

DOCUMENT RESUME

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Federal Bureau of Investigation's Handling and Responsiveness to Freedom of Information Act and Privacy Act Requests. April 10, 1978. 10 pp. + 2 enclosures (3 pp.).

Testimony before the House Committee on Government Operations: Government Information and Individual Rights Subcommittee; by Victor L. Lowe, Director, General Government Div.

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Because of increasing requests for information under the Freedom of Information and Privacy Acts, there was a need for the Federal Bureau of Investigation (FBI) to improve its organizational structure and processing procedures. Improvements have been made in processing requests and responsiveness to requestors, but further changes are needed. A project to eliminate the backlog of requests within 1 year did not achieve its goal although it did reduce the backlog considerably. The FBI has expanded the types and amounts of information it releases to the public, but there are still inconsistencies in applying exemptions. Exemptions which have caused problems are those which allow information to be withheld if it would interfere with a pending investigation, constitute an unwarranted invasion of privacy, or disclose confidential sources. Changes are needed in legislation and management to clarify provisions for disclosure and exemptions. The Attorney General should take action to minimize inconsistencies in implementation of the acts by providing proper guidance and to improve the processing of responses. Congress should change the time requirement for responding as it applies to the FBI. (HTW)

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STATEMENT OF
VICTOR L. LOWE, DIRECTOR, GENERAL GOVERNMENT DIVISION
BEFORE THE
SUBCOMMITTEE ON GOVERNMENT INFORMATION AND
INDIVIDUAL RIGHTS
HOUSE COMMITTEE ON GOVERNMENT OPERATIONS
ON THE
FEDERAL BUREAU OF INVESTIGATION'S
HANDLING AND RESPONSIVENESS TO
FREEDOM OF INFORMATION ACT AND
PRIVACY ACT REQUESTS

Mr. Chairman and Members of the Subcommittee:

As requested, our testimony today deals with the results of our review of the FBI's handling and responsiveness to Freedom of Information and Privacy Acts requests for information contained in its files.

The FBI, in the last 3 years, has received over 48,000 requests and estimates that requests will probably increase at a rate of 14 percent a year. This would result in about 20,000 and 23,000 information requests to the FBI in 1978 and 1979. Because of this heavy demand for information, the FBI has had to improve its organization structure and processing procedures.

In response to your Subcommittee's request and other expressions of congressional interest in this subject area, we are issuing today our report entitled "Timeliness and Completeness of FBI Responses to Requests Under the Freedom of Information and Privacy Acts Have Improved."

To evaluate the FBI's efforts, we sampled

--196 cases to evaluate the FBI's processing system,

--272 cases to ascertain the time needed to process a request, and

--34 cases to determine the appropriateness of the exemptions used.

We were provided access to the information needed to conduct our review and we believe the observations and conclusions we have today are valid. (See p. 77 of our report.)

Our review showed that the FBI has improved its processing of requests and its responsiveness to requesters by making various management improvements. However, areas still exist where the FBI can make further changes to improve its operations and be even more responsive. In addition, we believe legislation is needed to change the often unrealistic time requirement of the Freedom of Information Act as it applies to the FBI. We would now like to summarize the findings, conclusions, and recommendations contained in our report.

FBI IMPROVING RESPONSIVENESS TO FOI/PA REQUESTS

The Freedom of Information and Privacy Acts requests submitted to the FBI were initially handled by a small staff and processed in a fragmented

and ineffective manner. Acting on pressure from the Congress, courts, and requesters, the FBI has (1) revised its organizational structure for processing requests (see attachment I), and (2) significantly increased the resources devoted to this effort.

In fiscal year 1977, the FBI spent \$6.4 million and used up to 365 full-time people to process requests. In addition, during a 5-month period, the FBI assigned 282 special agents and expended about \$2.8 million to supplement its efforts. These efforts enabled the FBI to handle the workload increase in a more efficient and effective manner.

The FBI's ability to process requests in a timely manner is affected by the sensitivity and complexity of its files. There is a misconception that the processing of requests is very simple because it only involves reviewing a requester's file to excise the names of third parties. It is far from simple for the FBI because its records are not in dossier form. Thus, analysts must review many documents, often from different files. These files may contain information on the requester and other individuals. The analysts must make decisions as to what information can be released without violating someone's privacy, disclosing a source's identity or hindering future investigative capabilities.

The FBI's ability to process requests in a timely manner is also affected by requester lawsuits--because of the FBI's failure to meet the statutory time limit or displeasure with the documents released--which result in court imposed response deadlines. Several such deadlines have affected the general processing of requests, the most notable of which

involved the Rosenberg case. The primary processing of this case took place between August and November 1975 because of the court's deadline. The FBI used 73 full-time and 21 part-time employees to process this one request. These people represented over half of the personnel then assigned to the branch. The diversion of these resources was the major reason for the rapid increase in the backlog at that time. The backlog rose by 2,000 requests during this 3-month period.

Recently, a U.S. district court, hearing an appeal from relatives in this case, ordered the FBI to review records from 10 field offices at the rate of 40,000 pages per month and provide disclosures on a monthly basis. To meet this mandate, the FBI has assigned over 70 headquarters employees on a full-time basis and implemented a 6-day work week so as to complete the project in approximately 8 to 11 months. As in 1975, the diversion of these people to work on one request will very likely aggravate the backlog problem.

PROJECT ONSLAUGHT--AN
ATTACK ON THE BACKLOG

In May 1977 the FBI initiated a project referred to as Project Onslaught. The main purpose of this project was to enable the Bureau to eliminate its backlog of requests within 1 year. The project, which cost the Bureau about \$2.8 million, involved use of as many as 282 special agents during a 5-month period. This is in addition to its regular complement. The project was not successful in eliminating the backlog; however, it did reduce it from 7,566 requests in May 1977 to 4,910 requests in September 1977.

FBI RELEASING MORE INFORMATION THAN IN THE PAST

During the last 3 years, the FBI has made a number of changes in its processing of Freedom of Information and Privacy Acts requests. Since the passage of the 1974 Freedom of Information Act amendments, the FBI has expanded the types and amounts of information it releases to the public. However, inconsistencies still exist in applying the acts' exemptions. These inconsistencies have resulted because the disclosure provisions and exemptions of the Freedom of Information and Privacy Acts contain general language, thus leaving many areas subject to interpretation.

As a result, uniform implementation of the laws and unanimity of opinion as to whether a release is appropriate are unlikely to be achieved. During our review, we found disagreements regarding the releasability of specific information among FBI officials, Department officials, and among judges on litigated requests.

FBI personnel use the language of the two acts, Department of Justice guidelines, court decisions, and guidance in the agency's own manual, as criteria to process information requests and determine what is to be released or withheld. In early years, the FBI processed requests with the attitude that it should withhold as much information as possible. This stands in contrast to the current approach of withholding only that information which can be reasonably expected to damage effective law enforcement.

To ascertain the appropriateness of the FBI's use of Freedom of Information and Privacy Acts exemptions, we randomly selected 34 cases

processed during the period July 1975 through August 1977. (A listing of exemptions available and those used in the 34 cases is contained in attachment II.) Generally, we found that between 1975 and 1977, there was a substantial improvement in the amount and type of information released. I should note that we still disagree with how some of the exemptions were used and believe that in several cases additional information could have been released. On the other hand, if other individuals look at the same cases they might disagree with us.

I will now discuss three exemptions which cause the FBI problems in determining what and how much information to release. These are (b)(7)(A), (b)(7)(C), and (b)(7)(D).

The (b)(7)(A) exemption is used to withhold information which, if released, would interfere with a pending investigation. In our sample of 34 cases the FBI cited this exemption in 2 cases. In one case the exemption was used, in our view, inappropriately because all information was withheld without an attempt to identify any releasable part of it. The FBI, however, faces difficulties in applying this exemption--both when the requester knows about the active investigation and when he or she is unaware of it.

In the first situation the FBI is tasked with reviewing the files, segregating information and releasing that which would not interfere with the pending case. This is a time-consuming and costly process which usually nets the requester only information which is in the public domain and/or already known to him or her.

In the second situation, if the FBI cites the exemption, it would in essence be telling the requester that an investigation is underway. Thus, the FBI faces a dilemma. It cannot truthfully say there is no record, nor can it choose to ignore the request. The very existence of a backlog of requests helped to solve the problem because the processing delays served to conceal investigations until the Government was ready to apprehend or indict the individuals involved.

The (b)(7)(C) exemption allows the withholding of information which if released would constitute an unwarranted invasion of another individual's privacy. The FBI used this exemption in 27 of the 34 sampled cases. In many of these cases additional information could probably have been released without unwarrantedly invading the personal privacy of another individual. It should be noted, however, that in six of the more recent cases, the FBI released material of a nature that would have previously been withheld. The additional releases were made because of the more liberal policies established by the Department in May 1977.

When applying (b)(7)(C) exemption, the issue facing officials of law enforcement agencies is determining what constitutes an "unwarranted invasion" of privacy. This concept has never been clearly defined; therefore, subjective judgments will continue to be made, and inconsistent applications of the exemption will occur.

The (b)(7)(D) exemption allows the withholding of information which if revealed would disclose the identity of confidential sources. The FBI uses this exemption to generally withhold the identity of, and information

provided by informants, local police departments, credit bureaus, other commercial organizations and foreign law enforcement agencies. The FBI used this exemption in 27 of the 34 sampled cases. In the past this exemption was used to withhold some information which, in our opinion, could have been segregated and released. However, there have also been recent improvements here. For cases processed in 1977 the FBI was using this exemption more appropriately and requesters were receiving additional information. The problem with this exemption is that, in the last analysis, it rests on speculation as to how much of the information can be released without disclosing a source's identity.

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Although the FBI has substantially improved its operations under the Freedom of Information and Privacy Acts, additional management and legislative actions are needed. Neither the Freedom of Information Act nor the Privacy Act provides sufficient guidance on what information can be released because disclosure provisions and exemptions are stated in general terms. Therefore, subjective judgments result which allow wide disparity in agency and individual decisions on what information can be released. Thus, effective implementation of the acts by the FBI is hindered by definitional uncertainties concerning:

- What constitutes an "unwarranted" invasion of privacy?
- What is a confidential source?
- What information should be provided on pending investigations?

To minimize inconsistencies in Freedom of Information and Privacy Acts implementation, we have recommended that the Attorney General require the Department's Office of Privacy and Information Appeals to

- distribute the substance of its decisions to all Justice Department components so that they can be used as guidance in future cases,
- update its guidelines and distribute them to all Department components, and
- randomly check initial releases made by the FBI to improve the consistency and quality of that agency's releases.

To otherwise improve the processing of responses, we have recommended that the Attorney General

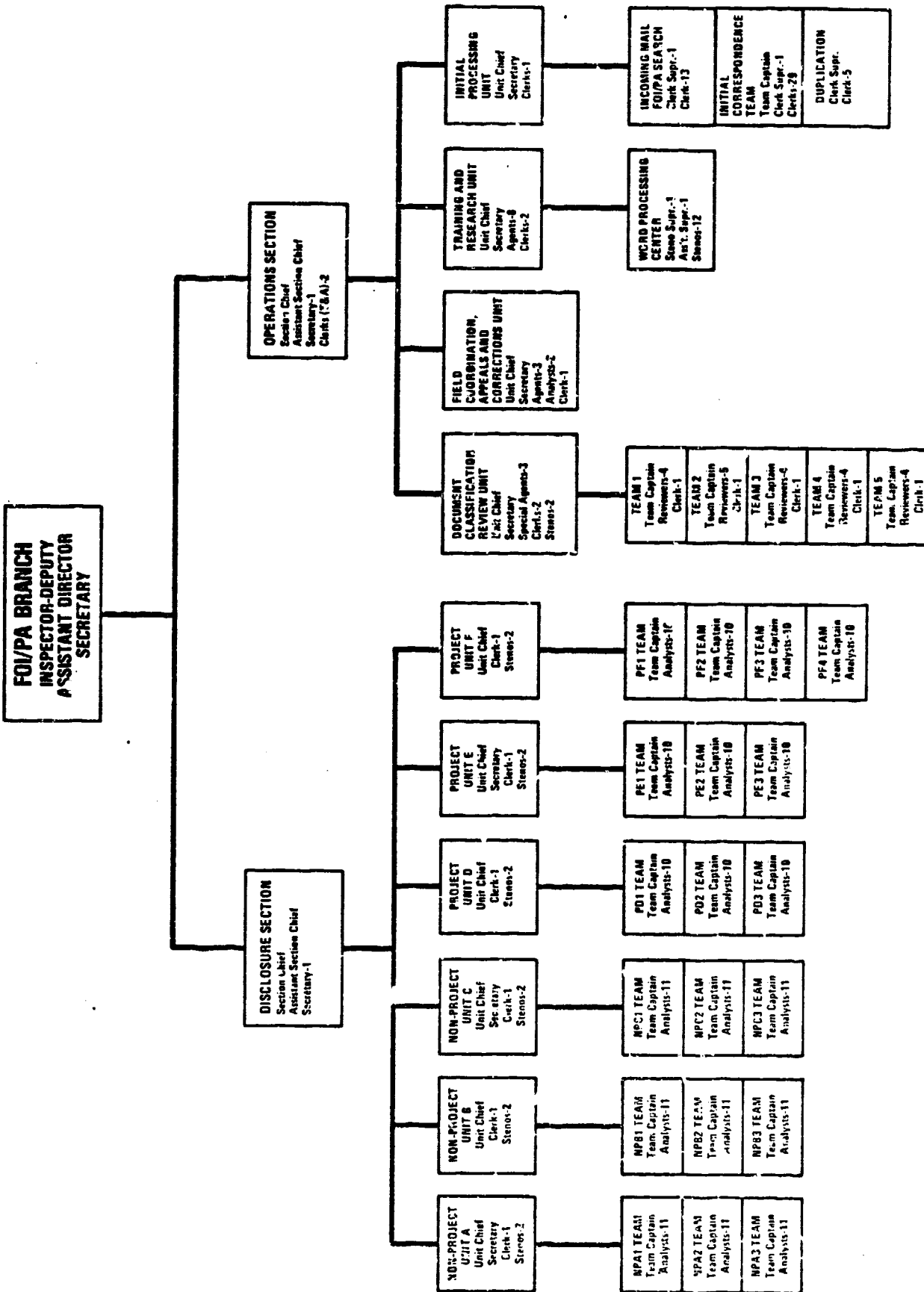
- require the FBI to reduce the drain on its investigative resources by--to the extent possible--making greater use of analysts instead of special agents to supervise the processing of requests, and
- require the FBI and other Department components to be more responsive to requesters by providing additional information on such items as the number of pages in a file, number denied, and by noting on each document the exemptions used to withhold information.

The FBI is faced with the dilemma that, even after a substantial commitment of resources and improvement of its organization and processing, it still cannot meet the often unrealistic 10-day time limit imposed by

the Freedom of Information Act. Therefore, we are recommending that the Congress change the act's time requirement as it applies to the FBI. We believe that the law should require the FBI, if unable to fully respond, to at least acknowledge the initial request within 10 working days and provide a full response within an additional 30 working days. In situations, however, where such a timeframe is unreasonable in view of the quantity of material to be reviewed, the FBI should provide the requester with a firm fixed date for delivery of its response. If the requester considers this date unreasonable, he could then bring suit to compel an earlier delivery. In reaching decisions on such suits, it would seem reasonable that the courts give consideration to the possible adverse impact of a directed earlier response on the FBI's ability to service the demands of other requesters, premised on a finding that the FBI is devoting a reasonable level of resources to these activities.

By changing the 10-day requirement, the courts will be relieved from handling numerous actions resulting from the FBI's inability to respond within 10 working days. We believe this is a desirable alternative to significantly increasing the number of people working in the Freedom of Information and Privacy Act area, while still maintaining a reasonable degree of responsiveness to requesters.

Mr. Chairman and Members of the Subcommittee, this concludes our statement. We will be happy to respond to any questions you have.



EXEMPTIONS AVAILABLE
AND THOSE USED IN
THE 34 CASES SAMPLED

Exemption

| <u>Freedom of Information Act</u> | <u>Number of cases</u> |
|--|------------------------|
| (b)(1) - Classified documents concerning national defense and foreign policy | 10 |
| (b)(2) - Internal personnel rules and regulations | 23 |
| (b)(3) - Information exempt under other laws | Not used |
| (b)(4) - Confidential business information | Not used |
| (b)(5) - Internal communications | 13 |
| (b)(6) - Protection of privacy | 2 |
| (b)(7)(A) - Investigatory records, interfering with enforcements proceedings | 2 |
| (b)(7)(B) - Investigatory records, deprive a person of a right to a fair trial | 1 |
| (b)(7)(C) - Investigatory records, unwarranted invasion of privacy | 27 |
| (b)(7)(D) - Investigatory records, disclosing the identity of a confidential source | 27 |
| (b)(7)(E) - Investigatory records, disclosing investigative techniques and procedures | 13 |
| (b)(7)(F) - Investigatory records, endanger the life or physical safety of law enforcement personnel | 8 |
| (b)(8) - Information concerning financial institutions | Not used |
| (b)(9) - Information concerning wills | Not used |

Privacy Act

| | |
|--|----------|
| (j)(2) - Files maintained by Federal criminal law enforcement agencies | Not used |
| (k)(1) - Classified documents concerning national defense and foreign policy | 1 |
| (k)(2) - Investigatory material compiled for law enforcement purposes | Not used |
| (k)(3) - Secret Service intelligence files | Not used |
| (k)(4) - Files used solely for statistical purposes | Not used |
| (k)(5) - Investigatory material used in making decisions concerning Federal employment, military service, Federal contracts, and security clearances | 6 |
| (k)(6) - Testing or examination material used solely for employment purposes | Not used |
| (k)(7) - Evaluation material used in making decisions regarding promotions in the armed services | Not used |