Harold — my notes on FBI's FOI/PA Manual

FREEDOM OF INFORMATION/PRIVACY ACT REFERENCE MANUAL (FEDERAL BUREAU OF INVESTIGATION), MARCH 1977

Editor's Note

DAG Guidelines
Action Memoranda

Action memorandum is prepared on all FOI/PA appeal cases.

DAG considers memoranda to be attorney work product.

Text

1 1946 APA, §3

--"properly and directly concerned"

--"secrecy in the public interest"

--"related to internal management"

--"held confidential for good cause"

--no judicial review

2 1958 Amendment to 5 U.S.C. § 22 (1789 housekeeping statute):

This section does not authorize withholing information from the public or limiting availability of records to the public.

3 PL 89-487, signed July 4, 1966, effective, July 4, 1967.

4 investigatory and criminal law enforcement agencies not the primary focus of openness legislation prior to 1967.

"Most shortcomings in the 1967 law, however, were generated from the experience of requesters dealing primarily with government agencies other than the FBI."

7 quotes Source Book on need for constructive attitude by top leadership and genuine desire to make more information public.

10 Privacy Act:

--material may be withheld only if classified or to extent confidential source will be identified

10 FBI has exempted itself from correction or amendment of investigative records

11 Privacy Act does not bar disclosure under FOIA.

14 Disclosure of information is favored, must be practiced and should be accomplished with an eye toward withholding only that which if released would harm lawful enforcement efforts or jeopardize personal privacy.

16 DCRU also performs mandatory declassification review of documents over 30 years old.

19 Routing Unit-IPU-Service Unit.

IPU maintains duplicate copies of request and searches assignment card.

Service Unit conducts general indices search.

20 IPU sends "no request" response or acknowledges request and places it in backlog.

IPU sents to file review to assure records identifiable with request.

25-26 Service Unit.

Index cards possibly pertinent to request are listed on a search slip, which is attached to a copy of the FOI/PA request and forwarded to the IPU.

28 "reasonably describes" was designed to insure that a requirement for a specific title or file number cannot be the only requirement of an agency for the identification of documents. H.Rep. No. 93-876, 93d Cong., 2d Sess. 5-6.

Agency should notify requester if request does not reasonably describe records sought.

30 Absent an authorization from the subject of a third party request we still review any existing material to locate material in the public domain available with or without the authorization of the subject of the records.

31 If the requester asserts that subject is dead, agency "may accept the assertion for purposes of searching for and processing records. . . ."

43 Can use (b)(3) to withhold copyrighted materials

State statute cannot be basis for (b)(3), only federal statute. Action Memorandum 133.

51 Action Memorandum 40, no (b)(5) for lab worksheets (but author disagrees)

54 "Improper use of exemption (b)(5) is discouraged by the policy of the Deputy Attorney General involving discretionary release of (b)(5) materials, provided release would not inhibit the free and frank exchange of views concerning important law enforcement concerns or major policy decisions." 12/ (emphasis added)

12/ Action memoranda 54, 55, 76 and 95. Action Memorandum No. 54 specified discretionary release appropriate unless "adverse consequences" raise compelling need to withhold the record. This is the general policy in processing historical requests. Action Memorandum No. 76 acknowledged (b)(5) as applicable, but argued that revealing action recommended but not taken, was informative. Action Memorandum 95 upheld application of (b)(5) to withhold an agent's evaluation concerning development of a potential informant.

55 "Policy of the Department of Justice is to waive application of exemption (b)(5) in situations unlikely to effect primary law enforcement concerns or which do not involve major policy deliberations."

58 4/ The FBI is therefore defending the privacy interests of third parties. As a law enforcement agency our advocacy on behalf of those interests is vulnerable to attack: (a) as an excuse to withhold material that would embarrass the agency rather than protect privacy rights, (b) since it represents the defense of a concept the agency is lawfully obligated to place in a secondary status when collecting personal information through interviews, execution of search and arrest warrants, conducting court-ordered or national secrity wiretaps and similar efforts to perform mandated functions, and (c) because of criticism for certain abuses of authority frequently related to privacy rights. Despite justifiable criticism of the necessity to engage in actions that intrude upon privacy, law enforcement personnel generally acquire a quantum of experience with human sorrow, the traumas of embarrassment and humiliation associated with both victims and certain nonpathological perpetrators of crime, which may uniquely qualify them to perform the required balancing of conflicting interests.

58-59 "And if anything can be said about privacy with certainty, it is what revelations may concern one individual will not bother another and that slight variations in circumstances will produce markedly different reactions.

62 In Rose court looked away from unlikely but possible invasions of privacy.

72 Sen. Hart explained that to qualify as an "investigation" "it would be sufficient if the investigation might result in some Government 'sanction' (e.g., a cutoff of Government funds), not necessarily a prosecution." 1975 Source Book, p. 333.

76 "However, even in the pretrial proceedings of the criminal investigation (b)(7)(A) is not to be applied as a 'blanket denial' to the entire investigation.

After the case is presented in court, (b)(7)(A) has little application as it is much more difficult to show that release will interfere with enforcement proceedings.

90 Exemption 7(C) "exists primarily for the purpose of preventing . . . the mental distress resulting from the public exposure of intimate or embarrassing personal details about the private life of an individual." Tennessean Newspaper, Inc. v. Levi, 403 F. Supp. 1318 (1975), note 1.

98 Conference Report:

> The substitution of the terms "confidential source" in Section 552(b)(7)(D) is to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. Under this category, in every case where the investigatory records sought were compiled for law enforcement purposes--either civil or criminal in nature--the agency can withhold the names, addresses, and other information that would reveal the identity of a confidential source who furnished the information. However, where the records are compiled by a criminal law enforcement authority, all of the information furnished only by a confidential source may be withheld if the information was compiled in the course of a criminal investigation. In addition, where the records are compiled by an agency conducting a lawful national security investigation, all of the information furnished only by a confidential source may also be withheld. The

99 conferees intend the term "criminal law enforcement authority" to be narrowly constued to include the Federal Bureau of Investigation and similar investigative authorities. Likewise, "national security" is to be strictly construed to refer to military security, national defense, or foreign policy. The term "intelligence" in Section 552(b)(7)(D) is intended to apply to positive intelligence-gathering activities, counter-intelligence activities, and background security investigations by governmental units which have authority to conduct such functions. 1975 Source Book, p. 230.

1975 Attorney General's Memorandum:

99 The first part of this provision, concerning the identity of confidential sources, applies to any type of law enforcement investigatory record, civil or criminal. The term "confidential source" refers not only to paid informants but to any person who provides information "under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. In most circumstances, it would be proper to withhold the name, address and other identifying information regarding a citizen who submits a complaint or report indicating a possible violation of the law. Of course, a source can be confidential with respect to some items of information he provides, even if he furnishes other information on an open basis; the test, for purposes of the provision, is whether he was a confidential source with respect to the particular information requested, not whether all connection between him and the agency is entirely unknown.

The second part of clause (D) deals with information provided by a confidential source. Generally speaking,
100 with respect to civil matters, such information may not be treated as exempt on the basis of clause (D), except to the extent that its disclosure would reveal the identity of the confidential source. However, with respect to criminal investigations conducted by a "criminal law enforcement authority" and lawful national security intelligence investigations conducted by any agency, any confidential information furnished only by a confidential source is, by that fact alone, exempt.

A further qualification contained in this second part of clause (D) is that the confidential information must have been furnished "only by the confidential source." In administering the Act, it is proper to consider this requirement as having been met if, after reasonable review of the records, there is no reason to believe that identical information was received from another source.

103 Gordon v. United States, 438 F.2d 858 (5th Cir. 1971):

> Generally speaking, therefore, an informer is an undisclosed person who confidentially volunteers material information of violations of the law to officers charged with enforcement of that law.

Guidance from the Department of Justice, Office of Privacy and Information Appeals, has generally followed the policy of encouraging discretionary release of source informationthat would normally be covered by the second clause of (b)(7)(D), where it is clear that such a release would not compromise the source. In instances where release of the information provided could identify the source the Appeals Unit allows for withholding the material. Action Memoranda Nos. 2, 26, 38, 100, 106 and 114. This policy allows for the basic thrust of the FOIA which is geared toward maximum
104 disclosure and to a degree addresses the language of the last paragraph of the (b)(7) exemption concerning release of reasonably segregable portions of records. It also follows the "harm theory" by advising the release of material in situations where no harm to Bureau operations would arise, i.e., if only one source has provided a particular piece of information and deletion of any source identifying data can be made, the information can be released without causing any harm.

Pursuant to (b)(7)(D), it shall be the policy to protect the identity of all persons who provide information when an express or implied assurance of confidentiality exists. It shall be the policy to withhold both the identity of the source and the information provided where the identity of the source could be determined from the information. It shall also be the policy to release the information provided by only one or two sources if the nature of the information is such that the source or sources could not be identified.

105 (b)(7)(E)

This exemption applies to the technique or procedure itself and not necessarily to the results, although the results may be exempt pursuant to another exemption. It is the mechanics of the technique or procedure which merit protection; i.e., in an electronic surveillance, the acutal operational details of the surveillance would be protected ..., whereas the results of the surveillance would be disclosed subject to other exemptions.

106 Examples of techniques or procedures protected pursuant to (b)(7)(E) would be electronic surveillance (the mechanics), pretext interviews and calls, trash covers, mail covers, various Bureau albums, flash notice, INS lookout notice, etc. In order to assert this exemption, the technique or procedure must be one which continues to be utilized. Thus,

118 lists file classifications which are not criminal
119 or national security files, including:

62 (Miscellaneous, including Administrative Inquiry; Miscellaneous, Civil Suit)

66 (Administrative Matters)

67 (Personnel Matters)

94 (Research Matters)

Section III: Discussion of Issues

141 A person waives no privacy as a result of his consanguinity or affinity to a requester.

"4. Whether the release to the requester that his relative was the subject of investigative interest to the FBI is an unwarranted invasion of the personal privacy of the relative depends upon the circumstances of the investigation. For example, generally the more derogatory, private and sensitive the information is concerning the relative, the more likely the disclosure would be an unwarranted invasion of his personal privacy. For example, to release the fact that the FBI conducted a background investigation on the requester's father for a sensitive Government position would probably not in itself be an unwarranted invasion of the father's personal privacy. Action Memorandum No. 58. However, information concerning the relative's involvement in the Communist Party, criminal activity, or very personal material would trigger the balancing test (balancing the requester's need for the information against the resultant invasion of privacy) to determine if the invasion is unwarranted.

145 An invasion of privacy to be protectable requires more than merely having one's name disclosed as appearing in a Government document. Investigatory records include the names of employers, relatives, casual acquaintances, public persons and the like, who enjoy no right of privacy relative to disclosure of their names. Each individual in this category crosses paths with a criminal or security subject (or any other person investigated by the FBI) in an underogatory context.

3/ *** See Action Memorandum No. 78 potential witnesses name withheld because confidentiality implied, i.e., (b)(7)(D). Contrast this decision with Action Memorandum No. 76 which notes that actual witnesses (trial) are not

145 protected by (b)(7)(C), no longer enjoying either privacy or confidentiality as to their statements. See also Action Memoranda Nos. 53, 96 and 126 where assertion of (b)(7)(C) justified because a third party would have been revealed as the subject of a criminal or national security investigation. *** Not every third party name recorded in an FBI document is there because of an embarrassing, derogartory or painful experience. Tehrefore, not every name should be or can be excised because of (b)(7)(C). Additionally, the names of third parties and personal information concerning third parties, if furnished by the requester, may not be withheld.

146 if the name and/or identifying personal information concerning a third party appears in an embarassing, painful or derogatory context, unquestionably release would cause an unwarranted invasion of privacy. Under these circumstances release can be justified only if the public's right to know outweighs the individual's personal privacy. To justify any such invasion will require a keen examination of the public's use of the information. Unless significant legal, political or social issues may be resolved or clarified by release, excision is the proper course to follow. Simply stated, once a determination has been made that a right of privacy inheres in the recorded information, balancing is required to determine if release may be granted; although discretionary release may be adopted as the correct adnistrative course to pursue.

147 Discretionary release should apply where common sense dictates the information is already in the public domain 6/ or easily accessible to the requester from other sources, including his/her (the requester's) personal knowledge of the facts. 7/ Typical of this situation is a request by one of two or more convicted co-defendants. 8/

6/ Action Memorandum No. 46 specified that because individuals had been identified due to their testimony in court, their identities were in the public domain and should be released.

148 Historical interest cases represent information determined to be of significant public interest. Thus, where so declared, the balancing has taken place and the resulting judgment is that the public's right to know outweighs the privacy interests of principals mentioned in the records. Action Memoranda Nos. 20 and 129. Lesser, or tangentially mentioned figures in historical cases continue to enjoy the same rights to protection as third parties identified within any investigation.

148 Non-historical third party requests for any records concerning an identified person present a unique problem. To deny, which requires citing an exemption, may leave the impression that the identified party concerning whom records were requested was a subject of investigation. The law allows for no alternative except review of any relevant rec-
149 ords, release if warranted following the analysis, ... 13/, and denial of specific materials that would constitute an unwarranted invasion of personal privacy. 14/

149 13/ Title 5, ... Section 552(a)(6)(i) requires that "reasons" for any denial be furnished to a requester. Title 5, ... Section 552(c) permits denial only on grounds specified in the statute, e.g., one or more of the nine exemptions. To neither confirm or deny the existence of records in response to a request is not authorized. (Note: an exception to this position may exist if the record is classified; although, even then (b)(1) should be cited without confirming or denying the existence of a record).

14/ Action Memorandum No. 71 specifies that in third party request situations newspaper articles and public records such as affidavits filed to obtain arrest, search or court ordered electronic interceptions (if not sealed) should be released.

152 Absent close living heirs, no basis exists for refusal to disclose even the most distateful personal details concerning a deceased person, unless one can muster support for a sense of common decency implicit in all legislation enacted by the
153 Congress....

153 Those factors which sould be considered relevant to the public's right to know are:

(1) Whether the information is pertinent to important legal, social or political issues vital to the populace;

(2) Whether the information reveals personal conduct inconsistent with official responsibilities relative to elected or appointed officials;

(3) Whether the information appears in a reliable context that will dispose of, or confirm allegations as opposed to giving birth to further inaccuracies or ugly gossip; and,

(4) Whether the information serves to clarify an agency's policy toward the collection and use of sensitive information regardless of whether such exposure is favorable or would provoke criticism.

158 The Deputy Attorney General ... has determined that corporations and organizations per se do not have a right of personal privacy to be invaded or protected.

161 The governing factor is that no right to personal privacy exists over that which is publicly known. It has been our position that the mere admission to a third party of the existence of an FBI investigative file is an unwarranted invasion of personal privacy. Some support for this position is indicated in the Deputy Attorney General's handling of appeals. The issue of being a "public figure" with regard to a person's career does not effect his privacy rights, unless his prominence has some relationship to our investigative interest in him. For example, if a person's "prominence" is due to his criminal activities (e.g., member of FBI's 10 most wanted fugitives), the disclosure by the FBI of information about his criminal activities to third parties would not be an unwarranted invasion of his personal privacy. However, his investigative file may contain information of an intimate, personal nature which can be withheld pursuant to (b)(7)(C).

162 Similarly, no unwarranted invasion of personal privacy would result form the disclosure of information of a noncriminal public figure in FBI files when he is identified in his "public role," (e.g., politician, civil rights leader, etc.), but to release to third parties the existence of FBI investigative interest in him because of alleged criminal activity would be an unwarranted invasion of his personal privacy. In this regard the Deputy Attorney General has noted that statements the disclosure of which would constitute an unwarranted invasion of person[al] privacy can be effected by prior widespread publicity. According to the Deputy Attorney General, the widespread circulation of such statements is the "gross" or "unwarranted" invasion of personal privacy and the subsequent release by the FIB is therefore, not protectable. Action Memorandum No. 142, note 2. The Deputy Attorney General in considering appeals from third parties for the investigative records of others has ruled that information in the public domain (news clippings, Department of Justice press releases, etc.) does diminish the criminal's privacy rights, at least to the extent that the existence of an FBI file is an unprotected fact.

166 When the employee has a public function and/or exposure and is identified in our files in such a role there can be no reasonable expectation of privacy and disclosure of identity is required.

169 Arrest records are made public through court dockets, police blotters, press releases, and court clerk records.

172 Material furnished by other Federal agencies will often appear in files. The (b)(7)(D) exemption should not be used in regard to this type of information. No federal institution can be considered a confidential source. *** However, in some situations, an employee of a Federal Executive agency will furnish information beyond the scope of his or her authority or even in violation of agency regulations. The ... [OPIA]

173 In most states, automobile registration and driver's license records are considered public records. In the abasence of any information in a file which would specifically indicate the records were received confidentially, they can be released to a requestor. ***

184 --administrative markings should be released on a discretionary basis to increase the productivity of FBI's analysts and achieve some reduction of backlog. (Were deleted in the past on theory that they were outside scope of request.)

185 "Therefore, administrative markings which are unique to FBI communications sh ould be released as a matter of discretion unless there is an exemption other than (b)(2) applicable to the particular administrative marking or device which protects a significant law enforcement concern.

187 The FBI over the years ... has developed several terms which appear frequently in Bureau documents. These words, such as "T symbol," "source," "references," "enclosures," etc., are deleted according to current policy because of exemption (b)(2).

Pursuant to the FBI's desire to expedite processing it is believed that the majority of these words and phrases should be released to the requester in order to effect a time savings.

However, in some instances wherein a particular source repeatedly furnishes information and the source is identified with a T symbol, this T symbol should be deleted pursuant to (b)(7)(D).

The point to be remembered is that if allowing these words or phrases to remain will expedite processing they should be released. The bottom line in this area is: What harm would result to FBI operations as a result of the release of the material? If no apparent harm is foreseeable they should be released to the requester.

191 (b)(2) has been applied in the past to notes appended to FBI documents but should not be.

"If the note is advisory in nature and functions to assist a superior in reaching a decision, nonfactual portions may be withheld using (b)(5); and in some instances, facts may also be withheld if selective to such an extent as to identify the deliberative process of the writer. To utilize (b)(5) the matter must involve major policy considerations or extremely important law enforcement concerns, otherwise discretionary release will be applied upon appeal.

192 1/ The term, scope of a request, represents a complex issue. It is not, however, a term of art relative to FOI/PA work. To the extent possible, it is to be defined by the requester and there should be no contention concerning what a requester wants, though, of course, considerable disagreement may ensue over that which a requester is entitled to receive. See write-up entitled, "The Scope of a Request (FOIA and Non-record Materials (Privacy Act)."

197 Clearly, an analyst cannot rely upon terminology such as "outside the scope" to "exempt" material. Material that is outsdie the scope of a request is: (1) material that does not concern an individual who has requested records concerning himself; or, (2) material that does not concern an investigation or incident described by a requester; or (3) material that does not concern a third party, whose records have been requested. Otherwise the material is within the scope of a request. Reasonableness should guide the analyst in such matters; when in doubt, the requester should be contacted. In any questionable circumstance the request should be construed in favor of inclusion, not exclusion.

201 Never deny release of material on the grounds that it is outside the scope of a request. If it is outside the scope of a request, be in a position to establish by communication from the requester that he does not want the document(s).

210 The first situation is where a Federal district judge has approved the use of a wiretap or microphone pursuant to Title 18, United States Code 2510 et seq. These surveillances are utilized in specified law enforcement investigations. Information derived from the intercept is exempt from disclosure under the FOI/PA as these documents are considered Judicial property and otuside the scope of FOI/PA. ***

The second situation is where information is obtained from a wiretap or microphone installation in a domestic security investigation based upon Attorney General approval. This information cannot be exempted under (b)(3) and must be processed for release where the requester is a party to the recorded conversation. If the requester was not a party to the recorded conversation his request should be denied on the basis of (b)(7)(C) and (b)(3) in conjunction with Title 18, United States Code 2517.

213 The FBI policy of reproducing newspaper clippings, and photographs pursuant to FOI/PA requests may at times be a technical violation of the copyright law. However, the cases dealing with newspapers and periodicals discuss printing

and reproduction of news for commercial and profit purposes. Internation News Services v. Associated Press, 248 U.S. 215, 63 L.Ed. 211. Certainly no individual could ever charge that the FBI is releasing documents pursuant to the FOI/PA for profit!

In some instances our files may contain copies or originals of items which have been copyrighted by a private corporation and thus, the documents should be denied for release per (b)(3), Title 17, United States Code 101. For example, on November 22, 1963, Abraham Zapruder took a home movie of President John F. Kennedy at the moment of his death. This home movie was sold to Time-Life, Inc., for $25,00, and which they in turn copyrighted. An FOIA request for this film should be denied as the release of this would in all probability open the Bureau up to a lawsuit for damages for release of this film.

214 Another example are photogrpahs which were taken immediately after the murder of Dr. Martin Luther King, Jr. The copyright on these photographs is held by Time-Life, Inc. The release by the FBI would infringe upon Time-Life's copyright.

223 The Senate Committee on the Judiciary report of May 16, 1974, concerning the amendments to the FOIA indicates the clear intent of Congress was that, notwithstanding the applicability of an FOIA exemption, records be disclosed where there is no compelling reason for withholding.

> Congress did not intend the exemptions in the FOIA to be used either to prohibit disclosure of information or justify the automatic withholding of information. Rather, they are only permissive. They merely mark the outer limits of the information that may be withheld where the agency makes a specific affirmative determination that the public interest and specific circumstances presented dictate--as well as that the intent of the exemption relied on allows--that the information should be withheld.

1975 Source Book, p. 158.

Senator Kennedy (May 30, 1974):

> Agencies have no discretion to withhold information that does not fall within one of those exemptions. It is equally clear, however, that agencies have a definite obligation to release information even where the withholding may be authorized by the language of the statute--where the public interest lies in disclosure. Congress certainly did not intend the exemptions of the FOIA to be used to prohibit disclosure of information or to justify automatic withholding.

1975 Source Book, p. 286

224 In accord with the legislative history, the Attorney General has made clear his support favoring discretionary release. The Deputy Attorney General . . . has advised Congress as follows:

> In my view, the existence of an exemption that applies to a particular record, or portion of a record, is merely a lawful excuse to withhold the material in question. The guidance I have consistently furnished to the Department primarily, but by no means exclusively, by means of my actions in a-peals, is that an exemption should not ordinarily be asserted unless there is some present vital interest of the Department to be furthered thereby.

226 On July 17, 1983, the Department of Justice issued Order No. 529-73, 38 FR 19029. 2/ 28 C.F.R. 50.8. This set forth the policy of the Department of Justice as to the criteria for discretionary access to investigatory records of historical interest. This order recognized that there was an increased demand for access to investigatory files of historical
227 interest and which were exempted from compulsory disclosure under the FOIA. It was decided that certain releases would be considered at the sole discretion of the Attorney General or by persons he delegated authority to do so.

This order stated information or material of historical interest contained within the Department of Justice investigatory files compiled for law enforcement purposes that are more than fifteen years old and no longer substantially related to current investigative or law enforcement activitites would be considered for release to persons engaged in historical research. These discretionary releases would be made subject to deletions to the minimum extent deemed necessary to protect law enforcement efficiency and the privacy, confidences or other legitimate interests of any person named or identified in the files.

A general statement of the types of deletions allowed pursuant to this order are: (1) names or other identifying information as to informants; (2) names or other identifying information as to law enforcement personnel where the disclosure of such information would jeopardize the safety of the employee or his family, or would disclose information about an employee's assignment that would impair his ability to work effectively; (3) unsubstantiated charges, defamatory material, matter involving an unwarranted invasion of privacy, or other matter which may be used adversely to affect private persons; (4) investigatory techniques and procedures; and (5) information the release of which would deprive an individual of a right to a fair trial or impartial adjudication, or would interfere with law enforeement functions designed directly to protection individuals against violations of law.

228 With the enactment of the 1974 FOIA amendments 28 Code of Federal Regulations 50.8 became obsolete since all investigatory records became subject to mandatory release if they did not fall under the protection of the narrowly defined exemptions. However, this regulation remains in the Code of Federal Regulations as a statement of the policy of the Department of Justice in the area of historical interest material.

When confronted with decisions as to releasable material in matters of historical interest, the available exemptions should be asserted only after careful consideration of the age, source and type of information contained in the files. Action Memorandum No. 54.

229 Where materials of significant historical interest are involved, the "privacy interest" of the subjects of the material must be balanced against the legitimate interests of historians or even the idle curiosity of members of the general public. As a general rule, subjects in this type of case retain an overriding privacy interest only as to documents pertaining to intimate or purely personal matters wholly unrelated to their alleged activities which cuased the compiling of the investigative files. This rule distinguishes between the "private" and "public" lives of the subjects of these records.

To be considered of historical interest, investigations need not necessarily be old. The criteria which would establish this designation is an investigation which would be of legitimate interest to the public as a whole. Being of interest to a segment of the public or only one geographic area would not suffice. The logic behind the maximum disclosure concept in a historical case is that the public's right to know the facts of such an investigation overrides the privacy rights of those involved in the matter.

230 --recommends that discussion be held among those processing historical interest case prior to commencement of the review.

231 --criteria for "historical interest" case:

The amount of national publicity generated in the press and other media should be considered, but publicity alone should not be a determining factor. This will preclude an automatic "historical interest" tag being placed upon a routine case which happened to have received unusual publicity, but otherwise would not constitute a matter of concern to the general public. The existence of controversy regarding the investigation and its results would favor broader discretionary release in

231 order to furnish the public the relevant facts. Age is also a factor inasmuch as with the passage of time the protectable personal privacy considerations tend to fade. The matter under review should be observed in the context of the time period in which it occurred and its relevance as a matter of concern to the general public. Examples of this are the "Cold War" atmosphere at the time of the Rosenberg espionage case; the circumstances surrounding certain of the civil rights investigations conducted during the 1960's and relevant social attitudes at the time of the Sacco-Vanzetti case.

232 Advisory comments representing logical conclusions or reasonable inferences drawn from facts are not protectable opinions.

233 Opinions joined with decisions, which reflect one's thinking or proclivities, are not protectable, no matter how derogatory or embarrassing, under exemption (b)(5).

238 Nonspecific requests submitted to FBI Headquarters will involve processing only of main files, not references.

Nonspecific requests submitted to a particular field division will involve a processing of both main files and references.

References at FBI Headquarters will only be processed in response to a request specifying sufficient detail to permit retrieval and indentification without undue disruption of normal operations of excessive burdens being imposed upon personnel.

273 Subsection (d)(2) [of the Privacy Act] is one of the subsections from which investigative records in the FBI Central Records System has been exempted by the regulations.

274 Even though these records are exempt from subsection (d)(2), the FBI will consider correcting an obvious error of fact, such as biographic data or other information taken from a public document subsequently found to be erroneous.

If we agree to correct or change an error of fact, we are required by the Act to notify all prior recipients of the record, i.e., all other agencies or Government officials to whom the record had been disseminated, that we have made the correction and that they should make the same correction on their copies of the record.

When we determine that the information sought to be corrected is not subject to amendment pursuant to our

274 exemption outlined in the Department of Justice regulations, we still will agree with the requester to place in the file his version of the disputed information, although this is not considered to be a formal correction, and prior recipients will not be notified.

275 expunction or destruction of record possible only when record violates Privacy Act's (e)(7) restriction against collection, use or maintenance of information concerning how an individual exercises First Amendment rights.

276 In attempting to make a determination as to whether or not information sought to be expunged is being maintained in violation of subsection (e)(7), it must be remembered that such information is not automatically violative of the Act. If it can be shown that the information is pertinent to and within the scope of an authorized law enforcement activity, i.e., it was collected and is being maintained pursuant to a legitimate investigation, which is justified by Federal Statute, or Executive Order, or Departmental mandate, its maintenance is not precluded by subsection (e)(7).

If, however, no such justification can be found for maintenance of this kind of information in an FBI file, then its expunction is required by law.

288 Analysts must prepare inventories of their handling of each record and initial all correspondence they prepare, signifying their determination that requests assigned to them have been accurately reviewed, thoroughly inventoried and properly released and/or exempted. Computer sheets reflecting action taken must be completed.

290 Unit chiefs should not substitute their judgment for that of a team supervisor, unless the facts clearly contravene the supervisor's judgment.

291 Each unit chief shall make the final determination on virtually all requests reaching his desk and will forward to the section chief only the most complex or controversial cases he receives (or in lieu thereof, a control sample).

296 FOI/PA Searches

(1) When requester submits his first name, middle name and last name, henceforth, the Service Unit will search (1) first name, middle name, last name, (2) first name, middle initial, last name and (3) first and last name. In searching (1), (2) and (3), the Service Unit will utilize standardized searching procedures listing all identical main file references and any which cannot be positively eliminated based on the data furnished and/or

296 any additional data obtained from an identical main file index card.

297 (a) Should the requester submit only his first name, middle initial and last name, the Service Unit will search for all identical main file index cards and will also list under this category all cards that cannot be positively eliminated. Buildups to a full name will be done for noncommon names but will be limited to middle initial furnished. Main file cards which cannot be positively eliminated will be listed. Breakdown to a first and last name only search will be conducted. Again, main files which cannot be positively eliminated will be listed.

(b) If the requester submits only his first and last name, the Service Unit will search on the nose listing identical main file references and those which cannot be positively eliminated. Buildups, if any, will be limited to standard searching procedure relative to uncommon names.

(2) The FOI/PA Branch adopted a search restriction policy which limits initial searches to main file references (with exceptions noted above) unless a requester provides additional information that will assure reasonable identification of possible "see" references. Requesters are advised that a further search will be conducted upon submission of information suggesting their name(s) may be indexed in the file of another person or some organization. This search restriction does not apply to field offices. (Emphasis in original)

298 (3) Title 28, Code of Federal Regulations, Section 16.57(c) limits search and processing of investigations to those materials submitted to FBI Headquarters unless a requester identifies specific field offices, whose indices he desires to have searched, or the requester addresses his request to the field office directly. Specific guidance has been furnished to all field offices regarding [28 C.F.R. 16.57(c)] by all SAC airtel dated 4/2/76. That guidance is reiterated herein with one revision. Copies of field office responses no longer need to be submitted to the [DAG] or to anyone else in the [DOJ] except FBI Headquarters.

28 C.F.R. 16.57(c) reads:

> When an individual requests access to records pertaining to criminal, national security or civil investigative activities of the FBI which are contained in systems of records exempted under provisions of the Privacy Act, such requests shall be processed as follows:

298 (1) Where the investigative activities involved have been reported to FBI Headquarters, records maintained in the FBI's central files will be processed; and,

(2) Where the investigative activities involved have not been reported to FBI Headquarters, records maintained in files of the field office identified by the requester will be processed.

299 Excerpts from SA, Albany airtel regarding FOI/PA requests involving [28 C.F.R. 16.57(c)], dated 4/2/76, contained the following:

(1) FOI/PA Request to Field Office--Your Indices Negative

A threshold question which must be considered is: Does the request ask for only the field office records or both the field office's records and the FBI as a whole? If the request is for only the field office's records, to whom the request is addressed, you should respond over the SAC's signature . . . advising that no record could be located.

If the request addresses not only the field office records, but also the FBI in general (or identifies other field offices) respond over the SAC's signature for your records and forward a copy of the request, identifying data and notarized signature (if received) to Headquarters. Copies of your "no record" response in either case should be furnished to Headquarters. ***

(2) FOI/PA Request to Field Office--Your Indices Reflect Only Investigation(s) Reported to Headquarters

Acknowledge the request and advise the requester that his request has been forwarded to Headquarters as all investigation(s) concerning him were reported to Headquarters. You may refer to [28 C.F.R. 16.57(c)] for this authority. You should also tell the requester that no unreported (to Headquarters) investigation(s) concerning him are retained in your field division's files. ***

300 (3) FOI/PA Request to Field Office--Your Indices Only Unreported (to Headquarters) Investigations

(a) Bearing in mind the threshold question posed under example 1, supra, the field office must process each page of such investigations. These cases will normally be investigations closed upon the authority of the SAC, cases involving declination of prosecution by

300 the United States Attorney, Potential Criminal Informant investigations, etc. Any unreported case must be processed by the field. ***

(b) In the event your search of indices reflects you were the auxiliary office, proceed as in 3(a) above, but furnish copies of request and released docuemnts to the Office of Origin. The Office of Origin is not obligated to process any documents unless they also receive a request for their records. This instruction is premised upon assumption that you have determined that the Office of Origin did not report this investigation to Headquarters. If they did, handle as explained in 2, supra.

(4) FOI/PA Request to Field Office--Your Indices Indicate Both Reported and Unreported (to Headquarters) Investigations

In this circumstance the field division shall:

(a) Obtain all necessary data to verify the requester's identity, either by personal contact involving display of satisfactory identification or notarized signature.

(b) Furnish a copy of request and verification of identity information to Headquarters.

(c) Advise the requester the Director will respond as to any investigation(s) reported to Headquarters and that the SAC will respond regarding investigations unreported to Headquarters. You are reminded that the field office responsponsibilities do not include any serials in an investigation otherwise reported to Headquarters. Do not process these serials and do not forward copies to Headquarters.

301 (5) FOI/PA Request Received at Headquarters--Identified Field Offices Specified in Request

Some requests received at FBI Headquarters are directed not only to information from the central files, but also to any files in specified field offices. Headquarters may furnish copies of the pertinent correspondence to the specified field offices for processing by those offices of any unreported (to Headquarters) investigations. As explained before, there is no need under such circumstances to concern yourself with any investigation that has been reported to Headquarters as these cases will have already been handled by the FOI/PA Branc....

301 (6) Exception to [28 C.F.R. 16.57(c)]

One exception is implicit under the FOIA as opposed to the Privacy Act. If an individual requester describes a particular incident with sufficient specificity to permit the recordation of that incident to be located without unreasonable disruption of our operations, Headquarters will ask the field to retrieve that specific document, even though the investigation, except for this document, was otherwise reported to Headquarters. Of ource any court order directing other field office documents to be processed will be honored.

302 (8) If a requester in his/her letter to Headquarters identifies not more than two field offices whose indices (in addition to Headquarters) he desires to have searched, the FOI/PA Branch will, ... furnish copies to the identified field offices for searches as to unreported investigations. ***

(9) For any request received by Headquarters in which the requester furnishes sufficient data to reasonably identify a "see" reference, a further search is to be conducted including a search of logically identified field office indices.

303 Nonclassified documents originating with another agency may not be referred in strictly FOIA request situations unless agreement has been reached with the outside agency to accept and promptly handle such requests.

306 FOI/PA Branch shall establish a committee of supervisory personnel to consider treatment of requested records which may be of "historical interest."

307 Determinations made by this committee shall be recorded and filed with the request correspondence. Any determination that the requested records are of historical interest should specify any special processing guidelines, the time frame encompassed by the historical interest definition and the identity of principals by name, title and/or degree of involvement, whose rights to privacy shall be waived. Exceptions to waiver, for personal information unrelated to the basis for historical interest, should also be set forth.

309 Exigencies which should guide the determination to accelerate processing would include: (a) risk to life or physical safety if the information is not disclosed quickly; (b) knowledge of exculpatory material that could prevent a miscarriage of justice; and (c) extreme public unrest that may be quieted through a timely release of facts that would dispel rumors or misinformation.

317 Prior to the implementation of that Order in June, 1972, only documents prepared for dissemination outside the FBI were marked as to classification. Executive Order 11652 requires proper classification marking of all documents, internal as well as those prepared for dissemination. The FBI, however, did not fully comply with this provision until 1975. For this reason all documents of a national security nature must be reviewed for classification determination whether or not they are marked classified.

321 Underlying all classification is the fact that the matter must involve national security information and that the disclosure of the source or method would be detrimental to the national security of the country. In order to classify under Category II the source or method must be one which reports on an organization or individual involved in national security matters. The source or method must be one which has never been specifically subject to public disclosure, must be active or in a position to be reactivated and one which is currently viable.

325 Those documents reviewed for Archives under the 30 year mandatory declassifcation requirement can seldom be continued as to classification, however, Archives officials are extremely sympathetic to the wishes of the FBI and where justification can be furnished they will withhold the document from public disclosure although they are forced to declassify it.