

Status Report on the Freedom of Information Act

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For over twenty years the Freedom of Information Act has offered individuals an avenue for gaining broad access to government information while providing for the reasonable protection of privacy and national security. In 1985, the most recent year for which such statistics have been compiled, over 250,000 people filed FOIA requests. Of these almost 92 percent were granted. Documents received through FOIA requests have contributed significantly to many publications on a wide range of historical and public policy issues. While acknowledging many problems—with processing delays, partial deletions, and denial of fee waiver requests—the FOIA has established a commendable record of informing the electorate and thus empowering citizens to hold the government accountable for its actions. Rooted in the first amendment, the idea of free access to government information has been central to American democratic thought.

Not everyone, however, applauds the accomplishments of the FOIA. The challenges are formidable. Opponents who have sought added restrictions for the FOIA argue that the intent of the legislation in allowing the press, consumers, public interest groups, and scholars access to documents pertaining to federal programs and policies has been distorted. Senator Orrin Hatch (R-UT), who from 1980 to 1986 chaired the Senate Subcommittee on the Constitution which has oversight responsibility for the FOIA, claims that the FOIA has had a detrimental effect on the ability of our intelligence and law enforcement agencies to enlist informants and to carry out confidential investigations. Added complications have evolved from the fact that the business community generates the largest number



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of FOIA requests, using it as a means of gathering information from government contract files about the operations of their competitors. Thus protection of trade secrets has emerged as a key issue in recent FOIA debates.

Opponents frequently cite the cost of administering the Act as a major reason for restricting its use. However most arguments over the financial costs of FOIA requests fail to consider the counter-value cost effectiveness of the FOIA in exposing wasteful or corrupt government. Most cost-benefit analyses have served simply as a smoke screen to avoid the major issues of the FOIA's role in promoting open and accountable government. An insightful comparison for evaluating the costs of the FOIA is that in 1981 when the cost of FOIA was \$45 million, the cost of governmental public relations and self-promotion programs was approximately \$1 billion. The amount of money spent telling people what they want to know about the government is a small fraction of the amount spent in telling them what the government thinks they ought to know.

In recent years there have been a number of legislative efforts to restrict the use of the FOIA. The Reagan Administration in 1981 expressed interest in totally overhauling the FOIA. While a comprehensive bill sponsored by Senator Hatch that would have substantially restricted the use of the FOIA passed the Senate, it made no progress in the House. Legislation broadening the CIA's ability to exempt its operational files from FOIA requests did become law in 1984. Then on October 17, 1986, Congress passed the Omnibus Drug Control Act, which included several hastily crafted amendments to the FOIA. The initiative for the amendments came from Senators Hatch (R-UT) and Jeremiah Denton (R-AL) who sought to broaden FOIA exemptions for law enforcement and intelligence records. This legislation, Public Law No. 99-570, also contained provisions that allow agencies to establish fee schedules specifically designed to charge "commercial" requesters for the costs involved in searching, reviewing, and copying the requested documents. In the spirit of the original intent of the FOIA of providing open access to government information, the act did include a fee waiver for educational/scientific institutional requesters and representatives of the news media. Since the possibility of some FOIA legislation had been looming for some time, the NCC staff in conjunction with Joan Hoff-Wilson, the Executive Secretary of the Organization of American Historians, had met in 1983 with Senator Hatch's staff and secured language in Hatch's FOIA bill to provide fee waivers for scholarly research. This principle of exempting scholars from any additional fees became a part of the 1986 amendments. In commenting on the new amendments, Representative Glenn English (D-OK) stated that "The new fee waiver standard should be liberally construed, to encourage full and complete disclosure of information," and he added "the new standard is specifically intended to make it easier for more requesters to qualify for the fee waiver."

Restrictive guidelines used by agencies in administering FOIA requests have, however, been as equally troublesome for scholars as the restrictive amendments. The center piece for the restrictive

strategy, established several years before the 1986 amendments, has been a policy of erecting "fees" as barriers for the use of the Act. On January 7, 1983 Jonathan C. Rose, Assistant Attorney General, issued "Fee Waiver Policy Guidance," frequently referred to as the Rose Memorandum. The memorandum established five criteria for determining fee waiver requests: whether there is a genuine public interest in the subject matter requested, whether the information requested is of value to the public, whether the requested information is already available in the public domain, whether the requester has appropriate qualifications, and whether there is evidence that any commercial or other personal gain will result from the use of the material requested.

Widespread expressions of outrage from FOIA supporters immediately followed the circulation of the Rose Memorandum. On February 22, 1983 Representative Glenn English wrote to all agency heads reminding them the original intent of the FOIA was that it be liberally construed and that the five criteria of the Justice Department were biased and inappropriate. Using an example of an FOIA request from a reporter, English stated "it is not the role of an agency to decide whether the reporter will understand the information that was disclosed, who might read the story, or whether the story is important." Despite the fact that Representative English alerted agency personnel that he planned to increase oversight of FOIA administration and that those who unreasonably denied fee waivers would have to explain their decision at future hearings, many agencies have incorporated the Rose Memorandum criteria into their FOIA procedures.

Since 1983 scholars have been denied FOIA requests for reasons such as "it does not appear that the general public will benefit from your request" or "since there have been voluminous books and studies previously published on Southeast Asia, we do not feel the records will meaningfully contribute to the public development or understanding of the subject." The possibility that the requested documents could be used in a publication that would bring some commercial gain offers

agency personnel an easy reason for denying fee waiver requests. The personal or commercial gain argument has appeared in various forms in denial letters. One scholar was told "It is not at all clear that neither financial nor personal interest will not be the result of your prospective use of the material." Another denial letter stated: "The fact that you intend to use the information in your college classes is not a relevant factor because as a college professor you are paid a salary and, therefore, would derive monetary benefit from the information requested."

With the passage of the 1986 amendments, Congress attempted to clarify the differences between commercial and non-commercial requests. However, since the Department of Justice has responsibility for encouraging agency compliance with the FOIA and the Office of Management and Budget has responsibility for issuing guidance on the implementation of the fees and fee waivers, the Reagan Administration has been able to successfully pursue a policy that restricts the use of information. The Reagan Administration's policy rests on the realization that many requesters faced with the choice of either paying thousands of dollars for documents, undertaking an expensive venture of taking the agency to court, or foregoing the request will choose to forego the request.

On March 27, 1987, the Office of Management and Budget circulated to the federal agencies guidelines for implementing the 1986 amendments on fees and included as a part of the information packet to the agencies a copy of the 1983 Rose Memorandum. Since the FOIA request process moves slowly, it is too early to evaluate the effect of the March 27th guidelines. However, it seems clear that the Rose Memorandum is still in effect and that scholars who make FOIA requests will continue to face substantial hurdles. Three sections of the new FOIA guidelines are of most concern to scholars.

First, although the 1986 amendments specify that FOIA requesters from news media representatives and educational and scientific institutions, whose purpose is scholarly or scientific research, should be charged duplication costs only, the guidelines make it difficult for scholars to qualify

for fee waivers for search and review costs. The OMB guidelines state: "To be eligible, . . . requesters must show that the request is being made as authorized by and under the auspices of a qualifying institution and that the records are not sought for a commercial use." Since the initiative for much scholarly research comes from individual scholars and not from sponsoring institutions, scholars may well be unable to prove to an agency that the request is "under the auspices" of and "authorized by" their institution. The guidelines make clear that a request written on the letterhead of an educational institution is not adequate proof for a fee waiver.

Second, the guidelines require that agencies determine that a request for an academic scholar is "in furtherance of the institution's program of scholarly research and not for a commercial use." The guidelines imply that even the publication of a scholarly monograph with limited financial remunerations would be considered "commercial use." Thus the scholar would not qualify for a fee waiver. The irony of the new guidelines is that news people who seek yesterday's "smoking gun" will be given free search, while scholars who seek 20- and 30-year-old documents to contribute to a greater public understanding of the operations and activities of our government will be stymied in their efforts by prohibitive costs.

Third, the guidelines specifically exclude independent scholars and students working on their individual research from qualifying for the fee waiver. The guidelines make a sharp distinction between the individual and the institutional need for the research requests. "A student who makes a request in furtherance of the completion of a course of instruction is carrying out an individual goal," the guidelines state, and thus "the request would not qualify" under this provision.

Leaders in both the Senate and the House, particularly Senator Patrick Leahy (D-VT) and Representative Glenn English (D-OK), have expressed concern that the FOIA is being implemented in a way that violates the intent of the FOIA which guarantees citizens the right to obtain documents about federal agency activities,

to participate more fully in government, and to promote government accountability. Even prior to the release of the OMB guidelines in March, Representative English initiated a General Accounting Office comprehensive review of the State Department's handling of FOIA requests. In 1984 when the Defense Department granted 92 percent of their FOIA requests, the State Department, one of the most zealous followers of the Rose Memorandum, granted only 29 percent. "The State Department," English has charged, "has the worst reputation among all Cabinet departments for the quality and timeliness of its FOIA operation." Although the final GAO report has not been completed, GAO in a preliminary briefing to the House Subcommittee on Government Information has documented an unacceptably high number of errors in the Department's basic FOIA tracking system. When the final GAO report is completed in early 1988, English plans to conduct hearings in the House and Senator Leahy has also indicated plans to hold hearings on a variety of FOIA issues.

The scholarly community needs to move on two fronts to support the FOIA. There is a need, first, to gather information on as many specific cases of egregious denials as possible and, second, to encourage congressional leaders who wish to restore the FOIA to its intended purposes of opening not denying information. The National Coordinating Committee for the Promotion of History will be providing congressional committees with relevant information as the time for the hearings approaches. Please contact me if you have had experiences with FOIA requests that would be pertinent. The address is NCC, 400 A St., SE, Washington, DC 20003. If you wish to contact congressional leaders directly, below are two key subcommittees with oversight responsibility for implementation of the FOIA.

Senate Subcommittee on Technology and Law of the Judiciary Committee. Patrick Leahy (D-VT), Chairman; Dennis DeConcini (D-AZ), and Gordon Humphrey (R-NH), Ranking Minority. Address: U.S. Senate, Washington, DC 20510.

House Subcommittee on Government Infor-

mation of the Government Operations Committee. Glenn English (D-OK), Chair; Louise Slaughter (D-NY), Bill Grant (D-FL), Edolphus Towns (D-NY), John Spratt (D-SC), David Skaggs (D-CO), Al McCandless (R-CA), ranking minority, Amory Houghton (R-NY), Dennis Hastert (R-IL). Address: U.S. House of Representatives, Washington, DC 20515.

The General Social Survey: A National Data Resource for the Social Sciences

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The National Science Foundation has recently announced renewal of support to the National Opinion Research Center (University of Chicago) for the *National Data Program for the Social Sciences*, the major focus of which is the General Social Survey, or GSS. The principal investigators of the GSS project are James A. Davis (NORC and Harvard University) and Tom W. Smith (NORC). The major goal of this project has been to provide the social science community with large-scale substantively important annual survey data of high quality (about 1,500 respondents each year). The GSS has been conducted in 14 years between 1972 and 1987. The new award covers the period 1988-1992.²

For several years the National Science Foundation has supported the GSS, along with two other major on-going survey data collection efforts (Michigan's Panel Study of Income Dynamics and the Michigan Election Studies) as national data resources for the social sciences. These three datasets (among others) represent an important part of the infrastructure of modern social science. Many universities and colleges have access to these data through their membership in the University of Michigan's ICPSR (Inter-University Consortium for Political and Social Re-