COMPTROLLER GENERAL'S
REPORT TO THE CONGRESS

TIMELINESS AND COMPLETENESS OF FBI RESPONSES TO REQUESTS UNDER FREEDOM OF INFORMATION AND PRIVACY ACTS HAVE IMPROVED

D I G E S T

Requests for information under authority of the Freedom of Information and Privacy Acts have created large workloads for various Federal agencies, but especially the FBI. It has received almost 48,000 requests in 3 years. Since 1975 the FBI has had a sizable backlog of requests. Although the FBI has improved the completeness and timeliness of its responses, it can do more in this regard.

FREEDOM OF INFORMATION AND PRIVACY ACTS

The Freedom of Information Act, effective July 4, 1967, directs that the public must have access to the information in the files of executive branch agencies, with certain exceptions specified in the act. Because of dissatisfaction with the way the act was being implemented, the Congress amended it, effective February 19, 1975, to

--limit the Government's authority to withhold certain kinds of information;

--strengthen the public's right to obtain information from Federal Government records; and

--speed public access to Federal Government records. (See p. 2.)

As a result of the amendments, agencies are now required to respond to the requester within 10 working days. The FBI has not been able, however, to comply with the

10-day requirement because the sensitive nature of the information in its files requires a line-by-line review to insure that only appropriate disclosures are made.

The Privacy Act, approved December 31, 1974, primarily deals with protecting an individual's personal privacy and providing an individual the opportunity to review, obtain and amend a copy of his or her record maintained by a Federal agency. (See p. 2.)

The Freedom of Information and Privacy Acts contain general guidance on what information can be released under their disclosure and exemption provisions. Subjective judgments result, which allow a wide disparity in agency and individual decisions on what information can be released.

FBI HAS MET AN INCREASING NUMBER OF REQUESTS

The FBI believes its heavy request workload will not only continue but will increase at an annual rate of about 14 percent. On this basis, it estimates that it will receive about 20,500 and 23,400 requests in 1978 and 1979, respectively.

To accommodate this increasing demand for information, the FBI has had to improve its organizational structure and processing procedures. Initially, the FBI handled Freedom of Information and Privacy Act requests with a small staff and processed requests in a fragmented and ineffective manner. This resulted in the slow processing of requests, development of a substantial backlog (8,599 in July 1976), and processing delays of about 12 months. (See p. 4 and ch. 4.)

The FBI maintains a central records system at headquarters for its investigative, personnel, applicant, administrative, and general files. Although it has other record systems, the central records system is the most important one. Basically, it consists of one numerical sequence of subject matter files and an alphabetical index to these files referred to as the general index. All information on a subject matter or case is included in one file.

Each of the FBI's 59 field offices and 13 foreign liaison offices has its own central records system similar to that of headquarters. Most, but not all, of the information kept at the field and foreign liaison offices is referred to headquarters and therefore filed in the central records system. FBI headquarters does not maintain statistics, however, on the number of case files or index cards maintained by its field offices.

The key to the files at headquarters and in the field and foreign liaison offices is the general index. It consists of alphabetically filed 3-by-5 index cards on various subject matters, primarily the name or names of individuals. The cards usually contain information such as name, file number, birthplace and birthdate, sex, race, and address. The general index must be searched to determine whether the FBI has information in its central records system.

Index cards are created and placed in the general index only for information considered pertinent for future retrieval. The names of the subjects and victims involved in FBI investigations are also placed in the general index. However, not all the names of persons who furnish information during an investigation are placed in the general index.

The general index to the FBI headquarters files contains more than 59 million cards. These are estimated to represent 20 million different individuals. Of the 59 million cards in the general index, only about 19 million are referenced to main files, that is, files on either a specific subject, suspect, or victim of an offense. The other 40 million index cards are called see references, which are names of people connected to an incident but who are not the subject of a file. For example, an FBI official told us that a witness to a crime may become a see reference within the file pertaining to the crime. However, there would not be a separate file on the witness.

FBI SEARCH POLICY

The FBI's current practice in searching for a file is to perform an "on-the-nose" search in which only the names used or provided by the requester are searched. The Deputy Attorney General approved the use of on-the-nose searches in 1975 because the previous searching procedure was time-consuming and did not generally result in additional information.

At headquarters, the FBI's search is limited to the central records system, unless a requester identifies other systems and less than three specific field offices to be checked. When more than two field offices are identified, the requester is told to send the request directly to each field office.

In 1975 the Deputy Attorney General approved a search policy dealing with see references. The see reference policy allows the FBI to limit searches to main files identified with the requester, cross-referenced general files, and any files relating to organizations and/or incidents identified by the requester. The see reference files would be reviewed only if the requester specifically identified records associated with a particular organization or incident covered in an investigation.

TYPES OF RESPONSES GIVEN

All requests submitted to the FBI require a certain amount of processing. The amount of processing time required depends on the amount of information maintained and the type of response given. The FBI classifies its responses to requests into six categories:

Administratively closed - The FBI can administratively close a request for several reasons: (1) lack of identifying information, (2) absence of a notarized signature, and (3) a requester's failure to remit the required fees. In each of these cases, the FBI asks the requester for the missing information or fee and holds the request open for 60 days. If no response is received within that time, the case is closed but is reopened if the requester subsequently responds.

No-record - A no-record response means that the FBI searched the general index and the central

records system and found no information concerning the subject of the request.

No-record main-file - A no-record main-file response means that the search of the general index and central records system disclosed no main files on the subject of the request but disclosed some see reference cards in the general index which may or may not pertain to the subject. The FBI needs additional specific information before further reviewing the files.

Granted in-full - A request granted in-full indicates that the FBI did not use any of the FOIA or PA exemptions to deny information.

Denied in-part - A request that is denied in-part indicates that the FBI used one or more FOI/PA exemptions to withhold information contained in a file. A request that is denied in-part may involve the mere excising of a name or the withholding of several thousand pages.

Denied in-full - In a request denied in-full, the FBI uses one or more FOI/PA exemptions to completely refuse the release of any information contained in the file.

FBI data for the period October 4, 1976, to September 30, 1977, shows the following breakdown of case responses.

Type of closing	Number	Percent
Administratively closed	4,582	26.0
No-record	3,817	21.7
No-record main-file	2,848	16.2
Processed (Note)	6,346	36.1
Total	17,593	100.0

Note: The 6,346 processed cases include those granted in-full, denied in-part, and denied in-full. FBI officials considered it impractical to break down these categories.

Response letters to requesters

The FBI, DEA, and AF-OSI differ in the method of providing information to a requester and in the content of the final response letter. The FBI's final response complies with the law by telling requesters, in the cover letter, which exemptions were used to deny any information and of their right to appeal. The information given to the requester contains a copy of the material released; however, it does not identify on each page the exemptions used to withhold information. Further, the response does not mention how many pages were in the file or how many were totally denied, nor does it mention that only the headquarters indexes were searched.

The FBI uses an inventory sheet to keep track internally of which exemptions were used on each page. Instead of this sheet, the FBI could mark on each page of a document which exemption was used to withhold information, allowing requesters to determine on what basis information was excised.

In our opinion, the requesters should be told how many pages are in their files and how many are denied entirely, so that they will have an idea of the file's size. The requesters should also be told that only the headquarters central records system was searched. The FBI publishes a list of field offices in the Federal Register; however, Federal Register distribution is limited and many requesters may not be familiar with it.

DEA response letters were not as informative or adequate as the FBI's. For an FOIA request DEA told the requester in the letter about the exemptions used to deny information. However, if the request was a PA request for criminal records, then it was processed under the FOIA, because otherwise it would be exempt under PA. In such cases DEA told requesters that the documents were found in an exempt system and that it was making certain releases on a discretionary basis. DEA did not mention the FOIA exemptions used to deny information. A DEA official said that in these types of cases DEA did not have to mention the exemptions used, because it processed the case under PA and made merely a discretionary release under FOIA.

A 1975 Attorney General's memorandum on the 1974 amendments to the FOIA clearly stated that denial letters must contain the reasons for denying information with specific reference to the exemptions used. DEA was not

volumes (200 pages per volume) relating to 47 project cases. FBI officials said that onslaught agents generally were able to meet the goal of 250 pages per day because their only duty was to review and excise files.

During project onslaught the FBI found that the agents could recognize a problem quicker than the analysts but that the analysts were better at following the guidelines and regulations for excising. FBI officials said that both groups of agents were conservative in their excising because the release of information was contrary to their FBI experience. Their excising was always legally defensible but more conservative than the Attorney General's release policy intended.

FBI promised to reprocess "onslaught" records at end then refused to.

Lessons learned

During project onslaught FBI officials learned that the senior analysts working as assistant supervisors proved to be quite capable of handling supervisory responsibility. FBI officials were then convinced that additional supervisory responsibility could be given to the senior analysts, thus allowing special agent team captains to be replaced.

FBI officials also learned that the ratio of 20 workers to 1 team captain in the first group was too large for effective supervision. They found that a 10-to-1 ratio used in the second group was more conducive to effective group performance.

During project onslaught FBI officials found that bleach could be used to erase the special see-through ink used to excise material. This proved very helpful because agents and analysts could make corrections quickly rather than having to recopy the whole page.

Accomplishments

Project onslaught reduced but did not eliminate the backlog. When project onslaught ended on September 30, 1977, 2,059 of the nonproject cases processed by the first group had been closed. Additionally, on the basis of the work done by the second group, 33 nonproject cases were closed and 1,615 volumes of material were released which related to 47 project cases. Cases processed but not yet closed at the end of project onslaught were awaiting supervisory review, classification review, or consultation with other agencies.

The estimated cost of the original project onslaught proposal was between $4.9 million and $5.3 million. A lower

Under the above policy the appeals office began to encourage additional releases of information that could have been protectd under the law. The emphasis on additional release affected most of the exemptions applied by the FBI.

The Attorney General further liberalized the disclosure policy in a May 1977 letter to all Federal departments and agencies:

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

He also indicated that the Department of Justice would defend FOIA suits "* * * only when disclosure is demonstratively harmful, even if the documents technically fall within the exemptions in the FOIA." Thus, this policy liberalized the criteria for releasing documents in favor of more disclosure. The standard evolved from withholding matters that affected the "vital interests of the Department" to matters that were "demonstratively harmful." The "harm theory" has resulted in further liberalization of release policies.

Results of the Office of Privacy and Information Appeals reviews

We examined the files of the appeals office to determine how often initial actions taken by the FBI were reversed, modified, or affirmed. We reviewed all decisions made by the appeals office in 1976 and found that 603 of the total 1,166 related to the FBI. In 166 of the 603 cases, the FBI was totally affirmed while in 345 cases, the FBI's decisions had been modified in one way or another. The remaining 92 cases involved administratively closed appeals which did not affect the FBI's initial release decisions. These 92 cases included appeals from requesters refusing to provide a notarized signature, refusing to wait in the FBI backlog, or withdrawing their appeal.

Taken at face value, these statistics would indicate that the FBI was not fully complying with the Department guidelines in about 57 percent of the cases where a decision was made. However, there are two factors that must be considered when drawing conclusions from these statistics.

USE OF FOI/PA EXEMPTIONS

The FBI uses exemptions less restrictively now than in the past. However, variation exists among teams on how the exemptions are used, and full conformance with the Office of Privacy and Information Appeals' directives has not been achieved. The following discusses the exemptions used most frequently by the FBI for 34 randomly selected cases processed during the period July 1975 through August 1977.

FOIA exemption (b)(1)--classified documents concerning national defense and foreign policy

FOIA exemption (b)(1) allows an agency to withhold information related to national defense or foreign policy which is properly classified pursuant to Executive Order 11652. The PA exemption (k)(1) is essentially the same as the FOIA (b)(1) exemption; therefore, the comments made on the (b)(1) are applicable to (k)(1).

Most of the information which the FBI classifies pursuant to the Executive Order falls within one of the following categories:

--Information or material furnished by foreign governments or international organizations.

--Information or material specifically covered by a statute or pertaining to cryptography or the disclosure of intelligence sources or methods.

--Information or material disclosing a system, plan, installation, project or specific foreign relations matter.

--Information or material the disclosure of which would place a person in immediate jeopardy.

In the past, the FBI did not publicly disclose any information contained in its files, and thus information was not marked as to its classification. However, since 1975 the FBI has classified the material placed in its files and currently classifies pre-1975 information when it is being processed for release under an FOIA or PA request.

The committee usually abides by another agency's classification. If disagreement arises which cannot be resolved between the committee and the concerned agency, the matter can be referred to the Interagency Classification Review Committee, established by Executive Order 11652. As of February 1978, only one case had been referred to this committee.

The two classification areas where disagreements most often arise pertain to protection of highly sensitive sources and techniques of intelligence gathering. Classification of this information depends on whether

--its release would reveal the use of particularly sensitive and useful techniques, not merely identify

--a group is active or defunct,

--more than one informant and/or sensitive sources are involved,

--the information obtained was specific or general,

--the information was gathered at a small meeting or through a large gathering, or

--the information obtained is recent or old.

According to committee staff, the review committee does not support withholding information on the use of illegal intelligence techniques (e.g., burglaries or mail openings) in domestic security cases, but usually does so when a foreign establishment is involved, because disclosure may harm national security.

Original documents from 34 randomly selected cases showed that 10 cases contained (b)(1) exemption material and 1 case had (k)(1) exemption material. In three of the cases, the (b)(1) exemption was used to withhold information provided by a foreign government. In three other cases, information withheld under the (b)(1) exemption dealt with U.S. interests in a foreign establishment. Four cases where (b)(1) was used involved information provided by security informants which was withheld to protect the source. The (k)(1) exemption was used to withhold the name of a sensitive program dealing with foreign interests. In all cases the exemption appeared to be properly applied.

Although information may be declassified by the review committee, it will not automatically be released. In some cases the information can be withheld under another FOIA exemption so that material could still be excised. A common situation involves a sensitive source which the review committee may not consider classifiable but which could still be protected under the confidential source exemption (b)(7)(D).

In the past, the FBI used the (b)(1) exemption too restrictively and overclassified material. Since the summer of 1976, however, it has made steady progress, and its use of the exemption now is more appropriate. In addition, continued oversight by the review committee should eliminate or prevent overclassification problems in the future.

FOIA exemption (b)(2)--internal personnel rules and practices

The FOIA(b)(2) exemption allows the withholding of matters relating solely to the personnel rules and practices of an agency. The FBI used this exemption to withhold administrative markings such as dissemination notations, case leads, field office and FBI file numbers, types of investigations, agents initials, words and phrases used in FBI communications, and notes that synopsize information within a document.

According to the FBI's FOI/PA manual, internal markings can be released on a discretionary basis depending on whether some forseeable harm to law enforcement efforts would occur. Although previous policy was to withhold all markings, processing teams varied in their practices. Depending on the type of case and circumstances involved, some teams would release many of these markings while others would not.

We attended three conferences where appeals attorneys discussed cases under appeal with FBI officials. In each case, the appeals attorneys agreed with the FBI's decisions to either release or withhold the markings. However, the attorneys believed that withholding most (b)(2) material was time-consuming and useless, since it related to internal procedures and did not usually represent important information.

The Deputy Attorney General guidelines, dated May 25, 1977, provide that all (b)(2) material is to be released unless harm can be demonstrated. The guidelines serve to remove FBI discretion and make releases the rule rather than the exception.

In most cases processed before May 1977, most administrative markings were withheld. Most markings could have been released without causing harm however, and would have been released under the May 1977 guidelines. Of the 10 cases released since May 1977, 3 did not have the (b)(2) exemption quoted. In six cases, (b)(2) was used for material of a sensitive nature, such as certain file numbers. In our opinion, its use met the harm theory. In one case, however, the material withheld under (b)(2) should have been released on the basis of the current harm theory. An FBI official agreed that such material should have been released.

DEA has a sensitive problem with its file numbers and class violator identifiers, which are considered administrative markings. DEA contends that both numbers represent a code and would be detrimental to DEA work if revealed. The file number indicates the region involved in the case, the year started, and case number. The class violator identifier includes information on the nature and priority level of the case.

Although we concur with DEA that the class violator identifier is too sensitive for release, we do not believe that the file numbers are of critical sensitivity. The Deputy Attorney General recently decided that DEA should be allowed to withhold the class violator identifier but that file numbers are to be released if the request deals with an inactive investigation. In commenting on our report, DEA said it no longer uses the (b)(2) exemption to protect file numbers, unless their release would interfere with an enforcement operation.

The FBI's previous policy of withholding administrative markings conformed with the requirements of the FOIA, but the excising of this type of material made the requester's comprehension of material released difficult. We believe the present policy, based on the harm theory, is more responsive to the public.

FOIA exemption (b)(5)--internal communication

FOIA exemption (b)(5) applies to interagency and intra-agency memorandums or letters which would not be available by law to a party other than in interagency litigation. According to the Office of Privacy and Information Appeals, information protected by this exemption is generally either attorney work product or predecisional advisory material.

CRD

Attorney work product encompasses an attorney's material related to litigation which sets out the strategy and position to be taken. The appeals office officials said that this material is exempt until a case has been tried, and afterwards, the material can be released unless it would adversely affect future operations.

CRD

Predecisional material generally consists of interagency or intra-agency memorandums which contain agency opinions, analyses, and recommendations prepared as part of the decisionmaking process. Department of Justice guidelines allow this deliberative material to be withheld provided it is more than an interpretation of a decision previously made. It is the Department's policy, however, not to use the (b)(5) exemption in situations unlikely to affect primary law enforcement concerns or not involving major policy deliberations. Because of this policy, FBI and DEA officials said that the use of (b)(5) has substantially declined.

In the past, (b)(5) was generally used for the following information:

--Secret Service form delineating the potential threat of the individual to the President.

Not --Agents' opinions and recommendations.

Not --Internal memos between headquarters and field offices recommending certain actions.

Not --Conference material from a strategy meeting with an assistant United States attorney.

Not --Interagency communications.

Not --Instructions to the field office on when to interview a subject.

Used by FBI

--Decision to put an individual in a particular index.

Not used by FBI

Because of the discretionary policies of the appeals office, FBI officials said that their use of (b)(5) has now been limited to the Secret Service form and some agents' opinions and recommendations if they are of a very sensitive nature.

Our sample of 34 cases showed that of the 13 cases processed under FOIA in 1975 and 1976, 8 contained material for which (b)(5) was used. In six of the eight cases the exemption was used to withhold internal communications, such as recommendations and opinions on the subject and/or how a case was to proceed. In our opinion, some of this information could have been released and would be released now, according to the current discretionary release policies.

Of the 34 cases reviewed, 15 were processed under FOIA in 1977, but only 5 used the (b)(5) exemption. In four of those cases the (b)(5) exemption was quoted appropriately for withholding the Secret Service form. In one of these four cases, however, the exemption was also used to withhold the reasons for including the requester in a discontinued index. This information should have been released. In another case, the exemption was cited to withhold FBI laboratory notes on an examination of latent fingerprints. This information too should have been released.

Although DEA used the (b)(5) exemption more often in the past, discouragement from the appeals office has currently limited its use. For the cases reviewed, DEA's use of the exemption appeared appropriate.

The AF-OSI uses the (b)(5) exemption for some information which the FBI withheld under the (b)(2) rules and practices exemption. An OSI official said that (b)(5) and (b)(2) are very similar. AF-OSI uses (b)(5) to withhold investigative leads, investigators' opinions, discussions of coordination with other Federal and local agencies, report distribution markings, and source evaluation symbols. Although much of this information is technically exempt under the law, the harm theory promulgated by the Attorney General should influence the OSI to reconsider withholding some of this information.

The present discretionary policy of using the (b)(5) exemption sparingly should be continued and encouraged. Unless real harm to law enforcement efforts exists, internal communications between and within agencies should be released.

FOIA exemption (b)(7)(A)--investigatory records, interfering with enforcement proceedings

FOIA exemption (b)(7)(A) allows agency officials to withhold investigative records compiled for law enforcement purposes, but only to the extent that the release of such records would interfere with law enforcement proceedings. The exemption is most commonly used for pending cases, but it has also been used for closed cases when release of the information would be detrimental to ongoing investigations.

The FOIA states that any reasonably segregable portions of a record must be provided after proper deletions have been made. Accordingly, blanket denials cannot be made. Even for pending investigations, agency officials must segregate and release information which would not affect enforcement proceedings.

FBI officials have used (b)(7)(A) for pending investigations as well as for some inactive cases where there is a reasonable possibility for prosecution or where information in a closed case affects an ongoing investigation. They agreed that, in the past, the FBI used the exemption on a blanket basis; but at the urging of the appeals office, the FBI began to segregate and release information which would not affect a pending investigation.

Of 34 cases reviewed, the (b)(7)(A) exemption was used for two criminal cases processed in 1977. FBI officials told us that in both cases the requesters were aware of the pending investigation. In one case in which the FBI used a blanket (b)(7)(A) exemption, the appeals office upheld the decision when the requester appealed. In our opinion, the FBI's and appeals office's use of a blanket (b)(7)(A) was contrary to the intent of the law and to its own guidelines. An FBI official agreed that information already known to the requester could have been released. In the other case, some information was segregated and released, although most of the information was withheld because of the pending proceedings. In this case, the FBI processed it appropriately.

requests served to conceal the investigation until the Government was ready to apprehend or indict the criminal involved.

Because the use of the (b)(7)(A) exemption puts the agency in a "no-win" situation, some feasible procedure is needed by which the Government's and public's interests are served fairly and efficiently. The (b)(7)(A) exemption has generally not been applied properly since the act was passed because it was used on a blanket basis. In 1976, after the appeals office required that files be properly segregated, the situation improved. However, present implementation is still inadequate. It is costly and time-consuming for Federal agencies to perform a review so that properly segregable material can be released. Unless the law is changed, the FBI and DEA will need to improve their implementation of this exemption if they are to be in full compliance with the act and with Departmental guidelines.

FOIA exemption (b)(7)(C)--investigatory records, unwarranted invasion of privacy

FOIA exemption (b)(7)(C) allows withholding investigatory records compiled for law enforcement the disclosure of which would constitute an unwarranted invasion of the personal privacy of another individual. In this regard, agency officials are faced with determining exactly what constitutes an unwarranted invasion of personal privacy. The act and the legislative history provide little guidance as to what these words mean. Therefore, the agencies have been left with a vague concept on which they have to base decisions as to whether to release or withhold information. In using this exemption, agencies have to balance the possible harm from disclosure against the public benefit from release.

Most of the guidance in determining invasion of privacy comes from the appeals office. According to its past guidelines, under (b)(7)(C), the appeals office would exempt from disclosure the information, names, and other identifying data about third parties but would release the substantive information about the requester. The present guidelines, issued in May 1977, state that "routine excising/denial of all 'third party information' is to cease." Under the policy, if material about a third party is directly connected to and affects the requester, it must be released.

Disclose = reveal what is NOT known or can be used for what is known more, not for what was published a disclosed earlier

Only very intimate or personal information about the third party which does not affect the requester is to be withheld under (b)(7)(C). The FBI manual basically took this approach in its description of procedures to be followed in third party access. This description is more specific as to the circumstances in which release is considered appropriate. However, its language and intent is more conservative than that expressed by the Deputy Attorney General. The Deputy Attorney General acknowledges that the Department "had been excising and withholding too much material in those instances where the requester is one of the persons whose activities are chronicled in the file."

In the past, the FBI used (b)(7)(C) to withhold the names of special agents, other Federal employees, judges, U.S. attorneys and assistant U.S. attorneys, names of the requesters' relatives, names of codefendants and coconspirators, names of speakers at a rally, and names of neighbors and associates. In all of the above cases, any data identifying individuals, information collected on them, or personal information about them was also withheld. In our sample of 34 cases, we found 21 requests processed prior to June 1977 where (b)(7)(C) was used and generally most of the above type of information was withheld. In many of these cases some of the information could have been released.

1978, late

Although the general policy was not to release third party material, variation existed among headquarters teams as to how that policy was actually implemented. For example, some teams began to give out the names of judges and assistant U.S. attorneys as well as high FBI officials, while others still withheld some of these names. Also some teams would release the name of a special agent if it appeared in the requester's own statement, while another team would never release the agent's name. According to an appeals office official, the application of exemption (b)(7)(C) is where most variation existed from one team to the other. Decisions ranged from no release of third party names and very little information about the third party to release of most third party names and a great deal of the information.

Until May 1977 the appeals office allowed the FBI to withhold most of the information about a third party even if it was related to the requester. For the most part, the appeals office's modifications of FBI releases dealt with third party names and the information they provided about the requester.

Not practice under my PA request, still under appeal

DEA files showed that before May 1977 names and information about third parties, including codefendants, were excised even after conviction or after information was made public in the press. For cases processed after May 1977, some third party information was released, such as codefendants' names and their activities if they were directly connected with the requester.

AF-OSI officials said their policy on the use of (b)(7)(C) had not changed much since they began processing requests. If the third party name was that of a codefendant, then they would release it as well as all the information which related to the requester. On statements made by third parties about the requester, they would release all the information provided and might release the third party's name, even if the information was derogatory. AF-OSI files and interviews with officials indicate that its release policy on (b)(7)(C) material has been more liberal than that of the FBI and DEA and more consistent with the current harm theory suggested by the Attorney General.

Past practices of withholding most or all information about third parties were too restrictive and resulted in too much material being excised. The current policy, as stated by the Deputy Attorney General, if properly implemented, should result in substantially more information being released to requesters.

FOIA exemption (b)(7)(D)--investigatory records, disclosing the identity of a confidential source

FOIA exemption (b)(7)(D) allows withholding investigatory records compiled for law enforcement, the disclosure of which would reveal the identity of a confidential source.

According to the appeals office's guidelines and the FBI manual, this exemption can be used to withhold names, identifying data, and investigatory information which would disclose or confirm the identities of confidential sources. The guidelines indicate that confidential sources include individual informants (such as tipsters or codefendants), local and State government agencies, foreign governments, educational institutions, and commercial organizations.

Both sets of guidelines also indicate that a promise of confidentiality is not enough to withhold information and that if the release of the information would not reveal the source, then it shall be released. The FBI works under

reveal is not synonymous with identify a state or report, etc.

the basic assumption that information provided them is given under an expressed or implied promise of confidentiality.

The FBI uses this exemption extensively because much of its information is obtained from informants and other types of confidential sources. The FBI is concerned about limiting the use of (b)(7)(D), fearing that its informants will refuse to cooperate if their identities can later be disclosed. FBI officials expressed concern over the amount of information provided by informants which has been released, and are therefore cautious in using this exemption. Its use is affected by the case's type, circumstances and age, and by the requester's type. For example, in an organized crime case officials would be restrictive with the information released because identifying informants may result in the informants' being murdered. In a domestic security case which is 10 or 15 years old, a more liberal release would be made because of the age and type of material and the number of sources that could have provided the information.

FBI officials told us that in the past they used to withhold all or most of the information provided by a confidential source. For example, they would withhold whole paragraphs or statements provided by the source, whereas, now they must segregate information from each paragraph, while still protecting the source's identity. The amount to be segregated and released depends on whether the informant is active or not, the size of a meeting, the number of informants who provided the same information, or the age of the information.

The FBI uses the exemption to generally withhold the identity and information provided by local police departments, credit bureaus, other commercial organizations, and foreign law enforcement agencies. These organizations, especially law enforcement agencies, strongly prefer that the FBI not release their identities and/or information they provide. Recent court decisions on the subject do not resolve the issue as to whether local police departments are covered by the (b)(7)(D) exemption.

The FBI manual and appeals office guidelines clearly indicate that other Federal agencies cannot be considered confidential sources and that (b)(7)(D) cannot be used to withhold the information provided. The FBI manual, however, states that if a Federal employee provides information beyond his official authority or even in violation of agency regulations, the identity and the information can be withheld under (b)(7)(D). The appeals office concurred in

this issue and at one appeals meeting we attended, the appeals attorney upheld its use by the FBI. This was a case involving information obtained in violation of agency regulations from a Selective Service employee. At that time, we questioned whether such use of (b)(7)(D) was appropriate. The appeals attorney said that they used it because of the concern over the repercussions to the employee who provided the information. However, in June 1977 the Deputy Attorney General stated that (b)(7)(D) would no longer be allowed to protect information obtained by unlawful or inappropriate activities, thus, the above use of (b)(7)(D) would no longer be appropriate.

NOT TRUE Re F.O. Switch to E?62?

Of the 34 sample cases, (b)(7)(D) was used in all 13 cases processed in 1975 and 1976 under FOIA. In eight of these cases additional information could have been segregated and released. This included segregable information, such as arrest record checks obtained from local police agencies. It also included segregable information provided by Federal agencies and information obtained from confidential sources as to the activities and whereabouts of the requester.

Most of the 14 cases processed in 1977 where (b)(7)(D) was used were processed more appropriately than those in 1975 and 1976. However, in one case, the FBI withheld a substantial amount of information provided by witnesses to a robbery. Some of this information should have been segregated and released. Subsequent to our review, the case was appealed and the FBI had to release the above type of information. An appeals office attorney said, and we agree, that in using this exemption one can only guess how much information can be released without disclosing the source's identity. Decisions on the amount of information released, therefore, are subjective and open to disagreement.

DEA uses the (b)(7)(D) exemption heavily and its use is a matter of deep concern to the agency. One DEA official said that the agency has a very conservative attitude on the release of information provided by an informant because of the violent nature of drug crimes. Like the FBI, DEA uses this exemption to withhold information provided by local and State law enforcement agencies and foreign governments. Unlike the FBI, DEA does not consider credit companies or drug companies as confidential sources. Officials said that individuals, however, who provide information to DEA, whether paid or not, are considered confidential sources and are protected.

The acts contain disclosure provisions and exemptions to disclosure to guide the agencies on what information to withhold or release. These guidelines are subjective and do not provide absolute criteria that clearly set out what information is to be released or withheld. The result is that agencies are left with wide discretion where reasonable disagreements arise as to what the laws mean and how they should be implemented.

Disagreements occurred on what to release among FBI teams between the FBI and the Justice Department's appeals office, among attorneys within the Department's appeals office, between the Department's appeals office and its litigation unit, and ultimately among judges deciding on litigated FOIA requests. Depending on individual attitudes and perspectives, the same piece of information could be released or withheld and still be considered in compliance with the law. These disagreements are not the result of a desire for noncompliance; rather, they reflect the inexact nature of the information handled and the inexact language of the laws.

Although the laws are subjective in what information is to be withheld or released, additional information could have been released for most of the responses to sampled requests processed by the FBI in 1975 and 1976. However, the FBI made improvements in the type and amount of information released in 1976 over 1975.

Further, requests processed in 1977 showed a substantial improvement in the amount and type of information released over those processed in 1975 and 1976. Although the FBI has made improvements, we still disagree with how some of the exemptions were used and believe that in some cases additional information could have been released. The improvements observed resulted from appeals office oversight, a change in attitude by FBI officials over the last 3 years, more experience in implementing the laws, and the establishment of the FBI's FOI/PA reference manual.

This is 1979 —

Problems will continue to plague the FBI and other Federal agencies, especially law enforcement agencies, and will generate questions as to whether the exemptions are properly applied. These problems include determining

--what constitutes an "unwarranted" invasion of privacy,

Much in 1996 is public domain

--what constitutes a confidential source, and

1996 & FIR NOT "pending"

--what information should be provided in pending investigations.

If the FBI adheres to its reference manual and the Department's appeals office maintains strong oversight, inconsistencies among processing teams and between headquarters and field offices will be minimized.

RECOMMENDATIONS

To minimize inconsistencies in FOI/PA implementation, we recommend that the Attorney General require:

--The Office of Privacy and Information Appeals to distribute the substance of its action memos to all Justice Department components regardless of the component specifically addressed.

--The Office of Privacy and Information Appeals to update its guidelines and distribute them to all Department components.

--The Office of Privacy and Information Appeals randomly check initial FBI releases to improve the consistency and quality of FBI releases.

under the Privacy Act the same advisory function for the Deputy Attorney General as under the FOIA.

Under the past organizational structure, the processing and review were very centralized because all of the attorneys' work was referred to two people--the Director and one of the two Deputy Directors. After the Deputy Director reviewed the cases and was satisfied, he referred them to the Director for his review. Further rewrites occurred based on the Director's review.

An appeals office official told us that the supervisory review took from 3 weeks to 6 months, depending on the case and the appeals backlog. The supervisory review, including the considerable rewrites of the attorney's position, added to the processing slowdown.

At the time of the appeals office's creation, the Department expected that it would receive about 300 to 400 appeals a year and would need 3 or 4 attorneys and two secretaries. The workload estimate proved to be inaccurate immediately, so the Department authorized additional permanent attorneys and some on a 90-day detail from the various Department components. As of October 1976, the strength of the office was 15 attorneys, 1 administrative assistant, 2 paralegals, and 7 support staff. As of October 1977, the office's full-time strength was 14 attorneys, 2 paralegals, and 5 support staff. The appeals office also planned to have eight detail attorneys in October 1977; however, only two had been assigned during the last quarter of 1977.

Department components totally reimburse the appeals office according to the time they engage the office's services. The FBI accounts for about 68 percent of the appeals office's time. During the period March 1975 to December 1977, the FBI had been notified of 2,099 appeals. An appeals office official said a study was conducted which showed that approximately 12.5 percent of the FBI processed requests are administratively appealed.

106 percent more cases than in 1976; however, the backlog was reduced by only 139 cases. Given the current backlog and the increasing rate of appeals, the appeals attorney staff will continue to be inadequate to handle the appeals within the 20 days set by the FOIA or the 30-day goal set by the Deputy Attorney General. An appeals office official said that additional people were not needed because with the higher productivity within the office, the present staff is sufficient to take care of all the appeals. He also said that the Department has other important missions which also need personnel and that the present commitment of resources to FOI/PA is quite generous.

Processing of Appeals

The appeals office has adopted the general practice of assigning appeals for processing in their approximate order of receipt. However, a court order, a case in court, or an appellant who can demonstrate substantial need for preferential handling of the appeal will result in moving a request to the front of the list.

Appellants are notified of the receipt of the appeal, the existing backlog, and their appeal number. This original acknowledgement and the final disposition of the appeal is supposed to occur within 20 working days. However, for 538 appealed FBI cases closed in 1976, it took an average of 41 days for the appeals office to make an initial acknowledgement. It took an average of 233 days from date of receipt to final disposition. An appeals office official said the office now processes appeals within an average of about 90 days.

I DID VIA FBI

FBI and DEA officials said that the appeals office was not prompt in informing them of appeals on their initial actions. Sometimes it took several months before they received their copy of the final action dictated by the appeals office, thereby delaying the final response sent to the requester.

Besides the regular appeals process, the appeals office also used another procedure to resolve cases of a more routine nature. The procedure used is a "skim session" in which the Deputy Director agrees to or modifies an analyst's proposals. Under this procedure, 10 to 15 cases were reviewed in 1 day.

After each appeal the office prepares a memorandum explaining its position on that particular case. The memorandum, called an action memo, serves as the most detailed

guidance provided to Department components on how to apply the exemptions. Action memos are given to the component responsible for the case, but as noted in ch. 5, are not provided to all Department components to assure consistent policy implementation.

In 1977 the appeals office closed many cases by assigning three full-time attorneys rather than the Deputy Director to perform skim sessions at the FBI. The three attorneys took care of all outstanding FBI appeals except for complex cases. These cases were assigned to the other appeals attorneys for regular processing. Simpler and less detailed action memorandums and final responses also helped to speed up the processing by reducing the amount of writing to be done by attorneys, the amount of reviewing by upper levels, and the amount of time spent by the support staff. Even with the above improvements, the appeals office found it impossible as of January 1978 to attain the Deputy Attorney General's goal of a 30-day turnaround time.

THE DEPARTMENT REVIEW COMMITTEE

The appeals office also provides staff to the Department Review Committee. The committee is composed of five senior Department officials from the FBI, Office of Legal Counsel, Criminal Division, Security Programs Section, and the Office of the Deputy Attorney General. These officials meet to discuss the classification of documents under administrative appeals. They decide by a simple majority whether a document still warrants classification. The review committee uses Executive Order 11652 to decide what information can be classified. There are four categories of information that are exempted from the general declassification schedule. Most of the FBI's classified information falls within one of these categories. (See p. 49.)

Before July 1976 the review committee met on an irregular basis to review all the classified documents under appeal; however, since July the committee meetings have been held on a weekly basis. When the review committee started to meet regularly, it had 180 cases pending. By January 1977 the number had been reduced to about 40 pending cases plus 25 awaiting consultation with other agencies. From April 1975 to January 1977, the review committee closed 239 cases; however, 200 of these cases were closed after June 1976. In 1977 the committee completed 413 decisions.

Has DRC any way of knowing what classified information is public domain? I have reviewed King records with b(1) claimed for p.d. Which means does FBI assign those who do not know or not provide its Foia people with means of knowing?

Through June 1977, the Department's litigation section had 218 FBI cases, of which 60 had been closed. Of these 218 cases, 118 represented civil actions initiated after a final determination by the FBI, whereas the other cases were initiated while the request was in the FBI backlog.

The section's staff as of June 1977 consisted of 11 attorneys, 1 paralegal, and 9 support staff. According to a section official, the litigation section would need to double the number of attorneys to properly handle the important and difficult litigation requirements of the FOIA and the PA.

The litigation section directly handles about 20 percent of the court cases while the U.S. attorneys handle the rest. The section's attorneys, however, must keep closely informed on all cases and must check all affidavits and other documents involved in the cases. A section official told us that the workload is heavy but that there is no backlog. This official said that all actions to delay court proceedings have come from the agencies. The section officials, however, did have to work considerable overtime to keep up with the caseload.

On May 5, 1977, the Attorney General issued a memorandum indicating that the Government would defend only cases where release of information would be harmful, and directed the Civil Division to review the pending cases and recommend whether litigation should be continued. As a result of this review, four cases were closed, one of which involved the FBI.

The Deputy Assistant Attorney General said the impact of the file review cannot be fully measured in the number of cases closed. He said that "* * * the true significance of the review lies in the change in approach and attitude of Department attorneys assigned to 'defend' FOIA suits." He also said that in several cases the litigation was not terminated, but additional information was released after the cases were reviewed. An official from the litigation section also said they are now more liberal in information releases.

According to a litigation section official, the Government "substantially prevails" in most of the cases. It was impossible, however, to exactly determine how many cases the Government won or lost because in many cases both the Government and the plaintiff prevailed in some of their positions. According to litigation section records, the Government had to pay $104,498 in attorneys fees in 1977. Most of these fees were paid after July 1977.

CONCLUSIONS

The Department of Justice's Office of Privacy and Information Appeals has had a backlog since 1975 and has not been able to meet the 20-day deadline imposed by the FOIA. Appeals officials said that the backlog developed because of the unexpectedly large number of appeals. In addition, our review showed that insufficient staff also contributed to the backlog.

The productivity of the appeals office increased significantly in 1977 because of improvements made in processing procedures and of the extensive use of skim sessions to review FBI cases. However, given the rate of appeals and the current backlog, the staff level is inadequate to maintain effective oversight and meet the deadline set by the FOIA.

The Civil Division's Information and Privacy Section still has a considerable number of pending cases. Officials said the section has never been the cause of delays in court proceedings; however, they believe that additional attorneys are needed to properly handle the FOIA and PA litigated cases. Therefore, given the number and complexity of current pending cases, the current staffing level may still be inadequate.

RECOMMENDATION

We recommend that the Attorney General provide sufficient staffing to the Office of Privacy and Information Appeals and the Civil Division's Information and Privacy Section so that they can act on administrative appeals and litigation in a timely manner and can maintain effective oversight over Department components.

CHAPTER 7

REVIEW SCOPE AND APPROACH

The findings and conclusions in this report are based on (1) our discussions with FBI officials at headquarters and in the FBI Chicago field office, (2) our review and analysis of randomly selected FOI/PA requests received by the FBI, DEA, and AF-OSI, (3) discussions with Justice Department officials at the Civil Division's Information and Privacy Section and the Deputy Attorney General's Office of Privacy and Information Appeals, and (4) discussions with headquarters officials from DEA and AF-OSI. Our review was conducted between September 1976 and November 1977.

To determine how effectively and efficiently the FBI processed FOI/PA requests, we selected a stratified sample of 196 nonproject requests closed between January and September 1976. The 196 requests included 56 no-record cases, 46 administratively closed cases, and 94 cases where information was processed. This sample was to allow us to analyze all the steps taken to process a request.

The FBI's FOI/PA recordkeeping practices during 1976 did not allow us to obtain the information we needed. Therefore, we developed a timetable sheet to be attached to a sample of 272 requests already in the FBI backlog. This sheet remained with the request from the time it left the backlog until the final response was made and was used to record the dates at various stages in the processing.

As with our other reviews of FBI operations, we were not accorded full access to the raw investigative files, although we believe that we have the legal authority to do so. Since full access was not possible, we used several procedures to determine whether the FBI used the FOI/PA exemptions properly. We interviewed special agents and analysts from headquarters and the special agent responsible for FOI/PA at the Chicago field office to determine how they interpreted and applied exemptions. We interviewed attorneys from the administrative appeals office to obtain their views on how the exemptions were to be applied and on FBI compliance. We also participated in some of the meetings between the appeals attorneys and FBI personnel.

Because the FBI provided us with only a copy of the material sent to the requester for the 196 sample cases, we were not able to determine what was excised and if it