

Finding the Facts Bureaucrats Hide

by John Rothchild

Information is a growing problem for the bureaucrat. The less action he performs, the more things he must write down. But the more he writes down, the greater the chance that something he records will be exposed and used against him. The xerox machine has brought the joy of reproduction to the agencies, but it has also brought fear—it is safe to assume that without the xerox, there never would have been anybody patient enough to copy down the 47 volumes of the Pentagon Papers by hand.

In any case, the heat is on all across government. Bureaucrats are tightening security, and from the State Department to the Federal Communications Commission, they are locking up the xeroxes at night. These measures are brought, in part, by the anxiety that more insiders will be smuggling the truth out in their briefcases. But the unsettled atmosphere has much more to do with the effects of a little-known but promising law—

John Rothchild is an editor of The Washington Monthly.

the Freedom of Information Act.

Freedom of information is important because it recognizes for the first time that an average citizen has the right to pry open almost any government file he wants. Its theory challenges the long-held belief that the government files are its own private property, that internal agency deliberations, like an individual's thought processes, must be protected from outside interference. Freedom of information posits that studies, memos, and reports are as much a part of the public domain as national forests.

In practice, the law hands the government the burden of justifying its withholding of information. While the citizen previously had to prove his need for data, the agencies are now required to release it to "any person." If requests are denied, the petitioner can take the agency to court, a remedy unavailable under previous law.

All these promising strictures, if fully applied, would put many prospective Ellsbergs out of work. Most

files would be open to all. Yet most Americans are not even aware that they have been offered a new freedom. Perhaps this is because most of us have, at one time or another, actually opened an official government report, only to arrive at the last page in bleary hypnosis, relieved that we couldn't remember what we had read. Official reports have always been the greatest argument for government secrecy—and there is a queasy notion that what they bury in the files must be as dreary as what they publish; that if we ever opened one of those files we would be met with a literary Pandora's revenge.

One would, therefore, have to be very frustrated to passionately desire the government's records, and the public has never reached that threshold. Congress has. Support for the law grew not from the quality of the files, but from the continued refusal of the Executive to disclose them. Congressmen found that freedom of speech doesn't mean much if you don't know what you are talking about, a fact which has not deterred them from talking, but nonetheless has moved them to pass this law.

Whistle-Blowers without Consent

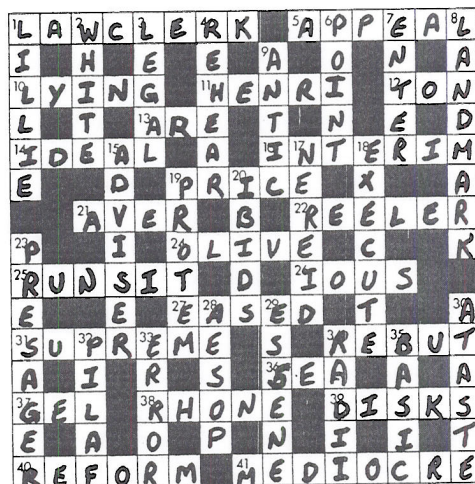
Congressmen also found in freedom of information the rare advantage of risk-free principle. The law, after all, didn't affect their own closed-door sessions and secret operations, since it only applied to the Executive. It took something less than a profile in courage to take an uncompromising stand on the "peoples' right to know."

The agencies were unanimously opposed. Freedom of information would force them to be whistle-blowers without their consent. Why would any self-respecting bureaucrat want to reveal the under-pinnings of his own decisions, which would be taken out of context to make him look bad? Bureaucrats are not rewarded for revealing information, but there are penalties for giving out information

that should have been withheld. Many laws, like the pesticide regulations, view bureaucratic leaking as a much greater crime than actual violation of the law out in the field. In fact, where using too much deadly poison and endangering life carried a fine of \$1,000 under the old pesticide law, the giving out of confidential information would cost the bureaucrat \$10,000. A new bill up for consideration this year narrows the discrepancy, but the higher fine will still go to the bureaucrat.

Aside from tradition, the agencies could also cite three legal precedents to their withholding of information. First was the Housekeeping Statute, enacted over 150 years ago, which essentially said that as the government can bolt down its desks and chairs, so can it protect its records. Second was the doctrine of Executive Privilege, never challenged or defined in the courts, based on the notion that the President was accountable only to the people, and that Congress could not, therefore, pass laws forcing him to reveal information. And third was the Administrative Procedures Act of 1943, which had supposedly been a "freedom of information" law, but actually provided the agencies with so many loopholes that they could effec-

Answers to December puzzle:



tively withhold any document.

Congressman John Moss, the real force behind the law, chipped away at the legal supports. He got one sentence added to the Housekeeping Statute, which required that it could no longer be used to suppress information. He helped influence Presidents Kennedy, Johnson, and Nixon to each say they would invoke privilege only personally and in extreme cases, which abolished the practice of the agencies themselves invoking the privilege as extensions of the Executive. And he drafted the Freedom of Information bill to amend the Administrative Procedures Act.

The proposed bill did not carry any penalties for the agency that withheld the records, but that was not enough to quell the opposition. It was said that Lyndon Johnson was dead against the bill, and almost didn't sign it at the last minute. Certain concessions had to be made in the amendments, which detailed what kinds of information could still be denied the public.

These amendments guaranteed secrecy for classified material, intra-agency memorandums, commercial or trade secrets, medical and personnel files, investigatory files for law enforcement purposes, among others. Two other amendments were added for special interests—the Dirksen amendment which calmed the oil people by prohibiting the release of data on drilling and oil reserves, and the Humphrey sop to the bankers, tacked on to “insure the security and integrity of financial institutions” by keeping government reports of their operations covered up.

Blotting the Law

When it looked like the bill would pass, the real battle ensued over the interpretation of amendments, where the difference in a comma might keep tons of data hidden or revealed. For instance, did the “internal personnel rules and practices” exemption refer to merely personnel practices or any

internal practices?

The price of the bill was that the Justice Department, representing the agencies, sit down with the Moss subcommittee that authored the bill, to work out the interpretations of the wording. The resulting House report, and later the Attorney General's memorandum on the act, could later be taken by agencies and judges as the intent of Congress. Justice made sure that the interpretation was as loose as possible, to satisfy the agencies that whatever they wanted to hide would probably fit into one or another of the exemptions.

The bill passed without a dissenting vote, evidence if anything, of these weaknesses. Johnson, who had opposed it from the start, was satisfied enough to sign it into law with rhetorical flourish on July 4, 1967, when he said, “I have always believed that freedom of information is so vital that only the national security, not the desire of public officials or private citizens, should determine when it must be restricted.” Johnson then gave a preview of how the noble sentiments of the act would apply by refusing to release the original draft of his speech.

The agencies didn't take this new law sitting down.

While such words as “public interest” and “interfere with efficient operation” were eliminated by the letter of the law, they have not yet left the spirit of the bureaucrat any more than the adrenalin of “Dixie” has been removed by the edicts of the Supreme Court. Every bureaucrat knows when “national interest” is being threatened—he can feel that rush of acidity to his stomach that warns him that whoever is attacking him is not acting with the nation's welfare in mind. Those outside may accuse him of having veins full of duplicating fluid, but it is such a personal sensitivity to national matters that makes the bureaucrat feel worthwhile.

The agencies could take an occasional expose or accidental leak, but

in the new law they were confronted with the first threat of a deliberate and systematic uncovering of the machinery of government. They had hidden behind Kafka for so long—behind the myth that because bureaucracy is unintelligible from the outside, it is also unintelligible from within—and now the ruse would be undone. The bureaucrat would be discovered running his patterns, and it was at the patterns that people like the Nader study groups struck with the new law, demanding literally hundreds of documents all across Washington. Any bureaucrat worth his blotter should know how to retaliate.

Nader's Raiders approached the files during what used to be the long, lazy time between the seasons of money-gathering and money-spending and made the summer one of the most frantic times in government. Hardened journalists were never a threat like the summer students, and the resulting grapple was one of the greatest tests of law against culture since Prohibition. Remarking on the aftermath, Nader lawyer Robert Fellmeth said: "The devices employed by federal officials to avoid compliance with the Act betray an ingenuity which could usefully be employed in the solution of problems under the agency's or department's jurisdiction." In some places, the word "Nader" was enough to bring the heavy iron bars sliding across cabinets all over town.

Sanitizing the Shelves

The best example of spirited bureaucratic defense occurred in the Department of Agriculture. While Agriculture's gambits in foiling the investigators were neither the most ingenious nor the most subtle, they did show the lengths to which an agency would go to avoid losing its claim to the privacy of its memory. The saga at Agriculture is recorded in *Sowing the Wind*, an excellent Nader report on pesticides and meat inspection by Harrison Wellford:

Joe Tom Easley and Bernard

Nevas, summer interns, were assigned by the Nader group to investigate Agriculture in 1969. They informed then-Secretary of Agriculture Clifford Hardin that they wanted to focus on the Pesticides Regulation Division (PRD) where permissible strengths and uses of commercial pesticides were decided and enforced. On arriving at Agriculture for what they thought would be a relaxed chat with Hardin, the two students were confronted with what Agriculture called a "visit of state," and met in a conference room not only with Hardin, but with 15 of the most important department heads as well.

Taking this as evidence of interest in their efforts, and unshaken in their faith in the Freedom of Information Act, the Raiders made a written request for 14 groups of records and an oral request for the registration file on the Shell Vapona No-Pest Strip. They were certain that none of these requests violated any of the amendments to the Act. They were surprised, therefore, to find that Harry Hays, head of the PRD, said that he doubted if any of the material could be provided. Hays did, however, reaffirm his support of the spirit of the investigation and invited the Raiders to a series of briefings on how the PRD really worked. The briefings were to begin the following day.

The first briefing also became the last after some probing questions by the students convinced the PRD officials that cordiality was not going to substitute for hard data. From then on, relations deteriorated. Hays told the two that he was denying access to everything on the list and that the Freedom of Information Act "didn't apply." He explained that the division had already been investigated enough.

The word went out to the PRD staff that a memorandum had to be filed after every interview with a Nader Task Force member, and that all interviews were to be cleared through Hays. This dictum was later rescinded, and several people in the Department refused to comply with it

anyway, but it set the tone for what was to come. Meanwhile, the two students filed the written appeals necessary before freedom of information cases can be taken to court, and decided to wait things out in the PRD public library.

The library became the main battleground for the recorded memory of the division. At first, the library opened onto the main corridor, and the librarian granted them free use of the documents, including some denied by Hays.

On a subsequent visit, Nevas and Easley found that the library door was locked. A hand-lettered sign told them to enter through an office two doors down. There they met up with the librarian, who said that the division had a new rule that all visitors to the library would have to be cleared through Dr. Hays. They were told to wait in the library while the librarian went to find Hays to ask for the security clearance.

Then, Wellford explains, "After browsing a few minutes, Easley suddenly noticed that two large volumes published by Shell Chemical Company which he had examined earlier were now missing. Searching the shelves more carefully, they discovered that the library had been swept clean of all Shell publications, although the library had many books and reports from other pesticide manufacturers. Even more mysterious, all records of Shell publications had been removed from the card catalog.

"At this point, Dr. Hays came rushing in, flushed and obviously out of breath. 'What are you doing here? May I help you?' Easley replied, 'Just browsing,' and asked about the missing Shell manuals. Hays became flustered and stared intently at the shelves as if looking for the missing volumes."

Even without the Shell material and some of the card catalogs, the library itself finally became too much a symbol of Department laxity and softheartedness. In early August, two other Task Force members were told by a PRD official that they could not

enter the library at all. He offered to "consider" any formal request made for some specific item.

Privacy survived the summer, but two lawsuits brought by project director Wellford resulted, two years later, in the release of the information so energetically denied. By this time, the Pesticides Regulation Division had moved to the Environmental Protection Agency, and Hays had lost his job. Either because of the suits, or because of the new agency, Wellford says, the Nader people have had little trouble getting everything they wanted out of EPA. Recently, however, they were refused the files on toxic residues left on crops after they are dusted with pesticides, and Wellford is threatening another freedom of information suit.

No Tickee, No Washee

While not all agencies shared the passion of Agriculture in bludgeoning curiosity, most of them showed the same ingenuity in detouring requests. The most common ploys include:

a) Commingling. The idea here is to take non-exempt material and slip it into a classified file, and then complain that separating the confidential from the public could take too much time. This is a favorite at the Defense Department where, for instance, information on the amount of oil pumped from ship bilges was refused because it was going to be included later in a classified report. The Nader Agriculture Task Force got a similar denial from deputy administrator F. R. Mangham: "Certain of these files do contain information that . . . would be available if separated from the basic file. . . however, our staff and work schedule is such that this cannot be done on a crash basis. Therefore, it is necessary that the entire file be restricted."

b) No Tickee, No Washee. The agency refuses to provide index files and master listings of all the documents available, then accuses any inquirer of "fishing for information"

and withholds requests because they aren't identified properly. This was a standard gambit of the pesticide people, but it backfired when the judge in one of the Wellford cases said that an agency cannot claim both that it is unable to find the files and that it would take too much work to separate the records in the files.

c) A Small Fee. The law said that agencies could collect reasonable fees for searching out and duplicating records, but set no uniform standard. In some agencies, the price of documents seemed to depend more on their sentimental value to the agency than on the actual costs of duplication. In the summer of 1968, the Nader group was offered a copy of the Federal Trade Commission's organizational manual at 60 cents a page, or a bargain for \$144. The Department of Agriculture said it would be glad to prepare its registration files for public view, if the inquisitors would pay the \$91,840 and wait 1.6 years.

The cost dodge has also become a key element in the computer retreat, wherein an agency hides all vulnerable information inside the computers and then says there is no program to print it out. When a group of mine investigators asked the Bureau of Mines for data on which mines had the worst accident records, the Bureau spokesmen complained of all the garbage in the computer and said a printout could be had—for \$2,000.

d) We Don't Serve That. A corollary to the computer retreat is the claim that the requested information has never been collected. The Interstate Commerce Commission, for instance, doesn't ever get around to classifying or even counting complaint letters from consumers. The Food and Drug Administration said it did not keep any brand name list of beverages containing cyclamates.

Usually, under pressure, the agencies admitted to having the materials, but if the investigators had not pressed them or learned from other sources that the records existed, nobody would have been the wiser.

e) The Working Paper. In this ploy, information is provided freely to insiders, but not to the public, on the grounds that it is still in rough, preliminary stages. Wellford says that Agriculture used this tactic to delay release of a report on the pesticide 2-45T. While a draft of the report was completed and circulated to industry people in August, 1970, the "final report" containing only minor changes from the draft, was released in May, 1971.

The working paper ban is usually justified on the grounds that the release of incomplete material would give the public a "warped impression." The Interior Department's Federal Water Pollution Control Administration refused a Nader researcher status reports on water pollution abatement programs at 20 federal installations, because all the figures were not in. On further questioning, it was discovered that Interior's real fear was its relationship with the Defense Department, which was "finicky about releasing figures on total sewage." For national security reasons, Defense didn't want the enemy to find out the amount of sewage coming from domestic military bases. "Presumably," Nader says, "the enemy could rush back to its abacus and calculate the manpower strength of the base."

If all these ploys fail, an agency can generally duck under the exemptions. Any record collected by or about a private corporation can easily enough be called a "trade secret." Any report or study done for an agency can be an "intra-agency memorandum" and withheld to protect the privacy of the decision-making process, even though the decision has already been made. A file will almost invariably fit one or more of these categories, or, if not, it will surely fall under "national security" or "commercial and financial information." The trick is to claim as many of the exemptions as possible, in the hopes that one of them will stick in court. The Nader group at Agriculture, for instance, was hit with trade secrets,

intra-agency memorandum, no tickee, no washee, work overload, commingling, and high fees simultaneously.

Hiding the Bullets

The bizarre uses of the exemptions are best illustrated in the saga of author Harold Weisberg, a member of the Committee to Investigate Assassinations, a group of ad hoc sleuths devoted to the solving of the JFK-MLK-RFK trilogy, with principal emphasis on JFK. The file that Weisberg wanted, and is still seeking, contains a scientific analysis of the bullet fragments found after the murder of President Kennedy in Dallas.

Weisberg first asked the Justice Department for the bullet analysis in 1966. He wanted to know if the FBI's scientific findings supported the Warren Commission's revised "three-bullet theory." That theory began as the simple conclusion that Oswald had fired three shots, two striking Kennedy and one wounding Governor Connally. After it was later discovered that another bullet had struck a curb near the Book Depository, the Commission was stuck with an extra shot to account for. It modified its early findings by giving one of the bullets the double task of going through Kennedy and into Connally, thus freeing the extra bullet for the curbstone. The FBI's spectrographic analysis of the found fragments would be a concrete test of the validity of the three-bullet theory and the contention that all the bullets came from Oswald's gun.

When Weisberg asked for the spectrographic findings, the FBI told him they were available in the National Archives, where the rest of the evidence considered by the Warren Commission was on deposit. The Archives, however, said they didn't have the file and rebounded Weisberg to the FBI. This time, Weisberg personally stood by while the FBI called the Archives and identified the file, only to be told officially that the Archives didn't have it. After that,

confusion became lockjaw, and as Weisberg says in a letter to then-Attorney General Ramsey Clark, "Your department became mute for more than four months."

The spectrographic test was part of selected material which had never even been presented to the Warren Commission, much less turned over to the Archives. And, if there was something in the test to warrant special secrecy, the Warren Commission never appeared to be very curious to know what it was. FBI Special Agent John Gallagher, who did the spectrographic tests, testified by deposition to the Commission, but was never asked about the results. Another agent, Robert Frazier, did refer to the tests, but according to Weisberg, "Agent Frazier's testimony is merely that the bullets were lead, which would seem to be considerably less information than spectrographic analysis would reveal."

After a long delay, Weisberg was finally told by the Justice Department that the data he sought was blocked from disclosure by Exemption Seven to the Freedom of Information Law, which said that any "investigatory file compiled for law enforcement purposes" could be withheld from the public. Weisberg then retained lawyer Bud Fensterwald, another member of the Committee to Investigate Assassinations, who had helped draft the original act while on the staff of then-Senator Edward Long, and filed suit.

Exemption Seven had been put into the law with the FBI specifically in mind, to protect the agency's right to quietly prepare a case against somebody without fear of early disclosure that might jeopardize an upcoming trial. The exemption gave firm legal sanction to an ongoing FBI practice that had never had any basis in statute before.

While people like Ralph Nader sought such information to prove that the government was lax in prosecuting corporate criminals, the government could withhold it precisely because

prosecution was still possible. The exemption, therefore, added one more benefit to the growing rewards of inaction—by making prosecution forever imminent, the government would face neither corporate retaliation nor public scrutiny of its failure to stand up to corporations.

The judges in several freedom of information suits, however, have not bought the government's imaginative vision of its coming glacier of legal action. They have generally limited the government's claim of exemption to information collected in cases that actually might be brought to trial. This made the claim especially tricky for the Warren Commission material. For one thing, the federal government had no jurisdiction to prosecute the assassin of President Kennedy, a defect later remedied for future Presidents; and secondly, even if the FBI was thinking of further prosecution, Weisberg would soon be curious to know just who it was they were bringing to court for Kennedy's death, more than five years after they had solemnly accepted the Warren conclusion that it was a solo job.

Since the Freedom of Information law is still young, its usefulness depends on how sympathetic a given judge is to the intent of Congress as opposed to the tradition of the agency. In the Weisberg case, the judge was particularly sensitive to the latter, not only ignoring the question of whether the file fit the exemption, but also overlooking another of the law's reforms by asking Weisberg "for what purpose are you seeking this information?" The judge also bypassed the exemption problem to find for the Justice Department, without giving a reason. All this, of course, has made Weisberg even more anxious to know what is in those spectrographic results, and he is appealing.

Saving the Hoarders

The Weisberg case, one of about 200 suits brought under the Act so far, shows that the government can no

longer brush off the curious with silence or guttural refusals. It now knows that capricious denials mean more court fights. The government's fear of a build-up of adverse decisions tightening the exemptions is evidenced by a memo sent from the Justice Department to all agencies in December, 1969. Justice warned that bureaucratic passion for the national interest might lead an agency to overlook the cold letter of the law, and suggested that each agency be ready to sacrifice a few files for the safety of its fellow data hoarders:

Although the legal basis for denying a particular request under the Act may seem quite strong to an agency at the time it elects finally to refuse access. . . the justification may appear considerably less strong when later viewed, in the context of adversary litigation, from the detached perspective of a court. . . and a possible adverse judicial decision may well have effects going beyond the operations and programs of the agency involved. . . .

In view of the foregoing. . . litigation should be avoided if reasonably practicable where the government's prospects for success are subject to serious question.

Like the Weisberg case, the Nader summers also say several important things about the law. First, in some cases, it can work—Wellford won two suits against Agriculture. But with the intent of the exemptions still left vague, there is no assurance of victory, and victory is often empty after the two-year delay in the courts. For timely information, the Act is useless. The government has 60 days to respond to the original suit, and enjoy agency delays before that point and court appeals after the first trial. As for timeless information, there are very few institutions or citizens around interested enough in one project to incur the legal fees and the delays. The real beneficiaries of freedom of information have been precisely those who needed the law least—lobbying groups and corporations, who are self-interested in government studies. *The New York Times* did not think it worth the effort to sue the

Renegotiation Board for material on an evaluation of defense contracts, but Grumman Aircraft, one of the interested subcontractors, did sue and finally won the case.

By systematically testing the bureaucratic barricades for the first time, the Nader forces also showed how little a threat it takes before an agency feels desperate enough to haul out its big guns. Those who thought that the agencies' original obstruction was a measure of the real value of the information sought were, in most cases, disappointed. The inquiries that closed the public library in the Pesticide Regulation Division uncovered some interesting data, but nothing that would crumble the agency.

The law, if anything, has increased the bureaucratic paranoia about public scrutiny. In almost every case brought before the courts, the agencies said disclosure would interrupt their work and make regulation impossible. On the one side, the agencies tend to believe that the most dire threat to the public interest is the public itself. On the other side, they are convinced that effective regulation depends on the will of those regulated. But sometimes even a threat of disclosure can have what most people would call a positive effect on regulation as in the chicken-cancer case.

Relaxing the Tumors

An industry advisory panel, composed of veterinarians and animal disease specialists, secretly recommended to the Department of Agriculture that its ban on the use of chickens with cancerous tumors be relaxed. Under the old system, if any tumor were detected, the whole chicken would be condemned, but under the new plan, the non-tumorous limbs would be cut up and sold as chicken, and the tumorous parts ground up and sold in hot dogs.

Normally, the Department would consider such a request a private matter, so that its advisory panels, as an Agriculture administrator once put

it, can have a "free and frank discussion" on the merits of a particular case.

This time, however, the news of the advisory panel proposal got out by accident, so the Department was on notice that whatever decision it made on the case would get publicity. Richard Lyng, the assistant secretary in charge of food protection, took the prudent bureaucratic course of going outside the Department for a human medical opinion, seeing as the veterinarians could understand cancer in the soon-to-be-slaughtered chicken, but perhaps not in humans. The matter was turned over to the U. S. Surgeon General, who appointed a review panel. In February, 1970, he recommended that the old system be retained and any chicken with visible evidence of cancer be tagged unfit for human consumption. The Secretary of Agriculture adopted his recommendation.

Without the accidental threat of this publicity, there is a strong chance we would be eating cancerous tumors at the hot dog stands today. The chicken cancer case is a good illustration both of the need for freedom of information and how even a federal agency can benefit from it. In the past, since an agency could legally withhold almost anything, it was the focus of industry blame when leaks occurred. If the law is enforced, however, the agency can take the heat off itself by appealing to fate and forces beyond its control. This could create both better decisions and less corporate pressure on the bureaucrat, because the corporate heavies will know that the information will be released whether the agency likes it or not.

But the bureaucratic fear that systematic disclosure will hamper rather than increase his effectiveness is related to Harrison Wellford's fear that publishing his study on pesticides would ruin his chances of further cooperation from the Department of Agriculture. Wellford was surprised to get precisely the opposite result. Now, he says, they call him up at night. They also respond immediately to

requests. Where a few once showed him goodwill in deference to his cause, now many more are forced to respect his power. It is a lesson, however, that few bureaucrats have had the opportunity to learn.

Congressional Convicts

Even the power of curiosity, though, has its limits. A Congress cannot expect to confer on Nader's Raiders and others a right-to-know that eludes even its own members. Any inquiring citizen with widespread hopes for freedom of information will be sobered by the failures of even the authors of the law to get the Executive to reveal itself.

Ironically, as the law opens more files for the citizen, the Congressmen face increasing condescension as the Executive ignores its demands for information. In fact, while Congress did not write the law with its own privileged members in mind, Senators and Representatives have had to turn to the Act to find out what is going on. Rep. Henry Reuss had to sue for a government study on the SST, and more recently, Rep. John Moss himself went to court after the Administration refused to provide him with the complete set of the Pentagon Papers. Moss and his Freedom of Information subcommittee demanded that all 47 volumes be turned over to his committee by 5 p. m. on Wednesday, June 22, but that day passed and Moss didn't even get the courtesy of a reply. The Administration finally gave the complete set to both of the friendly Armed Services committees—where curious legislators could file in, stripped of pencils, paper, and sharp objects like convicts at a shakedown, to take a look at how the government used their war votes.

Moss still hasn't gotten the full Papers, although all Congressmen were finally provided with the bulk of the material, but with the controversial volumes left out. He has sued in the federal courts under freedom of information, finding that his leverage as an

elected leader is no greater than his claim as "any person" under the act. Somehow, the notion that Moss and the man-on-the-street have an equal chance of getting the files is more threatening to than confirming of the strengths of democracy.

Other examples abound. When Rep. Pete McCloskey asked for photographs of villages in Laos that he knew were in the hands of the Defense Department, he was given the usual silent treatment and then told by a Department of Defense spokesman: "I cannot see that the civilians in Laos would be enhanced by our further exchange of photographs. . . it is neither feasible nor useful. . . to furnish extensive photography in Laos." Senator J. William Fulbright, himself a frequent victim of Executive tetanus, recently asked the General Accounting Office, which is specifically empowered to evaluate the Executive, to tell of its frustrations in getting information. The GAO responded with a lengthy report which said that while explicit denials were rare, the obstacles and delays amounted to the same thing.

The GAO recited a long list of statutes that empower it to full access in its reviews of government programs. It then recited a longer list of occasions where the statutes were ignored: "The Departments of Defense and State have denied permission to GAO to visit the Thai and Korean camps in Vietnam"; "in March, 1971, 13 months after GAO informed the U. S. Embassy in Germany that we planned to conduct a review of occupation costs in Berlin, we were informed by the Department of State that we would not be permitted to do so"; "we were denied access to official trip reports by DOD officials in Greece."

There is very little that the GAO, or the Congress itself, can do to force the Executive to spill. Congress can cut off money, or, supposedly, hold a federal official prisoner in the House for contempt. It would be difficult, however, to find any federal marshal willing to arrest John Mitchell or Mel

Laird and drag them over to the basement on Capitol Hill.

The main obstacle to enforced openness in government, which the freedom of information law scrupulously dodges, is the doctrine of Executive Privilege. Essentially, this doctrine says that the President doesn't have to tell anything he doesn't want to. And while the privilege isn't formally invoked very often, it is still the real basis for the security that permits the Executive to refuse to give information without offering any reason for doing so. Executive Privilege is also the prime rationale for the government's claim of a right to classify.

When President Eisenhower issued Executive Order 10501 in 1953, thereby creating the current classification system on which over 20 million secret documents now rest, he cited the "authority vested in me by the Constitution and statutes." As it turned out, there were no statutes, so the only authority he could claim to classify records was Executive Privilege, based on the separation of powers clause of the Constitution. Congress has been wary of challenging the claim. Some laws, like the Military Assistance Act, do provide for a cut-off of funds if the President refuses to release desired information without claiming Executive Privilege. But claiming Executive Privilege is as easy as saying the words. Senator Fulbright saw a victory in his recent use of this provision to force President Nixon to cite his privilege in denying Congress five-year projections on military assistance. So Nixon merely said, "O. K., Executive Privilege." It was something like convincing the bully to say "uncle" while he still has you pinned to the ground.

The Conservative's Mylai

While Congress did not challenge either executive privilege or the classification system in the freedom of information law, the courts, until recently, were equally unwilling to rule on the government's claims. The first

instance of the court's timidity was when it refused to open the Operation Keelhaul files.

The Keelhaul files are the conservatives' Pentagon Papers. Unfortunately, no patriot could be found to release them from within, so one may still only guess at the stories surrounding the decision of the Americans and the British to send an estimated two to five million anti-communist Russians back to Stalin and, presumably, to death or the salt mines. The estimate is provided by Julius Epstein, professor at Stanford University's Hoover Institution on War, Peace, and Revolution, who in 1954 came across a notation of "Operation Keelhaul—The Forced Repatriation of Communist Jews" which was mistakenly left in a card catalog at a military archives. The Defense Department predictably denied Epstein's request for the file on the grounds that it was classified.

In recent years, Keelhaul has become the right-wing Nuremberg suggestion. In any month's *Congressional Record*, you can find Rep. John Rarick chastising our lack of priorities, not to mention our hypocrisy, in discussing the more dubious war crimes of recent times, when we let such egregious and long-unsettled war crimes go unprosecuted. Let's get through with the old crimes before we worry about the new, seems to be the thrust. Rep. John Ashbrook, the most consistent supporter of Epstein's efforts to get the Keelhaul file, wonders how the Defense Department can callously cover up an incident "several thousand times bigger than the massacre of Mylai," and one that happened so long ago that its record could not possibly affect national security. Epstein sued under the Freedom of Information Act, and became the first to challenge the national security exemption.

All this support notwithstanding, the lower court threw out the Epstein suit. And on appeal, Epstein lost again when the court refused to examine the documents *in camera* to test the government's claim that their release

would imperil the nation. The court said it could not judge the merits of classification, because "Congress did not intend to subject such classifications to judicial scrutiny to that extent."

The Epstein case remains a clear and detrimental precedent for the future prospects of fighting the classification system under the law. Recently, a U. S. District Court cited Epstein in its refusal to order the government to turn over the four volumes of the Pentagon Papers that Congressman Moss is still seeking. Again, the court dodged the issue of Executive Privilege and refused to review the documents *in camera*, saying, in effect, that it was sure that these particular volumes involved national security, even though it could not look and see. The judge in the Moss suit, Gehard Gesell was the same judge who earlier had ruled that *The Washington Post* could print the Pentagon Papers. In the earlier case, he did review the documents in question, but the issue was different because the newspaper already had them in its possession. Perhaps in the Moss case he couldn't face the drudgery of reading any more Pentagon Papers.

In another recent decision on a secret government study of the potential effects of the atomic blast on Amchitka Island, the Cannikin Papers, a court for the first time in history did rule on Executive Privilege, saying that the government had to turn over the papers to a lower court for inspection *in camera*, to see if a claim of the national security exception applied. Nobody knows what the precedential effects of the Cannikin case will be, although it is a clear break from precedent and contradicts both the Moss and Epstein decisions.

Editor's Relief

Such are the limitations of the law. Its failings, however, have more to do with the handicaps of the institutions that were best equipped to use it. The real beneficiary of the law was not

supposed to be "any person" like Weisberg, but the working newspaper, where the daily lust for facts would outweigh any bureaucrat's blotter. Newspapers were the prime lobbyists and clarions of the law, as journalism societies across the country organized freedom of information cells to put pressure on one branch of the government to open the drawers of another.

The results of their efforts seem most visible on the editorial pages before the law was actually passed. People who desired freedom from reading about how the old, tired freedoms were being threatened found some relief in a whole spurt of editorials on the fresh topic of the people's right to know and the newspapers' happy evaluation of their obligation and ability to fulfill that right.

Furthermore, newspapers could view this effort as more than back-patting, since most readers were not immediately convinced of the personal benefits they would derive from this new freedom. Like Cortes explaining Catholicism to the Aztecs, the newspaper publishers saw whatever good publicity they were giving themselves as secondary to the difficult task of evangelism that often comes with a heroic defense of somebody else's freedom, especially a freedom that is not readily understood.

On the less glorious level of day-to-day reporting, however, the evangelism of the editorial pages did not seem to spill over onto the mundane affairs of the news pages, or the publishers' increased budget for legal counsel to defend the suits. In fact, of the more than 200 suits brought under the Act, the Justice Department estimates that from five to 10 have been filed by newspapers. While some editors note that the mere threat of the law has produced many documents, a survey in *Editor and Publisher* magazine of June 26, 1971, shows that of 123 Associated Press managing editors who answered a questionnaire, only 16 said they had used either the law—or the threat of it—to get information. And 59.4 per cent of the

editors said they never had any trouble getting information from federal agencies.

The yawning distance between the newspaper's ability to glorify freedom of information and its ability to put freedom to work suggests more doubts about the usefulness of newspapers than about the utility of the Act. Editors contend that it is the nature of news itself that obstructs freedom of information and explain that filing suit to get a copy of a secret government study opposing the SST months after the final vote is taken is work for historians, not journalists. They also point out that the news value of any single document does not usually justify the high legal fees, and that the good reporters can always find out what is going on through the more informal devices of friendship and liquor.

It is journalism itself that works out the tricky trades between news and novelty, and newspapers who set the metronome of public attention. The job of covering the official or the powerful is made a job of daily routine, dependent on a continuous flow of similar documents, while the job of uncovering the travesty is made dependent on surprise. The continuing report on what the President says is a boring obligation, but a continuing report on FDA meat inspection or bombing of villages is contingent on its value as entertainment. It is the double standard between the routine of officialdom and the necessary surprise of the pose that threatens freedom of information—the discovery of cancerous additives in meat is a story only this week, and next week we will eat the same meat while mentally absorbed in something else. The tempo of the expose dictates that another story on cancerous additives cannot appear until we have forgotten the horrors of the present, or unless the story can be disguised as something new.

This is why the newspapers' effectiveness is limited to those issues that can be resolved in the same amount of

time as the editors perceive to be the public attention span. A Carswell could be defeated by newspapers because two months of articles did not quite cross the threshold of boredom, a war could continue undefeated for the opposite reason. A dangerous pesticide program can survive the newspapers, because the poison can be sprayed day after day and will still be on the leaves when the last font has been melted for a new crusade and when the last lead has exhausted the writer's imagination for novelty. News coverage must be predictable for public figures, unpredictable for public problems. The scattershot expose is rarely a fatal challenge to a bureaucrat, whose greatest virtue is patience, and who defeats his enemies by out-sitting them.

The Tribal Computer

In the end the bureaucrat still has possession. As the law approaches, the information can retreat to new outposts. In the process, the agencies may be forced to regress to a time when business is carried on by word of mouth, when thoughts are left unrecorded, when facts are deliberately and hopelessly jumbled in their computers' memories.

This gets to the deepest level of freedom of information, whether the government has any obligation to collect accurate data at all. It is more than a theoretical question. The Bureau of Labor Statistics has abolished the urban poverty survey for the upcoming election year. The same agency abandoned the monthly briefings on unemployment statistics, and is replacing the rigid technicians with much more versatile political types. The Administration is also trying to rid itself of the poverty-level index, changing the definition of poverty because too many people are now defined as poor.

If these trends continue, by the time the files are pried open for good, there may be nothing of value stored there any more. ■