After Five Years: An Assessment of the Amended U.S. Freedom of Information Act

TRUDY HUSKAMP PETERSON

The opinions expressed in this article are solely those of the author and in no way reflect the official position of the National Archives and Records Service.

THE CONGRESS OF THE UNITED STATES in 1974 passed tough amendments to the 1966 Freedom of Information Act. These amendments required that "any reasonably segregable portion of a record" be released, set tight time limits for responses, amended two exemption categories, and established penalties for non-compliance. Critics of the Act argued that the impact of the amendments would be to invade the privacy of citizens, impair decision making, hamper investigatory and regulatory agencies, and cost untold sums. President Ford vetoed the bill; but Congress, acting in the torment of the Watergate year, passed it over his veto.[1] Most archivists applauded the measure; archivists are, after all, generally committed to opening records to public view. Now, after more than five years of experience with the amended Act, it is time to look at its impact on records creation, records disposition, and records availability.

Availability is the easiest of these

[1] 5 U.S.C. 552. Some agencies, including the National Archives and Records Service, were implementing the FOIA properly long before the 1974 amendments. However, the Act was implemented unevenly in Executive Branch agencies, and in several agencies implemented hardly at all. The procedural amendments to the Act, including a mandatory annual report to Congress from each agency on its administration of the Act, were intended to bring all agencies into compliance. The Ford veto was based in part upon the opinion that the amendment to the first exemption on classified information was unconstitutional.

The best handbook on the Freedom of Information Act is *A Citizen's Guide on How to Use the Freedom of Information Act and the Privacy Act in Requesting Government Documents* (Washington, D.C.: Government Printing Office, 1977). Current information on FOIA developments is found in *Access Reports/FOI,* a biweekly newsletter published by Plus Publications, Inc. A more expanded discussion of the 1974 amendments and the National Archives can be found in my article, "Using the Freedom of Information Act to Acquire Archival Materials," *Law Library Journal* (Fall 1979).

three to measure. The amended Act requires that the departments and agencies make an annual report to Congress on their administration of the Act, and these reports give the general statistical picture of the research use of the Act. Here, however, it is important to remember several things. First, there is no legislative definition and no consensus of what constitutes an FOI request. Some agencies count any request from the public for records as an FOI request, whether the request is for a press release or for a top secret document; others count only those requests that specifically mention the Freedom of Information Act. Consequently, it is not reasonable to argue that without the amended Act all or most of the information released in response to FOI requests would not have been released, for some portion of it surely would have been. Second, the typical researcher using the Act is not the typical archival researcher. The Justice Department, for instance, has a high number of FOI requests from convicts seeking records about themselves; some regulatory agencies report a large number of requests from businesses and corporations for information on competitors or on the decision-making process. These are not the archivist's usual clientele. Third, a denial may be made not only on the basis of substantive information in the requested record, but also because the record does not exist, the record is not in the possession of the agency, or the researcher's identification of the document is inadequate ("please give me everything you have on me"). Consequently, the number of denials at the initial request stage must be sorted into substantive and nonsubstantive categories. But even after the substantive denials are isolated, it remains a quirk of the reporting process that the denial of one word in a document is reported as a denial, just as if the entire document, volume, file, or series had been denied.

Perhaps the best statistics to use in measuring increased access due to the Act are the statistics on releases in response to appeals and to litigation. Here the agency would have denied the information to the researcher and, without the Act, the researcher would have been unable to obtain it. Here, too, most appeals and lawsuits are for records that are known to exist in the possession of the agency; few researchers will appeal or sue based on an agency's reply that the records do not exist in the agency's files. And at the appeals and litigation stages the statistics indicate whether the information was denied in full or in part, enabling us to see the release of information with greater precision. In 1976 there were 4,179 appeals, and 440 (12 percent) were granted in full, 1,535 (42 percent) granted in part. This means that more than half of the appeals resulted in the release of information and more than 2,000 requesters got information that would not have been obtained without the Act. In 1977 there were 5,190 appeals, of which 12.5 percent were granted in full and 34 percent were granted in part. Again, about 2,000 requesters gained additional information.[2] The General Accounting Office studied FOI litigation during the period 1975–77, and found that over half of the litigants received the documents they requested, re-

[2] Harold C. Relyea, *The Administration of the Freedom of Information Act: A Brief Overview of the Executive Branch Annual Reports for 1976;* ibid., . . . *for 1977* (Washington, D.C.: Congressional Research Service, Library of Congress, 17 October 1977 and 15 November 1978).

ceived them in whole or in part.[3]

But what kind of information is being released? Here statistics are silent. The FBI argues that the Act has made information on informants and techniques available to criminals and organized crime, jeopardizing informants and agents and compromising certain investigative methods. Corporations have gone to court to prevent the release of business information supplied to the government. These suits are known as "reverse FOI cases" because they seek to prevent release rather than to obtain it. It is probably a safe guess that most information released at the initial request level is either information that is already public or information about the individual or organization making the request. Requests for information about third parties (i.e., information about persons other than the individual making the request or the officials of the federal agency) probably make up a higher percentage of appeals and lawsuits than do initial requests; but the preponderance of information released at those later stages is probably still information about the individual or organization making the request. And the release of personal information to an individual, about that individual, does not necessarily open those records to general research; an individual has more rights to access to records about himself than does a third party. Release of information about third parties, however, generally opens the information to all. Consequently, we may theorize that the FOI is an effective means for gaining access to information about yourself, your organization, or your business; but it releases less information for general research than the statistics would suggest.

A second major concern, the impact of the amended Act on records creation, has generated considerable fear and controversy. While the 1974 amendments were being debated, many government officials argued that a tough Act would have a "chilling effect" on records creation. They believed that the likelihood of disclosure would inhibit some officials from documenting decision-making, that it would make officials reluctant to provide candid advice in writing, and that outsiders would be reluctant to furnish information to the government. And to some extent, this has all occurred. Shortly after the amendments went into effect, government officials could be heard to say, "Don't write that down—it could be released under FOI." And in at least one instance, I personally was very conscious of the Act as I compiled information, knowing that the records in the file would be nearly impossible to deny if requested under the Act.

However, for several reasons, much of the civil servant's initial fear of the Act has diminished. First, it is impossible to manage large federal agencies without issuing written instructions and documenting decisions and reporting on programs and problems. Also, experience with the law has shown officials which exemptions are and which are not likely to be upheld, either by the Department of Justice or by the courts. Experience, in other words, has shown officials how to live with the Act. Then, too, the law requires federal agencies to document their activities, and agencies generally do so, al-

[3] "Filing Suit under FOIA Effective in Getting Information, GAO Report Finds," *Access Reports*, vol. 5, no. 22, 13 November 1979, pp. 1–2.

though surely more to meet their own administrative, legal, and fiscal needs than to comply with the requirement that functions be documented.

It is incontrovertible that private individuals and organizations are increasingly reluctant to furnish information to the federal government because of the possibility that the information could be released under the FOI. Over time, this could pose a serious problem to the government; however, there are a number of steps that could be taken to ensure that truly confidential information is not released.[4] First, agencies must define more clearly for their employees the type of information that is covered by an exemption, and then the agencies must be consistent in the application of that definition. Certainly the Justice Department and the courts are the final arbiters, and definition will become easier as a body of legal precedent on FOI cases develops; but agencies can contribute to better definition through good guidelines, handbooks, and repeated training sessions. Similarly, agencies can take more care in the actual process of making deletions from the documents. If a name is excised on one page, only to appear on another, it will often undermine the entire effort to protect the identity of the source. Given the thousands of pages handled by the agencies each year in fulfilling FOI requests, it is inevitable that some accidental disclosures will occur; but the public must be made confident that agencies are taking all reasonable precautions to prevent such disclosures. The key problem here is trust: the private sector's trust that the government will assert the appropriate exemption, that the agency personnel will do a good job of identifying and sanitizing the records, and that the courts will uphold appropriate use of the exemptions.[5]

The most serious impact of the amended Freedom of Information Act on the archivist may be in the area of records disposition. There are four emerging problems here, all of them little predicted when the amendments were passed: (1) growing demands by the private sector that certain files be destroyed to prevent disclosure; (2) a developing tactic in litigation of using the Act to prevent the destruction of records; (3) an increasing confusion about the definition of federal records; and (4) a growing tendency to assert that the records received by an agency are not subject to FOI, thereby undermining the principle that the records of an agency are both those made and those received. These are ominous signs.

When the amendments were passed, observers predicted that agencies would try to schedule and quickly destroy those records that would pose difficult FOI problems for the agency. And is some cases this probably happened. Unexpected were pleas from

[4] One proposed solution is that persons or organizations named in the records be notified before records relating to them are released. As archivists are quick to realize, this would mean not only a great slowing of response time, and increased cost, but it would also mean dozens of letters a week for George Washington, Thomas Jefferson, and others long dead. In March 1978 the Office of Management and Budget requested agencies to notify contractors and potential contractors when their names appear in procurement records sought under the Freedom of Information Act. No time limits were suggested, so, potentially, this covers information submitted by contractors for the Union Army during the Civil War!

[5] If necessary, the government can obtain some types of information from private citizens and organizations by passing specific legislation requiring the submission of such information, or by using subpoena powers. This, however, is complex and certainly not as desirable as voluntary cooperation.

the private sector for destruction of records. Two cases will serve as examples. In one, the Southern Christian Leadership Conference and a number of individuals sought the destruction of the FBI's records of the telephone taps on Martin Luther King, Jr. In that case, the judge ordered the materials held at the National Archives under seal for fifty years. In the second case, an individual who had discovered, through the Privacy Act, that the FBI maintained a file on him, obtained a court order instructing the FBI to destroy the file and the portion of the index referring to it. The FBI did so. These experiences have alerted archivists to the external as well as the internal demands for destruction. We have certainly not seen the last of this type of litigation.[6]

Conversely, just as the Act has been used to impel destruction, so has it been used also as an argument to prevent destruction. In 1979 a number of organizations and individuals filed suit to prevent the disposal of the field office case files of the Federal Bureau of Investigation. A NARS-approved records schedule covered these files, which were to be destroyed after their administrative value had ceased. The plaintiffs said that in the past they had requested FBI documents under the Freedom of Information Act, that such documents were being destroyed, that they intended to make similar requests in the future, and that the court should prevent the disposal of the records. After a lengthy hearing, the judge issued a preliminary injunction against disposal of any FBI files and ordered the development of a new retention plan to be approved by the court. While the new plan has not been completed as of this writing, it seems likely that for FOI purposes some FBI case files may have to be retained for time periods beyond their actual administrative value.[7]

As soon as the amendments to the Act were effective, the question of what records were covered by the Act assumed a new urgency. It was clear that the Act covered records of federal agencies and not the records of the courts, the Congress, or the White House Office; but the Act offered no specific definition of a record of a federal agency. In the absence of such a definition, most federal officials assumed that the definition of records in the Federal Records Act was controlling.[8] However, in the spring of 1978, the United States Court of Appeals for the District of Columbia Circuit surprised most FOI cognoscenti by declaring, in the case of *Goland and Skidmore* v. *Central Intelligence Agency, et al.*, that the definition in the Federal Records Act was not controlling in FOI cases, pointing out that Congress "had ample opportunities" to refer to that definition in the FOI Act or its amendments, but had not done so. Just because the Federal Records Act contains the only definition of a federal record, the court seemed to say, that does not make it the FOI definition. The problem is that the court did not provide any alternative definition of records, and since the decision was handed

[6] *Bernard S. Lee* v. *Clarence M. Kelley, et al.* (Civil Action no. 76–1185) and *Southern Christian Leadership Conference* v. *Clarence M. Kelley, et al.* (Civil Action no. 76–1186), United States District Court for the District of Columbia, 31 January 1977. At the time of this writing there have been about eighty, NARS-approved destructions of individual FBI cases as a result of the pertinent individual's Privacy Act demand.

[7] *American Friends Service Committee, et al.* v. *William H. Webster, et al.* (Civil Action no. 79–1655), United States District Court for the District of Columbia, 10 January 1980.

[8] 44 U.S.C. 3301.

down there has been essentially no definition, for the court suggested that the question of whether a document was an agency record would have to be decided on the basis of individual facts of each case.[9]

Another development pertaining to the definition of 'records under the Freedom of Information Act came in the August 1979 hearing on the proposed FBI charter. Attorney General Benjamin Civiletti was asked about the charter provisions on destruction of FBI records, and he reportedly said that unsolicited information that does not pertain to any of the FBI's lawful responsibilities would be retained only until its administrative value expired, adding that this information "would in the long range not be subject to the FOIA because it is unnecessary and would not be retained."[10] As the Justice Department is responsible for the government's position on FOI litigation, one wonders whether the "necessity" test will become part of the criteria for defining a record covered by the Act. If so, this is yet another step away from the definition in the Federal Records Act.

The greatest threat to archives from the rapidly developing body of law and practice on the FOIA is the tendency to distinguish between records made by the agency and records received by the agency, and to declare the latter outside the reach of the Act. One of the first clear indications of this direction was in the *Goland* case mentioned above. In that case, the plaintiffs asked (in part) for the release of the CIA's copy of a transcript of a House of Representatives hearing. CIA argued that the transcript was not an agency record but was, rather, a "legislative document under the control of the House of Representatives" and therefore, since the Congress was not subject to the FOIA, was not reachable under the provisions of the Act. The plaintiffs lost in the lower court and appealed, basing their appeal, in part, on the Federal Records Act definition of records, arguing that records include all materials "made or received by an agency of the United States Government," and that no one denied that the CIA had received the transcript. They lost. The courts at both levels held that the transcript was "released to the CIA for limited purposes as a reference document only" and that it remained "within the control of Congress" and was, therefore, a congressional document outside the reach of the FOIA.[11] The next cases to follow this reasoning were two attempts to obtain access to questionnaires completed by U.S. Senators about nominees for federal judgeships, and then sent to the Justice Department. Although the questionnaires are filed in that department and the Attorney General's staff sends out, receives, and analyzes the completed forms, the judge ruled that they were "the collective product and property of the President, the Attorney General, the Senators, and the state [nominating] commissions, none of which are agencies for FOIA purposes." Thus, he said, the forms were not under the control of the Department of Justice, for the Attorney General was merely

[9] *Susan D. Goland and Patricia B. Skidmore* v. *Central Intelligence Agency, et al.* (Civil Action no. 76–1800), United States Court of Appeals for the District of Columbia, 23 May 1978.

[10] "Proposed Charter for FBI Would Limit Information Available Under FOIA," *Access Reports,* vol. 5, no. 16, 7 August 1979, pp. 1–2.

[11] *Goland and Skidmore* v. *CIA, et al.*

acting as counsel and adviser to the President to help him exercise his constitutional powers to nominate new judges.[12] The most recent case (at this writing) to use this argument is the denial of a request for pre-sentence reports on convicts. Despite the fact that these reports are filed at the U.S. Parole Commission, a federal agency, the judge ruled that the reports remain in the control of the courts and thus are court records not subject to the Freedom of Information Act.[13] As is quickly apparent, the courts have now used this argument to protect the three clear exclusions from the Act: the Congress, the White House Office, and the courts.[14]

The next step would appear to be that a corporation would claim that the information it supplied to the government is still its property and, as it is not a federal agency, the information is outside the reach of the Act. In the case of *Government Sales Consultants, Inc.* v. *General Services Administration,* Honeywell and Burroughs, two computer companies that had intervened in the lawsuit, argued that the records requested by the plaintiff were not federal records for purposes of the FOIA and the companies could demand the return of the records at any time. They lost, but have appealed.[15] Such challenges by other companies are likely to occur in the future.

What does all this mean? It means that the Freedom of Information Act is working, releasing some information that the agencies would like to withhold and withholding some information that requesters would like released, probably striking a balance. Appeals and lawsuits are both successful means to further release. The initial negative impact on records creation by federal employees has been mitigated, at least in part, but there remains a negative impact on the willingness of the public to supply certain kinds of information. While agencies can take some steps to reassure the public, the fear that the information provided will subsequently be released to the detriment of the provider will probably continue. Probably, too, there will be continuing efforts to modify the exemptions to afford more protection to the members of the public who provide the information. The attempts to exclude categories of information from the reach of the Act will continue, with unclear results for the current definition of federal records. Archivists must be alert to this trend, for the result may be filing practices that segregate records that are and are not covered by the Act; and in turn it may be more

[12] *Tom W. Ryan, et al.* v. *Department of Justice* (Civil Action no. 79–1042) and *Charles R. Halpern, et al.* v. *Department of Justice* (Civil Action no. 79–1043), United States District Court for the District of Columbia, 11 July 1979.

[13] *Burchel L. Carson* v. *Department of Justice, et al.* (Civil Action no. 79–0140), United States District Court for the District of Columbia, 25 July 1979.

[14] The problem of explaining that documents received by an entity are part of the records of that entity has also arisen in the legal tangles over Richard Nixon's materials. Courts have found it difficult to grasp that a memorandum from the Secretary of the Interior to the President, written on Interior Department letterhead stationery, is a part of the President's materials and not a record of Interior. The fact that the carbon copy that remains in Interior might be treated differently from the copy in the President's files seems to them to confuse the issue still further. And when you add the fact that if the memorandum bore a national security marking, the access to the copy in the President's files would be controlled by Interior so long as that marking remained in effect, the courts figuratively throw up their hands.

[15] *Government Sales Consultants, Inc.* v. *General Services Administration* (Civil Action no. 77–1294), United States District Court for the District of Columbia, 31 January 1979.

difficult to persuade agencies that all records are part of the federal records system. And, as we know all too well, federal practices are often reflected in state and local government. It is up to archivists to state the concept of records so clearly that everyone—agencies, researchers, lawyers, and even judges—will understand it. This will be a continuing challenge in the 1980s.

TRUDY HUSKAMP PETERSON, National Archives and Records Service, is assistant to the Deputy Archivist of the United States.