Freedom of Information Act Oversight: The American Experience

Harold C. Relyea

When the United States Congress enacted the *Freedom of Information Act* in 1966, only two other nations had an equivalent statute. Subsequently, a number of countries have adopted a national law embodying the freedom of information policy formula: a presumptive right of access to agency records, specific categories of information which may be exempted from the rule of access, and a procedure for court or quasi-judicial redress in the event of a dispute over the availability of requested materials. Canada entered this policy field in 1982 with the *Access to Information Act* and Parliament, in accordance with the requirements of this statute, is now engaged in a comprehensive review of its provisions and operation.

In almost all of the countries where so-called FOI laws now exist, they were championed by the legislators and opposed by the bureaucracy. In many regards, this clash of wills has continued beyond the enactment stage, through the implementation phase, and into everyday administration. Certainly this has been the case in the United States. It is a conflict of long standing, as sociologist Max Weber noted over a half century ago: "Every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret."

Active Oversight in the United States

The product of some eleven years of committee investigation in the House of Representatives and half as many years of Senate committee examination, the *Freedom of Information Act* was signed into law in July, 1966. It became operative one year later. Major oversight hearings – the first such proceedings for the FOI Act – were held in 1972. Consequently, the statute was significantly strengthened by major amendments in 1974 and modified a second time, but only slightly, in 1976. The law has endured and has been improved in large part due to diligent and conscientious oversight by Congress. For almost two decades, congressional overseers have experienced something less than enthusiasm for the FOI Act on the part of the departments and agencies. As a consequence of this history, they have become sensitive to, if no suspicious of, Executive Branch attempts to modify the statute Indeed, as one key House Republican concluded in the face of recently offered White House proposal for amending the Act: "' it ain't broke, don't fix it."

The author addresing the Nation Forum on Access to Information an Privacy. (Scott Morrison)

Continuous and careful oversight of the *Freedom of Informa tion Act* has served three important purposes. First, it has ind cated to the departments and agencies that Congress is very s rious about the proper implementation of this law. Second, it h permitted quick identification of administrative problems an has prompted corrective action to address those difficultie Third, it has built expertise and provided key legislators with knowledge base from which to assess and evaluate proposals f modifying the statute.

It may be of interest to Canadian legislators to know wh have been some of the principal areas of the FOI Act that ha

Harold Relyea is a Specialist in American National Government with the Congressional Research Service, Library of Congress, Washington D.C. This is a revised version of an address in March 1986 to the National Forum on Access to Information and Privacy in Ottawa.

been of concern to congressional overseers. Certainly the adequacy of the statute's exemptions has been an area of close attention. In addition to accommodating information protection specifically afforded by other laws, there must be basic coverage of information pertaining to commercial enterprise and trade, domestic security and personal privacy, national defense and foreign policy, and government advice. In this regard, the first (classified information) and seventh (law enforcement investigatory records) exemptions of the FOI Act were adjusted in 1974, and the third (intervening statutory protection) exemption was modified in 1976. Currently, there is some question as to the continued need for the second (internal agency personnel rules and practices) and eighth (agency regulation of financial institutions) exemptions.

A third area of oversight significance is the scope of the FOI Act, that is the range of agencies to which it applies. Considerable congressional attention was given to this question in 1974 and the definition of agency for the statute was both expanded and clarified. An important aspect of this adjustment was the inclusion of governmental bodies other than traditional administrative entities. Thus, organizations resembling crown corporations, such as the National Railroad Passenger Corporation (Amtrak), were deemed to merit FOI Act coverage.

Fourth, there are a number of oversight considerations in the area of administration. By way of introduction, it should be remembered that Congress adopted the 1974 amendments largely to reduce administrative discretion in FOI Act implementation. Further, the volume of requests under the Act, which was

The keynote Speaker at the National Forum was the Minister of Justice, John Crosbie. (Scott Morrison)

Another area of oversight consideration has been fair information practice. For example, during the late 1970s, attempts were made to institute so-called "reverse-*Freedom of Information Act*" lawsuits to prevent agency release of information submitted by third parties. In April 1979, the Supreme Court ruled that neither the FOI Act nor the *Trade Secrets Act*, which also had figured in the new litigation strategy, provides a private right of action to prevent agency disclosure of information. The Court did indicate, however, that judicial review of agency action in these matters is available to third party submitters under another law, the *Administrative Procedure Act*. Congressional overseers have been concerned about the adequacy of this arrangement and the possible need to amend the FOI Act to create third party intervention procedures similar to those in the Canadian *Access to Information Act*.

Use of the FOI Act as an alternative or supplement to the discovery process in litigation is another abiding fair information practice issue. While some want to modify the statute to somehow proscribe its use in this way, others suggest that the relaxation of the discovery rules is an adequate solution.

slightly over 280,000 in 1984, is not at issue. So, what are the concerns here? One is the question of resources: does each agency have an adequate FOIA budget (the cost of administering the Act is now $50 million annually), number of personnel, and available technology (machine readable instruments)? Next, how adequate are the records management systems of each principal department and agency? In brief, can they retrieve their filed documents and records easily and in a cost-effective manner?

Then, there is the personnel management system to consider. Within a given agency, what integrity and authority does the information access staff have; how is it organized relative to effective internal and inter-agency relations; is it functionally efficient (i.e. are file clerks properly used to retrieve materials while senior program staff appropriately conduct record reviews); and is adequate training available?

Finally, we come to the question of accountability mechanisms. Few agencies have any internal accountability structure – such as inspector general responsibility – for FOIA administration. Moreover, neither the Department of Justice nor the Office of Management and Budget have provided, to date, any signifi-

cant government-wide coordination and supervision of FOIA operations. Thus, accountability in FOIA administration has been insured by permanent congressional subcommittees, assisted by support agencies such as the Congressional Research Service and the General Accounting Office. Although similar oversight entities are available in the Canadian context, there is also the added resource of the Information Commissioner. It would appear, however, that Parliamentary overseers must be willing to enlist the aid and views of the Information Commissioner in their examination of agency administration of the *Access to Information Act*. Otherwise, this source, though an agent of the Parliament, seemingly will not voluntarily offer many insights regarding *Access to Information Act* operations.

Future Challenges

And what of the future? Recent House of Representatives' hearings indicate there is congressional concern about the impact of new technology on FOIA policy and practice. The ongoing revolution in computer and telecommunications technology has produced major changes in the way the federal departments and agencies collect, maintain,and disseminate information. The current trend toward increased use of electronic databases will probably continue and accelerate. Despite the sometimes considerable capital costs of electronic information systems, they offer the prospect of greater efficiency and better implementation of statutory objectives. Indeed, such new systems afford an opportunity to expand the availability of information and make it more useful. For congressional overseers, they also raise a number of important questions relative to the FOI Act and the possibility that new policies are needed not only to eliminate rising uncertainties, but also to assure that agency resort to electronic information systems will not reduce existing public access in any significant way. Congressional committees have begun exploring the implications of these developments, and at least one committee report, providing significant guidance to the Federal agencies on these matters, has already been issued.

A recently published office of Management and Budget (OMB) circular on information resources management raises some other new concerns about agency information collection, maintenance, and dissemination practices. Circular A-130 has a significant bearing upon the FOI Act because it may be a means for determining the kinds of information that the agencies can possess and also the medium in which it shall be collected, maintained, and disseminated.

The concept of information resources management arises from a 1977 report of the temporary Commission on Federal Paperwork, and received expression in the Paperwork Reduction Act of 1980. There, a section of the statute vested a number of pertinent duties and responsibilities in the director of OMB. The new OMB circular is a broad, general policy statement implementing this authority.

But the directive, indeed, may be too generous in its expression of administrative discretion and sufficiently vague at points to lend itself to political abuse. Congress amended the Freedom of Information Act in 1974 to limit administrative discretion. Available managerial latitude had been abused, resulting in "5 years of foot-dragging," according to the 1972 House oversight report. Moreover, as noted previously, attempts of late to make major changes in the FOI Act have been viewed by many Members of Congress, particularly those in the House, as neither necessary nor appropriate.

In its implementation, the OMB circular will have to demonstrate that it does not grant too much administrative discretion and is not an unneeded and otherwise overly ambitious instrument of political power. Congressional overseers will also have to be convinced that the directive does not have an adverse effect upon the FOI Act by significantly limiting agency information holdings. This could occur if agencies are forced to comply strictly and stringently with the circular's requirement that they generate or collect only that information that is necessary for the performance of their functions and that has practical utility, and only after planning for its total management.

Finally, in this time of fiscal austerity in government, there is some concern, justifiably, that the FOI Act might be undermined in the fashionable cause of efficiency, economy, and budget balance. In brief, budget cuts may be used to justify reduced agency FOIA administration and information holdings.

Undoubtedly, these same challenges – the electronic collection and dissemination of information, information resource management, and budget constraints – will confront the Access to Information Act and its overseers. Diligence in legislative oversight, as the FOI Act experience illustrates, is crucial for the preservation, refinement, and effective operation of information access law.

Notes

See U.S. Congress. House. Committee on Government Operations. *Electronic Collection and Dissemination of Information by Federal Agencies: A Policy Overview*. H. Rept. 99-560, 99th Congress, 2d Session. Washington, U.S. Govt. Print. Off., 1986.