

STATEMENT OF

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BEFORE THE SUBCOMMITTEE ON

CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

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Mr. Chairman, I appreciate the opportunity to appear before this Subcommittee today to discuss the FBI's compliance with the Freedom of Information and Privacy Acts (FOIPA). I will describe the requirements placed on the FBI by these laws, place them in the context of the increased demands on our resources, and describe the steps being taken to address these problems.

FBI Records

FBI records present a variety of processing problems which are not shared by many other agencies. Our records are multidimensional, in that they cover criminal, foreign counterintelligence, terrorist, and sensitive background investigative matters. Many contain derogatory information about individuals who have not been convicted or even indicted, the release of which could ruin their personal and professional lives. Our records also identify the persons or organizations who furnished that information. Disclosure of the identities of these sources could jeopardize national security interests or result in retaliation against the sources, and would certainly discourage the future cooperation of potential witnesses, informants, and domestic and foreign law enforcement agencies. The potential for serious, life-threatening, or even catastrophic harm from an erroneous disclosure decision is great. Thus, the review of FBI records for possible disclosure requires a meticulous line-by-line analysis.

Number/Scope of Requests

The greatest contributing factors to our inability to meet the statutory time limits for disclosure of records are the number of requests received and their scope. During Fiscal Year (FY) 1989, FBI Headquarters received 15,593 FOIPA requests. As Chart A (attached) indicates, this represents a 37 percent increase in requests compared to FY 1985. Furthermore, the number of requests received in FY 1990 will be substantially higher than FY 1989 as over 8,000 requests have already been received in the first four months of FY 1990. To a large extent this dramatic increase is the result of a television special, The Secret Files of J. Edgar Hoover, which aired last December. Even without this most recent surge, the number of requests received by FBI Headquarters is a heavy burden.

The scope of many of these requests presents additional problems. Processing is generally more difficult when the request is for a large investigative file. More research is required to ensure consistency in processing, more consultations with FBI investigative divisions are required, and it is often necessary to coordinate the processing with other agencies. Even a single request can tie up several analysts for years. For example, at least three analysts have been working on a full-time basis since 1982 on a request for FBI records pertaining to the assassination of President Kennedy. This problem may be put into perspective by examining our "project requests," those which

require the review of over 3,000 pages. While such requests account for only 3 percent of all requests in which the amount of responsive records has been determined, they represent 40 percent of the total pages to be reviewed.

Another aspect of the "numbers problem" is the multiple requester, that is, someone who has requested information on numerous subjects. For instance, one requester has submitted over 800 requests in the last five years. During FY 1989, a total of 3,046 requests were submitted by only 254 requesters. A prolific requester can tie up an analyst for years, thereby effectively denying the analyst's services to other requesters.

Another dimension to the problem is the additional work and expense associated with simply maintaining a large backlog. As the backlog grows, the turnaround time from receipt of a request to release of processed records lengthens; this generates status inquiries, complaints to Members of Congress, and lawsuits. That in turn further diverts resources from the actual review and processing of records.

FBI Headquarters had 8,012 FOIPA requests in its backlog at the end of FY 1989. While that was an improvement over the 9,947 total at the end of FY 1988, it still represents a 70 percent increase from the 4,736 total at the end of FY 1985. Furthermore, that improvement has been more than offset by the recent surge in requests. The backlog at the end of FY 1990 can be expected to be substantially higher than FY 1989.

Litigation

A precipitous increase in FOIPA litigation also represents a serious problem. As Chart B (attached) indicates, the number of new litigation matters has almost doubled in the last four years, from 71 in FY 1986 to 134 in FY 1989. To some extent this increase is a function of the backlog itself as many plaintiffs turn to the courts to seek expedited processing of their requests. For whatever reason lawsuits are filed, they hobble our operation because analysts must be diverted from processing other requests to assist in answering discovery motions and preparing declarations to be filed in court to justify our processing decisions. These declarations must have adequate detail to provide the requester with sufficient information to argue the propriety of the exemption without disclosing the very material we seek to protect. Some courts, especially those unfamiliar with FOIPA litigation, require agency defendants to satisfy extraordinary description demands for declarations justifying redactions of exempt information. One recent declaration required the efforts of six analysts working for approximately three weeks to satisfy a court's description requirements. The FBI's refusal to release information relating to unconvicted defendants was later upheld, but obviously at a substantial cost in resources.

The Government's burden of proof also requires a disproportionate expenditure of resources. A lawsuit may be brought upon payment of a negligible filing fee, and experienced FOIA requesters quickly realize that the Government's burden to defend every aspect of its processing requires that the plaintiff merely raise an issue to have it fully explored by lengthy agency declarations. If the Government fails to meet its burden in this task, which must frequently be done under tight court-imposed time deadlines, it may not only be forced to process sensitive information hurriedly, it may be required to pay the requester's attorney's fees. The requester, on the other hand, risks little or nothing by filing the suit, as a losing plaintiff is not required to pay the Government's costs to defend against even the most frivolous of claims.

The Ten-Day Rule

Given the realities of the volume and complexity of the FOIPA requests at the FBI, the FOIA's ten-day time limit is unworkable. For FY 1989, the turnaround time for requests which required review of records was 326 days. That represents a 47 percent increase over the turnaround time of 222 days for such requests for FY 1985. (See Chart C, attached). This increase is not attributable to a major loss of resources from the FBI's FOIPA program. In terms of dollars, the FBI spent \$14,593,762

(costs of services, equipment, duplication of documents, etc.) on its FOIPA program in calendar year (CY) 1989, as opposed to \$12,344,802 in CY 1985, an 18 percent increase. Those expenditures, which represented about 1 percent of the FBI's overall budget, were not offset by fees collected from requesters. During CY 1989, the FBI recovered only \$36,784 in fees. To comply with the ten-day rule, or even to approach compliance, would require a massive diversion of additional resources from the FBI's other programs.

Since the FBI has been unable to comply with the ten-day rule, it has followed procedures established in Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 615 (D.C. Cir. 1976). Under Open America, an agency has satisfied the FOIA's time limits if it exercises good faith and due diligence by processing requests on a first-in, first-served basis, except when exceptional need is shown. The agency must also not be "lax overall in meeting its obligations . . . with all available resources." Id. But see Mayock v. INS, 714 F. Supp. 1558 (N.D. Cal. 1989) (appeal pending). Under Mayock, a normal, predictable backlog may not be found to be an exceptional circumstance justifying a delay in processing.

Initiatives Already Implemented

To reduce our backlog and improve turnaround time, the

FBI has implemented the following initiatives within the last year:

- (1) We have begun a pilot project involving the use of optical disk technology to reproduce records and make redactions.
- (2) We are using field analysts at national training seminars to reduce the FOIPA Section's backlog by having them stay an additional week to process requests.
- (3) We do our own on-line indices searches for requesters seeking records about themselves, thus eliminating the delay involved in sending these requests to another section to be searched.
- (4) In appropriate cases we no longer conduct a classification review of records which are being withheld pursuant to other FOIA exemptions.

These initiatives have had a positive effect. Requests on hand decreased by almost 20 percent from the end of FY 1988 (9,947) to the end of FY 1989 (8,012). Requests closed increased by 29 percent from FY 1988 (13,614) to FY 1989 (17,528). Unfortunately, however, these improvements have been more than offset by the recent surge of new requests.

As for the future, we intend to expand on the use of optical disk technology if our pilot project is a success. We

will also continue to use our field analysts at national training seminars to work on requests from the FBI Headquarters backlog. On the whole, FOIPA processing will remain a labor intensive endeavor with few economies of scale.

Conclusion

In a nutshell, the FBI's inability to comply with the time limits of the FOIA can be attributed to two simple facts:

- (1) The FBI possesses a huge amount of information that is sought after by the media, authors and scholars, prisoners, and members of the public.
- (2) This information is difficult to process for disclosure because of its sensitivity and complexity.

This concludes my prepared testimony. I would be pleased to address any questions the Subcommittee might have on these issues.

CHART A

FOIPA PROGRAM

NEW REQUESTS / REQUESTS CLOSED / BACKLOG

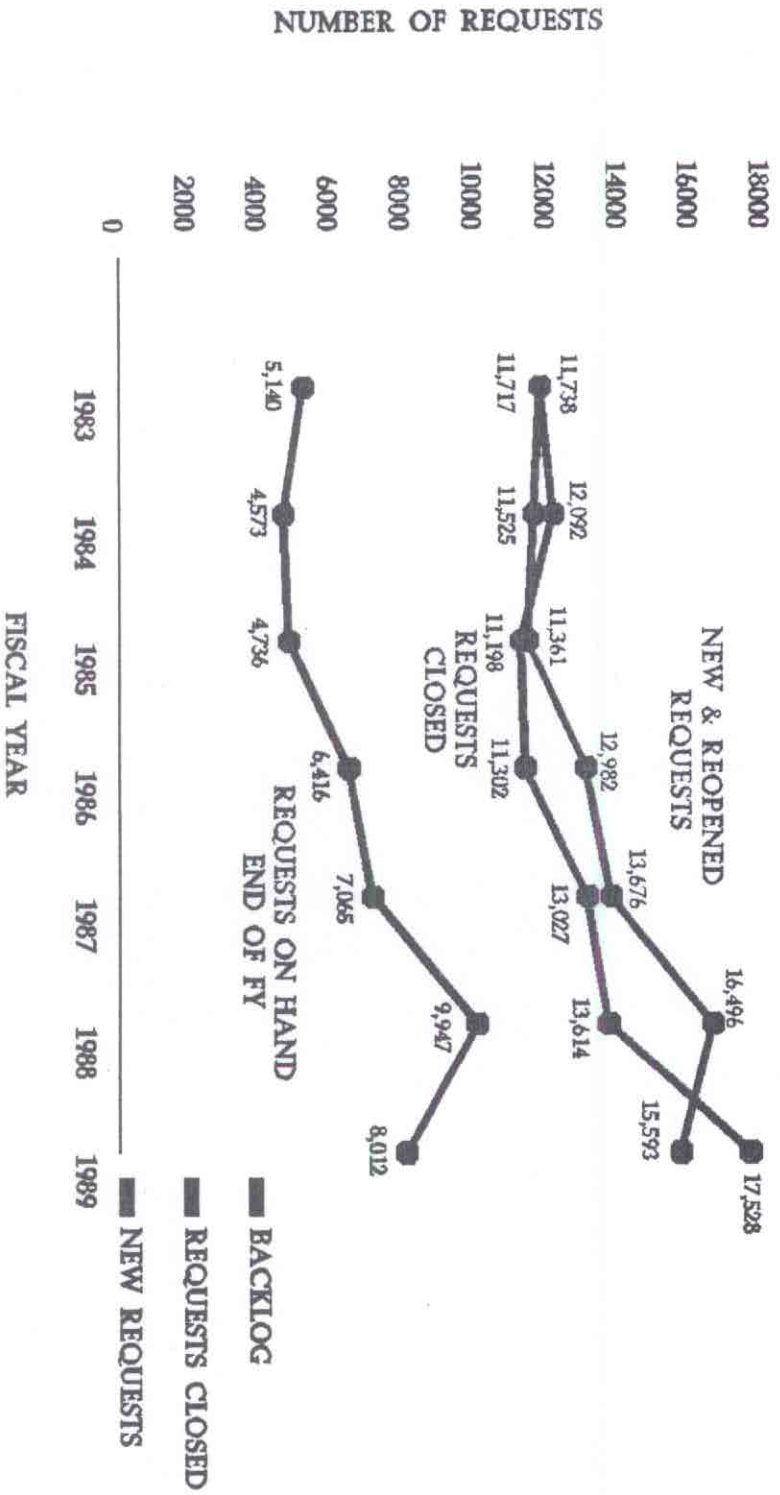


CHART B

FOIPA PROGRAM

LITIGATION

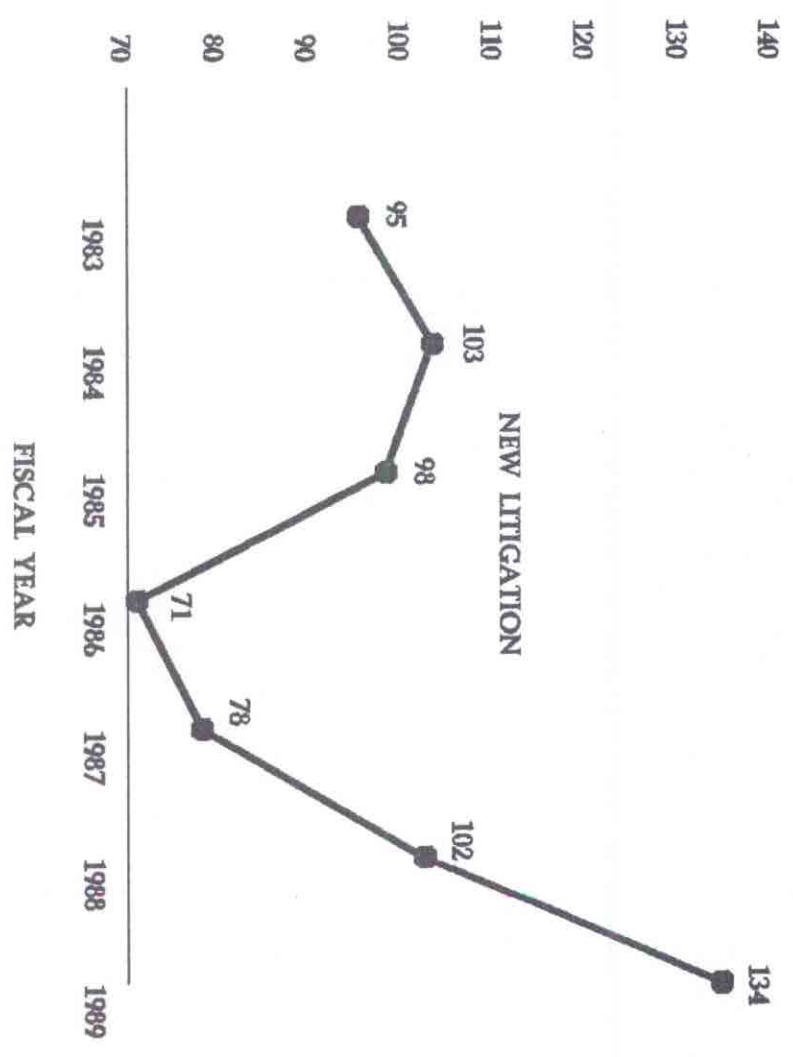


CHART C

FOIPA PROGRAM

TURN AROUND TIME

