A bi-weekly newsletter on Freedom of Information and Privacy

ACCESS REPORTS

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WASHINGTON FOCUS: Federal Bureau of Investigation charges that criminals are abusing the Freedom of Information Act may be winning public support, according to one Justice Department official . . . . In several recent speeches, FBI Director William H. Webster has called for a 10-year moratorium on access to materials from the bureau's investigative files. He says convicts and others use the FOIA to identify informants or to gain information that would weaken the government's cases against them . . . . The Justice Department source says Webster may be acting as a kind of lightning rod, using the speeches to test public reaction to any move toward restrictions on access. Suprisingly, the source says, there have been "no adverse reactions at all from any source" . . . . The official argues that FOIA reform is needed to protect open and active investigative files but that public sentiment may demand even stronger curbs on disclosure. Webster's complaints "are playing well in Peoria," the official says, and every day that goes by reduces the chance for a middle-ground solution . . . . Congressional sources have in the past called the government's complaints belly-aching. However, if political analysts are correct, a more conservative 96th Congress could be more sympathetic to the FBI's plea to restrict access. . . . One previously confident source said she was afraid what might happen were Congress to tackle the FOIA now. She said an assault might not stop with one section of the act and Congressional action might leave the act's openness provisions gutted.

MAJOR STORIES IN THIS ISSUE

JUDGE RULES NO PRIVATE CHECKUP NECESSARY WHEN U.S. AGENCIES JUSTIFY WITHHELD DATA

Detailed agency indexes and affidavits concerning material withheld from disclosure under the Freedom of Information Act make it unnecessary for a court to inspect the material privately (*in camera*), according to a recent opinion of the U.S. District Court for the District of Columbia.

The council approved the bill (No. 2-238) by a 7-2 vote earlier this month but must pass it again before it can be sent to the mayor's office for his signature. An overwhelming majority of states still require that adoption records be kept secret.

As originally drafted, the bill would have allowed adopted children to have access to records on them maintained by adoption agencies and the D.C. courts after reaching the age of 18. An adoptee would simply have to get the consent of one adoptive parent to gain access to the records.

Opponents of the measure succeeded in adding several amendments that would increase the conditions that must be met before adopted children could see their records.

The amended version would raise the age of access to 21 and would require the adoptee to obtain consent from one adoptive parent and one natural parent. When the adoptee requests his records, the D.C. Department of Human Resources would have 180 days to locate the natural parent and 90 additional days to release the records if everyone consented. If the natural parent could not be found or had died, the adoptee could see the records. If one natural parent consented to release of the records but the other did not, then the name of the objecting parent would simply be removed from the records. Finally, the measure would require the adoptee to undergo at least one counseling session, with or without both sets of parents, conducted by the department, to learn of any problems that might result from disclosure.

The legislation also would increase the department's recordkeeping responsibilities. It would require a more detailed report on the natural parents and the adopted child's medical history. A more complete social history would have to be filed, including information on the natural parents' nationality, racial composition and physical appearance, the existence of siblings and the reasons for putting the child up for adoption.

The measure was the target of emotional debate, which led to the amendments which modified the openness provisions. Supporters of the bill argued that adoptees have a right to information about their heritage and the medical history of their biological parents. Opponents predicted that the legislation would mean more black market adoptions and abortions if parents cannot be guaranteed anonymity.

Because only two of the council members opposed the legislation, it is expected to receive final approval when the council votes on it this week. An assistant to the council told Access Reports that additional amendments may be added to clarify the bill's language and definitions, but major changes are unlikely.

SPECIAL REPORT

WHAT'S A GOVERNMENT TO DO WITH ALL THOSE FILES?
THROW THEM OUT, OR BE 'OVERWHELMED WITH BOXES'?

In the past few months, numerous charges have been made that the Federal government has destroyed files that should have been retained and made available to the public.

FBI agents say field offices have destroyed files rather than make them available under the Freedom of Information and Privacy Acts.

FBI officials admit the destruction of several files connected with the espionage case of Julius and Ethel Rosenberg over the past decade, despite directives and orders that they be preserved.

Drug Enforcement Administration officials have been accused of destroying entire files systems that were requested under the FOIA.

Other charges abound. Sensational as they are, they tend to obscure a basic problem Federal agencies must confront daily -- what gets destroyed to make room for new files and what gets saved to retain a public record that can be used 50 years from now?

To some people, mostly government records managers, file destructions occur daily to keep the Federal bureaucracy from being buried in paper. One official of the National Archives has estimated that the amount of paper generated by the Federal government in only one year would fill the National Archives Building in Washington 10 times over.

ONE OF THE WORLD'S GOOD PEOPLE

On the other hand, people like Ann Schmidt, of the Bureau of Prisons, say there should be procedures for saving files that are or will be of historical interest. Unfortunately, the bureau, like many other Federal agencies, has no consistent policy or procedures for identifying those files that will be saved and those that will be thrown away.

? WHO HE/SHE?

As one Justice Department official explained it, the problem is like the tension that exists between openness and privacy: There are conceptual problems in conflict.

What results is that many files in which the public may have an interest disappear. Without a file, public access is a meaningless term. Moreover, the Freedom of Information Act cannot restore files that have been destroyed.

Schmidt says the Bureau of Prisons' example illustrates the difficulties in the informal approach to decision-making concerning the retention of files. Recently the bureau destroyed thousands of files on Federal prisoners, spanning almost three decades.

As Schmidt explains it, there are basically two types of files at the Bureau of Prisons, prisoners files and administrative files, which are "everything except prisoners files." About a year and a half ago, the General Services Administration notified the bureau that it would accept no more records from the agency for storage unless they were marked with a destruction date.

According to a spokesman at the National Archives and Records Service, the refusal to accept any more files became necessary after the Bureau of Prisons had stored about 45,000 cubic feet of boxed records in the Federal Records Center. After the GSA ultimatum, the Bureau of Prisons too felt the pinch, Schmidt says, and individual institutions were "being overwhelmed with boxes."

Clearly something had to be done. Over the objections of some officials in the bureau who argued that prisoner files should be retained as important social and historical documents, the bureau issued a flat policy statement that all such files would be destroyed 30 years after the expiration of the prisoner's sentence.

Schmidt says she opposed the wholesale destruction of everything and managed to convince bureau officials that major categories should be retained for a longer period of time. Among the categories established were those encom-

passing the files of inmates at Alcatraz, women who had been incarcerated at Alderson and "notorious offenders." That category included persons convicted of sedition, espionage, treason or virtually "anything that makes you memorable," Schmidt explained.

Except for the major categories, all files of Bureau of Prisons inmates from 1920 to 1948 have been destroyed. Even the files that were saved are slated for destruction in 2025. Moreover, Schmidt charges that there is no present procedure for saving the files of modern "notorious offenders," such as John Ehrlichman, H.R. Haldeman, John Mitchell and others convicted in the Watergate scandal.

Even after trying to save as many relevant categories as possible, Schmidt said she found that files were destroyed that could have been politically significant or could have been needed by researchers or by a former inmate. She cited the example of one inmate from the 1940's who asked for access to medical records made while he was in prison. His doctor had discovered a shadow on a chest x-ray and needed the older film to determine if it was a condition of long standing. But the files had been destroyed.

Schmidt says, "What gets saved is based on my own biases, and I don't think it should be that way. I don't think it is that hard to work out policy guidelines for retaining important records."

Independent advice by historians or political scientists about what should be saved is generally not solicited, Schmidt complained.

A spokesman for the National Archives says it is relatively rare that outside historians or researchers are asked to give advice about records retention. Once a record series, or a general category of records, gets to the archives, sheer volume makes it difficult if not impossible to look at individual records to determine their worthiness for preservation.

The spokesman said, "While you might think that John Mitchell's file is important, considering the hundreds of thousands of records, who's going to decide about whom?"

Smith College historian Allen Weinstein, who relied heavily on government files in his study of Alger Hiss, learned of the Bureau of Prisons destructions almost by accident.

WHAT EVER HAPPENED TO ?

Weinstein said he was alerted to the destruction by Justice Department official Quinlan Shea, chief of the Office of Privacy and Information Appeals. Weinstein said that some of the records being prepared for destruction dated from the 19th century and were of "great historical value."

Records managers have a different perspective, and what is not important to them may be extremely important to someone else, he said. "They should not have the power autonomously to make decisions about records destructions. These are issues that should not be decided without some kind of independent input."

Ed Worthy, assistant executive director of the American Historical Association, said the association did not become involved in the Bureau of Prisons destruction. The AHA makes a case for preservation only on an ad hoc basis, and no formal policy exists concerning lobbying against record destruction.

Worthy adds that historians are not the only parties interested in record

retention. Computer data, for example, may be of interest to researchers in a wide variety of disciplines.

Agencies, too, might have a "vested interest" in destruction of records, Worthy says, but the problem is deciding who can or will make the decisions. Business historians who have an interest in what the Securities and Exchange Commission has done might have better knowledge of what the commission should save for future use. They will probably not be consulted, however, and valuable records will end up being destroyed.

As to charges that records are deliberately destroyed to conceal wrongdoing or to avoid making records public under the FOIA, the Justice Department's Shea says, "I think there's a lot less venality in the government than people would like to believe. I think that would take a directed policy, and I don't think you could keep that secret."

Shea said there needs to be a better mechanism for recognizing files that may be important in the future and a procedure for saving them.

That is Schmidt's point of view, too. However, she said apparently no lessons were learned in the prisoners' files destruction. "That's the real horror of it. In a sense," she said, "nobody's really learned anything. People still see it just as a pile of paper. The idea of dumping John Mitchell's file kind of offends me."

CLEARINGHOUSE

Oral arguments are scheduled at the Supreme Court Nov. 29 in a case involving public disclosure of policy directives issued by the Federal Open Market Committee of the Federal Reserve System. The Court of Appeals ruled that the documents must be made available as soon as they are adopted, rather than after a delay as requested by the government. The committee has argued that a delay of about a month is needed to enable the system's account manager to implement monetary policy and to prevent speculation by members of the public. The appeals court said nothing in the FOIA permits agencies to keep final policy decisions secret (FOMC v. Merrill: S Ct No. 77-1387).

Certain written determinations issued by the Internal Revenue Service in response to taxpayers' requests will be opened for public inspection on March 5, 1979. Issues covered include IRS rulings on employee pension plans and trusts, tax-exempt organizations, private foundations, actuarial questions involved in the tax treatment of pension plans, among other related matters. Notice of the disclosure was published in the Nov. 9 Federal Register. A person at whose request a particular determination was issued may request deletions before the record is made public by writing before Dec. 14 to: IRS, Attention: T:FP:R, Ben Franklin Station, PO Box 7604, Washington, DC 20044.

The U.S. Court of Appeals for the District of Columbia Circuit has sent back to district court a Freedom of Information Act case involving access to Central Intelligence Agency files about the Church of Scientology, allegedly disseminated to foreign governments. The appeals court returned the case to obtain more details about documents the government says are exempt from disclosure. The action was in response to the D.C. Circuit's decision in Ray v. Turner (see Access Reference File, 13.575). (Church of Scientology v. Turner: CA-D.C. -- No. 78-1832; Nov. 15.)