affected must be accompanied by reasons.²⁰⁷

207. The discovery problem should be solved in an entirely separate legislative undertaking.

(f) Rules required by this Section and amendments to such rules may be made only after a proposed rule or amendment is published for public comment, and must be promulgated promptly upon receipt and consideration of the comments. Initial proposed rules shall be prepared by each agency and published for comment within ninety days of the effective date of this Act.

(g) Each agency shall include in its annual budget, programs aimed at providing information to the public and a full discussion and evaluation of these programs and past programs. These programs shall be designed to assure that the public has access to as much information as feasible about the agency including its internal operations and decisionmaking processes.

(h) An agency shall not release information specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy.

Sec. 6. (a) Subsection 552(c) of Title 5 of the United States Code is redesignated Subsection (i).

(b) Subsection 552(d) of Title 5 of the United States Code is repealed.

(c) Subsection 552(e) of Title 5 of the United States Code is redesignated Subsection (j).

Sec. 7. Section 552 of Title 5 of the United States Code is amended by adding:

“(k) *Judicial Review.*

(1) Any agency action, taken pursuant to this Section, may be reviewed pursuant to 5 U.S.C. §§ 701-706 (1976) on petition of any person to any United States Court of Appeals.

(2) Any person may file for injunctive relief/declaratory judgment in any United States District Court against an agency for failure to comply with a requirement of this Section. The complaint must demonstrate that the failure was brought to the attention of the agency and the agency failed or refused to act.

(l) *Administrative Enforcement.*

The General Accounting Office shall audit agency compliance and report recalcitrant agencies to Congress.²⁰⁸

Part II

Sec. 8. *Publication of Legislative Rule.* Section 553(c) of Title 5 of the United States Code is amended to add after the third sentence: “The rule and statement of basis and purpose shall be published in the Federal Register.”

Sec. 9. *Availability of Final Orders and Opinions.* Section 557(c) of Title 5 of the United States Code is amended to add after the last sentence: “The final order, decision, and opinion shall be made available for public inspection and copy pursuant to Section 552 of this title.”

208. This provision will serve until establishment of a National Commission on Document Access. See Miller & Cox, *On a Need For a National Commission on Documentary Access*, 44 GEO. WASH. L. REV. 213 (1976).