THOUGHTS ON AN EFFECTIVE FOIA POLICY FOR THE CLINTON ADMINISTRATION

Quinlan J. Shea, Jr. *

IMMEDIATE POLICY GOAL: Bring FOIA policy in particular, and Openness in Government policy generally, back <u>at least</u> to the situation that existed in the Ford-Carter period.

BACKGROUND: The Justice Department policy of "Maximum Possible Disclosure" evolved in the Ford Administration and continued through the Carter Administration. In his letter of May 5, 1977, Attorney General Bell extended the policy via his "harm" test to all agencies of the federal government at the FOIA litigation stage. He had no authority to impose the policy on other agencies in terms of their processing of FOIA requests at the initial and administrative appeal stages. The Office of Privacy and Information Appeals enforced the policy within the Justice Department. The Office of Information Law and Policy and the Freedom of Information Committee had government-wide responsibilities.

CAUTION: No policy that will be resisted by the career government workforce will produce the desired results unless careful attention is given to the <u>process</u> by which that policy is to be carried out. Process for this purpose includes procedures, responsibility, and dispute resolution mechanisms, and may well have to include formal structure as well.

SPECIFIC POLICIES:

A. FOIA exemptions authorize, but in many areas do not require, the denial of access to requested information.

B. Access to exempt information should not be denied unless: (1) mandated by law; <u>or</u> (2) the release of the specific information would cause actual, identifiable harm to an important, legitimate societal interest <u>and</u> that harm is not outweighed by the public benefit that would flow from release.

---

* Director, Center for Citizen Access to Government Information; formerly Director, Justice Department Office of Privacy and Information Appeals, Ford and Carter Administrations.

C. Harm is information-specific, not category-generic; <u>i.e.</u>, (1) Exemption 5 material should always be released as a matter of agency discretion unless sufficient cause exists for denying access to specific information -- generic "chilling effect" is not harm for purposes of this test; (2) where denial of access is not mandated, Exemption 3 material should be released as a matter of agency discretion unless a sufficient basis exists for denying access to specific information -- meeting the legal criteria for denial of access to a category of information is not harm for purposes of this test; and (3) Exemption 7(D)(II) material should be released as a matter of agency discretion unless the non-source-identifying information is sensitive in some way -- the fact that the information came from a confidential source is not harm for purposes of this test.

ITITIAL ACTIONS:

A. Justice Department:

(1) The new Attorney General should repromulgate the Bell letter on the defense of FOIA litigation, with implementation effective immediately and applicable to all pending FOIA suits, as well as future litigation;

(2) The new Attorney General should announce that the goal of the FOIA process inside the Justice Department is the maximum possible disclosure of requested information, as indicated above, effective immediately and applicable to all pending FOIA initial requests and administrative appeals, as well as those filed in the future; and

(3) The new Attorney General should designate one of her senior staff to recommend the changes to existing Justice Department policies, procedures, and, if necessary, structure, that are needed to ensure effective implementation of these policies. Relevant considerations include:

(a) Whether the Office of Information and Privacy should be disestablished, and the Offices of Privacy and Information Appeals and Information Law and Policy reconstituted;

(b) The location of OIP (or OPIA and OILP) within the Justice Department (this is extremely important);

(c) Ensuring that "maximum possible disclosure" is a critical element in the position description of the Director of OIP (or the Directors of OPIA and OILP);

(d) Ensuring that the Assistant Attorney General, Civil Division, is completely in sync with the Attorney General's desires in this area;

(e) Ensuring that the heads of all other Department of Justice component agencies understand that they are responsible for maximum possible disclosure within their respective agencies;

(f) Whether the Freedom of Information Committee should be reconstituted (with service on the committee, coupled with maximum possible disclosure, made a critical element of the position description of any person appointed to it);

(g) Ensuring that the procedures for resolving FOIA disputes within the Justice Department, or between the Justice Department and other departments or agencies, vest procedural responsibility in persons charged with carrying out the policy of maximum possible disclosure; and

(h) Establishing a rebuttable presumption that Justice Department component agencies should reprocess, on request, records as to which an initial action or administrative appeal decision was made after 1980.

B. Office of Management and Budget. The new Director should promulgate a proposed OMB Circular on the release of government information under FOIA, government-wide. As initially promulgated, this should be effective on an interim basis to the extent permitted by law and, where possible, use the same language as is being promulgated by the Attorney General governing FOIA operations within the Justice Department and the defense of FOIA litigation. The policy of maximum possible disclosure should be included in the appropriate position descriptions within OMB, and incorporated into management and budget reviews vis-a-vis all government agencies.

OPTIONAL FORM NO. 10
JULY 1973 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : Heads of All DOJ Components DATE: [illegible] 1977

FROM : Quinlan J. Shea, Jr., Director
Office of Privacy and Information Appeals

SUBJECT: Freedom of Information Act

Deputy Attorney General Flaherty has asked me to send you the attached copy of a letter from Attorney General Bell to the heads of all Federal Departments and Agencies, advising them of this Department's position on defending suits against the Government under the Freedom of Information Act. The basic standard enunciated in his letter is that denial of access to requested records should not occur unless the public interest requires it, because actual harm to some legitimate public or private interest would result from release. This must also be the basis on which this Department takes action at the administrative stage of processing requests for access to records under this Act.

The intent of the Freedom of Information Act is to produce the maximum possible disclosure of government records to the public. Each of you may want to review the standards and policies now being followed within your component to insure that this goal is being met. When this Department, at the direction of the Attorney General, is telling other agencies that we will not defend F.O.I. suits against them unless the test of "actual harm" is satisfied, it is obvious that we must apply that same rigorous standard to ourselves.

Your cooperation and support will be appreciated.

5010-110

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

Office of the Attorney General
Washington, D.C. 20530

LETTER TO HEADS OF ALL FEDERAL DEPARTMENTS AND AGENCIES

Re: Freedom of Information Act

I am writing in a matter of great mutual concern to seek your cooperation.

Freedom of Information Act litigation has increased in recent years to the point where there are over 600 cases now pending in federal courts. The actual cases represent only the "tip of the iceberg" and reflect a much larger volume of administrative disputes over access to documents. I am convinced that we should jointly seek to reduce these disputes through concerted action to impress upon all levels of government the requirements, and the spirit, of the Freedom of Information Act. The government should not withhold documents unless it is important to the public interest to do so, even if there is some arguable legal basis for the withholding. In order to implement this view, the Justice Department will defend Freedom of Information Act suits only when disclosure is demonstrably harmful, even if the documents technically fall within the exemptions in the Act. Let me assure you that we will certainly counsel and consult with your personnel in making the decision whether to defend. To perform our job adequately, however, we need full access to documents that you desire to withhold, as well as the earliest possible response to our information requests. In the past, we have often filed answers in court without having an adequate exchange with the agencies over the reasons and necessity for the withholding. I hope that this will not occur in the future.

In addition to setting these guidelines, I have requested Barbara Allen Babcock, Assistant Attorney General for the Civil Division, to conduct a review of all pending Freedom of Information Act litigation being handled by the Division. One result of that review may be to determine that litigation against your agency should no longer be continued and that information previously withheld should be released. In that event, I request that you ensure that your personnel work cooperatively with the Civil Division to bring the litigation to an end.

Please refer to 28 CFR 50.9 and accompanying March 9, 1976 memorandum from the Deputy Attorney General. These documents remain in effect, but the following new and additional elements are hereby prescribed:

In determining whether a suit against an agency under the Act challenging its denial of access to requested records merits defense, consideration shall be given to four criteria:

(a) Whether the agency's denial seems to have a substantial legal basis,

(b) Whether defense of the agency's denial involves an acceptable risk of adverse impact on other agencies,

(c) Whether there is a sufficient prospect of actual harm to legitimate public or private interests if access to the requested records were to be granted to justify the defense of the suit, and

(d) Whether there is sufficient information about the controversy to support a reasonable judgment that the agency's denial merits defense under the three preceding criteria.

The criteria set forth above shall be considered both by the Freedom of Information Committee and by the litigating divisions. The Committee shall, so far as practical, employ such criteria in its consultations with agencies prior to litigation and in its review of complaints thereafter. The litigating divisions shall promptly and independently consider these factors as to each suit filed.

Together I hope that we can enhance the spirit, appearance and reality of open government.

Yours sincerely,

Griffin B. Bell
Attorney General

Department of Justice

FOR IMMEDIATE RELEASE
SUNDAY, AUGUST 17, 1975

DAG

The Department of Justice today announced that Deputy Attorney General Harold R. Tyler, Jr. has directed those in the Department concerned with the Hiss and Rosenberg cases to release as much information on those cases as possible, with as little delay as possible.

Specifically he advised Department officials concerned with handling of freedom of information requests on the two cases that exemptions in the Act are not to be invoked without a compelling reason.

As an example of such a reason, he cited materials which are properly classified and which cannot be declassified or modified in such a way to make them appropriate for release. "Other compelling reasons for non-disclosure include substantial threats to the usefulness or safety of a past or present informant, or to an individual's right to privacy," he said in a statement today.

Mr. Tyler acted under the authority delegated to him by Attorney General Edward H. Levi on August 1, 1975, to make final decisions under the Freedom of Information Act on behalf of the Department of Justice.

"In authorizing me to make decisions for him in the freedom of information area," said Mr. Tyler, "Mr. Levi made clear his desire that the Department observe

(OVER)

the spirit, as well as the letter of the law, and make the maximum possible disclosure of information."

"While I am particularly concerned with these two cases because of their historical significance," he said, "the general policy of maximum possible disclosure will be followed in other cases as well."

He said that he considers that the defendants and principal witnesses in the two cases have no general privacy interest in the subject matter sufficient to justify the withholding of records. He said that an exception will be made for material of an intimate or personal nature wholly unrelated to the subject matter of the cases, should there be such information. He directed that records pertaining to other persons involved in these cases are to be considered very carefully before being withheld on privacy grounds.

Mr. Tyler said his directive is intended to ensure that the processing of freedom of information requests concerning these cases will be expedited within the Department. He expects the result will be that a substantial portion of the records will be made available to the public in the relatively near future. Finally, the Deputy Attorney General expressed his personal opinion that public examination of these records will demonstrate the integrity of the investigative, prosecutorial and judicial processes as they were carried out in these famous cases.

####

STATEMENT BY HAROLD R. TYLER, JR., DEPUTY ATTORNEY GENERAL

Under the authority delegated to me by Attorney General Levi on August 1, 1975, to make final freedom of information determinations for the Department of Justice, I have directed those responsible for freedom of information requests concerning the Hiss and Rosenberg cases to release with reasonable dispatch as much information as possible under the letter and spirit of the Freedom of Information Act.

In authorizing me to make decisions for him in the freedom of information area, Mr. Levi made clear his desire that the Department observe the spirit, as well as the letter of the law, and make the maximum possible disclosure of information. While I am particularly concerned with these two cases because of their historical significance and the unusual problems which they present, the general policy of maximum possible disclosure will be followed in other cases as well.

I have advised Departmental personnel that, with regard to freedom of information requests concerning these two cases, exemptions in the Act are to be invoked only if there is a compelling reason to do so. For instance, a record may be withheld if it is properly classified and cannot be declassified or modified in some way to make it appropriate for release. Other compelling reasons for

non-disclosure include substantial threats to the usefulness or safety of a past or present informant, or to an individual's right to privacy.

In my opinion, those involved in the criminal conduct in the two cases, as well as the principal witnesses, have no general privacy interest in the subject matter sufficient to justify the withholding of any of these records. An exception will be made for material, if it exists, of an intimate or personal nature wholly unrelated to the subject matter of the cases. Records pertaining to other persons involved in these cases are to be considered very carefully before being withheld on privacy grounds.

My directive to those concerned with requests in these two cases is intended to ensure that responses to pending requests will be expedited. I expect that a substantial portion of the records concerned will be made available to the public in the near future. Finally and importantly, I wish to note my view that public examination of these records will demonstrate beyond reasonable doubt the integrity of the investigative, prosecutorial and judicial processes as they were carried out in these cases.