American Bar Association Symposium on FOIA 25th Anniversary

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INTRODUCTION

The Freedom of Information Act ("FOIA") (5 U.S.C. § 552) celebrated its twenty-fifth birthday in 1991. Passed after more than a decade of lobbying and debate in Congress and signed into law (as P.L. 89-487) by President Lyndon Johnson on July 4, 1966, over the objection of every Federal agency, the Act has permanently changed the relationship between the Federal government and the public.

On its face, the FOIA is a simple and straightforward statute. Its essence is the presumption that government information is public information, implemented by the judicially enforceable requirement that *all* Federal agency records be made available promptly to any person upon request, subject only to nine exemptions. Congress and the courts have declared that these exemptions must be "narrowly construed."

Proponents of the FOIA see its guarantee of access to government information as an essential component of our democratic form of government. Both before the statute's enactment and more recently, its supporters have often invoked the words of James Madison to explain the central role of this statute in our democratic society:

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy, or perhaps both. Knowledge will forever govern ignorance: And a people who who mean to be their own Governors, must arm themselves with the power which knowledge gives.[1]

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QUESTION: There are two things we ought to recall. First: in this country, the government is us. And if there is anything wrong with it, it is not them, the government; we ought to look to ourselves to see what's wrong. Second, there are not only nine exemptions under the FOIA, but there are about 150 exemptions when you add the (b)(3) bills. As a government employee, what I'm trying to do, and I know it is true of the others here, is carry out the law the way Congress legislated it. We are not trying to hold back information.

ANN HARKINS: I am a government employee too; this is not a question of "us against them." We are very appreciative ofthe work that the people in the FOIA offices throughout the Executive Branch do.

QUESTION: Since you are adding the Legislative Branch to the Freedom of Information Act, what are you going to do about the Constitution, which permits Congress to be secret whenever it wants? Do you advocate a constitutional amendment?

ANN HARKINS: We are going to try and get the FOIA applied to Congress by statute. There are Constitutional questions raised by this proposal and we will have to explore them fully.

FIRST PANEL DISCUSSION

The Freedom of Information Act in Action: Does the Process Work?

SHERYL WALTER: We plan to discuss the original intent of the FOIA in terms of who was to use it and the anticipated burden on agencies; how the procedural aspects of the FOIA affect users and agencies; and substantive matters, especially the national security exemption and privacy considerations.

Ron Plesser, will you address briefly the original intent of the FOIA, whom it was assumed would use the Act, and whether in fact that assumption has come to fruition?

RON PLESSER: The history of the FOIA has evolved from the esoteric to ubiquitous. In 1967, which was the first year of the Act's effectiveness, there was a very esoteric group of users. The plaintiffs in the important cases from that period—*Bristol-Myers Co. v. FTC,*[24] *Sterling Drug Inc. v. FTC,*[25] *Ackerly v. Ley,*[26] and *Grumman Aircraft Engineering Corp. v. Renegotiation Board*[27]—primarily involved government contractors and administrative lawyers. It was a very specialized group of people. In 1972, Ralph Nader started the Freedom of Information Clearinghouse. With that development, many additional users started to invoke the FOIA.

Before the 1974 amendments, only a very few lawsuits were brought challenging agency assertions of FOIA Exemption 1,[28] which pertains to classified national security information. The *EPA v. Mink* case[29] effectively made such lawsuits futile. The 1974 amendments, which among other things overturned the *Mink* decision, really opened things up for public interest use and journalistic use. The belief in the 1960s was that the FOIA was really a tool for journalists. Before the 1974 amendments, however, I do not think there was even a single case filed by The Washington Post or The New York Times. Their cases only came after the 1974 amendments. It really took these amendments to make the Act more of a journalistic tool.

I do not think anybody who worked on the 1974 amendments can say that we foresaw the sustained explosion of requests for records relating to individuals that would occur. We did not imagine the level of mistrust and interest that people had in records maintained about themselves. The volume of requests for such records at the FBI, CIA, and State Department has been quite extraordinary and was not anticipated. The types of people and organizations making requests expanded more and more. It is not that any group has dropped off; it was just a question of more people invoking the Act. Use of the Act has become ubiquitous and everybody seems to want access.

Electronification of government information has made a big difference as well, because one of the barriers in using government data before was that you would have to choose between rekeying and reusing them in their original government format. Now that government information in the last decade has been stored in electronic form, there is a great deal more flexibility of use and application. A new group of people, re-disseminators and re-publishers, has emerged. They are particularly interested in electronic information because it allows them to use that data in many different formats without having to rekey them. Electronic information serves the public interest in terms of greater dissemination of data.

SHERYL WALTER: Bill Arkin, what is your perspective in terms of using the Act and how did you first come to use it?

WILLIAM ARKIN: As a user of the Act, I suppose I am supposed to say I am dissatisfied and provide a list of reasons for that. But I am not particularly displeased with my experience with the FOIA. My experience has been generally good; that is not to say that I have not had bad experiences—I have.

Over the long term, I have developed what I call "FOIA patience." The FOIA operates on a different time scale than anything else I would like to do. Often times, my office submits three to seven hundred requests on a single project, covering virtually every organization, military unit, command, and headquarters for similar types of information. Our purpose typically is to obtain information for a major research project on which many people are working. These requests usually give rise to a long series of negotiations with FOIA officers, most of whom know us pretty well, in which we are asked to prioritize the types of records that we really want. We find that the application of overwhelming force has a good effect, and often times, we negotiate the release of a lot of documentation, the bulk of which is unclassified.

SHERYL WALTER: George Freeman, what is your experience in terms of journalists?

GEORGE FREEMAN: Our view is a little dimmer, largely because of the time constraints under which journalists work.

It is somewhat ironic when a reporter comes to me and says that he has been named a defendant in a libel suit. He has a long dark face because he fears that he will probably lose. I smile because I know we will eventually win. On the other hand, when a reporter comes to me smiling and says, "I think I have some good information from the government, I'd like some more, can you help me with my FOIA request, appeal and lawsuit," I have the long dark face, because I know that he is not going to go away pleased. He is either not going to get the information at all, or at least not get it at a time when it still has any use to him. That is really the problem that journalists have. When they want information, they want it now. They barely or grudgingly admit that

it would be useful in ten days, much less in the time it ends up taking, especially after an appeal process. From a journalistic viewpoint, delay is really the problem.

Occasionally, we can be surprised. Recently, we ran a first page story on the Federal Deposit Insurance Corporation's relationship with its lawyers and the legal fees it is paying.[30] I wrote an appeal letter to assist the reporter in getting this information. Eventually, within about three months of the original request, the agency compromised and released some information. Fortunately, this was in time for the information to still be newsworthy. More often though, particularly if there is a need to file an administrative appeal, it can take many months—or even years—and by then the story is almost always no longer newsworthy. Even if at that point you win the appeal or lawsuit and get the information, it does not do the journalist much good.

SHERYL WALTER: What is the agency perspective on this?

GEORGE JAMESON: A number of things have occurred to me while listening to the remarks of this panel. First of all, the Central Intelligence Agency probably discovered the FOIA in about 1975 or 1976, after enactment of the 1974 amendments. The Agency's initial view, I think, was that the intent of the FOIA was simply to pass information to the KGB. That was an early view, not currently shared. The CIA reacted accordingly.

I came to the CIA in late 1975. I and others in the agency's general counsel's office tended to take the view that has often been expressed: when everything is secret, nothing is secret. I will not dispute, however, that the view of some is that when everything is secret, everything is secret and that that is how an intelligence business ought to operate.

Today, we have come a long way at the agency and throughout the intelligence community in recognizing not only the benefits that accrue to the public, but the benefits that result in the confidence in government that can sometimes come about when information about government operations is disclosed. We all defend the FOIA, only we all perhaps focus on different aspects of it. The intelligence community tends to defend the exemptions. The exemptions are very much a part of the Act. There are good reasons to keep in mind why those exemptions are there. The purpose of the Act clearly was to make available to the public information about the operations of our government, and to ensure that Americans and others dealing with the government are not unnecessarily kept in the dark, whether we are talking about an intelligence agency or some other agency.

The exemptions protect very important parts of our governmental processes. Our concern with the FOIA at the CIA today is not one of policy; rather, it is simply one of implementation. People who deal with these issues are only human, and the volume of requests received is overwhelming for many agencies. It is a difficult process for many people whose jobs have not been to figure out how to release information, but to protect the security of important intelligence operations for very good reasons.

SHERYL WALTER: Let's discuss the issue of delay. The FOIA requires that agencies respond to a request within 10 working days and to an appeal within 20 working days.[31] But what requesters in fact experience is very different.

DAVID GARROW: For both scholarly and journalistic users of FOIA, the very significant delays in the latter stages of the FOIA process, and not in terms of an initial acknowledgement of the request, are the real constraint. Over the years, these delays have led to a significant reduction in the perceived value of the FOIA to scholars. My experience has been largely with the FBI, but it is fair to say that among American

historians, certainly since the 1986 amendments took effect, there has been decreasing interest in the FOIA as a potential resource tool.

Many people assume initially that if someone files FOIA requests with the FBI, he or she is interested in learning what J. Edgar Hoover did and to whom. But for many American 20th-century historians, the real value of the FOIA when applied to agencies, such as the FBI, is *not* to study the internal behavior of the agency. Rather, it is to use the records of the agency, the FBI first and foremost, to portray political activism by people who had no particular connection to the Bureau, whether it be regarding labor union organizing in the 1940s or African-American activism at a grass-roots level in the South in the 1960s.

When dealing with a vacuum cleaner agency, as the FBI was from World War I through the mid 1970s, there is potentially a phenomenal amount of historical information that could be obtained but which, unfortunately, is not being sought due to growing perceptions of multi-year delays. Just as with journalists, this is particularly true for younger scholars and for graduate students, people who need to finish their dissertation within two or three years, or need to get a book out within two or three years and do not have the luxury of waiting five or six years for a multi-section, multi-volume release.

SHERYL WALTER: Bill, can you tell us more about what you have described as your concept of "FOIA patience"?

WILLIAM ARKIN: When I get a telephone call from an agency FOIA officer saying we found a request of yours—from five years ago that was sitting in some component's office—that is an interesting call. When the officer asks me if I still want the information, my standard answer is, what did I ask for? And then my second answer is that, of course, I still want the information. I have found that the Joint Chiefs of Staff, the Defense Nuclear Agency, the Naval Sea Systems Command, and, particularly, the Department of State, use this as a tactic to dissuade people from using the FOIA. So when I get such a call—often times it comes when a new FOIA officer comes in, cleans the decks, looks at all the outstanding requests and tries to figure out how to empty the "in" box—my response is one of let us negotiate rather than litigate.

I litigated once under the FOIA on a case involving a claim of Exemption 2[32] and lost. It was an educational experience. But I will never do it again.

Delay is a real deterrent even though the FOIA imposes time limits. In over 15 years of using the FOIA, I have never gotten a response to a request within 10 days. Once I got a response from a Marine Corps unit that asked for an extension because they had gotten an alert the day we asked for the information. The response was very military. I posted it on my door for about a year. I certainly do not accept the three, four, or five year delays which I can expect when I make a request to the CIA, the State Department, the Defense Nuclear Agency, the Strategic Air Command, or the Joint Chiefs of Staff. They are the worst. Often times when I make FOIA requests, I do not even bother with those agencies.

GEORGE JAMESON: I will not deny that, across government, there are significant delays. Obviously, the 10-day limit is unrealistic. There are a lot of reasons for delays. Without trying to sound overly defensive, I can say from my experience in the last three years that the CIA has made very significant efforts to reduce both the backlog and the average response time. Around 1985, we had a median response time of about nine months; now it is under three months. Our files contain about nine or ten requests

that are pre-1988. The goal of our Freedom of Information Act coordinator has been to reduce that backlog.

The CIA has some massive, time-consuming requests. For example, there are requests for everything relating to the Kennedy assassination or, more recently, for all records relating to the bombing of Pan Am flight 103. Such requests take up a lot of time and energy because of the great volume of documents and the need for coordination with other agencies that originated the documents.

It would be easy to say that if we get more money we could reduce delays because, in fact, resources are the major issue. I do not see today a real reluctance to sit down and process requests the way I did many years ago. Clearly, the thinking of agency officers over the years has changed as the times have changed; there is a recognition that this is something that has to be done, it is important and let's get the job done.

Even if our FOIA officers had larger staffs and more money, they still might not meet the Act's 10-day limit, which imposes an unreasonable and unrealistic schedule. But I think things would be processed somewhat more quickly. So, without really knowing if there would be a significant impact, I would applaud efforts to address the budget problem. But, being realistic, over the next few years as most parts of government are downsizing, FOIA administration is not likely to get priority funding from Congress.

Yes, there are delays. Their length varies from agency to agency and case to case. There often is a lot of delay in scoping out a request. What we try to do at CIA, and it is not always successful, is to work with requesters over the phone to narrow their requests, to find out what they really want, and to see if we can provide something that we have readily available in our file of information that has already been released. If we can send material we have already released to previous requesters, that may satisfy the new requester. For example, while this is not a very major category, we have requests from college or high school students doing term papers or similar projects. We can usually satisfy them with material that has already been released. That reduces delay. When you get a massive request, however, it involves either a diversion of resources or interagency coordination that is simply very time consuming.

SHERYL WALTER: Having been enacted 25 years ago, the FOIA was clearly designed for a paper world. Now electronic records are an important aspect of government information policy.

RON PLESSER: Probably the first FOIA case that bears upon the FOIA's applicability to electronic information pertained not to computer records but to film clips of dolphins being caught in tuna nets. The case, *Save The Dolphins v. Department of Commerce,*[33] established that the Freedom of Information Act applies not only to print on paper but also to film strips and any kind of storage material. From that modest beginning has sprung several other cases, including *Long v. IRS,*[34] that have treated electronic information as being subject to the FOIA.

There has been an arbitrariness in the government's effort to resist the move from paper into electronic media. In the last three years, I have settled five cases and litigated one case concerning access to electronic information. This suggests that when I finally get a case to the Justice Department, particularly on electronic records, they settle. They do not want to go to a decision because they are afraid of the result. But I am required, on behalf of my client, to force it all the way up through the system until I get the response. I was taken aback by Bill Arkin's experience of not filing FOIA lawsuits and

yet getting information. In my part of the world, that would not work. We would not get anything—ever.

In one case, we tried to get computer tapes from the Department of the Air Force. We sent a request for the tapes to Wright Patterson Air Force Base, which denied the request. We appealed that denial pursuant to Air Force rules, which required us to send the appeal to the originating base, which then is supposed to forward it to the Secretary of the Air Force. This procedure allows the recipient of the original request to get all the responsive records together. About two weeks later, our appeal was returned to me with an explanation that since the information we had requested was available in microfiche, the information was not being withheld and, therefore, the Air Force would not acknowledge my appeal. This was done without even giving the Secretary of Air Force the opportunity to review the denial. We immediately filed a lawsuit and the Justice Department resolved that case immediately. This is clearly an example of arbitrariness.

The one precedent that is often cited for the proposition that the FOIA does not provide a right of access to government information in electronic format is *Dismukes v. Department of Interior.*[35] I do not think that the *Dismukes* case was correctly decided or that it represents the current state of the law. *Dismukes* dealt with a request for an electronic version of a mailing list of the Department of Interior. The list was available in microfiche, and the District Court of the District of Columbia held that the FOIA really applied to information, not records, and that the requester had no right to receive it in any specific format. Therefore, the court held, the computer form of the list did not have to be released because the government was disclosing it in microfiche. I think that ruling has since been fairly discredited.

We won a case very recently, that is now on appeal, against the Department of Interior trying to get legal land description files from the Bureau of Land Management. The Department used a different defense: it argued that the records need not be released because they had not been thoroughly reviewed internally and therefore were not "final" agency records. This argument is invalid because there is no exemption for drafts, regardless of whether they are on paper or in an electronic form.

Electronic information is, and will continue to be, available and, hopefully, the Leahy legislation on the FOIA will codify the good case law concerning access to electronic records.

SHERYL WALTER: Bill, you have had a recent experience with computer-generated records. Briefly describe what the difference is now in the response you get from agencies?

WILLIAM ARKIN: In the past five or so years, as PCs have become more common in the military, and particularly as regulations have been compiled on word processing systems, we have found that documents that in the past would have been released with hand deletions are now being deleted on the screen. We get an excised document that does not necessarily reflect what has been deleted. This is a serious problem.

One of my favorite examples is a request to the Air Force for information on the nuclear crises procedures of U.S. Air Forces in Europe. This is top secret information, no doubt, but a subject on which the Joint Chiefs of Staff and other agencies have released information. We received a computer printout, an original copy, of blank pages. There is an occasional line on the pages, but somebody actually took the file and recreated the document and printed it out from a word processor without any page

numbers, index, or title page. This document is not very useful to me, nor was producing it very good use of government time.

Another example is our request for the "Directory of Public Affairs Officers" from the Navy's Office of Information. Somebody went through this directory and deleted all of the names, apparently on the basis of the Privacy Act. They gave us the title, location, and telephone numbers of the officers. Again, somebody in the government spent considerable time and energy doing this in a 100-page document. This kind of shenanigans is absurd and wastes the time of the office processing the request and the time of the requester. As more and more information is stored on word processors, we find that this kind of deletion occurs more regularly.

GEORGE FREEMAN: In addition to the agencies, the courts also bear some of the burden here, particularly in the electronic sphere. A major problem was the Supreme Court's decision in the *Reporter's Committee* case, which concerned FBI rap sheets.[36] In effect, the Court said in that case that because it is so easy to obtain information from electronic data, we had better cut back on the availability of such data altogether. It is like an objection I once made at a deposition when the other attorney was getting too close to the heart of the matter; I objected on the grounds that the questioning was *too* relevant. That is effectively what the Supreme Court said in terms of electronic data, and that is really a problem.

RON PLESSER: The Supreme Court's ruling in the *Tax Analysts* case,[37] which involved a request to the Department of Justice for records that were also maintained in the courts, rejected the argument that if information is otherwise public, the government is relieved of the obligation to provide it in the most convenient form. That precedent should be very helpful to requesters seeking information in electronic format because it indicates that as long as the government has the record, it must release the record unless the request fits within one of the statutory exemptions.

SHERYL WALTER: The national security and law enforcement exemptions are two of the most problematic FOIA exemptions, both for requesters and for agencies. With Exemption 1, there is the perennial problem of attempting to balance proper national security interests against the well-recognized problem of overclassification of government information. There also seems to be a problem of overly broad withholding whenever agencies assert that disclosure might tend to reveal so-called sources and methods of intelligence gathering. In the law enforcement field, some recent cases have made it very difficult for requesters to obtain information provided to the agency by a source on the grounds that all sources are presumptively confidential sources. There is some dispute, even in the courts, about whether that is a correct interpretation of the law enforcement exemption.

DAVID GARROW: Scholars who use the FOIA saw a significant increase in the scale of deletions and withholdings on national security grounds, pursuant to FOIA Exemption 1, following the 1982 Executive Order revising the standards for classification.[38] But in terms of both quantity and historical significance, the vast expansion in deletions pursuant to Exemption 7(D)[39] following enactment of the 1986 amendments has been far and away the most devastating experience for historical users of the FOIA at any time in the last 15 years.

With regard to claims of exemptions based upon national security (Exemption 1) or concerns about identification of confidential informants (Exemption 7(D)), most of

us in the scholarly community would favor a 25, 30, or 50 year time frame after which virtually everything would be releasable. Think, for instance, of the World War I era, when there were numerous paid FBI informants who are now long deceased. As a matter of historical record, after an individual is deceased and 50 years have passed, records about him or her should not be withheld. At some point, with the passage of time, everything ought to be open to historical examination. There should not be an informant's privilege that lasts for century after centuries.

Problems with governmental assertions of Exemption (7)(D) have become exceptionally serious since 1986, particularly for someone like me, who would like to utilize FBI records as a resource for exploring political activism in America over the last 75 or so years. As amended, the exemption provides that any information furnished by a confidential source may be withheld. Under some interpretations, each and every state, local, or foreign investigative or police agency can be categorized as a confidential source. The result of this approach is wholescale deletion of all information passed on to the Bureau by a county sheriff or a local chief of police. Now, there is a very easily understandable distinction between a paid undercover informant, where there may be a clear confidential source relationship, and a local law enforcement body. But what we have had since 1986 is a situation where federal law enforcement agencies are deleting from requested records all political information that has been received from local agencies. Such withholding does not protect anyone who might imaginably be vulnerable to retaliation or any other form of anger or harassment.

SHERYL WALTER: What is the agency perspective and, in particular, the intelligence agency perspective?

GEORGE JAMESON: There are a couple of problems with having merely the passage of time result in the automatic disclosure or release of certain types of information. I do not want to speak for the domestic agencies, but when we are dealing with agents or assets, the death of the individual involved, or even the passage of 50 years, is not going to mean that we can release the name of the individual who worked for us. There are many reasons for that. A source may be dead, but the source has left family behind and the family can suffer adverse consequences if it comes out that a member of the family, even 20 years earlier, had been a CIA agent. People have long memories and hold grudges for a long time. As much as some might argue that the passage of time should result in the disclosure of information, there are strong arguments to say that is just not realistic.

We all recognize that there are certain things we protect. People see information bandied about everyday and after they have read about it in the newspaper, they say "obviously that's not a secret; the government must be able to release it." They file FOIA requests expecting to receive reams of information on the topic, but the CIA replies by refusing to confirm or deny the facts published by the media.

The State Department also has some serious concerns with officially confirming things that may be or ostensibly are common knowledge. The reason is that diplomatic relations, foreign relations, or relations that may exist between the CIA and foreign services can be very dicey. A country that is friendly with us today may not necessarily be so tomorrow. There have been numerous instances where things have been inadvertently disclosed, either through leaks or mistakes in the FOIA processing, or

by officials simply giving speeches in which they say things that they probably should not have, and a foreign government then gets very upset.

I know it is being proposed that there be a balancing test on the theory that government can come in and say the following damage would result. Someone may argue, on the other hand, that there are countervailing public interests. But protection of sensitive information is also a public interest—it is not merely disclosure that is in the public interest. Balancing these interests presents problems for a couple of reasons, not the least of which is the constitutional issue that is involved if a judge determines that some public interest outweighs the Executive Branch's determination that disclosure would be damaging to the national security. But even putting the constitutional question aside, as times change and as so much information falls in this category, balancing would engage the courts in second-guessing. That would not further the public interest.

WILLIAM ARKIN: I mostly deal with information about nuclear weapons and political-military affairs. My experience in the past decade has been that as more information is published and in the public domain, as the facts about nuclear weapons become more transparent, as our society moves away from reliance on nuclear weapons, we have observed the ability directly to get more information. There is a direct link in my mind between information and political action, and societal change.

During the Reagan years, more and more programs that were politically sensitive "went black"—that is, they operated in total secrecy. By virtue of those programs disappearing altogether from standard information sources, it became impossible to see a full picture. In this fashion, secrecy hides the development of new weapon systems that Congress or the public might otherwise oppose. It has gotten to the point where a small number of people in Congress have access to this information. When that same information is revealed in newspapers or by public interest groups, invariably it causes a scandal in the public world, but those who are responsible in Congress are indifferent because they knew it already. They knew already that a secret bomber or a secret cruise missile or a secret hypervelocity weapon was under development. This process is particularly corrosive for the public good. In many cases, if the program had been publicly debated from the beginning, the likelihood of it having moved forward in research and development, or in procurement, would have been very small.

My experience now relates more to the Legislative Branch than to the Executive Branch. In the post-Watergate era, the Legislative Branch has security clearances and has become another cog in the defense oversight process rather than being an outside organization. One result is that you will often read in an open congressional hearing a question for the record, such as "list all of the nuclear weapons programs which are in early research and development." And the official answer from the agency, the Department of Energy, will be, "none." But I have seen documents that show such weapon systems are in early stages of research and development. The existence of these systems is just not acknowledged publicly, either by the Executive or Legislative branches.

This is a kind of courtesy that Congress shows to the Executive Branch by virtue of it having all the secret handshakes and access authorities. It disrupts the public record and impedes the public good. It is a means of taking information outside of circulation if you will; that, in essence, denies the public influence. The biggest problem relating to the tension between the Executive Branch and the public is the means by which, on a large or small scale, the creation of external systems of information or external

systems of government—from Iran/Contra, down to a secret nuclear weapons program that is being developed in some obscure laboratory—increasingly becomes more prevalent as a method of denying sensitive public debate. This problem of compartmentalization of information is not adequately addressed in FOIA, and maybe it cannot be covered in the Act.

SHERYL WALTER: Privacy is becoming increasingly important. Let's discuss litigation in that area.

GEORGE FREEMAN: The FOIA's privacy exemption and the stretching of it is really problematic for journalists. The New York Times has been involved in one such litigation, and another case is currently on the way to the Supreme Court.

The New York Times sued NASA to try to obtain the audio tape of the Challenger Space Shuttle disaster after NASA rejected a request for the tape on grounds that disclosure of the tape would invade the personal privacy of the families of the deceased astronauts. The only issue litigated so far is whether the tape is "similar" to personnel or medical files. In both the District Court and before a panel of the Court of Appeals, we won on that issue; however, by a 6 to 5 vote, the Court of Appeals for the D.C. Circuit, sitting *en banc,* reversed that decision.[40] Not so coincidentally, the five judges on our side were the five appointed before 1981 and the six against us were appointed thereafter.

The court's holding, and the position advocated by NASA, was that audio tapes reveal something about particular individuals and for that reason are akin to a personnel file. Our first argument was that an audio tape of the Challenger launch was not something likely to be stuck into a personnel file and, therefore, was not similar to a personnel file. More importantly, the tape related solely to a public event carried out at great public expense by government employees in the course of their business. NASA contended that release of the tape would disclose personal information by virtue of the voice intonations of the astronauts. This theory was at odds with its general argument that the personal privacy interest it was seeking to protect were not those of the deceased astronauts, but of their families. It is interesting that NASA's public position has been that the astronauts were not aware of their impending peril; hence, it seems that there would not be much information to be derived by the voice intonations. Incidentally, the case is now back in the District Court for the balancing test because all the decisions so far have been just on the threshold issue.[41]

There are two basic problems with the current state of affairs. First, these were government employees discussing nothing but public government business. Any finding that disclosure of the tape could constitute an invasion of personal privacy of family members who are not even mentioned on the tape would therefore be troubling. Second, there is the derivative notion that the voice intonations of the record, not the essence of the record itself, can give away personal information and, thus, bring a record within the privacy exemption. The same logic, it seems, would suggest that a report about farm prices written by an employee of the Department of Agriculture could be exempt from disclosure, because the report in terms of its style of writing, perhaps even its penmanship, might reveal some private information about the author of the report. If that is the case, then indeed the exception has swallowed the rule.

The second case, *Department of State v. Ray,*[42] is on its way to the Supreme Court.[43] That case is perhaps even more troubling, inasmuch as it presents the issue of whether,

under the privacy exemption, all efforts to obtain access can be rejected where the information sought does not directly relate to the question of "what government is up to."

By way of background, a prior case brought by Gannett's USA Today sought information about students who had obtained government loans.[44] Incidentally, I recently heard that the government is releasing a new report on the problems with its procedures regarding such collection on such loans. That is what USA Today was trying to report on. It attempted to do so not only by getting the government's point of view, but also by trying to get the names, and thereupon the stories, of individual student loan defaulters. However, the courts threw out the case, saying that the information sought—the names of the student loan defaulters—did not relate to what government was up to and, therefore, could be withheld. This result is troubling because the entire point of the FOIA request was to explore what the government was up to by identifying examples of particular students and exploring their experiences and ploys in defaulting on government loans.

Department of State v. Ray addressed the same general point. Some Haitians who were being deported to Haiti sought information about what had happened to other Haitians who had been similarly deported. The American government was contending that earlier deportees had not suffered persecution after their return to Haiti. The Haitian plaintiffs challenged this contention, and sought, through the FOIA, documents that would enable them to bolster this challenge. The lower courts in that case have ruled that the information must be disclosed under the FOIA, despite the argument that, again, the names of the deported Haitians did not go directly to what the government was up to. However, the fact that the Supreme Court has taken the case certainly could lead one to believe that it may adopt the approach of the Gannett case and rule that, because the information about these names themselves does not go directly to government activity, there is not a sufficient public interest to overcome whatever privacy interests are inherent in the records.[45]

GEORGE JAMESON: Sometimes we all forget what the Act is about and what really makes sense. I think that there are some categories of information that clearly fall into the column of "better left private." Because everyone's sensitivities are different, this is a difficult area. Whether you are a person who wants to keep your secret of the confessional quiet, or a newspaper reporter and want to protect your journalistic source, or a CIA official and want to protect your intelligence source, there are secrets of one kind or another.

I have two concerns about the privacy area. First, many data collectors make increasing use of electronic records. They pull together bits and pieces of what they get from the Defense Department, CIA, the FBI, Department of Health and Human Services, and others, and put together databases that raise significant issues for the privacy of individuals. This problem is the so-called mosaic concept that we always use in the government as a justification to avoid churning information out. Because government agencies are not perfect in making disclosures, there will be information that gets put out and, by piecing it together, a reviewer can pull these things together, put them in the database of a private commercial entity or a news media entity, and have access to personal and private information.

A second concern is that as a government employee working for the CIA, I have to take a physical, and a polygraph, and go through a number of fairly intrusive procedures in order to get and keep my job. In order to be qualified to go overseas on a regular basis, I have to take periodic physicals. Those files presumably are going to be available to the public after I die. And that bothers me. I think it would bother anyone to think that, as the courts have certainly interpreted, your right of privacy ends upon your death. Now, there are some very logical reasons why that is so, but, frankly, it bothers me and it is something that we all ought to think about.

DAVID GARROW: For the scholarly community, the consensus of feeling on the privacy issue is similar to that on the sources and methods matter, namely that any interests in maintaining secrecy attenuate greatly over time. One would be very hard-pressed to make Mr. Jameson's argument either with regard to privacy or to sources and methods, for example, on FBI documents dating from 1921.

> **QUESTION:** Has it been your perception, Mr. Freeman, that the press accepts what is in a FOIA release as being more credible than what it gets from other sources? Should there be a disclaimer on the documents that are released saying that the government does not always certify the facts of the document, it merely certifies that these do come from the agency file?

GEORGE FREEMAN: In my experience, journalists do not treat government documents differently depending on from where they are derived. They regard government documents with a healthy skepticism in either case. Indeed, in our case seeking the *Challenger* tape, NASA released a transcript of the tape pursuant to the FOIA. But, because of the press' healthy skepticism, which is at the root of the First Amendment, we believed that the press and the public should have a right to see whether that transcript is complete and accurate.

> **QUESTION:** Mr. Plesser stated that there is no exemption for draft documents. The Defense Contract Audit Agency Freedom of Information Act processing guide states that a final report must be released, but that drafts of the report may be withheld as predecisional. Who is right?

RON PLESSER: Predecisional documents can be withheld. But simply putting the word "draft" on a record does not protect it. To be withheld, it must meet the test for FOIA's Exemption 5,[46] that is, be a deliberative, predecisional document. We are litigating a case where computer records are now called "draft" only because the routing or the coding of those records may change in the future, and it was convenient for the agency to put "draft" on the record. Labels such as "draft" or "preliminary" do not in themselves establish that a record may be withheld.

SECOND PANEL DISCUSSION

The Freedom of Information Act Past and Future: A Look Back, A Look Forward

MARK GRUNEWALD: At the quarter-century mark for the Freedom of Information Act, the next panel brings collectively more than a century of experience

5. Freedom of Information Act and Amendments of 1974, P.L. 93-502; Government in the Sunshine Act, P.L. 94-409, 9th Cong., 2d Sess., § 5, Sept. 13, 1976, 90 Stat 1241 (amending 5 U.S.C. §552(b)(3)), Freedom of Information Reform Act of 1986; P.L. 99-570, Title I, Subtitle N, §§ 1801-1804.
6. The general statute regarding expedition of cases in the Federal courts, 28 U.S.C. § 1657(a) expressly singles out FOIA lawsuits as potentially qualified for expedited consideration.
7. *See Washington Post Co. v. Department of State,* 464 U.S. 979 (1983).
8. 5 U.S.C. § 552(b)(1).
9. 5 U.S.C. § 552(b)(5).
10. 5 U.S.C. § 552(b)(6).
11. 5 U.S.C. § 552(b)(7).
12. Diana Autin, "The Reagan Administration and the Freedom of Information Act," in *Freedom at Risk,* edited by Richard Curry (Philadelphia: Temple University Press, 1988), 69-86.
13. *New York Times Co. v. United States,* 403 U.S. 713 (1971) (*per curiam*).
14. J. Milton, *Areopagitica,* (Cambridge: University Press, 1918).
15. *See* A. Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper, 1948); A. Meiklejohn, *Political Freedom* (New York: Harper, 1960).
16. H.S. Commager, *Majority Rule and Minority Rights,* (New York: Oxford University Press: 1943), 24.
17. *See supra* note 1.
18. Information and Competitiveness, Hearing Before the Subcommittee on Technology and the Law of the Committee on the Judiciary, S. Hrg. 1064, 100th Cong., 2d Sess., 130-155 (1988).
19. *Department of Justice Report on "Electronic Record" Issues Under the Freedom of Information Act,* Office of Information and Privacy, Department of Justice (October 1990).
20. Senator Leahy introduced S. 1939 and S. 1940 on November 7, 1991. *See* Congressional Record S-16213.
21. E.J. Dionne, *Why Americans Hate Politics,* (New York: Simon & Schuster, 1991).
22. Statement by the President Upon Signing the "Freedom of Information Act." July 4, 1966, Pub. Papers, Book 2, Pg. 699.
23. *See* S. 1939, "Freedom of Information Improvement Act of 1991," 102d Cong., 1st sess.
24. 424 F.2d 935 (D.C. Cir.), *cert. denied,* 400 U.S. 824 (1970).
25. 450 F.2d 698 (D.C. Cir. 1979).
26. 420 F.2d 1336 (D.C. Cir. 1969).
27. 425 F.2d 578 (D.C. Cir. 1970).
28. 5 U.S.C. § 552(b)(1).
29. 410 U.S. 73 (1973).
30. Jeff Gerth, *Regulators' Lawyers: A Growth Industry/A Special Report, N.Y. Times,* Nov. 16, 1991, at A1, Column 1.
31. 5 U.S.C. § 552(a)(b)(A).
32. FOIA's Exemption 2, 5 U.S.C. § 552(b)(2), pertains to records that are "related solely to the internal personnel rules and practices of an agency."
33. 404 F. Supp. 407 (N.D. Cal. 1975).
34. 596 F.2d 362 (9th Cir. 1979), *cert. denied,* 446 U.S. 917 (1980).
35. 603 F. Supp. 760 (D.D.C. 1984).
36. *Reporters Committee for Freedom of the Press v. Department of Justice,* 489 U.S. 749 (1989).
37. *Department of Justice v. Tax Analysts,* 492 U.S. 136 (1989).
38. 47 Fed. Reg. 14874, Executive Order 12356 (April 2, 1982).
39. 5 U.S.C. § 552(7)(D).
40. *New York Times v. NASA,* 920 F.2d 1002 (D.C. Cir. 1990) (*en banc*).
41. Several months after this symposium, the District Court decided that the balance of public interests and privacy concerns favored withholding of the tape. *New York Times Co. v. NASA,* No. 86-2860 (D.D.C. Dec. 12, 1991).
42. 908 F.2d 1549 (11th Cir. 1990), *cert. granted,* 111 S. Ct. 1101, *rev'd,* 112 S. Ct. 541 (1991).
43. Several months after this symposium, the Supreme Court ruled in favor of the government in the *Ray* case. 112 S. Ct. 541 (1991).

44. *Gannett Satellite Information Network v. Department of Education,* No. 90-1392 (D.D.C. Dec. 20, 1990).
45. In fact, this essentially was the approach taken by the Supreme Court in deciding the case in favor of the government. 112 S. Ct. 541, 548-549 (1991).
46. 5 U.S.C. § 552(b)(5).
47. Congressional Directory, 84th Cong., 1st Sess. (1955), p. 11.
48. Act of Sept. 15, 1789, ch. 15, 1 Stat. 68 (1789).
49. Pub. L. No. 85-619, 72 Stat. 547 (1958).
50. The statute was 5 U.S.C. § 22, later recodified as 5 U.S.C. § 301. It is the only statutory authority cited for current regulations directing the withholding of "classified" Defense Department information. (32 C.F.R. § 159).
51. Replies from Federal Agencies to Questionnaire Submitted by the Special Subcommittee on Government Information of the Committee on Government Operations, 84th Cong., 1st Sess. (1955).
52. Herbert Brucker, *Freedom of Information,* (New York: Macmillan Co., 1949).
53. S. 1666, 88th Cong., 1st Sess. (1963).
54. 110 Cong. Rec. 17,089 (1964).
55. Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, Freedom of Information Act Source Book: Legislative Materials, Cases, Articles, S. Doc. No. 82, 93d Cong., 2d Sess. 10 (1974).
56. H.R. 5012, 89th Cong., 1st Sess. (1965); S. 1160, 89th Cong., 1st Sess. (1965).
57. 111 Cong. Rec. 26,821 (1965).
58. *See* S. Rep. No. 813, 89th Cong., 1st Sess., Committee on the Judiciary (1965); H.R. Rep. No. 1497, 89th Cong., 2nd Sess., Committee on Government Operations (1966). Professor Kenneth Culp Davis, an administrative law specialist, wrote: "... the House committee ambitiously undertakes to change the meaning that appears in the Act's words. The main thrust of the House committee remarks that seem to pull away from the literal statutory words is almost always in the direction of nondisclosure." K.C. Davis, *Administrative Law Treatise* (1970 Supplement) § 3A.2.
59. 111 Cong. Rec. 13,007 (1966).
60. *See supra* note 22.
61. 42 U.S.C. § 405.
62. 5 U.S.C. § 552a.
63. 5 U.S.C. § 552a nt.
64. 5 U.S.C. § 552b.
65. 5 U.S.C. App. II.
66. 15 U.S.C. §§ 272, 278(g).
67. 5 U.S.C. §§ 1201-1209, 22 U.S.C. § 4139.
68. Mark Grunewald, "Freedom of Information Act: Dispute Resolution," 40 Admin. L. Rev. 1 (1988).
69. *Vaughn v. Rosen,* 484 F.2d 820 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 977 (1974).
70. 898 F.2d 793 (D.C. Cir. 1990).
71. 725 F.2d 1403 (D.C. Cir. 1984).
72. 5 U.S.C. § 552a(b)(2).
73. 5 U.S.C. § 552(b)(5).
74. 839 F.2d 768 (D.C. Cir. 1988).
75. 804 F.2d 701 (D.C. Cir. 1986), *vacated,* 486 U.S. 1029 (1988).
76. 893 F.2d 390 (D.C. Cir. 1990).
77. 815 F.2d 1565 (D.C. Cir. 1987).
78. 479 F. Supp. 84 (D.D.C. 1979).
79. *See CIA v. Sims,* 471 U.S. 159 (1985).
80. Civ. No. 79-0333 (D.D.C. July 31, 1979).
81. Civ. No. 79-0151 (D.D.C. July 27, 1979), *aff'd in part,* 636 F.2d 838 (D.C. Cir. 1980), *cert. granted, vacated in part, and remanded,* 455 U.S. 997 (1982).
82. *See* Notice to Counsel, *In Re Dept. of Defense,* Civ. No. 84-3400 (D.D.C. Dec. 14, 1987) (Oberdorfer, J.).
83. *In Re Dept. of Defense,* 848 F.2d 232 (D.C. Cir. 1988) (denying application for Writ of Mandamus).
84. *Nishnic v. United States,* 671 F. Supp. 771 (D.D.C.), *aff'd,* 828 F.2d 844 (D.C. Cir. 1987).