UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

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

December 8, 1969

MEMORANDUM TO GENERAL COUNSELS OF
ALL FEDERAL DEPARTMENTS AND AGENCIES

Re: Coordination of Certain Administrative Matters under the Freedom of Information Act, 5 U.S.C. 552.

The Freedom of Information Act, providing for compulsory disclosure of agency records not exempted by the Act, confers administrative responsibility on each agency and makes the agency's final decisions subject to judicial review. The Department of Justice conducts litigation in defense of agency determinations under the Act and furnishes certain advisory and other services pertaining to Freedom of Information problems. In general, the Department's litigation functions in this area are conducted by the Civil Division, and the advisory and other functions are conducted by the Office of Legal Counsel.

In discharging these functions, the Department has noted several developments which we believe

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attention. First, the government in recent months has lost cases in court which involved a number of the exemptions contained in the Act. Consumers Union v. Veterans Administration, 301 F. Supp. 796 (S.D.N.Y. July 10, 1969) (involving exemptions 2, 3, 4 and 5); General Services Administration v. Benson, 415 F. 2d 878 (9th Cir. Aug. 26, 1969) (exemptions 4 and 5). Second, there has been considerable variation in agency practices with respect to consulting the Department on Freedom of Information controversies before the agency takes final action which may result in the filing of suit against the agency. Third, there are particular problem areas under the Act which are common to a number of agencies, where an exchange of views may be beneficial.

The implications of the judicial decisions cited above, as well as other cases, are under continuing review in the Department. However, enough review has already been accomplished to point to two conclusions: (1) Although the legal basis for denying a particular request under the Act may seem quite strong to an agency at the time it

elects finally to refuse access to the requested records, the justification may appear considerably less strong when later viewed, in the context of adversary litigation, from the detached perspective of a court and from the standpoint of the broad public policy of the Act; (2) An agency denial leading to litigation and a possible adverse judicial decision may well have effects going beyond the operations and programs of the agency involved, insofar as it creates a precedent affecting other departments and agencies in the Executive Branch.

In view of the foregoing, it seems manifestly desirable that, in most instances, litigation should be avoided if reasonably practicable where the government's prospects for success are subject to serious question. This can often best be done if, before a final agency rejection of a request has committed both sides to conflicting positions, the matter is given a timely and careful review, in terms of litigation risks, government-wide implications, and the policy of the Act, as well as the agency's own interests. To facilitate review of the nature just described, we need your cooperation. To

improve cooperation on our part, we have just established an informal committee of representatives of the Civil Division and of the Office of Legal Counsel.[1] The functions of this committee will be to assist in such review and help assure closer coordination in our work.

We request that in the future you consult this Department before your agency issues a final denial of a request under the Freedom of Information Act if there is any substantial possibility that such denial might lead to a court decision adversely affecting the government. Such consultation will serve the review function discussed above, and in some instances may also enable us to assist you in reaching a disposition of the matter reasonably satisfactory both to your agency and to the person making the request. The requested consultation may be undertaken

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1/ The members of this committee as of now are: Jeffrey F. Axelrad, Civil Div., ext. 3300; Robert V. Zener, Civil Div., ext. 3354; Steven P. Lockman, Office of Legal Counsel, ext. 2039; and Robert L. Saloschin, Office of Legal Counsel, ext. 2674, chairman. Deputy Assistant Attorney General Thomas E. Kauper, Office of Legal Counsel, ext. 2051, will be chairman ex officio.

formally or informally as you prefer, and ordinarily should be directed initially to the Office of Legal Counsel rather than to the Civil Division.

As regards the third development under the Act noted near the beginning of this memorandum -- the emergence of certain problem areas common to several agencies on which exchanges of view and experience may be mutually beneficial -- there is one such area warranting mention at this time. This area consists of various questions as to the availability of information on the testing of manufactured and other products (including such items of information as the identity of the maker or supplier, brand names, models, generic descriptions, test criteria, test procedures, test results, comparative ratings, limitations pertaining to products or characteristics not tested, etc.). If the activities of your agency involve testing or information pertaining thereto, we would welcome any statements of experience, policies or views which you may care to provide. Such statements may prove use-

ful to other agencies engaged in similar activities and to this Department in representing or counseling such agencies.

It is our hope that through the consultation and review procedures outlined above and through exchanges of experience and views on problems of common interest, positive benefits will accrue to individual agencies, the government as a whole, and the public.

Please feel free to call us if you have any questions about the foregoing.

William H. Rehnquist
Assistant Attorney General
Office of Legal Counsel

William D. Ruckelshaus
Assistant Attorney General
Civil Division