



FOIA UPDATE



*Legislative
Update*

Senate Passes Extensive FOIA Reform Legislation

After hearings and protracted deliberations extending over two sessions of Congress, the Senate on February 27 unanimously passed S. 774, the comprehensive package of FOIA reform amendments supported by the Administration.

Full Senate approval of S. 774 had been expected last year, based upon the bipartisan efforts of Senators Orrin Hatch (R-Utah) and Patrick Leahy (D-Vt.), but was delayed for several months as a result of concerns (primarily regarding national security issues) raised by Senator David

Durenberger (R-Minn.). Ultimately, however, the bill cleared the Senate with relatively little controversy after Senator Hatch agreed to schedule a hearing on April 3 before his Constitution Subcommittee of the Judiciary Committee addressing such concerns.

S. 774 now moves to the House of Representatives, where Government Information, Justice and Agriculture Subcommittee Chairman Glenn English (D-Okla.) has awaited final Senate action for more than two years before considering FOIA reform. In a

Cont'd on p. 6

On Agency Practice

Wide Variety of FOIA Training Available

Over the years since federal agencies first began implementing the Freedom of Information Act, they have become increasingly aware of the value of up-to-date training in this area.

Today, a wide variety of basic and advanced training courses on the FOIA are available throughout the Federal Government. In 1984, approximately 25 governmentwide FOIA training programs will be held in Washington, D.C. alone, and 18 more sessions are scheduled in re-

gions throughout the country. In addition, many agencies will offer in-house or on-the-job training for their FOIA access professionals and attorneys.

A review of the FOIA training practices at various federal departments and agencies reveals several consistent trends in FOIA training. New employees in the FOIA area usually attend at least one of the major FOIA training programs and thereafter return for refresher sessions from time to time.

Additionally, several agencies offer one-day or two-day in-house sessions on the FOIA which usually focus on technical questions and issues particular to those agencies. Educational programs offering updated training and advanced work are always popular and, as federal agencies have developed greater FOIA expertise in recent years, such programs have be-

come heavily subscribed.

The major sources of FOIA training are:

- **The Department of Justice's Legal Education Institute (LEI)**—which offers five sessions yearly of its two-day course, "The Freedom of Information Act for Attorneys and Access Professionals." In 1984, four of these sessions will be offered in Washington and the fifth will be held in Los Angeles. The faculty is comprised of access law experts from sev-

Cont'd on next page

New Feature

In this issue, *FOIA Update* inaugurates a new recurring feature, "Under Advisement" (page 9), which will point out pending litigation cases in which FOIA issues of particular significance are expected to be decided in the near future.

Inside Update

OIP Guidance: Congressional Access Under the FOIA pp. 3-4
FOIA Counselor: The Unique Protection of Exemption 2 pp. 10-11
Index to FOIA Update, Vols. I-IV pp. i-iv

...Varied FOIA Training Available

eral agencies and the Office of Information and Privacy.

LEI's training of legal personnel in the FOIA area goes back several years, but the current course was revised considerably in 1982. As it is now presented, the course is comprised of overview and case update lectures, a discussion of current FOIA policy issues; workshops on various FOIA exemptions and procedural issues, and a detailed explanation of the *Vaughn* requirements by an Assistant United States Attorney. It has been specifically made available to access professionals as well as attorneys and has been one of LEI's most heavily demanded course offerings over the past two years. A basic knowledge of the FOIA is usually required for participation.

In late 1983, based upon an OIP training survey showing a great demand for more advanced FOIA training, LEI inaugurated its "Advanced Seminar on the Freedom of Information Act." Intended for the principal FOIA officers at federal agencies or their designees, this one-day seminar includes specialized presentations and workshops on selected FOIA issues and will now be offered twice per year.

Also offered twice per year is LEI's new one-day Privacy Act seminar, which originated as part of its larger two-day information law course before it became a separate seminar early in 1983.

• **The Office of Personnel Management's Center for Communications and Administrative Management**—which, through its Administrative Management Training Institute, offers six FOIA/PA sessions yearly in the Washington area. Established during the winter of 1975-1976, OPM's "Successful Implementation of the Freedom of Information Act and the Privacy Act" is directed toward the new employee or the one with little FOIA/PA experience.

It is offered three times yearly, as is OPM's companion course, "FOIA

and Privacy Act Workshop for Administrative and Secretarial Personnel." The workshop is described by its instructor as a "nuts and bolts" course directed toward those involved in the receipt and processing of FOIA/PA requests.

All six Washington sessions are taught by William H. Harader, Director of the Center for Governmental Services and Professor of Political Science at Indiana State University. Harader was at OPM during the academic year of 1975-1976 as an exchange employee under the Intergovernmental Personnel Act. During that time, he worked with Office of Management and Budget employees and with OMB's Privacy Act guidelines to develop a Privacy Act course. Later, he worked with the Justice Department to add material on the FOIA.

• **The Office of Personnel Management's Government Affairs Institute**—which offers an annual two-day symposium on the FOIA. Professor Harader, who coordinates this symposium with OPM's Patti Shostek, describes the symposium as directed toward top level personnel concerned with new legislative, policy, and case law developments. It generally draws about 150 persons, despite being held in mid-August, and is open governmentwide. This year will see the sixth annual offering

of this FOIA program and, according to OIP Co-Director Dan Metcalfe, who has spoken at each program, it is "highly regarded and recommended."

• **The Office of Personnel Management's Regional Training Centers**—which have scheduled 17 two-day sessions on the FOIA and the Privacy Act for 1984. Response to the FOIA/PA course in the OPM regions varies. For example, the Denver Region Training Center recently offered a FOIA/PA course taught by the trainer from Dallas; the session filled quickly and some people were turned away. In other regions, however, demand has decreased in recent years. One region ran as many as nine sessions yearly, but is now down to three.

• **The U.S. Department of Agriculture Graduate School**—which offers a three-day course on information access laws four times a year and a two-day FOIA and Privacy Act course four times yearly. The three-day course on access laws was established in 1983. Course instructor Francis Seng says, "It's not for people just starting out in the field ... it's not a primer course." Instead, he says, instruction deals with the laws that regulate custody, management and disclosure of government information.

The two-day course at USDA is specifically directed at the FOIA and the Privacy Act. Instructors from the Office of Information and Privacy and other government agencies serve as the faculty. Now undergoing substantial revision, the course currently opens with an overview of the FOIA, focusing on procedural and exemption issues, and then moves into a detailed description of the Privacy Act, and a final summary comparing the two Acts. The course is aimed at students with little or no experience in these areas.

• **The American Society of Access Professionals (ASAP)**—which, since its establishment in late 1980,

Cont'd on p. 6



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

FOIA UPDATE

OIP Guidance

Congressional Access Under FOIA

A particularly delicate issue arising under the Freedom of Information Act is the proper treatment of FOIA requests received from Members of Congress. Such requests may be made for a variety of different purposes—such as in aid of a specific or general legislative function, on behalf of a constituent, or even as a matter of a Member's primarily personal interest. In responding to such requests, with their inherent implications for Executive/Legislative Branch relations, federal agencies can face troubling disclosure decisions and are often uncertain as to where they should, or must, "draw the line."

Fortunately, the FOIA contains language within its subsection (c) specifically addressing the subject of congressional access. The exact meaning of this language, though, is less than crystal clear, as it succinctly states only that "[the FOIA] is not authority to withhold information from Congress." 5 U.S.C. §552(c). Such phrasing leaves somewhat unclear exactly which requests should be treated as special ones "from Congress." Unfortunately, this has been clouded even further by the D.C. Circuit's highly questionable opinion in *Murphy v. Department of the Army*, 613 F.2d 1151 (D.C. Cir. 1979).

THE MURPHY DECISION

In *Murphy*, a FOIA requester argued that the Army had "waived" its right to protect requested records under Exemption 5 because it had provided the records to a Member of Congress. See 613 F.2d at 1155. While the congressman involved had an undeniable official interest in the records' subject matter (a proposed public works project within his district), it was undisputed that he had obtained them in his capacity as an individual Member, not through a formal committee or subcommittee request. See *id.* at 1153 & n.2.

In an opinion written by District Court Judge Harold H. Greene (sitting by special designation), the D.C. Circuit refused to find "waiver" under such circumstances, but it did so by relying exclusively on the operation of FOIA subsection (c). See *id.* at 1155-56. In so doing, Judge Greene's opinion interpreted subsection (c) expansively, suggesting that it requires unexempted FOIA access for any request made by a Member of Congress in his or her official capacity. See *id.* at 1156-58.

To be sure, the "non-waiver" outcome reached in *Murphy* seems entirely correct, particularly according to the law of waiver as it has developed under the FOIA. See

FOIA Update, Spring 1983, at 6. But the *Murphy* opinion's analysis and application of subsection (c) are quite troubling. In the past, the Department of Justice has not fully confronted *Murphy*, but instead strained to minimize its significance to subsection (c) determinations by rationalizing that subsection (c) "was not indispensable" to *Murphy*'s outcome. *FOIA Update*, Summer 1980, at 4. However, there is just no getting around the fact that the *Murphy* opinion, on its face, is based entirely upon its aberrational reading of subsection (c), and this has given pause to many agency officials considering access requests from individual Members of Congress.

THE PROPER SUBSECTION (C) "LINE"

Therefore, so that there should no longer be any doubt or hesitation among federal agencies on this point, it is now stated unequivocally, as a matter of Department of Justice FOIA policy, that the "line" within subsection (c) should be drawn between requests made by a House of Congress as a whole (including through its committee structure), on one hand, and requests from individual Members of Congress on the other. Even where a FOIA request is made by a Member clearly acting in a completely official capacity, such a request does not properly trigger the special access rule of subsection (c) unless it is made by a committee or subcommittee chairman, or otherwise under the authority of a committee or subcommittee. Insofar as the *Murphy* opinion indicates otherwise, it should not be followed.

This approach to the issue, *Murphy* notwithstanding, is strongly compelled by several considerations. First and foremost, the FOIA's legislative history makes it clear that precisely such a construction of subsection (c) was intended. See H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11-12 (1966) ("Members of Congress have all of the rights of access guaranteed to 'any person' [under the FOIA], and the Congress has additional rights of access to all Government information which it deems necessary to carry out its functions."); S. Rep. No. 813, 89th Cong., 1st Sess. 10 (1965); *Federal Public Records Law: Hearings on H.R. 5012, et. al. Before Subcomm. of the Government Operations Comm., 89th Cong., 1st Sess. 23 (1965)* (Statement of Rep. Moss). See also 5 U.S.C. §552a(b)(9) (identical "line" drawn under the Privacy Act of 1974).

Such a construction also fully comports with the access rules traditionally applied in non-FOIA contexts, which

... Congressional FOIA Access

limit congressional access along exactly the same lines. *See, e.g., Exxon Corp. v. FTC*, 589 F.2d 582, 592-94 (D.C. Cir. 1978) ("The principle is important that disclosure of information can only be compelled by authority of Congress, its committees and subcommittees, not solely by individual members."), *cert. denied*, 441 U.S. 943 (1979); *see also Liveright v. United States*, 347 F.2d 473, 474-75 (D.C. Cir. 1965) (congressional subpoena not valid unless issued by subcommittee chairman with full, express authority of subcommittee). Indeed, this rule was expressly applied in a recent decision denying Senator Jesse Helms' non-FOIA bid for special access to FBI records on Martin Luther King, Jr. *See Lee v. Kelley*, 99 F.R.D. 340, 342-43 & n.2 (D.D.C. 1983), *petition for mandamus denied*, No. 83-2090 (D.C. Cir. Oct. 19, 1983) (appeal docketed, Nos. 83-2141, 83-2142 (D.C. Cir. Oct. 28, 1983)).

FOIA PRACTICE

It is also significant that several FOIA requests from individual Members of Congress have been litigated through the years, including requests unquestionably made in a Member's official capacity, without it ever having been held that such requests qualify for special access under subsection (c). *See, e.g., Aspin v. Department of Defense*, 491 F.2d 24, 26 (D.C. Cir. 1973); *Mink v. EPA*, Civil No. 71-1614, slip op. at 1 (D.D.C. Aug. 27, 1971) (rejecting such a special access argument), *rev'd on other grounds*, 464 F.2d 742, 744 (D.C. Cir. 1972), *rev'd on other grounds*, 410 U.S. 73 (1973). *Cf. Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297, 300 (D.D.C.), *aff'd*, 548 F.2d 977 (D.C. Cir. 1976). It is therefore not at all surprising that the contrary interpretation of subsection (c) employed in *Murphy* was pointedly and persuasively criticized in a subsequent D.C. Circuit case. *See FTC v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 978-79 (D.C. Cir. 1980) (Wald, J., concurring in part, dissenting in part).

Moreover, such a demarcation within subsection (c) is most sensible from a practical standpoint as well. Were the "line" to be drawn otherwise, then any individual Member of Congress, acting out of some official interest in the subject matter of an agency record, could personally compel its disclosure without regard for its exempt status under the FOIA. Such a practice would not only pose a myriad of difficulties for federal agencies, it would be directly contrary to the traditional manner in which the Executive and Legislative Branches interact. *See, e.g., Exxon Corp. v. FTC*, *supra*, 589 F.2d at 592-94; *see also FTC v. Owens-Corning Fiberglas Corp.*, *supra*, 626 F.2d at 978-79 (Wald, J.).

DISCRETIONARY DISCLOSURE

This is not to say, however, that agencies are without discretion to make broad FOIA disclosures to individual

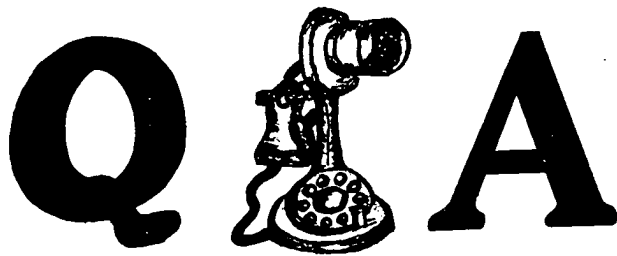
Members of Congress under appropriate circumstances. *Accord Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979) (FOIA exemptions are discretionary, not mandatory). Recognizing the importance of federal information flow to effective congressional relations, Executive Branch agencies should of course give very careful consideration to any access request received from a Member of Congress, with discretionary disclosure often a possibility. And where an agency makes such a discretionary disclosure in furtherance of a legitimate governmental interest, together with careful restrictions on further dissemination, it should be able to resist an argument that such action constitutes a "waiver" of FOIA exemptions. *See FOIA Update*, Spring 1983, at 6.

On the other hand, however, agencies must remember that certain types of information exempted under the FOIA are prohibited from disclosure by other rules or statutes, *see, e.g., Rule 6(e) of the Federal Rules of Criminal Procedure* (grand jury information), and that agency discretion to disclose such information is necessarily circumscribed, *see, e.g., United States v. Sells Engineering, Inc.*, 103 S.Ct. 3133, 3140-49 (1983) (strict limitations placed on disclosure of grand jury information). Moreover, even where the special congressional access rule of subsection (c) is clearly applicable, an agency could still refuse to disclose requested information based upon an authorized assertion of executive privilege by the head of the agency. *See President's Memorandum for the Heads of Executive Departments and Agencies Re: Procedures Governing Responses to Congressional Requests for Information* (Nov. 4, 1982) (requiring specific Presidential authorization for any invocation of executive privilege in response to a congressional access request).

CONCLUSION

In sum, when an agency receives a FOIA request from a Member of Congress, it should first determine whether it is a duly authorized request on behalf of Congress through a legislative committee or subcommittee. If so, then the request falls within subsection (c) of the FOIA and only a specially authorized claim of executive privilege could be interposed to justify nondisclosure. Any FOIA request submitted by the chairman of a committee or subcommittee on a subject within its jurisdiction should routinely fall into this category. On the other hand, if the request is not an official committee or subcommittee request, then the agency should process it as a request from "any person" under the FOIA, but with particular regard for the considerations of congressional relations, discretionary disclosure and waiver referred to above.

This guidance clarifies and updates the Department's 1980 policy statement on this subject, in which the same statutory interpretation was suggested.

FOIA Counselor (FTS) 724-7400**How should an agency charge applicable search fees when it has more than one request for the same records?**

The fee provision of the FOIA provides that an agency may charge fees to recover "the direct costs of [document] search and duplication." 5 U.S.C. §552(a)(4)(A). Accordingly, once an agency commences a search pursuant to a FOIA request for certain records, subsequent FOIA requesters of the same records should not be charged search fees; inasmuch as that is a cost that is normally incurred by a first requester only, it cannot be considered a "direct cost" for subsequent requesters.

Equitable considerations require application of a different rule, however, when an agency has more than one request for the same records in a pending request backlog. In such instances, even though one request will probably have been made before the others, agencies should process the requests together and should apportion the search fees evenly among all existing requesters. The key point in this latter situation is that at the time at which the search efforts are commenced, those efforts must fairly be regarded as being expended on behalf of all persons with requests pending for the records in question.

How far does an agency have to extend its review efforts to make sure that requested information withholdable under the FOIA has not previously been made public?

As a general rule, an agency need not conduct a collateral "investigation" to determine whether information protectible under one or more of the FOIA's exemptions has previously been disclosed, at least not in the absence of a specific demonstration by the requester that such a disclosure has been made. *See Williams v. United States Department of Justice*, 556 F. Supp. 63, 66 (D.D.C. 1982) (refusing to impose upon an agency an obligation to investigate the possibility that privacy interests of individuals mentioned in ABSCAM files "may have been breached in the course of many-faceted proceedings occurring in different courts over a period of prior years," because the plaintiff had "presented no specific, concrete cases of withheld materials that have been made public in [such] proceedings"); *see also, e.g., Dow, Lohnes & Alberison v. Presidential Commission on Broadcasting to Cuba*, Civil No. 82-0929, slip op. at 14-15 (D.D.C. Jan. 23, 1984) ("plaintiff fail[ed] to demonstrate that the withheld information has already been specifically revealed to the

public") (emphasis in original). Similarly, in a "prepublication review" case, the D.C. Circuit Court of Appeals recently held that the CIA "cannot reasonably bear the burden of conducting an exhaustive search to prove that a given piece of information is not published anywhere." *McGehee v. CIA*, 718 F.2d 1137, 1141 n.9 (D.C. Cir. 1983). *See also Dunaway v. Webster*, 519 F. Supp. 1059, 1078 & n.17 (N.D. Cal. 1981) (Exemption 7(C) upheld to protect identities of individuals of investigative interest to FBI, despite plaintiff's claim that some might be deceased, because "it would be a task beyond the scope of reasonable endeavor to expect the government to track them all down"); *but see also Diamond v. FBI*, 532 F. Supp. 216, 227 (S.D.N.Y. 1981) (ordering agency to re-check its files, including some 200,000 pages outside the scope of the request, to determine whether each individual whose identity was protected pursuant to Exemption 7(C) in documents thirty years old was still alive and, if so, whether he had "indicated in any manner preferences about disclosing his name and involvement"), *aff'd on other grounds*, 707 F.2d 75, 77 n.2 (2d Cir. 1983), *cert. denied*, 52 U.S.L.W. 3548 (U.S. Jan. 23, 1984) (No. 83-258).

It should be remembered, however, that prior official public disclosures can hardly be ignored in FOIA processing. *See, e.g., Tigar & Buffone v. United States Department of Justice*, Civil No. 80-2382, slip op. at 10-11 (D.D.C. Sept. 30, 1983) (FOIA affiant must be familiar with matters that were subjects of public congressional hearings and criminal prosecutions). *See also FOIA Update*, Spring 1983, at 6 (discussing standards governing "waiver" under the FOIA).

Do agencies have a duty under the FOIA to answer written questions?

No, not unless such a question can fairly be read as constituting a "reasonably describe[d]" request for access to particular records within the meaning of 5 U.S.C. §552(a)(3). The Supreme Court has squarely held that the FOIA does not require agencies to "create explanatory material." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 162 (1974). *See also, e.g., Borom v. Crawford*, 651 F.2d 500, 501 (7th Cir. 1981) (FOIA does not require the compilation of statistical data); *Krohn v. Department of Justice*, 628 F.2d 195, 198 (D.C. Cir. 1980) (same); *Giza v. HEW*, 628 F.2d 748, 751 (1st Cir. 1980) (agency expert could not be compelled to explain statements in previously disclosed records); *but see also Diamond v. FBI*, 487 F. Supp. 774, 777 (S.D.N.Y. 1979) (FBI required to provide a description of technical jargon and abbreviations which would be unintelligible to the average layman), *aff'd on other grounds*, 707 F.2d 75 (2d Cir. 1983), *cert. denied*, 52 U.S.L.W. 3548 (U.S. Jan. 23, 1984) (No. 83-258). However, while agencies do not have to create or compile new records in response to FOIA requests (whether formulated in question form or not), they should make good faith efforts to assist requesters in honing any requests for readily accessible records which are "inartfully presented in the form of questions." *Ferri v. Bell*, 645 F.2d 1213, 1220 (3d Cir. 1981).

...FOIA Reform Bill Moves to House

Cont'd from p. 1

statement issued on the day following Senate passage, Chairman English promised to schedule hearings on S. 774 very soon, but suggested that further House action on the bill should not necessarily be expected this year.

In other action on a separate FOIA proposal, the Senate on December 14 passed S. 1324, a bill aimed at providing the CIA with a categorical FOIA exclusion for certain of its operational files. This bill was jointly referred to the House Permanent Select Committee on Intelligence and to

Chairman English's subcommittee of the Government Operations Committee. Its progress through the House cannot yet be predicted.

Also before Chairman English's subcommittee in the House is a bill that would preclude the Justice Department's argument to the Supreme Court (see "Supreme Court Update" on p. 9 of this issue of *FOIA Update*) that the Privacy Act of 1974 can serve as an Exemption 3 statute under the FOIA. Introduced on January 31 by Chairman English and several other congressmen, H.R. 4696 would amend subsection (q) of the Privacy

Act, 5 U.S.C. §552a(q), to achieve its objective.

For a description of the provisions of S. 774 as approved by the full Senate, see the Summer 1983 issue of *FOIA Update* at pp. 1-2. The only modifications to S. 774 made upon final Senate passage were the removal of the proposed technological data exemption, in light of the special Exemption 3 protection for such data obtained by the Defense Department in its authorization bill last year (see 10 U.S.C. §140c), and the deletion of the term "royalty" from section 2 of the bill.

...Varied FOIA Training Available

Cont'd from p. 2

has offered annual training sessions on the FOIA and the Privacy Act. Lt. Col. William C. Goforth, ASAP training committee co-chairman, terms the ASAP half-day sessions "basic training for the novice or the person who has FOIA as an additional duty."

Col. Goforth says the FOIA sessions generally open with an overview, additional sessions deal with the exemptions, and the final program in the series presents a panel of managers who discuss problems and solutions.

Goforth estimates that there were approximately 250 paying attendees for the five FOIA courses in 1983 and that attendance has risen in each of the three years ASAP has offered the courses. Sessions are taught by personnel from government agencies and from the private sector.

* * * * *

Other such programs or seminars run locally have included an annual fall seminar on the FOIA and the Privacy Act sponsored by the Center for National Securities Studies, the American Civil Liberties Union, and the FOI Clearinghouse, as well as FOIA programs presented from time to time by the American Bar Association and the Federal Bar Association.

In-House Training

In addition, in-house courses, seminars, and training sessions are available in several federal agencies or in particular components where certain common issues can be identified.

For example, the Department of the Interior in the past year reinstituted earlier in-house training for FOIA officers and others dealing with the law. John D. Trezise, an assistant solicitor at Interior, says the new course was offered in 1983 to some 65 to 70 persons, the majority of whom had no prior training. A 300-page training manual was prepared for the course, with material focused on Exemptions 4 and 5 and, to a lesser extent, Exemptions 6 and 7. In addition, the course covered "nuts and bolts" procedural issues. Since the first 1983 sessions, condensed versions were held for program officers in various Interior Department components.

The Department of Health and Human Services also has an extensive program with personnel from its FOIA Office and its Office of the General Counsel offering training for all FOIA officers and to individual components throughout the year. In 1983, FOIA training was also held in five HHS regional offices. Similar field training is offered by FOIA personnel at both the Department of En-

ergy and the Department of Housing and Urban Development.

At the FBI, comprehensive training for both Headquarters and Field Office staff is a longstanding tradition, and even now when there are not as many new FOIA/PA employees, the Bureau does frequent updating and also holds an annual seminar at the FBI Academy at Quantico. Likewise, the Department of Defense and its components offer a wide range of in-house training in FOIA to supplement the programs available through LEI and the other outside trainers.

Special OIP Training

Finally, the Office of Information and Privacy provides specialized FOIA training upon request at individual federal agencies. During 1983, special training sessions were conducted by OIP attorneys at such agencies as the Department of Labor, the State Department, ACTION and the Merit Systems Protection Board. In a more specialized session, OIP's two co-directors spoke at a day-long FOIA training seminar presented for all inspectors general and their staffs under the auspices of the President's Council on Integrity and Efficiency last March.

(See page 12 of this issue for a listing of currently scheduled FOIA training opportunities.)

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

FOIA UPDATE

INDEX TO *FOIA UPDATE*

Volumes I-IV 1979-1983

This cumulative index covers all issues of *FOIA Update* from its inception in late 1979 through the end of 1983.

The citation at each entry is to the volume, the number and the page of the issue. A second citation is provided where an item has been updated or superseded.

POLICY GUIDANCE

When to Assert the Deliberative Privilege Under FOIA Exemption Five: Vol. I, No. 1, p. 3
Business Confidentiality After *Chrysler*: Vol. I, No. 2, p. 3 (see also Vol. III, No. 3, p. 3)
Status of Internal Audit Reports Under the FOIA: Vol. I, No. 3, p. 3
Release of Exempt Information to Members of Congress: The Impact of the *Murphy* Decision: Vol. I, No. 4, p. 3 (see also Vol. V, No. 1, p. 3)
Guidance on Fee Waivers: Vol. II, No. 1 p. 3 (superseded; see Vol. IV, No. 1, p. 3)
Similar Files: A Concept in Peril: Vol. II, No. 2, p. 3
Attorney General's Memo on FOIA: Vol. II, No. 3, p. 3
Submitters' Rights: Vol. III, No. 3, p. 3
Privacy Protection Considerations: Vol. III, No. 4, p. 3
Fee Waiver Policy Guidance: Vol. IV, No. 1, p. 3 (see also Vol. IV, No. 2, p. 5; Vol. IV, No. 4, p. 14)
The Privacy Act and FOIA Exemption 3: Vol. IV, No. 2, p. 3
When to Expedite FOIA Requests: Vol. IV, No. 3, p. 3
Copyrighted Materials and the FOIA: Vol. IV, No. 4, p. 3

FOIA COUNSELOR

Consultations Still Informal: Vol. I, No. 1, p. 2
What is a FOIA Request? Vol. I, No. 2, p. 2
Privacy Act/FOIA: Conflict or Harmony? Vol. I, No. 3, p. 5 (superseded; see Vol. IV, No. 2, p. 3)
The "High" and "Low" of Exemption Two: Vol. I, No. 4, p. 6 (see also Vol. V, No. 1, p. 10)
What is an Agency Record? Vol. II, No. 1, p. 5
Disclosure of Prices: Vol. II, No. 2, p. 5 (superseded; see Vol. IV, No. 4, p. 10)
Federal Job Data May Be Disclosed: Vol. II, No. 3, p. 4 (see also Vol. III, No. 4, p. 3)
Paths to Information: Vol. III, No. 1, p. 10
Discovery, the Privacy Act and FOIA: Vol. III, No. 2, p. 3
Protecting "Outside" Advice: Vol. III, No. 3, p. 10
Factoring in the "Public Interest": Vol. III, No. 4, p. 6
Fee Waiver Procedural Considerations: Vol. IV, No. 1, p. 4

The Effect of Prior Disclosure: Waiver of Exemptions:

Vol. IV, No. 2, p. 6
Attorney Work-Product Protection: Vol. IV, No. 3, p. 6
Unit Prices Under Exemption 4: Vol. IV, No. 4, p. 10

FOIA COUNSELOR Q & A

Are personal notes subject to the FOIA? Vol. III, No. 3, p. 5
What are the rights of foreign nationals under the FOIA? Vol. III, No. 3, p. 5
What document referral practices should be followed? Vol. III, No. 3, p. 5 (see also Vol. IV, No. 3, p. 5)
Can the privacy of a public figure be protected under the FOIA? Vol. III, No. 4, p. 5
Can the public interest balanced under Exemptions 6 and 7(C) compel nondisclosure? Vol. III, No. 4, p. 5
Does FOIA privacy protection extend to corporations? Vol. III, No. 4, p. 5
Can the privacy of deceased persons be protected under the FOIA? Vol. III, No. 4, p. 5
Must mailing lists be disclosed under the FOIA? Vol. III, No. 4, p. 5
What showing is necessary to satisfy the threshold requirement of Exemption 7? Vol. IV, No. 1, p. 6
Are drafts absolutely protected under Exemption 5? Vol. IV, No. 1, p. 6
Can a FOIA requester go to court before the completion of the administrative process? Vol. IV, No. 1, p. 6
To what standards are agencies generally held on "adequacy of search" issues? Vol. IV, No. 1, p. 6
How are minimum payment thresholds established for FOIA fees? Vol. IV, No. 2, p. 5
Can an agency refuse to admit the existence of records? Vol. IV, No. 2, p. 5
Is one agency's recommendation to another agency a final opinion? Vol. IV, No. 2, p. 5
Can an agency deny a FOIA request which requires a burdensome search or encompasses an enormous volume of records? Vol. IV, No. 3, p. 5
May an agency invoke Exemption 7(D) to protect the identity of, and information provided by, a deceased informant? Vol. IV, No. 3, p. 5

How should an agency respond to a FOIA request for records which are subject to a court order prohibiting disclosure? Vol. IV, No. 3, p. 5

What action can be taken against an employee who improperly denies a FOIA request? Vol. IV, No. 3, p. 5

Should the practice of referring requested documents be altered by the *McGehee* decision? Vol. IV, No. 3, p. 5

What "cutoff" practices should be followed? Vol. IV, No. 4, p. 14

Can Exemption 4 be applied to personal financial information? Vol. IV, No. 4, p. 14

Does commercial information lose its Exemption 4 status with the passage of time? Vol. IV, No. 4, p. 14

How should the fourth criterion of the Justice Department's fee waiver guidance be applied to the media? Vol. IV, No. 4, p. 14

Can commercial information be protected under Exemption 5? Vol. IV, No. 4, p. 14

Is there a "third prong" of the *National Parks* test? Vol. IV, No. 4, p. 15

GUEST ARTICLES

Information Policy Around the World: Vol. II, No. 4, p. 7

An Overview of Executive Order 12356: Vol. III, No. 3, p. 6

The Case Against *National Parks*: Vol. IV, No. 4, p. 8

APPROACHING THE BENCH

Guidelines for Agencies in Litigation: Vol. I, No. 1, p. 7

Affidavits: Vol. I, No. 2, p. 7; Vol. I, No. 3, p. 7

Open America Stays: Vol. I, No. 4, p. 7

In Camera Inspection: Vol. II, No. 1, p. 7

Initial Litigation Strategies: Vol. II, No. 2, p. 7

Determining Attorney's Fees: Vol. II, No. 3, p. 3

Eligibility and Entitlement (Attorney's Fees): Vol. II, No. 4, p. 3

LEGISLATIVE MATTERS

FOIA Oversight Committees Named: Vol. II, No. 2, p. 2

Hearings Scheduled on FOIA: Vol. II, No. 3, p. 1

Highlights of Testimony: Agency-FOIA Areas of Concern: Vol. II, No. 4, p. 1

Congress Approves FOIA-Tax Action: Vol. II, No. 4, p. 6

FOIA Reform Proposed (Discussion and Full Text):

Vol. III, No. 1, p. 3

FOIA Reform Bill Moves Forward: Vol. III, No. 2, p. 1

Senate Committee Approves Broad FOIA Reform Bill:

Vol. III, No. 3, p. 1

FOIA Reform Bill Advances Toward Passage in Senate:

Vol. IV, No. 2, p. 1

Senate Committee Approves FOIA Bill: Vol. IV, No. 3, p. 1

SURVEYS

Problems With Time: Vol. II, No. 4, p. 4

Recordkeeping Procedures Examined: Vol. III, No. 1, p. 1

Submitter Notice Practices: Vol. III, No. 3, p. 4 (see also Vol. IV, No. 4, p. 1)

Privacy Protection Practices Examined: Vol. III, No. 4, p. 1

Survey Shows Training Needs: Vol. III, No. 4, p. 8

Fees: Vol. IV, No. 1, p. 1

Predisclosure Business Notification Procedures: Vol. IV, No. 4, p. 1

UPDATES

Supreme Court Update: Vol. III, No. 1, p. 10; Vol. III, No. 2, p. 5; Vol. III, No. 3, p. 9; Vol. IV, No. 3, p. 1; Vol. IV, No. 4, p. 11

Basic FOIA References: Vol. I, No. 1, p. 5; Vol. I, No. 3, p. 6; Vol. III, No. 3, p. 12

FOIA Legal and Administrative Contacts at Federal Agencies: Vol. III, No. 4, pp. i-iv

Update on FOIA Case List Citations: Vol. IV, No. 2, p. 2

REFERENCE BY EXEMPTIONS

Exemption 1

Military Audit Project v. Casey (partial disclosure does not render implausible a claim of national security protection): Vol. II, No. 3, p. 6

Stein v. Department of Justice (courts not required to conduct "true" *de novo* review in Exemption 1 cases):

Vol. III, No. 2, p. 4

Guest Article: An Overview of Executive Order 12356:

Vol. III, No. 3, p. 6

Taylor v. Department of the Army (Exemption 1 can be applied to compilations of documents not classified in component parts): Vol. III, No. 4, p. 4

Salisbury v. United States (classification of information similar to that previously disclosed; the "mosaic" approach; excluding counsel from *in camera* proceedings): Vol. IV, No. 1, p. 5

Afshar v. Department of State (classification of information similar to that publicly disclosed): Vol. IV, No. 2, p. 4

Can an agency refuse to admit the existence of records? Vol. IV, No. 2, p. 5

Exemption 2

The "High" and "Low" of Exemption Two: Vol. I, No. 4, p. 6 (see also Vol. V, No. 1, p. 10)

Crooker v. BATF (two-part test for law enforcement manuals): Vol. III, No. 2, p. 4

Exemption 3

Piccolo v. U.S. Department of Justice (grand jury materials): Vol. II, No. 3, p. 6

Phillippi v. CIA (refusal to confirm or deny; 50 U.S.C. §403(d)(3)): Vol. II, No. 4, p. 5

Fund for Constitutional Government v. National Archives & Records Service (grand jury materials): Vol. II, No. 4, p. 5

Baldrige v. Shapiro (census data): Vol. II, No. 2, p. 5

Greentree v. U.S. Customs Service (Privacy Act held not an Exemption 3 statute): Vol. III, No. 3, p. 8

Washington Post Co. v. Department of State (diplomatic "Emergency Fund" expenditures; "displacement" theory): Vol. IV, No. 1, p. 5; Vol. IV, No. 4, p. 11

The Privacy Act and FOIA Exemption 3: Vol. IV, No. 2, p. 3

Copyrighted Materials and the FOIA: Vol. IV, No. 4, p. 3
Porter v. Department of Justice (Privacy Act held not an Exemption 3 statute): Vol. IV, No. 4, p. 6
Provenzano v. Department of Justice (Privacy Act held not an Exemption 3 statute): Vol. IV, No. 4, p. 6
Sims v. CIA (definition of "intelligence source" in National Security Act of 1947): Vol. IV, No. 4, p. 6

Exemption 4

Business Confidentiality After *Chrysler*: Vol. I, No. 2, p. 3 (see also Vol. III, No. 3, p. 3)
 Note Concerning Prosecutions Under 18 U.S.C. §1905, the Trade Secrets Act: Vol. I, No. 2, p. 6
 Disclosure of Prices: Vol. II, No. 2, p. 5 (superseded; see Vol. IV, No. 4, p. 10)
Worthington Compressors, Inc. v. Costle ("reverse engineering"): Vol. III, No. 1, p. 9
 Submitters' Rights: Vol. III, No. 3, p. 3
 Submitter Notice Practices: Vol. III, No. 3, p. 4 (see also Vol. IV, No. 4, p. 1)
Public Citizen Health Research Group v. FDA ("trade secrets" definition narrowed): Vol. IV, No. 3, p. 4
 Protecting Business Information: Vol. IV, No. 4, p. 1
 Predisclosure Business Notification Procedures: Vol. IV, No. 4, p. 1
 Copyrighted Materials and the FOIA: Vol. IV, No. 4, p. 3
 The Case Against *National Parks*: Vol. IV, No. 4, p. 8
 Unit Prices Under Exemption 4: Vol. IV, No. 4, p. 10
 Can Exemption 4 be applied to personal financial information? Vol. IV, No. 4, p. 14
 Does commercial information lose its Exemption 4 status with the passage of time? Vol. IV, No. 4, p. 14
 Is there a "third prong" of the *National Parks* test? Vol. IV, No. 4, p. 15

Exemption 5

When to Assert the Deliberative Privilege Under FOIA Exemption Five: Vol. I, No. 1, p. 3
 Impact of *Federal Open Market Committee v. Merrill*: Vol. I, No. 1, p. 5
 Status of Internal Audit Reports Under the FOIA: Vol. I, No. 3, p. 3
Taxation with Representation Fund v. IRS (predecisional documents relied on as final opinions): Vol. II, No. 3, p. 6
County of Madison v. U.S. Department of Justice (settlement documents): Vol. II, No. 3, p. 6
Pies v. IRS (draft documents): Vol. III, No. 2, p. 4
Grolier, Inc. v. FTC (attorney work-product): Vol. III, No. 3, p. 8; Vol. IV, No. 3, p. 1
Martorano v. Department of Justice (attorney work-product): Vol. III, No. 3, p. 8
Playboy Enterprises v. Department of Justice (selection of facts): Vol. III, No. 3, p. 8
Government Land Bank v. GSA (realty appraisals): Vol. III, No. 3, p. 9
 Protecting "Outside" Advice: Vol. III, No. 3, p. 10
Skelton v. U.S. Postal Service (final opinion; incorporation by reference): Vol. III, No. 4, p. 4
Weber Aircraft Corp. v. United States (privilege for air-

craft accident safety investigations): Vol. IV, No. 1, p. 5; Vol. IV, No. 3, p. 2; Vol. IV, No. 4, p. 11
Conoco Inc. v. Department of Justice (uncirculated handwritten notes): Vol. IV, No. 1, p. 5
 Are drafts absolutely protected under Exemption 5? Vol. IV, No. 1, p. 6
 Is one agency's recommendation to another agency a final opinion? Vol. IV, No. 2, p. 5
 Attorney Work-Product Protection: Vol. IV, No. 3, p. 6
 Can commercial information be protected under Exemption 5? Vol. IV, No. 4, p. 14

Exemption 6

Similar Files: A Concept in Peril: Vol. II, No. 2, p. 3
 Federal Job Data May Be Disclosed: Vol. II, No. 3, p. 4 (see also Vol. III, No. 4, p. 3)
Washington Post Co. v. U.S. Department of State (similar files): Vol. II, No. 4, p. 5; Vol. III, No. 3, p. 9
Brown v. FBI (privacy of victim who testified at trial): Vol. III, No. 1, p. 9
 Privacy Protection Practices Examined: Vol. III, No. 4, p. 1
 Privacy Protection Considerations: Vol. III, No. 4, p. 3
Holy Spirit Ass'n v. FBI (identities of persons reporting illegal activities): Vol. III, No. 4, p. 4
Arieff v. Department of the Navy ("mosaic" principle in Exemption 6 context): Vol. III, No. 4, p. 4; Vol. IV, No. 4, p. 6
 Can the privacy of a public figure be protected under the FOIA? Vol. III, No. 4, p. 5
 Can the public interest balanced under Exemptions 6 and 7(C) compel nondisclosure? Vol. III, No. 4, p. 5
 Can FOIA privacy protection extend to corporations? Vol. III, No. 4, p. 5
 Can the privacy of deceased persons be protected under the FOIA? Vol. III, No. 4, p. 5
 Must mailing lists be disclosed under the FOIA? Vol. III, No. 4, p. 5
 Factoring in the "Public Interest:" Vol. III, No. 4, p. 6
Washington Post v. HHS (personal financial data; balancing factors): Vol. IV, No. 1, p. 5
Minnis v. United States Department of Agriculture (mailing list): Vol. IV, No. 3, p. 4
American Federation of Government Employees v. United States (labor union access to home addresses of employees it represents): Vol. IV, No. 4, p. 7
Stern v. FBI (disclosure of identities of censured FBI agents): Vol. IV, No. 4, p. 7

Exemption 7

Status of Internal Audit Reports Under the FOIA: Vol. I, No. 3, p. 3
Abramson v. FBI (derivative Exemption 7 protection): Vol. II, No. 4, p. 5; Vol. III, No. 3, p. 9
Fund for Constitutional Government v. National Archives & Records Service (7(C)/public officials who were investigated but not indicted): Vol. II, No. 4, p. 5
Radovich v. U.S. Attorney, District of Maryland (7(D)/information furnished by confidential source): Vol. III, No. 1, p. 9

Bast v. U.S. Department of Justice (7(C)/importance of judicial impartiality in privacy balance): Vol. III, No. 1, p. 4

Pratt v. Webster (Exemption 7 threshold for criminal law enforcement agencies): Vol. III, No. 2, p. 4

Miller v. Bell (7(C)/"watchdog" activities; 7(D)/ promise of confidentiality inherent in FBI interview): Vol. III, No. 2, p. 5

Holy Spirit Ass'n v. FBI (7(C)/identities of persons reporting illegal activities): Vol. III, No. 4, p. 4

Alirez v. NLRB (7(C)/extent of withholding required to mask individual's identity): Vol. III, No. 4, p. 4

Can the privacy of a public figure be protected under the FOIA? (7(C)): Vol. III, No. 4, p. 5

Can the public interest balanced under Exemptions 6 and 7(C) compel nondisclosure? Vol. III, No. 4, p. 5

Can FOIA privacy protection extend to corporations? (7(C)): Vol. III, No. 4, p. 5

Can the privacy of deceased persons be protected under the FOIA? (7(C)): Vol. III, No. 4, p. 5

Factoring in the "Public Interest" (7(C)): Vol. III, No. 4, p. 6

Conoco Inc. v. Department of Justice (extent of detail required in 7(D) affidavit): Vol. IV, No. 1, p. 5

What showing is necessary to satisfy the threshold requirement of Exemption 7? Vol. IV, No. 1, p. 6

U.S. Steel Corp., American Bridge Division v. Department of Labor (7(D)/conditional assurance of confidentiality): Vol. IV, No. 2, p. 4

Binion v. Department of Justice (Exemption 7 threshold for criminal law enforcement agencies): Vol. IV, No. 2, p. 4

Diamond v. FBI (7(C) & 7(D)/age of records): Vol. IV, No. 3, p. 4

May an agency invoke Exemption 7(D) to protect the identity of, and information provided by, a deceased informant? Vol. IV, No. 3, p. 5

J.P. Stevens & Co. v. Perry (7(A)/generic determinations): Vol. IV, No. 4, p. 7

Stern v. FBI (7(C)/disclosure of identities of censured FBI agents): Vol. IV, No. 4, p. 7

Procedural Issues

Affidavits: Vol. I, No. 2, p. 7; Vol. I, No. 3, p. 7

Privacy Act/FOIA Conflict or Harmony? Vol. I, No. 3, p. 5 (superseded; see Vol. IV, No. 2, p. 3)

Open America Stays: Vol. I, No. 4, p. 7

Release of Exempt Information to Members of Congress: The Impact of the *Murphy* Decision: Vol. I, No. 4, p. 3 (see also Vol. V, No. 1, p. 3)

Guidance on Fee Waivers: Vol. II, No. 1, p. 3 (superseded; see Vol. IV, No. 1, p. 3)

What is an Agency Record? Vol. II, No. 1, p. 5

In Camera Inspection: Vol. II, No. 1, p. 7

Initial Litigation Strategies: Vol. II, No. 2, p. 7

Attorney General's Memo on FOIA: Vol. II, No. 3, p. 3

Determining Attorney's Fees: Vol. II, No. 3, p. 3

Coastal States Gas Corp. v. Department of Energy (response to inadequate *Vaughn* index): Vol. II, No. 3, p. 6

Eligibility and Entitlement (Attorney's Fees): Vol. II, No. 4, p. 3

Paths to Information: Vol. III, No. 1, p. 10

Discovery, the Privacy Act and FOIA: Vol. III, No. 2, p. 3

Doyle v. Department of Justice (fugitive requester): Vol. III, No. 2, p. 5

Are personal notes subject to the FOIA? Vol. III, No. 3, p. 5

What are the rights of foreign nationals under the FOIA? Vol. III, No. 3, p. 5

What document referral practices should be followed? Vol. III, No. 3, p. 5

Yeager v. DEA ("compacting" of exempt computerized information): Vol. III, No. 3, p. 8

Wolfe v. HHS (transition team materials not "agency records"): Vol. III, No. 3, p. 9; Vol. IV, No. 4, p. 6

Fees: Vol. IV, No. 1, p. 1

Fee Waiver Policy Guidance: Vol. IV, No. 1, p. 3 (see also Vol. IV, No. 2, p. 5; Vol. IV, No. 4, p. 14)

Fee Waiver Procedural Considerations: Vol. IV, No. 1, p. 4

Can a FOIA requester go to court before the completion of the administrative process? Vol. IV, No. 1, p. 6

To what standards are agencies generally held on "adequacy of search" issues? Vol. IV, No. 1, p. 6

McGehee v. CIA (document referral): Vol. IV, No. 2, p. 4

Ingle v. Department of Justice (in camera inspection): Vol. IV, No. 2, p. 4

How are minimum payment thresholds established for FOIA fees? Vol. IV, No. 2, p. 5

Can an agency refuse to admit the existence of records? Vol. IV, No. 2, p. 5

The Effect of Prior Disclosure: Waiver of Exemptions: Vol. IV, No. 2, p. 6

When to Expedite FOIA Requests: Vol. IV, No. 3, p. 3

Weisberg v. U.S. Department of Justice (adequacy of search): Vol. IV, No. 3, p. 4

Should the practice of referring requested documents be altered by the *McGehee* decision? Vol. IV, No. 3, p. 5

Can an agency deny a FOIA request which requires a burdensome search or encompasses an enormous volume of records? Vol. IV, No. 3, p. 5

How should an agency respond to a FOIA request for records which are subject to a court order prohibiting disclosure? Vol. IV, No. 3, p. 5

What action can be taken against an employee who improperly denies a FOIA request? Vol. IV, No. 3, p. 5

Paisley v. CIA ("agency record" status of documents created in connection with a congressional investigation): Vol. IV, No. 4, p. 7

United States v. U.S. District Court, Central District of California (FOIA and criminal discovery): Vol. IV, No. 4, p. 7

What "cut off" date practices should be followed? Vol. IV, No. 4, p. 14

How should the fourth criterion of the Justice Department's fee waiver guidance be applied to the media? Vol. IV, No. 4, p. 14

FOIA Focus: C. Nicholas Kalcounos

While FOIA analysts are the "front line troops" in responding to the more than 250,000 access requests that annually deluge the Federal Government, a second type of FOIA officer—the administrative appeals official—is also vital to an agency in carrying out its mandate under the Freedom of Information Act. The appeals officer has the delicate task of reviewing already processed documents in order to make an independent judgment about the correctness of co-workers' nondisclosure decisions. Often the appeals officer's job will involve conflict with agency program officers who think that too much is being released, as well as with requesters who contend that just the opposite is true. In short, the appeals officer, unloved and unsung, provides the agency with its last opportunity to ensure the correctness of its FOIA determinations before a FOIA requester takes his case to court.

* * * * *

"It's a problem in keeping the balance," says C. Nicholas Kalcounos of his job as an appeals official. Kalcounos is Director of the Freedom of Information and Privacy Act Appellate Office at the Small Business Administration.

To Kalcounos and his staff of three Freedom of Information Act specialists come approximately 200 appeals yearly. Initial requests are handled at the more than 100 SBA branch, district, or regional offices where the first disclosure determinations are made. Responses to initial requests carry an "appeals" paragraph (as required by statute) that directs the dissatisfied requester to Kalcounos' staff at SBA's central office.

Kalcounos personally scans the appeals as they arrive in twice-daily mail deliveries and makes assignments to his staff of FOIA specialists. The most difficult cases generally go to Beverly Linden, who is the office's senior analyst.

As an appeals matter is assigned, the pertinent files are requested from



the field office in which the initial request was processed. Once the files arrive, the FOIA appeals specialist reviews all material withheld at the initial level. It is possible that a document search could be ordered widened at that point, but Kalcounos observes that because of the nature of SBA programs it is rarely necessary to broaden a search on appeal.

It is at this point that the appeals specialist generally confers with the field office and then prepares a "memorandum to the file" setting forth a recommended disposition. "We go to them for an explanation of their decision. If we are convinced that their position is supported by the Act, we continue to withhold. If not, then we release. We're the final word on disclosure for SBA."

Kalcounos personally reviews all the work of his staff, taking as much as several hours on each appeal, although this varies with the complexity of the case. He also takes pride in the timeliness with which his office handles appeals. Rarely does his office seek extensions, he says.

"I will look to see that we have responded to the entire request. It's very easy to get off the track and to answer only one part of a question. Then I will look to see that the proper

exemption is cited. Primarily we deal with Exemption 4, but we have Exemption 5 and even Exemption 7 material, too. Then I will review the memo to the file authored by the FOIA appeals specialist and talk with her to see what her thinking is in overturning an initial determination," says Kalcounos. When it is necessary, outside submitters of material to SBA are consulted by the appeals staff and are given a chance to object before a release is made.

"Once a case is concluded we like to go back to the program people and explain what we've done," he emphasizes. Kalcounos says that program and field officers may "mumble and groan some," but by and large they are very cooperative and understand the necessity of the appeals process and the work of his appeals staff.

"In just about every appeal there's something that can be released," Kalcounos says, "and our staff will see it. This is very much in line with the agency's policy of releasing material whenever it is reasonably possible."

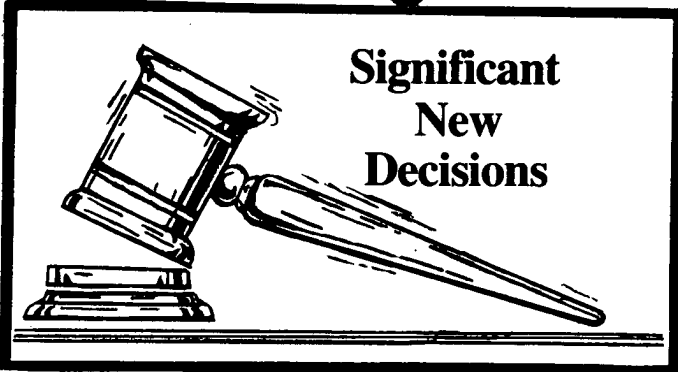
"What happens is that the program people are sympathetic to the small business community. No one wants to release material that will harm the competitive position of a small business. On the other hand, we do have these two laws—the FOIA and the Privacy Act—and we do have to comply with them or else hurt the agency, so there's the conflict."

* * * * *

Kalcounos himself is an old hand at balancing several competing considerations and making statutory determinations.

A native Washingtonian, he began his government career as a corporate tax law specialist at the IRS. That was in the early 1970s and Kalcounos was one of a group of IRS employees asked to develop sanitized versions of documents for release under the FOIA. "They sat us down and asked us, 'How would you sanitize these

Cont'd on p. 11



Core v. United States Postal Service, No. 83-1153 (4th Cir. Jan. 6, 1984).

In another recent ruling delineating the privacy protection to be afforded federal employment records, the U.S. Court of Appeals for the Fourth Circuit held that Exemption 6 does not shield the identities, education and relevant experience of successful applicants for federal jobs. Plaintiff Core, an unsuccessful applicant for a Postal Service position, had requested from the Postal Service records reflecting the education and relevant work experience of all other applicants. The Fourth Circuit approved the withholding of the identities and all other information concerning the unsuccessful applicants, finding that disclosure of their nonselection "may embarrass or harm" them. However, it ruled that the public's interest in the competency of the people hired, and in the Postal Service's adherence to proper hiring procedures, offset any "slight infringement" of the successful applicants' privacy; the requested information concerning this latter group was therefore found disclosable. Citing *FOIA Update*, the Court of Appeals noted that its decision was fully consistent with the Department of Justice policy regarding the release of records reflecting federal employees' prior government employment, private employment related to current duties, awards, honors and memberships in professional associations. See *FOIA Update*, Sept. 1982, at 3.

Antonelli v. FBI, 721 F.2d 615 (7th Cir. 1983)—*reversing* 536 F. Supp. 568 (N.D. Ill. 1982).

In an extremely broad opinion strongly approving the manner in which the Federal Bureau of Investigation responds to FOIA requests for records pertaining to third parties, the U.S. Court of Appeals for the Seventh Circuit held that the FBI appropriately invoked Exemptions 6 and 7(C) in refusing to confirm whether it maintains law enforcement records on such named individuals. The district court had not accepted the FBI's standard "refuse to confirm or deny" response and had ordered it to either produce existing documents or submit a detailed *Vaughn* affidavit justifying their withholding. The Seventh Circuit flatly reversed the district court, however, holding that any detailed FOIA withholding justification given in response to third-party requests for law enforcement records—even one broadly citing Exemption 7(D)—might itself "expose the subject of the inquiry to harassment and actual danger" and, at the least, would constitute a serious invasion of privacy by "revealing that a third party has been the subject

of FBI investigations." Finally, the Court of Appeals found no "genuine public interest"—only a personal one—in the requester's "interest in ensuring that his [bank fraud] convictions were not obtained as a result of a violation of the Constitution." The plaintiff has petitioned the Supreme Court for *certiorari* in this case.

9 to 5 Organization for Women Office Workers v. Board of Governors of the Federal Reserve System, 721 F.2d 1 (1st Cir. 1983)—*reversing* 551 F. Supp. 1006 (D. Mass. 1982).

In a closely watched Exemption 4 case, the U.S. Court of Appeals for the First Circuit criticized and vacated a district court decision which had too narrowly construed the first prong of the *National Parks* test. The district court had refused to permit Exemption 4 protection for salary data provided to a Federal Reserve Bank by a private organization, because it regarded *National Parks* as requiring that the information be "'necessary' in the sense of being absolutely *essential* to the operations of the agency" before it could be withheld. Such a restrictive interpretation, the First Circuit ruled, "would do violence to the statutory purpose of Exemption 4 were the Government to be disadvantaged by disclosing information which serves a valuable purpose and is useful for the effective execution of its statutory responsibilities."

Although the First Circuit declined to adopt the Government's rejection of the *National Parks* decision (see *FOIA Update*, Fall 1983, at 8-9), it pointedly emphasized that the *National Parks* test is not limited to just the two particular interests that it expressly delineates, specifically holding that "the Government should not be precluded from invoking the protection of Exemption 4 merely because the asserted interest is not precisely one of those two identified in *National Parks*." Rather, it declared, the appropriate inquiry for applicability of Exemption 4 should be whether release of the information would harm an "identifiable private or governmental interest" and it found specific support for this holding in a footnote of *National Parks*, 498 F.2d at 770 n.17, where the D.C. Circuit had expressly left open the possibility that other governmental interests not embodied in the test could appropriately be protected. (See also *FOIA Update*, Fall 1983, at 15, for a further discussion of this point).

Shapiro v. DEA, 721 F.2d 215 (7th Cir. 1983)—*affirming* *Wentz v. DEA/Shapiro v. DEA*, 3 GDS ¶83,122 (W.D. Wis. 1982) (consolidated).

Relying heavily on the legislative history of the Privacy Act, as well as the statutory language of both the Privacy Act and the FOIA, the U.S. Court of Appeals for the Seventh Circuit has once again found that the Privacy Act is a FOIA Exemption 3 statute. (See also *Terkel v. Kelly*, 599 F.2d 214, 216 (7th Cir. 1979), *cert. denied sub nom. Terkel v. Webster*, 444 U.S. 1013 (1980)). Accordingly, the Seventh Circuit ruled in this case that records pertaining to a first-party requester which were found to be exempt from disclosure under the Privacy Act's subsection (j)(2) (protecting information compiled for criminal law

enforcement purposes) need not be disclosed under the FOIA. Permitting the requester FOIA access to such records, it said, "would result in an emasculation of Privacy Act Exemption (j)(2) that would be inconsistent with clearly articulated congressional intent." It further noted that the legislative history of the Privacy Act reveals "Congress' special concern that individuals not be permitted access to certain records containing information about their own criminal investigations." The Court of Appeals emphasized the appellants' inability to identify any legislative history establishing their contrary position and it rejected their argument that subsection (b)(2) of the Privacy Act governs disclosures to first- and third-party requesters under the Act. Instead, it found that both the introductory

language of that section and its legislative history indicate that subsection (b)(2) was intended to apply only to third-party access to records.

This decision leaves evenly divided the four circuit courts of appeals which have considered whether the Privacy Act is an Exemption 3 statute. See *Porter v. United States Department of Justice*, 717 F.2d 787 (3d Cir. 1983); *Provenzano v. United States Department of Justice*, 717 F.2d 799 (3d Cir. 1983) (companion case with *Porter*); *Greentree v. United States Customs Service*, 674 F.2d 74 (D.C. Cir. 1982); *Painter v. FBI*, 615 F.2d 689 (5th Cir. 1980); see also *FOIA Update*, Spring 1983, at 3. The Supreme Court has been asked to rule on this issue in both *Provenzano* and *Shapiro*.

Under Advisement



The following pending cases involve FOIA issues of particular significance that are expected to be decided in the near future:

- *National Organization for Women v. Social Security Administration*, No. 76-2119 (D.C. Cir.) *Decision Below*: *Metropolitan Life Insurance Co. v. Utery*, 426 F. Supp. 150 (D.D.C. 1976). *Issues*: Is the Trade Secrets Act, 18 U.S.C. §1905, an Exemption 3 statute? Is it congruent with Exemption 4? *Status*: Argued before the D.C. Circuit on May 1, 1980; still pending after all these years.

- *Bureau of National Affairs, Inc. v. Department of Justice*, No. 83-1138 (D.C. Cir.)/*Environmental Defense Fund v. OMB*, No. 83-1685 (D.C. Cir.) (consolidated on appeal). *Decisions Below*: 3 GDS ¶83,064 (D.D.C. 1982) and 3 GDS ¶82,468 (D.D.C. 1982), respectively. *Issue*: Are appointment books and daily logs of senior officials "agency records"? *Status*: Argued before the D.C. Circuit on November 22, 1983.

- *Stern v. FBI*, No. 83-1861 (D.C. Cir.). *Decision Below*: 3 GDS ¶83,202 (D.D.C. 1983) (see *FOIA Update*, Fall 1983, at 7). *Issue*: Can identities of censured FBI Special Agents be protected under Exemption 6 and/or Exemption 7(C)? *Status*: Argued before the D.C. Circuit on February 29, 1984.

- *Bartel v. FAA*, No. 82-2473 (D.C. Cir. Jan. 17, 1984). *Issue*: Do only actual FOIA disclosures trigger the "required" disclosure exception to the Privacy Act's disclosure prohibition under 5 U.S.C. §552a(b)(2)? (A panel of the D.C. Circuit, in a radical departure from existing law and policy, decided this crucial FOIA-related issue adversely to the Government.) *Status*: Pending on the Government's petition for rehearing *en banc*, filed March 6.

Supreme Court Update

On March 5, the Supreme Court granted the Government's petition for *certiorari* in *Sims v. CIA*, 709 F.2d 95 (D.C. Cir. 1983), in which the D.C. Circuit Court of Appeals, over a strong dissent, articulated an extremely narrow definition of the term "intelligence source" under the CIA's major Exemption 3 statute, 50 U.S.C. §403(d)(3). See *FOIA Update*, Fall 1983, at 6. In seeking *certiorari* in *Sims*, the Solicitor General argued that the D.C. Circuit's harsh decision threatens to "seriously impair the Agency's ability to perform its mission." The Supreme Court will now hear oral argument on the issue next fall, with a final decision expected early in 1985.

On December 23, the Solicitor General also petitioned for *certiorari* in *Provenzano v. United States Department of Justice*, 717 F.2d 799 (3d Cir. 1983), in which the Third Circuit Court of Appeals ruled that the Privacy Act of 1974 cannot serve as an Exemption 3 statute under the FOIA. See *FOIA Update*, Fall 1983, at 6. The Solicitor General's *certiorari* petition pointed to the square conflict between that decision and the Seventh Circuit Court of Appeals' decision in *Shapiro v. DEA*, 721 F.2d 215 (7th Cir. 1983), which flatly held in the Government's favor on that issue. (See p. 8 of this issue of *FOIA Update*.) A *certiorari* petition by the plaintiff in *Shapiro* has also been filed.

The Court's "conference consideration" of the Government's *certiorari* petition in *Provenzano* has been scheduled for March 23. If *certiorari* is granted in *Provenzano*, as is expected, the case should be heard and decided by the Court not long after *Sims*.

Also pending before the Supreme Court this Term is its review of the Ninth Circuit Court of Appeals' decision in *Weber Aircraft Corp. v. United States*, 688 F.2d 638 (9th Cir. 1982), *cert. granted*, 103 S.Ct. 3534 (1983), which involves the special accident investigation report privilege under Exemption 5. See *FOIA Update*, Fall 1983, at 11. The case was argued before the Court on January 11 and a decision can be expected at any time before the Court adjourns in early July.

FOIA Counselor

The Unique Protection of Exemption 2

Perhaps more than with any other FOIA exemption, there has been a great deal of controversy and confusion surrounding Exemption 2 and its protection of "matters that are . . . related solely to the internal personnel rules and practices of an agency." 5 U.S.C. §552(b)(2). While some relatively minor judicial disagreement still lingers regarding the applicability of Exemption 2 to law enforcement materials, the overall outlines of its unusual protections—particularly as to non-law enforcement, administrative information—have recently become much clearer.

As regards the protection of law enforcement records under Exemption 2, the D.C. Circuit's *en banc* decision more than two years ago in *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1073-74 (D.C. Cir. 1981), made it clear at least within that critical judicial circuit that Exemption 2 can apply to any law enforcement record (such as training manuals) for which the standards of "predominant internality" and "significant risk of circumvention of law" can be met. As yet, it remains to be seen exactly how the *Crooker* standards will be applied, as well as the extent to which they will be adopted at all by other circuit courts previously reluctant to permit any law enforcement protection under Exemption 2. See the 1983 *Freedom of Information Case List* ("Short Guide to the Freedom of Information Act") at 205-08. See also, e.g., *Windels, Marx, Davies & Ives v. Department of Commerce*, 576 F. Supp. 405, 411-13 (D.D.C. 1983).

The "Burden" Aspect of Exemption 2

At present, the most interesting aspect of Exemption 2 is its unique application to far more mundane, yet pervasive, administrative records. In its decision eight years ago in *Department of the Air Force v. Rose*, 425 U.S. 352 (1976), the Supreme Court construed Exemption 2's somewhat ambiguous language as protecting internal agency matters so routine or trivial that they could not be "subject to . . . a genuine and significant public interest." 425 U.S. at 369. It should not be overlooked that, in this respect, Exemption 2 is the *only* exemption in the FOIA having a conceptual underpinning totally unrelated to any harm caused by disclosure *per se*; rather, it is aimed at avoiding the sheer administrative burden that can be imposed by FOIA processing. As the Supreme Court explained in *Rose*, "the general thrust of the exemption is simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest." *Id.* at 370.

Until quite recently, though, there existed a great deal of uncertainty as to the types of administrative records that could be considered for such unique protection under Exemption 2. This was primarily due to a 1980 D.C. Circuit ruling that Congress intended such Exemption 2 protection

for agency personnel records only, not for "trivial matters unrelated to *personnel*." *Allen v. CIA*, 636 F.2d 1287, 1290 n.21 (D.C. Cir. 1980) (emphasis in original). In reaching such a narrow view of Exemption 2, the D.C. Circuit in *Allen* relied upon its *en banc* decision in *Jordan v. United States Department of Justice*, 591 F.2d 753, 764 (D.C. Cir. 1978), which involved Exemption 2's law enforcement aspect, and it chose to perceive no conflict with its decision in *Lesar v. United States Department of Justice*, 636 F.2d 472, 485 (D.C. Cir. 1980).

Crooker Leads to Founding Church

One year after *Allen*, the full D.C. Circuit in *Crooker* revisited the issue involved in *Jordan* and adopted a distinctly broader view of Exemption 2, at least as regards its law enforcement aspect. Yet even after the D.C. Circuit's broad *en banc* decision in *Crooker* in 1981, it still remained unclear whether the *Allen/Jordan* holdings on the "burden" aspect of Exemption 2 still limited the extent of its possible application to personnel records only. This uncertainty over the prevailing D.C. Circuit case law on this aspect of Exemption 2 greatly inhibited its possible application during recent years.

In November 1983, however, the D.C. Circuit finally confronted this issue in *Founding Church of Scientology v. Smith*, 721 F.2d 828 (D.C. Cir. 1983), and squarely resolved it in the Government's favor. In *Founding Church*, the Justice Department pointedly admitted that it had withheld routine administrative notations "indistinguishable from the filing and routing instructions that were held unprotected under FOIA Exemption 2 in *Allen*," but it urged that *Allen* be abandoned in light of its discerned conflict with *Crooker* and *Lesar*. 721 F.2d at 829. Recognizing this conflict, and concluding that *Crooker* "repudiated the narrow construction of [E]xemption 2 that [had been] adopted in *Jordan*," the Court of Appeals in *Founding Church* did exactly what was urged, expressly holding that *Allen* "no longer represents the law of this circuit." *Id.* at 830.

Protecting Administrative Records

Consequently, agencies are now free to consider withholding a wide range of administrative information under Exemption 2—regardless of whether it is personnel-related or not—based upon the unique rationale that the very process of releasing such data would be an unwarranted administrative burden. This aspect of Exemption 2 has in the past been held properly applied to such trivial administrative data as file numbers, routing stamps and other similar administrative markings on requested records. See, e.g., *Scherer v. Kelley*, 584 F.2d 170, 175-76 (7th Cir. 1978), *cert. denied*, 440 U.S. 964 (1979); *Nix v. United States*,

Cont'd on next page

... FOIA Counselor

572 F.2d 998, 1005 (4th Cir. 1978); *Maroscia v. Levi*, 569 F.2d 1000, 1001-02 (7th Cir. 1977).

Most significantly, it has also been held to justify the withholding of more extensive and substantive portions of administrative records, even entire documents. *See, e.g., Ferri v. United States Department of Justice*, 573 F. Supp. 852, 862 (W.D. Pa. 1983) (Exemption 2 held to protect two entire documents dealing with an internal administrative matter); *Associated Press v. Department of Justice*, Civil No. 82-803, slip op. at 44 (D.N.J. Dec. 6, 1982) (entire "closing form" found properly withheld); *National Treasury Employees Union v. United States Department of the Treasury*, 487 F. Supp. 1321, 1324 (D.D.C. 1980) (internal discussions of collective bargaining matters properly withheld). Given the nondisclosure rationale of avoiding the administrative burdens involved in the processing of such records, agencies should now pay particular attention to any potential Exemption 2 withholdings of this latter variety.

"Genuine Public Interest" Limitation

Finally, agencies need to be especially mindful of the fact that this special Exemption 2 protection is simply not available for any information in which there is "a genuine and significant public interest." *Department of the Air Force v. Rose*, *supra*, 425 U.S. at 369. A useful illustration of how this "public interest" delineation is drawn can be found in *FBI Agents Association v. FBI*, 3 GDS ¶83,058, at 83,565-66 (D.D.C. 1983), in which large portions of an FBI administrative manual were ruled properly withholdable on a "burden" theory under Exemption 2, but other portions (because of a discerned "public interest" in them) were not. In making such delineations now for a wider category of administrative records in the wake of *Founding Church*, agencies should be sure to heed the D.C. Circuit's cautious admonition there that "a reasonably low threshold should be maintained for determining when withheld administrative material relates to significant public interests."

... FOIA Focus

Cont'd from p. 7

documents?" From that came some of their early procedures for making FOIA releases."

Kalcounos next went to the Office of General Counsel at the Federal Election Commission and about seven years ago joined SBA. At first, he was a one-man FOIA office, but within six months his staff began to

grow. Today, Kalcounos and his appellate office comprise a separate component within SBA's Office of Hearings and Appeals.

As SBA's first full-time FOIA officer, Kalcounos has developed many of the procedures followed agency-wide on the FOIA and the Privacy Act. He emphasizes the need for training agency access professionals and he personally sees to it that he and his staff attend all of the relevant training available. He also speaks frequently to SBA district and regional counsels to keep them updated on FOIA developments and acts as a consultant to SBA's field and program people on FOIA matters. "We encourage them to call," he says.

In addition, Kalcounos and his staff enjoy an excellent rapport with the litigation section of the SBA general counsel's office. "They are always there when we call," he notes. He also points out that the agency has had only one major setback in a lawsuit stemming from a decision of his. "We lost the *Miami Herald* case," Kalcounos says, "on a technicality. Still, one loss in seven years isn't bad."

New Update Managing Editor

This issue of *FOIA Update* marks a transition in its Managing Editor position, with the departure of Nancy T. Bruns and the arrival of new Managing Editor Pamela Maida.

Nancy Bruns was *FOIA Update*'s original Managing Editor and painstakingly helped guide its development for more than three years. With her departure at the end of 1983 to head the newly established Congressional Liaison Unit at the Washington District Office of the Justice Department's Immigration and Naturalization Service, she has left a legacy of professionalism that will not easily be continued.

New Managing Editor Pam Maida joined the Office of Information and Privacy in February 1983 after working as a paralegal specialist with the Justice Department's Legal Education Institute for almost two years. She received a B.A. degree at The George Washington University and did graduate work in language studies before joining the Department. Ms. Maida served as Editor of the *Freedom of Information Case List* in 1983 and will continue to serve in that additional capacity.

FOIA UPDATE

Published quarterly by the Office of Information and Privacy, U.S. Department of Justice, Washington, D.C. 20530.

Co-Directors:

Richard L. Huff
Daniel J. Metcalfe

Deputy Director:

Miriam M. Nisbet

Editorial Staff:

Managing Editor

Pamela Maida

Production Assistant

Bonnie L. Quinto

Graphics Assistant

Mary Ann Childs

Available through the Superintendent of Documents, GPO, Washington, D.C. 20402. Stock No. 027-000-80002-5. Subscription price: \$8.00, domestic; \$10.00, foreign.

United States Department of Justice
Washington, D.C. 20530

Postage and Fees Paid
JUS-431



Official Business
Address Correction Requested

Third Class Bulk

SPL/F-1 Chief, Litigation Div.
Room 7-B-44
C.I.A. HQS
Washington, DC 20205

FOIA Training Opportunities

DEPARTMENT OF JUSTICE

Legal Education Institute: The Freedom of Information Act for Attorneys and Access Professionals, **April 12-13, July 16-17, 1875 Connecticut Ave., N.W., Washington, D.C.; June 13-14, Los Angeles, CA.** Contact: Grace Mastalli or Sandra Manners, (FTS) 673-6372. No charge.

Legal Education Institute: Advanced Seminar on the Freedom of Information Act, **May 3, 1875 Connecticut Ave., N.W., Washington, D.C.** Contact: Grace Mastalli or Sandra Manners, (FTS) 673-6372. No charge.

Legal Education Institute: Seminar on the Privacy Act of 1974, **May 4, Washington, D.C.; Aug. 3, San Francisco, CA.** Contact: Grace Mastalli or Sandra Manners, (FTS) 673-6372. No charge.

OFFICE OF PERSONNEL MANAGEMENT

Boston Region Training Center: Successful Implementation of the Freedom of Information and Privacy Acts, **July 10-11, McCormack Post Office and Courthouse, Boston, MA.** Contact: Daniel J. Buckley, (FTS) 223-5786. Cost: \$175.

New York Region Training Center: Freedom of Information/Privacy Acts

Workshop, **March 27-28, 26 Federal Plaza, New York, NY.** Contact: Daniel Parker, (FTS) 264-8431. Cost: \$160.

Atlanta Region Training Center: Freedom of Information and Privacy Acts Workshop, **June 11-12, 75 Spring St., S.W., Atlanta, GA.** Contact: Stephen Trehern, (FTS) 242-3488. Cost: \$150.

Chicago Region Training Center: Freedom of Information and Privacy Acts, **May 15-16, Chicago, IL; June 26-27, Cincinnati, OH.** Contact: Charles V. Stout, (FTS) 353-2927. Cost: \$125.

Dallas Region Training Center: Freedom of Information/Privacy Acts, **July 10-11, Dallas, TX.** Contact: Yvonne Lindholm, (FTS) 729-8241. Cost: \$170.

Denver Region Training Center: Freedom of Information and Personal Privacy, **May 30-31, Denver, CO.** Contact: Nina Schmidt, (FTS) 234-2304. Cost: \$130.

Seattle Region Training Center: Freedom of Information Act and Privacy Act, **April 2-3, Portland, OR; May 3-4, Seattle, WA.** Contact: Charles C. Cloos, (FTS) 399-7904. Cost: \$140.

Center for Communications and Administrative Management, Administrative Management Training Insti-

tute: FOIA and PA Workshop for Administrative and Secretarial Personnel, **May 24-25, Thomas Circle Training Center, 1121 Vermont Ave., N.W., Washington, D.C.** Contact: Cassandra Saunders, (FTS) 254-3211. Cost: \$225. Successful Implementation of the Freedom of Information Act and the Privacy Act, **June 14-15, Thomas Circle Training Center, 1121 Vermont Ave., N.W., Washington, D.C.** Contact: Cassandra Saunders, (FTS) 254-3211. Cost: \$225.

Government Affairs Institute: Privacy Act Symposium, **June 19, Washington, D.C.** Contact: Patti Shosteck, (FTS) 632-5662. Cost: \$140. Sixth Annual Symposium on the Freedom of Information Act and the Privacy Act, **August 14-15, Washington, D.C.** Contact: Patti Shosteck, (FTS) 632-5662. Cost: \$275.

USDA GRADUATE SCHOOL

Information Access Laws, **May 16-18, 600 Maryland Ave., S.W., Washington, D.C.** Contact: Theresa DeSilva, (FTS) 447-3247. Cost: \$200. Implementation of the FOI and Privacy Acts, **June 14-15, 600 Maryland Ave., S.W., Washington, D.C.** Contact: Theresa DeSilva, (FTS) 447-3247. Cost: \$175.

Page Denied

Next 3 Page(s) In Document Denied