# Public Information Provision

# in the Digital Age

## Implementation and effects of the U.S. Freedom of Information Act

Report of a study for the

Ministerie van Binnenlandse Zaken en Koninkrijksrelaties

May 2000

**MR-1250-RE/BZK**

**RAND Europe**

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## INTRODUCTION

The Dutch government creates messages and owns and distributes a large amount of information. Access to this information is open in principle, but the legal framework implies constraints in allowing access to information at the same time, for instance to protect privacy, and it's re-use, for instance property rights[1]. The interaction of laws has led to differences in the way government services offer (access to) information, and against which costs. This affects the accessibility of government information directly, and therefor it affects the transparency of the public service.

Due to the rapid development of technologies and services in IT and telecommunications, and in particular the emergence and ubiquity of the Internet the way in which information is stored and has become accessible has changed a lot. The way public services provide information has therefore already been affected. This has led to even more differentiation in accessibility of data and pricing of access to data. As a result, the legal framework as well as the organisation of access to the databases and information will need to be reviewed, in particular to assess the applicability of current law on electronic data.. Many countries in the Western world have become active in revising their frameworks, with a particular focus on the ability to approach data electronically. This revision is likely to lead to reduction of costs per response to an information request, and provides an opportunity to simplify ("harmonise") access to information and the conditions for information provision.

A leading country is the United States, which has experience with the Freedom of Information Act. The US Freedom of Information Act (FOIA) was first enacted in 1966, giving any person the right to ask for access to federal agency records. It required agencies to release records upon written request, except for those protected from disclosure by FOIA's exemptions and exclusions.

Amendments to the Act in 1996 expanded the statutory definition of "record" to include information made available in electronic format. Additionally, they require certain kinds of records routinely to be made available in electronic media and others to be made available in any form or format on request (if the record can readily be reproduced in that form or format by the agency). Further provisions in the amendments have to do with enabling facilities such as electronic reading rooms and online indices to major information systems as well as guides for preparing FOIA requests.

The electronic FOIA amendments (e-FOIA) were associated with a staged implementation timeline; the last of the provisions should have been phased in to US agency operations by the end of 1999. The aim of the study task reported here is to learn whether and how e-FOIA is affecting (or expected to affect) US federal agency procedures, giving special attention to the implications of e-FOIA for interactions with citizens and private sector organisations. Of particular interest are early implementation experiences as well as benefits from and barriers to the use of digital media for complying with FOIA requirements.

It is the objective of this study to learn from that experience, thus enabling the Dutch government to take these lessons into account in their preparation of legislative measures towards unlocking government records in general, and more specific databases requested by citizens, companies and other government agencies.

This report presents the full results of the study to the implementation and effects of the U.S. Freedom of Information Act and considers it relevance for the Dutch situation. The study reflected in this report is based on articles and other literature related to FOIA along with the 1996 revisions that make it relevant to the widespread contemporary diffusion of electronic media[2], a literature study to the comparability with the Dutch legal situation, and a series of interviews with key people in US agencies and other organisations directly experienced with the transition to e-FOIA and its effects[3].

The report consists of three main chapters, followed by Conclusions (Chapter 4) and annexes containing other information of interest.

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[1] Main laws involved are the Wet Openbaarheid van Bestuur (WOB), the Auteurswet 1912, the Databankenwet and the Wet Persoonsregistraties.

[2] listed in the annex 5

[3] Approach and list of interviewed agencies is reflected in the annex 4

Chapter 1 ("Understanding FOIA") describes the origin and development of the US Freedom Of Information Ac, and explains its working in itself as well as its interaction with the main related law at Federal level.

In order to understand how the lessons learned in the US regarding the implementation and impact of (E)FOIA can apply to the situation in The Netherlands, we make in Chapter 2 ("Comparison US vs. Dutch situation") a general comparison of the legal conditions that apply in both countries.

Whereas Chapter 1 is focusing at the legal and administrative development of FOIA over the years, Chapter 3 ("Implementation and impact of FOIA") is focusing at the FOIA practice in the context of other developments regarding information provision in US government. Important input for this chapter has been generated from a series of in-depth interviews with FOIA experts based in the US (both government and users).

Finally, in the "Conclusions", (Chapter 4) the report will highlight the main findings regarding the implementation and impact of e-FOIA and derive recommendations towards the Dutch Ministry of Home Affairs with regards to a possible revision of WOB in its aim to respond to the potential and need for electronic access to records and documents in the Netherlands.

## 1. UNDERSTANDING FOIA

In this section we describe the origin and development of the US Freedom Of Information Act and explain its working in itself as well as its interaction with the main related law at Federal level.

### 1.1. ORIGIN AND DEVELOPMENT

The Freedom Of Information Act (FOIA), first signed into law by Lyndon Johnson in 1966 and codified at USC 552(5), generally gives any person an enforceable right of access to federal agency records, except where protected by one of nine exemptions or three special law enforcement record exclusions.

The 1966 FOIA established for the first time an effective statutory right of access to government information. "The basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." A subsequent revision in 1974 mandated further disclosures and created a presumption of disclosure unless one of 9 exemptions applies. Further revisions in 1994 and 1996 (The 'Electronic FOIA') extended the provisions of FOIA to electronic information, creating a requirement for electronically held information to be made available in electronic form.

The Supreme Court has emphasised that "[o]fficial information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose." In introducing the Electronic FOIA in 1993, President Clinton said:

> "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."[4]

The social goal of open government does not always coincide with other important public interests such as economical, effective and efficient government operation and respect for the confidentiality of sensitive (personal, commercial, and governmental) information. The FOIA is intended to balance these concerns. It evolved after a decade of debate among agency officials, legislators, and public interest groups, revising the public disclosure section of the Administrative Procedure Act, which was generally regarded as falling far short of its disclosure goals and more a withholding statute than a disclosure statute.

By contrast, under FOIA virtually every federal *agency record* must be *made available* to the public in one form or another, unless specifically exempted from disclosure or excluded from the Act's coverage in the first place. The nine exemptions of the FOIA ordinarily provide the only grounds for nondisclosure - they are discretionary rather than mandatory. Dissatisfied requesters are given access to district courts, where judges review agency withholdings *de novo* and agencies bear the burden of proof in defending their nondisclosure actions[5].

The 1966 FOIA contained certain weaknesses. In response, the courts fashioned procedural devices such as the "Vaughn Index[6]" and the "EPA v. Mink " requirement that agencies release non-exempt portions of a partially exempt record.

To extend the FOIA's disclosure requirements and in reaction to the abuses of the "Watergate era," the FOIA was substantially amended in 1974 – this narrowed the enforcement and national security exemptions and broadened its procedural provisions relating to fees, time limits,

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[4] President's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act, 29 Weekly Comp. Pres. Doc. 1999 (Oct. 4, 1993) reprinted in FOIA Update, Summer/Fall 1993.

[5] In 1993, Attorney General Reno rescinded the 1981 litigation guidelines, stating that Agency withholding decisions would not be defended against lawsuits merely because there was a "substantial legal basis" for doing so – the Justice Department would endorse a presumption of disclosure.

[6] A detailed index of withheld documents and the justification for their exemption, established in Vaughn v. Rosen.

segregability, and *in camera* inspection by the courts. The contemporaneous Privacy Act of 1974 supplements the FOIA with regard to individuals' requests for records about themselves and provides other privacy protections.

In 1976, Congress again limited disclosure exemptions by narrowing FOIA's incorporation of the disclosure prohibitions of other statutes. A technical change in 1978 updated provisions for administrative disciplinary proceedings, and the expedited court-review provision[7] was repealed in 1984 Congress.

Many years of administrative experience demonstrated the need for substantive and procedural reform, leading to the 1986 Freedom of Information Reform Act, which broadened the law enforcement information exemption, added special law enforcement record exclusions and created a new fee and fee waiver structure. While the law enforcement provisions took effect immediately, the fee and fee waiver provisions became effective as of mid-1987, and required further implementing regulations.

In October 1993 policy statements by President Clinton and Attorney General Reno resulted in the memorandum below. In conjunction with President Clinton's call upon all agencies to follow "the spirit" as well as the letter of the Act, Attorney General Reno's FOIA Memorandum articulated the FOIA's "primary objective" – "achieving maximum responsible disclosure of government information."

The memorandum:

i rescinded the Department of Justice's previous standard for defence of FOIA litigation;

ii established a new "foreseeable harm" standard applicable to the use of FOIA exemptions both in litigation and at the administrative level; and

iii strongly encouraged the making of discretionary disclosures of exempt information "whenever possible under the Act."[8]

These FOIA-disclosure policies are being implemented by agencies throughout the federal government as part of a range of related openness-in-government initiatives undertaken by the Department of Justice.

In October 1996 Congress enacted the Electronic Freedom of Information Act Amendments of 1996 (EFOIA) – this addressed electronic records, FOIA reading rooms, agency backlogs of FOIA requests and other procedural matters. Some EFOIA provisions (esp. for reading rooms and annual reporting) are still being phased in.

## 1.2. THE FREEDOM OF INFORMATION ACT

In this section the current version of FOIA, including the so-called "E-FOIA" update, is described in salient detail. The Act itself is attached as Annex 1.

### 1.2.1. Structure

The first two of the seven FOIA subsections establish categories of information that must automatically be disclosed by federal agencies. Subsection (a)(1) provides automatic public access to very basic information regarding the transaction of agency business, requiring Federal Register publication of descriptions of agency organisations, functions, procedures; substantive rules; and statements of general policy. Subsection (a)(2) (the "reading room" provision) requires "final opinions and orders rendered in the adjudication of cases, specific policy statements, certain administrative staff manuals, and some records previously processed for disclosure under the Act" to be made "available for public inspection *and copying*" (emphasis added). This requires that some such records be made available by agencies in 'electronic reading rooms." The courts have held[9] that the fundamental purpose of the publication requirement of subsection (a)(1) and the "reading room" availability requirement of subsection (a)(2) is provision of official notice

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[7] Previously contained in FOIA subsection (a)(4)(D).

[8] See further discussions of these FOIA policy principles under Exemption 5, Application of the "Foreseeable Harm" Standard, below; Discretionary Disclosure and Waiver, below; and Litigation Considerations, below.

[9] However, courts have also found that subsection (a)(1) did not require disclosure of unpublished interpretative guidelines available for copying and inspection in an agency program manual and that regulations pertaining solely to internal personnel matters that do not affect members of the public need not be published.

and guidance. Failure to comply can[10] invalidate related agency action. Of course, substantive rules and policy statements of general applicability that have not been adopted need not be published.

The most frequently used part of FOIA is subsection (a)(3), which requires disclosure of all records not made available under subsections (a)(1) or (a)(2), exempted from mandatory disclosure under subsection (b) or excluded under subsection (c), on receipt of a proper FOIA request from any person. Significantly, this does not allow withholding based on the purpose of the request or the identity of the person.

Subsection (b) contains the nine exemptions for specific types of material. These are discussed in more detail below.

Subsection (c), added by the 1986 Freedom of Information Reform Act, establishes three special categories of law enforcement-related records entirely excluded from the FOIA to prevent unique types of harm. Subsection (c) permits an agency to deny requests for such records as if the records did not exist.

Subsection (d) makes clear that the Act was not intended to authorise new withholding of information, including from Congress. Individual Members of Congress possess the same rights of access as members of the public, but Congress as a body (or through its committees and subcommittees) cannot be denied access to information on the grounds of FOIA exemptions.

Subsection (e) requires annual FOIA reports from each federal agency and an annual Department of Justice report on FOIA litigation and Department efforts (primarily through the Office of Information and Privacy) to encourage agency. As of the 1998 reports, the Department of Justice will make all reports available to the public through a single World Wide Web site.

Subsection (f) defines "agency" to include nearly all executive branch entities and defines "record" to include information maintained in an electronic format. (See further discussion in relation to the copyright problem in section below.) Newly added subsection (g) requires agencies to prepare FOIA reference guides describing their information systems and their processes of FOIA administration, which may assist potential FOIA requesters.

### 1.2.2. Procedural Requirements

Scope

FOIA applies to "records" maintained by "agencies" within the executive branch of the federal government, including the Executive Office of the President and independent regulatory agencies. It does not apply to records maintained by state governments, municipal corporations, courts, Congress or private citizens. In general, it does not apply to entities that "are neither chartered by the federal government [n]or controlled by it," including presidential transition teams. It also does not apply[11] to the Office of the President and units within the Executive Office of the President whose sole function is to advise and assist the President. However, government entities whose functions are not limited to advising and assisting the President are "agencies" under the FOIA[12].

Agency Records

The Supreme Court two-part test for "agency records" identifies records which are: i) created or obtained by an agency; and ii) under agency control at the time of the FOIA request. The D.C.

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[10] This sanction does not operate if the complaining party: a) had actual and timely notice of the unpublished agency policy; b) is unable to show that he was adversely affected by the lack of publication; or c) fails to show that he would have been able to pursue "an alternative course of conduct" had the information been published.

[11] The District of Columbia Circuit Court of Appeals held that the former Presidential Task Force on Regulatory Relief - chaired by the Vice President and composed of several cabinet members - was not an agency for purposes of the FOIA. The cabinet members were not acting as heads of their departments "but rather as the functional equivalents of assistants to the President."

[12] For example, the D.C. Circuit, after examining the responsibilities of one entity in the Executive Office of the President narrowly concluded that its investigatory, evaluative, and recommendatory functions exceeded merely advising the President and that it therefore was an "agency" subject to the FOIA. On the other hand, same court determined that the National Security Council is not an agency subject to the FOIA based on a review of its structure, proximity to the President and the authority delegated to it.

Circuit has provided comprehensive discussions[13] of relevant factors and precedents and how certain records maintained by agency employees may qualify as "personal" records rather than "agency" records.[14] A growing body of case law discusses the "agency record" status of records that are either provided by[15] or maintained by[16] a government contractor.

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[13] Burka v. HHS, 87 F.3d 508, 515 (D.C. Cir. 1996) found data tapes created and possessed by contractor to be agency records because of extensive supervision exercised by agency which evidenced "constructive control". Wolfe v. HHS, 711 F.2d 1077, 1079-82 (D.C. Cir. 1983) held that transition team records, physically maintained within "four walls" of agency, were not agency records under FOIA. Tax Analysts, 492 U.S. at 146 declared that federal court tax opinions maintained and used by Justice Department's Tax Division are agency records. General Elec. Co. v. NRC, 750 F.2d 1394, 1400-01 (7th Cir. 1984) determined that agency "use" of internal report submitted in connection with licensing proceedings makes the report an agency record. Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 11-12 (D.D.C. 1995) (following Washington Post v. DOD, 766 F. Supp. 1, 17 (D.D.C. 1991) found transcript of congressional testimony provided "solely for editing purposes," with cover sheet restricting dissemination, is not an agency record. Marzen v. HHS, 632 F. Supp. 785, 801 (N.D. Ill. 1985) declared that records created outside federal government which "agency in question obtained without legal authority" are not agency records). Waters v. Panama Canal Comm'n, No. 85-2029, slip op. at 5-6 (D.D.C. Nov. 26, 1985) found that Internal Revenue Code is not an agency record. Centre for Nat'l Sec. Studies v. CIA, 577 F. Supp. 584, 586-90 (D.D.C. 1983) held that agency report, prepared "at the direct request of Congress" with intent that it remain secret and transferred to agency with congressionally imposed "conditions" of secrecy, is not an agency record. See also SDC Dev. Corp. v. Mathews, 542 F.2d 1116, 1120 (9th Cir. 1976), which reached a "displacement-type" result for records governed by National Library of Medicine Act; FOIA Update, Fall 1990, at 7-8 n.32.

[14] Gallant v. NLRB, 26 F.3d 168, 171-72 (D.C. Cir. 1994) stated that letters written on agency time on agency equipment by board member seeking renomination, which had been reviewed by other agency employees but not integrated into agency record system and over which author had not relinquished control, are not agency records. Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice, 742 F.2d 1484, 1488-96 (D.C. Cir. 1984) held that appointment calendars and telephone message slips of agency official are not agency records. See also Spannaus v. United States Dep't of Justice, 942 F. Supp. 656, 658 (D.D.C. 1996), which found that "`personal' files" of an attorney no longer employed with agency were "beyond the reach of FOIA" if they were not turned over to the agency at end of employment. Judicial Watch, 880 F. Supp. at 11 concluded that "telephone logs, calendar markings, [and] personal staff notes" not incorporated into agency record-keeping system are not agency records). Hamrick v. Department of the Navy, No. 90-283, slip op. at 6 (D.D.C. Aug. 28, 1992) found that employee notebooks containing hand-written notes and comments, created and maintained for personal convenience and not placed in official files or referenced in agency documents, are not agency records. Sibille v. Federal Reserve Bank, 770 F. Supp. 134, 139 (S.D.N.Y. 1991) ruled that hand-written notes of meetings and telephone conversations taken by employees for their personal convenience and not placed in agency's files are not agency records. Dow Jones & Co. v. GSA, 714 F. Supp. 35, 39 (D.D.C. 1989) determined that agency head's recusal list, shared only with personal secretary and chief of staff, is not an agency record). Forman v. Chapotan, No. 88-1151, slip op. at 14 (W.D. Okl. Dec. 12, 1988) rejected the contention that materials distributed to agency officials at privately sponsored seminar are agency records. AFGE v. United States Dep't of Commerce, 632 F. Supp. 1272, 1277 (D.D.C. 1986) found that employee logs created voluntarily to facilitate work are not agency records despite containing substantive information. FOIA Update, Fall 1988, at 3-4 discusses circumstances under which presidential transition team documents can be regarded as "personal records" when brought to federal agency. See also FOIA Update, Fall 1984, at 3-4 ("OIP Guidance: `Agency Records' vs. `Personal Records'"). But also see Washington Post Co. v. United States Dep't of State, 632 F. Supp. 607, 616 (D.D.C. 1986) holding that logs compiled by Secretary of State's staff--without his knowledge--are agency records. Ethyl Corp. v. EPA, 25 F.3d 1241, 1247-48 (4th Cir. 1994), found record search inadequate because employees "not properly instructed on how to distinguish personal records from agency records".

[15] See Hercules, Inc. v. Marsh, 839 F.2d 1027, 1029 (4th Cir. 1988) holding that army ammunition plant telephone directory prepared by contractor at government expense, bearing "property of the U.S." legend, is an agency record. Tax Analysts v. United States Dep't of Justice, 913 F. Supp. 599, 607 (D.D.C. 1996) found that an electronic legal research database contracted by agency is not an agency record because licensing provisions specifically precluded agency control. Baizer v. United States Dep't of the Air Force, 887 F. Supp. 225, 228-29 (N.D. Cal. 1995) held that database of Supreme Court decisions, used for reference purposes or as research tool, is not an agency record. Lewisburg Prison Project, Inc. v. Federal Bureau of Prisons, No. 86-1339, slip op. at 4-5 (M.D. Pa. Dec. 16, 1986) held that training videotape provided by contractor is not an agency record.

[16] See, e.g., Los Alamos Study Group v. Department of Energy, No. 97-1412, slip op. at 4 (D.N.M. July 22, 1998) determining that records created by contractor are agency records within meaning of FOIA because government contract "establishes [agency] intent to retain control over the records and to use or dispose of them as they see fit" and agency regulation "reinforces the conclusion that [the agency] intends to exercise control over the material." Gilmore, 4 F. Supp. 2d at 921 found video conferencing software created by privately owned laboratory not an agency record. Chicago Tribune Co. v. HHS, No. 95-C-3917, 1997 U.S. Dist. LEXIS 2308, at *33 (N.D. Ill. Feb. 26, 1997) (magistrate's recommendation) found notes and audit analysis file created by independent contractor are agency records because they were created on behalf of and at request of agency and agency maintained "effective control" over them. Rush Franklin Publ'g, Inc. v. NASA, No. 90-CV-2855, slip op. at 10 (E.D.N.Y. Apr. 13, 1993) found computer tape maintained by contractor is not an agency record in absence of agency control. Sangre de Cristo Animal Protection, Inc. v. United States Dep't of Energy, No. 96-1059, slip op. at 3-6 (D.N.M. Mar. 10, 1998) held that records that agency neither possessed nor controlled and that were created by entity under contract with agency, although not agency records, are accessible under an agency's regulation (10 C.F.R. § 1004.3 (1998)) that specifically provided for public availability of contractor records. Animal Legal Defense Fund v. Secretary of Agric., 813 F. Supp. 882, 892 (D.D.C. 1993) ruled that plans regarding treatment of animals maintained on-site by entities subject to USDA regulation are not agency records - this was a non-FOIA case brought under Administrative Procedure Act, 5 U.S.C. § 551 (1994)), vacated for lack of standing sub nom. Animal Legal Defense Fund v. Espy, 29 F.3d 720 (D.C. Cir. 1994).

Each federal agency must publish its procedural regulations governing access[17] in the Federal Register. These regulations must[18] inform the public of where and how to address requests; search, review, and duplication fees; fee waiver criteria; and administrative appeal procedures. The EFOIA changed several procedural aspects of FOIA administration[19], including timing of the processing of FOIA requests, which are discussed below. Each federal agency is required[20] to promulgate implementing regulations in the Federal Register addressing these matters as well.

Valid requests

Any person can make FOIA requests – this encompasses individuals (including foreign citizens), partnerships, corporations, associations, and foreign or domestic governments. FOIA specifically excludes federal agencies but state agencies certainly can make FOIA requests. The only significant exception is for those who flout the law, such as fugitives from justice or their agents, who may be denied judicial relief by the courts.

FOIA requests can be made for any reason; because the purpose for which records are sought "has no bearing" upon the merits of the request, FOIA requesters do not have to explain or justify their requests. As a result, despite repeated Supreme Court requests for restraint, FOIA has been used successfully to substitute for or complement document discovery in civil and criminal litigation.

By the same token, the Supreme Court has stated that basic rights to access "are neither increased nor decreased" by virtue of having a greater interest in the records than that of an average member of the general public. Such considerations *do* affect certain procedural areas - expedited access, waiver or reduction of fees and the award of fees and costs to successful FOIA plaintiffs. The Supreme Court has also observed that: "The fact that no one need show a particular need for information in order to qualify for disclosure under the FOIA does not mean that in no situation whatever will there be valid reasons for treating [an exemption] differently as to one class of those who make requests than as to another class." In short, agencies should not invoke FOIA exemption to protect a requester from himself.

FOIA specifies only two requirements: that requests "reasonably describe" records sought; and that requests follow each agency's published procedural regulations. The legislative history of the 1974 FOIA amendments indicates a description is sufficient if it enables a professional agency employee familiar with the subject area to locate the record with a "reasonable amount of effort."

The rationale for this rule is that FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters, or to allow requesters to conduct "fishing expeditions" through agency files[21]. However, agencies are not supposed to interpret this so strictly as to deny requesters access to information simply because the requested information exists in different form. It should be stressed that the test is *not* the burden on the agency in filling the request, but only whether staff can reasonably ascertain and locate the exact records requested[22].

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[17] See 5 U.S.C. § 552(a)(3)(A), (a)(4)(A), (a)(6)(A), (a)(6)(D), (a)(6)(E); see also 5 U.S.C. § 552(g) requiring agencies to make available "reference material or a guide for requesting records or information from the agency." FOIA Update, Summer 1998, at 3 discusses availability of agency reference guides through agency FOIA sites on World Wide Web). FOIA Update, Spring 1997, at 1 discusses electronic publication of Justice Department's FOIA Reference Guide.

[18] Revised Department of Justice FOIA Regulations, 28 C.F.R. pt. 16 (1998).

[19] See FOIA Update, Winter 1998, at 3-5 ("OIP Guidance: Electronic FOIA Amendments Implementation Guidance Outline").

[20] 5 U.S.C. § 552(a)(6)(D), (a)(6)(E); see, e.g., 28 C.F.R. pt. 16 (1998); see also FOIA Update, Summer 1998, at 4 discussing availability of agency regulations--including proposed implementing regulations--through agency FOIA web sites. FOIA Update, Winter 1998, at 5 advises agencies to be sure to apply all effective statutory provisions favouring requesters even if implementing regulations have been delayed.

[21] One FOIA request was held invalid on the grounds that it required an agency's FOIA staff either to have "clairvoyant capabilities" to discover the requester's needs or to spend "countless numbers of personnel hours seeking needles in bureaucratic haystacks."

[22] Prior to EFOIA, several courts held that agencies do not have to reorganise file systems in response to FOIA requests, write new computer programs to search for "electronic" data not already compiled for agency purposes, or aggregate computerised data files to create new, releasable records. Agencies *may* be required to perform relatively simple computer searches to locate requested records or demonstrate why such searches are unreasonable in a given case. The EFOIA now requires agencies to make "reasonable efforts" to search for requested records in electronic form or format "except when such efforts would significantly interfere with the operation of the agency's automated

Deadlines

FOIA deadlines (formerly[23] 10 working days to notification of the agency decision and a "reasonable time" to release of the information) for compliance date from receipt of a proper request by the agency holding the data. Extensions may be sought in writing, and backlogs are to be handled on a first-in, first-out basis. EFOIA allows creation of separate tracks – FIFO is applied within each track, but separate tracks can be used to separate simple and complex requests.

In specific cases[24], demonstrated urgency can trigger expedited processing. EFOIA creates a further "fast track" (10 day) exception for a "person primarily engaged in disseminating information" who can demonstrate "urgency to inform the public concerning actual or alleged Federal Government activity." Failure to meet deadlines gives requesters immediate access to judicial remedies.

Requests may be denied if previously assessed fees have not been paid – indeed, the practice of requiring payment up front has been upheld by the courts.

When records originate with other agencies, those agencies should be consulted. In the case of "entire records," requests should be referred to the originating agency – though the agency that received the request remains "on the hook" in case of litigation about its actions. Agencies receiving referrals should handle them in FIFO fashion tied to the date of the original request.

Making information available

Courts have held that requested information need not be mailed, but can instead be "made available" in a public location (a physical reading room). Copies should not be sent unless specifically requested. It is important to distinguish information made available to all in (physical or electronic) reading rooms from information made available to specific requesters. EFOIA requires the agency to "provide the [requested] record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format" and "make reasonable efforts to maintain its records in forms or formats that are reproducible" for such purposes.

While it is well established "that computer-stored records, whether stored in the central processing unit, on magnetic tape, or in some other form, are records for the purposes of the FOIA," FOIA does not require "agencies, in providing information to the public, should invest in the most sophisticated and expensive form of technology." Agencies *are* encouraged to use advanced technology to satisfy existing or potential FOIA demands efficiently. This, together with EFOIA's "electronic reading room" obligations, has led to federal agencies increasingly designing and development Web sites for FOIA administration.

FOIA applies only to "records" - not to tangible, evidentiary objects. The courts initially defined "record" by relying on the dictionary meaning of the term. Subsequently, the Supreme Court referred to the Records Disposal Act. Recent technological advances have led at least one court to expand the term to encompass computer programs, or "software," in light of the FOIA's purpose of encouraging widespread public access. EFOIA defines the term as simply "includ[ing] any information that would be an agency record . . . when maintained by an agency in any format, including an electronic format."

Miscellaneous

As a rule, agencies are not required to create records in order to respond to FOIA requests, nor to answer questions posed as FOIA requests. FOIA does not provide for limited disclosure; rather, it "speaks in terms of disclosure and nondisclosure. *It ordinarily does not recognise degrees of disclosure, such as permitting viewing, but not copying, of documents*." (Emphasis added.) By the same token, providing exempt information to a requester and *limiting his ability to further disclose it* through a protective order is "not authorised by FOIA." Conversely, requesters cannot

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information system." The term "search" means "to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request."

[23] EFOIA extended this to 20 days.

[24] E.g. jeopardy to life or personal safety or threatened loss of substantial due process rights.

compel agencies to make automatic releases of records as they are created – this means that requests cannot properly be made for "future" records not yet created.

There also is no damage remedy available to FOIA requesters for nondisclosure. Agencies do not have to: i) seek return of records they do not "control" or records wrongfully removed from their possession; ii) recreate records properly disposed of; iii) respond to requests for records that already available for "reading room" inspection and copying; or iv) to seek the delivery of records held by private entities. FOIA may not be used as an "enforcement mechanism" to compel agencies to perform their missions. Finally, the D.C. District has held, in a singular such decision, that under some circumstances a FOIA claim may not be extinguished by the death of a requester.

### 1.2.3. Exemptions and exclusions

Exemption 1: National security

Exemption 1 of the FOIA protects national security information concerning national defence or foreign policy, provided that it has been properly classified Deference to Agency Expertise

Exemption 2: internal personnel rules and practices

Exemption 2 of the FOIA exempts records "related solely to the internal personnel rules and practices of an agency." Courts have interpreted the exemption to encompass two distinct categories of information:

i) Internal matters of a relatively trivial nature--sometimes referred to as "low 2" information; and

ii) More substantial internal matters, the disclosure of which would risk circumvention of a legal requirement--sometimes referred to as "high 2" information.

Exemption 3: exemption by statute (relevant to copyright issue)

Exemptions 3 and 4 are the ones most likely to apply to requests for copyrighted work. In such a case, the exempting statute would be the Copyright Act, the Digital Copyright Act or a similar law. For the exemption to apply, the statute referred to must:

i) Give the agency no discretion in withholding information;

ii) Establish clear withholding criteria: or

iii) Identify particular subjects to be withheld.

Since the Copyright Act and FOIA are independent, it is necessary to consider case law to understand the interaction. The following discussion draws on Tomkies (1993). A 1980 North Georgia federal district court ruling[25] held that "FOIA does not provide any exemption for copyrighted material nor does the copyright act meet the exemption standards under 5 USC 552(b)(3)." The latter conclusion reflects the absence from the Copyright Act of an express exemption provision – the court did not consider that Sections 106 (holder's *exclusive rights*) or 107 ("fair use") of the Copyright Act meet the above test.

Note: the fair use doctrine was developed to balance the competing interests of the copyright owner and the public. It defines certain "reasonable uses" that do not require the right-holder's consent – in particular, the work can be reproduced for certain limited purposes. Roughly, the doctrine exempts copying for comments, criticism, reporting, etc. The decision rests on four factors:

a) Purpose and character of the use (e.g. whether it is for commercial or educational purposes) – this can create problems for FOIA, which requires release of information regardless of purpose or the identity of the requester;

b) Nature of the work;

c) Amount and substantiality of copied portion; and

d) Effect of use on the work's market value – this "issue of harm" has been described as "the most important element of fair use." The determination rests on several explicit economic factors – these may be well beyond the capacity of the agency to determine as part of a FOIA decision.

[25] *St. Paul's Benevolent Educational and Missionary Institute v. United States*, 506 F. Supp. 822.

In view of the difficulty in applying fair use, suggested alternatives include: amending the Copyright Act to meet the test i-iii; amending the FOIA (to set out disclosure standards for copyright material, add a tenth exemption, or clarify whether requesters get access or a copy of the material)

Exemption 4: trade secrets, privileged or confidential commercial or financial information

If exemption 3 can be used to claim copyright protection, exemption 4 deals explicitly with industrial property protection: trade secrets and privileged commercial and financial information. It is certainly hard to claim trade secret status for copyrighted material – exceptions might be large reports or programmes written for a single client and not intended for further distribution or sale of copies. The *trade secret exemption* uses a three-prong test – information must be:

i) Commercial or financial;

ii) Obtained from a person; and

iii) Privileged or confidential.

The "National Parks test" for confidentially relies on two prongs - disclosure must:

a) Impair the government's ability to obtain necessary information in the future; or

b) Cause substantial harm to the competitive position of the information provider.

We can distinguish several possibilities in the case where information available under FOIA can be commercially exploited: where disclosure forestalls the requester from buying a single copy from the provider; where disclosure forestalls multiple sales[26]; where the requester sells many copies (perhaps more than the provider would have been able or willing to sell); etc. Condition a) above could apply to almost any information – copyrighted or not. Condition b) seems ideally suited to situations involving copyright, economic exploitation of databases, etc.

It can take account of FOIA fees relative to private alternatives and allows the court or agency to take implicit account of the identity and motives of the requester. Finally, it is worth remarking that this exemption is roughly analogous to the fair use doctrine in that both protect against copying that could adversely affect market potential.

Exemption 5: Inter- or intra-agency memoranda or letters

Exemption 5 of the FOIA protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency."

Exemption 6: the privacy exemption for medical and similar files

Personal privacy interests are protected by Exemptions 6 and 7(C). While Exemption 7(C) is limited to information compiled for law enforcement purposes, Exemption 6 lets the government withhold all information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." Of course, these exemptions cannot be invoked to withhold information pertaining only to the requester.

Exemption 7: law enforcement investigatory records

Exemption 7 protects "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information

i) Could reasonably be expected to interfere with enforcement proceedings,

ii) Would deprive a person of a right to a fair trial or an impartial adjudication,

iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy,

iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,

[26] Either by providing access to many potential customers or by undercutting the value of information by increasing its availability to others.

v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or

vi) Could reasonably be expected to endanger the life or physical safety of any individual."

Exemption 8: financial services regulatory reports

Exemption 8 protects matters that are "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."

Exemption 9: geographical and geophysical data relating to wells

Exemption 9 covers "geological and geophysical information and data, including maps, concerning wells." This exemption is very rarely invoked or interpreted - one court held that it applies only to "well information of a technical or scientific nature." Only two other decisions have mentioned Exemption 9 - neither discussed its scope or application.

Exclusions

The 1986 revision of FOIA created a novel mechanism for protecting certain law enforcement matters. These three special record "exclusions" expressly allow federal law enforcement agencies, for especially sensitive records under certain specified circumstances, to "treat the records as not subject to the requirements of [the FOIA]." The required procedures are by no means straightforward, and are usually co-ordinated with the Office of Information and Privacy.

It is important to distinguish between the result of employing a record exclusion and a refusal to confirm or deny the existence of records responsive to a request. The application of one of the three record exclusions results in a response to the FOIA requester stating that no records responsive to his FOIA request exist. These special record exclusions are intended to address the exceptionally sensitive situations in which even a refusal to confirm or deny is inadequate to the task.

- The (c)(1) Exclusion: information pertaining to criminal investigations where the subject is not aware of the investigation and where such awareness might jeopardise the investigation.
- The (c)(2) Exclusion: informant records requested by a third party.
- The (c)(3) Exclusion: classified FBI records relating to intelligence, counter-intelligence or terrorism.

### 1.2.4. Discretionary Disclosure and Waiver

FOIA strikes a balance between information disclosure and nondisclosure, with an emphasis on the "fullest responsible disclosure." Because its exemptions are discretionary rather than mandatory agencies are free to make "discretionary disclosures" of exempt information, as a matter of sound policy, whenever they are not otherwise prohibited from doing so.

Sometimes, invoking a FOIA exemption requires a determination of whether the applicability of the exemption has been waived through prior disclosure or express authorisation. This requires a careful analysis of the specific nature and circumstances of any prior disclosure. A "mismatch" between the prior disclosure and the exempt information in question may be a sufficient basis for concluding that no waiver occurred. Furthermore, general or limited public discussion of a subject does not usually lead to waiver with respect to specific information or records.

### 1.2.5. Fees and Fee Waivers

Before the FOIA Reform Act of 1986, agencies were authorised to assess reasonable charges only for document search and duplication; any such fees were to be waived or reduced if disclosure was found to be generally in the "public interest." A new fee structure was established, including a new provision allowing agencies to collect "review" charges when processing records in response to a commercial-use request. Specific fee limitations and restrictions were set on the assessment of certain fees both in general as well as for certain categories of requesters. Additionally, this FOIA amendment replaced the statutory fee waiver provision with a revised standard.

FOIA provides for three levels of fees. These categorical provisions base the level of fees to be charged on the identity of the requester and the intended use of the information sought. Note that

this can partially substitute for FOIA's general refusal to allow information to be withheld on the grounds of identity or use.

- The first level of fees includes charges for "document search, duplication and review, when records are requested for commercial use." OMB Fee Guidelines define the term "commercial use" as "a use or purpose that furthers the commercial, trade or profit interests of the requester or the person on whose behalf the request is being made," i.e., on the use to which the requested information would be put, rather than on the identity of the requester.
- The second level of fees limits charges to duplication costs only "when records are not sought for commercial use and the request is made by an educational or non-commercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media." FOIA requesters falling into one or more of these three subcategories of requesters under the 1986 amendments enjoy a complete "exemption" from the assessment of search and review fees. Their requests, like those made by any FOIA requester, still must "reasonably describe" the records sought in order to not impose upon an agency "`an unreasonably burdensome search.'"
- The third level of fees applies to all requesters who do not fall within either of the preceding two fee levels - it consists of reasonable charges for document search and duplication, as provided for in the former statutory FOIA fee provision.

Additionally, all requesters may be charged actual "direct costs" involved with a request for "special services," such as certifying records as true copies or mailing records by express mail. Agencies should strive to use the most efficient and least costly means of complying with a request. This may include the use of contractor services, as long as an agency does not relinquish responsibilities it alone must perform, such as making fee waiver determinations. This specifically paves the way for a form of public-private partnership outsourcing of FOIA service provision.

The fee structure also restricts the assessment of certain fees and the authority of agencies to ask for an advance payment of a fee. No FOIA fee may be charged by an agency if the government's cost of collecting and processing the fee is likely to equal or exceed the amount of the fee itself. In addition, except with respect to commercial-use requesters, agencies must provide the first 100 pages of duplication, as well as the first two hours of search time, without cost to the requester.

These two provisions work together so that, except with respect to commercial-use requesters, agencies should not begin to assess fees until after they provide this amount of free search and duplication; the assessable fee for any requester then must be greater than the agency's cost to collect and process it in order for the fee actually to be charged.

The third level of fees, which applies to all requesters who do not fall within either of the preceding two fee levels, consists of reasonable charges for document search and duplication, as was provided for in the former statutory FOIA fee provision. Agencies may not require advance payment before *work is begun or continued*, unless the agency first estimates that the fee is likely to exceed $250 or the requester has previously failed to pay a fee within thirty days of the billing date. This statutory restriction does not stop agencies from requiring payment before records are released.

The statutory fee waiver standard as amended in 1986 contains two basic requirements--the public interest requirement and the requirement that the requester's commercial interest in the disclosure, if any, must be less than the public interest in it.

### 1.2.6. "Reverse" FOIA

A "reverse" FOIA action is one in which the "submitter of information--usually a corporation or other business entity" that has supplied an agency with "data on its policies, operations or products--seeks to prevent the agency that collected the information from revealing it to a third party [usually] in response to the latter's FOIA request." Information falling within the ambit of Exemption 4 would also fall within the scope of the Trade Secrets Act. Accordingly, without a statute or regulation giving an agency authority to release the information[27] a determination that requested material falls within Exemption 4 amounts to a determination that it cannot be released, because the Trade Secrets Act "prohibits" disclosure.

[27] This would remove the Trade Secrets Act's disclosure prohibition.

The agency's decision to release the information will ordinarily "be grounded either in its view that none of the FOIA exemptions applies, and thus that disclosure is mandatory, or in its belief that release is justified in the exercise of its discretion, even though the information falls within one or more of the statutory exemptions."

The landmark case is *Chrysler Corp. v. Brown*; the Supreme Court held that jurisdiction for a reverse FOIA action cannot be based on the FOIA itself "because Congress did not design the FOIA exemptions to be mandatory bars to disclosure" and, as a result, the FOIA "does not afford" a submitter "any right to enjoin agency disclosure." The Supreme Court also held that jurisdiction cannot be based on the Trade Secrets Act[28], because it is a criminal statute that does not afford a "private right of action." Instead, the Court found that review of an agency's "decision to disclose" requested records could be sought under the Administrative Procedure Act (APA). Reverse FOIA plaintiffs typically argue that release would violate the Trade Secrets Act and thus would "not be in accordance with law" or would be "arbitrary and capricious" within the meaning of the APA.

The Chrysler Court specifically did not address the "relative ambits" of Exemption 4 and the Trade Secrets Act, nor whether the Trade Secrets Act qualified as an Exemption 3 statute. Almost a decade later, the Court of Appeals for the District of Columbia Circuit, resolved these difficult issues, holding that the Trade Secrets Act does not qualify as an Exemption 3 statute and that the scope of the Trade Secrets Act is "at least co-extensive with that of Exemption 4."

## 1.3. RELATED REGULATIONS

This section mentions some statues whose operation overlaps with that of FOIA in the areas of copyright, economic exploitation, database quality, organisation and/or relations with the public.

### 1.3.1. Copyright

The Copyright Act

The US is a "copyright" (as opposed to *droit d'auteur*) country, and copyright protection is based on a combination of public good and economic incentive considerations. Protection is extended in Sec. 102 to "original works of authorship fixed in a tangible medium of expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device…" Rights of copyright holders are specified in Sec. 106 to include exclusive rights to control, reproduce, adapt, perform, display and transmit a copyrighted work. It is generally not applicable to federal agencies.

Federal agencies do not own copyrights themselves, nevertheless they can possess information to which copyrights of third parties apply. If an agency possesses a copyright work that it is obliged to disclose under FOIA, both the agency and the requester may infringe on copyright. Sec. 501 covers infringement: if the government merely discloses a copyrighted work in possession of the agency, it infringes on the control and display rights. If it provides copies, it may also infringe on reproduction and transmittal rights. If it makes its own copy available for copying by the requestor, it may attract contributory infringement liability.

If it infringes, the government is liable for actual or statutory damages, but neither costs nor fees (under Sec. 505). The proper use of exemptions is the key point, with the understanding that information is assumed to be disclosable unless potential competitive or other harm can be shown to be a likely consequence of its release (i.e., the initial presumption is in favor of disclosure even of copyrighted material under "fair use" provisions).

Other copyright Acts

The 1997 The No Electronic Theft Act (Public Law: 105-147) provides greater copyright protection by creating criminal sanctions for infringement. It amends Federal copyright law to define "financial gain" to include the receipt of anything of value, including the receipt of other copyrighted works:

[28] A broadly worded criminal statute prohibiting the unauthorised disclosure of "practically any commercial or financial data collected by any federal employee from any source."

- It sets penalties for wilfully infringing a copyright: (1) for purposes of commercial advantage or private financial gain; or (2) by reproducing or distributing, including by electronic means, during any 180-day period, one or more copies of one or more copyrighted works with a total retail value of more than $1,000.

- It provides that evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish wilful infringement.

- It extends the statute of limitations for criminal copyright infringement from three to five years, and revises Federal criminal code provisions regarding criminal copyright infringement to provide for a fine and up to five years' imprisonment for infringing a copyright for purposes of commercial advantage or private financial gain, by reproducing or distributing, including by electronic means, during any 180-day period, at least ten copies or phonorecords of one or more copyrighted works which have a total retail value of more than $2,500.

- It provides for: (1) up to three years' imprisonment and fines in infringement cases described above (exclusive of commercial gain intent considerations); (2) up to six years' imprisonment and a fine for a second or subsequent felony offence under (1); and (3) up to one year's imprisonment and a fine for the reproduction or distribution of one or more copies or phonorecords of one or more copyrighted works with a total retail value of more than $1,000.

- It requires, during preparation of pre-sentence report in cases of criminal copyright infringement and related offences, a victim impact statement that identifies the victim and the extent and scope of the victim's injury and loss, including the estimated economic impact of the offence on that victim.

- It directs the U.S. Sentencing Commission to ensure that the applicable guideline range for a defendant convicted of a crime against intellectual property is sufficiently stringent to deter such a crime and adequately reflects consideration of the retail value and quantity of items with respect to which the crime against intellectual property was committed.

The Digital Millennium Copyright Act (Public Law 105-304), which implements to WIPO treaties, creates a new section (512) of the Copyright Act to limit service provider liability – this can affect government vicarious liability when FOIA requests infringe copyright. It also implements the controversial "anti-circumvention" provisions designed to punish those who circumvent copy protection, particularly on databases. This can further enhance government immunity in cases involving government databases that contain copyrighted material.

### 1.3.2. Other Openness Acts

These acts and others under consideration extend the reach of the FOIA, particularly to the legislative and (possibly) judicial branches of the Federal Government. It should be stressed that none of these laws are binding on State governments[29], many of whom have their own FOIA statutes and mechanisms.

The Government in the Sunshine Act

The Government in the Sunshine Act - Declares that the public is entitled to the "fullest practicable information" regarding Federal decision-making. The Act requires Federal agency meetings to be open to public observation except under enumerated conditions. It directs the agency to make verbatim transcripts or electronic recordings of each closed meeting or portion, to be made promptly available to the public. It further states that nothing in the Act authorises an agency to withhold information it is otherwise required to provide to an individual, the public or Congress. It is an addition to the FOIA (5 U.S.C. 552b).

The Congressional Openness Act

This bill is currently under consideration by the Senate. It requires the Congressional Research Service (CRS) to make all information[30] on the CRS web site that is not confidential nor the product of an individual, office or committee research request accessible to the public via a

[29] There are both Constitutional and pragmatic reasons for this – it is not lawful for the Federal government to impose FOIA on State governments, and an attempt to impose FOIA with respect to Federally supplied information would undoubtedly create a case for Federal funding.

[30] Including all CRS issue briefs, reports, and authorisation or appropriations products.

centralised electronic database between 30 and 40 days after it is first available to Members of Congress through the CRS web site. It includes lobbyist disclosure reports[31]; and gift rule disclosure reports[32].

Moreover, information about such available documents must be included in the electronic directory of Federal electronic information. The Act would make the CRS Director responsible for maintaining, updating and editing the information, and allow the Director to make such information available without the prior approval of specified congressional committees. It also suggests that each standing and special committee of the Senate and each Joint Committee of the Congress should provide access via the Internet to publicly available committee information, documents, and proceedings, including bills, reports, and transcripts of committee meetings that are open to the public.

### 1.3.3. Administrative Acts and Regulations

The Administrative Procedure Act

The 1946 APA represented a major step towards integrating e.g. the federal administrative state into the US Constitutional scheme. The need for this integration reflects the fact that the framers of the Constitution could not have foreseen the scale, scope and power of the current government, and as a result, administrative structures were not organised on democratic lines[33]. It sought openness and public participation in rule making by requiring publication of proposed rules in the *Federal Register* and opportunity for public comments. It also calls on agencies to "publish and provide" information about their operations.

These limited provisions for transparency provided the basis for other acts regulating administrative procedures, including the FOIA and the Government in the Sunshine Act. It is worth noting that both of these latter acts originated in Congress and faced strong executive branch opposition[34]. The original debate over the APA took the position that transparency was more important that administrative convenience. As Senator McCarran said:

> *" the [APA] bill must reasonably protect private parties even at the risk of some incidental or possible inconvenience to, or change in, present administrative operations[35]."*

This balancing has continued to be an important thread in the discussion over freedom of information. As Robert Vaughn notes:

> " [Federal information policy is not] an isolated body of law [because] conflicts regarding information policy inescapably participate in major debates about theories of administrative legitimacy and decision-making[36]."

The Paperwork Reduction Act

This act is notable because of the circular A-130: Management of Federal Information Resources. This circular, which has been amended three times, governs information dissemination procedures and affects FOIA disclosure in a number of ways, not least by its statement that:

> "In order to minimise the cost and maximise the usefulness of government information activities, the expected public and private benefits derived from government information should exceed the public and private costs of the information."

Many other provisions of the circular seek to put information disclosure activities on a market footing. This introduces an economic element that may conflict with the disclosure requirements of FOIA and has implications for both fees charged for specific requests and provision of databases and electronic reading rooms. It also affects the situation vis-à-vis copyright: and the discussion below indicates, part of the difficulty in applying exemption 3 based on the Copyright Act lies in understanding the economic consequences of disclosure. The circular may weaken the

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[31] Within 90 work days after receipt.

[32] Within five days after receipt.

[33] Waldo (1984).

[34] Rosenbloom (2000).

[35] US Congress 1946, 2150.

[36] Vaughn (1994)

argument that it is unreasonable for an agency to assess the value to private copyright holders of information it is compelled to disclose for the purposes of testing the "fair use" exemption from copyright. This argument has been used to justify use of exemption 3, but the circular states:

> "Agencies need knowledge of the marketplace in which their information products are placed. They need to know what other information products users have available in order to design the best agency product. As agencies are constrained by finite budgets, when there are several alternatives from which to choose, they should not expend public resources filling needs which have already been met by others in the public or private sector."

The existing circular has been characterised as stressing private sector prerogatives in disseminating government information and driving up the price of government information through user charges. The official revision of July 1993 weakens reliance on the private sector and creates overt enforcement and oversight responsibilities.

### 1.3.4. Privacy Protection

A number of recent acts have established privacy protections. The Privacy Protection Act establishes a central agency to guide the public and ensure agency compliance with Privacy Act provisions. After actress Rebecca Schaffer was murdered in Los Angeles by a man who obtained her address from the Department of Motor Vehicles, a Bill was introduced to limit disclosure of information relating to drivers and the subsequent uses of such information. The Department of Health and Human Services has developed guidelines on privacy of medical records that may be used in constructing a new uniform federal statute. Privacy has only recently emerged as a major reason for withholding information under Exemption 3.

## 2. COMPARISON US VS DUTCH SITUATION

The previous section described in detail the various legal elements of FOIA and other related legislation in the US. The implementation of FOIA regulations (most recently, regarding EFOIA) has had different kinds of impact on the way the US government conducts its business. However, in order to understand how the lessons learned in the US regarding the implementation and impact of (E)FOIA can apply to the Netherlands, this section will make a general comparison of the legal conditions that apply in both countries.

### 2.1. FREEDOM OF INFORMATION IN THE NETHERLANDS

In the perspective of public and administrative law in the Netherlands, the concept of freedom of information is positioned as a legal safeguard against the administration. The government is expected to administer in a fair and efficient way. To assure that, various administrative safeguards ("bestuurswaarborgen")have been put in place, such as the system of democratic or parliamentary control; control by courts of administrative, civil and criminal law; administrative control through a higher administrative authority ("bestuursorgaan"), and; direct control.

Public Access ("openbaarheid") is an important condition for the execution of administrative safeguards for a fair and efficient administration. Public Access may be defined as a situation where any person has the right to inform himself on the decision making process of the public administration.

In the sixties and seventies of the last century, the administrative agencies became more independent. To ensure democratic control was one of the reasons for drafting an Act to Promote Open Government (Wet openbaarheid van bestuur; WOB). The WOB itself expresses Public Access as a sine qua non for democracy.

The first-ever Act to Promote Open Government (Stb. 1978, 581 see annex 2 for full text) in the Netherlands, with additional -- separate -- execution regulations, contains rules relating to open government and public access to information about the administration, in order to provide a legal tool of monitoring the democratic process of administration.

After a new Section 110 in the Dutch Constitution and the publication of an evaluation report of the first WOB in 1983, the amended Act to Promote Open Government was finalized in 1993 (Stb. 1992, 422 and Stb. 1993, 650). The WOB is a - *general* - administrative statute that relates to Public Access to information about the administration laid down in documents.

In addition to public access to *government information in documents* there are other forms of public access in the administrative law, such as public access to assemblies; public access to procedures; and public access to registers.

### 2.2. THE ACT TO PROMOTE OPEN GOVERNMENT

#### 2.2.1. Structure

The Act to Promote Open Government (WOB) is an administrative statue, which relates to the public access to information about the administration laid down in documents. The WOB obligates the administrative bodies in the Netherlands to two ways of public access:

a. Passive public access, disclosing information upon request (section 3).
b. Active public access, affirmative disclosure of information (section 8).

Passive Public Access means that an administrative authority has the legal obligation to disclose information as requested by any person. The WOB expressly defines under what circumstances information can or must be withheld. Under the WOB, an administrative authority is also obliged to disclose/publish certain information without receiving a particular request, when seen as necessary for the public interest. However, there is not a common practice established, yet.

Active Public Access means that the administrative authority has the legal obligation to disclose some information pro-actively, informing citizens about facts that they may not be aware of, yet, in order to be able to make their views known to the authorities in good time. Article 8 of the WOB obliges administrative authority to provide, of its own accord, information on its policy and the preparation and implementation thereof, whenever the provision of such information is in the interests of effective, democratic governance.

The WOB uses what is called an information system, contrary to a document system. This means that the requester does not have to have the knowledge *in which* "document"[37] the required information is enclosed, but the required information must be laid down in a document and the requester must name the administrative matter ("bestuurlijke aangelegenheid") when asking for the information sought (which is the case in the USA).

*All* information relating to the environment is in principle public. This type of information does not have to be enclosed in a document. However, based on a European Directive (90/313/EC) the WOB states: *"(...) the economic and financial interests of the State apply to the submitting of environmental information, when relating to acts of a confidential nature*". The relative exemption to prevent disproportionate benefits or disadvantages of individuals, legal persons or third parties does not apply to environmental information.

### 2.2.2. Procedural Requirements

Scope

The WOB applies to information held by "administrative authorities", which includes the entire three-layer public administration system in the Netherlands (Rijk, provincie en gemeente). By way of an execution regulation (Algemene Maatregel van Bestuur) other administrative bodies can be brought under the scope of the WOB. In subsection 3(1) the WOB uses the wording "administrative authority or under the responsibility of an administrative authority operating institution, service or company".

Documents

According to the WOB (Section 1(a)) a document is defined as a written piece or other material that holds data and rests at an administrative authority. This document can be an internal document that is created by the administrative authority itself, or created by a third party, when intended for the administrative authority. The interpretation of "resting at an administrative authority" may be called broad. The WOB also applies to documents that are intended for the government, which could be resting at an advisory committee. It also applies to "Other material that holds data" and includes among other material, photos, movies and electromagnetic media.

Valid requests

*Any* (legal*) person* can make WOB requests. This means individuals, partnerships, corporations, associations, and foreign or domestic governments.

A WOB request can be made for *any reason*; because the purpose for which the information in documents or other material is not relevant upon the merits of the request. In other words: WOB requesters do not have to explain or justify their requests.

A request based on the WOB is form free: either oral (in person or over the telephone), or in writing. However, the requester must name the *administrative matter*[38] (following the so-called Danish system of Public Access) and does not need to know the specific document that holds the requested information (as used in the Swedish system of Public Access).

Deadlines

An administrative authority must make a decision "as soon as possible" but at the latest within two weeks after the day on which the request is received (section 6 of the WOB). Furthermore, the administrative authority has the right to postpone the decision for a maximum of two weeks, but in this case the requester must be informed - in writing and with the grounds named - before the end of the first term of two weeks.

As mentioned before, a request for information based on the WOB is form free, the decision on the request is in principle also forms free. Subsection 5(1) says that the decision must be "oral or in writing". However in case of (partial) denial of a written request, must be in writing when the requester asks for a written decision (subsection 5(2)). Also when the requested information

[37] "documents" as used under WOB does not only apply to information on paper: it also addresses "other materials that hold data", including –amongst other- photos, movies and electromagnetic media. This equals the use of the term "records" under FOIA.

[38] An administrative matter is matter, which relates to the policy of an administrative authority, including the preparation as well as the execution of the policy.

relates to a third party, the decision must be submitted in writing, and the third party must receive the information, which relates to him (subsection 5(3)).

Subsection 7(1) of the WOB gives an administrative authority the choice when submitting the requested information to the requester between submitting a copy of the document or submitting the actual content in another form; giving the requester the opportunity to examine the content; submitting an abstract of summary of the content, or giving the requester information extracted from the document.

### 2.2.3. Exemptions and exclusions

Not every request for government information will be honored. Administrative authorities have in some cases the obligation not to disclose the information requested, and in other cases they have the right in specified circumstances to refuse the disclosure of the requested information, according to section 10 that deals with exemptions. The Dutch public access to government information system uses both absolute and relative exemptions. Next to exemptions, the WOB also names three exclusions.

In the case of an absolute exemption, the government will not submit the required information. However, a negative decision can always be reviewed by a (administrative or civil) court of law. There are three absolute WOB exemptions: Unity of the Crown, national security and trade secrets of third parties. The rest (a total of seven) are relative exemptions.

In the case of a relative exemption, the administrative authority will first weigh the interest of the parties named in the exemption against the interest of the disclosure of the information, and will decide upon the findings.

Exemption 1: Unity of the Crown

Absolute exemption 1 is a typical Dutch exemption to the public access of government information because it relates to the concept of "the Crown", that is a body formed by the national government (the Ministers) and the King. Due to the constitutional monarchy, the unity of the Crown may not be threatened. No possible controversy between the King and the cabinet is allowed to be made public, because the ministers carry the political responsibility for the King.

Exemption 2: National security

An administrative authority will submit no information when this will possible endanger the de security of the State. This is an absolute exemption to the public access of government information, and *not* secrecy of confidentiality obligation for the public sector. All Dutch secrecy and security regulations stay into force, unless there are in conflict with the WOB.

Exemption 3: Trade secrets of third parties

Absolute exemption 3 applies to "company and production data" in the case that this type of data has been submitted to the public sector *in a confidential way*, by individuals or legal persons (subsection 10 (1) under c). In principle, the company involved must inform the government that the data are no longer confidential.

Exemption 4: External relations

Relative exemption 1 deals with the relations of the Netherlands with other nations and with international organizations. The WOB tries to prevent that the disclosure of information such as documents on the Dutch foreign policy or diplomatic correspondence and reports of Dutch embassies (with often a commentary included) may hurt Dutch international relations.

Exemption 5: Economic or financial interests of the State

Relative exemption 2 relates to the economic and financial interests of the State, other public law bodies and the in subsection 1(a) under c and d named administrative bodies.

The purpose of this exemption is to prevent the disclosure and use of administrative information from leading to a financial disadvantage of the public sector. Take for example the situation of the pre-procurement phase of a request for proposal for constructing a new city hall. Requesting this financial information by a constructing company will almost certain lead to a disadvantage for the government. This could also be the case in fiscal circumstances.

Exemption 6: Law enforcement and prosecution

Relative exemption 3 applies to the investigation and prosecution of criminal acts (misdemeanors and offences). The disclosure of information in documents and other material, collected by the police or by the public prosecutor, must not frustrate the investigation and prosecution of crimes.

Exemption 7: Inspection, control or monitoring

One might say that relative exemption 4 has the same purpose as relative exemption 3, that is not in a criminal law but in a civil (and fiscal) law perspective. If knowledge about the methods of inspection, control or monitoring of the administrative bodies became public, the effect of the public sector in its role as "supervisor" would be very much reduced.

Exemption 8: Protection of privacy

Relative exemption 5 deals with privacy. The right to privacy is a constitutional right (section 10 Dutch Constitution), but also a relative right.

Exemption 9: Interest of the addressee

Relative exemption 6 says that in circumstances *in society* ("het maatschapplijk verkeer") it is required that the addressee receives notification of the information sought by requester *before* this information is distributed to others.

Exemption 10: Prevention of disproportionate (dis)advantages

The reason for relative exemption 7 in the WOB is that legislation can not foresee all the different situations in which the WOB may apply. Therefor this general exemption is put in as a safety net.

Exclusion 1: Internal deliberation

The administrative authority will not submit to the requester any personal opinions of policy which may be formulated for internal deliberation within the public sector (subsection 11(1)). This is the general rule relating to personal opinions of policy.

Exclusion 2: Personal opinions of policy

However, in respect of a good and democratic execution of the administration, personal opinions of policy can be made public by the administrative authority in a form that protects the originator of the opinion from being identified, or if the person who developed or shared the opinion has no objection that the information will be distributed in a reduced form. (subsection 11(2)).

Exclusion 3: Reports of advisory committees

The last exclusion relates to advice of advisory committees (both civil servants-only committees and mixed committee). Personal opinions of policy of the members of the committee can be made public. However, to make this information public has to be determined before the Committee starts the work.

### *2.2.4.* Fees

The fact that the WOB provides an individual with an access right to government information does not mean that execution of this right is free of costs. Every administrative authority has the right to charge for the information service, but they can also submit the information for free.

For disclosing information on demand of information deposited within the State Government, there is a maximum in place for the costs of the public access to information held by national Government. At present, copies of documents on paper are free of costs when less than 6 pages. Copies from 6 until 13 pages costs Dfl. 10, and for 14 or more pages, the requester has to pay Dfl. 0,75 per page. In the situation that the administrative bodies submits the required information on a floppy disc, the normal price of a floppy disc may be asked. Abstracts or summaries may not exceed the price of Dfl. 5 per page.

No regulation of fees is in place for disclosure on demand of information deposited within other government bodies, nor for active disclosure of information.

## 2.3. RELATED REGULATIONS

### 2.3.1. Other (public access) legislation

The WOB is a general statute that regulates public access to government information. Also, the Dutch administrative legal system has a wide range of special laws and regulations on public access *and* non-disclosure of information in documents, e.g. articles in the Wet op de Raad van State (re: council reports), Algemene Wet inzake Rijksbelastingen (re: "tax secret") and Wet op de inlichtingen- en veiligheidsdiensten (re: classified information). All those special Acts supercede the general WOB, unless the special regulation is meant to be non-exhaustive. Furthermore, every public register has its own public access regime.

### 2.3.2. Copyright

Copyright ("auteursrecht") in the Netherlands is primarily regulated by the Copyright Act of 1912, which gives the author of a literary, scientific or artistic work the exclusive rights *to publish* and to *duplicate it* for a period of 70 years after the author's dead. Copyright comes into existence as soon as the creation of the author has received any form whatever that is capable of external observation. Also, a work must be original, in the wording of the Dutch Supreme Court, the work has to carry "the mark (stempel) of the author". In principle copyright is applicable to all government information, with the exemption of official texts of legislation, judicial decisions and administrative decrees. In order to execute the copyright, a government body must explicitly claim the copyright.

No special formality is found in the Dutch law such as an explicit reservation impressed on work or copies of the work. The transfer of copyright must take place in writing and copy right may also be transferred in parts.

### 2.3.3. Database rights

Based on the European Directive on the legal protection of databases (96/9/EC) of the European Parliament and of the Council of March 11, 1996, the Dutch Copyright Act of 1912 is amended. The Directive defines the minimum common legal protection of databases and sets out *two new exclusive rights* for the makers of databases: (a) the right to prevent unauthorized acts of extraction from a database and; (b) the right to prevent unauthorized acts of re-utilization of the contents of a database.

These rights are available whenever the database producer has made a substantial investment in obtaining, verifying or presenting the contents of database. The rights have a term of 15 years; substantial changes to the content of the database will result in the database being considered new with a new term of protection.

The right to prevent unauthorized extraction of data protects the effort of an author who creates a database which lacks sufficient originality for copyright protection. Persons with access to the database are prevented from extracting and re-utilizing the contents of the database for commercial purposes.

This right compares to the "sweat of the brow" threshold common to U.S. copyright law prior to the Feist decision (Feist Publications v. Rural Telephone Service Co. , 499 U.S. 340 (1991) (i.e. white pages are not entitled to copyright, and therefore use of them does not constitute infringement).

Like the U.S. Semiconductor Chip Protection Act, protection under the European Database Directive is to be available only to nationals of members of the Member States of the European Union. Other countries will obtain such protection only if they offer comparable protection to databases of European nationals and if a bilateral agreement is reached. Like for copyright, under Dutch law Database rights only apply to government databases when explicitly claimed so.

Compulsory licenses are contemplated where the data found in the database cannot be independently created, collected or obtained form other sources. Under such circumstances, the data must be made available on "Fair and non-discriminatory terms". For databases produced by "public bodies", one can extract and re-use insubstantial parts of the database for commercial purposes.

The exemptions on the copyright on government information are also included in the Dutch Database Act. So the Database Act is in principle applicable to all databases produced by the public sector that do not consist of the official texts of legislation, judicial decisions and administrative decrees. Like for the copyright, a government body must explicitly claim the database right in order to be able to execute it.

According to a recent survey[39] approximately 70% of all governmental producers of databases do explicitly claim the copyright and database right on their databases.

As mentioned above the Act to Promote Open Government (Wob) and the Copyright Act 1912 and Database Act are simultaneous applicable to government information. There is no priority between the two legal systems.

This simultaneous applicability of legislation on transparency and on copyright and databaseright is problematic from a legal point of view because of the essential differences in the basic principles and concepts of these two frameworks. This problem, has now gained structural importance as a result of the relatively new phenomenon of valuable databases. For example, public law may prescribe that, in the interests of transparency, information must be disseminated in return for payment of (at most) the costs of dissemination. At the same time, it may turn out that the exploitation of the same information is not prohibited under private law, so that the government body that holds the rights can set a price for the use of the information for commercial purposes.

Because of this simultaneous applicability of the Wob and the Database Act, government bodies are obliged under the Wob to disclose a database, but the requester is not allowed to use it (for economic purposes) without a formal consent (license) of the owner of the database.

### 2.3.4. The Dutch Privacy legislation

The first privacy act in the Netherlands is the Dutch Data Protection Act of 1988 (Wet persoonsregistraties (WPR); Stb. 1988, 655) which provides the protection of personal information enclosed in a "database with personal data". In 2000, the WPR will be replaced be a new privacy statute, the Personal Data Protection Act (Wet bescherming persoonsgegevens WBP).

Providing personal data to a third party

Under the WPR the providing of personal data out of a database with personal data to a third party is lawful when the providing: (a) arises from the purpose of the database with personal data; (b) is demanded by law; (c) takes place with the consent of the data subject

Wet bescherming persoonsgegevens

The Directive on the protection of personal data (95/46/EC) entered into effect on 25 October 1998. The Directive establishes a regulatory framework to ensure both protection for the privacy of individuals in all Member States and the free movement of personal data within the European Union.

Based on the Directive, the WBP will come into force later this year. The WBP relates to "processing of data", whereas the WPR uses the concept of "database with personal data". Processing of data includes "distributing by way of transmitting" and the WBP defines "providing of personal data" as "to disclose or to place data related to selected individuals at someone's disposal".

## 2.4. THE COMPARISON BETWEEN FOIA AND THE WOB

When comparing the Freedom of Information Act with the Act to Promote Open Government (WOB) the following remarks are relevant. There are various differences between the legal systems of common law countries like the United States and civil law countries such as the Netherlands.

[39] Electronic databases of government administration, BDO Consultants, Groningen 1998, commissioned by the Ministry of the Interior.

The principal "source of law" in a civil law country is legislation; in a common law country law starts with case law (jurisprudence). In the Netherlands, one also has one hierarchy of legislation; laws of lower order cannot be incompatible with laws of higher order. The WOB legislation consists of both a statute and - lower in order - execution regulations ("general administrative measure" or AMvB). By contrast, the FOIA has a specific clause (exemption 3) to cover "conflict of laws." Compared with the United States legal precedents are less "binding" judges in the Netherlands; the judge will always make her or his first referral to the law itself, whereas in the US especially a Supreme Court decision would be considered guiding for the application of law.

It is therefore important to understand that, even when the impact of the laws seem to coincide, the rationale and its handling can be quite different. Further to this basic, but important notion, we note the following remarkable differences between FOIA and the WOB:

- FOIA applies only to federal agencies[40], while the WOB relates to all government administrative bodies in the Netherlands (Rijk, provincie, gemeente) as well as other administrative bodies to be named by an execution regulation (AMvB). States have their own "FOIAs". There is no formal connection.

- FOIA uses only absolute exemptions, while the WOB has a system of relative exemption in place, including a general exemption (an "open norm") for situations not foreseen at the time of making of the law (subsection 10 (2) g). However, the judgement whether the absolute (FOIA) exemption applies is based on a discretionary decision (especially when it comes to sensitive political material).

- FOIA includes three specific exclusions; a federal agency has the right to respond to a request for public access to these record with a statement to the effect that "we are not aware of any records matching the request at this agency." (applicable for exceptionally sensitive situation in which even a refusal to confirm or deny is inadequate to the task).

- Under Dutch law an agency is expected to inform a requester where to obtain the information sought, whenever possible. American Federal agencies have no direct incentive to maintain and provide comprehensive information about holdings of information, since the FOIA request needs to be addressed to the right agency.

- Both FOIA and the WOB allow any person for any reason to request government information. A fine difference is that FOIA requesters must submit a "reasonably accurate description of the record(s) sought" to the "agency that holds the information" and "comply with agency regulations", whereas WOB requesters must "only" name the "administrative matter", or name the specific document, if known. Less procedural demands in the Dutch situation, but probably little difference in practice since it will be very difficult to respond to a request without clear subject.[41]

- Regarding the format in which the requested information must be provided: In the US e-FOIA, the first choice is to make information Internet/Web accessible under affirmative disclosure (do-it-yourself access) policies. For records that are the subject of specific requests (i.e., not available online), the requestor can specify the choice of format and the agency is obliged to provide it in that format if it would not require excessive effort. And the agency is required to make all information available in print if requested (thus addressing the "digital divide" problem)[42]. Under the WOB the preferred format requested can be ignored when necessary ("for practical reasons").

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[40] Thus, it does not apply to the legislative or judicial branches or to State and local governments. It also does not apply to all executive bodies – for instance, the President's personal advisors are exempt.

[41] One of the first provisions of e-FOIA had to do with giving information to individuals about how to make requests. Most of the Web sites provide a fill-in-the-blanks type of document that users can download and complete and then send in to make a FOIA request; theoretically this helps users make well-formed (or at least better-formed) requests on the first try. (As the report points out, it's still not possible just to click on completed forms to send them by email, though.) The incentive for agencies to make the request process more efficient is two-fold; they don't enjoy spending a lot of time iterating request documents back and forth until users get it right; and if these requests drag on, their back-log reports (now required as part of all agencies' FOIA compliance reports) starts looking very bad. It should be noted, however, that agency personnel only get involved in request handling to the extent that they haven't made the requested information readily available online on a do-it-yourself basis

[42] The provisions of e-FOIA apply to all records created after 1 NOV 97, partly so that agencies don't have to go back and scan their entire history. This date was picked partly to give agencies some lead time after enactment of e-FOIA and partly because it was assumed most agencies would already be creating their records in electronic form by that

- The Electronic Freedom of Information Act Amendment of 1996 (E-FOIA) introduced an "electronic reading room" facility. Federal agencies must provide public access to electronic records, FOIA reading rooms, agency backlogs of FOIA requests and other procedural matters. When a request for a particular record has been made for 3 times, this record needs to be made available in the Electronic Reading Room. The WOB makes no such provision; this enhancement seems to be an opportunity "in the spirit" of the WOB policy intend.

- Copyright protection of public data held and created by public agencies: Copyright is not held by US Federal agencies, but is often held by state and city agencies (and exploited indeed). FOIA and the WOB contain provisions relating to *access* to government information, not its *use*. Since information created by the U.S. federal public sector is *not copyright protected*, a FOIA requester may use the information also for commercial purposes. In the Netherlands information created by the government is in principle copyright protected. Commercial use of this data for which the copyright is claimed by the administrative agency is only allowed when the right holder (e.g. the administrative agency) gives its consent.

- Protection of 3rd party copyrighted information in possession of government agencies: The US government has limited powers to refuse to divulge 3rd party copyrighted information in its possession (under exemption 3 as noted above) but cannot escape liability for contributory or vicarious infringement of copyright. The proper use of exemptions is the key point, with the understanding that information is assumed to be accessible unless potential competitive or other harm can be shown to be a likely consequence of its release (i.e., the initial presumption is in favor of disclosure even of copyrighted material under "fair use" provisions).

point. As the report points out, the fact that these materials are created electronically doesn't guarantee that the agency maintains them that way in its official files (for the varied reasons noted). On the other hand, several agencies think that scanning documents makes them easier and cheaper to search for, retrieve and reproduce or disseminate that keeping them in print form, especially if they're likely to be frequently requested. So there's an bit of a mismatch between the policy rationale and current practices in this regard.

## 3. IMPLEMENTATION AND IMPACT OF FOIA

This section focuses on the implementation and impact of FOIA. It begins with general observations and then addresses explicitly each of the research questions.

### 3.1. TRADITIONAL FOIA ACTIVITY

While FOIA and its amendments result from action by the US Congress, the Department of Justice (DOJ) serves as the lead agency in this domain. That is, DOJ helps prepare draft legislation for the Act and any amendments to it; it also handles questions related to any substantive FOIA matters, including questions about applicability and exemptions. And, as head of DOJ, the US Attorney General by tradition sends a memorandum of policy to all agencies from time to time expressing the philosophy of the current administration toward FOIA activity. Another agency, the Office of Management and Budget (OMB), handles fee matters as well as issues that involve the Privacy Act[43].

Apart from the small set of relatively concentrated functions outlined above, FOIA procedures are highly distributed. There is no single federal FOIA office; rather, each of the entities in the executive branch of government has its own FOIA office. FOIA procedures thus comprise a diverse set of practices carried out differently in different agencies as a function of their organisational structures and missions. Most notably, FOIA procedures range from highly centralised in some agencies to highly decentralised in others.

In the Environmental Protection Agency (EPA), for example, all FOIA inquiries go to one headquarters FOIA office, where they are reviewed by staff who determine where the requested data are maintained. EPA has 10 Regions that cover the United States, and most information requests are for data maintained at the regional level (although requests may span regions). Each Region, in turn, has a FOIA officer who receives the request and forwards it to the appropriate programs for handling (different programs, for instance, are responsible for water data and air data). Program offices then provide responses to the headquarters office for dissemination to the requestor. Prior to their dissemination, records are reviewed to make sure that confidential information is not disclosed and other applicable legal requirements are met. In 1999, EPA received nearly 19,000 FOIA requests.

The Department of Commerce, in contrast, is a very large organisation that subsumes a number of comparatively independent bureaus (e.g., the US Census Bureau) and agencies (e.g., the National Oceanic and Atmospheric Administration). Its FOIA activities, accordingly, are highly decentralised. There is a central FOIA office for the Department as well as a FOIA office in each bureau and agency. If a request is department wide (e.g., requests for records related to the Secretary of Commerce's trade missions over a given time period), it is handled by the FOIA office at headquarters; otherwise, it is forwarded to the appropriate operating unit for handling. FOIA requests can also be made directly to those operating units. Operating units are themselves responsible for responding to requesters (i.e., responses are not returned to headquarters for dissemination) and for tracking unit-specific FOIA activity. Pre-release review of records to address concerns about confidentiality or legal matters is carried out within the responding unit. Commerce handles about 3000 department-level FOIA requests per year.

In other agencies FOIA procedures are partly centralised and partly decentralised. In the National Aeronautics and Space Administration (NASA), for instance, the headquarters FOIA office logs and tracks all FOIA requests in a centralised database; but its component programs and centres handle the responses themselves. Similarly, the National Centre for Health Statistics (NCHS) as an operating unit of the Centre for Diseases Control (CDC) can handle its own responses to FOIA requests; but the requests then have to be sent on to CDC to be maintained in a central log.

When federal entities have the creation of data as their mission (e.g., the National Center for Health Statistics [NCHS]), such data can be obtained by individuals and organisations simply by asking for them, without invoking FOIA[44]. However, a vast amount of data is generated by

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[43] The Privacy Act subsumes requests for individually identifiable agency records by the individuals identified therein.

[44] These kinds of data are still subject to provisions of the Privacy Act; that is, they can generally be provided either as tabulations or as de-identified microdata; for exceptions, see Constantijn Panis, Cynthia Grant and Roald Euller, "Release of Confidential Microdata for Research: Case Studies of Federal Agencies and Recommendations for the Social Security Administration," Santa Monica CA: RAND, PM-1044-SSA, March 2000.

agencies in the course of carrying out other missions--for instance, EPA gathers a wealth of environmental data from regulated industries to support compliance with environmental laws. These data are subject to FOIA.

Although the purpose of FOIA is (and has always been) to promote openness and accountability in government, there is growing recognition of the value of "administrative" records of government for research and for commercial uses not originally envisioned. The availability of records in electronic media is expected to increase their usefulness for these other purposes. Other kinds of federal agency records may be both copyrighted and confidential. For example, both NASA and EPA have materials in their files that have been provided by private sector firms (contractors and regulated industries). Such files often cannot be released to requesters even under the fair use provisions of the copyright act because of the exemption for industrial property protection; that is, private material cannot be disclosed under FOIA if its release would cause competitive harm to businesses[45].

Federal agencies are not permitted to copyright any of the information they produce (whether as a part of their central mission or a by-product of it). Nor may they charge for making their information available to requesters under FOIA, except for nominal amounts associated with the recovery of direct costs of search, duplication and review. OMB has established a uniform schedule of fees for all agencies, associating different fee levels with different categories of requesters (e.g., commercial vs. non-commercial organisations) and allowing fee waivers in specified circumstances. Thus while the direct costs of searching or copying may vary somewhat from agency to agency (for instance, as a function of the professional level of the staff needed to carry out these efforts), there is relatively little variation across agencies in FOIA-generated fees.

In general, US agencies recoup only a small fraction of the actual cost of dissemination of information under FOIA. Further, any revenues so generated go to the general treasury rather than to agency budgets. As a result, agencies have no incentive to charge for their information provision efforts[46]. Finally, once agency information has been released under FOIA to a requestor, there is no barrier to any future use of it.

### 3.1.1. Information sharing arrangements among federal agencies

There are numerous and varied arrangements for sharing information between federal agencies. These exchanges are not subject to FOIA but rather are arranged through special legislation or through separate Memoranda of Understanding (MOUs). For instance, the Social Security Administration (SSA) buys postal mail address information from the Internal Revenue Service in order to send employment benefit statements to individual social security account holders; but the sharing of such personal data between agencies required special legislation. As another example, under an MOU, the Census Bureau collects some employment data for the Bureau of Labour Statistics; But the Census Bureau will not share raw data--only redacted records or tabulations--with its parent organisation (the Commerce Department).

Two organisations, the National Technical Information Service (NTIS) and the US Government Printing Office, play unique roles in the provision of government information. Through special legislation, NTIS is permitted to sell subscriptions to libraries, corporations and other users who want to receive government-funded technical reports and other information on a regularly updated basis (in contrast to FOIA procedures, which only enable information to be obtained on a request-by-request basis after it has been created). NTIS, for example, sells regularly updated national death statistics produced by SSA; it also sells NASA-prepared videos and photographs. Like the US Government Printing Office, which performs similar marketing and sales services for government publications, NTIS operations are expected to be entirely self-supporting. In contrast, the agencies themselves can only charge for information provision activities entailed by FOIA that are not related to their basic missions (e.g., costs of searching for and photocopying records).

### 3.1.2. Information sharing relationships with states

Equally varied arrangements exist for exchanging information with states. As has been noted before, all states have their own FOIA laws--some weaker and some stronger than the federal law.

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[45] FOIA exemptions to protect industrial property are summarized in the first project report, section 3.1.6 (referenced in note 1).

[46] The National Technical Information Service and the US Government Printing Office are exceptions. Their information dissemination role is discussed in the next subsection of this report.

Federal agencies, however, rely on MOUs or contractual agreements for obtaining information from states[47].

Unlike federal agencies, states are able to copyright their information, and they view the data they collect as good sources of income. For instance, the National Records and Archives Administration (NARA), SSA, and other agencies who want actual copies of birth and death records must buy them from the states. These agencies, in turn, can release vital statistics to third-party requesters; but they cannot disseminate the raw records as they were received from the states. The same principle holds true of motor vehicle and driving license registration data owned by states[48].

### 3.1.3. Information sharing relationships with other data owners

The kinds of constraints just described apply to any copyrighted material that finds its way into the records of federal entities subject to FOIA. For example, an information booklet produced by the Office of the Vice President is illustrated with copyrighted Dilbert cartoons; third-party users are able to reproduce and disseminate text from the booklet but may not reproduce the cartoons themselves, except under the "fair use" provisions of the US copyright law[49]. As another example, SSA includes a map to its facilities in some of its informational material; created and sold by Map Quest, the map insert itself is subject to the fair use provisions of US copyright law (unlike the rest of the material SSA provides for its visitors).

## 3.2. IMPLEMENTATION OF E-FOIA

The e-FOIA amendments enacted in 1996 make two major changes to traditional FOIA activity.

First, they demand an increase in "affirmative" disclosures of government information. That is, they require agencies to make some categories of information available--preferably through Web and Internet access--without waiting for individual FOIA requests. These include records that are, or are expected to be, frequently requested.

Second, the amendments institute a number of other changes in agency procedures to make the FOIA requesting process itself a more effective vehicle for getting government information (e.g., by requiring agencies to identify their major information systems, to provide clear instructions for making FOIA requests, and to deliver requested records in the form or format desired by the requestor). These provisions are also intended to be met by means of Web- and Internet-based interactions to the extent possible.

While they represent significant departures from previous practice, it is worth noting that the e-FOIA amendments were adopted in the context of an administration actively seeking to "reinvent" government[50]. Headed by the Vice President's office, reinvention efforts focused on delivering improved government services at lower cost, in part by relying on digital media to enable agencies to interact more directly with their clients.

The view was that American corporations had accomplished similar kinds of goals by restructuring themselves to take better advantage of the capabilities of digital media not only to make internal operations more efficient but also to create better working relationships with customers, suppliers and other stakeholders in their business processes. Vice President Gore urged that government agencies likewise make better use of these new media in their pursuit of improved performance of their missions[51]. Consequently there was a major push for agencies to become Web- and Internet-accessible, quite independently of e-FOIA.

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[47] The converse does not hold. That is, state governments may--and often do--make FOIA requests for federal agency information.

[48] Besides having their own FOIA legislation, the states have their own Privacy Acts. In some states, the Department of Motor Vehicles is prevented by the state's Privacy Act from selling registration data except under certain restrictive conditions

[49] Relevant provisions of the US copyright are summarized in the first project report, section 3.1.5 (referenced in note 1).

[50] President Bill Clinton and Vice President Al Gore, BLAIR HOUSE PAPERS, Washington DC: National Performance Review, January 1997.

[51] Clinton and Gore, 1997, op cit (note 10).

The Department of Justice took an active role in training and assisting agencies with e-FOIA implementation from the outset. It continues to convene government-wide training sessions, to offer introductory and advanced FOIA workshops, and to provide timely guidance through its quarterly newsletter, the FOIA UPDATE. Among other things, the newsletter highlights best e-FOIA practices in agencies, responds to frequently raised issues, gives tips on e-FOIA Web site

| Effective Dates | Implementation targets |
|---|---|
| March-97 | General effective date for many amendment provisions |
| October-97 | Due date for Justice Department annual reporting guides; statistical compilation for new form of annual report begins . |
| October-97 | Effective date for provisions regarding time limits, multi-tracking, unusual or exceptional circumstances, expedited processing, and volume estimation. |
| November-97 | Deadline for making available digitally all reading room records created on or after 1 November 1996 . |
| February-99 | Due date for first annual report using new form and new fiscal year timetable (i.e., FOIA reports for fiscal year 1998) |
| December-99 | Deadline for making availabale on-line agency's index of selected FOIA-disclosed records |

Table 2. Timetable for e-FOIA Amendments

development, and comments on FOIA-relevant events.

Additionally, as the e-FOIA implementation time-table was nearing its end, the Justice Department circulated a memorandum from the Attorney General to all department and agency heads calling for renewed emphasis on openness in government and urging them to do everything possible to support the full implementation efforts of the FOIA offices in their organisations[52].
At the time of our working visits (April 2000), almost all agencies had posted their e-FOIA procedures on government Web sites, explaining to users how to make FOIA requests. Beyond that, the extent of e-FOIA implementation varies considerably from agency to agency and, according to a NARA representative, probably none are fully e-FOIA compliant yet.

Below we review implementation efforts in more detail. It is worth noting, however, that agencies with the most fully developed e-FOIA procedures appear to be those that began to make themselves generally Internet- and Web-accessible well before e-FOIA was enacted. According to a representative of the Electronic Privacy Information Centre (EPIC), the widespread adoption of the Web "enabled public information dissemination much faster and more dramatically than any legislation could have." Most other study participants agreed that the Web, was the major change agent, given the FOIA foundation.

### 3.2.1. FOIA home pages

Although a Web presence had already been established by many government agencies, the new amendments led them increasingly to incorporate e-FOIA considerations in their site designs, typically by developing a FOIA home page (or, in the case of decentralised agencies, multiple FOIA home pages). Such home pages are intended to help meet the dual objectives of e-FOIA by providing instructions for how to get desired information and by providing access to electronic reading rooms where frequently requested materials can be found.

According to guidance from the Department of Justice, there are two distinct elements of well-designed FOIA home pages: (i) ease of locating and accessing the pages; and (ii) accuracy of the information on the pages, including currency of the links[53]. For ease of location and access, agencies are encouraged to make the FOIA home page accessible directly from the agency's main home page; they are also urged to link their FOIA pages to the Department of Justice's FOIA home page (through which, it is hoped, all other agency FOIA Web sites will eventually be reachable). With respect to accuracy, the Department of Justice recommends that the text content

[52] Janet Reno, "The Freedom of Information Act," Memorandum for Heads of Departments and Agencies, Washington DC: Office of the Attorney General, September 3, 1999.

[53] FOIA UPDATE, Spring 1998.

of all FOIA home pages and the descriptions of links be checked regularly (at least quarterly) to ensure that they are correct and up to date[54].

Among the agencies we visited, NASA was one of the first to develop a FOIA home page; it is directly accessible from the overall NASA home page and will link users either to the FOIA home page for NASA headquarters or to the FOIA home page of any of its centers or laboratories. Additionally, NASA's headquarters FOIA home page has a link to the broader Government Information Locator System (or GILS, which is a collection of agency-based information locators). And, somewhere on every screen, NASA's FOIA site has a separate entry on making an information request so that users do not have to return to the home page to find it.

All of the agencies we visited provide online information about how to make a FOIA request, usually accompanied by request forms that can be downloaded, completed, printed and mailed or faxed to the appropriate office. There is no requirement in the e-FOIA amendments that agencies offer users the capability to make FOIA requests electronically through the Internet and their Web sites, although they may do so as a matter of administrative discretion and the Justice Department encourages them to explore this avenue of exchange. In fact, most FOIA requests continue to be sent and received on paper.

The persistence of paper seems to be tied, in part, to the fundamental requirement under the act for agencies to have an adequate written record of requests in case of any eventual confusion or dispute. There are some exceptions. SSA, for example, allows individuals to request data about their own estimated social security benefits by email; however, responses must be sent back to requesters by postal mail[55]. At NCHS, some FOIA requests are received by email, and the easy ones are simply answered right away by email; but then the request and response must be sent on to the parent organisation (CDC) for logging and storage. According to an NCHS representative, "email is the real missing link--it should be possible for individuals just to click on a completed FOIA request form" in order to email it to the intended office. However, robust email acknowledgement functions would have to be implemented to meet the documentation needs of requesters as well as agencies[56].

### 3.2.2. Electronic reading rooms

Besides facilitating FOIA requests, FOIA home pages provide entry to virtual reading rooms where government data or documents that are frequently requested--or expected to become so--are stored for immediate use on a self-service basis. According to working visit participants, information seekers now usually check reading room materials before making a FOIA request. NASA headquarters, for example, receives about 450 FOIA requests per year; but the headquarters reading room averages about 10,000 hits per month.

It should be underscored that virtual reading rooms are not expected to replace traditional reading rooms in the near future, for at least two reasons. First, less than half of all people in the United States have access to network services from their homes or workplaces[57]; such persons would not be able to obtain newly created records if they were only made available through remote online means. So records made available through an agency's electronic reading room must continue to be available in its conventional reading room either in paper form or via computer terminals and

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[54] FOIA UPDATE, Summer 1998.

[55] The provision of personal identifiable information to individuals by email is also the subject of privacy concerns. When SSA sent benefits estimates to requesting individuals by email, it relied on the same 5 data elements it requires to identify individuals who are requesting such information on paper. However, these measures were perceived by Congress and by the press as less secure when carried out electronically; so the practice of replying by email was cancelled about 6 weeks after it was initiated. It will not be resumed until much more secure techniques for verifying identities become available (see C. R. Neu, R. H. Anderson and T. K. Bikson, "E-Mail Communication Between Government and Citizens: Security, Policy Issues, and Next Steps," Santa Monica CA: RAND, IP-178, 1998; also available at http://www.rand.org). In the meantime, SSA has a staff of 19 people answering the 1000 email inquiries the agency receives each month; it typically has about a 30-day backlog.

[56] The two requesting organizations we interviewed say they send FOIA inquires on paper to be able to establish that they made a specific information request on a particular date mainly so that agencies cannot easily escape their responding requirements.

[57] T. K. Bikson and Constantijn Panis, "Citizens, Computers and Connectivity: A Review of Trends," Santa Monica CA: RAND, MR-1109-MF, 1999.

printers located there[58]. Second, an agency's electronic reading room requirements do not apply either to records generated by the agency before November 1996 (i.e., agencies are not required to scan or otherwise convert earlier paper records to digital media) or to nonelectronic records generated outside the agency and obtained by it (e.g., contract documents) even after November 1996. Such records, if frequently requested, should continue to be made available in conventional reading rooms. However, it is to be expected that the ease of access (from your own desk at home) will boost the use of the information made available in the electronic reading rooms.

Decentralised departments and agencies may have multiple electronic reading rooms just as, in the past, they have had multiple conventional reading rooms at their dispersed sites. But in such cases the Justice Department asks the agency to link its distributed virtual reading rooms in ways that promote relatively transparent user access across them. On the other hand, if an agency provides direct links from its reading rooms to relevant external sites (e.g., in other agencies or bureaus), it should let users know they are being transferred outside the agency to sites for whose contents the initially contacted agency is not responsible.

### 3.2.3. Special issues: Documents

As noted above, electronic reading room obligations under e-FOIA apply only to agency records with a creation date of 1 November 1996 or later. This cut-off date was intended to serve as a helpful limitation--it was assumed most agencies would already be maintaining most of their records in electronic form at that point. While this assumption generally holds true for databases, it is not necessarily the case for documents.

As we learned in working visits, although most agency employees typically prepare documents using digital media, they are not necessarily maintained that way by the organisation. Rather, what appears as a single report or memorandum often is a product of several authors and multiple electronic files (some text files, some files of tables, charts or graphs) often produced by different software applications and housed in numerous office computers; there is usually no integrated electronic file or even an identifiable set of files that corresponds exactly to the final document[59].

Representatives of the Commerce Department (most of whose records are documents) and NASA both described this problem, indicating that for such reasons document files (except for email) are even today mainly kept on paper in their agencies. In contrast, SSA, NCHS and EPA have a long history of preparing many of their text documents for online distribution; we also learned that other agencies in some cases are preparing their Web-based publications first, and then using those e-documents to produce the printed counterparts.

If agencies are not maintaining their post-1996 documents in electronic form, placing them in reading rooms or providing them in response to e-FOIA requests typically requires scanning. According to a NASA representative, this procedure works well for the agency's text-only material but is often not satisfactory for its charts and graphs--which may require manual repair efforts by computer graphics specialists. In contrast, scanning works well for most of the older records maintained by SSA; an SSA interviewee mentioned that for ease of access the agency is scanning even very old documents--some going as far back as 1938--because of their historical interest.

A number of agencies mentioned the likely future need for faster, more powerful scanners to meet e-FOIA requests for documents. On the other hand, for frequently requested documents, scanning might prove in the long run to be a more cost effective way for agencies to respond than repeated searching for and copying of paper records.

A final issue worth mentioning in relation to digital documents subject to e-FOIA has to do with metadata. Particularly for reading room use, according to a NARA representative, it will be necessary to support e-FOIA by generating standard metadata for electronic documents. At present there is not a consistent, commonly understood and useful set of metadata elements for

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[58] People who use traditional reading rooms have the right to obtain a copy of records made available for public inspection there.

[59] Problems of this sort are well described in a World Bank report summarizing efforts made by that organization to determine the extent to which its official documents could be identified with stored digital counterparts (see F. Fonseca, P. Polles and M. Almeida, "Analysis of Electronic Files of Bank Reports," Washington DC: The World Bank, Information and Technology Services, 1996).

describing such documents and facilitating search over a large corpus[60]. Standard metadata of the sort envisioned would enhance compliance with the e-FOIA requirement to develop an index and description of document-based records that are frequently disclosed (or expected to be frequently disclosed). This requirement was scheduled last for implementation in the congressionally-mandated e-FOIA time-line (31 December 1999) and has yet to be met by most agencies. Similar problems of standardised metadata, indices and descriptions arise in relation to databases but they are more pronounced in the domain of documents.

### 3.2.4. Special issues: databases

As just explained, databases maintained by agencies will also need to be indexed and described if they are in frequent use. Statistical agencies have had considerable experience preparing data dictionaries and in other ways making their data usable by staff and even by knowledgeable outsiders. However, preparing to comply with e-FOIA has led some of these agencies to attempt to harmonise terminology and updating schedules across their programs or operating units.

For example, well before e-FOIA was enacted, EPA began putting environmental data online via its ENVIROFACTS Web site. But only recently did it begin work on the development of an overarching index to all its data as well as plans to have hot links from index terms to relevant datasets. These efforts called attention to the need for standardised cross-program terms. In EPA, for instance, water programs and air programs do not necessarily use the same terms even when they record data about the same regulated facilities (e.g., a particular facility that emit pollutants into the air and water may have a different identifier in the air database and the water database).

Further, different programs often use different, incompatible data systems. These problems would make it either very difficult or impossible for users to search across the agency's databases and obtain results that could be meaningfully combined. The agency therefore brought in a contractor to assess the system changes that would have to be made to fully implement e-FOIA. While they will be extensive and initial costs will be high, EPA thinks that subsequent maintenance costs will be fairly low. Further, EPA believes the quality of the databases will improve with the development of common terms and standards.

Besides standardised descriptors for making data easier to find, agencies cited the need for more interactive and friendly techniques for using them. SSA, for instance, provides a Web-based calculation program that allows individuals to make "what if" inquiries once they have learned their current estimated social security entitlement (e.g., "what would the benefit be if I retired next year? or in 5 years? or in 10?); at present, however, SSA does not regard the calculator as easy to use.

As another example, NCHS provides two interactive tools (WONDER and FERRET) that provide the capabilities to create cross-tabulations, create frequencies, create user-specified datasets for down-loading, and so on. These tools have been cited as best practice examples for enabling interactive remote database use.

### 3.2.5. Special issues: registry-like information

Earlier in this report we noted that states are the owners of much registry-like information of public interest, such as birth and death records, motor vehicle registrations, and so on. Federal agencies may include data derived from such records (e.g., frequency of births or deaths per year by geographic area or disease category by year) in the statistical databases they make available but they may not provide the original records themselves to other users. Only the organisation that owns the records--the states, in this case-- can do so.

In other cases, however, federal agencies' records contain registry-like information. For instance, SSA maintains records of all applications ever received for social security cards. Sometimes a specific individual record in this registry is the subject of frequent request; notable in this category are applications from former celebrities such as Marilyn Monroe or Elvis Presley (deceased persons have no right of privacy in the United States).

More typically, however, only one or a very small number of persons (usually only the social security card holder's family members) will seek access to any given record for a deceased

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[60] As an example of the scale such problems can take, a single FOIA request to the Department of Commerce for documents related to former Secretary Ron Brown's trade missions yielded 30,000 separate documents. A well developed set of metadata could have been a great help to requesters searching these documents even though the documents themselves were only available in a conventional reading room.

person. The agency receives tens of thousands of requests per year for individual social security card applications that are handled through individual FOIA requests because the level of use for any given record does not justify putting it into a reading room for self-service retrieval. (Problems responding to inquiries made by living persons about their own records are discussed above and also in Note 15). Registry-like data maintained by the Department of Defence for military personnel are the subject of similar e-FOIA issues.

### 3.2.6. Special issues: confidentiality and privacy

Concerns about confidentiality and privacy have surfaced at several points in this report because they present exceptions or exclusions to affirmative disclosure policies. while these concerns are not new, they present new issues in relation to e-FOIA implementation.

In the realm of documents, the potential speed of response to FOIA inquires associated with electronic delivery can be offset by the time required for review and redaction. As the first report for this project explains, material that is private or proprietary or that poses a threat to national security should not be disclosed under FOIA. Judgements about what parts of records need to be excluded from disclosure (redacted) for these reasons can only be made on a document-by-document basis by FOIA officers or legal staff. When redacted records are provided to requesters, it is also necessary to indicate where material has been removed, how much of it, and of what type.

For documents available in electronic form, redaction software is becoming available to support the second stage of these efforts. That is, after exclusion decisions have been made, the software allows staff to generate a redacted version of the document that clearly denotes locations where content has been deleted and creates hot links to associate deletions with explanatory annotations about amount and type of material deleted. Most agencies, however, still employ manual redaction methods (in part because so many of their document-based records are maintained on paper). That is, they obtain a print copy of the document, black out the portions of the text to be redacted; and then recopy the document to assure that none of the redacted text is still visible (e.g. if the document is held up to the light). A manually redacted document could then be scanned for electronic provision in reading rooms, so long as explanatory annotations were also provided.

Statistical databases present a different array of issues. Standard practices for protecting privileged information in statistical databases involve deleting data fields that contain direct identifiers (e.g., names of individuals or firms) and by masking those most likely to enable identification by inference (e.g., by the use of categories rather than data for age, earnings, and the like). Now, however, concerns about identifiability by inference are growing as more and larger data sets become available online, especially when they can be combined. Although no individuals may be identifiable by inference using any single publicly available database, the possibility of combining separate databases (by matching on some commonly used variables) and using all the resulting fields together to enable identification of individuals is demonstrable and worrisome[61].

This issue is receiving considerable attention from US policymakers and researchers. Until it is resolved, two interim measures are being taken. First, the standard for judging compliance with the requirement not to release data that permit identification by inference is being interpreted to mean a "reasonable effort" toward privacy protection rather than an absolute guarantee. Second, data set requesters are sometimes asked to sign a statement swearing that they will not use the data for purposes of identifying individuals.

## 3.3. IMPACT OF E-FOIA TO DATE

It is too early to discern the real consequences of e-FOIA for federal agencies and those who have a stake in their documents and databases. The timeline for complying with the 1996 amendments has only just expired, and most agencies have yet to complete their implementation efforts. Some facts are stated below. The discussion that follows treats the near term effects and the expected

[61] This issue receives considerable attention, for example, in the US National Research Council's "Summary of a Workshop on Information Technology Research for Federal Statistics," Washington DC: Committee on Computing and Communications Research to Enable Better Use of Information Technology in Government, Computer Science and Telecommunications Board, 2000, in press. See also Panis, Grant and Euller, 2000, op cit (note 4).

longer term impact[62].

Influence of electronic reading rooms on FOIA requests

Besides facilitating FOIA requests, most federal government agencies have FOIA webpages which provide entry to virtual reading rooms where government data or documents that are frequently requested--or expected to become so--are stored for immediate use on a self-service basis.

This reading room service has decreased the number of new FOIA requests, since information seekers now usually check reading room materials before making a FOIA request. For example, NASA headquarters receives about 450 FOIA information requests per year; but the headquarters reading room averages about 10,000 hits per month. By providing information on the web it becomes easily accessible for everyone who is able to access Internet.

Compliance of Federal agencies to FOIA requirements

In the US, the prescribed implementation timeline, training workshops and guidance from the Dept of Justice, and cost guidelines from the Office of Management & Budget form the only common overarching framework for e-FOIA; everything else was left to the individual agencies.

More than three years after the enactment of the electronic Freedom of Information Act (E-FOIA) in the US it can be concluded that most federal agencies still fall short of its requirements. OMB Watch, a non profit research and advocacy group that tracks information policy, concluded that agencies have been negligent in the law's implementation.

For instance, of the 64 agencies examined at the end of 1999 7 (11%) have no useful E-FOIA presence. 57 (89%) have varying degrees of compliance with the requirements. No agency fulfilled all of the 1996 e-FOIA requirements, which might be not surprising since FOIA provides no meaningful penalty for individuals or agencies that do not follow its provisions.

Number of FOIA requests

Despite the fact that no agency fulfilled all e-FOIA requirements, the number of requests for FOIA documents has increased substantially since 1996. Members of the public, making use of the Freedom of Information Act have requested more than 600,000 records each year from the federal agencies[63]. This is a volume of requests that has currently overwhelmed some agencies.[64] There is general agreement that government information now reaches people faster than before, but it is acknowledged that delays are still too long.

### 3.3.2. Impact on the organisation of agencies

Our working visits did not surface any official "restructuring" as a part of e-FOIA implementation processes (see the discussion of government reinvention above). However, several kinds of changes in organisational relationships appeared to be underway. Most notably, in the traditional FOIA environment FOIA offices chiefly had to work with programs or operating units to make sure that information requests were handled in an accurate, timely and responsible way. Now, in order to carry out their functions in the e-FOIA context, their offices have to form three-way partnerships that change their relationships to substantive units and that also include their Information Resource Management (IRM) units.

These new needs for collaboration are explained in a September 1999 memorandum from the Attorney General along the following lines[65]:

- First, living up to the affirmative disclosure objective of e-FOIA demands regular consultation with substantive unit heads (the "institutional custodians" of the records) to

[62] As explained earlier, it is also not clear how to separate effects of e-FOIA from those associated with broader digital government efforts.

[63] "Electronic Freedom of Information Act Amendments of 1996", Floor Debate, September 1996, Congressional record: H10451

[64] "Electronic Freedom of Information Act Amendments of 1996", Floor Debate, September 1996, Congressional record: H10451

[65] See Reno, 1999, op cit (note 12).

determine what documents and data to make available on a discretionary basis, aiming at maximum disclosure consistent with avoidance of foreseeable harm.

- Second, meeting the requirements for maintaining electronic reading rooms and for producing records in varied digital forms or formats on request demands that an agency's FOIA officers and IRM staff work together "in a new partnership, with strong institutional ties, to achieve efficient information disclosure through electronic means." It is likely that external partnering with IRM contractors will occur as well in agencies that either lack the appropriate technical staff or whose technical departments are already overburdened (see the EPA example in the discussion of database issues above).

Another sort of organisational change may emerge as agencies adjust the balance between centralised and decentralised FOIA procedures. On the one hand, it will be easy to maintain documents and data where they are created in decentralised environments while making them widely accessible across the organisation through linked reading rooms and readily shareable information system indices and descriptors. On the other hand, such linkages inevitably bring about demands for standards (e.g., common metadata with consistent definitions, harmonised updating schedules so that data can be combined, and so on). The move to organisation-wide information and communication networks has been associated with concurrent increases in centralisation and decentralisation of this sort in previous research[66].

Besides such effects on agency processes, the working visit interviews also inquired about the impact of e-FOIA on numbers of inquiries received and costs of handling them. Answers to the first question are mixed. Some organisations report reduced numbers of FOIA inquiries, presumably because so much information has been placed on Web sites for self-service retrieval. About 6 years ago, for example, before EPA developed its ENVIROFACTS site, the number of FOIA inquiries was over 42,000 annually; now it gets substantially less than half that number (last year the total was 18,841).

On the other hand, the requests that remain are those that are the most complicated to fulfil. These are often large requests made by regulated companies or public interest groups (e.g., in anticipation of litigation) while private citizens with simple questions most often use the Web (e.g., to look up environmental information about their neighbourhood). So EPA's FOIA workload has not been reduced by an amount that is directly commensurate with the reduced number of inquiries. Several other agencies reported similar outcomes for data-related queries.

Other agencies report growing numbers of inquiries following e-FOIA implementation. Some attribute the increase directly to the publicity surrounding e-FOIA and other digital government efforts. Others, such as NASA, believe that posting a list of information systems and previously requested materials provides a window into the kinds of records an agency has that formerly was not open to people; and these insights naturally generate more interest and more requests.

Still others suggest that acquiring information inevitably breeds a desire for more information. In any case, even where numbers of requests are greater than before, agencies believe the numbers would be still higher had they not implemented electronic reading rooms.

Further, predictions that agencies would be massively overwhelmed with e-FOIA requests have not been borne out. As a NARA representative pointed out, similar predictions were made when GILS was introduced; in both cases, the resulting work load has been manageable. E-FOIA implementation progress and delays are strongly influenced by an agency's history of experience with making data available to external users in electronic form (whether under FOIA or for other purposes) and with its transition to networked media for their dissemination. Existing IRM expertise and technology resources, reflect mission differences (so, for instance, the Census, NCHS, SSA, EPA and so on are much advanced over other agencies; and there's a big difference in information technology sophistication even between, for example, the Census and the Dept of Commerce headquarters, its parent ministry) and have a major influence on speed of adaptation without a direct reflection in costs.

Finally, it should be acknowledged that the cost implications of e-FOIA are not yet clear. Agencies could not estimate either total initial expenses for full e-FOIA implementation or likely levels of post-implementation maintenance costs. However, the general belief is that in the long

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[66] C. Stasz, T. K. Bikson, J. D. Eveland and B. Mittman, "Information Technology in the US Forest Service: An Assessment of Late Stage Implementation, Santa Monica CA: RAND, R-3908-USDAFS, 1990.

run, making government information available electronically either in reading rooms or on request will pose less financial burden than their paper-based counterparts[67].

### 3.3.3. Impact on Citizen – Government interaction

Besides inquiring about its impact on agencies, our working visits sought to learn how e-FOIA is affecting their relationships to citizens. First, as a prelude to their answers, many agencies representatives pointed out that citizens often do not know what information is available to them even without making a FOIA request, and they often do not know where within the government particular types of information reside. Both problems can be remedied by well designed Web sites, they believe. An NCHS representative, for instance, suggests that every FOIA home page begin by explaining the kinds of data and documents people are entitled to have independently of FOIA (except for filing the exchange with CDC, NCHS handles FOIA and non-FOIA requests in the same way).

Concurring, a Washington Post interviewee said that simply asking for information typically yields a faster response than a FOIA request. Further, a Justice Department representative believes that just making agency directory information available--with names of offices, officers and phone numbers--has already made the federal government much more accessible to its citizens than it used to be. Well designed Web sites and linkages between them should go even further to connect information seekers with the appropriate information sources.

Second, when people have located the right agency, their information needs can be promptly met if the desired material is available in an electronic reading room. Particularly for databases, online availability has made a huge improvement in the speed of obtaining records as well their usefulness once acquired (formerly, statistical data were most often provided as printed tables or extracts).

Moreover, electronic reading rooms, together with multi-tracking policies, appear to have enabled most agencies to reduce their backlogs of FOIA requests. As an example, the Department of Justice reports that its constituent bureaux and services had reduced their FOIA request backlogs from a low of 16 percent improvement to a high of over 95 percent improvement by the summer of 1998[68].

But while there is general agreement that government information now reaches people faster than before, it is acknowledged that delays are still too long. The e-FOIA amendments in fact extended the number of working days to make a response from 10 to 20 working days. Many agencies contend that 20 working days often do not provide an adequate time period for searching, retrieving, reviewing, redacting if necessary, and disseminating documents or data, except for the simplest of requests. In contrast, such organisations as EPIC and the Washington Post say a 20-day time window is unreasonably long for many public purposes.

A Washington Post representative recommends looking at state level FOIA practices for good examples. In part because they are smaller and have less cumbersome bureaucracies, states are usually able to respond much faster. The Florida FOIA law, he points out, specifies a turn-around time of 3 working days.

Additionally, both EPIC and Washington Post interviewees contend that data and documents that are easiest and quickest to obtain through electronic reading rooms do not generally contain politically sensitive information of the sort to which FOIA was intended to give access (in order to control the acts of government to be correct). At least some agency FOIA officers confirmed this point.

An important final topic regarding citizen-government interaction has to do with the extent to which greater public information access through e-FOIA is leading to greater civic engagement and democratic action. Again, it is too soon to draw sound conclusions about e-FOIA effects in this arena. However, a number of relevant perspectives on this point emerged during our working

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[67] FOIA UPDATE, winter 1997. Although the organizations we interviewed do not expect that e-FOIA will have any negative financial consequencens for them, several respondents cited NTIS as an exception. NTIS, which makes government technical reports available on a subscription basis, is a "performance-based organization." That is, it is supposed to support the entire cost of its operations through the revenue it generates. Because so many agencies are making their technical reports available directly on their Web sites, respondents predict that NTIS is likely to loose a sizeable proportion of its customers; if so, its future existence would be in doubt.

[68] FOIA UPDATE, summer 1998.

visits, as summarised below.

- There is no clear evidence of a positive correlation linking civic action to improved information access, although there are some indications. This was acknowledged by representatives of the Vice President's office, as well as by other agency respondents. But they suggest that greater exposure to government information has intermediate effects that should lead in the longer term to stronger democratic participation. One such mediating condition is learning; simply put, the more people know about how their government operates, the more effectively they will be able to influence it. A second mediator is trust, associated with greater transparency or openness in government; the more confidence people have that they understand what is happening in their government, the more confident they will be in their ability to influence it and the more likely they will be to try.

- A Justice Department interviewee pointed out that information-action relationships are more likely to be manifest at state and local levels; vastly more Americans engage in political participation at those levels than at the level of the federal agencies affected by the e-FOIA amendments. A NASA representative made a similar point.

- An EPA respondent agreed with the correlation cited above, explaining that those motivated to seek public information are often those who intend to engage in civic action, Thus, this respondent proposed, under e-FOIA civic groups will be able to devote more of their time and resources to action because less effort will be spent just getting the data they need to inform their actions.

- However, an EPIC representative sounded a counterpoint to this positive thesis, saying that fears about relationships between information and action on the part of negatively intentioned actors could lead to increased use of FOIA exclusions based on national security criteria. As a case in point, he mentioned the nondisclosure of environmental information pin-pointing highly deadly toxic sites near major cities on grounds that the data could be used by terrorist organisations[69].

- More generally, according to a NARA representative, government agencies are often concerned, when they make information publicly available, that it will be misinterpreted and/or misused and the agency will be blamed.

- Last, respondents from EPIC and the Washington Post underscored the original purpose of FOIA: to enable citizens to expose wrong-doing by public officials and to hold government entities accountable for their behaviour. They emphasised that being able to demonstrate malfeasance by bringing official records to light is an extremely convincing and powerful stimulus for corrective and preventive action.

### 3.3.4. Implications for the private sector economy

Earlier in this report we explained that the economic implications of e-FOIA for executive branch bodies are uncertain. Should the transition to e-FOIA reduce their operating costs, that would be a budget benefit[70]. But since any cost-recovery fees from reproducing requested data or documents in desired digital forms or formats would go to the general treasury, there is little incentive to collect that, as well as there is no direct opportunity to create a source of investment money on top of the agency's budget that could be used for further (rapid) improvement. In contrast, interviewees could identify several economic implications for the private sector.

First, as has been mentioned, e-FOIA introduces a number of opportunities for information technology (IT) firms to provide services (e.g., Web site design, database maintenance) or software applications (e.g., redaction programs) to agencies. The federal government represents a

[69] Tensions between disclosure and public safety, like tensions between disclosure and privacy (see note 15 above), are well known and not new to the e-FOIA context. However, like the concerns noted earlier about privacy, there are concerns that the sheer amount of information available across agencies and the relative ease of accessing it may inadvertently create conditions that would empower negative actors to threaten public safety in ways much less feasible in the era of print.

[70] One agency respondent pointed out that when information access and dissemination are handled via Internet/Web sites, at least some FOIA-associated costs are shifted to external users (e.g., costs of telecommunications, Internet service provision, search time, and printing).

very large technology market in the United States[71]. Moreover, as pointed out by respondents in the Vice President's office, the move to reinvent government has encouraged a variety of innovative public-private partnerships in the information-provision domain. Although examples to date mainly reflect print media, it is expected that digital media conveying government information will follow a similar course[72].

Second, US enterprises have long used data from government agencies to inform their business strategies and tactics. Making that information available more quickly and easily through e-FOIA allows it to be used more effectively and efficiently. As one example, large firms have always requested Securities and Exchange Commission (SEC) data to guide their planning processes; now they can get updated SEC information directly, on their own, whenever they want it. As another example, in the past small enterprises usually have not had the resources required to bid on government procurements, even in the case of modest-size jobs they could readily fulfil. Now, in the spirit of reinventing government, agencies can permit heads of their operating units simply to buy goods or services costing $2500 or less with an agency credit card; and lists of credit card holders for every e-FOIA compliant agency are published on their Web sites. The result is that small businesses, formerly left out of the government contracting process, now send offers of goods or services directly to government purchasing agents identified as credit card holders. As a consequence, the list of credit card holders is one of the most frequently used reading room items in many agencies.

Third, there are indefinitely many and varied opportunities for new kinds of "information intermediaries," with potentially beneficial economic effects. Perhaps most immediate, there are FOIA service groups that undertake reading room searches and prepare and track specific information requests across operating units and across agencies for individual or organisational clients who seek government information. Next, firms are emerging that locate and (re) package available government information for customers in value-added ways on a one-time purchase or subscription basis. From EPA, for instance, we learned of firms whose business is to gather regional and state environmental data and package it with local building codes and other relevant material on a regularly updated basis. These information packages are sold to construction firms, real estate developers, land speculators, and others.

In the future, the envisioned National Spatial Data Infrastructure (NSDI) is expected to generate a plethora of economic opportunities for both private and public sector partners. Originally the development of NSDI-- conceived as the capability of Internet/Web-based geographic information system (GIS) technology together with fine-grained base map layers to support any geo-referenced data about any place--was a top-down effort with the United States Geologic Survey (USGS) as the lead agency.

Today this development is being driven by federal-local partnerships, with localities inputting their own data and pushing for faster implementation. Strong local interest has been stimulated in part by civic pride and in part by the belief that being "on the map" will be a source of economic vitality. Such efforts are also supported by the Consortium for Open GIS, a nonprofit organisation that is promoting the value of NSDI to private companies who want to earn revenue from combining government GIS data with varied value-added enhancements.

The eventual success of these efforts, according to a NARA respondent, will depend, in large measure, on two related factors: an authoritative source that controls the base maps and sets standards; and effective resolution of the data parentage or data linkage problems that arise when geo-referenced information from different sources is combined. While it is still not clear exactly how the US should finance an NSDI, there is considerable enthusiasm about its eventual pay-off.

### 3.3.5. Implications for database quality

We have found little discussion about concerns related to the quality of information and/or databases. Some of what we found was with respect to issues surrounding liability in providing

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[71] C. R. Neu, R. H. Anderson and T. K. Bikson, "Sending Your Government a Message: E-mail Communication Between Citizens and Government, Santa Monica CA: RAND, MR-1095-MF, 1999.

[72] As an example, representatives of the Vice President's office showed us paper tray liners from the McDonald's fast food chain. The liner provided toll-free telephone numbers to call for free government information about a variety of family health, safety and nutrition matters. The information was compiled and produced on tray liners along with advertisements for its own home-use products by a private sector firm at no cost to the government or to McDonald's. Product information was separated from government information and there was no attempt to suggest government endorsement of the firm or its products.

incorrect information. However, these issues fell outside the scope of this project. We specifically focused on what the effects of FOIA have been on completeness, accuracy, and timeliness of the provision of public sector information.

An important concern in the Netherlands is whether a policy of providing information only against marginal costs will influence the quality of data sets negatively. The rationale of this concern is twofold. First, new policies would restrict government agencies in their ability to process information in such a manner that would go beyond the public task of such an agency. Second, if agencies cannot request reimbursement for activities related to the construction and maintenance of databases and the collection of data that is contained in these databases, this could undermine the effort that is put into these activities and thus endanger the quality of the information.

FOIA and its fee structures have been in place since the creation of large databases in the United States. As indicated in the first part of this report, FOIA explicitly states that there can only be recovery of certain types of costs (for document search, duplication and review, and for direct costs). In practice, US agencies recoup only a small fraction of the actual cost of dissemination of information under FOIA. Further, any revenues so generated go to the general treasury rather than to agency budgets. This implies that no direct reinvestment to the design and maintenance of databases can take or have taken place. This situation has been in place since the changes made to FOIA in 1974. The implementation of E-FOIA has not altered this provision nor has it changed the practice of the recovery of costs.

However, the Office of Information and Privacy of the Department of Justice has formulated recommendations for FOIA web pages that give specific attention to quality concerns:

> "All links be checked regularly (at least quarterly) to ensure that they are still accurate and current. One of the most important features of web site design is the ability to "link" directly to practically any part of any existing web site. But if a linked item is changed at its underlying location, or the connection is otherwise altered with the passage of time, that link may become useless and frustrating to the web site user. So it is recommended that agencies regularly check their FOIA web site links for both accuracy and current viability, on no less than a quarterly basis."[73]

While the recommendation pertains to only a very narrow part of data collections maintained by the U.S. government, there is at least a recognition of potential harm to the quality of material. However, questions about the impact of e-FOIA on the quality of government databases generated consensual and positive views. Respondents believe that e-FOIA has already had good effects on government databases and that quality will continue to improve.

One factor associated with quality improvements is simply that more IRM expertise is being deployed to make databases accessible to users in digital media either in electronic reading rooms on a self-service basis or in response to specific requests. These costs are generally considered "overhead" and are part of the total personnel budget. In the past, according to a Washington Post representative, a skilled user requesting particular information sometimes had to assist an agency FOIA office in downloading the appropriate datasets. Now agencies have top level encouragement for putting IRM professionals to work with their FOIA offices (see the memorandum from the Attorney General, cited earlier) as well as clear internal incentives. The better able users are to find and extract the data they want from the agency's Web servers on their own, the less staff resources the agency has to expend in assisting them.

It is claimed that FOIA has become successful enabling legislation, because it guarantees public access to all government information and that any one person can make a request for the information. A person making a request does not have to show any particular need for the information, nor does the requester even have to be a U.S. citizen or resident. The only requirement for the request is that it must reasonably describe the records that are sought. The right of access is only balanced by concerns about privacy and confidentiality, which have grown stronger in recent years. Making information actively available via Internet reduces the costs for making information available, specifically when multiple requests are made on the same topic.

The most common problem that requesters have encountered is the delay of the response to the

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[73] http://www.usdoj.gov/oip/foia_updates/Vol_XIX_3/xix3page3.htm

request for information. It is this problem that E-FOIA has tried to address by stimulating "affirmative disclosure" of information by government making use of the Internet and other electronically accessible databases. E-FOIA requires agencies to use technology to enhance public access to government information through a number of provisions.

- First, E-FOIA settles that electronic records are subject to the Act as well, and allows the public to request records in a particular electronic format.
- Second, it requires agencies to make certain types of records available on-line and develop tools for their accessibility.

As explained earlier, some agencies are making interactive tools available along with the databases they provide. In line with earlier observations regarding the restructuring of agencies, this often requires cooperation with outside agencies for tool development.

Such tools, for example, allow users efficiently to explore a database, define highly customized datasets, and even try out certain statistical tests to be sure they have exactly the data they want before downloading it. In the future, these interactive capabilities will be extended for use with a greater number of databases and will be modified to accommodate a broader range of user skills. But for cases where such dynamic inquiry tools are not available or where the information request is too complex to be addressed by them, the National Centre for health Statistics (NCHS) has established Research Data Centers (RDCs). According to an interviewee there, RDCs operate much like customer service centers, except that they give technical assistance to information seekers who have complicated requests.

A somewhat different approach is being taken at the Social Security Administration (SSA), which receives around 1000 inquiries a month about its data. SSA expects to start handling at least some of these through a frequently-asked-questions (FAQ) facility. As planned, the FAQ database will be fully searchable using natural language queries; after responses are generated, users will be asked whether or not their question was answered; and responses receiving the most "yesses" will automatically move to the top of the FAQ.

Finally, users will be allowed to indicate whether they want email notification when information in the SSA database changes. These kinds of improvements represent significant enhancements to previous practices that improve both usability and timeliness of data, as well as it decreases the cost of responding to individual requests.

Additionally we have mentioned moves toward standardized meta-data, common variable definitions, and coordinated updating schedules so that links between datasets will be current and accurate. These kinds of harmonization efforts are chiefly visible now within agencies, across their various data-producing sub-units; such data reconciliation activities improve the accuracy of the resulting information while making it more usable.

Likewise, harmonization efforts being undertaken between agencies are expected to yield similarly beneficial effects on databases. For example, earlier sections of this report explain that a number of agencies have specific data-sharing arrangements; at present, substantial efforts are underway to develop EDI[74]-like support for such data exchange, to be negotiated by MOUs. The success of these efforts will depend, in part, on agreements about standardized data elements, data administration procedures and schedules, and so on.

Although EDI-like procedures are limited to data sharing between agencies, hot links between potentially relevant agency Web sites could enable external users to integrate digital information across agency sources. But the ability to combine information across sources depends, again, on data harmonisation. There is considerable public pressure for harmonisation, because combinability of data sets could vastly increase the scope and variety of questions they could be used to address.

While respondents uniformly agreed that there will never be a single consolidated US statistical agency,[75] they also suggested that many of the advantages associated with such a body could be achieved by virtual centralisation in an actually decentralised environment. A federal interagency

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[74] Electronic Data Interchange: the exchange of structured electronic messages over special telecommunication networks, often implemented to replace paper transactions.

[75] Lack of trust in government--and especially in large centralized agencies that gather information about individuals--is the reason why most interviewees believe it would be impossible to create a single federal statistical office in the United States. It is also the reason why sometimes special legislation is required to permit data sharing between agencies. See, for example, K. C. Laudon, "Dossier Society: Value Choices in the Design of National Information Systems," New York: Columbia University Press, 1986.

statistical commission is currently exploring initiatives that could yield standardisation and comparability of the sort achieved by a centralised system while retaining the flexibility and separation of authority represented by decentralised procedures.

Finally, representatives of both requesting and responding organisations emphasised that the widespread visibility of agency databases under e-FOIA-- to the public and to other government bodies--is probably the strongest single influence on database quality, urging agencies to benefit from decreasing cost of faster and more user-friendly hardware and software. Inaccurate, out of date, or poorly organised information damage an agency's reputation with the public and with its peers. In this it is to be understood that these "measures of success" are relative to the average level of deployment. Conversely, in the age of digital government, provision of high quality data by agencies is likely to become a necessary condition for their continued viability, both for internal work efficiency and external customer satisfaction.

# 4. CONCLUDING REMARKS

This study of the FOIA was undertaken with the intent to benefit from the lessons learned during the implementation process, with a focus on the "e" effect of the E-FOIA amendments of 1996. It should enable the Dutch government to take those lessons into account as it prepares legislative measures relative to unlocking government records requested by citizens, companies and other government agencies. For that reason, we will specifically examine the "e" in the FOIA in our concluding remarks.

Functioning of the FOIA has been explained against a background of its historical development since 1966. However, it is important to put the conclusions relative to implementation of the E-FOIA (following the FOIA amendments of 1996) in context. Today, it is still too early to draw conclusions about the long term consequences of the E-FOIA.

It is also evident that it will not be possible to separate the effects of the electronic-access amendments to the FOIA from the effects of concurrent events in a broader societal context. Well before 1996, the push to "reinvent government" in the executive branch, together with the Information Revolution that also led to widespread Internet/Web proliferation in the United States, had already stimulated efforts on the part of many federal agencies to become "e-literate" and digitally accessible. At several of the agencies we visited, for instance, electronic FOIA reading rooms constitute natural extensions of websites already developed by those agencies well before 1996. Nonetheless, among those we interviewed, the consensual conclusion was that these influences jointly stimulate a more open and accessible federal government.

A comparison of the legal content and context of both the FOIA and the "WOB" has been made in order to understand how the lessons learned in the US may serve as examples for the Dutch situation. Although there are some major differences in the principles underlying the law, many of those theoretical differences seem to make much less difference in practice than they do in theory. Therefore, many of the lessons learned from the FOIA may be useful for preparing a similar "e" amendment to the WOB.

## 4.1. RELEVANCE FOR THE DUTCH CONTEXT

In order to learn from past experience with the FOIA, it is important to understand the differences between the US and Dutch legal situation. The basic differences between the two are:

- Principal "source of law". In a civil law country (like the Netherlands) this is legislation; in a common law country (like the US) law starts with case law (jurisprudence). Compared with the United States legal precedents are less "binding" judges in the Netherlands; the judge will always make her or his first referral to the law itself, whereas in the US especially a Supreme Court decision would be considered guiding for the application of law.

- in the Netherlands, one also has one hierarchy of legislation; laws of lower order cannot be incompatible with laws of higher order. By contrast, the US Federal law may "co-exists" with State law (as is the case with "FOIA").

- The FOIA applies only to federal agencies, while the WOB relates to all governmental administrative bodies in the Netherlands (Rijk, provincie, gemeente), as well as other administrative bodies. In the US, states have their "own" FOIA, different from state to state and, as mentioned above, not bound by the FOIA at a federal level. (NB: lessons could be learned from exploring "best practice" in several of those states.)

- Under Dutch law, an agency is expected to inform a requester where to obtain the information sought, whenever possible. American federal agencies have no direct incentive to maintain and provide comprehensive information about information holdings, since FOIA requests must be addressed to the proper agency.

Although these differences are quite basic in their origin, we found that there is less difference in practice. However, there are some striking issues in the FOIA that are of interest for further "e"-WOB development:

### 4.1.1. The Electronic Reading Room

The Electronic Freedom of Information Act Amendments of 1996 (E-FOIA) introduced an "electronic reading room" facility, intended as a means of active information provision. federal agencies must provide public access to electronic records, FOIA reading rooms, agency backlogs of FOIA requests, and other procedural matters. Although the WOB currently makes no such provision, this enhancement seems to be an opportunity to make the concept of active information provision tangible "in the spirit" of the law (as reflected in Article 8).

### 4.1.2. Sources for funding of activities

Copyright may provide an important provision of funding for improving the quality of databases. Important because FOIA and the WOB contain provisions relating to *access* to government information, not its *use*. However, there are important differences:

- Whereas a US agency cannot claim copyright on data created by the agency[76], a Dutch public service in general will claim that copyright. Although copyright is not held by US Federal agencies, it is often held by state and city agencies (and exploited indeed).

- The US government has limited powers to refuse to divulge 3rd party copyrighted information in its possession (under exemption 3) but cannot escape liability for contributory or vicarious infringement of copyright[77].

In addition, (marginal cost) tariffs paid by requesters to a US agency go to the general treasury: therefore there is no direct opportunity to use this for re-investment in (improving the quality of) databases.

Consequently all database developments by US Federal agencies have been funded by general budget provision. The fact that this has led to some high quality databases with state-of-the-art user interfaces[78] shows that high quality can be achieved within this framework. Nevertheless, it is not clear from our research whether results would be better if there were a return-on-investment. This could be the subject of an additional study, e.g., regarding the practice in this matter at the state level, where revenues are (partly) used for reinvestment.

## 4.2. RELEVANT IMPACT EXPERIENCES

The analyses of relevant impact studies focus on the following four areas: organisation and operation of federal agencies; interaction between citizens and federal agencies; economic development in the private sector; and the quality and availability of databases.

### 4.2.1. Impact of the FOIA on agency organisation

E-FOIA implementation processes have not led to "official" restructuring. However, several types of changes in organisational relationships appear to be underway. Most notably, in the traditional FOIA environment, FOIA offices chiefly worked with programs or operating units to ensure that information requests were handled in an accurate, timely and responsible way. Now, in order to carry out their functions in the E-FOIA context, these offices must form three-way partnerships that change their relationships to substantive policy units and that also include their Information Resource Management (IRM) units.

The need to provide access to information on-line is considered to be an extra stimulus for implementation on organisation-wide information systems. It is expected that the costs of "streamlining the provision of information" will be offset by the resultant efficiencies both in supporting the work within agencies and in responding to requests for information by other parties.

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[76] NB: this may differ for State or Local agencies !

[77] The proper use of exemptions is the key point, with the understanding that information is assumed to be disclosable unless potential competitive or other harm can be shown to be a likely consequence of its release (i.e., the initial presumption is in favor of disclosure even of copyrighted material under "fair use" provisions).

[78] For instance the NCHS tools WONDER and FERRET – see section 3.2.4

### 4.2.2. Government Citizen Interaction

The number of requests for FOIA documents has increased substantially since 1996. Members of the public, making use of the Freedom of Information Act, have requested more than 600,000 records each year from federal agencies[79]. There is general agreement that government information now reaches people faster than before, but it is acknowledged that delays are still too long.

Despite the growth in the number of overall requests, the reading room service has decreased the number of *new* FOIA requests, since information seekers now usually check reading room materials before making a FOIA request. For example, NASA headquarters receives about 450 FOIA information requests per year; but the headquarters reading room averages about 10,000 hits per month. By providing information on the Web, it becomes easily accessible to anyone with Internet access. As a result, more time has become available for handling the more complicated requests. Another example: Some 6 years ago, before the EPA developed its ENVIROFACTS site, it received more than 42,000 FOIA inquiries annually; now, it receives substantially less than half that number (last year, the total was 18,841). The requests that remain are those that are the most complicated to fulfil. So EPA's FOIA workload has not been reduced in direct proportion to the reduced number of inquiries. Several other agencies have reported similar outcomes for data-related queries.

Reduction of backlog: Electronic reading rooms, together with multitracking policies, appear to have enabled most agencies to reduce their backlogs of FOIA requests. As an example, the Department of Justice reports that its constituent bureaus and services had reduced their FOIA request backlogs from a low of 16% improvement to a high of more than 95% improvement by the summer of 1998[80]. Conclusion: our research indicates that more requests are handled with less effort since the introduction of the electronic reading room, and that the backlog in responding to requests has been reduced accordingly.

The original purpose of FOIA is to enable citizens to expose wrongdoing by public officials and to hold government entities accountable for their behaviour. The ability to demonstrate malfeasance by bringing official records to light is an extremely convincing and powerful stimulus for corrective action. Easier access to information, through implementation of electronic reading rooms and guidance Web pages, reinforces the transparency of government.

### 4.2.3. Implications for the private sector economy

Implementation of the FOIA introduces a number of opportunities for information technology (IT) firms to provide services (e.g., web site design, database maintenance) and software applications (e.g., redaction programs) to agencies.

There are new companies, FOIA service groups, that:

- conduct reading room searches, and prepare and track specific information requests across operating units and across agencies for individual or organisational clients seeking government information.

- locate and (re)package available government information for customers in value-added ways, on a one-time purchase or subscription basis.

US enterprises have long used data from government agencies to inform their business strategies and tactics. Making that information available more quickly and easily through the E-FOIA allows it to be used more effectively and efficiently.

### 4.2.4. Implications for database quality

US agencies recoup only a small fraction of the actual cost of disseminating information under the FOIA. These revenues go to the general treasury. This implies that no direct reinvestment in the design and maintenance of databases can take or has taken place. Nevertheless, respondents

[79] "Electronic Freedom of Information Act Amendments of 1996", Floor Debate, September 1996, Congressional record: H10451

[80] FOIA UPDATE, summer 1998.

believe that the E-FOIA has already had good effects on government databases and that their quality will continue to improve.

One positive effect is that more IRM expertise is being deployed to make databases accessible to users in digital media, either through electronic reading rooms on a self-service basis, or in response to specific requests. Better professional staffing in this respect has a positive influence on the management of databases.

Last but not least, the widespread visibility of agency databases under the E-FOIA -- to the public and to other government bodies -- is probably the strongest single influence on database quality.

#### 4.2.5. Final observation

Implementation of the E-FOIA has led to more transparent access to data (guidance Web pages) and to cheaper access to data for more requesters, through the electronic reading rooms.

Although fulfilment of E-FOIA obligations was still low by the end of 1999, it is expected that a growing gap between the leading agencies and the lagging agencies will boost the pressure on the lagging agencies to make the necessary investments (i.e., set the priorities) in order to comply with the FOIA (perception of quality).

From the lessons learned, explicit incorporation of an “e” component into the WOB would be expected to lead to more transparent, often quicker, and certainly broader access to public data across the board, against lower costs per information request.

**ANNEXES**

Annex 1 The FOIA text itself

Annex 2 The WOB text in English

Annex 3 Tables comparing FOIA vs Dutch law

Annex 4 Interview set-up

Annex 5 General list of reviewed articles

**ANNEX 1: FOIA LEGAL TEXT**

United States Code

- TITLE 5 - GOVERNMENT ORGANIZATION AND EMPLOYEES
  - PART I - THE AGENCIES GENERALLY
    - CHAPTER 5 - ADMINISTRATIVE PROCEDURE
      - SUBCHAPTER II - ADMINISTRATIVE PROCEDURE

*US Code as of: 01/05/99*

**Sec. 552. Public information; agency rules, opinions, orders, records, and proceedings**

- (a) Each agency shall make available to the public information as follows:
  - (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public -
    - (A) descriptions of its central and field organisation and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;
    - (B) statements of the general course and method by which its functions are channelled and determined, including the nature and requirements of all formal and informal procedures available;
    - (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;
    - (D) substantive rules of general applicability adopted as authorised by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
      (E) each amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.
  - (2) Each agency, in accordance with published rules, shall make available for public inspection and copying -
    - (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
    - (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;
    - (C) administrative staff manuals and instructions to staff that affect a member of the public;
    - (D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and
    - (E) a general index of the records referred to under subparagraph (D); unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency,

by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if -

- (i) it has been indexed and either made available or published as provided by this paragraph; or
- (ii) the party has actual and timely notice of the terms thereof.

- (3)
  - (A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
  - (B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.
  - (C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.
  - (D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

- (4)
  - (A)
    - (i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.
    - (ii) Such agency regulations shall provide that -
  - (I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

- (II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and (III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

    - (iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

    - (iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. 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 -

- (I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

- (II) for any request described in clause (ii) (II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

    - (v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

    - (vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

    - (vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: Provided, That the court's review of the matter shall be limited to the record before the agency.

- (B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

- (C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

    - (D) Repealed. Pub. L. 98-620, title IV, Sec. 402(2), Nov. 8, 1984, 98 Stat. 3357.)

    - (E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

    - (F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the

United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

- (G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

- (5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

- (6)

  - (A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall -

    - (i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

    - (ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

  - (B)

    - (i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

    - (ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

    - (iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests -

  - (I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

  - (II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

- (III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

    - (iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requesters acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

- (C)

    - (i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of 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.

    - (ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

    - (iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

- (D)

    - (i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

    - (ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

    - (iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

- (E)

    - (i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records -

- (I) in cases in which the person requesting the records demonstrates a compelling need; and

- (II) in other cases determined by the agency.

    - (ii) Notwithstanding clause (i), regulations under this subparagraph must ensure -

- (I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

- (II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

    - (iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

    - (iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

    - (v) For purposes of this subparagraph, the term "compelling need" means -

- (I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

- (II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

    - (vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

- (F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

- (b) This section does not apply to matters that are -

- (1)

    - (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

- (2) related solely to the internal personnel rules and practices of an agency;

- (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

- (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

- (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

- (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

- (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

- (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

- (9) geological and geophysical information and data, including maps, concerning wells. Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted shall be indicated at the place in the record where such deletion is made.

- (c)

    - (1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and -

        - (A) the investigation or proceeding involves a possible violation of criminal law; and
          (B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and
          (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

    - (2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

    - (3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

- (d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

- (e)

- (1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include -
    - (A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;
    - (B)
        - (i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and (ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;
    - (C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median number of days that such requests had been pending before the agency as of that date;
    - (D) the number of requests for records received by the agency and the number of requests which the agency processed;
    - (E) the median number of days taken by the agency to process different types of requests;
    - (F) the total amount of fees collected by the agency for processing requests; and
      (G) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.
- (2) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means.
- (3) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.
- (4) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.
- (5) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

- (f) For purposes of this section, the term -
    - (1) "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; and
      (2) "record" and any other term used in this section in

reference to information includes any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format.

- (g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including -

    - (1) an index of all major information systems of the agency;

    - (2) a description of major information and record locator systems maintained by the agency; and
      (3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

# Act of 31 October 1991, containing regulations governing public access to government information

We Beatrix, by the grace of God, Queen of the Netherlands, Princess of Orange-Nassau, etc., etc., etc.

Greetings to all who shall see or hear these presents! Be it known:

Whereas We have considered that, in view of Article 110 of the Constitution, it has proved desirable, in the interests of effective, democratic governance, to amend the rules concerning openness and public access to government information and to incorporate these rules in statute law wherever possible;

We, therefore, having heard the Council of State, and in consultation with the States General, have approved and decreed as We hereby approve and decree:

## Chapter I. Definitions

### Section 1

The definitions employed in this Act and the provisions deriving from it shall be as follows:

a. document: a written document or other material containing data which is deposited with an administrative authority;

b. administrative matter: a matter of relevance to the policies of an administrative authority, including the preparation and implementation of such policies;

c. internal consultation: consultation concerning an administrative matter within an administrative authority or within a group of administrative authorities in the framework of their joint responsibility for an administrative matter;

d. independent advisory committee: a committee appointed by the government to advise one or more administrative authorities, the members of which do not include any civil servants who advise the administrative authority to which they are responsible on the subjects put before the committee. A civil servant who is the secretary or an advisory member of such a committee shall not be regarded as a member for the purposes of this provision;

e. civil service or mixed advisory committee: a committee responsible for advising one or more administrative authorities, which is composed partly or wholly of civil servants whose duties include advising the administrative authority to which they are responsible on the subjects put before the committee.

f. personal opinion on policy: an opinion, proposal, recommendation or conclusion of one or more persons concerning an administrative matter and the arguments they advance in support thereof;

g. environmental information: all information available in written, visual, audible or digital form concerning the condition of water, air, soil, fauna, flora, agricultural land and nature reserves; concerning activities, including activities causing nuisance such as noise, and measures which have or probably will have an adverse affect on these; and concerning relevant protective activities and measures, including measures under administrative law and environmental protection programmes.

### Section 1a

1. This Act shall apply to the following administrative authorities:

   a. Our Ministers;

   b. the administrative authorities of provinces, municipalities, water boards and regulatory industrial organisations;

   c. administrative authorities whose activities are subject to the responsibility of the authorities referred to in subsection 1 (a and b);

   d. such other administrative authorities as are not excluded by order in council.

2. Notwithstanding subsection 1 (d), this Act shall apply only to such administrative authorities

responsible for education and research in the policy field of the Ministry of Education, Culture and Science as have been designated by order in council.

**Chapter II. Public Access**

**Section 2**

An administrative authority shall, in the exercise of its functions, disclose information in accordance with the present Act, without prejudice to provisions laid down in other statutes.

**Chapter III. Information on application**

**Section 3**

1. Anyone may apply to an administrative authority or to an agency, service or company carrying out work for which it is accountable to an administrative authority for information contained in documents concerning an administrative matter.

2. The applicant shall specify the administrative matter or the document relevant to it about which he wishes information.

3. An application for information shall be granted with due regard for the provisions of sections 10 and 11.

**Section 4**

If the application concerns documents held by an administrative authority other than that to which the application has been submitted, the applicant shall, if necessary, be referred to that authority. If the application was made in writing, it shall be forwarded and the applicant shall be notified accordingly.

**Section 5**

1. The decision on an application for information shall be given verbally or in writing.

2. The applicant shall receive written notification of a refusal to disclose all or part of the information for which he applied in writing. If the application was made verbally, the applicant shall receive, on request, written notification of the refusal. This option shall be brought to the attention of the applicant.

3. The decision shall likewise be given in writing if the application for information concerns a third party and said third party has applied for this information. In such a case, the decision and the information relevant to the third party shall be sent to him.

**Section 6**

The administrative authority shall decide on the application for information at the earliest possible opportunity, and in any event no more than two weeks after the date of receipt of the application. The administrative authority may defer the decision for no more than a further two weeks. The applicant shall be notified in writing, with reasons, of the deferment before the first two-week period has elapsed.

**Section 7**

1. The administrative authority shall provide information concerning the documents which contain the information required by:
   a. issuing a copy of the documents or conveying their exact substance in some other form,
   b. permitting the applicant to take note of the contents of the documents,
   c. supplying an extract from the documents or a summary of their contents, or
   d. supplying information contained in the documents.

2. In choosing one of the methods listed in subsection 1 the administrative authority shall take into account the preference of the applicant and the importance of smooth, rapid procedure.

**Chapter IV. Information provided voluntarily**

**Section 8**

1. The administrative authority directly concerned shall provide, of its own accord, information on its policy and the preparation and implementation thereof, whenever the provision of such information is in the interests of effective, democratic governance.

2. The administrative authority shall ensure that the information is supplied in a comprehensible form and in such a way as to reach the interested party and as many interested members of the public as possible at a time which will allow them to make their views known to the administrative authority in good time.

**Section 9**

1. The administrative authority directly concerned shall ensure that the policy recommendations which the authority receives from independent advisory committees, together with the requests for advice and proposals made to the advisory committees by the authority, shall be made public where necessary, possibly with explanatory notes.

2. The recommendations shall be made public no more than four weeks after they have been received by the administrative authority. Their publication shall be announced in the Netherlands Government Gazette or in some other periodical made generally available by the government. Notification shall be made in a similar manner of non-publication, either total or partial.

3. The documents referred to in subsection 1 may be made public by:

   a. including them in a publication which is generally available,

   b. publishing them separately and making them generally available, or

   c. depositing for public inspection, providing copies or making them available on loan.

**Chapter V. Exceptions and restrictions**

**Section 10**

1. Information shall not be disclosed pursuant to this Act if

   a. it might endanger the unity of the Crown;

   b. it might damage the security of the State;

   c. it concerns data on companies and manufacturing processes which were furnished to the government in confidence by natural or legal persons.

2. Nor shall information be disclosed pursuant to this Act if its importance does not outweigh one of the following:

   a. relations between the Netherlands and other states or international organisations;

   b. the economic and financial interests of the State, other bodies constituted under public law or the administrative authorities referred to in section 1a, subsection 1 (c and d) and subsection 2;

   c. the investigation of criminal offences and the prosecution of offenders;

   d. inspection, control and oversight by administrative authorities;

   e. respect for personal privacy;

   f. the importance to the addressee of being the first to note the information;

   g. the prevention of disproportionate advantage or disadvantage to the natural or legal persons concerned or to third parties.

3. Subsection 2, chapeau and at b, shall apply to the disclosure of environmental information concerning confidential procedures.

4. Subsection 2, chapeau and at g, shall not apply to the disclosure of environmental information. It is possible to refrain from disclosing such information pursuant to this Act if its publication would make damage to the environment more likely.

**Section 11**

1. Where an application concerns information contained in documents drawn up for the purpose of internal consultation, no information shall be disclosed concerning personal opinions on policy contained therein.

2. Information on personal opinions on policy may be disclosed, in the interests of effective, democratic governance, in a form which cannot be traced back to any individual. If those who expressed the opinions in question or who supported them agree, information may be disclosed in a form which may be traced back to individuals.

3. Information concerning the personal opinions on policy contained in the recommendations of a civil service or mixed advisory committee may be disclosed if the administrative authority directly concerned informed the committee members of its intention to do so before they commenced their activities.

**Chapter VI. Other provisions**

**Section 12**

Rules applicable to the central government may be laid down by or pursuant to an order in council concerning charges for copies of documents made and extracts from or abstracts of documents supplied in response to applications for information.

**Section 13**

Publication of recommendations by the Council of State or independent advisory committees which were issued before 1 May 1980 shall not be compulsory under the present Act.

**Section 14**

Further rules concerning the implementation of provisions laid down by or pursuant to the present Act may be laid down:

a. for central government, by or pursuant to an order by Our Prime Minister in accordance with the views of the Cabinet;

b. for provinces, municipalities, water boards and the other administrative authorities referred to in section 1*a*, subsection 1 (c and d) and subsection 2, by their executive bodies.

**Section 15**

[Lapsed.]

**Section 16**

The provisions of the previous Government Information (Public Access) Act (Bulletin of Acts and Decrees 1987, no. 581) shall continue to apply to appeals against decisions given pursuant to the said Act which had been lodged before the present Act entered into force.

**Section 17**

Our Prime Minister and Minister of General Affairs, and our Minister of the Interior shall, within five years of the entry into force of the present Act, report to the States General on its application.

**Chapter VII. Amendments to certain Acts of Parliament**

**Section 18**

[Contains amendments to other regulations.]

**Section 19**

The provisions of the previous Act shall continue to apply to advisory reports, recommendations and proposals issued by the Council of State before the present Act entered into force.

**Section 20**

[Contains amendments to other regulations.]

**Section 21**

Restrictions on access imposed before the entry into force of the present Act shall continue to apply to applications pursuant to the 1962 Public Records Act (Bulletin of Acts and Decrees 1962, no. 313) for consultation or use of documents which had been deposited in a repository before the entry into force of the present Act.

**Sections 22-24**

[These articles contain amendments to other regulations.]

**Chapter VIII. Concluding provisions**

**Section 25**

The 1978 Government Information (Public Access) Act (Bulletin of Acts and Decrees 1978, no. 581) shall be repealed.

**Section 26**

This Act shall enter into force on a date to be determined by Royal Decree.

**Section 27**

This Act may be cited as the Government Information (Public Access) Act.

We order and command that this Act shall be published in the Bulletin of Acts and Decrees and that all ministerial departments, authorities, bodies and officials whom it may concern shall diligently implement it.

Done at The Hague, 31 October 1991

Beatrix

R. F. M. Lubbers
Prime Minister,
Minister of General Affairs

C. I. Dales
Minister of the Interior

Published the thirty-first of December 1991

E. M. H. Hirsch Ballin
Minister of Justice

**ANNEX 3: COMPARATIVE TABLES BETWEEN FOIA AND THE WOB**

**Table 1. Structure of FOIA and the WOB**

| SCOPE | *FOIA* | WOB |
|---|---|---|
| Which administration? | *federal* administrative agencies (excluding the Congress, and the Courts) | generally *all* administrative bodies, including ministers (and open for expanding by an execution regulation) |
| Ways of public access | - on request by the requester<br>- electronic reading room as a form between active and passive<br>- automatically by the federal agency (one of many) | - on request by the requester<br>- automatically by the administrative authority |
| Who can request information? | any person<br>special "fast track" procedure for news groups and persons with an urgent interest | any person<br>No specific "WOB" provision: only a fast track for any person with an urgent interest *by the President of a District Court in summary proceeding* |
| For what reason/with what effect? | any reason<br>"reverse" FOIA | any reason |
| (Formal) requirements | - Some specific requests require specific information and forms.<br>- In most cases, no reference to FOIA required | - Free of form, e.g. in person, by telephone, letter, fax, e-mail<br>- No reference to the WOB required |
| (Material) requirements | 1. reasonably description of the record(s) sought<br>2. comply with agency regulations<br>3. the name of the agency | - naming of the administrative matter (or the specific document) |
| To what efforts must the government go the find and submit the requested info? | reasonable efforts | reasonable efforts |
| Deadlines for making a decision | - 10/20 *working* days for making a decision<br>- reasonable time to release the information<br>- fast track for specific situations (10 days) and categories of requesters (such as news media) | - as soon as possible, within 14 days at the latest, or a postponement of another 14 days (has to be in writing with grounds named) |
| Access to what? | agency records (according to the US Supreme Court): | documents or other materials that holds data |

| | | |
|---|---|---|
| | 1. created or obtained by an agency; and<br><br>2. under agency control at the time of the FOIA request<br><br>A rule of reason governs the amount of material that may be requested at one time. | |
| Category of information<br><br>(what "content"?) | - in principle all government information, unless exemptions and exclusions<br><br>- geographical and geophysical data relating to wells (exemption) | - in principle all government information, unless exemptions and exclusions<br><br>- in principle all environmental information is accessible to the public (EC Law) |
| Format of the information | - on paper<br><br>- electronically (E-FOIA)<br><br>- "Any form or format requested" | - on paper<br><br>- electronically<br><br>- other media (e.g. magnetic tape for sound and video) |
| Choice of format of information to be provided by the government | requester chooses the format of the requested information | requester chooses the format of the requested information, public body may deny this format for practical reasons |

**Table 2. Exemptions and exclusions**

| SCOPE | FOIA | WOB |
|---|---|---|
| Exemptions | total of 9 | total of 10<br><br><u>absolute exemptions</u><br><br>1. danger to the Unity of the Crown |
| | 1. national security | 2. national security |
| | 2. trade secrets, privileged or confidential commercial or financial information | 3. trade secrets or confidential information of companies<br><br><u>relative exemptions</u> |
| | | 1. international relations |
| | | 2. economic or financial interests of the State, public bodies or independent administrative bodies |
| | 3. law enforcement investigatory records | 3. criminal law enforcement |
| | 4. the privacy exemption for medical and similar files | 4. public inspection, control or supervision |
| | | 5. protection of privacy |
| | | 6. the interest of the addressee to be the first to be informed |
| | | 7. to prevent disproportional benefit of disadvantage of individuals, legal persons or third-parties (an “open norm”) (does not apply to environmental information) |
| | 5. internal personnel rules and practices | (internal deliberation in the WOB is an exclusion) |
| | 6. inter- or intra agency memoranda or letters | |
| | 7. financial service regulatory reports | |
| | 8. geographical and geophysical data relating to wells | 8. in principle all envorinmental information is public accessable |
| | 9. exemption by statue | - the WOB is a general law; under the civil law system special laws go before general laws |

| | | |
|---|---|---|
| exclusions | 1. exclusions (three special record “exclusions” expressly allow federal law enforcement agencies, for especially sensitive records under certain specified circumstances, to “treat the records as not subject to the requirements of [the FOIA]”)<br><br>2. discretionary disclosure and waiver | (to prevent disproportional benefit of disadvantage of individuals, legal persons or third-parties (an “open norm”) (is an exemption of the WOB)<br><br>1. internal deliberation<br><br>2. personal views of policy<br><br>3. reports of advisory committees |

**Tabel 3 Comparative tabel US and Dutch copyright and database laws**

| SCOPE | COPYRIGHT ACT | AUTEURSWET |
|---|---|---|
| exclusive rights | to control, reproduce, adapt, perform, display and transmit a copyrighted work | - to publish, and<br>- to duplicate "works" |
| works created by the public sector | *not* copyright protected | copyright protected, except legistation, jurisprudence |
| right holders | - author | - author<br>- (employer) fictive authorship |
| term | 50 to 70 years after the death of the author | 70 years after the death of the author |
| exemptions | fair use as "open rule" | exemptions specified in the law |
| compulsory licensing | yes | yes |

| SCOPE | COPYRIGHT ACT | DATABANKENWET |
|---|---|---|
| exclusive rights | to control, reproduce, adapt, perform, display and transmit a copyrighted work | 1. to prevent unauthorized acts of extraction from a database and;<br>2. to prevent unauthorized acts of re-utilization of the contents of a database |
| right holders | any person | only nationals of members of the European Union |
| databases created / produced by the public sector | not copyright protected | copyright and/or database right protected, exept legistation, ect. |
| term | 50 to 70 years after the death of the author | 15 years |
| compulsory licensing | yes | yes, in case if copyright applies |

**ANNEX 4 ORGANISATION OF INTERVIEWS**

As explained, the purpose of this task was to gather information about e-FOIA implementation processes and effects that would not be found in published literature. The intent was to get a picture of FOIA inquiry and response activities from varied perspectives by visiting a number of organizations and interviewing a range of participants who regularly engage in them. Specifically, we arranged working visits to three types of organisations:

(1) entities that provide FOIA guidance or oversight (n = 4);

(2) responding agencies (n = 5); and

(3) requesting organizations (n = 2).

The resulting sample appears, by category, in Table 1.

| 1 Overarching | 2 Responding | 3 Requesting |
|---|---|---|
| Vice President's Office | Department of Commerce | Electronic Privacy Information Center |
| Department of Justice | Environmental Protection Agency | Washington Post |
| National Archives & Records Administration | National Aeronautics & Space Administration | |
| Fellow, American Statistical Association[81] | Social Security Administration | |
| | National Center for Health Statistics | |

Table 1. Participants in Working Visits, by Category*

In visits to overarching bodies (category 1), we attempted to gain overviews and historical perspectives as well as comments on the status of e-FOIA implementation across federal agencies and their effects to date. It should be noted that entities in this category may will also belong to category 2; for example, records of the Department of Justice (DOJ) as well as its component bureaus and agencies receive and reply to thousands of FOIA requests per year.

Responding agencies (category 2) were chosen for this study task to reflect organizational procedures ranging from highly centralized (e.g., the Environmental Protection Agency [EPA]) to highly decentralized (e.g., the Department of Commerce). We also sought to include in this category organizations whose requested records would chiefly comprise text documents, statistical data, registry-like data, or a combination of these.

Finally, given the limited time frame for this study task, it was not possible to include a sizeable range of requesting organizations in working visits--especially because many such organizations are not physically located in or near the nation's capitol. The two organizations visited in this category include the Washington Post, representing the general interests of citizens in responsible government, and the Electronic Information Privacy Center (EPIC), a special interest group representing citizens concerned about the impact of digital media on both information access and privacy.

[81] This interviewee serves as an independent statistical consultant to several US agencies.

#### 4.2.6. PROCEDURES

All working visits were guided by a semi-structured interview protocol. The protocol directed discussion to the following major topic areas:

- how FOIA requests have traditionally been handled within responding organizations;

- how e-FOIA amendments have been implemented within these organizations; and

- what the effects (actual or anticipated) of e-FOIA implementation are on agencies, government-citizen interactions, private sector economic opportunities, and the quality of government-developed and -maintained databases.

Organisational participants gave differing amounts of attention to different topics of discussion depending on their role in FOIA processes as well as the extent of their experience with e-FOIA. We believe that, taken together, inputs from the working visits (along with supplementary materials provided by participants) yield a rich picture of e-FOIA activities in a cross-section of US agencies.

The findings that follow are presented in three sections, paralleling the three topics of concern addressed by the interview protocol outlined above. A final section provides conclusions and implications.

**ANNEX 5 – LITERATURE AND WEB SITE REFERENCES**

### 4.2.7. Literature


Chinoy, Ira, *The Federal Page, Amendment Seeks to Open Public Files to Digital Diggers, The Washington Post, 09/18/96*

"Electronic Freedom of Information Act Amendments of 1996", Floor Debate, September 1996, Congressional record: H10451

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Hammitt, Harry, *A Presumption of Openness*, Government Executive, October 1997, Vol. 29

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Mason , Sasha A, *Freedom of Information Act* , George Washington Law Review, April 1998, Vol. 66

Sprehe, Timothy J., *Federal Information Policy in the Clinton Administration's first year*, Bulletin of the American Society for Information Science, 1994, Vol. 20

Thomson, Dennis, F., *Democratic Secrecy*, Political Science Quarterly, 07/01/99

Unsworth, Michael.E., *Freedom of Information, It's Ebb and Flow*, American Libraries, June 1999, Vol. 30

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### 4.2.8. Relevant Web sites

www.citizen.org/litigation/foic/speech.htm

www.citizen.org/litigation/foic/efoia_highlight.html

www.cpsr/foia/citizens_guide_to_foia_93.txt

www.eff.org/pub/Activism/FOIA/foia.kit

www.fda.gov/foi/annual99.html

www.ombwatch.org/info/armedpr.html

www.ombwatch.org/info/efoia99/efoiareport.html

www.ombwatch.org/a4a/govimp.html

www.usdoj.gov/04foia/indextxt.html

www.youknow.com/democracy/dmoc.html

www.civiced.org/attitudes.html