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The Freedom of Information Act directed that the public have access to the information in the files of executive branch agencies, with certain exceptions. Because of dissatisfaction with the way the act was implemented, the Congress amended it to limit the Government's authority to withhold certain kinds of information, strengthen the public's right to obtain information from Federal records, and speed public access to Federal Government records. The Federal Bureau of Investigation (FBI) has received almost 48,000 requests for information since 1975 and has accumulated a sizable backlog of requests.

Findings/Conclusions: Delays in processing requests were caused by limited staffing and a fragmented and ineffective processing system. The following improvements to the processing system have resulted in more efficient and timely processing: reorganization of management structure, specialization of processing activities, increased personnel, elimination of some review levels, more efficient correspondence with requesters, simplifications in the excising process, and improved personnel training. Even with the improvements, the FBI still cannot meet the 10-day time limit imposed by the Freedom of Information Act. Problems continue to exist concerning the exemptions to the act; these problems include determining what constitutes an "unwarranted" invasion of privacy, what constitutes a confidential source, and what information should be provided in pending investigations. Recommendations: The Attorney General should require: the FBI to reduce the drain on its investigative resources by using analysts instead of special agents to supervise the processing of requests; the FBI and other Department components to be more responsive to requesters by providing additional information on items such as the number of

pages in a file, the number of pages denied, and by noting the exceptions used to withhold information; the FBI and other Department components to avoid the practice of charging fees in cases where billing costs exceed the charges assessed; and the Office of Privacy and Information Appeals to reduce inconsistencies in the amount of information released by improving guidelines and oversight. The Congress should change the time requirement for FBI responses to Freedom of Information requests. (RRS)

59165

BY THE COMPTROLLER GENERAL

Report To The Congress

OF THE UNITED STATES

Timeliness And Completeness Of FBI Responses To Requests Under Freedom Of Information And Privacy Acts Have Improved

The Freedom of Information Act and the Privacy Act require Federal agencies upon request to produce information from their records.

Inundated with almost 48,000 requests in 3 years, the FBI has made progress since the fall of 1976 in improving the completeness and timeliness of information it provides. Various problems, however, continue to hamper FBI efforts to effectively comply with requests.

GAO recommends that the Congress modify the legislation and that the Attorney General improve management procedures.



GGD-78-51
APRIL 10, 1978



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-179296

To the President of the Senate and the
Speaker of the House of Representatives

This report discusses the Federal Bureau of Investigation's efforts to comply with the Freedom of Information and Privacy Acts. Although the Bureau has made great progress in implementing the acts, further management improvements are needed to make the Bureau more fully responsive to information requests. Recommendations are made to the Attorney General and to the Congress.

Our review was made pursuant to the Budget and Accounting Act, 1921 (31 U.S.C. 53), and the Accounting and Auditing Act of 1950 (31 U.S.C. 67). A special interest in the review was expressed by various members of the House Subcommittee on Civil and Constitutional Rights and of the House Subcommittee on Government Information and Individual Rights.

We are sending copies of this report to the Director, Office of Management and Budget; the Attorney General; the Director, Federal Bureau of Investigation; the Administrator, Drug Enforcement Administration; and the Secretary of the Air Force.

A handwritten signature in black ink, reading "Elmer B. Staats".

Comptroller General
of the United States

D I G E S T

Requests for information under authority of the Freedom of Information and Privacy Acts have created large workloads for various Federal agencies, but especially the FBI. It has received almost 48,000 requests in 3 years. Since 1975 the FBI has had a sizable backlog of requests. Although the FBI has improved the completeness and timeliness of its responses, it can do more in this regard.

FREEDOM OF INFORMATION AND
PRIVACY ACTS

The Freedom of Information Act, effective July 4, 1967, directs that the public must have access to the information in the files of executive branch agencies, with certain exceptions specified in the act. Because of dissatisfaction with the way the act was being implemented, the Congress amended it, effective February 19, 1975, to

- limit the Government's authority to withhold certain kinds of information;
- strengthen the public's right to obtain information from Federal Government records; and
- speed public access to Federal Government records. (See p. 2.)

As a result of the amendments, agencies are now required to respond to the requester within 10 working days. The FBI has not been able, however, to comply with the

10-day requirement because the sensitive nature of the information in its files requires a line-by-line review to insure that only appropriate disclosures are made.

The Privacy Act, approved December 31, 1974, primarily deals with protecting an individual's personal privacy and providing an individual the opportunity to review, obtain and amend a copy of his or her record maintained by a Federal agency. (See p. 2.)

The Freedom of Information and Privacy Acts contain general guidance on what information can be released under their disclosure and exemption provisions. Subjective judgments result, which allow a wide disparity in agency and individual decisions on what information can be released.

FBI HAS MET AN INCREASING NUMBER OF REQUESTS

The FBI believes its heavy request workload will not only continue but will increase at an annual rate of about 14 percent. On this basis, it estimates that it will receive about 20,500 and 23,400 requests in 1978 and 1979, respectively.

To accommodate this increasing demand for information, the FBI has had to improve its organizational structure and processing procedures. Initially, the FBI handled Freedom of Information and Privacy Act requests with a small staff and processed requests in a fragmented and ineffective manner. This resulted in the slow processing of requests, development of a substantial backlog (8,599 in July 1976), and processing delays of about 12 months. (See p. 4 and ch. 4.)

The FBI took steps to improve its responsiveness in 1976 by making certain organizational and processing changes. This has been costly; \$9.2 million and 365 people were devoted to Freedom of Information Act and Privacy Act activities in fiscal year 1977. As a result of the changes made, more people were assigned to these activities at headquarters than were on the staffs of 51 of the Bureau's 59 field offices. The branch handling the requests was larger than six of the eleven headquarters divisions excluding its own division.

Although the improvements to date are noteworthy, additional management and legislative actions are needed to allow the FBI to respond more quickly and fully to information requests.

RECOMMENDATIONS

GAO recommends that, to improve the management of information disclosure activities, the Attorney General require

- the FBI to reduce the drain on its investigative resources by using analysts instead of special agents to supervise the processing of requests;
- the FBI and other Department components to be more responsive to requesters by providing additional information on items such as the number of pages in a file, the number of pages denied, and by noting on each document the exemptions used to withhold information;
- the FBI and other Department components to avoid the practice of charging fees in those cases where billing costs exceed the charges assessed;

--the Office of Privacy and Information Appeals to reduce inconsistencies in the amount of information released by improving guidelines and oversight of the process.

GAO also believes that a legislative change is needed and recommends that the Congress change the time requirement for FBI responses to Freedom of Information Act requests. GAO believes that the law should require the FBI to acknowledge an initial request within 10 working days and provide a full response within an additional 30 working days. In situations, however, where such a timeframe is unreasonable in view of the quantity of material to be reviewed, the FBI shall provide the requester with a firm fixed date for delivery of its response.

If the requester considers this date unreasonable, he may, according to the law, bring suit to compel an earlier delivery. In reaching decisions on such suits, the courts should give due consideration to the possible adverse impact of a directed earlier response on the FBI's ability to service the demands of other requesters, premised on a finding that the FBI is devoting a reasonable level of resources to these activities.

AGENCY COMMENTS

The Departments of Justice and Air Force agreed, except for certain minor issues, with the information presented in this report. GAO has recognized their views in the appropriate sections of this report. (See pp. 31, 53, and 57.)

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ABBREVIATIONS

AF-OSI	Department of the Air Force's Office of Special Investigations
DEA	Drug Enforcement Administration
FBI	Federal Bureau of Investigation
FOIA	Freedom of Information Act
GAO	General Accounting Office
PA	Privacy Act

CHAPTER 1

INTRODUCTION

In July 1976 various members of the House Subcommittee on Civil and Constitutional Rights and of the House Subcommittee on Government Information and Individual Rights (see app. I) requested that we conduct a comprehensive review of the delays the FBI was experiencing in processing requests for information submitted under the Freedom of Information Act (FOIA) 1/. Two subsequent letters from the Chairperson of the House Subcommittee on Government Information and Individual Rights (see app. II and III) asked us to expand our study and include other FOIA and Privacy Act (PA) 2/ issues concerning the FBI and the Department of Justice's Office of Privacy and Information Appeals.

We reviewed FOI/PA activities at the FBI between September 1976 and November 1977. Our review included interviews with FBI headquarters officials, evaluations of randomly selected FOI/PA requests submitted to the FBI, and a visit to the FBI's Chicago field office. We also reviewed FOI/PA activities at the Department's Office of Privacy and Information Appeals and at the Civil Division's Information and Privacy Section. For contrasting purposes we reviewed FOI/PA activities at the Drug Enforcement Administration (DEA) and the Air Force's Office of Special Investigations (AF-OSI). The scope of our review is discussed more fully in chapter 7.

THE FREEDOM OF INFORMATION ACT

The Freedom of Information Act, signed into law on July 4, 1966, and effective 1 year later, directs that all Federal executive branch agencies' records must be made available to the public, except information which is specifically exempted by the act. When the FOIA was signed into law, Congress expected that new disclosure standards and practices would be applied by Federal executive agencies. The law was to (1) improve the public's access by establishing judicial review of an agency's actions and (2) place the burden of justifying the withholding of information on the Government.

1/5 U.S.C. 552.

2/5 U.S.C. 552a.

Nine specific exemptions could be used to withhold information, but the use of these exemptions was to be permissive rather than mandatory.

Congressional hearings held during 1971 and 1972 disclosed several problems which hindered the FOIA's proper implementation. Because of the problems, records were not as accessible in fact as the act had proposed they would be in theory.

The shortcomings disclosed during the hearings and the desire to strengthen and clarify the FOIA led to congressional passage of the 1974 amendments to the FOIA. The amendments, effective February 19, 1975, were designed to

- limit the Government's authority to withhold certain kinds of information;
- strengthen the public's right to obtain information from Federal Government records; and
- speed public access to Federal Government records.

The amendments narrowed the language of the exemptions available for agencies, specifically law enforcement agencies, to withhold information. The amendments required executive agencies to respond to a requester within 10 working days after receipt of a request and provided a requester the right to appeal an agency's decision to withhold information. Agencies were also required to make final appeal decisions within 20 working days after the appeals were received. In unusual circumstances an agency's time limit could be extended for not more than 10 working days, for both the initial determination and appeals combined.

The FOIA allows for judicial review of agency actions. Courts may direct the Government to release additional documents, expedite the handling of requests and, if the requester substantially prevails, pay reasonable attorney fees of the requester.

THE PRIVACY ACT

Congress approved the Privacy Act on December 31, 1974. This act emphasizes protecting an individual's personal privacy and providing an individual the opportunity to review and obtain a copy of his or her record maintained by

a Federal agency. The PA provides for exemptions which, like the FOIA's, are permissive not mandatory. Unlike those of the FOIA, the PA's exemptions apply to systems of records rather than to requests for access to specific information.

The PA also allows individuals to request that their records be amended and that records they believe inaccurate be corrected or deleted. If the agency either denies access or refuses to amend a record, the PA allows for judicial review of the agency's action. The court may assess against the Government reasonable attorney fees, as well as award damages to the individual, if the requester substantially prevails.

Among the administrative requirements involving the collection, maintenance, retention, and disclosure of an agency's records, the PA requires that each agency publish annually in the Federal Register

- a descriptive list of its records systems and
- the procedures to enable people to obtain their own files.

The Office of Management and Budget (OMB) is responsible for developing guidelines for Federal agencies' implementation of the PA provisions. OMB has issued several memorandums which

- helped agencies interpret the act's requirements,
- established basic criteria for applying the act's provisions, and
- gave examples of instances which are covered by the PA.

One of the guidelines OMB set forth concerned time limits in responding to PA requests. Unlike the FOIA, the PA does not require Federal agencies to comply with requests within a specific time period. However, the July 1975 OMB guidelines state that an agency should acknowledge an initial request within 10 working days. It further states that in the event access is to be granted, it should be done within 30 working days.

CHAPTER 2

FOI/PA REQUESTS HAVE

INCREASED SUBSTANTIALLY

Since 1973 the FBI has received over 48,000 requests for disclosure of information. The figures below show the increase in FOI/PA requests submitted to FBI headquarters.

<u>Calendar year</u>	<u>Requests received</u>	<u>Requests per workday</u>
1973	64	less than 1
1974	447	2
1975	13,881	55
1976	15,778	63
1977	<u>18,026</u>	72
Total	<u>48,196</u>	

FBI officials estimate that requests will continue to increase at a rate of about 14 percent each year, resulting in 20,500 requests in 1978 and 23,400 in 1979. The officials believe that increased publicity about records accessibility is the major reason for the increase. FBI field offices have received 3,379 requests since October 1975 and about one-half of these were received by 8 of the 59 field offices.

Because the FBI was not able to keep up with the number of requests, a substantial backlog began to develop and by June 1975, 2,063 requests awaited processing. In July 1976 the backlog reached 8,599. By December 1977, as a result of management awareness and substantial resources being applied, the FBI was able to reduce its backlog to 5,118. For further details of the backlog, see pages 36 to 38.

TYPES OF REQUESTS

Although requests from people asking for information on themselves are generally processed under the PA, most records compiled for law enforcement purposes can be exempt from disclosure. Since the vast majority of records in the FBI's

central records system involves investigative and law enforcement material, most of the FBI's files could be considered exempt from disclosure under the Privacy Act.

The Attorney General, however, issued regulations (28 C.F.R. 16.57) which state that any first-party request 1/ for records deniable under the PA exemptions should be processed under the FOIA. This allows the requester to have the maximum disclosure benefits available under both acts. Under this policy the FBI has to handle PA requests involving investigative records under FOIA provisions and cannot therefore declare its records totally exempt from disclosure under the law enforcement exemption of the PA.

DEA and AF-OSI files, like those of the FBI, are primarily investigative in nature. Similar to the FBI, requests for information are processed under FOIA provisions. The FBI, DEA, and AF-OSI also receive requests from individuals asking for information on people or groups other than themselves. These third-party requests are processed solely under the FOIA provisions.

The FBI classifies a request as either project or non-project. A project request is where 15 or more volumes (200 pages per volume) exist on the subject matter requested, while a nonproject request is anything less than 15 volumes.

FBI data showed that from September 1976 to September 1977 about 80 percent of the total requests received were first-party requests. FBI figures also show for the period October through December 1977 the following types of requesters.

1/First-party requests are those where the requester desires information about himself or herself.

<u>Type of requester</u>	<u>Number of requests</u>	<u>Percent of total requests</u>
News media	13	0.3
Scholars	17	0.4
Attorneys, self	95	2.1
Attorneys, client	213	4.7
Prisoners	267	5.8
Citizens	3,165	69.1
Organizations	516	11.3
Congressional, self	11	0.2
Congressional, constituent	84	1.8
Referrals from another agency	118	2.6
Personnel files	74	1.6
Others	5	0.1
Total	<u>4,578</u>	<u>100.0</u>

Our sample of 94 nonproject requests showed that 35 percent of the cases related to security classifications, 30 percent concerned criminal classifications, and 35 percent covered other classifications, such as applicants for positions with the Federal Government.

In the security classifications, 68 percent of the requests dealt with domestic security matters as opposed to foreign counterintelligence matters. In the applicant classifications, 41 percent of the requests came from former or current FBI employees.

DEA AND AF-OSI HAVE EXPERIENCED INCREASED WORKLOADS

Since 1975 DEA and AF-OSI have received an increasing number of information requests. DEA requests have risen from 675 in 1975 to 923 in 1977, while AF-OSI requests have increased from 566 to 1,154 during the same period. The respective percentage increases amount to 37 and 104. The FBI's requests increased about 30 percent over the same period.

DEA officials said that approximately 40 percent of the total number of FOI/PA requests DEA received came from convicted felons asking for their own files. Our review of 82 randomly selected cases from DEA files showed the following types of requesters.

<u>Requester</u>	<u>Number</u>	<u>Percent of total number</u>
Prisoners	33	40.3
Citizens	15	18.4
Drug companies	5	6.1
Student	1	1.2
Professor	1	1.2
Doctors	2	2.4
Ex-DEA employees	3	3.7
Current DEA employees	2	2.4
News media	1	1.2
Attorneys, client	8	9.8
Attorneys, self	4	4.9
Applicant	1	1.2
Informant	1	1.2
Alien	1	1.2
Organizations	2	2.4
Arrestees, pending trial	<u>2</u>	<u>2.4</u>
Total	<u>82</u>	<u>100.0</u>

AF-OSI officials said that the majority of AF-OSI FOI/PA requests are from current and former Air Force employees, including both civilian and military personnel. Our review of 43 randomly selected AF-OSI files showed the following types of requesters.

<u>Requester</u>	<u>Number</u>	<u>Percent of total number</u>
Current AF members	8	18.5
Ex-AF members	11	25.6
Current members of military, except AF	2	4.7
Ex-member of military, except AF	1	2.3
Attorneys, client	3	7.0
Attorney, self	1	2.3
Organizations	2	4.7
Contractor employee	1	2.3
Professors	2	4.7
AF dependents	2	4.7
Citizens	8	18.5
Current civilian employees	<u>2</u>	<u>4.7</u>
Total	<u>43</u>	<u>100.0</u>

CHAPTER 3

HOW THE FBI IDENTIFIES

REQUESTERS, SEARCHES ITS FILES, AND RESPONDS TO REQUESTS

Before the FBI can search its files in response to a request for information, it requires a certain amount of identifying information from the requester. The identifying information needed depends on whether the request is a first-party or third-party request.

To make an accurate search of its records for a first-party request, the FBI needs information, such as the requester's name, date and place of birth; current address and employment; and other identifying data, such as prior addresses and employment. FBI also requests an individual's notarized signature to attest to the identity of the requester.

Information requested by third parties often concerns persons who were or are prominent in the public eye and who fall into the categories of living or deceased. Regarding living persons, FBI's policy is to determine if there is an invasion of privacy, and if so, then the FBI advises the requester to obtain a notarized authorization from the subject of the request if the requester expects data other than that which is in the public domain. Regarding deceased persons, the Deputy Attorney General has stated that information will ordinarily be released without an authorization from the heir or heirs of the deceased person. The FBI will also release information on an organization but not necessarily on its members unless a notarized authorization is provided.

FBI'S SEARCH OF ITS FILES

Once all the required identifying information has been received, the FBI's Records Branch of the Records Management Division searches the general index to the central records system to determine if the requested information is maintained. Other FBI systems of records reported in the Federal Register would be searched only if specifically requested.

The FBI maintains a central records system at headquarters for its investigative, personnel, applicant, administrative, and general files. Although it has other record systems, the central records system is the most important one. Basically, it consists of one numerical sequence of subject matter files and an alphabetical index to these files referred to as the general index. All information on a subject matter or case is included in one file.

Each of the FBI's 59 field offices and 13 foreign liaison offices has its own central records system similar to that of headquarters. Most, but not all, of the information kept at the field and foreign liaison offices is referred to headquarters and therefore filed in the central records system. FBI headquarters does not maintain statistics, however, on the number of case files or index cards maintained by its field offices.

The key to the files at headquarters and in the field and foreign liaison offices is the general index. It consists of alphabetically filed 3-by-5 index cards on various subject matters, primarily the name or names of individuals. The cards usually contain information such as name, file number, birthplace and birthdate, sex, race, and address. The general index must be searched to determine whether the FBI has information in its central records system.

Index cards are created and placed in the general index only for information considered pertinent for future retrieval. The names of the subjects and victims involved in FBI investigations are also placed in the general index. However, not all the names of persons who furnish information during an investigation are placed in the general index.

The general index to the FBI headquarters files contains more than 59 million cards. These are estimated to represent 20 million different individuals. Of the 59 million cards in the general index, only about 19 million are referenced to main files, that is, files on either a specific subject, suspect, or victim of an offense. The other 40 million index cards are called see references, which are names of people connected to an incident but who are not the subject of a file. For example, an FBI official told us that a witness to a crime may become a see reference within the file pertaining to the crime. However, there would not be a separate file on the witness.

FBI SEARCH POLICY

The FBI's current practice in searching for a file is to perform an "on-the-nose" search in which only the names used or provided by the requester are searched. The Deputy Attorney General approved the use of on-the-nose searches in 1975 because the previous searching procedure was time-consuming and did not generally result in additional information.

At headquarters, the FBI's search is limited to the central records system, unless a requester identifies other systems and less than three specific field offices to be checked. When more than two field offices are identified, the requester is told to send the request directly to each field office.

In 1975 the Deputy Attorney General approved a search policy dealing with see references. The see reference policy allows the FBI to limit searches to main files identified with the requester, cross-referenced general files, and any files relating to organizations and/or incidents identified by the requester. The see reference files would be reviewed only if the requester specifically identified records associated with a particular organization or incident covered in an investigation.

TYPES OF RESPONSES GIVEN

All requests submitted to the FBI require a certain amount of processing. The amount of processing time required depends on the amount of information maintained and the type of response given. The FBI classifies its responses to requests into six categories:

Administratively closed - The FBI can administratively close a request for several reasons: (1) lack of identifying information, (2) absence of a notarized signature, and (3) a requester's failure to remit the required fees. In each of these cases, the FBI asks the requester for the missing information or fee and holds the request open for 60 days. If no response is received within that time, the case is closed but is reopened if the requester subsequently responds.

No-record - A no-record response means that the FBI searched the general index and the central

records system and found no information concerning the subject of the request.

No-record main-file - A no-record main-file response means that the search of the general index and central records system disclosed no main files on the subject of the request but disclosed some see reference cards in the general index which may or may not pertain to the subject. The FBI needs additional specific information before further reviewing the files.

Granted in-full - A request granted in-full indicates that the FBI did not use any of the FOIA or PA exemptions to deny information.

Denied in-part - A request that is denied in-part indicates that the FBI used one or more FOI/PA exemptions to withhold information contained in a file. A request that is denied in-part may involve the mere excising of a name or the withholding of several thousand pages.

Denied in-full - In a request denied in-full, the FBI uses one or more FOI/PA exemptions to completely refuse the release of any information contained in the file.

FBI data for the period October 4, 1976, to September 30, 1977, shows the following breakdown of case responses.

<u>Type of closing</u>	<u>Number</u>	<u>Percent</u>
Administratively closed	4,582	26.0
No-record	3,817	21.7
No-record main-file	2,848	16.2
Processed (Note)	<u>6,346</u>	<u>36.1</u>
Total	<u>17,593</u>	<u>100.0</u>

Note: The 6,346 processed cases include those granted in-full, denied in-part and denied in-full. FBI officials considered it impractical to break down these categories.

CHAPTER 4

FBI IMPROVING RESPONSIVENESS

TO FOI/PA REQUESTS

FOI/PA requests submitted to the FBI have historically been handled by a small staff and processed in a fragmented and ineffective manner. This contributed to the backlog of requests which at one point reached 8,599 cases and to processing delays of about 12 months.

Recognizing this problem and reacting to pressure from the Congress, courts, and requesters, in September 1976 the FBI improved its organizational structure and processing procedures. It also committed substantial funds and personnel to FOI/PA activities. These efforts resulted in more effective and efficient processing of requests. However, areas still exist where the FBI can further improve its operations and be more responsive to requesters.

The FBI has generally not been able to process requests within 10 working days as required by the FOIA because of its backlog, the time needed to prepare requests for processing, and the careful review needed to process very sensitive and complex investigative information. Considering the nature of information gathered by the FBI, the processing of requests within 10 working days will probably never become a reality. However, even if not within the 10-day limit, the FBI seems to be making every effort to reduce the response time and its efforts should be encouraged.

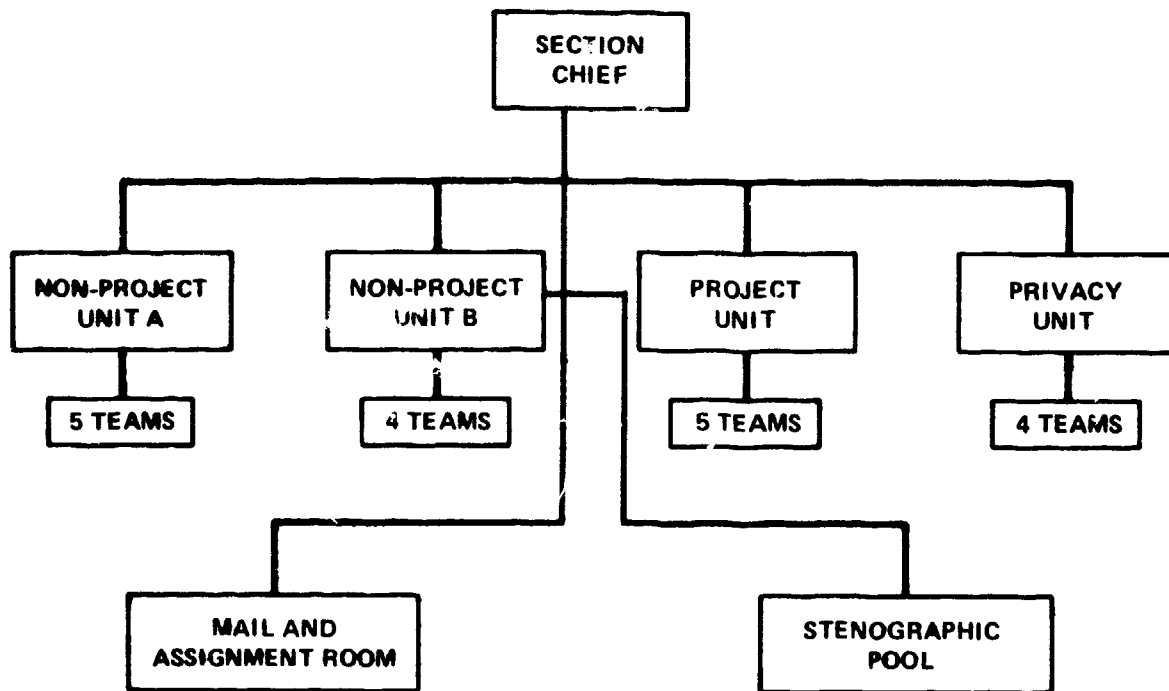
PAST ORGANIZATIONAL STRUCTURE AND PROCESSING PROCEDURES CONTRIBUTED TO THE BACKLOG

The FBI's handling of FOI/PA requests was fragmented and ineffective in dealing with the increasing number of requests. The inefficiency and ineffectiveness of the past organizational structure and processing procedures contributed to a substantial backlog of requests.

Past organizational structure inhibited efficiency and effectiveness

In 1973 processing of FOI requests was a minor undertaking and performed by a unit within the External Affairs Division. This unit had 8 people and received only 64 requests during that year. At that time, the unit was highly unstructured because the small workload did not dictate the need for a sophisticated operation.

With the passage of the 1974 amendments to the FOIA, the FBI had to increase its staff to keep up with an increasing workload. By May 1975 the unit's staff increased to 101, and the unit became a more structured and specialized section under the Records Management Division. For the first time processing teams were created, usually consisting of one special agent as a team captain, one research assistant, a clerk, and five processing analysts. During 1975 the section was separated into four units as shown below.



A two-track system (project and nonproject) was established so that the large requests would not impede the processing of the smaller, more numerous, routine requests. In addition, the FBI established a separate unit in the Legal Counsel Division to handle FOIA lawsuits and created a classification review unit in the Intelligence Division to review all documents of a classified nature.

This organizational structure represented a significant improvement over that in effect prior to May 1975 and helped to handle the workload increase which the FBI experienced from mid-1975 to mid-1976. The structure had several inefficient features, however, which contributed to slow processing of requests and resulted in a huge backlog. For example:

- Each team was responsible for handling all aspects of a request from the time it came in until the final response was given. Besides processing information, analysts had to perform administrative and support functions such as duplicating material and handling correspondence.
- The organizational structure featured a very centralized decisionmaking process with several review levels. Generally, no one below the unit chiefs had authority to release information. An FBI official said that several review levels were needed because of the newness of the FOIA and the PA and staff inexperience.
- The review of classified information was performed by people outside the division. An FBI official said that approximately 35 percent of the requests involved material of a classified nature. There were no full-time agents working on classifying or declassifying material; thus, the review, in some cases, could take up to 3 or 4 months to complete. Of 94 sample nonproject cases, 38 were referred for classification and took an average of about 18 days to process; however, an average of only about 2 agent hours were required to do the work.

Past processing of a request was
cumbersome and ineffective

Until May 1975 when agents and analysts processed cases, handled all correspondence, and took care of other administrative duties, processing operations were inefficient. Each

case was a one-person operation. The duties of the agents and analysts included sending the files and prepared releases to other FBI divisions for their review, consulting with other agencies when the FBI files contained materials from them, referring other agencies' documents back to them for review, and exchanging correspondence with requesters to obtain more identifying information and notarized signatures. Analysts told us they had to write so often to requesters explaining the delays in processing, that soon they were just writing letters explaining delays and processing few original requests.

After May 1975 when processing teams were formed, operations improved as the backlog of requests was handled on a team rather than on an individual basis. As an analyst's workload diminished, the team captain assigned new cases. The research assistant handled the team backlog, initial correspondence with requesters, and other administrative matters such as photocopying. Analysts processed requests, handled most of the subsequent correspondence with requesters, referred material to and consulted with other agencies, contacted other FBI divisions, and matched the requester with the appropriate file. Analysts began to use form letters to obtain more information from requesters and/or inform requesters of the backlog. This practice replaced the burdensome and time-consuming procedures.

As the volume of processing work increased, it became impossible for one person to review all releases. Therefore, the division director delegated review responsibility to the section chief who further delegated the review to the unit chiefs. By early 1976 the unit chiefs approved most of the final releases, with only complex cases going to the section chief for review.

From our sample of 196 nonproject requests closed during the period January to September 1976, we tried to determine how long it took to process a case and what caused delays at each step. We found, however, that the FBI's recordkeeping procedures did not allow us to determine anything other than how long it took to process a request from the time it was received until the case was closed. The following table shows the amount of time required for the FBI to respond.

Final Response Time

<u>Response type</u>	<u>Average time</u> (Days)	<u>Range</u>	
		<u>Low</u>	<u>High</u>
No record	77	2	278
Administratively closed	164	9	395
Processed	185	1	383

IMPROVEMENTS MADE TO HANDLE REQUESTS MORE EFFICIENTLY

In September 1976 the FBI reorganized its FOI/PA section to try to reduce its backlog of requests and provide quicker responses. The new organizational structure, improved processing procedures, and increased commitment of funds and personnel resulted in improved operations.

Organizational structure promotes more efficient processing

In July 1976 the House Judiciary Subcommittee on Civil and Constitutional Rights asked the FBI to prepare a plan to eliminate the backlog of requests within 1 year. In September 1976 the FBI presented a proposal before the Subcommittee which called for a massive reorganization of the section. The chart on page 18 shows the structure of the branch as of January 1978.

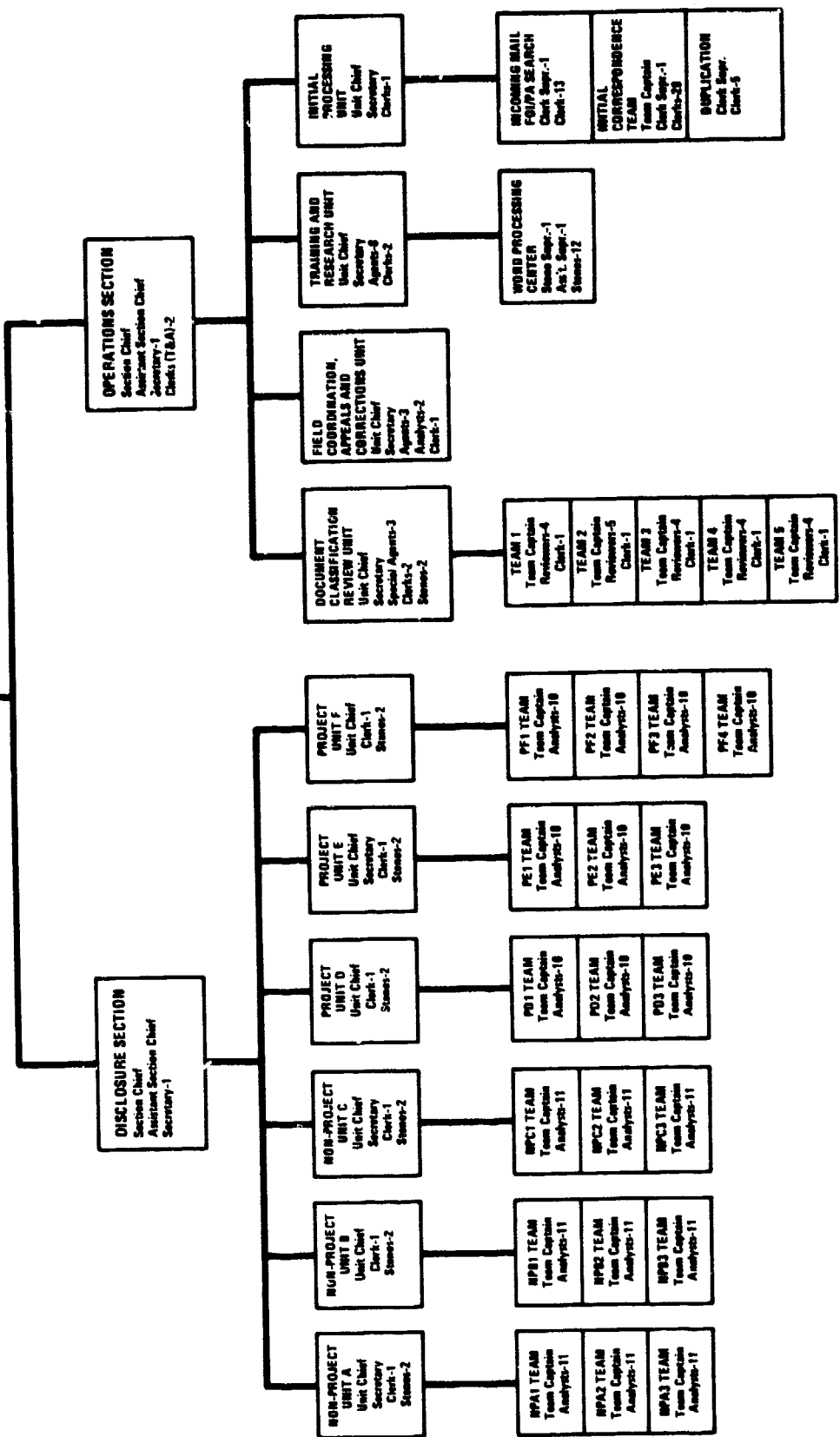
The newly created branch was divided into two sections: disclosure and operations. Because the reorganization brought greater specialization of activities, the processing operation was more capable of meeting the heavy workload demands.

The disclosure section's main responsibility is to determine what information to release to a requester. The section is divided into nonproject and project units. The operations section's main responsibility is to provide support to the disclosure section. This section consists of four units: training and research; field coordination, appeals and corrections; classification review; and initial processing.

The unit chiefs are responsible for assuring that each team works efficiently and for distributing the workload. The team captains are the immediate supervisors and provide

guidance to the analysts on how to handle requests and how to apply the laws' exemptions. Generally, team captains have responsibility for the release or denial of information. They refer complex cases, however, to the unit chiefs for final determination. Only a few cases are sent to the section chief for review. Analysts' main responsibilities are to process documents and make initial determinations as to what can be released.

**FOI/PA BRANCH
INSPECTOR-DEPUTY
ASSISTANT DIRECTOR
SECRETARY**

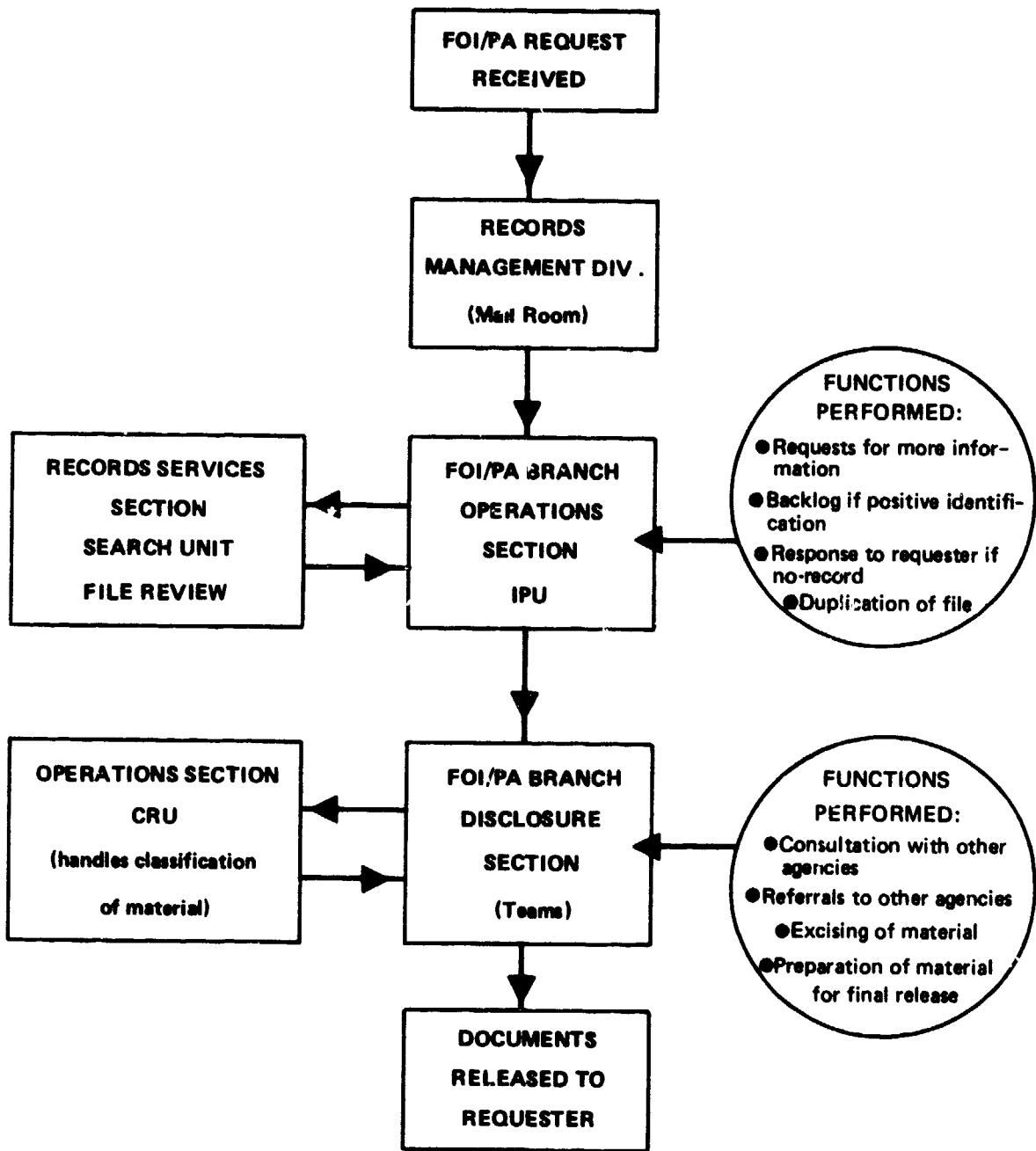


Many improvements have emerged as a result of the new organizational and processing structure. For example:

- Analysts have more time to devote to processing documents because the initial processing unit handles all initial work previously performed by analysts.
- Team captains and unit chiefs can concentrate on supervising actual processing operations because the training and research unit now trains new employees and researches the latest legal interpretations.
- Most aspects of processing a request, including coordination of classified material, are now under the control of one branch.
- Numerous review levels which previously existed were eliminated.

Processing of requests streamlined

Upon reorganization of the FOI/PA branch, request processing changed considerably. The new process features greater specialization of activities, new excising techniques, and a more efficient handling of paperwork. The flowchart on p. 20 depicts how a request flows through the system.



FBI officials told us that many FOI/PA requests have inherent delays upon receipt because requesters initially do not provide complete documentation. Requests which lack a notarized signature or enough information to positively verify the requester's identity are considered not "perfected." In an October 1977 survey, the FBI found that only about 55 percent of the requests were perfected upon receipt. The survey also showed that for the other 45 percent, the FBI needed about 33 working days from the date of receipt to obtain all the information.

After a request was perfected, according to the FBI, the initial processing unit needed an additional 15 to 20 working days to prepare it for analyst processing. FBI officials identified the initial processing unit's lack of sufficient personnel to handle the heavy workload as one reason for this length of time. Another reason for the delay was an inability to locate the files needed to make a positive identification of the requester. Often other FBI divisions or other teams within the FOI/PA branch who were using the files had not properly checked them out. FBI officials said that this occurs about 15 to 20 percent of the time.

Once the initial processing unit finishes preparing the material for processing, the material is put into the backlog until an analyst is available to start a new case. During the processing, analysts determine (1) if the file contains information that needs to be referred to the classification review unit and (2) on a line-by-line basis what material is to be released. A popular misconception about this process is that excising is a very simple process because it involves only reviewing a requester's file to excise information on third parties. Because the FBI's records are not, however, in dossier form, analysts must review many documents which may contain information on the requester as well as on other individuals. Moreover, analysts must decide, among other things, what information would violate someone's privacy or disclose a source's identity. Therefore, excising includes such things as deleting names, other information that would allow the requester to determine who provided information to the FBI, and information that would hinder the FBI's future investigative capabilities.

Since mid-1977 analysts have been using a new technique to excise the material to be withheld. The new excising process involves a special marker which blackens out the information to be deleted when duplicated for release to the requester. The marker still allows the analyst and reviewers to read the material deleted on

the copy from which the duplication is made. This new technique allows faster excising than the prior method of physically cutting out material.

Another technique which has helped to speed up processing is the increased use of form letters. The letters are used to acknowledge a request, inform the requester of the backlog, obtain additional personal identification, request a notarized signature, provide a final response, and tell the requester which exemptions were used to withhold material.

Inventory sheets are available to analysts for use in identifying the exemptions used on each document, the number of pages processed, and the number of pages released. This information could be used to internally monitor productivity and to facilitate the appeals process by providing a ready reference as to the exemptions used on a particular document.

Aside from their regular processing duties, analysts and team captains must also handle administrative appeals and litigations. At the administrative appeal stage analysts and sometimes team captains meet with attorneys from the Office of Privacy and Information Appeals to discuss the rationale for using each exemption.

When a request leads to litigation, the FBI has been required to submit affidavits with concise justifications for each excision. Analysts and team captains usually prepare the affidavits with the aid of the Information and Privacy Acts Litigation Unit within the Legal Counsel Division. FBI officials said their preparation is very time-consuming and detracts from the time available to process requests.

Quicker response by the classification review unit

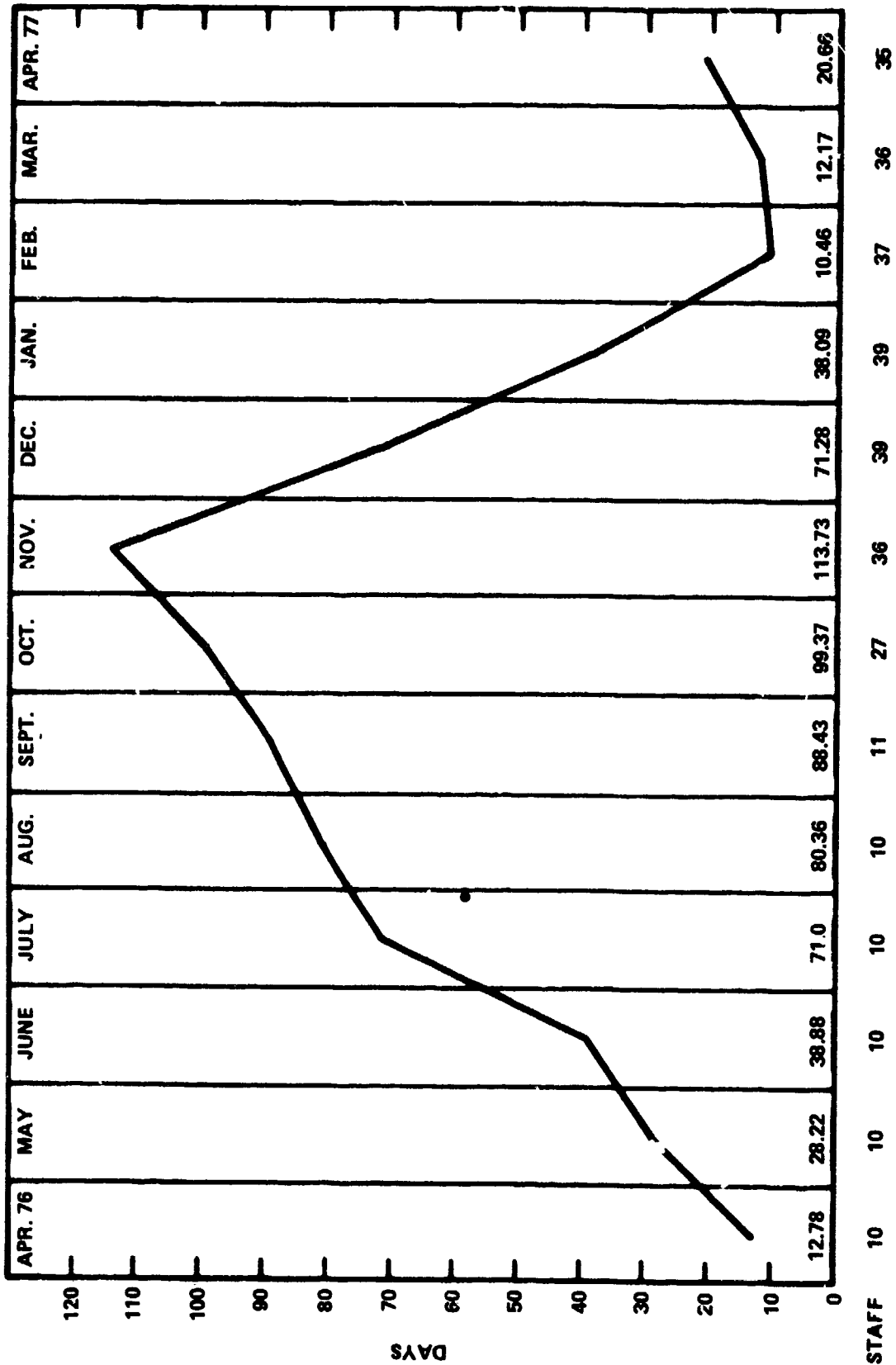
Lack of sufficient staff to handle the increased workload greatly increased the classification review unit's turnaround time. The unit was formed in April 1976 with a staff of 10 people. After the FOI/PA branch reorganization, the staff increased to 27 by the end of October and to 36 by the end of November 1976. FBI officials said that about 35 percent of all FOI/PA requests require the classification review unit's processing. The unit's turnaround time on requests grew dramatically and peaked at an average of about 114 days in November 1976. The amount of time required was attributed to the backlog, since on the average only a few hours were spent actually processing each case.

The charts on pages 24 and 25 depict the average number of days cases remained with the classification review unit and the average number of unit review hours for the period April 1976 through April 1977.

In December 1976 unit turnaround time decreased as dramatically as it had increased, and the backlog was substantially reduced. While the unit processed only 411 cases from April to September 1976, it processed 1,575 cases between October 1976 and April 1977. An FBI official said the higher number of cases processed and the reduction in processing time resulted from the substantial increase in personnel.

As of December 1977, the unit's staff consisted of 47 people, and about 20 to 25 days were needed to process a case. At that time the unit had 650 requests on hand and, according to an FBI official, about one-half of these were in actual processing.

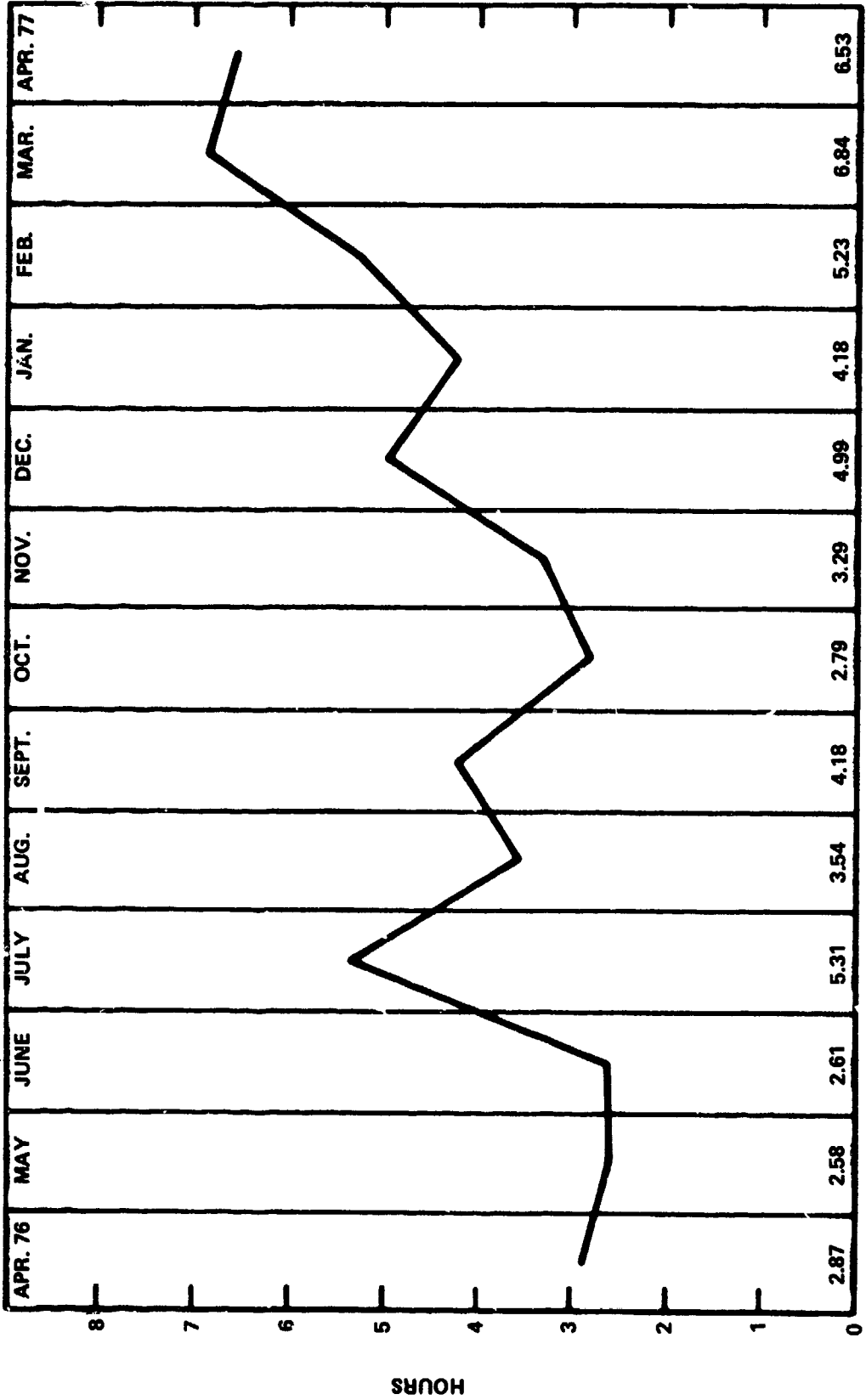
AVERAGE NUMBER OF DAYS IN CRU - APRIL 1976 THRU APRIL 1977



DAYS

STAFF

AVERAGE NUMBER OF REVIEW HOURS SPENT IN CPU- APRIL 1976 THRU APRIL 1977



Timeliness of responses improving

Response time, which represents the time from receipt of a request to the date a request is closed, has also improved since the reorganization. We sampled 272 nonproject requests processed during early 1977 and determined response times for 155 processed and 91 no-record cases. The other 26 cases were administratively closed and we were unable to determine their processing time. As shown below, the amount of time cases spent in the backlog contributed significantly to the overall amount of time required for processing.

<u>Response type</u>	<u>Average processing time (days)</u>	<u>Average time in backlog (days)</u>
No-record	313	292
Processed	346	294

FBI officials said they are presently able to respond to most no-record cases within 10 days because the FBI now verifies whether a record exists. Previously, the request was put in the backlog and waited its turn before any verification was made that a record even existed.

In May 1977 the branch was processing nonproject requests received in June 1976 and project requests received in January 1976. By September 1977, however, the branch was processing nonproject requests received in July 1977 and project requests received in May 1977. By the end of 1977, the unit was processing nonproject requests received in November 1977 and project requests received in October 1977.

FBI has increased its resources and training

The FBI's commitment of funds and personnel to FOI/PA activities has grown more than tenfold since the 1974 FOIA amendments went into effect in February 1975. Typical of the increased commitment is the increase in staff assigned to FOI/PA activities at headquarters, which in June 1977 was larger than the entire staff at 51 of the 59 field offices. In addition, not counting the Records Management Division of which the FOI/PA branch is a part, the branch's staff was larger than six of the other eleven headquarters divisions. The increase, however, has still proven to be inadequate to meet the high volume of requests received during the same period. The result has been a huge backlog and an inability to meet the required 10-day response time.

Personnel

Work performed by the FOI/PA branch involves five types of employees: special agents, analysts, clerks, stenographers, and secretaries. The following table shows the increase in staffing since 1973.

Date	Special agents	Analysts	Clerks	Stenos, secretaries	Total (note a)
Oct. 1973	3	3	1	1	b/ 8
Aug. 1974	5	7	2	2	b/ 16
Feb. 1975	5	17	3	2	b/ 27
May 1975	12	55	16	16	b/101
Sept. 1975	22	73	35	33	b/163
Dec. 1975	22	72	30	37	161
June 1976	24	88	30	41	183
Sept. 1976	34	86	40	39	199
Jan. 1977	49	105	51	34	239
June 1977	55	214	60	36	365
Sept. 1977	53	210	59	37	359
Dec. 1977	54	208	74	31	367

a/Project onslaught agents are not included.

b/These figures represent the authorized level. The remaining figures represent actual level.

When the flood of requests began to arrive in mid-1975, the FBI increased the number of people working on FOI/PA activities. By September 1975 the FBI had about 10 times as many people as in 1974. Even with this substantial personnel increase, however, the FBI was unable to keep up with requests, and a backlog of about 4,000 requests developed.

From September 1975 to September 1976, the FBI was not as quick to react to the increasing workload. Thirty-six additional people were assigned during that 1-year period, but the backlog grew to about 7,700 requests.

FBI officials said that additional personnel were not assigned because the FBI thought that the trend of the public's requests for information would decline and that most people would not bother to submit FOI/PA requests. Although the ever-increasing number of requests proved this assumption false, Justice Department officials believed that the staff assigned to FOI/PA was generous and that an increase was not warranted.

In addition to the FBI headquarters FOI/PA staff, each of the field offices has two special agents trained in FOI/PA matters who work part-time in processing requests. In the larger field offices receiving the most requests, such as New York, Los Angeles, and San Francisco, either one or both of the agents may work full-time and may also have clerical help.

There are several other employees in headquarters whose work is directly connected to the FOI/PA branch but who are not assigned to the branch. These include 11 employees in the litigation unit and the equivalent of 7 full-time employees in the Records Management Division who search the general index and review files.

In contrast to the large number at the FBI, the FOI/PA unit within DEA had 15 authorized staff positions in July 1977, of which 13 were filled. By November 1977 DEA had increased its staff to 17. DEA brought in, for a 3-month period, 13 agents from its regional offices and 4 summer interns to handle the increased number of requests on hand.

The FOI/PA branch within AF-OSI had three people working full-time and three people working the equivalent of about one and one-half full-time in May 1977. By the end of 1977, the branch had a staff of six full-time people.

Funds

The FOIA did not provide funds for Federal agencies to implement and administer the act. The House Committee on Government Operations originally estimated that the Government-wide costs to implement the FOIA would be \$50,000 in fiscal year 1974 and \$100,000 for each of the succeeding 5 fiscal years. These estimates turned out to be far below the actual expenses reported by Federal agencies.

According to the Congressional Research Service's annual FOIA reports, 35 agencies reported calendar year 1975 costs amounting to about \$11.8 million. For calendar year 1976, 36 agencies reported costs of about \$20.8 million. At the same time, the agencies collected fees amounting to only about \$1 million and \$978,000 for 1975 and 1976, respectively. The Department of Justice's costs were not included for either year because it did not distinguish between FOIA and PA costs.

The PA, like the FOIA, did not provide for any funds for Federal agencies to implement and administer the act. In 1974 OMB estimated that the annual cost of implementing the PA would be \$200 to \$300 million a year, with a one-time start-up cost of \$100 million. These estimates proved to be high, since the President's second annual PA report showed start-up costs of about \$29.5 million and operating costs of \$36.6 million for the period September 1975 to September 1976.

The FBI processes both FOIA and PA requests without making any administrative distinctions and thus does not separate the costs or allocation of manpower to either act. It does, however, report an estimate of the combined cost for FOI/PA activities in the FOI annual report. The following table provides the FOI/PA cost breakdown by fiscal year for FBI headquarters.

<u>Fiscal year</u>	<u>FOI/PA costs</u> (note a)
1974	\$ 160,000
1975	462,000
1976	3,090,000
1977	<u>b/9</u> 153,000
1978 estimate	7,112,000
1979 estimate	7,665,000

a/Amounts include (1) the cost of personnel assigned to the FOI/PA branch; (2) the cost of certain personnel of the Legal Counsel and Intelligence Divisions who are involved in handling FOI/PA matters at FBI headquarters, and (3) related costs, such as supplies, equipment, and overhead. Support costs, such as handling of files in the field and in the Records Management Branch at headquarters, are not included. Fiscal years 1976 through 1979 include the reimbursable costs for appeals office services.

b/This figure includes "project onslaught" costs of \$2.8 million. (See p. 36 for a discussion of project onslaught.)

The costs have increased steadily and this trend is likely to continue in view of the continually increasing rate of requests.

Training of personnel in the FOI/PA area

The special agents assigned full-time to FOI/PA headquarters activities are all law-trained agents and act as supervisors. The FBI assigned law-trained agents because of the law's complexity, the need to make legal interpretations, and potential administrative appeals and litigation.

When agents first started to work on FOI/PA matters, no formal training was provided. In June 1975 agents already assigned conducted training sessions for newly assigned agents. However, all training was on an ad hoc basis and consisted mostly of on-the-job training. For the two agents from each field office a 3-day conference was held in September 1975 to train them in the latest FOIA changes and new PA requirements.

Since the training unit was created in September 1976, training has become more formalized and comprehensive, and now lasts 5 days. The first full 5-day training for new agents was conducted in mid-January 1977. An additional training seminar was held in March 1977. For field office agents, the FBI held seven 4-day regional training seminars during the period November 1976 to January 1978.

Analysts are assigned from other FBI areas and volunteer for the FOI/PA work. They are usually at the GS-7 and GS-9 levels and have at least 2 years of FBI experience. Many are college graduates.

Like agents, the analysts did not receive any formal training when they first started in early 1975. After reading the FOIA and the Attorney General's guidelines, subsequent training was on-the-job. In June 1975 new analysts began to receive a few hours of training. Although a training unit had not yet been established, formal training was given to newly assigned analysts in January and May 1976.

The new training unit began conducting classes in early 1977 when the branch's expansion brought in a heavy influx of new analysts. These classes were much more comprehensive than those conducted in 1976 and lasted for 5 days. The training unit plans to continue the 1-week training for new analysts and agents and to begin some in-service training for both agents and analysts who have been in the branch for a long time.

FBI officials told us that they have been studying the possibility of replacing the special agents with senior analysts as team captains. Three of the senior analysts interviewed had a good knowledge of the law and how to use the exemptions. Additionally, senior analysts have already handled many supervisory duties. For example, during the FBI's special project onslaught, senior analysts were used as assistant supervisors and reviewed much of the material processed by the special agents. FBI officials said that the analysts performed their supervisory responsibilities very well.

The FOI/PA branch is now well established and senior analysts have the knowledge and experience to be given additional responsibility. Therefore, senior analysts should be able to replace the special agent team captains. Only a small cadre of special agents at higher positions should be needed to run the branch effectively. The other agents could return to perform investigative duties. However, this does not mean that the total branch staff should be reduced.

In commenting on our report, the Department of Justice said that it had reservations as to the efficacy of immediately implementing our recommendation regarding the substitution of clerical personnel for law-trained special agent supervisors at the FBI. The Department of Justice has already reduced 10 agent supervisors from the FOI/PA branch and plans to consider the feasibility of reducing the number of agents even further. However, it had reservations over additional reductions at this time because it believes that experienced law-trained agents are needed to supervise the processing of sensitive material and handle litigations.

We agree with the Department's concerns, but believe that a small cadre of agents should be sufficient to effectively manage the branch and provide guidance in processing sensitive material and handling litigation. We also believe that the FBI should continue to emphasize replacing first-line agent supervisors with properly trained and experienced analysts.

OTHER NEEDED IMPROVEMENTS

Two other areas which do not affect the processing of requests but which need improvement are the information content of response letters and the basis for charging fees for services rendered.

Response letters to requesters

The FBI, DEA, and AF-OSI differ in the method of providing information to a requester and in the content of the final response letter. The FBI's final response complies with the law by telling requesters, in the cover letter, which exemptions were used to deny any information and of their right to appeal. The information given to the requester contains a copy of the material released; however, it does not identify on each page the exemptions used to withhold information. Further, the response does not mention how many pages were in the file or how many were totally denied, nor does it mention that only the headquarters indexes were searched.

The FBI uses an inventory sheet to keep track internally of which exemptions were used on each page. Instead of this sheet, the FBI could mark on each page of a document which exemption was used to withhold information, allowing requesters to determine on what basis information was excised.

In our opinion, the requesters should be told how many pages are in their files and how many are denied entirely, so that they will have an idea of the file's size. The requesters should also be told that only the headquarters central records system was searched. The FBI publishes a list of field offices in the Federal Register; however, Federal Register distribution is limited and many requesters may not be familiar with it.

DEA response letters were not as informative or adequate as the FBI's. For an FOIA request DEA told the requester in the letter about the exemptions used to deny information. However, if the request was a PA request for criminal records, then it was processed under the FOIA, because otherwise it would be exempt under PA. In such cases DEA told requesters that the documents were found in an exempt system and that it was making certain releases on a discretionary basis. DEA did not mention the FOIA exemptions used to deny information. A DEA official said that in these types of cases DEA did not have to mention the exemptions used, because it processed the case under PA and made merely a discretionary release under FOIA.

A 1975 Attorney General's memorandum on the 1974 amendments to the FOIA clearly stated that denial letters must contain the reasons for denying information with specific reference to the exemptions used. DEA was not

following the Attorney General's guidelines or the full disclosure intent of the Congress. The fact that a discretionary release was made should make no difference, and response letters, at least, should cite the exemptions used. After we brought this to the attention of the Office of Privacy and Information Appeals, DEA began citing the exemptions used in its responses to requesters.

The AF-OSI response letters, like those of the FBI, identify the exemptions used to deny information. The released information, unlike that of the FBI and DEA, also identifies which exemptions were used to deny portions of the information. AF-OSI notes the exemptions used over the material which is deleted and informs the requester of the number of pages withheld entirely. This procedure is more informative than the methods FBI and DEA used.

Neither the FBI nor DEA informs the requester of the number of pages in a file or the number denied. They should include this type of information in their responses.

Fees charged for document searches and duplication

The FOIA allows agencies to charge fees for document searches and duplication, while the PA allows charges only for duplication. The FBI generally charges only duplication fees--in special circumstances it will charge search fees. The FBI collected \$2,650, \$25,751, and \$82,478 in 1975, 1976, and 1977, respectively. The DEA reported collecting \$7,400 and \$641 in 1975 and 1976, respectively. AF-OSI collected only \$212 in 1976.

According to the FOIA, fees can be waived or reduced if the requested information is considered as primarily benefiting the general public. Department regulations also include indigency as a reason for waivers. The FBI uses a three-person committee to decide whether a fee should be waived.

FBI officials have problems waiving fees because they have very little guidance on what is considered "in the public interest." Their main concern in deciding to waive or not waive the fee is whether the information will be disseminated to the general public. Only in very exceptional and well known cases, therefore, will they consider waiving the fee for a first-party request because they find it difficult to consider such requests beneficial to the general public.

The FBI charges a fee to the requester only when the reproduction costs are over \$3. In March 1976 FBI officials proposed that the Justice Department reevaluate this \$3 minimum fee because they believed that in many cases the administrative cost of collecting and processing the fee exceeded the fee itself. According to an FBI official, the FBI wanted to raise the minimum fee so that all fees less than \$25 could be waived. The official also said that Department officials rejected the proposal because they feared that if fees of up to \$25 were waived, some Department components, especially the Bureau of Prisons, would be overwhelmed with requests. The 1977 draft regulations of the Department, however, provide that a "Department official may, but need not, waive in the public interest any fee, or portion thereof, where the actual administrative cost of collecting and processing that fee would exceed the amount of the fee itself." These regulations have not yet been implemented.

Although we did not conduct a cost study, it seems logical that in many cases the administrative costs of processing fee correspondence could exceed the fee itself. Therefore, it is imperative for the Department to require all components to study the administrative cost of processing fees and establish a fee schedule based on cost. The schedule would allow the FBI and other Department components to charge a fee only when the amount to be recovered exceeded the costs of collecting fees.

FACTORS THAT AFFECT THE PROCESSING OF REQUESTS

Two factors that prevent the FBI from processing requests in a timely manner are lawsuits and the size of the request. A factor that could improve the effectiveness of FOI/PA operations is the FBI's proposed file destruction policy, which is currently pending approval before the Congress.

Lawsuits

FBI officials said that lawsuits are one of the most important factors affecting timely request processing. Lawsuits are triggered by the FBI's failure to meet the statutory time limits or by a requester's dissatisfaction with the documents released.

The question of timeliness also arises when a court imposes on the FBI a short deadline for processing a request. The timeliness problem is particularly acute when a large volume of information must be processed for a project case. Because many analysts and agents have to be

used to process the request within the imposed deadline, branch productivity decreases. Both agents and analysts have to put aside other requests and concentrate their efforts on the court-imposed requirements.

Several court cases, notably the Rosenberg case, have delayed the timely processing of requests regarding other cases. During the processing of the Rosenberg case, which mostly took place between August and November 1975 because of the court-imposed deadline, the FBI used over one-half the personnel assigned to the branch. This resulted in a rapid increase in the backlog. According to FBI statistics, the backlog grew by about 2,000 requests during this 3-month period.

Another case requiring a significant amount of resources was the Alger Hiss request. As a result of a court order, most of the processing took place between August 1975 and January 1976. Although the regular workforce consisted mainly of 2 agents, 5 analysts, and 3 clerks, during this 6-month period 2 agents and as many as 31 analysts worked on this single case.

Processing delays also arise when requesters ask for justifications on each exemption used to deny part or all of the information on each document. FBI officials said that "in almost every lawsuit the plaintiff demands and receives what is commonly referred to as a Vaughn v. Rosen 484 F.2d 820 (D.C. Circuit, 1973) refusal justification affidavit." This refusal requires a concise description of each item withheld and the reasons for withholding it. Preparation of these affidavits is time-consuming, especially when large project cases are involved. In project cases many people are involved, and even though a case may have been processed before, it must be almost totally reprocessed.

Size of files requested

The size of the files pertaining to a request also affect the time needed for processing. Project cases which involve 15 or more volumes of information require a large amount of staff time for processing. The Kennedy Assassination files, the Rosenberg files, and the COINTELPRO files are examples of cases where over 50,000 pages had to be reviewed. For these and other cases where tens of thousands of pages have to be reviewed, the FBI cannot realistically process them within 10 days.

Requesters sometimes seek information dealing with several individuals or with a very general subject involving a considerable number of files. The FBI negotiates with

such requesters to narrow the scope of the requests. The FBI has found that requesters often did not realize how much material they were asking for.

File destruction

In May 1977 the FBI submitted a plan for disposing of some of its records. This plan was submitted to the National Archives and to the Congress for comment. The comments from the Congress had not been received as of March 1978.

When implemented, the plan will call for transferring to the National Archives, after 75 years, files which are historical in nature and for which intense congressional and public interest has been expressed. The plan will call for the destruction of criminal records after 10 years of no relevant activity and of most security and applicant investigative files after 30 years of no relevant activity. A separate authority has been granted for destroying field office records on the basis that the records are contained in headquarters files in whole, substance, or summarization.

Destroying files will not have a large and immediate impact upon the FOI/PA branch, but in the future it should reduce the workload by diminishing the number of files from which requests could be made.

PROJECT ONSLAUGHT--AN ATTACK ON THE BACKLOG

At a July 1976 hearing the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee requested that the FBI prepare a plan to eliminate the existing backlog of FOI/PA requests. At a hearing 2 months later the FBI presented a proposal called "project onslaught" to the Subcommittee. The proposal called for a reorganization of the branch coupled with additional staffing. It also called for a crash program of assigning 400 law-trained special agents from the field offices to work on the backlog.

Because of space allocation problems at FBI headquarters, the project did not get started until May 1977. This meant that the project would only run for 5 months rather than the planned 6 months. The project was divided into two groups, with 198 agents in the one and 84 agents in the other. The agents were responsible for reviewing and excising files, while support analysts handled all correspondence, consultations with other agencies, and administrative matters.

The first group processed 3,019 nonproject cases while the second group processed 186 nonproject cases and 3,036

volumes (200 pages per volume) relating to 47 project cases. FBI officials said that onslaught agents generally were able to meet the goal of 250 pages per day because their only duty was to review and excise files.

During project onslaught the FBI found that the agents could recognize a problem quicker than the analysts but that the analysts were better at following the guidelines and regulations for excising. FBI officials said that both groups of agents were conservative in their excising because the release of information was contrary to their FBI experience. Their excising was always legally defensible but more conservative than the Attorney General's release policy intended.

Lessons learned

During project onslaught FBI officials learned that the senior analysts working as assistant supervisors proved to be quite capable of handling supervisory responsibility. FBI officials were then convinced that additional supervisory responsibility could be given to the senior analysts, thus allowing special agent team captains to be replaced.

FBI officials also learned that the ratio of 20 workers to 1 team captain in the first group was too large for effective supervision. They found that a 10-to-1 ratio used in the second group was more conducive to effective group performance.

During project onslaught FBI officials found that bleach could be used to erase the special see-through ink used to excise material. This proved very helpful because agents and analysts could make corrections quickly rather than having to recopy the whole page.

Accomplishments

Project onslaught reduced but did not eliminate the backlog. When project onslaught ended on September 30, 1977, 2,059 of the nonproject cases processed by the first group had been closed. Additionally, on the basis of the work done by the second group, 33 nonproject cases were closed and 1,615 volumes of material were released which related to 47 project cases. Cases processed but not yet closed at the end of project onslaught were awaiting supervisory review, classification review, or consultation with other agencies.

The estimated cost of the original project onslaught proposal was between \$4.9 million and \$5.3 million. A lower

actual cost of \$2.8 million resulted from using fewer agents over a shorter period of time and from processing a smaller amount of work than anticipated.

FBI officials said that project onslaught was beneficial because a considerable portion of the backlog was eliminated, especially in the project case area.

Although project onslaught did not accomplish its objective of eliminating the backlog, it was successful in reducing it. When the project began, the FBI had 7,566 requests on hand. From May 2, 1977, through September 30, 1977, the branch received 7,892 new requests; when project onslaught ended, the FBI had 4,910 requests on hand. Thus, during the 5-month period, the FBI closed 10,548 requests for a net reduction in the backlog of 2,656 requests.

The FBI recently redefined what it considers its backlog. The FBI counts as backlog only those requests that have been perfected--that is, those which contain all information needed for processing as opposed to counting all requests on hand. Under this definition, the backlog as of September 30, 1977, amounted to 1,007 requests instead of 4,910. The 4,910 figure was broken down into 2,015 requests being processed, 1,154 requests awaiting a response from the requester, 187 requests waiting to be closed for various reasons (such as awaiting fees from the requester), 547 newly received requests, and 1,007 perfected. This definition is more realistic and it more accurately reflects what can be considered as a true backlog.

CONCLUSIONS

The ever increasing number of requests for information has contributed to the FBI's inability to handle requests in a timely manner. The number of requests rose from 64 in 1973 to about 20,000 in 1977. Delays in processing requests were caused by limited staffing and a fragmented and ineffective processing system. As a result, a sizable backlog of requests developed causing at one point about a 12-month delay in responding to requesters.

The FBI recognized its problems and responded to pressures from the Congress by improving its operations. The following improvements resulted in more efficient and timely processing.

- Reorganization of management structure.
- Specialization of processing activities.
- Increased personnel.

- Elimination of some review levels.
- More efficient correspondence with requesters.
- Simplifications in the excising process.
- Improved personnel training.

Even though these efforts are a major step forward, the FBI could be more responsive by:

- Including in its responses to requesters such items as the number of pages in a file and the number denied, the exemption used to deny information on each particular page, and a statement that only headquarters' files were searched.
- Improving controls over investigative files so they can more easily be located.
- Waiving the fees in those cases where the cost of collection is more than the fee itself.
- Using analysts as team captains to allow agents to return to their main purpose of performing investigative duties.

Although the FBI implemented project onslaught to eliminate the backlog within 1 year, it was not successful. The project merely reduced the backlog. This project was very costly and any similar efforts in the future should be carefully studied before being implemented.

The FBI is faced with the dilemma that even after a substantial commitment of resources and improvement of its organization and processing procedures, it still cannot meet the 10-day time limit imposed by the FOIA. The FBI's basic problem is that most requests deal with investigative records requiring a time-consuming, line-by-line review to determine what information can be released. For investigative records the 10-day time limit seems unrealistic and impractical. Given the present staff, improvements made, and the same rate of requests, the FBI will not be able to meet the time limit for cases where information must be processed. FBI officials doubt they will ever be able to process requests within 10 days but hope to provide timely responses in 30 working days for nonproject requests and 45 working days for project requests.

RECOMMENDATIONS

We recommend that the Attorney General

- require the FBI to use analysts in lieu of special agents to supervise the processing of FOI/PA cases;
- require the FBI and other Department components to provide more information to requesters, such as the type and amount of material withheld; and
- require the FBI and other Department components to waive duplication fees when the cost of collection is more than the fee itself.

RECOMMENDATION TO THE CONGRESS

In view of the past experiences and projected increases in the number of requests and the inability of the FBI to keep up with the requests received without committing substantial additional resources, we recommend that the Congress change the FOIA's time requirement for responses by the FBI. The law should require the FBI to acknowledge an initial request within 10 working days and provide a full response within an additional 30 working days. In situations, however, where such a timeframe is unreasonable in view of the quantity of material to be reviewed, the FBI shall provide the requester with a firm fixed date for delivery of its response.

If the requester considers this date unreasonable, he may, according to the law, bring suit to compel an earlier delivery. In reaching decisions on such suits, the courts should give due consideration to the possible adverse impact of a directed earlier response on the FBI's ability to service the demands of other requesters, premised on a finding that the FBI is devoting a reasonable level of resources to these activities.

By changing the 10-day requirement, the courts will be relieved from handling numerous actions resulting from the FBI's inability to respond within 10 days. We believe this is a viable alternative to increasing the number of people working in the FOI/PA area and will still enable the FBI to be responsive to the public.

CHAPTER 5

FBI RELEASING MORE INFORMATION

THAN IN THE PAST

The last 3 years have seen numerous changes in the FBI's processing of FOI/PA requests. Since the passage of the 1974 FOIA amendments, the FBI has improved the type and the amount of information it releases to the public. However, inconsistencies still exist in applying FOI/PA exemptions and in implementing guidelines of the Deputy Attorney General and the FBI.

The FOIA and the PA provide the basic guidance on withholding information; however, they do not provide specific criteria for agencies to use in determining what information is to be released or withheld. The acts' disclosure provisions and exemptions contain general language, thus leaving many areas subject to interpretation. As a result, uniform implementation of the law and unanimity of opinion as to whether a release is appropriate are unlikely to be achieved.

The Congress passed the FOIA and the PA to assure both private and public access to Government records and protection of an individual's privacy. While the goals of the FOIA and the PA are consistent, some conflicts appear between the maximum disclosure intent of the FOIA and the privacy rights of the PA. Because the two acts provide only general guidance to the agencies, officials are left to balance the public's right to information against an individual's right to privacy.

MANY POLICIES, REGULATIONS AND COURT DECISIONS GOVERN WHAT WILL BE RELEASED

The FBI uses several criteria to process information requests and determine what is to be released or withheld. The criteria are provided by the FOIA and the PA, Department guidelines, court decisions, Justice Department's Office of Privacy and Information Appeals guidance, and the FBI's FOI/PA manual.

The FOIA and the PA

The Congress in passing the FOIA made clear its desire for maximum disclosure of information contained in Federal files. The act, however, contains several disclosure exemptions to protect legitimate Federal Government interests. The Congress made it clear, however, that these exemptions are permissive rather than mandatory.

The 1974 FOIA amendments were designed to facilitate public access, especially to records of law enforcement agencies. While most of the original FOIA exemptions were not changed, two exemptions--(b)(1)-classified information and (b)(7)-investigative files--were narrowed to restrict the opportunities for agencies to withhold information. Another substantive provision added by the 1974 amendments deals with information which can be isolated from portions being withheld:

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

The tightening of the exemptions' language and inclusion of the "segregable portion of a record" requirement, in addition to other requirements, clearly indicates that the law overwhelmingly favors disclosure. However, even after limiting the use of the exemptions, the law still contains language the agencies have difficulty interpreting when applying the exemptions.

The Privacy Act allows an individual to have access to his own file and to request that the files be corrected. The act has its own set of access exemptions, and like those of the FOIA, their use is permissive, not mandatory.

The PA has two sets of exemptions applicable to FBI records: general exemptions in subsection (j) and specific exemptions in subsection (k). FBI investigatory records would be exempt from disclosure under the general exemption (j)(2), because they were compiled for law enforcement activities. However, the FBI does not use this exemption. There are seven specific exemptions within subsection (k), which the FBI can use to deny part of a record from its public systems of records. The FBI uses these specific exemptions to withhold information from files processed.

Although the PA does not restrict the release of information that the FOIA requires, the PA fails to clarify the privacy issues raised in implementing the FOIA. Therefore, agency officials must subjectively determine what is "an unwarranted invasion of privacy" when applying the FOIA privacy exemptions. In processing requests, they must weigh whether the public's right to know is strong enough to override an invasion of personal privacy.

The disclosure intent of the FOIA and the PA are consistent; however, conflict exists between the disclosure philosophy of the FOIA and the privacy protection goals of the PA. Agencies are encouraged to lean towards disclosure when processing an FOIA request, but at the same time, they must be concerned with the protection of an individual's privacy under the PA.

Department of Justice guidelines

In June 1967 a Department of Justice memorandum set forth guidelines for Federal agencies to use in preparing their FOIA regulations. The memorandum represented the executive branch's interpretation of what information the law allowed to be disclosed or withheld. In February 1975 the Attorney General published new guidelines for Federal agencies to follow in complying with the 1974 FOIA amendments.

The 1975 guidelines explain the changes to classified and law enforcement records exemptions (b)(1) and (b)(7) and the new "segregable portion of a record" provision. These guidelines are very general, thus leaving substantial discretion to the agencies in determining what information can be released or withheld.

Court decisions

One of the key provisions of the 1966 FOI Act was that individuals improperly denied access to documents had a right to seek injunctive relief in the courts. According to a Congressional Research Service study, the courts, prior to the 1974 amendments, had been reluctant to order disclosure of Government information under the classified and law enforcement files exemptions (b)(1) and (b)(7). Also, few court decisions were available to indicate a clear pattern on the use of the other FOIA exemptions.

Since the passage of the 1974 amendments, over 800 suits have been filed under FOIA. The majority of these suits are still pending and Department of Justice and FBI officials said that very few court cases have set precedents on exemption usage, specifically with respect to the law enforcement files exemption (b)(7).

Department of Justice's Office of Privacy and Information Appeals guidance

The Office of Privacy and Information Appeals within the Office of the Deputy Attorney General is primarily responsible for acting on administrative appeals. Its guidance constitutes the single most significant and specific guidance Department components receive. It also has the greatest impact on how the FOI/PA exemptions are interpreted and used.

Appeals office actions provide guidance to Department components in three ways. First, "action memos" are prepared recommending action to be taken and are sent to the Department component that handled the case from which the appeal arose. Action memos address the specific issues in the case and explain the reasons for the recommended action. Because of their significance, the substance of these memos should be circulated to all Departmental components to assure maximum consistency in handling similar cases.

The Director of the Privacy and Information Appeals Office told us that action memos do not carry the force of an order or directive for future cases and should be used only for reference purposes, not as legal precedents.

A second method of guidance involves administrative interpretations of how the exemptions should be applied. Appeals office officials said these interpretations reflect the results of dealing with only specific problems in the context of individual appeals. Interpretations are not considered rules to be strictly followed, but in treating each exemption, they do provide examples as to the type of information that can be withheld or released.

Individual contacts between the appeals office staff and personnel from the FBI and other Department components represent the third method of guidance. For the FBI, individual contact is frequent because the majority of the appeals involve cases processed by the FBI. Personal

guidance also takes the form of periodic meetings, scheduled more frequently now than in the past, to discuss the latest policies and interpretations.

FBI's FOI/PA manual

The FBI's FOI/PA manual, issued in March 1977, discusses in general each FOIA and PA exemption and discusses specific instances under which the exemptions can or cannot be used to withhold information. The manual represents a significant effort by the FBI to provide guidance to its FOI/PA employees.

The manual specifically deals with the use of the exemptions in given situations. Examples are provided as to the type and the extent of information to be withheld or released. The manual is not all-encompassing but provides a quick reference for analysts and team captains on the use of exemptions in common situations.

The manual reflects the FBI's implementation of the laws but has not been updated recently to reflect new appeals office policies. FBI officials said that the manual would be updated as soon as the training branch's agents were freed from project onslaught duty. However, as of March 1, 1978, the manual's updating had not been completed.

THE OFFICE OF PRIVACY AND INFORMATION APPEALS AFFECTS HOW EXEMPTIONS ARE USED

The appeals office has the greatest impact on how Department components use legal exemptions. All FBI agents and analysts and DEA FOI/PA specialists indicated that interpretations made by the appeals office have the greatest impact on what information is to be released or withheld.

The Deputy Attorney General issued a policy statement in 1976 instructing Departmental components to release information to the public unless it was contrary to "the vital interests of the Department." Although this concept was never specifically defined, the Deputy Attorney General advised the Department of Justice components that they were to release not only clearly releasable material but also some that was technically withholdable. The Deputy Attorney General said that in his own view " * * * an exemption is nothing more than a lawful excuse to withhold a record."

Under the above policy the appeals office began to encourage additional releases of information that could have been protected under the law. The emphasis on additional release affected most of the exemptions applied by the FBI.

The Attorney General further liberalized the disclosure policy in a May 1977 letter to all Federal departments and agencies:

"The Government should not withhold documents unless it is important to the public interests to do so, even if there is some arguable legal basis for the withholding."

He also indicated that the Department of Justice would defend FOIA suits "* * * only when disclosure is demonstratively harmful, even if the documents technically fall within the exemptions in the FOIA." Thus, this policy liberalized the criteria for releasing documents in favor of more disclosure. The standard evolved from withholding matters that affected the "vital interests of the Department" to matters that were "demonstratively harmful." The "harm theory" has resulted in further liberalization of release policies.

Results of the Office of Privacy and Information Appeals reviews

We examined the files of the appeals office to determine how often initial actions taken by the FBI were reversed, modified, or affirmed. We reviewed all decisions made by the appeals office in 1976 and found that 603 of the total 1,166 related to the FBI. In 166 of the 603 cases, the FBI was totally affirmed while in 345 cases, the FBI's decisions had been modified in one way or another. The remaining 92 cases involved administratively closed appeals which did not affect the FBI's initial release decisions. These 92 cases included appeals from requesters refusing to provide a notarized signature, refusing to wait in the FBI backlog, or withdrawing their appeal.

Taken at face value, these statistics would indicate that the FBI was not fully complying with the Department guidelines in about 57 percent of the cases where a decision was made. However, there are two factors that must be considered when drawing conclusions from these statistics.

First, the appeals office's decision on the FBI's- release was usually not made until about 6 to 8 months after the appeal was initially made, because of the huge backlog at the appeals office. During those 6 to 8 months, the release policies by the appeals office became more and more liberal, so that the final appeal decision was made based on guidelines not in effect at the time the FBI made its initial decision on what material to release.

Second, any release recommended by the appeals office counts as a modification, no matter whether it involves merely names, parts of paragraphs, or several pages of previously withheld material.

FBI OFFICIALS' ATTITUDES CHANGING

Attitudes of processing officials are important in determining what information is to be released or withheld. After the passage of the 1974 FOIA amendments, the FBI began to process a considerable number of requests. At that time, the FBI approached the law with extreme caution and its information releases were accordingly very limited. The main reason was that FBI officials, who for many years had worked under the system that FBI files were not for the public to see, were now required to release some of that information. Also, because the law was new, only general guidelines existed on how to implement the exemptions.

Interviews with several analysts and agents revealed different attitudes on how the exemptions were to be applied. For example, they did not agree on whether to withhold administrative markings. All of them expressed deep concern over the protection of confidential sources and tried to protect them by releasing as little as possible from their statements; however, the degree of release of this information varied among the teams. The invasion of a third party's privacy was also a concern, so references in a file to a third party were sometimes withheld entirely by some, while others allowed some of the third party's information to be released. Even now, the invasion of someone's privacy and the protection of confidential sources are still strong issues, and there are some agents and analysts who are very conservative in the amount of information released under the legal exemptions.

Attitudes can make the difference as to how many pages, paragraphs, lines, or even words are excised. This is because the excising process consists of a line-by-line review, and officials must constantly make subjective decisions as to whether a certain paragraph or line would disclose the identity of an informant or constitute an unwarranted invasion of privacy. FBI attitudes have changed from "withhold as much as possible" to "withhold only that which can be reasonably expected to damage effective law enforcement."

The appeals office attorneys agreed that the FBI has progressed substantially from its past reluctance to release information, and is now one of the best Departmental components in this regard. Also, an official from the Department's Information and Privacy Section said that the FBI has made a noticeable improvement in the amount and type of information that is released.

The type of file involved also affects the use of the exemptions and forms the basis as to whether the subjective judgments will be restrictive or unrestrictive. According to agents and analysts, the single most disturbing aspect of the law is determining how to respond to requests from convicted criminals. In such cases, they provide the requesters with what they are entitled to under the law, but on judgment calls, they are very conservative in their decisions.

In one of our sample cases, the FBI withheld most of the information in the requester's file even though the file contained information that could have been released. FBI officials involved with this request said that they withheld the information because the requester was a convicted kidnapper and considered a dangerous individual and they did not believe that the Congress intended for this individual to find out how he was captured and how he and his fellow prison inmates could avoid future apprehension. Subsequently, the case was appealed and the FBI was instructed to release additional information. In our opinion the released information did not compromise the FBI's main concerns.

FBI and DEA officials are especially careful with their excising in cases involving organized crime, national security, and narcotics trafficking. They believe this is required to insure that the identity of informants or information which would affect an open investigation is not disclosed.

USE OF FOI/PA EXEMPTIONS

The FBI uses exemptions less restrictively now than in the past. However, variation exists among teams on how the exemptions are used, and full conformance with the Office of Privacy and Information Appeals' directives has not been achieved. The following discusses the exemptions used most frequently by the FBI for 34 randomly selected cases processed during the period July 1975 through August 1977.

FOIA exemption (b)(1)--classified documents concerning national defense and foreign policy

FOIA exemption (b)(1) allows an agency to withhold information related to national defense or foreign policy which is properly classified pursuant to Executive Order 11652. The PA exemption (k)(1) is essentially the same as the FOIA (b)(1) exemption; therefore, the comments made on the (b)(1) are applicable to (k)(1).

Most of the information which the FBI classifies pursuant to the Executive Order falls within one of the following categories:

- Information or material furnished by foreign governments or international organizations.
- Information or material specifically covered by a statute or pertaining to cryptography or the disclosure of intelligence sources or methods.
- Information or material disclosing a system, plan, installation, project or specific foreign relations matter.
- Information or material the disclosure of which would place a person in immediate jeopardy.

In the past, the FBI did not publicly disclose any information contained in its files, and thus information was not marked as to its classification. However, since 1975 the FBI has classified the material placed in its files and currently classifies pre-1975 information when it is being processed for release under an FOIA or PA request.

To determine the appropriateness of the FBI's use of (b)(1), we reviewed the minutes of the meetings which are held by the Department Review Committee once cases are administratively appealed. The review committee within the Justice Department determines the appropriateness of classifying decisions made by Department components. Review committee staff members said the FBI is classifying less material now than before, and that the classifications assigned are more appropriate.

Because of the close working relationship between the FBI staff and review committee staff, only significant issues or disagreements are brought before the review committee. However, FBI cases still represent about 99 percent of the committee's workload.

The following table shows the results of cases reviewed by the review committee during the period July 1976 through September 1977.

<u>Time period</u>	<u>Number</u>	<u>Percent upheld</u>	<u>Percent where some information was declassified</u>
July 1976 through Dec. 1976	183	71.5	28.5
Jan. 1977 through May 1977	125	82.5	17.5
June 1977 through Sept. 1977	<u>83</u>	83.0	17.0
	<u><u>391</u></u>		

The figures indicate that the FBI has been improving its use of the exemption, since the percentage of cases upheld has increased. These figures, however, provide only a partial picture because they indicate only the number of cases and not the volume of material classified or declassified in each case.

Review committee meeting minutes from July 1976 through January 1977 showed that the committee always upheld the FBI's decision to withhold information on intelligence methods used against a foreign diplomatic establishment and on information classified by a foreign government.

The committee usually abides by another agency's classification. If disagreement arises which cannot be resolved between the committee and the concerned agency, the matter can be referred to the Interagency Classification Review Committee, established by Executive Order 11652. As of February 1978, only one case had been referred to this committee.

The two classification areas where disagreements most often arise pertain to protection of highly sensitive sources and techniques of intelligence gathering. Classification of this information depends on whether

- its release would reveal the use of particularly sensitive and useful techniques,
- a group is active or defunct,
- more than one informant and/or sensitive sources are involved,
- the information obtained was specific or general,
- the information was gathered at a small meeting or through a large gathering, or
- the information obtained is recent or old.

According to committee staff, the review committee does not support withholding information on the use of illegal intelligence techniques (e.g., burglaries or mail openings) in domestic security cases, but usually does so when a foreign establishment is involved, because disclosure may harm national security.

Original documents from 34 randomly selected cases showed that 10 cases contained (b)(1) exemption material and 1 case had (k)(1) exemption material. In three of the cases, the (b)(1) exemption was used to withhold information provided by a foreign government. In three other cases, information withheld under the (b)(1) exemption dealt with U.S. interests in a foreign establishment. Four cases where (b)(1) was used involved information provided by security informants which was withheld to protect the source. The (k)(1) exemption was used to withhold the name of a sensitive program dealing with foreign interests. In all cases the exemption appeared to be properly applied.

Although information may be declassified by the review committee, it will not automatically be released. In some cases the information can be withheld under another FOIA exemption so that material could still be excised. A common situation involves a sensitive source which the review committee may not consider classifiable but which could still be protected under the confidential source exemption (b)(7)(D).

In the past, the FBI used the (b)(1) exemption too restrictively and overclassified material. Since the summer of 1976, however, it has made steady progress, and its use of the exemption now is more appropriate. In addition, continued oversight by the review committee should eliminate or prevent overclassification problems in the future.

FOIA exemption (b)(2)--internal
personnel rules and practices

The FOIA(b)(2) exemption allows the withholding of matters relating solely to the personnel rules and practices of an agency. The FBI used this exemption to withhold administrative markings such as dissemination notations, case leads, field office and file numbers, types of investigations, agents initials, words and phrases used in FBI communications, and notes that synopsize information within a document.

According to the FBI's FOI/PA manual, internal markings can be released on a discretionary basis depending on whether some foreseeable harm to law enforcement efforts would occur. Although previous policy was to withhold all markings, processing teams varied in their practices. Depending on the type of case and circumstances involved, some teams would release many of these markings while others would not.

We attended three conferences where appeals attorneys discussed cases under appeal with FBI officials. In each case, the appeals attorneys agreed with the FBI's decisions to either release or withhold the markings. However, the attorneys believed that withholding most (b)(2) material was time-consuming and useless, since it related to internal procedures and did not usually represent important information.

The Deputy Attorney General guidelines, dated May 25, 1977, provide that all (b)(2) material is to be released unless harm can be demonstrated. The guidelines serve to remove FBI discretion and make releases the rule rather than the exception.

In most cases processed before May 1977, most administrative markings were withheld. Most markings could have been released without causing harm however, and would have been released under the May 1977 guidelines. Of the 10 cases released since May 1977, 3 did not have the (b)(2) exemption quoted. In six cases, (b)(2) was used for material of a sensitive nature, such as certain file numbers. In our opinion, its use met the harm theory. In one case, however, the material withheld under (b)(2) should have been released on the basis of the current harm theory. An FBI official agreed that such material should have been released.

DEA has a sensitive problem with its file numbers and class violator identifiers, which are considered administrative markings. DEA contends that both numbers represent a code and would be detrimental to DEA work if revealed. The file number indicates the region involved in the case, the year started, and case number. The class violator identifier includes information on the nature and priority level of the case.

Although we concur with DEA that the class violator identifier is too sensitive for release, we do not believe that the file numbers are of critical sensitivity. The Deputy Attorney General recently decided that DEA should be allowed to withhold the class violator identifier but that file numbers are to be released if the request deals with an inactive investigation. In commenting on our report, DEA said it no longer uses the (b)(2) exemption to protect file numbers, unless their release would interfere with an enforcement operation.

The FBI's previous policy of withholding administrative markings conformed with the requirements of the FOIA, but the excising of this type of material made the requester's comprehension of material released difficult. We believe the present policy, based on the harm theory, is more responsive to the public.

FOIA exemption (b)(5)--internal communication

FOIA exemption (b)(5) applies to interagency and intra-agency memorandums or letters which would not be available by law to a party other than in interagency litigation. According to the Office of Privacy and Information Appeals, information protected by this exemption is generally either attorney work product or predecisional advisory material.

Attorney work product encompasses an attorney's material related to litigation which sets out the strategy and position to be taken. The appeals office officials said that this material is exempt until a case has been tried, and afterwards, the material can be released unless it would adversely affect future operations.

Predecisional material generally consists of interagency or intra-agency memorandums which contain agency opinions, analyses, and recommendations prepared as part of the decisionmaking process. Department of Justice guidelines allow this deliberative material to be withheld provided it is more than an interpretation of a decision previously made. It is the Department's policy, however, not to use the (b)(5) exemption in situations unlikely to affect primary law enforcement concerns or not involving major policy deliberations. Because of this policy, FBI and DEA officials said that the use of (b)(5) has substantially declined.

In the past, (b)(5) was generally used for the following information:

- Secret Service form delineating the potential threat of the individual to the President.
- Agents' opinions and recommendations.
- Internal memos between headquarters and field offices recommending certain actions.
- Conference material from a strategy meeting with an assistant United States attorney.
- Interagency communications.
- Instructions to the field office on when to interview a subject.

--Decision to put an individual in a particular index.

Because of the discretionary policies of the appeals office, FBI officials said that their use of (b)(5) has now been limited to the Secret Service form and some agents' opinions and recommendations if they are of a very sensitive nature.

Our sample of 34 cases showed that of the 13 cases processed under FOIA in 1975 and 1976, 8 contained material for which (b)(5) was used. In six of the eight cases the exemption was used to withhold internal communications, such as recommendations and opinions on the subject and/or how a case was to proceed. In our opinion, some of this information could have been released and would be released now, according to the current discretionary release policies.

Of the 34 cases reviewed, 15 were processed under FOIA in 1977, but only 5 used the (b)(5) exemption. In four of those cases the (b)(5) exemption was quoted appropriately for withholding the Secret Service form. In one of these four cases, however, the exemption was also used to withhold the reasons for including the requester in a discontinued index. This information should have been released. In another case, the exemption was cited to withhold FBI laboratory notes on an examination of latent fingerprints. This information too should have been released.

Although DEA used the (b)(5) exemption more often in the past, discouragement from the appeals office has currently limited its use. For the cases reviewed, DEA's use of the exemption appeared appropriate.

The AF-OSI uses the (b)(5) exemption for some information which the FBI withheld under the (b)(2) rules and practices exemption. An OSI official said that (b)(5) and (b)(2) are very similar. AF-OSI uses (b)(5) to withhold investigative leads, investigators' opinions, discussions of coordination with other Federal and local agencies, report distribution markings, and source evaluation symbols. Although much of this information is technically exempt under the law, the harm theory promulgated by the Attorney General should influence the OSI to reconsider withholding some of this information.

The present discretionary policy of using the (b)(5) exemption sparingly should be continued and encouraged. Unless real harm to law enforcement efforts exists, internal communications between and within agencies should be released.

FOIA exemption (b)(7)(A)--investigatory records, interfering with enforcement proceedings

FOIA exemption (b)(7)(A) allows agency officials to withhold investigative records compiled for law enforcement purposes, but only to the extent that the release of such records would interfere with law enforcement proceedings. The exemption is most commonly used for pending cases, but it has also been used for closed cases when release of the information would be detrimental to ongoing investigations.

The FOIA states that any reasonably segregable portions of a record must be provided after proper deletions have been made. Accordingly, blanket denials cannot be made. Even for pending investigations, agency officials must segregate and release information which would not affect enforcement proceedings.

FBI officials have used (b)(7)(A) for pending investigations as well as for some inactive cases where there is a reasonable possibility for prosecution or where information in a closed case affects an ongoing investigation. They agreed that, in the past, the FBI used the exemption on a blanket basis; but at the urging of the appeals office, the FBI began to segregate and release information which would not affect a pending investigation.

Of 34 cases reviewed, the (b)(7)(A) exemption was used for two criminal cases processed in 1977. FBI officials told us that in both cases the requesters were aware of the pending investigation. In one case in which the FBI used a blanket (b)(7)(A) exemption, the appeals office upheld the decision when the requester appealed. In our opinion, the FBI's and appeals office's use of a blanket (b)(7)(A) was contrary to the intent of the law and to its own guidelines. An FBI official agreed that information already known to the requester could have been released. In the other case, some information was segregated and released, although most of the information was withheld because of the pending proceedings. In this case, the FBI processed it appropriately.

Of 36 cases reviewed at the FBI Chicago field office, the (b)(7)(A) exemption was used for two cases. The (b)(7)(A) exemption was used on a blanket basis because it was believed that any release of information would adversely affect a local prosecution of the case. We were not provided the raw files, and could therefore not determine how much of the information was segregable.

We also reviewed 13 DEA cases in which the (b)(7)(A) exemption was used to deny either all or part of the file information. For six of the seven cases processed in 1975 and 1976, a blanket basis exemption was used. A DEA official said that in the past the (b)(7)(A) was used on a blanket basis; but since the summer of 1976, information was being segregated.

For the six cases processed in 1977, however, only one case involved a blanket exemption. In our opinion, some information within this requester's file should have been segregated and released. In the five other cases, DEA did segregate and release some information; however, in these cases, more information could have been given to the requester. A DEA official agreed that in these cases, additional information could have been released but that most of it would have been innocuous and already known by the requester. The official said that the FOI unit did not want to release any information which case agents in the field offices believed would harm the pending case. In commenting on our report, the Department of Justice said that DEA is now segregating information and no longer uses the blanket exemption to exempt an entire file. (See app. V.)

Because the (b)(7)(A) exemption is generally used for requests where investigations are pending, the exemption poses a particularly difficult problem for law enforcement agencies. For example, if requesters under investigation ask for access to their records, under the (b)(7)(A) exemption they would receive only "reasonably segregable portions" of information which would not hinder ongoing investigative efforts. As a result, requesters would probably not receive any information they were not already aware of, while the agency would have devoted many useless hours deciding what information could be released. On the other hand, if requesters, unaware that they are under investigation, seek access to their records, they would immediately realize the situation once the agency cited the (b)(7)(A) exemption to withhold information that may harm a pending investigation. Thus, the agency faces a dilemma. It cannot lie to requesters by saying that no records exist, nor can it choose to ignore the requests. In the past, the backlog at the FBI and DEA helped to solve the problem because the delay in processing

requests served to conceal the investigation until the Government was ready to apprehend or indict the criminal involved.

Because the use of the (b)(7)(A) exemption puts the agency in a "no-win" situation, some feasible procedure is needed by which the Government's and public's interests are served fairly and efficiently. The (b)(7)(A) exemption has generally not been applied properly since the act was passed because it was used on a blanket basis. In 1976, after the appeals office required that files be properly segregated, the situation improved. However, present implementation is still inadequate. It is costly and time-consuming for Federal agencies to perform a review so that properly segregable material can be released. Unless the law is changed, the FBI and DEA will need to improve their implementation of this exemption if they are to be in full compliance with the act and with Departmental guidelines.

FOIA exemption (b)(7)(C)--investigatory records, unwarranted invasion of privacy

FOIA exemption (b)(7)(C) allows withholding investigatory records compiled for law enforcement the disclosure of which would constitute an unwarranted invasion of the personal privacy of another individual. In this regard, agency officials are faced with determining exactly what constitutes an unwarranted invasion of personal privacy. The act and the legislative history provide little guidance as to what these words mean. Therefore, the agencies have been left with a vague concept on which they have to base decisions as to whether to release or withhold information. In using this exemption, agencies have to balance the possible harm from disclosure against the public benefit from release.

Most of the guidance in determining invasion of privacy comes from the appeals office. According to its past guidelines, under (b)(7)(C), the appeals office would exempt from disclosure the information, names, and other identifying data about third parties but would release the substantive information about the requester. The present guidelines, issued in May 1977, state that "routine excising/denial of all 'third party information' is to cease." Under the policy, if material about a third party is directly connected to and affects the requester, it must be released.

Only very intimate or personal information about the third party which does not affect the requester is to be withheld under (b)(7)(C). The FBI manual basically took this approach in its description of procedures to be followed in third party access. This description is more specific as to the circumstances in which release is considered appropriate. However, its language and intent is more conservative than that expressed by the Deputy Attorney General. The Deputy Attorney General acknowledges that the Department "had been excising and withholding too much material in those instances where the requester is one of the persons whose activities are chronicled in the file."

In the past, the FBI used (b)(7)(C) to withhold the names of special agents, other Federal employees, judges, U.S. attorneys and assistant U.S. attorneys, names of the requesters' relatives, names of codefendants and coconspirators, names of speakers at a rally, and names of neighbors and associates. In all of the above cases, any data identifying individuals, information collected on them, or personal information about them was also withheld. In our sample of 34 cases, we found 21 requests processed prior to June 1977 where (b)(7)(C) was used and generally most of the above type of information was withheld. In many of these cases some of the information could have been released.

Although the general policy was not to release third party material, variation existed among headquarters teams as to how that policy was actually implemented. For example, some teams began to give out the names of judges and assistant U.S. attorneys as well as high FBI officials, while others still withheld some of these names. Also some teams would release the name of a special agent if it appeared in the requester's own statement, while another team would never release the agent's name. According to an appeals office official, the application of exemption (b)(7)(C) is where most variation existed from one team to the other. Decisions ranged from no release of third party names and very little information about the third party to release of most third party names and a great deal of the information.

Until May 1977 the appeals office allowed the FBI to withhold most of the information about a third party even if it was related to the requester. For the most part, the appeals office's modifications of FBI releases dealt with third party names and the information they provided about the requester.

Under the previous guidelines, information on a requester which was commingled with information on others was only processed as far as what was related directly to him. For example, if the requester's name appeared in 2 pages of a 50-page report within the requester's main file, dealing with a demonstration, the requester would have gotten only the information directly related to him on those 2 pages. Nothing else would have been given and all third party names would have been deleted, including the public speakers at the demonstration. Under current FBI and appeals office guidelines, the whole 50-page report should be processed, and with very few exceptions, all the information, including third party names, should be given out.

In a closed case where the requester and a partner committed a crime and were both convicted, the requester would get only the information directly related to him and information collected on the partner generally would be withheld. Under the current guidelines the information about the partner should also be released as long as it was directly related to the requester. Only personal information about the partner should be withheld.

Of 34 sample cases, 6 in which (b)(7)(C) was used to withhold information were released after May 1977. In three of the six cases the use of (b)(7)(C) seemed appropriate. In the three other cases, we found minor problems with the use of the exemption.

For example, in one case the FBI excised the marital status and the name of the requester's wife; in the second case, it excised names which the requester himself provided in his statement; and in the third case, the FBI excised the name of and some of the information about the requester's codefendant. In these cases the analysts did not follow the FBI manual and the appeals office's policies. An FBI official agreed that the above information should have been released.

DEA used to excise from its files the names of all third parties and the information not concerning the requester. Because of the Deputy Attorney General's guidelines, DEA officials believe that more material about third parties within a requester's file will now be released as long as it directly relates to the requester. Personal information about a third party will still be withheld.

DEA files showed that before May 1977 names and information about third parties, including codefendants, were excised even after conviction or after information was made public in the press. For cases processed after May 1977, some third party information was released, such as codefendants' names and their activities if they were directly connected with the requester.

AF-OSI officials said their policy on the use of (b)(7)(C) had not changed much since they began processing requests. If the third party name was that of a codefendant, then they would release it as well as all the information which related to the requester. On statements made by third parties about the requester, they would release all the information provided and might release the third party's name, even if the information was derogatory. AF-OSI files and interviews with officials indicate that its release policy on (b)(7)(C) material has been more liberal than that of the FBI and DEA and more consistent with the current harm theory suggested by the Attorney General.

Past practices of withholding most or all information about third parties were too restrictive and resulted in too much material being excised. The current policy, as stated by the Deputy Attorney General, if properly implemented, should result in substantially more information being released to requesters.

FOIA exemption (b)(7)(D)--investigatory records, disclosing the identity of a confidential source

FOIA exemption (b)(7)(D) allows withholding investigatory records compiled for law enforcement, the disclosure of which would reveal the identity of a confidential source.

According to the appeals office's guidelines and the FBI manual, this exemption can be used to withhold names, identifying data, and investigatory information which would disclose or confirm the identities of confidential sources. The guidelines indicate that confidential sources include individual informants (such as tipsters or codefendants), local and State government agencies, foreign governments, educational institutions, and commercial organizations.

Both sets of guidelines also indicate that a promise of confidentiality is not enough to withhold information and that if the release of the information would not reveal the source, then it shall be released. The FBI works under

the basic assumption that information provided them is given under an expressed or implied promise of confidentiality.

The FBI uses this exemption extensively because much of its information is obtained from informants and other types of confidential sources. The FBI is concerned about limiting the use of (b)(7)(D), fearing that its informants will refuse to cooperate if their identities can later be disclosed. FBI officials expressed concern over the amount of information provided by informants which has been released, and are therefore cautious in using this exemption. Its use is affected by the case's type, circumstances and age, and by the requester's type. For example, in an organized crime case officials would be restrictive with the information released because identifying informants may result in the informants' being murdered. In a domestic security case which is 10 or 15 years old, a more liberal release would be made because of the age and type of material and the number of sources that could have provided the information.

FBI officials told us that in the past they used to withhold all or most of the information provided by a confidential source. For example, they would withhold whole paragraphs or statements provided by the source, whereas, now they must segregate information from each paragraph, while still protecting the source's identity. The amount to be segregated and released depends on whether the informant is active or not, the size of a meeting, the number of informants who provided the same information, or the age of the information.

The FBI uses the exemption to generally withhold the identity and information provided by local police departments, credit bureaus, other commercial organizations, and foreign law enforcement agencies. These organizations, especially law enforcement agencies, strongly prefer that the FBI not release their identities and/or information they provide. Recent court decisions on the subject do not resolve the issue as to whether local police departments are covered by the (b)(7)(D) exemption.

The FBI manual and appeals office guidelines clearly indicate that other Federal agencies cannot be considered confidential sources and that (b)(7)(D) cannot be used to withhold the information provided. The FBI manual, however, states that if a Federal employee provides information beyond his official authority or even in violation of agency regulations, the identity and the information can be withheld under (b)(7)(D). The appeals office concurred in

this issue and at one appeals meeting we attended, the appeals attorney upheld its use by the FBI. This was a case involving information obtained in violation of agency regulations from a Selective Service employee. At that time, we questioned whether such use of (b)(7)(D) was appropriate. The appeals attorney said that they used it because of the concern over the repercussions to the employee who provided the information. However, in June 1977 the Deputy Attorney General stated that (b)(7)(D) would no longer be allowed to protect information obtained by unlawful or inappropriate activities, thus, the above use of (b)(7)(D) would no longer be appropriate.

Of the 34 sample cases, (b)(7)(D) was used in all 13 cases processed in 1975 and 1976 under FOIA. In eight of these cases additional information could have been segregated and released. This included segregable information, such as arrest record checks obtained from local police agencies. It also included segregable information provided by Federal agencies and information obtained from confidential sources as to the activities and whereabouts of the requester.

Most of the 14 cases processed in 1977 where (b)(7)(D) was used were processed more appropriately than those in 1975 and 1976. However, in one case, the FBI withheld a substantial amount of information provided by witnesses to a robbery. Some of this information should have been segregated and released. Subsequent to our review, the case was appealed and the FBI had to release the above type of information. An appeals office attorney said, and we agree, that in using this exemption one can only guess how much information can be released without disclosing the source's identity. Decisions on the amount of information released, therefore, are subjective and open to disagreement.

DEA uses the (b)(7)(D) exemption heavily and its use is a matter of deep concern to the agency. One DEA official said that the agency has a very conservative attitude on the release of information provided by an informant because of the violent nature of drug crimes. Like the FBI, DEA uses this exemption to withhold information provided by local and State law enforcement agencies and foreign governments. Unlike the FBI, DEA does not consider credit companies or drug companies as confidential sources. Officials said that individuals, however, who provide information to DEA, whether paid or not, are considered confidential sources and are protected.

During our review of DEA files, we found that most of the information provided by informants and confidential sources was excised. In some cases, additional information about the requester could have been released without causing harm to law enforcement efforts.

AF-OSI does not use the (b)(7)(D) exemption as much as the FBI and DEA. AF-OSI officials said that individuals have to request confidentiality; otherwise, their identity may be released to a requester. AF-OSI officials consider it advantageous not to offer confidentiality because they want individual sources out in the open and able to testify.

AF-OSI uses (b)(7)(D) for information developed by foreign governments, local police departments, and financial institutions. For information provided by local police departments, AF-OSI tries to prepare a summary, which then becomes its document, rather than keeping the local police department report itself. An AF-OSI official said this allows it to release information to an FOI/PA requester without upsetting the local police departments. In the files reviewed, AF-OSI used this exemption properly.

FOIA exemption (b)(7)(E)--investigatory records disclosing investigative techniques and procedures

FOIA exemption (b)(7)(E) allows an agency to withhold investigatory records compiled for law enforcement purposes, the disclosure of which would reveal investigatory techniques and procedures. According to the appeals office's guidelines, this exemption applies to sensitive investigative techniques not generally known outside of the Government, and which, if disclosed, would impair their future effectiveness in law enforcement procedures. Even when the names of the techniques used and the information obtained is disclosed, the FBI will not reveal when and how the techniques are used.

The FBI manual states that the exemption cannot be used for well-known techniques such as ballistics tests and fingerprinting nor for the term "bait money." The manual also states that references to discontinued techniques such as the Administrative Index and the Security Index are to be released, as well as the use of alleged unlawful techniques such as the use of electronic surveillance on certain groups. Techniques not revealed to the requester because of their sensitivity and usefulness include: mail covers, pretext telephone calls and interviews, trash covers, stop notices, and photo albums.

In 13 of 34 sample cases the (b)(7)(E) exemption was used. In eight cases processed in 1975 and 1976, (b)(7)(E) was used to protect such techniques as pretext calls and interviews, stop notices, photo albums, and references to the Security and Administrative Index. In these cases the name and some of the information connected with the use of the technique was withheld. In three of the eight cases the use of (b)(7)(E) to withhold references to the Administrative and Security Index was contrary to Department of Justice guidelines.

In the five cases processed in 1977, the FBI used (b)(7)(E) to protect the use of pretext contacts, photo surveillance and a discussion on the possible use of a telephone trap. The exemption appeared to be appropriately applied in all these cases.

DEA used (b)(7)(E) to withhold techniques such as flash rolls, body transmitters, drug field tests, videotapes, tracking devices, and surveillance aircraft. According to DEA officials, the use of wiretaps are withheld only if they are authorized by a court. A review of the DEA files showed that (b)(7)(E) was used in 17 out of the 82 cases sampled to protect the use of flash rolls and body transmitters. Generally, not only was the technique withheld but also the information obtained through its use.

The AF-OSI does not use this exemption extensively. Officials told us that they use it for such techniques as polygraphs and photo surveillance. AF-OSI tries to withhold only those techniques not widely known to the public and those which may be used in the future. Both the name of the technique and how it works are withheld. In 3 of the 43 cases sampled, (b)(7)(E) was used appropriately for a polygraph exam, a mail intercept, and for information concerning the method used to obtain latent fingerprints.

PA exemption (k)(5)--investigatory material used in making decisions concerning Federal employment, military service, Federal contracts, and security clearance

PA exemption (k)(5) allows an agency to withhold investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, the disclosure of which would reveal the identity of a confidential source. The FBI uses this exemption more than any other PA exemption.

It is used to protect the identity of sources such as friends, neighbors, coworkers, and references. The FBI manual states that the exemption applies to clerks and other employees of police departments, credit bureaus, telephone companies, and banks which provide information to the FBI.

Before the Privacy Act was passed, the FBI considered all information obtained from persons to be confidential and it extended an implied promise of confidentiality to always protect the source. The Privacy Act requires the agency to obtain an expressed desire of confidentiality; otherwise, it must disclose the source and the information to the requester. FBI officials told us that if they do not see a confidentiality notation on a post-1975 file, they will release all of the information.

In 6 of 34 sample cases, information was withheld on the basis of the (k)(5) exemption. In one case the information was collected after the passage of the PA, so the files contained a notice of who wanted confidentiality. All of the information from this file was released except the identity of the parties wanting confidentiality--local police departments with which the FBI had made an arrest check on the applicant. In the other cases, all of the information was collected before the PA was enacted, so the FBI assumed that all the parties involved desired confidentiality. Therefore, for these cases, the identity of the people providing information was protected. The exemption appeared to be appropriately applied in three of these cases. However, in two cases, some information connected with a credit and/or arrest record check could have been released without disclosing the sources' identities. An FBI official agreed that the above information should have been released.

DEA and AF-OSI officials said that (k)(5) is applicable to confidential sources, but that it is rarely used. In our review of their files, we found two cases at DEA and one at AF-OSI where (k)(5) was used. In all three cases, (k)(5) was appropriately applied.

CONCLUSIONS

The FOIA's basic concept is that the public has a right to know what the Government is doing. The PA, on the other hand, stresses the individual's right to privacy. These laws, although not contradictory and mutually exclusive, contain general guidance and thus present implementation problems.

The acts contain disclosure provisions and exemptions to disclosure to guide the agencies on what information to withhold or release. These guidelines are subjective and do not provide absolute criteria that clearly set out what information is to be released or withheld. The result is that agencies are left with wide discretion where reasonable disagreements arise as to what the laws mean and how they should be implemented.

Disagreements occurred on what to release among FBI teams between the FBI and the Justice Department's appeals office, among attorneys within the Department's appeals office, between the Department's appeals office and its litigation unit, and ultimately among judges deciding on litigated FOIA requests. Depending on individual attitudes and perspectives, the same piece of information could be released or withheld and still be considered in compliance with the law. These disagreements are not the result of a desire for noncompliance; rather, they reflect the inexact nature of the information handled and the inexact language of the laws.

Although the laws are subjective in what information is to be withheld or released, additional information could have been released for most of the responses to sampled requests processed by the FBI in 1975 and 1976. However, the FBI made improvements in the type and amount of information released in 1976 over 1975.

Further, requests processed in 1977 showed a substantial improvement in the amount and type of information released over those processed in 1975 and 1976. Although the FBI has made improvements, we still disagree with how some of the exemptions were used and believe that in some cases additional information could have been released. The improvements observed resulted from appeals office oversight, a change in attitude by FBI officials over the last 3 years, more experience in implementing the laws, and the establishment of the FBI's FOI/PA reference manual.

Problems will continue to plague the FBI and other Federal agencies, especially law enforcement agencies, and will generate questions as to whether the exemptions are properly applied. These problems include determining

--what constitutes an "unwarranted" invasion of privacy,

- what constitutes a confidential source, and
- what information should be provided in pending investigations.

If the FBI adheres to its reference manual and the Department's appeals office maintains strong oversight, inconsistencies among processing teams and between headquarters and field offices will be minimized.

RECOMMENDATIONS

To minimize inconsistencies in FOI/PA implementation, we recommend that the Attorney General require:

- The Office of Privacy and Information Appeals to distribute the substance of its action memos to all Justice Department components regardless of the component specifically addressed.
- The Office of Privacy and Information Appeals to update its guidelines and distribute them to all Department components.
- The Office of Privacy and Information Appeals randomly check initial FBI releases to improve the consistency and quality of FBI releases.

CHAPTER 6

ADMINISTRATIVE APPEALS AND LITIGATION

The FOIA grants requesters the opportunity to appeal any adverse determination by an agency official. The Department's Office of Privacy and Information Appeals handles the administrative appeals as a result of determinations made by Justice Department components.

The Office of Privacy and Information Appeals has 20 working days to respond to an appeal; however, the appeals office has had a backlog of requests since it started in March 1975. In the past final responses to requesters took an average of 8 months. Although many appeals were closed in 1977, the appeals office still had a backlog of 996 requests and was unable to process an appeal within the deadline imposed by the FOIA.

Requesters also have the right to sue the Government if they are not satisfied with the administrative appeals decision. The Department's Information and Privacy Section within the Civil Division is responsible for defending the Government in such FOI/PA suits. As of September 1977, the section had 929 pending suits.

ADMINISTRATIVE APPEALS PROCESS

The Office of Privacy and Information Appeals, originally known as the Freedom of Information Appeals Unit, is within the Office of the Deputy Attorney General. The office was established on March 10, 1975, for the purposes of:

- Assisting the Deputy Attorney General in making recommendations to the Attorney General concerning the disposition of appeals resulting from decisions on FOIA requests filed within the various Department components.
- Advising the Deputy Attorney General on initial requests for records maintained in the Offices of the Attorney General and the Deputy Attorney General.

In June 1976 the appeals office began providing staff support to the Department Review Committee. The committee, upon an administrative appeal, reviews classified documents to determine whether the classification should be maintained, reduced, or eliminated. The appeals office has performed

under the Privacy Act the same advisory function for the Deputy Attorney General as under the FOIA.

Under the past organizational structure, the processing and review were very centralized because all of the attorneys' work was referred to two people--the Director and one of the two Deputy Directors. After the Deputy Director reviewed the cases and was satisfied, he referred them to the Director for his review. Further rewrites occurred based on the Director's review.

An appeals office official told us that the supervisory review took from 3 weeks to 6 months, depending on the case and the appeals backlog. The supervisory review, including the considerable rewrites of the attorney's position, added to the processing slowdown.

At the time of the appeals office's creation, the Department expected that it would receive about 300 to 400 appeals a year and would need 3 or 4 attorneys and two secretaries. The workload estimate proved to be inaccurate immediately, so the Department authorized additional permanent attorneys and some on a 90-day detail from the various Department components. As of October 1976, the strength of the office was 15 attorneys, 1 administrative assistant, 2 paralegals, and 7 support staff. As of October 1977, the office's full-time strength was 14 attorneys, 2 paralegals, and 5 support staff. The appeals office also planned to have eight detail attorneys in October 1977; however, only two had been assigned during the last quarter of 1977.

Department components totally reimburse the appeals office according to the time they engage the office's services. The FBI accounts for about 68 percent of the appeals office's time. During the period March 1975 to December 1977, the FBI had been notified of 2,099 appeals. An appeals office official said a study was conducted which showed that approximately 12.5 percent of the FBI processed requests are administratively appealed.

Appeals office workload

The following chart shows the appeals office's workload during the past 3 calendar years. It also shows the final appeals office's determinations for the cases closed during this period.

Appeals Office Workload

Calendar year	<u>Total number of appeals</u>			<u>Results of closed cases</u>			
	<u>Received</u>	<u>Closed</u>	<u>Pending</u>	<u>Reversed</u>	<u>Affirmed</u>	<u>Modified</u>	<u>Administratively closed</u>
1975	1,276	531	745	(a)	(a)	(a)	(a)
1976	1,556	1,166	1,135	89	270	532	275
1977	2,261	2,400	996	(a)	(a)	(a)	(a)

a/Figures not available.

The following chart shows the workload progression for 1977, as well as the increased productivity of the appeals office. As can be seen, the backlog of pending requests remains very large.

<u>Date</u>	<u>Incoming requests per quarter</u>	<u>Closings per quarter</u>	<u>Total incoming requests</u>	<u>Total closings</u>	<u>Total backlog</u>
Mar. 31, 1977	476	305	a/3,308	a/2,002	a/1,306
June 30, 1977	490	515	7,798	2,517	1,281
Sept. 30, 1977	693	646	4,491	3,163	1,328
Dec. 31, 1977	602	934	5,093	4,097	996

a/Includes requests carried forward from 1975 and 1976.

The number of appeals rose by about 22 percent from 1975 to 1976 and by 45 percent from 1976 to 1977. At the same time productivity increased in 1977 and the office closed

106 percent more cases than in 1976; however, the backlog was reduced by only 139 cases. Given the current backlog and the increasing rate of appeals, the appeals attorney staff will continue to be inadequate to handle the appeals within the 20 days set by the FOIA or the 30-day goal set by the Deputy Attorney General. An appeals office official said that additional people were not needed because with the higher productivity within the office, the present staff is sufficient to take care of all the appeals. He also said that the Department has other important missions which also need personnel and that the present commitment of resources to FOI/PA is quite generous.

Processing of Appeals

The appeals office has adopted the general practice of assigning appeals for processing in their approximate order of receipt. However, a court order, a case in court, or an appellant who can demonstrate substantial need for preferential handling of the appeal will result in moving a request to the front of the list.

Appellants are notified of the receipt of the appeal, the existing backlog, and their appeal number. This original acknowledgement and the final disposition of the appeal is supposed to occur within 20 working days. However, for 538 appealed FBI cases closed in 1976, it took an average of 41 days for the appeals office to make an initial acknowledgement. It took an average of 233 days from date of receipt to final disposition. An appeals office official said the office now processes appeals within an average of about 90 days.

FBI and DEA officials said that the appeals office was not prompt in informing them of appeals on their initial actions. Sometimes it took several months before they received their copy of the final action dictated by the appeals office, thereby delaying the final response sent to the requester.

Besides the regular appeals process, the appeals office also used another procedure to resolve cases of a more routine nature. The procedure used is a "skim session" in which the Deputy Director agrees to or modifies an analyst's proposals. Under this procedure, 10 to 15 cases were reviewed in 1 day.

After each appeal the office prepares a memorandum explaining its position on that particular case. The memorandum, called an action memo, serves as the most detailed

guidance provided to Department components on how to apply the exemptions. Action memos are given to the component responsible for the case, but as noted in ch. 5, are not provided to all Department components to assure consistent policy implementation.

In 1977 the appeals office closed many cases by assigning three full-time attorneys rather than the Deputy Director to perform skim sessions at the FBI. The three attorneys took care of all outstanding FBI appeals except for complex cases. These cases were assigned to the other appeals attorneys for regular processing. Simpler and less detailed action memorandums and final responses also helped to speed up the processing by reducing the amount of writing to be done by attorneys, the amount of reviewing by upper levels, and the amount of time spent by the support staff. Even with the above improvements, the appeals office found it impossible as of January 1978 to attain the Deputy Attorney General's goal of a 30-day turnaround time.

THE DEPARTMENT REVIEW COMMITTEE

The appeals office also provides staff to the Department Review Committee. The committee is composed of five senior Department officials from the FBI, Office of Legal Counsel, Criminal Division, Security Programs Section, and the Office of the Deputy Attorney General. These officials meet to discuss the classification of documents under administrative appeals. They decide by a simple majority whether a document still warrants classification. The review committee uses Executive Order 11652 to decide what information can be classified. There are four categories of information that are exempted from the general declassification schedule. Most of the FBI's classified information falls within one of these categories. (See p. 49.)

Before July 1976 the review committee met on an irregular basis to review all the classified documents under appeal; however, since July the committee meetings have been held on a weekly basis. When the review committee started to meet regularly, it had 180 cases pending. By January 1977 the number had been reduced to about 40 pending cases plus 25 awaiting consultation with other agencies. From April 1975 to January 1977, the review committee closed 239 cases; however, 200 of these cases were closed after June 1976. In 1977 the committee completed 413 decisions.

A committee staff attorney said classified material is present in about 20 percent of all FBI appealed cases and must therefore go before the committee. The attorney also said that the FBI represents about 99 percent of the committee's workload.

In the past the lack of staff assigned to the committee and the infrequency of meetings were the reasons for the committee delays. These delays have been eliminated, however, and should not recur as long as the committee is properly staffed and meets regularly.

LITIGATION

If requesters are unhappy with the decision made by the appeals office, they have one last recourse--they can sue the Government. In such a case Justice Department's litigation section, the Information and Privacy Section of the Civil Division, would usually defend the suit against the Government. This section, established in April 1975, was originally a unit within the Department's Office of Legal Counsel, but became a separate section in May 1976.

The litigation section's workload has increased since its formation. The following chart shows the workload and cases pending through September 30, 1977.

<u>Date</u>	<u>Total cases</u>			<u>Types of pending cases</u>		
	<u>Received</u>	<u>Closed</u>	<u>Pending</u>	<u>FOI</u>	<u>PA</u>	<u>Miscellaneous (note a)</u>
Dec. 31, 1975	--	--	463	328	0	135
June 30, 1976	362	134	691	459	29	203
Dec. 31, 1976	255	79	867	582	62	223
June 30, 1977	255	241	881	585	84	212
Sept. 30, 1977	<u>119</u>	<u>71</u>	129	602	87	240
Total	<u>991</u>	<u>525</u>				

a/Includes reverse FOI suits, Federal Advisory Committee Act suits, and amendment of records suits.

Through June 1977, the Department's litigation section had 218 FBI cases, of which 60 had been closed. Of these 218 cases, 118 represented civil actions initiated after a final determination by the FBI, whereas the other cases were initiated while the request was in the FBI backlog.

The section's staff as of June 1977 consisted of 11 attorneys, 1 paralegal, and 9 support staff. According to a section official, the litigation section would need to double the number of attorneys to properly handle the important and difficult litigation requirements of the FOIA and the PA.

The litigation section directly handles about 20 percent of the court cases while the U.S. attorneys handle the rest. The section's attorneys, however, must keep closely informed on all cases and must check all affidavits and other documents involved in the cases. A section official told us that the workload is heavy but that there is no backlog. This official said that all actions to delay court proceedings have come from the agencies. The section officials, however, did have to work considerable overtime to keep up with the caseload.

On May 5, 1977, the Attorney General issued a memorandum indicating that the Government would defend only cases where release of information would be harmful, and directed the Civil Division to review the pending cases and recommend whether litigation should be continued. As a result of this review, four cases were closed, one of which involved the FBI.

The Deputy Assistant Attorney General said the impact of the file review cannot be fully measured in the number of cases closed. He said that "* * * the true significance of the review lies in the change in approach and attitude of Department attorneys assigned to 'defend' FOIA suits." He also said that in several cases the litigation was not terminated, but additional information was released after the cases were reviewed. An official from the litigation section also said they are now more liberal in information releases.

According to a litigation section official, the Government "substantially prevails" in most of the cases. It was impossible, however, to exactly determine how many cases the Government won or lost because in many cases both the Government and the plaintiff prevailed in some of their positions. According to litigation section records, the Government had to pay \$104,498 in attorneys fees in 1977. Most of these fees were paid after July 1977.

CONCLUSIONS

The Department of Justice's Office of Privacy and Information Appeals has had a backlog since 1975 and has not been able to meet the 20-day deadline imposed by the FOIA. Appeals officials said that the backlog developed because of the unexpectedly large number of appeals. In addition, our review showed that insufficient staff also contributed to the backlog.

The productivity of the appeals office increased significantly in 1977 because of improvements made in processing procedures and of the extensive use of skim sessions to review FBI cases. However, given the rate of appeals and the current backlog, the staff level is inadequate to maintain effective oversight and meet the deadline set by the FOIA.

The Civil Division's Information and Privacy Section still has a considerable number of pending cases. Officials said the section has never been the cause of delays in court proceedings; however, they believe that additional attorneys are needed to properly handle the FOIA and PA litigated cases. Therefore, given the number and complexity of current pending cases, the current staffing level may still be inadequate.

RECOMMENDATION

We recommend that the Attorney General provide sufficient staffing to the Office of Privacy and Information Appeals and the Civil Division's Information and Privacy Section so that they can act on administrative appeals and litigation in a timely manner and can maintain effective oversight over Department components.

CHAPTER 7

REVIEW SCOPE AND APPROACH

The findings and conclusions in this report are based on (1) our discussions with FBI officials at headquarters and in the FBI Chicago field office, (2) our review and analysis of randomly selected FOI/PA requests received by the FBI, DEA, and AF-OSI, (3) discussions with Justice Department officials at the Civil Division's Information and Privacy Section and the Deputy Attorney General's Office of Privacy and Information Appeals, and (4) discussions with headquarters officials from DEA and AF-OSI. Our review was conducted between September 1976 and November 1977.

To determine how effectively and efficiently the FBI processed FOI/PA requests, we selected a stratified sample of 196 nonproject requests closed between January and September 1976. The 196 requests included 56 no-record cases, 46 administratively closed cases, and 94 cases where information was processed. This sample was to allow us to analyze all the steps taken to process a request.

The FBI's FOI/PA recordkeeping practices during 1976 did not allow us to obtain the information we needed. Therefore, we developed a timetable sheet to be attached to a sample of 272 requests already in the FBI backlog. This sheet remained with the request from the time it left the backlog until the final response was made and was used to record the dates at various stages in the processing.

As with our other reviews of FBI operations, we were not accorded full access to the raw investigative files, although we believe that we have the legal authority to do so. Since full access was not possible, we used several procedures to determine whether the FBI used the FOI/PA exemptions properly. We interviewed special agents and analysts from headquarters and the special agent responsible for FOI/PA at the Chicago field office to determine how they interpreted and applied exemptions. We interviewed attorneys from the administrative appeals office to obtain their views on how the exemptions were to be applied and on FBI compliance. We also participated in some of the meetings between the appeals attorneys and FBI personnel.

Because the FBI provided us with only a copy of the material sent to the requester for the 196 sample cases, we were not able to determine what was excised and if it

was done properly. Therefore, we arranged with the FBI to review about 10 percent of the original documents within 34 randomly selected cases. For these 34 cases the FBI excised only the names of informants and other confidential sources.

We also reviewed the operations of the Department of Justice's appeals office and the litigation section to analyze their impact on FOI/PA operations at the FBI.

In addition, our review included a study of FOI/PA implementation policies and practices at DEA and AF-OSI to compare their processing methods and excising practices with those of the FBI. At DEA and AF-OSI we reviewed 82 and 43 randomly selected cases, respectively.

CHRISTOPHER J. DODD
2nd DISTRICT, CONNECTICUT

WASHINGTON OFFICE:
430 CORDON HOUSE OFFICE BUILDING
WASHINGTON, D.C. 20518
(202) 225-2076

BRITNEY OFFICE:
STANLEY ISRAELITE
SPECIAL ASSISTANT
POST OFFICE BUILDING
340 MAIN STREET
MERRICK, CONNECTICUT 06360
(203) 686-6129

Congress of the United States
House of Representatives
Washington, D.C. 20515

July 2, 1976

COMMITTEE:
JUDICIARY
SUBCOMMITTEES:
IMMIGRATION, CITIZENSHIP AND
INTERNATIONAL LAW
CIVIL AND CONSTITUTIONAL RIGHTS
SCIENCE AND TECHNOLOGY
SUBCOMMITTEES:
SCIENCE, RESEARCH AND TECHNOLOGY
EMBRYO RESEARCH, DEVELOPMENT AND
DEMONSTRATION
BOARD OF VISITORS TO THE UNITED
STATES COAST GUARD ACADEMY

The Honorable Elmer Staats
Comptroller General of the
United States
General Accounting Office
Washington, D.C. 20548

Dear Comptroller Staats:


We would like to request that the General Accounting Office conduct a comprehensive study of processing delays the Federal Bureau of Investigation is experiencing with respect to requests for information filed in accordance with the provisions of the Freedom of Information Act (FOIA), as amended, 5 U.S.C., Section 552.

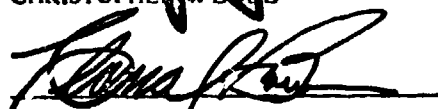
In all, federal agencies have received more than 30,000 FOI requests for access to files, a number far beyond all expectations. This has resulted in a situation where few agencies can meet their statutory obligation under FOIA to comply with requests, or state the reasons for denial, within ten days of receipt.

The problem of lengthy delays in the processing of FOI requests is particularly critical with the Federal Bureau of Investigation, which has received the largest number of requests by far. Since January 3, 1975, the FBI has received over 20,000 FOI requests, and it continues to receive an average of 55 to 60 per day. Thus, the FBI has a tremendous backlog of requests, and is just now processing those received in September, 1975 - fully nine months ago.

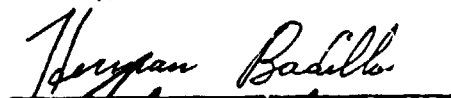
As members of the House Judiciary Subcommittee on Civil Rights and Constitutional Rights, which has jurisdiction for FBI oversight, and of the House Government Operations Subcommittee on Government Information and Individual Rights, which has jurisdiction for public access to federal records, we are concerned that the FBI process requests within a reasonable period of time. To accomplish this, we would ask that the General Accounting Office investigate the FBI's difficulty in meeting its statutory requirement for timely processing, and recommend administrative and legislative action to expedite processing by this agency. We would also request that this study include the costs involved in implementing such corrective measures.

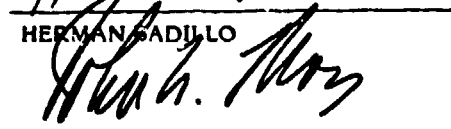
Thank you for your attention.


CHRISTOPHER J. DODD


CLARENCE J. BROWN

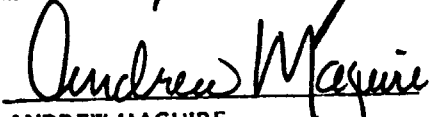
Sincerely,


HERMAN BADILLO

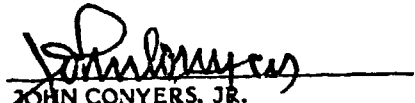

JOHN E. MOSS

The Honorable Elmer Staats
July 2, 1976
Page 2


MICHAEL J. HARRINGTON


ANDREW MAGUIRE


ANTHONY JOBY MOFFETT


JOHN CONYERS, JR.


ROBERT F. DRINAN


BELLA S. ABZUG

BO LA S. ARIZ. N.Y. CHAMBERMAN
 LEILA BYAM, CALIF.
 JOHN CUNYERS, JR., MICH.
 THOMAS H. MACDONALD, MASS.
 JOHN E. MOHR, CALIF.
 MICHAEL HARRINGTON, MASS.
 ANDREW MAGUIRE, N.J.
 ANTHONY MOPPETT, CONN.

DAN STEINER, ARIZ.
 CLARENCE J. BROWN, OHIO
 PAUL H. MCCLURE, JR., CALIF.
 225-3741

NINETY-FOURTH CONGRESS
Congress of the United States
House of Representatives
 GOVERNMENT INFORMATION AND INDIVIDUAL RIGHTS
 SUBCOMMITTEE
 OF THE
 COMMITTEE ON GOVERNMENT OPERATIONS
 RAYBURN HOUSE OFFICE BUILDING, ROOM B-349-B-C
 WASHINGTON, D.C. 20515

July 7, 1976

Honorable Elmer B. Staats
 Comptroller General of the United States
 General Accounting Office
 441 G Street
 Washington, D.C. 20548

Dear Mr. Comptroller General:

I am writing to support and expand upon the request made of GAO by various members of my Subcommittee and the Judiciary Subcommittee on Civil and Constitutional Rights regarding a comprehensive study of processing delays the FBI is experiencing in responding to Freedom of Information Act requests. As you know, this Subcommittee has both legislative and oversight jurisdiction over the implementation of the Freedom of Information Act.

I would ask that the GAO report to this Subcommittee focus on the following issues:

1. The adequacy, completeness and quality of FBI responses to Freedom of Information Act requests. As you know, the Act requires that certain files and records be made available to persons requesting same and sets forth certain exemptions from this rule in subsection (b). We are particularly concerned with the proper use of these exemptions, specifically exemption (b)(7). We would like to have your opinion as to which FBI records are considered to be "investigatory records compiled for law enforcement purposes" as defined by subsection (b)(7). That is, records such as those compiled for suitability clearances or other purposes might not comprise "law enforcement purposes". Nevertheless, FBI may be utilizing this exemption more extensively than it should.
2. Handling of the "big case". As you may be aware, FBI maintains that a large portion of its available Freedom of Information Act resources

Honorable Elmer B. Staats
July 7, 1976

Page Two

have recently been utilized in handling such cases as the Rosenberg, Hiss, Tom Hayden and Eldridge Clever matters and similar cases. We would appreciate the GAO making an analysis of the handling of some of these large cases in order to determine whether they might be handled more expeditiously. Might different review standards be used if the case is over a certain age (say, 30 or 40 years)? For example, is there a date at which the value of maintaining the confidentiality of informants is outweighed by other considerations -- particularly where the review process to eliminate all identifying references is burdensome and there is evidence that the informants are deceased or no longer utilized by the Bureau?

3. Analysis of management techniques in handling requests. For example, are there unnecessary bureaucratic approvals required before a decision is made? Are FOI reviewers adequately trained? Is there undue delay in processing "originating agency" requests?

4. Has the FBI engaged in "delaying tactics"? Please supply the number of cases and the circumstances surrounding each case in which the FBI or the Department of Justice has produced requested files after the requester has filed a lawsuit. The question is raised in these instances as to whether this material should have been released in the first place without the necessity of a lawsuit having been filed.

5. Evaluation of FBI's compliance with the segregable requirement which provides that "Any reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt". Has the FBI been deleting more than is allowed under the Act?

6. Fees. An evaluation of the Agency's response to the requirement of the Act which provides: "Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public." Has the FBI established criteria for waiver of fees? How consistent is their application of this provision?

8. Attorneys fees. Describe the number, instances, and amount of court awarded fees against the United States. What has been the agency's policy with respect to attorneys fees where a case is settled without court order?


9. Privacy Act. Does the Bureau treat requests for an individual's own file any differently if the requester cites the Privacy Act rather than the Freedom of Information Act? What substantive and procedural differences, if any, are there in the Bureau's handling of Privacy Act requests, as opposed to FOIA requests? Please evaluate.

Honorable Elmer B. Staats
July 7, 1976

Page Three

If you have any questions concerning this request, please contact
Subcommittee Professional Staff Member Ted Jacobs at 225-3741.

Sincerely,


BELLA S. ABZUG
Chairwoman

WILLIAM C. WEAVER, N.Y., CHAIRMAN
 LEO J. STOKES, CALIF.
 JOHN SPICER, ILL. MICH.
 WALTER H. BRIDGES, MASS.
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 MICHAEL MANNING, MASS.
 ARTHUR WALKER, N.J.
 GUYTON HOPKINS, OHIO.

BOB STUBBS, ARIZ.
 CLARENCE J. BROWN, OHIO
 PAUL H. K. SULLIVAN, ILL., CALIF.
 205-4741

NINETY-FOURTH CONGRESS
Congress of the United States
House of Representatives
 GOVERNMENT INFORMATION AND INDIVIDUAL RIGHTS
 SUBCOMMITTEE
 OF THE
 COMMITTEE ON GOVERNMENT OPERATIONS
 RAYBURN HOUSE OFFICE BUILDING, ROOM B-149-B-C
 WASHINGTON, D.C. 20515

August 11, 1976

Hon. Elmer B. Staats
 Comptroller General of the United States
 General Accounting Office
 441 G Street, N.W.
 Washington, D.C. 20548

Dear Mr. Comptroller General:

This is in further reference to the request of this Subcommittee and various other Members of Congress for the GAO to conduct a comprehensive study of processing delays the FBI is experiencing in responding to Freedom of Information Act requests.

This letter is to request that the GAO's examination be expanded to include the administrative appeal unit within the Department of Justice which handles appeals from FBI denials of Freedom of Information requests. I am informed that the Freedom of Information and Privacy Unit of the Deputy Attorney General's Office has approximately 1,265 appeals completed or assigned for processing and that approximately 900 appeals have not been assigned to an attorney for processing and are awaiting action. I suggest that a comprehensive examination of the practices and procedures of this Unit be undertaken with a view to determining the causes of delay, adequacy of management procedures, whether an adequate number of attorneys have been or will be assigned to this Unit, and an examination of their efficiency in handling appeals.

In addition, I request that the scope of this examination be expanded to include the Freedom of Information and Privacy Section of the Civil Division of the Department of Justice. Questions similar to those suggested above should be asked and answered with respect to this Section.

Hon. Elmer B. Staats
August 11, 1976

Page Two

If your staff has questions concerning this request, please
contact Ted Jacobs of the Subcommittee staff at 225-3741.

Sincerely,



BELLA S. ABZUG
Chairwoman

cc: Members, Subcommittee on Government
Information and Individual Rights
Hon. Herman Badillo
Hon. Christopher J. Dodd
Hon. Robert F. Drinan
Hon. Don Edwards

DEPARTMENT OF THE AIR FORCE
WASHINGTON 20330

OFFICE OF THE SECRETARY

March 24, 1978

Mr. Fred J. Shafer
Director, Logistics and
Communications Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Shafer:

This is in reply to your letter to the Secretary of the Air Force regarding your report dated March 20, 1978, on "FBI Has Improved the Timeliness and Completeness of its Responses to Requests for Information Under the Freedom of Information and Privacy Acts," OSD Case #4P51 (Code 18428).

The Air Force concurs in the report as written and is appreciative of the opportunity to have reviewed it.

Sincerely,

Edward A. Miller, Jr.
Edward A. Miller, Jr.
Special Assistant, SAF/MI



UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

MAR 30 1978

Mr Victor L. Lowe
Director
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Lowe:

We appreciate the opportunity given the Department to review and comment on the draft of your proposed report to the Congress entitled "FBI has Improved the Timeliness and Completeness of its Responses to Requests for Information Under the Freedom of Information and Privacy Acts."

For more than 2 years, the Department has been taking advantage of every feasible opportunity to inform Congress of the serious problems created by the time limits and substantive language of the Freedom of Information (FOIA) and Privacy Acts (PA), particularly the Freedom of Information Act. Our review of the draft report indicates that essentially the same conclusions have been reached by GAO regarding the complexity of administering these statutes and the extensive costs incurred in order to properly balance the competing interests affected by the disclosure of investigatory records. There are several areas, however, that we believe are deserving of further comment.

Federal Bureau of Investigation (FBI)

Use of Support Supervisors. We have certain reservations as to the efficacy of immediately implementing a GAO recommendation regarding the substitution of clerical personnel for law-trained Special Agent Supervisors. The report makes reference to the fine job our analysts have done, particularly during Project Onslaught, but suggests that we replace agents in this type of work to enable them to return to their basic mission, namely, investigative duties. This concept is not new to the FBI. During the course of GAO's study, a detailed manpower study was undertaken independently by



FBI Headquarters. The FBI study included numerous recommendations, including a recommendation expressing their belief that support people could replace agents in certain specified areas. Since completion of the GAO study, the FBI's manpower study recommendations were implemented resulting in the reduction of 10 Special Agent Supervisors in the Freedom of Information-Privacy Acts (FOIPA) Branch. It is the FBI's plan to consider the feasibility of reducing the agent complement even further; however, it must be emphasized that the magnitude and the complexity of many of the requests currently being received severely limit our options. We do not feel it would be in the best interests of the Bureau, and in turn the Government, to further reduce the agent complement at this time. We wish to clarify this point since the GAO recommendations would lead the reader to believe that all first-line Agent Supervisors should be immediately replaced by support personnel.

It is important to recognize that the Special Agent Supervisor in the FOIPA Disclosure Section is responsible for resolving disclosure issues and for the final review of most of the work product of 13 to 16 analysts. This daily work product includes hundreds of pages of information furnished by confidential sources. It is of imperative necessity that the FBI be able to adequately protect its confidential sources. Since the FOIA does not provide a blanket exemption for information provided by confidential sources, an important task of the Special Agent Supervisor is to assist his analysts in the processing of sensitive material. Special Agent Supervisors have personally worked with informants and have been involved in many sensitive investigative endeavors. The investigator's perception of sensitive information is different from a person whose background contains no such experience.

The Special Agent Supervisor is also involved in administrative appeals and litigation generated pursuant to requests. Delegation to non-agent personnel of basic administrative responsibilities, working with inexperienced analysts, reviewing correspondence and the final review in less complex cases, is being evaluated at the present time. A delegation of the litigation responsibilities poses a more difficult consideration. The Special Agent Supervisor

handling litigation prepares and signs affidavits explaining the processing procedures and exactly how the FOIA exemptions were applied. A key factor in the success of the FBI's FOIA litigation defense is the investigative experience and legal ability of the Special Agent Supervisors. Not only perception of what information needs to be protected, and for what reasons, but the ability to articulate these reasons in written or oral testimony is crucial to litigation.

Extension of Statutory Time Limits. While we generally concur with GAO's recommendations concerning the extension of time limits, there are several factors not addressed by GAO which would render compliance impossible despite the time extensions recommended.

First, the necessity of assigning large numbers of personnel to a single request as a result of a court imposed deadline severely drains our manpower. This restricts the FBI's ability to keep current with the volume of requests received on a daily basis.

Frequently, requests involve major cases that have necessitated extensive investigation. Despite the proposed extension of statutory deadlines, it would be impossible to complete the processing of these voluminous records within the time limitations unless the problem associated with the sheer volume of records is specifically recognized and adequately addressed by Congress.

Finally, the FBI's experience has been that the average number of requests received on a daily basis has increased significantly each year since the 1975 legislation. Despite extraordinary efforts to reach a timely response posture, the FBI continues to be inundated with requests. If this trend continues, the FBI will find itself backlogged and unable to respond to any request in a timely manner even with the liberalized statutory time limits recommended by GAO.

Protection of Confidential Sources. The GAO report sets forth a discussion of the use of each exemption utilized by the FBI in a random sampling of FOIA requests. The exemption of paramount concern to the FBI is (b) (7) (D), the FOIA

exemption which permits the withholding (in investigatory records) of information which would "disclose the identity of a confidential source and, ... confidential information furnished only by the confidential source." This exemption is discussed in the GAO draft report on pages 87-90. The [See GAO GAO discussion is accurate, but does not convey the grave note.] concern which the application of this exemption has created. The relationship between the Special Agent and the informant is very delicate. It is very difficult for an FOIA specialist at FBI Headquarters to sufficiently protect sources, given the Department's interpretation of what is reasonably segregable, without revealing the identity of the source. The Department has not permitted the withholding of informant information in its entirety but instead requires the release of information which would not "identify the source." To meet the objectives of the Department's policy and yet be assured that confidential source information is adequately protected has presented serious problems for the FBI, particularly because subjective evaluations are not adequate to protect such information. Ordinarily the analysts are forced to consider the document alone unaware of what interrelationship might be revealed with another FOIA request processed by someone else, or of what information the requester possesses but which the record does not reveal.

The FBI is aware of several "group type" requests where the members are forced to submit FOIA requests with the sole objective being to identify the informant. Indeed, FBI informants have alerted us to these efforts. No doubt, more subtle efforts in this vein may have passed unnoticed.

Legislative history indicates the primary reason former President Ford vetoed the 1974 Amendment was his belief that (b) (7) (D) imposed a burden so great on the Government that confidentiality of FBI files could not be maintained. The author of the (b) (7) (D) amendment specifically addressed the concern over FBI sources of information, stating that the amendments should not "hinder the Bureau's performance in any way." The myriad of difficulties encountered could not have been contemplated by the author. The "chilling" effect of the erosion of informant trust and confidence has already occurred as the word spreads that the FBI is releasing information about informant activity. Much can be said about the burdens, administrative and financial, caused by Freedom of Information and Privacy Acts, but those concerns are dwarfed by the problem of being unable to adequately protect confidentially furnished information.

GAO note: Page references in this appendix refer to the draft report and do not necessarily agree with the page numbers in this report.

Office of Privacy and Information Appeals (OPIA)

There are several references to the development of the case backlog within what is now the Office of Privacy and Information Appeals. In 1975, a deliberate decision was made by Attorney General Levi and Deputy Attorney General Tyler that the long-range interests of the Department and the public would be best served by putting emphasis on maximum possible disclosure of records, whether or not they were technically exempt from mandatory release, and by using the appeals process as a vehicle for training the components of the Department to handle requests initially in full compliance with that policy. It would have been much quicker and easier simply to affirm components as to all denials of access to exempt materials, but that was not to be allowed. The memoranda containing the advice to the decision-making official were to be comprehensive in terms of laying out specific policies and the underlying logical rationale for those policies. The intent was to move as quickly as possible to a posture in which most initial actions would be correct and could be affirmed on administrative appeal. Given the fact that the expected downturn in requests and appeals never came, the backlog became much larger than we had anticipated. The comments of the GAO report concerning the present attitude of the FBI are conclusive evidence that the Department's approach was the correct one.

[See GAO note, p. 92.]

With regard to the recommendation that additional staff be assigned to OPIA, we continue to believe that the present approved strength of 23 is adequate to accomplish the work--943 appeals were closed in the 4th quarter of calendar year 1977. Considering the Department as a whole, we believe that our commitment of resources to the FOIPA area has been overly generous, given the important primary missions that have suffered as a consequence.

[See GAO note below.]


Drug Enforcement Administration (DEA)

Since completion of the GAO report, DEA has implemented several changes in the processing of FOIA and PA requests. The implementation of a team concept and the prescreening of incoming requests have improved the efficiency of their operation. The assertion of 7(A) (interfere with enforcement proceedings) is now done on a limited, segregable basis, and not used to "blanket" exempt an entire file. New guidelines have been implemented to expand the scope of Privacy Act requests to include certain co-defendant data. Finally DEA does not now assert b(2) (internal markings) to protect file numbers. They are released unless to do so would interfere with an enforcement operation.

- - - -

Should you have any questions with regard to our comments, please feel free to contact us.

Sincerely,


Kevin D. Rooney
Assistant Attorney General
for Administration

GAO note: Deleted comments refer to material contained in our draft report which has been revised or which has not been included in the final report.

PRINCIPAL OFFICIALS RESPONSIBLE
FOR ADMINISTERING ACTIVITIES
DISCUSSED IN THIS REPORT

<u>Tenure of office</u>	
<u>From</u>	<u>To</u>

DEPARTMENT OF JUSTICE

ATTORNEY GENERAL OF THE UNITED STATES:

Griffin B. Bell	Jan. 1977	Present
Edward H. Levi	Feb. 1975	Jan. 1977

FEDERAL BUREAU OF INVESTIGATION

DIRECTOR:

William H. Webster	Feb. 1978	Present
Clarence M. Kelley	July 1973	Feb. 1978

DRUG ENFORCEMENT ADMINISTRATION

ADMINISTRATOR:

Peter B. Bensinger	Jan. 1976	Present
Henry S. Dogin (acting)	June 1975	Dec. 1975
John R. Bartels	Oct. 1973	May 1975

DEPARTMENT OF THE AIR FORCE

SECRETARY OF THE AIR FORCE:

John C. Stetson	Apr. 1977	Present
Thomas C. Reed	Jan. 1976	Apr. 1977
James W. Plummer (acting)	Nov. 1975	Jan. 1976
John L. McLucas	July 1973	Nov. 1975

(18428)