

Remember the Freedom of Information Act? It's practically in mothballs today

Leadership and lobbying that went into the Act a few years ago have not resulted in a like amount of participation coming out of it.

By ROBERT O. BLANCHARD

A SERIES of congressional hearings this past spring has demonstrated that the Freedom of Information Act, in its present form, has been little used by the press.

"One of the great mysteries about the operation of the Act," said Chairman William S. Moorhead (D-Pa.) "is why it is not more widely used by the press. When the legislation was being considered six years ago, most of us thought that the public media would be one of the major champions and beneficiaries of this new weapon against the secrecy-minded government news censor."

Testimony from working newsmen, before Moorhead's House Information Subcommittee, provided the keys to the "mystery." One general explanation is that newsmen — and their editors and publishers — do not usually include the art of systematic, time-consuming and sometimes costly implementation of the Act as part of their routine reportorial skills. If a reporter cannot get the information he needs with a phone call, a threat, a leak or some other traditional means, he either flits off to another story or is otherwise discouraged by agency delays or his editor's indifference.

But also emerging from these hearings are suggested solutions to the lack of press use of the FOI Act. First, are amendments to the Act, which are expected to be proposed by Moorhead, narrowing or eliminating agency discretion and stalling.

Another hopeful assist to the press is the emergence of consumer and citizen groups into the issue of free-

dom of information or the right to know. The press could find these groups to be powerful and effective legal and political allies against government secrecy.

For instance, Nader's Center for the Study of Responsive Law has used the Act to challenge the bureaucrats of almost 40 federal agencies. It documented various techniques of evasion which agencies use to withhold information which the Act was supposed to make available to the public. Common Cause also has shown great interest in the Act and has offered amendments to make it more responsive.

The Act, passed in 1966, effective in 1967, makes government papers, opinions, records, policy statements and staff manuals available upon request unless they fall among one or more of nine exemptions. In addition, the requestor can take the agency to court if it refuses, and the burden of proof for withholding information would be on the government in any court case.

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The Subcommittee's own survey found agencies taking advantage of the broad exemption phrases. The Subcommittee has found that the courts are not interpreting the Act as its proponents assumed they would.

Where has the press been during this investigation of the Act?

The traditional press anti-secrecy spokesmen — the freedom of information committees of Sigma Delta Chi, the American Society of Newspaper Editors, the Associated Press Managing Editors, the American Newspaper Publishers Association, the Radio-Television News Directors Association — have had little to offer to the Subcommittee in either facts or specific amendments.

This is not surprising, since they have had little experience with the Act.

"Various organizations representing the news media were among the staunchest supporters of the work of this Subcommittee and of the freedom of information legislation," said Moorhead. "Yet, after more than four years of operation, only a handful of newspaper or other public media have actually invoked the provisions of the Act to the limit — by going into the federal courts to fight for their First Amendment rights."

The Subcommittee invited the testimony of some of the few journalists who had experience with the law. Some of these suggested that editors and publishers were reluctant to go to the trouble or expense of going to court.

Ward Sinclair of the Washington

bureau of the Louisville *Courier-Journal*, said one of the problems "is that there simply aren't enough hard-nosed editors around the country who are going to insist and push it (use of the Act)."

One editor who did go to court, John Seigenthaler of the Nashville *Tennessean*, cited related factors:

One of the problems is really reaching a point of conflict. I think that within government particularly, the information officer does know about it and he is anxious to avoid conflict if he possibly can, and so quite often reporters get walized around for a day, week or month, or inevitably never get the information . . . They are never able to make a case with the city editor or with the editor, much less with the legal counsel of the newspaper, that they are really getting a run-around.

Sinclair cited the disadvantages of the reporter who represents a newspaper hundreds of miles away from Washington:

Our contacts with the home office sometimes are infrequent. When the question of unavailability of information arises in a reporter-federal agency confrontation, it is most often the reporter himself who must make the instant judgment about pursuing his quest . . . Most of us, not being lawyers and not being terribly conversant with the Act, do not get very far, unless we are unusually persistent.

Sinclair also said the pressure of deadline and the nature of Washington reporting reward the bureaucrat who plays the waiting game:

The Washington newsman often flits, if that is the right word, from one subject to another. Today he is at the Senate, tomorrow at the House, next week at the Interior Department and so on. Events do not wait for him. If he is stalled or deterred in his efforts to collect information on one subject, there is always a fresh, new — and perhaps more easily covered — subject awaiting him, sometimes forced upon him by the pressure of time and events. Thus, the government official who delays, fails to respond promptly, or passes the

buck, plays a far more stronger hand than the reporter who, perforce, must move on to other things.

The FOI Act apparently has been useful to some newsmen without going to court.

"There are a number of working reporters," said Seigenthaler, "who are using the Act as a sort of a lever to break (information) loose, and you never really hear about the many cases in which that occurs."

Other newsmen appeal, or threaten to appeal, to the staff of the Subcommittee (the Foreign Operations and Government Information Subcommittee of the House Government Operations Committee).

Just how often and to what extent newsmen have used the Act as an effective threat is not known. But of all complaints (initiated by newsmen and others) taken to court, half have won their case. Members of the Subcommittee staff said calling an agency's bluff to this extent — going to court — will be even more effective after proposed amendments are adopted. This is in view of the Department of Justice advice to all general counsels of the federal government that they should avoid going to court when challenged under the Act "where the government's prospects for success are subject to serious question."

If the information is important and if the agency, not just one bureaucrat, wants to keep the information secret, neither the threat to use the Act nor appealing to the Subcommittee would appear to be enough.

Sinclair, who sought Subcommittee help, said the staff was "very generous in helping with my dealings . . . and they have been partially successful and partially unsuccessful."

Rep. John N. Erlenborn (R-Ill.), a member of the Subcommittee, suggested wider publicity of the Subcommittee's availability for assistance. But William Phillips, Subcommittee staff director, said:

I can say within the last 10 days since these hearings have begun and news stories began to appear around the country, we have received over 20 letters from people who have information problems and most of them stating in great detail . . . exactly what those problems are all about. I think we could

keep . . . busy for six months just tracking down those 20 cases.

Rep. Erlenborn suggested that perhaps responding to individual complaints "is beyond the capability of the Subcommittee" with its present resources and that obtaining a bigger staff "is something that the Subcommittee ought to consider."

Democrat John E. Moss (D-Calif.), former Subcommittee chairman and still a member, strongly opposes making the Subcommittee responsible for assisting newsmen and others who seek assistance.

"I don't think any independent watchdog committee of the Congress would be able to do the job," he said. "I think we would have . . . to have an independent commission, as nearly independent as you can create it under our form of government, somewhat analogous to the independent regulatory commissions."

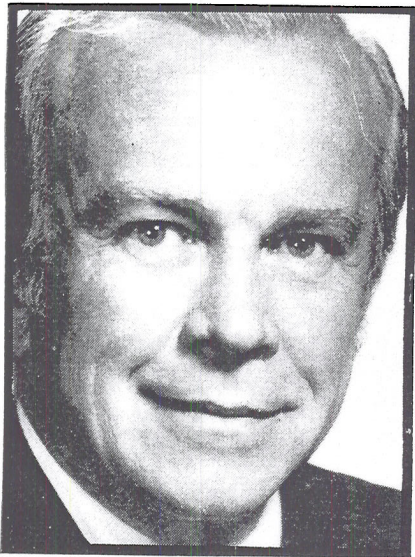
This commission could "initiate actions in court against any department of the government." But there are strong pressures on the Subcommittee that it be a continuous watchdog by providing a forum where complaints can be aired frequently.

Common Cause spokesman Mitchell Rogovin proposed an amendment to the Act requiring every government department, bureau or agency to submit annually to Congress a report which would detail, item-by-item, the record of each agency's response to requests for disclosure of information under the FOI Act:

Common Cause believes the effect of this amendment would be to institutionalize what this subcommittee is doing this session — collecting, analyzing and publishing such information from the agencies, along with public hearings where citizen groups could be heard and can scrutinize the findings. The amendment would regularize the watchdog function. All of us could set our political action calendars on this annual review schedule. We, and groups representing the news media, the bar, scientists and others, could count on the opportunity each year to air our grievances about government secrecy.

This would require annual Subcommittee hearings. It would also probably require a larger Subcommittee

Major election issue?

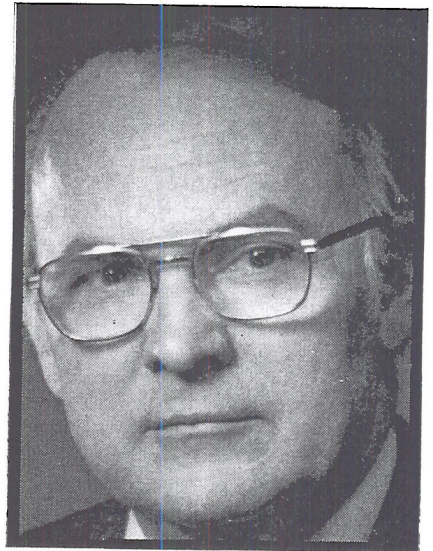


REP. WILLIAM S. MOORHEAD

U. S. Representatives William S. Moorhead (D-Pa.) and John E. Moss (D-Calif.) last month predicted that truth in government would be a major issue of the November elections. They accused President Nixon of directing a "closed, secrecy-minded administration."

Moorhead, chairman of the House Freedom of Information Subcommittee, and Moss, the panel's second-ranking Democrat, said they based their charge on testimony before the Subcommittee in recent hearings to determine how federal agencies have complied with the five-year-old Freedom of Information Act aimed at making all government information public unless specifically forbidden.

"During the 1968 campaign and after his election, President Nixon pledged an open government, freedom of information and a free flow of information to Congress," they said. "But during the past three and one-half years, the closed, secrecy-minded Republican Administration has made a shambles of the Freedom of Information Act. . . It has excluded the average American from any meaningful voice in the decision-making processes of his government."



REP. JOHN E. MOSS

staff or the assistance of outside consultants or of the Congressional Research Service.

Airing individual complaints and dramatizing perennial bureaucratic evasion of the Act were not the only functions of the Subcommittee hearings. The more recent phases of hearings have been devoted to the public examination of major executive information issues.

This has included cross-examination of a high-level Justice Department official who warned those attending the American Society of Newspaper Editors convention in April that if they publish classified government documents or files stolen from the government agencies, they can run the risk of criminal prosecution.

It heard Jack Anderson encourage the press to print classified documents.

The Subcommittee has devoted considerable time reviewing President Nixon's new security classification system, problems of Congress in obtaining information from the executive branch, and public access to information from executive branch advisory groups.

The Subcommittee's four-month, five-phase series of hearings has been a thorough review of the FOI Act. It

should result in the introduction of several amendments designed to narrow the exemption phrases, reduce agency stalling, make more uniform implementation of the Act and provide for annual reporting and review.

Perhaps the most dramatic proposed amendment, introduced May 25 by Moorhead, would override the executive order authorizing the system of classification and substitute legislative guidelines for the classification of U.S. documents. The amendment would establish an independent commission to adjudicate and enforce these new areas of congressional authority.

In the meantime, the effort to effectively instill the spirit of the Act is being continued by the Subcommittee. In addition to handling daily complaints, the staff is encouraging agencies to conduct "seminars" or workshops where the Act is explained to agency personnel. Staff members have participated in such programs so far.

Hopefully, the Subcommittee members will continue to investigate and publicize major administrative information abuses, whether or not they fall within the jurisdiction of the Act and whether or not they occur during an election year.

The press can assist this process by joining the citizen action groups at two levels. First, Washington newsmen should seek legal assistance offered by Nader and other organizations in effectively applying the Act as a news-gathering tool. The Stern Foundation recently funded a program for Nader where newsmen and others can seek assistance for the implementation of the FOI Act.

At the political level, news media professional organizations and their freedom of information committees should join the new citizens' groups, especially in behalf of amendments to the Act proposed by the Subcommittee. Together they could assist the Subcommittee's continued investigation and exposure of government secrecy and government intimidations of the media.

These media groups provided the rhetorical and political leadership in the 1950s and 1960s in designing and lobbying for the imperfect FOI Act of 1966. Now that political concern for strengthening the Act — and for the people's right to know generally — has broadened, media groups should more effectively participate in the movement which they launched and once led. ■