

# Notes

## Public Enforcement of the Freedom of Information Act

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The Freedom of Information Act of 1966<sup>1</sup> (FOIA) has transformed the process by which Executive agencies release information.<sup>2</sup> Private groups and individuals have secured disclosure of countless materials that might otherwise have remained secret: from the Food and Drug Administration, for example, a list of prescription drugs which the agency had yet to approve but which remained on the market;<sup>3</sup> from the Department of Defense and the Department of Energy, records on fallout and other harmful effects from atom bomb testing in the 1950's and 1960's;<sup>4</sup> from the Central Intelligence Agency and the Federal Bureau of Investigation, sensitive documents concerning the trial of Julius and Ethel Rosenberg and the assassination of President Kennedy.<sup>5</sup> Instances such as these attest to the effectiveness of the Act in promoting the release of information.

To understand the evolution of FOIA enforcement, it is first necessary to distinguish the two broad categories into which the institutional forms of law enforcement have typically been divided. Under models of private law enforcement, such as those characteristic of tort and contract law, individuals seeking to invoke the coercive sanctions of the state both initiate and largely control the judicial process.<sup>6</sup> Under systems of public enforcement, such as those typical of administrative and criminal law, the state itself, presumably acting on behalf of society in general, directs or administers the sanctioning process.<sup>7</sup>

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1. Pub. L. No. 90-23, 81 Stat. 54-56 (1966), codified at 5 U.S.C. § 552 (1982).

2. See *infra* notes 230, 232 and accompanying text.

3. CAMPAIGN FOR POLITICAL RIGHTS, FORMER SECRETS: GOVERNMENT RECORDS MADE PUBLIC THROUGH THE FREEDOM OF INFORMATION ACT at 15 (R. Hendricks ed. 1982).

4. *Id.* at 39.

5. *Id.* at 120-28.

6. See Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282-83, (1976).

7. Discussions of the differences between private and public law in much of recent legal

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The relation between these models of enforcement is complex. Under either model, the universe of appropriate enforcement mechanisms encompasses far more than coercive or punitive responses to violations of the law. Individuals and institutions charged with enforcement may also help to secure compliance with the law through noncoercive means such as instruction in what the law requires, persuasion, or coordination of efforts to comply. Often, public and private activities complement rather than substitute for each other in the enforcement of the same law.<sup>8</sup> The proper combination of enforcement mechanisms depends on a vast array of considerations: the substantive character of the law to be enforced, the identity of potential violators, the nature of the tools that might be applied to promote compliance, and the political or administrative postures of the individuals and institutions which might be relied upon to implement those tools.

This note considers public enforcement activities in a particular administrative context. The enforcement history of FOIA illustrates the broad range of enforcement techniques available to governmental bodies seeking to ensure compliance with a law. While the text of the original act provided for enforcement only through private suits in court,<sup>9</sup> a wealth of public enforcement activities, some initiated by Congress and some by Executive officials themselves, have also evolved to foster compliance. These nonjudicial enforcement actions illustrate the way in which coercive sanctions are applied within a governmental bureaucracy, and the variety of non-coercive devices available to promote com-

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literature have adopted a number of different approaches to this broad distinction. Chayes has emphasized that judicial adjudication may tend toward a public or private model. *Id.* He distinguishes the public from private because the former is prospective rather than retrospective, multi-party rather than bilateral, negotiative rather than imposed, ad hoc rather than liability-based, concerned with public policy issues rather than confined to a single dispute over private rights, and entails an active rather than a passive judicial role. *Id.* at 1302. Mashaw relies on a similar distinction to delineate the differences between various types of enforcement mechanisms under a regulatory statute. Mashaw, *Rights in the Federal Administrative State* (Dec. 1982) (forthcoming 92 YALE L.J.). Stewart and Sunstein explain the rationales for such remedies for deficient administrative performance as rights to contest regulatory action, hearing rights concerned with governmental benefits, implied rights of action for private individuals, and private rights to order administrative enforcement action in terms of three often conflicting conceptions that underly statutes: preservation of entitlements, promotion of efficiency, and advancement of public values. Stewart and Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195 (1982). Several writers in the economics of law tradition have also compared abstract models of public and private enforcement. *See, e.g.*, Becker and Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEG. STUDIES 1 (1974); Landes and Posner, *The Private Enforcement of Law*, 4 J. LEG. STUDIES 1 (1975); Polinsky, *Private versus Public Enforcement of Fines*, 9 J. LEG. STUDIES 105 (1980).

8. For instance, public enforcement systems often incorporate opportunities for private parties either to sue for commencement of a public enforcement action or to enforce a law directly through the judicial process. *See generally* Stewart and Sunstein, *supra* note 7; Mashaw, *supra* note 7.

9. *See* 5 U.S.C. § 552(a)(4)(B) (1982).

pliance with such a bureaucracy. The experience of public enforcement under FOIA also testifies to the way in which enforcement activities evolve in a bureaucracy over time, and ultimately, to the role political variables may play in determining the forms of public enforcement. This Note will examine Congressional and Executive efforts to promote compliance with FOIA and the indirect effect that these public enforcement activities may have had on actions by private parties to enforce rights under the Act. A necessary preliminary to any description of how these activities evolved, however, is an account of the Act itself and the original private enforcement mechanism.

### I. *The Freedom of Information Act as a Privately Enforced Statute*

Signed into law on July 4, 1966, FOIA replaced the provisions for government disclosure of information enacted in the Administrative Procedure Act of 1946 (APA).<sup>10</sup> The original APA, the first statute to provide for public disclosure of records, orders, and other Executive documents, required only that "matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found." It allowed broad exemptions from this requirement for documents related to "any function of the United States requiring secrecy in the public interest" and "any matter relating solely to the internal management of an agency."<sup>11</sup> These exceptions in the statutory language, described by later commentators as "restrictive and nebulously drafted,"<sup>12</sup> had allowed agencies to withhold records largely at will.<sup>13</sup>

The 1966 Act went much further.<sup>14</sup> It directed that agencies in the Executive Branch make all of their records available for disclosure except those for which the Act allowed narrow and specific exemptions. The nine categories of exempt information were defined more specifically than in the previous statute. They encompassed (1) information classified under criteria established by Executive Order, (2) materials related solely to an agency's internal rules and practices, (3) information

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10. Administrative Procedure Act, § 3, 60 Stat. 237, 238 (1946), codified at 5 U.S.C. § 1002 (1964).

11. 5 U.S.C. § 1002 (1964).

12. *United States Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act: Hearings Before the Subcomm. on Foreign Operations and Government Information of the House Comm. on Government Operations*, 92d Cong., 2d Sess., Pt. 4, at 1367 (1972) [hereinafter cited as *1972 House Hearings*].

13. *Id.* See also *infra* notes 16-17 and accompanying text.

14. See 5 U.S.C. § 552 (1982). See also H.R. REP. NO. 98, 92d Cong., 2d Sess. 3, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 6267, 6267; STAFF OF HOUSE COMM. ON GOV'T OPERATIONS, 92d Cong., 2d Sess., ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT, H.R. REP. NO. 1419, (1972) [hereinafter cited as 1972 HOUSE REPORT].

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specifically exempted from disclosure by statute, (4) trade secrets and confidential commercial or financial information, (5) agency memoranda that would not be available to the public by law, (6) files whose disclosure would constitute a clearly unwarranted invasion of privacy, (7) investigatory files compiled for law enforcement purposes, (8) certain materials related to regulation or supervision of financial institutions, and (9) geological and geophysical information.<sup>15</sup>

In addition to strengthening the statutory presumption favoring disclosure, the new Act for the first time added a provision for enforcement of the public disclosure section of the APA. The original APA had vested responsibility for review of administrative activity generally in the courts of appeals.<sup>16</sup> The new provision, however, effectively eliminated the deference courts of appeals had demonstrated in reviewing actions under the former section on disclosure.<sup>17</sup> FOIA explicitly granted district courts “jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.”<sup>18</sup> The burden of proof in such actions fell on the agency that sought to justify withholding the information, and courts would interpret the Act so as to authorize judges to examine the materials in order to evaluate the agency’s claim.<sup>19</sup> “Any person,” regardless of their interest in obtaining the information, could request and sue for information under the Act.<sup>20</sup> The Act also directed district courts to assign suits filed under it “precedence . . . over all other causes” as a general policy, and to expedite FOIA suits “in every way.”<sup>21</sup> Amendments to the Act in 1974 further sought to facilitate private actions by requiring indexes of agency documents, imposing time limits for administrative responses to requests for information and administrative appeals, explicitly authorizing *in camera* inspection by courts of requested documents, shortening the time permitted for agencies to answer complaints in court, allowing award of attorney’s fees to successful plaintiffs, and explicitly making available any “reasonably

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15. See 5 U.S.C. § 552(b) (1982).

16. Administrative Procedure Act of 1946, § 10, 60 Stat. 237, 243-44 (1946) (codified at 5 U.S.C. § 1009 (1964)).

17. See, e.g., *Hiatt v. Compagna et al.*, 178 F.2d 42 (5th Cir. 1949) (APA, including § 1009, held inapplicable to United States Parole Board); *Nola Electric v. Reilly*, 11 F.R.D. 103, 105 (D.C.N.Y. 1950) (“It is within the Executive authority [under 5 U.S.C. § 22, despite § 1009] to promulgate rules severely limiting disclosure of Government files.”). See the account in H. CROSS, *THE PEOPLE’S RIGHT TO KNOW* 223-28 (1953).

18. 5 U.S.C. § 552(a)(4)(B) (1982).

19. See *EPA v. Mink*, 410 U.S. 73, 88 (1973).

20. *Id.* at 79.

21. 5 U.S.C. § 552(a)(4)(D) (1982).

segregable" portion of records requested in court.<sup>22</sup>

Even during the detailed discussion of FOIA prior to its passage, Congress scarcely considered how the provisions for disclosure would actually be administered.<sup>23</sup> Legislative debate instead focused on the broader issues of principle surrounding access to government information.<sup>24</sup> The failure to consider how the bureaucracy might administer the Act resulted in large measure from the intense opposition the Act inspired among all of the principal Executive agencies. While these agencies uniformly claimed that the Act was unconstitutional and an unmanageable administrative burden, they never offered to discuss what administrative mechanisms might be necessary to coordinate a positive effort to comply.<sup>25</sup> The only thorough discussion of the Act focused on the wording of specific exemptions.<sup>26</sup> Cryptic treatment of the Act, however, may have been necessary to secure passage of the bill in the face of a hostile executive branch.<sup>27</sup>

Creation of a private judicial remedy without assignment of an agency or agencies to assist in administration, however, was an unusual arrangement for a Federal administrative statute.<sup>28</sup> Those in favor of this provision argued that the ultimate decision as to whether disclosure should take place should be removed from the Executive Branch to a forum more likely to take the presumption in favor of disclosure seriously.<sup>29</sup> While the courts of appeals had shown substantial deference to agency action in appellate review of agency decisions under the APA,

22. Pub. L. No. 93-502, 88 Stat. 1561-64 (1974) (codified at 5 U.S.C. § 552 (1982)). The attitude of courts also shifted substantially in favor of disclosure under the new Act. See *infra* note 34, and notes 169-79 and accompanying text.

23. See *Administrative Procedure Act: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965) [Hereinafter cited as *1965 Senate Hearings*]; *Federal Public Records Law: Hearings Before the Subcomm. on Foreign Operations and Government Information of the House of Representatives Comm. on Government Operations*, 89th Cong., 1st Sess. (1966) [Hereinafter cited as *1966 House Hearings*]; H.R. REP. NO. 1497, 89th Cong., 2d Sess., reprinted in 1966 U.S. CODE AND CONG. NEWS 1418.

24. See, e.g., *1965 Senate Hearings* at 130 (Testimony of Eugene Patterson, Editor, Atlanta Constitution) ("Surely it is time to open the doors of Government except for those properly closed. . . ."); at 4 (Statement of Senator Sam J. Ervin, Jr.) ("Everything in our common law heritage and the history of our Constitution" demands recognition of "a 'right to know,' endorsed by Congress. . . .").

25. See, e.g., *id.* at 192-97 (Statement of Asst. Attorney Gen. Norbert Schlei); at 29-33 (Statement of Edwin Rains, Asst. Gen. Counsel, Dep't of Treasury).

26. See, e.g., *id.* at 30-31 (Statement of Edwin Rains, Asst. Gen. Counsel, Dep't of Treasury); at 178 (Statement of Prof. Kenneth Davis).

27. Archibald, *The Freedom of Information Act Revisited*, 39 PUB. AD. REV. 311, 313 (1979).

28. Most substantive administrative statutes, of course, delegated to an agency responsibility either for administering sanctions or for bringing enforcement actions in the courts. The APA authorized judicial review of agency action as an enforcement mechanism, but only at the appellate level. See *supra* note 16.

29. See H. REP. 1497, 89th Cong., 1st Sess. 2419 (1966); *1966 House Hearings*, *supra* note 23, at 25-27.

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allowing private actions that entailed what amounted to a *de novo* review of the facts in district court with the burden of proof on the relevant agency, was likely to provide relatively strict judicial enforcement of disclosure requirements. The notion that this exclusively judicial enforcement scheme might have shortcomings that would also necessitate some administrative role in enforcement never received serious discussion.<sup>30</sup> Creation of a private judicial sanction, however, was bound to have far-reaching consequences for internal agency procedures concerned with dissemination and withholding of information.

Government-wide rules regarding agency conduct, of course, were far from new; the APA itself was perhaps the most far-reaching example. But the hearings prior to passage of FOIA demonstrated the well-established tendency of agencies to circumvent the intent behind the APA provisions by interpreting the law in a way that favored the withholding of information.<sup>31</sup> Judicial review by the courts of appeal had clearly failed to reverse this tendency.<sup>32</sup> The bias toward withholding resulted from an amalgamation of many factors: “bureaucratic notions of official secrecy, years of ingrained habits of self-protection, exaggerated fears of public disclosure,” and opposition to the Act itself.<sup>33</sup> These con-

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30. The absence of discussion of this issue in the initial legislative debates might also have reflected congressional confidence that its own oversight activities could address any administrative problems effectively. During consideration of the 1974 amendments a House subcommittee did consider a bill that would establish a seven-member “Freedom of Information Commission” with oversight responsibility and a quasi-appellate function. See *The Freedom of Information Act: Hearings on H.R. 5425 and H.R. 4960 Before the Subcomm. on Foreign Operations and Gov't Information of the House Comm. on Gov't Operations*, 93d Cong., 2d Sess. 12-20, 29 (1973) [hereinafter cited as *1973 House Hearings*]. This proposal, however, met with opposition in initial hearings on the proposed amendments. See, e.g., *id.* at 281 (Statement of Antonin Scalia, Chairman, Admin. Conf. of the U.S.) (Commission “seems to introduce another layer of administration into a system which is already somewhat complex.”); at 320 (Statement of John T. Miller, Chairman, Section on Administrative Law, Am. Bar Ass'n) (“[T]he more experience one has with Federal commissions and agencies, the less one is inclined to be optimistic about their inexpensive character or their speed.”). Consequently, sponsors of the bill decided not to include the provision for a commission in the bill as reported, confining the amendments largely to technical changes. See SUBCOMM. ON GOV'T INFORMATION AND INDIVIDUAL RIGHTS OF HOUSE COMM. ON GOV'T OPERATIONS, SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF SENATE COMM. ON THE JUDICIARY, 94TH CONG., 1ST SESS., FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (*P.L. 93-502*), SOURCEBOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS, 245-46 (Jt. Comm. Print 1975) (explanation of bill on House floor) [hereinafter cited as *Joint Source Book*].

31. See, e.g., *Availability of Information from Federal Dep'ts and Agencies: Hearing Before the Gov't Information Subcomm. of the House Comm. on Gov't Operations*, Part 17, 86th Cong., 2d Sess. (1959); *1965 Senate Hearings*, *supra* note 23; *1966 House Hearings*, *supra* note 23.

32. See *supra* note 17.

33. STAFF OF SUBCOMM. ON ADMINISTRATIVE PRACTICES AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 95TH CONG., 2D SESS., AGENCY IMPLEMENTATION OF THE 1974 AMENDMENTS TO THE FREEDOM OF INFORMATION ACT 53 (1980) [hereinafter cited as 1980 SENATE REPORT]. It remains unclear how much of the motivation to withhold resulted from rational self-interest and how much from simple habit.

ditions highlighted the need to reinforce the countervailing interest in disclosure, which Congress had already affirmed in the strict substantive language of FOIA, through the addition of an effective enforcement mechanism.

The remedy that Congress chose for this purpose was a private right of action. The judicial injunction that the Act authorizes carries with it the threat of severe penalties, imposed by the court pursuant to a private suit, should the agency continue its refusal to disclose the material at issue.<sup>34</sup> Judicial enforcement appears to have been effective in encouraging disclosure of information. In the first four years FOIA was in effect, petitioners secured release of all or part of the documents they sought in seventy percent of the cases decided in court.<sup>35</sup>

As a private right of action, however, this enforcement mechanism relies on those deprived under the Act to sue to vindicate their rights. The injured class created by a substantive violation of FOIA consists only of those with the individual motivation to make an initial request for information under the statute, regardless of whether their motivation is idealistic or derived from self-interested concerns. By explicitly placing the sole responsibility for pursuing sanctions on these private citizens, the drafters of the Act sought to avoid the difficulties inherent in relying on collective private action for enforcement.<sup>36</sup> Under FOIA, whatever motivation prompted the original request must remain sufficient, despite such constraints as time and cost, to stimulate an appeal to the courts if the agency refuses to disclose the requested information. Provisions to make judicial action cheaper, quicker, and more assuredly favorable to the FOIA applicant encourage assertion of this private right of action.

## II. *Direct Public Enforcement Under FOIA*

A full explanation of enforcement under the Act must also take into account the many public activities intended to foster maximum compliance. The government actors that undertook these activities belonged

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34. See 5 U.S.C. § 552(a)(4)(G) (1982) ("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.").

35. See 1972 House Hearings, *supra* note 12, Part 4, at 1339.

36. These difficulties reside in the fact that the benefit to each member of the public from release of information may not be enough to motivate a rational individual to act on behalf of the public. This situation can lead to a failure to secure release of information when disclosure might effect a net benefit to society. See generally M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1970) (describing other examples of this "free rider" problem, in which an individual's incentive to act in own narrow self-interest is less than incentive to act on behalf of a group in a way that ultimately would benefit the individual more).

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to both the legislative and executive branches. Perhaps the most prominent, and the closest to a “lead agency” in administering the Act, has been the Department of Justice. The Department has used its authority to withhold counsel from agencies defending against suits under the Act as a tool to promote compliance.<sup>37</sup> It has issued interpretations of the Act, offered individualized advice on substantive interpretation, coordinated enforcement efforts undertaken by agencies themselves, and assisted in training employees throughout the Executive Branch to apply FOIA properly.<sup>38</sup> A provision in the 1974 amendments requiring the Department to report annually to Congress regarding activities by the Department intended to further compliance with the Act in other agencies supplied a limited statutory basis for this prominent status in enforcement of the Act.<sup>39</sup> The attitudes of different administrations toward the Act have exerted perhaps their greatest effect on enforcement efforts at this level, as successive administrations have adjusted the Justice Department enforcement apparatus to accord with their view of FOIA.<sup>40</sup> As this note will show, however, the impetus behind the prominent role assumed by the Department has in large measure followed from internal pressures generated by its unique position in the structure of public enforcement.

Congressional committees, a second group of actors with a crucial role in administering the Act, have assumed their function for two apparent reasons. As we shall see, Congress has never authorized, and the Justice Department has seldom assumed, a strong lead agency role in coordinating and promoting compliance with the Act. However, the democratic values that motivated the Act have proven attractive issues for Congressional politicians in search of political capital.<sup>41</sup> As a result, Congress has exercised more intensive oversight and guidance under FOIA than under many other statutes: during the 1970’s an average of 14 days of hearings a year concerned issues related to the Act.<sup>42</sup> Staff of the princi-

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37. See *infra* notes 66-105 and accompanying text.

38. See *infra* notes 153-56, 160-62, 212 and accompanying text.

39. “The Attorney General shall submit an annual report . . . 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 . . . such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.” 5 U.S.C. § 552(d) (1982).

40. See *infra* notes 66-105 and accompanying text.

41. “[T]he freedom of information policy prospect provides an occasion when a legislator can assume the all-too-often illusive role of a statesman pursuing good government procedures in the “public interest.” Relyea, *Faithful Execution of the FOIA Act: A Legislative Branch Perspective*, 39 PUB. AD. REV. 328 (1979).

42. Data compiled from abstracts of hearings published annually by Congressional Information Service, 1970-80. Of course, this data does not indicate the amount of time devoted to actual oversight of implementation, as opposed to any need for substantive legislative change,

pal oversight subcommittees in the House and Senate<sup>43</sup> have also gathered general information on enforcement of the Act throughout the government and have sometimes dealt with individual complaints concerning the availability of agency records.

A third major role belongs to the administrative agencies. Each has established its own FOI Office to process internal appeals of denials and to manage implementation of the Act at the lower levels of the bureaucracy. The institutionalization and increasing sophistication of these offices have tended to compensate for the absence of a strong lead agency, and for the vagaries of enforcement efforts by the Justice Department. The Civil Service Commission and its successors, the Merit Systems Protection Board and Special Counsel, have been responsible for implementing the disciplinary sanction that the 1974 amendments added for employees that violate the Act.<sup>44</sup> The civil service authority, the Office of Personnel Management, the General Services Administration, and an organization of information professionals within the bureaucracy<sup>45</sup> have conducted government-wide training sessions on the Act. Finally, such entities as the General Accounting Office (GAO), the Congressional Research Service (CRS) and the Administrative Conference of the United States have contributed research and expertise that have aided the principal enforcers.

The forms of public enforcement undertaken by these actors varied tremendously. On the whole, however, it is fair to say that a flexible, largely noncoercive form of sanctioning has evolved into the primary form of public penalty imposed to enforce the Act. Giving advice, publishing interpretations, managing a growing information bureaucracy, and educating agency employees about the requirements of the Act comprise important elements of FOIA enforcement efforts throughout the bureaucracy. Policy differences over how the Act should be administered have surfaced recurrently, most notably at the level of Justice Department coercive and interpretative activities. Yet over time, coercion, administration, interpretative guidance and training have largely become institutionalized in individual agencies as well as in the Justice

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or the number of staff hours devoted to less formal oversight. Such an estimate thus provides only a rough guide to congressional interest in the Act. *See also* Relyea, *supra* note 41, at 329 (citing "formal record of dedicated oversight efforts").

43. In the House, the Government Operations Subcommittee on Foreign Operations and Government Operations (after 1974 the Subcommittee on Government Information and Individual Rights, and after 1983 the Subcommittee on Government Information, Justice, and Agriculture), and in the Senate the Judiciary Subcommittee on Administrative Practice and Procedure (after 1981 the Subcommittee on the Constitution) have assumed this primary oversight role.

44. *See infra* notes 46-65 and accompanying text.

45. *See infra* notes 204-12 and accompanying text.

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Department and Congress. The remainder of this section will describe this evolution.

### A. *The Disciplinary Sanction*

The most unambiguously coercive public enforcement tool under the Act has been the disciplinary sanction that the 1974 amendments authorized for employees responsible for violations. This provision, praised initially as “potentially the most important” of the amendments,<sup>46</sup> gave a public agency the ultimate authority to impose unspecified penalties on individual violators of the Act in the same manner a court might impose a fine for contempt.<sup>47</sup> By 1980, however, a Senate Committee Report found that “weakness in [the] statutory language, inadequate administrative procedures to implement [the provision], and a questionable judicial interpretation have combined to limit [its] effectiveness.”<sup>48</sup> The history of the disciplinary provision raises questions as to the practicability of such a blatantly coercive, relatively inflexible sanction as a tool for enforcement.

The disciplinary sanction originated as a legislative proposal for a purely private remedy, that is, a remedy imposed by a court under a private right of action. Ralph Nader and others testifying at Congressional hearings had proposed that criminal sanctions be authorized as “incentives” to overcome the tendency of bureaucrats to withhold information.<sup>49</sup> In response, the Senate bill contained a provision that would have authorized courts to order suspension without pay of up to 60 days or “other appropriate disciplinary or corrective action” for employees responsible for withholding information “without reasonable basis in

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46. Vaughn, *The Sanctions Provision of the Freedom of Information Act Amendments*, 25 AM. U.L. REV. 7 (1975).

47. “Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney’s 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 Civil Service Commission 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 Commission, after investigation and consideration of the evidence submitted, shall submit its 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 Commission recommends.” 5 U.S.C. § 552(a)(4)(F) (1982).

48. 1980 SENATE REPORT, *supra* note 33, at 103.

49. *Executive Privilege, Secrecy in Government, Freedom of Information: Hearings on S. 858, S. Con. Res. 30, S.J. Res. 72, S. 1106, S. 1142, S. 1520, S. 1923, and S. 2073 Before the Subcomm. on Govt. Operations and the Subcomms. on Separation of Powers and Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, Vol. 1, 93rd Cong., 1st Sess. 209 (1973) [hereinafter cited as *1973 Senate Hearings*].

law.”<sup>50</sup> The House of Representatives included no such provision in its version of the bill. House conferees objected to the sanction as an “unusual” grant of power over Federal agencies to the judiciary and as a danger to the rights of Federal employees.<sup>51</sup> Consequently, the legislation that emerged from the Conference and was ultimately enacted preserved judicial authority to initiate the sanctioning process, but shifted the final decision on whether or not to apply the sanction from the courts to the bureaucracy. Courts were to refer their findings concerning the behavior of agency officials to the Civil Service Commission for a “proceeding” undertaken to formulate a “recommendation” on whether sanctions should be applied and what form they should take. The Commission would submit its recommendation to the “administrative authority” of the relevant agency, which would then undertake “the corrective action the Commission recommend[ed].”<sup>52</sup> The conference committee report prescribed that the Civil Service proceeding would entail all the rights usually observed in Civil Service actions, including a right to appeal within the Commission.<sup>53</sup>

The addition of procedural hurdles to application of the disciplinary sanction was certain to weaken its coercive effect. Nonetheless, even such a feeble statutory provision, if implemented aggressively by the institutions charged with enforcement, might still have retained some effectiveness. By the late 1970’s, however, the courts and the Civil Service Commission had come to apply the disciplinary sanction in a way that only confirmed its insignificance in the scheme of enforcement. In *Holly v. Acree*,<sup>54</sup> the first case referred by a court to the Commission, the Customs Service had simply ignored both an initial FOIA request and an application for appeal from the denial of the request. The District Court, following the terms of the statute, referred the judicial findings to the Civil Service General Counsel, who was responsible under Civil

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50. See SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., AMENDING THE FREEDOM OF INFORMATION ACT, S. Rep. No. 854, at 21 (1974) [hereinafter cited as 1974 SENATE REPORT]. The report on the Senate bill noted that, despite numerous sanctions for unauthorized disclosure of information, no specific sanction against unauthorized withholding existed. Moreover, while certain general administrative sanctions were available against employees who violated classification requirements, none of the 2500 cases under those provisions had led to punishment for overclassification. For a brief account of the legislative history see Vaughn, *supra* note 46, at 8-12.

51. 120 CONG. REC. 34,166 (Oct. 7, 1974) (Statement of Rep. Erlenborn); Vaughn, *supra* note 46, at 11.

52. 5 U.S.C. § 552(a)(4)(F) (1982).

53. 120 CONG. REC. 34,161-62 (statement of Rep. Morehead). Moreover, the judicial finding necessary to initiate the process changed from “conduct with no reasonable basis in law” to “questions whether the Federal agency personnel acted arbitrarily and capriciously,” a more lenient phrase that invoked the standard for judicial review of other forms of administrative action under the APA.

54. 72 F.R.D. 115 (D.D.C. 1976).

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Service regulations for conducting the disciplinary proceeding. The Commission's handling of this investigation, however, suggested hostility toward the very idea of imposing a sanction. While the General Counsel did conduct some manner of investigation, he refused at first to release the results. Only after the plaintiff filed another FOIA request did the General Counsel send him a letter explaining that the Commission had decided to take no further action.<sup>55</sup> In this letter the General Counsel relied on a strained reading of the Act to avoid what seemed an inevitable finding of arbitrary and capricious behavior by Customs Service officials. Since several agency employees had shared responsibility for ignoring the application, the General Counsel found that none of them was "primarily responsible" as the statute required. As further extenuating circumstances, the General Counsel pointed to the adjustments to legal changes and the higher influx of applications that had followed enactment of the 1974 FOIA amendments and the Privacy Act of 1974. Thus, a refusal even to respond to repeated FOIA requests—perhaps the most blatant violation possible under the Act—went unpunished under the sanctions provision.

Only once since *Holly v. Acree* has a court referred findings to the civil service authority,<sup>56</sup> and in that instance the Special Counsel closed the case without issuing public findings.<sup>57</sup> Other cases interpreting the disciplinary sanction provision show a trend toward increasingly restrictive reading of the statutory language.<sup>58</sup> Congress, in the Civil Service Reform Act of 1978,<sup>59</sup> attempted to bypass judicial reluctance to invoke the sanctions provision. The new civil service law specifically authorized the Special Counsel of the new Merit Systems Protections Board, which, together with the Office of Personnel Management, supplanted the Civil Service Commission, to undertake investigations of FOIA vio-

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55. See letter from Carl F. Goodman to John C. Sims (Jan. 3, 1977), printed in *Freedom of Information Act: Hearings Before the Subcomm. on Administrative Practice and Procedure of the United States Senate Comm. on the Judiciary*, 95th Cong., First Sess. 889-90 (1977) [hereinafter cited as *1977 Senate Hearings*]; 1980 SENATE REPORT, *supra* note 33, at 107.

56. See *Long v. Internal Revenue Service*, Order No. C7-640V (D.C. Wash. 1981).

57. Telephone interview with H. Alma Hepner, Director of Congressional and Public Relations, Office of Special Counsel, Merit Systems Protection Board (March 6, 1984).

58. In *Emery v. Laise*, 421 F. Supp. 91 (D.D.C. 1976). Decided before the Commission ruling in *Holly*, the court held that withholding cannot be arbitrary and capricious if the agency releases the information following commencement of an FOI action in court. This precedent allows the most flagrant abuses to take place without even a chance of referral to the civil service authority, so long as the agency relents when an injunction becomes inevitable. In *Lovell v. Alderete*, 630 F.2d 428, 431 (5th Cir. 1980). The court narrowed its interpretation of "arbitrary and capricious" behavior in this context to conduct that shows "malice or bad faith".

59. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified at 5 U.S.C. §§ 1201-1209 (1982)).

lations even in the absence of a judicial referral.<sup>60</sup>

While this legislation removes a substantial procedural hurdle to the imposition of sanctions, it has made no noticeable difference in enforcement of the provision. Despite detailed recommendations in the 1980 Senate Report concerning implementation of the new provisions by the Counsel and the Board,<sup>61</sup> and a number of private petitions to the Special Counsel for investigations, the office has yet to issue formal investigative findings on any case under the new statutory arrangement.<sup>62</sup> Under the Reagan Administration even the congressional oversight committees have refrained from placing pressure on the civil service authority to invigorate the provision.<sup>63</sup> The disciplinary sanction may well retain some usefulness as a "threat to use against recusant officers," as some information officials have testified.<sup>64</sup> But this limited coercive power is likely to be ignored if the potential violator is all but certain that the sanction will never be imposed. The longer the period of time without so much as an investigation that might lead to imposition of a sanction, the more this coercive provision becomes irrelevant to enforcement of the Act.<sup>65</sup>

### B. *The Authority of the Justice Department to Refuse Counsel*

A second potential coercive tool was inherent in the administrative structure of the Act. Since all but a handful of agencies lack authority to defend suits under FOIA in court,<sup>66</sup> the Justice Department could

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60. The statute authorizes the Special Counsel to investigate any allegation concerning "arbitrary or capricious withholding of information prohibited under § 552 of this title, except that the Special Counsel shall make no investigation under the subsection of any withholding of foreign intelligence or counterintelligence information the disclosure of which is specifically prohibited by law or by Executive order." 5 U.S.C. § 1206(e)(1)(C) (1982). According to the conference report on the legislation, the authorization to investigate "any allegation" obviates the need for a judicial determination before the Special Counsel can investigate a FOI Act violation: ". . . this provision is not intended to require that an administrative or court decision be rendered concerning withholding of information before the special counsel may investigate allegations of such a prohibited practice. H.R. Rep. No. 1717, 95th Cong., 2d Sess., at 136 (1978).

61. 1980 SENATE REPORT, *supra* note 33, at 105-08.

62. Telephone interview with H. Alma Hepner, *supra* note 57.

63. Telephone interview with Robert Gellman, Counsel to House of Representatives Government Operations Subcommittee on Government Information, Justice, and Agriculture (February 27, 1984). The Public Citizen Litigation Group, however, has filed a suit requesting judicial referral to the Merit System Protection Board in a case in which OSHA officials allegedly falsified the contents of a document released under the Act. *See* Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss, *Simon v. Dep't of Labor*, Civil Action No. 83-3780 (filed Feb. 7, 1984).

64. 1980 SENATE REPORT, *supra* note 33, at 105; telephone interview with Russell Roberts, Chief FOI Officer, Department of Health and Human Services (February 28, 1984).

65. Telephone interview with Robert Gellman, *supra* note 63; telephone interview with Eric Glitzenstein, attorney, Public Citizen Litigation Group (February 27, 1984).

66. *See* 28 U.S.C. § 516 (1976) ("Except as otherwise authorized by law, the conduct of

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utilize its authority as counsel to the government in such suits to deny any legal defense in court to an agency threatened with a pending suit. If the Department refused to deny an agency, and the agency could not legally defend itself, a judgement against the agency in court would be inevitable. While this mechanism was available for the Justice Department to affect compliance with any administrative statute that assigned the Department exclusive authority as counsel, the government-wide application of FOIA made the Department's role particularly important: if a weak case led to an unfavorable precedent, the effects would be felt not only by the agency in which the case arose but by all agencies.<sup>67</sup>

The Department had two principal administrative devices available to implement this sanction: it could place pressure on an agency directly, during negotiations to develop a litigation strategy in response to a suit, or it could provide for clearance of denials before the agency made a final decision on whether to withhold information. Implementation remained contingent on the Department's role as a highly public, politically responsive arm of successive Administrations with different attitudes toward enforcement of the Act. At the same time, the mechanism initially designed to administer the sanction through clearance of final agency denials assumed an increasingly consultative, coordinative role in enforcement before the Reagan Administration dismantled that mechanism altogether.

In 1969, recently installed Justice Department officials, proclaiming dissatisfaction with the number of unnecessary FOIA suits that had accumulated and the loss of several recent FOIA suits in court, established a "Freedom of Information Committee" to screen final denials by agencies of FOIA applications. The Committee was composed of two members of the Department's Civil Division, which was responsible for litigation, and three officials from its Office of Legal Counsel, which helped advise the agencies on legal matters. A memorandum announcing formation of the Committee to general counsels of all departments

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litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General." A limited number of statutes authorize individual agencies to represent themselves in court under certain circumstances. See, e.g., 15 U.S.C. Sect. 77t (1982) (Securities and Exchange Commission); 42 U.S.C. §§ 2000e-4(b) (1976) (Equal Employment Opportunity Commission). For a comprehensive, if dated listing which includes fifteen such statutes, see *Representation of Congress and Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 145-46 (1976) [hereinafter cited as *Court Representation Hearings*].

67. Telephone interview with Daniel Metcalf, Co-Director, Office of Information and Privacy, Dep't of Justice (February 27, 1984); telephone interview with Barbara Babcock, former Assistant Attorney General, Civil Division, Dep't of Justice (Feb. 28, 1984).

and agencies "requested" that they consult the Committee before issuing a final denial of an appealed application "if there is any substantial possibility that such denial might lead to a court decision adversely affecting the government." The FOI Committee would give the proposed denial "a timely and careful review, in terms of litigation risks, governmentwide implications and the policy of the Act, as well as the agency's own interests."<sup>68</sup> This language, and the presence of litigators on the Committee, implied that the Committee's nominally consultative role might give way to a coercive, quasi-appellate role. Certainly the possibility that the Department would refuse to defend a denial lurked behind any strong recommendation that material be disclosed.

The formation of the FOI Committee thus appears to have served several functions. By warning agencies at an early stage that they might not be defended in court for withholding, the Committee clearance process could prevent some weak cases from coming before the Justice Department litigators at all. Enumeration of the considerations the Committee would take into account in evaluating potential denials might provide further warning to the agencies. Finally, the public announcement that the FOI Committee had been established operated as a signal to the public and Congress as well as to the agencies that the Nixon administration was serious about enforcing FOIA. In this way, establishment of the Committee represented an attempt to appeal politically to those who supported enforcement of the Act, and apparently reflected a commitment to enforcement on the part of Administration officials.

The rate of initial contacts between the agencies and the Committee climbed throughout the early 1970's. Justice officials testifying before Congress in 1972 estimated the total number of contacts since formation of the Committee at 400 to 500.<sup>69</sup> Not all of these contacts raised substantial issues, and Committee members and staff disposed of around half of those that did occasion such issues over the telephone.<sup>70</sup> The most problematic issues led to "Committee consultations," estimated in 1972 to be taking place at an accelerating rate of 75 to 100 a year.<sup>71</sup> The vast majority of these consultations were face-to-face meetings between Committee members and agency personnel that lasted from half

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68. *Memorandum to General Counsels of All Federal Departments and Agencies Re Coordination of Certain Administrative Matters Under the Freedom of Information Act* (Dec. 8, 1969), printed in *1972 House Hearings*, *supra* note 12, Part 4, at 1132.

69. *1972 House Hearings*, *supra* note 12, Part 4, at 1179-80.

70. See Saloschin, *The Work of the Freedom of Information Committee of the Department of Justice*, 23 *AD. L. REV.* 147, 149 (1971).

71. *1972 House Hearings*, *supra* note 12, at 1179.

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an hour to two hours and treated all the legal and political aspects of the proposed denial. At the conclusion of the meeting or shortly thereafter, the Committee would give the agency a recommendation, which might take one of several forms. Of the 120 consultations that occurred by 1972, for example, about 40 drew a reaction that the material was "clearly or very probably exempt" from disclosure under the Act. In another 40 instances the Committee's reaction had been uncertain or had pointed to an alternative solution besides simple disclosure or non-disclosure. In 15 of the remaining cases the Committee concluded that certain of the records were exempt and certain were not. The final 25 cases prompted the Committee to conclude that "the records in dispute must be released or that the case for withholding . . . was very weak."<sup>72</sup>

The effect of this advice, and consequently the effectiveness of the Committee in promoting compliance, remains undocumented. Only very rarely did the Civil Division invoke the implicit sanction that underlay the Committee's authority.<sup>73</sup> Coercion instead appears to have taken the more diluted form of an intimation that the Civil Division would consider refusing to defend if suit was brought, or simply the tacit threat of such a refusal. According to FOI Committee Chairman Robert Saloschin, the agencies followed strong Committee recommendations to disclose in the vast majority of cases.<sup>74</sup> A 1972 House oversight report noted an absence of firm evidence about how effective the Committee was in compelling compliance, but praised the Committee's efforts to "encourage greater understanding of the act and to help bring about a more enlightened administration of the act within the Federal bureaucracy."<sup>75</sup> When Attorney General Elliot Richardson announced in July, 1973 that the Department would refuse to defend agency decisions to withhold information unless the agency had consulted with the FOI

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72. *Id.* at 1182.

73. See G. Lardner, *Information Act: Years of Foot-dragging Not Ended*, Washington Post, July 26, 1976, reprinted in *1977 Senate Hearings*, supra note 55, Vol. 2, at 974 ("Justice Department lawyers told officials at Agriculture to make the information public or take the risk of going to court without a lawyer. Agriculture ignored the warning and suit was filed. 'Counsel was withheld,' the government lawyer said, 'and Agriculture had to give in.'"). Jeff Axelrad, the attorney in the Civil Division who handled most of these early cases for the Department, recalls one instance in which Justice attorneys, in handling a case resulting from an instance of withholding in which the agency had not consulted the Committee, decided to refrain from opposing a motion for summary judgment by the petitioner. Telephone interview with Jeffrey Axelrad, former Chief of Information and Privacy Section, Civil Division, Department of Justice (February 28, 1984).

74. Telephone interview with Robert Saloschin, Former Chairman of FOI Committee, (April 28, 1983).

75. STAFF OF HOUSE OF GOV'T OPERATIONS COMM., 92D CONG., 2D SESS., ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT: AN EVALUATION OF GOV'T INFORMATION PROGRAMS UNDER THE ACT, 1967-72, at 69 (1973) [hereinafter cited as 1972 HOUSE REPORT].

Committee prior to a final denial,<sup>76</sup> he appeared to confirm a mildly coercive role for the Committee.

By the middle to late 1970s, the Committee had assumed a less coercive role in government-wide efforts to promote compliance. The increasing number of applications and appeals that followed passage of the 1974 amendments, the diversion of Committee officials to such tasks as issuing government-wide interpretations of the amendments,<sup>77</sup> the increasing institutionalization of expertise in individual agencies administering the Act,<sup>78</sup> and the relative absence of pressure from the highest levels of the Ford Administration to stake out a public position in favor of strict implementation<sup>79</sup> resulted in a policy of returning as much coercive and consultive activity as practicable to the agencies themselves.<sup>80</sup> In 1976 Attorney General Edward Levi removed the requirement that agencies consult the FOI Committee before issuing a denial.<sup>81</sup> Committee review of final agency denials also became more cursory. About this time, the Committee began to divide its consultations into two types: "summary" consultations usually handled by the Committee chairman over the telephone, and "in-depth" consultations that retained the face-to-face format. The number of in-depth consultations, formerly as high as 100 annually, shrank to 21 in 1976 and 15 in 1979. Moreover, a third to a half of these were "preconsultations" that occurred in the early stages of processing, and served more as a way to aid the agency in formulating an initial opinion in a case than as any sort of appellate control.<sup>82</sup> These changes in the FOI Committee virtually guaranteed that review would assume a less coercive tenor, and perhaps even that it would play a less significant role in inducing compliance.

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76. See 38 Fed. Reg. 19123 (July 18, 1973). See also 1980 SENATE REPORT, *supra* note 33, at 145 (quoting from Committee for Public Justice, *The Justice Department and Freedom of Information: Is the Bell Directive Enough?* JUSTICE DEPARTMENT WATCH, Summer 1977, at 2). The new policy required only consultation with the Committee, not approval of the decision to withhold information.

77. The Committee and its staff became preoccupied increasingly with such advisory functions as preparation of guides to interpretation of the Act in light of new developments and "special problem areas." More time was also necessary to apprise Committee members of the growing body of case law under the Act. See annual Reports of the Dep't of Justice on Implementation of the Freedom of Information Act, 1977 at 17-18, 1978 at 24 [hereinafter cited as Justice Dep't Annual Reports].

78. Justice Dep't Annual Reports, *supra* note 77, 1977 at 18, 1978 at 24.

79. Telephone interview with Barbara Babcock, *supra* note 67; telephone interview with Jeffrey Axelrad, *supra* note 73.

80. Interview with Robert Saloschin, *supra* note 74.

81. See 41 Fed. Reg. 10222 (March 10, 1976) (codified at 28 C.F.R. § 50.9 (1977)). To justify this action, Levi contended that procedural deadlines imposed by the 1974 amendments, along with a heavy influx of requests for information by 1975, had made the former policy "an impracticable bar" to proper administration of the Act. 41 Fed. Reg. at 10222.

82. See Justice Dep't Annual Reports, *supra* note 77, 1977 at 16-17, 1978 at 24, 1979 at 109-110.

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Nonetheless, a memorandum from Attorney General Griffin Bell in May, 1977 announced to the heads of all Federal departments and agencies that “the Justice Department will defend Freedom of Information Act suits only when disclosure is demonstrably harmful, even if there is some arguable legal basis for the withholding.”<sup>83</sup> While the memorandum incorporated a bias in favor of disclosure, the new “demonstrable harm” standard differed only in specificity from the “policy of the act” which the 1969 memorandum had announced that the FOI Committee would consider in formulating its recommendation concerning disclosure.<sup>84</sup> Throughout the Carter Administration, the FOI Committee retained the same chairman it had always had, Robert Saloschin, and essentially the same policies. Even if the threat of coercion remained present in the Committee clearance process, the shortage of Committee staff assigned to review final denials in detail assured that the threat would have less potential force.

The Civil Division, of course, could still administer the sanction of refusing counsel directly as a part of its function of developing litigation strategy. Even here, however, the seriousness with which the Department used its authority remains open to question. The Justice Department in 1979 issued a detailed set of procedures to govern consideration of refusals to defend suits under the Act,<sup>85</sup> but materials distributed by the Department at the same time throughout the government emphasized that “such action will only be taken in rare situations, and after consultation between [Justice officials in charge of information policy] and the litigators.”<sup>86</sup> Continuing struggles within the Department between those in favor of the pro-disclosure policy of the 1977 memorandum and those advocating a more permissive approach to accepting cases under the Act further hampered effective implementation of the Department’s authority.<sup>87</sup> In the end, the announcement of the “demonstrable harm” standard probably exerted a greater effect as a coordinative policy guide to officials charged with ensuring compliance in

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83. Office of the Attorney Gen., Memorandum on FOIA, (May 5, 1977), *reprinted in 1977 Senate Hearings*, *supra* note 55, at 217-18 [hereinafter cited as 1977 *Memorandum*].

84. The new criteria were: “(a) Whether the agency’s denial seems to have a substantial legal basis, (b) Whether defense of the agency’s denial involves an acceptable risk of adverse impact on other agencies, (c) Whether there is a sufficient prospect of actual harm to legitimate public or private interests if access to the requested records were to be granted to justify the defense of the suit, and (d) Whether there is sufficient information about the controversy to support a reasonable judgment that the agency’s denial merits defense under the three preceding criteria.” This amounted to little more than a more specific rearticulation of the criteria listed *supra* note 68 and accompanying text.

85. *See* Justice Dep’t Annual Report, *supra* note 77, 1978 at 24.

86. 1 FOIA Update 7 (Autumn 1979).

87. Telephone interview with Barbara Babcock, *supra* note 67; telephone interview with Jeffery Axelrad, *supra* note 73.

the individual agencies than as a direct influence on the activities of the FOI Committee or Justice Department litigators.<sup>88</sup>

More important to the role of the Committee under the Carter Administration was the formation of a new Office of Information Law and Policy (OILP) in the Justice Department in October, 1978. The chairman of the Committee became director of OILP, and the Committee itself was reincorporated as an arm of the office with increased responsibility for consultation with the FOI appeals Office that processed the Department's own FOIA applications and appeals.<sup>89</sup> For the remainder of the Carter Administration, OILP staff took on most of the responsibility for initial advisory contacts between agencies and the Justice Department. OILP also stepped up the many coordinative and consultative activities that the FOI Committee and its staff lacked the resources to undertake effectively. Yet the activities of the Committee itself remained confined mostly to detailed consultations on a range of issues, including a vestigial quasi-appellate function.<sup>90</sup>

Only in initiating regular review of pending FOIA suits that the Department had previously accepted did the Carter Administration clearly increase use of the Department's authority to refuse counsel. Throughout the early 1970's, the Justice Department had never reconsidered a decision to defend an agency in a suit brought under FOIA. The memorandum issued in May, 1977, however, announced a review of all 600 pending cases to determine how many might merit a more compromising litigative stance or dismissal.<sup>91</sup> Even here, resistance among Department attorneys reluctant to change positions or give up on the cases in the backlog greatly limited the success of the pro-disclosure policy.<sup>92</sup> The review, which extended to approximately 475 of the pending cases, led to dismissal in four cases and efforts toward settlement or a partial release of the withheld information in an unspecified number of others.<sup>93</sup> A policy of regular FOI Committee consultations on problems in pending suits followed up the review. Approximately 20 such consultations took place in 1979, and 30 in the first year of the Reagan

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88. COMPTROLLER GEN. OF THE UNITED STATES, TIMELINESS AND COMPLETENESS OF F.B.I. AND PRIVACY ACTS HAVE IMPROVED, GEN. ACCOUNTING OFFICE REP. NO. GGD-78-51, at 46 (1978) [hereinafter cited as AGO REPORT NO. GGD-78-51]; telephone interview with Barbara Babcock, *supra* note 67.

89. Justice Department Annual Report, *supra* note 77, 1978 at Appendix B.

90. *See id.*

91. *See 1977 Memorandum, supra* note 83.

92. Telephone interview with Barbara Babcock, *supra* note 67; telephone interview with Jeffrey Axelrad, *supra* note 73.

93. *See* Letter from Deputy Attorney General William Schaffer to Senator James Abourezk (Nov. 17, 1977), reprinted in *1977 Senate Hearings, supra* note 55, at 933-35.

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### Administration.<sup>94</sup>

The announcement of the “demonstrable harm” standard and the case review, like the formation of the FOI Committee during the Nixon Administration, both reflected a position favoring the pro-disclosure policy of the Act and represented attempts to capitalize on perceived political sentiment in favor of disclosure. Ultimately, however, Justice Department enforcement activities under the Carter Administration pointed to a less coercive, more consultative role for the Department in administration of FOIA. The culmination of these trends came with the Reagan Administration. In a memorandum to the heads of all departments and agencies in May 1981, Attorney General William French Smith announced a new policy which greatly lowered the standards the Department would apply in deciding whether to defend FOIA suits.<sup>95</sup> By 1982, Departmental reorganizations under Smith had disbanded the FOI Committee altogether, and thereby severed the Office of Information and Privacy (OIP) (for a time the Office of Legal Counsel), where consultative activities to enforce the Act remained, from Civil Division officials in charge of litigation decisions.<sup>96</sup> The cumulative effect of these actions was a signal to agencies that the Department had altogether disavowed use of its power of counsel as a coercive tool.<sup>97</sup> Yet despite these actions, the Reagan Justice Department has maintained and even enhanced such functions as providing telephone consultations for agencies, issuing general interpretative statements, and lending support for training activities.<sup>98</sup>

The growing commitment to a purely consultative as opposed to a coercive approach has stemmed in part from the genuine belief of officials long involved in Justice Department activities under the Act that enforcement activities could be handled more effectively at the individ-

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94. See Annual Reports of the Justice Department, 1979, 1981, *supra* note 77.

95. In the memorandum Smith announced: “The Department’s current policy is to defend all suits challenging an agency’s decision to deny a request submitted under the FOIA unless it is determined that: (a) The agency’s denial lacks a substantial legal basis; or (b) Defense of the agency’s denial presents an unwarranted risk of adverse impact on other agencies ability to protect important records.” Office of the Attorney General, Memorandum on FOIA (May 4, 1981) (on file with the *Yale Law and Policy Review*). This new policy reversed the presumption against defense of FOIA suits which had characterized earlier Justice Department policy.

96. Informal contacts between the litigators and OIP, however, continue to take place. See Justice Dep’t Annual Report, *supra* note 77, 1982 at 204 (75 litigation consultations by OIP in 1982 “at the request of, and in coordination with, the Department of Justice’s litigating divisions.”).

97. See *infra* note 130 and accompanying text.

98. See *infra* notes 162, 167, 189, 212, and accompanying text. In at least one instance the Department refused to defend the legal position taken by an agency. Telephone interview with Daniel Metcalf, *supra* note 67.

ual agency level.<sup>99</sup> In addition, the reluctance of Justice Department officials to use their authority as counsel as a sanction can be traced to intra-departmental loyalties. Beneath the cautious attitude of Justice Department officials lay a concern that regular refusals to defend agencies would induce Congress to grant agencies the authority to defend themselves in court.<sup>100</sup> Justice officials noted with concern that agencies constantly lobbied to obtain authority for their own general counsel to represent them.<sup>101</sup> For the Justice Department, the loss of this exclusive authority would mean the loss of any coercive power, a fragmentation of positions among counsel for the government, and a less important function for the Department itself.<sup>102</sup>

Moreover, aside from political motivations guiding Departmental policies, the only driving force behind formation of the Committee and use of its veiled sanction was the standard of legal representation held by Justice Department officials: their desire to do legal work of high quality, and their reluctance to take on cases they were certain to lose.<sup>103</sup> This motivation thus depended to a great extent on the subjective standards of those managing the Department at any particular time, and not on the policies of particular administrations.

As might be expected, political developments such as the changing attitudes toward the Act under different Administrations played an important role in the evolution of Justice Department enforcement activities, and to a less dramatic extent in the development of enforcement activities throughout the agencies under FOIA. The three major statements by Attorneys General on the role of the Committee and the standards for denials, for example, constituted initial public statements of policy toward the Act by the three Administrations elected since its enactment, and were certain to influence activities throughout the Execu-

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99. Telephone interview with Robert Saloschin, *supra* note 74; telephone interview with Daniel Metcalf, *supra* note 67.

100. Grants of this authority to agencies became increasingly common in the 1970s. *See, e.g., Federal Water Pollution Control Act, Sect. 2, Pub. L. No. 92-500, 86 Stat. 889 (1972) (codified at 33 U.S.C. § 1366 (1976)) (authorizing Environmental Protection Agency to represent self in court under Act if Attorney General fails to notify Administrator "within a reasonable time" that Attorney General will represent agency); Federal Trade Commission Act, Sect. 240(a), Pub. L. No. 93-637, 88 Stat. 2199 (1975) (codified at 15 U.S.C. § 56 (1982)) (authorizing Federal Trade Commission lawyers to control litigation in specified types of actions, and to undertake other types of litigation if Attorney General fails to respond within 45 days of request for counsel). *See generally Court Representation Hearings, supra* note 66, at 145-46 (listing similar statutes up to 1976).*

101. *See G. Lardner, supra* note 71; *Court Representation Hearings, supra* note 66, at 146-47.

102. Telephone interview with Robert Saloschin, *supra* note 74; telephone interview with Barbara Babcock, *supra* note 67.

103. *Id.* High standards could secure the self-interest of individual Justice officials by enhancing their reputation, but this motivation would depend on the individual, and was not reinforced by any clear institutional motivation on the part of the Department.

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tive Branch. The 1969 and 1977 statements, with their strong hints that the Department's authority might be used as a sanction, reflected both an ideological bias in favor of the principles embodied in the Act and an attempt to appeal politically to those who supported those principles. The 1981 statement, along with subsequent Justice Department dismantling of the Committee, reflected and appealed to a bias against effectuating the Act and its principles. Despite changing administration politics, however, a cadre of professional civil service lawyers have provided a degree of continuity in the history of this coercive authority: they resisted the pro-disclosure policies of the Carter Administration,<sup>104</sup> and their presence guarantees that even under the Reagan Administration the use of this coercive authority will not end completely.<sup>105</sup>

The two mechanisms the Department used to implement its coercive authority also displayed substantial advantages over the disciplinary sanction as enforcement tools. The sanction the Committee or the Civil Division might threaten, i.e., the withdrawal of counsel in a single instance, was probably less intimidating to agency officials than the personal censure that the civil service authority would likely use if it applied its disciplinary sanction. The flexibility available to Justice Department lawyers in either process enabled them to threaten explicitly, or to combine threats with persuasion or advice, and on appropriate occasions to substitute consultation completely for coercion. The disciplinary provision, with its requirement of formal findings and investigation, and even, for a time, of a formal judicial initiative, allowed far less flexibility. Finally, the coercive power of the Justice Department, as exercised by the Civil Division or the Committee, could be applied in the context of an ongoing relationship between the Department, as legal counsel and advisor to the Executive branch, and the agencies themselves. At least in the area of information policy, the civil service authority lacked this sort of regular relationship in which to incorporate its sanctions. The contrast between the flexibility of the Justice Department's authority to refuse to defend an agency and the rigidity of the disciplinary sanction assigned to the civil service authority helps to explain why the former has been exercised more often, and doubtless with greater effect, than the latter.

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104. Telephone interview with Barbara Babcock, *supra* note 67; telephone interview with Jeffrey Axelrad, *supra* note 73.

105. *See supra* note 98. As of April, 1984, the four senior officials of OIP were career civil servants appointed during the Carter or Ford Administrations. Telephone interview with Richard Huff, Co-Director, Office of Information and Privacy, Department of Justice, (April 9, 1984).

### C. *Internal Agency Appeals*

Mechanisms within the agencies themselves might also help compel or otherwise promote compliance with the Act. As the number of information requests increased in the 1970's,<sup>106</sup> and the coercive role of the Justice Department diminished, appellate processes within the agencies took on a growing proportion of the responsibility for both coercive and consultative enforcement activities. Justice Department officials encouraged this assumption of authority,<sup>107</sup> as did the increasing numbers of agency FOI officials and Offices with a personal interest in assuming appellate responsibility.<sup>108</sup>

The intra-agency appellate processes differed from FOI Committee review in several respects. Because the agency decision-makers in the appeals process were typically the superiors of those who issued the initial decision, they wielded the power not only to reverse that decision but to affect agency employees' careers in a way the Justice Department could not. Intra-agency appeals offices were thus assured of greater sanctioning leverage than the Justice Department. An internal appellate proceeding allowed reconsideration of a decision by officials with more concentrated experience in using the information under consideration for disclosure, and who were more likely than the FOI Committee to be involved in the day-to-day administration of the Act within the agency. Since the burden to appeal an initial denial fell on the private individual who made the initial information request, the dynamics of the appeals process resembled the judicial private right of action more than did the FOI Committee mechanism. Although placing the procedural hurdle of an appeal before an applicant usually entailed lower costs for the private citizen than a judicial trial, this administrative procedure, which normally entailed drafting a letter in support of releasing the information, served to "weed out frivolous requests"<sup>109</sup> in a way the FOI Committee could not.

But appeals could also hinder the effective implementation of the Act. An intra-agency procedure might lack the independence of a review by an external body such as the FOI Committee or a court. If agency offi-

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106. The GAO, projecting from data reported by selected agencies, estimated that total information requests under the Act rose from 154,000 in 1975 to 156,000 in 1976 and 177,000 in 1977. See COMPTROLLER GEN. OF THE UNITED STATES, REPORT NO. LCD-80-8, AN INFORMED PUBLIC ASSURES THAT FEDERAL AGENCIES WILL BETTER COMPLY WITH FREEDOM OF INFORMATION/PRIVACY LAWS, at 22 (1979) [hereinafter cited as GAO REPORT LCD-80-8].

107. Telephone interview with Robert Saloschin, *supra* note 74.

108. See *infra* notes 202-05 and accompanying text.

109. D. Giannella, *Agency Procedures Implementing the Freedom of Information Act: A Proposal for Uniform Regulations*, 23 AD. L. REV. 217, 254 (1971).

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cials were reluctant to release information, an appeal might help to delay the final decision on whether to withhold.<sup>110</sup> The appellate process also gave the agency an opportunity to offer additional justifications, such as statutory provisions an initial decision failed to cite, to rationalize the original denial.<sup>111</sup>

Statistics collected by the Library of Congress show substantial appellate activity during the first years of the Act. Between 1967 and 1971, of 1822 initial refusals to disclose any information and 373 partial refusals, FOIA applicants appealed 296 or about 13.5 percent.<sup>112</sup> The number of appeals per agency remained low, and some agencies, such as the Federal Trade Commission and the Atomic Energy Commission, reported no appeals at all.<sup>113</sup> Agencies reaffirmed denials in 66.2 percent of these cases, granting 12.5 percent of appeals in full and 14.2 percent in part. What the high level of affirmed denials indicates is not entirely clear. A portion of these cases may represent instances in which the agency simply upheld a valid initial decision. Congressional hearings, however, uncovered numerous situations which might indicate that appeals served only to delay or rationalize questionable initial decisions.<sup>114</sup>

The 1974 amendments to FOIA both encouraged intra-agency appellate processes and attempted to curb their abuse. Time limits for agency processing of requests under the amendments mandated an initial determination within 10 working days of receipt of an application.<sup>115</sup> Since processing of initial determinations had averaged 33 days before passage of the amendments,<sup>116</sup> this deadline placed considerable pressure on the agencies. If the applicant submitted an appeal of the initial denial, the amendments allowed an agency an additional 20 working days for processing the appeal. The amendments thus made an appellate process inevitable "not only because it permit[ed] the correction of errors and avoidance of unnecessary litigation but also because, under the 1974 amendment, it ma[d]e available an additional 20 days for agency con-

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110. The two-step appellate procedures in some agencies in the early years of the Act were particularly convenient devices for implementing a strategy of delay. *Id.*

111. When an agency neglected to notify requesters initially denied information of the right to appeal, it might completely avoid reconsideration of the initial decision. 1972 HOUSE REPORT, *supra* note 75, at 10.

112. See Congressional Research Service, *Special Analysis of Operations of the Freedom of Information Act*, reprinted at 118 CONG. REC. 9949-9953 (1972) [hereinafter cited as *Special Analysis*].

113. Discrepancies between agencies could have resulted from any number of factors: from the different substance of information requests between agencies to differences in organizational structure to differences in attitude among agency staff. *Id.* at 9951.

114. See 1972 HOUSE REPORT, *supra* note 75, at 20-42.

115. 5 U.S.C. § 552(a)(6) (1976).

116. *Special Analysis*, *supra* note 112.

sideration of the request."<sup>117</sup>

These procedural changes, along with a heavy influx of applications in the middle to late 1970s, produced a higher level of appellate activity within the agencies. The Department of Health, Education and Welfare, which processed only 17 appeals between 1967 and 1971, processed 127 in 1977; the Department of Justice, which considered 14 appeals between 1967 and 1971, heard 1622 in 1977.<sup>118</sup> Government-wide, the total number of appeals climbed to 3,614 in 1975 and 5,190 in 1977.<sup>119</sup>

By the mid-1970's the appeals process in most agencies had become institutionalized in a separate office, with increasing numbers of staff devoted to their processing.<sup>120</sup> Since no systematic study of the many appellate processes has been done, evidence of how they operated is necessarily anecdotal rather than fully descriptive. Perhaps the most extensive, and most thoroughly documented, evolved at the Department of Justice.<sup>121</sup> Throughout 1976 and 1977, its appellate office included 25 staff members, 15 of them attorneys. Although a considerable backlog led to delays in processing appeals, the office exercised somewhat more independence than had been the rule in the early days of the Act. In statistics for 1977, the office reported it had denied 44 percent of appeals and granted 8 percent in full and 17 percent in part.<sup>122</sup> Seventy-two percent of the denials reversed or partly reversed on appeal were not formal reversals, but "modifications of initial actions arrived at in the course of the appeals process, by agreement between the component and the appeals office."<sup>123</sup> These decisions reflected and emphasized a flexible, consultative aspect of the appeals process that was probably typical among the agencies, and resembled the flexibility of the FOI Committee itself. Even as the appeals process threatened to apply compulsion, it allowed for negotiation and persuasion that could instead simply change the mind of the official making the initial decision.<sup>124</sup>

Government-wide statistics for the middle 1970s demonstrated a

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117. *Department of Justice, Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* 6 (1975).

118. *See Annual Reports Filed Under Freedom of Information Act Show Public Interest Up, and So Are Costs*, 4 ACCESS REPORTS 10 (May 2, 1978).

119. GAO REPORT NO. LCD-80-8, *supra* note 106, at 22.

120. *See, e.g.*, Testimony of Quinlan J. Shea, Jr., Director, Office of Privacy and Information Appeals, Department of Justice, *1977 Senate Hearings*, *supra* note 55, at 134.

121. *See* GAO REPORT NO. GGD-78-51, *supra* note 88.

122. *See* Justice Dep't Annual Report, *supra* note 77. The remaining 31 percent of cases included those concerned with failure to abide by statutory time limits or fee waivers, consolidated appeals, those where no records were found, those withdrawn by the requester, and other similar cases.

123. *Id.*

124. For accounts of appellate processes in other agencies, see R. Roberts, *The Faithful Execution of the FOI Act: One Executive Branch Experience*, 39 PUB. AD. REV. 318 (1979) (describ-

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slight rise in the use of reversal on appeal as an explicit check on initial decisions to withhold information. In 1976, agencies denied 46 percent of appeals in full, granted 42 percent in part and 12 percent in full. In 1977, they denied 53.5 percent in full, granted 42 percent in part and 12.5 percent in full.<sup>125</sup> Compilations for the late 1970's do not exist. The change of only 15 to 20 percentage points since the early 1970's in the proportion of denials may reflect continued use of the appeals process to subvert legitimate requests for information. But the statutory time limits on processing of appeals and initial requests had largely eliminated the worst abuses of the appellate process in the early 1970's.<sup>126</sup> The high proportion of appeals denied may also reflect the success of the full range of enforcement activities in instilling proper attitudes and awareness of the Act at the lower levels of the agencies. The appeals office at the Department of Justice sought, in the words of its director, "to get to the point where every appeal action is an affirmance of the initial action."<sup>127</sup> In the Department of Justice, efforts to further this objective included distribution of prior opinions of the appeals office throughout the Department as advisory opinions, and other activities described later in this Note. Any resulting liberalization of disclosure policy at the lower levels of an agency was bound to produce a higher level of affirmances on appeal.

Nonetheless, suspicions of abuse in the appeals process persisted. The 1980 Senate report criticized the frequent failure of agencies to give reasons for denials of applications before appeal,<sup>128</sup> a policy that effectively required applicants to apply twice in order to learn the basis for a denial. The danger also persisted that appeals would serve to rationalize initial decisions rather than to reconsider them.<sup>129</sup> Following signals sent forth by the Justice Department under the Reagan Administration in opposition to strict enforcement of the Act, the agencies appear to have resorted increasingly to such abuses.<sup>130</sup>

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ing procedures at Dept. of Health, Education and Welfare); *At Commerce Department, Decentralization is Key to FOIA Work*, 2 FOIA Update 7 (June 1981).

125. GAO REPORT LCD-80-8, *supra* note 106, at 22.

126. The 1980 Senate Report noted that "the majority of agencies are complying or making a reasonable effort to comply with the administrative response times enacted in 1974." 1980 SENATE REPORT, *supra* note 33, at 64.

127. 1977 Senate Hearings, *supra* note 55, at 136.

128. 1980 SENATE REPORT, *supra* note 33, at 45-46.

129. The Report evidenced concern for this problem in an emphasis on the need to separate employees considering initial denials from those hearing appeals. *Id.* at 62.

130. See Gelbspan, *Reagan Changes in Information Act Under Scrutiny*, Boston Globe, Jan. 24, 1984, at 1, col. 3 (detailing abuses of process of appeals and initial decisionmaking process). Public interest attorneys working with the Act have noticed an increase in the intransigence of agencies with respect to withholding information under the Reagan Administration. Telephone interview with Eric Glitzenstein, *supra* note 65; telephone interview with Elaine Eng-

Long before the Reagan Administration encouraged more lenient attitudes toward enforcement, however, the appeals offices scattered throughout the Executive agencies had assumed primary responsibility for public coercive activities that supplemented and substituted for the private coercive mechanism of the courts. In doing so, these offices appear to have implemented this coercive tool in a restrained, subtle manner that often resembled that of the FOI Committee. Compulsion was a last resort, flexibly applied, seldom explicitly invoked, and often combined with simultaneous coordinative efforts. Like the FOI Committee, the agency appeals processes had available the relatively non-threatening, impersonal sanction of a simple reversal. As the internal office responsible for giving regular advice on FOIA matters also typically handled appeals, the appeals processes were even more integrated into the day-to-day process of administering the Act than was the FOI Committee. Despite the narrow perspective of these intra-agency processes, and their continued potential for misuse, they have most likely played a more important role in inducing compliance with the Act than any other public activity.<sup>131</sup>

#### D. *Oversight*

Review of FOIA implementation throughout the Executive Branch is yet another instance of a noncoercive public enforcement mechanism not strictly mandated by the terms of the Act. Collection of general data on administration of the Act, development of broad recommendations for improved processes, and answering of complaints by private citizens about implementation characterize this aspect of public enforcement. In the normal scheme of Federal administrative statutes an agency charged with oversight often plays this role. The Privacy Act, for example, requires the President to submit a consolidated report of activities by all agencies under the Act for each year.<sup>132</sup> The Office of Management and Budget has been assigned this task, as well as responsibility for providing "continuing assistance to and oversight of the implementation of the provisions" of the Privacy Act by the agencies.<sup>133</sup>

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lish, Director, FOI Service Center, Reporters Committee for Freedom of the Press (February 29, 1984); telephone interview with Mark Lynch, Center for National Security Studies (March 2, 1984).

131. See GAO REPORT *GGD-78-51*, at 45 ("The appeals office has the greatest impact on how [Justice] Department components use legal exemptions."); telephone interview with Russell Roberts, *supra* note 64.

132. See 5 U.S.C. § 552A (p) (1982).

133. Privacy Act of 1974, § 6(2), Pub. L. No. 93-579, 88 Stat. 1909, (codified at 5 U.S.C. § 552A note (1982)). See also STAFF OF HOUSE COMM. ON GOVERNMENT OPERATIONS, 98TH CONG., 1ST SESS., WHO CARES ABOUT PRIVACY? OVERSIGHT OF THE PRIVACY ACT OF 1974

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Under FOIA, however, Congress and its associated research organizations, the General Accounting Office (GAO) and the Congressional Research Service (CRS), have for the most part assumed these roles themselves without express authorization. Seldom has the Justice Department supplemented their efforts, and no other agency has come forth to do so.

During the first four years of the Act general review of agency implementation was at best sparse, and confined almost entirely to informal activities by congressional committee staff. In 1971, after the appointment of Rep. William Moorhead (D-Calif.) as Chairman of the Subcommittee on Foreign Operations and Government Information, and in the face of mounting criticism by public interest representatives,<sup>134</sup> the Subcommittee formulated a plan for comprehensive oversight of implementation of the Act by more than 100 agencies.<sup>135</sup> The Subcommittee staff began preparation for a series of general oversight hearings by distributing a detailed questionnaire to all agencies administering FOIA.<sup>136</sup> The oversight hearings that followed lasted fourteen days and included testimony by some fifty witnesses with a variety of perspectives on the administration of the Act.<sup>137</sup> These hearings were only part of a more general oversight effort that spanned 41 days of hearings, included 142 witnesses during 12 months of 1971 and 1972, and examined FOIA, national security classifications, and congressional rights to information from the Executive.<sup>138</sup> A report published on the basis of these hearings included a series of recommendations to agencies directly responsible for administering the Act as well as legislative recommendations that would lead eventually to passage of the 1974 amendments.<sup>139</sup>

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BY THE OFFICE OF MANAGEMENT AND BUDGET AND BY THE CONGRESS, H. REP. NO. 455 (1983) (criticizing Office of Management and Budget for inadequate oversight efforts).

134. See, e.g., Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. C.R.-C.L. L. REV. 1 (1970); Katz, *Games Bureaucrats Play: Hide and Seek Under the FOIA*, 48 TEX. L. REV. 1261 (1970).

135. See *Congressional Research Service, Legislative Oversight and Program Evaluation, Prepared for the Subcomm. on Oversight Procedure of the Senate Comm. on Gov'tal Affairs*, 94th Cong., 2d Sess. 193 (Comm. Print 1976) [hereinafter cited as *Legislative Oversight*].

136. The questionnaire sought information on such matters as numbers of denials, appeals, and court cases, as well as types of requesters and security classification arrangements. The staff enlisted the aid of the Congressional Research Service to tabulate responses to the questionnaire. See *Special Analysis*, *supra* note 112.

137. See *Legislative Oversight*, *supra* note 135, at 196.

138. *Id.*

139. Recommendations to Federal departments and agencies called on them to improve their record-keeping systems for information under the Act; to provide greater "policy direction" to field offices implementing the Act; to require that letters denying access to information state the reasons for the refusal; to "assure maximum participation of the consultation with public information personnel in administrative actions" under the Act; to establish fees for processing that were uniform and "the lowest reasonable," and could be waived for hardship cases or requests in the public interest; to establish seminars and other training activities

In 1977, the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, in the first general oversight hearings since passage of the 1974 amendments, initiated the second comprehensive review of substantive and procedural aspects of FOIA implementation. Four days of hearings with testimony from 28 witnesses and additional submissions by numerous others produced a final hearing record of over 1000 pages.<sup>140</sup> In 1980 the Subcommittee staff, drawing primarily on these hearings, produced a 175-page report that made detailed recommendations to the agencies as well as to Congress on how to improve many substantive and administrative features of FOIA.<sup>141</sup> The Senate Subcommittee on Intergovernmental Relations continued congressional oversight efforts with similarly extensive hearings in 1980.<sup>142</sup> Although the Subcommittee chairman relinquished his position as a result of the change in Senate leadership in 1981, he issued a personal report which made numerous administrative recommendations on the basis of the hearings.<sup>143</sup> Although the Reagan administration embraced few of these recommendations,<sup>144</sup> the House Subcommittee on Government Information and Individual Rights continued general oversight of FOIA implementation with hearings in July,

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for employees affected by the Act; and to release a "positive statement" from the agency head "affirming his personal commitment to the principles embodied in the FOI Act." 1972 HOUSE REPORT, *supra* note 14, at 82.

140. In these hearings the Subcommittee specifically sought to examine compliance with the 1974 amendments and the Attorney General's 1977 policy statement, to focus in detail on problems in agencies concerned with the law enforcement and national security exemptions addressed in the 1974 amendments, and to develop legislative and administrative recommendations to improve future compliance with the Act. *See* 1980 SENATE REPORT, *supra* note 33, at 1-2.

141. *See id.*

142. *See Oversight of the Freedom of Information Act: Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Gov'tal Affairs*, 96th Cong., 2d Sess. (1980).

143. *See* Senator James Sasser, *Oversight of the Administration of the Federal Freedom of Information Act: A Personal Report* (Nov. 1981), printed in *Hearings on S. 587, S. 1235, S. 1247, S. 1730, and S. 1751 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, Vol. 2, 97th Cong., 1st Sess. 53 (1981) [hereinafter cited as SASSER REPORT]. Sasser recommended, among other proposals, "mandating the Department of Justice [or another agency] as the principal agency responsible for Executive Branch leadership and government-wide coordination of F.O.I. Act administration"; "creating an advisory panel, composed entirely of private individuals, and an inter-agency council, composed of government agency representatives" to assist in oversight activities; establishing government-wide guidelines on fees, fee waivers, attorneys fees, reporting and accounting systems, and use of professional and clerical employees to search for records; requiring studies of employee training under the Act and the possibility of establishing a hot line system to enhance public understanding of the Act; and improving training in procedures under the Act.

144. The Administration did, however, enhance training opportunities, *see infra* note 212 and accompanying text, establish government-wide guidelines in certain areas, *see infra* note 189 and accompanying text, and at least maintain the Justice Department's consultative function, *see infra* note 162 and accompanying text. Other recommendations have gone unheeded.

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1981.<sup>145</sup> Hearings in the Senate under the Reagan Administration have focused on development of legislative recommendations, both procedural and substantive, to amend FOIA.<sup>146</sup>

The 1974 amendments, in order to obviate the need for the oversight committees themselves to distribute questionnaires, required each agency to submit an annual report on its implementation of the Act. Due on March 1 of each year, and delivered to the President as well as to Congress, the reports were to include numbers of denials and decisions on appeal, the reasons for all such determinations, the officials responsible for denials of requests, copies of agency regulations on FOIA procedures, processing fees and fee waivers, and “such other information as indicates efforts to administer fully [the FOIA provisions.]”<sup>147</sup> The amendments contained no provision for enforcing this reporting requirement, and the 1980 Senate report concluded that “while a majority of agencies comply or make a reasonable effort to comply with the annual reporting requirements, a number of agencies continue to file incomplete reports, late reports, or no reports at all. Congressional oversight and followup on what is reported has also been spotty.”<sup>148</sup>

The failure of Congressional staff to make extensive use of the reports as a basis for oversight activities resulted in large measure from the inadequacy of the data required in the reports. The Senate report and an earlier GAO report agreed that, if the annual reporting requirement “is to be used to aid decisionmaking, more accurate information and other types of information will be needed.”<sup>149</sup> Among deficiencies in the reporting provisions, the Senate report singled out absence of a consistent basis for reporting denials, allowance of imprecise or inaccurate data on costs of compliance, and the absence of any requirement to report total requests or fee waivers granted. For 1975, 1976, and 1977, CRS

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145. See *Freedom of Information Act Oversight: Hearings Before the Subcomm. on Government Information and Individual Rights of the House Comm. on Government Operations*, 97th Cong., 1st Sess. (1981) [hereinafter cited as *1981 House Hearings*]. Other oversight hearings during the late 1970s and early 1980s focused specifically on implementation of the Act in law enforcement agencies. For a general account of these and other oversight activities, see Relyea, *The Rise and Pause of the U.S. Freedom of Information Act*, 10 GOV. PUBS. REV. 19, 22-25 (1983).

146. See *Freedom of Information Act: Hearings Before the Sub-comm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess., Vols. 1 and 2 (1981) [hereinafter cited as *1981 Senate Hearings*]. The absence of House oversight hearings since 1981 results partly from the reluctance of the oversight committee staff to provide encouragement to Reagan Administration officials and others who favor amendments that reduce the pro-disclosure bias of the statutory language. Telephone interview with Robert Gellman, *supra* note 63.

147. 5 U.S.C. § 552(d) (1982).

148. 1980 SENATE REPORT, *supra* note 33, at 117. The Attorney General, in a 1974 memorandum to all agencies, also recommended that they include data on processing costs in their reports. See GAO REPORT LCD-78-120, *supra* note 106, at 43.

149. 1980 SENATE REPORT, *supra* note 33, at 188. Quoting GAO REPORT 78-120, *supra* note 106, at 64.

had prepared a summary of all the reports submitted by agencies, and had included in this survey a listing of problems revealed by the reports, such as illegal grounds for denials and failures to report certain data. After 1977, however, CRS analysts and Subcommittee staff agreed to terminate the summary reports. Because preparation of these summaries demanded considerable work from CRS staff, and by themselves provided little basis for oversight activities, those involved agreed that the analysts' time would be better spent on other types of oversight.<sup>150</sup> While Subcommittee staff lacked the time to tabulate all the individual agency reports themselves, both staff members and CRS analysts continued to review the reports on a selective basis. The reporting requirement, however, remained largely useless.

The immensity of the task of oversight often forced the oversight subcommittees to assign much of the burden of factfinding that underlay the general oversight function to both the CRS and the GAO. As a consequence of preparing various analytical reports these organizations accumulated considerable expertise in administration of the Act. In 1978 and 1979, for example, the GAO prepared seven reports, including lengthy in-depth studies of the administration of the Act by selected agency field offices and by the FBI.<sup>151</sup> After publication of the annual summary reports ended, CRS staff broadened their attention to other types of analyses as part of their continued support for oversight by congressional committees.<sup>152</sup>

Finally, efforts by the Justice Department to discern and remedy systematic deficiencies in administration of FOIA have been sporadic. In 1974 the Department initiated a project to study implementation of the Act in all agencies, but when fears about the independence of this effort

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150. Telephone interview with Robert Gellman, *supra* note 63; telephone interview with Harold Relyea, Congressional Research Service Specialist in American Government (April 28, 1983). *See also* GAO REPORT LCD-78-120, *supra* note 106, at 47 (report data submitted by agencies "inconsistent" and "imprecise"). Since agencies often exaggerated figures for processing requests and appeals, such compilations tended to reveal inflated processing costs that might generate efforts toward lower enforcement or even legislative reform of the Act. *See Annual Reports Filed Under Information Act Show Public Interest Up, and So Are Costs*, 4 ACCESS REPORTS 9 (May 2, 1978); *House Units Inquiries Sour Accuracy in Executive Agency's FOIA Reporting*, 4 ACCESS REPORTS 9 (May 2, 1978); *House Units Inquiries Sour Accuracy in Executive Agency's FOIA Reporting*, 4 ACCESS REPORTS 6 (Oct. 31, 1978).

151. *See* reports listed in GAO REPORT LCD-80-8, *supra* note 106 at 27-30; *see also* CONTROLLER GEN. OF THE UNITED STATES, UPDATE ON PREVIOUS GAO FINDINGS, OBSERVATIONS, AND RECOMMENDATIONS CONCERNING THE FREEDOM OF INFORMATION ACT, GEN. ACCOUNTING OFFICE REPORT NO. LCD-80-103 (1980).

152. *See, e.g.*, H. Relyea and S. Cavanaugh, *Press Notices on Disclosures Made Pursuant to the Federal Freedom of Information Act, 1972-1980: A Compilation*, reprinted in 1981 House Hearing, *supra* note 145, at 914; H. Relyea, *The Administration and Operation of the Freedom of Information Act: A Capsule Overview, 1966-1980*, reprinted in *id.* at 945.

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led to resignation of the lawyer in charge, the project collapsed.<sup>153</sup> Under the Carter and Reagan Administrations, the Department conducted surveys of the agencies to ascertain problems in implementing the Act.<sup>154</sup> These surveys, however, aimed primarily at developing legislative proposals for reform.<sup>155</sup> In the end, studies by congressional support organizations, informal oversight by the subcommittee staffs, and Justice Department activities, may have been a poor substitute for strong ongoing oversight by an administrative body, especially during the periods between comprehensive congressional reviews of FOIA implementation.<sup>156</sup>

A final aspect of oversight encompasses answering of individual complaints about agency implementation. Justice Department staff and the staff of Congressional committees overseeing the Act have shared responsibility for this activity, which has apparently played only a small role in ensuring compliance. The committees performed nearly all such activities during the first decade of the Act. While no measure exists to determine the quantity or quality of casework by oversight committee staff, answering individual complaints about administration of the Act appears to have been a regular task.<sup>157</sup> Complaints addressed by the House Subcommittee staff on an individualized basis usually came from the general public or the press.<sup>158</sup> When complaints about a particular agency or official accumulated, subcommittee staff would contact the relevant agency. It remains unclear how effective such individualized contacts were, since staff acting in this capacity could only advise the

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153. See Relyea, *Opening Government to Public Scrutiny: A Decade of Federal Efforts*, 35 PUB. AD. REV. 3, 4 (1975).

154. Justice Dep't Annual Report, *supra* note 77, 1978 at Appendix D, 1981 at 135-36, 1982 at 205; telephone interview with Daniel Metcalf, *supra* note 67.

155. See Justice Department Reports cited *supra* note 154; telephone interview with Daniel Metcalf, *supra* note 67.

156. See, e.g., 1980 SENATE REPORT, *supra* note 33, at 139 (criticizing lack of leadership by the Justice Department in "FOIA policy and practice"); SASSER REPORT, *supra* note 143, at 64-68 (recommending stronger role by Justice Department in "leadership and government-wide coordination" of FOIA administration). This result left responsibility for general improvements in administration with the individual agencies, whose reviews might or might not improve processing. See COMPTROLLER GEN. OF THE UNITED STATES, FREEDOM OF INFORMATION ACT OPERATIONS AT SIX JUSTICE DEPARTMENT UNITS, GEN. ACCOUNTING OFFICE REPORT NO. CGD-83-64, at 13-15 (1983) (detailing failure of Justice Department to alter resource allocation policies after an internal 1980 review, but small improvements in processing as a result of actions based on a 1982 review).

157. The House Subcommittee on Government Information and Individual Rights in particular may have been a focus for individual complaints, because of its more specialized oversight capacity and the inclusion of "Information" in its title. See H. Relyea, *Faithful Execution of the FOI Act: A Legislative Branch Perspective*, 39 PUB. AD. REV. 328, 329 (1979); telephone interview with Harold Relyea, *supra* note 150.

158. *Freedom of Information Act: Hearings Before the Subcommittee on Foreign Operations and Governmental Information of the House of Representatives Government Operations Committee*, 93d Cong., 1st Sess. 50 (1973) [hereinafter cited as *1973 House Hearings*].

agency, and perhaps threaten to publicize abuses.<sup>159</sup>

Up to 1978, the FOI Committee and its staff, preoccupied mostly with review of agency appeals, played only a small part in supplementing these congressional activities. For the calendar year 1977, the Justice Department reported only about a dozen instances in which it gave "appropriate guidance" to an agency or to an applicant as a result of complaints submitted to the Department.<sup>160</sup> Establishment of the OILP increased the Department's capacity to handle complaints: for 1979 it reported responses to 64 inquiries, including 34 routed through Members of Congress or congressional committees. OILP maintained records of complaints by citizens about each agency, and would telephone or write the agency whenever more than two or three such contacts accumulated. In an unspecified number of these cases, the Department advised an agency "as to what steps the agency should take to bring itself into compliance with [the Act]."<sup>161</sup> While no records on the effectiveness of such contacts were kept, they continued at a slightly lower level into the Reagan Administration. In 1982 the Department reported handling nine citizen complaints and 41 congressional inquiries.<sup>162</sup>

#### E. *Interpretation of the Act*

One of the most prominent functions of public enforcement under the Act was to provide guidance as to how its terms should be interpreted. The two most important aspects of this function were to assure the most accurate interpretation of congressional intent possible for a given situation, and to promote uniformity of interpretation in order to allay confusion concerning ambiguous issues. Judicial precedents could provide guidance as they accumulated. But the case law might require years to establish an authoritative interpretation of a section. Moreover, those implementing the Act, especially at the lower levels of an agency, would

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159. Interview with Robert Gellman, Counsel to House Subcommittee on Gov't Information and Individual Rights (April 8, 1983). Threats to publicize violations might operate as a coercive sanction by holding out the prospect of embarrassment before agency officials. This sanction too could function as a tacit as well as an explicit one, although it was unclear how coercive it might be.

160. Justice Dep't Annual Report, *supra* note 77, 1977 at 21.

161. Justice Dep't Report, *supra* note 77, 1978 at 26; telephone interview with Mary Ann Childs, former OILP staff member (April 28, 1983).

162. Justice Dep't Annual Report, *supra* note 77, 1982, at 206. Interest groups such as the Reporters Committee for Freedom of the Press, the American Civil Liberties Union, and the Freedom of Information Clearinghouse affiliated with the Nader organization might also provide a limited ombudsman service by directing citizens with complaints to the proper place or by attempting to answer complaints themselves. Because these groups lacked the official status of congressional or Justice Department staff, their capacity to correct abuses in administration, through threatening suit or through some form of unfavorable publicity, was more limited than that of the public bodies.

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not have time to follow all the judicial opinions on the issues and synthesize them. The task fell to the public entities themselves to fill the gaps in judicial interpretations, to combine those interpretations into a coherent vision of the law, and to secure implementation of the law by the agency officials who were the potential violators of the Act. To perform this task, the Justice Department and the agencies resorted both to individualized advice, like the consultations and preconsultations of the FOI Committee, and to the general publication of interpretative guides to the Act. In this function, as in others, the enforcement role has remained subject to policy differences as to how the act should be enforced.

The interpretative role devolved upon the Justice Department as a matter of tradition. Shortly after passage of the original APA in 1946, the Department prepared a detailed set of interpretations in the form of a lengthy memorandum to advise agencies on how to administer the Act.<sup>163</sup> Following this precedent, the Department in June, 1967, issued a new memorandum that sought to “assist the agencies in developing a uniform and constructive implementation” of the Act.<sup>164</sup> The forty-seven page memorandum “was a policy document combining political inputs, traditional concepts, and statutory construction.”<sup>165</sup> The source of the memorandum, the thoroughness of its coverage, and the generally high quality of its analysis made it immediately a primary resource for substantive interpretations of the Act.<sup>166</sup> Ironically the Justice Department had only a year before strenuously opposed FOIA as unconstitutional.<sup>167</sup> The compromise that enabled the bill to become law had allowed lawyers from the Department to help prepare the House report on the legislation.<sup>168</sup> This report conflicted with the Senate report and even “ambitiously [undertook] to change the meaning that appears in

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163. See *Attorney General's Memorandum on the Administrative Procedure Act* (1947).

164. See *Attorney General's Memorandum of June 1967 on the Public Information Section of the Administrative Procedure Act: A Memorandum for the Executive Departments and Agencies Concerning Section 3 of the Administrative Procedure Act: A Memorandum for the Executive Departments and Agencies Concerning Section 3 of the Administrative Procedure Act as Revised Effective July 4, 1967*, at iv. [hereinafter cited as *1967 Memorandum*].

165. J. O'REILLY, *FEDERAL INFORMATION DISCLOSURE: PROCEDURES, FORMS AND THE LAW* 3-12 (1977).

166. See 1972 HOUSE REPORT, *supra* note 68, at 64 (“Next to the Act itself, and the legislative history contained in committee reports and debates on the bill, the Attorney General's Memorandum has become the single most important interpretative document upon which executive departments and agencies rely to defend judgments on what information should be made available to the public under the Act.”).

167. See Appendix to Statement of Norbert A. Schlei, Ass't Attorney General, Department of Justice, *1965 Senate Hearings*, *supra* note 23, at 205.

168. See Archibald, *The Freedom of Information Act Revisited*, 39 PUB. AD. REV. 314, 315 (1979).

the Act's words."<sup>169</sup> Drafters of the *Memorandum*, relying consistently on the language of the House Report, interpreted the Act in ways universally understood to favor broad powers not to disclose.<sup>170</sup>

The policymaking element in these interpretations placed them in constant risk of being undermined by other official sources of interpretation in the courts and Congress. Courts, asserting that the Act had assigned interpretative authority to each of the agencies rather than to the Justice Department, declined to accord the *Memorandum* the deference usually given to contemporaneous agency construction of its own statute.<sup>171</sup> On several occasions, in fact, courts rejected interpretations in the *Memorandum* as not in keeping with a proper reading of the Act. For example, under the second exemption, which protects matters "related solely to the internal personnel rules and practices of an agency," the House report sought to include "[o]perating rules, guidelines, and manuals of procedure for Government investigators or examiners."<sup>172</sup> The *Memorandum* simply affirmed this interpretation.<sup>173</sup> It thus neglected to mention the Senate report, which had assumed that manuals and guidelines would be disclosed and had mentioned only routine employer-employee rules as exempt under the provision.<sup>174</sup> Most cases under this exemption have adopted the Senate interpretation rather than the version espoused by the *Memorandum*.<sup>175</sup>

The original FOIA also exempted "trade secrets and commercial or financial information obtained from a person and privileged or confi-

169. Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 763 (1967).

170. See 1972 HOUSE REPORT, *supra* note 68, at 64-65 ("the memorandum . . . in its overall tone and in detailed discussions of the exemptions of subsection (b) of the act leans toward a restrictive interpretation of these key provisions."); O'REILLY, *supra* note 165, at 3-12 ("The client desired the protection of vague textual terms and broadly interpreted powers of nondisclosure, and the client got what it wanted."); Davis, *supra*, note 169, at 761 (the Memorandum "quite legitimately . . . reflects the point of view of the agencies, all of whom opposed the act.").

171. *Consumers Union of the United States, Inc. v. Veterans Admin.*, 301 F. Supp. 796 (S.D.N.Y. 1969), *appeal dismissed* 436 F.2d 1363 (2d Cir. 1971).

172. H.R. REP. NO. 1497, 89th Cong., 1st Sess. 10 (1966).

173. *1967 Memorandum*, *supra* note 164, at 30-31 ("As the examples cited in the House report indicate, the exemption in subsection (e)(2) is designed to permit the withholding of agency records relating to management operations to the extent that the proper performance of necessary agency functions requires such withholding.").

174. S. REP. NO. 813, 89th Cong., 1st Sess. 8 (1965) ("Examples of [internal personnel rules and practices] may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like.") [hereinafter cited as 1965 SENATE REPORT].

175. In *Consumers Union of United States, Inc. v. Veterans Administration* the court based its choice of the interpretation in the Senate report on the ground that that report was the only one considered by both Houses of Congress. In *Stokes v. Hodgson*, 347 F. Supp. 1371, 1374 (N.D. Ga. 1972), *aff'd sub nom.* *Stokes v. Brennan*, 476 F.2d 699, 703 (5th Cir. 1973), another court adopted the approach of the Senate report as more consistent with the plain meaning of the statute.

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dential.”<sup>176</sup> The *Memorandum* interpreted the phrase “obtained from a person” to extend the exemption to material originating either outside or inside the executive bureaucracy.<sup>177</sup> The original bill had only protected information obtained “from the public,”<sup>178</sup> and at least two agencies had urged in 1965 hearings that the exemption be expanded to encompass information originating within the agencies.<sup>179</sup> The Senate Report on the legislation, however, explained the substitution of “person” for “public” as an attempt to constrict the breadth of the exemption: “It was pointed out in statements to the Committee that agencies may obtain information of a highly personal and individual nature. To better convey this idea the substitute language is provided.”<sup>180</sup> Subsequently, courts generally interpreted the exemption to “condone withholding information only when it is obtained from a person outside an agency.”<sup>181</sup>

A second Memorandum offered detailed advice to agencies on how to interpret the 1974 amendments to the Act.<sup>182</sup> While reaction to this document was more positive than to the first memorandum,<sup>183</sup> the 1980 Senate Report found reason to criticize the 1975 Memorandum for misconstruction of the amendments “at various points.”<sup>184</sup> Still, in part be-

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176. 5 U.S.C. § 552(b)(4) (1982).

177. 1967 *Memorandum*, *supra* note 164, at 34.

178. Katz, *supra* note 134, at 1271.

179. See 1965 *Senate Hearings*, *supra* note 23, at 383 (comments on S. 1336 by Dep’t of Agriculture); at 437 (comments on S. 1336 by Dep’t of Labor).

180. 1965 SENATE REPORT, *supra* note 174, at 2.

181. *Benson v. General Services Administration*, 289 F. Supp. 590, 594 (W.D. Wash. 1968), *aff’d*, 415 F.2d 878 (9th Cir. 1969). See also *Grumman Aircraft Eng’ring Corp. v. Renegotiation Bd.*, 425 F.2d 578, 580-81 (D.C. Cir. 1970); *Consumers Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796, 802-03 (S.D.N.Y. 1969).

182. *Dep’t of Justice, Attorney General’s Memorandum on the 1974 Amendments to the Freedom of Information Act* (1975) [hereinafter cited as 1975 *Memorandum*].

183. See 1 K. Davis, *Administrative Law Treatise* § 5:1, at 310 (2d Ed. 1978) (describing 1975 *Memorandum* as “gaining general judicial acceptance” in contrast to 1967 *Memorandum*).

184. 1980 SENATE REPORT, *supra* note 33, at 151. While the text of the amendments allowed *in camera* inspection by a court of “any” records in dispute, the 1975 Memorandum discussed *in camera* review only with respect to the national security exemption. The Senate report took this reading to be an improper limitation on when *in camera* review should take place. *Id.* at 44-45. A “Preliminary Guidance” memorandum printed along with the 1975 Memorandum encouraged agencies to toll the processing deadlines in the amendments in cases that entailed substantial cost, and in which the agencies sought the consent of the requester to those costs before processing. 1975 *Memorandum*, *supra* note 182, at 9-10. The Senate report found no foundation for this policy in the amendments, and contradictory language in a prominent early judicial decision on the Act: “To deny a citizen that access to agency records which Congress has specifically granted, because it would be difficult to find the records, would subvert Congressional intent to say the least.” *Wellford v. Hardin*, 315 F. Supp. 175, 177 (D. Md. 1970), *aff’d* 444 F.2d 21 (4th Cir. 1971). The Preliminary Guidance memorandum further suggested that a ten-day statutory extension for unusual circumstances in processing of requests could be allocated partly to the initial processing period and partly to the appellate processing period. 1975 *Memorandum*, *supra* note 182, at 4. The Senate report cited a previous Senate report prepared to accompany the amendment at their passage to

cause the amendments themselves were largely procedural, disagreement between the *Memorandum* and the Senate report over interpretations of the 1974 amendments was less substantial than the controversy raised by the 1967 Memorandum. The two memoranda remain in use today as aids to interpretation of certain provisions of FOIA. They have become the starting point as well for an entire series of similar government-wide interpretative documents by Justice Department lawyers.<sup>185</sup>

Interpretative guidance of this sort increased following the establishment of OILP in 1978. In 1979, the Department issued three memoranda giving policy guidance: one to aid in the interpretation of the fifth exemption, and two to help agencies to interpret the Supreme Court's decision concerning so-called "reverse FOIA" suits in *Chrysler v. Brown*.<sup>186</sup> *FOIA Update*, a quarterly publication begun by OILP in Autumn, 1979, and distributed in a circulation of approximately 4000 throughout the Federal government, immediately became a vehicle for regular guidance as to how the Act was to be interpreted and administered.<sup>187</sup> A substantial part of this newsletter consisted of interpretative materials prepared by Justice lawyers. OILP also began to publish an annual *Freedom of Information Case List*, enumerating all the court cases under the Act and cross-referencing them by subject matter. Later editions of the *Case List* included a tabulation of books and articles concerning the Act, and a "Short Guide to the Freedom of Information Act" that briefly explained the most important case law for each significant part of the Act.<sup>188</sup> While the reorganization under the Reagan Administration eliminated the OILP, the Justice Department continued to publish both the *Case List* and *FOIA Update*. In addition, government-wide memoranda became the vehicle for several attempts by the Attor-

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demonstrate a legislative intent to invoke the extension "either during initial review of the request or during appellate review." *1980 Senate Report, supra* note 33, at 152.

185. In addition to the 1977 "demonstrable harm" memorandum, which functioned more as a policy statement for agencies to follow of their own accord than as a coercive control, the Justice Department issued three other specific directives in 1977. These documents sought to discourage use of the seventh exemption as a basis for withholding information on illegal government activities, records from an applicant's file affecting a third party but also the applicant, and documents with administrative markings. *1980 Senate Report, supra* note 33, at 44-45.

186. 441 U.S. 281 (1979) (allowing jurisdiction only under APA Sec. 701 to protect private information submitted to the government from FOIA disclosure). See *Policy Guidance: When to Assert the Deliberative Privilege under FOIA Exemption Five* (June 6, 1979); Memorandum from Robert Saloschin to All Federal Departments and Agencies (June 15, 1979); Memorandum from Assistant Attorney General Barbara Babcock to General Counsels of All Federal Departments and Agencies (June, 1979).

187. For figures on circulation, see Justice Dep't Annual Report, *supra* note 77, 1981 at 137.

188. Department of Justice, *Freedom of Information Case List* (Sept. 1982 ed.).

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ney General to enumerate new policies in interpretation of the Act.<sup>189</sup>

The extent of compliance with such interpretative statements was unclear, and may well have varied widely. The 1972 House report found that the regulations of “some agencies” failed to adhere to the 1967 *Memorandum*,<sup>190</sup> and the 1980 Senate report criticized compliance with the three 1977 directives as “less than partial.”<sup>191</sup> In at least one instance, disagreements as to the policies to be followed in administering FOIA under the Reagan Administration might have undermined the authority of Justice Department interpretations just as earlier judicial interpretations had undermined parts of the 1967 *Memorandum*. A policy statement by the Department on waiver of fees for search and copying of documents provoked the House Subcommittee responsible for oversight to send letters to all departments and agencies urging that they disregard the Justice Department’s advice.<sup>192</sup> While no systematic data on implementation of the fee waiver provision exists, anecdotal evidence suggests that many agencies ignored the oversight subcommittee’s interpretation and followed the Justice Department guidelines.<sup>193</sup> Despite the leeway the Act allowed for policy differences, and despite the essentially coordinative, noncoercive character of interpretative efforts by the Justice Department, this tool served as a helpful guide for agency officials in search of guidance as to substantive interpretation of the Act.

Offices responsible for FOIA administration and appeals within agencies might occasionally set forth policies for a single agency in the same way that the Justice Department offered broader interpretative guidance for agencies generally.<sup>194</sup> Moreover, the statutory authority agencies possessed to regulate their own procedures for enforcement made the guidelines they issued more likely to be heeded by lower level officials than general Justice Department interpretations, which might only be enforced through the sanction of withholding counsel. The Justice Department itself, with one of the highest concentrations of FOIA applications, assumed a leading role in this area. As early as 1976, the De-

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189. See Justice Dep’t Annual Report, *supra* note 77, 1981, at 136, (six policy statements issued in 1981, including removal of “demonstrable harm” standard for denials).

190. See 1972 HOUSE REPORT, *supra* note 75, at 9.

191. 1981 SENATE REPORT, *supra* note 33, at 45.

192. See Memorandum from Asst. Attorney General Jonathan Rose to Heads of All Federal Departments and Agencies (Jan. 7, 1983); Letter from Rep. Glenn English to All Agency Heads (Feb. 22, 1983).

193. See sources listed *supra* note 130.

194. Telephone interview with Russell Roberts, *supra* note 68; interview with Robert Gellman, *supra* note 159. This leverage varied greatly according to the position of FOI officers within an agency’s organizational structure. When a Secretary or Deputy Secretary made the initial decision to withhold information, the FOI officials might be left out of decisionmaking under the Act altogether. Telephone interview with Russell Roberts, *supra* note 64; telephone interview with Mark Lynch, *supra* note 134.

partment distributed internal guidelines that set out a standard for appeals weighted heavily in favor of disclosure. In 1979, the Department also distributed guidance to its component units concerning application of the fee waiver provisions of the 1974 amendments. Since the Department favored highly discretionary application of the fee waiver provisions, it chose to distribute copies of letters explaining previous decisions on fee waivers in lieu of a single interpretative memorandum.<sup>195</sup>

More individualized interpretative guidance, in the form of consultations, became increasingly the province of separate agency offices over the course of the 1970's.<sup>196</sup> To encourage development of expertise within the agencies, and to conserve its own resources, the OILP tended to discourage consultations on individual applications that did not raise significant policy issues.<sup>197</sup> OILP also published a list of legal and administrative contracts on information issues for each of the agencies.<sup>198</sup> Summary telephone consultations by Justice Department officials, however, continued unabated into the Reagan Administration at a rate of 950 or more per year.<sup>199</sup>

The policies of individual agencies toward internal individualized contacts appear to have varied considerably. Some, such as the Justice Department, relied heavily on advice from a central information office both before and after initial decisions on denials were made.<sup>200</sup> Other agencies sought to systematize consultations, or avoid the need for them entirely, by requiring clearance of any denial with one of the agency's attorneys, or with one of a handful of authorized agency officials.<sup>201</sup> Although information on the prevalence of such techniques remains largely unavailable, they doubtless play a significant role in assuring compliance in day-to-day administration of the Act.

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195. Memorandum from Quinlan J. Shea, Office of Privacy and Information Appeals, to All Department of Justice Coordinators (March 14, 1979) (with attachments). The central information policy office in the Commerce Department has played a similar guiding role. See 2 FOIA Update 7 (June 1981).

196. See *supra* notes 77-80 and accompanying text.

197. See 1 FOIA Update 7 (Autumn 1979) ("except in matters of usual difficulty or importance agencies should wait to consult until they have tentatively determined to deny an administrative appeal"; and consultations by telephone on such appeals should be reserved for "uncertain, important, or novel questions").

198. Memorandum from Robert Saloschin to All Federal Departments and Agencies (June 1, 1979) (listing "principal legal and administrative contracts for Freedom of Information Act questions.").

199. Justice Dep't Annual Reports, *supra* note 77, 1981 at 134 (for 1980), 1982 at 203 (for 1982).

200. See Dep't of Justice Management Div., *Evaluation of the Dep't of Justice Management of the Freedom of Information and Privacy Act* 10-16 (Oct. 1980) (outlining institutional structure for processing FOIA applications to Justice Department under Carter Administration).

201. For account of such efforts see sources *supra* note 124.

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### F. *Training*

Along with distribution of interpretative materials and individualized consultations, enforcement activity by governmental entities in the late 1970's and early 1980's focused on training the employees assigned to administer the Act. These efforts aimed both at inculcating knowledge of the Act and at instilling proper attitudes toward compliance without the need for externally imposed sanctions.

In part, training was a natural process that took place through the increasing familiarization of agency employees with the procedures of the Act and the slow accumulation of expertise among those who worked most with information issues. In addition, workers entering government service after FOIA's enactment were unfamiliar with the mores of bureaucratic secrecy that preceded the Act, and much more receptive to policies that favored disclosure.<sup>202</sup>

The emergence of "Freedom of Information officers" as a distinct class of employees charged with primary responsibility for administration of the Act enhanced the general trend toward greater awareness and acceptance of the underlying principles of the Act.<sup>203</sup> This group, along with others responsible for administering such related laws as the Privacy Act,<sup>204</sup> the Sunshine in Government Act,<sup>205</sup> and the Federal Advisory Committee Act,<sup>206</sup> formed its own professional organization, the American Society of Access Professionals (ASAP), in the fall of 1980.<sup>207</sup> At regular meeting ASAP members, who numbered 250 by 1981 and 300 by 1983, discuss issues related to information law. The group also sponsors workshops on FOIA and related laws, and conducts surveys to ascertain the needs of Federal employees administering those laws, and gives awards as part of an incentive program for information officers.<sup>208</sup> A representative of ASAP testified in congressional oversight hearings on FOIA in 1981, urging "that the Congress encourage agencies to

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202. Telephone interview with Russell Roberts, *supra* note 64; telephone interview with Robert Gellman, *supra* note 63; telephone interview with Harold Relyea, *supra* note 150. When the Carter Administration entered in 1977, the Department of Justice took advantage of such a change by distributing a briefing booklet on "What Every Federal Official Should Know About the Freedom of Information Act." See Justice Dept. Annual Report, *supra* note 77, (1977) at 18.

203. Telephone interview with Russell Roberts, *supra* note 64; telephone interview with Robert Gellman, *supra* note 63; telephone interview with Robert Saloschin, *supra* note 74.

204. Pub. L. No. 93-579, 88 Stat. 1896-1910 (1974), codified at 5 U.S.C. § 552a (1982).

205. Pub. L. No. 94-409, 90 Stat. 1241 (1976), codified at 5 U.S.C. § 552b (1982).

206. Pub. L. No. 92-463, 86 Stat. 770, codified as amended at 5 U.S.C. App. §§ 1-14 (1982).

207. See 2 FOIA Update 7 (Fall 1980).

208. See 2 FOIA Update 8 (June 1981); telephone interview with Russell Roberts, *supra* note 64. The Federal Bar Association, a private organization, conducted similar seminars attended by agency personnel.

devote sufficient staff, equipment and resources to administer the Act as effectively and efficiently as possible"; that agencies "make far greater efforts in conjunction with the professionalization and training of their staffs responsible for administering the Act"; and that Congress conduct "an assessment and evaluation of the processing procedures, records management practices and organizational structures of problem agencies, and . . . identify the major elements of proven and successful operations under the Act at other agencies and departments."<sup>209</sup> The interest of ASAP members in maintaining relations with their supervisors may have precluded the fledgling professional organization from taking a more aggressive stance on its own behalf.<sup>210</sup> But the activities of ASAP, by materially assisting those administering the Act, by speaking on their behalf, and by enhancing their sense of identity, reflect and reinforce the new bureaucratic interest that has arisen to foster training, proper procedures, and the overall policy of disclosure itself.

Several agencies also undertook government-wide training activities. The Civil Service Commission held 70 training sessions on the Act with a total of 4,659 participants in 1976, and 49 sessions with a total of 1,751 participants in 1977.<sup>211</sup> After 1979, *FOIA Update* listed pending seminars and training sessions each quarter under sponsorship of the Department of Justice, the Office of Personnel Management, the Agriculture Department Graduate School, or the National Archives and Records Service of the General Services Administration. The Justice Department played a key role in many of these sessions, even when sponsored by other agencies. Officials from the FOI Committee or the OILP reported 17 appearances at seminars, conferences, or briefings on the Act in 1977, 16 in 1979, and 35 in 1981.<sup>212</sup> In 1981 the Department also instituted a regular course entitled "Introduction to Information Law for Attorneys" as part of its Legal Education Institute.

Training sessions on FOIA also became a regular feature of efforts to promote compliance in most agencies.<sup>213</sup> Chief officials charged with

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209. *Freedom of Information Oversight: Hearings Before the Government Information and Individual Rights Subcommittee of the House of Representatives Committee on Government Operations*, 97th Cong., 1st Sess. 780-88 (1981) (statement of Bruce Moyer for ASAP). See also Comments of the American Association of Access Professionals on Proposed Legislation, *1981 Senate Hearings*, *supra* note 146, vol. 2, at 279.

210. Telephone interview with Harold Relyea, *supra* note 150; telephone interview with Robert Gellman, *supra* note 63.

211. See GAO REPORT LCD-78-120, *supra* note 148, at 13. The total might be expected to decline as the number of employees working with the Act who had already attended the sessions increased.

212. See Justice Dep't Annual Reports, *supra* note 77, at 1977 at 19, 1979 at 111, 1981 at 137.

213. See GAO REPORT LCD-78-120, *supra* note 148, at 13. *Bul see* SASSER REPORT, *supra*

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administration of the Act at the Department of Health, Education and Welfare conducted roving seminars at the Departments' national and regional offices, and attributed a relatively low rate of information denials partly to their emphasis on training.<sup>214</sup> Often, however, training at agency field offices took the form of a formal, standard presentation.<sup>215</sup> In 1978, the General Accounting Office, noting the wide variety of training experiences for employees in agency field offices, found that some of the training, including certain Civil Service seminars, remained too general to help employees solve specific enforcement problems.<sup>216</sup> Enhanced training, the GAO found, could also help avoid confusion about conflicts between the requirements of FOIA and other information statutes such as the Privacy Act.

### III. *Public Facilitation of Private Enforcement Under FOIA*

As indicated earlier, the few comprehensive and reliable statistics on information requests under the Act suggest that public awareness and exercise of rights to information increased in the late 1970's. The number of requests and intra-agency appeals climbed, and the number of cases listed in the Justice Department's backlog mounted to well over 1,000 during this period. At the same time, despite increasing resolution of legal issues under the Act, the number of new cases the Department received each month remained steady.<sup>217</sup>

Part of the growth in use of the Act has doubtless resulted from the substantive and procedural changes made by the 1974 amendments, as well as administrative efforts to facilitate compliance described in the previous section of this Note. Certainly, the appeals mechanisms could be seen as devices designed to provide some recourse in the event of a denial short of a costly judicial trial. Similarly, the exercise or threatened exercise of the Justice Department's authority to refuse counsel could help to assure that the opportunity to appeal was itself more meaningful. General review of procedures under the Act could help to isolate and resolve particular enforcement problems. Handling of individual complaints by the Justice Department or congressional staff could provide highly efficient aid in obtaining information for applicants faced with intransigent agency officials who refused to disclose ma-

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note 143, at 85-86 (depicting deficiencies in training at agency level under Carter Administration).

214. See 1 FOIA Update 1 (Autumn 1980).

215. See GAO REPORT LCD-78-120, *supra* note 148, at *id.*

216. *Id.* at 13-17.

217. See GAO REPORT LCD-80-8, *supra* note 106, at 13. Comprehensive figures for the 1980s have yet to be compiled.

terial, and smooth out smaller problems in implementation for the benefit of future applicants. Interpretative activities could help ensure that agencies processed applications in ways that conformed with the substantive and procedural requirements of FOIA, and, to the degree interpretations were available to the general public, could help applicants to know how to apply for information and when agencies were violating their statutory rights. Increased training could further enhance efficiency and compliance with the law in the processing of applications and appeals.

Increased use of FOIA and its remedies also doubtless resulted from the gradual familiarization with its provisions by those private groups with an interest in obtaining government information. The business community has found the Act a valuable tool for gaining access to information that competitors submit to the government.<sup>218</sup> A cottage industry of "FOI Service" companies now submits requests for information on behalf of firms that wish to maintain confidentiality about their applications. These intermediaries submitted over 40 percent of the 32,000 requests received by the Food and Drug Administration in 1979.<sup>219</sup> For lawyers, FOIA has sometimes proven a more effective alternative to traditional judicial discovery proceedings.<sup>220</sup> Businesses, service companies, and law firms together submitted 86 percent of all requests to the Food and Drug Administration under the Act in 1979,<sup>221</sup> and perhaps three-fifths of applications to all agencies.<sup>222</sup> Scholars, public interest groups, and the press also utilize the Act and its remedies to obtain information in furtherance of professional or other interests.<sup>223</sup>

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218. See Montgomery, Peters, and Weinberg, *The Freedom of Information Act: Strategic Opportunities and Threats*, 19 SLOAN MGMT. REV. 1 (Winter 1978).

219. See 1981 Senate Hearings, *supra* note 146, vol. 1, at 235 (1981) (Statement of Prof. John Marthinsen). See generally L. Smith, *Washington's New Sleuths*, DUN'S REVIEW 70 (Oct. 1976), reprinted in 1981 Senate Hearings, *supra* note 146, vol. 2, at 836.

220. See, e.g., Toran, *Information Disclosure in Civil Action: The Freedom of Information Act and the Federal Discovery Rules*, 49 GEO. WASH. L. REV. 843 (1981); Fleming, *The Freedom of Information Act: An Important Discovery Aid in Labor Law Cases*, 16 LAW NOTES 53 (Spring 1980).

221. Elengold, *Freedom of Information Policy at the FDA*, 35 FOOD, DRUG, COSM. L.J. 627 (1980).

222. Weinstein, *Open Season on Open Government*, N.Y. Times Magazine, June 10, 1979, at 74, printed in 1981 Senate Hearings, *supra* note 146, vol. 2, at 840. For example, 55 percent of all requests to the Defense Department between 1975 and 1980 were from such groups. 1981 Senate Hearings, *supra* note 146, vol. 1, at 106 (Statement of William Taft, General Counsel, Department of Defense).

223. Individual scholars used FOIA requests to further their research. Public interest groups made requests as part of their continual scrutiny of the political process. The Freedom of Information Clearinghouse associated with the Nader organization, the Center for National Security Studies affiliated with the American Civil Liberties Union, and similar organizations helped to facilitate such uses of the Act. These organizations sought to provide assistance to individual citizens seeking to use the Act. Finally, use of the Act by the press, while probably lower than anticipated, produced a continual flow of news stories based on

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Explanatory publications and mass publicity about the Act may have directly facilitated or promoted the exercise of rights under it. Most of the primary sources on the Act are publications the government has issued as a matter of standard procedure, such as congressional hearings, or those issued to facilitate implementation directly by the agencies, such as the Attorney General's memoranda and *FOIA Update*.<sup>224</sup> But at least two government publications are designed primarily to enable private citizens to use the Act without legal assistance.<sup>225</sup> A multitude of private publications have also promoted understanding of the Act by tracking the latest legal developments and systematizing the interpretative data contained in many of the government documents.<sup>226</sup> Several private publications have also adopted an explanatory approach oriented toward the concerns of average citizens who might want to use the Act.<sup>227</sup>

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released information. See CAMPAIGN FOR POLITICAL RIGHTS, *supra* note 3 (detailing numerous uses of the Act by the press, public interest groups, and scholars).

224. *FOIA Update*, for example, had a circulation of 4000 among Federal offices, but only 179 outside the Federal government. See Justice Dep't Annual Report, *supra* note 77, 1981 at 137. Annual subscription price from the Government Printing Office was \$5.50 domestically or \$6.90 for foreign subscribers. The *Freedom of Information Case List*, with its systematization of cases under the Act and list of references, served a similar dual purpose. Distributed free to the agencies, and relied upon by Justice Department lawyers, it was also available for purchase from the Government Printing Office (GPO). Justice Department officials also distributed printed copies of the 1967 and 1975 Attorney General's memoranda and other policy statements on request. Congressional references on the Act, such as the 1972 House subcommittee report, the 1980 Senate subcommittee report, transcripts of hearings, and sourcebooks of legislative records, articles, and cases, were available for purchase from the GPO, or free from the issuing Committees while supplies lasted, and can be consulted in many libraries. See, e.g., STAFF OF SENATE COMM. ON THE JUDICIARY, 93D CONG., 1ST SESS., FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES, S. Doc. No. 82, (1975); JOINT SOURCE BOOK, *supra* note 30.

225. The Justice Department, in cooperation with the General Services Administration, published a free 18-page pamphlet of basic questions and answers on the FOIA and the Privacy Act in 1981. The booklet, entitled "Your Right to Federal Records," quickly became one of the ten most popular free publications released by the Federal Consumer Information Center, with nearly 14,000 copies distributed in a month. See 2 FOIA Update 8 (June 1981). Several years before the House Government Operations Committee prepared a more detailed booklet with the same aim, which is currently available for \$4.50 from the Government Printing Office. STAFF OF HOUSE OF REPRESENTATIVES COMMITTEE ON GOVERNMENT OPERATIONS, 95TH CONG., 1ST SESS., A CITIZENS GUIDE ON HOW TO USE THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT IN REQUESTING GOVERNMENT DOCUMENTS, H.R. REP. NO. 793 (1977).

226. *Access Reports*, a biweekly newsletter of 10-12 pages that covers the various information laws, is one of several newsletters published by the *Washington Monitor*. *Privacy Times*, a similar biweekly, treats issues under FOIA as well as the Privacy Act. And a two-volume treatise by James O'Reilly, entitled *Federal Information Disclosure*, has been supplemented twice yearly since it first appeared in 1977. Such publications provide a detailed, up-to date picture of the Act and its administration that systematizes and builds on the raw materials of government documents. Supplementing them as well are the dozens of law review articles that appear each year on the Act. For a comprehensive listing see *Freedom of Information Case List* 129-50 (1982 ed.).

227. See, e.g., CENTER FOR NATIONAL SECURITY STUDIES, LITIGATION UNDER THE FED-

Press coverage of events surrounding implementation of the Act may have further promoted its use. News of Congressional hearings and such significant actions as the publication of the Attorney General's memoranda, for example, may have helped to alert the public of the opportunity to take advantage of the Act and its remedies.<sup>228</sup> Frequent mention of the Act in news stories concerned with information released as a result of private requests, appeals, or suits may have spurred further private resort to the Act. With little systematic empirical evidence on requests or litigation under the Act, it remains difficult to generalize further about the motivation behind private resort to its remedies. Clearly, however, a mixture of public and private efforts characterizes those activities aimed at directly stimulating private enforcement.

#### IV. *Lessons from FOIA Enforcement*

This Note has traced the evolution of public enforcement in the context of a statute imposing requirements on the Federal government itself.<sup>229</sup> The implications of this survey for the process of enforcement, however, extend far beyond this type of statutory framework to any statute imposed in the context of a bureaucracy, and perhaps to the nature of enforcement in general. Most striking of the lessons to be gleaned from the story of FOIA is the range of tools available to public enforcement officials beyond the imposition of coercive sanctions. Those enforcing the Act offered individualized advice to potential violators; answered complaints from private citizens about questionable practices under the Act; conducted general investigations to ascertain broader problems in the enforcement apparatus; formulated official interpretations to help guide activities under the Act; trained employees in order to instill greater awareness and greater willingness to comply; and issued publications and generated press coverage of the Act to encourage private citizens to vindicate their rights under the statute. Isolating the

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ERAL FREEDOM OF INFORMATION ACT (7th ed. 1982) (yearly editions); R. GORDON, *THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT* (1977); R. BOUCHARD AND J. FRANKLIN, *GUIDEBOOK TO THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT* (1980).

228. "A congressional hearing, in addition to gathering in written form the masses of detailed fact needed to write a report or develop a proposal, moves on a more dramatic or educational *oral* level which should illustrate the issues in a way that is both comprehensible and interesting to the general public. And the hearings can communicate their message to the public only by capturing the attention of the media." Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547, 607 (1979).

229. This kind of statute, which Mashaw has termed a "structural" statute, *see* Mashaw, *supra* note 7, at 38, typically regulates the processes and institutions by which the government operates rather any substantive area. Examples of this type of statute, which often rely heavily on a private right of action, include the Privacy Act, 5 U.S.C. § 552a (1982), and the Sunshine in Government Act, 5 U.S.C. § 552b (1982).

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effectiveness of each of these activities would be as difficult as separating the effects of all of them from those of sanctions. No adequate measure exists to determine the degree of compliance any one or all of these tools induced. But the multiplicity of these noncoercive enforcement activities indicates that they did play some role in attaining whatever level of compliance was achieved. Moreover, the proliferation of this type of enforcement activity, and the tendency of even publicly applied sanctions to be relatively non-coercive and non-threatening, point to the important role that inducing voluntary compliance may play in enforcement.

Clearly these non-coercive techniques merit general consideration as tools for bringing about compliance. The range and characteristics of public enforcement activities under FOIA are most relevant to enforcement of statutes against government officials. But their implications for implementation of law in any complex bureaucracy, whether a public agency or a private organization such as a corporation or a union, can hardly be underestimated. In large measure, enforcement will be a matter of instilling proper attitudes toward the law within the organization, whether through training or through the threat of sanctions. The story of FOIA, however, suggests that other aspects of enforcement are fundamental as well. The interpretative function of synthesizing statutory language, legislative history and judicial rulings into a guide to behavior at the most mundane levels of bureaucratic activity appears to be an inescapable element of enforcing the law. Training of affected employees at least lays the groundwork for this aspect of enforcement. Ultimately, written materials and individual consultants provide important elements that aid an organization in its attempts to comply with the law.

A second concern, often intimately related to the first, is the coordinative function. The more complex and extensive the bureaucratic action necessary to effectuate statutory language, the more some organizational framework to facilitate enforcement, such as that provided by the individual agency FOI Offices, the Justice Department, and congressional committees in FOIA enforcement, may be necessary. This coordinative function entails both a systematic consultative role and continued review of bureaucratic activities so as to discern ways that agency administration may be inefficient or may deviate from what the law prescribes. It is difficult to imagine effective compliance with FOIA by an agency, or effective compliance with a complex environmental statute by a manufacturing company, without some such institutional mechanism for coordination.

Third, at least in the context of a law to be enforced through a private right of action, informing private parties and encouraging them to resort to the private remedy appears to be an important part of public as well as private enforcement, and may profoundly affect the attitudes of potential violators. Without this information the threat of a sanction may remain largely unrealized.

In part, of course, sanctioning and the other public enforcement activities, as well as the private enforcement activities that have evolved, represent a response to the original judicial sanction. The increasing familiarization by private groups to use of the Act, and the proliferation of publications and publicity regarding the Act, may foreshadow the gradual institutionalization of the private sanctioning mechanism originally designed to serve as a substitute for a public enforcement agency. Intra-agency appeals, the FOI Committee, the general oversight and interpretative activities by the Department of Justice, and training in FOIA administration all evolved partly from the desire of Executive officials to avoid the financial, professional, and political costs of litigation. It remains difficult, however, to regard such a proliferation of activities as generated solely by fear of litigation. These public enforcement efforts also express a commitment on the part of agencies or Justice Department officials to promote compliance. The general oversight activities undertaken by Congress to better effectuate the intent of the statute, and the emergence of ASAP as an internal bureaucratic force favoring responsible administration of the Act, demonstrate that public enforcement maintains vitality independent of the threat of private suit.

The history of the Act shows how the combination of this commitment to ensuring compliance with an effective judicial sanctions may ultimately lead to the internalization of legal norms and the mechanisms for effectuating them within an agency. Over the first fifteen years of the Act's existence the burden of coercive sanctioning, as well as of the various noncoercive forms of enforcement, shifted gradually toward the agency officials who made the initial decisions under the Act. By the late 1960s, the Justice Department, acting in its own perceived interest as well as in the interest of compliance, had begun to take over part of the judicial function of applying coercion to potential violators, and to supplement the judicial function of interpretation. By the late 1970's, as Justice Department activities focused increasingly on broader interpretative activities and government-wide training activities, the individual agency FOIA offices, with the encouragement of the Justice Department, assumed an increasing proportion of responsibility for sanctioning, consultation, and training of their own employees. All

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these activities, along with those of the information professionals, probably contributed to increasing awareness of the requirements of the Act throughout the agencies. These activities appear to have coincided with the entry of a new generation of government workers unfamiliar with bureaucratic mores that preceded the Act to produce a greater bureaucratic willingness to comply.<sup>230</sup> By the late 1970's implementation in many agencies, directed if not performed by internal FOIA Offices, had developed into a bureaucratic routine which reflected not only convenience, habit and an ideological commitment to compliance, but also an equilibrium or "truce" among the competing interests of information professionals, other bureaucrats, Justice Department officials, and congressional overseers.<sup>231</sup> In this way, FOIA became largely self-enforcing in many agencies.<sup>232</sup>

This process of internalization may typify the way a bureaucracy, whether public or private, adapts to a new set of regulatory requirements. Since officials in a private bureaucracy are not employees of the government itself, they may feel less obligation to promote compliance with a law within their organization than would public officials. But just as internal FOIA Offices assumed responsibility for appeals, consultations, and training within an agency, a company faced with the need to comply with occupational health and safety regulations will often establish an internal office to regulate activities designed to comply with the law, to provide information on how to comply, to train employees, and even to act as an advocate of the policies underlying the law.<sup>233</sup> This process of internalization, of course, depends in part on positive attitudes toward compliance within a public or a private bureaucracy. While no gauge of government-wide attitudes toward the Act over time exists, the shifting policies toward disclosure manifest in Justice Department activities illustrate how internal public or private enforcement remains contingent on internal policies toward the substance of the law being enforced. Even in the Department of Justice, however, the internalization of the norms embodied in the Act, especially by officials

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230. See GAO REPORT *LCD-78-120*, *supra* note 148, at 6-8; GAO REPORT *GGD-78-51*, *supra* note 88, at 47-48; Relyea, *The Freedom of Information Act a Decade Later*, 39 PUB. ADMIN. REV. 310, 310 (1979).

231. For a general account of these ways to describe organizational activity, see R. NELSON & S. WINTER, *AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE* 96-136 (1982).

232. See GAO REPORT *LCD-78-120*, *supra* note 148, at 10; GAO REPORT *GGD-78-51*, *supra* note 88, at 66-67. Another long-term effect of FOIA has been to induce initial disclosure of more materials by agencies so that the public need not file a request under the Act for information. Interview with Robert Gellman, *supra* note 159; telephone interview with Harold Relyea, *supra* note 150.

233. See E. BARDACH & R. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* 217-42 (1983).

whose careers have spanned more than one Administration, has ensured a degree of continuity between Administrations in such tasks as consultation, training, oversight, and, to a lesser extent, the exercise of authority to refuse to defend suits.

A final set of conclusions follows from an appraisal of the sanctioning mechanisms used by public officials enforcing the Act. With the exception of the statutory disciplinary sanction, these public sanctions shared several characteristics. The penalties applied as sanctions, usually amounting to little more than the embarrassment of reversal in any individual case, were mild and largely impersonal. The offices with authority to apply these penalties possessed the flexibility to substitute mere advice for sanctions, and to negotiate with affected parties in order to obviate the need to apply the sanction in a given instance. Moreover, sanctioning could take place as an integrated part of an ongoing, largely consultative relationship between the enforcement office and the bureaucrats who were potential violators. The apparent atrophy of the disciplinary sanction as an enforcement tool may trace largely to the absence of such characteristics. Sanctions under this provision, regardless of their specific form, were understood as a type of personal censure; the process of applying such sanctions entailed the relatively elaborate mechanism of a formal investigation and findings, and for a time of an initial judicial finding; and the absence of an ongoing relationship between the civil service authority and agencies, at least in the area of information processing, made sanctioning a potentially threatening bureaucratic intrusion.

Some combination of mildness, flexible application, and integration into the normal functioning of agencies thus appears important to the effective enforcement of law. The introduction of non-coercive forms of sanctions into normal bureaucratic procedures make the process of inducing compliance less threatening to potential violators. As a result, these officials may be more willing to compromise with enforcers and ultimately to comply with the law. Flexibility and integration also offer the advantage of increasing the administrative efficiency of enforcement efforts. These features of internal sanctions may produce a greater willingness to apply such sanctions, and consequently a greater degree of deterrence. Finally, more efficient enforcement can save administrative resources for other more substantive bureaucratic tasks.