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THE FREEDOM OF INFORMATION ACT: SUGGESTIONS FOR MAKING INFORMATION AVAILABLE TO THE PUBLIC

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Free and current information about the operations of the government is the keystone of a democracy. Without it, visions of impropriety and intrigue lead to mistrust. Without it, conjecture replaces knowledge as the basis for electoral decisions. Yet the whole structure of the federal bureaucracy sits, seemingly immovable, upon the public records of the government.

Two major congressional efforts have been undertaken to lift this mass of bureaucratic diffidence from the public records. The first of these efforts was section 3 of the Administrative Procedure Act, which was passed in 1946.¹ That provision directed agencies to make available more information about the law developing within them, but left the bureaucrats as the final judge of their own compliance. For this reason, section 3 as then worded did not significantly open the workings of government even to those directly affected by the administrative process. Therefore, Congress enacted the Freedom of Information Act in 1966.² Promulgated as an amendment to section 3, it was intended to make disclosure the rule — permitting records to be withheld only if they fell within one of nine exemptions.³

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1. Act of June 11, 1946, ch. 324, 60 Stat. 237. The Federal Administrative Procedure Act (the "APA") was passed for the purpose of establishing uniform standards and procedures for the activities of all administrative agencies. Section 3 of the APA was the public information section.

2. Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250, *as amended*, Act of June 5, 1967, Pub. L. No. 90-23, 81 Stat. 54, *amending* Act of June 11, 1946, ch. 324, 60 Stat. 237 (codified at 5 U.S.C. § 552 (1970)). The Freedom of Information Act was enacted July 4, 1966, to become effective July 4, 1967. The codification contained some changes in the internal structure from the original enactment.

3. *See* 5 U.S.C. § 552(b) (1970).

The Act provides for judicial review of agency denial of access to identifiable records; it also specifically requires the agency to bear the burden of justifying the denial. Furthermore, it empowers the courts to enjoin agencies from wrongfully withholding records.⁴

However, more than added effectiveness separates the Act from the original section 3, for Congress held out the hope with its enactment that the mechanisms of this democratic government would become visible. Congress intended the Act to provide the means by which the electorate could obtain meaningful information with which to judge the performance of those operating the government. Thus, while consideration of the original section 3 focused upon the law-making function of each agency, in the contemplation of the new legislation the emphasis was placed on the right of the public to know how the government was performing. Unfortunately, despite this clear intent, utilization of the Act has been limited to providing those directly involved in the administrative process with some means of obtaining the information necessary to protect their special interests. The failure of the Act to accomplish its goal stems more from congressional misdirection and ad hoc interpretations by the courts than from conscious efforts by the bureaucracy.

This article will seek out interpretations of the Act which will transcend the needs of individual applicants and provide effective ways to open the government both to parties involved in its proceedings and to the electorate. In addition, the article will venture more ambitious revisions, less closely related to the present Act, which should implement the goals of a public information system.⁵

I. DEVELOPMENT AND IMPLEMENTATION OF A PUBLIC INFORMATION SYSTEM

The 1930's saw an increase in the breadth of activities performed by administrative agencies which was so great that it became necessary to investigate possible procedures for controlling these activities. Of

4. 5 U.S.C. § 552(a)(3) (1970).

5. The Act has already been the subject of some very learned critiques. Chief among them is the prophetic work by Professor Davis following on the heels of its enactment. See Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967) [hereinafter cited as Davis]. See also Giannella, *Agency Procedures Implementing the Freedom of Information Act: A Proposal for Unfair Regulations*, 23 AD. L. REV. 217 (1970) [report prepared for the Administrative Conference of the United States; hereinafter cited as Giannella]; Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEXAS L. REV. 1261 (1970) [hereinafter cited as Katz].

primary concern was the secrecy with which agencies could operate. In 1935, Congress enacted the Federal Register Act⁶ to provide for publication of administrative regulation in the same manner as other laws.

Late in the decade, President Roosevelt appointed a blue ribbon committee headed by the Attorney General⁷ to develop procedures for the administrative agencies.⁸ This committee found that one necessary reform was the elimination of the secrecy with which law was being created by federal agencies. The Committee stated that "[a]n important and far-reaching defect in the field of administrative law has been simple lack of adequate public information concerning its substance and procedure."⁹ The Committee pointed to the natural distrust for secret government decision making as a major source of the criticism of the administrative process.¹⁰ Although it praised the Federal Register Act, it proposed even broader disclosure of the law created in varied forms within the federal government. Its recommended legislation would have required the publication of policies and interpretations, and the promulgation of rules for making materials available to the public.¹¹

6. 44 U.S.C. § 150j (1970) (originally enacted as Act of July 26, 1935, ch. 417, 49 Stat. 500).

7. On February 24, 1939, Attorney General Murphy, at the direction of the President, appointed "The Attorney General's Committee on Administrative Procedure" to investigate the need for procedural reform in the various administrative tribunals and to suggest improvements in administrative procedure. The Report of the Committee was transmitted to the Senate on January 29, 1941. ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, REPORT, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 213 (1941) [hereinafter cited as ATTORNEY GENERAL'S REPORT].

8. SENATE COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess. 245 (1946) [hereinafter cited as APA LEGISLATIVE HISTORY].

9. ATTORNEY GENERAL'S REPORT, *supra* note 7, at 25.

10. The report stated:

Such a state of affairs will at least partially explain a number of types of criticisms of the administrative process. Where necessary information must be secured through oral discussion or inquiry, it is natural that parties should complain of 'a government of men.' Where public regulation is not adequately expressed in rules, complaints regarding 'unrestrained delegation of legislative authority' are aggravated. Where the process of decision is not clearly outlined, charges of 'star-chamber proceedings' may be anticipated. Where the basic outlines of a fair hearing are not affirmatively set forth in procedural rules, parties are less likely to feel assured that opportunity for such a hearing is afforded. Much has been done in recent years to alleviate these difficulties. But much more can readily be done by the agencies themselves.

Id.

11. *Id.* at 195.

Although the majority report of the Committee seemed to focus its efforts upon exposing secret law, the minority report developed a position more sensitive to the needs of the democratic system for information concerning the interworkings of the government. Its recommendation for a public information section was that "matters of record shall be made available to all interested persons," except that "personal data" which the agency finds based upon good cause *and* statutory authorization should be treated as confidential.¹² The key words are "interested persons;" the use of the phrase "[t]he press and other interested persons"¹³ indicates that the term "interested persons" was to be given a broad meaning intended to open access to others besides those directly affected by a specific agency decision.

Section 3 of the APA

Final action on the original APA proposals was delayed by the Second World War. When Congress returned to reforming the administrative process, the public information section was again considered to be of great importance. However, a change in emphasis appeared in the legislative comments on the value and purpose of the public information section. At this point, Congress seemed more concerned with opening the workings of the government to the electorate in general than it had been previously.¹⁴ Despite this concern, the public information system finally adopted, section 3 of the APA, pro-

12. *Id.* at 221. The minority proposal also permitted agencies to withhold "publicity . . . during the preliminary or investigative phases of adjudication." *Id.*

13. *Id.*

14. The report of the Senate Judiciary Committee stated:

The public information requirements of section 3 are in many ways among the most important, far-reaching and useful provisions of the bill. . . . [T]hese provisions require agencies to take the mystery out of administrative procedures by stating it. The section has been drawn upon the theory that administrative operations and procedures are *public property* which the general public, rather than a few *specialists or lobbyists*, is entitled to know or to have the ready means of knowing with definiteness and assurance.

SENATE COMM. ON THE JUDICIARY, REPORT ON THE ADMINISTRATIVE PROCEDURE ACT, S. REP. NO. 752, 79th Cong., 1st Sess. 12 (1945) (emphasis added). The report of the House Judiciary Committee stated:

The public-information provisions of section 3 are of the broadest application because, while some functions and some operations may not lend themselves to formal procedure, all administrative operations should as a matter of policy be disclosed to the public except as secrecy may obviously be required or only internal agency 'housekeeping' arrangements may be involved.

HOUSE COMM. ON THE JUDICIARY, REPORT ON THE ADMINISTRATIVE PROCEDURE ACT, H.R. REP. NO. 1980, 79th Cong., 2d Sess. 17-18 (1946).

vided a method of disclosure only for those persons properly and directly affected by the agency action.¹⁵

Proposals to amend section 3 appeared soon after enactment of the APA. These proposals were precipitated by the realization that section 3 had not become a disclosure provision, but rather a statutory excuse for withholding government records.¹⁶ Section 3 permitted numerous excuses for nondisclosure. 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." 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." These broad phrases were not defined in the section nor

15. 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—

(a) RULES. — Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed and served upon named person in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(b) OPINIONS AND ORDERS. — Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedent) and all rules.

(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)

16. "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]." HOUSE COMM. ON GOVERNMENT OPERATIONS, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, H.R. REP. NO. 1497, 89th Cong., 2d Sess. 4 (1966) [hereinafter cited as H.R. REP. NO. 1497]. See also ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT (1967), reprinted in 20 AD. L. REV. 263 (1963) [hereinafter cited as ATTORNEY GENERAL'S MEMORANDUM, page references to the AD. L. REV.].

in its legislative history.¹⁷ There was no provision for review of an agency's wrongful denial of access to the records. In sum, section 3 was a public information statute only to the extent agencies desired that it be, and they didn't.¹⁸

Freedom of Information Act

The failure of section 3 to provide access to government records even to those directly affected by agency action resulted in the congressional effort which culminated in the Freedom of Information Act.¹⁹ One of the key changes was to require disclosure of all information in government records not specifically defined in the nine exemptions.²⁰ Hence, it is said that the Act was intended as a disclosure statute, not a withholding statute.²¹

The new legislation established a review procedure which provides judicial enforcement of the disclosure policy established by Congress. The district courts were authorized to grant de novo review of denials of access to records and empowered to enjoin agencies from improper denials. The agencies were required to bear the burden of

17. See Bennett, *The Freedom of Information Act, is it a Clear Public Record Law?*, 34 BROOKLYN L. REV. 72, 73 (1967).

18. The intent of Congress was clearly to direct agencies to make more information available: "The public information section is basic, because it requires agencies to take the initiative in informing the public." APA LEGISLATIVE HISTORY, *supra* note 8, at 251. Congress apparently felt that their direction would be enough. Of course, the bureaucracy virtually ignored the public information section. Sherwood, *The Freedom of Information Act: A Compendium for the Military Lawyer*, 52 MILITARY L. REV. 103, 104 (1971).

19. 5 U.S.C. § 552 (1970). See generally 80 HARV. L. REV. 909 (1967).

20. 5 U.S.C. § 552(b) (1970) sets forth the nine exemptions as follows:

- (1) matters specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy;
- (2) matters related solely to the internal personnel rules and practices of an agency;
- (3) matters specifically exempted by statute;
- (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (5) inter-agency or intra-agency memorandums;
- (6) personnel and medical files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (7) investigatory files compiled for law enforcement purposes;
- (8) matters contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;
- (9) geological and geophysical information and data.

21. *Getman v. NLRB*, 450 F.2d 670, 679 (D.C. Cir.), application for stay denied, 404 U.S. 1204 (1971); See *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971).

showing that denials were "specifically" permitted by one of the nine exemptions.²²

In the most important change, however, access to government records was broadened under the Act by permitting "any person" to request government records, rather than only those persons "properly and directly concerned" as under prior section 3. This change in language indicates a shift of emphasis from providing access to citizens directly affected by an agency action to establishing a more informed electorate — an opening of the bureaucracy to any interested citizen.

In this new legislative effort the intent was to provide the public with ready access to government information. The Senate Judiciary Committee found that "[a]lthough the theory of an informed electorate is vital to the proper operation of a democracy, there is nowhere in our present law a statute which affirmatively provides for that information."²³ Thus, Congress set out to bring into the open "the hundreds of departments, branches, and agencies."²⁴ Looking into the full history of the Act, the Second Circuit later found that "the ultimate purpose was to enable the public to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope, and procedure of federal government activities."²⁵ It is the electoral process and not just the administrative process for which the information was to be provided. It is the informed electorate as well as the informed party to an agency proceeding which occupied the foreground in the Act's legislative history.

The Act and the Informed Electorate

Although the expressed purpose of the Act was to provide the electorate with information, it is not well suited for the task.²⁶ It is,

22. 5 U.S.C. § 552(a) (3) (1970).

23. SENATE COMM. ON THE JUDICIARY, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, AND FOR OTHER PURPOSES, S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1967).

24. *Id.* In signing the bill into law, President Johnson stated that "a democracy works best when the people have all the information that the security of the nation permits." Statement by President Johnson Upon Signing Public Law 89-487 on July 4, 1966, as reproduced in ATTORNEY GENERAL'S MEMORANDUM, *supra* note 16, at 263.

25. *Frankel v. SEC*, 460 F.2d 813, 816 (2d Cir.), *cert. denied*, 93 S. Ct. 125 (1972). The court stated: "[F]or the great majority of different records, the public as a whole has a right to know *what its Government is doing*." 460 F.2d at 816, *quoting* S. REP. NO. 813, *supra* note 23, at 5-6 (emphasis added by the court).

26. The Act is universally considered to be the product of poor draftsmanship. Professor Davis announced on the heels of its enactment: "The Act is difficult to

of course, unrealistic to suppose that citizens in general will have the interest or the time to examine agency records to make themselves better informed voters. But two groups who digest information for mass consumption, researchers and the media, have not been sufficiently accommodated by the Act.

Researchers

A study reported by Ralph Nader found that "most agencies have a two-pronged information policy — one towards citizens and one towards the special interest groups that form the agency's regulated constituency."²⁷ A survey conducted by the Administrative Conference²⁸ generally supports the conclusions of the Nader study.²⁹ This bias, however, is not the result of a conspiracy between special interests and the agencies but is rather the natural result of the Act.

Reliance on judicial enforcement is one reason for this bias. Judicial review is more realistically available to agency clientele than to most researchers. There is usually a tangible benefit in compelling disclosure to a party in an agency proceeding. Hence, the possibility of court action by a disappointed member of an agency's clientele is far greater than that of action by a disappointed private citizen engaged in research.

In addition, compliance with the Act requires considerable resource allocation. Because the Act permits some documents to be withheld, and because most agency statutes or rules require certain documents to be confidential, a large amount of staff resources must be committed to the segregation of documents before release. Agency officials are understandably reluctant to commit resources to such tasks. They become more reluctant where the request is not directly related

interpret, and in some respects it is badly drafted." Davis, *supra* note 5, at 761. Although courts have differed in interpretation, they have agreed, if sometimes implicitly, with Davis' observations: "Unquestionably the Act is awkwardly drawn." *Epstein v. Resor*, 421 F.2d 930, 932 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970). "The Information Act leaves a good many things not clearly defined." *Nichols v. United States*, 325 F. Supp. 130, 138 (D. Kan. 1971).

27. Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1, 2 (1970) [hereinafter cited as Nader].

28. The Administrative Conference was created by the Administrative Conference Act, 5 U.S.C. §§ 571-76 (1970). It is composed of representatives of the heads of the many administrative agencies who meet to discuss and recommend uniform changes in administrative procedure. See generally Prettyman, *Some Broader Aspects of an Administrative Conference of the United States*, 17 AD. L. REV. 48 (1964); Note, *The Administrative Conference Act*, 53 GEO. L.J. 457 (1965).

29. Giannella, *supra* note 5, at 221.

to an agency's function. This problem is aggravated by the fact that requests from researchers are generally broader and less exact, and hence require significant expenditures of resources. For these reasons, student groups engaged in general research, for example, will not find agency officials sympathetic to their requests.

The alleged two-pronged approach is also the result of the belief held by most government officials that the Act should not be used for "fishing expeditions." The Attorney General's memorandum on the Act expressed this view.³⁰ This opinion is not consistent with the history and purpose of the Act; the Act was no doubt intended to assist in permitting searching inquiries into the administrative process.³¹ However, the absence of direction and advice, except to the limited extent provided by judicial review, makes it unlikely that bureaucrats will be disabused of this notion.

For these reasons, the Act often fails to promote disclosure to the researchers who in turn might help create a more informed electorate. Only the threat of judicial review by those few researchers who have the capability can force the system to make the Act perform this function.³²

The Media

More troublesome than the difficulty researchers experience in obtaining information is the fact that the media has gained very little from the Act despite its contribution to the enactment.³³ The media is the major conduit through which general information reaches the vast majority of the electorate, and therefore it can best provide the electorate with quick insight into government operations. Even Nader-type research groups must depend on the media to reach the private citizen.

At a symposium on the Act conducted by the Administrative Law Section of the American Bar Association one newspaperman, familiar with administrative agencies, testified as to the reasons the media has

30. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 16, at 292, states:

The requirement is thus not intended to impose upon agencies an obligation to undertake to identify for someone who requests records the particular materials he wants where a reasonable description is not afforded. The burden of identification is with the member of the public who requests a record, and it seems clear that Congress did not intend to authorize 'fishing expeditions.'

31. Giannella, *supra* note 5, at 231; Katz, *supra* note 5, at 1261.

32. See *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir.), *application for stay denied*, 404 U.S. 1204 (1971).

33. HOUSE COMM. ON GOVERNMENT OPERATIONS, ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT, H.R. REP. NO. 92-1419, 92d Cong., 2d Sess. 8 (1972); Giannella, *supra* note 5, at 219.

not been a particularly prominent user of the Act.³⁴ The reporter pointed out that the media cannot wait for the grant of access; this is a process which takes even the speediest agency time in excess of ordinary deadlines. Second, because of the defenses of agencies, the media has developed alternate means for obtaining information about newsworthy occurrences, despite the fact that this information may be less complete and accurate than information from the agencies themselves. Third, it is simply bad business for one member of the media to invest money in a lawsuit to obtain information which will be public knowledge.³⁵

Therefore, the Act has not provided the electorate with information because it has not adequately opened government operations to researchers and media. The public information system established by the Act fails to take cognizance of the practical problems of permitting access to these two groups of applicants.

Secret Law

Although the Act was intended to do more, it has been somewhat successful in dealing with the problem of secrecy in agency law, making. Professor Davis, upon passage of the Act, recognized the dichotomy between secret law and public information. He prophesied this result in his statement: "Although the bar played a minor role in getting the Act enacted, members of the bar and their clients will be the principal beneficiaries. Unlike the Act's accomplishments in opening up information, its accomplishments in opening up secret law are impressive."³⁶

The diminution of secret lawmaking is brought about by two provisions. First, the Act requires an agency to make available for public inspection and copying four classes of information: (1) "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;" (2) "those statements of

34. L. Kohlmeier, *Freedom of Information Act and the Agencies*, *The Journalist's Viewpoint*, 23 AD. L. REV. 129, 143 (1971). Mr. Kohlmeier is a reporter for the Wall Street Journal and author of *The Regulators: Watchdog Agencies and the Public Interest*. Accord, Statement of Ward Sinclair, Washington Bureau, Louisville Courier-Journal, *Hearings on U.S. Government Information Policies and Practices — Administration and Operation of the Freedom of Information Act Before the Foreign Operations and Government Information Subcomm. of the House Comm. on Government Operations*, 92d Cong., 2d Sess., pt. 4, at 1279 (1972) [hereinafter cited as *1972 Hearings*].

35. *But cf.* Statement of John Seigenthaler, Editor, Nashville Tennessean, 1972 *Hearings* at 1302; Statement of James Steele, Writer, Philadelphia Inquirer, *Id.* at 1294.

36. Davis, *supra* note 5, at 804.

policy and interpretations which have been adopted by the agency and are not published in the Federal Register;" (3) "administrative staff manuals and instructions to staff that affect a member of the public;" and (4) "a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published."³⁷ Failure to comply with this provision disables the agency from relying on, using or citing as precedent such material unless the party has actual notice.³⁸ Thus, decisions and opinions of the agency and the affected party now are available to anyone having business with the agency.

Second, secret lawmaking is diminished under the Act by providing parties with access to agency records. The APA contains no provision for pretrial discovery in the administrative process.³⁹ The Administrative Conference found that "most federal agencies do not provide in their rules for any significant amount of discovery against the agency."⁴⁰ Since the provisions of the Federal Rules of Civil Procedure for discovery do not apply to administrative agencies, there is a gap with respect to the discovery available in an administrative proceeding. Moreover, even those agencies which do provide some pretrial discovery techniques in an adjudicative context may not have discovery procedures in other types of proceedings, such as rulemaking.

The major use of the Act to date has been to fill this void and to provide new discovery tools where none existed before.⁴¹ The great

37. 5 U.S.C. § 552(a)(2) (1970).

38. 5 U.S.C. § 552(a)(2)(C) (1970) states in part:

A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party . . . only if — (i) it has been indexed and either made available or published as provided by this paragraph; or (ii) the party has actual and timely notice of the terms thereof.

39. 1 K. DAVIS, ADMINISTRATIVE LAW § 8.15 at 588 (1958).

40. K. DAVIS, ADMINISTRATIVE LAW § 8.15 at 392 (Supp. 1970).

41. One example of the use of the Act as a form of discovery is found in *Shakespeare Co. v. United States*, 389 F.2d 772 (Ct. Cl. 1968), *appeal dismissed*, 419 F.2d 839 (Ct. Cl. 1969), *cert. denied*, 400 U.S. 820 (1970). Shakespeare was locked in a dispute with the IRS over the amount of excise tax it owed. It sought discovery of the private rulings of the IRS. As an alternative approach, Shakespeare claimed that access should be granted under the Act. The court found that Shakespeare could not obtain discovery under any traditional discovery theory. It dismissed the claim under the Act because the records were not relevant to the proceeding and because the documents were not specifically defined. The relevancy holding is clearly wrong because there is no requirement of relevancy under the Act. The holding that the party failed to properly define the documents is too restrictive. The restrictive decision probably resulted because the court recognized the claim under the Act as just another discovery ploy and wished to avoid giving records under the Act which it found un-

bulk of access requests received by federal agencies concern requests for information to be used by private interests in proceedings before the agencies.⁴²

It can be predicted that the major use of the Act will continue to be by private parties to gain discovery of agency records. Where there is no discovery in an agency's adjudicative proceedings, the Act will be the only method of gaining access to agency documents. Where there are alternatives, a party to an agency proceeding may well have a choice of tactics. Parties will certainly attempt to utilize the Act as a discovery tool where the information may be or has been held to be irrelevant for the purposes of actual discovery.⁴³ It will also

available under ordinary discovery. Ordinarily, an appellate court will uphold the use of the Act for discovery purposes, particularly where no other discovery exists in the agency's proceeding. *See, e.g., Bannerkraft Clothing Co. v. Renegotiation Bd.*, 466 F.2d 345 (D.C. Cir. 1972).

42. Ralph Nader found that from the effective date of the Act to early 1969, there were forty cases brought under the Act: "Thirty-seven of these cases involved actions by corporations or private parties seeking information relating to personal claims or benefits. In only three cases did the suits involve a clear challenge by or for the rights of the public at large to information." Nader, *supra* note 27, at 13.

Review of the reported cases under the Act to date shows fifty-five cases, forty-one of which involve, to some degree, access to records. Of these, thirty-three involve corporate or private interests. (The cases brought under the Act which involve validity of a rule under the publication provision are excluded, but they all involved private interests). Six cases could be termed public information cases. *See Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971) (access to "Excelsior" lists of employees for the purpose of studying labor elections); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971) (access to President's Commission Report on the SST); *Epstein v. Resor*, 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970) (access to war papers for scholarly study); *Skolnick v. Parsons*, 397 F.2d 523 (7th Cir. 1968) (access to report to the President from the President's Crime Commission); *Nichols v. United States*, 325 F. Supp. 130 (D. Kan. 1971) (access to exhibits relating to Kennedy assassination); *Consumers Union v. Veterans Admin.*, 301 F. Supp. 796 (S.D.N.Y. 1969) (access to government test data for hearing aids). One would expect the requests to reflect similar ratios.

43. The use of the Act as a discovery tool may delay an enforcement proceeding if the adjudicative proceeding must be suspended by the agencies until all the material is supplied. One solution to this problem might be to adopt the doctrine that since a request under the Freedom of Information Act is a separate matter from the pending adjudicatory proceeding the pendency of such a request is not a ground for postponing the hearing in the proceeding. However, resort to this remedy may be foreclosed as a result of a recent opinion by the District of Columbia Circuit. *See Bannerkraft Clothing Co. v. Renegotiation Bd.*, 466 F.2d 345 (D.C. Cir. 1972), affirming the district court's decision to enjoin the proceedings until the request under the Act was completed. The court concluded that the Act was intended to mitigate the problems of those forced to litigate with agencies on the basis of incomplete information, and that the parties involved in the proceeding would suffer irreparable injury if the proceeding were continued pending completion of the request. *But cf. Sears, Roebuck & Co. v. NLRB*, 433 F.2d 210, 211 (6th Cir. 1970) (*per curiam*).

be used in this fashion in nonadjudicative proceedings, such as rule-making, where the right to discovery against the agency may not exist.

The access provision of the Act has been largely limited to providing additional discovery because of inherent weaknesses in the congressional approach to implementing a public information policy. Knowledge of the agency and the law is almost essential to framing a request under the Act. Only special interests have both the incentive and the resources to test denial in the courts; hence, where an agency denies a request in the nature of discovery by an affected party, the basis for that denial will in all likelihood be tested. Not only has this factor led to court opinions and orders limiting agency discretion to withhold such records, but bureaucrats have treated requests more generously where the threat of court action exists.⁴⁴

In fairness, there is nothing particularly wrong with this result.⁴⁵ Indeed, the advantages of a better informed bar outweigh any disad-

See also Missouri Portland Cement Co. v. FTC, CCH TRADE REG. REP. ¶ 74,124 (D.D.C. 1972) (no irreparable injury shown).

If the *Bannercraft* opinion is limited to instances in which no other method of discovery is available, it is sound and will no doubt have a beneficial result. If it is applied to proceedings where discovery against the agency is provided by the agency, then this decision will do great damage to agencies' law enforcement efforts, due to the delay entailed in halting the proceedings while discovery is conducted.

44. "The mere threat of . . . an action under the act has often released documents that have been earlier withheld." Statement of Benny L. Kass, 1972 *Hearings, supra* note 34, at 1414.

45. However, the increased publication and access might well have been accomplished under old section 3 but for the absence of judicial enforcement. Of the four classes of documents which must be made available for public inspection, the two most important — adjudicative orders and opinions, and statements of policy and interpretation — could have been available under section 3. Section 3(b) makes available the first class by the language: "All final opinions and orders in the adjudicative cases" with an exception which is maintained in the exemption in the Act. The second class, statements of policy and interpretation, would also be included in the section 3(b) requirement of availability of "all rules." The term "rules" is defined by the APA as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4) (1970). The phrase in the Act — "statement of policy or interpretation" — is no more inclusive than this definition. The term "rules" is much broader than the rules referred to in the Federal Register provision. 5 U.S.C. § 552(a)(1) (1970). It can be assumed that the use of the term in (b) was not intended to be a redundancy and hence meant everything included in the definition of rules but not covered by the Federal Register provision. In addition, this definition of "rules" might well have been held to include the third class of "staff manuals and instruction to staff that affect a member of the public."

The second assault on secret law, the discovery mechanism, could also have been developed by judicial enforcement of section 3. Section 3(c) required a grant of access to anyone "properly and directly concerned." One who could claim to be affected by an agency determination certainly would fall within this definition. Thus,

vantages of opening the decisional process to private interests. In addition, the efforts of "public interest" attorneys are surely aided by the Act because of the likelihood that they would be denied access to records more often than the representatives of agency clientele. Any resulting diminution in secret lawmaking is desirable even if the process remains obscure or unavailable to the general public.⁴⁶

Yet, even in this regard, the Act has not been totally effective. Access has been incomplete and inequitable. Regular members of the agencies' clientele with experienced and specialized counsel have found the Act more useful than those with less understanding, resources, and influence.⁴⁷

Reasons for Agency Evasion

Since the effective date of the Act, criticizing the agencies for the failures of the Act has been a popular sport.⁴⁸ The tendency has been to impute ill will to bureaucrats for their reluctance to comply.⁴⁹

broad discovery could have resulted under this provision. There are a few exceptions, but none of these are any broader than those in the present Act.

Consequently, had the public information section of the APA been obeyed, little would have been accomplished by an amendment such as the Act in the diminishing secret law. More agency law would have been available for inspection and the absence of discovery in some instances would have been cured. If this were the sum total of the goal of the Act, an amendment to grant court jurisdiction could have cured the problem.

46. There is a merging of both the secret law and public information problems which should be recognized in order to interpret the Act to assist citizens in dealing with the government. The Act should be interpreted to require publication of rules and interpretations of broad application developed in an individual adjudicative context on the same basis as such broadly applicable determinations are now published when promulgated in a rulemaking proceeding. Individual adjudicative opinions generally contain so much opinion relevant only to the case at hand that broad policy decisions are hidden. In *British Auto Parts, Inc. v. NLRB*, 405 F.2d 1182 (9th Cir. 1968), *cert. denied*, 394 U.S. 1012 (1969), a rule promulgated by adjudication was not required to be separately published. The right of the agency to make rules in adjudication, although criticized, has been upheld. *NLRB v. Wyman-Gordon*, 394 U.S. 759 (1969). However, it would greatly assist those who are not in continual contact with the agency if such rules were separated from the individual opinion and published as rules.

47. H.R. REP. NO. 92-1419, *supra* note 33, at 8.

48. *See, e.g.*, Giannella, *supra* note 5; Katz, *supra* note 5; Nader, *supra* note 27.

49. *See, e.g.*, Fellmeth, *The Freedom of Information Act and the Federal Trade Commission: A Study in Malfeasance*, 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 345 (1969); Katz, *supra* note 5; Statements of Messrs. Robertson, Wellford and Schuck for the Center for the Study of Responsive Law, 1972 *Hearings*, *supra* note 34, at 1251. Indeed, there have been certain allegations of conscious avoidance of the Act which

However, an objective reading of the Act leads to the conclusion that the poor performance of the agencies is largely the result of inherent defects within the Act.

The significant resource allocation required by the Act for the release of information necessarily causes bureaucrats to attempt to avoid or mitigate compliance. Providing information to the public is a primary task in very few agencies. Public information considerations must be balanced in every agency against its primary role, and there is no federal agency which envisions itself as having the resources to carry out the full extent of its function. In this milieu, public information activities find little support.⁵⁰

The agencies are left with the difficult task of applying ambiguous language in specific circumstances. Therefore, it is not surprising that agencies resolve the ambiguities in a way which is most favorable to them or which requires the least commitment of resources. The propensity to withhold documents increases because of the unresolved conflict between the disclosure compelled by the Act and the nondisclosure directed by the specific statutes which control the activities of the agency.⁵¹ These conflicts are most easily resolved by withholding all documents arguably covered by the specific statutory direction.⁵² Unfortunately, the practical problems which the Act creates for agencies are largely ignored by the courts.⁵³

A significant drain on the administrative process is the inevitable result of the present draconian approach of the judiciary. Courts interpret the Act so that agencies must not only review and justify withholding each individual document, but are also often required to edit documents so that individual portions can be released.⁵⁴ Although it

seem so elaborate that it seems improbable that most bureaucrats would actually take the trouble. This sort of activity does not seem to be very widespread, and certainly is not the cause of a significant amount of the failure to make records available.

50. See Statement of Robert Beatty, Assistant Secretary for Public Affairs, Department of Health, Education and Welfare, 1972 *Hearings*, *supra* note 34, at 1666-67.

51. Sherwood, *supra* note 18, at 119.

52. See Giannella, *supra* note 5, at 221.

53. See *Wellford v. Hardin*, 444 F.2d 21, 24 (4th Cir. 1971). Indicative of this attitude is the court's statement: "The Freedom of Information Act was not designed to increase administrative efficiency. . . ."

54. See, e.g., *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir. 1970). But see *Environmental Protection Agency v. Mink*, 41 U.S.L.W. 4201 (U.S. Jan. 22, 1973), holding that "in camera inspection . . . to sift out so-called 'non-secret components'" [41 U.S.L.W. at 4204] is not permissible where exemption one (documents specifically required by Executive Order to be kept secret in the interest of defense) is concerned.

is inconceivable that Congress intended the Act to cripple agencies' efforts to fulfill their primary duties,⁵⁵ courts do not generally consider the possibility of that result in their interpretations of the Act.

The notable exception to the typical myopic judicial decisions is Judge Holtzoff's opinion in *Bristol-Myers Co. v. Federal Trade Commission*.⁵⁶ In that case, the applicant requested numerous documents compiled in connection with a law enforcement investigation. Judge Holtzoff found that the definition of available documents under the Act must be susceptible to use by lower level staff so that the release of documents constitutes merely a ministerial function. He surmised that, if information was to be released to "any person," the mechanics for obtaining access could not involve agency officials on a regular basis.⁵⁷ Unfortunately, the D.C. Court of Appeals, in reviewing Judge Holtzoff's opinion, found unacceptable anything other than tedious review and editing of individual documents.⁵⁸ Ignoring the rationale of the lower court, the court simply found that the lower court had committed error because it had "failed to examine the disputed documents, and to explain the specific justification for withholding particular items."⁵⁹ Thus, the unworkability of the Act has not been cured, but instead has been aggravated by the courts. Agencies certainly need prodding to release information, but there is a difference between prodding and the unrealistic compulsions which are now imposed upon them.

55. Giannella, *supra* note 5, at 234-35.

56. 284 F. Supp. 745 (D.D.C. 1968), *aff'd*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

57. *Id.* at 747.

58. *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

59. *Id.* at 938. It is interesting to note that the judicial approach has also placed significant burdens on reviewing courts. In *Bristol-Myers* the appellate court returned the case to the district court for review of all the documents. If every review is to necessitate the court reading all the documents, then a significant drain on the already overworked judicial system will result. Subsequent to the appellate court's direction in *Bristol-Myers* the district court again refused access without inspecting the documents. See *Irons v. Schuyler*, 321 F. Supp. 628 (D.D.C. 1970). The court said:

This Court is not required to examine every manuscript decision of the past 100 or more years to decide in each case if there is trade secret or other material which should be excluded. The legislative history of the Act indicates that it was not the intent of Congress to add materially to the burden of overworked courts. *Id.* at 629. This may be good reading of congressional intent and good sense, but it does not appear to be the law. Another possible method of avoiding this overwhelming burden is found in the approach of the court in *Wechsler v. Shultz*, 324 F. Supp. 1084 (D.D.C. 1971), where the court only inspected samples of the numerous records in question.

II. MAKING THE ACT WORK

The assignment for those who are dissatisfied with implementation of the Act is not to lay blame but to remold the Act so that ready access to government records can be a reality. The primary requisite for all interpretations of the Act must be the practicality of implementation, not just in the case at issue, but in relation to every potential access request similar to that in the case at issue.

A major effort to enable agencies to leave compliance in the hands of lower level staff is necessary; hence, distinctions cannot be too sharply drawn or too complicated. Moreover, it must be possible to make categorical decisions as to whether or not to release documents. Compliance with the Act breaks down where every document covered by a request must be read and edited by members of the agencies' professional staff.

Implementation of the Act must be equitable. Every request must stand or fall on the same test. Major resource commitments or nice distinctions necessarily lead to a value judgment as to the worth of a particular request. The possibility of an enforcement proceeding becomes a key factor in such a situation. Finally, the more complicated the implementation, the slower access will come. The imposition of time limits upon agencies is an easy and unthinking approach to delay which is unacceptable.⁶⁰ The reasons behind the delay must be examined and cured.

The first effort in making the Act work must be made by the courts. The courts must take a more practical approach to interpreting the Act. Even though the Act permits exemptions only where "specifically stated," its ambiguity gives the courts a broad range of discretion in its implementation. Courts have unfortunately followed an ad hoc approach. At present, the decision in every case involves a balancing of the equities of the parties before the court. The Act will become a public information statute only if the courts take a pragmatic look into the agencies' recordkeeping and limit themselves to broad pronouncements as to the categories of information which must be released.

The two statutory exemptions which have raised the most questions are investigatory files and internal documents. These exemptions are particularly susceptible to practical interpretation. Perhaps this susceptibility is a result of the fact that they grew out of concern for the continued functioning of the agencies without significant interfer-

60. H.R. REP. NO. 92-1419, *supra* note 33, at 83.

ence from the Act.⁶¹ Suggested below are interpretations which both offer more public information and deal realistically with agencies' problems in releasing these types of records.

Investigatory Files

Exemption seven,⁶² the investigatory file exemption, has been one of the most controversial. This exemption protects from disclosure investigatory files compiled by the agency for the purpose of pursuing its law enforcement functions, whether civil or criminal. By the inclusion of the phrase "except to the extent available by law to a private party," Congress intended to foreclose use of the exemption to deny access to documents which otherwise have been made available by Congress and the courts, such as Jencks Act statements.⁶³ The exemption's purpose is to assure that the Act does not interfere with the law enforcement responsibilities of the agencies.

The language of the exemption seems to create a blanket exemption for any records compiled for law enforcement purposes, and some courts have so read it.⁶⁴ However, the fact situations presented to the courts have compelled them to legislate some limitations. The courts now stand at the crossroads between two related interpretations of the investigatory file exemption. One interpretation requires

61. See Note, *Freedom of Information: the Statute and the Regulation*, 56 GEO. L.J. 18, 39-40, 47 (1967).

62. 5 U.S.C. § 552(b) (1970); "This section does not apply to matters that are . . . (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency . . ."

63. The Attorney General interpreted 5 U.S.C. § 552(b) (1970) as follows: The effect of the language in exemption (7) . . . seems to be to confirm the availability to litigants of documents from investigatory files to the extent to which Congress and the courts have made them available to such litigants. For example, litigants who meet the burdens of the Jencks statute (18 U.S.C. 3500 [1970]) may obtain prior statements given to an FBI agent or an SEC investigator by a witness who is testifying in a pending case; but since such statements might contain information unfairly damaging to the litigant or other person, the new law, like the Jencks statute, does not permit the statement to be made available to the public.

ATTORNEY GENERAL'S MEMORANDUM, *supra* note 16, at 307. The Jencks statute was enacted in response to the Supreme Court's grant of access to government witness interview reports in *Jencks v. United States*, 353 U.S. 657 (1957). For an interpretation of the statute see *Palermo v. United States*, 360 U.S. 343 (1959).

64. In *Frankel v. SEC*, 460 F.2d 813 (2d Cir.), *cert. denied*, 93 S. Ct. 125 (1972), the court found that the exemption was indeed unlimited. It read the legislative history as expressing a congressional intent that any investigatory file compiled for law enforcement purposes is exempt forever. *Accord*, *Cowles Communication, Inc. v. Department of Justice*, 325 F. Supp. 726 (N.D. Cal. 1971), holding that "'investigatory files compiled for law enforcement purposes' need not be produced whether proceedings be contemplated or not." 325 F. Supp. at 727.

release of files when they are no longer current, or for some other reason have ceased to be useful for law enforcement purposes; the other requires release of that portion of the records, whether inactive or current, that will not prematurely disclose the government's case. While one of these interpretations is workable, the other has the potential effect of interfering with the administrative process.

In *Cooney v. Sun Shipbuilding and Drydock Co.*,⁶⁵ one of the earliest opinions to interpret the exemption, the court was faced with a fact situation which compelled it to limit the exemption. Plaintiff sought production of a report of an accident, which resulted in the death of plaintiff's decedent, prepared immediately after the accident by an investigator for the Department of Labor. The law enforcement file containing the report was four and a half years old, and no longer useful to the government for law enforcement. The court limited the exemption by looking beyond the language of the Act to the legislative purpose. The primary purpose, it found, was to avoid premature disclosure of the government's case in a law enforcement proceeding. Because the records were not only old but had served their public purpose, the court held that the purpose of the exemption was not furthered by applying it to these documents.

*Bristol-Myers Co. v. Federal Trade Commission*⁶⁶ suggested a similar limitation to the exemption. There the Federal Trade Commission sought to protect documents relevant to a rulemaking proceeding involving the analgesic drug industry. The Federal Trade Commission had originally compiled the documents for the purpose of possible cease and desist proceedings, but later decided to deal with the problem by an industrywide rulemaking proceeding. The documents sought were old and the original law enforcement purpose no longer existed. Therefore, the court found that the danger of premature disclosure was not present since no real concrete possibility of an adjudicative proceeding existed. It stated that the test was whether the possibility of adjudication was so unlikely that the records could not be said to be a law enforcement file.⁶⁷

Although these cases involve files which were found to be no longer "law enforcement," the underlying "premature disclosure" rationale has been broadened to include current files. In *Wellford v. Hardin*,⁶⁸ the district court, citing both *Cooney* and *Bristol-Myers*, found that the test was not whether the file was still a law enforcement

65. 288 F. Supp. 708 (E.D. Pa. 1968).

66. 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

67. *Id.* at 939.

68. 315 F. Supp. 175 (D. Md. 1970), *aff'd*, 444 F.2d 21 (4th Cir. 1971).

file, but whether portions of the records sought from an investigatory file might prematurely disclose the government's case. Plaintiff sought four categories of documents from the Department of Agriculture: letters of warning sent to nonfederally inspected meat or poultry processors; information relating to detention of meat and poultry products; biweekly reports of the Director of Slaughter Inspection Division; and minutes of meetings of the National Food Inspection Advisory Committee. The court postponed consideration of the last two categories.⁶⁹ Finding that the first two categories of documents were already in the possession of the potential party to any proceeding, the court held that release could not result in premature disclosure of the government's case. The appellate court upheld the district court and agreed with its use of the "premature disclosure" rationale.⁷⁰

The expansion of the "premature disclosure" rationale by *Wellford* is extremely impractical. Agencies may automatically release files when they are not current or for some other reason have ceased being useful for law enforcement purposes. But agencies cannot reasonably be expected to release documents contained in a working law enforcement file. Constant searches through law enforcement files would place an impossible burden on the law enforcement resources of every agency. More onerous is the prospect that after each new release of information to a party, such as pretrial conference, new documents would fall into the disclosable category by operation of their disclosure to respondent. Thus, constant new releases would be necessary throughout the law enforcement proceeding.

The premature disclosure reasoning is not only impractical to administer, but it is also not good law. The sole basis for the rationale is one sentence of the history of the exemption which reads: "The Act is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceeding."⁷¹ To glean from this sentence the conclusion that premature disclosure was the *only* interference from which Congress intended to protect agency law enforcement seems somewhat intuitive. This sentence, in context, suggests *one* of the

69. 315 F. Supp. 179. Upon reconsideration the court decided not to examine the biweekly reports and the minutes, determining that they were exempt under exemption five.

70. *Wellford v. Hardin*, 444 F.2d 21 (4th Cir. 1971). However, the court limited reliance on a premature disclosure rationale by its finding that the requested materials were not part of an investigatory file because they were the results of agency action which should have been released as such. 444 F.2d at 24.

71. H.R. REP. No. 1497, *supra* note 16, at 11; *see Wellford v. Hardin*, 315 F. Supp. 175, 177 (D. Md. 1970).

ways Congress did not wish the exemption to be used.⁷² This language should not be read to indicate Congress' intent to limit the exemption solely to premature disclosure.⁷³

Courts have recognized that the exemption was intended to assure that the Act was not used to interfere with law enforcement functions.⁷⁴ Although it is perhaps a better reading of both the language and the history of the Act to conclude that the exemption is blanket,⁷⁵ it is clear that, at the very least, no grant of access was intended where it might in any way interfere with law enforcement.

The need for some limitation on the exemption is evident.⁷⁶ A workable limitation is the test set down by the District of Columbia Circuit in *Bristol-Myers*: "Thus the District Court must determine whether the prospect of enforcement proceedings is concrete enough to bring into operation the exemption for investigatory files, and if so whether the particular documents sought by the company are nevertheless discoverable."⁷⁷ If a file is currently active then it should be given blanket protection. But if it has passed its usefulness, then it should be open to the public, excepting those records protected by another exemption. This "currently active" limitation has been found to comport with legislative intent in creating the exemption.⁷⁸ Such a limitation would be practical. It would permit the agencies undisturbed use of the working files while freeing the information in them when they are no longer serviceable to the agency.

72. In *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708, 711 (E.D. Pa. 1968), the court found "a primary purpose" was to prevent premature disclosure. It did not suggest that it was the only purpose.

73. Indeed, in *Benson v. United States*, 309 F. Supp. 1144, 1146 (D. Neb. 1970), the court relied on the very same sentence of the House Report to reach an opposite conclusion.

74. The courts have tended to be sympathetic to agencies' legitimate need to protect information in their enforcement files, and have found that the Act should not be used to interfere with the law enforcement activities of administrative agencies. "The investigatory functions of the Agency may not be crippled by a requirement not commanded by the statute, certainly not by a requirement specifically exempted by the statute." *Evans v. DOT*, 446 F.2d 821, 824 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972). In *Clement Bros. v. NLRB*, 282 F. Supp. 540 (N.D. Ga. 1968), the court found that in addition to the legislative history, there is a "common sense necessity of protecting the investigatory function." *Id.* at 542.

75. *Benson v. United States*, 309 F. Supp. 1144 (D. Neb. 1970), found that: "The legislative history of this statute indicates that it is not the intent of the statute to hinder or in any way change the procedures involved in the enforcement of any law including 'files prepared in connection with related government litigation and adjudicative proceedings.'" *Id.* at 1146 (emphasis added).

76. See, e.g., *Nader*, *supra* note 27, at 6; *Sherwood*, *supra* note 18, at 128.

77. *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 939-40 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

78. *Katz*, *supra* note 5, at 1279.

Informants' Privilege

The one difficulty with this approach is the protection of informants. Nowhere in the Act is there articulated an "informants' privilege." However, courts have interpreted the investigatory file exemption as protecting those who assist the government since identification of informants may interfere with law enforcement.⁷⁹ The rationale behind the cases which apply the most restrictive readings of the investigatory file exemption has been the protection of informants.⁸⁰

There is no reason that the two considerations cannot be separated. Informants could be protected by a limited exemption and the rest of the file could be released when it ceases to be active. To accomplish this, courts need only focus on the purpose of the exemption to protect the law enforcement function. They could release the file but protect information which would identify informants because release of the informant information would make citizens reluctant to inform and thereby severely impair government law enforcement.⁸¹ Specific recognition of an informant privilege would lead to broader disclosure by limiting the "informant privilege" rationale to protection of informants only and not entire files.

Criminal law enforcement files

Another step which would open investigatory files would be to recognize the natural distinction between criminal investigatory files and civil files. The investigatory file exemption has been found not

79. *Evans v. DOT*, 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972).

80. This rationale has been explained as follows:

For at least two reasons, of which Congress was undoubtedly aware, investigation files should be kept secret. The informant may not inform unless he knows that what he says is not available to private persons at their request, but more important in this day of increasing concern over the conflict between the citizen's right of privacy and the need of the Government to investigate it is unthinkable that rights of privacy should be jeopardized further by making investigatory files available to private persons. If these concerns are legitimate concerns, and I have no trouble in concluding that Congress regarded them as such, then at least a part of the purpose of enacting the investigatory file exemption is lost if the file ceases to be confidential as soon as the threat of a law enforcement proceeding disappears. Consequently, I hold that 'investigatory files compiled for law enforcement purposes' need not be produced whether proceedings be contemplated or not.

Cowles Communication, Inc. v. Department of Justice, 325 F. Supp. 726, 727 (N.D. Cal. 1971) (footnotes omitted).

81. Informants may also be protected by exemption four. However, since no one knows what that exemption means [ATTORNEY GENERAL'S MEMORANDUM, *supra* note 16, at 300-03] it might be wiser to rely on the law relating to government investigatory files to protect informants.

to be limited to criminal investigation.⁸² This finding is supported by specific legislative statement.⁸³

However, a more severe public policy rationale exists for the protection of criminal investigatory files.⁸⁴ Broader release of civil investigatory file information would be possible if a special interpretation of the exemption, as applicable only to criminal investigatory files was established. Criminal law enforcement files could thereby be given a more restrictive exemption than civil enforcement files.

Not only will this effect better protection for the government's criminal investigatory function, but it will protect the individual rights of those involved in criminal investigation. It is difficult to find any reason why the public should have access to the files compiled in the investigation of a possible individual criminal activity.

The difference in policy considerations for the releasing of civil investigatory files and criminal investigatory files is so great that it was a mistake for Congress to consider them together in the first place, and it remains a mistake to continue to consider them together.

Internal Memorandum Exemption

Inter-agency or intra-agency documents are protected by exemption five.⁸⁵ This provision exempts any internal document "which would not be available by law to a party . . . in litigation with the agency." Thus the preliminary test is whether a party in any conceivable context could discover the document. If not, then the document is protected by exemption five. The phrase "which would not be available by law to a party" was intended to incorporate the traditional privileges applied to such documents.⁸⁶ The purposes of the exemption are to protect an agency's staff from operating in a "fish bowl," so that the staff will freely express their opinions, and to prevent the premature disclosure of agency decisions.

The internal memoranda exemption has resulted in impractical ad hoc judicial interpretation. Although this exemption seems to be

82. *Clement Bros. v. NLRB*, 282 F. Supp. 540, 542 (N.D. Ga. 1968). *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591 (D.P.R. 1967).

83. H.R. REP. NO. 1497, *supra* note 16, stated: "This exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws." *Id.* at 11.

84. *Black v. Sheraton Corp.*, 50 F.R.D. 130, 132 (D.D.C. 1970).

85. 5 U.S.C. § 552(b) (1970) states: "This section does not apply to matters that are . . . (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

86. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 16, at 304.

a blanket exemption for internal papers, the courts have found occasion to attempt to limit its applicability. In *Consumers Union v. Veterans Administration*,⁸⁷ one court reasoned from the "available by law" phrase that an internal memorandum would be available under the Act if it were available through discovery under rule 26(b) of the Federal Rules of Civil Procedure. Consumers Union sought the results of hearing aid tests conducted by the Veterans Administration. The court, by superimposing upon the Act precedent developed under rule 26, found that the documents would ordinarily be made available under the Act. It relied on the traditional "government records" exception to discovery under rule 26. Government records had been held to be privileged where they were part of the "deliberative process that must precede any well taken decision or policy statement."⁸⁸ The court relied on the cases decided before passage of the Act to find that the exception did not extend to factual documents. It transferred the "policy vs. factual" document distinction to the fifth exemption and held that the exemption did not extend to factual material.⁸⁹

The District of Columbia Circuit in *Bristol-Myers v. FTC*⁹⁰ went further and held that the exemption applied only to the opinion portions of internal documents and not to the entire document.⁹¹ The court followed this expansion of the "purely factual" doctrine in *Sterling Drug, Inc. v. Federal Trade Commission*.⁹² *Sterling* involved a request for documents relating to the Commission's investigation of a merger which was similar to the one which Sterling was defending but which the Commission had ultimately approved. The court held that not only purely factual documents but also purely factual portions of policy documents must be released. Thus, under these two cases, agencies must attempt to edit "policy" documents so that the factual portions of an otherwise exempted document could be disclosed.⁹³

87. 301 F. Supp. 796 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971).

88. *Id.* at 804.

89. *Id.* at 805.

90. 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

91. After holding that portions of a document may be deleted to protect confidential information, the court moved on to exemption five where it found "[a] similarly detailed analysis is necessary." 424 F.2d at 939.

92. 450 F.2d 698 (D.C. Cir. 1971).

93. *Sterling* recognized that a document might be so opiated that a deletion approach would not be practical, but did not rule out the deletion approach in all instances. This can be seen in the court's answer to Sterling's contention that the

This holding is impracticable. The segregation of fact from opinion in individual memoranda cannot be done by lower level staff personnel. Hence, trained professionals must read every internal memorandum and edit out "purely factual" material. The mass of records which would require such treatment would require a large resource allocation, both by the agency and later by a reviewing court.

Even as applied categorically to separate internal documents, the "purely factual" test places a significant burden on agencies. Request will not be limited to relevant discovery material as under rule 26, and hence, merely separating factual documents from policy documents will require professional staff to read and to segregate vast quantities of documents.

It would be more consistent with the underlying goals of the Act if all internal memoranda were released after a certain period of time. A theory analogous to the "currently active" theory developing under the investigatory file exemption would be the most rational way to limit this exemption. The "premature disclosure" rationale is more firmly rooted under the internal memorandum exemption than under the investigatory file exemption.⁹⁴ Internal memoranda could, based on the underlying theory of the exemption, lose their protection after they were no longer pertinent to a current decision.⁹⁵ Courts should be no more reluctant to incorporate such a limitation than they are to

lower court had not properly considered the possibility of deleting the opinion portions of the memorandum when it said:

we must agree, however, that there is no indication in the opinion below that the judge considered the possibility of deleting portions of the documents. It may well be that making deletions would not change the character of these documents, since they appear to consist primarily of the thoughts and recommendations of the Commission and its staff. . . . We must therefore remand the case so that the District Court judge can consider this possibility and state in his opinion that he has done so.

Id. at 704. The *Sterling* court cited *Soucie v. David*, 448 F.2d 1067 (D.D.C. 1971), which held that: "Factual information may be protected only if it is inextricably intertwined with policy-making processes." 448 F.2d at 1077-78. However, the court in *Soucie* seemed to limit this holding to separate documents and not portions of documents, and hence, it seems that both *Bristol-Myers* and *Sterling* go beyond the holding of that case.

94. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 16, at 304 states: "The above [legislative] quotations make it clear that the Congress did not intend to require the production of [internal memoranda] where *premature disclosure* would harm the authorized and appropriate purpose for which they are being used." (emphasis added).

95. Documents involving national security would not be automatically released after a period of time but perhaps would be periodically subject to review. *Epstein v. Resor*, 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970).

release "purely factual" documents. Faced with such a limitation, agencies at least would be able to develop specialized internal rules for coping with it.⁹⁶

The nondisclosure of policy memoranda is supported by the desire to allow a free and frank exchange of ideas and to prevent bureaucrats from operating in a "fish bowl."⁹⁷ However, this non-disclosure rationale is contrary to the disclosure bias of the Act. Moreover, the necessity for protection of all internal memoranda, either factual or opinion, is overstated. The rationale loses its vitality as time passes after the final determination for which the document was drafted is made. Furthermore, if the staffs of the agencies realized that some time in the future their work product would go on the public record, they would do a more careful, workmanlike job.⁹⁸ If they knew that their work could be questioned in the future, even though the relevant decision was irrevocable, they would be more accurate and unbiased, and perhaps would avoid bowing to the special interests who, under the present system, would be the only ones likely to know their role in the decisionmaking. The decisionmaking process as a whole may benefit from criticism of the internal work product or the decisional process which resulted in an official decision. Staffs will continue to give agency officials their opinions because they must. The worst that can happen is that agency staff and agency officials would communicate orally more often; which may be a beneficial result from another point of view.

In sum, the electorate would be better informed as to the factors behind a decision if all internal documents were subject to disclosure at some time. And agencies would find such a requirement workable

96. One point worthy of mention is the oversight in the Act in not defining the term "agency" differently than it is used in the rest of the Administrative Procedure Act. Section 551(1) excludes Congress from coverage of the APA and state and local governments are excluded by lack of authority over their administrative procedure. For the purposes of the Act, particularly exemption five, congressional, state and local government communications with federal agencies should also be exempt but subject to ultimate release as prescribed.

97. "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 16, at 10. 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 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).

98. *Tennessean Newspaper, Inc. v. FHA*, 464 F.2d 657, 660-61 (6th Cir. 1972).

in contrast to the present "purely factual" limitation on the exemption. The problems of bureaucrats operating in a "fish bowl" are overstated. Thus, the limitation placed on the fifth exemption should be founded, not on the type of document, but on the current relevancy of the document to government policymaking.⁹⁹

Privileges

The goal of providing readily available information cannot be permitted to steamroll legitimate concern for the protection of information obtained from outside the government which demands privileged treatment. Clear demarcation of privileged information is also a necessary part of a public information system.

In this regard, it is unfortunate that the most unfathomable provision of the Act is exemption four, relating to privileged and confidential information.¹⁰⁰ This exemption seems on its face to refer

99. The internal memorandum exemption presently protects the most numerous types of law made by an agency — decisions not to prosecute or to take action. The decision not to act is rarely accompanied by an agency opinion, and hence, the most important decisions reached by agencies are given no background reasons. See K. DAVIS, DISCRETIONARY JUSTICE 103-06 (1969). In *American Mail Lines, Ltd. v. Gulick*, 411 F.2d 696 (D.C. Cir. 1969), the agency was required to disclose internal memoranda which were incorporated into a final determination by the agency. This opinion does not go far enough, and does not deal with instances where an agency makes a final determination, such as a decision not to proceed in an investigation, but does not incorporate a staff opinion. Where no agency opinion is adopted for any final agency action, all internal memoranda which were involved in that decision should be released to the public. *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 714 (D.C. Cir. 1971) (dissenting opinion). See also *United States v. Leichtfuss*, 331 F. Supp. 723 (N.D. Ill. 1971). The purpose of this is twofold: (1) It will encourage agencies to develop opinions in formal no-action situations and; (2) it will permit those affected by the agency decision some glimpse into the input for that decision. One should be cautioned that, as the court in *Sterling* found, a released staff opinion may well confuse those outside the process as to what actually caused the agency to reach its final determination. Bearing this in mind, perhaps a more straightforward solution to this problem would be to require an opinion in every final agency action.

100. Discussing exemption four, Davis stated:

The *Attorney General's Memorandum* never acknowledges that the statutory words of the fourth exemption have a plain meaning. Instead, the *Memorandum* says that the words are

. . . susceptible of several readings, none of which is entirely satisfactory. The exemption can be read, for example, as covering three kinds of matters: i.e., 'matters that are * * * [a] trade secrets and [b] commercial or financial information obtained from any person and [c] privileged or confidential.' . . . Alternatively, clause [c] can be read as modifying clause [b]. Or, from a strictly grammatical standpoint, it could even be argued that all three clauses have to be satisfied for the exemption to apply. In view of the uncertain

only to documents of a commercial nature.¹⁰¹ The legislative history demonstrates that it was not to be so limited and was intended to include traditional privileges.¹⁰²

Clearer articulation of what constitutes privileged information is necessary. The government has a duty to hold certain information in confidence, and this information should be carefully protected. Moreover, clear definition of privileged information will permit full use of clerical personnel to handle access. Although total cure for the Act's deficiencies in guarding confidential information can only be accomplished by amendment, courts must take cognizance of these deficiencies in releasing information. Courts must recognize that those who deal with the government do not lose their rights because they submit information to the government.

Corporations

There must be a distinction between the rights of an individual citizen and those of a corporation. Corporate rights to deal with the government in secret should be severely limited. Where information is obtained from a corporation, there seem to be very few instances where there will be reason to maintain its confidentiality. Trade secrets should not be disclosed by the government.¹⁰³ Sensitive financial and commercial information obtained from a company under no statutory or administrative compulsion and with assurance of confidentiality explicitly given should be withheld from disclosure.¹⁰⁴

meaning of the statutory language, a detailed review of the legislative history of the provision is important.

Especially fascinating is this sequence: The Attorney General (1) says the statute is susceptible of several readings, (2) he lists those readings, and (3) he then reaches a conclusion different from any he lists! If what he says implies that the statute is not susceptible of the reading he adopts, then I agree! Yet I am in basic sympathy with the Attorney General in all this because I fully agree with the fundamental idea that underlies what he says in the passage quoted — that no reading of which the Act is susceptible can feasibly govern what the agencies will do. The fault is that of Congress, not that of the Attorney General. Davis, *supra* note 5, at 788.

101. 5 U.S.C. § 552(b) (1970) states: "This section does not apply to matters that are . . . (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential."

102. "It would also include information customarily subject to the doctor-patient, lawyer-client, lender-borrower, and other such privileges." S. REP. NO. 813, *supra* note 23, at 9.

103. If the information is readily available through independent research then it is not a trade secret. Gellhorn, *Business Secrets in Administrative Agency Adjudication*, 22 AD. L. REV. 515, 516 (1971).

104. The Environmental Protection Agency has promulgated a rule to this effect. See 40 CFR § 2.107a(b) (1972).

Information Specifically Given in Confidence

Information freely given with specific assurance by the government that it will be kept in confidence should be exempt. In *Tobacco Institute v. Federal Trade Commission*,¹⁰⁵ the court found that the controlling factor was whether confidentiality had been requested. The Tobacco Institute sought access to the answers to questionnaires sent to persons and organizations actively engaged or interested in the subject of smoking and health. About half of those responding requested confidential treatment. The court refused to order disclosure of those questionnaires which were received in confidence.

The court in *Nichols v. United States*¹⁰⁶ went so far as to hold that even where the information was not obtained by a specific grant of confidentiality the material would be protected if the assurance was given later. The case involved a request from a pathologist for material connected with the assassination of President Kennedy. The material was given to the government by the estate of President Kennedy without any request that it be protected from public disclosure. Later the Kennedy family was asked if it wished confidential treatment and it responded affirmatively. Thus, at least in a sensitive fact situation, combined with an explicit request for confidentiality, courts will not require disclosure. Regardless of whether the information was given on the assurance of confidential treatment or the expression was received after the information is in the possession of the government, it appears that courts will generally protect information specifically given in confidence.

Citizens' Privilege in Dealing With the Government

The legislative history of the Act suggests that it is necessary to balance the disclosure requirement against the right of privacy.¹⁰⁷ Nevertheless a right should accrue to an individual citizen who must deal with the government that information he supplies will be used only for the purpose for which he supplied it and no other. Meticulous care should be taken to avoid any danger of staff discretion infringing on individual rights of privacy. Certain traditional privileges, such as doctor-patient and attorney-client, should be spelled out. But more importantly, a general privilege should be established for communication between the government and private individual — a government-citizen privilege.

105. Civil No. 3035-67 (D.D.C. April 11, 1968).

106. 325 F. Supp. 130 (D. Kan. 1971), *aff'd*, 460 F.2d 671 (10th Cir. 1972).

107. S. REP. NO. 813, *supra* note 23, at 7.

A new sensitivity to the protection of the individual privacy when dealing with the government has been emerging.¹⁰⁸ At present, the Act does not afford this protection.¹⁰⁹ Exemption four does not go far enough to assure privacy for those dealing with the government. Exemption six¹¹⁰ permits withholding personal and medical information, but is severely limited by the phrase "clearly unwarranted invasion of personal privacy."¹¹¹ It is true that courts may hold that agencies are not required to release personal information.¹¹² But the *Getman v. NLRB*¹¹³ decision severely limits this exemption and suggests that minor invasions of privacy should give way to the public right to know. In that case, Getman, a law professor, attempted to gain access to the "Excelsior" lists of employees filed with the Board by employers.¹¹⁴ Since the list contained names and addresses of individual employees, the Board argued that release of the information would interfere with the privacy of the employees. The court suggested that the employees' rights were not as important as the public interest value of the academic study. It found that legislative history indicated that only disclosure of intimate details was foreclosed.¹¹⁵

Balancing of this sort seems both unnecessary and unwarranted. The public does not have a need to know private information, and

108. This new sensitivity is evidenced by the numerous bills to limit the sale or distribution of mailing lists by federal agencies. See, e.g., H.R. 327, 92d Cong., 1st Sess. (1971); H.R. 8903, 92d Cong., 1st Sess. (1971); H.R. 9738, 92d Cong., 1st Sess. (1971); H.R. 10020, 92d Cong., 1st Sess. (1971).

109. "In essence, [the Act] reverses the traditional presumption in favor of personal privacy and places the burden on the information-holding agency to find a specific statutory ground for refusing to honor a request for disclosure. In some instances the Act not only has shifted the burden of proof, it apparently has increased it as well." Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 MICH. L. REV. 1089, 1194 (1969) (footnotes omitted).

110. 5 U.S.C. § 552(b) (1970) states: "This section does not apply to matters that are . . . (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

111. "The statute *requires* an invasion of personal privacy . . . so long as it is not 'clearly unwarranted.' The use of the word 'clearly' is a legitimate expression of a policy judgment, although one may wonder about its wisdom." Davis, *supra* note 5, at 798 (emphasis added).

112. *Tuckinsky v. Selective Serv. Sys.*, 294 F. Supp. 803 (N.D. Ill.), *aff'd*, 418 F.2d 155 (7th Cir. 1969), held that a draft counsellor could not have personal information about members of the selective service system and appeal board unless consent was given to release the information.

113. 450 F.2d 670 (D.C. Cir. 1971).

114. In accordance with a rule announced in *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966), employers must furnish the Board with a list of the names and addresses of all employees eligible to vote in an upcoming labor election.

115. 450 F.2d at 674-75.

even if it did the individual has the right to have the information used for the purpose for which the government obtained it and for no other. He either has a right to privacy or does not, and no balancing is necessary. However, the *Getman* conclusion is correct in one sense; it is difficult to find protection within the Act, and information about an individual may well be freely available.¹¹⁶

This situation is aggravated by the fact that there is no requirement that exempt material be protected by agencies. Thus, even exempt personal information will not be protected unless an agency wishes to protect it.¹¹⁷ In *LaMorte v. Mansfield*,¹¹⁸ a witness in a Securities and Exchange Commission proceeding attempted to claim the investigatory file exemption for testimony given by him in an agency proceeding. Access was sought to the testimony in connection with a litigation in which he was a defendant. The court held that a private individual could not claim an exemption granted an agency under the Act. Therefore, the private individual has no more protection than an agency wishes to afford him even with respect to exempt material.

An unambiguous exemption for personal privacy should be established to cover any information supplied to the government by an individual citizen, and application of the exemption by the agency should be mandatory. A private individual should be protected from the harassment which may emanate from the release of personal information by the government. Bureaucrats should not be permitted any latitude in releasing private information.¹¹⁹

III. MORE AMBITIOUS MODIFICATIONS

Despite the possible adjustments through judicial interpretations which have been suggested above, the undeniable truth is that the Act is not well suited for the task of providing public information. Judicial legislation may provide a partial remedy if the courts begin to take a pragmatic approach to providing public information. But if easily and quickly obtainable information is to be supplied to the public, administrative or legislative innovations must be forthcoming. Two innovations are appropriate. First, active administrative enforcement must replace passive judicial enforcement. Second, greater efforts must be made to make everything not exempt available for public inspection and copying.

116. *But cf.* Giannella, *supra* note 5, at 219.

117. *See* Miller, *supra* note 109, at 1195-96.

118. 438 F.2d 448 (2d Cir. 1971).

119. Miller, *supra* note 109, at 1199.

Administrative Enforcement

Judicial enforcement in a public information system has not been effective.¹²⁰ The courts are not equipped to handle this problem. They can only sit passively and wait for cases to come to them. Thus, judicial enforcement has not provided most citizens with the benefits of the Act.¹²¹ Courts cannot provide the leadership and supervision required for a comprehensive public information system.¹²² Indeed, judicial enforcement is not only inadequate, but also aggravates the problem by increasing delay. Judicial enforcement is also made inadvisable by the overwhelming burden it places on the already overburdened courts.

A recommendation made in 1940 by the Attorney General's Committee on Administrative Procedure may provide the type of enforcement necessary for a viable public information system. The Committee recommended the creation of a Director of Administrative Procedure — an administrative agency to oversee administrative agencies.¹²³ One of the Proposed tasks of the Director was that of policing the public information policies of the various agencies.¹²⁴ In the area of public information, this idea has even greater value today than it did in the 1940's, because judicial enforcement has been given a test and has failed.

Government information will be made generally available only if an executive entity is vested with sole responsibility for making it available. A public information agency must be established that will assume an active role. It must act both as an inspector general — policing agencies' information policy — and as an ombudsman — dealing with complaints through administrative procedures.

The Justice Department has set up "The Freedom of Information Committee" which reviews agency denials of access from the point of view of defending the denial in court.¹²⁵ There is no doubt that this group does a great deal to loosen the access policies of the agencies. But it is passive in approach, and tends to weigh success in the courts and resource allocation of trial staff more than it does the policy of

120. Giannella, *supra* note 5, at 225.

121. Nader, *supra* note 27, at 2.

122. Courts also are unable to cure deficiencies in agencies' staff work. Giannella, *supra* note 5, at 225; *Pharmaceutical Mfrs. Ass'n v. Gardner*, 381 F.2d 271, 282 (D.C. Cir. 1967) stated: "The courts sit to assure substantial fairness, not to discipline agencies for awkwardness in their staff work."

123. ATTORNEY GENERAL'S REPORT, *supra* note 7, at 123-26 — This proposal is a touch of genius and continues to be a worthwhile proposal.

124. Proposed Bill, § 7, ATTORNEY GENERAL'S REPORT, *supra* note 7, at 194.

125. H.R. REP. NO. 92-1419, *supra* note 33, at 66-69.

freeing access to information. The experience of this body does demonstrate, however, that an oversight group will assist in releasing information and that such an organization could be created by the executive without further resort to Congress.¹²⁶

Public Inspection

The present scheme for obtaining access to government information consists of a request, with varying degrees of specificity, administrative search and determination, and often judicial review, before access is granted. This procedure cannot provide free and fast information. Most of the six common complaints with respect to the implementation of the Act found by the Administrative Conference¹²⁷ can be attributed to the technique established by the Act for releasing information.

The inherent defects in the system of the Act cannot be overcome merely by developing guidelines that a clerk can follow. The information which is to be made available must be made available quickly and in a useful manner. There will be no free and fast public information until the available records can simply be pulled off a shelf upon a request to clerical personnel.

All nonexempt documents should be available for public inspection at a convenient location.¹²⁸ All agencies have public record rooms where certain documents are available "across the counter." Records available under this procedure need only be expanded to include all information to which access is required under the Act. Because screening and segregating of the documents will be done beforehand, no cumbersome administrative determinations or clerical decisions will be required.

In implementing this policy, it would be desirable to establish an official in each agency whose duty it is to make information available. Anything that is developed in a final form within the agency — excluding *current* internal memoranda and material in a *working*

126. "This committee also is convinced that the FOI Committee and the Office of Legal Counsel [of the Department of Justice] could — and should — exercise more of a leadership and coordinating function to improve the administrative machinery as well as to foster a more positive attitude in the Federal bureaucracy toward the basic principles and goals of the FOI Act." *Id.* at 68.

127. These were: (1) equality of access; (2) evasive and obstructive practices — overly formal requirement; (3) delay; (4) commingling of exempt and nonexempt information; (5) resistance to disclosure by lower level staff; and (6) lack of uniform fee for locating and copying. Giannella, *supra* note 5, at 221-25.

128. See Nader, *supra* note 27, at 15.

investigatory file¹²⁹ — should pass through this official before they are included in a permanent file. This official should be responsible for setting up the procedure. He and his staff should review all these records. If the material does not come under an exemption, then it should be indexed and placed on public display. If it does come within an exemption, and a decision is made to withhold it, then it should be described in an index and reasons given for withholding.

This procedure will permit the media the quick access which they require. It will permit researchers the latitude to make searching expeditions in agencies' records using primarily their own resources and only a small amount of the agencies' resources. Most importantly, this procedure will provide access indistinguishably as to interest involved.¹³⁰

This procedure will also solve one problem which unsuccessful applicants now face. At present, there is no immediate requirement that withheld information be identified or reasons given for denial. Documents are withheld without the requesting party knowing what he has not seen or why he has not seen it.

This method of disclosure would take advantage of the fact that those inside an agency understand the records and can organize and compile the information in a useable form.¹³¹ It is vital that information be well organized and retrievable, and only agency personnel can successfully manage the records.

It is also hoped this procedure will change the attitude of the agencies' staff towards disclosure. At present, it is easier to withhold documents than to release them, and hence agency personnel find that to deny access is in their own best interest.¹³² It is predicted that imposing a greater burden for withholding documents, while making it relatively easy to release them, will do much to encourage release.¹³³

As the Senate Report said, "[f]or the great majority of different records, the public as a whole has a right to know what its Govern-

129. These would, of course, be placed in the process for release immediately upon loss of "current" status.

130. APA LEGISLATIVE HISTORY, *supra* note 8, at 198 states: "The section [section 3] has been drawn upon the theory that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know or to have the ready means of knowing with definiteness and assurance."

131. ATTORNEY GENERAL'S REPORT, *supra* note 7, at 26.

132. *See* Giannella, *supra* note 5, at 224.

133. Statement of John R. Quarles, Jr., Assistant Administrator for Enforcement and General Counsel, Environmental Protection Agency, 1972 *Hearings*, *supra* note 34, at 1877: "Thus, staff personnel must go to some trouble to deny a request, while granting a request is less troublesome since high-level clearance is not needed. We hope and expect that this procedure will encourage staff personnel to respond promptly and affirmatively to requests for information."

ment is doing."¹³⁴ When motivated away from seeing danger in every exposure, agencies will find that most documents can be made public as a matter of course without doing injury to their function.

The Administrative Conference considered greater use of public inspection and rejected that approach. It suggested that use of that approach would result in mechanical insertion of material into closed files rather than true exercise of agency discretion.¹³⁵ However, this result does not necessarily follow from a public inspection system. First, if the agencies honestly try to comply with the Act, very little information will not be made public, assuming that the recommendations earlier made as to investigatory files and internal memoranda are implemented. Second, there is no reason an agency cannot exercise its discretion in special cases under a public inspection procedure. Indeed, the index of withheld documents will facilitate special requests for nonpublic information.

The agencies generally resist giving specific reasons for withholding documents,¹³⁶ but the reasons will facilitate the auditing and enforcement of the Act. Moreover, as mentioned above, the extra burden of giving reasons for withholding each document will provide incentive to resist the temptation to withhold questionable documents.

To universally accomplish this policy will require congressional or executive action. However, there are examples of judicial orders requiring agencies to grant public inspection of nonexempt material and to index material which cannot be disclosed.

In *Irons v. Schuyler*,¹³⁷ the applicant sought all the unpublished manuscript opinions of the Patent Office. The court found that the request was so broad as to be burdensome since the opinions contained some information which would be protected by the Act and release would require unreasonable effort to segregate disclosable material. Although it refused to order the agency to disclose the information, it did require indexing in compliance with § 552(a)(2)(c).¹³⁸ This section is limited to matters formally considered by the agency and cannot be read to extend to all records required by the Act to be disclosed. However, the rationale of *Irons* is worth noting. The court held that it could not require disclosure under so broad a request but

134. S. REP. No. 813, *supra* note 23, at 5.

135. Giannella, *supra* note 5, at 242-43.

136. *Id.* at 255.

137. 321 F. Supp. 628 (D.D.C. 1970).

138. 5 U.S.C. § 552(a)(2)(C) (1970) states "... Each Agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published."

ordered the agency to index the documents so a reasonable request could be fashioned. An index of documents which are in the possession of the agency, but not to be released, permits everyone — the requesting party, the courts, and probably the agency itself — to focus any controversy on information actually available. Indexing should be considered by courts more frequently when they are faced with questions of overly broad requests rather than upholding denial of access or putting the agency to an impossible burden.

In *United States v. Leichtfuss*,¹³⁹ the applicant requested access to Selective Service directives and manuals. The court found that the documents should have been made available under the Act. But the court went further, and found that the applicant and others like him should not be required to file a formal request under the Act each time disclosure of the documents was desired. It found that such a procedure would serve no purpose; in addition it would burden the agency and the applicant, and would inject unnecessary delay into the granting of access to documents already designated for release. Therefore, the court ordered the records to be made available in a convenient place for anyone to inspect and copy. Courts could so order where the same information is likely to be requested repeatedly.

Realistically, easily and quickly obtainable public information can only result from a major modification in the public information system. An administrative agency assigned to enforce the Act is the only means which will assure adequate enforcement and active leadership in implementing a public information system. Only an "over the counter" access system will make information realistically available to all users.

IV. CONCLUSION

The problems inherent in the effort to achieve fair and effective administration of a public information policy transcend the needs of individual applicants. These problems must be considered within the broad spectrum of the administrative process. Unfortunately, Congress did not write a statute which lends itself easily to efficient implementation of a freedom of information system within the total administrative process. Moreover, the courts have followed a rather narrow and myopic approach to implementing the Act.¹⁴⁰

139. 331 F. Supp. 723 (N.D. Ill. 1971).

140. Recently, the Supreme Court in *Environmental Protection Agency v. Mink*, 41 U.S.L.W. 4201 (U.S. Jan. 22, 1973) made an effort to rationalize the judicial approach to implementation of the Act. Although the major portion of the opinion relates to exemption one [see note 54 *supra* and accompanying text] its most interesting aspect is its approach to judicial scrutiny under exemption five. In direct conflict

The inherent deficiencies of the Act and the unrealistic decisions of the judiciary have resulted in continual criticism of the agencies. Although bureaucrats have not been overly enthusiastic in complying with the Act, it seems somewhat unfair to focus all adverse comment on them. Indeed, many agencies have labored diligently to carry out the congressional mandate as they see it. Moreover, one should not underestimate the effects of the guerilla activities of "public interest" bureaucrats.

This article has suggested that the task for the courts and the critics of the present public information system is to modify the approach of the Act and the information system in general in order to make it possible to realistically expect a free and fast flow of information from the federal government. The suggested interpretations of the Act attempt to indicate methods for avoiding the present ad hoc approach and for incorporating into decisions considerations of the practical difficulties in making records available. The suggested interpretations, while recognizing the burden on the agencies, are not intended to provide less access, and are indeed intended ultimately to provide more disclosure of agencies' records. Suggested also are modifications beyond the authority of the judiciary but within easy reach of others. These too represent an attempt to build workability into the public information system so that more information can reasonably be made available.

The constant flailings of those dissatisfied with implementation of the Act cannot produce any positive change and can only result in continued use of a frustrating and basically faulty system. It is simply time we moved off center and approached the problems of a public information system rationally.

with the trend of circuit court decisions, the Court held that "*in camera* inspection of all documents is not a necessary or inevitable tool in every case." *Id.* at 4207. Thus, an agency by various means short of submission of all the documents may be able to show to a court's satisfaction that it has complied with the Act. For instance, an agency may by affidavit or oral testimony demonstrate that the "surrounding circumstances" support a finding that the withheld documents are "advisory" and contain no severable "purely factual" material or that the edited versions it voluntarily released contain the entire disclosable portion of the documents. The Court also sanctioned *in camera* inspection of a representative document only. This holding will absolve the district courts from performing many of the largely clerical functions previously required of them. It constitutes a clear recognition that methods utilized by courts in handling traditional discovery are not practical in reviewing access questions under the Act.