

Washington Star

SUNDAY
EDITION

S * * * *

WASHINGTON, D. C., SUNDAY, DECEMBER 11, 1977

Phone (202) 484-5000 CIRCULATION 484-3000
CLASSIFIED 484-0000 60 Cents On Newsstand

INFOCUS Getting the U.S. to Cough Up Data:

By John J. Flalka

Washington Star Staff Writer

Last May the FBI quietly ordered 198 of its special agents, the ones who are also lawyers, to drop whatever they were doing in the field and return to Washington to work in a top priority matter the agency called Project Onslaught.

That was not enough manpower, so a month later the bureau ordered an additional 84 lawyer-agents to report to headquarters. Some agents were heard to mutter that Onslaught should really have been called Mission Impossible, but actually it was not all that exciting.

Onslaught is the official name for how the FBI tackled into a mountain

of requests for agency files under the Freedom of Information Act and it almost reduced the bureau's backlog to conform to the law, which requires that an agency respond to a request within 10 days.

According to a bureau spokesman, Onslaught cut the agency's response time from 14 months to a little over one month. By the end of September, when the agents went back to the field, Onslaught had cost the government \$2.8 million, which came out of the FBI's regular operating budget.

On the one hand, Onslaught is an indication that Attorney General Griffin B. Bell is trying to bring the Justice Department into conformity with the 1966 law. It appears to

Personal interest, not public's need at work

be a major effort by an agency that has long regarded FOIA as a kind of hairshirt for bureaucrats, an item to be avoided as long as humanly possible.

ON THE OTHER HAND, Onslaught is also some indication of the as yet uncalculated but undoubtedly stiff price the federal government must be prepared to pay if it is to live up to the spirit of the law, which was intended to reverse Washington's long-standing practice of limiting public access to public records. Last week, after determined FOIA

requesters won a federal court ruling that the notes made of Henry Kissinger's telephone calls were public property and forced the release of a quarter-ton of documents in the John F. Kennedy assassination case, the average newspaper reader might be tempted to assume that the administrative wheels and pulleys of FOIA are working well and that the chief beneficiaries of their operations are journalists.

Both of these assumptions would be wrong, very wrong.

Although there are no reliable government-wide figures on the use of FOIA, there is considerable evidence that the average requestor is a businessman trying to spy on another businessman or trying to peek into the files of a regulatory agency that might be about to regulate him.

According to Mark Lynch, an ACLU attorney regarded as one of the city's foremost experts on FOIA, "it is clear that the media is a very small user; probably 80 percent of all requests are from commercial users."

Even when it might be in the media's interest to use FOIA, according to Lynch, most editors and reporters tend not to.

"I don't know why that is," adds the attorney. "Maybe it's the 10-day

Who Does It?

title. Even among the major papers, only Dow Jones (the publisher of the Wall Street Journal) seems to have the staying power to go into court to enforce their FOIA rights.

Consider the situation at the Food and Drug Administration, which is now receiving FOIA requests at the rate of 24,400 a year. According to Sherwin Gardner, the agency's deputy commissioner, only 5 percent of the requests are from the press or public interest groups. Eight percent are from individuals and 80 percent are from drug companies. The companies, Gardner recently told a Senate Judiciary subcommittee, are frequently trying to get a peek at so-

See INFORMATION, A-14

called trade secrets used by a competitor. Legitimate trade secrets are exempt from disclosure through the act, but trying to determine which material contains trade secrets has turned the FDA into a kind of administrative battleground, forcing the agency to remove new drugs from their normal work of scrutinizing new drugs to examine and pass on FOIA requests. The workload, Gardner insists, is "quite excessive and seriously detracts from the work of the agency."

FOIA HAS BECOME a sizable cottage industry for lawyers who bill clients as much as \$200 an hour for FOIA work. The lawyers have also come up with something new called a "reverse FOIA lawsuit" under which a company whose "secrets" might be exposed by an FOIA request goes into court for an injunction to stop the agency from acting on it.

Used by a clever corporation lawyer, the reverse FOIA suit can be a formidable legal roadblock to stop or at least slow down federal regulators and investigators.

According to Gerald P. Norton, deputy general counsel of the Federal Trade Commission, companies have begun to sue the FTC to protect documents the agency has not yet requested from them. "We get involved in multiple litigation in different courts. It has been a tremendous problem in the last couple of years."

Peter Flaherty, the outgoing deputy attorney general, recently testified that a "nationwide tax and fraud investigation" was held up for over two months after attorneys for potential defendants filed "dozens" of FOIA requests combined with reverse FOIA lawsuits.

According to Flaherty, since the investigators were the only persons familiar with the files, they were pulled off the case to focus on the FOIA matters. The legal tangle absorbed the efforts of 39 special Internal Revenue Service agents and 8 Justice Department attorneys. Meanwhile, Flaherty said, the case was "substantially suspended."

Because of a long history of problems with FOIA, public interest attorneys tend to view statements about how the act interrelates with normal agency work with some skepticism.

The Justice Department, for example, is still among the toughest agencies to deal with when it comes to the FOIA. According to a recent study by the Library of Commerce, the highest rate of FOIA denials come from three agencies: the Department of Defense, Treasury and Justice. In that order.

Of course, there are some requests that have to be denied. Treasury has had a request for the formula for the ink used in printing dollar bills. The Drug Enforcement Administration has been asked for the radio frequencies used by its agents. The State Department has had a request for an entire file drawer, identified by its serial number.

And then there is the matter of "classified documents" concerning national defense and foreign policy, which are also exempt from the act. If there has been one battleground where the media and public interest law firms dominate the action, this is probably it.

AS ONE AFTERMATH of the Pentagon Papers episode — when it was demonstrated that the reason some documents were classified was because they were embarrassing — Congress amended the FOIA in 1974 to state that a classification stamp on a document will not protect it from disclosure unless the government can convince a judge that the classification is a proper one under the presidential order establishing the various degrees of classification — "confidential," "secret" and "top secret."

Despite the new amendments, there have been few signs of improvement in this area. For example, Morton Halperin, a former staff member of the National Security Council, is still suing the State Department for the transcript of a background briefing former Secretary of State Kissinger gave to 33 reporters.

A public interest law firm, the Military Audit Project, is suing the CIA for documents showing the ownership and financing of the Glomar Explorer, the huge ship which the CIA operated through Howard Hughes' Summa Corp., in an attempt to salvage a Soviet submarine. One of the strangest cases in the annals of the FOIA, it has led Fielding McGehee III, a staff reporter of MAP,

to conclude that the FOIA is still regarded as "merely an annoying gnaw" by the defense and intelligence communities.

When California jurisdictions attempted to charge the Summa Corp. for the property tax on the ship, the CIA readily volunteered information showing that the government owned the ship. When MAP, looking primarily for evidence of cost overruns, asked for the financial documents and contracts dealing with Glomar, the CIA refused to confirm or deny that there were any.

In 1975 MAP sued under the new FOIA amendments and a secret trial was held before U.S. District Court Judge Gerhard A. Gesell. The CIA presented seven affidavits and a secret witness, who apparently argued that even mentioning that there were documents would imperil national security. Then Gesell issued an opinion which was, of course, secret.

THROUGHOUT THE TRIAL, MAP and its attorneys were left standing outside in the hall. This phase of FOIA practice is especially unerving to attorneys. One has described it as "sitting craps under a blanket." Another compared it to "a knife fight in the dark."

At any rate, MAP was informed that Gesell was denying its request through a one-sentence order issued by the court.

"We appealed," explained McGehee. "We had absolutely no idea of what we were appealing on. We just said, 'We appeal.' The defendants were saying things like, 'What do you mean, you appeal? What are you appealing on?' We said we have absolutely no idea."

But the U.S. Court of Appeals smiled on MAP, perhaps influenced by an admission by the National Security Council that there were indeed documents of the sort MAP had requested. In fact there were 128,000 of them.

Shortly after that revelation Gesell, the judge to whom the Appeals Court had remanded the case, hit the ceiling. Charging that the CIA and the Justice Department attorneys "enchanted" him into the initial denial by "irresponsible representations," Gesell angrily removed himself from the case.

"Let someone else look at it," said Gesell. "It is an outrageous chapter in this courtroom." All of this, of course, did not mean that MAP could see the documents. The two-year-old case is now before another judge.

As FOIA cases go, MAP vs. CIA director Admiral Stanfield Turner is quite young. The oldest case is probably the one involving Harold Weisberg, the author and skeptic of the Warren Com-

mission report, who asked the FBI for the Kennedy assassination files back in 1968.

Since then the case has been to the appellate court twice and has been refilled once. It was one of the legal engines that forced the disclosure of assassination documents last week and, according to Weisberg's attorney, Jim Lesar, it is going back to the Appeals Court again because Weisberg is sure that certain scientific evidence dealing with the assassination bullets has been withheld.

"The Department of Justice," complains Lesar, "remains in the same position that it was in when J. Edgar Hoover ran the FBI. It allows other departments to dictate to it what the government's position should be in FOIA."

WHETHER THAT IS TRUE or not is unclear. In May, when Project Onslaught got under way, Attorney General Griffin B. Bell issued a "Letter to Heads of All Federal Departments and Agencies."

In the letter he said he was concerned that there are "over 600" FOIA cases pending in the courts and that he was "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."

A reporter who asked for an update on the progress of this effort was told by a Justice spokesman that a letter showing how many FOIA cases had been affected by this move had been sent to a Senate subcommittee. However, Justice's policy, he added, was not to release the letter until the Senate subcommittee acknowledged it.

Diana Huffman, counsel for the Senate Judiciary's Administrative Practices Subcommittee, said her panel had received a letter saying that there was a total of 475 FOIA cases to begin with and that the letter made it appear that only four of them had been dismissed. She could not release the letter either, she said, because it seemed to be "fuzzy" and the panel was seeking a better response.

The two Justice Department officials working with the FOIA docket, Assistant Attorney General Barbara A. Babcock, head of the Civil Division, and her deputy, William G. Schaffer, could not be reached for comment, despite two days of phone calls.

Still, there are ways of getting such information. The Washington Star has sent a Freedom of Information Request to Justice, asking for the records showing the status of the FOIA case docket.