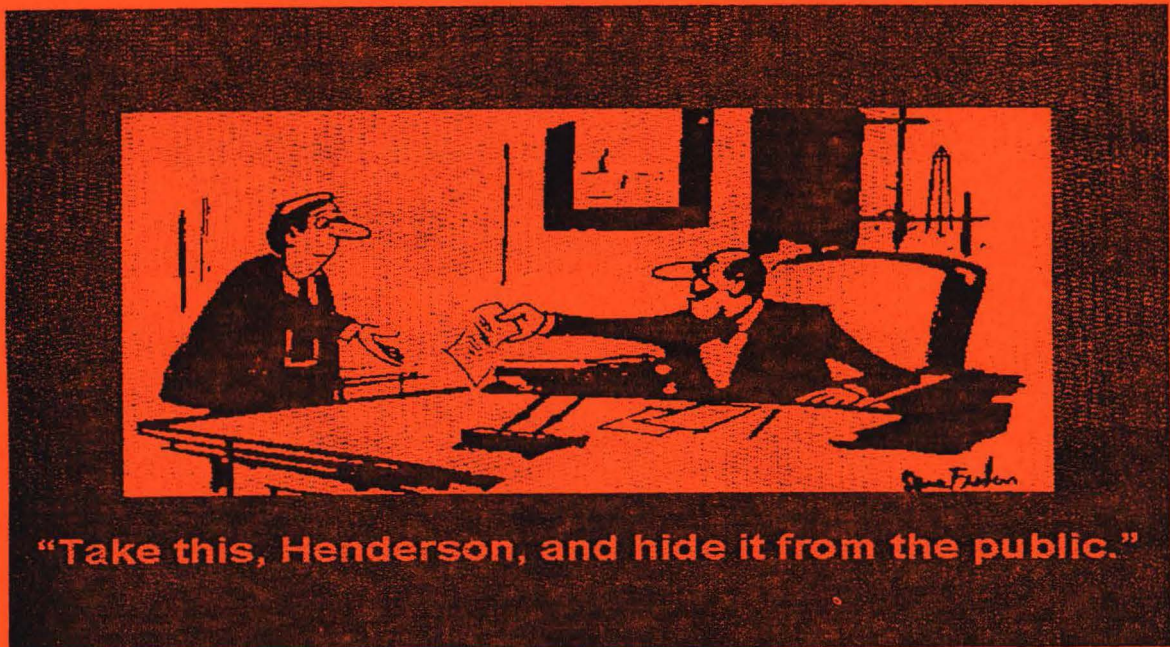


Freedom of Information Act Requests

Secrets of FOIA revealed.

What is a FOIA?



How do you use FOIA?

What will a FOIA tell you?

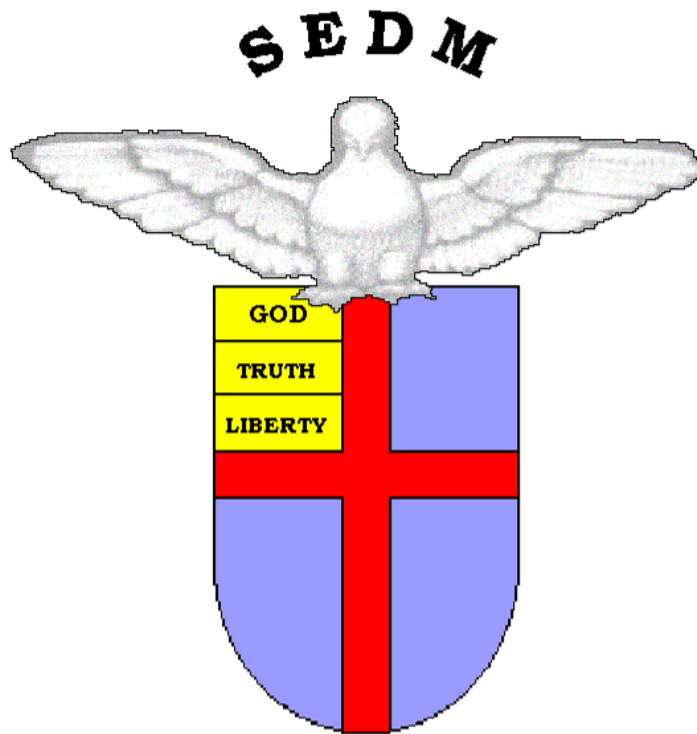
How can you use FOIA to your benefit?

Volume 4, April 2002

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Introduction to the Freedom of Information Act (1966) **(5 U.S.C. 552)**

President Lyndon Johnson signed the Freedom of Information Act into law on July 4, 1966. His bill signing statement articulated the delicate public policy balance that the FOIA was intended to develop between the citizens and the Federal Government. "A democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury to the public interest""(July 4, 1966, LBJ).

A. Key concerns of the FOIA

1. That disclosure is the general rule, not the exception.
2. That all individuals have equal rights of access.
3. That the burden be on the government to justify the withholding of a document, not on the individual who requested it.
4. The individual denied access to documents has a right to seek injunctive relief in the courts.
5. That there be a change in government policy and attitude.

B. Key Processing Issues

1. Conduct a reasonable file search based on the request.
2. Review documents for reasonably segregable material.
3. Apply "Possession and Control" standards on Non-U.S. Government-Originated documents.
4. Address processing costs as early as possible, especially for public interest fee wavers.
5. Coordinate with in house counsel on initial details.
6. Have a response ready within 20 days.

C. Definitions

1. Search

- a. All time spent looking.
- b. Time to determine if document is responsive.
- c. May charge for no records.
- d. Not applicable to applying exemptions.
- e. Manual or computer.

2. Review

- a. Examining for exemptions.
- b. Excision time.
- c. Does not include resolving law or policy unrelated to exemptions.
- d. Chargeable only to commercial requesters.
- e. Initial Reviews.

3. Duplication

- a. Duplication copy for requesters.
- b. Paper copy microfiche, audiovisual.
- c. Magnetic tape or disc.
- d. Not duplicating for internal use.

1996 Electronic Freedom of Information Act

- A. Requires that 5 USC (a) (2) records created after November 1, 1996 be made available to the public by computer telecommunications or other electronic means.
 1. Establishes a new category of (a) (2) record (a) (2) (d). which are records released under a FOIA request, and which may become the subject of future FOIA requests
 2. Requires that an index of (a) (2) (D) records be made available to the public by December 31, 1999
- B. Directs an agency to provide a record in any form or format requested if the record is reproducible in that form or format.
 1. Directs agencies to make reasonable efforts to maintain its records in forms or formats that are reproducible.
- C. Requires agencies to search for records in electronic form, unless such effort would significantly interfere with the agency's automated information systems.
- D. Establishes multi-track processing based on amount of work and or time required.
 1. Allows requesters who don't qualify for the fast track to limit the request in order to qualify.
- E. Established that backlogs are not acceptable circumstance for delay unless an agency shows reasonable progress in reducing its backlogs.
- F. Provides expedited access for compelling need if:
 1. A threat to life or safety.

2. A person engaged in disseminating information has an urgency to inform the public on actual or alleged Federal Government activity.

G. Requires determination be provided within 10 days.

H. Requires that a requester must certify that compelling need is true and correct.

I. Extends initial requests response time to 20 working days.

J. Requires an estimate of amount of material denied unless such would harm an interest protected by an exemption.

K. Requires computer redactions be shown on the record if technically feasible.

L. Changes Annual reporting requirements.

M. Directs agency to make available to public, reference material or a guide for requesting information, including:

1. An index of all major information systems.
2. A description of major information and record locator systems maintained by the agency.
3. A handbook for obtaining information from the agency.

N. Allows for aggregation of request by the same requester or group of requesters if requests actually constitute a single request because they involve related matters.

1. Multiple requests involving unrelated matters shall not be aggregated.

O. Advance payment.

1. Cannot collect, unless requester failed to pay in timely fashion (i.e. 30 calendar days), or fee estimated to exceed \$250.00.
2. If fee exceeds \$250.00 notify and insure payment if requester has no prompt payment history.

3. If no history of payment, may collect advance payment up to full amount of estimated charges.
4. Where failed to pay previously, may require full amount owed, plus interest, and to make advance payment of full amount of estimated new fee.
5. After work is completed, may require payment prior to document release if no history of payment, or history of bad payment.
6. May not require advance payment after work is done for requesters with history of prompt payment.

P. Fee Guidance

1. Aggregating Requesters:
 - a. Attempts to breakup requests below threshold.
 - b. Time frame and subject matter.
 - c. Determine if requester is attempting to avoid fees, may aggregate multiple requests and charge.
2. Debt collection of 1982 (PL 97-365)
 - a. May charge interest for outstanding fees beyond 30 calendar days.
 - b. Rate prescribed by title 31 U.S.C. Section 3717.
 - c. Must send one demand letter and allow 30 calendar days to expire.
 - d. May submit to finance and accounting office for collection.

Q. Commercial Requesters

1. Commercial purpose, trade, profit interest.
2. Determine use to which requester will put the document.
3. Charges for search, review and duplication.
4. Not entitled to two hours and 100 pages free.

Please read the next three pages from the Department of Treasury Internal Revenue Service.

Internal Revenue Service

Department of the Treasury

District
Director

300 E. 8th St., Austin, Texas 78701

Person to Contact:
Valerie Mazur

Telephone Number:
(512) 499-5030

Refer Reply to:

E:DISC:FOIA # 1998-473
Date:

JUL 06 1998

Dear Mr.

This is in response to your Freedom of Information Act request dated June 18, 1998, and received in our office on June 22, 1998. We are unable to respond to your request for information.

While the Freedom of Information Act (FOIA) provides for access by the public to records maintained by the Federal government, the Statement of Procedural Rules, copy enclosed, sets forth certain requirements which must be met in order for a request to be processed. As submitted, your request fails to meet several of these requirements.

A request under the Freedom of Information Act must:

1. be made in writing and be signed by the person making the request;
2. state that it is made pursuant to the Freedom of Information Act, or regulations thereunder;
3. be addressed to and mailed or hand delivered to the Director of the Internal Revenue Service district where the requester resides, or the office having control of the records;
4. reasonably describe the records;
5. in the case of tax records, establish the identity of the requester and the requester's right to receive the records;
6. set forth the address to which the response is to be sent;
7. state whether the requester wishes to inspect the records or have copies made without prior inspection;
8. state the requester's agreement to pay for search and reproduction charges; and,

9. furnish an attestation under penalties of perjury as to the status of the requester.

The Statement of Procedural Rules states that the requester must sufficiently identify the records to which he or she is seeking access. The type of records which are maintained in the Austin District Office include Criminal Investigation Division, Collection, Examination, and Appeals administrative case files which originated within the respective divisions. In your request, please specify the type of records and the tax periods for which you are seeking information.

Please note that the Freedom of Information Act does not require agencies to respond to interrogatories. It also does not require agencies to conduct research to determine which resolution, decision, or statute you are seeking.

To the extent you are seeking records which establish the authority of the Internal Revenue Service to assess, enforce and collect taxes, please be advised of the following. The Sixteenth Amendment to the Constitution authorized Congress to impose an income tax. Congress did so in the Internal Revenue Code. The Internal Revenue Service administers the Internal Revenue Code. The Code contains information that may be responsive to portions of your request.

Copies of the Code are available in many public libraries. Or, if you choose, you may purchase a copy from the National Office Freedom of Information Act Reading Room at the Internal Revenue Service, P.O. Box 795, Ben Franklin Station, Washington, D.C. 20044. Alternatively, copies of the Internal Revenue Code may be purchased in book stores or read in public libraries.

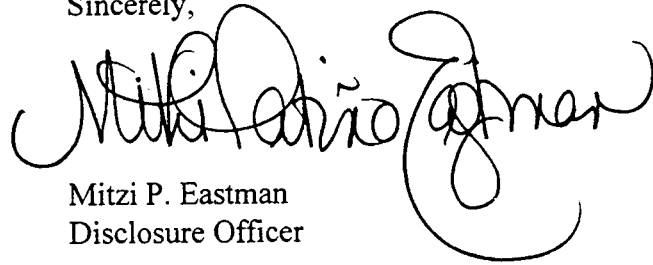
As a courtesy, a copy of the Library of Congress publication, #97-59 A, Frequently Asked Questions Concerning the Federal Income Tax, accompanies this reply.

If the requested documents originated within the Austin District, a perfected request for information should be submitted to the Disclosure Office at:

300 E. 8th Street
Mail Stop 7000AUS
Austin, Texas 78701

If you have any questions, please contact the Disclosure Office at (512) 499-5030.

Sincerely,

A handwritten signature in black ink, appearing to read "Mitzi P. Eastman". The signature is fluid and cursive, with a large, stylized initial "M".

Mitzi P. Eastman
Disclosure Officer

Enclosures

Department of Treasury- IRS

FOIA Response Letter from the IRS

- A. Many of us have received this exact letter or a version of it. If you have been sending out FOIA request then you may have received one of these letters yourself.
- B. The 3rd paragraph down gives you what a request must contain which needs to be customized to your request.
- C. In the first paragraph on page 8 : Important points to remember:
 - 1. Do not ask for interrogatories or in other words you do not ask questions.
 - 2. Do not ask them to do research.
 - 3. You are only to ask for specific documents.
- D. Third paragraph: here they are bringing up the 16th amendment, which is of no concern to most average Americans. Like the Tax cases proclaim, “The 16th amendment gave congress no new taxing powers.”
- E. In the FOIA request in question we only asked for certain specific documents, which are not contained in the code. See first full paragraph at the top of page 8.
- F. This is just one of the many ways they try to side step your request.
- G. For more information order items #110 and #145 on our literature list and read where they actually teach Disclosure Officers to lie and to send you the wrong information.

The Development of FOIA 1966-1996

- A. The next report, consisting of 36 pages put together by Professor Charles J. Wichmann III, is one of the best articles we have read concerning the FOIA development process.
- B. As you read the introduction remember Byron De Beckwith and how he was framed. Item #126 on our literature list. The FBI actually planted a bomb in his car then had local cops pull him over and guess what they found.
 - 1. Remember Ruby Ridge, Idaho where the Government settled with the Weaver family for 3.1 million dollars out of court.
 - 2. Remember Waco, Texas, and all the lies that the FBI Special Agent Ricks told on National TV. The list of incidents such as these involving governmental misconduct is much longer than you think.
- C. When you read this section, make sure you have your yellow marker.
 - 1. Be sure to read this section more than once.
 - 2. Don't just skim through this. Mr. Wichmann III spent untold hours putting this article together to enlighten and educate us. Take advantage of this.
- D. This is called background material which is designed to open up your mind and teach you what you can do if you simply apply yourself.
- E. The FOIA process is not a flashy overnight "silver bullet" that is going to cost you thousands of dollars for "hype" promoted by some ex-used car salesmen. And there are a lot of them out there.
- F. Protect yourself. Don't rely on someone else's paperwork.

RIDDING FOIA OF THOSE "UNANTICIPATED CONSEQUENCES":¹ REPAVING A NECESSARY ROAD TO FREEDOM

CHARLES J. WICHMANN III

A government by secrecy benefits no one. It injures the people it seeks to serve; it damages its own integrity and operation. It breeds distrust, dampens the fervor of its citizens and mocks their loyalty.²

The question, of course, is whether this public expense is worth it³

INTRODUCTION

I. THE DEVELOPMENT OF FOIA, 1966-1996

- A. The Birth of FOIA: Introducing an Era of Open Government
- B. The 1974 Amendments: The Source of Unanticipated Consequences
- C. The 1986 Amendments: Amending FOIA's Fee Structure Again

II. JUDICIAL ATTEMPTS TO BALANCE STATUTORY COMMANDS WITH FISCAL REALITIES

- A. Time Extensions: Defining "Exceptional Circumstances" and "Due Diligence"
- B. The "Central Purpose" Doctrine: Application to the Privacy Exemptions

III. THE ELECTRONIC FREEDOM OF INFORMATION ACT AMENDMENTS OF 1996

- A. E-FOIA's Major provisions
- B. E-FOIA's Likely Effect

IV. ADDITIONAL SUGGESTIONS TO STREAMLINE FOIA

- A. Returning FOIA to Its Roots: Expanding the Central Purpose Doctrine
- B. Fee provisions: Let the Agencies Keep the Money

CONCLUSION

FOOTNOTES

INTRODUCTION

On June 10, 1997, Elmer "Geronimo" Pratt, a former leader of the Black Panther Party who had been convicted in 1972 of a 1968 murder-robbery, was freed on bail after a California state judge ordered a new trial.⁴ The new trial order represented the culmination of more than two decades of appeals and denied writs.⁵ Pratt, who has always maintained his innocence, asserted that he was framed by the Federal Bureau of Investigation (FBI) as part of an attempt to destroy the Black Panthers.⁶ The judge granted Pratt a new trial because his conviction was "tainted by the prosecutor's failure to reveal that a crucial witness was also a police and FBI informer."⁷ Critical to Pratt's receiving a new trial were several requests made under the Freedom of Information Act (FOIA).⁸ Pratt's FOIA requests revealed that Julius Butler, a key prosecution witness who had testified that Pratt had confessed to committing the murder, had provided police and FBI agents with information on the Black Panthers for

9/18/2001

almost two and a half years preceding the Pratt trial.⁹ Since Butler had denied under oath that he had ever been a police or FBI informant, this information would have enabled Pratt's defense attorneys to impeach his credibility.¹⁰ The effect that this information could have had on Pratt's 1972 trial is demonstrated by the fact that several jurors in that original trial have since stated that they would not have voted to convict Pratt if they had known that Butler was an informant.¹¹

Pratt's FOIA requests also turned up FBI documents that showed that FBI director J. Edgar Hoover had ordered that Pratt and other prominent Panther members be "neutralized."¹² Pratt also discovered documents that supported his contention that he was in Oakland on the night of the murder.¹³ The impact of the documents Pratt and his attorneys procured through FOIA is clear; without FOIA, Pratt would still be in jail.¹⁴

If Geronimo Pratt's story were the norm, FOIA's usefulness would be beyond debate. For every one case like Geronimo Pratt's, however, there are many cases like that of Frank Jimenez. Jimenez, a prisoner at the Oxford Federal Correctional Institution in Wisconsin, has submitted numerous FOIA requests which appear to have done nothing but waste the government's time and resources. Jimenez sought all records held by eight separate executive agencies that were "in any way connected to related to or even remotely in reference to his name."¹⁵ For example, Jimenez requested the U.S. Postal Service (USPS) to provide "all records concerning himself regarding mail he received in the states of Wisconsin and Illinois."¹⁶ Government agencies must undertake a serious search in response to each FOIA request, and the burden is on the agencies to establish that materials have not been improperly withheld.¹⁷ The USPS, therefore, performed an "exhaustive but unfruitful" search of its records.¹⁸ Similarly, Jimenez's request to the Bureau of Alcohol, Tobacco & Firearms (ATF) turned up no responsive records -- a result which was hardly surprising since the ATF had not been involved in the investigation or prosecution of Jimenez.¹⁹ The FBI, however, had more difficulty responding to Jimenez's FOIA request. Citing extremely limited resources and a backlog of 3,080 requests ahead of Jimenez's, the FBI moved to stay the proceedings to give it until March 2000 to process the request.²⁰ Unconvinced that Jimenez's request was necessary or urgent, the district court agreed with the FBI that the Agency's delay was justifiable and thereby granted the motion to stay the proceedings until March 2000.²¹

The use of FOIA by prisoners such as Frank Jimenez and Geronimo Pratt highlights the benefits and problems of the statute. One of FOIA's purposes is to enable people to expose government action to "the light of public scrutiny."²² In Pratt's case, the government had paid an informant and then improperly withheld this information which, had it been disclosed at trial, may well have led to an acquittal. Twenty-five years later, Pratt was able to use FOIA to expose that improper government action and to use the previously withheld information to regain his freedom. In contrast, Jimenez's experience shows how FOIA can be abused at enormous cost to American taxpayers and illustrates the delays that can occur as understaffed federal agencies struggle to respond to requests for information that the agencies may or may not possess.²³

This Note surveys recent FOIA cases which illustrate the delays that have come to plague FOIA administration. In 1996, in an effort to cure these delays and update FOIA for the computer age, Congress passed the Electronic Freedom of Information Act Amendments of 1996 (E-FOIA).²⁴ This Note analyzes the major provisions of E-FOIA and concludes that congressional attempts to use administrative changes to reduce delays in FOIA administration are destined to fail as long as agency FOIA-processing units remain under-staffed and underfunded. Part I begins by briefly sketching

the beginnings and intended purposes of FOIA. It then examines the early amendments to the statute and discusses how these amendments led to many unanticipated consequences, including enormous increases in the administrative cost of FOIA and in the time delays in processing requests. Part I concludes by discussing the 1986 FOIA amendments which included changes to FOIA's fee provisions. Part II evaluates judicial attempts to balance FOIA's requirement of open government with present fiscal constraints and agency staffing problems. Part III outlines the major provisions of E-FOIA and explores how it may affect a typical FOIA case and whether it will help reduce the administrative and financial burdens of FOIA. Part IV surveys alternative measures that have been suggested by scholars and legislators for reducing FOIA's cost and agency backlogs. It concludes that none of these measures would effectively address FOIA's problems while preserving the benefits of a policy of open government.

I. THE DEVELOPMENT OF FOIA, 1966-1996

A. The Birth of FOIA: Introducing an Era of Open Government

The Freedom of Information Act was born out of concerns about a growing federal bureaucracy that was not accountable to the electorate²⁵ and about the "mushrooming growth of Government secrecy."²⁶ Early champions of a freedom of information bill recognized the importance of an informed populace in a democracy, believing that "[f]ree people are, of necessity, informed; uninformed people can never be free."²⁷ They saw FOIA as an essential way to ensure that the government would be open. In the vanguard of the freedom of information movement was the press, a group that had historically encountered administrative roadblocks in its quest to inform the public about questionable governmental practices.²⁸ Despite the press's traditional role as the public's watchdog, legal complications were depriving the press of its "most vital raw material" -- public records and proceedings.²⁹ Frustrated by the lack of an enforceable legal right to examine public records, reporters had to rely upon "the favorable exercise of official grace or indulgence or 'discretion.'"³⁰

The Freedom of Information Act of 1966³¹ fundamentally changed the way that requests for information were handled by creating a presumption in favor of disclosure and by requiring agencies to justify any nondisclosure.³² Prior to FOIA, the release of governmental records was governed largely by the Administrative Procedure Act (APA),³³ which required only that public records be made available to "persons properly and directly concerned," and exempted the nebulous category "information held confidential for good cause found."³⁴ The introduction to FOIA explicitly stated that its purpose was "to clarify and protect the right of the public to information."³⁵ It required that records be made available to "any person,"³⁶ and an agency seeking to withhold a record after 1966 had to show that the information contained in the record fell within one of nine limited statutory exemptions.³⁷

B. The 1974 Amendments: The Source of Unanticipated Consequences

Despite the powerful rhetoric employed by proponents of a freedom of information statute, FOIA as originally enacted was relatively ineffective.³⁸ Administrative agencies routinely "delayed responses to requests for documents, replied with arbitrary denials, and overclassified documents to take advantage of the 'national security' exemption."³⁹ FOIA began to develop into its present form in 1974, when Congress amended it in an effort to remedy the perceived deficiencies in the statute's administration.⁴⁰ The amendments significantly reduced agencies' discretion over whether to release

information⁴¹ and eliminated inefficiencies in the processing of requests "in order to contribute to the fuller and faster release of information, which is the basic objective of the Act."⁴² Unfortunately, Congress did not anticipate a major effect of its alterations: after the 1974 amendments, the number of FOIA requests skyrocketed.⁴³ Prior to the changes, Congress had estimated that the new amendments would cost the government about \$50,000 for the first year, and \$100,000 for each of the following five years.⁴⁴ The actual costs of FOIA quickly and dramatically surpassed these conservative estimates.⁴⁵ By 1991, FOIA's annual expense totaled \$91 million,⁴⁶ and in 1992, the figure had increased to \$108 million.⁴⁷

These dramatic increases came about because of a change in FOIA's fee provisions.⁴⁸ Prior to 1974, an agency could charge requesters for the costs of searching for responsive documents, reviewing documents for exempted information that the agency could then delete, and duplicating the documents that were to be released.⁴⁹ The 1974 amendments limited fees to "reasonable standard charges for document search and duplication and provide[d] for recovery of only the *direct costs* of such search and duplication."⁵⁰ The change forced agencies to bear the cost of reviewing documents for exempted material. This review process is the most expensive part of processing FOIA requests because it often requires the use of highly trained agency personnel.⁵¹ For example, documents requested by prisoners are typically investigative files that may contain references to a confidential source,⁵² or material that, if released, could reasonably result in an unwarranted invasion of personal privacy.⁵³ In processing such a request, someone familiar with the investigation must go through the documents "line by line to delete those portions, and only those portions, that would disclose a confidential source or come within one of the other specific exceptions to the requirement of disclosure."⁵⁴

C. The 1986 Amendments: Amending FOIA's Fee Structure Again

In an attempt to address FOIA's rapidly escalating costs, Congress passed the Freedom of Information Reform Act of 1986 (1986 Reform Act),⁵⁵ which significantly increased agencies' ability to charge requesters for the costs of processing requests.⁵⁶ Senator Orrin Hatch, one of the Act's sponsors, estimated that if agencies could charge commercial requesters for the cost of document review, the agencies would be able to collect up to \$60 million per year in additional fees.⁵⁷ The amendments established a three-tiered fee system, dividing requests into (1) requests for commercial use; (2) non-commercial requests by the news media or by educational or scientific institutions whose purpose is scholarly or scientific; and (3) all other non-commercial requests.⁵⁸ For category (1) requests, agencies may assess charges for document search, duplication, and review.⁵⁹ For category (2) requests, agencies may only assess document duplication charges.⁶⁰ For category (3) requests, agencies may assess search and document duplication charges but not charges for review.⁶¹ In addition, category (2) and (3) requesters may not be charged for the first two hours of search time or the first 100 pages of duplication.⁶² Regardless of which category the request falls into, no fee may be charged if the costs of collecting or processing the fee would likely exceed the amount of the fee.⁶³ Finally, if a requester has previously failed to pay fees in a timely manner or if the agency determines that the fee will exceed \$250, the agency may require advance payment of the expected fee.⁶⁴

The 1986 Reform Act also clarified the circumstances under which a fee waiver is appropriate. The 1974 FOIA amendments required documents to be furnished at a reduced rate or at no charge when the agency determined that doing so was "in the public interest because furnishing the information can be considered as primarily benefiting the general public."⁶⁵ In interpreting this section, courts had given

agencies broad discretion to determine whether to grant a fee waiver.⁶⁶ The 1986 Reform Act narrowed the definition of "public interest," so that an agency must grant a fee waiver only when disclosure of information "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."⁶⁷ The Act also changed the standard of review so that courts would review an agency's fee waiver determination *de novo*.⁶⁸

The fee provisions that the 1986 Reform Act established draw the proper balance between keeping government activities open to the light of public scrutiny and fiscal realities. Requesters whose primary interest in certain government information is commercial should pay the government the entire price of collecting, reviewing, and disclosing that information. Similarly, requesters whose primary purpose is to inform the public about governmental activities should be able to procure such information with minimal costs. Unfortunately, despite these fee provisions, backlogs and delays continue to exist.⁶⁹

II. JUDICIAL ATTEMPTS TO BALANCE STATUTORY COMMANDS WITH FISCAL REALITIES

The inadequacy of congressional attempts to ameliorate the problems surrounding FOIA's administration, coupled with agencies' inability to handle the huge influx of requests due to woeful underfunding and understaffing, left the judiciary to sort out the mess. Since the passage of the 1974 amendments, courts have granted besieged agencies tremendous time extensions and, relying on early legislative history, have interpreted FOIA to allow agencies to withhold more information than they previously could.

A. Time Extensions: Defining "Exceptional Circumstances" and "Due Diligence"

The first case in which a court intervened to permit understaffed federal agencies to take more time to process FOIA requests was *Open America v. Watergate Special Prosecution Force*.⁷⁰ In *Open America*, a public interest group, a law professor, and several law students sought documents relating to a former Acting Director of the FBI's role in the Watergate scandal.⁷¹ After the FBI received the request, it notified the plaintiffs that there were 5,137 FOIA requests in front of theirs.⁷² The district court granted the plaintiffs' motion to require detailed justification, itemization, and indexing of documents within thirty days.⁷³ The government appealed, arguing that the FBI had exercised "due diligence" in processing the FOIA requests, but that "exceptional circumstances" existed that prevented it from processing them within the statutory time limits.⁷⁴ In such circumstances, the 1974 FOIA amendments state, "the court may retain jurisdiction and allow the agency additional time to complete its review of the records."⁷⁵

The U.S. Court of Appeals for the D.C. Circuit, citing the language and legislative history of the 1974 FOIA amendments, vacated the district court's order.⁷⁶ According to FOIA at that time, an agency that received a request for information had to determine whether it would grant or deny that request within ten days.⁷⁷ In "unusual circumstances," however, the agency was permitted an additional ten working days.⁷⁸ After that period, the requester was deemed to have exhausted his administrative remedies⁷⁹ and could bring an action in district court to compel production of the documents.⁸⁰ The agency could obtain a stay in the proceedings, however, and thus gain additional time to review the records, if it could "show [that] exceptional circumstances exist[ed] and that the agency [was] exercising due diligence in responding to the request."⁸¹

In *Open America*, the D.C. Circuit examined the legislative history of the 1974 FOIA amendments and determined that Congress inserted the "exceptional circumstances" language of section 552(a)(6)(C) "as a safety valve after the protests of the [Ford] administration that the rigid limits of [sections 552(a)(6)] (A) and (B) might prove unworkable."⁸² The court stated that "exceptional circumstances" exist when an agency "is deluged with a volume of requests for information vastly in excess of that anticipated by Congress, [and] the existing resources are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A)."⁸³ Applied to the facts, the court found that the FBI's expenditure of \$2,675,000 in processing FOIA requests in 1976, a year in which Congress had anticipated that FOIA would cost the *entire government* only \$100,000, constituted "exceptional circumstances."⁸⁴ It further found that the agency's use of a two-track system to handle simple and complex requests on separate "first-in, first-out" bases satisfied the "due diligence" requirement.⁸⁵ Since the plaintiffs alleged no urgency or exceptional need for the information they had requested, the court reasoned that a stay was appropriate.⁸⁶

More than twenty years later, courts are still struggling with the same problems. In *Edmond v. United States Attorney*,⁸⁷ a prisoner sued the United States Attorney's Office (USAO) to force the agency to disclose information responsive to a FOIA request that he had made on August 14, 1992.⁸⁸ The prisoner, Rayful Edmond, Jr., sent a request to the USAO seeking all documents in the possession of the Drug Enforcement Administration (DEA), the FBI, the United States Attorney, and the United States Bureau of Prisons (USBP) which "pertain[ed] to him, mention[ed] his name, or refer[red] to him."⁸⁹ Five days later, the USAO notified Edmond that his request would be handled in the order in which it was received.⁹⁰ When Edmond had received no documents by December 1994, he wrote a letter to the USAO asking about the status of his request.⁹¹ The USAO's response explained that his request would be handled in its turn but noted that the agency was unable to give a specific date for completion of its processing of the request.⁹² Edmond and the USAO exchanged similar letters in 1995 and 1996.⁹³ Having received no documents and still in prison, Edmond finally resorted to filing suit in district court on October 15, 1996.⁹⁴

The USAO, estimating that the records responsive to Edmond's request consisted of 2,000 pages, and noting that there were thirty-one requests in front of Edmond's, asked the district court for an additional two years to process his request.⁹⁵ The district court held that, based on the record before it, the USAO had satisfied the "exceptional circumstances" test as defined in *Open America*.⁹⁶ It further held that the USAO's use of a "first-in, first-out" system satisfied the due diligence requirement.⁹⁷

The court noted that a stay would not be appropriate if Edmond could make a showing of "exceptional need or urgency," which the court defined as "potential jeopardy to . . . life or personal safety, or to substantial due process rights."⁹⁸ Edmond asserted that the requested documents contained exculpatory material that would aid him in overturning his criminal conviction.⁹⁹ The court held, however, that unless Edmond could "provide an adequate showing" that it was likely that the requested documents contained "materially exculpatory information," he was not entitled to priority processing of his FOIA request.¹⁰⁰ Since Edmond had not made such a showing, he was not entitled to priority processing.¹⁰¹ The court was not satisfied, however, that it would take the government two years to process the thirty-one requests in front of Edmond's.¹⁰² The court therefore granted the government only one additional year to complete the processing of Edmond's request, "with an opportunity to seek a further extension if necessary at a later date."¹⁰³

Edmond raises several troubling issues concerning the state of FOIA law. First, Edmond had already been waiting four and a half years for the information when the district court granted the agency additional time to respond to the request.¹⁰⁴ While it is true that the court chose only to grant the agency a one-year extension, instead of the requested two-year extension, it is troublesome that a prisoner will be forced to wait over five years to obtain any exculpatory material that the government might possess. Second, the court's requirement that Edmond make a showing that the requested material likely contains exculpatory material in order to obtain priority review is nearly impossible to satisfy. It is absurd to think that a person in Edmond's position would be able to know what possible exculpatory material might be contained in documents that the government has made an effort to keep secret. Nonetheless, the court in *Edmond* reasoned that allowing prisoners to obtain priority processing without some additional showing would require courts to grant a large number of such requests filed by federal prisoners,¹⁰⁵ thus negating the "exceptional" nature of the circumstances.¹⁰⁶

Edmond is not unique; other cases have involved even longer delays. In *Fox v. United States Department of Justice*,¹⁰⁷ for example, the plaintiff had requested that the FBI furnish him with all documents in its possession relating to him.¹⁰⁸ The FBI had located over 300 pages of documents pertaining to Fox but, citing a backlog of 11,828 requests and Congress's failure to delegate money to expand the FBI's small staff of FOIA processors, said that it did not expect to be able to process those documents until 1999.¹⁰⁹ The court granted the government's motion to stay the case, requiring only that the FBI file a status report within a year informing the court of any progress it makes in the processing of Fox's request.¹¹⁰

There are strong policy arguments on both sides of the debate over expedited processing for prisoner FOIA requests. On the one hand, prisoners are among the most litigious classes of citizens in the country,¹¹¹ and granting their requests priority review without requiring some additional showing that the requests are likely to uncover exculpatory information could have a crippling effect on the efficient functioning of FOIA. On the other hand, uncovering exculpatory material that was improperly withheld by the government is, perhaps, the quintessential example of why FOIA is needed in a supposedly just society.¹¹²

Long delays in processing FOIA requests have been one of the statute's most serious problems since its enactment,¹¹³ and the delays have continued in the 1990s.¹¹⁴ While courts have routinely granted extensions -- even though such extensions were intended only for "exceptional circumstances"¹¹⁵ -- their action is an understandable response to agencies that are faced with inadequate resources for processing FOIA requests. But unfortunately, these long delays increase public cynicism towards the government,¹¹⁶ and can occasionally result in serious harm to the disappointed requester.¹¹⁷

B. The "Central Purpose" Doctrine: Application to the Privacy Exemptions

By granting agencies additional time to process FOIA requests, courts have helped agencies cope with extensive FOIA backlogs. Courts have also helped agencies by giving them a way to quickly dispose of certain requests. They have accomplished this latter end through the "central purpose" doctrine, a judicially created tool designed to alleviate the problem inherent in balancing the competing concerns of disclosure under FOIA and personal privacy interests in preventing disclosure.¹¹⁸ The cornerstone of the doctrine was laid by the Supreme Court in 1989, in *United States Department of Justice v. Reporters Committee for Freedom of the Press*.¹¹⁹ In that case, a CBS news correspondent had sought the criminal records of organized crime figure Charles Medico and three members of his family.¹²⁰ Medico's family business had been investigated by the Pennsylvania Crime Commission for allegedly

obtaining several defense contracts through improper ties with a corrupt congressman.¹²¹ The CBS reporter asserted that information concerning past crimes by Medico would potentially be "a matter of special public interest."¹²² The issue was whether Medico's criminal rap sheet was exempt from disclosure under FOIA Exemption 7(C),¹²³ which permits an agency to withhold a document when disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."¹²⁴ To determine whether the invasion of privacy that would result from disclosure was warranted, the Supreme Court used a balancing test, weighing Medico's privacy interest against the public interest in disclosure.¹²⁵ The Court refused, however, to give the alleged public interest much weight in the balance, stating instead that:

[A]lthough there is undoubtedly some public interest in anyone's criminal history, especially if the history is in some way related to the subject's dealing with a public official or agency, the FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed.¹²⁶

The Court concluded that the public interest in the information sought by the reporter simply fell "outside the ambit of the public interest that the FOIA was enacted to serve."¹²⁷ In the context of the privacy-public interest balancing test, this requirement that requested information open governmental activities "to the sharp eye of public scrutiny" has subsequently been referred to as the "central purpose" doctrine.¹²⁸

The Court's decision in *Reporters Committee*, which was not based on any language found in FOIA,¹²⁹ fundamentally "changed the FOIA calculus."¹³⁰ The central purpose doctrine has been subsequently reaffirmed and expanded. In 1991, the Supreme Court, in *United States Department of State v. Ray*,¹³¹ extended the central purpose doctrine to FOIA Exemption 6,¹³² the other privacy exemption, which covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."¹³³ The Court reaffirmed and strengthened the central purpose doctrine in 1994, in *United States Department of Defense v. Federal Labor Relations Authority (FLRA)*,¹³⁴ another Exemption 6 case. The Court in *FLRA* explicitly stated that when balancing the public interest in disclosure against the potential invasion of privacy, "the *only* relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding of *the operations or activities of the government*."¹³⁵

In 1997, the Court, in a *per curiam* decision, reversed a Ninth Circuit panel and reaffirmed its *FLRA* decision.¹³⁶ *Bibles v. Oregon Natural Desert Association (ONDA)* involved a FOIA request to the Oregon Bureau of Land Management (BLM) for the names and addresses of recipients of the BLM's newsletter.¹³⁷ The Ninth Circuit panel found a "substantial public interest in knowing to whom the government is directing information, or as ONDA characterizes it, 'propaganda,' so that those persons may receive information from other sources that do not share the BLM's self-interest in presenting government activities in the most favorable light."¹³⁸ The Supreme Court viewed the Ninth Circuit decision as resting on "a perceived public interest in providing persons on the BLM's mailing list with additional information,"¹³⁹ a foundation that was "inconsistent" with *FLRA*.¹⁴⁰

Soon after *Reporters Committee* was decided, the United States Department of Justice Office of Information and Privacy issued a report concerning the ramifications of that decision on FOIA

processing.¹⁴¹ The Justice Department advised agency FOIA offices that the Court's "new 'core purpose' public interest standard . . . should govern the process of balancing interests under Exemptions 6 and 7 (C)."¹⁴² The Supreme Court's terse decision in *ONDA* reaffirmed the strong signal it sent to lower courts and government agencies in its earlier decisions, confirming the Court's intention to continue to strictly enforce the central purpose doctrine. Thus, at least when the privacy exemptions are involved, agencies may continue to rely on the central purpose doctrine and deny requests that fail the balancing test with little fear of reversal by the judiciary.¹⁴³

III. THE ELECTRONIC FREEDOM OF INFORMATION ACT AMENDMENTS OF 1996

In an attempt to address the serious problem of agency backlogs in processing FOIA requests, Congress passed the Electronic Freedom of Information Act Amendments of 1996.¹⁴⁴ While these amendments have been praised as finally bringing FOIA into the electronic age,¹⁴⁵ they do not solve all the problems facing FOIA.¹⁴⁶ Some commentators have argued that E-FOIA will actually *increase* both the cost of FOIA¹⁴⁷ and agency time delays in responding to requests.¹⁴⁸ Even more troublesome is the potential that this overhaul of FOIA will require relitigation of FOIA issues, as agencies try to sidestep settled FOIA doctrine by citing E-FOIA's alterations to the statutory language.¹⁴⁹

A. E-FOIA's Major provisions

1. *Electronic Reading Rooms: Placing Government Information On-Line.* Section 4 of E-FOIA requires agencies to make certain records created on or after November 1, 1996, available for public inspection "by computer telecommunications or . . . by other electronic means" within one year of their creation.¹⁵⁰ This provision, designed to promote access to government information via the Internet,¹⁵¹ creates what Attorney General Janet Reno termed "electronic reading rooms."¹⁵² Of the documents subject to this provision, the type that will be of most interest to the general public and that has the greatest potential for reducing the total number of FOIA requests are copies of previously released records that are likely to be the subject of subsequent requests.¹⁵³ In the FBI's electronic reading room,¹⁵⁴ for example, documents posted in compliance with this provision include information of popular interest on such topics as Elvis Presley,¹⁵⁵ Julius and Ethel Rosenberg,¹⁵⁶ and various UFO sightings.¹⁵⁷

Some FOIA observers have argued that this provision will lead to extensive litigation since "a requester who disagrees with an agency's assessment of the likelihood of future requests may be able to sue to challenge that assessment."¹⁵⁸ The merits of this argument are questionable for two reasons. First, it is difficult to imagine how an individual would have standing to challenge the agency's assessment, since the individual would not have suffered any concrete harm as a result of an agency decision not to make a particular document or set of documents available in electronic reading rooms.¹⁵⁹ Second, E-FOIA leaves to agency discretion the determination of which records are likely to become the subject of repeated requests.¹⁶⁰ Since courts have historically shown great deference to the exercise of agency discretion in the context of FOIA,¹⁶¹ any challenge to an agency determination likely will be unsuccessful.

Critics also argue that agencies may divert resources to publishing older, previously released documents

at the expense of processing current requests.¹⁶² This argument cynically assumes that agencies will act in bad faith and will actively attempt to delay FOIA processing. The merits of this view are questionable given the Clinton administration's efforts to encourage open government. In 1993, after the dismal FOIA performance record of the Reagan and Bush administrations,¹⁶³ President Clinton signaled a desire to reverse the trend. In a memorandum to department and agency heads, he made it clear that "[t]he existence of unnecessary bureaucratic hurdles has no place in [FOIA's] implementation."¹⁶⁴ In 1997, following the passage of E-FOIA, Attorney General Janet Reno wrote another memorandum to department and agency heads, reaffirming the administration's position on FOIA.¹⁶⁵ While the Clinton administration has not earned a perfect FOIA report card,¹⁶⁶ agencies appear to be moving away from actively impeding FOIA administration.¹⁶⁷

The creation of these electronic reading rooms has a tremendous potential for making important information readily available to the general public.¹⁶⁸ The electronic reading rooms will also save time and money for agencies, as they will be able to unburden themselves of requests by multiple persons for similar information.¹⁶⁹ This provision creates a relatively inexpensive and efficient method of "open[ing] agency action to the light of public scrutiny."¹⁷⁰

2. *Specifying the Format of Requested Information.* Prior to the passage of E-FOIA, an agency was under no obligation to accommodate a requester's preference for a particular format for requested information. In *Dismukes v. Department of the Interior*,¹⁷¹ the requester sought to obtain from the Bureau of Land Management (BLM) a copy of a computer tape which listed the names and addresses of the participants in six 1982 BLM Simultaneous Oil and Gas Leasing lotteries.¹⁷² The Agency was willing to make the information available on microfiche, but the requester argued that the computer tape version would be more convenient for his purposes.¹⁷³ The district court held that release on microfiche was sufficient.¹⁷⁴ The court stated that the Agency was only required to provide "responsive, nonexempt information in a reasonably accessible form."¹⁷⁵ The district court's decision seriously undermined the effectiveness of FOIA in the electronic age. By not releasing information in the requested format, an agency can substantially decrease the usefulness of the information to the requester, sometimes effectively denying access to the information.¹⁷⁶ For information-seekers looking for "trends, abuses and outrages," electronic searching of government material can reduce search times from days or weeks to hours or minutes.¹⁷⁷

An illustration of how important format can be is the Environmental Working Group's (EWG) request to the FDA for pesticide monitoring results.¹⁷⁸ The EWG, a nonprofit organization, wanted certain data to enable it to "analyze the variance between levels of toxins that are inherent in imported foods consumed by infants and children, as compared to adults."¹⁷⁹ The FDA refused to release the data in electronic form, instead releasing the data in the "unwieldy physical form of [6,000 pages of] paper documents," a form that was "cumbersome, confusing, and unorganized [sic] for the efficient statistical analysis necessary for quality scientific research."¹⁸⁰ The EWG was able to complete its project, but only at an unnecessarily high cost:

The FDA's decision left the EWG with no choice other than to bear the financial burden of paying a commercial scanning firm to input the pesticide data. Then, the EWG had to go through the labor intensive chore of converting the data into suitable electronic format -- the very format that the FDA maintained all along.¹⁸¹

E-FOIA will prevent such inefficiencies from occurring in the future by requiring agencies to provide a requested record "in any form or format requested by the person if the record is readily reproducible by the agency in that form or format."¹⁸² This provision was intended to override the holding in *Dismukes*,¹⁸³ and the new language should increase the usefulness and efficiency of FOIA.

3. *First In/First Out and Multi-Track Processing.* Courts have permitted agencies to process FOIA requests on a first in/first out (FIFO) basis.¹⁸⁴ FIFO processing standing alone is problematic, however, because simple requests that could be processed rapidly are delayed while earlier, more complex requests are handled.¹⁸⁵ In the interest of efficiency and speed, some agencies, such as the FBI, have set up two-track systems -- dividing requests into simple and complex requests -- which are processed on separate FIFO bases.¹⁸⁶ E-FOIA gives agencies statutory authority to establish such multi-track systems, but it does not require the establishment of such systems.¹⁸⁷ Since some agencies had already established multi-track systems, this development is not very momentous; the multi-tracking option in the statute will, at most, give agencies that do not currently use multi-tracking a reason to consider whether they might benefit from such a system. While the lack of explicit guidelines has drawn some criticism,¹⁸⁸ it would be unwise to require all agencies to set up a uniform multi-tracking system since lengthy delays do not plague every agency.¹⁸⁹ By permitting individual agencies to design their own systems, E-FOIA allows each agency to tailor a processing system to its distinct needs. For example, an agency with a severe backlog might want to create three tracks and assign its most experienced personnel to the track containing the most complex requests. Other agencies with only minor backlogs might prefer a two-track system, or even a single-track system. Encouraging agencies to set their own rules regarding multi-track systems will likely encourage experimentation. Through this process, agencies will learn which procedures work best, and will be able to borrow from other agencies' experiences with various systems.

4. *Expedited Review.* Occasionally, a FOIA requester will have an urgent need for the requested information, and delays in processing the request can have serious consequences.¹⁹⁰ In response, E-FOIA requires agencies to set up a system of expedited processing for cases where the requester demonstrates a "compelling need."¹⁹¹ This requirement can be met in one of two ways. First, a compelling need is present when "a failure to obtain requested records on an expedited basis . . . could reasonably be expected to pose an imminent threat to the life or physical safety of an individual."¹⁹² This provision will help minimize the most severe kinds of adverse effects which delays in FOIA can have on requesters. Furthermore, since it is doubtful that many people will be able to meet the provision's high standard,¹⁹³ it is unlikely that the provision will result in serious delays to the processing of non-expedited requests. Since an agency's denial of a request for expedited review is subject to judicial review,¹⁹⁴ requesters will likely challenge denials of expedited review in the courts. But courts should have little trouble absorbing any increased litigation. After all, prior to E-FOIA, courts were already making such determinations, albeit at a later stage, when determining whether to stay proceedings and grant an agency additional time to process a request.¹⁹⁵

Second, for requesters that are "primarily engaged in disseminating information," the compelling need requirement may be satisfied by a showing of "urgency to inform the public concerning actual or alleged Federal Government activity."¹⁹⁶ The media will be the primary beneficiary of this provision, and it is reasonable to expect that reporters will attempt to invoke it frequently. FOIA critics have found fault with the statute precisely because it is no longer used primarily by the media to inquire into the activities of the government.¹⁹⁷ While this provision will not prevent non-media requesters from using FOIA, and thus does not directly respond to these critics' concerns, it will give certain media requests preferential

processing, thereby making FOIA work more effectively for the media. Accelerating media access to information on government activities is a positive development for FOIA. Since one of FOIA's original objectives was to "open agency action to the light of public scrutiny,"¹⁹⁸ it is both reasonable and desirable to give preferential treatment to requests that are intended to publicize governmental activities.

5. *Twenty-Day Time Limit.* Prior to the passage of E-FOIA, an agency was required to determine whether it would comply with a request for information within ten days of its receipt of the request.¹⁹⁹ Agency disregard for the time limits prompted strident criticism from observers such as Senator Patrick Leahy, author of the Senate version of E-FOIA. When testifying before the House Subcommittee on Government Management, Information and Technology of the Committee on Government Reform and Oversight, Leahy complained:

The current time limits in the FOIA are a joke. Few agencies actually respond to FOIA requests within the 10-day limit required in the law. Such routine failure to comply with the statutory time limits is bad for morale in the agencies and breeds contempt by citizens who expect government officials to abide by, not routinely break, the law.²⁰⁰

In an attempt to remedy the problem, Congress doubled the statutory time limit from ten days to twenty days.²⁰¹ The expansion of the time limit was intended to "help Federal agencies in reducing their backlog of FOIA requests."²⁰² Congress's recognition of the need for expanded time limits is commendable, and the new provision likely will enable agencies with only minor backlogs to process requests within the statutory limits.²⁰³ Unfortunately, a twenty-day limit is barely more realistic than a ten-day limit for agencies such as the FBI or the CIA, whose enormous backlogs draw the most criticism. While these agencies may be able to process some of their smaller, simpler FOIA requests within the twenty-day limit by utilizing a multi-track system,²⁰⁴ their backlogs are several months long.²⁰⁵ The FBI receives requests for law enforcement information that may fall within Exemption 7,²⁰⁶ and the CIA receives requests for information that may be covered under the National Security Act and may thus be exempt from disclosure under Exemption 3.²⁰⁷ The FBI²⁰⁸ and the CIA can actively invoke these exemptions to ensure effective law enforcement or to protect national security, thus necessitating close and extensive review of requested documents.²⁰⁹ In view of these circumstances, it is unlikely that the expanded time limits will result in a substantial reduction of these agencies' backlogs.²¹⁰

Furthermore, the new twenty-day limit, like its ten-day predecessor, is rife with exceptions. E-FOIA maintains the provision for a ten-day extension in "unusual circumstances."²¹¹ If it is unlikely that the agency will complete processing of the request within that time, the agency must only notify the requester and give that person the opportunity to limit the scope of the request so that it may be processed within the time limit.²¹² If the agency fails to conform to the time limits, irrespective of whether the requester chose to limit the scope of his request, the requester is deemed to have exhausted his administrative remedies and may bring suit in federal district court.²¹³ The district court has the power to allow the agency additional time to process the request, however, if the agency can show that "exceptional circumstances exist and that the agency is exercising due diligence in responding to the request."²¹⁴ Prior to the passage of E-FOIA, no statutory definition of "exceptional circumstances" existed, and the term was thus left to unbridled judicial construction. In an attempt to constrain what was seen as liberal judicial allowance of significant time extensions for agencies faced with request backlogs,²¹⁵ and to encourage agencies to reduce those backlogs, Congress explicitly stated

in E-FOIA that "the term 'exceptional circumstances' does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests."²¹⁶

The new statutory language was intended to limit a judge's ability to give an agency additional time to respond to a request absent truly extraordinary circumstances, and thereby to coerce agencies into reducing their backlogs of requests.²¹⁷ The new statutory language is loose enough, however, to enable judges to continue to grant time extensions to beleaguered agencies.²¹⁸ While this reality is contrary to congressional intent, it is both unavoidable and desirable in view of the currently inadequate levels of agency funding for FOIA request processing. It would be problematic if a judge were forced by statute to compel disclosure of requested documents without giving the agency adequate time to review the documents to ensure that they do not contain exempted material.²¹⁹ The risks involved are particularly severe in regard to material that may contain information that must be kept secret for national security reasons,²²⁰ or information whose disclosure would result in an invasion of privacy.²²¹

An application of the new statutory language to the facts of *Edmond v. United States Attorney*²²² illustrates the ease with which judges could continue to grant time extensions to underfunded agencies. First, while the statute explicitly states that "the term 'exceptional circumstances' does not include a delay that results from a predictable agency workload of requests,"²²³ Congress did not define "predictable agency workload." The district court in *Edmond* noted that the USAO had received "a volume of requests for information vastly in excess of that anticipated by Congress."²²⁴ The judge could easily determine that such an unanticipated volume was not "predictable" under E-FOIA's language. Second, delays from a predictable agency workload can constitute exceptional circumstances if the agency "demonstrates reasonable progress in reducing its backlog of pending requests."²²⁵ The statute leaves to the courts the job of determining what constitutes "reasonable progress." Courts could liberally construe this language to give agencies a fair opportunity to process requests. The *Edmond* court noted that the USAO had increased its FOIA staff from one to four people.²²⁶ The court could consider this action to be "reasonable progress" toward reducing the agency's FOIA backlog under the new language. Third, if a FOIA requester had earlier refused to narrow the scope of his request or to arrange for an alternative timetable,²²⁷ the judge must consider this refusal as a factor in determining whether "exceptional circumstances" exist.²²⁸ Therefore, unless a requester was willing to narrow the scope of his request before the suit was filed, E-FOIA gives judges an additional means of granting liberal time extensions to agencies faced with understaffing and too many FOIA requests. While it is unfortunate that people will have to be satisfied with less information if they want to receive it in a timely manner, such a result is unavoidable given Congress's refusal to allocate sufficient resources to agencies for FOIA processing.

B. E-FOIA's Likely Effect

Congress passed E-FOIA to accomplish two goals. The first goal, which it largely achieved, was to "encourage electronic access to Government information."²²⁹ The requirement that agencies release as much information as possible in the format requested, including on CD-ROM or diskette, was a long-overdue step.²³⁰ The provisions relating to on-line publication of government information promise to make information maintained and collected by the government more accessible to a larger segment of the American public.²³¹ The second goal, to encourage and assist reduction of agency backlogs of FOIA requests, will likely prove more elusive. Although increased funding for FOIA processing is the action most likely to reduce backlogs significantly,²³² such an increase was noticeably absent from the

reforms.²³³

The changes the amendments did accomplish will likely have a mixed effect on the backlogs. As agencies publish more information on the Internet, people will need to turn to FOIA less frequently to obtain desired information and multiple requests for the same information will certainly be reduced.²³⁴ But FOIA will still continue to be widely used; agency FOIA processing teams will continue to be underfunded and understaffed; and the time required to process requests will continue to result in backlogs. The provisions authorizing multi-tracking will probably speed up the processing of simpler requests, but the fact that the FBI had a system of multi-tracking in place prior to E-FOIA,²³⁵ yet had one of the worst backlogs,²³⁶ demonstrates that multi-tracking is not a panacea. It remains to be seen how expedited review will work in practice, because the amendments leave the details to agency regulations.²³⁷ While the expedited processing provisions may lead to more litigation²³⁸ and may increase overall delay and costs,²³⁹ their benefits outweigh these drawbacks. Expedited review will secure rapid access to information for those requesters with the most urgent need for information, and it will accelerate the media's efforts to provide the public with important information about governmental activities. Finally, the twenty-day time limit may help agencies with minor backlogs, but it will have only a minor effect on agencies with the largest backlogs, and congressional attempts to limit the judiciary's ability to grant these agencies time extensions likely will be ineffective. Thus, since it is doubtful that E-FOIA will substantially improve the speed at which FOIA requests are processed, more invasive surgery is required.

IV. ADDITIONAL SUGGESTIONS TO STREAMLINE FOIA

Congressional attempts in the 1970s and 1980s to reduce the cost and delays associated with FOIA were inadequate. Likewise, it appears that E-FOIA will not substantially accelerate agency processing of FOIA requests. These failures result from Congress's apparent preference for administrative solutions, such as multi-track processing and expanded time limits. This focus on administrative improvements shifts the debate away from the underlying cause of FOIA's problems: a lack of adequate funding and staffing for agencies' FOIA-processing divisions.

One group of scholars has suggested expanding the central purpose doctrine as a means of making FOIA more efficient and less costly.²⁴⁰ Their claim is that this proposal would return the statute to its intended purpose as a tool for citizens to open governmental operations to the light of public scrutiny.²⁴¹ It would also avoid the need for additional funding. This Part examines this proposal as well as a funding provision that was in the original Senate E-FOIA bill²⁴² but that was not included in the final Act. These proposals are analyzed both for their potential effects on the cost and delays associated with FOIA and for their ability to conform to an overarching commitment to openness in government.

A. Returning FOIA to Its Roots: Expanding the Central Purpose Doctrine

Anyone may use FOIA to procure non-exempt information for any reason.²⁴³ Some critics have attacked the absence of a purpose requirement because public dollars are not unlimited and other public causes may be more deserving.²⁴⁴ The absence of such a requirement invites abuse,²⁴⁵ "bring[ing] into the system requests that are not really important enough to be there, [and] crowding out the genuinely desirable ones to the end of the line."²⁴⁶ One possible solution to these problems is to expand the central purpose doctrine²⁴⁷ beyond the realm of the privacy exemptions, empowering agencies to apply the doctrine directly to *all* FOIA requests received.²⁴⁸ Advocates of a universal central purpose

standard argue that it would dramatically reduce the costs and delays currently associated with FOIA.²⁴⁹ Agencies could use the doctrine to decide quickly whether to deny a request as being outside the scope of FOIA, or whether to process the request more fully. Supporters argue that the doctrine would help eliminate FOIA abuses and would help return FOIA to its original purpose of enabling citizens to learn about the activities of government.²⁵⁰ Such a proposal is theoretically feasible, given the apparent willingness within some federal courts to expand the central purpose doctrine beyond the privacy exemptions.²⁵¹ There are, however, several problems with such a proposal.

At a practical level, the current Congress appears to be moving away from limiting the scope of FOIA and has, in fact, reaffirmed its commitment to universal access to FOIA for any purpose. The findings accompanying E-FOIA explicitly state that "the purpose of [FOIA] is to . . . establish and enable enforcement of the right of *any person* to obtain access to the records of [agencies of the Federal Government], subject to statutory exemptions, *for any public or private purpose.*"²⁵² Senator Leahy explained the finding as follows:

This finding is intended to address concerns that the reasoning of the Supreme Court in *Department of Justice v. Reporters Committee* and the *U.S. Department of Defense v. Federal Labor Relations Authority* analyzed the purpose of the FOIA too narrowly. . . . Efforts by the courts to articulate a 'core purpose' for which information should be released imposes a limitation on the FOIA which Congress did not intend and which cannot be found in its language, and distorts the broader import of the Act in effectuating Government openness.²⁵³

Senator Leahy's comments illustrate his dissatisfaction with the central purpose doctrine. Nonetheless, the central purpose doctrine will likely survive within its present boundaries because nothing in the statute expressly prohibits courts from employing the doctrine as part of the privacy exemptions' balancing tests.²⁵⁴ The legislative findings, however, may prevent courts from expanding the central purpose doctrine to other areas of FOIA, and they send a strong signal that Congress is not likely to limit the scope of FOIA in the near future.

A second practical problem with the proposed expansion of the central purpose doctrine is that agencies might exercise a broader power too expansively. Agency determinations would have to be reviewable by the courts, and this increased litigation would dramatically increase the costs and delays associated with FOIA -- the very problems such a solution was intended to fix.²⁵⁵

A final practical problem is that requesters often do not know in advance what their requests will reveal. Thus, while it is true that FOIA is being used by corporate lawyers to conduct industrial espionage,²⁵⁶ the information they obtain occasionally reveals hidden governmental abuses;²⁵⁷ corporate requesters cannot anticipate these contents until after the agencies have disclosed the material and the requesters have had the opportunity to examine it. Thus, while such requesters may have selfish motives for making their requests, the public may benefit from the information as well. While such occasional indirect benefits may be difficult to justify given that government resources are limited,²⁵⁸ the proper response to this problem is not to limit the scope of FOIA; the proper response was made in 1986 when FOIA's fee provisions were amended to shift the cost of processing primarily commercial requests to the requester.²⁵⁹ It is unwise to place limits on who can use FOIA and for what purposes they can use it, because limiting a basic freedom can end up having the unintended consequence of hurting those who need it most.²⁶⁰ Any initial limitation of a freedom facilitates subsequent limitations of that freedom; it is preferable not to start down that road.

Expansion of the central purpose doctrine would perform the undesired service of further tipping the scales toward government secrecy and away from disclosure.²⁶¹ The central purpose doctrine was ostensibly intended to return FOIA to its original purposes. In deciding the central purpose doctrine cases, however, the Supreme Court ignored one of FOIA's important original purposes. Section 3 of the Administrative Procedure Act had required agencies to disclose information only "to persons properly and directly concerned."²⁶² The passage of FOIA in 1966 was specifically intended to eliminate "the test of who shall have the right to different information."²⁶³ That change was essential to the new scheme that FOIA established.²⁶⁴ FOIA represents the basic idea that information in the government's possession should be made available to anyone for *any* purpose, unless the information is explicitly exempted.²⁶⁵ It is too simplistic to suggest that FOIA has one single, central purpose that should override this equally important ideal. Limiting the scope of FOIA also ignores the collateral benefits of having a broad public disclosure law, such as "ensur[ing] for the individual citizen a sense of empowerment and control over a government that can at times appear monolithic and imperious."²⁶⁶ It ignores the idea that if "information is power, then to deny public ownership of government information is to deny public control over the government."²⁶⁷ Limiting the amount of information available through FOIA does limit, in a sense, the amount of power we have over our government. Since government resources are not infinite, however, it is proper, in some cases, to place a price on access to certain types of information. FOIA's current fee provisions appropriately balance the philosophy of open government with fiscal realities, however, and it would be unwise to expand the central purpose doctrine.²⁶⁸

B. Fee provisions: Let the Agencies Keep the Money

In passing E-FOIA, Congress recognized that inadequate agency resources are one of the primary causes of delay in FOIA administration.²⁶⁹ This is not a novel insight; previous legislators, as well as scholars and agency heads, have all highlighted the need for more FOIA funding to ensure the effective operation of the statute.²⁷⁰ Congress attempted to recoup some of the costs of FOIA by amending the statute's fee structure in 1986.²⁷¹ In 1992, agencies spent about \$108 million processing FOIA requests, and charged \$8 million in fees.²⁷² Under the current scheme, however, agencies do not keep those fees; the money is deposited in the Treasury.²⁷³ This fee collection structure does nothing to help agencies process FOIA requests more rapidly.

In 1996, Senator Leahy introduced a bill that would have permitted agencies to collect a portion of FOIA fees directly if, looking at all of their requests, they were in "substantial compliance" with FOIA's time limits.²⁷⁴ The purpose of the Senate bill was to give agencies an incentive to comply with the statutory time limits.²⁷⁵ These fee-sharing provisions, however, failed to make it into the final draft of E-FOIA. While Senator Leahy had good intentions, his bill would not have been the most effective solution. First, it would have helped the agencies that needed the least assistance, while the agencies with the biggest backlogs would not have received the additional money needed to reduce their backlogs.²⁷⁶ Second, an agency can be in "substantial compliance" by either providing responsive documents *or by denying requests*.²⁷⁷ Since the stated purpose of the proposed requirement was to provide agencies with a financial incentive to reduce backlogs, it is possible that agencies would have denied requests in order to attain "substantial compliance." This would have threatened to shift FOIA's delicate balance towards initial non-disclosure, an undesirable result. Finally, the administrative costs to the GAO would have outweighed the benefits of the procedure.²⁷⁸ Under the provision, the GAO might have been required to conduct a substantial number of FOIA audits annually.²⁷⁹ Since the GAO's budget, like that of many agencies, has recently been cut, some critics argued that "meeting demands for

FOIA audits would diminish the agency's ability to carry out other functions."²⁸⁰

One positive feature of the Leahy proposal is that it required that agencies use the fees collected to improve their FOIA processing capabilities.²⁸¹ That aspect of the Leahy bill could be integrated into a provision that would allow agencies to keep all the FOIA fees that they collect, irrespective of their level of compliance with the time limits.²⁸² This solution would eliminate the expense of agency performance audits, and, "rather than simply rewarding agencies that already are in compliance with FOIA time limits, funds [would] become available to those agencies that experience backlogs to assist them in overcoming their timing problems."²⁸³

CONCLUSION

FOIA is not perfect. It is often used by the "wrong" people for the "wrong" reasons.²⁸⁴ But the basic principle underlying FOIA should not be abandoned. In the context of a \$1.63 trillion federal budget,²⁸⁵ the \$100 to \$200 million that FOIA costs each year is minuscule. When one considers that FOIA spending is roughly equivalent to federal spending on military bands,²⁸⁶ FOIA suddenly does not seem so extravagant and wasteful. Spending \$200 million or more on open government is worth the price even after "the era of big government is over."²⁸⁷ FOIA today is very different than its creators could have imagined; it is indeed "a far cry from John Q. Public finding out how his government works."²⁸⁸ Still, FOIA serves many valuable purposes,²⁸⁹ and the lofty rhetoric used by early supporters of open government²⁹⁰ continues to have merit. The specter of a secretive federal government, especially one as large and impersonal as the current one, is reason enough to continue efforts to perfect the statute. FOIA has many obvious benefits, but there are hidden benefits as well. Simply having a public disclosure statute in the United States Code "serves as an effective deterrent to government waste, abuse, and mismanagement."²⁹¹ With all of the benefits -- tangible and intangible -- FOIA is worth the cost. As Judge Patricia Wald observed: "It takes constant vigilance, commitment, and common sense to make any law work. I hope we as citizens have all these qualities -- in large measure -- to keep the FOIA around for a long time *and to make it work.*"²⁹²

E-FOIA is illustrative of Congress's adherence to this goal. In passing E-FOIA, Congress demonstrated both a willingness to adapt FOIA to changing times and a desire to continue searching for ways to make FOIA more effective. Internet publication of government information will facilitate broad public access to information without requiring people to bear the added time and expense of making a FOIA request. E-FOIA's administrative improvements are a small step toward increased efficiency in FOIA processing. Nevertheless, E-FOIA should not be the final effort to perfect FOIA. Future efforts should be directed at funding agency FOIA-processing divisions. Only adequate funding will enable agencies to eliminate backlogs and delay and allow FOIA to reach its full potential.

FOOTNOTES

- ¹ Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, Mar.-Apr. 1982, at 15, 15 (criticizing the Act as "the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored").
- ² 110 CONG. REC. 17,087 (1964) (statement of Sen. Long).
- ³ Scalia, *supra* note 1, at 17.

4. See William Booth, *Ex-Black Panther Freed; After 25 Years, "The Struggle Continues,"* WASH. POST, June 11, 1997, at A1.
5. See Edward J. Boyer, *Lawyer Presses 23-Year Battle on Behalf of "Geronimo" Pratt*, L.A. TIMES, Mar. 13, 1997, at B1 [hereinafter Boyer, *Lawyer Presses 23-Year Battle*].
6. See Edward J. Boyer, *Pratt Strides into Freedom*, L.A. TIMES, June 11, 1997, at A1 [hereinafter Boyer, *Pratt Strides into Freedom*] ("Pratt said he understood that former FBI Director J. Edgar Hoover and former President Richard Nixon 'launched a program to kill us all. [The Black Panther Party was] at the center of the bull's-eye."); see also Clarence Page, Commentary, *Time for a New Peek at Old FBI Files*, CHI. TRIB., Sept. 14, 1997, at 21 ("Pratt always had maintained that the FBI knew he was innocent because it allegedly had him under surveillance in Oakland when the murder occurred in Santa Monica."). M. Wesley Swearingen, a 25-year FBI veteran, supports Pratt's view, contending that wiretap logs placed Pratt in Oakland at the time of the murder but that "someone had destroyed these logs." M. WESLEY SWEARINGEN, *FBI SECRETS: AN AGENT'S EXPOS...* 86 (1995).
7. Booth, *supra* note 4, at A1.
8. 5 U.S.C. § 552 (1994 & Supp. II 1996).
9. See Boyer, *Lawyer Presses 23-Year Battle*, *supra* note 5, at B1.
10. See *id.*
11. See Booth, *supra* note 4, at A1. The judge who reversed Pratt's conviction noted that the information about Butler would have enabled Pratt's lawyers to "put the whole case in a different light." Edward J. Boyer, *D.A. Appeals Decision to Release Ex-Black Panther*, L.A. TIMES, Jan. 31, 1998, at B1 [hereinafter Boyer, *D.A. Appeals*].
12. See Tony Jones, *Cochran: Past, Present Future*, TRI-STATE DEFENDER, May 10, 1995, at 1A. A retired FBI agent has corroborated these documents, stating that Pratt was "framed as part of the FBI's now-defunct counter intelligence program-covert efforts to 'neutralize' what they called 'black hate groups.'" Boyer, *Pratt Strides into Freedom*, *supra* note 6, at A1.
13. See Booth, *supra* note 4, at A1.
14. On January 30, 1998, Los Angeles County District Attorney Gil Garcetti appealed Pratt's release, arguing that "nothing points to Pratt's innocence; everything points to his guilt." Boyer, *D.A. Appeals*, *supra* note 11, at B1. The *Los Angeles Times* characterized Garcetti's decision to appeal as "unwise" and "a fool's errand." Editorial, *Misguided Move Against Pratt*, L.A. TIMES, Feb. 3, 1998, at B6. If the appeal fails, most legal observers believe that the prosecution will be unable to win a new trial since Butler has been discredited and the only eye-witness is now dead. See Boyer, *Pratt Strides into Freedom*, *supra* note 6, at A1.
15. *Jimenez v. FBI*, 938 F. Supp. 21, 25 (D.D.C. 1996). Jimenez made FOIA requests to the FBI, the Drug Enforcement Agency, the U.S. Postal Service, the Bureau of Prisons, the Bureau of Alcohol, Tobacco & Firearms, the Executive Office of the U.S. Attorney, the U.S. Marshals Service, and the Criminal Division of the Department of Justice. See *id.* at 24-25.
16. *Id.* at 26.
17. See *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989) (citing FOIA's legislative history to support the Court's holding that the burden is on the government agency); see also *Safecard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991) (holding that a search is adequate if it is "reasonably calculated to discover the requested documents"); *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986) ("[A] search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request."); *Weisberg v. United States Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983) ("What the agency must show beyond material doubt is that it has conducted a search reasonably calculated to uncover all relevant documents.").

18. *Jimenez*, 938 F. Supp. at 26.
19. *See id.*
20. *See id.* at 31.
21. *See id.* at 31-32. FOIA permits courts to grant time extensions under certain conditions: "If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records." 5 U.S.C. § 552(a)(6)(C) (1994).
22. *Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976).
23. Legislative and scholarly commentators have focused their criticism on these costs and delays, and the abuses of FOIA have engendered debate over the wisdom and merits of having such a freely available window into the operation of federal agencies. Compare *The Electronic Freedom of Information Improvement Act: Hearings on S. 1940 Before the Subcomm. on Tech. and the Law of the Senate Comm. on the Judiciary*, 99th Cong. 1 (1992) (statement of Sen. Leahy) ("FOIA proves that the best way to combat the coverups, the mistakes, and the secret policies that undermine faith in our democratic system is to expose them to public view."), and Jane Kirtley, *Freedom of Information Act-How Is It Working?*, COMM. LAW., Fall 1996, at 7, 9 [hereinafter Kirtley, *FOIA*] (arguing that oversight by the press and the public "provides the only independent assurance that the rights of the individual are being preserved"), and Christopher P. Beall, Note, *The Exaltation of Privacy Doctrines over Public Information Law*, 45 DUKE L.J. 1249, 1299 (1996) ("Access to information . . . ensures for the individual citizen a sense of empowerment and control over a government that can at times appear monolithic and imperious."), with Scalia, *supra* note 1, at 19 ("The defects of the Freedom of Information Act cannot be cured as long as we are dominated by the obsession that gave them birth-that the first line of defense against an arbitrary executive is do-it-yourself oversight by the public and its surrogate, the press.").
24. Pub. L. No. 104-231, 110 Stat. 3048 [hereinafter E-FOIA] (codified at 5 U.S.C. § 552 (Supp. II 1996)).
25. See Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 650 (1984) (noting that Congress enacted FOIA at a time when, even before Watergate, the public was suspicious of government bureaucracy).
26. H.R. REP. NO. 89-1497, at 2 (1966), reprinted in 1966 U.S.C.C.A.N. 2418, 2419.
27. *Freedom of Information: Hearings on S. 1666 and S. 1663 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong. 3 (1964) (statement of Sen. Edward Long); see also HAROLD L. CROSS, *THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS* xiii (1953) ("Public business is the public's business. The people have the right to know. Freedom of information is their just heritage. Without that the citizens of a democracy have but changed their kings."); H.R. REP. NO. 93-876, at 2 (1974) ("An informed public makes the difference between mob rule and democratic government. If the pertinent and necessary information on government activities is denied the public, the result is a weakening of the democratic process and the ultimate atrophy of our form of government.") (quoting Letter of William L. Dawson), reprinted in 1974 U.S.C.C.A.N. 6267, 6268; Letter from James Madison to W.T. Barry (Aug. 4, 1822) ("A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."), reprinted in *THE COMPLETE MADISON* 337 (Saul K. Padover ed., 1953).
28. See Wald, *supra* note 25, at 650 & n.4 (discussing the press's frequent encounters with "government agencies' random, unexplained denials of access to information about crucial

decisions, denials which had covered up the mistakes or irregularities of the time").

29. CROSS, *supra* note 27, at 4.
30. *Id.* at 197.
31. Pub. L. No. 89-487, 80 Stat. 250 [hereinafter FOIA] (codified as amended at 5 U.S.C. § 552 (1994 & Supp. II 1996)).
32. *See id.* at 251 (codified as amended at 5 U.S.C. § 552 (1994 & Supp. II 1996)) ("[E]very agency shall, upon request for identifiable records . . . make such records promptly available to any person." (emphasis added)). Upon complaint of nondisclosure made to a district court, "the court shall determine the matter de novo and the burden shall be upon the agency to sustain its action." *Id.* From an administrative law perspective, FOIA is unique because of its de novo review of many agency determinations, including the determination that a particular document is exempted under the statute. *See* 5 U.S.C. § 552(a)(4)(B) (1994 & Supp. II 1996). Outside of FOIA, a reviewing court can normally set aside agency findings and conclusions only if they are "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A) (1994).
33. Pub. L. No. 79-404, ch. 324, 60 Stat. 237 (1946) [hereinafter APA]. The original APA no longer exists in recognizable form. After being modified by FOIA, it was replaced when Congress enacted Title 5 of the United States Code. *See* Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 378.
34. APA, *supra* note 33, § 3(c), 60 Stat. at 238.
35. FOIA, *supra* note 31, 80 Stat. at 250.
36. *Id.* at 251.
37. *See* 5 U.S.C. §§ 552(b)(1)-(9) (1994). The exemptions covered documents:
 - (1) Classified as secret for national defense or foreign policy reasons;
 - (2) Related solely to internal agency personnel rules and practices;
 - (3) Specifically exempted from disclosure by another statute;
 - (4) Containing trade secrets or confidential commercial or financial information;
 - (5) Containing legally privileged information;
 - (6) Containing personnel, medical or "similar" files that, if disclosed, would result in an invasion of privacy;
 - (7) Involving law enforcement investigations, but only to the extent that disclosure
 - (A) Would interfere with law enforcement proceedings;
 - (B) Would deprive a person of a fair trial;
 - (C) Could result in an invasion of privacy;
 - (D) Could disclose the identity of a confidential source;
 - (E) Would disclose law enforcement techniques; or
 - (F) Could endanger the life or safety of any person;
 - (8) Involving financial regulatory activities; or
 - (9) Involving geological information about oil or natural gas wells.

See id.

Six of the nine exemptions have survived to this day with little or no change to their original language. The exemptions that have undergone significant changes are Exemption 1, which was amended in 1974 to limit the exemption to classified documents, *see* Act of Nov. 21, 1974, Pub. L. No. 93-502, § 2(a), 88 Stat. 1561, 1563 [hereinafter 1974 Amendments] (codified at 5 U.S.C. § 552(b)(1) (1994)); Exemption 3, which was amended in 1976 to add a set of criteria intended to limit the situations where the exemption could be invoked, *see* Government in the Sunshine Act, Pub. L. No. 94-409, § 5(b), 90 Stat. 1241, 1247 (1976) (codified at 5 U.S.C. § 552(b)(3) (1994));

- and Exemption 7, which was expanded in 1986 to further limit public access to certain investigatory files, *see* Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1802 (a), 100 Stat. 3207-48, 3207-48 to 3207-49 [hereinafter 1986 Reform Act] (codified at 5 U.S.C. § 552(b)(7) (1994)).
38. *See* DAVID M. O'BRIEN, *THE PUBLIC'S RIGHT TO KNOW: THE SUPREME COURT AND THE FIRST AMENDMENT 7* (1981) ("Initial administrative compliance with the Freedom of Information Act was not particularly impressive."); Scalia, *supra* note 1, at 15 ("The 1966 version [of FOIA] was a relatively toothless beast . . .").
39. Scalia, *supra* note 1, at 15; *see also* H.R. REP. NO. 92-1419, at 8-9 (1972) ("The efficient operation of the Freedom of Information Act has been hindered by five years of foot-dragging by the Federal bureaucracy.").
40. *See* 1974 Amendments, *supra* note 37, 88 Stat. at 1561.
41. *See* O'BRIEN, *supra* note 38, at 8.
42. H.R. REP. NO. 93-876, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6267.
43. For example, the FBI received 447 FOIA requests in 1974, and 13,875 requests in 1975. *See* *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 617 n.3 (D.C. Cir. 1976) (Leventhal, J., concurring).
44. *See* H.R. REP. NO. 93-876, at 9, *reprinted in* 1974 U.S.C.C.A.N. 6267, 6275. Congress believed that agencies' operating budgets would be able to absorb most of the costs, including the cost of searching for the requested information. *See id.*; *see also* Eric J. Sinrod, *Freedom of Information Act Response Deadlines: Bridging the Gap Between Legislative Intent and Economic Reality*, 43 AM. U. L. REV. 325, 334 (1994) (noting that, based on the belief that administration of FOIA would not entail significant costs, Congress did not appropriate additional resources to fund the 1974 amendments).
45. In fact, the cost of implementing FOIA in fiscal year 1974 for the FBI *alone* was \$160,000. *See* *Open America*, 547 F.2d at 612. By fiscal year 1976, the actual costs for the FBI totaled \$2,675,000. *See id.* The FBI was not alone. A single request by a former CIA agent cost the CIA an estimated \$400,000. *See* *Agee v. CIA*, 517 F. Supp. 1335, 1342 n.5 (D.D.C. 1981). These sums had been amassed at individual agencies despite projections that the cost of FOIA *to the entire government* for the period 1976-80 would amount to no more than \$500,000. *See supra* text accompanying note 44.
46. *See* Sinrod, *supra* note 44, at 334.
47. *See* S. REP. NO. 104-272, at 21 (1996).
48. *See* Scalia, *supra* note 1, at 16.
49. *See id.*
50. 1974 Amendments, *supra* note 37, § 1(b)(2), 88 Stat. at 1561 (amended 1986) (emphasis added).
51. *See* Orrin G. Hatch, *Balancing Freedom of Information with Confidentiality for Law Enforcement*, 9 J. CONTEMP. L. 1, 8 (1983); Scalia, *supra* note 1, at 16.
52. Such material would be exempt under 5 U.S.C. § 552(b)(7)(D).
53. Such material would be exempt under 5 U.S.C. § 552(b)(7)(C).
54. Scalia, *supra* note 1, at 16.
55. 1986 Reform Act, *supra* note 37, § 1803, 100 Stat. at 3207-48 (codified at 5 U.S.C. § 552(a)(4)(A) (1994)). The 1986 FOIA amendments were attached to the Anti-Drug Abuse Act as part of a last-minute addition. *See* Susan L. Beesley & Theresa A. Newman Glover, Note, *Developments Under the Freedom of Information Act-1986*, 1987 DUKE L.J. 521, 524 (1987). Congress had been considering a more substantial overhaul of FOIA, but additional measures died in the Senate after passing the House. *See id.* at 523-24.

57. See 132 CONG. REC. 26,771 (1986).
58. See 1986 Reform Act, *supra* note 37, § 1803, 100 Stat. at 3207-49 to 3207-50 (codified at 5 U.S.C. §§ 552(a)(4)(A)(ii)(I)-(III) (1994)).
59. See *id.* (codified at 5 U.S.C. § 552(a)(4)(A)(ii)(I) (1994)).
60. See *id.* (codified at 5 U.S.C. § 552(a)(4)(A)(ii)(II) (1994)).
61. See *id.* (codified at 5 U.S.C. § 552(a)(4)(A)(ii)(III) (1994)).
62. See *id.* (codified at 5 U.S.C. § 552(a)(4)(A)(iv)(II) (1994)).
63. See *id.* (codified at 5 U.S.C. § 552(a)(4)(A)(iv)(I) (1994)).
64. See *id.* (codified at 5 U.S.C. § 552(a)(4)(A)(v) (1994)).
65. 1974 Amendments, *supra* note 37, § 1(b)(2), 88 Stat. at 1561. It is perhaps interesting to note that indigence does not entitle a requester to a fee waiver. See *Crooker v. Bureau of Alcohol, Tobacco and Firearms*, 577 F. Supp. 1213, 1216 (D.D.C. 1983) (permitting agency to deny fee waiver despite claim of indigence where there is no showing that the public would benefit from disclosure).
66. See, e.g., *Shaw v. FBI*, 604 F. Supp. 342, 346 (D.D.C. 1985) (holding that an agency determination not to waive search fees should be disturbed only if that determination is arbitrary or amounts to an abuse of discretion).
67. 1986 Reform Act, *supra* note 37, § 1803, 100 Stat. at 3207-50 (codified at 5 U.S.C. § 552(a)(4)(A)(iii) (1994)).
68. See *id.* (codified at 5 U.S.C. § 552(a)(4)(A)(vii) (1994)).
69. See *infra* text accompanying note 109 (giving recent estimates of the backlog and delay at the FBI).
70. 547 F.2d 605 (D.C. Cir. 1976).
71. See *id.* at 608.
72. See *id.* Of these, 1,084 were in "various stages of completion." *Id.*
73. See *id.*
74. See *id.* at 610.
75. 1974 Amendments, *supra* note 37, § 1, 88 Stat. at 1563 (codified as amended at 5 U.S.C. § 552(a)(6)(C) (1994 & Supp. II 1996)).
76. See *Open America*, 547 F.2d at 610-13, 616.
77. See 5 U.S.C. § 552(a)(6)(A)(i) (1994). FOIA's time limits were doubled in 1996. See *E-FOIA*, *supra* note 24, 110 Stat. at 3052 (codified at 5 U.S.C. § 552(a)(6)(A)(i) (Supp. II 1996)). These changes are discussed *infra* Part III.A.5.
78. See 5 U.S.C. § 552(a)(6)(B) (1994). "Unusual circumstances" included:
- (i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;
 - (ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or
 - (iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

- Id.* §§ 552(a)(6)(B)(i)-(iii).
79. *See id.* § 552(a)(6)(C).
80. *See id.* § 552(a)(4)(B).
81. *Id.* § 552(a)(6)(C).
82. *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 610 (D.C. Cir. 1976).
83. *Id.* at 616.
84. *See id.* at 612.
85. *See id.* at 616. *But see* *Mayock v. INS*, 714 F. Supp. 1558, 1566 (N.D. Cal. 1989) (holding that a first-in, first-out processing policy did not constitute "due diligence" because the INS did not accord priority to requests for information needed for immigration proceedings), *rev'd and remanded sub nom.* *Mayock v. Nelson*, 938 F.2d 1006 (9th Cir. 1991). *Mayock v. INS* was initially decided on summary judgment. The Ninth Circuit reversed and remanded for the resolution of outstanding issues of fact. *See Nelson*, 938 F.2d at 1008. After the case was remanded, the parties entered into a settlement agreement that resulted in changes to FOIA processing practices at the INS. *See infra* note 117 (discussing elements of the settlement agreement).
86. *See Open America*, 547 F.2d at 614-16. The court recognized that, given the FBI's finite resources, priority processing of the plaintiffs' request would have necessitated taking personnel away from other prior requests. *See id.* at 614. The court was unwilling to order such a reallocation of resources when the plaintiffs "have alleged no urgency, have alleged no exceptional need, for the information they seek." *Id.*
87. 959 F. Supp. 1 (D.D.C. 1997).
88. *See id.* at 2.
89. *Id.* Edmond is serving an 18-year sentence in federal prison after pleading guilty to distributing a kilogram of crack cocaine. *See Like Son, Like Father; Edmond Gets 18 Years*, WASH. POST, Dec. 18, 1991, at C5. Edmond is the father of Rayful Edmond III, who is currently serving three life terms after being convicted in 1989 of running the District of Columbia's largest crack distribution ring. *See id.*
90. *See Edmond*, 959 F. Supp. at 2.
91. *See id.*
92. *See id.* The USAO refused to give a specific date was given despite explicit statutory instructions that required it to do so:

The time limits . . . may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days.

5 U.S.C. § 552(a)(6)(B) (1994).

93. *See Edmond*, 959 F. Supp. at 2.
94. *See id.*
95. *See id.*
96. *See id.* at 4. *Edmond* was decided under FOIA as it stood prior to E-FOIA. The new rules relating to time limits, discussed *infra* Part III.A.5, went into effect on Oct. 2, 1997. *See E-FOIA, supra* note 24, § 12, 110 Stat. at 3054.
97. *See Edmond*, 959 F. Supp. at 3.
98. *Id.*

99. *See id.*
100. *Id.* at 4 (internal quotation marks omitted) (quoting *Billington v. United States Dep't of Justice*, CIV.A. No. 92-0462-RCL (D.D.C. July 21, 1992)). The court emphasized that a mere "naked assertion" is not enough. *Id.*
101. *See id.*
102. *See id.*
103. *Id.*
104. Edmond made his initial FOIA request on August 14, 1992. *See id.* at 2. The district court's order was issued on February 27, 1997. *See id.* at 1.
105. *See id.* at 4. The court noted that "a mere challenge to a conviction which *might* subsequently release prisoner [sic] from incarcerative status does not warrant an expedited process." *Id.*
106. *See id.* Courts have required that a plaintiff establish an "exceptional need or urgency" to get prioritization over earlier requests. *Id.* at 3. This judicial practice was codified by E-FOIA with the establishment of a system of expedited review. *See infra* Part III.A.4.
107. No. CV-94-4622, 1994 WL 923072, at *1 (C.D. Cal. Dec. 14, 1994).
108. *See id.* Fox asserted that the FBI began investigating him following his participation in a peaceful protest against the House Un-American Activities Committee in 1947. *See id.* As part of this investigation, FBI agents spoke to his parents. *See id.* Fox maintained that after his parents learned of his involvement in the protest, his relationship with them deteriorated. *See id.* Fox asserts that he was excluded from the trust left by his parents due to this soured relationship. *See id.* Prior to bringing his FOIA suit, Fox had brought a separate action challenging the validity of the trust and accusing the trustee of misappropriation of \$2 million. *See id.* That court granted summary judgment in favor of the trustee. *See id.* According to Fox, he would not have lost that suit if he had been able to introduce the FBI documents into evidence, and he planned to pursue the action further. *See id.*
109. *See id.* at *1-*2.
110. *See id.* at *3. The court concluded that expedited process was not warranted in this case because Fox had failed to show how the documents "could substantially change the outcome of the state court litigation." *Id.* at *2.
111. *See* Julie M. Riewe, *The Least Among Us: Unconstitutional Changes in Prisoner Litigation Under the Prison Litigation Reform Act of 1995*, 47 DUKE L.J. 117, 117 (1997) (noting that "[t]he federal courts increasingly have been inundated with prisoner litigation").
112. *See, e.g., supra* notes 4-14 and accompanying text (discussing how Geronimo Pratt used FOIA to obtain information that led to his release from prison).
113. *See* H.R. REP. NO. 104-795, at 23 (1996) (citing agency delay in responding to requests as "the single most frequent complaint about the operation of the FOIA"), *reprinted in* 1996 U.S.C.C.A.N. 3448, 3466; *see also* Robert G. Vaughn, *Administrative Alternatives and the Federal Freedom of Information Act*, 45 OHIO ST. L.J. 185, 188 n.24 (1984) (citing a 1983 GAO study which found that the average time it took to answer a FOIA request that turned up responsive documents was 191 days for the FBI and 270 days for the Office of Information and Privacy).
114. *See* S. REP. NO. 104-272, at 16 (1996) (noting that only 28 of 75 agencies responding to a Department of Justice survey in February 1994 reported no backlog of requests); Michael M. Lowe, Note, *The Freedom of Information Act in 1993-94*, 43 DUKE L.J. 1282, 1285 (1994) (reporting that the FBI had a backlog of 8,000 FOIA and Privacy Act requests in 1990); *Congress Brings Information Act into Electronic Age*, MULTI MED. & VIDEODISC MONITOR, Oct. 1, 1996, *available in* 1996 WL 8303113 (reporting that the average time for the FBI to process a FOIA request was 923 days).

115. See *Edmond v. United States Attorney*, 959 F. Supp. 1, 3 (D.D.C. 1997) ("Courts have uniformly granted the government reasonable periods of time in which to review FOIA requests when there is a backlog."); *Sinrod*, *supra* note 44, at 342 (noting the irony that "the condition of 'exceptional circumstances' has become the norm").
116. See 142 CONG. REC. S10,894 (daily ed. Sept. 18, 1996) (statement of Sen. Leahy) ("[R]outine failure to comply with the statutory time limits . . . breeds contempt by citizens who expect government officials to abide by, not routinely break, the law.").
117. Timely FOIA responses are particularly important to aliens facing deportation proceedings. See *Sinrod*, *supra* note 44, at 350. Since discovery is not permitted in deportation proceedings, see *Kulle v. INS*, 825 F.2d 1188, 1194 (7th Cir. 1987), aliens often must rely on FOIA to obtain information from the INS. See *Mayock v. INS*, 714 F. Supp. 1558, 1560 (N.D. Cal. 1989) ("FOIA is essentially the only procedure which aliens can use to obtain from the INS information relevant to their cases."); see also *Guevara Flores v. INS*, 786 F.2d 1242, 1252 (5th Cir. 1986) (affirming the denial of a subpoena sought against the INS because the plaintiff "failed to meet her burden of proving that the materials she sought were essential to her case and otherwise unavailable" (since FOIA was available to obtain the requested information) (emphasis added)).

An example of the serious consequences that can result from FOIA delays is the case of Hassan Tehranijam, an Iranian alien who had petitioned for political asylum, fearing persecution if returned to Iran. See *Sinrod*, *supra* note 44, at 351. The immigration judge doubted the authenticity of Tehranijam's political asylum claim and ordered him deported. See *id.* Prior to the deportation order, Tehranijam's attorney had made a FOIA request to the INS for documentation to support the claim of political persecution, but a large backlog of requests at the INS delayed processing of his request. See *id.* Without this needed documentation to support his claim, Tehranijam was deported. See *id.* Tehranijam's attorney eventually sued the INS in order to change its procedures. See *Maycock*, 714 F. Supp. at 1559-60. That case ended with a settlement agreement under which the INS instituted some changes in its processing of FOIA requests. See *Sinrod*, *supra* note 44, at 353-54. The *Maycock* settlement agreement included arrangements for expedited processing of certain time-sensitive requests and a two-track processing system to separately handle simple and complex requests. See *id.* at 354-55. These features were included in E-FOIA, to the effect that certain FOIA requests may receive expedited processing, see *infra* Part III.A.4, and all agencies are authorized to create a multi-track processing system. See *infra* Parts III.A.3.

118. See generally Fred H. Cate et al., *The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 67-69 (1994) (defining and discussing the central purpose doctrine); Beall, *supra* note 23, at 1253-61 (same).
119. 489 U.S. 749 (1989).
120. See *id.* at 757.
121. See *id.*
122. *Id.*
123. 5 U.S.C. § 552(b)(7)(C) (1994).
124. *Id.*
125. See *Reporters Comm.*, 489 U.S. at 762.
126. *Id.* at 774.
127. *Id.* at 775.
128. See Cate et al., *supra* note 118, at 67; Beall, *supra* note 23, at 1258.
129. See *United States Dep't of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 507 (1994)

(Ginsburg, J., concurring).

130. *Id.* at 505 (Ginsburg, J., concurring); *see also* Glenn Dickinson, Comment, *The Supreme Court's Narrow Reading of the Public Interest Served by the Freedom of Information Act*, 59 U. CIN. L. REV. 191, 211 (arguing that the *Reporters Committee* decision shifted the balance away from full disclosure); Beall, *supra* note 23, at 1261 (criticizing the central purpose jurisprudence for shifting the burden to the FOIA requester "and against the underlying principle of disclosure").
131. 502 U.S. 164 (1991)
132. *See id.* at 171, 177-79.
133. 5 U.S.C. § 552(b)(6) (1994).
134. 510 U.S. 487 (1994).
135. *Id.* at 495 (internal quotation marks omitted) (first emphasis added).
136. *See* *Bibles v. Oregon Natural Desert Ass'n (ONDA)*, 117 S. Ct. 795, 795-96 (1997) (per curiam).
137. *See* *Oregon Natural Desert Ass'n v. Bibles*, 83 F.3d 1168, 1169 (9th Cir. 1996), *rev'd per curiam*, 117 S. Ct. 795 (1997).
138. *Id.* at 1171.
139. *ONDA*, 117 S. Ct. at 795.
140. *See id.*
141. *See Privacy Protection Under the Supreme Court's Reporters Committee Decision*, FOIA UPDATE (Office of Info. and Privacy, U.S. Dep't of Justice), Spring 1989, at 3.
142. *Id.* at 6.
143. *But see infra* notes 252-54 and accompanying text (discussing the possible elimination of the central purpose doctrine by the 1996 Electronic Freedom of Information Act Amendments).
144. E-FOIA, *supra* note 24, 110 Stat. 3048. The House noted, in passing these amendments, that the "lack of sufficient agency resources has constrained the effectiveness of the FOIA." H.R. REP. NO. 104-795, at 6 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3448, 3449.
145. *See* Statement on Signing the Electronic Freedom of Information Act Amendments of 1996, 32 WEEKLY COMP. PRES. DOC. 1949, 1949 (October 2, 1996) [hereinafter E-FOIA Signing Statement]. Earlier attempts to expand FOIA to electronic records had failed. *See, e.g.*, Electronic Freedom of Information Act of 1993, S. 1782, 103d Cong.; Freedom of Information Improvement Act and the Electronic Freedom of Information Improvement Act, S. 1940, 102d Cong. (1991); H.R. 2773, 101st Cong. (1989).
146. *See* Kirtley, *FOIA*, *supra* note 23, at 9 (pointing out that E-FOIA does not tackle the problems of excessive access fees or the tension between privacy and disclosure in FOIA doctrine).
147. *See* Cate et al., *supra* note 118, at 73 ("[FOIA's] costs threaten to increase exponentially when the FOIA is applied to the increasing number of computerized agency records.").
148. *See* Robert Gellman, *I Predict That E-FOIA Will Slow Down Agency Responses*, GOV'T COMPUTER NEWS, Nov. 18, 1996, at 27 [hereinafter Gellman, *E-FOIA Will Slow Down Agency Responses*] (arguing that new procedural requirements will cause agency FOIA operations to slow down "as agencies spend more time on process and less on actual disclosure").
149. *See* Mike Feinsilber, *Freedom of Information Act Updated*, COM. APPEAL, Sept. 22, 1996, at 13A (recounting the concern of David Burnham, co-director of the Transactional Records Access Clearing House, that changing FOIA "will give reluctant federal agencies grounds for ignoring [past] decisions"). Burnham worries that FOIA requesters "may have to refight battles that have already been won." *Id.*
150. E-FOIA, *supra* note 24, § 4, 110 Stat. at 3049 (codified at 5 U.S.C. § 552(a)(2) (Supp. II 1996)). If an agency does not have the means necessary to publish the materials on the Web, the agency

would be able to satisfy the requirements of this section by making the records available on CD-ROM or diskette. See H.R. REP. NO. 104-795, at 20 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3448, 3463. The records that are to be made available for public inspection by electronic means are:

- (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
- (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;
- (C) administrative staff manuals and instructions to staff that affect a member of the public;
- (D) copies of all records, regardless of form or format, which have been released to any person . . . and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and
- (E) a general index of the records referred to under subparagraph (D).

E-FOIA, *supra* note 24, § 4, 110 Stat. at 3049 (codified at 5 U.S.C. § 552(a)(2) (Supp. II 1996)).

One commentator has erroneously stated that § 552(a)(2) requires *all* records created after November 1, 1996, to be made available electronically within one year of their creation. See David MacDonald, Note, *The Electronic Freedom of Information Act Amendments: A Minor Upgrade to Public Access Law*, 23 RUTGERS COMPUTER & TECH. L.J. 357, 375 (1997). Such a requirement would be nearly impossible for agencies to fulfill and would be an incredible waste of agency resources.

151. See H.R. REP. NO. 104-795, at 11, *reprinted in* 1996 U.S.C.C.A.N. 3448, 3454.

152. *Attorney General Reiterates FOIA Policy*, FOIA UPDATE (Office of Info. and Privacy, U.S. Dep't of Justice), Spring 1997, at 1 [hereinafter Reno Memo].

153. See E-FOIA, *supra* note 24, § 4, 110 Stat. at 3049 (codified at 5 U.S.C. § 552(a)(2)(D) (Supp. II 1996)).

154. *FBI FOIA Electronic Reading Room* (visited Apr. 1, 1998) <<http://www.fbi.gov/foipa/document.htm>>.

155. See *Index of /foipa/elvis* (visited Apr. 1, 1998) <<http://www.fbi.gov/foipa/elvis/>>.

156. See *Index of /foipa/rosen* (visited Apr. 1, 1998) <<http://www.fbi.gov/foipa/rosen>>.

157. See *Index of /foipa/ufo* (visited Apr. 1, 1998) <<http://www.fbi.gov/foipa/ufo/>>.

158. *Electronic Freedom of Information Improvement: Hearing on S. 1090 Before the Subcomm. on Gov't Management, Info. and Tech. of the House Comm. on Gov't Reform and Oversight*, 104th Cong. 74 (1996) (testimony of Robert Gellman) [hereinafter Gellman Testimony]; see also MacDonald, *supra* note 150, at 382 (arguing that the provision will likely result in an "explosion of litigation").

159. An agency's assessment would not be aimed at anyone in particular, and an individual would still have access to the document through traditional FOIA channels. Cf. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 575-76 (1992) ("[T]he alleged violation of a right to have the Government act in accordance with law [is] not judicially cognizable because 'assertion of a right to a particular

kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III" (quoting *Allen v. Wright*, 468 U.S. 737, 754 (1984))).

160. See E-FOIA, *supra* note 24, § 4, 110 Stat. at 3049 (codified at 5 U.S.C. § 552(a)(2)(D) (Supp. II 1996)).
161. See *supra* note 66 and accompanying text (discussing agency discretion in the context of granting fee waivers).
162. See MacDonald, *supra* note 150, at 383 n.164 (arguing that "[a]gencies may find less political risk in processing antiquated documents than current and controversial ones"); Gellman Testimony, *supra* note 158, at 74.
163. See Jane Kirtley, *Public Access to Records Always Under Attack*, EDITOR & PUBLISHER MAG., July 7, 1997, at 48 (noting that the Clinton administration "inherited a legacy of entrenched bureaucratic resistance to openness promulgated during the Reagan and Bush administrations").
164. Memorandum from President Clinton on FOIA to Heads of Departments and Agencies (Oct. 4, 1993), *reprinted in* FOIA UPDATE (Office of Info. and Privacy, U.S. Dep't of Justice), Summer/Fall 1993, at 3 [hereinafter 1993 Clinton Memo].
165. See Reno Memo, *supra* note 152, at 1 ("As your department or agency implements the Electronic FOIA amendments, I urge you to be sure to continue our strong commitment to the openness-in-government principles that President Clinton and I [have] established . . .").
166. See *Open Records Ensure Freedoms*, WIS. ST. J., July 4, 1997, at 13A (noting that the Clinton administration's record is "mixed," but emphasizing that it is "an improvement upon the policies of the Reagan and Bush administrations").
167. See *Federal Information Policy Oversight: Hearing Before the Subcomm. on Gov't Management, Info., and Tech. of the House Comm. on Gov't Reform and Oversight*, 104th Cong. 51 (1996) (statement of J. Kevin O'Brien, Chief, Freedom of Info. and Privacy Acts Section, FBI) [hereinafter O'Brien Testimony] (asserting that the FBI would continue its "best efforts" to reduce its backlog of unprocessed FOIA requests); Letter from John C. Dwyer, Acting Associate Attorney General, to The Speaker of the United States House of Representatives (July 1, 1997) (expressing the Clinton administration's "firm commitment" to FOIA and to "its faithful implementation in [a] strong spirit of government openness"), *reprinted in* OFFICE OF INFO. AND PRIVACY, U.S. DEPT OF JUSTICE, DOJ ANNUAL FOIA REPORT TO CONGRESS 1996, available at [DOJ Annual FOIA Report to Congress - 1996](http://www.usdoj.gov/oip/annual_report/1996/96-sp.htm) (visited Apr. 1, 1998) <http://www.usdoj.gov/oip/annual_report/1996/96-sp.htm>. There is a risk, of course, that future administrations will revert to a more restrictive FOIA policy. If that scenario becomes a reality, the courts could intervene and set reasonable limitations on agency discretion. Agencies would still be subject to FOIA's time limits, and if, as a result of diverting resources to post previously released material, an agency took too long responding to newer requests, the courts could compel disclosure and require the agency to shift resources back to processing current requests.
168. The system is by no means perfect, however. For example, when I examined some FBI information on UFOs, the documents on the screen were barely legible due to the condition of the original documents. See *FBI FOIA Electronic Reading Room, UFO: Section 1* (visited Apr. 1, 1998) <<http://www.fbi.gov/foipa/ufo/ufo1.pdf>>.
169. See S. REP. NO. 104-272, at 9 (1996) ("Government dissemination of more varieties and greater amounts of its information holdings via [the information] 'superhighway' may reduce the volume of FOIA requests . . .").
170. *Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976).
171. 603 F. Supp. 760 (D.D.C. 1984).
172. See *id.* at 760-61.

173. *See id.* at 762.
174. *See id.* at 763.
175. *Id.*
176. *See* Ira Chinoy, *Amendment Seeks to Open Public Files to Digital Diggers*, WASH. POST, Sept. 18, 1996, at A17 (quoting Senator Patrick Leahy, E-FOIA's Senate sponsor, as saying: "In the society we're in today, you are not going to have the access to what the government is doing in any practical fashion if you don't have access electronically"); *cf.* Feinsilber, *supra* note 149, at A13. Feinsilber discusses the experience of the *Miami Herald*, which wanted to match the names of those with permits to carry concealed weapons against a list of school bus drivers. The *Herald* was given the requested information under the Florida state FOIA-but on "yards and yards of paper." The *Herald* was forced to abandon the project because it could not perform a computer match. *See id.*
177. Chinoy, *supra* note 176, at A17.
178. *See* Jeffrey Norgle, Comment, *Revising the Freedom of Information Act for the Information Age: The Electronic Freedom of Information Act*, 14 J. MARSHALL J. COMPUTER & INFO. L. 817, 817-19 (1996).
179. *Id.* at 817-18 (citations omitted).
180. *Id.* at 818.
181. *Id.* at 818-19.
182. E-FOIA, *supra* note 24, § 5, 110 Stat. at 3050 (codified at 5 U.S.C. § 552(a)(3)(B) (Supp. II 1996)).
183. *See* S. REP. NO. 104-272, at 14 (1996).
184. *See supra* notes 85 & 97 and accompanying text.
185. *See* H.R. REP. NO. 104-795, at 23 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3448, 3466.
186. *See* Gellman, *E-FOIA Will Slow Down Agency Responses*, *supra* note 148, at 27.
187. *See* E-FOIA, *supra* note 24, § 7, 110 Stat. at 3050 (codified at 5 U.S.C. § 552(a)(6)(D)(i) (Supp. II 1996)) ("Each agency *may* promulgate regulations . . . providing for multi-track processing" (emphasis added)).
188. *See, e.g.,* Gellman, *E-FOIA Will Slow Down Agency Responses*, *supra* note 148, at 27 (arguing that E-FOIA's multi-track authorization is likely to make "[I]lengthy administrative delays" more commonplace).
189. *See* S. REP. NO. 104-272, at 16 (1996) (noting that 28 of 75 agencies responding to a Department of Justice survey in February 1994 reported no backlog of requests).
190. *See supra* note 117 and accompanying text.
191. E-FOIA, *supra* note 24, § 8, 110 Stat. at 3052 (codified at 5 U.S.C. § 552(a)(6)(E)(i)(I) (Supp. II 1996)).
192. *Id.* (codified at 5 U.S.C. § 552(a)(6)(E)(v)(I) (Supp. II 1996)).
193. *See* MacDonald, *supra* note 150, at 384 ("Only a small number of requesters should be able to show that their own or other lives [are] hanging in the balance pending a FOIA request.").
194. *See* E-FOIA, *supra* note 24, § 8, 110 Stat. at 3052 (codified at 5 U.S.C. § 552(a)(6)(E)(iii) (Supp. II 1996)).
195. *See supra* notes 98-101 and accompanying text.
196. E-FOIA, *supra* note 24, § 8, 110 Stat. at 3052 (codified at 5 U.S.C. § 552(a)(6)(E)(v)(II) (Supp. II 1996)).
197. *See, e.g.,* Amy E. Rees, *Recent Developments Regarding the Freedom of Information Act: A*

"Prologue to a Farce or a Tragedy; or, Perhaps Both," 44 DUKE L.J. 1183, 1184 (1995) (lamenting the fact that "FOIA has rarely if ever been used as a powerful external check on governmental affairs," and noting that "the typical FOIA request is made by a wily civil litigant circumventing traditional discovery rules, a corporate counsel in search of competitor's financial information, or a conspiracy theorist demanding operational files of the [CIA] on himself or other players in covert intelligence maneuvers in Cuba"); Scalia, *supra* note 1, at 16 ("[FOIA was] promoted as a boon to the press, the public interest group, the little guy; [it has] been used most frequently by corporate lawyers. . . . [The current situation] is a far cry from John Q. Public finding out how his government works."). Perhaps the most scathing and extensive critique of FOIA was delivered by Assistant Attorney General Stephen J. Markman, in 1988:

Today, a typical FOIA scenario is not, as envisioned by the Congress, the journalist who seeks information about the development of public policy which he will shortly publish for the edification of the electorate. Rather, it is the corporate lawyer seeking business secrets of a client's competitors; the felon attempting to learn who it was who informed against him; the drug trafficker trying to evade the law; the foreign requester seeking a benefit that our citizens cannot obtain from his country; or the private litigant who, constrained by discovery limitations, turns to the FOIA to give him what a trial court will not.

The Freedom of Information Act: Hearings Before the Subcomm. on Tech. and the Law of the Senate Comm. on the Judiciary, 100th Cong. 37 (1988) (footnote omitted).

198. Department of the Air Force v. Rose, 425 U.S. 352, 361 (1976) (internal quotation marks omitted).
199. See 5 U.S.C. § 552(a)(6)(A)(i) (1994).
200. 142 CONG. REC. S10,894 (daily ed. Sept. 18, 1996) (statement of Sen. Leahy); see also Sinrod, *supra* note 44, at 342 (noting that "compliance with FOIA's ten-day rule has become the exception rather than the norm"); Beall, *supra* note 23, at 1254 n.14 ("[T]he 10-day time limits imposed by [the 1974] Congress no longer have any significance.").
201. See E-FOIA, *supra* note 24, § 8, 110 Stat. at 3052 (codified at 5 U.S.C. § 552(a)(6)(A)(i) (Supp. II 1996)).
202. H.R. REP. NO. 104-795, at 26 (1996), reprinted in 1996 U.S.C.C.A.N. 3448, 3469.
203. There is a risk, however, that the new time limits will slow down some FOIA processing since agencies that currently respond within ten days will no longer have the pressure to comply within ten days. See Gellman Testimony, *supra* note 158, at 75.
204. See *supra* notes 186-89 and accompanying text.
205. See *Congress Brings Information Act into Electronic Age*, *supra* note 114.
206. See Sarah Henderson Hutt, *In Praise of Public Access: Why the Government Should Disclose the Identities of Alleged Crime Victims*, 41 DUKE L.J. 368, 383 n.88 (1991).
207. See Michael H. Hughes, *CIA v. Sims: Supreme Court Deference to Agency Interpretation of FOIA Exemption 3*, 35 CATH. U. L. REV. 279, 281 (1985).
208. See Hutt, *supra* note 206, at 383 n.88.
209. See Hughes, *supra* note 207, at 281.
210. See Gellman Testimony, *supra* note 158, at 75 (noting that no matter whether the time limits are ten or twenty days, agencies with very large backlogs "will never be in compliance" because "they will not have any more resources").
211. See E-FOIA, *supra* note 24, § 7(b), 110 Stat. at 3050-51 (codified at 5 U.S.C. § 552(a)(6)(B) (Supp. II 1996)). One supporter of a twenty-day time limit argues that the expanded limit should

replace the "unusual circumstances" provision, contending that the added administrative burden of sending out notices of extensions to requesters is unnecessary. *See* Sinrod, *supra* note 44, at 357.

212. *See* E-FOIA, *supra* note 24, § 7(b), 110 Stat. at 3050-51 (codified at 5 U.S.C. §§ 552(a)(6)(B)(i)-(ii) (Supp. II 1996)).
213. *See* 5 U.S.C. § 552(a)(6)(C)(i) (Supp. II 1996).
214. *Id.*
215. *See supra* Part II.A.
216. E-FOIA, *supra* note 24, § 7, 110 Stat. at 3051 (codified at 5 U.S.C. § 552(a)(6)(C)(ii) (Supp. II 1996)).
217. *See* H.R. REP. NO. 104-795, at 24 (1996) (explaining that the language does not cover "routine backlogs" because permitting such backlogs to "give agencies an automatic excuse to ignore the time limits . . . provides a disincentive for agencies to clear up those backlogs"), *reprinted in* 1996 U.S.C.C.A.N. 3448, 3467.
218. *See infra* notes 222-28 and accompanying text.
219. *See supra* notes 52-54 and accompanying text.
220. Information that is classified by executive order in the interest of national defense or foreign policy is exempted from disclosure by 5 U.S.C. § 552(b)(1).
221. Such information is exempted from disclosure by 5 U.S.C. §§ 552(b)(6) and (b)(7)(C). President Ford, when he initially vetoed the 1974 FOIA amendments, voiced such a concern:

I believe that confidentiality would not be maintained if many millions of pages of FBI and other investigatory law enforcement files would be subject to compulsory disclosure Our law enforcement agencies do not have, and could not obtain, the large number of trained and knowledgeable personnel that would be needed to make such a line-by-line examination of information requests that sometimes involve hundreds of thousands of documents, within the time constraints added to current law by this bill.

Veto of Freedom of Information Act Amendments, 1974 PUB. PAPERS 374, 375 (Oct. 17, 1974).

222. 959 F. Supp. 1 (D.D.C. 1997), discussed in detail *supra* at pages 1228-29.
223. E-FOIA, *supra* note 24, § 7, 110 Stat. at 3051 (codified at 5 U.S.C. § 552(a)(6)(C)(ii) (Supp. II 1996)).
224. *Edmond*, 959 F. Supp. at 2.
225. E-FOIA, *supra* note 24, § 7, 110 Stat. at 3051 (codified at 5 U.S.C. § 552(a)(6)(C)(ii) (Supp. II 1996)).
226. *See Edmond*, 959 F. Supp. at 3 n.2.
227. *See supra* text accompanying note 212 (discussing opportunity to narrow scope of requests).
228. *See* E-FOIA, *supra* note 24, § 7, 110 Stat. at 3051 (codified at 5 U.S.C. § 552(a)(6)(C)(ii) (Supp. II 1996)).
229. S. REP. NO. 104-272, at 5 (1996); *see also* E-FOIA, *supra* note 24, § 2(a)(6), 110 Stat. at 3048 ("Government agencies should use new technology to enhance public access to agency records and information.").
230. *See Electronic Freedom of Information Improvement: Hearing on S. 1090 Before the Subcomm. on Gov't Management, Info., and Tech. of the House Comm. on Gov't Reform and Oversight*, 104th Cong. 98 (1996) (testimony of James P. Lucier, Jr.) (categorizing E-FOIA's technological provisions as not "particularly astonishing" and "little more fundamental than requiring agencies to

- publish their telephone numbers now that telephones have been invented").
231. See E-FOIA Signing Statement, *supra* note 145, at 1949.
232. See O'Brien Testimony, *supra* note 167, at 51 ("It is clear, however, that only more analysts, trained to process requests, can significantly diminish the backlogs . . .").
233. See MacDonald, *supra* note 150, at 384 (calling the failure to fund "[t]he first and primary failure" of E-FOIA). For a discussion of the Senate proposal to fund the amendments that was not passed, as well as other proposed ways to fund FOIA, see *infra* Part IV.B.
234. See S. REP. NO. 104-272, at 9 (1996) ("Government dissemination of more varieties and greater amounts of its information holdings via a 'superhighway' may reduce the volume of FOIA requests.").
235. See Gellman, *E-FOIA Will Slow Down Agency Responses*, *supra* note 148, at 27.
236. See 142 CONG. REC. S10,894 (daily ed. Sept. 18, 1996) (statement of Sen. Leahy) (noting that FOIA requests to the FBI can take up to four years to be processed).
237. See E-FOIA, *supra* note 24, § 8, 110 Stat. at 3051 (codified at 5 U.S.C. § 552(a)(6)(E)(i) (Supp. II 1996)). For example, it is unknown how expedited review will function in combination with multi-track processing. One commentator suggests that an agency might put all other requests on hold so it can devote all of its FOIA resources to processing the expedited cases. See Gellman, *E-FOIA Will Slow Down Agency Responses*, *supra* note 148, at 27. One of the only firm requirements that the amendments place on agency regulations is that they ensure "expeditious consideration of administrative appeals of [the] determinations of whether to provide expedited processing." E-FOIA, *supra* note 24, § 8, 110 Stat. at 3052 (codified at 5 U.S.C. § 552(a)(6)(E)(ii)(II) (Supp. II 1996)).
238. Cf. Gellman Testimony, *supra* note 158, at 74 (noting that "virtually every word in the FOIA has been the subject of intense litigation").
239. See MacDonald, *supra* note 150, at 383 (arguing that the expedited review provisions "will add significant costs to administrative overhead" and will "further drain agency resources and slow down FOIA compliance overall").
240. See, e.g., Cate et al., *supra* note 118, at 67-69.
241. See *id.* at 45.
242. S. 1090, 104th Cong. (1996).
243. The statute itself places no limitations on who may request records or for what reason. As long as the records do not fall within one of the statutory exemptions, an agency, "upon *any* request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, *shall* make the records promptly available *to any person*." 5 U.S.C. § 552(a)(3) (1994) (emphases added). Courts have reaffirmed this basic principle of FOIA, noting that Congress "clearly intended the FOIA to give any member of the public as much right to disclosure as one with a special interest in a particular document." *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989) (internal quotation marks omitted); see also H.R. REP. NO. 104-795, at 6 (1996) ("Requesters do not have to show a need or reason for seeking information."), *reprinted* in 1996 U.S.C.C.A.N. 3448, 3449.
244. See Scalia, *supra* note 1, at 17 (criticizing FOIA and its costs because requests that "may be motivated by no more than idle curiosity" take "money from the Treasury that could be better spent elsewhere").
245. See Scott Shane, *Panning for Gold in Government Files: Businesses Make Most of Public Right to Know*, BALTIMORE SUN, July 28, 1997, at 1A (noting that some people have become "FOIA hobbyists"). One such FOIA hobbyist, Michael J. Ravnitsky of St. Paul, Minnesota, "has flooded a

dozen agencies with 2,200 FOIA requests." *Id.* Ravnitsky, who recently got a bill from the FBI for \$18,000 in costs, stated: "I think FOIA is great fun. It's a national treasure." *Id.* He says that he is not planning on paying the bill. *See id.*

246. Scalia, *supra* note 1, at 17.
247. *See* discussion *supra* Part II.B. (discussing the central purpose doctrine, which has been used to uphold the denial, based on the privacy exemptions, of FOIA requests that do not serve FOIA's "central purpose," which is to ensure access to information concerning the activities of government, not those of private citizens).
248. *See* Cate et al., *supra* note 118, at 67 ("The test for whether a request seeks 'official information' should be the touchstone for disclosure under FOIA. . . . [O]nly information that will serve the purpose of ensuring that 'the Government's activities be opened to the sharp eye of public scrutiny' should ever be subject to disclosure under the FOIA." (quoting *Reporters Comm.*, 489 U.S. at 774)). *But see* Beall, *supra* note 23, at 1279-80, 1300 (criticizing the central purpose doctrine as "contrary to the original spirit of FOIA," and expressing dismay over the doctrine's "exaltation of privacy doctrines" that erode "one of the central bulwarks to a free democracy," access to information).
249. *See* Cate et al., *supra* note 118, at 69, 72.
250. *See id.* at 67-68.
251. *See* Beall, *supra* note 23, at 1273-80 (reviewing cases in which lower courts incorporated the central purpose doctrine's language in non-privacy exemption cases).
252. E-FOIA, *supra* note 24, § 2(a)(1), 110 Stat. at 3048 (emphases added).
253. S. REP. NO. 104-272, at 24 (1996) (additional views of Senator Leahy) (citations omitted).
254. In fact, it is difficult to avoid the use of a balancing test. For example, under Exemption 7(C), material may be withheld if disclosure would result in an "unwarranted invasion" of privacy. *See* 5 U.S.C. § 552(b)(7)(C) (1994). In order to determine whether an invasion of privacy would be unwarranted, a court is forced to weigh the relative merits of the interest in disclosure and the privacy interest involved. *See* Dickinson, *supra* note 130, at 209-10 ("[B]y casting the personal privacy exemptions as balancing tests, Congress reintroduced into disclosure disputes the issue of merit."). Senator Leahy appears to have recognized this necessity. His attachment to the Senate report accompanying E-FOIA states that the requester's intended use can properly be considered when balancing the public interest in disclosure against the privacy interest. *See* S. REP. NO. 104-272, at 27 (additional views of Senator Leahy). Most likely, any congressional attempt to fully overturn *Reporters Committee* and its progeny and to eliminate the central purpose doctrine would need to be more explicit.
255. One way to avoid such a problem would be to require FOIA requesters to state how the information they are requesting is likely to shed light on the activities and operations of the government. This type of initial purpose statement would assist agencies in making the initial determination. *But see* Cate et al., *supra* note 118, at 68 n.229 (arguing that a congressional attempt to limit the use of FOIA for purely private purposes by requiring that requesters demonstrate a "public purpose use" for the requested information would be ineffective and ultimately "unworkable").
256. *See* Wald, *supra* note 25, at 666.
257. *See id.* at 670 (noting the risk of "increas[ing] the cozy, closed door government-business dealings which were the very sort of practices the Act was designed to root out") (internal quotation marks omitted). Public interest groups argue that moving too quickly to cut off public disclosure of business data would be unwise, claiming that such a move would shield such embarrassing information as "drug company tests on humans [that are performed] before completing animal tests, toxic chemicals dumped into streams and rivers, inspection reports of the Department of

Agriculture concerning unwholesome meat, [and] misleading reports by a utility to its ratepayers about the costs of a new nuclear plant." *Id.* at 669-70 (footnotes omitted).

258. See Scalia, *supra* note 1, at 17-18 ("[FOIA's] defects . . . might not be defects in the best of all possible worlds. They are foolish extravagances only because we do not have an unlimited amount of federal money to spend, [or] an unlimited number of agency employees to assign . . .").
259. See 1986 Reform Act, *supra* note 37, § 1803, 100 Stat. at 3207-48 (codified at 5 U.S.C. § 552(a)(4)(A)(iii) (1994)). For a discussion of the 1986 amendments, see *supra* Part I.C.
260. Cf. *The Electronic Freedom of Information Improvement Act: Hearings on S. 1940 Before the Subcomm. on Tech. and the Law of the Senate Comm. on the Judiciary*, 100th Cong. 96 (1992) (statement of Sen. Leahy) ("[A]ll of us would look at some requests as frivolous, but that is part of the price of democracy.").
261. See Beall, *supra* note 23, at 1262 (arguing that the use of the central purpose doctrine as a gatekeeper "would work a dramatic *volte face* from the principles of FOIA, improperly shifting the Act from one that favors disclosure to one that favors secrecy").
262. Pub. L. No. 79-404, ch. 324, § 3, 60 Stat. 237, 238 (1946).
263. S. REP. NO. 89-813, at 40 (1965).
264. See H.R. REP. NO. 99-832, at 7 (1986) ("The inclusion of any type of purpose test would have made the FOIA as useless as the disclosure statute it replaced.").
265. See S. REP. NO. 89-813, at 3. This 1965 Senate Report states that the primary purposes of the law were "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld." *Id.*
266. Beall, *supra* note 23, at 1299.
267. *Id.*
268. See discussion *supra* Part I.C (arguing that the 1986 Amendments strike the proper balance between keeping government activities open to the light of public scrutiny and fiscal realities).
269. See H.R. REP. NO. 104-795, at 13 (1996) ("A principal constraint to the full effectiveness of the FOIA has been the lack of adequate agency resources."), *reprinted in* 1996 U.S.C.C.A.N. 3448, 3456; S. REP. NO. 104-272, at 16 (1996) ("The reasons for [the backlogs] may vary, but principally it appears to be a problem of too few resources in the face of too heavy a workload.").
270. See, e.g., H.R. REP. NO. 99-832, at 11 (1986) (citing inadequate resources as a reason for delay in FOIA processing); Memorandum from Attorney General Janet Reno on FOIA to Heads and Departments of Agencies (Oct. 4, 1993) (noting that the principal reason for backlogs appears to be "too few resources in the face of too heavy a workload"), *reprinted in* FOIA UPDATE (Office of Info. and Privacy, U.S. Dep't of Justice), Summer/Fall 1993, at 5; Sinrod, *supra* note 44, at 33-4 ("Congress' failure to fund FOIA adequately led to backlogs and delays in many agencies . . .").
271. See discussion *supra* Part I.C (noting that the 1986 Amendments significantly increased agencies' ability to charge requesters for the costs of processing requests).
272. See S. REP. NO. 104-272, at 21.
273. See *id.*
274. S. 1090, 104th Cong. § 6(a) (1996). The bill's language provided:

If at an agency's request, the Comptroller General determines that the agency annually has either provided responsive documents or denied requests in substantial compliance with the [time limit] requirements of [5 U.S.C. § 552(a)] (6)(A), one-half of the fees collected under this section shall be credited to the collecting agency and expended to offset the costs of complying with this section through staff development

and acquisition of additional request processing resources. The remaining fees collected under this section shall be remitted to the Treasury as general funds or miscellaneous receipts.

Id.

275. See S. REP. NO. 104-272, at 16.

276. See *id.* at 21 (estimating that, in 1992, agencies that would likely be eligible to retain fees accounted for only about 10% of the total fees collected, while the four agencies with the largest backlogs accounted for almost 75% of the total fees collected).

277. See S. 1090, § 6(a).

278. See Gellman Testimony, *supra* note 158, at 74 (stating that the provision was "guaranteed to lose money for the government").

279. See *id.* at 75.

280. *Id.*

281. See S. 1090, § 6(a).

282. See Sinrod, *supra* note 44, at 361.

283. *Id.* at 361-63 (footnote omitted).

284. See Wald, *supra* note 25, at 683 (noting that FOIA "sometimes helps the unworthy").

285. See 1998 INFORMATION PLEASE ALMANAC 125 (Borgna Brunner ed., 1998).

286. See Harvey L. Pitt & Karen L. Shapiro, *Securities Regulation by Enforcement: A Look Ahead at the Next Decade*, 7 YALE J. ON REG. 149, 283 & n.568 (1990) ("\$167.5 million [was] allocated [in Fiscal Year 1989] to military bands."); Wald, *supra* note 25, at 665 (arguing that one must put the cost of FOIA in context and noting that in 1984 "we spent nearly \$100 million annually on military bands").

287. William J. Clinton, Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 79, 79 (Jan. 23, 1996); *cf.* Wald, *supra* note 25, at 650 ("It is seductively easy to let go of legislated freedoms on the ground that they are too costly for a beleaguered Twentieth Century democracy.") (emphasis omitted).

288. Scalia, *supra* note 1, at 16.

289. As the House Report accompanying the 1986 FOIA amendments stated:

If it were possible to trace all of the disclosures made under the FOIA, the identifiable dollar savings to the taxpayer resulting from those disclosures would almost certainly exceed the cost of the FOIA. In fact, the savings from a single FOIA disclosure can pay the cost of the entire FOIA for an entire year or even longer. When [one considers] the non-monetary benefits that result from FOIA disclosures—such as fairer and more responsive government, better agency policy, health and safety improvements, and a better informed citizenry—the total benefits of the FOIA far exceed the costs.

H.R. REP. NO. 99-832, at 10-11 (1986) (internal citations omitted). This House Report recounts several instances where use of FOIA led to recovery of misspent tax dollars. See *id.* at 9-10. Sometimes the amount recovered is relatively small. For example, the Better Government Association used FOIA "to document that a [government official] illegally used an agency chauffeur for non-official transportation." *Id.* at 10. The official eventually reimbursed the government \$6,411. See *id.* The savings can be substantial, however, such as when the Better Government Association used FOIA during an investigation of a Navy shipbuilding contractor.

See id. at 9. The investigation uncovered waste and false billing by the contractor, and "[u]ltimately a settlement was reached with the contractor that resulted in potential savings to the government of \$170 million." *Id.*

290. *See supra* notes 25-27 and accompanying text.

291. H.R. REP. NO. 99-832, at 9; *accord* H.R. REP. NO. 104-795, at 7 (1996) (noting that FOIA "may have a certain degree of preventive effect, prompting a higher degree of probity and conscientiousness in the performance of government operations"), *reprinted in* 1996 U.S.C.C.A.N. 3448, 3450; William Safire, Essay, *Free Speech v. Scalia*, N.Y. TIMES, Apr. 29, 1985, at A17 (asserting that FOIA "has done more to inhibit the abuse of Government power . . . than any legislation in our lifetime"). This deterrent value exists because "[a]gency managers know that many of their actions are subject to public oversight through documents obtained by the press and by citizens through the FOIA." H.R. REP. NO. 99-832, at 9.

292. Wald, *supra* note 25, at 683 (emphasis added).

Unanticipated Consequences

- A. We hope you found the preceding report enlightening as to why you should be using the FOIA process to your benefit.

- B. We have read many of these type of reports. We have read every appellate and Supreme Court case cited in the previous report plus hundreds more. We read everything we can find on FOIA. Our goal is to help everyone who needs help and is willing to listen to us.

- C. Some people are doing FOIA requests on their own, but seem to lack the deeper understanding of the benefit of using this process.
 - 1. Many of these requesters are asking the Disclosure Officers to do research.
 - 2. They do not ask for specific documents.
 - 3. They request 10, 15, or 20 or more records in one FOIA request.

- D. We suggest you ask for “one” specific item at a time.
 - 1. Date each request with a different date.
 - 2. Keep each FOIA request in its own file folder by date.
 - 3. The Disclosure Officer will usually respond to your request by citing the date you used on your FOIA request.
 - 4. Match each dated response from the Disclosure Officer with the corresponding date on the original request and put it in the folder.
 - 5. You can decide what the next course of action you choose to follow.
 - 6. Each FOIA request is a separate issue on its own and serves a particular purpose.
 - 7. Many times you will get a response form the IRS Disclosure Officer stating “we have no documents responsive to your request.”

8. These types of responses are what we consider “Golden Letters.”
9. People often contact us because they feel they didn't get a meaningful response when, in fact, many times these are Golden Letters.
10. Golden Letters are responses you receive in which the IRS unknowingly demonstrates that they failed to follow Due Process.
11. Remember each one of these requests is a separate issue.
12. Now, you start building your case against the IRS, FOIA by FOIA.
13. Some people who have been self-assessing themselves believe they are going to have codes on their IMF or BMF that indicate they are drug runners or are involved in some excise taxable activity. Not so.
 - a. This is just one of the many myths that surround the FOIA process.
 - b. We have found a number of people who are disseminating false information concerning the FOIA request process. Whether they are doing it with good intentions or not, it's still the wrong information!
 - c. We often wonder if some of these people have ever read anything with substance concerning the FOIA process.
 - d. Then there are those who teach against using any FOIA process at all.

E. Dishonesty, Fraud, Deceit, or Willful Misrepresentation.

1. The FOIA process can be used to combat all the above with documented substantiated facts concerning your own case.
2. We have heard three different Federal Judges say that decisions are made on an individual case by case basis. And this is what we have relied upon in building affirmative defenses.
3. FOIA can be used to prove:
 - a. Dishonesty regarding procedural compliance.
 - b. Fraud in your documents that was created by someone at the IRS.
 - c. Deceit by the government agents in destroying, concealing, or withholding documents, that would expose their corruptness and your innocence.
 - d. **WILLFUL MISREPRESENTATION** of the facts in question. Even their own manuals teach them to lie.

- F. We were standing before a Judge with no lawyer, with all our accumulated evidence on the table in front of us, and the Judge said, "What if everybody did this?" We replied that we didn't care about anybody else's case as we are here for our own case. We don't care what anybody else does. He then proceeded to run us out of his courtroom and told us to never come back in his courtroom ever again. Then he screamed at the prosecutor "Never bring that man back into this courtroom again!"
1. If we had been using some stupid Idiot Legal Argument, would that have happened?
 2. We've had a number of people trying to pump us full of their stupid idiot legal arguments that they are still circulating around the country, which most of them are all hype and prove nothing.
- G. This 36-page report sends a very clear message "The average people are not using the FOIA process." Why Not?
1. We simply try to teach people the first, second, and third stages of using and implementing the FOIA process.
- H. Just like Mr. Prat who set himself free by using the FOIA process. So can you!
- I. We find a number of people who will spend thousands on this or that program, yet they will not spend 34 cents on a stamp to send in a FOIA request for there IMF or BMF.
- J. Mr. Pratt stayed with the FOIA program and saw it through. So can you!
- K. Just as Mr. Pratt exposed the FBI lies, you can expose the lies of the IRS.
- L. We have people call us who want to argue against doing FOIA requests. Usually in the first minute, we know that they don't have a clue of what they are talking about.
- M. Read and learn for yourself like thousands of others are doing.

Your Right to Federal Records

- A. We wanted you to have direct access to the original source of this information.
- B. Even though they give us all this great information, they never talk about the practical applicability of using the FOIA request.
- C. What do you ask for and to whom do you send it? It depends upon what agency you have dealings with and what documents you are seeking.
- D. Sometimes we will read hundreds of pages concerning the FOIA process and only find one or no items to request. We spend hours searching for specific items to request through the FOIA process.
- E. There has been a lot of contention around the country Concerning Privacy Act VS. Freedom of Information Act as to how to obtain information. Who cares how you get this valuable information as long as you get it.
 - 1. This is another minor issue that we have been questioned about big time.
 - 2. We want to acquire certain specific records.
 - 3. We hope to get these specific documents or get a reply back that states "we have no documents responsive to your request". Thousands of you may have received these types of responses.
 - 4. If they give you what you ask for, that's great. In most cases you can make an effective use of the "we have no documents" letters.
- F. Our goal is to expand your understanding, not only in making FOIA requests, but also in the practical use of their responses, to produce credible evidence that rebuts the government's erroneous presumptions.
- G. When you use our services to decode your IMF or BMF we hope to take you up to the next level, and beyond.
- H. Learn to protect yourself by using the FOIA process.
- I. Learn more and use our Specialized Services and better protect yourself.

YOUR RIGHT TO FEDERAL RECORDS

Questions and Answers on the Freedom of Information Act and the Privacy Act

A joint publication of

U.S. General Services Administration
Washington, DC 20405

U.S. Department of Justice
Washington, DC 20530

At the time of this publication's printing, the Electronic Freedom of Information Act Amendments of 1996 became Public Law 104-231. P.L. 104-231 amends the Freedom of Information Act to provide for public access to information in an electronic format, and for other purposes. For details on how this amendment may affect your search for information, please contact the Freedom of Information Act Officer at the agency in which the records are being sought.

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Introduction

This brochure provides basic guidance about the Freedom of Information Act (FOIA) and the Privacy Act of 1974, to assist members of the public

in exercising their rights. It uses a question-and-answer format to present information about these laws in a clear, simple manner. The brochure is not intended to be a comprehensive treatment of the complex issues associated with the FOIA and the Privacy Act. It also does not discuss the availability of federal agency information electronically, although many federal agencies maintain Internet World Wide Web sites at which a wide range of information is readily available.

The questions answered in this brochure are those frequently asked by persons who contact the Federal Information Center (FIC) for information on the FOIA and the Privacy Act. The answers were compiled by the FIC and the Consumer Information Center (CIC) of the U.S. General Services Administration. They were reviewed by the Department of Justice, the agency responsible for coordinating the administration of the FOIA and encouraging agency compliance with it. The Office of Management and Budget (OMB), which has a similar responsibility for the Privacy Act, reviewed the answers to questions on that act.

The FOIA, enacted in 1966, provides that any person has the right to request access to federal agency records or information. Federal agencies are required to disclose records upon receiving a written request for them, except for those records that are protected from disclosure by the nine exemptions and three exclusions of the FOIA. This right of access is enforceable in court.

The Privacy Act is another federal law regarding federal government records or information about individuals. The Privacy Act establishes certain controls over how the executive branch agencies of the federal government gather, maintain, and disseminate personal information. The Privacy Act also can be used to obtain access to information, but it pertains only to records that the federal government keeps about individual U.S. citizens and lawfully admitted permanent resident aliens. The FOIA, on the other hand, covers all records in the possession and control of federal executive branch agencies.

This brochure contains information about the most significant provisions of the FOIA and the Privacy Act. We hope you find it helpful.

The Freedom of Information Act

What information is available under the FOIA?

The FOIA provides access to all federal agency records (or portions of those records), except for those records that are protected from disclosure by nine exemptions and three exclusions (reasons for which an agency may withhold records from a requester).

The exemptions cover (1) classified national defense and foreign relations information, (2) internal agency rules and practices, (3) information that is prohibited from disclosure by another law, (4) trade secrets and other confidential business information, (5) inter-agency or intra-agency communications that are protected by legal privileges, (6) information involving matters of personal privacy, (7) certain information compiled for law enforcement purposes, (8) information relating to the supervision of financial institutions, and (9) geological information on wells. The three exclusions, which are rarely used, pertain to especially sensitive law enforcement and national

security matters.

Even if information is exempt from disclosure under the FOIA, the agency still may disclose it as a matter of administrative discretion when that is not prohibited by any law and would not cause any foreseeable harm. The full text of the FOIA is printed beginning on page 15 of this brochure.

The FOIA does not apply to Congress, the courts, or the immediate office of the White House, nor does it apply to records of state or local governments. However, nearly all state governments have their own FOIA-type statutes. You may request information about a state's records access law by writing to the office of the attorney general of that state.

The FOIA does not require a private organization or business to release any information directly to the public, whether it has been submitted to the federal government or not. However, information submitted to the federal government by such organizations or companies can be available through a FOIA request if it is not protected by a FOIA exemption, such as the one covering trade secrets and confidential business information.

Under the FOIA, you may request and receive by mail a copy of any record that is in an agency's files and is not covered by one of the exemptions or exclusions. For example, suppose you have heard that a certain toy has been recalled as a safety hazard and you want to know the details. The Consumer Product Safety Commission could help you by providing copies of the recall documents. Perhaps you want to read the latest inspection report on conditions at a nursing home certified for Medicare. Your local Social Security office keeps such records on file. Or you might want to know whether the Department of Veterans Affairs has a file that mentions you. In all of these examples, you could use the FOIA to request information from the appropriate federal agency. (See the discussion below on how to find the right agency office and address.)

When you make a FOIA request, you must describe the records that you want as clearly and specifically as possible. If the agency cannot identify and locate records that you have requested with a reasonable amount of effort, it will not be able to assist you. While agencies strive to handle all FOIA requests in a customer-friendly fashion, with no unnecessary bureaucratic hurdles, the FOIA does not require them to do research for you, to analyze data, to answer written questions, or in any other way to create records in order to respond to a request.

Whom do I contact in the federal government with my request? How do I get the right address?

No one office of the federal government handles all FOIA requests. Each FOIA request must be made to the particular agency that has the records that you want. For example, if you want to know about an investigation of motor vehicle defects, write to the Department of Transportation. If you want information about a work-related accident at a nearby manufacturing plant, write to the Department of Labor (at its office in the region where the accident occurred). Most of the larger federal agencies have several FOIA offices. Some have one for each major bureau or component; others have one for each region of the country.

You may have to do a little research to find the proper agency office to

handle your FOIA request, but you will save time in the long run if you send your request directly to the most appropriate office. For assistance, you can contact the Federal Information Center (FIC). The FIC is specially prepared to help you find the right agency, the right office, and the right address. The FIC is administered by the U.S. General Services Administration. Information on how to contact the FIC begins on page 14.

The U.S. Government Manual, the official handbook of the federal government, may also be useful. It describes the programs within each federal agency and lists the names of top personnel and agency addresses. The Manual is available at most public libraries and can be purchased from the Superintendent of Documents. (Ordering instructions are on page __.) Additionally, each agency publishes FOIA regulations in the Code of Federal Regulations (CFR) that contain the mailing addresses of its FOIA offices. (For example, the Department of Justice's FOIA regulations can be found in Volume 28 of the CFR, Part 16.) The CFR is available at most public libraries.

How do I request information under the FOIA?

All you have to do to make a FOIA request is write a letter to the agency. (For the quickest possible handling, mark both your letter and the envelope "Freedom of Information Act Request.") Although you do not have to give a record's name or title, you should identify the records that you want as specifically as possible to increase the likelihood that the agency will be able to locate them. Any facts or clues you can furnish about the time, place, authors, events, subjects, and other details of the records will be helpful to the agency in deciding where to search and in determining which records respond to your request, saving you and the government time and money.

As a general rule, FOIA requesters are not required to state the reasons why they are making their requests. You may do so if you think it might help the agency to locate the records. If you are not sure whether the records you want are exempt from disclosure, you may request them anyway. Agencies often have the legal discretion to disclose exempt information and, in line with the government's openness policy, they are encouraged to do so whenever possible.

A sample request is shown below. Keep a copy of your request. You may need to refer to it in further correspondence with the agency.

Sample FOIA Request Letter

Date

Freedom of Information Act Request Agency Head or FOIA Officer Name of agency or agency component Address (see discussion above on whom to contact)

Dear _____:

Under the Freedom of Information Act, 5 U.S.C. subsection 552, I am

requesting access to [identify the records as clearly and specifically as possible].

If there are any fees for searching for or copying the records, please let me know before you fill my request. [Or, please supply the records without informing me of the cost if the fees do not exceed \$_____, which I agree to pay.]

If you deny all or any part of this request, please cite each specific exemption you think justifies your refusal to release the information and notify me of appeal procedures available under the law.

Optional: If you have any questions about handling this request, you may telephone me at _____ (home phone) or at _____ (office phone).

Sincerely,

Name Address

What about costs for getting records under the FOIA?

The FOIA permits agencies to charge fees to FOIA requesters. For noncommercial requesters, an agency may charge only for the actual cost of searching for records and the cost of making copies. Search fees usually range from \$10 to \$30 per hour, depending upon the salary levels of the personnel needed for the search. The charge for copying documents can be as little as 10 cents per page at some agencies, but may be considerably more at other agencies.

For noncommercial requests, agencies will not charge for the first two hours of search time or for the first 100 pages of document copying. Agencies also will not charge if the total cost is minimal. An agency should notify you before proceeding with a request that will involve large fees, unless your request letter already states your willingness to pay fees as large as that amount. If fees are charged, you may request a waiver of those fees if you can show that the records, when disclosed to you, will contribute significantly to the public's understanding of the operations or activities of the government.

How long will it take to answer my request?

Under the FOIA, federal agencies are required to respond to your request within 10 working days of receipt (excluding Saturdays, Sundays, and federal holidays). If you have not received a response by the end of that time (allowing for mailing time), you may telephone the agency or write a follow-up letter to ask about the status of your request. Sometimes an agency may need more than 10 working days to find the records, examine them, possibly consult other persons or agencies, decide whether to disclose all of the information requested, and prepare the records for disclosure. Agencies may extend this 10-day period up to 10 more working days, with written notice to you. Some agencies, particularly law enforcement agencies, receive large numbers of requests, many of which involve voluminous records or require exceptional care to process. If an agency has a backlog of requests

that were received before yours and has assigned a reasonable portion of its staff to work on the backlog, the agency ordinarily will handle requests on a first-come, first-served basis and may not respond to all requests within the statutory time period.

What happens if the agency denies my request?

If the agency locates records in response to your request, it can withhold them (or any portion of them) only if they are exempt from disclosure. If an agency denies your request, in whole or in part, it must tell you the reason(s) for the denial in writing and inform you of your right to appeal to a higher decisionmaking level within the agency.

How do I appeal a denial?

All that is necessary to appeal a denial is to promptly send a letter to the agency. Most agencies require that appeals be made within 30 to 45 days after you receive notification of a denial. The denial letter should tell you the office to which your appeal letter should be addressed. For the quickest possible handling, you should mark both your request letter and the envelope "Freedom of Information Act Appeal."

To appeal, simply ask the agency to review your FOIA request and its denial decision. It is a good idea also to give your reason(s) for believing that the denial was wrong. Be sure to refer to any pertinent communications you have had with the agency on the request and include any number the agency may have assigned to your request. It can save time in acting on your appeal if you include copies of your FOIA request and the agency's denial letter. You do not need to enclose copies of any documents released to you. Under the FOIA, the agency has 20 working days (excluding Saturdays, Sundays, and federal holidays) to decide your appeal. Under certain circumstances, it may also take an extension of up to 10 working days. At some agencies, as with initial requests, some appeals may take longer to decide.

What can I do if my appeal is denied?

If the agency denies your appeal, or does not respond within the statutory time period, you may take the matter to court. The agency's denial letter should tell you that you can file a FOIA lawsuit in the U.S. District Court where you live, where you have your principal place of business, where the documents are kept, or in the District of Columbia. In court, the agency will have to prove that any withheld information is covered by one of the exemptions listed in the act. If you win a substantial portion of your case and your lawsuit is found to be a matter of public interest, the court may require the government to pay court costs and reasonable attorney's fees for you.

The Privacy Act

What is the Privacy Act?

The federal government compiles a wide range of information on individuals. For example, if you were ever in the military or employed by a federal agency, there should be records of your service. If you have ever applied for a federal benefit or received a student loan guaranteed by the government, you are probably the subject of a file. There are records on every individual who has ever paid income taxes or received a check from Social Security or Medicare.

The Privacy Act, passed by Congress in 1974, establishes certain controls over what personal information is collected by the federal government and how it is used. The act guarantees three primary rights: (1) the right to see records about oneself, subject to the Privacy Act's exemptions; (2) the right to amend that record if it is inaccurate, irrelevant, untimely, or incomplete; and (3) the right to sue the government for violations of the statute, including permitting others to see your records, unless specifically permitted by the act.

The act also provides for certain limitations on agency information practices, such as requiring that information about an individual be collected from that individual to the greatest extent practicable; requiring agencies to ensure that their records are relevant, accurate, timely, and complete; and prohibiting agencies from maintaining information describing how an individual exercises his or her First Amendment rights unless the individual consents to it, a statute permits it, or it is within the scope of an authorized law enforcement investigation.

What information may I request under the Privacy Act?

The Privacy Act applies only to records about individuals maintained by agencies in the executive branch of the federal government. It applies to these records only if they are in a "system of records," which means they are retrieved by an individual's name, social security number, or some other personal identifier. In other words, the Privacy Act does not apply to information about individuals in records that are filed under other subjects, such as organizations or events, unless the agency also indexes and retrieves them by individual names or other personal identifiers.

There are 10 exemptions to the Privacy Act under which an agency can withhold certain kinds of information from you. Examples of exempt records are those containing classified information on national security and those concerning criminal investigations. Another exemption often used by agencies is that which protects information that would identify a confidential source. For example, if an investigator questions a person about your qualifications for federal employment and that person agrees to answer only if his identity is protected, then his name or any information that would identify him can be withheld. The 10 exemptions are set out in the act.

If you are interested in more details, you should read the Privacy Act in its entirety. Though the act is too lengthy to publish as part of this brochure, it is readily available. It is printed in the U.S. Code (Section 552a of Title 5), which can be found in many public and school libraries. You may also order a copy of the Privacy Act of 1974, Public Law 93-579, from the Superintendent of Documents. (Ordering instructions are on page 12.)

Whom do I contact in the federal government with my request? How do I get the right address?

As with the FOIA, no one office handles all Privacy Act requests. To locate the proper agency to handle your request, follow the same guidelines as for the Freedom of Information Act.

How do I know if an agency has a file on me?

If you think a particular agency has a file pertaining to you, you may write to the Privacy Act Officer or head of the agency. Agencies are generally required to inform you, upon request, whether or not they have files on you. In addition, agencies are required to report publicly the existence of all systems of records they keep on individuals. The Office of the Federal Register publishes a listing of each agency's systems of records notices, including exemptions, as well as its Privacy Act regulations. The multi-volume work, Privacy Act Issuance's Compilation, is updated every two years and can be found in most large reference and university libraries.

How do I request information under the Privacy Act?

Write a letter to the agency that you believe may have a file pertaining to you. Address your request to the Privacy Act Officer or head of the agency, such as "Secretary, Department of Health and Human Services." Be sure to write "Privacy Act Request" clearly on both the letter and the envelope.

Most agencies require some proof of identity before they will give you your records. Therefore, it is a good idea to enclose proof of identity (such as a copy of your driver's license) with your full name and address. Do not send the original documents. Remember to sign your request for information, since your signature is a form of identification. If an agency needs more proof of identity before releasing your files, it will let you know.

Give as much information as possible as to why you believe the agency has records about you. The agency should process your request or contact you for additional information.

A sample request is shown below. Keep a copy of your request. You may need to refer to it in further correspondence with the agency.

Sample Privacy Act Request Letter

Date

Agency Head or FOIA Officer Name of agency or agency component Address
(see discussion above on whom to contact)

Dear _____:

Under the Freedom of Information Act, 5 U.S.C. subsection 552, and the Privacy Act, 5 U.S.C. subsection 552a, I am requesting access to [identify the records as clearly and specifically as possible].

If there are any fees for searching for or copying the records, please let me know before you fill my request. [Or, please supply the records without informing me of the cost if the fees do not exceed \$_____, which I agree to pay.]

If you deny all or any part of this request, please cite each specific exemption you think justifies your refusal to release the information and notify me of appeal procedures available under the law.

Optional: If you have any questions about handling this request, you may telephone me at _____ (home phone) or at _____ (office phone).

Sincerely,

Name Address

What about costs for getting records under the Privacy Act?

Under the Privacy Act, an agency can charge only for the cost of copying records for you, not for time spent locating them.

How long will it take to answer my request?

Under the terms of the Privacy Act, the agency is not required to reply to a request within a given period of time. However, most agencies have adopted the 10-day period in their regulations. If you do not receive any response within 4 weeks or so, you might wish to write again, enclosing a copy of your original request.

What if I find that a federal agency has incorrect information about me in the files?

The Privacy Act requires agencies maintaining personal information about individuals to keep complete, accurate, timely, and relevant files. If, after seeing your file, you believe that it contains incorrect information and should be amended, write to the agency official who released the record to you. Include all pertinent documentation for each change you are requesting. The agency will let you know if further proof is needed. The act requires an agency to notify you of the receipt of such an amendment request within 10 working days of receipt. If your request for amendment is granted, the agency will tell you precisely what will be done to amend the record. You may appeal any denial. Even if an agency denies your appeal, you have the right to submit a statement explaining why you think the record is wrong and the agency must attach your statement to the record involved. The agency must also inform you of your right to go to court and have a judge review the denial of your appeal.

What can I do if I am denied information requested under the Privacy Act?

There is no required procedure for Privacy Act appeals, but an agency should advise you of its own appeal procedure when it makes a denial. Should the agency deny your appeal, you may take the matter to court. If you win your case, you may be awarded court costs and attorney's fees.

A Comparison of the Freedom of Information Act and the Privacy

What is the relationship between the FOIA and the Privacy Act?

Although the two laws were enacted for different purposes, there is some similarity in their provisions. Both the FOIA and the Privacy Act give people the right to request access to records held by agencies of the federal government. The FOIA's access rights are given to "any person," but the Privacy Act's access rights are given only to the individual who is the subject of the records sought (if that individual is a U.S. citizen or a lawfully admitted permanent resident alien).

The FOIA applies to all records of federal agencies. The Privacy Act, however, applies to only those federal agency records that are in "systems of records" containing information about individuals that is retrieved by the use of a name or personal identifier. Each law has a somewhat different set of fees, time limits, and exemptions from its right of access.

If the information you want pertains to the activities of a federal agency, an organization, or some person other than yourself, you should make your request under the FOIA, which covers all agency records. If the information you want is about yourself, you should make the request also under the Privacy Act, which covers most records of agencies that pertain to individuals. Sometimes you can use the FOIA to get records about yourself that are not in a Privacy Act "system of records." If you are in doubt about which law applies or would better suit your needs, you may refer to both in your request letter. If you request records about yourself and the Privacy Act applies, the agency should process the request under both the FOIA and the Privacy Act and withhold requested information from you only if it is exempt under both laws.

Can I request information about other people?

Yes, but it might be withheld to protect their personal privacy. The FOIA contains two very important provisions concerning personal privacy: Exemption 6 and Exemption 7(C). They protect you from others who may seek information about you, but they also may block you if you seek information about others. The FOIA's Exemption 6 permits an agency to withhold information about individuals if disclosing it would be "a clearly unwarranted invasion of personal privacy." This includes, for example, almost all of the information in medical and financial benefit files and much of the information in personnel files. Exemption 7(C) similarly protects personal privacy interests in law enforcement records. To decide whether to withhold information under these two FOIA privacy exemptions, an agency must balance personal privacy interests

against any public interest that would be served by disclosure. Neither Exemption 6 nor Exemption 7(C) can be used to deny you access to information about yourself, only to deny you information about other persons.

The Freedom of Information Act, 5 U.S.C. 552

Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public; unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes 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. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be

unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. 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 other than an agency 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.

(3) Except with respect to the records made available under paragraphs (1) and (2) of the subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under the section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that--

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section.

No fee may be charged by any agency under this section--

(I) if the cost of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: Provided, that the court's review of the matter shall be limited to the record before the agency.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) [Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.] Repealed. Pub. L. 98-620, Title IV, 402(2), Nov. 8, 1984, 98 Stat. 3335, 3357.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel,

after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6) (A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

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

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

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

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

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances

exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are--

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(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;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) 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;
or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and--

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of the section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include--

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly

withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

THE FEDERAL REGISTER
System of Records

- A. In these “VIP Dispatches” if you notice we usually start out in the FOIA request using the appropriate Systems of Records number.
1. 24.030 for IMF
 2. 24.046 for BMF
 3. 34.018 for NMF
- B. We have included some sample pages from the Federal Register containing the 10, December 2001, Systems of Records for the IRS. The complete book is item #195 on our literature list.
1. As you look through these records, you'll see that many are for IRS personal or for other Government Agencies. So they do not pertain to most of us.
 2. Some are for criminal purpose only. So, if you do not have a CI ongoing in your situation then they would not apply to you.
 - a. Being referred over to CI from the examination officer is different than having an actual CI ongoing.
 - b. Being notified that you are a target of a Grand Jury Investigation is a different situation.
- C. If you have been self-assessing yourself and sending in whatever forms you believe are correct, signing forms under penalty of perjury, keeping and storing all those books and records for at least 10 years, most of the items in the Systems of Records will be of little benefit to you except for educational purposes.
- D. If you are one of the approximately 56 million Americans who have had enough and are sick and tired of dealing with such a sick system in today's fast paced information highway, then this Systems of Records could be very helpful to you.
- E. We meet people in their late teens and early twenties who have never filed a return of any kind. And many don't really plan on doing so.

- F. Now read through the next four pages with your highlighter so you get a feel of how to use the System of Records.
- G. This Federal Register of Dec. 10, 2002 could just prove to be a valuable tool for your use in the FOIA process.
- H. Learn to use it to your advantage. It is Item # 195 on our literature list.
- I. Turn off the electric toilet (TV) in your living room and spend some time creating your own FOIA requests pertaining to your situation.
- J. It used to take us 2 to 4 hours to do one request on our old Royal typewriter. Then came the word processor and the 1.6 GHz computer.
 - 1. We have gone from 4hrs and a bottle of white out to 15 minutes or less and no white out.
 - 2. We still spend hours doing research and development of the actual FOIA requests.
 - 3. We like to know as much as we can about what we ask for in order to answer the following questions:
 - a. What exactly we are asking for.
 - b. Why are we asking for it.
 - c. When in the FOIA process do we use it.
 - d. How to use the reply that we receive back from the request.
 - e. What we expect to accomplish by using it.



Federal Register

Monday,
December 10, 2001

Part III

Department of the
Treasury

Internal Revenue Service

Privacy Act of 1974, as Amended; System
of Records; Notice

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Privacy Act of 1974, as Amended;
System of Records

AGENCY: Internal Revenue Service,
Treasury.

ACTION: Notice of systems of records.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, as amended, 5 U.S.C. 552a, the Internal Revenue Service, Treasury, is publishing its Privacy Act systems of records.

SUPPLEMENTARY INFORMATION: Pursuant to the Privacy Act of 1974 (5 U.S.C. 552a) and the Office of Management and Budget (OMB) Circular No. A-130, the Internal Revenue Service (IRS) has completed a review of its Privacy Act systems of records notices to identify minor changes that will more accurately describe these records.

The changes throughout the document are editorial in nature and consist principally of changes to system locations and system manager addresses. Revisions have also been made due to the restructuring of the IRS along business lines.

The IRS Restructuring and Reform Act of 1998 included specific provisions impacting the Office of the Chief Inspector, Internal Revenue Service. The law provided for the appointment of a Treasury Inspector General for Tax Administration (TIGTA), effective January 19, 1999, who reports directly to the Secretary of the Treasury. As a consequence, two IRS systems of records were affected by the transfer of responsibility (published June 15, 1999 at 64 FR 32096). The first, IRS 60.008—Security, Background, and Character Investigation Files, Inspection, has been renumbered and renamed as "IRS 34.021—Personnel Security Investigations, National Background Investigations Center-Treasury/IRS." The second, IRS 60.011—Internal Security Management Information System (ISMIS) has been renumbered and renamed as "IRS 34.022—National Background Investigations Center Management Information System (NBICMIS)—Treasury/IRS."

The following seven systems of records have been added to the IRS' inventory of Privacy Act notices since September 30, 1998:

- IRS 00.334—Third Party Contact Reprisal Records. (Published October 25, 2000, at 65 FR 63917)
- IRS 00.333—Third Party Contact Records. (Published June 15, 1999, at

- 64 FR 32095, and as amended on October 25, 2000, at 65 FR 63919)
- IRS 22.062—Electronic Filing Records. (Published August 31, 2000, at 65 FR 53089)
- IRS 46.051—Criminal Investigation Audit Trail Records System. (Published April 4, 2000, at 65 FR 21236)
- IRS 22.028—Disclosure Authorizations for United States Residency Certification Letters. (Published March 6, 2000, at 65 FR 11833)
- IRS 34.037—IRS Audit Trail and Security Records System. (Published November 18, 1999, at 64 FR 63108).

The following systems of records have been removed from IRS' inventory of Privacy Act systems:

- IRS 34.005—Parking Space Application and Assignment. (December 14, 2000, at 65 FR 78263).
- IRS 36.888—Employee Tax Compliance Records (ETC). (Published February 6, 2001, at 66 FR 9142).

Systems Covered by This Notice

This notice covers all systems of records adopted by the Bureau up to August 1, 2001. The systems notices are reprinted in their entirety following the Table of Contents.

Dated: September 26, 2001.

W. Earl Wright, Jr.,
Chief Management and Administrative
Programs Officer.

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- IRS 00.333—Third Party Contact Records
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- IRS 10.001—Biographical Files, Chief, Communications and Liaison
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- IRS 22.032—Individual Microfilm Retention Register
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- IRS 26.020—Taxpayer Delinquency Investigation (TDI) Files
- IRS 26.021—Transferee Files
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- IRS 34.021—Personnel Security Investigations, National Background Investigations Center (formerly: IRS 60.008—Security, Background, and Character Investigation Files, Inspection)
- IRS 34.022—National Background Investigations Center Management

CATEGORIES OF RECORDS IN THE SYSTEM:

Taxpayer entity records (name, address, taxpayer identification number, and filing requirements related to entity liability); and tax modules (specific tax returns, tax years, and transactions which have been recorded relative to the module) when specifically requested by a service center, or if a notice for balance of tax due has been issued; a specific tax period is in taxpayer delinquent account status (TDA); a specific tax period is either credit or debit balance; no return has been posted and the return due date (RDD) has passed; or when a specific tax period is in taxpayer delinquent return (TDI) status.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 26 U.S.C. 7602, 7801 and 7802.

PURPOSE(S):

This system maintains records necessary to efficiently identify individuals having specific current business with the IRS.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Disclosure of returns and return information may be made only as provided by 26 U.S.C. 6103.

POLICIES AND PROCEDURES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**STORAGE:**

Disk storage.

RETRIEVABILITY:

By social security number.

SAFEGUARDS:

Access controls will not be less than those provided by the Automated Information System Security Handbook, IRM 2(10)00, and the Manager's Security Handbook, IRM 1(16)12.

RETENTION AND DISPOSAL:

Records are maintained in accordance with Records Disposition Handbooks, IRM 1.15.2.1 through IRM 1.15.2.31.

SYSTEM MANAGER(S) AND ADDRESS:

Official prescribing policies and practices—management official (Wage and Investment and Small Business Self Employed). Officials maintaining the system—Internal Revenue Service Center Directors. (See IRS appendix A for addresses.)

NOTIFICATION PROCEDURE:

Individuals seeking to determine if this system of records contains a record pertaining to themselves may inquire in

accordance with instructions appearing at 31 CFR part 1, subpart C, appendix B. Inquiries should be addressed as in "Record access procedures" below.

RECORD ACCESS PROCEDURES:

Individuals seeking access to any record contained in this system of records may inquire in accordance with instructions appearing at 31 CFR part 1, subpart C, appendix B. Inquiries should be addressed to the Director of the Internal Revenue Service Center servicing the area in which the individual resides. (See IRS appendix A for addresses.)

CONTESTING RECORD PROCEDURES:

26 U.S.C. 7852(e) prohibits Privacy Act amendment of tax records.

RECORD SOURCE CATEGORIES:

Tax returns and other filings made by the individual and agency entries made in the administration of the individual's tax account.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Treasury/IRS 24.030

SYSTEM NAME:

CADE Individual Master File (IMF)—Treasury/IRS.

SYSTEM LOCATION:

Martinsburg Computing Center, Martinsburg, West Virginia 25401, and IRS Service Centers.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who file and/or are included on Federal Individual Income Tax Returns (i.e., Forms 1040, 1040A, and 1040EZ); individuals who file other information filings; and power of attorney notifications for individuals.

CATEGORIES OF RECORDS IN THE SYSTEM:

Taxpayer entity records (name, address, identification number (SSN), and other indicators pertaining to entity maintenance, including zip code), and tax modular records which contain all records relative to specific tax returns for each applicable tax period or year. Modular records for authorization information (name, address, identification number and type of authority granted, and the name of the representative(s) for the taxpayer. Modular records for the representative (name, address and unique identification number). Recorded here are tax transactions such as tax amount, additions, abatement of tax payments, interest and like type transactions recorded relative to each tax module, power or attorney authorization

transactions, and a code identifying taxpayers who threatened or assaulted IRS employees. An indicator will be added to any taxpayer's account who owes past due child and/or spousal support payments and whose name has been submitted to IRS by a state under provisions of Pub. L. 97-35.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 26 U.S.C. 7602, 7801 and 7802.

PURPOSE(S):

To increase the efficiency of tax administration, the IRS maintains records of tax returns, payments, and assessments including Telefile records.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Disclosure of returns and return information may be made only as provided by (1) 26 U.S.C. 3406, and (2) 26 U.S.C. 6103.

POLICIES AND PROCEDURES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**STORAGE:**

Magnetic media.

RETRIEVABILITY:

By taxpayer identification number (social security number or employer identification number), document locator numbers and alphabetically by name.

SAFEGUARDS:

Access controls will not be less than those provided by the Automated Information System Security Handbook, IRM 2(10)00, and the Manager's Security Handbook, IRM 1(16)12.

RETENTION AND DISPOSAL:

Records are maintained in accordance with Records Disposition Handbooks, IRM 1.15.2.1 through IRM 1.15.2.31. Generally, the code identifying taxpayers who threatened or assaulted IRS employees may be removed five years after initial input.

SYSTEM MANAGER(S) AND ADDRESS:

Official prescribing policies and practices—Commissioner (Commissioner, Wage and Investment). Officials maintaining the system—Internal Revenue Service Center /Campus Directors and the Director, Martinsburg Computing Center. (See IRS appendix A for addresses.)

NOTIFICATION PROCEDURE:

Individuals seeking to determine if this system of records contains a record pertaining to themselves may inquire in

accordance with instructions appearing at 31 CFR part 1, subpart C, appendix B. Inquiries should be addressed as in "Record access procedures" below.

RECORD ACCESS PROCEDURES:

Individuals seeking access to any record contained in this system of records may inquire in accordance with instructions appearing at 31 CFR part 1, subpart C, appendix B. Inquiries should be addressed to the Area Director or the Internal Revenue Service Center/Campus Director servicing the area in which the individual resides. (See IRS appendix A for addresses.)

CONTESTING RECORD PROCEDURES:

26 U.S.C. 7852(e) prohibits Privacy Act amendment of tax records.

RECORD SOURCE CATEGORIES:

Tax returns and other filings made by the individual and agency entries made in the administration of the individual's tax account.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Treasury/IRS 24.046

SYSTEM NAME:

CADE Business Master File (BMF)—Treasury/IRS.

SYSTEM LOCATION:

Martinsburg Computing Center, Martinsburg, West Virginia 25401, Cincinnati Service Center, 201 West River Center Blvd., Covington, KY 41019; Memphis Service Center/Campus, 3131 Democrat Road, Memphis, TN 38118; and Ogden Service Center/Campus, 1160 West 1200 South Street, Ogden, UT 84201, and other IRS Service Centers. (See IRS appendix A for addresses.)

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Persons in a sole proprietary role who file business tax returns, including Employer's Quarterly Federal Tax Returns (Form 941), Excise Tax Returns (Form 720), Wagering Returns (Forms 11C and 730), Highway Use Returns (Form 2290), and Form 1065 (U.S. Partnership Returns of Income), and U.S. Fiduciary Returns (Form 1041) and Estate and Gift Taxes (Forms 706, 706NA, and 709). The latter can be individuals not in a sole proprietorship role.

CATEGORIES OF RECORDS IN THE SYSTEM:

Taxpayer entity records (name, address, taxpayer identification number (TIN) which may be either EIN or SSN, and other indicators pertaining to entity maintenance, including zip code), and

tax modules which are all the records relative to specific tax returns for each applicable tax period. Recorded are tax transactions such as tax amount, statements/additions to tax, payments, interest and like type transactions relative to each tax module. The Employer Identification Number (EIN)/Name Control file which contains EINs and the associated IRS name controls.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 26 U.S.C. 7602, 7801 and 7802.

PURPOSE(S):

To increase the efficiency of tax administration, the Service maintains magnetic media records of tax returns filed by business taxpayers, and payments and assessments made to the accounts.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Disclosure of returns and return information may be made as provided by 26 U.S.C. 6103, and for meeting the requirements of 26 U.S.C. 3406. 26 U.S.C. 3406 provides, in part, that the Secretary of the Treasury notify a payor that the TIN (Taxpayer Identification Number) furnished by the payee is incorrect.

POLICIES AND PROCEDURES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Magnetic media.

RETRIEVABILITY:

By name, type of tax, and identifying number (including document locator number).

SAFEGUARDS:

Access Controls will not be less than those provided by the Automated Information System Security Handbook, IRM 2(10)00, and the Manager's Security Handbook, IRM 1(16)12.

RETENTION AND DISPOSAL:

Records are maintained in accordance with Records Disposition Handbooks, IRM 1.15.2.1 through IRM 1.15.2.31.

SYSTEM MANAGER(S) AND ADDRESS:

Official prescribing policies and practices—Management Official—Small Business Self Employed. Officials maintaining the system—Internal Revenue Service Center/Campus Directors, and the Director, Martinsburg Computing Center. (See IRS appendix A for addresses.)

NOTIFICATION PROCEDURE:

Individuals seeking to determine if this system of records contains a record pertaining to themselves may inquire in accordance with instructions appearing at 31 CFR part 1, subpart C, appendix B. Inquiries should be addressed as in "Record access procedures" below.

RECORD ACCESS PROCEDURES:

Individuals seeking access to any record contained in this system of records may inquire in accordance with instructions appearing at 31 CFR part 1, subpart C, appendix B. Inquiries should be addressed to the Director of the Internal Revenue Service Center servicing the area in which the individual resides. (See IRS appendix A for addresses.)

CONTESTING RECORD PROCEDURES:

26 U.S.C. 7852(e) prohibits Privacy Act amendment of tax records.

RECORD SOURCE CATEGORIES:

Tax returns and other filings made by the individual and agency entries made in the administration of the individual's tax account.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Treasury/IRS 24.047

SYSTEM NAME:

Audit Underreporter Case File—Treasury/IRS.

SYSTEM LOCATION:

Internal Revenue Service Centers and Martinsburg Computing Center. (See IRS appendix A for addresses.)

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Recipients of income who appear not to have declared on their income tax returns (Forms 1040, 1040A, and 1040EZ) all income paid to them in the tax year under study.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records maintained are taxpayer (i.e., payee) entity records containing payee name, address, taxpayer identification number, and other indicators relating to entity maintenance; and income records containing the types and amounts of income received/reported, and information identifying the income payer.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 26 U.S.C. 7602, 7801 and 7802.

PURPOSE(S):

These records provide a way to identify recipients of income who

Introduction to the FOIA Section

- A. In this issue we only included three basic FOIA requests on purpose.
- B. After going through this issue we want you to develop your own request and send it in.
 - 1. Form a FOIA study group and help each other with requests. Then compare the results you get back.
- C. Every once in awhile something slips through. You may get a two to six page answer that can prove to be very interesting!
- D. If you get something out of the norm, we would like to take a look at it. You can fax it to 313-557-0708. That way we can all learn and help others. Don't forget to use a cover letter so we know who is sending the fax.
- E. FOIA is a very precise way of building your file by using their documents. And learning how to use the System of Records is a way of helping that process. FOIA upon FOIA . . .
- F. These FOIA requests come back in your name not somebody else's name.
- G. If you are one of the millions who have stopped self-assessing yourself then this process is critical for your overall protection.

1.) FOIA request for your “IMF”

- A.** Once you have it ready to go you can send it in by regular mail to your correct local disclosure office.
- B.** We suggest you keep this request very simple by not mixing this IMF request with any other request.
- C.** Try to keep your request limited to 3 or 4 years at a time.
- D.** Your IMF will generally run 1 ¾, to 2 years behind. If you ask for the current year or last year’s IMF they will probably not yet be in the IDRS system.
- E.** We provide a complete decoding service of your IMF that goes into great depth and detail. The decoding that we do will include another group of FOIA requests for you to send in which are based upon what the IRS has posted to your IMF and other documents.
- F.** The first 100 pages of a FOIA request are free. It is 10cents a page after that. The first two hours of research are free.
- G.** The IRS has 20 days to respond to your request. But do not hold your breath. Some people get responses within a couple of weeks. With others it may take months.
- H.** When you send this or any other FOIA request it has to have a notarized statement or you can use your driver's license copied onto the FOIA request to verify that you are the correct requester.
- I.** If you no longer have a SSN you might want to put “former SSN” in front of the SSN number in the account area of the FOIA request.

FREEDOM OF INFORMATION ACT REQUEST

TO:
Disclosure Officer
Internal Revenue Service
iraddr1
iraddr2

FROM: name
addr1
addr2

Account #

Dear Disclosure Officer:

1. This is a request under the Freedom of Information Act, 5 USC 552, or regulations thereunder. This is my firm promise to pay fees and costs for locating and duplicating the records requested below, ultimately determined in accordance with 26 CFR 601.702 (f).
2. If some of this request is exempt from release, please furnish me with those portions reasonable segregable. I am waiving personal inspection of the requested records.
3. This request pertains to the years:
4. Please send me a copy of all documents maintained in the system of records identified as Individual Master File (IMF) *specific and not literal*; Data Service, Treasury / IRS 24.030, which pertain to this requester.
5. Please certify all documents with the Form 2866, certificate of official record. If there are no specific documents pertaining to this request, certify your response with Form 3050, certificate of lack of records.

DATED:

Respectfully,

name, Requester

AFFIDAVIT / DECLARATION

COUNTY OF _____)
) SS
STATE OF _____)

SUBSCRIBED AND AFFIRMED:
On this _____ day of _____, Name, personally appeared, personally known to me, OR proved to me on the basis of satisfactory evidence to be the one whose name is subscribed to the within instrument.

Witness my hand and official seal.

Signature of Notary

I, Name, hereby swear and affirm that I have the authority to request information pertaining to Entity name.

Name

FOIA Section

- A. FOIA, your key to relief.
- B. You will notice the FOIA requests in this section are also in the past issues. This issue is geared to giving you a background on the FOIA process with a little study.
 - 1. Both BMF and IMF have the same items that you want to obtain through FOIA request.
 - 2. If you want to teach a class on the IMF, the BMF, or the NMF you will have them in the past issues.
 - 3. Some people will be buying a certain issue because someone they know has a problem in this area. Then, if that individual wants a year subscription they can order it for themselves.
- C. In the March VIP Dispatch concerning the NMF (Non-Master File) the FOIA requests are the key and will continue to be. That is why this issue is so important.
- D. Each “VIP Dispatch” is designed to be a self-contained unit based on one main topic.
- E. We will introduce several new FOIA requests that can be used with the IMF or BMF in the following issues.
- F. After years of teaching about the FOIA process we want people to say; “that was exactly the FOIA request that we were looking for,” Or “look what I received back from that FOIA request. I had no idea they were keeping this type of information on me.”
- G. FOIA requests are a great tool to use to document actual IRS Procedural Due Process abuse against you.
 - 1. These documented procedural due process violations are the only real issue that the federal system will sit up and take notice of in tax matters.
 - 2. If you get good at this and with some divine providence you can trace these procedural due process violations to one or two specific agents. You can then file a complaint against them. First you must gather the documented facts.
- H. When you do a BMF request make sure you use the Entity name and not your personal name.
 - 1. Make sure you use the entities EIN and not your SSN.
- I. We have hundreds of entities who obtain their BMF’s. They do exist and can be acquired for its use as credible evidence to rebut the Prima Facie presumptions of the IRS.
- J. If the IRS is coming after an entity, the BMF will show how far along they are in the process.

1.) The FOIA request for your BMF (Business Master File)

A. There are two important points to remember concerning a request for a BMF.

1. In order to have a BMF you must have an EIN (Employer Identification Number).
2. If you have an SSN you will not have a BMF. But the IRS will still input BMF codes into your IMF file to make you liable for some kind of an excise tax.

B. If you have a trust with an EIN then you can send off for the BMF of that trust.

C. We also offer decoding process for your BMF which can get somewhat complicated and time consuming depending on the size of the BMF.

D. Remember: There must be an affidavit/declaration, notary statement filled out and signed, and attached to each FOIA request.

1. Sometimes the disclosure officer will send back your original request in the case of a trust asking to see a copy of the trust document making you the qualified individual to receive the information asked for.
2. If you do not have this document, contact whoever sold you your last trust packet. Ask for this page or create it yourself, if you are the qualified trustee, and make sure there is a notary statement with it, or it will probably be returned again.

FREEDOM OF INFORMATION ACT REQUEST

TO:
Disclosure Officer
Internal Revenue Service
iraddr1
iraddr2

FROM: Entity name
addr1
addr2

Account (EIN) #

Dear Disclosure Officer:

1. This is a request under the Freedom of Information Act, 5 USC 552, or regulations thereunder. This is my firm promise to pay fees and costs for locating and duplicating the records requested below, ultimately determined in accordance with 26 CFR 601.702 (f).
2. If some of this request is exempt from release, please furnish me with those portions reasonable segregable. I am waiving personal inspection of the requested records.
3. This request pertains to the years:
4. Please send me a copy of all the documents maintained in the System of Records known as Returns and Information Processing D:R:R - Treasury / IRS Business Master File Specific (BMF): 24.046 which pertains to the above referenced EIN# and entity.
5. Please certify all documents with the Form 2866, certificate of official record. If there are no specific documents pertaining to this request, certify your response with Form 3050, certificate of lack of records.

DATED:

Respectfully,

name, Qualified Requester

FOIA request concerning the NMF

- A. The FOIA request for a NMF can cover an IMF or BMF.
- B. When you do a FOIA request in this section make sure it is customized for a IMF or BMF.
- C. Triple check your FOIA request to make sure if it's filled out correctly.
 - 1. If it is for an IMF make sure all fill in items pertain to an IMF type of request. Your name, your SSN are in all the correct places and dated.
 - 2. Treat the BMF request in the same manner but using the entity name with the EIN in all the correct places. Also, make sure you have the date on it.
- D. If you or the entity has not had a CP-504 or a CP-518 then you probably do not have a NMF.
- E. If you should even have a FOIA request returned the Disclosure Officer will send a form letter telling you why. Just correct it and send it back in again. Do not let anything or anyone sidetrack you from doing your FOIA request.
- F. This FOIA process is your key to unlocking the IRS's "BIG DARK CHEST OF SECRETS," that they are hiding from you.

FREEDOM OF INFORMATION ACT REQUEST

TO:
Disclosure Officer
Internal Revenue Service
iraddr1
iraddr2

FROM: (your name or entity name)
addr1
addr2

Account #

Dear Disclosure Officer:

1. This is a request under the Freedom of Information Act, 5 USC 552, or regulations thereunder. This is my firm promise to pay fees and costs for locating and duplicating the records requested below, ultimately determined in accordance with 26 CFR 601.702 (f).
2. If some of this request is exempt from release, please furnish me with those portions reasonable segregable. I am waiving personal inspection of the requested records.
3. This request pertains to the years:
4. Please send me a copy of the Non Master file and Comments Field maintained in a System of Records known as Integrated Data Retrieval System / IRS 34.018 which pertain to the above referenced SS# or EIN#.
5. Please certify all documents with the Form 2866, certificate of official record. If there are no specific documents pertaining to this request, certify your response with Form 3050, certificate of lack of records.

Dated:

Respectfully,

name, Qualified Requester

CERTIFICATION OF IDENTITY
From the: U.S. Department of Justice

- A. Every once in a while we will get a call from someone whose FOIA was returned because lack of identity.
 - 1. If it is for an IMF type of document you can use your Driver's License by photocopying it right on the request. That will also save you a notary fee.
 - 2. If it is for a BMF type of document then sometimes they will want to see your corporate papers or a trust document that shows you are a qualified requester.

- B. You can use the following form from U.S.D.O.J.
 - 1. The information they request is information they already have on you anyway.

- C. One thing we like about this Form is item 3, Social Security Number. If you go to the bottom of the page at item 3, even the D.O.J. says providing your SSN is "VOLUNTRY."
 - 1. This Form makes a nice little exhibit to use when some entity wants that number from you.



Privacy Act Statement. In accordance with 28 CFR Section 16.41(d) personal data sufficient to identify the individuals submitting requests by mail under the Privacy Act of 1974, 5 U.S.C. Section 552a, is required. The purpose of this solicitation is to ensure that the records of individuals who are the subject of U.S. Department of Justice systems of records are not wrongfully disclosed by the Department. Failure to furnish this information will result in no action being taken on the request. False information on this form may subject the requester to criminal penalties under 18 U.S.C. Section 1001 and/or 5 U.S.C. Section 552a(i)(3).

Public reporting burden for this collection of information is estimated to average 0.50 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Suggestions for reducing this burden may be submitted to Director, Facilities and Administrative Services Staff, Justice Management Division, U.S. Department of Justice, Washington, DC 20530 and the Office of Information and Regulatory Affairs, Office of Management and Budget, Public Use Reports Project (1103-0016), Washington, DC 20503.

Full Name of Requester ¹ _____

Citizenship Status ² _____ Social Security Number ³ _____

Current Address _____

Date of Birth _____ Place of Birth _____

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that I am the person named above, and I understand that any falsification of this statement is punishable under the provisions of 18 U.S.C. Section 1001 by a fine of not more than \$10,000 or by imprisonment of not more than five years or both, and that requesting or obtaining any record(s) under false pretenses is punishable under the provisions of 5 U.S.C. 552a(i)(3) by a fine of not more than \$5,000.

Signature ⁴ _____ Date _____

OPTIONAL: Authorization to Release Information to Another Person

This form is also to be completed by a requester who is authorizing information relating to himself or herself to be released to another person.

Further, pursuant to 5 U.S.C. Section 552a(b), I authorize the U.S. Department of Justice to release any and all information relating to me to:

Print or Type Name

¹ Name of individual who is the subject of the record sought.

² Individual submitting a request under the Privacy Act of 1974 must be either "a citizen of the United States or an Alien lawfully admitted for permanent residence," pursuant to 5 U.S.C. Section 552a(a)(2). Requests will be processed as Freedom of Information Act requests pursuant to 5 U.S.C. Section 552, rather than Privacy Act requests, for individuals who are not United States citizens or aliens lawfully admitted for permanent residence.

³ Providing your social security number is voluntary. You are asked to provide your social security number only to facilitate the identification of records relating to you. Without your social security number, the Department may be unable to locate any or all records pertaining to you.

⁴ Signature of individual who is the subject of the record sought.

ADMINISTRATIVE APPEAL PROCEDURES

- A. The following four pages give you an overall view of Administrative Appeal Procedures.
- B. The first page covers the basics of the Administrative Appeal. Read it carefully and follow all procedures.
- C. On the second page you will find a sample FOIA Appeal letter. Make sure you send it to the correct address.
 - 1. Make sure you write FOIA appeal on the lower left-hand corner of the envelope, "FOIA APPEAL."
- D. On the third and fourth page is a report by the Treasury Inspector General for Tax Administration concerning FOIA appeals.
 - 1. When you send in your appeal you can actually attach these two pages as an exhibit.
- E. The next level is the filing of a suit in Federal District Court, which can be an educational experience, or pure pain in the rear depending on your attitude and abilities.
 - 1. Before you decide to go to this level research it and weigh your options.
- F. We have found few people who wish to expend the time or money necessary to do an appeal or file a suit.
- G. If you get a request back and they have blacked out large portions of what they send you or admitted to withholding documents, then you might consider doing the appeal. Then follow up with a suit.
- H. If they say, "we have no documents responsive to your request" we usually accept that, and use it as an admission on their part that they have failed to follow due process.
- I. We know of one individual who has filed over 10,000 FOIA requests. Many have gone to appeal and suit.

Administrative Appeal Procedures

Whenever an FOIA request is denied, the agency must inform the requester of the reasons for the denial and the requester's right to appeal the denial to the head of the agency. A requester may appeal the denial of a request for a document or for a fee waiver. A requester may contest the type or amount of fees that were charged. A requester may appeal any other type of adverse determination including a rejection of a request for failure to describe adequately the documents being requested. A requester can also appeal because the agency failed to conduct an adequate search for the documents that were requested.

A person whose request was granted in part and denied in part may appeal the part that was denied. If an agency has agreed to disclose some but not all requested documents, the filing of an appeal does not affect the release of the documents that are disclosable. There is no risk to the requester in filing an appeal.

The appeal to the head of the agency is a simple administrative appeal. A lawyer can be helpful, but no one needs a lawyer to file an appeal. Anyone who can write a letter can file an appeal. Appeals to the head of the agency often result in the disclosure of some records that had been withheld. A requester who is not convinced that the agency's initial decision is correct should appeal. There is no charge for filing an administrative appeal.

An appeal is filed by sending a letter to the head of the agency. The letter must identify the FOIA request that is being appealed. The envelope containing the letter of appeal should be marked in the lower left hand corner with the words "Freedom of Information Act Appeal."

Many agencies assign a number to all FOIA requests that are received. The number should be included in the appeal letter, along with the name and address of the requester. It is a common practice to include a copy of the agency's initial decision letter as part of the appeal, but this is not required. It can also be helpful for the requester to include a telephone number in the appeal letter.

An appeal will normally include the requester's arguments supporting disclosure of the documents. A requester may include any facts or any arguments supporting the case for reversing the initial decision. However, an appeal letter does not have to contain any arguments at all. It is sufficient to state that the agency's initial decision is being appealed.

The FOIA does not set a time limit for filing an administrative appeal of an FOIA denial. However, it is good practice to file an appeal promptly. Some agency regulations establish a time limit for filing an administrative appeal. A requester whose appeal is rejected by an agency because it is too late may refile the original FOIA request and start the process again.

A requester who delays filing an appeal runs the risk that the documents could be destroyed. However, as long as an agency is considering a request or an appeal, the agency must preserve the documents.

An agency is required to make a decision on an appeal within twenty days (excluding Saturdays, Sundays, and federal holidays). It is possible for an agency to extend the time limits by an additional ten days. Once the time period has elapsed, a requester may consider that the appeal has been denied and may proceed with a judicial appeal. However, unless there is an urgent need for records, this may not be the best course of action. The courts are not sympathetic to appeals based solely on an agency's failure to comply with the FOIA's time limits.

Sample FOIA Appeal Letter

Freedom of Information Act Appeal
Office of General Counsel
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Sir/Madam:

This is an appeal under the Freedom of Information Act. My request was assigned the following identification number: _____. On [date], I received a response to my request in a letter signed by [name of official]. I appeal the denial of my request.

[Optional]

The documents that were withheld must be disclosed under the FOIA because . . .

[Optional]

I appeal the decision to deny my request for a waiver of fees. I believe that I am entitled to a waiver of fees. disclosure of the documents I requested in is in the public interest because the information is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in my commercial interest. [provide details]

[Optional]

I request that you release the withheld documents notwithstanding their exempt status. The public interest in their release outweighs the public interest in withholding them because . . . [provide information on purpose for which the records would be used]

If you need to discuss this request, I can be reached at [daytime phone number]. Thank you for your consideration of this appeal.

Sincerely,

Name
Address
City, State, Zip
Telephone Number

TREASURY INSPECTOR GENERAL

FOR TAX ADMINISTRATION

TAXPAYERS SHOULD BE PROVIDED TIMELY SERVICE WHEN APPEALING DENIED REQUESTS UNDER THE FREEDOM OF INFORMATION ACT

August 2000

Reference No. 2000-10-116

Executive Summary

The Freedom of Information Act (FOIA) established an effective legal right of access to government information by requiring agencies to make various information available to the public. Taxpayers who file FOIA requests can administratively appeal to the Commissioner when the Internal Revenue Service (IRS) Disclosure Offices deny requests or when the IRS does not respond timely and asks for an extension of time to process the requests. Taxpayers who do not agree to voluntarily extend the time frame can consider the delay a denial of their request for information and, therefore, may appeal.

The Assistant Chief Counsel (Disclosure Litigation) in the IRS Office of the Chief Counsel was responsible for processing the administrative appeals; this Office closed almost 1,700 appeals cases in Fiscal Year 1999. The IRS' Modernization Plan transfers responsibility for reviewing appeals to the Chief, Appeals because it more appropriately falls within that Office's jurisdiction.

The objective of the audit was to evaluate the IRS' efforts to provide prompt and appropriate service to taxpayers who appeal a denial of a FOIA request for information or a delay in providing information.

Results

The Assistant Chief Counsel (Disclosure Litigation) staff made appropriate determinations in the 50 cases we sampled. Attorneys and paralegals generally worked cases when taxpayers appealed because the IRS denied their requests for information. Attorneys and paralegals properly determined whether the IRS' decisions to not provide information were appropriate. Clerical employees generally worked cases timely and appropriately when taxpayers appealed because of IRS delays in providing information.

Although the IRS correctly processed taxpayers' appeals, improvements to the service can be made by:

- Responding timely when taxpayers appeal because the IRS denied their requests for information.
- Analyzing FOIA appeals case information to identify potential trends in resource or case resolution issues in Disclosure Offices.

The Internal Revenue Service Should Timely Respond to Appeals of Denied Requests

At the end of Calendar Year 1999, the Office of the Chief Counsel inventory records indicated that 918 appeals had been open an average of 420 workdays. These appeals had been filed by taxpayers when the IRS denied their requests for information. The 420 workdays extend significantly beyond the 20 workday requirement in the law. These cases were assigned, based on complexity, to attorneys or to paralegals to make determinations as to the appropriateness of the IRS' initial denial of the requests.

Although the Office of the Chief Counsel records indicated that, on average, attorneys expended 19 hours and paralegals expended 6 hours working an appeal, the appeals were often in inventory several months and sometimes for years before decisions were made and provided to the taxpayers. Management from the Assistant Chief Counsel (Disclosure Litigation) cited two main reasons for these extensive time frames: the loss of paralegal staff who principally handled FOIA appeals, and the subsequent distribution of appeals to attorneys who had higher priority work.

The Chief, Appeals has been implementing its Modernization Plan, including the transfer of responsibility for FOIA appeals. That Office, however, has not set a specific target date for transferring the FOIA appeals responsibilities or conducted an analysis to determine the staffing necessary to timely process the appeals.

The Internal Revenue Service Should Analyze Freedom of Information Act Appeals Case Information to Identify Potential Trends in Disclosure Offices

FOIA appeals information was not analyzed to identify trends that Disclosure Offices could address. For example, data may indicate an inordinate number of appeals due to delays in a few Disclosure Offices or common characteristics among cases decided in favor of taxpayers. Identifying these characteristics and resolving any associated problems could reduce the need for taxpayers to appeal.

Summary of Recommendations

The Office of the Chief Counsel should work with the Chief, Appeals to expedite the transfer of responsibility for resolution of FOIA appeals. The Chief, Appeals should determine the staffing necessary to timely process FOIA appeals and should capture case information and periodically trend FOIA appeals data.

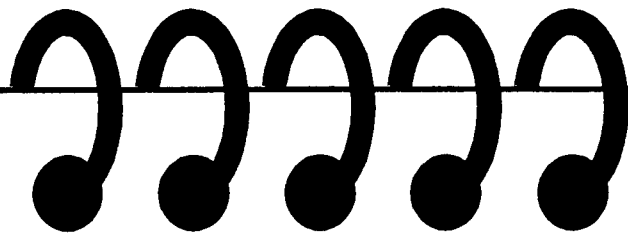
Management's Response: IRS management agrees that expediting the transfer of responsibility for processing FOIA appeals and ensuring an appropriate level of staffing necessary to process FOIA appeals quickly are critical steps towards the IRS' renewed commitment to the FOIA. The Chief, Appeals is considering staffing needs required to process FOIA appeals more quickly and effectively and will work with the Office of the Chief Counsel to ensure that workload transition issues and training needs are addressed.

Management's response did not address specific corrective actions for the report recommendation to periodically trend FOIA appeals data. As a result, we could not determine whether adequate corrective action was planned to capture case information and periodically trend the data. As part of our follow-up activities, we are asking management to provide us more specific information on its planned corrective action. Management's complete response to a draft of this report is included as Appendix IV.

DISCLOSURE LITIGATION REFERENCE BOOK

- A. This is their newest book of which we only enclosed the first few pages out of 313 pages.
- B. Much of this book does not have a lot to do with most of us.
- C. We did want you to have these first pages as they present a good overall history of the history and development of the current tax code.
- D. The footnotes are an excellent source for further study in this matter
- E. At part C page 106, we find the “Summary of Permissible Disclosures”. This list identifies to whom, and for what purposes, your tax returns and other information can be released.
- F. They can also give your information to the Federal Reserve Bank. Who knows what they do with that information?
- G. Where does much of the "money" go that the IRS collects? We plan on doing a “VIP Dispatch” in the future based on that question.
- H. Page 105 the 1st full paragraph tells us that the IRS is really an information collection agency and the money is really a side issue.
- I. The Internal Revenue Code is essentially a manual on how to keep Americans complacent and dependent on the government of the United States. An interesting definition of the term "United States" is found in 28 USC 3002.

Assistant Chief
Counsel
(Disclosure
Litigation)



Disclosure Litigation Reference Book

Rev. 4-2000



IRS

Department of the Treasury
Internal Revenue Service

www.irs.ustreas.gov

Document 8448 (4-2000)
Catalog Number 24147Q



OFFICE OF
CHIEF COUNSEL

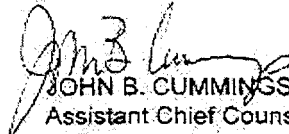
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

April 2000

To the Reader:

This reference book covers the primary disclosure laws that affect the Internal Revenue Service (I.R.C. § 6103, the Freedom of Information Act (FOIA), and the Privacy Act of 1974), and related statutes. Together, these laws represent efforts by the Congress to strike a balance between a citizen's expectations of privacy and an open government. Guidance on legal matters concerning these disclosure laws is provided by the Office of Assistant Chief Counsel (Disclosure Litigation). This office is also responsible for defending litigation filed pursuant to I.R.C. § 6103, the FOIA, and the Privacy Act of 1974.

This reference book will be used at the June 2000 course "Disclosure Training for Chief Counsel Attorneys"; we hope that this material will also prove to be a useful reference tool for your office. We welcome your comments and suggestions for improvement.


JOHN B. CUMMINGS
Assistant Chief Counsel
(Disclosure Litigation)

N.B. Attorneys in the Office of Chief Counsel (Disclosure Litigation) prepared this textbook for training purposes only. Disclosure laws turn on factual nuances, and factual variations may make significant differences in providing the correct legal advice. This reference book is intended only as a reference; it may not be used or cited as authority for setting or sustaining a legal position.

CHAPTER 1

PART I: I.R.C. § 6103 -- HISTORY AND OVERVIEW

OBJECTIVES

At the end of this chapter, you will be able to:

1. describe the historical development of the disclosure laws so that you understand the concepts forming the basis of I.R.C. § 6103; and
2. identify the major provisions of I.R.C. § 6103.

I. HISTORY OF TAX CONFIDENTIALITY LAWS ¹

A. Introduction

Except for a few periods in our history, tax information generally has not been available to the public—its disclosure has been restricted. Congress has used two basic approaches in determining whether, and under what circumstances, tax information could be disclosed. Under the first approach, taken prior to 1977, tax information was considered a "public record", but was only open to inspection under Treasury regulations approved by the President or under presidential order. Under this scheme, the rules regarding disclosure were essentially left to the Executive branch.

By the mid-1970's, there was increased congressional and public concern about the widespread use of tax information by government agencies for purposes unrelated to tax administration. This concern culminated with the total revision of section 6103, which was enacted as part of the Tax Reform Act of 1976. There, Congress eliminated Executive discretion regarding what information could be disclosed to which Federal and State agencies. Under this second approach, Congress established a new statutory scheme in which tax information was confidential and not subject to disclosure except to the extent explicitly provided by the Internal Revenue Code. Although there have been many amendments to

¹ Much of the information in this chapter was taken from "Report on Administrative Procedures of the Internal Revenue Service to the Administrative Conference of the United States," S. Document 266, 94th Cong., 2d Sess., 821-1028 (October 1975); Zaritsky, "Legislative History of Tax Return Confidentiality: Section 6103 of the Internal Revenue Code of 1954 and Its Predecessors," U.S. Congressional Research Service, Library of Congress, D.C.: 74-211A (1974); Janssen, "Income Tax Snooping Through History," Wall Street Journal, May 6, 1970, at 18; and Rogovin, "Privacy and Income Tax Returns," The Washington Post, October 13, 1974, at C4.

the law since that time, the basic statutory scheme established in 1976 remains in place today.

B. Publicity of Tax Returns

The history of tax information confidentiality may be traced to the Civil War Income Tax Act of 1862,² when tax information was posted on courthouse doors and sometime published in newspapers to promote taxpayer surveillance of neighbors. For the next 70 years, there was debate in Congress as to the effect of public disclosure on the tax system and to societal interests in general.

1. 1866-1913

In 1866, Congress debated prohibiting publication of assessment lists in the newspapers, but the proposal failed, principally because many congressmen believed that publication of the assessed tax would assist in preventing tax fraud.

In 1870, the Commissioner prohibited newspaper publication of the annual list of assessments, but the list itself remained available for public inspection.³ The Revenue Act of 1870 confirmed this directive.⁴ Two years later, in part because of problems stemming from publicity of tax returns, the income tax law was allowed to expire. When the income tax was reinstated by the Revenue Act of 1894, Congress affirmatively prohibited both the printing and the publishing in any manner of any income tax return unless otherwise provided by law, and provided criminal sanctions for unlawful disclosure.⁵

² Act of July 1, 1862, 12 Stat. 432. Ambiguities in that provision regarding public inspection led Congress, in 1864, to explicitly permit public inspection of the assessment list:

It shall be the duty of the assessor ... to submit the proceedings of the assessors ... and the annual lists taken and returned as aforesaid, to the inspection of any and all persons who may apply for that purpose.

Act of June 30, 1864, 13 Stat. 218, 228.

³ Treasury Decision (April 5, 1870).

⁴ Act of July 14, 1870, 16 Stat. 256, 259.

⁵ Income Tax Act of August 15, 1894, ch. 349, 28 Stat. 509.

In 1895, the Supreme Court declared the tax unconstitutional in Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429 (1895). After this decision, according to one commentator, the cause of confidentiality received its ultimate victory, the burning of all tax returns.

It was not until the enactment of the Payne-Aldrich Tariff Act of 1909,⁶ which imposed a special excise tax on corporations, that the question of tax return publicity was raised anew. Paragraph six of section 38 of that Act seemed to provide that corporate returns were fully public, but paragraph seven imposed a penalty for the disclosure of any information obtained by a U.S. employee in the discharge of his duties.⁷ The legislative history does little to illuminate these apparently conflicting provisions. Since, however, the Payne-Aldrich legislation did not provide any funds for the examination of returns filed pursuant to the Act, it became necessary, in 1910, to appropriate them. During the debate on the Appropriations Act of 1910, considerable light was shed upon the Congressional intention behind the 1909 legislation.

The prevailing opinion seems to have been that paragraph six of the 1909 legislation was intended to make corporate tax returns "public records" which

⁶ Act of August 5, 1909, 36 Stat. 11,116.

⁷ Section 38 of the legislation read as follows:

Sixth. When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which may have been made by the Commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such.

Seventh. It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or make known in any manner whatever not provided by law to any person any information obtained by him in the discharge of his official duty, or to divulge or make known in any manner not provided by law any document received, evidence taken, or report made under this section except upon the special direction of the President; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or both, at the discretion of the court. (Emphasis added).

were open to public inspection.⁸ It was believed by many that public inspection of corporate tax returns would be of great assistance in the supervision and control of corporate entities (there was considerable fear of the power of corporations at that time).

The contrary view, held by a minority, acknowledged that the 1909 legislation made tax returns public documents. However, paragraph seven of the law made it a criminal offense for any government officer or employee to release material contained in these public documents without special instruction from the President. If, the argument proceeded, the public access granted by paragraph six had been entirely unfettered, paragraph seven would not have imposed criminal sanctions for divulging information without the President's consent. This illogical result was taken to mean that tax returns had not been opened to indiscriminate public inspection but only to persons having a proper interest in the returns.⁹

While there was disagreement over what was intended by the 1909 legislation, it was universally conceded that it altogether failed to open corporate returns to the public. Some blame this result on inadequate draftsmanship. Others thought the failure lay in lack of an appropriation to provide clerks to do the publicizing. At any rate, a majority did conclude that another approach was necessary. An amendment to the provision in the 1910 Appropriations Act resulted.

The 1910 legislation, which appropriated funds for the necessary classifying, indexing, and processing of corporate returns, also stated:¹⁰

any and all such returns shall be open to inspection only upon the order of the President under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President.

The debate surrounding the 1910 Act plainly indicates that Congress intended by the quoted provision to back away from the fully "public" treatment of corporate

⁸ "The truth is, however, that the intention was to provide complete publicity of the returns made by these corporations." Comments of Mr. Fitzgerald, 45 Cong. Rec. 4137 (1910).

⁹ "It will be noted that the law does not provide the returns shall be subject to public inspection, but that the returns shall become public records and open to inspection as such ... the mere branding of these instruments as public records did not carry with it the right of indiscriminate public inspection." Comments of Mr. Smith, 45 Cong. Rec. 4136 (1910).

¹⁰ Act of June 17, 1910, 36 Stat. 468, 494.

returns. Some Congressmen argued for full publicity, as opposed to publicity only at the whim of the Administration, as provided by the bill. The majority, however, chose the approach that returns would be made public only on the order of the President.

Left standing was the notion of the 1909 Act that returns constitute "public records" open to public inspection. The 1910 effort to revise congressional intent merely added on the seemingly contradictory and confusing concept that these "public" records would be available only upon order of the President. The history of tax information confidentiality may be traced to the Civil War Income Tax Act of 1862, when tax information was posted on courthouse doors and sometime published in newspapers to promote taxpayer surveillance of neighbors. For the next 70 years, there was debate in Congress as to the effect of public disclosure on the tax system and to societal interests in general.

2. Revenue Act of 1913

Even though the statute seemed to have two rather inconsistent threads, Congress wove both of them into the Tariff Act of 1913.¹¹ In pertinent part, it provided:

G.(d)1 When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which may have been made by the Commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such: Provided, That any and all such returns shall be open to inspection only upon the order of the President, under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President.

The 1913 Congress thereby merged the mismatching philosophies from the 1909 Act and the 1910 amendment. Although there was, through the years, some change in language, the basic pattern adopted in 1913 remained part of the law until 1976.

3. 1913 to 1976

The enactment of each revenue act subsequent to 1913 was, at least through 1934, accompanied by debate on the question of whether or not individual and corporate returns should be made fully public. Two main arguments were made in favor of making tax returns public:

¹¹ Tariff Act of 1913, ch. 16, 38 Stat. 114.

(1) publicity in the affairs of businesses generally is appropriate and would serve to end improper trade policies, business methods, and conduct and

(2) publicity would assure fuller and more accurate reporting by taxpayers.

The proponents of full disclosure obtained their fundamental philosophy from a speech by the former President Benjamin Harrison who, before the Union League Club of Chicago in 1898, stated:¹²

each citizen has a personal interest, a pecuniary interest in the tax return of his neighbor. We are members of a great partnership, and it is the right of each to know what every other member is contributing to the partnership and what he is taking from it.

The other point of view, consistently taken over the years by the Department of the Treasury, opposed the publicity of tax information. Secretary of the Treasury Mellon articulated this position when he stated that:

While the government does not know every source of income of a taxpayer and must rely upon the good faith of those reporting income, still in the great majority of cases this reliance is entirely justifiable, principally because the taxpayer knows that in making a truthful disclosure of the sources of his income, information stops with the government. It is like confiding in one's lawyer.

Secretary Mellon later observed that:¹³

there is no excuse for the publicity provisions except the gratification of idle curiosity and filling of newspaper space at the time the information is released.

The proponents of full disclosure had a limited victory in 1924. The Revenue Act of 1924 provided that the Commissioner would:¹⁴

¹² Rogovin, Privacy and Income Tax Returns, The Washington Post (Oct. 13, 1974), at C4.

¹³ Hearings on Revenue Revision 1925 Before the House Ways and Means Comm., 69th Cong., 1st Sess. 8-9 (1925).

¹⁴ Act of June 2, 1924, ch. 234, 43 Stat. 253, 293.

as soon as practicable in each year cause to be prepared and made available to public inspection ... lists containing the name and ... address of each person making an income tax return ... together with the amount of income tax paid by such person.¹⁵

As a result of the 1924 Act, newspapers devoted pages to publishing the taxes paid by taxpayers, and the right of newspapers to publish these lists was upheld by the Supreme Court.¹⁶ The Revenue Act of 1926, however, removed the provision requiring that the amount of tax be made public while leaving the requirement that a list be published containing the name and address of each person making an income tax return.¹⁷

In 1934, after a widely publicized income tax evasion scandal, those favoring publicity obtained enactment of another form of limited disclosure. The Revenue Act of 1934 contained provision for the mandatory filing of a so-called "pink slip" with the taxpayer's return.¹⁸ The pink slip, to be filed with the return, was to set forth the taxpayer's gross income, total deductions, net income and tax payable. The pink slip was to be open to public inspection. Fueled by images of kidnappers sifting through pink slips looking for worthwhile victims, the provision was repealed even before it took effect.¹⁹

From 1934 until 1976 there was no substantial change in the statute respecting the disclosure of tax returns. The pre-1976 statute was thus very much the product of the 1909 and 1910 legislation, continuing with the oddity of "public" records open to inspection only under regulations or orders of the President.

C. Disclosure to Government Agencies

Although corporate returns were, in 1910, made available to the public, as well as to other government agencies, individual returns were kept within Treasury until 1920. In 1920, individual returns joined corporate returns as being generally

¹⁵ One news article reported that in 1924, within 24 hours after it was announced that tax lists were ready for inspection, Internal Revenue officers throughout the country were besieged by applications from promoters, salespeople, and advertisers.

¹⁶ U.S. v. Dickey, 268 U.S. 378 (1975).

¹⁷ Act of Feb. 26, 1926, ch. 27, 44 Stat. 9, 52.

¹⁸ Act of May 10, 1934, ch. 277, 48 Stat. 680, 698.

¹⁹ Act of April 19, 1935, ch. 74, 49 Stat. 158.

available to federal agencies.²⁰ The 1930's saw a new technique of more general access being granted to specific agencies as well as to congressional committees. The 1940's, 1950's, and 1960's were marked by almost unrestrained growth in the use of tax returns by government agencies. During this time tax returns became a generalized governmental asset. The public, however, was denied access.

D. Summary 1866-1970

This diverse history on disclosure reveals the existence of a statute which, in all significant respects, went unchanged since 1910. Thus, the story is one of the exercise of discretion granted by a Congress unwilling to define precisely the policy to be followed. Having committed discretion to the President, and an agency headed by his designee, it was not surprising that the power was exercised toward expanding the use of information. Indeed, it would have been unrealistic to assume that the President could have been expected to resist agency arguments for more information on which to base important decisions, even though such information might not be necessary and might well be used for many purposes other than that apparently intended.

E. Developments in the 1970's

By the mid-1970's Congress became increasingly concerned about the disclosure and use of information gathered from and about citizens by agencies of the federal government.²¹ The events leading to the revision of the tax disclosure laws in 1976 can, however, be directly traced to Executive Orders 11697 and 11709, issued by President Richard M. Nixon authorizing the Department of Agriculture to inspect the tax returns of all farmers "for statistical purposes."

During 1973, two subcommittees of the House of Representatives held hearings regarding the Department of Agriculture's need for the tax data disclosed by the two executive orders.²² During these hearings, sentiments against the orders were expressed. Officers of the Department of Justice testified that the two

²⁰ T.D. 2961, 2 C.B. 249 (Jan. 7, 1920)

²¹ This concern led directly to the enactment of the Privacy Act of 1974, 5 U.S.C. § 552a.

²² Hearings on Executive Orders 11697 and 11709 Permitting Inspection by the Department of Agriculture of Farmers' Income Tax Returns Before House Subcomm. On Foreign Operations and Government Information of Comm. on Government Operations, 93rd Cong., 1st Sess. (1973).

orders were prototypes of future orders opening other tax returns to inspection by other agencies. Responding to the adverse sentiment expressed in these two hearings, the President revoked both orders on March 21, 1974.

The concern over tax return confidentiality that remained after revocation of the two orders was increased by disclosures made in hearings of both the Senate Select Committee on Presidential Campaign Activities (Watergate Committee) and the House Judiciary Committee investigating the possible impeachment of President Nixon. The Watergate Committee's hearings revealed that former White House counsel John Dean had sought from the IRS political information on so-called "enemies." Furthermore, it was disclosed to that committee that the White House actually was supplied information on IRS investigations of Howard Hughes and Charles Rebozo. The Committee noted that tax information and income tax audits were commonly requested by White House staff and supplied by IRS personnel.

The House Judiciary Committee's impeachment inquiry also revealed apparently unauthorized use of IRS tax data by the President. One of the Articles of Impeachment proposed by the Judiciary Committee alleged that President Nixon had:²³

endeavored to obtain from the Internal Revenue Service, in violation of the constitutional rights of citizens, confidential information contained in income tax returns for purposes not authorized by law.

Congressional interest in tax return confidentiality also manifested itself in 1974 when, as part of the Privacy Act of 1974, Congress ordered the newly-established Privacy Protection Study Commission to report to the President and Congress on the proper restrictions which should be placed on the disclosure of federal income tax information. This report was issued on June 9, 1976, and suggested major changes in the distribution of tax data to the Department of Justice for both tax and nontax law enforcement, distribution of tax data to the states and to local governments, and transfer of information to the President and the executive agencies. It also recommended more severe penalties for wrongful disclosure of tax data. The commission did not recommend a general denial of tax data to nontax federal agencies.

On June 10, 1976, the Senate Finance Committee issued its report on H.R. 10612, the Tax Reform Act of 1976, in which it proposed substantial revisions in

²³ Report on the impeachment of Richard M. Nixon, President of the United States, H.R. Rep. No. 93-1305 at 3 (1974).

the rules governing tax return confidentiality.²⁴ The Finance Committee's proposal dealt with the same general issues as had the Privacy Protection Study Commission's report, but it resolved them differently. With few technical changes, the Conference Committee on H.R. 10612 adopted the Senate Finance Committee's version of the tax confidentiality rules as part of the Tax Reform of 1976.

II. PRINCIPAL AREAS OF REVISION IN THE TAX REFORM ACT OF 1976

A. Congressional Philosophy behind the 1976 Amendments to Section 6103

Congress recognized that the IRS had more information about citizens than any other federal agency, and that other agencies routinely sought access to that information. Congress also recognized that citizens reasonably expected that the tax information they were required to supply to the IRS would be kept private. If the IRS abused that reasonable expectation of privacy, the loss of public confidence could seriously impair the tax system.

Although Congress felt that the flow of tax information should be more tightly regulated, not everyone agreed where the lines should be drawn. The debates on accessibility were most heated in the area of nontax criminal law enforcement purposes. One side, led by Senator Long, sought more liberal access rules in order to fight white collar crime, organized crime, and other violations of the law. This side felt "the Justice Department is part of this Federal Government. It is all one Government." The other side, led by Senator Weicker, wanted very restrictive rules. This side recognized that it was cheaper and easier for Justice to come directly to the IRS. But they also felt that when citizens made out their tax returns, they made them out for the IRS, and no one else.

Ultimately Congress amended section 6103 to provide that tax returns and return information are confidential and are not subject to disclosure, except in limited situations, as delineated by the Internal Revenue Code, where disclosure is warranted. In each area of allowable disclosure, Congress attempted to balance the particular office or agency's need for the information involved with the citizen's right to privacy, as well as the impact of the disclosure upon the continuation of compliance with the voluntary tax assessment system.²⁵ In short, Congress undertook direct responsibility for determining the types and manner of permissible disclosures.

²⁴ S. Rep. No. 94-938 at 315-349, 1976-3 C.B. (Vol. 3) 353-387.

²⁵ Staff of Joint Committee on Taxation, 94th Cong., General Explanation of the Tax Reform Act of 1976, 313-316 (Comm. Print 1976), 1976-3 C.B. (Vol. 2) 325-328.

B. Structure of Tax Information Confidentiality Provisions

The Tax Reform Act of 1976 enacted a comprehensive statutory scheme regulating the use and disclosure of tax returns and tax return information. There are four basic parts to this statutory scheme.

- The general rule of I.R.C. § 6103(a) making tax returns and tax return information confidential except as expressly authorized in the Internal Revenue Code. Definitions of key terms, such as return and return information, are contained in I.R.C. § 6103(b).
- The exceptions to the general rule detailing permissible disclosures—I.R.C. §§ 6103(c)–6103(o).
- Technical, administrative, and physical safeguard provisions to prevent the recipients of tax information from using or disclosing the information in an unauthorized manner, and accounting, recordkeeping and reporting requirements that detail what disclosures are made for what purposes to assist in Congressional oversight. I.R.C. § 6103(p).
- Criminal penalties, including a felony for the willful unauthorized disclosure of tax information, a misdemeanor for the unauthorized inspection of tax information,²⁶ and a civil cause of action for the taxpayer whose information has been disclosed in a manner not authorized by section 6103. I.R.C. §§ 7213 (criminal penalty for unauthorized disclosure), 7213A (criminal penalty for unauthorized inspection), 7431 (civil damages provision).

C. Summary of Permissible Disclosures

1. Disclosures to taxpayer's designees (consent) - section 6103(c).
2. Disclosures to state tax officials - section 6103(d).
3. Disclosures to the taxpayer and other persons having a material interest - section 6103(e).
4. Disclosures to committees of Congress - section 6103(f).
5. Disclosures to the President and White House - section 6103(g).
6. Disclosures to federal employees for tax administration purposes - section 6103(h).

²⁶ In addition, the unauthorized access of tax information in government computer files is a felony under 18 U.S.C. § 1030(a)(2)(B).

7. Disclosures to federal employees for nontax law enforcement purposes - section 6103(i).
8. Disclosures for statistical purposes - section 6103(j).
9. Disclosures for certain miscellaneous tax administration purposes - section 6103(k).
10. Disclosures for purposes other than tax administration - section 6103(l).
11. Disclosures of taxpayer identity information - section 6103(m).
12. Disclosures to contractors for tax administration purposes - section 6103(n).
13. Disclosures with respect to wagering excise taxes - section 6103(o).

Appendix 2

Form 8821 Rev. January 2000 Department of the Treasury Internal Revenue Service	<h3 style="margin: 0;">Tax Information Authorization</h3> <p style="font-size: small; margin: 0;">▶ IF THIS AUTHORIZATION IS NOT SIGNED AND DATED, IT WILL BE RETURNED.</p>	OMB No. 1545-0047 For IRS Use Only Received by: Name _____ Position _____ Title _____	
1 Taxpayer information. Taxpayer name(s) and address (please type or print)			
City of X 123 Municipal Plaza X, State 99999	Social security number(s) _____	Employer identification number 12 2456789	
	Daytime telephone number 000 444-3333	Plan number (if applicable) _____	
2 Appointee. Name and address (please type or print)			
CAF No. _____ Telephone No. _____ Fax No. _____ Check if new: Address <input type="checkbox"/> Telephone No. <input type="checkbox"/>			
3 Tax matters. The appointee is authorized to inspect and/or receive confidential tax information in any office of the IRS for the tax matters listed on this line.			
(b) Type of Tax (Income, Employment, Estate, etc.)	(c) Tax Form Number (1040, 941, 706, etc.)	(d) Year(s) or Period(s)	(e) Specific Tax Matters (see instr.)
1999 City of X Industrial Development	Revenue Bonds	(XYZ Project)	
4 Specific use not recorded on Centralized Authorization File (CAF). If the tax information authorization is for a specific use not recorded on CAF, check this box. (See the instructions on page 2.) <input checked="" type="checkbox"/> If you checked this box, skip lines 5 and 6.			
5 Disclosure of tax information (you must check the box on line 5a or b unless the box on line 4 is checked): a If you want copies of tax information, notices, and other written communications sent to the appointee on an ongoing basis, check this box. <input type="checkbox"/> b If you do not want any copies of notices or communications sent to your appointee, check this box. <input checked="" type="checkbox"/>			
6 Revocation/revocation of tax information authorizations. This tax information authorization automatically revokes all prior authorizations for the same tax matters you listed above on line 3 (unless you checked the box on line 4; if you do not want to revoke a prior tax information authorization, you MUST attach a copy of any authorizations you want to remain in effect AND check this box. <input type="checkbox"/> To revoke this tax information authorization, see the instructions on page 2.			
7 Signature of taxpayer(s). If a tax matter applies to a joint return, either husband or wife must sign. If signed by a corporate officer, partner, guardian, executor, receiver, administrator, trustee, or party other than the taxpayer, I certify that I have the authority to execute this form with respect to the tax matters/periods covered.			
Signature _____ Date _____ MARY ISSUER Mayor Print Name Title (if applicable)	Signature _____ Date _____ _____ Print Name Title (if applicable)		

General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

Purpose of form: Form 8821 authorizes any individual, corporation, firm, organization, or partnership you designate to inspect and/or receive your confidential information in any office of the IRS for the type of tax and the years or periods you list on this form. You may file your own tax information authorization without using Form 8821, but it must include all the information that is requested on this form.

Form 8821 does not authorize your appointee to advocate your position with respect to the Federal tax laws; to execute waivers, consents, or closing agreements; or to otherwise represent you before the IRS. If you want to authorize an individual to represent you, use Form 2848, Power of Attorney and Declaration of Representative.

Use Form 56, Notice Concerning Fiduciary Relationship, to notify the IRS of the existence of a fiduciary relationship. A fiduciary (trustee, executor, administrator, receiver, or guardian) stands in the position of a taxpayer and acts as the taxpayer. Therefore, a fiduciary does not act as an appointee and should not file Form 8821. If a fiduciary wishes to authorize an appointee to inspect and/or receive confidential tax information on behalf of the fiduciary, Form 8821 must be filed and signed by the fiduciary acting in the position of the taxpayer.

Taxpayer identification numbers (TINs). TINs are used to identify taxpayer information with corresponding tax returns. It is important that you furnish correct names, social security numbers (SSNs), individual taxpayer identification numbers (ITINs), or employer identification numbers (EINs) so that the IRS can respond to your request.

For Privacy Act and Paperwork Reduction Act Notice, see page 2. OMB No. 1545-0047 Form 8821 (Rev. 1-2000)

**Memorandum for the Heads of Executive Department
and Agencies**

- A. You can read this three-page report for yourself. See if you can spot the main points.

- B. Go to the middle of the second page paragraph (b) where it discusses the OMB.
 - 1. On page 111, in section (b)(1), we find a directive concerning the System of Records

 - 2. Essentially, this section directs all Federal Agencies to update their System of Records.

- C. We read a report from the OMB and GAO that all federal agencies had compiled and updated their System of Records - Except the IRS.
 - 1. Finally on December 10, 2001 the IRS completed this task and released the updated System of Records.

 - 2. You can now obtain this updated version. Just go to our web site near the end of our literature list and place your order. (Item 195) It is an essential tool for defending your substantive rights.

- D. If you are sending FOIA requests to some other Federal agency we encourage you to obtain their System of Records Manual and request those records also.

ELECTRONIC PRIVACY INFORMATION CENTER

**MEMORANDUM FOR THE HEADS OF EXECUTIVE
DEPARTMENTS AND AGENCIES**

THE WHITE HOUSE
Office of the Press Secretary
(Eisenach, Germany)

For Immediate Release
May 14, 1998

May 14, 1998

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND
AGENCIES

SUBJECT: Privacy and Personal Information in Federal Records

Privacy is a cherished American value, closely linked to our concepts of personal freedom and well-being. At the same time, fundamental principles such as those underlying the First Amendment, perhaps the most important hallmark of American democracy, protect the free flow of information in our society.

The Federal Government requires appropriate information about its citizens to carry out its diverse missions mandated by the Constitution and laws of the United States. Long mindful of the potential for misuse of Federal records on individuals, the United States has adopted a comprehensive approach to limiting the Government's collection, use, and disclosure of personal information. Protections afforded such information include the Privacy Act of 1974, the Computer Matching and Privacy Protection Act of 1988, the Paperwork Reduction Act of 1995, and the Principles for Providing and Using Personal Information ("Privacy Principles"), published by the Information Infrastructure Task Force on June 6, 1995, and available from the Department of Commerce.

Increased computerization of Federal records permits this information to be used and analyzed in ways that could diminish individual privacy in the absence of additional safeguards. As development and implementation of new information technologies create new possibilities for the management of personal information, it is appropriate to reexamine the Federal Government's role in promoting the interests of a democratic society in personal privacy and the free flow of information.

Accordingly, I hereby direct the heads of executive departments and agencies ("agencies") as follows:

It shall be the policy of the executive branch that agencies shall:

- (a) assure that their use of new information technologies sustain, and do not erode, the protections provided in all statutes relating to agency use, collection, and disclosure of personal information;
- (b) assure that personal information contained in Privacy Act systems of records be handled in full compliance with fair information practices as set out in the Privacy Act of 1974;
- (c) evaluate legislative proposals involving collection, use, and disclosure of personal information by the Federal Government for consistency with the Privacy Act of 1974; and
- (d) evaluate legislative proposals involving the collection, use, and disclosure of personal information by any entity, public or private, for consistency with the Privacy Principles.

To carry out this memorandum, agency heads shall:

- (a) within 30 days of the date of this memorandum, designate a senior official within the agency to assume primary responsibility for privacy policy;
- (b) within 1 year of the date of this memorandum, conduct a thorough review of their Privacy Act systems of records in accordance with instructions to be issued by the Office of Management and Budget ("OMB"). Agencies should, in particular:
 - (1) review systems of records notices for accuracy and completeness, paying special attention to changes in technology, function, and organization that may have made the notices out of date, and review routine use disclosures under 5 U.S.C. 552a(b)(3) to ensure they continue to be necessary and compatible with the purpose for which the information was collected;
 - (2) identify any systems of records that may not have been described in a published notice, paying special attention to Internet and other electronic communications activities that may involve the collection, use, or disclosure of personal information;
- (c) where appropriate, promptly publish notice in the Federal Register to add or amend any systems of records, in accordance with the procedures in OMB Circular A-130, Appendix I;
- (d) conduct a review of agency practices regarding collection or disclosure of personal information in systems of records between the agency and State, local, and tribal governments in accordance with instructions to be issued by OMB; and
- (e) within 1 year of the date of this memorandum, report to the OMB on the

results of the foregoing reviews in accordance with instructions to be issued by OMB.

The Director of the OMB shall:

- (a) issue instructions to heads of agencies on conducting and reporting on the systems of record reviews required by this memorandum;
- (b) after considering the agency reports required by this memorandum, issue a summary of the results of the agency reports; and
- (c) issue guidance on agency disclosure of personal information via the routine use exception to the Privacy Act (5 U.S.C. 552a(b)(3)), including sharing of data by agencies with State, local, and tribal governments.

This memorandum is intended only to improve the internal management of the executive branch and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

WILLIAM J. CLINTON

Disclosure, Privacy Act, and Paperwork Reduction Act
Notice

- A. Page 72 from the 1040 Handbook. You can get this at most post offices. Have you ever read this page before? Do you understand what it says?
- B. First and Second paragraphs: We keep asking for this information they are talking about but it seems the only answer we receive, if any, is "Oh it's in title 26 USC."
- C. In the third column under "The Time It Takes To Prepare Your Return", they admit the tax laws are very complex.
- D. We could spend several pages on this page alone but we want to stress just how long it takes out of your life to fulfill your alleged "duties" to fill out all their forms.
- E. Add it up. 70 hours of your life in one year. Is that what you would like to devote to them? Free? What else will you do for free?
- F. If you can do it that fast let us know. I know people who have small business that spend at least one hour every work night plus part of almost every weekend trying to keep up with their "books and records."
- G. How much are you being paid to do all of that plus save these records for up to 10 years?
 - 1. When we ask these questions the common answer we usually get is, "That is the price you pay to live in a civilized society."
- H. If they get paid to look at that information, then we want to be paid to comply, as we are not one required to do that under their own code, regulations, and statutes.
 - 1. If I am a person required, then show me the exact code section, regulation, or statute at large which creates such requirement. We have read and read, and haven't found it yet.
 - 2. If there was such a law, then there wouldn't be a need for them to falsify our files and lie to us so much.

Disclosure, Privacy Act, and Paperwork Reduction Act Notice

The IRS Restructuring and Reform Act of 1998, the Privacy Act of 1974, and Paperwork Reduction Act of 1980 require that when we ask you for information we must first tell you our legal right to ask for the information, why we are asking for it, and how it will be used. We must also tell you what could happen if we do not receive it and whether your response is voluntary, required to obtain a benefit, or mandatory under the law.

This notice applies to all papers you file with us, including this tax return. It also applies to any questions we need to ask you so we can complete, correct, or process your return: figure your tax; and collect tax, interest, or penalties.

Our legal right to ask for information is Internal Revenue Code sections 6001, 6011, and 6012(a) and their regulations. They say that you must file a return or statement with us for any tax you are liable for. Your response is mandatory under these sections. Code section 6109 requires that you provide your social security number or individual taxpayer identification number on what you file. This is so we know who you are, and can process your return and other papers. You must fill in all parts of the tax form that apply to you. But you do not have to check the boxes for the Presidential Election Campaign Fund or for the third-party designee. You also do not have to provide your daytime phone number.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become

material in the administration of any Internal Revenue law.

We ask for tax return information to carry out the tax laws of the United States. We need it to figure and collect the right amount of tax.

If you do not file a return, do not provide the information we ask for, or provide fraudulent information, you may be charged penalties and be subject to criminal prosecution. We may also have to disallow the exemptions, exclusions, credits, deductions, or adjustments shown on the tax return. This could make the tax higher or delay any refund. Interest may also be charged.

Generally, tax returns and return information are confidential, as stated in Code section 6103. However, Code section 6103 allows or requires the Internal Revenue Service to disclose or give the information shown on your tax return to others as described in the Code. For example, we may disclose your tax information to the Department of Justice, to enforce the tax laws, both civil and criminal, and to cities, states, the District of Columbia, U.S. commonwealths or possessions, and certain foreign governments to carry out their tax laws. We may disclose your tax information to the Department of Treasury and contractors for tax administration purposes; and to other persons as necessary to obtain information which we cannot get in any other way in order to determine the amount of or to collect the tax you owe. We may disclose your tax information to the Comptroller General of the United States to permit the Comptroller General to review the Internal Revenue Service. We may also disclose your tax information to Committees of Congress; Federal, state, and local child support agencies; and to

other Federal agencies for the purposes of determining entitlement for benefits or the eligibility for and the repayment of loans.

Please keep this notice with your records. It may help you if we ask you for other information. If you have questions about the rules for filing and giving information, please call or visit any Internal Revenue Service office.

The Time It Takes To Prepare Your Return

We try to create forms and instructions that can be easily understood. Often this is difficult to do because our tax laws are very complex. For some people with income mostly from wages, filling in the forms is easy. For others who have businesses, pensions, stocks, rental income, or other investments, it is more difficult.

We Welcome Comments on Forms

If you have comments concerning the accuracy of the time estimates shown below or suggestions for making these forms simpler, we would be happy to hear from you. You can e-mail us your suggestions and comments through the IRS Internet Home Page (www.irs.gov/help/email2.html) or write to the Tax Forms Committee, Western Area Distribution Center, Rancho Cordova, CA 95743-0001. Do not send your return to this address. Instead, see the back cover.

Estimated Preparation Time

The time needed to complete and file Form 1040, its schedules, and accompanying worksheets will vary depending on individual circumstances. The estimated average times are:

Form	Recordkeeping	Learning about the law or the form	Preparing the form	Copying, assembling, and sending the form to the IRS	Totals
Form 1040	2 hr., 46 min.	3 hr., 30 min.	6 hr., 37 min.	34 min.	13 hr., 27 min.
Sch. A	3 hr., 4 min.	39 min.	1 hr., 34 min.	20 min.	5 hr., 37 min.
Sch. B	33 min.	8 min.	25 min.	20 min.	1 hr., 26 min.
Sch. C	6 hr., 4 min.	1 hr., 31 min.	2 hr., 19 min.	41 min.	10 hr., 35 min.
Sch. C-EZ	45 min.	3 min.	35 min.	20 min.	1 hr., 43 min.
Sch. D	1 hr., 29 min.	2 hr., 59 min.	2 hr., 34 min.	34 min.	7 hr., 36 min.
Sch. D-1	13 min.	1 min.	11 min.	34 min.	59 min.
Sch. E	3 hr.	1 hr.	1 hr., 24 min.	34 min.	5 hr., 58 min.
Sch. EIC	-----	1 min.	13 min.	20 min.	34 min.
Sch. F:					
Cash Method	3 hr., 29 min.	36 min.	1 hr., 27 min.	20 min.	5 hr., 52 min.
Accrual Method	3 hr., 36 min.	26 min.	1 hr., 25 min.	20 min.	5 hr., 47 min.
Sch. H	1 hr., 38 min.	30 min.	53 min.	34 min.	3 hr., 35 min.
Sch. J	19 min.	11 min.	1 hr., 32 min.	20 min.	2 hr., 22 min.
Sch. R	19 min.	15 min.	30 min.	34 min.	1 hr., 38 min.
Sch. SE: *					
Short	13 min.	14 min.	13 min.	13 min.	53 min.
Long	26 min.	20 min.	35 min.	20 min.	1 hr., 41 min.

Criminal Tax Trials

- A. This paragraph came from the Disclosure Litigation Reference Book, which we have briefly covered already.
- B. This Paragraph demonstrates the requirements imposed on the government and enhances the FOIA process you will be using. It reduces the likelihood that you'll actually go to court.
- C. By learning what to ask for in the FOIA process, following the procedure, seeing the responses to your requests, and studying our materials, you will gain a broader understanding of the "big picture."
- D. The harder they come after you the more FOIA requests and Rebuttal letters you want to send back to them. All erroneous presumptions, that are not rebutted, stand in the record as accepted facts.
- E. For every page they send you, you send them back 100 pages, if that's what it takes to rebut their presumptions.
- F. We were working with someone, who had been using an Idiot Legal Argument and had been indicted. He obtained our courses, started the FOIA process filing over thousands of pages of paperwork into the case and the judge said if everybody who had a case in this court entered in that much paperwork the courthouse would collapse from the weight of the paperwork. Using the process, his possible nine-year sentence became a plea bargain of less than a year of house arrest with work privileges.
- G. One of our goals is to provide the tools you need to let the IRS know that you know that they are violating their own due process.
- H. You want to build your file so you will not be selected to be one of their victims in the first place.
- I. Remember that the Federal Prosecutors prefer to pursue the people they know will bring them a win, or will quiet someone that they want to quiet. They are limited by fiscal constraint and a strict quota system, which limits the number of tax cases they can prosecute.

XIV. CRIMINAL TAX TRIALS

Two Ninth Circuit cases, United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991), and United States v. Jennings, 960 F.2d 1488 (9th Cir. 1992), have established the requirement that upon request by a criminal defendant, the government has an obligation to search its own files for exculpatory material including evidence affecting the credibility of its proposed witnesses and to provide that material to the defense. For witnesses who are government employees, this includes a review of their personnel files. Jennings makes clear that this requirement is based upon the Constitutional underpinnings of the Fifth Amendment as set forth in Brady v. Maryland, 373 U.S. 83 (1963). This requirement overrides any Privacy Act considerations.

