

09/21/94 DRAFT Substitute language -- prepared by OMB
Version #2

FOR: S. 1782 by LEAHY (D-VT) -- Electronic Freedom of
Information Improvement Act of 1994

AN ACT

To amend section 552 of title 5, United States Code (commonly known as the Freedom of Information Act), to provide for public access to information in an electronic format, and for other purposes.

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Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Electronic Freedom of Information Improvement Act of 1994".

SEC. 2. FINDINGS AND PURPOSES.

(a) Findings.--The Congress finds that--

(1) the purpose of the Freedom of Information Act is to ~~provide the public an information~~ ~~discovery of~~ ~~information~~ by requiring agencies of the Federal Government to make certain agency information available for public inspection and copying and to establish and enable enforcement of the right of any person to obtain access to the records of such agencies (subject to statutory exemptions) for any public or private purpose;

(2) since the enactment of the Freedom of Information Act in 1966, and the amendments enacted in 1974 and 1986, the Freedom of Information Act has been a valuable means through which any person can learn how the Federal Government operates;

(3) the Freedom of Information Act has led to the disclosure of waste, fraud, abuse, and wrongdoing in the Federal Government;

(4) the Freedom of Information Act has led to the identification of unsafe consumer products, harmful drugs, and serious health hazards;

(5) Government agencies increasingly use computers to conduct agency business and to store publicly valuable agency records and information; and

(6) Government agencies should strive to make information available through the use of electronic means wherever practicable in order ~~use new technology~~ to enhance public access to agency records and information, through both the FOIA and other information dissemination channels.

(7) Government agencies should strive to make information available affirmatively on their own initiative in order to meet anticipated public demands for it, rather than be compelled to meet such demands under subsection (a)(3) of the FOIA. Thus, FOIA processes should not be encumbered by requests for routinely available records or information that can most efficiently be made available to the public through some other means. To the extent that agencies make such data available through electronic means, that data should not be subject to the Act.

(b) Purposes.--The purposes of this Act are to--

(1) foster democracy by ensuring public access to agency records and information;

(2) improve public access to agency records and information;

(3) ensure agency compliance with statutory time limits; and

(4) maximize the usefulness of agency records and information collected, maintained, used, retained, and disseminated by the Federal Government.

SEC. 3. PUBLIC INFORMATION AVAILABILITY.

Section 552(a)(1) of title 5, United States Code, is amended--

(1) in the first sentence by inserting "by computer telecommunications, or if computer telecommunications means are not available, by other electronic means," after "Federal Register";

(2) by striking out "and" at the end of subparagraph (D);

(3) by redesignating subparagraph (E) as subparagraph (F); and

(4) by inserting after subparagraph (D) the following new subparagraph:

"(E) a complete list of all statutes that the agency head or general counsel relies upon to authorize the agency to withhold information under subsection (b)(3) of this section,

together with a specific description of the scope of the information covered; and".

SEC. 4. MATERIALS MADE AVAILABLE IN ELECTRONIC FORMAT.
PRINCIPLES 62 - 66

Section 552(a) (2) of title 5, United States Code, is amended--

(1) in the first sentence by inserting "including, within 1 year after the date of the enactment of the Electronic Freedom of Information Improvement Act of 1994, by computer telecommunications, or if computer telecommunications means are not available, by other electronic means," after "copying";

(2) in subparagraph (B) by striking out "and" after the semicolon;

(3) in subparagraph (C) by inserting "and" after the semicolon;

(4) by adding after subparagraph (C) the following new subparagraphs:

"(D) an ~~index~~ **inventory** of all major information systems containing agency records regardless of form or format unless such an index is provided as otherwise required by law; and

~~"(E) a description of any new major information system with a statement of how such system shall enhance agency operations under this section,"; and~~

or, aggregate like databases
"(E) a description of any new major information system with a statement of how such system shall enhance public access to agency information under the FOIA as well as under affirmative information dissemination operations apart from the FOIA. Agencies shall be exempted from this requirement when the very existence of a particular database or electronic system is itself a sensitive, exempt fact."

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(5) in the third sentence by inserting "and the extent of such deletion shall be indicated on the portion of the record which is made available or published at the place in the record where such deletion was made **to the extent possible in an electronic environment**" after "explained fully in writing".

SEC. 5. FEES [Principles 9 - 10]

Section 552(a) (4) of title 5, United States Code, is amended by--

(1) replacing subparagraph (iv) with the following subparagraph:

"(iv) Fee schedules shall provide for the recovery of only the direct costs of search and retrieval, duplication, or review. Search and retrieval may include either manual or automated search processes such as computer programming. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course processing a request under this section. The direct costs of providing electronic products and services under the FOIA should be determined in such a way as to not discourage use of non-FOIA dissemination channels. No fee may be charged by any agency under this section--

SEC. 5- 6. ~~LIST OF RECORDS MADE AVAILABLE TO THE PUBLIC AND HONORING FORMAT REQUESTS.~~

Section 552(a) (3) of title 5, United States Code, is amended by--

- (1) inserting "(A)" after "(3)";
- (2) striking out "(A) reasonably" and inserting in lieu thereof "(i) reasonably";
- (3) striking out "(B)" and inserting in lieu thereof "(ii)"; and
- (4) adding at the end thereof the following new subparagraphs:

~~"(B) A list of all records which are made available to any person under this paragraph shall be made available for public inspection and copying as provided under paragraph (2) of this subsection. Copies of all such records, regardless of form or format, which because of the nature of their subject matter, have become or are likely to become the subject of subsequent requests under this paragraph for substantially the same records, shall be made available for inspection and copying as provided under paragraph (2) of this subsection.~~

"(C) An agency shall, as requested by any person, provide records in any form or format in which such records are maintained by that agency-, **excluding exceptional cases in which the original form of a record cannot readily be handled without damage to it, such as exists with archival records, so that an alternative copy form is used instead; and excluding circumstances involving partially exempt records in which agencies need to handle the records in a certain form for purposes of redaction, such as exists with microfilm, and therefore cannot readily disclose them, as redacted, in a previously existing form.**" [PRINCIPLES 55 - 57]

"(D) An agency shall make reasonable efforts to provide records in the form or format requested by any person, including in an electronic form or format, even where such records are not usually maintained but are available in such form or format. Agencies are not required to disclose requested records in a new form or electronic format where the agency determines that it requires the expenditure of two person-hours of time or more in order to convert the information to the requested format. Beyond this threshold, it shall be a matter of administrative discretion for agencies to disclose requested records in a new form or electronic format; agencies shall consider administrative efficiency and the existence of identified public demands for the information in making this determination and shall strive to disclose requested records in a new form or electronic format where practicable. Notwithstanding these requirements, a FOIA requester shall be entitled to obtain a paper "printout" of any nonexempt electronic records if the requester so prefers."

[PRINCIPLES 58 - 61]

"(E) If an agency maintains an electronic information system in such a way that objectively understandable access to any nonexempt information in it is dependent upon a computer program that is unavailable to the public (including instances of "embedded proprietary software"), then the agency shall upon request take all practicable steps to convert the data in order to afford FOIA access to it.

"(F) An agency shall not convert any information into "digitized" or other form for the purpose of altering its status under the FOIA.

SEC. ~~6~~ 7. AUTOMATED SEARCH AND RETRIEVAL [PRINCIPLES 45 - 49]

Section 552(a)(4) of title 5, United States Code, is amended by--

(1) inserting in subparagraph (A)(iv) after "at the end the following new clause:

(2) "Fee schedules shall provide for the recovery of only the direct costs of search and retrieval, duplication, or review. Search and retrieval costs shall include only the direct costs incurred during either a manual or automated search for data. In responding to FOIA requests seeking only specified portions of databases, agencies should search for and retrieve data in the manner in which they do so in the ordinary course of agency business (i.e., with their existing retrieval-programming capability) for the database systems involved. Where requesters seek to have data retrieved according to specifications other than those ordinarily used by agencies for data retrieval from the database system involved, agencies are required to retrieve data according to new specifications where the extraordinary retrieval activity involves two person-hours or less of computer

program development time. ¹ Agencies should comply with such requests, as a matter of administrative discretion, where they can efficiently do so. ² Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section.

No fee may be charged by any agency under this section--

SEC. ~~6~~ 8. DELAYS.

(a) Fees.--Section 552(a)(4)(A) of title 5, United States Code, is amended by adding at the end thereof the following new clause:

¹ This standard specifically does not include the computer system operation activities that implement those new specifications and that are distinct from the process of computer-program development. Computer system operation activities include what is referred to as "central processing unit [CPU] operating time" in the OMB Fee Guidelines, 52 Fed. Reg. at 10,018, but also may include other information-processing resources used in the processes of computer operation. This requirement for extraordinary search activity, in tandem with the "record" status of agency software, may result in compelled software creation by agencies. Given that both agency computer-program development resources and agency computer system operations resources are highly valuable and finite, it is clear that both categories of agency resources will be impinged upon by the level of new search activity that is required. Given the critical importance of agency computer system operation resources to the performance of primary agency missions, and given the potential for FOIA requests to impair the operation of entire electronic information systems, a specific level of resources, not required to be exceeded, in meeting the demands of any FOIA request. That level should be set through some workable, objective standard of measurement.

² Agencies should be required to retrieve data according to such new specifications only where the extraordinary retrieval activity involved meets a specific, objective standard. The simplest and most workable objective standard for this purpose, one that has a firm basis in existing FOIA administration, is the amount of time that is required for the extraordinary retrieval activity that is involved (i.e., the time required to develop the computer programs, routines, and symbolic languages necessary to control the functioning and direct the operation of the agency's computer system for that new retrieval purpose).

"(viii) If at an agency's request, the Comptroller General determines that the agency annually has either provided responsive documents or denied requests in substantial compliance with the requirements of paragraph (6) (A), one-half of the fees collected under this section shall be credited to the collecting agency and expended to offset the costs of complying with this section through staff development and acquisition of additional request processing resources. The remaining fees collected under this section shall be remitted to the Treasury as general funds or miscellaneous receipts.".

7. ~~* (b) Payment of the Expenses of the Person Making a Request. Section 552(a) (4) (E) of title 5, United States Code, is amended by adding at the end thereof the following new sentence: "The court may assess against the United States all out of pocket expenses incurred by the person making a request, and reasonable attorney fees incurred in the administrative process, in any case in which the agency has failed to comply with the time limit provisions of paragraph (6) of this subsection."~~

(c) Demonstration of Circumstances for Delay.--Section 552(a) (4) (E) of title 5, United States Code, is further amended--

(1) by inserting "(i)" after "(E)"; and

(2) by adding at the end thereof the following new clause:

"(ii) Any agency not in compliance with the time limits set forth in this subsection shall demonstrate to a court that the delay is warranted under the circumstances set forth under paragraph (6) (B) or (C) of this subsection.".

(d) Period for Agency Decision To Comply With Request.--Section 552(a) (6) (A) (i) is amended by striking out "ten days" and inserting in lieu thereof "twenty days".

(e) Agency Backlogs.--Section 552(a) (6) (C) of title 5, United States Code, is amended by inserting after the second sentence the following: "As used in this subparagraph, 'exceptional circumstances' shall be unforeseen and shall not include delays that result from a predictable workload, including any ongoing agency backlog, in the ordinary course of processing requests for records.".

(f) Notification of Denial.--The fourth sentence of section 552(a) (6) (C) of title 5, United States Code, is amended to read: "Any notification of any full or partial denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request and the total number of denied records and pages considered by the agency to have been responsive to the request.".

(g) Multitrack FIFO Processing and Expedited Access.--Section 552(a)(6) of title 5, United States Code, is amended by adding at the end thereof the following new subparagraphs:

"(D)(i) Each agency shall adopt a first-in, first-out (hereafter in this subparagraph referred to as FIFO) processing policy in determining the order in which requests are processed. The agency may establish separate processing tracks for simple and complex requests using FIFO processing within each track.

"(ii) For purposes of such a multitrack system--

"(I) a simple request shall be a request requiring 10 days or less to make a determination on whether to comply with such a request; and

"(II) a complex request shall be a request requiring more than 10 days to make a determination on whether to comply with such a request.

"(iii) A multitrack system shall not negate a claim of due diligence under subparagraph (C), if FIFO processing within each track is maintained and the agency can show that it has reasonably allocated resources to handle the processing for each track.

"(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing that upon receipt of a request for expedited access to records and a showing by the person making such request of a compelling need for expedited access to records, the agency shall determine within 5 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such a request, whether to comply with such request. No more than one day after making such determination the agency shall notify the person making a request for expedited access of such determination, the reasons therefor, and of the right to appeal to the head of the agency. A request for records to which the agency has granted expedited access shall be processed as soon as practicable. A request for records to which the agency has denied expedited access shall be processed within the time limits under paragraph (6) of this subsection.

"(ii) A person whose request for expedited access has not been decided within 5 days of its receipt by the agency or has been denied shall be required to exhaust administrative remedies. A request for expedited access which has not been decided may be appealed to the head of the agency within 7 days (excepting Saturdays, Sundays, and legal public holidays) after its receipt by the agency. A request for expedited access that has been denied by the agency may be appealed to the head of the agency within 2 days (excepting Saturdays, Sundays, and legal public

holidays) after the person making such request receives notice of the agency's denial. If an agency head has denied, affirmed a denial, or failed to respond to a timely appeal of a request for expedited access, a court which would have jurisdiction of an action under paragraph (4)(B) of this subsection may, upon complaint, require the agency to show cause why the request for expedited access should not be granted, except that such review shall be limited to the record before the agency.

"(iii) The burden of demonstrating a compelling need by a person making a request for expedited access may be met by a showing, which such person certifies under penalty of perjury to be true and correct to the best of such person's knowledge and belief, that failure to obtain the requested records within the timeframe for expedited access under this paragraph would--

"(I) threaten an individual's life or safety;

"(II) result in the loss of substantial due process rights and the information sought is not otherwise available in a timely fashion; or

"(III) affect public assessment of the nature and propriety of actual or alleged governmental actions that are the subject of widespread, contemporaneous media coverage.".

SEC. ~~7~~ 8. COMPUTER REDACTION.

Section 552(b) of title 5, United States Code, is amended by inserting before the period in the sentence following paragraph (9): ", and the extent of such deletion shall be indicated on the released portion of the record at the place in the record where such deletion was made".

SEC. ~~8~~ 10. DEFINITIONS. [PRINCIPLES 16 - 41]

Section 552(f) of title 5, United States Code, is amended to read as follows:

"(f) For purposes of this section--

"(1) the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency;

~~that is generated by an outside party under a government contract or generated by an agency and a private party jointly under a cooperative agreement, in which that party retains some or all of the proprietary interest, only~~

"(2) the term 'record' means all books, papers, maps, photographs, **computer software**, machine-readable materials, or other information or documentary materials, regardless of physical form or characteristics, **including dynamic or continuously changing data** ³; digitized data that is ordinarily preserved for agency documentation purposes ⁴; computer software that is generated totally at government expense or that is generated by an outside party under a government contract and in which the government has retained all proprietary interest, or in which a private, outside party retains some proprietary interest insofar as is compatible with proprietary protections; and shall exclude distributed data ⁵, reference items that have been acquired by the government and either are made commercially available by an outside proprietary interest holder or are otherwise publicly available in the absence of any proprietary interest, reference items that have been generated by the government and are distributed through government publication outlets, and any information made affirmatively available through electronic information outlets; and

"(i) the term 'computer software' may be regarded as the computer programs, routines, and symbolic languages that control the functioning and direct the operation of computer hardware, and may also include any underlying or associated documentation;

"(ii) the term 'computer program' is a set of statements of instructions to be used directly or indirectly in a computer in order to bring about a certain result;

³ Special procedures might be required to accommodate FOIA applicability to such data on a "snapshot" basis, while at the same time not unduly impairing the operation of the electronic system involved.

⁴ Such "transitory" information includes voicemail, security monitoring videotapes, and some information maintained in multimedia form.

⁵ Distributed data that is retrieved into an agency database by an agency employee or agent, or is printed out in paper form, becomes subject to the Act. Rules governing the circumstances under which agencies may merely view, and not preserve, distributed data in the performance of their functions should be established through legal and policy mechanisms other than the FOIA. Rules governing the circumstances under which agencies may transfer agency information to contractors, for its subsequent maintenance as "distributed data" available to the agency only in that way, likewise should be established apart from the FOIA -- but with a recognition of the FOIA consequences of such transfers.

"(iii) the term 'distributed data' may be regarded as information or data maintained outside of the government that is accessed electronically by an agency, but merely viewed by agency employees, and that does not come into the agency's possession and control by virtue of such electronic access;

"(3) the term 'search' means a manual or automated review of agency records that is conducted for the purpose of locating those records which are responsive to a request under subsection (a) (3) (A) of this section. ~~"~~; and

"(4) the term 'major information system' means an information system that requires special management attention because of its importance to an agency mission; its high development, operating, or maintenance costs; or its significant role in the administration of agency programs, finances, property, or other resources."

Electronic Record FOIA Legislation Group

Consensus Electronic Record Principles

GENERAL

1. As a general rule, information maintained in electronic form should be no less subject to the Act than information maintained in conventional record form.

2. Agencies should strive to make information available affirmatively on their own initiative in order to meet anticipated public demands for it, rather than be compelled to meet such demands under subsection (a)(3) of the FOIA. In other words, FOIA processes should not be encumbered by requests for routinely available records or information that can most efficiently be made available to the public through some other means.

3. To the extent that agencies make such data available through electronic means under OMB Circular A-130, that data should not be subject to the Act.

4. An agency's practical ability to make records and information affirmatively available to the public apart from the FOIA is far greater as to nonexempt records than as to any record or information that is partially exempt and requires redaction.

5. Agencies should strive to make information available through electronic means wherever practicable, including under the FOIA; public access to agency records and information should be enhanced through electronic means.

6. The FOIA is not an independent basis for requiring agencies to maintain records or information; other statutes establish such requirements.

7. Agencies should make use of electronic information technology in order to most efficiently administer their responsibilities under the Act.

8. Agencies should strive to meet their responsibilities under subsection (a)(1) of the Act, and to the maximum extent practicable under subsection (a)(2) as well, through electronic means.

9. For any records or information made available under the FOIA in the form of electronic products or through electronic services, applicable fees should neither exceed nor be less than the direct costs of providing those products or services. (The meaning of the term "direct costs" should receive particular attention in the context of electronic records.)

10. Consistent with the information-dissemination policy goals of OMB Circular A-130, the "direct costs" of providing electronic products and services under the FOIA should be determined in such a way as to not discourage use of non-FOIA dissemination channels.

11. Private commercial interests in computer software or any other valuable electronic information that is maintained by an agency should be protected through an efficient FOIA mechanism; where such protection is limited under existing law, Congress should consider whether it should be extended as a matter of legislative policy.

12. Any government interests in computer software or any other valuable electronic information that is maintained by an agency should be protected only to the limited extent provided for under existing law; Congress should consider whether this protection should be extended as a matter of legislative policy.

13. In determining the applicability of the Act to information maintained in electronic information systems, consideration should be given to the potential for FOIA requests to "shut down," or otherwise impair the operation of, entire systems.

14. The term "record" (or "information") should be defined in the text of the FOIA, but that definition should not necessarily be tied to any definition of "record" that is used for purposes of other statutes (e.g., Federal Records Act or Privacy Act).

15. As a practical matter, rules governing the extent of agency obligations under the Act should be designed to be as clear and workable as possible--especially within the realm of electronic records--in order to promote uniformity among agencies, minimize uncertainty among FOIA requesters, and avoid potential disagreements between the two.

DEFINITION OF "RECORD"

"Distributed" Data

16. Information or data maintained outside of the government that is accessed electronically by an agency, but

merely viewed by agency employees, should not be deemed to come into the agency's possession and control by virtue of such electronic access.

17. Any such data that is retrieved into an agency database by an agency employee or agent, or is printed out in paper form, becomes subject to the Act.

18. Rules governing the circumstances under which agencies may merely view, and not preserve, distributed data in the performance of their functions should be established through legal and policy mechanisms other than the FOIA.

19. Rules governing the circumstances under which agencies may transfer agency information to contractors, for its subsequent maintenance as "distributed data" available to the agency only in that way, likewise should be established apart from the FOIA--but with a recognition of the FOIA consequences of such transfers (cf. Privacy Act subsection (m)).

"Dynamic" Data

20. As a general rule, data that is continuously changing should nonetheless be subject to the Act.

21. Special procedures might be required to accommodate FOIA applicability to such data on a "snapshot" basis, while at the same time not unduly impairing the operation of the electronic system involved.

22. Any such nonexempt data for which there is an anticipated public demand is likely to be made available affirmatively, pursuant to OMB Circular A-130, thereby removing any potential FOIA complication for that data.

"Digitized" Data

23. The Act should generally apply to information maintained by an agency in "digitized" form.

24. However, the Act should not apply to any such information that is so transitory in character that it is not ordinarily preserved for agency documentation purposes; such information should be explicitly excluded. Examples: some voicemail, some security monitor tapes, and some information maintained in "multimedia" form.

25. Agencies should not convert any information into "digitized" form for the purpose of altering its status under the FOIA.

Computer Software

26. The term "computer software" is closely related to, but somewhat broader than, the term "computer program," though the two terms in most instances may be used interchangeably. As a general rule, "computer software" may be regarded as the computer programs, routines, and symbolic languages that control the functioning and direct the operation of computer hardware. (See American Heritage Dictionary, 3d ed., 1992, at 1713.) It might also be regarded as including any underlying or associated documentation. (See Random House Unabridged Dictionary, 2d ed., 1987, at 1814.) A "computer program" may be regarded as a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result. (See 17 U.S.C.A. § 101 note (Supp. 1994).) For present purposes, the broader of the two terms should be used.

27. Items of computer software should be treated as "records" as a general rule--regardless of their inherent characteristics in individual cases--if effective statutory protection of the proprietary interests existing in many software items is provided as well.

28. An item of computer "firmware" (a physical object in which computer instructions are embedded) should be treated the same as computer hardware and not as a "record"; any underlying documentation pertaining to such an item, however, should be treated as a "record."

29. Any software that has been acquired by the government, and is made commercially available by the outside proprietary interest holder, should be explicitly excluded from the Act's coverage as a threshold definitional matter; the most effective handling of a FOIA request for such software would be for the agency to simply identify the software as commercially available.

30. In exceptional situations in which acquired software is not made commercially available by the outside proprietary interest holder, the circumstances of the acquisition and of the proprietary interest will have to be examined in order to determine the software's status under the Act.

31. In situations in which acquired software has been "customized" by an agency and for that reason is not commercially available in the exact form in which it is requested, both the acquisition circumstances and the scope of the outside proprietary interest will have to be examined--together with possible segregation of proprietary from nonproprietary information--in order to determine the software's status under the Act.

32. Software that is generated totally at government expense, and in which there exists no private proprietary interest, should be subject to the Act and disclosed if not covered by a FOIA exemption (e.g., Exemption 2, which can protect against circumvention of computer-system security). Such software should be made available at direct cost under the FOIA absent any specific authorization by Congress for the charging of a greater fee.

33. Any software that is generated by an outside party under a government contract, in which the government has retained all proprietary interest, should likewise be subject to the Act.

34. Any software that is generated by an outside party under a government contract, in which that party retains some or all of the proprietary interest, should be subject to disclosure under the Act only insofar as is compatible with that proprietary interest (as well as the interests protected by any other applicable FOIA exemption, such as Exemption 2 or Exemption 3).

35. Any software that is generated by an agency and a private party jointly under a cooperative agreement should be subject to disclosure under the Act only insofar as is compatible with the private party's proprietary interest in it (as well as the interests protected by any other applicable FOIA exemption, such as Exemption 2 or Exemption 3).

36. Any software or any other information that is generated by an agency and furnished to an outside party "exclusively" under a cooperative agreement should be treated under the Act in accordance with the provisions of any specific congressional enactment pertaining to such information.

37. If an agency maintains an electronic information system in such a way that objectively understandable access to any nonexempt information in it is dependent upon a computer program that is unavailable to the public (including instances of "embedded proprietary software," even where it may be characterized as "firmware"), then the agency should upon request take all practicable steps to convert the data in order to afford FOIA access to it.

Reference Items

38. The Act's definition of "record" should broadly encompass items in conventional media form--e.g., books and maps--as well as information maintained in electronic form.

39. However, as a general rule, it should explicitly exclude any such reference item that has been acquired by the government and either is made commercially available by an outside proprietary interest holder or is otherwise publicly

available in the absence of any proprietary interest. Example: library reference materials, such as are discussed in the Tax Analysts decisions. Exception: photocopies of publication portions that, as maintained in agency files, are themselves reflective of agency activity (e.g., copies of sections of the United States Code located in a prosecution file).

40. Likewise, the definition should explicitly exclude any such reference item that is generated by the government and is distributed through GPO or any other such government publication outlet (e.g., GSA's Consumer Information Center), in accordance with OMB Circular A-130.

41. Likewise excluded should be any electronic reference information that is made publicly available by any government agency; such information should be made available through established electronic information outlets, not through FOIA requests.

AUTOMATED SEARCH AND RETRIEVAL

42. In responding to FOIA requests seeking only specified portions of databases, agencies should search for and retrieve data in the manner in which they do so in the ordinary course of agency business (i.e., with their existing retrieval-programming capability) for the database systems involved.

43. Where requesters seek to have data retrieved according to specifications other than those ordinarily used by agencies for data retrieval from the database system involved, agencies should comply with such requests, as a matter of administrative discretion, where they can efficiently do so.

44. Agencies should be required to retrieve data according to such new specifications only where the extraordinary retrieval activity involved meets some specific standard--ideally, an objective one (e.g., a set amount of "programming" time, measured in dollar value or otherwise, or the use of a specified level of "programming" expertise).

45. The simplest and most workable objective standard for this purpose, one that has a firm basis in existing FOIA administration, is the amount of time that is required for the extraordinary retrieval activity that is involved (i.e., the time required to develop the computer programs, routines, and symbolic languages necessary to control the functioning and direct the operation of the agency's computer system for that new retrieval purpose); that quantification already is required for the calculation of an applicable FOIA fee for any computer-search activity that is undertaken by an agency. (See OMB Uniform FOIA Fee Schedule & Guidelines, 52 Fed. Reg. 10,011, 10,018-19 (Mar.

27, 1987) (establishing a fee mechanism for "computer searches" in terms of "hourly" rates); see also 5 U.S.C. § 552(a)(4)(A)(iv)(II) (providing that noncommercial FOIA requesters are to receive "first two hours of search time," in the context of manual searches, without charge).)

46. Agencies should be required to retrieve data according to new specifications where the extraordinary retrieval activity involves two person-hours or less of computer program-development time. (Note that this standard specifically does not include the computer system operation activities that implement those new specifications and that are distinct from the process of computer-program development. Computer system operation activities include what is referred to as "central processing unit [CPU] operating time" in the OMB Fee Guidelines, 52 Fed. Reg. at 10,018, but also may include other information-processing resources used in the processes of computer operation.)

47. In setting this level of extraordinary search activity that can be compelled by a FOIA requester, it should be recognized that any such requirement, in tandem with the "record" status (and ordinarily nonexempt nature) of agency software, holds some potential for compelled software creation.

48. Similarly, it also should be recognized by Congress that both agency computer-program development resources and agency computer system operation resources are highly valuable and finite; both of these categories of agency resources will be impinged upon by the level of new search activity that is required.

49. Additionally, given the critical importance of agency computer system operation resources to the performance of primary agency missions, and in accordance with Principle #13, above, Congress should likewise establish a specific level of those resources not required to be exceeded in meeting the demands of any FOIA request--regardless of whether the retrieval activity is extraordinary in any other sense; that level should be set through some workable, objective standard of measurement (e.g., at a resource level equivalent to some fixed dollar amount, as calculated through use of the agency's "resource algorithm" for the particular system involved). The exact level set should be based upon a careful analysis of individual agency resource limitations.

AUTOMATED REDACTION

50. Agencies should make use of the capability to redact exempt information through electronic means, including through the acquisition of software packages for those purposes, wherever it is most efficient to do so.

51. Where redactions are made by electronic means, or within electronic information in a manner that is not readily apparent, the requester should be notified of the extent of the redactions.

52. This likewise should apply to redaction in conventional record form, in which case the extent of redactions ordinarily can be shown on the face of partially disclosed records.

53. An agency should not be required to specify the nature or extent of any redaction or withholding of exempt information in the exceptional circumstance in which the very nature or extent of the redaction itself is a sensitive, exempt fact (e.g., where the very volume of exempt information would reveal the magnitude of an ongoing law enforcement investigation). Likewise, this requirement should not apply to the circumstance in which an agency can neither confirm nor deny the existence of any responsive record without disclosing an exempt abstract fact (colloquially known as "Glomarization").

54. Agencies should not be required to aggregate, "compact" or modify electronic data in any way in order to release it to FOIA requesters in nonexempt form; they may do so as a matter of administrative discretion, just as FOIA requesters may modify their requests in order to encompass only nonexempt data.

FORM OF DISCLOSURE

Choice of Existing Forms

55. As a general rule, the requester should be given the choice of any existing form in which a requested record is maintained by an agency; in other words, the precedent of Dismukes v. Department of the Interior (which gives the agency its choice among existing multiple record forms, so long as it chooses "reasonably") should no longer be followed.

56. This should apply to choices between conventional record forms (e.g., paper vs. microfilm) as well as to choices between existing electronic formats. Exception: any situation (such as often exists with archival records) in which the original form of a record cannot readily be handled without damage to it, so an existing copy form (e.g., microfilm) is used instead.

57. An exception also should be established for circumstances involving partially exempt records in which agencies need to handle the records in a certain form for purposes of redaction and therefore cannot readily disclose them, as redacted, in a previously existing form. Examples: microfilm

or electronic information that must be converted to paper form for redaction purposes.

New Form or Format

58. As a general rule, the decision whether to disclose requested records or information in a new form or electronic format is a matter of administrative discretion; in exercising that discretion, agencies should consider administrative efficiency and the existence of identified public demands for the information.

59. Agencies should be required to disclose requested records or information in a new form or electronic format only where information already is maintained in one electronic format, the requester seeks to have it disclosed in a different electronic format, and the agency determines that it can convert the information to the requested format with the expenditure of two person-hours of time or less.

60. The computer system operation resource limitations set forth in Principles #48 and #49, above, should apply to agency obligations under this heading as well.

61. As another exception to the general rule, a FOIA requester should be entitled to obtain a paper "printout" of any nonexempt electronic records--or any readily retrievable, nonexempt part of such records--if the requester so prefers and actually pays the full differential cost.

AFFIRMATIVE ELECTRONIC INFORMATION OBLIGATIONS

62. The term "major information system" should be defined as it is in OMB Circular A-130. In other words, the scope of electronic information subject to any affirmative FOIA obligation should be clearly established.

63. At the time of "major information system" establishment, agencies should consider both the potential FOIA availability of the information involved as well as the affirmative availability of the information apart from the FOIA.

64. Agencies should establish inventories of their "major information systems" to the maximum extent practicable, in accordance with OMB Circular A-130.

65. An agency should not be required to identify the existence of a particular database or electronic system in the exceptional circumstance in which its existence is itself a sensitive, exempt fact. Example: a new investigatory database the existence of which necessarily reflects the existence of an

ongoing law enforcement investigation protectible under Exemption 7(A).

66. Agency affirmative disclosure obligations should extend to records that have been processed under subsection (a)(3) only to the extent determined to be practicable in the exercise of agency administrative discretion.



U.S. Department of Justice
Office of Information and Privacy

Telephone: (202) 514-3642

Washington, D.C. 20530

August 17, 1994

MEMORANDUM FOR Sally Katzen
Chair, IITF Information Policy Committee
Administrator, Office of Information and
Regulatory Affairs
Office of Management and Budget

Bruce W. McConnell
Chair, IITF Government Information Working Group
Chief, Information Policy Branch, OIRA
Office of Management and Budget

FROM:  Daniel J. Metcalfe
Chair, Electronic Record FOIA Legislation Group
Co-Director, Office of Information and Privacy
Department of Justice

SUBJECT: Consensus Electronic Record Principles

On behalf of the fifteen members of the Information Infrastructure Task Force's Electronic Record FOIA Legislation Group, I am pleased to forward the attached set of proposed Consensus Electronic Record Principles (attached at Tab A) for review and further consideration as appropriate through the IITF structure.

As you know, this IITF working group has met weekly since the time of its formation in late April with the ultimate objective of developing possible consensus positions on electronic record FOIA issues in the form of proposed legislation. (See working group charter document of April 21, 1994, attached at Tab B.) Toward that end, the group first reviewed a wide range of related background materials and then developed a comprehensive outline of the issues involved (attached at Tab C). It also met with a dozen different representatives of the FOIA-requester community and computer software developers in order to gain broader perspectives on those issues. (See attachment at Tab D.)

In accordance with its charter, the group has worked to develop a set of proposed agency positions covering each of the issues and sub-issues it has identified, in the form of policy principles that, if accepted, can readily guide the crafting of legislative provisions addressing these issues. This effort has proceeded from the premise that these issues are so exceptionally complex that they require analysis and expression at a conceptual level before attempts are made to refine their resolution in statutory terms. This certainly has been borne out by the working group's experience. Simply put, the group's exhaustive deliber-

ations over the past sixteen weeks have served to deepen this belief and also to confirm the importance of articulating fundamental, workable rules in the pursuit of any remedial legislation in this subject area.

The set of sixty-six principles here proposed by the Electronic Record FOIA Legislation Group represents the group's collective judgment of the electronic record FOIA rules that can be most workable for both federal agencies and the FOIA-requester community alike. These principles are offered with a recognition that neither agencies nor FOIA requesters will be completely satisfied by them, but with the belief that they (or something much akin to them) might be acceptable to a consensus of interested parties overall. As with most attempted reconciliations of conflicting positions, these principles seek to accommodate competing interests and countervailing concerns to the greatest extent possible.

In particular, the following major features of these proposed principles should be highlighted:

- **Software would be treated as a "record" in character, in all instances**--this would be a flat, workable rule.
- **Any commercially available software, however, would be excluded from the Act's coverage**--this is based upon the premise that the administration of the Freedom of Information Act ought not to be encumbered by requests for such items.
- **Likewise, other publicly available reference items also would be excluded**--this is based upon the affirmative information dissemination approach of OMB Circular A-130.
- **Agencies would be required to go beyond the bounds of existing programming for data-retrieval purposes**--this is because otherwise even a small degree of new data-retrieval effort necessary to comply with a FOIA request could be refused.
- **Agencies would be required to afford requesters choices among existing record forms and to expend efforts to create new electronic formats**--existing discretionary action in these areas would be codified as mandatory, within certain fixed limits.
- **The standards for determining the limits of agency obligations would be objective ones**--the extent of each new agency obligation would be determined by a fixed, workable rule tied to objective measures of expended resources.
- **An additional limitation would be placed upon the use of agency computer system operation resources**--this is based upon both the scarcity of agency "computer time" and the need to guard against computer-system impairment.

To aid a careful examination of these proposed principles, and of their evolution during the working group's processes of deliberation, a complete set of its working drafts (Working Drafts #1 through #11) was maintained and is included for more detailed reference as well. (See attachments at Tab E.) These drafts are interlineated in such a way as to show all language that was added, rejected, or modified in any way from the outset of the group's efforts to achieve consensus agreement within it. For purposes of review, the final proposed principles (attached at Tab A) can best be read in conjunction with the group's final working draft, Working Draft #12 (attached at Tab F).

To be sure, these principles can and should be refined even further, based upon a close review by all concerned, before consensus agreement is sought on any particular statutory language. While the working group defers to your determination of the next steps that are most appropriate within the IITF structure, it is suggested that circulation to interested parties at the earliest practicable time would best facilitate the consensus-building process. All federal agencies should be afforded a full opportunity to voice objection to, or pragmatic concern with, any aspect of this proposal; even the agencies that are represented on the working group are not by virtue of that participation committed to it in any necessary respect. (See Tab B at 2.)

As well, we should encourage review by representatives of the FOIA-requester community and by the legislative staffs who are considering pending electronic record FOIA legislation--most particularly, Senate Technology and the Law Subcommittee Counsel Beryl A. Howell and House Information, Justice, Transportation, and Agriculture Subcommittee Chief Counsel Robert Gellman. The exceptional complexity of the FOIA issues addressed by these principles makes it especially crucial that they be addressed through a "constructive partnership" on the parts of all concerned if they are going to be resolved through viable remedial legislation. See, e.g., FOIA Update, Summer/Fall 1993, at 9 (advocating such approach to FOIA legislative process); see also id. at 5 (Attorney General Reno's FOIA Memorandum suggesting same).

With the completion of this initial phase of its work, the Electronic Record FOIA Legislation Group will await full review and potential refinement of these proposed policy principles before seeking to convert them to statutory terms in the form of consensus legislation. Such legislative provisions would be proposed in lieu of the electronic record provisions of the FOIA-amendment bills presently pending before Congress--Senate bill S. 1782 and its more recently introduced House counterpart, H.R. 4917. Based upon its experience thus far, this working group (the full membership of which is set out on the last two pages of this memorandum) stands prepared to work actively toward that end upon completion of all necessary steps of policy review.

Electronic Record FOIA Legislation Group

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Executive support for this IITF working group has been provided by Michael H. Hughes, Senior Attorney, Office of Information and Privacy, with assistance from OIP law clerks Shannon V. Lane, Diane M. Brady, Jennifer L. Smiles, and James P. Wehner.



Office of the Attorney General
Washington, D. C. 20530

File
FOIA

October 4, 1993

MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES

SUBJECT: The Freedom of Information Act

President Clinton has asked each Federal department and agency to take steps to ensure it is in compliance with both the letter and the spirit of the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The Department of Justice is fully committed to this directive and stands ready to assist all agencies as we implement this new policy.

First and foremost, we must ensure that the principle of openness in government is applied in each and every disclosure and nondisclosure decision that is required under the Act. Therefore, I hereby rescind the Department of Justice's 1981 guidelines for the defense of agency action in Freedom of Information Act litigation. The Department will no longer defend an agency's withholding of information merely because there is a "substantial legal basis" for doing so. Rather, in determining whether or not to defend a nondisclosure decision, we will apply a presumption of disclosure.

To be sure, the Act accommodates, through its exemption structure, the countervailing interests that can exist in both disclosure and nondisclosure of government information. Yet while the Act's exemptions are designed to guard against harm to governmental and private interests, I firmly believe that these exemptions are best applied with specific reference to such harm, and only after consideration of the reasonably expected consequences of disclosure in each particular case.

In short, it shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be.

It is my belief that this change in policy serves the public interest by achieving the Act's primary objective -- maximum responsible disclosure of government information -- while preserving essential confidentiality. Accordingly, I strongly encourage your FOIA officers to make "discretionary disclosures"

whenever possible under the Act. Such disclosures are possible under a number of FOIA exemptions, especially when only a governmental interest would be affected. The exemptions and opportunities for "discretionary disclosures" are discussed in the Discretionary Disclosure and Waiver section of the "Justice Department Guide to the Freedom of Information Act." As that discussion points out, agencies can make discretionary FOIA disclosures as a matter of good public policy without concern for future "waiver consequences" for similar information. Such disclosures can also readily satisfy an agency's "reasonable segregation" obligation under the Act in connection with marginally exempt information, see 5 U.S.C. § 552(b), and can lessen an agency's administrative burden at all levels of the administrative process and in litigation. I note that this policy is not intended to create any substantive or procedural rights enforceable at law.

In connection with the repeal of the 1981 guidelines, I am requesting that the Assistant Attorneys General for the Department's Civil and Tax Divisions, as well as the United States Attorneys, undertake a review of the merits of all pending FOIA cases handled by them, according to the standards set forth above. The Department's litigating attorneys will strive to work closely with your general counsels and their litigation staffs to implement this new policy on a case-by-case basis. The Department's Office of Information and Privacy can also be called upon for assistance in this process, as well as for policy guidance to agency FOIA officers.

In addition, at the Department of Justice we are undertaking a complete review and revision of our regulations implementing the FOIA, all related regulations pertaining to the Privacy Act of 1974, 5 U.S.C. § 552a, as well as the Department's disclosure policies generally. We are also planning to conduct a Department-wide "FOIA Form Review." Envisioned is a comprehensive review of all standard FOIA forms and correspondence utilized by the Justice Department's various components. These items will be reviewed for their correctness, completeness, consistency, and particularly for their use of clear language. As we conduct this review, we will be especially mindful that FOIA requesters are users of a government service, participants in an administrative process, and constituents of our democratic society. I encourage you to do likewise at your departments and agencies.

Finally, I would like to take this opportunity to raise with you the longstanding problem of administrative backlogs under the Freedom of Information Act. Many Federal departments and agencies are often unable to meet the Act's ten-day time limit for processing FOIA requests, and some agencies -- especially

those dealing with high-volume demands for particularly sensitive records -- maintain large FOIA backlogs greatly exceeding the mandated time period. The reasons for this may vary, but principally it appears to be a problem of too few resources in the face of too heavy a workload. This is a serious problem -- one of growing concern and frustration to both FOIA requesters and Congress, and to agency FOIA officers as well.

It is my hope that we can work constructively together, with Congress and the FOIA-requester community, to reduce backlogs during the coming year. To ensure that we have a clear and current understanding of the situation, I am requesting that each of you send to the Department's Office of Information and Privacy a copy of your agency's Annual FOIA Report to Congress for 1992. Please include with this report a letter describing the extent of any present FOIA backlog, FOIA staffing difficulties and any other observations in this regard that you believe would be helpful.

In closing, I want to reemphasize the importance of our cooperative efforts in this area. The American public's understanding of the workings of its government is a cornerstone of our democracy. The Department of Justice stands prepared to assist all Federal agencies as we make government throughout the executive branch more open, more responsive, and more accountable.

A handwritten signature in black ink, appearing to read "Janet Reno", is positioned in the lower right area of the page.

THE WHITE HOUSE
WASHINGTON

October 4, 1993

File
FHA

MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES

SUBJECT: The Freedom of Information Act

I am writing to call your attention to a subject that is of great importance to the American public and to all Federal departments and agencies -- the administration of the Freedom of Information Act, as amended (the "Act"). The Act is a vital part of the participatory system of government. I am committed to enhancing its effectiveness in my Administration.

For more than a quarter century now, the Freedom of Information Act has played a unique role in strengthening our democratic form of government. The statute was enacted based upon the fundamental principle that an informed citizenry is essential to the democratic process and that the more the American people know about their government the better they will be governed. Openness in government is essential to accountability and the Act has become an integral part of that process.

The Freedom of Information Act, moreover, has been one of the primary means by which members of the public inform themselves about their government. As Vice President Gore made clear in the National Performance Review, the American people are the Federal Government's customers. Federal departments and agencies should handle requests for information in a customer-friendly manner. The use of the Act by ordinary citizens is not complicated, nor should it be. The existence of unnecessary bureaucratic hurdles has no place in its implementation.

I therefore call upon all Federal departments and agencies to renew their commitment to the Freedom of Information Act, to its underlying principles of government openness, and to its sound administration. This is an appropriate time for all agencies to take a fresh look at their administration of the Act, to reduce backlogs of Freedom of Information Act requests, and to conform agency practice to the new litigation guidance issued by the Attorney General, which is attached.

Further, I remind agencies that our commitment to openness requires more than merely responding to requests from the public. Each agency has a responsibility to distribute information on its own initiative, and to enhance public access through the use of electronic information systems. Taking these steps will ensure compliance with both the letter and spirit of the Act.

William J. Clinton

Not
5

From the desk of STEPHEN R. NEUWIRTH

To John Podesta

Date 3/17/94

94 MAR 17 P5:41

John:

I think the attached bill, on "electronic FOIA," is worthy of our attention.

I attended an interagency meeting on this subject, and I'd like to discuss the meeting with you when convenient.

Steve

*File
electronic
FOIA*



OFFICE OF INFORMATION & PRIVACY
UNITED STATES DEPARTMENT OF JUSTICE

10th Street and Constitution Avenue, N.W.
Washington, D.C. 20530

Tela-Fax Number: 202-514-1009

TO: Steve Newirth
White House Counsel's Office

FAX: 456-1647 or 456-2146

Additional Message: Here's the "electronic record" bill, together
with the outline I mentioned. (Will send paper
copies as well.) Hope to be able to coordinate
very closely with you and John on this.

FROM: Dan Metcalfe

DIRECT DIAL: 514-3642

Number of Pages (excluding this page): 11

Date: 3/15/94



U.S. Department of Justice
Office of Information and Privacy

Washington, D.C. 20530

2/17/94

Outline of Provisions of S. 1782

The provisions of S. 1782 fall into three basic categories: "electronic record" provisions, time limit provisions and miscellaneous provisions.

A. "ELECTRONIC RECORD" PROVISIONS

1. Definition of "Record" -- Section 7 of the bill. Would define the term "record" for the first time under the Act, such that it would specifically include computer software and other "electronic information" as well.

2. Definition of "Search" -- Section 7. Would define the term "search" to explicitly include an "automated" search. Appears to be intended to require agencies to undertake computer programming for requested data-retrieval purposes, without limitation.

3. "Computer Redaction" -- Section 6. Would require agencies to provide specific indications of deletions wherever made. Might be intended as logical basis for requiring programming for FOIA-processing purposes as well. Note: It is unclear whether this provision (which does not by its terms match its section heading) is intended to apply to both electronic and conventional FOIA processing.

4. "Honoring Format Requests" -- Section 4. Two-part provision. First, would allow FOIA requesters to choose any existing record form or format, regardless of agency preference. Second, would require record conversion (presumably even from paper form) to any "electronic form" preferred by a requester, wherever such conversion could be accomplished with "reasonable efforts."

5. Database Descriptions -- Section 3 (new subsections (E) and (F)). Two separate, but related, provisions. First, would require automatic publication of indices for all agency databases. Second, would require preparation and publication of statements of FOIA impact at the outset of any database creation.

6. **"Electronic" Federal Register** -- Section 3.
Would expand the FOIA's Federal Register publication mechanism to include dissemination electronically as well.

B. TIME LIMIT PROVISIONS

1. **Retention of Fees** -- Section 5(a). Would permit timely agencies (as certified by GAO) to retain half of all FOIA fees charged, in an effort to "offset" the costs of time-limit compliance. **Note:** While agencies generally cannot retain FOIA fees under existing law, those fees typically amount to only a small percentage of their FOIA costs.

2. **Requester's Expenses** -- Section 5(b). Would authorize courts to award FOIA requesters their "out-of-pocket expenses" and any attorney fees incurred at the administrative level, on the basis of time limit noncompliance alone. **Note:** This provision would expand existing law as to both the type of fees awardable to FOIA requesters and the basis for such awards. Also, as with the "civil penalties" provision below, it would interrelate with the new 5-day time limit for "expedited access" decisions.

3. **"Civil Penalties"** -- Section 5(c). Would authorize courts to award FOIA requesters "civil penalties" of up to \$75 per day for time limit noncompliance, including noncompliance with the 5-day "expedited access" deadline.

4. **Backlogs** -- Section 5(d). Would preclude any "routine agency backlog" from serving as a basis for a 10-day extension of the Act's time limits on the statutory ground of "unusual circumstances." **Note:** This provision might have been intended also to preclude the common judicial practice of affording agencies lengthy stays of proceedings in FOIA lawsuits based upon the distinct statutory ground of "exceptional circumstances."

5. **"Expedited Access"** -- Section 5(f). Would explicitly provide for expedited FOIA access, according to a "compelling need" standard, and also seems intended to require that agency decisions on whether to grant expedited access be made within five working days. **Note:** This provision as drafted makes ambiguous use of the term "request," in such a way as to appear to inadvertently condition its 5-day deadline upon satisfaction of the "compelling need" standard itself.

C. MISCELLANEOUS PROVISIONS

1. **Listing of Exemption 3 Statutes** -- Section 3 (new subsection (G)). Would require agencies to publish descrip-

tive lists of all statutory provisions relied upon by them in withholding records under Exemption 3 of the FOIA (which incorporates the disclosure prohibitions of other statutes).

2. Denial Notifications -- Section 5(e). Would require that all FOIA denial letters specify both the name and title of the responsible agency decisionmaker(s). More significantly, would require specification of the total numbers of denied records and record pages found responsive to a request (specifications which could be sensitive in exceptional cases).

3. Definition of "Agency" -- Section 7. The bill includes a definition of the term "agency," but it inadvertently contains exactly the same language as in existing law. It might have been intended that this provision expand the reach of the FOIA to the Offices of the President and Vice President, to Congress, or to both, as in a previous legislative proposal (S. 1939, 102d Cong.).

103D CONGRESS
1ST SESSION

S. 1782

To amend title 5, United States Code, to provide for public access to information in an electronic format, to amend the Freedom of Information Act, and for other purposes.

IN THE SENATE OF THE UNITED STATES

NOVEMBER 22, 1993

Mr. LEAHY (for himself and Mr. BROWN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 5, United States Code, to provide for public access to information in an electronic format, to amend the Freedom of Information Act, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Electronic Freedom
5 of Information Improvement Act of 1993”.

6 **SEC. 2. FINDINGS AND PURPOSES.**

7 (a) FINDINGS.—The Congress finds that—

8 (1) since the enactment of the Freedom of In-
9 formation Act in 1966, and the amendments enacted

1 in 1974 and 1986, the Freedom of Information Act
2 has been a valuable means through which any per-
3 son can learn how the Federal Government operates;

4 (2) the Freedom of Information Act ensures ac-
5 cess to information held by the Government, which
6 is a valuable national resource;

7 (3) the Freedom of Information Act has led to
8 the disclosure of waste, fraud, abuse, and wrong-
9 doing in the Federal Government;

10 (4) the Freedom of Information Act has led to
11 the identification of unsafe consumer products,
12 harmful drugs, and serious health hazards;

13 (5) Government agencies increasingly use com-
14 puters to conduct agency business and to store pub-
15 licly valuable information; and

16 (6) Government agencies should use new tech-
17 nology to enhance public access to information.

18 (b) PURPOSES.—The purposes of this Act are to—

19 (1) foster democracy by ensuring access to pub-
20 lic information;

21 (2) improve public access to agency records and
22 information;

23 (3) ensure agency compliance with statutory
24 time limits; and

1 (4) maximize the usefulness of agency records
2 and information collected, maintained, used, re-
3 tained, and disseminated by the Federal Govern-
4 ment.

5 **SEC. 3. PUBLIC INFORMATION AVAILABILITY.**

6 Section 552(a)(1) of title 5, United States Code, is
7 amended—

8 (1) in the first sentence by inserting “electroni-
9 cally by computer telecommunications, and by other
10 means,” after “Federal Register”;

11 (2) by striking out “and” at the end of sub-
12 paragraph (D);

13 (3) by redesignating subparagraph (E) as sub-
14 paragraph (H); and

15 (4) by inserting after subparagraph (D) the fol-
16 lowing new subparagraphs:

17 “(E) an index of all information retrievable or
18 stored in an electronic form by the agency;

19 “(F) a description of any new database or
20 database system with a statement of how such
21 database or system shall enhance agency operations
22 under this section;

23 “(G) a complete list of all statutes that the
24 agency head or general counsel relies upon to au-
25 thorize the agency to withhold information under

1 subsection (b)(3) of this section, together with a spe-
2 cific description of the scope of the information cov-
3 ered; and”.

4 **SEC. 4. HONORING FORMAT REQUESTS.**

5 Section 552(a)(3) of title 5, United States Code, is
6 amended by—

7 (1) inserting “(A)” after “(3)”;

8 (2) striking out “(A) reasonably” and inserting
9 in lieu thereof “(i) reasonably”;

10 (3) striking out “(B)” and inserting in lieu
11 thereof “(ii)”;

12 (4) adding the following new subparagraphs at
13 the end thereof:

14 “(B) An agency shall provide records in any form in
15 which such records are maintained by that agency as re-
16 quested by any person.

17 “(C) An agency shall make reasonable efforts to pro-
18 vide records in an electronic form requested by any person,
19 even where such records are not usually maintained in
20 such form.”.

21 **SEC. 5. DELAYS.**

22 (a) FEES.—Section 552(a)(4)(A) of title 5, United
23 States Code, is amended by adding at the end thereof the
24 following new clause:

1 “(viii) If at an agency’s request, the Comptroller Gen-
2 eral determines that the agency annually has either pro-
3 vided responsive documents or denied requests in substan-
4 tial compliance with the requirements of paragraph
5 (6)(A), one-half of the fees collected under this section
6 shall be credited to the collecting agency and expended to
7 offset the costs of complying with this section through
8 staff development and acquisition of additional request
9 processing resources. The remaining fees collected under
10 this section shall be remitted to the Treasury as general
11 funds or miscellaneous receipts.”.

12 (b) PAYMENT OF REQUESTER’S EXPENSES.—Section
13 552(a)(4)(E) of title 5, United States Code, is amended
14 by adding at the end thereof the following new sentence:
15 “The court may assess against the United States all out-
16 of-pocket expenses incurred by the requester, and reason-
17 able attorney fees incurred in the administrative process,
18 in any case in which the agency has failed to comply with
19 the time limit provisions of paragraph (6) of this sub-
20 section.”.

21 (c) CIVIL PENALTY FOR DELAY.—Section
22 552(a)(4)(E) of title 5, United States Code, is further
23 amended—

24 (1) by inserting “(i)” after “(E)”; and

1 (2) by adding at the end thereof the following
2 new clause:

3 “(ii) Any agency not in compliance with the time lim-
4 its set forth in this subsection shall demonstrate to a court
5 that the delay is warranted under the circumstances. It
6 shall be within the discretion of the court to award the
7 requester an amount not to exceed \$75 for each day that
8 the agency’s response to his request exceeded the time lim-
9 its set forth in paragraph (6) of this section.”.

10 (d) AGENCY BACKLOGS.—Section 552(a)(6)(B) of
11 title 5, United States Code, is amended in the fourth sen-
12 tence by inserting “shall not include routine agency back-
13 logs and” after “ ‘unusual circumstances’ ”.

14 (e) NOTIFICATION OF DENIAL.—The fourth sentence
15 of section 552(a)(6)(C) of title 5, United States Code, is
16 amended to read: “Any notification of any full or partial
17 denial of any request for records under this subsection
18 shall set forth the names and titles or positions of each
19 person responsible for the denial of such request and the
20 total number of denied records and pages considered by
21 the agency to have been responsive to the request.”.

22 (f) EXPEDITED ACCESS.—Section 552(a)(6) of title
23 5, United States Code, is amended by adding at the end
24 thereof the following new subparagraph:

1 “(D)(i) Each agency shall promulgate regulations,
2 pursuant to notice and receipt of public comment, provid-
3 ing that upon receipt of a request for expedited access to
4 records and a demonstration by the requester of a compel-
5 ling need for expedited access to records, the agency shall
6 determine within five days (excepting Saturdays, Sundays,
7 and legal public holidays) after the receipt of such a re-
8 quest, whether to comply with such request. No more than
9 one day after making such determination the agency shall
10 notify the requester of such determination, the reasons
11 therefor, and of the right to appeal to the head of the
12 agency.

13 “(ii) A requester whose request for expedited access
14 has not been decided within five days of its receipt by the
15 agency or has been denied shall not be required to exhaust
16 administrative remedies. An agency failing to comply with
17 this time limitation shall be subject to the provisions of
18 paragraph (4)(E)(ii).”.

19 **SEC. 6. COMPUTER REDACTION.**

20 Section 552(b) of title 5, United States Code, is
21 amended by inserting before the period in the sentence
22 following paragraph (9): “, and such deletion shall be indi-
23 cated on the released portion of the record at the place
24 where such deletion was made”.

1 **SEC. 7. DEFINITIONS.**

2 Section 552(f) of title 5, United States Code, is
3 amended to read as follows:

4 “(f) For purposes of this section—

5 “(1) the term ‘agency’ as defined in section
6 551(1) of this title includes any executive depart-
7 ment, military department, Government corporation,
8 Government controlled corporation, or other estab-
9 lishment in the executive branch of the Government
10 (including the Executive Office of the President), or
11 any independent regulatory agency;

12 “(2) the term ‘record’ includes all books, pa-
13 pers, maps, photographs, data, computer programs,
14 machine readable materials, and computerized,
15 digitized, and electronic information, regardless of
16 the medium by which it is stored, or other documen-
17 tary materials, regardless of physical form or char-
18 acteristics; and

19 “(3) the term ‘search’ includes a manual or
20 automated examination to locate records.”.

○



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY AFFAIRS

94 APR 18 P2:14

April 12, 1994

John Podesta
Per our conversation.
-Bruce McC
4/15/94

MEMORANDUM FOR THE INFORMATION INFRASTRUCTURE TASK FORCE

FROM: Sally Katzen SK

SUBJECT: Principles for Providing and Using
Personal Information

The Working Group on Privacy in the NII has completed an update of the Code of Fair Information Practices called Principles for Providing and Using Personal Information. The Principles and an explanatory Commentary are attached for your review and comments.

Following your review, we intend to publish them for wide public comment. If you have comments please contact Robert Veeder at the Office of Management and Budget by Tuesday, April 19, 1994. He can be reached by telephone at (202)395-3785 or by fax at (202)395-7285.

file
FOIA

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Room 283

Principles for Providing and Using Personal Information

Preamble

The United States is committed to building a National Information Infrastructure (NII) to meet the information needs of its citizens. This infrastructure, essentially created by advances in technology, is expanding the level of interactivity, enhancing communication, and allowing easier access to services. As a result, many more users are discovering new, previously unimagined, uses for personal information. In this environment, we are challenged to develop new principles to guide participants in the NII in the fair use of personal information.

Traditional fair information practices, developed in an age of paper records, must be adapted to this new environment where information and communications are sent and received over networks on which users have very different capabilities, objectives and perspectives. Specifically, new principles must acknowledge that all members of our society (government, industry, and individual citizens) share responsibility for ensuring the fair treatment of individuals in the use of personal information, whether in paper or electronic form. Moreover, the principles should recognize that the interactive nature of the NII will empower individuals to participate in protecting information about themselves. The new principles should also make clear that this is an active responsibility requiring openness about the process, a commitment to fairness and accountability, and continued attention to security. Finally, principles must recognize the need to educate all participants about the new information infrastructure and how it will affect their lives.

These "Principles for Providing and Using Personal Information" recognize the changing roles of government and industry in information collection and use. Thus, they are intended to be equally applicable to public and private entities that collect and use personal information. However, these Principles are not intended to address all information use and protection concerns for each segment of the economy or function of government. Rather, they should provide the framework from which specialized principles can be developed.

I. General Principles for the National Information Infrastructure

A. Information Privacy Principle

1. Individuals are entitled to a reasonable expectation of information privacy.

B. Information Integrity Principles

Participants in the NII rely upon the integrity of the information it contains. It is therefore the responsibility of all participants to ensure that integrity. In particular, participants in the NII should, to the extent reasonable:

1. Ensure that the information is secure, using whatever means are appropriate;
2. Ensure that information is accurate, timely, complete, and relevant for the purpose for which it is given.

II. Principle for Information Collectors (i.e. entities that collect personal information directly from the individual)

A. Collection Principle

A decision to provide personal information requires knowledge of the intended uses, protection and consequences. Therefore, collectors of this information should:

1. Inform the data subject about the reason for collecting and expected uses of the information, the efforts to protect the confidentiality and integrity of the information, the consequences of providing or withholding information, and any rights of redress.

III. Principles for Information Users (i.e. Information Collectors and entities that obtain, process, send or store personal information)

A. Acquisition and Use Principles

Users of personal information must recognize and respect the stake individuals have in the use of personal information. Therefore, users of personal information should:

1. Assess the impact on personal privacy of current or planned activities before obtaining or using personal information;

2. Obtain and keep only information that could reasonably be expected to support current or planned activities and use the information only for those or compatible purposes;
3. Assure the accuracy, timeliness, completeness, and relevance of personal information as necessary for the intended use;

B. Protection Principle

Users of personal information must take reasonable steps to prevent the improper disclosure or improper alteration of the information they possess. As such, users should:

1. Use appropriate managerial and technical controls to protect the confidentiality and integrity of personal information.

C. Education Principle

The full effect of the NII on both data use and personal privacy is not readily apparent, and individuals may not recognize how their lives can be affected by networked information. Therefore, information users should:

1. Educate themselves, their employees, and the public about how personal information is obtained, sent, used, stored, and protected and how these activities affect others.

D. Fairness Principles

Because information is used to make decisions that affect individuals, and those decisions should be fair, information users should, as appropriate:

1. Provide individuals a reasonable means to obtain, review, and correct their own information;
2. Inform individuals about any final actions taken against them and provide individuals with means to redress harm resulting from improper use of personal information;
3. Allow individuals to limit the use of their personal information if the intended use is incompatible with the original purpose for which it was collected, unless that use is authorized by law.

IV. Principles for Individuals who Provide Personal Information

A. Awareness Principles

Individuals have a responsibility to understand the consequences of providing personal information to others. While information collectors have an obligation to provide information (as outlined in the Collection Principle), individuals also should ensure that they obtain adequate, relevant information about:

1. Planned primary and secondary uses of the information;
2. Any efforts that will be made to protect the confidentiality and integrity of the information;
3. Consequences for the individual of providing or withholding information;
4. Any rights of redress the individual has if harmed by improper use of the information.

B. Redress Principles

Individuals should be protected from harm resulting from inaccurate or improperly used personal information. Therefore, individuals should, as appropriate:

1. Be given means to obtain their information and be provided opportunity to correct inaccurate information that could harm them;
2. Be informed of any final actions taken against them and what information was used as a basis for the decision;
3. Have a means of redress if harmed by an improper use of their personal information.

Draft - April 12, 1994

PRINCIPLES FOR PROVIDING AND USING PERSONAL INFORMATION

Commentary

1. With the initiation and expansion of the National Information Infrastructure (NII),¹ the information age is clearly upon us. The ability to access, collect, store, analyze, and disseminate data at an acceptable cost has never been greater, and continuing advances in computer and telecommunications technologies, especially interactive applications, will serve to ensure that the amount of electronically stored personal information and transactional data will continue to grow at a healthy pace.

2. Cost is, of course, the overriding factor. Continually decreasing hardware, software and networking costs allow individuals and organizations to use data in ways that were previously, in a non-electronic world, cost-prohibitive. For example, if someone were interested in building a dossier on a citizen who had lived in four different states, that dossier could have been built "manually" by travelling from state to state (or hiring individuals in each state) to compile public records pertaining to that individual's birth, motor vehicle registration, driver's license, real property holdings, voting, etc. This would have required, however, filling out forms, paying fees, and perhaps waiting in long lines for record searches at various state and local office buildings. In short, it could be done, but it would have been a time-consuming and costly exercise; thus, it would not be done unless the reward for building this dossier were considerable. If the ultimate goal was to collate data on thousands of individuals, analytical processing costs would also be added to the mix.

3. Today, such a dossier can be built in a matter of minutes, at minimal cost, assuming all the needed information is on-line.² Indeed, with the NII, the assumption is that large amounts of sensitive information will be on line, and can be accessed, perhaps without authority, by a large number of network users. With advanced networking, each link in the chain--access, collection, storage, and analysis--becomes a cost-effective method of using information, as does the ability to disseminate the final collated product to others.

¹ The term "NII" does not refer to any specific Administration program, but rather the data superhighway concept: information linked by networks of phones, televisions, computers, and other devices.

² This ease of access has led some to question whether even traditionally public information should be available on-line.

4. Such networking offers considerable benefits. The NII holds forth the promise of greater public participation in society, advances in research and medical treatment, and quick verification of critical personal information (e.g., a gun purchaser's criminal record), just to name a few. There is, however, another issue: information privacy. To the extent that the ability to access, collect, store, analyze, and disseminate data has never been greater, the threat to personal information privacy has never been greater either.³

5. The truth is, the NII will only achieve its full potential if individual privacy is properly protected. Absent such protections, individuals may be reluctant to participate in the NII, fearful that the risks to personal privacy outweigh the benefits. Citizens should not have to make that choice; rather, they should be assured that the use of personal information will be appropriately limited. The adoption of fair information principles is a critical first step in that direction.

6. Although Fair Information Principles currently exist, [see Advisory Committee on Automated Personal Data Systems, *Records, Computers and the Rights of Citizens*, (Washington, D.C., Department of Health, Education and Welfare, 1973)], it is clearly time that they be rewritten to address the issues raised by our new electronic environment, as well as cover paper records. The most major concerns:

- (1) It is no longer governments alone that collect and use large quantities of personal data; the private sector clearly rivals the government sector in information usage. As such, these new principles should apply to both the government and private sectors.
- (2) The NII will, if it fulfills its promise, be interactive; i.e., individuals about whom data relates (so-called "data subjects") will become increasingly active participants, creating volumes of communicative and transactional data. To the extent that individuals

³ According to the First Annual Report of the Privacy Rights Clearinghouse in California (January 1994), the clearinghouse hotline received over eleven thousand calls during its first year of operation. Sixty-three percent of them related to direct marketing (unsolicited mail and telephone calls), credit reporting, and Social Security Numbers. Other topics of concern included medical records, workplace monitoring, wiretapping, harassing telephone calls, merchant information-gathering practices, government records, called ID, and wireless telephones.

are providing information about themselves, they too should have obligations when using the NII.

- (3) The transport vehicles for this information (the networks) are vulnerable to abuse; thus, the reliability of the network itself becomes critical to the future success of the NII.
- (4) Traditional ethical rules, long-accepted when dealing with tangible objects, are not easily applied in the new electronic environment, and all NII participants must be educated in the proper use of the NII. Consider, for example, how an individual who would never trespass in the home of another might attempt to justify computer hacking as an intellectual exercise. Indeed, what constitutes a proper use of the NII or NII information might not be intuitively obvious. Whether a particular use is acceptable may depend on a host of factors including, but by no means limited to, the purpose for which the data was collected, whether the use is compatible with that purpose, and whether the use is specifically authorized by law. In such an environment, individuals need to be educated about the proper use of both the NII and the information it contains.

7. As ambitious as the task is, these Principles attempt to address these issues. That said, one must recognize the limitations inherent in any such principles. First, the Principles are not intended to have the force of law. Broad sweeping principles provide a framework for addressing fair information practices, but any specific regulatory implementation must be sector by sector. This is because each information sector (e.g., medical, financial, law enforcement, national security, research and statistics) has specific and unique needs that cannot be addressed by general principles.

8. Second, the Principles are only intended to apply domestically; although, to the best of our knowledge, these Principles are in accord with current international guidelines regarding personal privacy and data protection, and should not hinder the ongoing development of an international information infrastructure.

9. Third, the Principles only address information identifiable to a living individual. It makes little sense to restrict the use of information that does not relate to an identifiable living person, and to do so would unduly hamper researchers and others who use large quantities of data for generic statistical purposes.

10. Finally, although the Principles are written broadly, there will no doubt be times when their strict application would be inappropriate. For example, public safety could be undermined if law enforcement had to seek a data subject's approval before obtaining transactional records relevant to an ongoing criminal investigation on the theory that this use was incompatible with the purpose for which the records were originally created. To account for such cases, the words "as appropriate" or "to the extent reasonable" appear in the Principles. This is not to suggest, however, that the Principles need not be rigorously adhered to. To the contrary, the need to diverge from a given principle should be the exception, not the rule, and should only occur when there is an compelling reason. For in the end, it is adherence to these Principles that is critical to developing trust between data users and data subjects in the electronic information age.

General Principles for the National Information Infrastructure

11. We begin with the three principles that apply to all NII participants: information collectors, information users, and individuals ("data subjects"). These three principles, relating to privacy and information integrity, provide the underpinnings for the successful implementation of the NII. They state clearly that individuals are entitled to a reasonable expectation of information privacy, and that efforts should be made to ensure that information is adequately protected and used appropriately.

12. If the NII is to be trusted, participants must have a reasonable expectation of privacy in personal information. Although individuals harbor subjective expectations of privacy, these must be honored only to the extent that society is prepared to recognize those subjective expectations as objectively reasonable. For example, an individual who posts an unencrypted personal message in an area of a bulletin board service that is provided for open, public messages cannot reasonably expect that his/her message will only be read by the individual listed in the salutation. Where a subjective expectation of privacy is made clear and is objectively reasonable, however, individuals should have their privacy respected.

13. NII participants must also be able to rely upon the integrity of the information contained in and transmitted through the NII. This will be the case only if the information is secure from improper disclosure and alteration, and if the information is accurate, timely, complete, and relevant for the purpose for which it is used. The responsibility of providing adequate security and reliable information falls properly on all participants in the NII.

14. We recognize, of course, that individuals and organizations do not always provide accurate and complete data when requested.

Large data brokers, as well as privacy advocates, may intentionally provide false data as a method of monitoring data flow. For example, an individual who misspells his name slightly when dealing with one company and then receives mail, with the name similarly misspelled, from a second company, may now be aware that the first company has disseminated his name to others. We do not intend to suggest that any falsehood violates this principle. It would violate this principle, however, to provide false information to create some improper result (such as receiving illegitimate benefits or injuring another).

Responsibilities of Original Collectors (i.e., Entities that Collect Information Directly from the Individual) of Personal Information

15. One of the most alluring features of the NII--easy access to and dissemination of information--also provides one of its most vexing problems: it is impossible for an individual to identify all the other individuals and organizations that may possess some personal information about himself or herself. At the risk of over-simplification, there are essentially two types of data users: those who collect information directly from the data subject, and those who do not. By necessity, the rules for these two groups must differ.

16. Those who collect information directly from the individual should inform the data subject

- (1) how the information collected will be used,
- (2) whether the information will remain confidential and be protected against improper access or alteration, and
- (3) the consequences of providing or withholding the requested information.

The fulfilling of these obligations will ensure that individuals have a meaningful opportunity to exercise sound judgment in accordance with the Principles for Individuals Who Provide Personal Information. Juxtaposed, the Principles for Information Collectors and Principles for Individuals Who Provide Personal Information highlight the true interactive nature of the NII and the ideal symbiotic relationship between data collectors and data subjects.

17. It is simply impossible, of course, to impose these Information Collector obligations on entities that have no direct relationship with the individual. If every recipient of data were required to contact every individual on whom they receive data to provide some form of notice, the exchange of information would become unduly burdensome, and the benefits of the NII would be lost. On the other hand, information dispersion will be

common on the NII and the following principles, designed to promote fair information use, should apply to all data users (including data collectors).

Responsibilities of Information Users (i.e., Information Collectors and Entities that Obtain, Process, Send or Store Personal Information).

18. In an environment where individuals cannot realistically know where all personal information about them resides, and cannot account for each use of that information, it is simply impossible for individuals to ensure that personal information is used fairly. In some cases, even arguably adverse actions may go unnoticed, and therefore redress will not be available. For example, a company may decide not to include an individual in a mass mailing offer regarding a financial opportunity because an analysis of that individual's credit history suggests the individual is a bad credit risk. In such an environment, it is particularly important to ensure that data users use personal information in acceptable ways. The following principles, which apply to all users (including Collectors), fall into four categories: Acquisition and Use, Protection, Education, and Fairness.

A. Acquisition and Use Principles

19. The benefit of information lies in its use, but such use may also have a negative effect on personal privacy. Additionally, that privacy, once lost, cannot always be entirely restored (consider, for example, the extent to which the inappropriate release of extremely embarrassing personal information is rectified by a public apology). To protect the information privacy of individuals adequately requires that the effect of data use be considered before personal information is obtained or used. In assessing this effect, data users will need to consider not just the effect of their action on the individual, but other factors (such as public opinion and market forces) which may be relevant in determining whether a particular data use is appropriate.

20. It may well be that the effect on personal privacy has been considered and it has been decided, appropriately, to obtain and use personal information for some purpose. In such cases, the data user should obtain only that information which could reasonably be expected to support current or planned activities. Although the cost of storing information continues to decrease, it is simply inappropriate to collect volumes of personal information because it may, in the future, prove to be of some unanticipated value. Moreover, once collected, personal information should only be used for those current or planned activities, or other compatible purposes. Incompatible uses not authorized by law should not be undertaken without consultation

with the data subject. See, Fairness Principles, below. Finally, information should only be kept as long as necessary. It should be destroyed when appropriate.

21. Reasonable efforts should be made to ensure that information that will be relied upon is accurate, timely, complete, and relevant. It must be recognized that information which is accurate when collected may not be used for years, and the use of stale information may have unfair or inaccurate results.

B. Protection Principle

22. In a networked environment, the risk of unauthorized access (i.e., loss of confidentiality) and unauthorized alteration (i.e., loss of data integrity) increases exponentially. Both insiders and outsiders may browse through information they have no right to see, or make hard-to-detect changes in data which will then be relied upon in making decisions that affect the individual. It is therefore incumbent on data users to protect the data commensurate with the harm that might occur if the data were improperly disclosed or altered. Additionally, the level of protection should be consistent with whatever the data subject was told if the data was collected directly from the individual.

23. It is not enough, however, to rely upon technical controls. Although technological safeguards can serve to protect data confidentiality and integrity, there is a human component that defies a solely technical solution. For example, insiders--those who are authorized to access and alter data--may not violate access controls when they improperly alter or delete data they are authorized to change. Therefore, the protections employed must be multi-faceted and include technical solutions, management solutions (e.g., creating an environment where fair information practices are the accepted norm), and educational solutions (e.g., providing data handlers with proper training).

C. Education Principle

24. The Education Principle represents a significant addition to the traditional Fair Information Principles. The effect of the NII on both data use and personal privacy is by no means readily apparent. Most individuals are ignorant as to the amount of personal information already networked, and may not recognize how their lives can be affected by networked information.

25. It is important that information users appreciate how the NII affects information privacy, and that individuals understand the ways in which personal information can be used in this new environment. Thus, data users need to educate themselves, their own employees, and the public in general about how personal information is obtained, transmitted, used and stored, including

what types of security measures are being used to protect data confidentiality and data integrity.

D. Fairness Principles

26. If information can be used to adversely affect an individual, it is only fair that individual have a reasonable means to obtain, review, and correct personal information about himself or herself. Moreover, to the extent adverse actions are taken against the individual, the individual should be notified and have a means of redress. Equally important, the data collector should explain to the individual exactly what that means of redress is. Redress may take many forms (mediation, arbitration, civil suit, criminal prosecution) and be offered in different forums (federal, state, local) but cannot be imposed by these principles.

27. One of the most difficult issues is dealing with incompatible uses of previously collected information. An incompatible use is not necessarily a bad use; in fact, it may be of considerable benefit to either a data subject or society as a whole. A data subject may benefit, for example, when a customer mailing list is used to warn those customers that a product that they purchased is defective and may cause serious physical injury. Society as a whole may benefit when criminal conviction information is used for some purpose not originally contemplated such as screening candidates for child care positions or weapons purchases. Similarly, researchers and statisticians using previously collected information may determine the cause of a potentially fatal disease such as cancer.

28. On the other hand, without some limitation, information use may know no boundaries. Individuals who disclose information for one purpose may then be subjected to unintended and undesired consequences, and this will discourage them from disclosing personal information in the future. To ensure that this does not occur, information should only be used in ways compatible with the purposes for which it was collected and, before incompatible uses occur, they must either be authorized by law or the individual data subject should be notified so that he or she can opt out of such use.

Rights and Responsibilities of Individuals who Provide Personal Information

29. As noted, the NII has significant implications for information use and personal privacy. In such an interactive environment, it is not sufficient for individuals to disclose personal information and then abdicate responsibility for the consequences; rather, individuals must take an active role in

deciding whether to disclose personal information in the first instance. But if individuals are to be held responsible for making these choices, they must be empowered to make intelligent choices. This requires that they receive meaningful information on the intended uses of the information they provide, and the consequences for providing or withholding personal information. For these purposes, the PRINCIPLES FOR INDIVIDUALS WHO PROVIDE PERSONAL INFORMATION create two discrete categories that apply to individuals: Awareness and Redress.

A. Awareness Principles

30. Awareness encompasses the notion that individuals should understand the ways in which personal information may be used, and the results that flow from such use. This will allow them to make intelligent choices regarding the disclosure of personal information.

31. Increasingly, individuals are being asked to surrender personal information about themselves. Sometimes the inquiry is straight-forward; for example, a bank may ask for personal information prior to processing a loan request. In this type of situation, it may be clear to the individual the purpose, or at least the primary purpose, for which the information is sought (e.g., processing the loan application). There may, however, be secondary uses which are not so immediately obvious, such as being put on a mailing list for a credit card solicitation. Indeed, there are no doubt many times when individuals decide to disclose information without being fully cognizant of the many ways in which that information may ultimately be used.

32. It is difficult, if not impossible, to anticipate all such uses. Individuals who pay for medical services with a charge card may not recognize that they are creating transactional records from which others may attempt to ascertain the current state of the individual's health. Equally problematic is that the assumptions drawn from such data may be false, and the individual may never know that the data has been used to reach some conclusion, or take some action, regarding his or her future.

33. It is impossible to formulate any set of principles that can cover comprehensively all possible uses of information. Nor would such an attempt be wise for, in fact, different people desire and expect different levels of privacy, and hold different concerns regarding the ultimate use of personal data. Ultimately, whether an individual chooses to disclose personal information, or create a transactional record, should depend upon the individual's own wishes unless, of course, the information is required by law.

34. The Awareness Principles recognize the importance of personal choice and cultivate an environment where these critical personal decisions can be made intelligently. For whatever the degree of personal interest in information privacy, it is critical that individuals receive enough facts to make rational choices regarding the disclosure of personal information.

35. First and foremost, an individual should know the intended primary and secondary uses of the information. Second, individuals should determine whether efforts will be made to assure data confidentiality and data integrity. In some cases, confidentiality may be required by law (e.g., tax records), but of equal concern may be the technical and managerial controls in place to protect the data. This principle does not mean that the individual should obtain a technical explanation regarding the security measures used to protect such data. Indeed, such technical explanations might be unwelcome, unwarranted and counterproductive (widespread disclosure of the technical measures used might actually expose vulnerabilities in a given system). But individuals should be told whether the information is intended to remain confidential and whether efforts will be made to preserve data integrity. Some individuals might choose not to disclose personal data if they knew that the data provided was freely obtainable by others, or might easily be altered.

36. Individuals should also be informed of the consequences of providing or withholding information. Data subjects should be told whether disclosing the requested information is mandatory (i.e., required by law) or voluntary, and the consequences that can flow from their decision. We recognize fully that even when disclosure is legally "voluntary," it may in fact be coerced (e.g., the refusal to "voluntarily" provide information may result in the denial of critical life-sustaining benefits). General principles cannot resolve such difficult issues but clearly, whatever the consequences, they should be clearly articulated.

37. Lastly, there will be times when individuals feel aggrieved by the improper use of personal information. If redress is available, individuals should be aware of that fact, and be informed as to how such redress can be obtained.

B. Principle of Redress

38. Invariably, people will be harmed by the improper disclosure or improper use of personal information. It is therefore important to implement proactive measures to limit that harm, and reactive measures to provide relief when harm occurs.

To the extent inaccurate information can be used to harm individuals, it follows that individuals may wish to ensure that collected and stored personal information is in fact accurate and

complete. For this reason, individuals should be able to obtain from data users, as appropriate, a copy of this personal information and have the opportunity to correct inaccurate information. This may allow them, proactively, to prevent anticipated harms. This principle is, however, limited in scope. Although, idealistically, all stored personal information should be accurate, the fact remains that inaccurate personal information does and will exist, and correcting inaccurate data cannot be done without cost. Pragmatically, it makes little or no sense to devote resources to correcting data that cannot be used to harm the individual, and therefore the opportunity to review personal information in order to correct data inaccuracies is limited to those cases where harm may occur.

40. When final actions are taken against individuals, they are entitled to notice. Absent notice, it may be impossible to seek available redress. Moreover, redress should be available for individuals who have been harmed by the improper use of information (including the use of inaccurate information). To ensure that individuals can take advantage of these redress mechanisms, the awareness principle, as noted above, requires that individuals be informed of the remedies available.

Freedom of Information Day

File
FOIA

On the Clinton/Reno Memos

- o On October 4th of last year, President Clinton issued a memorandum to the heads of all Departments and Agencies setting a standard of openness for his administration.
- o The memo addressed agencies' implementation of the Freedom of Information Act. It noted that "the FOIA was enacted based upon the fundamental principle that an informed citizenry is essential to the democratic process and that the more the American people know about their government, the better they will be governed. Openness in government is essential to accountability and the Act has become an integral part of that process."
- o With this memo, the President personally changed the Executive Branch's approach to implementing the FOIA. He told agencies "the Freedom of Information Act...has been one of the primary means by which members of the public inform themselves about their government. As Vice President Gore made clear in the National Performance Review, the American people are the Federal government's customers. Federal Departments and agencies should handle requests for information in a customer-friendly manner. The use of the Act by ordinary citizens is not complicated, nor should it be. The existence of unnecessary bureaucratic hurdles has no place in its implementation."
- o The memo goes on to exhort agencies to carry out their administrative responsibilities diligently - to renew their commitment to the FOIA and to reduce backlogs and conform their litigating practices to new guidance issued by the Attorney General.
- o With this call for greater openness in government, President Clinton sought to abolish the sometimes adversarial relationship between agencies who are keepers of the records of government, and the citizens who seek such records.
- o To implement this new policy, Attorney General Reno issued a detailed memorandum laying out the steps the Department of Justice would take and the steps she expected agencies would take in response to the President's direction.
- o For Justice, the Reno memorandum represented a fundamental change in the way it would carry out its FOIA litigating responsibilities. For twelve years, the Department had operated under a memorandum issued by Attorney General William French Smith that required Justice to defend any suit "with a substantial legal basis." This broad standard inevitably resulted in more information being withheld than released. Attorney General Reno specifically rescinded the Smith memorandum.
- o The Reno memorandum returns Justice to a standard used under the Carter Administration. There, Attorney General Griffin Bell committed the Department to defending FOIA suits only where agencies could show a "demonstrable harm" flowing from the use of a withholding exemption. The Reno memo instructs agencies that Justice will "defend the assertion of a FOIA exemption only in those cases where the agency reasonably

foresees that disclosure would be harmful to an interest protected by that exemption....In determining whether or not to defend a nondisclosure, we will apply a presumption of disclosure."

- o Indeed, the memo goes even further by urging agencies where "an item of information might technically or arguably fall within an exemption" not to withhold "unless it need be."
- o Since the Attorney General herself will be addressing this group during luncheon, I'll go no further about what Justice is doing to further implement this policy.
- o Finally, it is important not to underestimate the powerful symbol of linking the President's memo and the Attorney General's. In the past, Justice alone established FOIA policy. In this Administration, the policy is the President's himself, with the assistance of Justice.

O'LEARY

Bruce insert

Improving FOIA compliance is of course only one of the ways we are improving access to government information.

Because FOIA is the most expensive way of making routine public information available, we are aggressively promoting information dissemination, particularly in electronic form.

On June 25th the Clinton Administration took a major step to improve the Federal government's capabilities for making information available to the American people. OMB issued new policies direct agencies to use information technology to make government information available to the public:

- o in a timely and equitable manner;
- o via a diverse array of sources, both public and private;
- o recouping only those costs associated with the dissemination of information, and not those associated with its creation or collection; and,
- o not attempting to restrict the secondary uses of their information products.

These policies build on the tradition of open information flow reflected in the Freedom of Information Act.

Since then, as part of the Administration's efforts to "reinvent government," we have

- o developed standards for an agency-based Government Information Locator Service to help the public locate and access public information;

- o put White House documents, including speeches, press releases, Executive orders, etc. on-line for free in several convenient locations, including the Commerce Department's National Technical Information Service;
- o proposed \$184 million in the FY 95 President's Budget for initiatives to improve public access to government information assistance to libraries and other public institutions; and,
- o established electronic mail for the President -- currently hundreds of citizens are taking advantage of this means of getting their views in every week.

CLASSIFICATION ORDER

E-FOIA

- o One of the most important questions we must answer is how to provide access to government records in a electronic environment.
- o The Federal government is currently spending upwards of 25 billion dollars annually to acquire information resources management technology. Use of this technology helps manage large complex programs more efficiently and provide services more effectively.
- o It also has resulted in the automation of more and more of the records of government.
- o Moreover, as we develop and grow the National Information Infrastructure, more and more government information will reside on and flow through this national information superhighway.
- o Providing access to these records will present a major challenge to the FOIA.
- o Like other access statutes, the FOIA was developed in an era when paper records predominated. An agencies' information resided within the four walls of the agency. Networking and sharing of information was for the future.
- o The future is now. Agencies' automated information stores are growing. They are maintaining shared pools of information, not individually within single agencies, but collectively.
- o Requesters are growing more sophisticated both in terms of seeking information and of acquiring and using information technology.
- o There are real questions about whether the FOIA as currently written can accommodate these changes.
- o The answer is probably no. Accordingly, we are going to have to undertake a serious effort to bring the law fully into the information age. And to do so in ways that ensure

against the creation of an information "have-not" underclass. That do not sink agencies with exponentially growing administrative costs. And that leaves the Freedom of Information Act as the expression of a government confident in itself and its citizens.

o While this forum is not the place to lay out what all of those changes might entail, I can talk a little about the process for getting there.

o As you may know, there have been several legislative efforts to give life to the idea of an electronic FOIA. One most recently from Sen Leahy's Subcommittee on Information and the Law. These are all good efforts and they represent a foundation on which to build. But they must go further if they are to take this statue into the next century.

o Ok John - make policy. Options - empower the Information Policy Committee to establish a working group to develop an administration proposal. Task Justice to come up with an alternative. Do it yourself. Have OIRA do it as an information policy responsibility under the Paperwork Act.

Armstrong

Joe DiGenova ~~Email records~~
Hard drives

Gov't Information
Locator system
parallel NARA

EMBARGOED FOR RELEASE
9:00 a.m. MARCH 15, 1994

THE CLINTON ADMINISTRATION AND THE NEWS MEDIA

*A Summary and Analysis of 151 Actions by the Clinton Administration
Aimed at Restricting Access to Government Information
and Intruding on Editorial Freedom.*

**A CONTINUING CHRONOLOGY PREPARED BY
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
WASHINGTON, D.C.**



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Using This Report

Since 1983, The Reporters Committee for Freedom of the Press has tracked attempts by presidents, their administrations and their legislative supporters to stifle editorial freedom, keep public information secret and manipulate news to control public perceptions. This report is the first of a cumulative summary of such actions since Bill Clinton launched his presidential campaign in 1992.

The 151 entries appear first in a reverse chronological list and then, on page 22, in a list grouped by categories. The category groupings include a page number and a portion of the headline to allow easy cross-referencing to the full entry in the chronological list. This report also includes a full index, allowing readers to find entries using the names of officials, departments or journalists.

The Clinton Chronology

Disinformation

DEFENSE CHIEF PRAISES ADMIRAL'S HONOR; JUDGE SAYS HE LIED

Secretary of Defense William Perry calls retiring Adm. Frank Kelso II a man of the "highest integrity and honor," *The New York Times* reports. A Navy judge had found that Kelso, the Navy's top admiral, lied when he said he did not witness misconduct at the 1991 Tailhook convention, and then tried to manipulate the investigation. The *Times* asserts that Perry's statement was made as part of a bargain to convince Kelso to resign and prevent the formation of a special court of inquiry to assess Kelso's performance.

Disinformation

EX-RENO DEPUTY: GOVERNMENT AFRAID TO SPEAK TRUTH ABOUT CRIME

Former Deputy Attorney General Philip Heymann says that because of politics and ideology, no one in government dares speak the truth about crime, *The New York Times* reports. "The problem here is that this whole area is so much a matter of political debate that there is no room for a reasoned debate," Heymann says. White House officials express annoyance over Heymann's remarks, the *Times* reports.

Disinformation

SOUND BITE OFFERS TOO LITTLE TO CHEW ON

Clinton media adviser Mandy Grunwald creates an ad for the Democratic National Committee that includes a sound bite of South Carolina's Republican Gov. Carroll Campbell saying of health care, "There's not a crisis." Campbell in fact said: "Number one, you shouldn't say there's not a crisis," *The Washington Post* reports. Although Campbell said the whole medical system was not in crisis, he said that some areas are. Grunwald defends the ad as a "clean, clear hit."

Freedom of Information

\$25 MILLION WHITE HOUSE PHONE SYSTEM CLASSIFIED, AT FIRST

The administration initially blocked FOI Act requests for information about the new \$25 million White House telephone system, claiming it was "classified," until the Secret Service told the administration it was not, *Wired* magazine reports.

Policing Thought

AIR FORCE COLONELS CLAIM DISMISSAL OVER OPPOSITION TO SATELLITE

Col. Sanford Mangold, the head of Air Force spending for space systems, tells the House Government Operations Committee he was dismissed in retaliation for recommending that the Air Force scrap the expensive Milstar satellite program, *The New York Times* reports. Another colonel, Edward Dietz, tells the

committee he was reassigned after urging the Air Force not to develop a new satellite warning system, *Copley News Service* reports.

Policing Thought

CLINTON CONTINUES BAR ON TRAVEL TO CUBA

Following a review of travel bans, the Clinton Administration retains restrictions on travel to Cuba. Under the policy only U.S. officials, journalists, citizens with close relatives in Cuba, professional researchers and expenses-paid guests of Castro can visit Cuba without official permission, *The New York Times* reports. The administration refuses to extend this right to teachers, writers, artists, physicians, human rights advocates and church leaders.

Policing Thought

FBI SUSPENDS OFFICIAL WHO CALLS RENO 'SOCIAL WORKER'

The FBI suspends James Ahearn, its top official in Arizona, for questioning the ability of Attorney General Janet Reno in an interview with *The Arizona Republic*, *The Associated Press* reports. In the interview, Ahearn, a 35-year FBI veteran nearing retirement, criticized Reno for rejecting a plan to merge the FBI with the Drug Enforcement Administration. He also said Reno "forgot that she's the nation's prosecutor. She's become a social worker."

Policing Thought

FCC FINES INFINITY \$400,000 OVER HOWARD STERN SHOW

The FCC issues notices of apparent liability of \$400,000 to Infinity Broadcasting Corp. for broadcasting "apparently indecent" material on the Howard Stern radio show. The shows described such activities as incest and the insertion of a gerbil into a human orifice.

Prior Restraint

CIA, PENTAGON SEEK TO LIMIT PRIVATE SATELLITE PHOTO SALES

Testifying before Congress about possible government restrictions on the sale of commercial satellite photographs, CIA Director James Woolsey advocates "measures that would prevent the collection of sensitive data . . . in certain cases." A Defense Department official advocates imposing stricter controls over commercial satellites during crises.

Secret Government

ARCHIVES TO MOVE AUDIO, VIDEO COLLECTION FROM D.C. TO MD.

After the Supreme Court finally lifts restrictions on access to the tapes of its arguments, the National Archives confirms March 1994 plans to move the tapes, along with the rest of its audio and video collections, from downtown Washington to a new building in suburban College Park, Md., accessible by a 45-minute shuttle bus ride.

Secret Government

GORE MEETS WITH FCC CHAIR A WEEK BEFORE RATE ANNOUNCEMENT

Representatives for Vice President Gore and FCC Chairman Reed Hundt decline to characterize what was discussed at a private meeting one week before the FCC announced further cable rate regulation, *Electronic Media* reports. Gore is known as a proponent of cable rate controls.

Secret Government

POLITICS DELAYS RELEASE OF JAIL GLUT REPORT

The Justice Department withholds until February 1994 the release of a summer 1993 report describing how nonviolent, low-level drug offenders sentenced to mandatory minimum times are clogging federal prisons. David Gergen, President Clinton's counselor, requested the delay lest it send a message of "softness" on crime before the administration's crime proposals were ready, according to *The New York Times*.

Stop the Press

ATTORNEY GENERAL APPROVES PRESS SUBPOENAS

A spokesman for Attorney General Janet Reno reports that her office authorized 10 subpoenas against reporters in 1993. The Clinton Administration has taken no formal action to limit subpoenas.

Freedom of Information**DEFENSE DEPARTMENT WITHHOLDS INFORMATION FROM O'LEARY**

Stymieing Energy Secretary Hazel O'Leary's campaign to make public the government's uses and abuses of radiation and radioactive material, the Defense Department refuses to tell her exactly how much plutonium is used in its weapons around the world, claiming security reasons, *Time* reports.

Freedom of Information**JUSTICE: NO WAY TO PREDICT RELEASE OF FOSTER REPORT**

The Wall Street Journal sues for release of a photocopy of the original torn-up note from White House deputy counsel Vincent Foster's briefcase and reports prepared by the U.S. Park Service and the FBI on his suicide in July 1993. The Justice Department initially predicted a September 1993 release of the reports, but a spokesman tells *The Associated Press* in February 1994 he has no way to know when they will be disclosed.

Freedom of Information**MAIL FORWARDING INFORMATION CLOSED PENDING NEW REGULATION**

A person's forwarding address is no longer available from a local post office, the U.S. Postal Service announces in a proposed regulatory change that it immediately puts in effect "temporarily." The USPS claims the rule would protect victims of domestic violence. The regulation was scheduled to be published in the Federal Register in March 1994 for a 60-day comment period.

Policing Thought**ADMINISTRATION URGES SUPREME COURT TO UPHOLD MUST-CARRY**

The Clinton Administration asks the Supreme Court to uphold the constitutionality of a law requiring cable systems to allot channels to local broadcasters. Turner Broadcasting System, Inc. and other groups argue that the law violates the First Amendment rights of the cable companies by limiting their editorial freedom to choose programming.

Policing Thought**JUDGE STAYS DEPORTATION OF PALESTINIANS CLAIMING BIAS**

Palestinians, claiming that the U.S. wants to deport them because of their support of the Popular Front for the Liberation of Palestine, win a stay of their deportation proceedings. Stating that mere association with the PFLP is protected by the First Amendment, a U.S. district court judge in Los Angeles orders the government to demonstrate that it does not try to deport on technical grounds only those foreigners who support disfavored groups.

Policing Thought**JUSTICE SEEKS TO RESTORE BAN ON FEDERAL EMPLOYEE HONORARIA**

The Justice Department asks the Supreme Court to review a March 1993 decision by the U.S. Court of Appeals in Washington (D.C. Cir.) that found unconstitutional a law banning executive branch employees from taking money for articles or speeches. The ban includes subjects unrelated to the employees' work.

Policing Thought**NEW FCC CHAIRMAN URGES BROADCASTERS TO REDUCE TV VIOLENCE**

Reed Hundt, the new chairman of the FCC, urges broadcasters not to fight government efforts to reduce televised violence, *The Associated Press* reports. Stating that TV violence "hurts our children," Hundt says that if Congress enacts TV violence regulation, the FCC will enforce those regulations vigorously. At his confirmation hearings in September 1993, Hundt told the Senate that the FCC should be on "the cutting edge" of the effort to reduce TV violence, *Broadcasting & Cable* reports.

Secret Government**CLINTON SPOKESMAN ADHERES TO BELGIAN SECRECY**

Communications Director Mark Gearan informs the press at a Brussels briefing that President Clinton met alone with Belgium's King Albert II and that nothing of the meeting will be made public. Gearan says:

"According to Belgian protocol, all meetings with the King are held in strictest confidence and discussions are never divulged in public — something we may want to continue when we return back to the States."

Secret Government

GORE CLOSES MEETING WITH TELECOMMUNICATIONS EXECUTIVES

The week before his appearance at the Los Angeles "superhighway summit," Vice President Gore holds a closed-door "listening session" to allow telecommunications executives to express their concerns directly about the opening of regulated businesses to competition. *The Associated Press* reports.

Secret Government

POLL RESULTS FOR CLINTON'S EYES ONLY

Clinton gets to look twice a day at tabulations from the taxpayer-funded public comments line, but the statistics are for his eyes only, *The Washington Post* reports. The telephone line works like a poll, with members of the public calling in to register their views on policy issues.

Secret Government

WHITE HOUSE BRIEFS BEHIND VEIL

At a background press briefing in Brussels during Clinton's trip to Europe, a reporter seeking to attach a name to information passed on to the public asks a "Senior Administration Official" if the briefing will be on the record. "No, this is, once again, your friendly Senior Administration Official." "Why?" the reporter asks. "Because that's the only name I know to answer to after all these months," the official says.

Stop the Press

CLINTON PIQUED BY WHITEWATER QUESTIONS IN EUROPE

After agreeing to a *Nightline* interview each day of his European trip, Clinton refuses to answer questions about the decision to seek a special prosecutor for Whitewater, *The New York Times* reports. Clinton also halts an interview with NBC when questioned about Whitewater, and snaps at Ann Compton of ABC, *The Washington Post* reports.

Stop the Press

FBI ASKS OREGONIAN TO PUT HARDING STORY ON ICE

The FBI asks *The Oregonian* to hold off publishing the first story linking figure skater Tonya Harding's ex-husband and bodyguard to the January 6, 1994, assault on figure skater Nancy Kerrigan, out of concern that it would jeopardize the criminal investigation, *The Associated Press* reports. Reporter Dave Hogan tells FBI spokesman Hank Glaspie the newspaper would consider the FBI's plea to hold the story if the FBI could provide specific information on how the story would hamper the investigation. Glaspie never calls back, and the story runs on January 12, 1994.

Stop the Press

INMAN ACCUSES COLUMNISTS OF 'MODERN MCCARTHYISM'

Clinton's nominee for secretary of defense, Bobby Ray Inman, withdraws his nomination and claims he is a victim of the "modern McCarthyism" of newspaper columnists and political opponents. He charges that *New York Times* columnist William Safire and Sen. Bob Dole conspired against him. Inman acknowledges that his media coverage was generally favorable, *The Washington Post* reports.

Stop the Press

NIH PUBLIC RELATIONS OFFICES BLOCK THE NEWS

The National Institutes of Health Public Relations offices get in the way of the news by requiring reporters to get permission before speaking to scientists and returning calls on deadline stories too late, *Newsday* reporters Bob Cooke and Laurie Garrett tell *Science Writers*.

Stop the Press

TASK FORCE: 'MEDIA FOCUS ON TECHNOLOGY TO INVADe PRIVACY'

The Privacy Working Group of the government's Information Infrastructure Task Force's Information Policy Committee drafts a work plan to ensure "privacy protection" in the National Information Infra-

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structure. It dismisses journalists' uses of electronic information by saying the media "often" focus "on the use of modern information technology to invade privacy." However, the task force cites no examples of journalists using technology for the purpose of invading privacy.

Stop the Press

WHAT PRESIDENT HAS LEARNED IS OFF THE RECORD

Details of what the President said to the Hilton Head, S.C., Renaissance Weekend crowd of 1,000 in a 35-minute presentation on "What I Have Learned" remain strictly off the record, *The New York Times* reports. Journalists who attend had to agree not to reveal what they learned from the President, the First Lady and administration officials.

Disinformation

JUST WHO WAS IN FOSTER'S OFFICE?

After initial reports that only Deputy White House Counsel Vincent Foster's secretary had entered his office after his suicide in July 1993 and before it was sealed, the White House later reveals that three others had been there, *The New York Times* reports. The White House also delayed informing U.S. Park Police of the torn-up note found in Foster's briefcase for 30 hours after its discovery.

Disinformation

WHITE HOUSE DELAYS NEWS ABOUT INMAN'S 'ZOE BAIRD' PROBLEM

The White House introduces Defense Secretary nominee Bobby Ray Inman with fanfare, but waits four days before acknowledging that he failed to pay Social Security taxes on his housekeeper's wages, *The New York Times* reports. A *Times* editorial calls "disingenuous" the White House explanation that Inman did not pay back taxes after the Zoe Baird affair because he was waiting for Congress to change the law.

Freedom of Information

CLINTON ADMINISTRATION KILLS IMPORTANT LEGAL DATABASE

The Clinton Administration permanently shuts down the Department of Justice's online legal database, JURIS, reassigning the entire government staff who collected and maintained the database of public records. The move shifts all government legal computerized research to private, commercial services, and will increase the government's online research costs from \$12 million to \$18 million a year, public interest groups estimate. The Justice Department continues to block FOI Act requests and defend several lawsuits asking for the information from the JURIS database, some of which dates back to 1965.

Freedom of Information

EDUCATION DEPT. REDESIGNS RULEMAKING QUESTIONS TO COUNTER MEDIA ANSWERS

Using pointed questions designed to elicit negative responses, the Education Department requests additional comments in December on a proposed rule to discourage disclosure of student disciplinary records by classifying them as "education records" under the Family Educational Rights and Privacy Act. In response to an August 1993 request for comments, student and professional journalists had criticized the department's proposal. The second request asked how parents and students believe they would be affected if student criminal disciplinary proceedings were no longer "protected" by FERPA.

Freedom of Information

WHITE HOUSE STAFFERS' SALARIES STILL 'SECRET' AFTER LEAK

Even after *The Washington Post* published a leaked list of salaries of White House staffers, the White House denies a written FOI Act request by Knight-Ridder reporter Angie Cannon for the salary information on the basis of "privacy."

Plumbing Leaks

CLINTON FURIOUS OVER LEAK OF MEDICAID ABORTION PLAN

Administration officials say Clinton becomes furious when the administration's plan to require Medicaid coverage of abortions following rape or incest is leaked to *The Washington Post*, *The New York Times* reports. Department of Health and Human Services Secretary Donna Shalala tells the *Times*: "I was as angry as the president. We all hate leaks. The problem was the leak."

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Plumbing Leaks**FBI SUSPENDS NEW YORK CHIEF FOR TALKING TO MEDIA**

FBI Director Louis Freeh suspends James Fox, the head of the Bureau's New York office, after Fox talked about the World Trade Center bombing during a television interview with the New York station WPIX. *The New York Times* reports.

Policing Thought**CLINTON URGES HOLLYWOOD TO EXAMINE IMPACT OF VIOLENCE**

Speaking before a star-studded crowd in Los Angeles two months after Attorney General Janet Reno warns of impending government regulation of violence on television, Clinton urges Hollywood to think of the impact of large doses of TV violence on youths who "haven't been taught." In a radio address, Clinton praises radio stations that ban songs that advocate violent crime or show contempt for women.

Policing Thought**FCC DELAYS RADIO STATION PURCHASE BY HOWARD STERN'S EMPLOYER**

The FCC delays approving the sale of a Los Angeles radio station to Infinity Broadcasting Corp., the employer of radio personality Howard Stern, *The New York Times* reports. In August 1993 the FCC's interim chairman, Jim Quello, had warned that the FCC might reject the sale, *Electronic Media* reported. After a month's delay, the FCC approves the sale in January 1994, citing a November 1993 decision by the U.S. Court of Appeals in Washington (D.C. Cir.) that struck down the agency's indecency regulations as unconstitutional.

Secret Government**FOSTER FILES SECRET UNDER CLINTON-SOUGHT SUBPOENA**

Whitewater files (concerning the Clintons' investment in the Whitewater real estate development linked to a failed Arkansas savings and loan) were discovered two days after Vincent Foster's death in July, removed from his office and taken to a private law firm. Clinton does not disclose their existence until late December, when he announces he is voluntarily turning over the records to the Justice Department. In January 1994, Clinton aides reveal that Clinton's personal lawyer asked the Justice Department in December to issue a subpoena for the records to keep them secret, *The Washington Post* reports. Clinton adviser Bruce Lindsey tells *The New York Times* that the subpoena will mean penalties for those who leak details of the Whitewater investigation.

Secret Government**UFO SEEKERS FEAR LOSS OF PERCH ABOVE AIR FORCE BASE**

The secretary of the Air Force asks the Interior Department's Bureau of Land Management to restrict ground access to 3,900 acres outside the vast Nellis Air Force Base in Nevada as "necessary for the safe and secure operations of the activities on the Nellis range." Local UFO seekers and aviation buffs claim the action is meant to prevent them from climbing the White Sides hills and Freedom Ridge for views of the Groom Lake runway and hangar complex, which the government will not even confirm exists, *The Wall Street Journal* reports.

Secret Government**WHO SAYS GORE ONLY ATTENDS FUNERALS?**

During a detour from the Brussels summit meeting to Budapest, ostensibly to attend a funeral, Vice President Gore meets secretly with Leonid Kravchuk, the Ukrainian president, to act as catalyst in moving Ukraine's nuclear missiles back to Russia to be dismantled. The hint that some private "security guarantee" is given Ukraine, perhaps by President Clinton, is worrisome, William Safire writes in a *New York Times* editorial.

Stop the Press**CAMERA-SHY PRINCESS DI SHUNS PRESS, WELCOMES PUBLIC**

During Princess Diana's visit to the National Gallery of Art, museum security officers at the direction of the State Department place members of the press in a cordoned-off area while allowing members of the public to follow the Princess and take pictures of her.

Stop the Press**CLINTON ECONOMIC ADVISERS CHIDE PAPER FOR BUGS BUNNY QUOTE**

White House economic advisers Robert Rubin, Gene Sperling and Laura Tyson invite *Washington Post* editors and reporters to the White House and criticize them for quoting economist Richard Hoey of Dreyfus Corp. as saying the economy would have improved even if "voters had elected Bugs Bunny," *The Wall Street Journal* and a *Post* business editor report.

Stop the Press**HILLARY CLINTON REFUSES TO ANSWER NON-CHRISTMAS QUESTIONS**

Amid a swirl of allegations that Bill Clinton used Arkansas state troopers to facilitate extramarital affairs, the White House insists that the network morning shows interview Hillary Clinton only about the impending White House Christmas celebration, *The Washington Post* reports. The networks, who said they had been promised two issue questions, cancel the interviews.

Freedom of Information**'ASAP' MAY MEAN A YEAR OR LONGER**

A month after sending a standard Freedom of Information Act backlog letter promising a response "as soon as possible," a U.S. Fish and Wildlife Service spokesperson tells Michael Milstein, a *Billings (Mont.) Gazette* reporter investigating poaching in Yellowstone National Park, that he should consider himself "lucky" if he hears back concerning his FOI Act appeal within a year.

Freedom of Information**DESPITE NEW FOI POLICY, WHITE HOUSE SECRETIVE**

One month after Attorney General Janet Reno issued a memo to all federal departments and agencies calling for "a presumption of disclosure" in FOI Act matters, Associate Attorney General Webster Hubbell issues another memorandum, restricting access to records that originated in the White House and to White House "information" incorporated into federal agency records. The memo expands the list of White House departments possibly excluded from FOI Act requirements, and instructs FOI Act officers to return to the White House for review any documents that originated there.

Freedom of Information**CIA: SECRETS NOT LESS SENSITIVE WITH AGE**

CIA lawyers call "meritless" a plaintiff's argument in *Kronisch v. U.S.* that the passage of 40 years reduces the risk of serious harm in disclosure of documents concerning alleged LSD and electroshock treatments by the CIA, the *Secrecy & Government Bulletin* reports. This position contradicts the government's draft position in its overhaul of the Cold War secrecy system that 40 years might merit automatic declassification.

Freedom of Information**GOVERNMENT RESPONSE TO FOI REQUEST DEEMED 'PREPOSTEROUS'**

A federal district judge deems "preposterous" the White House's refusal to provide doctors and consumer groups documents needed to assess whether the more than 500 people who worked for the Health Care Task Force had complied with federal ethics laws, and orders the documents released, *The New York Times* reports.

Plumbing Leaks**NOMINEE TO HEAD RESOLUTION TRUST CORP. ACCUSES EMPLOYEES OF LEAKS**

In withdrawing as Clinton's nominee to head the Resolution Trust Corporation, Stanley Tate accuses RTC employees of leaking stories to discredit him, *The Associated Press* reports.

Polling Thought**CLINTON BACKPEDALS AWAY FROM RUSHDIE MEETING**

Although Clinton meets with persecuted writer Salman Rushdie, in the wake of Muslim denunciations the president later plays down the significance of the meeting. Clinton insists that he "meant no disrespect" to Muslims, and emphasizes that he spent only a couple of minutes with Rushdie, author of the controversial novel *The Satanic Verses*. Clinton aides say the encounter was too brief to be considered a "meeting."

The New York Times reports. In February 1994, the State Department condemns Iran's decree that Rushdie must die.

Policing Thought

CLINTON ADVOCATES BROAD CHILD PORN DEFINITION

After the Justice Department is criticized for backing away from the broad definition of child pornography advocated by the Bush Administration, Clinton orders Attorney General Janet Reno to draft a law permitting prosecution even for depictions of clothed children who do not engage in lascivious behavior. The American Civil Liberties Union notes that this could implicate ads for children's underwear and bathing suits.

Policing Thought

COURT RULES MILITARY POLICY ON GAYS PUNISHES THOUGHTS

U.S. Court of Appeals panel in Washington, D.C. rules that the military's ban on homosexual status — a policy inherited from the Bush Administration but defended by Clinton's Justice Department, despite Clinton campaign pledges to end the ban — violates the Constitution because it punishes people for thoughts and desires. The court does not address the constitutionality of Clinton's revised policy. The full D.C. Circuit later vacates the panel's decision pending a rehearing.

Policing Thought

FCC INDECENCY REGULATIONS STRUCK DOWN BY COURT

Despite the FCC's arguments to the contrary, the U.S. Court of Appeals in Washington (D.C. Cir.) rules that the agency's ban on "indecent" broadcasts between 6 a.m. and midnight violates the First Amendment. The court rules that the FCC failed to take into account the First Amendment interests of older minors and adults. *The New York Times* reports in January 1994 that this decision probably warded off an FCC hearing to revoke the radio licenses of Howard Stern's employer, Infinity Broadcasting Corp. In February 1994 the D.C. Circuit decides to rehear the indecency case *en banc*.

Policing Thought

FCC UNSUCCESSFULLY ARGUES FOR INDECENCY LIMITS

Rejecting the contrary argument of the FCC, the U.S. Court of Appeals in Washington (D.C. Cir.) holds that the First Amendment not only prohibits the government from banning indecent speech from leased access cable channels, but it also bars the government from "deputizing cable operators with the power to effect such a ban." In February 1994 the D.C. Circuit decides to rehear the case *en banc*.

Secret Government

BLACK BUDGET IS \$28 BILLION (OR SO)

Citing national security demands, President Clinton opposes the publication of the annual military and intelligence budget total of \$28 billion (or so) hidden in the Pentagon budget under code-named line items, such as "tractor hole" and "chalk coral." Critics, including members of Congress, say keeping the "black budget" secret is unconstitutional, *The New York Times* reports.

Secret Government

DRAFT DECLASSIFICATION ORDER LEAKED TO SCIENTISTS

A draft order by the government task force reviewing declassification procedures is leaked to the Federation of American Scientists, *The New York Times* reports. The order proposes a maximum classification lifetime of 40 years, despite public interest groups' recommendations to automatically declassify records more than 25 years old.

Stop the Press

CLINTON 'SICK AND TIRED' OF 'KNEE-JERK LIBERAL PRESS'

In a *Rolling Stone* interview, an angry Clinton says he has "fought more damn battles" than any other president in the past 20 years, except maybe for Reagan, "and not gotten one damn bit of credit from the knee-jerk liberal press, and I am sick and tired of it, and you can put that in the damn article." Clinton tells *Rolling Stone*'s William Greider that the "know-nothings and the do-nothings and the negative people and the right-wingers always win [b]ecause of the way people like you put questions to people like me."

Policing Thought**IN JANET RENO'S WORLD, AFTERNOON SOAPS WOULD FOLLOW LETTERMAN**

Continuing her attack on television programmers, Attorney General Janet Reno says on *Meet the Press* that it is time for the networks to do something about violence. She also suggests that because of their sexual content, afternoon soaps should not air when children are in the audience. *Broadcasting & Cable* reports.

Policing Thought**RENO WARNS OF IMPENDING REGULATION OF TELEVISION VIOLENCE**

Testifying before Congress, Attorney General Janet Reno says that if the television industry does not take immediate voluntary action to reduce violence on television, the White House and Congress will do so for them. Reno says that all House bills on the subject are constitutional, including a proposal to ban violent programming when a substantial number of children are watching.

Secret Government**VP ROLE IN NEW REGULATORY PROCESS STILL QUIET**

An executive order that opens up the federal government's regulatory review process still allows the vice president to communicate off-the-record with the Office of Management and Budget's Office of Information and Regulatory Affairs, according to *The Wall Street Journal*. However, the regulatory office will note on its public records when the vice president or president decides to intervene in a regulatory proceeding — a closely guarded secret during the Quayle years.

Stop the Press**CLINTON BARS REPORTERS FROM VISIT WITH WOUNDED SOLDIERS**

The White House bars reporters from the Walter Reed Army Medical Center during Clinton's visit with American soldiers wounded in Somalia, *Newsday* reports. The White House also refuses to release photographs or video footage of this meeting or a later meeting with the wounded in the Oval Office. The press also is barred from attending a memorial service for soldiers killed in Somalia held at Fort Bragg, N.C., *Newsday* reports, although two other services were open.

Stop the Press**NO PRYING EYES AT FAT CAT DINNER**

The Clinton Administration allows no prying eyes at the \$1,500-a-plate Democratic Senate Majority Dinner attended by President Clinton. Told that Republicans invited the press to similar fund-raisers, deputy White House communications director David Dreyer tells *The Washington Post*: "This is change, man. We're the party of change!" President Clinton later announces that future major Democratic Party fund-raising events he attends will be open to reporters as part of the party's commitment to campaign finance reform.

Disinformation**WHITE HOUSE BUDGET 'CUTS' AREN'T CUTS**

Press Secretary Dee Dee Myers acknowledges that some "cuts" that the administration talked about in its budget proposal were not really spending cuts, but just restraint in growth of spending. Myers says the administration was using long-time Washington terminology.

Freedom of Information**CLINTON SLOW TO NAME KENNEDY ASSASSINATION REVIEW BOARD**

In response to a law requiring him to nominate by January 1993 a five-member review board to determine which Kennedy assassination documents can be released, Clinton fails to make the first nominations until September 1993 and does not forward the final paper work required for Senate hearings until November. Half the board's allotted operation time under the law has expired by the time the board is confirmed by the Senate in February 1994, says James Lesar of the Assassinations Archives and Research Center.

Freedom of Information**DEA DENIES FOI REQUEST ON CO-CONSPIRATOR IN AGENT'S MURDER**

The Drug Enforcement Administration denies *New York Daily News* reporter Zachary Margulis's FOI Act request for files on Manuel Bartlett Diaz, a prominent Mexican politician whose name was invoked in federal District Court by U.S. attorneys as a co-conspirator in the murder of a DEA agent, on the basis of protecting the politician's personal privacy. Margulis's appeal of the denial was still pending in February 1994, with no response to an early January letter asking for a status report.

Freedom of Information**PRIVACY ACT INVOKED TO PREVENT RELEASE OF WACO REPORTS**

The Treasury Department proposes rules to keep the public from seeing the federal Waco Administrative Review Group's investigative reports, which could reveal what really happened at the site of the stand-off between Branch Davidians and federal authorities, citing the Privacy Act. In February 1994, the proposed rules are still under review.

Plumbing Leaks**WHITE HOUSE 'DUMB — BUT NOT THAT DUMB'**

Hoping to prevent leaks to the media, White House aides brief members of Congress about Clinton's health plan only orally. A printed version of the health plan given to members of Congress was previously leaked to the press. *Newsweek* reports that a White House aide explains the changed procedure by saying: "We may be dumb, but we're not that dumb."

Policing Thought**AMID CRITICISM, NEA DROPS SUPPORT OF \$-DISPENSING ART**

The National Endowment for the Arts drops its support of a project in which conceptual artists handed out crisp \$10 bills to illegal immigrants. The project had been attacked by one Congressional critic of the NEA, Rep. Randy (Duke) Cunningham (R-Calif.), as a "contemptuous use of taxpayers' hard-earned dollars," *The New York Times* reports.

Policing Thought**FCC NOMINEE SAYS AGENCY SHOULD SEE IF PUBLIC GETS DIVERSITY**

Reed Hundt, Clinton's nominee as FCC chairman, tells the Senate that if Congress does not restore the fairness doctrine, the FCC should investigate whether the public now can obtain "diversity of views." Hundt also says he would strongly defend the FCC's indecency regulations. *Broadcasting & Cable* reports.

Policing Thought**JUSTICE FAILS TO FIND FAULT IN SILENCING OF QUAYLE ACCUSER**

A Clinton Justice Department investigation fails to find evidence that the Bush-Quayle campaign was involved with the 1988 silencing of federal prisoner Brett Kimberlin. The prisoner was placed in solitary confinement on the eve of the 1988 presidential election after claiming he sold marijuana to Dan Quayle. Sen. Carl Levin (D-Mich.) calls the Justice Department report "a major disappointment," noting that Justice failed to even express disapproval over the isolation of Kimberlin from the press, *The New York Times* reports.

Secret Government**U.S. HOLDS SECRET TALKS WITH CUBA**

In secret talks with Fidel Castro's government in Miami, the Clinton Administration agrees to hand over to Havana about 1,500 Cubans held in U.S. federal prisons, *The New York Times* reports.

Stop the Press**DEA AGENT BEATS PANAMANIAN PHOTOGRAPHER**

An undercover U.S. Drug Enforcement Administration agent beats a photographer from the local daily *Hoy* as he takes photographs on a Panama City street, the *Inter Press Service* reports. The U.S. Embassy later apologizes.

Stop the Press**U.S. HELICOPTER SHOOTS AT JOURNALISTS**

A U.S. helicopter working for UN forces in Somalia fires on Peter Northall, a British photographer working for *The Associated Press* and Mohamud Hussein Jinade, a Somali translator, the *Index on Censorship* reports. Northall claims they directed fire in his direction to keep him out of an operations area.

Disinformation**CLINTON SANITIZES NAZISM OF SHALIKASHVILI'S FATHER**

Introducing Gen. John Shalikashvili, Clinton's choice to replace Gen. Colin Powell as chairman of the Joint Chiefs of Staff, Clinton calls "Shali" the "son of a Georgian army officer" during World War II. Clinton notes that Gen. Shalikashvili and his family were "caught in the crossfire" of ethnic rivalries and "fled in a cattle car westward to Germany in front of the Soviet advance." Clinton does not say that Shalikashvili's father was a major in the Waffen SS.

Disinformation**RON BROWN ISSUES FALSE STATEMENTS ABOUT VIETNAM CONTACTS**

Secretary of Commerce Ron Brown's office denies any sort of relationship between Brown and any Vietnamese entity seeking an end to the U.S. trade embargo. A Commerce spokesman later says that Brown does not recall an alleged meeting with a Vietnamese businessman. In October, Brown's lawyer acknowledges that Brown met with the Vietnamese businessman before and after taking office. In February 1994 the Justice Department exonerates Brown of charges he took a bribe from the Vietnamese.

Freedom of Information**AGENCIES IGNORE MANDATE TO TURN OVER JFK ASSASSINATION RECORDS**

Virtually no federal agency complies with a law mandating an August 23, 1993, deadline for public disclosure of all Kennedy documents to the National Archives. The FBI and the CIA alone were still withholding more than 500,000 documents as of February 1994, says James Lesar of the Assassinations Archives and Research Center.

Plumbing Leaks**FBI INVESTIGATES FOI ACT REQUESTER**

The FBI investigates historian Chuck Hansen after he requested declassification review of two nuclear weapons histories from the Defense Nuclear Agency, specifying exact pages based on references in a previously declassified document. The FBI assumed he had unauthorized access to the classified documents. When Hansen complained to the DNA about the investigation, Col. Robert Summers wrote back: "If any apology is in order, it would be from you," the *Secrecy & Government Bulletin* reports.

Policing Thought**RUFFLED BY STERN, FCC FINES INFINITY \$500,000**

The FCC issues notices of apparent liability of \$500,000 to Infinity Broadcasting Corp. for broadcasting allegedly "indecent" material on the Howard Stern radio show, *Electronic Media* reports. The FCC also fines a Nevada station \$73,750 for airing Stern.

Prior Restraint**WHITE HOUSE STAFF WARNED: DON'T DISCUSS FIRST FAMILY LIFE**

Deputy Chief of Staff Roy Neel issues a memo to staff warning that "discussions . . . of the First Family's personal activities of any kind, or any other matter which breaches their privacy, with anyone outside of the immediate staff is prohibited," *The Washington Post* reports.

Prior Restraint**WHITE HOUSE WARNS NYU NOT TO USE PRESIDENTIAL SEAL IN AD**

When New York University includes the presidential seal in ads that ask what Clinton's health care reforms mean for doctors, the White House counsel's office tells NYU that federal law does not authorize use of the presidential seal in advertising, *The New York Times* reports. NYU pulls the ad, although its advertising agency says the seal is often used in advertising.

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Stop the Press**AIR FORCE DENIES *INSIDE EDITION* ACCESS TO BASE**

The Air Force denies *Inside Edition* access to the headquarters building at Patrick Air Force Base in Melbourne, Fla., based on the Air Force's categorizing the media outlet as "not a news organization." A few days after *Inside Edition* files an appeal, a base press officer calls associate producer Tim Peek and agrees to allow access.

Stop the Press**HILLARY TO PRESS: 'I THOUGHT YOU WERE REAL PEOPLE'**

Hillary Clinton disinvites a crowd of spectators to a White House reception following the swearing-in of Supreme Court Justice Ruth Bader Ginsburg after learning they were members of the press. "I thought you were real people," she says, according to *Time*.

Disinformation**'I'LL FIRE THEM THE NEXT DAY' (MAYBE)**

Responding to the Bush Administration's search of his and his mother's passport files, Clinton said, "If I catch anyone using the State Department like that when I'm president, I'll fire them the next day." Yet in July, the Clinton State Department retrieved 160 personnel files of Bush political appointees. An investigation prompted by Sen. Mitch McConnell (R-Ky.) was launched in September. In November, the Secretary of State fired two people who were involved in the incident for "lack of confidence" and sent to the Justice Department its inspector general's report, finding that the search may have violated the Privacy Act. In January, DOJ declined prosecution.

Freedom of Information**GAO PROBE FINDS CD-ROM DISC PRICES UNFAIR**

The public is forced to pay too much for federal information released on CD-ROM discs because prices, which range from \$13 to \$1,895, have been set arbitrarily, with different agencies sometimes charging a different price for the same disc, a General Accounting Office report says.

Plumbing Leaks**ENERGY DEPARTMENT PROBES LEAK OF SUPER COLLIDER REPORT**

Energy Secretary Hazel O'Leary tells Congress she approves of an agency investigation into the leak of a report about uncontrolled costs for the Superconducting Super Collider project, *The Washington Post* reports.

Prior Restraint**CLINTON TEAM: TELL PUBLIC BUDGET IS GOOD; DON'T DISCUSS DETAILS**

Clinton's budget "message team" tells administration officials to tell America about Clinton's budget: "This is good, and this is change," *The Washington Post* reports. The team's memorandum instructs officials that if pressed for details, "there is nothing wrong with demurring for the moment on the technicalities." Asked to name the memo's author, White House Communications Director Mark Gearan says only that it was the work of Clinton's message team.

Secret Government**\$1.3 MILLION STUDY? WHAT \$1.3 MILLION STUDY?**

The Pentagon refuses to make public a \$1.3 million Rand Corporation think tank study, which suggested that lifting the ban on gays in the military could work if strongly supported by the military's senior leadership, *The New York Times* reports in an article based on a leaked study.

Stop the Press**U.S. KEEPS TIRED, POOR, HUDDLED CHINESE OFF TV**

The U.S. Coast Guard initially facilitates media pool access to three ships stopped off Mexico trying to smuggle 659 Chinese into California, but later keeps a 500-yard perimeter around the scene. This action keeps Chinese passengers waving signs, such as "USA I Love You," off television and out of newspapers, *The New York Times* reports. Officials refuse to comment publicly on the stranded refugees, the talks with

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the Mexican government or the new political asylum policy. State Department spokesman Michael McCurry calls it a "sensitive matter of diplomacy."

Disinformation

CLINTON OVERSTATES EVIDENCE TO JUSTIFY BOMBING OF IRAQ

After the U.S. bombs Iraqi intelligence headquarters in Baghdad, Clinton cites "compelling evidence that there was in fact a plot to assassinate former President Bush" by Iraqi intelligence. *The New Yorker* reports in October 1993 that the case against Iraq contained serious flaws. For example, although the administration asserts that a remote control device found in a bomb intended to kill Bush bears the same "signature" as similar Iraqi devices, experts tell *The New Yorker* that the evidence presented to the public depicts mass-produced items with no "signatures."

Disinformation

GOVERNMENT OFFICIALS MAY HAVE MISLED PRESS ABOUT IRAQ PLAN

Following the U.S. air strike against Iraqi intelligence in Baghdad, senior White House officials tell *The New York Times* that inaccurate reports about U.S. intentions in the *Times* and *The Washington Post* may have helped to keep Iraq off guard. The papers had quoted unnamed officials as saying the U.S. would delay any response pending a trial in Kuwait. But the senior White House officials insist that there was no deliberate effort to mislead. Rather, they suggest that the reporters' sources did not know what the administration planned to do.

Freedom of Information

ARMY INVESTIGATES LAWYER FOR RELEASE OF GAY CRIME DATA

The Army investigates its top criminal lawyer, Col. Richard Black, for providing documents about homosexual soldiers' sex crimes in response to a FOI Act request by the Defense Readiness Council, a private group opposed to lifting the ban on homosexuals in the military, *The Washington Times* reports. The Army subsequently honors a request for the same documents by Accuracy in Media of Washington, D.C., and "quietly drops" the investigation into Black, according to AIM.

Freedom of Information

STATE DEPARTMENT WITHHOLDS 'IRRELEVANT' DOCUMENTS

The Department of State improperly censors the documents it releases under the FOI Act by blocking out information "not relevant" to a requester's intent — not on the basis of statutory exemptions, according to a lawsuit filed by The National Security Archive in U.S. District Court in Washington, D.C. In February 1994, Judge Charles Richey orders Justice Department and Archive lawyers to negotiate a solution by mid-March.

Plumbing Leaks

RIP TONGUES OUT OF LEAKERS, SAYS WHITE HOUSE OFFICIAL

Asked about officials who leaked information about Clinton's search for a successor to Supreme Court Justice Byron White, White House Communications Director Mark Gearan tells *The Washington Post*: "We should rip their tongues out. Those who know what the president was thinking weren't talking, and those who were talking don't know."

Policing Thought

AIR FORCE OUSTS GENERAL WHO DERIDES CLINTON

The Air Force fines and forces the retirement of Maj. Gen. Harold Campbell, who referred to Clinton as the "dope-smoking," "skirt-chasing" and "draft-dodging" commander-in-chief, *The New York Times* reports.

Policing Thought

ARMY THREATENS TO BLACKLIST EMPLOYEE FOR SENATE TESTIMONY

The Army threatens to blacklist a civilian worker who testified before Congress about secret military programs, *The New York Times* reports. The Army accuses the worker, William Golden, of improperly discussing classified information with a Senate intelligence committee. Lawyers for the Merit Systems Protection Board find that Golden is suffering "reprisal for whistle-blowing."

Prior Restraint**ADMINISTRATION URGES GUINIER, NIGHTLINE TO CANCEL APPEARANCE**

Administration officials urge civil rights nominee Iani Guinier to cancel an appearance on *Nightline*, *The Washington Post* reports. Carl Stern, the Justice Department public affairs director, tells the *Post* he attempted to block the interview, and called Ted Koppel to tell him not to air promotions for Guinier's appearance. Guinier appears anyway.

Prior Restraint**NATIONAL INSTITUTES OF HEALTH BARS SCIENTISTS FROM CONFERENCE**

The National Institutes of Health bars two of its scientists from speaking of their work on academic plagiarism on NIH property, *The New York Times* reports. The NIH found that the scientists were working on projects unrelated to the work of the institutes. The ban prevents the scientists from speaking at a conference on plagiarism held at the NIH.

Secret Government**CLINTONS MAKE PRESS GUESS WHO'S COMING TO DINNER**

The Clintons refuse to divulge guest lists for dinners they host for departing U.S. Ambassador to France Pamela Harriman and newly sworn-in Chief of Protocol Molly Rasor. *The Washington Post* reports they are as protective of their private guest lists as the Reagans were.

Secret Government**WHITE HOUSE KEEPS IRAQ ATTACK SECRET**

White House press secretary Dee Dee Myers does not keep the press on alert before an air strike against Iraqi intelligence headquarters in Baghdad in retaliation for an alleged plot against George Bush. The previous day Myers incorrectly said Clinton had not received an FBI report about the alleged Bush plot. She later explained that she had not been informed otherwise.

Stop the Press**CLINTON HALTS GINSBURG NEWS CONFERENCE AFTER ONE QUESTION**

Following remarks by Supreme Court nominee Ruth Ginsburg, ABC's Brit Hume asks Clinton a deferentially phrased question inquiring whether Clinton could disabuse the media of the "perhaps unfair" impression of "a certain zigzag quality in the decision-making process here." Clinton responds: "I have long since given up the thought that I could disabuse some of you of turning any substantive decision into anything but a political process. How you could ask a question like that after the statement she just made is beyond me. Goodbye. Thank you."

Stop the Press**POLICE LINE KEEPS PRESS FROM DONKEY DINNER**

Members of the press are herded behind a yellow-taped police line 30 feet from the entrance to the Democratic National Committee's \$1,500-a-plate Presidential Dinner, which raised \$4.2 million from lobbyist and corporate donations, *The Washington Post* reports. DNC spokeswoman Catherine Moore says there is nothing wrong "with people being allowed to have a meal and enjoy an evening without hundreds of reporters standing in the back of the room hollering at them."

Stop the Press**PRESS BARRED FROM CLINTON'S 25TH REUNION**

Clinton bars the press from the White House for his Georgetown University 25th reunion party that attracted 600 Hoyas.

Disinformation**CLINTON MAKES FALSE CLAIM ABOUT DOLE**

At a press dinner, Clinton accuses Senate Minority Leader Bob Dole of hypocrisy for seeking \$23 million in federal money for a Kansas boathouse while accusing the president of pork-barrel spending. After Dole accuses Clinton of a lie, Clinton's press secretary says the president used "a rather large dose of hyperbole."

The Associated Press reports. Dole says he sought a federal waiver to permit privately funded construction of a public boathouse in Wichita, the *Los Angeles Times* reports.

Disinformation

WHITE HOUSE MISLEADS PRESS ABOUT TRAVEL OFFICE INQUIRY

White House management chief David Watkins tells the press secretary to say that the inquiry into the White House travel office was a routine part of Gore's national performance review. But the White House acknowledges at a July press briefing that Watkins knew the inquiry was triggered by Clinton's cousin, who had been given a job in the travel office, and by one of Clinton's Hollywood friends, producer Harry Thomason, who also owns a charter company.

Freedom of Information

EDUCATION DEPT. RULES THESES SECRET, THEN RETREATS

The Department of Education rules that student theses generally cannot be released without consent of the student because they are ordinarily considered education records under the Family Educational Rights and Privacy Act. The department backtracks in September, assuring libraries that they need not obtain a student's signed and dated consent to disclose or publish a thesis as long as they advise students in advance that a particular thesis will be made publicly available as part of the curriculum requirement.

Freedom of Information

PENTAGON DELAYS EXPENSE REPORT FOR ASPIN'S VENICE VACATION

Despite press secretary Vernon Gaudry's promise to reporters on the plane back from Italy that the cost figures would be forthcoming on Defense Secretary Les Aspin's Memorial Day 5-night sidetrip to Venice made after an official business trip, the Pentagon waits until mid-August to reveal that taxpayers footed a \$36,000 bill for food and lodging for staff, security agents and the crew of the Air Force jet left waiting, *The Washington Post* reports.

Plumbing Leaks

HEALTH CARE TASK FORCE DOCUMENTS UNDER LOCK AND KEY

The administration keeps its 34 ever-expanding, large-ringed notebooks of health policy minutiae in a second-floor reading room of the Old Executive Office Building, where the public cannot read them, and the staff cannot even photocopy them for fear the copies might be leaked, *The Washington Post* reports.

Policing Thought

REP. SCHROEDER CHARGES RTC RETALIATION AGAINST WHISTLEBLOWER

Rep. Patricia Schroeder (D-Colo.) asks Treasury Secretary Lloyd Bentsen to investigate the Resolution Trust Corp.'s search of the computer files of an employee who had criticized the agency before Congress, *The National Law Journal* reports. Although Schroeder says the search "can only be seen as retaliation . . . for blowing the whistle," Treasury concludes in August 1993 that the search was appropriate and not retaliatory.

Prior Restraint

STATE DEPARTMENT ORDERS TOP OFFICIALS TO CLEAR PUBLIC REMARKS

Secretary of State Warren Christopher orders that top department officials clear all public remarks with the assistant secretary for public affairs, *The Associated Press* reports. A State Department spokesman denies that the memo is related to the department's disavowal that same week of remarks by its third-ranking official, Peter Tarnoff, undersecretary of state for political affairs.

Secret Government

MULTI-BILLION DOLLAR SPY CONTRACT SIGNED IN DARK

The Pentagon's secret reconnaissance office signs a new multi-billion-dollar contract for a classified spy satellite program, without the required permission of the House Appropriations Committee. Citing the public's right to know, a committee report says it is "dismayed" that the Defense Department ignored its instructions to keep Congress informed about the program, *The New York Times* reports.

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Stop the Press**JUSTICE BARS MEDIA FROM ARRESTS**

New Justice Department guidelines bar advance word to the media about searches and arrests, and prohibit invitations to the media to accompany such actions. The guidelines permit officials to ask media present at such actions to leave, and suggest that officials consider cancelling the actions if the media refuse to go. The new guidelines follow the failed February 1993 raid by the Bureau of Alcohol, Tobacco and Firearms on the Branch Davidians in Waco. There were allegations that a member of the media inadvertently tipped off the cult.

Stop the Press**NEWSWEEK SAYS HILLARY CLINTON REFUSES INTERVIEW TO PUNISH REPORT**

Newsweek's Washington bureau chief tells *The Washington Post* that Hillary Clinton refused to speak with the magazine as punishment for printing a rumor about Mrs. Clinton throwing a large object at Mr. Clinton. Mrs. Clinton's press secretary denies any retaliation against *Newsweek*. The *Post* reports that Mrs. Clinton often refuses interviews, requires that questions be submitted in advance, and limits the scope of the questioning.

Disinformation**CLINTON CALLS SNUB STORY CONFIRMED BY GENERAL 'ABJECT LIE'**

Speaking to a group of newspaper editors, Clinton denounces as an "abject lie" a story about a general being snubbed by a White House aide. But that morning's *Washington Post* quotes Army Lt. Gen. Barry McCaffrey, an assistant to Gen. Colin Powell, as confirming that on his way out of the White House during Clinton's first week he said "Good morning" to an unidentified aide. Gen. McCaffrey said the aide responded, "I don't talk to the military," and stomped by.

Freedom of Information**CLINTON ADMINISTRATION DEFENDS RIGHT TO PURGE E-MAIL**

In an effort to maintain control over its own computer records, the Clinton Administration continues to defend the Reagan/Bush position that White House electronic mail records are not subject to the FOI Act and need not be preserved. In August, the U.S. Court of Appeals in D.C. ruled against the Executive Branch in *Armstrong v. Executive Office of the President*.

Freedom of Information**FBI FAVORS TERRORISTS' PRIVACY OVER HOSTAGE'S RIGHT TO KNOW**

The Clinton Administration continues to deny former *Associated Press* reporter Terry Anderson access to records relating to the Islamic Jihad members who held him hostage for more than six years without proof of their death or their written permission, for fear of invading the captors' privacy. In April, the FBI notified Anderson it had reopened the request as to one of the captors who since died, but still had released nothing as of February 1994.

Policing Thought**CLINTON SEEKS TO ENABLE GOVERNMENT TO EAVESDROP**

The Clinton Administration announces plan to install "Clipper Chips" into telephones and computers to facilitate government access to private coded computer communications, *The New York Times* reports. In February 1994, the administration works on a bill to require telecommunications companies to install software on their networks to enable the government to monitor telephone calls and computer transmissions, the *Times* reports.

Policing Thought**FCC PROBES TALK SHOW ON 'COUCH DANCING' EXPOSÉ**

The FCC asks KYW-TV in Philadelphia to show why a 1991 *Jane Wallace Live* program on "couch dancing" does not violate FCC indecency regulations. KYW tells the FCC the Wallace program focused on legitimate public debate following "widespread expressions of community concern" over exotic dancing in residential neighborhoods.

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Policing Thought**HILLARY CLINTON CITES BARRAGE OF TV SEXUALITY, VIOLENCE**

In an interview with *Parade*, Hillary Rodham Clinton says the "constant barrage of violence and explicit sexuality" on television and other media "reinforces the loosening of human bonds, undermining the evolution of a mature person." Mrs. Clinton says she supports government control over what programs children have access to.

Policing Thought**NEH NOMINEE TOOK NO ACTION AGAINST PENN NEWSPAPER-DESTROYERS**

Clinton nominates University of Pennsylvania President Sheldon Hackney to chair the National Endowment for the Humanities. At Penn, Hackney took no action against students who destroyed a press run of the *Daily Pennsylvanian*. At his confirmation hearings in June 1993, Hackney notes that he criticized the theft at the time. Hackney also says he should have used stronger words in support of free speech during a controversial Penn investigation of a student who called other students "water buffalo."

Secret Government**PREDICATE IS GREATER OPENNESS, SAYS UNIDENTIFIED SOURCE**

The decision to put bureaucrats whose job has been stamping documents secret on a task force to review secrecy rules dampens Clinton's presidential directive to declassify millions of secret military and intelligence documents, *The New York Times* reports. A White House official asserts, "The predicate here is greater openness," but asks not to be identified, in a September 1993 *Washington Post* story about the task force's proposed draft order.

Disinformation**ATF OFFICIALS MISLEAD SUPERIORS, PRESS ABOUT WACO**

Top officials of the Bureau of Alcohol, Tobacco and Firearms mislead superiors and the press about their February raid on the Branch Davidians at Waco, a Treasury Department report says in September 1993. Despite their pronouncements to the contrary, the ATF officials apparently knew that the element of surprise had been lost. The report prompts Treasury Secretary Lloyd Bentsen to remove five ATF officials from their posts, *The Wall Street Journal* reports.

Freedom of Information**QUELLO: SUNSHINE ACT DIMS EFFICIENCY**

Jim Quello, interim chairman of the FCC, says the federal Government in the Sunshine Act should be eliminated because it undermines efficiency. He says he should be able to call all the commissioners into his office to talk things out privately, *Electronic Media* reports.

Freedom of Information**TO COPY 21 PAGES AT INTERIOR: BRING 500 SHEETS, LEAVE 479**

Members of the public who plan to exceed the 20-page limit for free photocopies at the U.S. Department of Interior library must bring 500 pages of copy paper and leave behind any they do not use, the *Washington (D.C.) City Paper* reports. "That's still the way it works," a librarian says in February 1994.

Policing Thought**FCC CHAIRMAN ADVOCATES REGULATION OF VIOLENCE**

Jim Quello, interim chairman of the FCC, tells *Electronic Media* that he would support a ban on violent programming during children's viewing hours. "If the First Amendment rights conflict with the public interest, as far as the FCC is concerned, the public interest should prevail," Quello says.

Policing Thought**JUSTICE SUPPORTS DECENCY RESTRICTIONS ON ART GRANTS**

The Clinton Justice Department appeals a 1992 ruling by a U.S. District Court judge in *Finley v. NEA* that the statutory "decency" restrictions placed on National Endowment for the Arts grants violated the First Amendment. Attorney General Janet Reno plays an active role in the appeal, *The Washington Post* reports.

Prior Restraint**FBI, ATF WARN AGENTS NOT TO SPEAK TO PRESS**

The FBI and the Bureau of Alcohol, Tobacco and Firearms warn their agents in a joint statement that "loose and often uninformed comments to the press" may jeopardize investigations in the World Trade Center bombing and the armed standoff at Waco, Texas, and undermine public confidence in the agencies.

Prior Restraint**WHITE HOUSE BARS USE OF CLINTON PICTURE IN CITY'S AD**

The White House prohibits the inclusion of a Clinton picture in a *Wall Street Journal* ad for Chillicothe, Ohio, *The Associated Press* reports. The Chillicothe Community Improvement Corp. had hoped its ad would include a picture of Clinton at a town meeting there. The White House says it prohibits such use of Clinton's picture so he does not seem to endorse one city over others, the *AP* reports.

Secret Government**BRANCH DAVIDIANS' CASES HEARD IN JAIL, NOT COURT**

Federal prosecutors succeed in closing magistrate hearings involving some of the Branch Davidian cult members who surrendered during the stand-off at Waco, and move hearings from the courthouse to the jail to thwart media coverage, *The Dallas Morning News* reports.

Stop the Press**CLINTON 'STIFFS' MEDIA; NO FULL-FLEDGED PRESS CONFERENCE FOR TWO MONTHS**

Clinton does not hold a full-fledged news conference until more than two months into his presidency, the *Los Angeles Times* reports. According to the *Times*, Clinton partially jests at a media dinner: "You know why I can stiff you on the press conferences? Because Larry King liberated me from you by giving me to the American people directly."

Stop the Press**REPORTERS KEPT AT BAY AT WACO, 2 MILES FROM ACTION**

FBI authorities keep reporters two miles away from the site of the Branch Davidian compound at Waco during the 51-day stand-off between cult members and FBI agents. The FBI claims the restriction is necessary for "media safety."

Disinformation**CLINTON PRESENTS BUDGET PLAN THAT VINDICATES BUSH CRITIQUE**

Clinton says his first budget provides for tax increases for most families earning over \$30,000, although the true figure is closer to \$20,000, *The Washington Post* reports. When Bush had claimed in October 1992 that Clinton would raise taxes on families earning just \$36,600 a year, Clinton said: "It is blatantly false. . . . It is a disgrace to the American people that the president of the United States would make such a claim that is so baseless, that is so without foundation, so shameless in its attempt to get votes under false pretenses." Clinton explains in February that his tax increases are forced by an unexpected \$346 billion deficit. But the *Post* reports that Clinton had said in July 1992 that the deficit would approach \$400 billion.

Disinformation**WHITE HOUSE TRUMPETS EXAGGERATED DEFICIT REDUCTION**

White House documents detailing Clinton's proposed economic program promise deficit reductions of "almost \$500 billion over four years." Elsewhere, documents mention \$160 billion in "long-term public investments in economic growth and jobs," but do not indicate that this figure should be deducted from the deficit reduction total. *The New York Times* reports that the documents mislead the *Times* and other media, causing them to report an inflated reduction amount.

Freedom of Information**FORMER HOSTAGE DENIED ACCESS TO HIS OWN FBI FILES**

The Justice Department denies an appeal by Terry Anderson, the former *Associated Press* reporter held hostage in Lebanon, for access to his personal files held by the FBI. The government claims release would jeopardize law enforcement proceedings.

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Freedom of Information**PRISONER FEARS EXECUTION WILL PRECEDE FBI FOI RESPONSE**

The Clinton Justice Department argues to uphold a decision that a condemned man's lawsuit over a FOI Act delay is frivolous. When the death row inmate asked the FBI to expedite his request because of his fear that he might be executed before his request was processed, the FBI advised him that his circumstances did not demonstrate the "exceptional need or urgency" required to process his request out-of-turn. The U.S. Court of Appeals (5th Cir.) ruled in favor of the prisoner in September 1993.

Plumbing Leaks**CLINTON LASHES AIDES AFTER LEAKS**

The Wall Street Journal reports that Clinton roared at aides for leaking economic policy options under consideration. The *Journal* also reports that Clinton, angered by leaks about the consideration of Kimba Wood for attorney general, shouted: "The press appointed Kimba Wood, not me!"

Policing Thought**FCC FINES CHICAGO STATION \$33,750 FOR PENIS HUMOR**

The FCC fines Chicago radio station WLUP-AM \$33,750 for violating indecency regulations by broadcasting discussion of penis size and a song parody of Frankie Avalon's "Venus." The parody replaced "Venus" with "penis."

Stop the Press**ATF SEEKS TO DELAY NEWSPAPER SERIES ON BRANCH DAVIDIANS**

Officials of the Bureau of Alcohol, Tobacco and Firearms meet with editors of the *Waco (Texas) Tribune-Herald* and ask them to delay publication of a series about Branch Davidians until ATF conducts a planned raid. The paper publishes anyway. A Treasury Department report concludes in September that the ATF effort to delay publication was flawed. The report suggests that ATF should have entrusted the task of delaying the series to officials with more experience in media relations.

Stop the Press**FOREST SERVICE AIDE SNATCHES REPORTER'S CAMERA**

An aide to a key U.S. Forest Service official snatches a camera from the hands of a *Snowmass (Colo.) Sun* reporter, tries unsuccessfully to open it and then scuffles with the reporter during his attempt to retrieve it, *Colorado Editor* reports. The reporter had openly taken a photo of the project manager in charge of preparing an environmental impact statement on the Snowmass Ski Area expansion plan proposal. The Forest Service later apologizes.

Stop the Press**WHITE HOUSE STOPS BROADCAST OF NEWS BRIEFINGS**

The White House halts its newly instituted practice of televising its daily news briefings. Press Secretary Dee Dee Myers says the sessions were too combative, *The Associated Press* reports.

Freedom of Information**HEALTH CARE TASK FORCE, WORKING GROUP MEETINGS CLOSED**

The administration refuses to open up meetings of the National Health Care Task Force and its working groups. In June, the U.S. Court of Appeals in Washington (D.C. Cir.) determines that the task force of high-level officials chaired by Hillary Clinton is not an advisory committee that must comply with open meeting and record requirements of the Federal Advisory Committee Act, but finds that the working groups may be subject to the act.

Plumbing Leaks**CLINTON 'RABID' OVER LEAKS, AIDE SAYS**

A newly inaugurated Clinton gathers his staff and warns them against unauthorized disclosures, which he says damaged his predecessors, *The Wall Street Journal* reports. The *Journal* reports that Clinton becomes irate whenever aides reveal what he considers his private thoughts and actions. *The Washington Post* reports

that a Clinton aide says the president is "more rabid on the subject [of leaks] than anyone you've seen in Washington in a long time."

Secret Government

NEW WHITE HOUSE STAFF MUST ZIP LIPS

Clinton advisers in Little Rock ask new White House senior staff to "zip their lips" until the whole team is assembled and announced, *The Washington Post* reports.

Secret Government

U.S. BOMBED IRAQ, SIX HOURS AGO

Military officials at the Pentagon do not confirm that U.S. planes bombed Iraqi missile sites in the northern "no-fly zone" until six hours after the incident because Defense Secretary Les Aspin's team was waiting to hear what to say from communications chief George Stephanopoulos, *The Washington Post* reports. White House aides attribute the success of the missile attack to the press blackout, *The Washington Times* reports.

Stop the Press

PENTAGON: MEDIA POOL MEMBERS MUST BE U.S. CITIZENS

The Defense Department revises proposed rules approved by the Bush Administration that set out specific criteria for membership in the National Media Pool for access to military actions. The Defense Department under Clinton adds a requirement that members be U.S. citizens, contending that it will be easier for them to get visas, according to Army Lt. Col. Don Gersh. By late February 1994, the rules had not been approved by the Pentagon's general counsel's office.

Stop the Press

PRESIDENT-ELECT CLINTON ATTENDS SECRET 'RENAISSANCE WEEKEND'

President-elect Clinton attends the secret annual "Renaissance Weekend," an "informal house party" in which more than 1,000 people discuss policy and personal issues, *The Associated Press* reports. Some members of the press are invited to the event on the condition that they not breathe a word about what transpires, or else not be invited back, the AP reports. Among the journalists who attend the event are future top Clinton Administration officials Strobe Talbott of *Time* and David Gergen of *U.S. News and World Report*.

Stop the Press

WHITE HOUSE BARS MEDIA FROM PRESS OFFICIALS' OFFICES

White House press officials cut off reporters' access to the officials' offices, *The Associated Press* reports. Presidential scholar Stephen Hess notes that reporters had full access to White House press offices for nearly a quarter century. The bar ends with the May 1993 appointment of David Gergen as White House counselor, and the substitution of Mark Gearan for George Stephanopoulos as communications director, *The Washington Post* reports.

Plumbing Leaks

STEPHANOPOULOS TO CABINET: PROBE POLICY IN PRIVATE

White House Communications Director George Stephanopoulos tells Cabinet officials and senior aides that policy options should not be debated in the newspapers, *The Washington Post* reports. One source tells the *Post* that Stephanopoulos sent "an unmistakable message" not to talk to the press. Another says the group was "ordered not to make news unless it is specific news we are ordered to make."

Prior Restraint

CLINTON STAFF TELLS APPOINTEES TO GET APPROVAL FOR INTERVIEWS

President-elect Clinton's adviser Howard Paster tells Cabinet appointees that Clinton aide George Stephanopoulos requires them to clear interviews with the press/communications office, *The Washington Post* reports. Clinton's aides also advise nominees to be respectful to senators and their rules, but divulge as little as possible; and to memorize Clinton's policy pronouncements, but not venture any further, *The New York Times* reports.

Stop the Press**CANDIDATE CLINTON ACCUSES PRESS OF BUSH BIAS**

Angered over questions about his draft status during the Vietnam War, Clinton explodes, *The New York Times* reports. He accuses the reporters of engaging in a "feeding frenzy" on an unimportant matter while not similarly questioning President Bush about the Iran-Contra affair.

Polling Thought**GOV. CLINTON SEEKS DISCLAIMER ON PROGRAM CRITICIZING ARKANSAS**

Gov. Clinton's office asks producers of a *Frontline* documentary criticizing Arkansas' child welfare and foster care system to add a disclaimer warning viewers that the program includes only one side of a complex issue, *The Associated Press* reports.

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* Information Policy Comm.

- * electronic monitoring / service maintenance
- * technical problems

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*

IPWG / IITE

revision

FAIR INFORMATION PRACTICES

Rob Reeder

Monday 25TH

NII → reaction discussion
Advisory Commission

Privacy Advocate
IRS

Privacy Protection Comm. draft language

- medical records condit
Gelman bill
Sally early may
Health information

only use
it
for purposes
collected

TELEPHONE CALLS

John D. Podesta

Date: April 14

[illegible]

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Docket Nos. 93-5086

93-5092

ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC., *et al.*,
Appellees/Cross-Appellants,

v.

HILLARY RODHAM CLINTON, *et al.*,
Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, NEWSLETTER PUBLISHERS
ASSOCIATION, INC., AMERICAN SOCIETY OF NEWSPAPER EDITORS, SOCIETY OF
PROFESSIONAL JOURNALISTS AND THE ASSOCIATED PRESS
IN SUPPORT OF APPELLEES/CROSS-APPELLANTS,
ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC.

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CERTIFICATE AS TO PARTIES,
RULINGS, AND RELATED CASES

A. PARTIES AND AMICI

To the best of counsel for amici curiae's knowledge, all parties and intervenors appearing in this Court and below are listed in the briefs of Appellants/cross-appellees and Appellees/cross-appellants. Amici appearing before this Court include:

The Reporters Committee for Freedom of the Press
Radio-Television News Directors Association
The Newsletter Publishers Association, Inc.
The American Society of Newspaper Editors
The Society of Professional Journalists
The Associated Press

B. RULINGS UNDER REVIEW

References to the ruling below appear in the brief of Appellants/cross-appellees.

C. RELATED CASES

Counsel for amici curiae is not aware of any other related cases or proceedings within the meaning of D.C. Circuit Rule 11(a)(1)(c).


Jane E. Kirtley
Counsel for Amicus Curiae
Reporters Committee for
Freedom of the Press

INTEREST OF AMICI
Pursuant to Local Rule 6A

The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and news editors dedicated to protecting the First Amendment and freedom of information interests of the news media. The Committee provides legal defense assistance to a wide variety of news reporters and thus has a vital interest in protecting the First Amendment right of the press to gather news.

Radio-Television News Directors Association, with a membership of more than 3,000 persons, is the principal professional organization of journalists -- executives, editors, reporters and others -- who gather and disseminate news and other information on radio and television in the United States.

The Newsletter Publishers Association, Inc., ("NPA") represents more than 650 publishers of approximately 2,200 newsletters and specialized information services. The Federal Advisory Committee Act provides NPA's member and their subscribers with a vital means of access to information regarding the operations and policies of the federal government.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 900 people who hold positions as directing editors of daily newspapers throughout the United States.

The Society of Professional Journalists, a voluntary, nonprofit organization, is the largest and oldest organization of journalists in the United States. Its members represent every

branch and rank of print and broadcast journalism.

The Associated Press is the world's largest newsgathering organization. It is a mutual news cooperative organized under the Not-For-Profit Corporation Law of the State of New York. AP engages in gathering and distribution of news of local, national, and international importance to its member newspapers and broadcast stations throughout the world.

None of the above identified amici has a parent company, subsidiary or affiliate that has issued shares or debt securities to the public.

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<u>Gates v. Schlesinger</u> , 366 F.Supp. 797, 799 (D.D.C. 1973) . . .	9
<u>STATUTES AND REGULATIONS</u>	
5 U.S.C. § 552	9
5 U.S.C. § 552b	9
5 U.S.C. App. II § 10(a)(1)	9
5 U.S.C. App. II § 10(b)	9
41 C.F.R. § 101-6.1004 (g) & (i)	6
Ill. Rev. Stat. Ch. 102, Sec. 41-46 (1987)	9
Tex. Rev. Stat. Ann. § 6252-17 (Vernon's Supp. 1992)	9
<u>OTHER</u>	
Remarks on Health Care Reform and an Exchange with Reporters, January 25, 1993, 29 Weekly Compilation of Presidential Documents 96, February 1, 1993	4
*Twenty-First Annual Report of the President on Federal Advisory Committees at 2 (Fiscal Year 1992) . . .	4,5
1976 U.S. Code Cong. & Admin. News 2183, 2261	9-10
Press Briefing by George Stephanopoulos, The White House, March 10, 1993, p.5	5,6

* Authorities chiefly relied upon are marked with an asterisk.

TO BE ARGUED APRIL 30, 1993

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Docket Nos. 93-5086
93-5092

ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC., *et al.*,
Appellees/Cross-Appellants,

v.

HILLARY RODHAM CLINTON, *et al.*,
Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, NEWSLETTER PUBLISHERS
ASSOCIATION, INC., AMERICAN SOCIETY OF NEWSPAPER EDITORS, SOCIETY
OF PROFESSIONAL JOURNALISTS AND THE ASSOCIATED PRESS
IN SUPPORT OF APPELLEES CROSS-APPELLANTS, ASSOCIATION
OF AMERICAN PHYSICIANS AND SURGEONS, INC.

The Reporters Committee for Freedom of the Press, Radio-
Television News Directors Association, The Newsletter Publishers
Association, Inc., The American Society of Newspaper Editors and
The Society of Professional Journalists moved for leave to file
this brief as amici curiae on March 31, 1993. The Associated Press
moved to join them on April 2, 1993.

STATEMENT OF THE ISSUES AND OF THE CASE

Amici curiae have no independent knowledge of the facts and rely on the statements in the briefs of the parties.

SUMMARY OF ARGUMENT

I. The court below correctly held that the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. II, which mandates open meetings, applies to the President's Task Force on National Health Care Reform. However, the court's failure to extend that holding to the working groups at the core of the Task Force both contradicts the finding that the FACA applies and severely undercuts the law's intent to provide openness and accountability in government.

II. The lower court incorrectly held that the deliberative sessions of the Task Force are exempt from the FACA's requirement of open meetings by erroneously equating them to consultations between the President and his personal advisors. Because application of the FACA to all meetings of the formally constructed Health Care Task Force in no way impedes the President's ability to privately confer with whomever he wishes, the lower court's finding of unconstitutionality is in error.

ARGUMENT

I. In order to insure meaningful public access to the President's Task Force on National Health Care Reform, the FACA must apply to the Task Force interdepartmental working groups.

Application of the FACA to the Task Force's interdepartmental working groups ("working groups") is essential to achieving the openness and accountability of the Task Force mandated by the FACA. The court below correctly recognized the FACA's goal of openness, stating that it was intended "to increase the accountability of advisory committees by opening their meetings to the general public and forcing disclosure of their purpose, membership, costs, and activities." This openness is vital to the role of the news media in informing and educating the public about issues of national concern. In holding that the FACA applied to the Task Force, the court held the Task Force to the accountability mandated by the law. But by failing to extend the holding to the working groups at the core of the Task Force, the district court's decision frustrated the purpose of the FACA and renders it of little significance in providing the openness and access Congress intended.

Issues of national health care reform are of vital importance to the American people. Their participation in the formulation of a national health care plan is essential to the democratic process. News media access is particularly important because many persons rely on press reports, television and radio broadcasts and trade journals for information concerning advisory committee actions. Food Chemical News, Inc. v. Davis, 378 F.Supp. 1048, 1052 (D.D.C.

1974). The news media have a "statutory right under the [FACA] as well as a First Amendment privilege to report on the manner in which Government affairs are conducted." Id.

Appellants/cross-appellees make many references in their brief to the high priority given to their mission. This view of the critical nature of our nation's health care is shared by the American public. The President himself recognizes Americans' overwhelming concerns about the cost and availability of health care in the United States. Remarks on Health Care Reform and an Exchange with Reporters, January 25, 1993, 29 Weekly Compilation of Presidential Documents 96, February 1, 1993. The extensive news coverage of the creation of the Task Force and of its early work is a result of the public's desire to be informed about the Task Force's progress.

Without reporting by the nation's news media, Americans would have little means of learning about the Task Force's work. Indeed, were this holding applied to media access to other advisory committees, the public would be cut off from an enormous part of the governmental process. The number of advisory committees created each year bears witness to the importance of these committees to the formulation of national policies. During fiscal year 1992, for example, 64 federal departments and agencies sponsored 1,230 advisory committees, which were composed of a total of 29,020 individuals, held 4,645 meetings and issued 1,241 reports. Twenty-First Annual Report of the President on Federal Advisory Committees at 2 (Fiscal Year 1992). Issues of national

importance addressed by advisory committees include AIDS, homelessness, drug abuse and environmental contamination. Id. Unquestionably, news media access to the Health Care Task Force and advisory committees in general is essential to an informed public.

The court below, however, thwarted the goals of the FACA in this case. After deciding that the FACA applied to the Task Force, the court decided that the working groups were not subject to the FACA because they were not created by the President and were only fact-gathering groups. This holding denies the public access to the testimony of private citizens before the Task Force's working groups on issues which affect their health and economic well-being. The news media, likewise, are denied the ability to report these events to the public. This ruling not only violates the clear legislative intent of the FACA, but is not required by the precedent cited.

The structure of the Task Force is explained fully in appellant/cross-appellees' and appellees/cross-appellants' briefs. The working groups, composed of government employees and outside consultants, play an essential role in the Task Force's duties. The President's spokesman, in his press briefing after the district court's decision, said that the working groups do all the "nuts and bolts" work of the Task Force -- "that is always how it was contemplated." Press Briefing by George Stephanopoulos, The White House, March 10, 1993, p.5. By the administration's own admission, the working groups are the heart of the Task Force; to exclude them from public scrutiny is to severely limit the public's view of the

Task Force's work. The court below held that only the Task Force's fact-finding function is subject to the FACA. But without the working groups, the Task Force has no fact finding upon which to base its recommendations. Denial of access to the working groups results in the conclusion reached by the President's spokesman that the decision below has "no practical effect on the task force." Id.

The regulations promulgated under the FACA make clear that the function of a subcommittee to an advisory committee is essential to determining whether it is covered by the FACA. Specifically, 41 C.F.R. § 101-6.1004 (g) & (i) both indicate that a committee group may cross the boundary from non-coverage to coverage based on its function. Examples from the regulations include when an "operational committee" becomes primarily advisory in nature or when an agency accepts the deliberations of a group not covered by the FACA as advice or recommendations.

In concluding that the working groups under the Task Force do not fall within the FACA, the district court relied on National Anti-Hunger Coalition v. Executive Committee, 557 F.Supp. 524 (D.D.C.), aff'd 711 F.2d 1071 (D.C. Cir. 1983) ("NAHC"). NAHC can be distinguished and does not require the conclusion reached by the district court.

In NAHC, an executive committee was established by President Ronald Reagan to obtain advice from the private sector on reducing costs in the federal sector. The government never contested the FACA's applicability to the executive committee. The executive

committee, of its own accord, created a subcommittee which recognized its obligation to comply with the FACA and anticipated the plaintiffs' participation in the executive committee's and subcommittee's "formulation of recommendations." 557 F.Supp. at 528. This executive committee was not publicly funded. Rather, a privately funded foundation provided the executive committee with facilities and staff support. Id. at 526. The foundation's management office organized 36 task forces, each chaired by executive committee members, to do preliminary work such as fact-gathering, statistical evaluations and the formulation of preliminary reports.

The district court in NAHC held that the foundation-created task forces were not subject to the FACA because they were not directly established or utilized by the President and performed only staff functions. Id. at 529. These task forces are distinguishable from the working groups of the Health Care Task Force. First, the working groups were created by the advisory-committee-entity itself, the Health Care Task Force, rather than by a separate funding entity. The working groups are a part of the overall scheme created by the President. Further, the working groups are at the core of the work of the Task Force. They perform more than administrative functions. They are responsible for the essential gathering of information which will provide the basis of the Task Force's recommendations.

This Court, in affirming NAHC, noted that the FACA may have applied to those task forces if their reports had been "transmitted

directly to federal decision makers before they [were] made publicly available and that the subcommittee of the Executive Committee [was] merely 'rubber stamping' the task forces' recommendations with little or no independent consideration." That is, the FACA was deemed to apply to the subgroups if they were instrumental in the formulation of the policy. This Court obviously considered the function of the group to be determinative of whether the FACA applies, just as Congress intended. The Health Care Task Force's working groups, which were created by the President for the purpose of gathering information into reports for his review and for review by the Task Force, perform the type of functions that by law must be open to public view. To hold otherwise is to render meaningless the intent of the FACA.

II. The lower court's separation of powers analysis is misplaced and effectively eliminates the FACA's openness requirement as applied to the Task Force.

In addition to the lower court's holding that the working groups are exempt from the FACA, the court also held that the deliberations of the Task Force itself are exempt from the FACA's requirement of openness. This holding, based on an unnecessary separation of powers analysis, fails to recognize the FACA as the simple open meeting act that it is, and erroneously views it as an unconstitutional infringement on the President's right to candid counsel. This analysis, coupled with the lower court's denial of access to meetings of the working groups, results in a Task Force which will overhaul the nation's health care without the benefit of public scrutiny.

The FACA is an open meeting act, similar to the Government in the Sunshine Act, 5 U.S.C. § 552b, and comparable state acts. See e.g., Ill. Rev. Stat. Ch. 102, Sec. 41-46 (1987); Tex. Rev. Stat. Ann. § 6252-17 (Vernon's Supp. 1992). The FACA provides first and foremost that "each advisory committee meeting shall be open to the public." 5 U.S.C. App. II § 10(a)(1). It provides that all records and reports prepared by the advisory committees shall be available for public inspection and copying. Id. at 10(b). The only qualification of this clear right of access is that the availability of records is subject to the Freedom of Information Act, 5 U.S.C. § 552 ("FOI Act"), and meetings may be closed by the President or agency head under 5 U.S.C. § 552b (the "Sunshine Act"). There is no basis in either the FACA or Sunshine Act to prohibit public oversight of an advisory committee's deliberative process. The Appellants' arguments notwithstanding, the applicable FOI Act openness exceptions are very limited.

Attempts by federal agencies to broadly apply the "inter-agency and intra-agency memoranda" exemption of the FOI Act to all deliberative conversations of committee meetings have been held to be contrary to the intent and policy of the FACA. Gates v. Schlesinger, 366 F.Supp. 797, 799 (D.D.C. 1973). In its 1976 amendment to the FACA, Congress prevented any further attempts to use the FOI Act exemption to close advisory committee meetings. Congress stated that it intended to "end agency reliance upon the 'full and frank' discussion rationale for closing advisory committee meetings." Joint Explanatory Statement of the Committee

of Conference, H.R. Conf. Rep. No. 94-1441, 94th Cong. 2d Sess. 26 (1976), reprinted in 1976 U.S. Code Cong. & Admin. News 2183, 2261. In arguing that a deliberative process exemption countermands the legally required openness of their meetings, Appellants maintain that "full and frank" discussion of issues must be shielded from public scrutiny and possible criticism. Despite Congress' rejection of this argument, the court below utilized it to deny access to the Task Force's deliberations.

The court below held that the application of the FACA to the Task Force is unconstitutional as a violation of the separation of powers. It found that application of the statute to this Task Force's deliberations prevents the President from accomplishing a constitutionally assigned function by hampering his ability to obtain the information he needs to offer proposed legislation to Congress. But because the presidential power at issue is not specifically enumerated in the Constitution, the court balanced the interest of the President against the interests of Congress to determine if the limitation was justified.

To conduct the balancing test, the court first identified two types of Task Force meetings: fact finding and deliberating. It held that the Presidential interest in confidentiality was not present at the information-gathering and information-reporting meetings of the Task Force and that "the congressional interest in openness and accountability clearly is present at these meetings." District Court Op. at 21. Accordingly, the court held that the Task Force must comply with FACA when conducting fact-finding or

information-gathering meetings. But in the context of deliberation, it found that public access is not required because the President's interests in receiving private counsel outweigh any congressional interest.

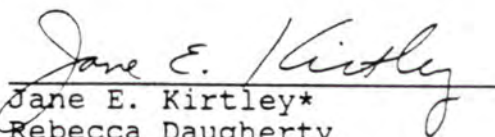
The lower court's analysis is flawed because it fails to distinguish the uncontested ability of the President to consult with his advisors at will from the legally mandated requirement that formal committee meetings be held in public view. The FACA does not in any way limit the President's right to confer with advisors behind closed doors; rather, it simply mandates that should the President create a formal committee structure to approach an issue of national concern, the work and process of the committee and its subgroups should not be shrouded in secrecy away from public view. Limiting the public's access to only those meetings where facts are gathered bars the public from the policy making process that results from the evaluation of those facts. This violates the spirit and the intent of the FACA. Because separation of powers is not violated in providing the openness Congress intended, the FACA is not unconstitutional as applied in this case, and should be applied to the Task Force without limitation.

CONCLUSION

For the foregoing reasons, paragraph 1 of the judgment order, which holds the FACA applicable to the Task Force, should be affirmed, and paragraph 2 of the judgment order, which holds that the working groups and the deliberative sessions of the Task Force are not subject to the FACA, should be reversed.

Dated: April , 1993

Respectfully submitted,


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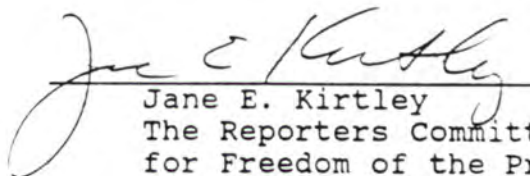
I hereby certify that on the 5th day of April, 1993, I, Jane E. Kirtley, attorney of record for Amici Curiae, caused to be served two correct copies of the foregoing by hand upon counsel listed below for the parties in this case.

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ADDENDUM

Ill. Rev. Stat. Ch. 102, Sec. 41-46

41. Public policy

1. It is the public policy of this State that the public commissions, committees, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of this Act that their actions be taken openly and that their deliberations be conducted openly.

41.01. Short title.

This Act shall be known and may be cited as the Open Meetings Act.

41.02. Definitions For the purposes of this Act:

"Meeting" means any gathering of a majority of a quorum of the members of a public body held for the purpose of discussing public business.

"Public body" includes all legislative, executive, administrative or advisory bodies of the state, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees or commissions of this State, and any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees which are supported in whole or in part by tax revenue, or which expend tax revenue, except the General Assembly and committees or commissions thereof.

42. All official meetings open to the public - Exceptions.

(A) All meetings of public bodies shall be public meetings except for the following:

(a) collective negotiating matters between public employers and their employees or representatives, or deliberations concerning salary schedules for one or more classes of municipal employees;

(b) that portion of the deliberations for decisions of the Illinois Commerce Commission in which there is discussed any of the following: commercial, financial or other information which is obtained from a person and which is privileged, proprietary, confidential, or a trade secret; information relating solely to the internal rules, practices, investigation techniques and procedures of the Commission; information the premature disclosure of which would be likely to lead to significant financial speculation in securities of a regulated equity or to significantly endanger the stability of any regulated entity; information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed Commission action; information obtained during the course of an inspection, examination or investigation which would be subject to the prohibition set forth in Section 5-108 of the Public Utilities Act [Chapter 111 2/3, para. 5-108] or information specifically exempted from disclosure by federal or state law;

(c) meetings where the acquisition of real property is being considered or where the selling price of real estate is being considered;

(d) where the constitution provides that a governmental unit

can hold closed meetings;

(e) meetings at public institutions of higher education relating to campus security or to the safety of staff and students and meetings at public institutions of higher education and of school boards of public school districts to respond to actual danger to the safety of students, staff, and school premises, including discussion of emergency security procedures and the utilization of personnel and equipment to respond to that danger;

(f) that portion of State Investment Board meetings and meetings of Board of Trustees of public employee retirement systems operated under authority granted by the Illinois Pension Code [Chapter 108 1/2, para. 1-101 et seq.] where the sale or purchase of securities or investment contracts is to be considered or in which matters relating to the determination of disability or the results of medical examinations are to be considered, if the request for a closed meeting is initiated by the person whose disability determination or whose medical examination results are to be considered and not by the board of trustees of the public employee retirement system;

(g) that portion of meetings of law enforcement agencies, committees or commissions involved in the investigation of criminal activities which are concerned with or are to discuss informant sources, the hiring or assignment of undercover personnel, the purchase and assignment of undercover autos, or actual ongoing, prior or future investigations, or any budgetary considerations specifically concerning any of the foregoing;

(h) meetings held to discuss litigation when an action against, affecting, or on behalf of the particular public body has been filed and is pending in a court or administrative tribunal, or when the public body finds that such an action is probable or imminent, in which case the basis for such finding shall be recorded and entered into the minutes of the closed meeting in accordance with Section 2.06;

(i) that portion of the meetings of the Citizens Utility Board in which there is discussed commercial, financial or other information which is obtained from a person and which is privileged, proprietary, confidential or a trade secret; information relating solely to matters internal to the Citizens Utility Board; information the premature disclosure of which would be likely to lead to significant financial speculation in securities of a regulated entity or to significantly endanger the stability of any regulated entity; information the premature disclosure of which would be likely to significantly frustrate implementation of proposed Citizens Utility Board action; or information specifically exempted from disclosure by federal or state law.

(j) deliberations for decisions of the Prisoner Review Board, and

(k) that portion of the deliberations for decisions of the

Illinois Gaming Board in which there is discussed any of the following: personal, commercial, financial, or other information obtained from any source that is privilege, proprietary, confidential, or a trade secret; information relating solely to the internal rules, practices, investigation techniques, and procedures of the Board; or information specifically exempted from disclosure by federal or State law.

B) This Section does not prohibit any of the following:

- (1) any body covered by this Act from holding closed meetings to consider information regarding appointment, employment or dismissal of an employee or officer or to hear testimony on a complaint lodged against an employee or officer to determine its validity;
- (2) an agency of government from holding a closed meeting when Federal regulation requires it;
- (3) a school board or any committee thereof from hearing student disciplinary cases or from discussing matters relating to individual students in special education programs as defined by Article 14 of The School Code [Chapter 122, para. 14-1.01 et seq.] at a closed meeting.
- (4) an advisory committee appointed to provide a public body with professional consultation on matters germane to its field of competence from holding a closed meeting to consider matters of professional ethics or performances;
- (5) the corporate authorities of a municipality from enacting ordinances which provide for closed meetings for conciliating complaints of discrimination under Section 1111.1-1 of the "Illinois Municipal Code", approved May 29, 1961, as amended. [Chapter 24, para. 11-11.1.1];
- (6) a school board from holding closed meetings with representatives of a state association authorized under Article 23 of "The School Code", approved March 18, 1961, as amended, [Chapter 122, para. 23-1 et seq.] for the purposes of discussing a board's self-evaluation, practices and procedures, or professional ethics;
- (7) the State Employees Suggestion Award Board from holding closed meetings for the purpose of evaluating suggestions for classification as confidential or continued confidential as provided in Section 67.28 of the Civil Administrative Code of Illinois;
- (8) any body covered by this Act from holding closed meetings to consider the appointment of a member to fill a vacancy on that body;
- (9) any local public entity subject to this Act from holding closed meetings to establish reserves or settle claims as provided in the Local Governmental and Governmental Employees Tort Immunity Act, if otherwise the disposition of a claim or potential claim might be prejudiced, or to review or discuss claims, loss or risk management information, records, data advice or communications from or with respect to any insurer of the local public entity or any intergovernmental risk management association or self insurance pool of which the local government is a member;
- (10) the mayor and commissioners of a municipality organized under

Article 4 of the Illinois Municipal Code from holding closed meetings to discuss matters which relate solely to the exercise of their executive or administrative responsibilities, nor shall those meetings be subject to Sections 2a, 2.02, 2.03 or 2.06 of this Act. [Chapter 24, para. 4-1-1 et seq.]

(11) the Illinois Experimental Organ Transplantation Procedures Board or any screening team of the Illinois Experimental Organ Transplantation Procedures Board from holding closed meetings for the purposes or reviewing, or discussing, applications received under the Experimental Organ Transplantation Procedures Act. [Paragraphs 42a, 42.02, 42.03 or 42.06 of this chapter.]

(C) Only those portions of any meeting expressly enumerated herein as exceptions may be closed. No final action may be taken at a closed meeting. All final action taken at an open session shall be preceded by a public recital of the nature of the matter being considered and such other information as would inform the public of the business being conducted.

42a. Closed sessions - Procedure.

A public body may hold a meeting closed to the public, or close a portion of a meeting to the public, upon a majority vote of a quorum present, taken at a meeting open to the public for which notice has been given as required by this Act. A motion to close any meeting at a public institution of higher education or of a school board of a public school district to respond to actual danger to the safety of students, staff and school premises, as described in subsection (e) of Section 2, shall include a description of the actual danger. A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, provided each meeting in such series involves the same particular matters and is scheduled to be held within no more than 3 months of the vote. The vote of each member on the question of holding a meeting closed to the public and a citation to the specific exception contained in Section 2 of this Act [Paragraph 42 of this chapter.] which authorizes the closing of the meeting to the public shall be recorded and entered into the minutes of the meeting. Nothing in this Section or this Act shall be construed to require that any meeting be closed to the public. At any open meeting of a public body, for which proper notice under this Act has been given, the body may, without additional notice under Section 2.02 [Paragraph 42.02 of this chapter.] hold a closed meeting in accordance with this Act. Only topics specified in the vote to close under this Section may be considered during the closed meeting.

42b. Hospital services procurement advisory board - Closed sessions.

Nothing in this Act shall prevent the Hospital Services Procurement Advisory Board from holding a closed session for the purpose of reviewing the reasonableness of proposed contracts with hospitals for services rendered to recipients of assistance under Articles V, VI, and VII of The Illinois Public Aid Code [Chapter 23, para. 5-1 et seq., 6-1 et seq., and 7-1 et seq.] as provided under Article III of the Illinois Health Finance Reform Act, enacted by the

Eighty-Third General Assembly, [Chapter 111 1/2, para. 6503-1 et seq.] This Section shall not be construed as authorizing a closed session of the Board for the purpose of voting on proposed contracts to be presented to the Director of the Illinois Department of Public Aid.

42.01 Time and place - Holidays.

All meetings required by this Act to be public shall be held at specified times and places which are convenient to the public. No meeting required by this Act to be public shall be held on a legal holiday unless the regular meeting day falls on that holiday.

42.02 Public notice.

Public notice of all meetings, whether open or closed to the public, shall be given as follows:

(a) Every body subject to this Act shall give public notice of the schedule of regular meetings at the beginning of each calendar or fiscal year and shall state the regular dates, times, and places of such meetings. Public notice of any special meeting except a meeting held in the event of a bona fide emergency, or of any rescheduled regular meeting, or of any reconvened meeting, shall be given at least 24 hours before such meeting, which notice shall also include the agenda for the special, rescheduled, or reconvened meeting, but the validity of any action taken by the public body which is germane to a subject on the agenda shall not be affected by other errors or omissions in the agenda. However, this requirement of public notice or reconvened meetings does not apply to any case where the meeting was open to the public and (1) it is to be reconvened within 24 hours, or (2) an announcement of the time and place of the reconvened meeting was made at the original meeting and there is no change in the agenda. Notice of an emergency meeting shall be given as soon as practicable, but in any event prior to the holding of such meeting, to any news medium which has filed an annual request for notice under subsection (b) of this Section.

(b) Public notice shall be given by posting a copy of the notice at the principal office of the body holding the meeting, or, if no such office exists, at the building in which the meeting is to be held. The body shall supply copies of the notice of its regular meetings, and of the notice of any special, emergency rescheduled or reconvened meeting, to any news medium that has filed an annual request for such notice. Any such news medium shall also be given the same notice of all special, emergency, rescheduled or reconvened meetings in the same manner as is given to members of the body provided such news medium has given the public body an address or telephone number within the territorial jurisdiction of the public body at which such notice may be given.

42.03 Schedule of meetings.

In addition to the notice required by Section 2.02 [Paragraph 42.02 of this chapter.] each body subject to this Act must, at the beginning of each calendar or fiscal year, prepare and make available a schedule of all its regular meetings for such calendar or fiscal year, listing the times and places of such meetings. If a change is made in regular meeting dates, at least 10 days'

notice of such change shall be given by publication in a newspaper of general circulation in the area in which such body functions. However, in the case of bodies of local governmental units with a population of less than 500 in which no newspaper is published, such 10 days' notice may be given by posting a notice of such change in at least 3 prominent places within the governmental unit. Notice of such change shall also be posted at the principal office of the public body or, if no such office exists, at the building in which the meeting is to be held. Notice of such change shall also be supplied to those news media which have filed an annual request for notice as provided in paragraph (b) of Section 2.02.

42.04. Other notices - Failure to receive notice.

The notice requirements of this Act are in addition to, and not in substitution of, any other notice required by law. Failure of any news medium to receive a notice provided for this Act shall not invalidate any meeting providing notice was in fact given in accordance with this Act.

42.05. Recording meetings.

Subject to the provisions of "An Act in relation to the rights of witnesses at proceedings conducted by a court, commission, administrative agency or other tribunal in this State which are televised or broadcast or at which motion pictures are taken", approved July 14, 1953, as amended, [Chapter 51, para. 57 (repealed; see, now, ch. 110, para. 8-701.)] any person may record the proceedings at meetings required to be open by this Act by tape, film, or other means. The authority holding the meeting shall prescribe reasonable rules to govern the right to make such recordings.

If a witness at any meeting required to be open by this Act which is conducted by a commission, administrative agency or other tribunal, refuses to testify on the grounds that he may not be compelled to testify if any portion of his testimony is to be broadcast or televised or if motion pictures are to be taken of him while he is testifying, the authority holding the meeting shall prohibit such recording during the testimony of the witness. Nothing in this Section shall be construed to extend the right to refuse to testify at any meeting not subject to the provisions of "An Act in relation to the rights of witnesses at proceedings conducted by a court, commission, administrative agency or other tribunal in this State which are televised or broadcast or at which motion pictures are taken", approved July 14, 1953, as amended.

42.06. Written minutes of meetings

(a) All public bodies shall keep written minutes of all their meetings, whether open or closed. Such minutes shall include, but need not be limited to;

(1) the date, time, and place of the meeting;

(2) the members of the public body recorded as either present or absent; and

(3) a general description of all matters proposed, discussed, or decided, and a record of any votes taken.

(b) The minutes of meetings open to the public shall be available for public inspection within 7 days of the approval of such minutes

by the public body. Minutes of meetings closed to the public shall be available only after the public body determines that it is no longer necessary to protect the public interest or the privacy of an individual by keeping them confidential.

(c) The public body shall periodically, but no less than semi-annually, meet to review minutes of all closed sessions. At such meetings a determination shall be made, and reported in an open session. At such meetings a determination shall be made, and reported in an open session that (1) the need for confidentiality still exists as to all or part of those minutes or (2) that the minutes or portions thereof no longer require confidential treatment and are available for public inspection.

43. Noncompliance - Civil actions - Relief - Fees and costs

(a) Where the provisions of this Act are not complied with, or where there is probable cause to believe that the provisions of this Act will not be complied with, any person, including the State's Attorney of the county in which such noncompliance may occur, may bring a civil action in the circuit court for the judicial circuit in which the alleged noncompliance has occurred or is about to occur, or in which the affected public body has its principal office, prior to or within 45 days after the meeting alleged to be in violation of this Act.

(b) In deciding such a case the court may examine in camera any portion of the minutes of a meeting at which a violation of the Act is alleged to have occurred, and may take such additional evidence as it deems necessary.

(c) The court, having due regard for orderly administration and the public interest, as well as for the interests of the parties, may grant such relief as it deems appropriate, including granting a relief by mandamus requiring that a meeting be open to the public, granting an injunction against future violations of this Act, ordering the public body to make available to the public such portion of the minutes of a meeting as is not authorized to be kept confidential under this Act, or declaring null and void any final action taken at a closed meeting in violation of this Act.

(d) The court may assess against any part, except a State's Attorney, reasonable attorney's fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with this Section, provided that costs may be assessed against any private party or parties bringing an action pursuant to this Section only upon the court's determination that the action is malicious or frivolous in nature.

44. Violations or provisions of Act.

Any person violating any of the provisions of this Act shall be guilty of a Class C misdemeanor.

45. Effect of invalid provisions or applications of Act 5.

If any provision of this Act, or the application of this Act to any particular meeting or type of meeting is held invalid or unconstitutional, such decision shall not affect the validity of the remaining provisions or the other applications of this Act.

46. Minimum requirements for home rule units.

The provisions of this Act constitute minimum requirements for home

rule units; any home rule unit may enact an ordinance prescribing more stringent requirements binding upon itself which would serve to give further notice to the public and facilitate public access to meetings.

Tex. Rev. Stat. Ann. § 6252-17

Definitions

Section 1. As used in this Act:

(a) "Meeting" means any deliberation between a quorum of members of a governmental body, or between a quorum of members of a governmental body and any other person, at which any public business or public policy over which the governmental body has supervision or control is discussed or considered, or at which any formal action is taken. It shall not be construed that the intent of this definition is to prohibit the gathering of members of the governmental body in numbers of a quorum or more for social functions unrelated to the public business which is conducted by the body or for attendance of regional, state, or national conventions or workshops as long as no formal action is taken and any discussion of public business is incidental to the functions, conventions, or workshops.

(b) "Deliberation" means a verbal exchange during a meeting between a quorum of members of a governmental body, or between a quorum of members of a governmental body and any other person, concerning any issue within the jurisdiction of the governmental body or any public business.

*Text of subsection (c) effective until
approval by voters of Acts 1991, 72nd Leg.,
S.J.R. No. 15*

(c) "Governmental body" means any board, commission, department, committee, or agency within the executive or legislative department of the state, which is under the direction of one or more elected or appointed members; and every Commissioners Court and city council in the state, and every deliberative body having rule-making or quasi-judicial power and classified as a department, agency, or political subdivision of a county or city; and the board of trustees of every school district, and every county board of school trustees and county board of education; and the governing board of every special district heretofore or hereafter created by law.

*Text of subsection (c) effective upon approval
by voters of Acts 1991, 72nd Leg., S.J.R. No.
15*

(c) "Governmental body" means any board, commission, department, committee, or agency within the executive or legislative department of the state, which is under the direction of one or more elected or appointed members; and every Commissioners Court and city council in the state, and every deliberative body having rule-making or quasi-judicial power and classified as a department, agency, or political subdivision of a county or city; and the board of trustees of every school district, and every county board of school trustees and county board of

education; and every nonprofit corporation organized under Chapter 76, Acts of the 43rd Legislature, 1st Called Session, 1933 (Article 1434a, Vernon's Texas Civil Statutes), that provides a water supply or wastewater service, or both, and is exempt from ad valorem taxation under Section 11.30, Tax Code; and the governing board of every special district heretofore or hereafter created by law.

(d) "Quorum" unless otherwise defined by constitution, charter, rule or law applicable to such governing body, means a majority of the governing body.

Sec. 1 amended by Acts 1973, 63rd Leg., p. 45, ch. 31, § 1, eff. Jan. 1, 1974;
Sec. 1(a), (b) amended by Acts 1987, 70th Leg., ch. 549, § 1, eff. Aug. 31, 1987;
Sec. 1(c) amended by Acts 1991, 72nd Leg., ch. 306, § 4, eff. Jan. 1, 1992.

Application of act

Sec. 2. (a) Except as otherwise provided in this Act or specifically permitted in the Constitution, every regular, special, or called meeting or session of every governmental body shall be open to the public; and no closed or executive meeting or session of any governmental body for any of the purposes for which closed or executive meetings or sessions are hereinafter authorized shall be held unless a quorum of the governmental body has first been convened in open meeting or session for which notice has been given as hereinafter provided and during which open meeting or session the presiding officer has publicly announced that a closed or executive meeting or session will be held and identified the section or sections under this Act authorizing the holding of such closed or executive session.

(b) In this Act, the Legislature is exercising its rule-making powers to prohibit secret meetings of the Legislature, its committees, or any other bodies associated with the Legislature, except as otherwise specifically permitted by the Constitution.

(c) A governmental body may exclude any witness or witnesses from a hearing during examination of another witness in the matter being investigated.

(d) Nothing in this Act shall be construed to affect the deliberation of grand juries.

(e) Private consultations between a governmental body and its attorney are not permitted except in those instances in which the body seeks the attorney's advice with respect to pending or contemplated litigation, settlement offers, and matters where the duty of a public body's counsel to his client, pursuant to the Code of Professional Responsibility of the State Bar of Texas, clearly conflicts with this Act.

(f) The public may be excluded from that portion of a meeting during which a discussion is had with respect to the purchase, exchange, lease, or value of real property, negotiated contracts for prospective gifts or donations to the state or the governmental body, when such discussion would have a detrimental effect on the negotiating position of the governmental body as between such body and a third person, firm or corporation.

(g) Nothing in this Act shall be construed to require

governmental bodies to hold meetings open to the public in cases involving the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee or to hear complaints or charges against such officer or employee, unless such officer or employee requests a public hearing.

(h) Nothing in this Act shall be construed to require school boards to hold meetings open to the public:

(1) in cases involving discipline of public school children unless an open hearing is requested in writing by a parent or guardian of the child; or

(2) in cases in which a complaint or charge is brought against an employee of a school district by another employee, which complaint or charge directly results in a need for a hearing, unless an open hearing is requested in writing by the employee against whom the complaint or charge is brought.

(i) All or any part of the proceedings in any public meeting of any governmental body as defined hereinabove may be recorded by any person in attendance by means of a tape recorder, video camera, or any other means of sonic or visual reproduction. The governmental body may adopt reasonable rules to maintain order at the meeting place. These rules may include, but shall not be limited to, a determination of the location of such equipment and the manner in which the recording is conducted; provided, however, that the rules do not have the effect of preventing or unreasonably impairing camera coverage or tape recording.

(j) Nothing in this Act shall be construed to require governing bodies to deliberate in open meetings regarding the deployment, or specific occasions for implementation, of security personnel or devices.

(k) Nothing in this Act shall be construed to allow a closed meeting of a governing body where such closed meeting is prohibited, or where open meetings are required, by charter.

(l) Whenever any deliberations or any portion of a meeting are closed to the public as permitted by this Act, no final action, decision, or vote with regard to any matter considered in the closed meeting shall be made except in a meeting which is open to the public and in compliance with the requirements of Section 3A of this Act.

(m) Nothing in this Act shall be construed to require school boards operating under consultation agreements provided for by Section 13.901 of the Texas Education Code to deliberate in open meetings regarding the standards, guidelines, terms, or conditions it will follow or instruct its representatives to follow, in consultation with representatives of employee groups.

(n) Nothing in this Act shall be construed to require an agency wholly financed by Federal funds to deliberate in open meetings.

(o) Nothing in this Act shall be construed to require medical boards or medical committees to hold meetings open to the public in cases where the individual medical and psychiatric records of an applicant for a disability benefit from a public retirement system are being considered.

(p) Nothing in this Act shall be construed to require that interviews or counseling sessions between the members of the Board of Pardons and Paroles¹ and inmates of any facility of the Texas Department of Corrections be open to the public.

(q) The requirements of this Act shall not apply to a meeting of the State Board of Insurance in the discharge of responsibilities to regulate and maintain the solvency of those persons over which the agency has regulatory authority. In this regard, the State Board of Insurance may meet in closed meeting with any of its staff and/or the regulated person or representatives of the regulated person to deliberate and determine appropriate action to be taken with respect to the person's solvency.

Text of subsec. (r) as added by Acts 1987, 70th Leg., ch. 549, § 2

(r) Nothing in this Act shall be construed to require a quorum of the members of a governmental body to confer with an employee or employees of the governmental body in an open meeting where such conference is for the sole purpose of receiving information from the employee or employees or to ask questions of the employee or employees; provided, however, that no discussion of public business or agency policy that affects public business shall take place between the members of the governmental body during the conference.

Text of subsec. (r) as added by Acts 1987, 70th Leg., ch. 964, § 4

(r) This Act does not prohibit the board of regents or other governing body of an institution of higher education, as defined by Section 61.003 of the Education Code, from holding an open or executive meeting by telephone conference call. Each part of a meeting that is required to be open to the public and that is held by a conference call must be available to be heard by the public at the normal meeting place for the board of regents or, in the case of Systems, the board of regents conference room at the System office and must be tape recorded. The tape recording must be made available to the public. A meeting held by conference call is subject to the same notice requirements that apply to other meetings. For purposes of the notice, the place of the meeting by conference call is considered to be the normal meeting place for the board of regents or, in the case of Systems, the board of regents conference room at the System office. Telephone conference calls shall be restricted to special called meetings requiring immediate action when it is otherwise difficult or impossible to convene a quorum of the board of regents in one location.

(s) [Blank]

(t) This Act does not require the Credit Union Commission to

¹References to the Board of Pardons and Paroles shall mean either the Board of Pardons and Paroles or the pardons and paroles division of the Texas Department of Criminal Justice as provided by Acts 1989, 71st Leg., ch. 785, § 1.20(f)(2) as amended by Acts 1990, 71st Leg., 6th C.S., ch. 25, § 5.

deliberate in open meetings regarding matters made confidential by law.

Sec. 2 amended by Acts 1971, 62nd Leg., p. 1401, ch. 381, § 1, eff. Aug. 30, 1971; Acts 1973, 63rd Leg., p. 45, ch. 31, § 2, eff. Jan. 1, 1974; Sec. 2, subsec. (q) added by Acts 1985, 69th Leg., ch. 348, § 1, eff. Aug. 26, 1985; Sec. 2(a), (i) amended and (r) added by Acts 1987, 70th Leg., ch. 549, § 2, eff. Aug. 31, 1987; Sec. 2(r) added by Acts 1987, 70th Leg., ch. 964, § 4, eff. Aug. 31, 1987; Sec. 2(t) eff. added by Acts 1989, 71st Leg., ch. 1098, § 18, eff. Aug. 28, 1989; Sec. 2(h) amended by Acts 1991, 72nd Leg., ch. 395, § 1, eff. June 10, 1991.

Agenda for closed meetings

Sec. 2A. (a) For each of its meetings that is closed to the public, except for consultations in accordance with Subsection (e) of Section 2 of this Act, a governmental body shall keep a certified agenda of the proceedings.

(b) The presiding officer must certify that the agenda kept under Subsection (a) of this section is a true and correct record of the proceedings.

(c) The certified agenda shall include an announcement made by the presiding officer at the beginning and end of the meeting indicating the date and time. The certified agenda shall state the subject matter of each deliberation and shall include a record of any further action taken. The certified agenda of closed or executive sessions shall be made available for public inspection and copying only upon court order in an action brought under this Act.

(d) In lieu of the requirements for maintaining a certified agenda as provided in Subsections (a), (b), and (c) of this section, a governmental body may make a tape recording of the proceedings which shall include an announcement made by the presiding officer at the beginning and end of the meeting indicating the date and time.

(e) The certified agenda or tape shall be available for in camera inspection by the judge of a district court if litigation has been initiated involving an alleged violation of this Act. The court upon entry of a final judgment may admit the certified agenda or tape into evidence in whole or in part. The court may grant equitable or legal relief it considers appropriate, including an order that the governmental body make available to the public the certified agenda or tape of any part of a meeting that was not authorized to be closed under this Act.

(f) The governmental body shall preserve the certified agenda or tape for at least two years after the date of the meeting. If an action involving the meeting is commenced during the required preservation period, the certified agenda or tape shall be preserved pending the outcome of the action.

(g) No member of a governmental body shall participate in a meeting of the governmental body closed to the public knowing that a certified agenda of the meeting is not being kept or tape recording is not being made. A person who violates this subsection commits a Class C misdemeanor.

(h) No individual, corporation, or partnership shall, without lawful authority, knowingly make public the certified agenda or tape recording of a meeting or that portion of a meeting that was closed under authority of this Act. A person who violates this subsection shall be liable to any person injured or damaged thereby For:

(1) actual damages including but not limited to lost wages, damages due to defamation of character, or mental or other emotional distress or other personal injury or damages;

(2) costs of court;

(3) reasonable attorney's fees; and

(4) exemplary or punitive damages in the discretion of the trier of fact.

(i) An offense under Subsection (h) of this section is a Class B misdemeanor.

(j) It shall be a defense to prosecution under Subsection (h) of this section and an affirmative defense in any civil action arising under Subsection (h) that the person releasing the certified agenda or tape thereof had good reason to believe the release was lawful or that the release was the result of a mistake of fact concerning the nature or content of the certified agenda or tape.

Sec. 2A added by Acts 1987, 70th Leg., ch. 549, § 3, eff. Aug. 31, 1987.

Mandamus or injunction to prevent closed meetings

Sec. 3 (a) Any interested person, including bona fide members of the news media, may commence an action either by mandamus or injunction for the purpose of stopping, preventing, or reversing violations or threatened violations of this Act by members of a governing body. An action taken by a governmental body in violation of this Act is voidable.

(b) In an action brought under this section, a court may assess costs of litigation and reasonable attorney's fees incurred by a plaintiff or defendant who substantially prevails. In exercising its discretion, the court shall consider whether the conduct of the governmental body had a reasonable basis in law and whether the litigation was brought in good faith.

Sec. 3 amended by Acts 1979, 66th Leg., p. 1015, ch. 449, § 1, eff. Aug. 27, 1979; Acts 1987, 70th Leg., ch. 549, § 4, eff. Aug. 31, 1987.

Notice of meetings

Sec. 3A. (a) Written notice of the date, hour, place, and subject of each meeting held by a governmental body shall be given before the meeting as prescribed by this section. The requirement for notice prescribed by this section does not apply to matters about which specific factual information or a recitation of existing policy is furnished in response to an inquiry made at such meeting, whether such inquiry is made by a member of the general public or by a member of the governmental body. Any deliberation, discussion, or decision with respect to the subject about which

inquiry was made shall be limited to a proposal to place such subject on the agenda for a subsequent meeting of such governmental body for which notice has been provided in compliance with this Act.

(b) A State governmental body shall furnish notice to the Secretary of State, who shall then post the notice on a bulletin board to be located in the main office of the Secretary of State at a place convenient to the public.

(c) A city governmental body shall have a notice posted on a bulletin board to be located at a place convenient to the public in the city hall.

(d) A county governmental body shall have a notice posted on a bulletin board located at a place convenient to the public in the county courthouse.

(e) A school district shall have a notice posted on a bulletin board located at a place convenient to the public in its central administrative office and shall give notice by telephone or telegraph to any news media requesting such notice and consenting to pay any and all expenses incurred by the school district in providing special notice.

(f) A governmental body of a water district or other district or political subdivision covering all or part of four or more counties shall have a notice posted at a place convenient to the public in its administrative office, and shall also furnish the notice to the Secretary of State, who shall then post the notice on a bulletin board located in the main office of the Secretary of State at a place convenient to the public; and it shall also furnish the notice to the county clerk of the county in which the administrative office of the district or political subdivision is located, who shall then post the notice on a bulletin board located at a place convenient to the public in the county courthouse.

(g) The governing body of a water district, other district, or other political subdivision, except a district or political subdivision described in Subsection (f) of this section, shall have a notice posted at a place convenient to the public in its administrative office, and shall also furnish the notice to the county clerk or clerks of the county or counties in which the district or political subdivision is located. The county clerk shall then post the notice on a bulletin board located at a place convenient to the public in the county courthouse.

(h) Notice of a meeting must be posted in a place readily accessible to the general public at all times for at least 72 hours preceding the scheduled time of the meeting, except that notice of a meeting of a state board, commission, department, or officer having statewide jurisdiction, other than the Texas Workers' Compensation Commission or the governing board of an institution of higher education, must be posted by the Secretary of State for at least seven days preceding the day of the meeting. In case of emergency or urgent public necessity, which shall be clearly identified in the notice, it shall be sufficient if the notice is posted two hours before the meeting is convened. Any public official or person who is designated or authorized to post notices

of meetings by a governmental body in accordance with Section 3A of this Act shall post the notice taking at face value the reason for the emergency as stated by the governmental body. Cases of emergency and urgent public necessity are limited to imminent threats to public health and safety or reasonably unforeseeable situations requiring immediate action by the governmental body. Provided further, that where a meeting has been called with notice thereof posted in accordance with this subsection, additional subjects may be added to the agenda for such meeting by posting a supplemental notice, in which the emergency or urgent public necessity requiring consideration of such additional subjects is expressed. In the event of an emergency meeting, or in the event any subject is added to the agenda in a supplemental notice posted for a meeting other than an emergency meeting, it shall be sufficient if the notice or supplemental notice is posted two hours before the meeting is convened, and the presiding officer or the member calling such emergency meeting or posting supplemental notice to the agenda for any other meeting shall, if request therefor containing all pertinent information has previously been filed at the headquarters of the governmental body, give notice by telephone or telegraph to any news media requesting such notice and consenting to pay any and all expenses incurred by the governmental body in providing such special notice. The notice provisions for legislative committee meetings shall be as provided by the rules of the house and senate.

Sec. 3A amended by Acts 1971, 62nd Leg., p. 1789, ch. 527, § 1, eff. June 1, 1971; Acts 1973, 63rd Leg., p. 47, ch. 31, § 3, eff. Jan. 1, 1974; Sec. 3A, subsec. (h) amended by Acts 1975, 64th Leg., p. 968, ch. 367, § 1, eff. Sept. 1, 1975; Sec. 3A, subsec. (a) amended by Acts 1977, 65th Leg., p. 1674, ch. 659, § 1, eff. Aug. 29, 1977; Sec. 3A, subsec. (e) amended by Acts 1981, 67th Leg., p. 2231, ch. 529, § 1, eff. Sept. 1, 1981; Sec. 3A(a), (h) amended by Acts 1987, 70th Leg., ch. 549, § 5, eff. Aug. 31, 1987; Sec. 3A(h) amended by Acts 1989, 71st Leg., 2nd C.S., ch. 1, § 15.34, eff. Jan. 1, 1991.

Record of open meetings

Sec. 3B. A governmental body shall prepare and retain minutes or make a tape recording of each of its open meetings. The minutes shall state the subject matter of each deliberation and shall indicate each vote, order, decision, or other action taken by the governmental body. The minutes or tapes prepared under this section are public records and shall be made available for public inspection and copying on request to the chief administrative officer of the governmental body or to any other official designated by the chief administrative officer.

Sec. 3B added by Acts 1987, 70th Leg., ch. 549, § 4, eff. Aug. 31, 1987.

Violations and penalties

Sec. 4. (a) Any member of a governing body who knowingly calls or aids in calling or organizing a special or called meeting or session which is closed to the public, or who knowingly closes or aids in closing a regular meeting or session to the public, or

who knowingly participates in a regular, special, or called meeting or session which is closed to the public where a closed meeting is not permitted by the provisions of this Act, shall be guilty of a misdemeanor and on conviction is punishable by a fine of not less than \$100 nor more than \$500 or imprisonment in the county jail for not less than one month nor more than six months, or both.

(b) Any member or group of members of a governing body who knowingly conspires to circumvent the provisions of this Act by meeting in numbers less than a quorum for the purpose of secret deliberations in contravention of this Act shall be guilty of a misdemeanor and on conviction is punishable by a fine of not less than \$100 nor more than \$500 or imprisonment in the county jail for not less than one month nor more than six months or both.

Sec. 4 amended by Acts 1973, 63rd Leg., p. 48, ch. 31, § 4, eff. Jan. 1, 1974;
Sec. 4(a), (b) amended by Acts 1987, 70th Leg., ch. 549, § 6, eff. Aug. 31, 1987.