Our Government Stymies Open Government

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By Robert G. Vaughn

JULY 4 IS the 18th anniversary of the enactment of the Freedom of Information Act — in theory, a birthday worth celebrating. The law is testimony to America's continuing commitment to open, accountable government. The Founding Fathers would be proud of the act — unless they could see how the peoples' government often frustrates its purpose.

Some cases:

In 1976, Berkeley graduate student David Dunaway, who was researching a book on folk singer Pete Seeger, asked the FBI for records on musical groups of which Seeger had been a part. After his request was denied, Dunaway filed suit to get the material. In 1981 — five years after Dunaway's initial request — Judge Robert F. Peckham not only ordered the release of the information but also criticized the government for a "dangerous litigation strategy" of making FOIA proceedings as lengthy and costly as possible to discourage others from pursuing their rights under the act.

A Colorado company filed suit in federal court to make the government release certain documents under the Freedom of Information Act. The government subsequently turned over the material but a frustrated Judge Jim R. Carrigan lectured the Department of Education about its "delay, foot dragging, obdurateness and lack of candor." Some remedy ought to be found, the judge declared, to prevent the government's "damn cussedness" in complying with the Freedom of Information Act.

In 1978, Continental Can Co. asked the Labor Department for copies of case law used to determine the rights of government contractors. Although the Labor Department signed a consent decree promising to provide them, the District Court for the Northern District of Illinois found in 1981 that the Labor Department's conduct under the agreement demonstrated a "lack of cooperation, and evasive and dilatory tactics."

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A disabled government worker sought records from the Labor Department to challenge the reduction of his disability payments. After delaying some six months, the department released the records — but only after a suit was filed against it in a Kentucky federal court. In ordering the government to pay legal fees, the court asserted that some type of pressure ought to be put on the bureaucracy to stop it from giving citizens "the runaround, as was done here."

When the Treasury Department denied records requested by the Church of Scientology, forcing more than two years of litigation in U.S. District Court here, Judge William B. Bryant harshly criticized the Treasury and government attorneys: "It ill behooves the United States government to participate with such cunning creativity in what can only be seen as an attempt to frustrate the will of Congress in enacting the Freedom of Information Act and [of] this court in enforcing it."

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These judicial comments are far from rare. There have been dozens of them issued since 1979 that indict the federal government for subverting the spirit and intent of the Freedom of Information Act by delay, intransigence, evasion and even open hostility toward those attempting to avail themselves of their legal rights.

So costly and difficult has the government made it for the public to gain speedy access to information that the Freedom of Information Act may become useless for all but the most-patient and the best-financed citizens.

In fact, a reading of what the courts have been saying about the government's compliance with the act suggests that Congress should be considering new mechanisms for enforcing it — not studying proposals to further restrict its application, as it is now doing.

When Congress passed the act in 1966, it was concerned with an executive branch whose preoccupation with secrecy had reached ludicrous proportions.

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Off limits to the public were such things as the amount of peanut butter purchased by the armed forces, the memoirs of a Confederate army general criticizing Reconstruction and the tapes of a call-in weather forecasting service. The determination to end this state of affairs led to the passage of the act over the unanimous opposition of federal agencies, led by the Justice Department.

The public's use of the act actually grew slowly. The press, which had championed it before passage, did not use it extensively — possibly because it was of little value to journalists preparing stories under the pressure of daily deadlines. Instead, the major users of the law became corporations and law firms, joined in the late 1960s by environmental, consumer and other public interest groups.

Increased congressional oversight and concern about executive secrecy during Watergate helped generate amendments to strengthen the act in 1974. Congressional hearings identified long delays, bureaucratic delaying tactics and restrictive interpretations of the law. Congressional amendments focused on improving procedures, compelling government departments to comply and encouraging use of the act by individuals and the press.

Since 1974, Congress has restricted access to information through specific legislation apart from the act itself. During the Carter administration, Congress excluded from public access information acquired by the Federal Trade Commission under subpoena. In 1981, Congress, through the appropriation process, also effectively prohibited the Consumer Product Safety Commission from releasing complaints by consumers about products suspected of being hazardous.

In this session of Congress, the Senate passed legislation exempting from disclosure CIA documents in "operational files," and the legislation is now pending before a subcommittee of the House Government Operations Committee, but could pass before the end of the year.

Since 1974, attempts have also been made to alter the act itself. The Reagan administration's Justice Department began seeking broad amendments in October 1981. Conservative members of Congress, led by Sen. Orrin G. Hatch (R-Utah), have called for modifications on grounds that the act costs the taxpayers too much to implement, is sometimes used to harass government agencies and fails to adequately protect the rights of individuals and companies that submit confidential information to the government.

The Senate has passed amendments far less drastic than the original proposal. The Senate measure would exempt from disclosure law enforcement information that could endanger informants, Secret Service records and technical and commercial data that cannot be exported to foreign countries.

A number of limited changes would be made in agencies' procedures, including increasing their ability to extend the deadline for responding to requests and providing extensive procedural rights for persons who have submitted requested information to the government.

Similar legislation is pending in the House Government Operations Committee.

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Worrisome as these changes may be to advocates of open information, by far the greatest threat to the FOIA are the tactics of the federal bureaucracy. These already thwart the public far more effectively than is generally realized.

The proposals now before Congress pay too much attention to abuse by users and too little to the abuse of government *agencies* which are charged with administering the law.

No doubt some of the problems, including the huge backlog of cases, often result from circumstances beyond the control of agencies, such as the heavy volume of requests and inadequate resources to cope with it. But the comments of federal judges suggest that delays are sometimes motivated by hostility and are used by the government to its own tactical advantage.

Consider, for instance, the difficulties faced by a civilian employe of the Navy Department who requested information from his personnel file which he believed had been wrongfully collected. After he filed suit in U.S. District Court here, the Navy released much of the information sought. The U.S. Court of Appeals here subsequently declined to award attorney's fees, but in its 1982 decision it disapproved in "no uncertain terms" the Navy's conduct in withholding the information, as well as the Navy's "cavalier tone" and "unacceptable behavior" toward requesters.

An official of the Treasury Department employes' union, who sought from the IRS a copy of the "objectives and standards" used to evaluate IRS officials was turned down. The District Court here ordered the release of all the withheld documents and, in evaluating the government's conduct, pointed to Treasury's lack of response as evidence of an attempt to frustrate the requester.

Sam and Juene Jaffee requested from the CIA and the FBI records pertaining to themselves. In 1981, a federal judge here called "apt" the Jaffees' description of the FBI's conduct as a "war of attrition" designed to wear down the requesters. The judge stated that the litigation revealed a a history of "agency delay" and "recalcitrance."

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The act's current deadlines for response to requests have limited practical significance. The volume of requests and inadequate resources devoted to processing them guarantee large backlogs.

Courts have recognized the practical problems faced by the government by deferring judicial review if an agency is processing its backlog in good faith. The backlog itself has become an issue for the courts. Some plaintiffs now seek judicial intervention to advance their place in the line on grounds of special circumstances.

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The courts understandably prefer that cases be resolved without judicial intervention, given that the process of judicial review can be as lengthy as the delay at the agency level. (The administrative office of the United States Courts found that the median time between the filing of an FOIA suit and its disposition in district courts was eight months for the year ending June 30, 1981. And 10 percent of the cases took more than 23 months.)

As things now stand, courts have limited ability to evaluate the reasons for a backlog — and little