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Report to Sen. James O. Eastland, Chairman, Senate Committee on the Judiciary; by Elmer B. Staats, Comptroller General.

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In the past 5 years, the Congress has enacted legislation to control and provide public access to the vast amount of information collected, maintained, and disseminated by the Federal Government. The Congress intended this legislation to provide openness in Government activities and to protect individual privacy. Findings/Conclusions: Federal and local law enforcement officials say that the Freedom of Information Act (FOIA), Privacy Act, and similar laws are eroding their investigative capabilities, especially in the area of intelligence gathering. They believe that the acts are a financial and administrative burden; inhibit their ability to collect information from the general public, informants, and institutions; and diminish the quality and quantity of information exchanged with other law enforcement agencies. Federal Bureau of Investigation and U.S. Secret Service officials indicate that the legislation is forcing them into a reactive rather than a preventive role and say that the total effect of these laws will not be realized until some time in the future. Officials at other agencies are concerned about the erosion of their investigative capabilities because of the amount of resources needed to comply with FOIA and Privacy Act requirements and the type of requesters benefiting from the acts' provisions. (RRS)

REPORT BY THE

Comptroller General

OF THE UNITED STATES

8344

Impact Of The Freedom Of Information And Privacy Acts On Law Enforcement Agencies

*released
11-12-78*

Law enforcement officials almost universally agree that the Freedom of Information and Privacy Acts have eroded their ability to collect and disseminate information. However, the extent and significance of the information not being gathered because of these acts cannot be measured.





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

B-179296

The Honorable James O. Eastland
Chairman, Committee on the Judiciary
United States Senate

Dear Mr. Chairman:

In response to your April 1978 request, we are reporting on the impact the Freedom of Information and Privacy Acts are having on Federal law enforcement agencies' ability to obtain and exchange information.

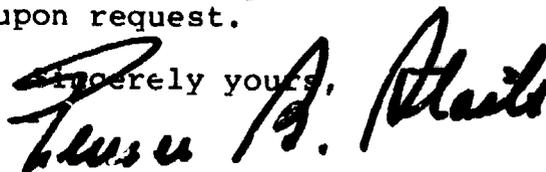
Law enforcement officials almost universally believe that the ability of law enforcement agencies to gather and exchange information is being eroded. The extent and significance of the information not being obtained, however, cannot be measured. Some confusion also exists about the requirements and provisions of these acts that affect the ability of law enforcement agencies to collect and disseminate information.

Appendix I shows information obtained from law enforcement agencies, including typical examples of the effect that the Freedom of Information and Privacy Acts are having on their ability to (1) obtain information from the general public, informants, and businesses and institutions and (2) exchange information with Federal, State, and local agencies, and foreign governments. Additional examples are included in appendix II. As agreed with your office, we did not verify or draw conclusions from the examples provided. Further, we did not attempt to evaluate the benefits to be derived from these acts.

Our work was performed at the headquarters and selected field offices in California and the Washington, D.C., area of the Federal Bureau of Investigation; Drug Enforcement Administration; Bureau of Alcohol, Tobacco and Firearms; United States Secret Service; and Civil Service Commission. We interviewed agency officials and obtained examples of investigative cases affected by these acts. We also contacted State and local law enforcement agencies in California, Maryland, and Virginia to determine how the Freedom of Information and Privacy Acts were affecting their relationships with the Federal law enforcement agencies.

B-179296

As arranged with your office, unless you publicly release its contents, we plan no further distribution of this report until 30 days after its issue date. At that time, we will send copies to interested parties and make copies available to others upon request.

Sincerely yours,


Comptroller General
of the United States

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ABBREVIATIONS

A&F	Bureau of Alcohol, Tobacco and Firearms
CSC	Civil Service Commission
DEA	Drug Enforcement Administration
FBI	Federal Bureau of Investigation
FOIA	Freedom of Information Act
GAO	General Accounting Office
IRS	Internal Revenue Service
PA	Privacy Act
USSS	United States Secret Service

IMPACT OF THE FREEDOM OF INFORMATION AND
PRIVACY ACTS ON LAW ENFORCEMENT AGENCIES

BACKGROUND

In the last 5 years the Congress has enacted legislation to control and provide public access to the vast amount of information collected, maintained, and disseminated by the Federal Government. The Congress intended this legislation to provide openness in Government activities and protect individual privacy.

These laws include the Freedom of Information Act (FOIA), enacted in 1966 and amended in 1974, which allows public access to information maintained by Federal executive agencies (see app. III); the Privacy Act (PA) of 1974, which emphasizes the protection of an individual's personal privacy by controlling the collection, maintenance, retention, and dissemination of personal information (see app. III); and the Tax Reform Act of 1976, which limits dissemination of tax returns and taxpayer information for non-tax-related matters. Many States have enacted their own openness laws to provide public access to State government records and activities and privacy laws to regulate the collection and dissemination of information by State agencies and by private organizations.

Law enforcement agencies depend on recorded information about the activities of individuals and desire full and complete access to such information while performing their legitimate law enforcement activities. Additionally, these agencies have traditionally been very protective of the information they collect and use and have worked under systems that promise total confidentiality. Therefore, such legislation as the FOIA and the PA, which opens records to public inspection and restricts the collection and flow of information, has a definite impact on how law enforcement agencies operate and fulfill their responsibilities.

Law enforcement officials at all levels of government have stated in congressional testimony that the proliferation of access and privacy laws has been instrumental in creating a restrictive climate which affects their ability to obtain information from the public and institutions, to recruit and maintain informants, and to exchange information with other law enforcement agencies.

NATURE OF INVESTIGATIVE OPERATIONS

Law enforcement agencies conduct criminal, as well as national security investigations. These investigations vary from relatively short-term efforts following a crime to long-term efforts sustained over a period of years. Efforts generally involve identifying perpetrators of violent and nonviolent crimes, developing evidence for prosecution, and gathering intelligence about individuals or organizations involved in, or contemplating involvement in, criminal activities. Investigations range from general criminal matters to organized crime, terrorism, political corruption, and foreign counterintelligence operations.

During investigations agencies must develop the pertinent facts in a given case. The development of these facts requires various investigative techniques, such as obtaining information from informants and other individuals who do not want their identities revealed, reviewing institutional records, and gathering information from the general public. Information developed through these efforts normally is systematically recorded and evaluated for use in current and future investigations. Additionally, law enforcement agencies disseminate information to other agencies with similar investigative interests to avoid duplication of investigative efforts.

OFFICIALS ASSERT EROSION OF LAW ENFORCEMENT CAPABILITIES

Federal and local law enforcement officials say the FOI/PA and similar laws are eroding their investigative capabilities, especially in the area of intelligence gathering. They believe the acts (1) are a financial and administrative burden, (2) inhibit their ability to collect information from the general public, informants, and institutions, and (3) diminish the quality and quantity of information exchanged with other law enforcement agencies.

Federal Bureau of Investigation (FBI) and U.S. Secret Service (USSS) officials indicate that the legislation is forcing them into a reactive rather than a preventive role and that the total effect of these laws has not and will not be realized until sometime in the future. The FBI, USSS, Drug Enforcement Administration (DEA), and Bureau of Alcohol, Tobacco and Firearms (ATF) officials have stated that they cannot measure the extent of the erosion or provide concrete evidence of its effects because they lack ways of determining the value or impact of the information not being received.

We asked the agencies for examples of how the acts have affected their investigative operations. Although several agencies provided examples showing the legislation's impact in specific cases, no agency could document the total impact the laws have had on overall investigative operations. Furthermore, it was difficult for them to distinguish between the impact resulting specifically from the FOI/PA provisions and the impact from other laws or regulations, misinterpretations of laws and regulations, or from a general distrust of law enforcement agencies. Some examples are included in the following discussion, and additional examples are in appendix II. We did not verify these examples.

Financial and administrative burden

Officials at the FBI, DEA, ATF, and USSS are concerned about the erosion of their investigative capabilities due to the amount of resources needed to comply with the FOI/PA requirements and the type of requesters benefiting from the acts' provisions. They said that a substantial number of staff members are processing FOI/PA requests, who could otherwise be fulfilling their investigative responsibilities. We previously reported the monetary impact of the FOI/PA on some law enforcement agencies in a report entitled "Data on Privacy Act and Freedom of Information Act Provided by Federal Law Enforcement Agencies" (LCD-78-119, June 16, 1978).

Additionally, DEA and ATF officials complained about the amount of paperwork involved in complying with the "disclosure accounting" provision of the PA. Officials of these agencies told us that when information was disclosed outside the agencies, a form indicating the information and to whom it was disseminated must be prepared. They believe this requirement has become a tremendous administrative burden which detracts from agents' time available for investigative duty.

To the Federal agencies' officials, the administrative and financial burdens seem even more destructive considering the types of individuals submitting FOI/PA requests. They believe that while these acts are of limited value to the American public, they are beneficial to criminals. According to DEA officials, about 40 percent of its requesters are prisoners asking not only for their own files but also for sensitive information, such as the agents' manual of instructions and laboratory materials describing the manufacture of dangerous drugs. An ATF official said about 50 percent of its requests come from prior offenders

who use the FOI/PA in an attempt to find out how investigations are conducted and thus avoid capture in future crimes. In our report titled "Timeliness and Completeness of FBI Responses to Requests Under Freedom of Information and Privacy Acts Have Improved" (GGD-78-51, Apr. 10, 1978), we reported that from October through December 1977 prisoners comprised about 6 percent of the requesters for information from the FBI files. In an analysis of a sample of requests submitted to the FBI, we found that 30 percent of the requests concerned criminal files.

Reduced ability to obtain information

Federal and local law enforcement officials we contacted indicated that the FOI/PA have eroded their enforcement capabilities by limiting their ability to develop investigative information from the general public, informants, and institutions.

General public

Federal and local law enforcement agencies have reported a marked reluctance of the public to cooperate with law enforcement efforts. This trend is not attributed solely to the FOI/PA. The legislation is seen as just one effect of the "post-Watergate Syndrome"; that is, the public's general distrust of law enforcement agencies and the Government.

The FBI has documented numerous cases where citizens have withheld information specifically because they fear their identities will be disclosed through FOI/PA requests for information maintained by the FBI. FBI officials say these acts have eroded the public's confidence in the FBI's ability to maintain confidentiality. Citizens are reluctant to furnish derogatory information for either criminal or applicant investigations, fearing that disclosure of their testimony could result in embarrassment or civil suits against them. For example:

--A recent Department of Justice applicant investigation developed a considerable amount of derogatory information. A U.S. district judge was interviewed, and he admitted that he had information which would bear on the investigation, but he refused to furnish it to the FBI because he said he knew that his information, once released outside the FBI, would not be protected to conceal him as the source of the information. He said other Federal judges felt

the same way and believed that the Federal bench in general was unwilling to assist in such background investigations.

--In a fraud investigation in a southwestern city, a former employee of the company being investigated, who had been a principal source of information, was fearful that he would be sued by the subjects of the investigation if he provided information to the FBI. He knew this information would be available upon request under the FOI/PA, and if the criminal allegation was not ultimately resolved in court, he would become civilly liable. On several occasions this source expressed reluctance to provide information of value.

The USSS provided the following example of a citizen's reluctance to cooperate.

--In accordance with a request from the Department of Justice, USSS offices were required to make inquiries regarding the organized crime situation in their respective districts. In connection with this effort, an agent interviewed the Chief Investigator for a County District Attorney's Office, who had considerable background on organized crime activities. When interviewed, he declined to release any information. He stated that, under the FOIA, records and files of Government agencies could be obtained by non-law-enforcement personnel, that much of the information he had could not be positively substantiated, and that he could be liable for making statements he could not fully prove. He further advised that if his identity as a source of information were obtained under the FOIA, he might be subpoenaed before another body to testify on the information he had, possibly compromising his informants.

Civil Service Commission (CSC) officials, on the other hand, said that in making background investigations they have had only a minor drop in the amount of derogatory information obtained from the general public. However, they could not determine the significance of the information no longer being obtained. Actually, CSC officials were surprised at the amount of derogatory information the public provided without requiring that the information be kept confidential. CSC officials, however, expressed concern about the limits the PA imposes on collecting data

relating to how an individual exercises first amendment rights. They believe that, although this provision of the PA is not absolute, it restricts the scope of loyalty investigations and may result in some disloyal individuals entering Government service.

Informants

Federal law enforcement officials believe informants are necessary for effective criminal law enforcement, because informants are one of the most important intelligence-gathering tools. Federal officials perceive that, since the advent of FOI/PA, there has been some difficulty in recruiting and maintaining informants, especially in areas such as organized crime and foreign counterintelligence.

FBI officials believe the acts have had the greatest impact on informants in the organized crime and foreign counterintelligence areas. These individuals are usually well-educated, sophisticated, informed about the laws' provisions, and aware of recent court decisions and news articles concerning the release of information from Federal files. Informants in these areas, especially in foreign counterintelligence, are frequently respectable business people whose community standing or livelihood could be jeopardized by an FOI/PA disclosure. FBI officials said that some of these individuals are either refusing or hesitating to provide information because they believe the Government can no longer protect their identities. Sources are also concerned that if their identities are revealed they will be subject to harassment or physical retaliation. To illustrate:

--An informant connected with organized crime provided information in FBI cases, including some which led directly to the identification and prosecution of several Federal violators. Inquiring into a dramatic decrease in his productivity, the FBI learned that he became very circumspect after an organized crime figure requested and received, under the FOIA, a large volume of FBI reports and was undoubtedly trying to identify informants. The informant expects organized crime to make much greater use of the FOI/PA and doubts the FBI's ability to maintain control over the contents of its files.

--An informant who was productive for many years in the area of organized crime and

who furnished information resulting in numerous convictions became concerned that he might be identified. He indicated that newspaper accounts of FBI information disclosures under FOIA caused him to lose confidence in the FBI's ability to protect his identity. Because he had furnished information over a number of years, he believed it would be possible to identify him from a compilation of this information. The informant is presently in a position to furnish information on a major political corruption case and refuses to do so, stating that the more sensitive the information the more likely it is to "come out."

--A former source of excellent quality information was recontacted because his background was such that he could develop information of value concerning a terrorist group. He initially refused to cooperate for fear that through an FOIA disclosure his identity could eventually be revealed. He believed his information would be of such quality that anyone outside of the FBI upon reading it would easily be able to identify him. He was reminded that he had functioned as a valued source for several years and that his identity had never been disclosed. He acknowledged this was true; however, he stated that due to FOIA he no longer believes that FBI agents can assure his complete protection even though they would make every effort to do so. The source also cited recent court cases, particularly the Socialist Workers Party lawsuit, which convinced him that his identity could not be protected. After 3 hours of conversation, the former source agreed to cooperate but only in a very limited way. He made it clear he would never again function as extensively as before because of FOIA, similar laws, and court decisions. He added that disclosure of his identity would most assuredly cost him his life.

Recruiting low-level informants is less of a problem. DEA and ATF officials said the FOI/PA have had very little effect on their use of these types of informants because these individuals are involved in or on the fringes of

criminal activities and, thus, are willing to provide information in exchange for more favorable treatment of their criminal activities. Because most of them are not even aware of FOI/PA provisions, any lack of cooperation is more likely to stem from dissatisfaction about the money they have received or the deals they have made than from fear of an FOI/PA disclosure. However, FBI, D'A, and ATF officials said that, as these informants become more aware of the acts' provisions, they will be more reluctant to provide information.

FBI and ATF officials also said that, because of the FOI/PA some agents are reluctant to develop new informants. They believe they can no longer provide the 100-percent guarantee of confidentiality which is needed to avoid exposing informants to possible liability or physical harm. These officials believe their sources are vulnerable despite the acts' source-protection provisions because individuals processing FOI/PA requests do not have first-hand knowledge of the cases. Consequently, an individual processing a request may release a seemingly harmless piece of information by which the requester could identify the source.

Institutions

All law enforcement officials reported that the PA has had some of its most severe effects on their ability to obtain information from institutions such as hospitals, banks, and telephone companies. Previously, law enforcement agencies could obtain records from these institutions on an informal basis. Now, an increasing number of institutions require the agencies to obtain a subpoena before providing information.

Although the PA does not apply to private organizations, many institutions have adopted withholding information as administrative policy. Federal law enforcement officials believe these policies are a result of an increased consciousness of privacy concerns stimulated by the PA. Some organizations believe that a blanket refusal to release information without a subpoena will help protect them against invasion of privacy litigation. CSC officials said that many private companies are increasingly reluctant to allow investigators to interview employees because of PA concerns.

FBI, ATF, and USSS officials said that, in most cases, they have to use a grand jury subpoena to obtain records. This procedure is very time-consuming because of the paperwork involved and the infrequency of some grand jury meetings. FBI officials were particularly concerned over how

this procedure will affect kidnapping or fugitive cases where speed of action is essential. USSS officials said that most of the threats on the President come from mentally unstable individuals, so timely access to records maintained by mental institutions is critical when the President or other dignitaries travel around the country. Because travel schedules are sometimes not known in advance, officials cannot afford to spend considerable time trying to obtain a subpoena.

FBI, USSS, and DEA officials also said that some banks and telephone companies immediately notify the subject of the subpoena rather than allowing the customary 90-day period to elapse. Agents believe that if this immediate notification policy is continued and expanded, they will be hindered in using institutional records as investigative leads. Because organized crime and foreign counterintelligence investigations extend over long periods without the subject's knowledge, agents believe that such notifications could disclose, and thus destroy, entire investigations.

Some representative examples provided by agencies follow:

--In a case involving approximately 100 forged checks in a midwestern city, the USSS attempted to develop information on the accounts in which these checks were deposited. Banks refused to furnish copies of documents from three accounts without a subpoena, even though the banks stood to lose a total of \$40,000. These banks cited the PA as a reason for failing to furnish the requested information. Information was provided after subpoenas were served.

--During an unlawful flight to avoid prosecution/murder investigation, the FBI found out the nonpublished telephone number where the fugitive would be for the Christmas holiday. The FBI tried to obtain the location of the number from various officials of a midwestern telephone company, but they refused to release the information without a subpoena. As a result, the fugitive was not apprehended.

--In a fraud investigation the FBI was denied information submitted to Medicare through an insurance agency. This information showed Medicare fraud perpetrated by the staff of a union-owned hospital and was withheld by the

insurance agency because of the PA. Most of the information desired was ultimately obtained by a Federal grand jury subpoena.

Exchange of information affected

Federal, State, and local law enforcement officials stated that the exchange of information among law enforcement agencies has been curtailed since enactment of the PA. State privacy laws, modeled after the Federal legislation, have also limited the once free exchange of information among Federal, State, and local agencies. The information flow from non-Federal to Federal law enforcement agencies has been most affected. Foreign law enforcement agencies have expressed concern that information they provide may be disclosed through the FOIA but are still cooperating with U.S. law enforcement agencies.

Federal agencies:

Federal law enforcement officials said that, in general, obtaining information from other Federal law enforcement agencies presents no serious difficulties. This is due primarily to the "routine use" provision of the PA which facilitates information flow. Under the routine use provision, Federal agencies may disclose a record for a purpose which is compatible with the purpose for which it was collected.

USSS officials were concerned about not getting as much intelligence information from the FBI as before because of restrictions imposed on the FBI's ability to collect such information. However, they cited the implementation of the Attorney General's guidelines for domestic security investigations, rather than the PA, as the reason for the reduction in the availability of information. USSS officials believe this reduction of intelligence information severely hampers its protective efforts.

FBI, DEA, and ATF officials complained about difficulties in obtaining taxpayer-related information from the Internal Revenue Service (IRS). ATF officials told us the difficulties in obtaining information from IRS arise from provisions of the Tax Reform Act of 1976 which restrict the dissemination of taxpayer-related information for non-tax related crimes.

FBI, USSS, and ATF officials indicated that gaining access to records maintained by non-law-enforcement Federal agencies has become more difficult. The FBI and USSS said that Federal agency officials often cite the FOI/PA as the

reason for withholding information. The FBI said that in many cases these officials are confused by or unaware of the disclosure provisions and requirements of the FOI/PA but are quite aware of the penalties that can be imposed for improper disclosure. Therefore, rather than risk punitive action for improper disclosures, some agency officials assume an overly conservative stance and withhold information that legally could be provided to a law enforcement agency.

Examples of cases where the FBI encountered difficulties in obtaining information from Federal agencies follow:

- FBI agents in the Pacific Northwest developed information that an escaped prisoner might have been receiving Supplemental Security Income payments. Local Social Security officials refused to supply any information about the fugitive, citing the PA. The FBI later apprehended the fugitive, after expending considerable manpower. The FBI found that the fugitive, when arrested, had been receiving Supplemental Security Income payments.
- During an FBI investigation in a western city, under the Racketeer Influenced and Corrupt Organizations statute, information developed on a subject was provided to an IRS agent. The IRS agent advised that due to the PA, the IRS could accept information valuable to them but could not provide any information that would aid an FBI-related case.
- During an unlawful flight to avoid prosecution/murder investigation, the FBI found out that the subject was receiving a monthly disability check from the Social Security Administration. Although the Social Security Administration confirmed the subject was getting a check, it declined to furnish the address where the check was being sent because of the PA. The subject was eventually located, but it took over 3 months of investigative effort.

Federal and local agencies

Most State and local law enforcement officials interviewed said they were increasingly reluctant to share intelligence information with Federal agencies because they fear that their information would be released as part of an

FOI/PA disclosure. These officials fear such disclosures will identify confidential sources or prematurely reveal investigative interests. Officials also anticipate that, in light of the current rash of lawsuits against law enforcement agencies, some subjects of investigations may eventually sue the local agencies for providing intelligence information to the Federal agencies.

Because of their concerns, most local officials said they are increasingly providing information orally and only to Federal agents with whom they have established rapport. If information is provided in writing it is "sanitized" to protect confidential information and sources. Some officials believe information exchange has become so hazardous that they could release unexpurgated data only to trusted associates who would protect its confidentiality. FBI officials corroborated the local officials' statements and provided several examples of situations in which local officials have been reluctant to provide information.

- FBI agents working on organized crime cases in a southwestern city reported that they were excluded from intelligence meetings held by State and local law enforcement agencies. Several State law enforcement officers cited concern over FOI/PA disclosures as the reason for excluding the agents from the meetings.
- A southern city's police intelligence unit learned that one of its intelligence reports, furnished to the FBI with assurances of confidentiality, had been released under the FOIA. Although this document did not reveal the identity of any informants, the unit refused to furnish any further written information to the FBI. It simply did not believe the FBI could guarantee confidentiality for information provided, and it wanted to avoid the possible compromise of informants.
- An extremist organization's leader, who was convicted of two murders, received documents from FBI headquarters through an FOIA request. The convicted leader's attorney informed a mideastern city's police intelligence officer that, after reviewing the documents, the leader had identified the police department's informant in the murder case. This police department will no longer furnish written reports to the FBI.

State privacy and access laws, modeled after the Federal legislation, also regulate dissemination of information. These laws, however, generally apply to criminal history rather than intelligence information. Under these laws, Federal law enforcement agents must now make requests in person or present documentation justifying need before the criminal history information is provided. FBI, DEA, and ATF officials said that in the past, merely a telephone call or display of credentials was sufficient to obtain the records.

CSC officials said that they have special problems in getting access to police records because some State laws do not recognize them as proper recipients of criminal history information. CSC officials believe that the difficulties stem from the fact that they are not a law enforcement agency. CSC officials also said that some local law enforcement officials mistakenly quote the Law Enforcement Assistance Administration's criminal justice information systems' regulations as requiring the withholding of information. This is done even though Law Enforcement Assistance Administration and CSC officials have explained to local officials that the regulations permit departments to release criminal history records under CSC's statutory and administrative investigative authority.

Federal and foreign agencies

Both FBI and DEA officials said that in some of their operations they depend on information provided by foreign law enforcement agencies. They also said that although these foreign agencies have continued to cooperate, they have expressed a deep concern that their information will be disclosed through the FOIA. These agencies have requested that their information always be considered confidential and thus not releasable, otherwise they would cease to provide additional information.

Although both FBI and DEA officials consider their relationship with foreign law enforcement agencies as still essentially good, they cannot tell how much information they are no longer getting because of the U.S. agencies' inability to provide total assurance of confidentiality. For example, an FBI field office reported that two officers of one prominent foreign law enforcement agency admitted they had withheld some case information from the FBI because of their concern about FOIA disclosures. During congressional testimony the Administrator of DEA cited statements by French and British officials that, if DEA were required to disclose

information furnished by them, their law enforcement agencies were certain to cease all cooperation with DEA.

AGENCY COMMENTS AND OUR EVALUATION

The Department of Justice, the Department of the Treasury, and the Civil Service Commission generally agreed with our observations. The Department of Justice, however, believes that we understated the gravity of the adverse impact the FOI/PA are having on law enforcement agencies. It also believes that we failed to emphasize the need for congressional action to remedy what it considers to be the present imbalance between the FOI/PA openness goals and the need for confidentiality in criminal and other investigations.

The benefits to the public and the difficulties experienced by law enforcement agencies resulting from the implementation of these acts cannot be quantitatively measured. The proper balance between openness and the needs of law enforcement agencies is a matter of one's perspective. Therefore we have merely presented the views of law enforcement officials and examples of how the FOI/PA are creating difficulties for law enforcement agencies. It is up to the Congress to weigh the significance of these difficulties against the public benefit derived from the openness and privacy protection provisions of the FOI/PA.

The FBI objected to our statement that "* * * no agency could document the laws' impact on overall investigative effectiveness." Officials believe that such a statement undermines the case for the Congress to reexamine the legislation. We believe that the examples provided by the FBI show that in some specific cases, it has taken the FBI longer to apprehend a criminal, that the FBI has had to spend additional agent hours collecting and/or verifying information, that the public has been increasingly reluctant to cooperate, and that some criminals are using the acts to try to obtain sensitive information from law enforcement agencies. The examples, however, do not show that the FBI or other law enforcement agencies have been unable to fulfill their investigative responsibilities.

The FBI had difficulty determining whether the impact on its operations resulted solely from the FOI/PA. Other laws or regulations, administrative policies, and a general distrust of law enforcement agencies may have had as much or more to do with the FBI's difficulties as the FOI/PA. Therefore, it was not possible to accurately document the total impact these two laws have had on the investigative operations of the FBI.

SELECTED CASE STUDIES PROVIDED
BY FEDERAL AGENCIES

Agencies we contacted almost universally agreed that law enforcement information-gathering capabilities were being eroded. They pointed out, however, that no investigative records were maintained specifically to show how these laws affect their operations. According to the FBI and USSS, the examples provided represent only the instances which could be documented after the fact and only a fraction of the total occurrences.

The FBI and USSS provided the most illustrative and specific examples, and the following sections contain a cross section of these. We did not verify the examples.

EROSION OF ABILITY TO OBTAIN INFORMATION
FROM THE GENERAL PUBLIC

- The FBI initiated a Racketeer Influenced and Corrupt Organizations investigation based on information provided by businessmen in a small southwestern town. The businessmen asked that they not be called to testify because they feared their businesses would suffer. Upon later learning that the information might be disclosed through an FOI/PA release, they decided not to furnish further information. Without this assistance the FBI had to discontinue the investigation.

- During a background investigation of a nominee for U.S. District Judge, the FBI contacted two attorneys but both were extremely reluctant to furnish their opinions of the nominee's qualifications. They feared that if the nominee was appointed and later learned of their comments, he would use his position to punish them. The attorneys had little confidence in the confidentiality protection afforded by the FOI/PA, but eventually provided some comments. However, the FBI indicated that there was no assurance that they were as candid as they might have been before passage of the FOI/PA.

- During an FBI background investigation for a possible presidential appointment, over 40 interviews were conducted and in over half of the interviews the agents believed that possible derogatory information was being

withheld. On many occasions the agents were asked if the appointee would have access to the information through the PA. Several of the individuals interviewed said that they feared reprisals and would not provide derogatory comments.

- During an FBI investigation of interstate transportation of obscene matter and interstate pimping of juvenile boys, school officials fearing reprisals if their testimony were released through the FOI/PA, refused to verify the boys' identities. Citizens in the community only reluctantly cooperated and appeared to be holding back valuable information. Several expressed fear that their identities would be revealed through an FOI/PA release. Most of the citizens indicated that organized crime was involved and feared their reputations would be damaged or their physical safety threatened. One source refused to provide any information because he did not believe the FBI could protect his identity and he feared for his life.
- An FBI office reported that the most significant negative impact on its investigative mission has resulted from a \$600,000 lawsuit filed against a person, who about 20 years ago, allegedly provided derogatory information to the FBI about the plaintiff's suitability for a Government job. The plaintiff had used the FOIA to request FBI files which she claimed allowed her to identify the source of the derogatory information. The plaintiff charged that the information was slanderous and defamatory. The suit was dismissed because the statute of limitations had run out, but the primary issue of whether or not a person can sue someone who has provided information to the FBI was never addressed or resolved. FBI agents reported that members of the general public and law enforcement officers were shocked that such a lawsuit had been filed. Numerous individuals informed FBI agents that, as a result of this lawsuit, they would never provide derogatory information to the FBI.

- In an FBI applicant investigation a local police official refused to provide derogatory information concerning the applicant. The official said that under the FOIA the applicant would have access to the information and, even if his identity were to remain confidential, the information could serve to identify him.
- FBI agents contacted the former employer of a person applying for an FBI position. Company officials provided the dates of employment, but refused to provide a recommendation or comment on the employee's performance, citing the PA and the fact that the information could become known to the applicant. The officials further stated that no other information would be provided regarding the applicant, even if the applicant signed a release form.
- The FBI was investigating the financial status of a person convicted of fraud against the Government. This individual had consented to a \$300,000 judgment. A potential Government witness refused to furnish information regarding ownership and management of the defendant's property after being advised about the FOIA's provisions. The potential witness believed that an FOIA release would adversely affect his business relations with the defendant.

EROSTON OF ABILITY TO RECRUIT AND/OR
MAINTAIN INFORMANTS

- A top management official in a State agency wanted to provide the FBI with information on white collar crime and political corruption. However, he refused to provide the information because he doubted the FBI could protect his identity due to the access possible through the FOIA.
- A potential counterintelligence source advised that he could not cooperate with the FBI because he feared that his identity would be revealed publicly. He indicated that recent newspaper accounts regarding material released under the FOIA had revealed the names of several individuals in a professional capacity who had assisted the FBI, and the nature of their

assistance. This type of publicity, according to the individual, would be detrimental to any person in business who elected to cooperate with the FBI.

- An FBI informant who had regularly furnished information resulting in recovery of large amounts of stolen Government property, arrests, and convictions, relocated and discontinued his services. Upon his return to a position where he could furnish similar information, he refused to cooperate because he feared that through an FOI/PA release he would be identified and his life would be jeopardized.
- A businessman was approached by an intelligence officer from a hostile country. During an FBI interview, the businessman said that were it not for the FOI/PA he would be willing to cooperate with the FBI in foreign counterintelligence involving the intelligence officer who contacted him plus any others. He refused to get involved because he feared that his identity would be divulged, thus seriously affecting his business operations.
- A source providing foreign counterintelligence information expressed anxiety on numerous occasions about continuing his relationship with the FBI. He fears that his identity will be disclosed through an FOI/PA release, thus hurting his business and jeopardizing members of his family who reside inside the hostile country. Because of his fears the source frequently requests the FBI to place dissemination restrictions on the information he furnishes.
- In a southwestern city, an individual who is in a position to furnish foreign counterintelligence information has refused to cooperate. It is his opinion that the Federal Government cannot insure his confidentiality in view of congressional scrutiny of the FBI, subsequent news media leaks, access to records through the FOI/PA and the extensive civil discovery proceedings exemplified by the Socialist Workers Party lawsuit, where the court has ordered the Government to disclose the identity of some informants. The individual said that if the disclosure climate was more restrictive he would be willing to cooperate.

- An FBI informant, who provided information regarding gambling and organized crime in a southern city, asked to terminate his FBI association because he believed that the FBI could not sufficiently protect his identity. The source is afraid that his identity may be revealed under the FOI/PA causing him to lose his business.
- In June 1978, an FBI agent from a southwestern city met with a source to seek help in locating a wanted person. The source said that he did not want to continue providing information and would not help. The source believed that the FBI could no longer guarantee confidentiality in light of the FOI/PA and recent court cases such as the Socialist Workers Party lawsuit.
- During an investigation to locate an armed robbery fugitive, the local police developed an informant close to the fugitive. The informant initially provided valuable information, but upon realizing that the local police were sharing the information with the FBI the informant refused to continue cooperating, believing that her identity might be revealed through an information request under the FOI/PA. The fugitive committed several crimes during the additional time that was required to apprehend him.

EROSION OF ABILITY TO OBTAIN INFORMATION
FROM NON-GOVERNMENTAL INSTITUTIONS

- A forged U.S. Treasury check was used to pay a telephone bill. The telephone company supervisor refused to furnish USSS agents with any information about the individual who negotiated the check or the telephone account involved. Although the USSS agent pointed out that the telephone company was a victim in this case, the company refused to furnish any data without a court order. The Secret Service agent said that this information would not have been withheld prior to enactment of the FOI/PA.
- A USSS agent, working undercover, learned that a \$3,800 U.S. Treasury check had been stolen, forged, and deposited in a bank account in a west coast city. The Secret Service immediately called all the banks in the city, with negative

results. The undercover agent later learned which bank had received the check. When he visited this bank, bank officials acknowledged they had been contacted earlier, but had ignored the inquiry because it was bank policy not to reply to law enforcement inquiries because of the PA. By the time the agent made the initial telephone call to the bank, \$500 had been withdrawn from the account. The subjects withdrew an additional \$2,500 between the initial call and the visit by the Secret Service agent. The bank would have prevented a \$2,500 loss if it had cooperated when first contacted.

- A west coast bank advised the FBI that the bank had made a \$100,000 loan to an individual who appeared to have provided false information on the loan application. The bank indicated that this person may also have defrauded several other banks. The FBI contacted the bank official who had the loan records but he refused to release the documents without a subpoena. The FBI then contacted the assistant U.S. attorney who advised that he would not issue a subpoena without knowing what information of evidential value was contained in the records. Because of this "Catch-22" situation, the FBI closed the investigation. The case was eventually reopened in light of the amount of losses suffered (several million dollars).
- In a fugitive-deserter investigation the FBI found out that the subject had worked at a particular oil company. The oil company was contacted but refused to provide the subject's address or other background information. The company feared future liability if the subject learned that the company provided the information to the FBI. Company officials believed the FBI would have to provide this information to the subject because of the FOI/PA.
- During an FBI fugitive investigation of a subject wanted for extortion and firearms violations, an agent contacted a hotel's security officer to develop background information on a former employee who was an associate of the fugitive. This former employee allegedly had knowledge of the fugitive's whereabouts, but the security officer refused to provide any information from the files without a

subpoena. The security officer believed that without a subpoena the hotel would be subject to civil litigation under provisions of the PA.

--A west coast telephone company informed the USSS that whenever the company releases information about a non-published number, they will immediately notify the subscriber that an inquiry was made and who made the inquiry. Consequently, agents must now decide whether to obtain the information and thus alert the subscriber, or not use this important investigative tool.

--During a sensitive investigation, the FBI subpoenaed bank records concerning the subject of the investigation. Contrary to a prior agreed upon arrangement, the bank manager immediately advised the subject that the FBI had requested the records and jeopardized several ongoing investigations. The manager justified his action by citing the PA. As a result of this experience, agents working on another sensitive investigation decided not to request needed bank records because the risk of the bank notifying the suspect was too great.

EROSION OF ABILITY TO EXCHANGE INFORMATION
WITH OTHER FEDERAL AGENCIES

--An FBI office in the South reported that FBI agents must now obtain change of address information from the Postal Inspector's Office. Previously, FBI agents with proper identification could get this information from the local postal substation. Furthermore, the Postal Service asked this FBI office not to contact individual mail carriers for information. The mail carriers, who are familiar with neighborhood activity, are considered valuable sources to whom access is now denied.

--A father took his 5-year old son away from the boy's grandfather who had legal custody. As a result, a Federal warrant was filed for the father's arrest and the FBI began looking for him. Three months later, the father contacted the Social Security office in the city where the child previously lived and requested that the child's Social Security check be forwarded to another office. The Social Security office told

the grandfather about the request. The FBI immediately contacted the Social Security claim representative, explained that there was a Federal warrant for the father's arrest and asked where the father wanted the check sent. The claim representative told the FBI that Social Security headquarters had instructed him not to release any information without a subpoena. Two days later, the assistant U.S. attorney obtained a subpoena from the U.S. District Court Clerk and the FBI served the claim representative with the subpoena. Local Social Security officials contacted the Assistant Regional Attorney of the Department of Health, Education, and Welfare, who advised them not to honor the subpoena based on Social Security regulations. The assistant U.S. attorney then advised the grandfather to go to the local Social Security office and request the needed information under the FOIA. Through an FOIA request, the grandfather received all the information needed to enable the FBI to locate the child and arrest the father.

- In a recent USSS stolen check investigation, three empty Government check envelopes were found in the suspect's bedroom. Each envelope had apparently been used by the suspect to practice writing the payee's name. Two of the written names were identified and the payees were located. The third name could not be identified and an inquiry was made at the local Social Security office to determine if checks were being issued in this name. Social Security office personnel cited the PA and refused to provide any information. Copies of the forged check were subsequently obtained through formal channels 6 months later.
- In an eastern city, the FBI received information from the State police concerning possible fraud. An individual was allegedly receiving full Social Security disability payments, while still working full time. The FBI contacted the local Social Security office, but the office chief refused to provide any information, including whether or not the individual was receiving disability payments. The official cited the provisions of the FOI/PA as the reason for not giving the information.

- On a large military installation, FBI agents were investigating the theft of lumber and needed to interview persons working in the installation's electrical generating plant over the weekend. The officer in charge declined to furnish the weekend work schedule because of the PA. The FBI had to obtain the assistance of a Judge Advocate General officer before the list was made available.

EROSION OF ABILITY TO EXCHANGE INFORMATION
WITH STATE AND LOCAL LAW ENFORCEMENT AGENCIES

- A midwestern State's police intelligence unit advised that the unit's officers will provide information only to Federal agents who they know personally. Their rationale is that they can trust the agents they know to properly conceal informant identities even if the information is later released under the FOI/PA.
- The FBI learned that an FBI applicant was a former employee of a midwestern State's bureau of investigation. When contacted, State bureau officials acknowledged they had derogatory information concerning the applicant but refused to reveal the information because the applicant would have access to it under the PA.
- During a suitability investigation of a political appointee, the officer in charge of a police department's organized crime bureau advised the FBI that he had furnished derogatory information about the appointee directly to the congressional committee which had requested the FBI investigation. He added that the derogatory information concerned national security, but refused to comment further. The officer later told the FBI that he was thoroughly familiar with the confidentiality provisions of the FOI/PA, but was also aware that the legislation is subject to interpretation. Consequently, he refused to give the derogatory information to the FBI. After receiving this derogatory information, the committee refused to provide this information to the FBI and requested the FBI to discontinue its investigation.
- In a southwestern State, a member of a local law enforcement agency told the FBI that while

police reports and other verified data would be disseminated, the agency would be reluctant to provide intelligence data because of the possible release under the FOI/PA.

- In an eastern city, the FBI reported that local police officers are reluctant to make all information available concerning subjects of investigations because of the FOI/PA. The police department has told the FBI that if one of its sources is exposed through an FOI/PA release, it will no longer make its records available to the FBI, even on a personal basis.

SUMMARIES OF THE
FREEDOM OF INFORMATION ACT
AND PRIVACY ACT

THE FREEDOM OF INFORMATION ACT

The Freedom of Information Act, 1/ signed into law on July 4, 1966, directs that all Federal executive branch agencies' records must be made available to the public, except information specifically exempted by the act. The law provided new disclosure standards and practices to be applied by the executive agencies. The law, which was meant to improve public access to information held by Federal agencies, established a judicial review of agency actions. This review makes it necessary for agencies to justify the withholding of information.

The act identifies nine categories of information that can be exempt from release. These categories are (1) information classified pursuant to executive order, (2) information related solely to an agency's internal rules and practices, (3) information specifically exempted from disclosure by statute, (4) trade secrets and confidential commercial or financial information, (5) agency memorandums that would not be available by law, (6) files whose disclosure would constitute a clearly unwarranted invasion of privacy, (7) investigatory records compiled for law enforcement purposes, (8) certain information related to regulation or supervision of financial institutions, and (9) geological and geophysical data. However, the act's legislative history makes it clear that the Congress did not intend for agencies to use these exempt categories to automatically withhold information.

The FOIA amendments, passed by the Congress in 1974 and effective February 19, 1975, were designed to

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

THE PRIVACY ACT

The Privacy Act 1/ was enacted on December 31, 1974. This act emphasizes protecting an individual's personal privacy and provides an individual the opportunity to review, and obtain a copy of his or her record maintained by a Federal agency. The PA provides for exemptions which, like the FOIA's, are permissive not mandatory. Unlike those of the FOIA, the PA's exemptions apply to systems of records rather than to requests for access to specific information.

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

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

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

1/5 U.S.C. 522a



UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D.C. 20415

IN REPLY PLEASE REFER TO

YOUR REFERENCE

SEP 1 1978

Mr. H. L. Krieger
 Director, Federal Personnel and
 Compensation Division
 U.S. General Accounting Office
 Washington, D.C. 20548

Dear Mr. Krieger:

These are our comments on your draft report entitled "Erosion of Law Enforcement Capabilities Attributed to the Freedom of Information and Privacy Acts."

As an initial matter, we should point out that some of the difficulty agencies with law enforcement functions are experiencing with the Privacy Act results from an interpretation of certain provisions of the Act in the case of Gang v. United States Civil Service Commission, et al., Civ. No. 76-1263 (D.D.C. 1977). A copy of that decision is attached to this letter for your information.

In the Gang case, the court held that the Civil Service Commission violated subsection (e)(6) of the Act by failing to make "reasonable efforts" to assure that an investigative file furnished to the Library of Congress on the plaintiff was accurate, complete, timely, and relevant for agency purposes. This is required by the Act when a file is disseminated to someone "other than an agency". The court found the Library of Congress was not an "agency" for purposes of this provision since it is an instrumentality of the legislative, rather than the executive, branch of the Federal Government. This conclusion was drawn despite a longstanding agreement between the Library of Congress and the Commission that the former would be treated as an agency for purposes of receiving Commission investigative files.

As a result, all agencies furnishing investigative files to other than executive branch agencies (for example, GAO) must attempt to screen the files to satisfy the amorphous standard of accuracy, relevance, timeliness and completeness or assume the risk of violating this provision of the Act.

THE MERIT SYSTEM—A GOOD INVESTMENT IN GOOD GOVERNMENT

Moreover, the court found that the Commission violated subsection (e)(7) of the Act by maintaining information on how the plaintiff had exercised First Amendment rights. Agencies are permitted to maintain information of this character only if it is "expressly authorized by statute, or by the individual about whom the record is maintained or unless pertinent to and within the scope of authorized law enforcement activity." However, the court found that the background security investigation conducted by the Commission was not a "law enforcement activity" despite a clear reference in the legislative history of the Act to the effect that background investigations should be regarded as a law enforcement activity.

While this one decision may not be absolutely dispositive of this issue, it has undoubtedly resulted in a wariness on the part of agencies conducting security or suitability background investigations about collecting information that may conceivably be regarded as an exercise of First Amendment rights.

Perhaps the most significant impact on agency law enforcement activities, however, has come at the collection stage even though, as you point out in your draft report, the Commission continues to receive good cooperation generally from the public in obtaining derogatory information. The Office of Administrative Law Judges of the Commission which examines administrative law judge applicants has cited a number of instances of non-cooperation by potential sources of information because of Privacy Act access by the subject of the inquiry. Copies of material manifesting non-cooperation by sources are attached to this letter for your information. In addition, that Office feels that Privacy Act access has caused sources who do cooperate to be less candid and frank in their evaluations.

(See GAO note, p. 36.)

(See GAO note, p. 36.)

We hope you find these comments helpful in preparing the final version of your report.

Sincerely yours,


Raymond Jacobson
Executive Director

Enclosure



DEPARTMENT OF THE TREASURY

WASHINGTON, D.C. 20220

ASSISTANT SECRETARY

OCT 5 1978

Dear Mr. Lowe:

This responds to your letter of August 23, 1978, requesting our comments on the United States General Accounting Office draft report entitled, "Erosion of Law Enforcement Capabilities Attributed to the Freedom of Information and Privacy Acts."

The report accurately reflects the many concerns and difficulties experienced by Treasury Department law enforcement agencies since the enactment of the Freedom of Information and Privacy Acts.

The Treasury Department is well aware of the public and legislative concerns which led to the enactment of these statutes. We are sympathetic to these concerns, and have established procedures to assure timely responses to public requests made under the provisions of these acts.

However, we have found that compliance with the Freedom of Information Act places two burdens upon our law enforcement activities. First, some resources must be diverted from other operations to handle the review and editing of materials requested by the public. Second, there has been some diminution in the flow of information provided to Treasury law enforcement agencies from what heretofore have been vital sources, such as, State, local and foreign law enforcement agencies, public utilities, educational institutions, and confidential informants. Our law enforcement agencies are unable, however, to provide a precise quantification of the extent of this diminution.

The reluctance to voluntarily release information to Treasury law enforcement agencies is based upon a concern by the sources of information that Freedom of Information Act inquiries may lead to public disclosure of information provided by them which previously had been considered confidential. Confidential informants are particularly

concerned that their identity may be revealed through such disclosures either by direct disclosure, or indirectly, based upon other information which has been released. These laws have also adversely affected the gathering of information from the business community. For example, the Customs Service which enforces the statutes governing fraud, antidumping, countervailing duties, and classification and appraisement of imported merchandise has found it difficult to obtain commercial information for enforcement of these statutes without the use of subpoenas.

While the diversion of staff resources to process Freedom of Information Act and Privacy Act requests clearly has a negative impact on our law enforcement capabilities, this direct reduction does not represent the only effect of these statutes upon law enforcement. There are other significant but intangible costs of processing Freedom of Information Act requests. For instance, when a request is made for an open investigative file, the steps necessary to process that request will tend to disrupt the investigation. Records in open cases are generally exempt from disclosure under the Freedom of Information Act. However, the tasks of locating, indexing, and defending the records from disclosure under the Act can complicate law enforcement activity. Enforcement personnel must be diverted from their investigative activities to spend time analyzing the releasability of material in the investigative file, and the file itself becomes temporarily unavailable for the purpose for which it is maintained.

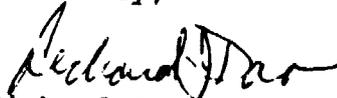
We have found that the 1974 Amendments to the Freedom of Information Act have, as expected, greatly decreased our ability to protect the confidentiality of our sources of information. Prior to the 1974 Amendments, the scope of the exemption for investigatory material was of a broader nature. Specifically, it provided that its disclosure dictates were not applicable to "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." However, the 1974 Amendments made investigatory materials more readily available to public access. Now, as a general rule, investigatory material can be protected only if its disclosure would 1) interfere with a concrete prospective enforcement proceeding, 2) prejudice a person's right to a fair trial or impartial adjudication, 3) cause an unwarranted invasion of personal privacy, 4) disclose the identity of a confidential source, 5) disclose investigative techniques, or 6) endanger the life or physical safety of law enforcement personnel.

One of the effects of this Amendment has been to offer to subjects of criminal investigations a viable alternative to the discovery procedures available in each of the various judicial forums. The structure of the Freedom of Information Act, particularly with respect to the manner in which litigation is to be conducted, encourages court tests of agency decisions to withhold information regardless of the obvious applicability of the claimed exemption. The burden of proof in any Freedom of Information Act suit is upon the defendant agency, and the judicially recognized methods of sustaining this burden in many instances afford the plaintiff at least indirect relief. In this regard, it has become commonplace for courts to require agencies to submit detailed affidavits regarding the claimed exemptions and/or indices of the documents or portions thereof with respect to which exemption claims have been asserted in conjunction with motions for summary judgment. Should large numbers of individuals who are subject to pending criminal proceedings institute actions of this type, the Department would find it extremely difficult to meet the increased workload requirements.

While it is recognized that individuals have a right to obtain relevant information maintained by the government, it must also be recognized that these laws have had an adverse impact on the ability of Treasury law enforcement bureaus to perform their missions effectively. I firmly believe it is necessary to find a middle ground where the rights of individuals to privacy and open Government as well as to effective law enforcement are protected.

Please contact me if I may be of any further assistance in the matter.

Sincerely,



Richard J. Davis
Assistant Secretary
(Enforcement and Operations)

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



UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

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

OCT 26 1978

Mr. Allen R. Voss
Director
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Voss:

This letter is in response to your request for comments on the draft report entitled "Erosion of Law Enforcement Capabilities Attributed to the Freedom of Information and Privacy Acts."

It is clear from our reading of the draft report that the Freedom of Information and Privacy Acts (FOI/PA), as perceived by law enforcement officials and informants, have resulted in an erosion of investigative information. There is a pervasive, widely held, and deeply felt conviction that the FOI/PA are having an unforeseen adverse impact upon law enforcement. Our concern, however, is that the report, as written, fails to highlight this perception and its crippling impact upon the Department's investigative work, primarily with regard to the Federal Bureau of Investigation and the Drug Enforcement Administration.

An appropriate balance must be struck between the salutary goals of the FOI/PA and the equally important necessity of protecting confidentiality in criminal and other investigations. We are convinced that there is now sufficient evidence to justify a congressional reexamination of this balance. This aspect of the report needs to be more strongly emphasized.

Federal Bureau of Investigation (FBI)

The FBI expended considerable effort to document, by example, the erosive consequences of the FOI/PA legislation and to facilitate numerous interviews by GAO personnel of special agents conducting investigations in the field and supervisory personnel at FBI Headquarters. Numerous examples were submitted by the FBI from virtually every field office in each of the categories for GAO's review. Selections of the information included in the report demonstrate (1) diminished public cooperation, (2) diminished law enforcement exchanges of information, (3) diminished informant assistance, and (4) other adverse ramifications.

The examples furnished clearly indicate the FBI is not now receiving vital information previously provided by the public, private institutions, Federal agencies, informants and foreign, State and local law enforcement organizations. Some investigations had to be discontinued altogether. Other investigations required many additional man-hours to resolve, and during these extended periods some fugitives remained at large committing additional crimes which could have been prevented. As the report clearly depicts, elements of organized crime and other criminal groups are using the FOI/PA statutes to determine the method and extent of the Government's penetration of their activities and to identify informants.

Although GAO went to considerable length to obtain examples and present them in an objective manner, the report suggests on page 4 of Appendix I that ". . . no agency could document the laws' impact on overall investigative effectiveness." We think this statement undermines the case for reexamination.

Drug Enforcement Administration (DEA)

While the right to access to information by the criminal element is legitimate under provisions of the FOI/PA, it nevertheless is a significant detriment to the effective operation of DEA's criminal investigatory activities. It impacts on virtually every aspect of investigative activity and creates a restrictive climate in a number of areas. The impact in the more significant areas includes:

GAO note: Page reference in this appendix refers to the draft report and does not necessarily agree with the page number in this report.

- It diminishes the ability to obtain cooperation and information from individuals, businesses and institutions.
- It hampers efforts to recruit and maintain informants.
- It impedes the free exchange of drug-related information with foreign, State and local law enforcement organizations.

(See GAO note, p. 36.)

One area of special concern to DEA involves the use of information disseminated via the FOI/PA to members of criminal organizations. These organizations attempt to manipulate the criminal justice system and thus abort investigative efforts concerning their activities. The U.S. Senate, Permanent Sub-Committee on Investigations, held hearings on August 10, 1978, dealing with aspects of criminal misuse of the FOI/PA. The hearing dealt with testimony by a convicted criminal, Gary Bowdach, and, in our opinion, clearly established the laws' impact on diminishing our overall investigative effectiveness. Mr. Bowdach made statements to the Sub-Committee that the criminal element goes beyond their legal rights in that they use FOI/PA requests to "bog down the system, tie up law enforcement personnel, prosecutors." They use the acts to "subvert the criminal justice system," and to "assassinate people that are cooperating with the government."

Although DEA is powerless to completely prevent these manipulative efforts by the criminal element, we consider it our duty to make sure that those who interpret the FOI/PA recognize these facts so that they may be appropriately guided to interpreting the law in the spirit in which intended.

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Financially and administratively the FOI/PA are very expensive to administer and impose both stringent procedural and heavy proof burdens on the recipient bureaus. The burden is made doubly severe when the bureaus feel compelled to bring teams of agents in from the field to process the backlog of FOI/PA requests. The FBI and DEA have both felt it necessary to resort to such temporary remedies, resulting in the loss of valuable workyears in field investigations. In recent years the bureaus have requested increased funding in order to cope with the escalating demand for records to be made available through the FOI/PA. However, because of the extreme scarcity of resources, we have been hesitant to approve increases or reprogram current resources when the extent of the long-run demand for FOI/PA materials in the future is, at best, conjectural.

A major concern of both FBI and DEA continues to be the problem of meeting the policies of FOI/PA, the courts and the Department, and yet be assured that confidential source information is adequately protected. It is often difficult to prevent disclosure of precisely the information which risks exposure of informants and/or reveals the scope and penetration of the investigation of organized crime elements. It is important to recognize that diminished effectiveness is difficult to measure, given the many factors present in any investigative program. Our concern for the future is the striking of a just balance between the public's legitimate access to information and law enforcement's need to protect information essential to successful pursuit of investigations.

We appreciate the opportunity to comment on the draft report. Should you desire any additional information, please feel free to contact us.

Sincerely,


Kevin D. Rooney
Assistant Attorney General
for Administration

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