REPORT BY THE

Comptroller General

OF THE UNITED STATES

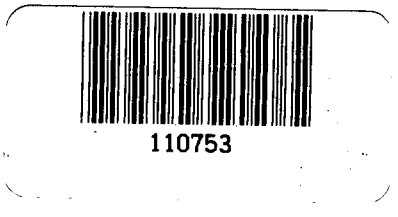
An Informed Public Assures That Federal Agencies Will Better Comply With Freedom Of Information/Privacy Laws

Analysis of the Department of Justice data on selected court cases arising because of agencies' denials of requests for records citing these laws showed

--the monthly flow of new suits was continuing at a relatively stable rate even though requests for records were increasing and

--when sued, agencies often released considerable information in records they had initially denied requesters.

The Department of Justice has taken steps to assure or to improve responsiveness by Federal agencies to the Freedom of Information Act, as amended, and the Privacy Act. However, the best assurance for compliance--in GAO's view--comes from a public well informed concerning the law and rights of access to the records maintained by agencies. GAO's study, requested by the Chairman, Senate Committee on the Judiciary, shows that these laws generally are effective tools for meeting congressional policy on openness in Government.



LCD-80-8

OCTOBER 24, 1979

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

B-130441
B-173761

The Honorable Edward M. Kennedy
Chairman, Committee on the
Judiciary
United States Senate

Sen 02500 HD201504 AGC00037 AGC00027

Dear Mr. Chairman:

This report presents our analysis of data on litigation arising from the Freedom of Information Act, the Privacy Act and other laws governing disclosure of and access to public records. Our analysis was made from data in the Department of Justice's case files. Our report responds to a request made on November 29, 1978, from the previous Judiciary Committee Chairman, Senator James O. Eastland.

Oliver

In providing for litigation, the Congress clearly intended that the open Government laws it enacted or strengthened in recent years would, in a large measure, rely on citizen enforcement to ensure effective compliance. Advantages of this approach, which we believe should be preserved, are to minimize costs and unnecessary complexities of administration. However, on the basis of our present and past reviews, we believe that better oversight and executive direction can achieve improved implementation without substantially adding organizational structures and staffing.

Only minimal specific requirements for executive oversight and related reporting are mandated in the Freedom of Information Act and the Privacy Act. However, the Privacy Act, while placing only minimum burdens, provides information useful in evaluating agency compliance with the intent of the act; the reporting requirements and related oversight provisions are more specific than the Freedom of Information Act. Under subsection 3(p) of the Privacy Act, for example, the President is required to issue an annual report about agencies' operations under the act. The Freedom of Information Act only requires individual agency reports. The agency reports on the Freedom of Information Act operations lack an overall assessment of progress and problems, in general, and the status of litigation in particular. Also, under provisions in section 6 of the Privacy Act agencies receive some central direction and monitoring by the Office of Management and Budget which is not

provided for in the Freedom of Information Act. Consequently, Freedom of Information administration is left to individual agencies.

The initial purpose of our study was to examine the effectiveness of these statutes and show to what extent the Government, as defendant, or the requester, as plaintiff, had prevailed in litigation. (See app. I, pp. 1 and 2.) However, in further defining the scope of the study with Senator Eastland's office, it was agreed that our report should provide data and analysis on (1) implications of the growing court case load, (2) the extent to which agencies prevailed on the issues litigated in court, and (3) the extent to which information sought by the requesters was provided by the Government during litigation. We were asked to consider this data for a 3-year period, starting with calendar year 1975, and to analyze possible trends.

Our analysis of case outcome showed that a lot of information held by agencies was released during litigation. Many initial agency decisions to withhold information were modified in the administrative appeal or the litigation processes. Additionally, many of these initial decisions were not consistent with the lessons they should have learned from previous agency experiences. Most agencies examined had 13 years of experience dealing with the Freedom of Information Act and 700 Federal court case decisions to capitalize on. We believe that the burden of a continuously increasing case load on agencies and the burden on the public of bringing suit to obtain information can be eased. Both sides need better feedback on the results of previous agency decisions.

Better executive direction and monitoring of agencies' performance is dependent upon the availability of adequate data on information requests to agencies. Agencies should have ready reference to legal decisions on releasability of data, reasons for agency denials, final disposition on appeal actions, and the outcome of any litigation. Better records and reports on denials and resulting litigation would provide a basis for correcting problems as they occur, and future problems leading to litigation could be minimized.

We discussed the results of our analysis of denials and litigation with an official of Justice's Office of Information Law and Policy, and he agreed that better data is needed and would be useful in counseling agencies as well as directly useful to the agencies.

We recognize that continuing efforts by the Department of Justice in providing legal guidance and consultation to agencies (see app. I, p. 4) should improve agencies' responsiveness to the openness policies these statutes have fostered. However, we believe the best assurance for compliance is a public that is well informed concerning the law and rights of access to the records the agencies maintain. This study and our previous reviews show that, notwithstanding the continuing litigation, these laws generally are effective tools for meeting congressional policy on openness in Government.

Details on the results of our analysis are presented in appendix II of this report. We have supplemented our analysis with other material that provides the texts of these statutes and explain their operation for the benefit of general readers.

The data in this report supplements and updates material previously presented. On November 29, 1978, we made a presentation to the Committee staff on the basis of our partial collection and analysis of Department of Justice case data relative to disclosure laws. This presentation and two of our earlier reports 1/ were considered and used in the Committee print (pp. 136 and 140) "The Erosion of Law Enforcement Intelligence and its Impact on the Public Security." That report was published early in 1979 by the Subcommittee on Criminal Laws and Procedures (95th Congress, 2d session).

We hope the report will be useful to you and the cognizant subcommittees in performing congressional oversight responsibilities and to others with interests in the Government's information laws and policies.

At the Committee's request, we did not obtain written agency comments on the matters discussed in this report. As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this

---

1/See app. III for a brief summary of these reports (LCD-78-119, issued June 16, 1978, and GGD-78-108, issued November 15, 1978).

report until 10 days after the issue date. At that time we will send copies to interested parties and make copies available upon request.

Sincerely yours,

ACTING Comptroller General
of the United States

LISTING OF APPENDIXES

BACKGROUND AND OBJECTIVES OF THE STUDY

OBJECTIVES

In response to a request from the former Chairman of the Senate Committee on the Judiciary, Senator James O. Eastland, 1/ we analyzed selected court cases from the records of the Department of Justice to show to what extent the Government, as defendant, or the requester, as plaintiff, had prevailed in litigation. These court cases were the result of agencies denying individuals' requests for records under the Freedom of Information Act (FOIA) and other provisions of law relating to access to records. Our representatives were informed that the Chairman was interested in the effectiveness of these statutes in meeting the policies intended by the Congress.

In defining the scope of the study with Senator Eastland's office, it was agreed that our report should provide data and analysis on (1) implications of the growing court case load, (2) the extent to which agencies prevailed on issues litigated in court, and (3) the extent to which information sought by requesters was provided by the Government during litigation. We were asked to consider this data for a 3-year period, starting with calendar year 1975, and to note possible trends.

It was also agreed that our efforts would be directed at producing an informational type report on requests by the public which resulted in litigation. 2/ These appendixes provide our analysis of the data and background information which should be useful to (1) the cognizant congressional subcommittees for consideration in their performing oversight functions and (2) others with interests in the Government's information laws and policies.

1/The present report was requested on November 29, 1978, as a follow-on to the Chairman's letter request of July 18, 1977. The initial request was met by the report entitled "Data on Privacy Act and Freedom of Information Act Provided by Federal Law Enforcement Agencies" (LCD-78-119, June 16, 1978).

2/Other GAO reports which have examined and made recommendations pertaining to FOIA/Privacy Act issues are listed in app. III.

SCOPE OF REVIEW

We reviewed the records access provisions and related legislative histories of the FOIA and selected other laws that could be relevant to issues in litigation.

We requested from the Justice Department's Civil Division court case statistics and summary data from its case files on FOIA and related cases closed in calendar years 1975 through 1977, and a few cases that were readily available for 1978. We analyzed this data and studied the implications of cases for presentation in the report.

We reviewed the (1) FOIA annual reports which were issued by Justice and (2) Privacy Act annual reports which were issued by the Office of Management and Budget (OMB). We also reviewed reports prepared periodically by the Congressional Research Service (CRS) which analyzed agencies' annual reports on their FOIA activities. The latest such report was published by CRS in November 1978 and was entitled "The Administration of the Freedom of Information Act: A Brief Overview of Executive Branch Annual Reports for 1977."

ANALYSIS OF JUSTICE'S PUBLISHED CASE LISTINGS

We initially tallied and analyzed the Civil Division's annotated lists of new and completed cases attached to Justice's annual FOIA reports for calendar years 1975-77 and the expanded departmentwide case list accompanying the 1978 report. The reports did not identify cases pending in the courts. Table A shows a summary of this analysis.

APPENDIX I

Table A
Analysis of Case Volume and
Outcome for Years 1975-77 (note a)

Year	New cases	Cases with final action	Judgments For requester No.	Judgments For requester Percent	Judgments For Government No.	Judgments For Government Percent	Other outcome or unknown No.	Other outcome or unknown Percent
1975	274	75	14	19	17	23	44	58
1976	483	246	25	10	63	26	158	64
1977	311	316	22	7	51	16	243	77
1978	496	382	39	10	181	47	162	43
	1,564	1,019						

a/The 1975-77 lists were intended to show only those FOIA cases with final actions whereas the 1978 list was to show all FOIA cases in which decisions were made by the courts. Reverse cases--those enjoining the Government from releasing sensitive data--were not consistently included (43 cases decided and about 100 pending cases). Also, the lists included some but not all cases concerning requests for expungement of records, or pertaining to rights under the Privacy Act or other laws.

A Civil Division attorney said that the Government usually prevailed in cases that received a full trial and a judgment by the courts. He conceded that it was not always possible to determine, from information the Civil Division maintained or accumulated, which or how many cases the Government "won" or "lost." He thought this was because (1) in many of these cases both the Government and the plaintiff had prevailed in some of their positions when the cases reached a judgment and (2) a majority of cases were dismissed without a full trial reaching a judgment. The Division attorney acknowledged that requesters and the Government (agencies) often negotiated settlements on the release of part or all of the records sought. The annual report lists did not always provide meaningful information on outcome of individual cases because Civil Division case files were not complete and/or lists were not adequately annotated to show results from litigation.

We decided that a further review of case workloads and the outcome and issues of cases closed in prior years, even though the case lists and files were incomplete, would provide information needed to respond to the Chairman's request. Consequently, we requested Justice to first retrieve its files from local or archival storage and, secondly, record the basic data--from the 504 cases it located--in workpaper form. We assisted Justice in the analysis. (See app. II for details of this analysis and our assessments of the implications of workload and case data.)

ADMINISTRATIVE GUIDANCE

The Department of Justice has assumed a lead agency role and it coordinates the Government's efforts on meeting the requirements of the FOIA in responding to the public's requests for records. Justice provides continuing legal guidance and consultation to agencies. In addition, Justice handles essentially all of the litigation arising from agencies' denials of such requests. Most of these cases are tried by the U.S. attorneys, but Justice's Civil Division has overall responsibility for coordinating and monitoring the progress of litigation. In some instances, other divisions in Justice (e.g., Tax Division on cases pertaining to the Internal Revenue Service) and a limited number of other agencies (with independent authority to conduct litigation) may retain this responsibility for certain cases where access to records is an issue.

Within each of the 95 Federal judicial districts, the U.S. attorney is the chief law enforcement representative of the Attorney General. He handles most of the Government's litigation, including the trials of most FOIA cases in court.

On May 5, 1977, the Attorney General issued a letter to the heads of agencies and expressed concern over the 600 FOIA cases then pending in Federal courts. He stated that the Government would only defend cases where releasing information would be demonstrably harmful, even if there was some legal basis for withholding requested records. He said it would no longer suffice that documents technically fall within the FOIA exemptions; Justice would have to be assured that agencies' determinations not to release specific information would be harmful to the interests protected by the act's exemptions. (See app. IV for a reprint of the Attorney General's May 5, 1977, letter published in the Congressional Record with remarks by Senator Edward M. Kennedy.)

The Attorney General has provided extensive interpretative guidance such as his memorandum of June 1967 on the initial FOIA enactment and his February 1975 memorandum on the 1974 FOIA amendments. Also, Justice provides consulting services prior to agencies' denials of appeals, for example, on complex requests and furnishes interpretative material periodically for use in agency training programs.

The "Freedom of Information Case List" is published semiannually by the Office of Information Law and Policy, Department of Justice. The list is annotated to identify the issues the courts have addressed; i.e., FOIA sections or exemptions and Privacy Act cases with court decisions.

OMB also provides directives and guidance on implementing the Privacy Act (Circular A-108 and guidelines attachment).

LEGISLATIVE HISTORY

The FOIA (5 U.S.C. 552) provides the basic authority and procedures for the public to petition the Government for unreleased documents and records in its possession. The original FOIA enactment, which became effective on July 4, 1967, represented new law based upon the principle that all Government information, other than categories of records permissively exempted by the statute, should be available to the public. The act was amended to strengthen these policies in 1974 and 1976.

Concurrent with enacting the major 1974 amendments to the FOIA, the 93d Congress passed the Privacy Act of 1974 (5 U.S.C. 552a), which became effective on September 27, 1975. Although the Privacy Act supplemented the FOIA on matters of an individual's rights to access to records about himself, its purpose was broader.

The underlying purpose of the Privacy Act is to give citizens more control over what information is collected by the Federal Government about them and how that information is used. The act accomplishes this in five basic ways. First, it requires agencies to publicly report the existence of all systems of records they maintain on individuals. Second, it requires that the information in these systems be secure, accurate, complete, relevant, and up-to-date. Third, it provides procedures whereby individuals can inspect and correct inaccuracies in almost all Federal files about themselves. Fourth, it specifies that the information an agency gathers about an individual for one purpose may not be used for another without the individual's consent. And, finally, it requires agencies to keep an accurate accounting of the disclosure of records and, with certain exceptions, to make these disclosures available to the individuals. In addition, the act provides sanctions to enforce these provisions.

The two enactments were intended to work together to give the public maximum access to records balanced against the Government's needs to maintain confidentiality and prevent harmful effects to governmental operations or to those persons served by the Government by releasing the

information. 1/ Both acts contain exemptions in their provisions.

Exemptions from disclosure

The FOIA, under subsection 552 (b), title 5 of the United States Code, lists nine categories of data that may be exempted from disclosure by agencies' determinations. These are matters that are:

--Authorized by Executive order to be kept secret in the interest of national defense or foreign policy and properly classified.

--Related to internal personnel rules and practices of an agency.

--Specifically exempted from disclosure by another statute.

--Trade secrets and commercial or financial information.

--Interagency or intra-agency memorandums or letters.

--Personnel and medical files.

--Investigatory records compiled for law enforcement purposes (only to the extent set out in subparts).

--Data obtained by agencies responsible for regulation or supervision of financial institutions.

--Geological and geophysical information.

1/Freedom of Information Act and Amendments of 1974 (Public Law 93-502) Source Book: Legislative History, Texts, and other documents. Joint Committee Print: Committee on Government Operations, House of Representatives; and Committee on the Judiciary, United States Senate; U.S. Government Printing Office, March 1975.

Source Book on Privacy: Legislative History of the Privacy Act of 1974, S. 3418 (Public Law 93-579). Joint Committee Print: Committee on Government Operations, U.S. Senate; and Committee on Government Operations, House of Representatives; U.S. Government Printing Office; 1976.

The texts of the FOIA and Privacy Act are reprinted in appendixes V and VI.

To provide clear guidance to the public and to Federal agencies, on November 2, 1977, the Congress published House Report No. 95-793 ("A Citizen's Guide on How to Use the Freedom of Information Act and the Privacy Act in Requesting Government Documents"). This report (available from the Government Printing Office) contained an excellent analysis of the operation of these two very complex statutes and explained the provisions in these acts for exempting records from disclosure.

APPENDIX II

ANALYSIS OF LITIGATION SEEKING ACCESS TO RECORDS OF FEDERAL AGENCIES

SUMMARY

Analysis of Justice Department files and data on court cases arising in recent years because of agencies' denials of requests for records showed

--the monthly flow of new suits was continuing at a relatively stable rate;

--a substantial backlog of open cases was steadily accumulating; and

--when sued, agencies often released considerable information in records they had initially denied requesters.

The litigation arose out of apparent judgmental differences between requesters and agencies on what was releasable information--from difficulties on application of the law to particular records. Sometimes there were reasonable differences which had to be settled by court action. However, in many instances the litigants, either the requester or the agency, showed a serious lack of understanding of provisions of the law and its intent. This condition persists even though precedent cases abound. The Federal courts, by March 1979, had pronounced decisions in about 700 cases, 1/ including many decisions reviewed by the appeals courts. In addition, there were eight cases reviewed by the U.S. Supreme Court in recent years.

Further study showed that:

--Litigation sometimes was instituted when agencies did not appropriately respond or failed to acknowledge a request or appeal. In such cases, the courts

---

1/See "Freedom of Information Case List," published by the Office of Information Law and Policy, Department of Justice. The list is annotated to identify the issues addressed by the courts, i.e.; FOIA sections or exemptions and Privacy Act cases with court decisions. The current March 1979 edition contains a guide and is distributed to the public by the Government Printing Office.

remanded the matter back to agencies for initial determinations.

--In many cases, requesters initiating suits caused agencies to reevaluate their decisions and reach agreements with requesters--a majority of cases were so resolved without judgment on issues by the court.

--Technical guidance was not always available or understood by the various levels within an agency to be effective in the critical, prelitigation phases of initial response and denials.

--Prior to March 1979, the Government had not published adequate continuing guidance for the benefit of nonattorneys in agencies and the public.

We concluded from our study of cases and their outcome that the agencies and the public were not benefiting to the extent they should have from knowledge of the results of past court decisions. Two examples follow.

Recently, we were requested to intercede in behalf of a requester who was denied certain records by an agency official in a component of a large department. The denial letter stated that the FOIA "prohibits release" of the requested documents and cited exemption 4--"trade secrets and commercial or financial information obtained from a person and privileged or confidential." We asked the department level official responsible for making decisions on denials to review the request. He immediately reversed the agency's initial decision on the basis of his personal knowledge of a "lead" court case which had decided the same issue 6 years earlier.

Even though this department was the defendant in the cited lead case, the component agency did not seem to understand the operation of the law and the exemption in question. The requested documents did not meet the tests of harm required under exemption 4 to justify withholding records from disclosure.

In another instance, an agency recently denied several requesters specific technical data used to support certain agency systems. Generally, this data were released in the past. The agency, however, revised its regulations to state that such data were not "agency records" within the meaning of mandatory release requirements of the FOIA. In its initial

denial, the agency did not permit consideration through its appeals process. The agency merely cited its own regulation and it did not invoke one of the statutory exemptions provided in the FOIA.

Clearly, the avoided steps are necessary to preclude circumventing the act's intent and to allow a requester to exhaust all administrative remedies before he files a complaint in the Federal courts. The FOIA provides that an agency's initial denial is subject to an administrative appeal that is reviewable by the courts so that any remaining disputes over releasability of records can be finally resolved.

The question of whether the agency may properly withhold such technical data in the particular circumstances of a request is being considered by the courts at this time. Our point here is that the courts have held that the FOIA is a disclosure statute. The language, logic, and history of the FOIA show that it requires the disclosure of any existing records, unless the agency invokes and successfully defends one of the permissive exemptions provided by the act. Elimination of the appeals process is contrary to this thrust of the law.

Prior GAO report

Our prior report "Government Field Office Should Better Implement the Freedom of Information Act" 1/ contained several recommendations for improving the FOIA's implementation. The following is a summary of actions most relevant to our present study:

--Because agency managers were not sufficiently concerned, heads of agencies should review, at least annually, implementation at headquarters and field offices.

--Justice should review agencies' treatment of exempt material--e.g., clarify issues such as agencies excluding technical data, as nonrecord material, cited in the above example.

--Justice should evaluate the adequacy of staff resources allocated to the Department's oversight role in concert with determination of its responsibilities under the act.

1/See p. 27; LCD-78-120, July 25, 1978.

--The Congress should consider amending the FOIA to clearly give the oversight role to Justice and delineate the responsibilities in this role.

To encourage agency compliance with the FOIA, Justice established an Office of Information Law and Policy in September 1978. We are pleased with this action and believe it will provide greater visibility to Justice's efforts. Because the new office essentially represents a realinement of responsibilities, it needs to be provided sufficient staff to adequately discharge its responsibilities.

Secondly, we are not aware of any significantly increased attention being given by agencies' top management that would serve to provide more enlightened and consistent decisions on releases or denials of requests. Finally, the Congress has not acted to strengthen an oversight role by delineating this responsibility in the act.

We believe that these actions, if fully implemented, will have a positive effect on reducing the overall level of new complaints being filed in the courts.

Guidance to the public

In our earlier report (LCD-78-120, July 25, 1978) we concluded that a citizen's guide was needed. We also noted that the House Committee on Government Operations reached the same conclusion concerning this need after the 1972 hearings on the act. One of the Committee's recommendations was that Justice

> "* * * prepare a pamphlet in simple, concise language for the general public, to be published by the Government Printing Office, setting forth the basic principles of the Freedom of Information Act, the procedures by which a citizen may obtain public records from a Federal agency, and his right to appeal a denial of his request, including court remedies, and other similar advice concerning the citizen's right under the act."

The Committee on Government Operations prepared such a guide, "A Citizen's Guide on How to Use the Freedom of Information Act and the Privacy Act in Requesting Government Documents." The guide, which was approved in November 1977, was intended to help citizens exercise their rights under the two acts. (See p. 7.)

In March 1979, the Justice Department incorporated "A Short Guide to the Freedom of Information Act" as an appendix to its FOIA case list and made it available to the general public. (See p. 8.)

Details of our study of litigation resulting from denials of requests for records (tables 1 through 10) are discussed in the following sections of this appendix.

PROGRESS TO RESOLVE LITIGATION IS SLOW

Statistics maintained by the Civil Division of the Justice Department showed that a substantial backlog of open "information" cases was steadily accumulating. Although the monthly flow of new cases assigned to the Civil Division continued at a relatively stable rate (47.8 cases per month), cases were closed at an average of only 20.9 cases per month. This resulted in a threefold increase in the number of pending cases in the period we analyzed. Table 1 shows this data for the months from November 1975 through July 1978.

Table 1
Caseload Changes - Justice Department
"Information" Cases (note a)

Month	Cases received during month	Cases closed during month	Total pending end of month (note c)
Oct. 1975	-	-	370
Nov. 1975	40	1	409
Dec. 1975	58	4	463
Jan. 1976	64	12	515
Feb. 1976	52	6	561
Mar. 1976	68	38	591
Apr. 1976	65	17	639
May 1976	56	39	656
June 1976	46	11	691
July 1976	54	7	738
Aug. 1976	45	18	767
Sept. 1976	39	6	800
Oct. 1976	37	27	810
Nov. 1976	45	8	847
Dec. 1976	33	13	867
Jan. 1977	55	15	907
Feb. 1977	25	11	921
Mar. 1977	56	40	937
Apr. 1977	38	17	958
May 1977	47	b/123	882
June 1977	33	b/34	881
July 1977	32	28	885
Aug. 1977	51	20	916
Sept. 1977	36	23	929
Oct. 1977	33	7	955
Nov. 1977	46	26	975
Dec. 1977	32	13	994
Jan. 1978	88	21	1,061
Feb. 1978	57	7	1,111
Mar. 1978	48	27	1,132
Apr. 1978	65	10	1,187
May 1978	48	37	1,197
June 1978	37	4	1,230
July 1978	60	4	1,286

a/Excludes cases handled by Justice's Tax Division for the Internal Revenue Service.

b/Cases closed were greater than number received.

c/Justice lacked an inventory of pending cases (files) to back up the numbers of pending cases at the present time or on past dates and their accuracy cannot be determined.

We observed that the lack of close monitoring of these cases and prompt action to administratively close case files caused the Civil Division's statistics to be less than accurate. For example, the time lag following court action for administratively closing the cases averaged 4.5 months and in some instances closings were delayed much longer.

The buildup of pending cases in the Civil Division is further demonstrated in table 2. As the table shows, the number and aging of pending cases increased significantly (from 370 to 1,230). We concluded that while Civil Division's statistics lacked a degree of accuracy or backup the trends were generally as shown in table 1.

Table 2
Aging of Pending Cases

Year case opened	Number of cases at beginning (Nov. 1975)	Number of cases at ending (June 1978)
1971 and prior	12	9
1972	18	7
1973	19	5
1974	43	19
1975	278	176
1976	-	334
1977	-	385
1978	-	295
Total	370	1,230

Table 3 shows by type of case, the Civil Division's workload and the rapid accumulation of pending cases occurring during calendar years 1976-77.

Table 3
Civil Division's Case Load
by Types of Pending Cases

Date	Total cases			Types of pending cases		
	Received	Closed	Pending	FOIA	Privacy Act	Misc. (note a)
Dec. 31, 1975	-	-	463	328	-	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	119	71	929	602	87	240
Total	991	525				

a/Includes reverse FOIA cases (to enjoin release of records) and cases citing other disclosure laws.

We were advised that the Civil Division's litigation section directly handled about 20 percent of the cases in court, while U.S. attorneys handled the rest. The section's attorneys, however, monitored all of these assigned cases and were responsible for coordinating cases with the agencies and for checking all affidavits and other documents involved. A section official said the workload was heavy but, in his view, the section had no backlog awaiting completion of Civil Division responsibilities. The section, however, did have to work considerable overtime to keep up with the caseload.

On a departmentwide basis, all pending information cases in this period went from 706 in June 1976 to 989 in September 1977 and 1,111 at the end of February 1978. Most of the additional items making up these departmentwide totals were cases handled by the Tax Division for the Internal Revenue Service. We were advised that the trends of new and closed cases generally continued through 1978 but that specific numbers of currently pending cases were not identifiable.

CASE OUTCOME--HOW MUCH INFORMATION IS PROVIDED?

Our analysis of Civil Division's files showed that, when sued, agencies often released considerable information in records they had initially denied requesters. We estimated that agencies released information in about one-half or more of the contested requests. Only an approximate estimate was

possible because the files did not always show how much information was released by the agencies being sued. 1/

To determine the trends of case outcome and other case characteristics, we analyzed data in the Civil Division's files on 504 cases. Our sample represented about one-half of the total "final action" cases listed with Justice's annual reports covering FOIA activities for calendar years 1975 to 1978. The selection included only 10 percent of those cases closed in 1978 and thus may not reflect any changes occurring in that full year's activities.

The number of denials and/or degree that information was released--during or as a result of litigation--in the 504 cases is shown by year in table 4.

Table 4
Number of Cases in Sample Showing Records Denied or Degree of Disclosures by Year

Year	Records denied		Full disclosure		Partial disclosure		Other issues or unknown (note a)	
	Amount	Percent	Amount	Percent	Amount	Percent	Amount	Percent
1975	14	22	30	46	11	17	10	15
1976	73	39	46	25	33	18	33	18
1977	78	35	39	18	43	20	59	27
1978	11	31	15	43	6	17	3	9
Total	176	35	130	26	93	18	105	21

a/Incomplete data in Civil Division's files.

By allocating the unknown cases and assuming that information was released or denied to the same degree as in the cases where this was shown, we estimated that information was fully or partially provided in 56 percent of all cases and was denied in 44 percent of all cases.

1/See discussion of difficulties in determining case outcome from Justice's annual report case lists on pp. 2 and 3.

We correlated the adjudicated outcome to the degree of information released for the 469 sample cases from the years 1975 to 1977. The analysis showed that information was released in many instances regardless of whether the adjudicated outcome was shown as dismissed or judgment was for either the plaintiff or defendant. However, the problem of determining the extent of disclosures persisted because of incomplete data in many of the Civil Division's case files. Table 5 shows for the 1975-77 cases the adjudicated case outcome of issues correlated to numbers of denials or degree of information released.

Table 5
Analysis of 1975-77 Cases
To Show Adjudicated Outcome

Degree of disclosure	Judgment issued (note a) For plaintiff	Judgment issued (note a) For defendant	Case dismissed	Outcome unknown or other
Denied	-	54	108	3
Full disclosure	26	6	79	4
Partial disclosure	7	21	57	2
Other issues or unknown	11	6	80	5
Total	44	87	324	14

a/Justice's annual report classifications; however, in many cases there were multiple issues and mixed decisions.

The above analysis again showed that in more than one-half of the cases, where it could be determined and projected by a prorata allocation of unknown cases, the plaintiffs (requesters) received full or partial information during or as a result of the litigation.

We identified 74 departments and agencies or their office and bureau components that were defendants in the 504 sampled cases. Table 6 identifies the 23 departments or agencies that were most frequently involved and shows the number of times records were denied and/or the degree of disclosure by an agency.

APPENDIX II

Table 6
Number of Cases Denied or
Degree of Disclosure Listed by Agencies

Agencies	No. of cases (note a)	Number denied or degree of disclosure: Records denied	Full disclosure	Partial disclosure	Other issues or unknown (note b)
Executive Office of President (includes six component agencies or offices)	21	10	3	5	3
Executive departments:					
Agriculture	10	-	6	2	2
Commerce	7	3	3	1	-
Defense (components other than military departments)	16	2	3	3	8
Army	16	7	4	1	4
Navy	14	3	4	5	2
Air Force	18	4	6	3	5
Energy	10	1	3	2	4
Health, Education, and Welfare	25	11	6	3	5
Housing and Urban Development	6	-	5	-	1
Interior	13	3	4	2	4
Justice	141	52	40	27	22
Labor	21	6	6	3	6
State	11	4	4	1	2
Transportation	14	3	6	4	1
Treasury (excluding Internal Revenue Service)	36	21	5	6	4
Totals for executive departments	358	120	105	63	70
Executive or independent agencies:					
General Services Administration	7	-	-	3	4
Federal Communications Commission	13	4	4	4	1
Federal Trade Commission	22	6	5	6	5
National Labor Relations Board	19	12	-	3	4
Civil Service Commission	8	1	4	2	1
Postal Service	15	9	1	2	3
Veterans Administration	18	7	10	-	1
Others with less than six cases per agency	30	6	6	6	12
Totals for executive agencies	132	45	30	26	31
Totals for above departments and agencies	511	175	138	94	104
Percentages of denials or releases	100	34.2	27.0	18.4	20.4

a/Does not agree with total cases because there were multiple agencies cited in certain cases and some cases cited defendants other than executive departments or agencies.

b/Incomplete data in Civil Division's files.

APPENDIX II

A further analysis which attempts to show FOIA exemptions or other principal issues in the 504 cases is presented in Table 7.

Table 7
Principal Issues Identified in Cases Examined
--FOIA Exemptions (b)(1) through (9)

	Cases	
	No.	Percent
1. Data classified for national defense or foreign policy.	18	4
2. Agencies' internal personnel rules and practices.	6	1
3. Specifically exempted by statute.	22	4
4. Trade secrets and other confidential commercial or financial information.	58	12
5. Interagency or intra-agency internal memorandums.	58	12
6. Disclosure which would constitute clearly unwarranted invasions of privacy.	22	4
7. Investigatory records compiled for law enforcement purposes (only to extent set out in subparts).	107	21
8. Related to examining financial institutions.	2	-
9. Geological or geophysical data.	-	-
Other issues or not shown.	211	42
Total	504	100

We noted that in many cases several specific exemptions were asserted for denials of records. For this analysis, we classified the cases according to what seemed to be the principal issue where this could be determined by reference to the Civil Division's files. It is important from an oversight responsibility to know what exemptions are being used

in denials that result in litigation. However, the large number of cases where information was not available or adequate to show the various issues significantly detracted from this analysis.

Table 8 identifies the plaintiffs (requesters) in the 504 cases.

Table 8
Plaintiff Categories
(includes clients represented)

	Cases	
	No.	Percent
Corporations and organizations	180	36
Individuals - general public	222	44
Federal employees - present and former	43	9
Prisoners in Federal institutions	47	9
Unknown	12	2
Total	504	100

The President's annual reports on the Privacy Act (see p. 23) reveal that agencies usually classify requests from individuals for information about themselves as Privacy Act requests. While the incidence of litigation is low in these cases, it is in addition to the FOIA cases we have analyzed here. The relative proportion of cases involving corporations and organizations, shown in table 8, would be somewhat smaller if the comparison were expanded to include individual plaintiffs in all Privacy Act suits.

INCREASES IN FOIA DENIALS AND ADMINISTRATIVE APPEALS

The continuing high levels of public complaints being filed in new suits have been fostered by agencies' denials of requests and denials of administrative appeals. 1/ While many factors may influence a requester to file a suit, the primary factors are (1) actual denials and (2) delays or

---

1/Subsection 552(a)(6)(A) provides an individual a right of appeal of any agency adverse determination concerning requests for records. (See app. V.)

APPENDIX II

lack of responses (constructive denials). Trends in this regard vary among agencies but, in total, denials are on the increase.

Agencies' FOIA annual report statistics in calendar years 1975 to 1977 showed that Government-wide requests were increasing. Moreover, denials increased out of proportion to the increases in total numbers of requests: denials as a percentage of requests rose from 12 percent in 1975 to 16 percent in 1976 and 19 percent in 1977. This data included--for certain agencies which provided it--denials based on statutory exemptions from disclosure and denials because the agencies could not identify the requested records. The data were not always consistent because some agencies or agency components did not count the latter as denials.

Administrative appeals processed by agencies also sharply increased from 3,614 in 1975 to 4,179 in 1976 and 5,190 in 1977. The specific amount of record information provided or denied could not be fully determined from agencies' reports because in some instances denials were partial, coming after some information had been provided. However, as a result of appeals, information was subsequently provided in more than one-half of the total appealed cases for this 3-year period.

We extracted and analyzed these statistics largely from the CRS report "The Administration of the Freedom of Information Act: A Brief Overview of the Executive Branch Annual Reports for 1977." We also obtained information from the 1975 and 1976 issues of this report. CRS cooperated further by making agencies' reports directly available to us. Table 9 presents our summary of the selected data combined for all agencies.

Table 9

Summary Data for Years 1977, 1976, and 1975
Agencies' Actions on Requests (FOIA) Denied and Appealed

	1977	1976	1975
Total initial denials	33,892	24,604	18,571
Percent of requests (note a)	19	16	12
FOIA exemptions cited:			
Classified data, (b) (1)	1,226	1,262	1,125
	5%	5%	4%
Personnel rules and practices, (b) (2)	814	1,140	1,301
	3%	4%	5%
Another Federal statute, (b) (3)	3,009	3,293	2,759
	11.5%	12%	10%
Business data, (b) (4), (8), (9)	4,212	3,165	1,858
	15.5%	12%	7%
Interagency or intra-agency memorandums, (b) (5)	4,992	5,084	5,772
	19%	19%	21%
Personnel files, (b) (6)	4,146	3,699	3,856
	16%	14%	14%
Investigatory files, (b) (7)	7,757	9,159	10,629
	30%	34%	39%
Total number of times statutory exemptions were cited in denials	26,156	26,802	27,300
Other bases for initial refusals (No record located, request withdrawn, failure to pay fees or to follow rules, etc.)	16,285	11,137	7,864
Appelate action:			
Total appeals	5,190	4,179	3,614
Percent of total denials	15	17	20
Analysis of disposition (note b):	4,263	3,666	2,356
Appeals denied in full	2,285	1,691	1,139
	53.5%	46%	48%
Appeals granted in part	1,442	1,535	858
	34%	42%	37%
Appeals granted in full	536	440	359
	12.5%	12%	15%

a/Incomplete agency reporting on total requests; projecting the data reported by selected agencies indicated that total requests Government-wide were about 154,000 in 1975, 156,000 in 1976, and 177,000 in 1977.

b/Incomplete agency reporting on disposition of appeals.

APPENDIX II

PRIVACY ACT LAWSUITS

The Privacy Act provides that an individual may sue an agency in a U.S. District Court to gain access to or amend a record, or to seek damages when the individual is injured as the result of a violation of the Privacy Act. During 1977 the number of lawsuits increased significantly. While most of the lawsuits related to access or amendment, a substantial portion challenged disclosure policies or recordkeeping practices.

According to figures provided by Justice, 141 Privacy Act lawsuits were filed during 1977--a significant increase over the 69 filed during 1976. The number of these suits was relatively low, however, considering that agencies received 1,417,214 requests for access. According to the President's annual report on the Privacy Act for calendar year 1977, agencies granted these requests (in full or part) in 1,355,515 instances (95.6 percent).

Table 10 indicates the provisions under which lawsuits were brought. Although most suits sought access to or amendment of records (subsections (d) (1) and (d) (2), respectively), a substantial number of actions challenged agency disclosure of information (subsection (b)) and agency recordkeeping practices (subsection (e)).

Table 10
Provisions of the Privacy Act Cited in 66 Lawsuits

Provision	No. of suits
(b) Conditions of disclosure	20
(b) (1) Intra-agency disclosures	1
(b) (3) Routine use disclosures	1
(d) (1) Access to records	12
(d) (2) Amendment of records	11
(d) (3) Appeal of adverse amendment decision	1
(d) (4) Statements of disagreement	1
(d) (5) Records compiled for civil action or proceeding	1
(e) Agency requirements	3
(e) (4) Maintenance of necessary, authorized records	4
(e) (3) Privacy Act notification	1
(e) (4) System notices	1
(e) (5) Standard of accuracy	5
(e) (6) Validation of records	3
(e) (7) First Amendment records	4
(e) (9) Agency rules of conduct	2
(e) (10) Safeguards	1
(g) Civil remedies	17
(g) (1) Right of action	3
(g) (1) (A) Amendment of records	4
(g) (1) (B) Access to records	8
(g) (1) (C) Standard of accuracy	9
(g) (1) (D) Other failure to comply with the act	11
(g) (3) (A) Court order for access to records	2
(g) (3) (B) Award of attorney's fee	1
(g) (4) Damages	7
(i) (1) Criminal penalties--maintenance of secret system	2

Note: Most suits cited more than one section of the act. Figures represent 66 cases for which information is available.

APPEALS OF ADVERSE AGENCY PRIVACY ACT DECISIONS

The Privacy Act requires agencies to establish procedures whereby individuals may appeal denials of requests for access to and amendment of records 1/ to authorities higher in the agency than the official who made the initial determination. The number of appeals reported for 1977 was somewhat larger than for 1976.

--The Department of Defense reported 98 appeals of decisions to deny access or amendments to records. Defense's initial decisions in these cases were sustained in 52 cases and reversed in 46. These denials of appeals increased somewhat over 1976 when 86 appeals were filed, with 53 sustained; 18 partially sustained; 13 reversed; and 2 were pending at year end.

--The Central Intelligence Agency reported 160 total appeals and sustained the agency's decisions in 17 cases and partially sustained them in 28. No decisions were reversed; 115 cases were carried over to 1978. By contrast, only 78 appeals had been received during 1976, and only 12 completed. Of the 12, 5 decisions were partially reversed, 6 were sustained, and 1 was withdrawn.

--Justice had 2,261 new appeals filed during 1977 (compared to 1,556 in 1976). Of these new appeals, 444 decisions were sustained, 1,067 were partially sustained, 38 were reversed, and the remainder were carried over to 1978.

--Of the remaining agencies, 19 reported receiving a total of 200 appeals. In most of these cases, the agencies' decisions were sustained. Again, this is a moderate increase in appeals over the total of 132 filed during 1976.

--Twenty-one additional agencies which had received requests for access and amendments reported that no decisions were appealed.

1/Under subsection 552a (d) (2), an individual may request an amendment to correct a record pertaining to himself. Subsection (f) (4) provides for appeals of an agency's adverse determinations. (See Privacy Act text in app. VI.)

APPENDIX II

JUSTICE AND AGENCIES' ANNUAL REPORTS LACKED MEANINGFUL DATA ON LITIGATION

Better information is needed to identify and correct problems that are implicit in the increasing backlog of cases in court. For example, summary data is not being systematically reported by the agencies or Justice. Justice's annual published case lists contain too little analysis to show trends and status of litigation or to provide information needed to effectively monitor this activity.

The agencies' annual reports do not provide data tracking their denials to litigation. Agencies are the logical basic source for information on the status and outcome of court cases pertaining to their respective denials of requests for their data. This information is needed for their own monitoring. The only statistical information on court cases they now report concerns court actions pertaining to their limited numbers of petitions to obtain formal approval of proposed time extensions for responding to requests and administrative appeals.

We discussed the results of our analysis of denials and litigation with an official of the Justice Department's Office of Information Law and Policy, and he agreed that better data was needed. He believes it would be useful in advising and counseling agencies as well as directly useful to the agencies.

APPENDIX III

SELECTED GAO REPORTS ON IMPROVING EFFECTIVENESS OF OPERATIONS RELATED TO THE FOIA AND PRIVACY ACT

FREEDOM OF INFORMATION, LAW ENFORCEMENT, AND BUSINESS DATA

1. "Government Field Offices Should Better Implement the Freedom of Information Act" (LCD-78-120, July 25, 1978).

Requested by: Chairman, Subcommittee on Government Information and Individual Rights, House Committee on Government Operations.

Summary: With few exceptions, regional personnel were aware of their duty to respond to public requests and were attempting to comply with the act. However, the act was not totally supported and implemented. We recommended that various actions be taken by Justice to improve FOIA implementation. As a result, Justice reorganized its activities for oversight and administration of FOIA matters and took various other actions to implement the recommendations. Recommendation to the Congress: While Justice has implicit oversight responsibility for the FOIA, it is not providing adequate resources to this responsibility. We recommended that the Congress amend the act to give Justice explicit oversight for the act.

2. Letter report to the Chairman, Subcommittee on Administrative Practice and Procedures, Senate Committee on the Judiciary; Senator Kennedy; and Administrator of General Services concerning our monitoring of a study by the General Services Administration of FOIA indexing and publishing practices in Federal agencies (LCD-78-126, July 31, 1978).

Requested by: Chairman, Subcommittee on Administrative Practice and Procedures, Senate Committee on the Judiciary.

Summary: The study was requested in July 1975. Issuance of the final report was the responsibility of General Services. National Archives and Records Service

APPENDIX III

completed its fieldwork in the summer of 1976 and provided us a draft report for informal comment in January and April 1977. We felt the April version needed only minor revisions, but General Services, OMB, and Justice had problems with the report recommendations--one of which recommended that the FOIA be amended to give Justice oversight responsibility for the act. We sent a letter signed by Mr. Staats to the Administrator of General Services in April 1978 expressing our concern about the slow progress on the report. The Administrator advised Mr. Staats in May 1978 that the report was delayed because of the need to consult with OMB and Justice. The draft report was submitted to GAO in May 1978 and indications were that once our comments were received the report would be issued soon thereafter. In July 1978 we provided our formal comments to the Administrator of General Services and sent letters to the Subcommittee Chairman and Senator Kennedy, the former Subcommittee Chairman. We told the Subcommittee Chairman and Senator Kennedy that we expected that the final report would be forwarded to them in the near future. However, despite efforts by GAO, the requesting Subcommittee and the House Committee on Government Operations, Subcommittee on Government Information and Individual Rights, the report has not yet been issued. We were told by a National Archives official in March 1979 that they were awaiting comments from Justice. Recently we were told that the report was being considered by OMB, but no date for issuance had been established.

3. "Timeliness and Completeness of FBI Responses to Requests Under Freedom of Information and Privacy Acts Have Improved" (GGD-78-51, Apr. 10, 1978).

Requested by: 10 Members of Congress.

Summary: The report showed that the Federal Bureau of Investigation, after being inundated with 48,000 requests in 3 years, had made progress since the fall of 1976 in improving the timeliness and completeness of information provided. However, various problems continued to hamper FBI efforts to effectively comply with requests. The report recommended that the Congress modify the FOIA and that the Attorney General improve management practices.

4. "Data on Privacy Act and Freedom of Information Act Provided by Federal Law Enforcement Agencies" (LCD-78-119, June 16, 1978).

Requested by: Chairman, Senate Committee on the Judiciary.

Summary: This report showed the fiscal impact on some law enforcement agencies resulting from the response to individuals requesting information or access to agency records and files. Thirteen agencies contacted by us either estimated or identified operating and startup costs associated with the two acts to be $35.9 million during 1975 through and 1977. Agency operating costs ranged from about $159,000 to $13.8 million. About 80 percent of the operating costs of the agencies went for salaries. An estimated 147,000 requests for data were received by the 13 agencies. (See also GGD-78-108, Nov. 15, 1978.)

5. "Impact of the Freedom of Information and Privacy Act on Law Enforcement Agencies" (GGD-78-108, Nov. 15, 1978).

Requested by: Chairman, Senate Committee on the Judiciary.

Summary: This review was done as part of the LCD-78-119 request. Law enforcement officials almost universally agreed that the FOIA and Privacy Act had eroded their ability to collect and disseminate information. However, the extent and significance of the information being gathered could not be measured. The trend perceived by these law enforcement officials was not attributed solely to the FOIA and Privacy Act. Other laws, misinterpretation of the rules, and "a general distrust of law enforcement agencies" also contributed to the problem. Moreover, they could not determine the significance of the information being obtained. As agreed with the requester, the report did not verify or draw conclusions from the numerous examples provided. Further, we did not attempt to evaluate the benefits to be derived from these acts.

6. "Review of Freedom of Information Requests by Service Companies" (Oral briefing Feb. 14, 1978; closeout letter Mar. 14, 1978).

Requested by: Chairman, Subcommittee on Government Information and Individual Rights, House Committee on Government Operations.

Summary: At the Food and Drug Administration, service companies comprised one of the major groups of requesters of data and they were engaged by Administration regulated companies, such as Johnson & Johnson and E.R. Squibb & Sons. At the Social Security Administration, service companies were not widely used. Information developed during the review contributed to the July 1978 House Government Operations Committee report, "Freedom of Information Act Requests for Business Data and Reverse-FOIA Lawsuits."

PRIVACY AND DATA SECURITY

1. "Agencies Implementation of and Compliance With the Privacy Act Can Be Improved" (LCD-78-115, June 6, 1978).

Requested by: Self-initiated.

Summary: Identified actions needed to insure that agency locations were complying with the Privacy Act and which would reduce the cost of carrying out the act's provisions. We recommended that OMB make agencies aware of our recommended actions. OMB agreed to take action in accordance with our recommendations.

2. "Challenges of Protecting Personal Information in an Expanding Federal Computer Network Environment" (LCD-76-102, Apr. 28, 1978).

Requested by: Two Members of Congress.

Summary: The report discussed problems involved and presented possible ways to provide a high level of protection for personal information. We recommended that OMB provide Federal agencies with comprehensive guidance.

3. "Procedures to Safeguard Social Security Benefit Records Can and Should be Improved" (HRD-78-116, June 5, 1978).

Requested by: Two Members of Congress.

Summary: This review addressed the Social Security Administration's procedures to prevent misuse of beneficiary records. We recommended that security weaknesses identified be corrected and that Social Security pursue an active and aggressive security program. Social Security took action to improve security over access to computer terminals and data in its telecommunications network and held workshop symposiums on privacy and security.

4. "Privacy Act of 1974 Has Little Impact on Federal Contractors" (LCD-78-124, Nov. 27, 1978).

Requested by: Chairman, Subcommittee on Government Information and Individual Rights, House Committee on Government Operations.

Summary: This review examined efforts to implement subsection 3(M) of the Privacy Act at 10 Federal departments and agencies and at 60 contractors. We recommended ways to correct problems which agencies and contractors had in carrying out the subsection and alternative ways the Congress could clarify the law. We were requested to testify on the findings in this assignment by the House Committee on Government Operations, Subcommittee on Government Information and Individual Rights. Actions being taken on the recommendations in the report should improve protection of sensitive data in systems of records.

5. "Automated Systems Security--Federal Agencies Should Strengthen Safeguards Over Personal and Other Sensitive Data" (LCD-78-123, Jan. 23, 1979).

Requested by: Chairman, Subcommittee on Government Information and Individual Rights, House Committee on Government Operations.

Summary: We examined and reported on the status and effectiveness of major Federal agencies' computer security programs.

After completion of our fieldwork, OMB issued Circular A-71, TM-1, on security of automated information systems which could contribute greatly to correcting many of the problems addressed in our report. We recommended that OMB critique agencies on the adequacy of their plans for computer security using the findings and recommendations in our report, as well as the requirements set forth in A-71.

APPENDIX III

6. Letter report to DOD on computer security programs (LCD-79-109, Mar. 21, 1979).

Requested by: Chairman, Subcommittee on Government Information and Individual Rights, House Committee on Government Operations.

Summary: This report completed the request for GAO assessment of computer security programs of major agencies (LCD-78-123, Jan. 23, 1979). Because of extensive DOD internal audits of systems security which coincided with our review, we did not include DOD in our scope of agencies examined for our LCD-78-123 report. Instead, we evaluated those audits and briefed the various service departments on our findings (Defense Audit Service, Army Audit Agency, Naval Audit Service, and Air Force Audit Agency). We also reviewed with DOD officials the extent of programs and guidelines to protect sensitive data.

Our review demonstrated that the Government-wide problems reported in LCD-78-123 were pervasive in DOD. Subject letter report to DOD stressed this. The letter report also emphasized that DOD be included among the agencies that should respond to OMB on the recommendations in LCD-78-123.

APPENDIX IV

ATTORNEY GENERAL BELL REINVIGORATES THE FREEDOM OF INFORMATION ACT

Mr. KENNEDY. Mr. President, over 10 years ago Congress passed the Freedom of Information Act with a firm commitment to opening the processes of Government to greater public scrutiny. The law embodied a presumption that all Government information was public unless it fell within nine specific exemptions in the act.

Over the next few years, agencies disregarded the FOIA or abused its procedures to the point that the law became in many ways a shield for withholding information from the public. This led to the 1974 amendments, which clarified two of the more troublesome exemptions of the act and streamlined its procedures substantially. By overriding a Presidential veto of the amendments, Congress again made clear in 1974 its strong dedication to open government. Subsequent enactment of the Privacy Act and the Sunshine Act reinforced the basic principle that a democratic government works best when it works openly.

President Ford's veto of the FOIA amendments, though overridden, sent a message to the Federal bureaucracy which conflicted with that contained in the amendments themselves. So agency footdragging, overuse of exemptions, and procedural sleights of hand continue to mitigate full implementation of the act.

President Carter has stated his personal commitment to more "sunshine" on the Potomac; but until now we have seen little concrete action to back up that welcome rhetoric. Last week, however, Attorney General Griffin Bell made a bold move to reinvigorate the spirit and the letter of the Freedom of Information Act.

On May 5, the Attorney General wrote to the heads of all Federal departments and agencies conveying an important message loudly and clearly:

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

And then Attorney General Bell went one step farther—he indicated that the Department will defend FOIA suits "only when disclosure is demonstrably harmful, even if the documents technically fall within the exemptions of the act."

This, Mr. President, reflects a significant change from the Department's previous practice of blindly defending agency refusals to disclose information whenever a complaint was filed against the Government. This "hired gun" attitude by Justice not only ran counter to the FOIA itself—which contemplates a leadership role by the Department to induce greater, not less, disclosure of information by agencies—but also led to the litigating of hundreds of cases in Federal court. The present FOIA docket has over 600 cases; in probably half or more of these, the information could well be disclosed with no harm to any governmental or private interest. But, agencies have come to view litigation as simply one more procedural tool for extending the time period they have before turning over information, particularly if it is of an embarrassing nature. The readiness of Justice to defend all comers has encouraged agencies to take this "let them sue" approach to FOIA requesters.

The Attorney General has done more than just make a nice pronouncement; he has established four specific criteria to be applied by Justice in determining whether to defend an FOIA suit against an agency. The key criterion is "whether there is a sufficient prospect of actual harm to legitimate public or private interests if access to the requested records were to be granted to justify the defense of the suit."

But, that is not all. Attorney General Bell also gave a new boost to the Department's FOIA Committee, which advises agencies regarding appropriate responses to requests. This committee, over the years, has done yeoman's service to the Government and the public by providing objective, enlightened counseling to agencies on particular applications of the FOIA. It fell into disuse over recent years, however, especially since Justice lawyers stood ready to defend an agency whether or not the agency sought or followed the FOIA Committee's advice. No doubt the committee will have an added workload in the months to come, but if it can continue to do its job of influencing greater disclosure by agencies and reducing the number of suits ultimately filed, the new burdens will be well worth the effort.

Finally, the Attorney General has requested the Civil Division to review pending cases to determine which litigation can be brought to a premature close by release of the information sought by the plaintiff. This may be the most concrete step the Department has taken to reduce the workload of the Federal courts since the new Attorney General took office, and I suspect this review will pay off handsomely.

Mr. President, I applaud this important and forceful step by Attorney General Bell to breathe new life into the Freedom of Information Act and to be-

gin to fulfill this administration's more general commitment to the spirit of openness, which underlies our democratic system of government.

I ask unanimous consent that the Attorney General's memorandum of May 5, 1977, be printed in the RECORD.

There being no objection, the memorandum was ordered to be printed in the RECORD, as follows:

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., May 5, 1977.

LETTER TO HEADS OF ALL FEDERAL DEPARTMENTS AND AGENCIES—RE FREEDOM OF INFORMATION ACT

I am writing in a matter of great mutual concern to seek your cooperation.

Freedom of Information Act litigation has increased in recent years to the point where there are over 600 cases now pending in federal courts. The actual cases represent only the "tip of the iceberg" and reflect a much larger volume of administrative disputes over access to documents. I am convinced that we should jointly seek to reduce these disputes through concerted action to impress upon all levels of government the requirements, and the spirit, of the Freedom of Information Act. The government should not withhold documents unless it is important to the public interest to do so, even if there is some arguable legal basis for the withholding. In order to implement this view, the Justice Department will defend Freedom of Information Act suits only when disclosure is demonstrably harmful, even if the documents technically fall within the exemptions in the Act. Let me assure you that we will certainly counsel and consult with your personnel in making the decision whether to defend. To perform our job adequately, however, we need full access to documents that you desire to withhold, as well as the earliest possible response to our information requests. In the past, we have often filed answers in court without having an adequate exchange with the agencies over the reasons and necessity for the withholding. I hope that this will not occur in the future.

In addition to setting these guidelines, I have requested Barbara Allen Babcock, Assistant Attorney General for the Civil Division, to conduct a review of all pending Freedom of Information Act litigation being handled by the Division. One result of that review may be to determine that litigation against your agency should no longer be continued and that information previously withheld should be released. In that event, I request that you ensure that your personnel work cooperatively with the Civil Division to bring the litigation to an end.

Please refer to 28 CFR 50.9 and accompanying March 9, 1976 memorandum from the Deputy Attorney General. These documents remain in effect, but the following new and additional elements are hereby prescribed:

In determining whether a suit against an agency under the Act challenging its denial of access to requested records merits defense, consideration shall be given to four criteria:

(a) Whether the agency's denial seems to have a substantial legal basis,

(b) Whether defense of the agency's denial involves an acceptable risk of adverse impact on other agencies,

APPENDIX IV

(c) Whether there is a sufficient prospect of actual harm to legitimate public or private interests if access to the requested records were to be granted to justify the defense of the suit, and

(d) Whether there is sufficient information about the controversy to support a reasonable judgment that the agency's denial merits defense under the three preceding criteria.

The criteria set forth above shall be considered both by the Freedom of Information Committee and by the litigating divisions. The Committee shall, so far as practical, employ such criteria in its consultations with agencies prior to litigation and in its review of complaints thereafter. The litigating divisions shall promptly and independently consider these factors as to each suit filed.

Together I hope that we can enhance the spirit, appearance and reality of open government.

Yours sincerely,

GRIFFIN B. BELL,
Attorney General.

APPENDIX —TEXT OF THE FREEDOM OF INFORMATION ACT

FREEDOM OF INFORMATION ACT

§ 552. Public information; agency rules, opinions, orders, records, and proceedings.

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

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

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

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

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

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

(E) each amendment, revision, or repeal of the foregoing.

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

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

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

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

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency

shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

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

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. 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.

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

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

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

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

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

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

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

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

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

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

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

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

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

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

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the application time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

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

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

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

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

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

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

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

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency

responsible for the regulation or supervision of financial institutions; or

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

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

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

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

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

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

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

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

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

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

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

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

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

APPENDIX VI

APPENDIX —TEXT OF THE PRIVACY ACT

Public Law 93-579: The Privacy Act of 1974

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Privacy Act of 1974."

Sec. 2.

(a) The Congress finds that -

(1) the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies;

(2) the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information;

(3) the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems;

(4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States; and

(5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.

(b) The purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal agencies, except as otherwise provided by law, to—

(1) permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated by such agencies;

(2) permit an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent;

APPENDIX VI

(3) permit an individual to gain access to information pertaining to him in Federal agency records, to have a copy made of all or any portion thereof, and to correct or amend such records;
(4) collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information;
(5) permit exemptions from the requirements with respect to records provided in this Act only in those cases where there is an important public policy need for such exemption as has been determined by specific statutory authority; and
(6) be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act.

Sec. 3.

Title 5, United States Code, is amended by adding after section 552 the following new section:

"552a. Records maintained on individuals

"(a) DEFINITIONS. - For purposes of this section—
"(1) the term 'agency' means agency as defined in section 552(e) of this title;
"(2) the term 'individual' means a citizen of the United States or an alien lawfully admitted for permanent residence;
"(3) the term 'maintain' includes maintain, collect, use, or disseminate;
"(4) the term 'record' means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;
"(5) the term 'system of records' means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;
"(6) the term 'statistical record' means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13; and
"(7) the term 'routine use' means, with respect to the disclosure of

a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

"(b) CONDITIONS OF DISCLOSURE. - No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior consent of, the individual to whom the record pertains, unless disclosure of the record would be—

"(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

"(2) required under section 552 of this title;

"(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

"(4) to the Bureau of the Census for purposes of planning or carrying out a census of survey or related activity pursuant to the provisions of title 13;

"(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

"(6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

"(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

"(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

"(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

"(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or

"(11) pursuant to the order of a court of competent jurisdiction.

"(c) ACCOUNTING OF CERTAIN DISCLOSURES.—Each agency, with respect to each system of records under its control, shall—

APPENDIX VI

"(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of—

"(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

"(B) the name and address of the person or agency to whom the disclosure is made;

"(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

"(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

"(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

"(d) ACCESS TO RECORDS.—Each agency that maintains a system of records shall—

"(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

"(2) permit the individual to request amendment of a record pertaining to him and—

"(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

"(B) promptly, either—

"(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

"(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

"(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal,

APPENDIX VI

and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

"(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

"(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

"(e) AGENCY REQUIREMENTS.—Each agency that maintains a system of records shall—

"(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

"(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

"(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual—

"(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

"(B) the principal purpose or purposes for which the information is intended to be used;

"(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

"(D) the effects on him, if any, of not providing all or any part of the requested information;

APPENDIX VI

"(4) subject to the provisions of paragraph (11) of this subsection, publish in the *Federal Register* at least annually a notice of the existence and character of the system of records, which notice shall include--

"(A) the name and location of the system;

"(B) the categories of individuals on whom records are maintained in the system;

"(C) the categories of records maintained in the system;

"(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

"(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

"(F) the title and business address of the agency official who is responsible for the system of records;

"(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

"(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

"(I) the categories of sources of records in the system;

"(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

"(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

"(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

"(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

"(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this

section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

"(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained; and

"(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the *Federal Register* notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency.

"(f) AGENCY RULES.—In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall—

"(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

"(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

"(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;

"(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

"(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall annually compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

"(g) —

"(1) CIVIL REMEDIES.—Whenever any agency

"(A) makes a determination under subsection (d)(3) of this

APPENDIX VI

section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

"(B) refuses to comply with an individual request under subsection (d)(1) of this section;

"(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

"(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

"(2) —

"(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter *de novo*.

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

"(3) —

"(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter *de novo*, and may examine the contents of any agency records *in camera* to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

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

"(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines

that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

"(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

"(B) the costs of the action together with reasonable attorney fees as determined by the court.

"(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where any agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to the effective date of this section.

"(h) RIGHTS OF LEGAL GUARDIANS.—For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

"(i) —

"(1) CRIMINAL PENALTIES.—Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

"(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

"(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under

false pretenses be guilty of a misdemeanor and fined not more than $5,000.

"(j) GENERAL EXEMPTIONS.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is—

"(1) maintained by the Central Intelligence Agency; or

"(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

"(k) SPECIFIC EXEMPTIONS.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is—

"(1) subject to the provisions of section 552(b)(1) of this title;

"(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however*, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal Law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the

Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

"(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to Section 3056 of title 18;

"(4) required by statute to be maintained and used solely as statistical records;

"(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

"(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

"(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

"(l) ARCHIVAL RECORDS.—

"(1) Each agency record which is accepted by the Administrator of General Services for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Administrator of General Services shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

"(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the *Federal Register*.

"(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

"(m) GOVERNMENT CONTRACTORS.—When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

"(n) MAILING LISTS.—An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

"(o) REPORT ON NEW SYSTEMS.—Each agency shall provide adequate advance notice to Congress and the Office of Management and Budget of any proposal to establish or alter any system of records in order to permit an evaluation of the probable or potential effect of such proposal on the privacy and other personal or property rights of individuals or the disclosure of information relating to such individuals, and its effect on the the preservation of the constitutional principles of federalism and separation of powers.

"(p) ANNUAL REPORT.—The President shall submit to the Speaker of the House and the President of the Senate, by June 30 of each calendar year, a consolidated report, separately listing for each Federal agency the number of records contained in any system of records which were exempted from the application of this section under the provisions of subsections (j) and (k) of this section during

APPENDIX VI

the preceding calendar year, and the reasons for the exemptions, and such other information as indicates efforts to administer fully this section.

"(q) EFFECT OF OTHER LAWS.—No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section."

Sec. 4.

The Chapter analysis of chapter 5 of title 5, United States Code, is amended by inserting:

"552a. Records about individuals."

immediately below:

"552. Public information; agency rules, opinions, orders, and proceedings.".

[Section 5 of the Privacy Act established a Privacy Protection Study Commission for a period of two years. Its term has now expired. Among other things, the Commission was charged with the responsibility of assessing the effectiveness of privacy protections throughout the society. In July 1977, it issued a report entitled "Personal Privacy in an Information Society" which proposed a series of recommendations directed toward safeguarding personal privacy in both the public and private sector. This report can be obtained from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20420 for a charge of $5.]

Sec. 6.

The Office of Management and Budget shall—

(1) develop guidelines and regulations for the use of agencies in implementing the provisions of section 552a of title 5, United States Code, as added by section 3 of this Act; and

(2) provide continuing assistance to and oversight of the implementation of the provisions of such section by agencies.

APPENDIX VI

Sec. 7.

(a) —

(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

(2) The provisions of paragraph (1) of this subsection shall not apply with respect to—

(A) any disclosure which is required by Federal statute, or

(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

(b) Any Federal, State, or local government agency which requests an individual to disclose his social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

Sec. 8.

The provisions of this Act shall be effective on and after the date of enactment, except that the amendments made by section 3 and 4 shall become effective 270 days following the day on which this Act is enacted.

Sec. 9.

There is authorized to be appropriated to carry out the provisions of section 5 of this Act for fiscal years 1975, 1976, and 1977 the sum of $1,500,000, except that not more than $750,000 may be expended during any such fiscal year.

Approved December 31, 1974

(941143)