

Note

RIDDING FOIA OF THOSE “UNANTICIPATED CONSEQUENCES”:¹ REPAVING A NECESSARY ROAD TO FREEDOM

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A government by secrecy benefits no one. It injures the people it seeks to serve; it damages its own integrity and operation. It breeds distrust, dampens the fervor of its citizens and mocks their loyalty.²

The question, of course, is whether this public expense is worth it³

INTRODUCTION

On June 10, 1997, Elmer “Geronimo” Pratt, a former leader of the Black Panther Party who had been convicted in 1972 of a 1968 murder-robbery, was freed on bail after a California state judge ordered a new trial.⁴ The new trial order represented the culmination of more than two decades of appeals and denied writs.⁵ Pratt, who has always maintained his innocence, asserted that he was framed by the Federal Bureau of Investigation (FBI) as part of an attempt to destroy the Black Panthers.⁶ The judge granted Pratt a new trial be-

1. Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, Mar.-Apr. 1982, at 15, 15 (criticizing the Act as “the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored”).

2. 110 CONG. REC. 17,087 (1964) (statement of Sen. Long).

3. Scalia, *supra* note 1, at 17.

4. See William Booth, *Ex-Black Panther Freed; After 25 Years, “The Struggle Continues.”* WASH. POST, June 11, 1997, at A1.

5. See Edward J. Boyer, *Lawyer Presses 23-Year Battle on Behalf of “Geronimo” Pratt*, L.A. TIMES, Mar. 13, 1997, at B1 [hereinafter Boyer, *Lawyer Presses 23-Year Battle*].

6. See Edward J. Boyer, *Pratt Strides into Freedom*, L.A. TIMES, June 11, 1997, at A1 [hereinafter Boyer, *Pratt Strides into Freedom*] (“Pratt said he understood that former FBI Director J. Edgar Hoover and former President Richard Nixon ‘launched a program to kill us all.

cause his conviction was "tainted by the prosecutor's failure to reveal that a crucial witness was also a police and FBI informer."⁷ Critical to Pratt's receiving a new trial were several requests made under the Freedom of Information Act (FOIA).⁸ Pratt's FOIA requests revealed that Julius Butler, a key prosecution witness who had testified that Pratt had confessed to committing the murder, had provided police and FBI agents with information on the Black Panthers for almost two and a half years preceding the Pratt trial.⁹ Since Butler had denied under oath that he had ever been a police or FBI informant, this information would have enabled Pratt's defense attorneys to impeach his credibility.¹⁰ The effect that this information could have had on Pratt's 1972 trial is demonstrated by the fact that several jurors in that original trial have since stated that they would not have voted to convict Pratt if they had known that Butler was an informant.¹¹

Pratt's FOIA requests also turned up FBI documents that showed that FBI director J. Edgar Hoover had ordered that Pratt and other prominent Panther members be "neutralized."¹² Pratt also discovered documents that supported his contention that he was in Oakland on the night of the murder.¹³ The impact of the documents Pratt and his attorneys procured through FOIA is clear; without FOIA, Pratt would still be in jail.¹⁴

[The Black Panther Party was] at the center of the bull's-eye."); see also Clarence Page, Commentary, *Time for a New Peek at Old FBI Files*, CHI. TRIB., Sept. 14, 1997, at 21 ("Pratt always had maintained that the FBI knew he was innocent because it allegedly had him under surveillance in Oakland when the murder occurred in Santa Monica."). M. Wesley Swearingen, a 25-year FBI veteran, supports Pratt's view, contending that wiretap logs placed Pratt in Oakland at the time of the murder but that "someone had destroyed these logs." M. WESLEY SWEARINGEN, *FBI SECRETS: AN AGENT'S EXPOSÉ* 86 (1995).

7. Booth, *supra* note 4, at A1.

8. 5 U.S.C. § 552 (1994 & Supp. II 1996).

9. See Boyer, *Lawyer Presses 23-Year Battle*, *supra* note 5, at B1.

10. See *id.*

11. See Booth, *supra* note 4, at A1. The judge who reversed Pratt's conviction noted that the information about Butler would have enabled Pratt's lawyers to "put the whole case in a different light." Edward J. Boyer, *D.A. Appeals Decision to Release Ex-Black Panther*, L.A. TIMES, Jan. 31, 1998, at B1 [hereinafter Boyer, *D.A. Appeals*].

12. See Tony Jones, *Cochran: Past, Present Future*, TRI-STATE DEFENDER, May 10, 1995, at 1A. A retired FBI agent has corroborated these documents, stating that Pratt was "framed as part of the FBI's now-defunct counter intelligence program—covert efforts to 'neutralize' what they called 'black hate groups.'" Boyer, *Pratt Strides into Freedom*, *supra* note 6, at A1.

13. See Booth, *supra* note 4, at A1.

14. On January 30, 1998, Los Angeles County District Attorney Gil Garcetti appealed Pratt's release, arguing that "nothing points to Pratt's innocence; everything points to his guilt." Boyer, *D.A. Appeals*, *supra* note 11, at B1. The *Los Angeles Times* characterized Garcetti's decision to appeal as "unwise" and "a fool's errand." Editorial, *Misguided Move Against Pratt*,

If Geronimo Pratt's story were the norm, FOIA's usefulness would be beyond debate. For every one case like Geronimo Pratt's, however, there are many cases like that of Frank Jimenez. Jimenez, a prisoner at the Oxford Federal Correctional Institution in Wisconsin, has submitted numerous FOIA requests which appear to have done nothing but waste the government's time and resources. Jimenez sought all records held by eight separate executive agencies that were "in any way connected to, related to or even remotely in reference to his name."¹⁵ For example, Jimenez requested the U.S. Postal Service (USPS) to provide "all records concerning himself regarding mail he received in the states of Wisconsin and Illinois."¹⁶ Government agencies must undertake a serious search in response to each FOIA request, and the burden is on the agencies to establish that materials have not been improperly withheld.¹⁷ The USPS, therefore, performed an "exhaustive but unfruitful" search of its records.¹⁸ Similarly, Jimenez's request to the Bureau of Alcohol, Tobacco & Firearms (ATF) turned up no responsive records—a result which was hardly surprising since the ATF had not been involved in the investigation or prosecution of Jimenez.¹⁹ The FBI, however, had more difficulty responding to Jimenez's FOIA request. Citing extremely limited resources and a backlog of 3,080 requests ahead of Jimenez's, the FBI moved to stay the proceedings to give it until March 2000 to process the request.²⁰ Unconvinced that Jimenez's request was necessary or urgent, the district court agreed with the FBI that the

L.A. TIMES, Feb. 3, 1998, at B6. If the appeal fails, most legal observers believe that the prosecution will be unable to win a new trial since Butler has been discredited and the only eyewitness is now dead. See Boyer, *Pratt Strides into Freedom*, *supra* note 6, at A1.

15. *Jimenez v. FBI*, 938 F. Supp. 21, 25 (D.D.C. 1996). Jimenez made FOIA requests to the FBI, the Drug Enforcement Agency, the U.S. Postal Service, the Bureau of Prisons, the Bureau of Alcohol, Tobacco & Firearms, the Executive Office of the U.S. Attorney, the U.S. Marshals Service, and the Criminal Division of the Department of Justice. See *id.* at 24-25.

16. *Id.* at 26.

17. See *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989) (citing FOIA's legislative history to support the Court's holding that the burden is on the government agency); see also *Safecard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991) (holding that a search is adequate if it is "reasonably calculated to discover the requested documents"); *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986) ("[A] search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request."); *Weisberg v. United States Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983) ("What the agency must show beyond material doubt is that it has conducted a search reasonably calculated to uncover all relevant documents.").

18. *Jimenez*, 938 F. Supp. at 26.

19. See *id.*

20. See *id.* at 31.

Agency's delay was justifiable and thereby granted the motion to stay the proceedings until March 2000.²¹

The use of FOIA by prisoners such as Frank Jimenez and Geronimo Pratt highlights the benefits and problems of the statute. One of FOIA's purposes is to enable people to expose government action to "the light of public scrutiny."²² In Pratt's case, the government had paid an informant and then improperly withheld this information which, had it been disclosed at trial, may well have led to an acquittal. Twenty-five years later, Pratt was able to use FOIA to expose that improper government action and to use the previously withheld information to regain his freedom. In contrast, Jimenez's experience shows how FOIA can be abused at enormous cost to American taxpayers and illustrates the delays that can occur as understaffed federal agencies struggle to respond to requests for information that the agencies may or may not possess.²³

This Note surveys recent FOIA cases which illustrate the delays that have come to plague FOIA administration. In 1996, in an effort to cure these delays and update FOIA for the computer age, Congress passed the Electronic Freedom of Information Act Amendments of 1996 (E-FOIA).²⁴ This Note analyzes the major provisions

21. See *id.* at 31-32. FOIA permits courts to grant time extensions under certain conditions: "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." 5 U.S.C. § 552(a)(6)(C) (1994).

22. Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976).

23. Legislative and scholarly commentators have focused their criticism on these costs and delays, and the abuses of FOIA have engendered debate over the wisdom and merits of having such a freely available window into the operation of federal agencies. Compare *The Electronic Freedom of Information Improvement Act: Hearings on S. 1940 Before the Subcomm. on Tech. and the Law of the Senate Comm. on the Judiciary*, 99th Cong. 1 (1992) (statement of Sen. Leahy) ("FOIA proves that the best way to combat the coverups, the mistakes, and the secret policies that undermine faith in our democratic system is to expose them to public view."), and Jane Kirtley, *Freedom of Information Act—How Is It Working?*, COMM. LAW., Fall 1996, at 7, 9 [hereinafter Kirtley, *FOIA*] (arguing that oversight by the press and the public "provides the only independent assurance that the rights of the individual are being preserved"), and Christopher P. Beall, Note, *The Exaltation of Privacy Doctrines over Public Information Law*, 45 DUKE L.J. 1249, 1299 (1996) ("Access to information . . . ensures for the individual citizen a sense of empowerment and control over a government that can at times appear monolithic and imperious."), with Scalia, *supra* note 1, at 19 ("The defects of the Freedom of Information Act cannot be cured as long as we are dominated by the obsession that gave them birth—that the first line of defense against an arbitrary executive is do-it-yourself oversight by the public and its surrogate, the press.")

24. Pub. L. No. 104-231, 110 Stat. 3048 [hereinafter E-FOIA] (codified at 5 U.S.C. § 552 (Supp. II 1996)).

of E-FOIA and concludes that congressional attempts to use administrative changes to reduce delays in FOIA administration are destined to fail as long as agency FOIA-processing units remain understaffed and underfunded. Part I begins by briefly sketching the beginnings and intended purposes of FOIA. It then examines the early amendments to the statute and discusses how these amendments led to many unanticipated consequences, including enormous increases in the administrative cost of FOIA and in the time delays in processing requests. Part I concludes by discussing the 1986 FOIA amendments which included changes to FOIA's fee provisions. Part II evaluates judicial attempts to balance FOIA's requirement of open government with present fiscal constraints and agency staffing problems. Part III outlines the major provisions of E-FOIA and explores how it may affect a typical FOIA case and whether it will help reduce the administrative and financial burdens of FOIA. Part IV surveys alternative measures that have been suggested by scholars and legislators for reducing FOIA's cost and agency backlogs. It concludes that none of these measures would effectively address FOIA's problems while preserving the benefits of a policy of open government.

I. THE DEVELOPMENT OF FOIA, 1966-1996

A. *The Birth of FOIA: Introducing an Era of Open Government*

The Freedom of Information Act was born out of concerns about a growing federal bureaucracy that was not accountable to the electorate²⁵ and about the "mushrooming growth of Government secrecy."²⁶ Early champions of a freedom of information bill recognized the importance of an informed populace in a democracy, believing that "[f]ree people are, of necessity, informed; uninformed people can never be free."²⁷ They saw FOIA as an essential way to ensure

25. See Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 650 (1984) (noting that Congress enacted FOIA at a time when, even before Watergate, the public was suspicious of government bureaucracy).

26. H.R. REP. NO. 89-1497, at 2 (1966), reprinted in 1966 U.S.C.C.A.N. 2418, 2419.

27. *Freedom of Information: Hearings on S. 1666 and S. 1663 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong. 3 (1964) (statement of Sen. Edward Long); see also HAROLD L. CROSS, *THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS* xiii (1953) ("Public business is the public's business. The people have the right to know. Freedom of information is their just heritage. Without that the citizens of a democracy have but changed their kings."); H.R. REP.

that the government would be open. In the vanguard of the freedom of information movement was the press, a group that had historically encountered administrative roadblocks in its quest to inform the public about questionable governmental practices.²⁸ Despite the press's traditional role as the public's watchdog, legal complications were depriving the press of its "most vital raw material"—public records and proceedings.²⁹ Frustrated by the lack of an enforceable legal right to examine public records, reporters had to rely upon "the favorable exercise of official grace or indulgence or 'discretion.'"³⁰

The Freedom of Information Act of 1966³¹ fundamentally changed the way that requests for information were handled by creating a presumption in favor of disclosure and by requiring agencies to justify any nondisclosure.³² Prior to FOIA, the release of governmental records was governed largely by the Administrative Procedure Act (APA),³³ which required only that public records be made available to "persons properly and directly concerned," and exempted the nebulous category "information held confidential for

NO. 93-876, at 2 (1974) ("An informed public makes the difference between mob rule and democratic government. If the pertinent and necessary information on government activities is denied the public, the result is a weakening of the democratic process and the ultimate atrophy of our form of government.") (quoting Letter of William L. Dawson), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6268; Letter from James Madison to W.T. Barry (Aug. 4, 1822) ("A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."), *reprinted in* THE COMPLETE MADISON 337 (Saul K. Padover ed., 1953).

28. See Wald, *supra* note 25, at 650 & n.4 (discussing the press's frequent encounters with "government agencies' random, unexplained denials of access to information about crucial decisions, denials which had covered up the mistakes or irregularities of the time").

29. CROSS, *supra* note 27, at 4.

30. *Id.* at 197.

31. Pub. L. No. 89-487, 80 Stat. 250 [hereinafter FOIA] (codified as amended at 5 U.S.C. § 552 (1994 & Supp. II 1996)).

32. See *id.* at 251 (codified as amended at 5 U.S.C. § 552 (1994 & Supp. II 1996)) ("[E]very agency shall, upon request for identifiable records . . . make such records promptly available to any person." (emphasis added)). Upon complaint of nondisclosure made to a district court, "the court shall determine the matter de novo and the burden shall be upon the agency to sustain its action." *Id.* From an administrative law perspective, FOIA is unique because of its de novo review of many agency determinations, including the determination that a particular document is exempted under the statute. See 5 U.S.C. § 552(a)(4)(B) (1994 & Supp. II 1996). Outside of FOIA, a reviewing court can normally set aside agency findings and conclusions only if they are "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A) (1994).

33. Pub. L. No. 79-404, ch. 324, 60 Stat. 237 (1946) [hereinafter APA]. The original APA no longer exists in recognizable form. After being modified by FOIA, it was replaced when Congress enacted Title 5 of the United States Code. See Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 378.

good cause found.”³⁴ The introduction to FOIA explicitly stated that its purpose was “to clarify and protect the right of the public to information.”³⁵ It required that records be made available to “any person,”³⁶ and an agency seeking to withhold a record after 1966 had to show that the information contained in the record fell within one of nine limited statutory exemptions.³⁷

B. The 1974 Amendments: The Source of Unanticipated Consequences

Despite the powerful rhetoric employed by proponents of a freedom of information statute, FOIA as originally enacted was relatively ineffective.³⁸ Administrative agencies routinely “delayed re-

34. APA, *supra* note 33, § 3(c), 60 Stat. at 238.

35. FOIA, *supra* note 31, 80 Stat. at 250.

36. *Id.* at 251.

37. See 5 U.S.C. §§ 552(b)(1)-(9) (1994). The exemptions covered documents:

- (1) Classified as secret for national defense or foreign policy reasons;
- (2) Related solely to internal agency personnel rules and practices;
- (3) Specifically exempted from disclosure by another statute;
- (4) Containing trade secrets or confidential commercial or financial information;
- (5) Containing legally privileged information;
- (6) Containing personnel, medical or “similar” files that, if disclosed, would result in an invasion of privacy;
- (7) Involving law enforcement investigations, but only to the extent that disclosure
 - (A) Would interfere with law enforcement proceedings;
 - (B) Would deprive a person of a fair trial;
 - (C) Could result in an invasion of privacy;
 - (D) Could disclose the identity of a confidential source;
 - (E) Would disclose law enforcement techniques; or
 - (F) Could endanger the life or safety of any person;
- (8) Involving financial regulatory activities; or
- (9) Involving geological information about oil or natural gas wells.

See id.

Six of the nine exemptions have survived to this day with little or no change to their original language. The exemptions that have undergone significant changes are Exemption 1, which was amended in 1974 to limit the exemption to classified documents, *see* Act of Nov. 21, 1974, Pub. L. No. 93-502, § 2(a), 88 Stat. 1561, 1563 [hereinafter 1974 Amendments] (codified at 5 U.S.C. § 552(b)(1) (1994)); Exemption 3, which was amended in 1976 to add a set of criteria intended to limit the situations where the exemption could be invoked, *see* Government in the Sunshine Act, Pub. L. No. 94-409, § 5(b), 90 Stat. 1241, 1247 (1976) (codified at 5 U.S.C. § 552(b)(3) (1994)); and Exemption 7, which was expanded in 1986 to further limit public access to certain investigatory files, *see* Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1802(a), 100 Stat. 3207-48, 3207-48 to 3207-49 [hereinafter 1986 Reform Act] (codified at 5 U.S.C. § 552(b)(7) (1994)).

38. See DAVID M. O'BRIEN, THE PUBLIC'S RIGHT TO KNOW: THE SUPREME COURT AND THE FIRST AMENDMENT 7 (1981) (“Initial administrative compliance with the Freedom of Information Act was not particularly impressive.”); Scalia, *supra* note 1, at 15 (“The 1966 version

sponses to requests for documents, replied with arbitrary denials, and overclassified documents to take advantage of the 'national security' exemption."³⁹ FOIA began to develop into its present form in 1974, when Congress amended it in an effort to remedy the perceived deficiencies in the statute's administration.⁴⁰ The amendments significantly reduced agencies' discretion over whether to release information⁴¹ and eliminated inefficiencies in the processing of requests "in order to contribute to the fuller and faster release of information, which is the basic objective of the Act."⁴² Unfortunately, Congress did not anticipate a major effect of its alterations: after the 1974 amendments, the number of FOIA requests skyrocketed.⁴³ Prior to the changes, Congress had estimated that the new amendments would cost the government about \$50,000 for the first year, and \$100,000 for each of the following five years.⁴⁴ The actual costs of FOIA quickly and dramatically surpassed these conservative estimates.⁴⁵ By 1991, FOIA's annual expense totaled \$91 million,⁴⁶ and in 1992, the figure had increased to \$108 million.⁴⁷

[of FOIA] was a relatively toothless beast . . .").

39. Scalia, *supra* note 1, at 15; *see also* H.R. REP. NO. 92-1419, at 8-9 (1972) ("The efficient operation of the Freedom of Information Act has been hindered by five years of foot-dragging by the Federal bureaucracy.").

40. *See* 1974 Amendments, *supra* note 37, 88 Stat. at 1561.

41. *See* O'BRIEN, *supra* note 38, at 8.

42. H.R. REP. NO. 93-876, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6267.

43. For example, the FBI received 447 FOIA requests in 1974, and 13,875 requests in 1975. *See* *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 617 n.3 (D.C. Cir. 1976) (Leventhal, J., concurring).

44. *See* H.R. REP. NO. 93-876, at 9, *reprinted in* 1974 U.S.C.C.A.N. 6267, 6275. Congress believed that agencies' operating budgets would be able to absorb most of the costs, including the cost of searching for the requested information. *See id.*; *see also* Eric J. Sinrod, *Freedom of Information Act Response Deadlines: Bridging the Gap Between Legislative Intent and Economic Reality*, 43 AM. U. L. REV. 325, 334 (1994) (noting that, based on the belief that administration of FOIA would not entail significant costs, Congress did not appropriate additional resources to fund the 1974 amendments).

45. In fact, the cost of implementing FOIA in fiscal year 1974 for the FBI *alone* was \$160,000. *See Open America*, 547 F.2d at 612. By fiscal year 1976, the actual costs for the FBI totaled \$2,675,000. *See id.* The FBI was not alone. A single request by a former CIA agent cost the CIA an estimated \$400,000. *See Agee v. CIA*, 517 F. Supp. 1335, 1342 n.5 (D.D.C. 1981). These sums had been amassed at individual agencies despite projections that the cost of FOIA *to the entire government* for the period 1976-80 would amount to no more than \$500,000. *See supra* text accompanying note 44.

46. *See* Sinrod, *supra* note 44, at 334.

47. *See* S. REP. NO. 104-272, at 21 (1996).

These dramatic increases came about because of a change in FOIA's fee provisions.⁴⁸ Prior to 1974, an agency could charge requesters for the costs of searching for responsive documents, reviewing documents for exempted information that the agency could then delete, and duplicating the documents that were to be released.⁴⁹ The 1974 amendments limited fees to "reasonable standard charges for document search and duplication and provide[d] for recovery of only the *direct costs* of such search and duplication."⁵⁰ The change forced agencies to bear the cost of reviewing documents for exempted material. This review process is the most expensive part of processing FOIA requests because it often requires the use of highly trained agency personnel.⁵¹ For example, documents requested by prisoners are typically investigative files that may contain references to a confidential source,⁵² or material that, if released, could reasonably result in an unwarranted invasion of personal privacy.⁵³ In processing such a request, someone familiar with the investigation must go through the documents "line by line to delete those portions, and only those portions, that would disclose a confidential source or come within one of the other specific exceptions to the requirement of disclosure."⁵⁴

C. The 1986 Amendments: Amending FOIA's Fee Structure Again

In an attempt to address FOIA's rapidly escalating costs, Congress passed the Freedom of Information Reform Act of 1986 (1986 Reform Act),⁵⁵ which significantly increased agencies' ability to charge requesters for the costs of processing requests.⁵⁶ Senator Orrin

48. See Scalia, *supra* note 1, at 16.

49. See *id.*

50. 1974 Amendments, *supra* note 37, § 1(b)(2), 88 Stat. at 1561 (amended 1986) (emphasis added).

51. See Orrin G. Hatch, *Balancing Freedom of Information with Confidentiality for Law Enforcement*, 9 J. CONTEMP. L. 1, 8 (1983); Scalia, *supra* note 1, at 16.

52. Such material would be exempt under 5 U.S.C. § 552(b)(7)(D).

53. Such material would be exempt under 5 U.S.C. § 552(b)(7)(C).

54. Scalia, *supra* note 1, at 16.

55. 1986 Reform Act, *supra* note 37, § 1803, 100 Stat. at 3207-48 (codified at 5 U.S.C. §552(a)(4)(A) (1994)). The 1986 FOIA amendments were attached to the Anti-Drug Abuse Act as part of a last-minute addition. See Susan L. Beesley & Theresa A. Newman Glover, Note, *Developments Under the Freedom of Information Act—1986*, 1987 DUKE L.J. 521, 524 (1987). Congress had been considering a more substantial overhaul of FOIA, but additional measures died in the Senate after passing the House. See *id.* at 523-24.

56. See generally Beesley & Newman Glover, *supra* note 55, at 529-34 (discussing the ex-

Hatch, one of the Act's sponsors, estimated that if agencies could charge commercial requesters for the cost of document review, the agencies would be able to collect up to \$60 million per year in additional fees.⁵⁷ The amendments established a three-tiered fee system, dividing requests into (1) requests for commercial use; (2) non-commercial requests by the news media or by educational or scientific institutions whose purpose is scholarly or scientific; and (3) all other non-commercial requests.⁵⁸ For category (1) requests, agencies may assess charges for document search, duplication, and review.⁵⁹ For category (2) requests, agencies may only assess document duplication charges.⁶⁰ For category (3) requests, agencies may assess search and document duplication charges but not charges for review.⁶¹ In addition, category (2) and (3) requesters may not be charged for the first two hours of search time or the first 100 pages of duplication.⁶² Regardless of which category the request falls into, no fee may be charged if the costs of collecting or processing the fee would likely exceed the amount of the fee.⁶³ Finally, if a requester has previously failed to pay fees in a timely manner or if the agency determines that the fee will exceed \$250, the agency may require advance payment of the expected fee.⁶⁴

The 1986 Reform Act also clarified the circumstances under which a fee waiver is appropriate. The 1974 FOIA amendments required documents to be furnished at a reduced rate or at no charge when the agency determined that doing so was "in the public interest because furnishing the information can be considered as primarily benefiting the general public."⁶⁵ In interpreting this section, courts had given agencies broad discretion to determine whether to grant a

pected changes in FOIA fees created by the 1986 Reform Act).

57. See 132 CONG. REC. 26,771 (1986).

58. See 1986 Reform Act, *supra* note 37, § 1803, 100 Stat. at 3207-49 to 3207-50 (codified at 5 U.S.C. §§ 552(a)(4)(A)(ii)(I)-(III) (1994)).

59. See *id.* (codified at 5 U.S.C. § 552(a)(4)(A)(ii)(I) (1994)).

60. See *id.* (codified at 5 U.S.C. § 552(a)(4)(A)(ii)(II) (1994)).

61. See *id.* (codified at 5 U.S.C. § 552(a)(4)(A)(ii)(III) (1994)).

62. See *id.* (codified at 5 U.S.C. § 552(a)(4)(A)(iv)(II) (1994)).

63. See *id.* (codified at 5 U.S.C. § 552(a)(4)(A)(iv)(I) (1994)).

64. See *id.* (codified at 5 U.S.C. § 552(a)(4)(A)(v) (1994)).

65. 1974 Amendments, *supra* note 37, § 1(b)(2), 88 Stat. at 1561. It is perhaps interesting to note that indigence does not entitle a requester to a fee waiver. See *Crooker v. Bureau of Alcohol, Tobacco and Firearms*, 577 F. Supp. 1213, 1216 (D.D.C. 1983) (permitting agency to deny fee waiver despite claim of indigence where there is no showing that the public would benefit from disclosure).

fee waiver.⁶⁶ The 1986 Reform Act narrowed the definition of “public interest,” so that an agency must grant a fee waiver only when disclosure of information “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.”⁶⁷ The Act also changed the standard of review so that courts would review an agency’s fee waiver determination *de novo*.⁶⁸

The fee provisions that the 1986 Reform Act established draw the proper balance between keeping government activities open to the light of public scrutiny and fiscal realities. Requesters whose primary interest in certain government information is commercial should pay the government the entire price of collecting, reviewing, and disclosing that information. Similarly, requesters whose primary purpose is to inform the public about governmental activities should be able to procure such information with minimal costs. Unfortunately, despite these fee provisions, backlogs and delays continue to exist.⁶⁹

II. JUDICIAL ATTEMPTS TO BALANCE STATUTORY COMMANDS WITH FISCAL REALITIES

The inadequacy of congressional attempts to ameliorate the problems surrounding FOIA’s administration, coupled with agencies’ inability to handle the huge influx of requests due to woeful underfunding and understaffing, left the judiciary to sort out the mess. Since the passage of the 1974 amendments, courts have granted besieged agencies tremendous time extensions and, relying on early legislative history, have interpreted FOIA to allow agencies to withhold more information than they previously could.

66. See, e.g., *Shaw v. FBI*, 604 F. Supp. 342, 346 (D.D.C. 1985) (holding that an agency determination not to waive search fees should be disturbed only if that determination is arbitrary or amounts to an abuse of discretion).

67. 1986 Reform Act, *supra* note 37, § 1803, 100 Stat. at 3207-50 (codified at 5 U.S.C. § 552(a)(4)(A)(iii) (1994)).

68. See *id.* (codified at 5 U.S.C. § 552(a)(4)(A)(vii) (1994)).

69. See *infra* text accompanying note 109 (giving recent estimates of the backlog and delay at the FBI).

A. Time Extensions: Defining "Exceptional Circumstances" and "Due Diligence"

The first case in which a court intervened to permit understaffed federal agencies to take more time to process FOIA requests was *Open America v. Watergate Special Prosecution Force*.⁷⁰ In *Open America*, a public interest group, a law professor, and several law students sought documents relating to a former Acting Director of the FBI's role in the Watergate scandal.⁷¹ After the FBI received the request, it notified the plaintiffs that there were 5,137 FOIA requests in front of theirs.⁷² The district court granted the plaintiffs' motion to require detailed justification, itemization, and indexing of documents within thirty days.⁷³ The government appealed, arguing that the FBI had exercised "due diligence" in processing the FOIA requests, but that "exceptional circumstances" existed that prevented it from processing them within the statutory time limits.⁷⁴ In such circumstances, the 1974 FOIA amendments state, "the court may retain jurisdiction and allow the agency additional time to complete its review of the records."⁷⁵

The U.S. Court of Appeals for the D.C. Circuit, citing the language and legislative history of the 1974 FOIA amendments, vacated the district court's order.⁷⁶ According to FOIA at that time, an agency that received a request for information had to determine whether it would grant or deny that request within ten days.⁷⁷ In "unusual circumstances," however, the agency was permitted an additional ten working days.⁷⁸ After that period, the requester was deemed to have

70. 547 F.2d 605 (D.C. Cir. 1976).

71. *See id.* at 608.

72. *See id.* Of these, 1,084 were in "various stages of completion." *Id.*

73. *See id.*

74. *See id.* at 610.

75. 1974 Amendments, *supra* note 37, § 1, 88 Stat. at 1563 (codified as amended at 5 U.S.C. § 552(a)(6)(C) (1994 & Supp. II 1996)).

76. *See Open America*, 547 F.2d at 610-13, 616.

77. *See* 5 U.S.C. § 552(a)(6)(A)(i) (1994). FOIA's time limits were doubled in 1996. *See E-FOIA*, *supra* note 24, 110 Stat. at 3052 (codified at 5 U.S.C. § 552(a)(6)(A)(i) (Supp. II 1996)). These changes are discussed *infra* Part III.A.5.

78. *See* 5 U.S.C. § 552(a)(6)(B) (1994). "Unusual circumstances" included:

- (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,

exhausted his administrative remedies⁷⁹ and could bring an action in district court to compel production of the documents.⁸⁰ The agency could obtain a stay in the proceedings, however, and thus gain additional time to review the records, if it could “show [that] exceptional circumstances exist[ed] and that the agency [was] exercising due diligence in responding to the request.”⁸¹

In *Open America*, the D.C. Circuit examined the legislative history of the 1974 FOIA amendments and determined that Congress inserted the “exceptional circumstances” language of section 552(a)(6)(C) “as a safety valve after the protests of the [Ford] administration that the rigid limits of [sections 552(a)(6)] (A) and (B) might prove unworkable.”⁸² The court stated that “exceptional circumstances” exist when an agency “is deluged with a volume of requests for information vastly in excess of that anticipated by Congress, [and] the existing resources are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A).”⁸³ Applied to the facts, the court found that the FBI’s expenditure of \$2,675,000 in processing FOIA requests in 1976, a year in which Congress had anticipated that FOIA would cost the *entire government* only \$100,000, constituted “exceptional circumstances.”⁸⁴ It further found that the agency’s use of a two-track system to handle simple and complex requests on separate “first-in, first-out” bases satisfied the “due diligence” requirement.⁸⁵ Since the plaintiffs al-

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.

Id. §§ 552(a)(6)(B)(i)-(iii).

79. *See id.* § 552(a)(6)(C).

80. *See id.* § 552(a)(4)(B).

81. *Id.* § 552(a)(6)(C).

82. *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 610 (D.C. Cir. 1976).

83. *Id.* at 616.

84. *See id.* at 612.

85. *See id.* at 616. *But see* *Mayock v. INS*, 714 F. Supp. 1558, 1566 (N.D. Cal. 1989) (holding that a first-in, first-out processing policy did not constitute “due diligence” because the INS did not accord priority to requests for information needed for immigration proceedings), *rev’d and remanded sub nom.* *Mayock v. Nelson*, 938 F.2d 1006 (9th Cir. 1991). *Mayock v. INS* was initially decided on summary judgment. The Ninth Circuit reversed and remanded for the resolution of outstanding issues of fact. *See Nelson*, 938 F.2d at 1008. After the case was remanded, the parties entered into a settlement agreement that resulted in changes to FOIA processing practices at the INS. *See infra* note 117 (discussing elements of the settlement agreement).

leged no urgency or exceptional need for the information they had requested, the court reasoned that a stay was appropriate.⁸⁶

More than twenty years later, courts are still struggling with the same problems. In *Edmond v. United States Attorney*,⁸⁷ a prisoner sued the United States Attorney's Office (USAO) to force the agency to disclose information responsive to a FOIA request that he had made on August 14, 1992.⁸⁸ The prisoner, Rayful Edmond, Jr., sent a request to the USAO seeking all documents in the possession of the Drug Enforcement Administration (DEA), the FBI, the United States Attorney, and the United States Bureau of Prisons (USBP) which "pertain[ed] to him, mention[ed] his name, or refer[red] to him."⁸⁹ Five days later, the USAO notified Edmond that his request would be handled in the order in which it was received.⁹⁰ When Edmond had received no documents by December 1994, he wrote a letter to the USAO asking about the status of his request.⁹¹ The USAO's response explained that his request would be handled in its turn but noted that the agency was unable to give a specific date for completion of its processing of the request.⁹² Edmond and the USAO exchanged similar letters in 1995 and 1996.⁹³ Having received no documents and still in prison, Edmond finally resorted to filing suit in district court on October 15, 1996.⁹⁴

86. See *Open America*, 547 F.2d at 614-16. The court recognized that, given the FBI's finite resources, priority processing of the plaintiffs' request would have necessitated taking personnel away from other prior requests. See *id.* at 614. The court was unwilling to order such a reallocation of resources when the plaintiffs "have alleged no urgency, have alleged no exceptional need, for the information they seek." *Id.*

87. 959 F. Supp. 1 (D.D.C. 1997).

88. See *id.* at 2.

89. *Id.* Edmond is serving an 18-year sentence in federal prison after pleading guilty to distributing a kilogram of crack cocaine. See *Like Son, Like Father; Edmond Gets 18 Years*, WASH. POST, Dec. 18, 1991, at C5. Edmond is the father of Rayful Edmond III, who is currently serving three life terms after being convicted in 1989 of running the District of Columbia's largest crack distribution ring. See *id.*

90. See *Edmond*, 959 F. Supp. at 2.

91. See *id.*

92. See *id.* The USAO refused to give a specific date was given despite explicit statutory instructions that required it to do so:

The time limits . . . may be extended by written notice to the person making such request setting forth the reasons 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.

5 U.S.C. § 552(a)(6)(B) (1994).

93. See *Edmond*, 959 F. Supp. at 2.

94. See *id.*

The USAO, estimating that the records responsive to Edmond's request consisted of 2,000 pages, and noting that there were thirty-one requests in front of Edmond's, asked the district court for an additional two years to process his request.⁹⁵ The district court held that, based on the record before it, the USAO had satisfied the "exceptional circumstances" test as defined in *Open America*.⁹⁶ It further held that the USAO's use of a "first-in, first-out" system satisfied the due diligence requirement.⁹⁷

The court noted that a stay would not be appropriate if Edmond could make a showing of "exceptional need or urgency," which the court defined as "potential jeopardy to . . . life or personal safety, or to substantial due process rights."⁹⁸ Edmond asserted that the requested documents contained exculpatory material that would aid him in overturning his criminal conviction.⁹⁹ The court held, however, that unless Edmond could "provide an adequate showing" that it was likely that the requested documents contained "materially exculpatory information," he was not entitled to priority processing of his FOIA request.¹⁰⁰ Since Edmond had not made such a showing, he was not entitled to priority processing.¹⁰¹ The court was not satisfied, however, that it would take the government two years to process the thirty-one requests in front of Edmond's.¹⁰² The court therefore granted the government only one additional year to complete the processing of Edmond's request, "with an opportunity to seek a further extension if necessary at a later date."¹⁰³

Edmond raises several troubling issues concerning the state of FOIA law. First, Edmond had already been waiting four and a half years for the information when the district court granted the agency additional time to respond to the request.¹⁰⁴ While it is true that the

95. *See id.*

96. *See id.* at 4. *Edmond* was decided under FOIA as it stood prior to E-FOIA. The new rules relating to time limits, discussed *infra* Part III.A.5, went into effect on Oct. 2, 1997. *See E-FOIA, supra* note 24, § 12, 110 Stat. at 3054.

97. *See Edmond*, 959 F. Supp. at 3.

98. *Id.*

99. *See id.*

100. *Id.* at 4 (internal quotation marks omitted) (quoting *Billington v. United States Dep't of Justice*, CIV.A. No. 92-0462-RCL (D.D.C. July 21, 1992)). The court emphasized that a mere "naked assertion" is not enough. *Id.*

101. *See id.*

102. *See id.*

103. *Id.*

104. Edmond made his initial FOIA request on August 14, 1992. *See id.* at 2. The district

court chose only to grant the agency a one-year extension, instead of the requested two-year extension, it is troublesome that a prisoner will be forced to wait over five years to obtain any exculpatory material that the government might possess. Second, the court's requirement that Edmond make a showing that the requested material likely contains exculpatory material in order to obtain priority review is nearly impossible to satisfy. It is absurd to think that a person in Edmond's position would be able to know what possible exculpatory material might be contained in documents that the government has made an effort to keep secret. Nonetheless, the court in *Edmond* reasoned that allowing prisoners to obtain priority processing without some additional showing would require courts to grant a large number of such requests filed by federal prisoners,¹⁰⁵ thus negating the "exceptional" nature of the circumstances.¹⁰⁶

Edmond is not unique; other cases have involved even longer delays. In *Fox v. United States Department of Justice*,¹⁰⁷ for example, the plaintiff had requested that the FBI furnish him with all documents in its possession relating to him.¹⁰⁸ The FBI had located over 300 pages of documents pertaining to Fox but, citing a backlog of 11,828 requests and Congress's failure to delegate money to expand the FBI's small staff of FOIA processors, said that it did not expect to be able to process those documents until 1999.¹⁰⁹ The court granted the government's motion to stay the case, requiring only that the FBI

court's order was issued on February 27, 1997. *See id.* at 1.

105. *See id.* at 4. The court noted that "a mere challenge to a conviction which *might* subsequently release prisoner [sic] from incarcerative status does not warrant an expedited process." *Id.*

106. *See id.* Courts have required that a plaintiff establish an "exceptional need or urgency" to get prioritization over earlier requests. *Id.* at 3. This judicial practice was codified by E-FOIA with the establishment of a system of expedited review. *See infra* Part III.A.4.

107. No. CV-94-4622, 1994 WL 923072, at *1 (C.D. Cal. Dec. 14, 1994).

108. *See id.* Fox asserted that the FBI began investigating him following his participation in a peaceful protest against the House Un-American Activities Committee in 1947. *See id.* As part of this investigation, FBI agents spoke to his parents. *See id.* Fox maintained that after his parents learned of his involvement in the protest, his relationship with them deteriorated. *See id.* Fox asserts that he was excluded from the trust left by his parents due to this soured relationship. *See id.* Prior to bringing his FOIA suit, Fox had brought a separate action challenging the validity of the trust and accusing the trustee of misappropriation of \$2 million. *See id.* That court granted summary judgment in favor of the trustee. *See id.* According to Fox, he would not have lost that suit if he had been able to introduce the FBI documents into evidence, and he planned to pursue the action further. *See id.*

109. *See id.* at *1-*2.

file a status report within a year informing the court of any progress it makes in the processing of Fox's request.¹¹⁰

There are strong policy arguments on both sides of the debate over expedited processing for prisoner FOIA requests. On the one hand, prisoners are among the most litigious classes of citizens in the country,¹¹¹ and granting their requests priority review without requiring some additional showing that the requests are likely to uncover exculpatory information could have a crippling effect on the efficient functioning of FOIA. On the other hand, uncovering exculpatory material that was improperly withheld by the government is, perhaps, the quintessential example of why FOIA is needed in a supposedly just society.¹¹²

Long delays in processing FOIA requests have been one of the statute's most serious problems since its enactment,¹¹³ and the delays have continued in the 1990s.¹¹⁴ While courts have routinely granted extensions—even though such extensions were intended only for “exceptional circumstances”¹¹⁵—their action is an understandable response to agencies that are faced with inadequate resources for processing FOIA requests. But unfortunately, these long delays increase

110. See *id.* at *3. The court concluded that expedited process was not warranted in this case because Fox had failed to show how the documents “could substantially change the outcome of the state court litigation.” *Id.* at *2.

111. See Julie M. Riewe, *The Least Among Us: Unconstitutional Changes in Prisoner Litigation Under the Prison Litigation Reform Act of 1995*, 47 DUKE L.J. 117, 117 (1997) (noting that “[t]he federal courts increasingly have been inundated with prisoner litigation”).

112. See, e.g., *supra* notes 4-14 and accompanying text (discussing how Geronimo Pratt used FOIA to obtain information that led to his release from prison).

113. See H.R. REP. NO. 104-795, at 23 (1996) (citing agency delay in responding to requests as “the single most frequent complaint about the operation of the FOIA”), *reprinted in* 1996 U.S.C.C.A.N. 3448, 3466; see also Robert G. Vaughn, *Administrative Alternatives and the Federal Freedom of Information Act*, 45 OHIO ST. L.J. 185, 188 n.24 (1984) (citing a 1983 GAO study which found that the average time it took to answer a FOIA request that turned up responsive documents was 191 days for the FBI and 270 days for the Office of Information and Privacy).

114. See S. REP. NO. 104-272, at 16 (1996) (noting that only 28 of 75 agencies responding to a Department of Justice survey in February 1994 reported no backlog of requests); Michael M. Lowe, Note, *The Freedom of Information Act in 1993-94*, 43 DUKE L.J. 1282, 1285 (1994) (reporting that the FBI had a backlog of 8,000 FOIA and Privacy Act requests in 1990); *Congress Brings Information Act into Electronic Age*, MULTI-MED. & VIDEODISC MONITOR, Oct. 1, 1996, available in 1996 WL 8303113 (reporting that the average time for the FBI to process a FOIA request was 923 days).

115. See *Edmond v. United States Attorney*, 959 F. Supp. 1, 3 (D.D.C. 1997) (“Courts have uniformly granted the government reasonable periods of time in which to review FOIA requests when there is a backlog.”); Sinrod, *supra* note 44, at 342 (noting the irony that “the condition of ‘exceptional circumstances’ has become the norm”).

public cynicism towards the government,¹¹⁶ and can occasionally result in serious harm to the disappointed requester.¹¹⁷

B. The "Central Purpose" Doctrine: Application to the Privacy Exemptions

By granting agencies additional time to process FOIA requests, courts have helped agencies cope with extensive FOIA backlogs. Courts have also helped agencies by giving them a way to quickly dispose of certain requests. They have accomplished this latter end through the "central purpose" doctrine, a judicially created tool designed to alleviate the problem inherent in balancing the competing concerns of disclosure under FOIA and personal privacy interests in preventing disclosure.¹¹⁸ The cornerstone of the doctrine was laid by the Supreme Court in 1989, in *United States Department of Justice v.*

116. See 142 CONG. REC. S10,894 (daily ed. Sept. 18, 1996) (statement of Sen. Leahy) ("[R]outine failure to comply with the statutory time limits . . . breeds contempt by citizens who expect government officials to abide by, not routinely break, the law.").

117. Timely FOIA responses are particularly important to aliens facing deportation proceedings. See Sinrod, *supra* note 44, at 350. Since discovery is not permitted in deportation proceedings, see Kulle v. INS, 825 F.2d 1188, 1194 (7th Cir. 1987), aliens often must rely on FOIA to obtain information from the INS. See Mayock v. INS, 714 F. Supp. 1558, 1560 (N.D. Cal. 1989) ("FOIA is essentially the only procedure which aliens can use to obtain from the INS information relevant to their cases."); see also Guevara Flores v. INS, 786 F.2d 1242, 1252 (5th Cir. 1986) (affirming the denial of a subpoena sought against the INS because the plaintiff "failed to meet her burden of proving that the materials she sought were essential to her case and otherwise unavailable" (since FOIA was available to obtain the requested information) (emphasis added)).

An example of the serious consequences that can result from FOIA delays is the case of Hassan Tehranijam, an Iranian alien who had petitioned for political asylum, fearing persecution if returned to Iran. See Sinrod, *supra* note 44, at 351. The immigration judge doubted the authenticity of Tehranijam's political asylum claim and ordered him deported. See *id.* Prior to the deportation order, Tehranijam's attorney had made a FOIA request to the INS for documentation to support the claim of political persecution, but a large backlog of requests at the INS delayed processing of his request. See *id.* Without this needed documentation to support his claim, Tehranijam was deported. See *id.* Tehranijam's attorney eventually sued the INS in order to change its procedures. See *Maycock*, 714 F. Supp. at 1559-60. That case ended with a settlement agreement under which the INS instituted some changes in its processing of FOIA requests. See Sinrod, *supra* note 44, at 353-54. The *Maycock* settlement agreement included arrangements for expedited processing of certain time-sensitive requests and a two-track processing system to separately handle simple and complex requests. See *id.* at 354-55. These features were included in E-FOIA, to the effect that certain FOIA requests may receive expedited processing, see *infra* Part III.A.4, and all agencies are authorized to create a multi-track processing system. See *infra* Parts III.A.3.

118. See generally Fred H. Cate et al., *The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 67-69 (1994) (defining and discussing the central purpose doctrine); Beall, *supra* note 23, at 1253-61 (same).

Reporters Committee for Freedom of the Press.¹¹⁹ In that case, a CBS news correspondent had sought the criminal records of organized crime figure Charles Medico and three members of his family.¹²⁰ Medico's family business had been investigated by the Pennsylvania Crime Commission for allegedly obtaining several defense contracts through improper ties with a corrupt congressman.¹²¹ The CBS reporter asserted that information concerning past crimes by Medico would potentially be "a matter of special public interest."¹²² The issue was whether Medico's criminal rap sheet was exempt from disclosure under FOIA Exemption 7(C),¹²³ which permits an agency to withhold a document when disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."¹²⁴ To determine whether the invasion of privacy that would result from disclosure was warranted, the Supreme Court used a balancing test, weighing Medico's privacy interest against the public interest in disclosure.¹²⁵ The Court refused, however, to give the alleged public interest much weight in the balance, stating instead that:

[A]lthough there is undoubtedly some public interest in anyone's criminal history, especially if the history is in some way related to the subject's dealing with a public official or agency, the FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed.¹²⁶

The Court concluded that the public interest in the information sought by the reporter simply fell "outside the ambit of the public interest that the FOIA was enacted to serve."¹²⁷ In the context of the privacy-public interest balancing test, this requirement that requested information open governmental activities "to the sharp eye of public scrutiny" has subsequently been referred to as the "central purpose" doctrine.¹²⁸

119. 489 U.S. 749 (1989).

120. *See id.* at 757.

121. *See id.*

122. *Id.*

123. 5 U.S.C. § 552(b)(7)(C) (1994).

124. *Id.*

125. *See Reporters Comm.*, 489 U.S. at 762.

126. *Id.* at 774.

127. *Id.* at 775.

128. *See Cate et al.*, *supra* note 118, at 67; Beall, *supra* note 23, at 1258.

The Court's decision in *Reporters Committee*, which was not based on any language found in FOIA,¹²⁹ fundamentally "changed the FOIA calculus."¹³⁰ The central purpose doctrine has been subsequently reaffirmed and expanded. In 1991, the Supreme Court, in *United States Department of State v. Ray*,¹³¹ extended the central purpose doctrine to FOIA Exemption 6,¹³² the other privacy exemption, which covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."¹³³ The Court reaffirmed and strengthened the central purpose doctrine in 1994, in *United States Department of Defense v. Federal Labor Relations Authority (FLRA)*,¹³⁴ another Exemption 6 case. The Court in *FLRA* explicitly stated that when balancing the public interest in disclosure against the potential invasion of privacy, "the *only* relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government."¹³⁵

In 1997, the Court, in a *per curiam* decision, reversed a Ninth Circuit panel and reaffirmed its *FLRA* decision.¹³⁶ *Bibles v. Oregon Natural Desert Association (ONDA)* involved a FOIA request to the Oregon Bureau of Land Management (BLM) for the names and addresses of recipients of the BLM's newsletter.¹³⁷ The Ninth Circuit panel found a "substantial public interest in knowing to whom the government is directing information, or as ONDA characterizes it, 'propaganda,' so that those persons may receive information from other sources that do not share the BLM's self-interest in presenting

129. See *United States Dep't of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 507 (1994) (Ginsburg, J., concurring).

130. *Id.* at 505 (Ginsburg, J., concurring); see also Glenn Dickinson, Comment, *The Supreme Court's Narrow Reading of the Public Interest Served by the Freedom of Information Act*, 59 U. CIN. L. REV. 191, 211 (arguing that the *Reporters Committee* decision shifted the balance away from full disclosure); Beall, *supra* note 23, at 1261 (criticizing the central purpose jurisprudence for shifting the burden to the FOIA requester "and against the underlying principle of disclosure").

131. 502 U.S. 164 (1991)

132. See *id.* at 171, 177-79.

133. 5 U.S.C. § 552(b)(6) (1994).

134. 510 U.S. 487 (1994).

135. *Id.* at 495 (internal quotation marks omitted) (first emphasis added).

136. See *Bibles v. Oregon Natural Desert Ass'n (ONDA)*, 117 S. Ct. 795, 795-96 (1997) (*per curiam*).

137. See *Oregon Natural Desert Ass'n v. Bibles*, 83 F.3d 1168, 1169 (9th Cir. 1996), *rev'd per curiam*, 117 S. Ct. 795 (1997).

government activities in the most favorable light.”¹³⁸ The Supreme Court viewed the Ninth Circuit decision as resting on “a perceived public interest in providing persons on the BLM’s mailing list with additional information,”¹³⁹ a foundation that was “inconsistent” with *FLRA*.¹⁴⁰

Soon after *Reporters Committee* was decided, the United States Department of Justice Office of Information and Privacy issued a report concerning the ramifications of that decision on FOIA processing.¹⁴¹ The Justice Department advised agency FOIA offices that the Court’s “new ‘core purpose’ public interest standard . . . should govern the process of balancing interests under Exemptions 6 and 7(C).”¹⁴² The Supreme Court’s terse decision in *ONDA* reaffirmed the strong signal it sent to lower courts and government agencies in its earlier decisions, confirming the Court’s intention to continue to strictly enforce the central purpose doctrine. Thus, at least when the privacy exemptions are involved, agencies may continue to rely on the central purpose doctrine and deny requests that fail the balancing test with little fear of reversal by the judiciary.¹⁴³

III. THE ELECTRONIC FREEDOM OF INFORMATION ACT AMENDMENTS OF 1996

In an attempt to address the serious problem of agency backlogs in processing FOIA requests, Congress passed the Electronic Freedom of Information Act Amendments of 1996.¹⁴⁴ While these amendments have been praised as finally bringing FOIA into the electronic age,¹⁴⁵ they do not solve all the problems facing FOIA.¹⁴⁶

138. *Id.* at 1171.

139. *ONDA*, 117 S. Ct. at 795.

140. *See id.*

141. *See Privacy Protection Under the Supreme Court’s Reporters Committee Decision*, FOIA UPDATE (Office of Info. and Privacy, U.S. Dep’t of Justice), Spring 1989, at 3.

142. *Id.* at 6.

143. *But see infra* notes 252-54 and accompanying text (discussing the possible elimination of the central purpose doctrine by the 1996 Electronic Freedom of Information Act Amendments).

144. E-FOIA, *supra* note 24, 110 Stat. 3048. The House noted, in passing these amendments, that the “lack of sufficient agency resources has constrained the effectiveness of the FOIA.” H.R. REP. NO. 104-795, at 6 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3448, 3449.

145. *See Statement on Signing the Electronic Freedom of Information Act Amendments of 1996*, 32 WEEKLY COMP. PRES. DOC. 1949, 1949 (October 2, 1996) [hereinafter E-FOIA Signing Statement]. Earlier attempts to expand FOIA to electronic records had failed. *See, e.g.*, Electronic Freedom of Information Act of 1993, S. 1782, 103d Cong.; Freedom of Information

Some commentators have argued that E-FOIA will actually *increase* both the cost of FOIA¹⁴⁷ and agency time delays in responding to requests.¹⁴⁸ Even more troublesome is the potential that this overhaul of FOIA will require relitigation of FOIA issues, as agencies try to side-step settled FOIA doctrine by citing E-FOIA's alterations to the statutory language.¹⁴⁹

A. E-FOIA's Major provisions

1. *Electronic Reading Rooms: Placing Government Information On-Line.* Section 4 of E-FOIA requires agencies to make certain records created on or after November 1, 1996, available for public inspection "by computer telecommunications or . . . by other electronic means" within one year of their creation.¹⁵⁰ This provision,

Improvement Act and the Electronic Freedom of Information Improvement Act, S. 1940, 102d Cong. (1991); H.R. 2773, 101st Cong. (1989).

146. See Kirtley, *FOIA*, *supra* note 23, at 9 (pointing out that E-FOIA does not tackle the problems of excessive access fees or the tension between privacy and disclosure in FOIA doctrine).

147. See Cate et al., *supra* note 118, at 73 ("[FOIA's] costs threaten to increase exponentially when the FOIA is applied to the increasing number of computerized agency records.").

148. See Robert Gellman, *I Predict That E-FOIA Will Slow Down Agency Responses*, GOV'T COMPUTER NEWS, Nov. 18, 1996, at 27 [hereinafter Gellman, *E-FOIA Will Slow Down Agency Responses*] (arguing that new procedural requirements will cause agency FOIA operations to slow down "as agencies spend more time on process and less on actual disclosure").

149. See Mike Feinsilber, *Freedom of Information Act Updated*, COM. APPEAL, Sept. 22, 1996, at 13A (recounting the concern of David Burnham, co-director of the Transactional Records Access Clearing House, that changing FOIA "will give reluctant federal agencies grounds for ignoring [past] decisions"). Burnham worries that FOIA requesters "may have to re-fight battles that have already been won." *Id.*

150. E-FOIA, *supra* note 24, § 4, 110 Stat. at 3049 (codified at 5 U.S.C. § 552(a)(2) (Supp. II 1996)). If an agency does not have the means necessary to publish the materials on the Web, the agency would be able to satisfy the requirements of this section by making the records available on CD-ROM or diskette. See H.R. REP. NO. 104-795, at 20 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3448, 3463. The records that are to be made available for public inspection by electronic means are:

- (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 . . . 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

designed to promote access to government information via the Internet,¹⁵¹ creates what Attorney General Janet Reno termed "electronic reading rooms."¹⁵² Of the documents subject to this provision, the type that will be of most interest to the general public and that has the greatest potential for reducing the total number of FOIA requests are copies of previously released records that are likely to be the subject of subsequent requests.¹⁵³ In the FBI's electronic reading room,¹⁵⁴ for example, documents posted in compliance with this provision include information of popular interest on such topics as Elvis Presley,¹⁵⁵ Julius and Ethel Rosenberg,¹⁵⁶ and various UFO sightings.¹⁵⁷

Some FOIA observers have argued that this provision will lead to extensive litigation since "a requester who disagrees with an agency's assessment of the likelihood of future requests may be able to sue to challenge that assessment."¹⁵⁸ The merits of this argument are questionable for two reasons. First, it is difficult to imagine how an individual would have standing to challenge the agency's assessment, since the individual would not have suffered any concrete harm as a result of an agency decision not to make a particular document or set of documents available in electronic reading rooms.¹⁵⁹ Second,

(E) a general index of the records referred to under subparagraph (D).

E-FOIA, *supra* note 24, § 4, 110 Stat. at 3049 (codified at 5 U.S.C. § 552(a)(2) (Supp. II 1996)).

One commentator has erroneously stated that § 552(a)(2) requires *all* records created after November 1, 1996, to be made available electronically within one year of their creation. See David MacDonald, Note, *The Electronic Freedom of Information Act Amendments: A Minor Upgrade to Public Access Law*, 23 RUTGERS COMPUTER & TECH. L.J. 357, 375 (1997). Such a requirement would be nearly impossible for agencies to fulfill and would be an incredible waste of agency resources.

151. See H.R. REP. NO. 104-795, at 11, *reprinted in* 1996 U.S.C.C.A.N. 3448, 3454.

152. *Attorney General Reiterates FOIA Policy*, FOIA UPDATE (Office of Info. and Privacy, U.S. Dep't of Justice), Spring 1997, at 1 [hereinafter Reno Memo].

153. See E-FOIA, *supra* note 24, § 4, 110 Stat. at 3049 (codified at 5 U.S.C. § 552(a)(2)(D) (Supp. II 1996)).

154. *FBI FOIA Electronic Reading Room* (visited Apr. 1, 1998) <<http://www.fbi.gov/foipa/document.htm>>.

155. See *Index of foipa/elvis* (visited Apr. 1, 1998) <<http://www.fbi.gov/foipa/elvis/>>.

156. See *Index of foipa/rosen* (visited Apr. 1, 1998) <<http://www.fbi.gov/foipa/rosen/>>.

157. See *Index of foipa/ufo* (visited Apr. 1, 1998) <<http://www.fbi.gov/foipa/ufo/>>.

158. *Electronic Freedom of Information Improvement: Hearing on S. 1090 Before the Subcomm. on Gov't Management, Info. and Tech. of the House Comm. on Gov't Reform and Oversight*, 104th Cong. 74 (1996) (testimony of Robert Gellman) [hereinafter Gellman Testimony]; see also MacDonald, *supra* note 150, at 382 (arguing that the provision will likely result in an "explosion of litigation").

159. An agency's assessment would not be aimed at anyone in particular, and an individual

E-FOIA leaves to agency discretion the determination of which records are likely to become the subject of repeated requests.¹⁶⁰ Since courts have historically shown great deference to the exercise of agency discretion in the context of FOIA,¹⁶¹ any challenge to an agency determination likely will be unsuccessful.

Critics also argue that agencies may divert resources to publishing older, previously released documents at the expense of processing current requests.¹⁶² This argument cynically assumes that agencies will act in bad faith and will actively attempt to delay FOIA processing. The merits of this view are questionable given the Clinton administration's efforts to encourage open government. In 1993, after the dismal FOIA performance record of the Reagan and Bush administrations,¹⁶³ President Clinton signaled a desire to reverse the trend. In a memorandum to department and agency heads, he made it clear that "[t]he existence of unnecessary bureaucratic hurdles has no place in [FOIA's] implementation."¹⁶⁴ In 1997, following the passage of E-FOIA, Attorney General Janet Reno wrote another memorandum to department and agency heads, reaffirming the administration's position on FOIA.¹⁶⁵ While the Clinton administration has not earned a perfect FOIA report card,¹⁶⁶ agencies appear to be moving away from actively impeding FOIA administration.¹⁶⁷

would still have access to the document through traditional FOIA channels. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 575-76 (1992) ("[T]he alleged violation of a right to have the Government act in accordance with law [is] not judicially cognizable because 'assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III . . .'" (quoting *Allen v. Wright*, 468 U.S. 737, 754 (1984))).

160. See E-FOIA, *supra* note 24, § 4, 110 Stat. at 3049 (codified at 5 U.S.C. § 552(a)(2)(D) (Supp. II 1996)).

161. See *supra* note 66 and accompanying text (discussing agency discretion in the context of granting fee waivers).

162. See MacDonald, *supra* note 150, at 383 n.164 (arguing that "[a]gencies may find less political risk in processing antiquated documents than current and controversial ones"); Gellman Testimony, *supra* note 158, at 74.

163. See Jane Kirtley, *Public Access to Records Always Under Attack*, EDITOR & PUBLISHER MAG., July 7, 1997, at 48 (noting that the Clinton administration "inherited a legacy of entrenched bureaucratic resistance to openness promulgated during the Reagan and Bush administrations").

164. Memorandum from President Clinton on FOIA to Heads of Departments and Agencies (Oct. 4, 1993), *reprinted in* FOIA UPDATE (Office of Info. and Privacy, U.S. Dep't of Justice), Summer/Fall 1993, at 3 [hereinafter 1993 Clinton Memo].

165. See Reno Memo, *supra* note 152, at 1 ("As your department or agency implements the Electronic FOIA amendments, I urge you to be sure to continue our strong commitment to the openness-in-government principles that President Clinton and I [have] established . . .").

166. See *Open Records Ensure Freedoms*, WIS. ST. J., July 4, 1997, at 13A (noting that the

The creation of these electronic reading rooms has a tremendous potential for making important information readily available to the general public.¹⁶⁸ The electronic reading rooms will also save time and money for agencies, as they will be able to unburden themselves of requests by multiple persons for similar information.¹⁶⁹ This provision creates a relatively inexpensive and efficient method of “open[ing] agency action to the light of public scrutiny.”¹⁷⁰

2. *Specifying the Format of Requested Information.* Prior to the passage of E-FOIA, an agency was under no obligation to accommodate a requester’s preference for a particular format for requested information. In *Dismukes v. Department of the Interior*,¹⁷¹ the requester sought to obtain from the Bureau of Land Management (BLM) a copy of a computer tape which listed the names and addresses of the participants in six 1982 BLM Simultaneous Oil and Gas Leasing lotteries.¹⁷² The Agency was willing to make the information available on microfiche, but the requester argued that

Clinton administration’s record is “mixed,” but emphasizing that it is “an improvement upon the policies of the Reagan and Bush administrations”).

167. See *Federal Information Policy Oversight: Hearing Before the Subcomm. on Gov’t Management, Info., and Tech. of the House Comm. on Gov’t Reform and Oversight*, 104th Cong. 51 (1996) (statement of J. Kevin O’Brien, Chief, Freedom of Info. and Privacy Acts Section, FBI) [hereinafter O’Brien Testimony] (asserting that the FBI would continue its “best efforts” to reduce its backlog of unprocessed FOIA requests); Letter from John C. Dwyer, Acting Associate Attorney General, to The Speaker of the United States House of Representatives (July 1, 1997) (expressing the Clinton administration’s “firm commitment” to FOIA and to “its faithful implementation in [a] strong spirit of government openness”), reprinted in OFFICE OF INFO. AND PRIVACY, U.S. DEP’T OF JUSTICE, DOJ ANNUAL FOIA REPORT TO CONGRESS 1996, available at *DOJ Annual FOIA Report to Congress - 1996* (visited Apr. 1, 1998) <http://www.usdoj.gov/oip/annual_report/1996/96-sp.htm>. There is a risk, of course, that future administrations will revert to a more restrictive FOIA policy. If that scenario becomes a reality, the courts could intervene and set reasonable limitations on agency discretion. Agencies would still be subject to FOIA’s time limits, and if, as a result of diverting resources to post previously released material, an agency took too long responding to newer requests, the courts could compel disclosure and require the agency to shift resources back to processing current requests.

168. The system is by no means perfect, however. For example, when I examined some FBI information on UFOs, the documents on the screen were barely legible due to the condition of the original documents. See *FBI FOIA Electronic Reading Room, UFO: Section 1* (visited Apr. 1, 1998) <<http://www.fbi.gov/foipa/ufo/ufo1.pdf>>.

169. See S. REP. NO. 104-272, at 9 (1996) (“Government dissemination of more varieties and greater amounts of its information holdings via [the information] ‘superhighway’ may reduce the volume of FOIA requests . . .”).

170. *Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976).

171. 603 F. Supp. 760 (D.D.C. 1984).

172. See *id.* at 760-61.

the computer tape version would be more convenient for his purposes.¹⁷³ The district court held that release on microfiche was sufficient.¹⁷⁴ The court stated that the Agency was only required to provide "responsive, nonexempt information in a reasonably accessible form."¹⁷⁵ The district court's decision seriously undermined the effectiveness of FOIA in the electronic age. By not releasing information in the requested format, an agency can substantially decrease the usefulness of the information to the requester, sometimes effectively denying access to the information.¹⁷⁶ For information-seekers looking for "trends, abuses and outrages," electronic searching of government material can reduce search times from days or weeks to hours or minutes.¹⁷⁷

An illustration of how important format can be is the Environmental Working Group's (EWG) request to the FDA for pesticide monitoring results.¹⁷⁸ The EWG, a nonprofit organization, wanted certain data to enable it to "analyze the variance between levels of toxins that are inherent in imported foods consumed by infants and children, as compared to adults."¹⁷⁹ The FDA refused to release the data in electronic form, instead releasing the data in the "unwieldy physical form of [6,000 pages of] paper documents," a form that was "cumbersome, confusing, and unorganized [sic] for the efficient statistical analysis necessary for quality scientific research."¹⁸⁰ The EWG was able to complete its project, but only at an unnecessarily high cost:

173. See *id.* at 762.

174. See *id.* at 763.

175. *Id.*

176. See Ira Chinoy, *Amendment Seeks to Open Public Files to Digital Diggers*, WASH. POST, Sept. 18, 1996, at A17 (quoting Senator Patrick Leahy, E-FOIA's Senate sponsor, as saying: "In the society we're in today, you are not going to have the access to what the government is doing in any practical fashion if you don't have access electronically"); cf. Feinsilber, *supra* note 149, at A13. Feinsilber discusses the experience of the *Miami Herald*, which wanted to match the names of those with permits to carry concealed weapons against a list of school bus drivers. The *Herald* was given the requested information under the Florida state FOIA—but on "yards and yards of paper." The *Herald* was forced to abandon the project because it could not perform a computer match. See *id.*

177. Chinoy, *supra* note 176, at A17.

178. See Jeffrey Norgle, Comment, *Revising the Freedom of Information Act for the Information Age: The Electronic Freedom of Information Act*, 14 J. MARSHALL J. COMPUTER & INFO. L. 817, 817-19 (1996).

179. *Id.* at 817-18 (citations omitted).

180. *Id.* at 818.

The FDA's decision left the EWG with no choice other than to bear the financial burden of paying a commercial scanning firm to input the pesticide data. Then, the EWG had to go through the labor intensive chore of converting the data into suitable electronic format—the very format that the FDA maintained all along.¹⁸¹

E-FOIA will prevent such inefficiencies from occurring in the future by requiring agencies to provide a 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.”¹⁸² This provision was intended to override the holding in *Dismukes*,¹⁸³ and the new language should increase the usefulness and efficiency of FOIA.

3. *First In/First Out and Multi-Track Processing.* Courts have permitted agencies to process FOIA requests on a first in/first out (FIFO) basis.¹⁸⁴ FIFO processing standing alone is problematic, however, because simple requests that could be processed rapidly are delayed while earlier, more complex requests are handled.¹⁸⁵ In the interest of efficiency and speed, some agencies, such as the FBI, have set up two-track systems—dividing requests into simple and complex requests—which are processed on separate FIFO bases.¹⁸⁶ E-FOIA gives agencies statutory authority to establish such multi-track systems, but it does not require the establishment of such systems.¹⁸⁷ Since some agencies had already established multi-track systems, this development is not very momentous; the multi-tracking option in the statute will, at most, give agencies that do not currently use multi-tracking a reason to consider whether they might benefit from such a system. While the lack of explicit guidelines has drawn some criticism,¹⁸⁸ it would be unwise to require all agencies to set up a uniform multi-tracking system since lengthy delays do not plague every agency.¹⁸⁹ By permitting individual agencies to design their own systems, E-FOIA allows each agency to tailor a processing system to its distinct needs. For example, an agency with a severe backlog might want to create three tracks and assign its most experienced personnel to the track containing the most complex requests. Other agencies with only minor backlogs might prefer a two-track system, or even a single-track system. Encouraging agencies to set their own

181. *Id.* at 818-19.

182. E-FOIA, *supra* note 24, § 5, 110 Stat. at 3050 (codified at 5 U.S.C. § 552(a)(3)(B) (Supp. II 1996)).

183. *See* S. REP. NO. 104-272, at 14 (1996).

rules regarding multi-track systems will likely encourage experimentation. Through this process, agencies will learn which procedures work best, and will be able to borrow from other agencies' experiences with various systems.

4. *Expedited Review.* Occasionally, a FOIA requester will have an urgent need for the requested information, and delays in processing the request can have serious consequences.¹⁹⁰ In response, E-FOIA requires agencies to set up a system of expedited processing for cases where the requester demonstrates a "compelling need."¹⁹¹ This requirement can be met in one of two ways. First, a compelling need is present when "a failure to obtain requested records on an expedited basis . . . could reasonably be expected to pose an imminent threat to the life or physical safety of an individual."¹⁹² This provision will help minimize the most severe kinds of adverse effects which delays in FOIA can have on requesters. Furthermore, since it is doubtful that many people will be able to meet the provision's high standard,¹⁹³ it is unlikely that the provision will result in serious delays to the processing of non-expedited requests. Since an agency's denial of a request for expedited review is subject to judicial review,¹⁹⁴ requesters will likely challenge denials of expedited review in the courts. But courts should have little trouble absorbing any increased litigation. After all, prior to E-FOIA, courts were already making

184. See *supra* notes 85 & 97 and accompanying text.

185. See H.R. REP. NO. 104-795, at 23 (1996), reprinted in 1996 U.S.C.C.A.N. 3448, 3466.

186. See Gellman, *E-FOIA Will Slow Down Agency Responses*, *supra* note 148, at 27.

187. See E-FOIA, *supra* note 24, § 7, 110 Stat. at 3050 (codified at 5 U.S.C. § 552(a)(6)(D)(i) (Supp. II 1996)) ("Each agency may promulgate regulations . . . providing for multi-track processing . . ." (emphasis added)).

188. See, e.g., Gellman, *E-FOIA Will Slow Down Agency Responses*, *supra* note 148, at 27 (arguing that E-FOIA's multi-track authorization is likely to make "[l]engthy administrative delays" more commonplace).

189. See S. REP. NO. 104-272, at 16 (1996) (noting that 28 of 75 agencies responding to a Department of Justice survey in February 1994 reported no backlog of requests).

190. See *supra* note 117 and accompanying text.

191. E-FOIA, *supra* note 24, § 8, 110 Stat. at 3052 (codified at 5 U.S.C. § 552(a)(6)(E)(i)(I) (Supp. II 1996)).

192. *Id.* (codified at 5 U.S.C. § 552(a)(6)(E)(v)(I) (Supp. II 1996)).

193. See MacDonald, *supra* note 150, at 384 ("Only a small number of requesters should be able to show that their own or other lives [are] hanging in the balance pending a FOIA request.").

194. See E-FOIA, *supra* note 24, § 8, 110 Stat. at 3052 (codified at 5 U.S.C. § 552(a)(6)(E)(iii) (Supp. II 1996)).

such determinations, albeit at a later stage, when determining whether to stay proceedings and grant an agency additional time to process a request.¹⁹⁵

Second, for requesters that are “primarily engaged in disseminating information,” the compelling need requirement may be satisfied by a showing of “urgency to inform the public concerning actual or alleged Federal Government activity.”¹⁹⁶ The media will be the primary beneficiary of this provision, and it is reasonable to expect that reporters will attempt to invoke it frequently. FOIA critics have found fault with the statute precisely because it is no longer used primarily by the media to inquire into the activities of the government.¹⁹⁷ While this provision will not prevent non-media requesters from using FOIA, and thus does not directly respond to these critics’ concerns, it will give certain media requests preferential processing, thereby making FOIA work more effectively for the media. Accelerating media access to information on government activities is a positive development for FOIA. Since one of FOIA’s original objectives was to “open agency action to the light of public scrutiny,”¹⁹⁸ it is both

195. See *supra* notes 98-101 and accompanying text.

196. E-FOIA, *supra* note 24, § 8, 110 Stat. at 3052 (codified at 5 U.S.C. § 552(a)(6)(E)(v)(II) (Supp. II 1996)).

197. See, e.g., Amy E. Rees, *Recent Developments Regarding the Freedom of Information Act: A “Prologue to a Farce or a Tragedy; or, Perhaps Both,”* 44 DUKE L.J. 1183, 1184 (1995) (lamenting the fact that “FOIA has rarely if ever been used as a powerful external check on governmental affairs,” and noting that “the typical FOIA request is made by a wily civil litigant circumventing traditional discovery rules, a corporate counsel in search of competitor’s financial information, or a conspiracy theorist demanding operational files of the [CIA] on himself or other players in covert intelligence maneuvers in Cuba”); Scalia, *supra* note 1, at 16 (“[FOIA was] promoted as a boon to the press, the public interest group, the little guy; [it has] been used most frequently by corporate lawyers. . . . [The current situation] is a far cry from John Q. Public finding out how his government works.”). Perhaps the most scathing and extensive critique of FOIA was delivered by Assistant Attorney General Stephen J. Markman, in 1988:

Today, a typical FOIA scenario is not, as envisioned by the Congress, the journalist who seeks information about the development of public policy which he will shortly publish for the edification of the electorate. Rather, it is the corporate lawyer seeking business secrets of a client’s competitors; the felon attempting to learn who it was who informed against him; the drug trafficker trying to evade the law; the foreign requester seeking a benefit that our citizens cannot obtain from his country; or the private litigant who, constrained by discovery limitations, turns to the FOIA to give him what a trial court will not.

The Freedom of Information Act: Hearings Before the Subcomm. on Tech. and the Law of the Senate Comm. on the Judiciary, 100th Cong. 37 (1988) (footnote omitted).

198. Department of the Air Force v. Rose, 425 U.S. 352, 361 (1976) (internal quotation marks omitted).

reasonable and desirable to give preferential treatment to requests that are intended to publicize governmental activities.

5. *Twenty-Day Time Limit.* Prior to the passage of E-FOIA, an agency was required to determine whether it would comply with a request for information within ten days of its receipt of the request.¹⁹⁹ Agency disregard for the time limits prompted strident criticism from observers such as Senator Patrick Leahy, author of the Senate version of E-FOIA. When testifying before the House Subcommittee on Government Management, Information and Technology of the Committee on Government Reform and Oversight, Leahy complained:

The current time limits in the FOIA are a joke. Few agencies actually respond to FOIA requests within the 10-day limit required in the law. Such routine failure to comply with the statutory time limits is bad for morale in the agencies and breeds contempt by citizens who expect government officials to abide by, not routinely break, the law.²⁰⁰

In an attempt to remedy the problem, Congress doubled the statutory time limit from ten days to twenty days.²⁰¹ The expansion of the time limit was intended to "help Federal agencies in reducing their backlog of FOIA requests."²⁰² Congress's recognition of the need for expanded time limits is commendable, and the new provision likely will enable agencies with only minor backlogs to process requests within the statutory limits.²⁰³ Unfortunately, a twenty-day limit is barely more realistic than a ten-day limit for agencies such as the FBI or the CIA, whose enormous backlogs draw the most criticism. While these agencies may be able to process some of their smaller, simpler FOIA requests within the twenty-day limit by util-

199. See 5 U.S.C. § 552(a)(6)(A)(i) (1994).

200. 142 CONG. REC. S10,894 (daily ed. Sept. 18, 1996) (statement of Sen. Leahy); see also Sinrod, *supra* note 44, at 342 (noting that "compliance with FOIA's ten-day rule has become the exception rather than the norm"); Beall, *supra* note 23, at 1254 n.14 ("[T]he 10-day time limits imposed by [the 1974] Congress no longer have any significance.").

201. See E-FOIA, *supra* note 24, § 8, 110 Stat. at 3052 (codified at 5 U.S.C. § 552(a)(6)(A)(i) (Supp. II 1996)).

202. H.R. REP. NO. 104-795, at 26 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3448, 3469.

203. There is a risk, however, that the new time limits will slow down some FOIA processing since agencies that currently respond within ten days will no longer have the pressure to comply within ten days. See Gellman Testimony, *supra* note 158, at 75.

izing a multi-track system,²⁰⁴ their backlogs are several months long.²⁰⁵ The FBI receives requests for law enforcement information that may fall within Exemption 7,²⁰⁶ and the CIA receives requests for information that may be covered under the National Security Act and may thus be exempt from disclosure under Exemption 3.²⁰⁷ The FBI²⁰⁸ and the CIA can actively invoke these exemptions to ensure effective law enforcement or to protect national security, thus necessitating close and extensive review of requested documents.²⁰⁹ In view of these circumstances, it is unlikely that the expanded time limits will result in a substantial reduction of these agencies' backlogs.²¹⁰

Furthermore, the new twenty-day limit, like its ten-day predecessor, is rife with exceptions. E-FOIA maintains the provision for a ten-day extension in "unusual circumstances."²¹¹ If it is unlikely that the agency will complete processing of the request within that time, the agency must only notify the requester and give that person the opportunity to limit the scope of the request so that it may be processed within the time limit.²¹² If the agency fails to conform to the time limits, irrespective of whether the requester chose to limit the scope of his request, the requester is deemed to have exhausted his administrative remedies and may bring suit in federal district court.²¹³ The district court has the power to allow the agency additional time to process the request, however, if the agency can show that "exceptional circumstances exist and that the agency is exercising due

204. See *supra* notes 186-89 and accompanying text.

205. See *Congress Brings Information Act into Electronic Age*, *supra* note 114.

206. See Sarah Henderson Hutt, *In Praise of Public Access: Why the Government Should Disclose the Identities of Alleged Crime Victims*, 41 DUKE L.J. 368, 383 n.88 (1991).

207. See Michael H. Hughes, *CIA v. Sims: Supreme Court Deference to Agency Interpretation of FOIA Exemption 3*, 35 CATH. U. L. REV. 279, 281 (1985).

208. See Hutt, *supra* note 206, at 383 n.88.

209. See Hughes, *supra* note 207, at 281.

210. See Gellman Testimony, *supra* note 158, at 75 (noting that no matter whether the time limits are ten or twenty days, agencies with very large backlogs "will never be in compliance" because "they will not have any more resources").

211. See E-FOIA, *supra* note 24, § 7(b), 110 Stat. at 3050-51 (codified at 5 U.S.C. § 552(a)(6)(B) (Supp. II 1996)). One supporter of a twenty-day time limit argues that the expanded limit should replace the "unusual circumstances" provision, contending that the added administrative burden of sending out notices of extensions to requesters is unnecessary. See Sinrod, *supra* note 44, at 357.

212. See E-FOIA, *supra* note 24, § 7(b), 110 Stat. at 3050-51 (codified at 5 U.S.C. §§ 552(a)(6)(B)(i)-(ii) (Supp. II 1996)).

213. See 5 U.S.C. § 552(a)(6)(C)(i) (Supp. II 1996).

diligence in responding to the request.”²¹⁴ Prior to the passage of E-FOIA, no statutory definition of “exceptional circumstances” existed, and the term was thus left to unbridled judicial construction. In an attempt to constrain what was seen as liberal judicial allowance of significant time extensions for agencies faced with request backlogs,²¹⁵ and to encourage agencies to reduce those backlogs, Congress explicitly stated in E-FOIA that “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.”²¹⁶

The new statutory language was intended to limit a judge’s ability to give an agency additional time to respond to a request absent truly extraordinary circumstances, and thereby to coerce agencies into reducing their backlogs of requests.²¹⁷ The new statutory language is loose enough, however, to enable judges to continue to grant time extensions to beleaguered agencies.²¹⁸ While this reality is contrary to congressional intent, it is both unavoidable and desirable in view of the currently inadequate levels of agency funding for FOIA request processing. It would be problematic if a judge were forced by statute to compel disclosure of requested documents without giving the agency adequate time to review the documents to ensure that they do not contain exempted material.²¹⁹ The risks involved are particularly severe in regard to material that may contain information that must be kept secret for national security reasons,²²⁰ or information whose disclosure would result in an invasion of privacy.²²¹

214. *Id.*

215. *See supra* Part II.A.

216. E-FOIA, *supra* note 24, § 7, 110 Stat. at 3051 (codified at 5 U.S.C. § 552(a)(6)(C)(ii) (Supp. II 1996)).

217. *See* H.R. REP. NO. 104-795, at 24 (1996) (explaining that the language does not cover “routine backlogs” because permitting such backlogs to “give agencies an automatic excuse to ignore the time limits . . . provides a disincentive for agencies to clear up those backlogs”), *reprinted in* 1996 U.S.C.C.A.N. 3448, 3467.

218. *See infra* notes 222-28 and accompanying text.

219. *See supra* notes 52-54 and accompanying text.

220. Information that is classified by executive order in the interest of national defense or foreign policy is exempted from disclosure by 5 U.S.C. § 552(b)(1).

221. Such information is exempted from disclosure by 5 U.S.C. §§ 552(b)(6) and (b)(7)(C). President Ford, when he initially vetoed the 1974 FOIA amendments, voiced such a concern:

I believe that confidentiality would not be maintained if many millions of pages of FBI and other investigatory law enforcement files would be subject to compulsory disclosure Our law enforcement agencies do not have, and could not obtain, the

An application of the new statutory language to the facts of *Edmond v. United States Attorney*²²² illustrates the ease with which judges could continue to grant time extensions to underfunded agencies. First, while the statute explicitly states that “the term ‘exceptional circumstances’ does not include a delay that results from a predictable agency workload of requests,”²²³ Congress did not define “predictable agency workload.” The district court in *Edmond* noted that the USAO had received “a volume of requests for information vastly in excess of that anticipated by Congress.”²²⁴ The judge could easily determine that such an unanticipated volume was not “predictable” under E-FOIA’s language. Second, delays from a predictable agency workload can constitute exceptional circumstances if the agency “demonstrates reasonable progress in reducing its backlog of pending requests.”²²⁵ The statute leaves to the courts the job of determining what constitutes “reasonable progress.” Courts could liberally construe this language to give agencies a fair opportunity to process requests. The *Edmond* court noted that the USAO had increased its FOIA staff from one to four people.²²⁶ The court could consider this action to be “reasonable progress” toward reducing the agency’s FOIA backlog under the new language. Third, if a FOIA requester had earlier refused to narrow the scope of his request or to arrange for an alternative timetable,²²⁷ the judge must consider this refusal as a factor in determining whether “exceptional circumstances” exist.²²⁸ Therefore, unless a requester was willing to narrow the scope of his request before the suit was filed, E-FOIA gives judges an additional means of granting liberal time extensions to agencies faced with understaffing and too many FOIA requests.

large number of trained and knowledgeable personnel that would be needed to make such a line-by-line examination of information requests that sometimes involve hundreds of thousands of documents, within the time constraints added to current law by this bill.

Veto of Freedom of Information Act Amendments, 1974 PUB. PAPERS 374, 375 (Oct. 17, 1974).

222. 959 F. Supp. 1 (D.D.C. 1997), discussed in detail *supra* at pages 1228-29.

223. E-FOIA, *supra* note 24, § 7, 110 Stat. at 3051 (codified at 5 U.S.C. § 552(a)(6)(C)(ii) (Supp. II 1996)).

224. *Edmond*, 959 F. Supp. at 2.

225. E-FOIA, *supra* note 24, § 7, 110 Stat. at 3051 (codified at 5 U.S.C. § 552(a)(6)(C)(ii) (Supp. II 1996)).

226. *See Edmond*, 959 F. Supp. at 3 n.2.

227. *See supra* text accompanying note 212 (discussing opportunity to narrow scope of requests).

228. *See* E-FOIA, *supra* note 24, § 7, 110 Stat. at 3051 (codified at 5 U.S.C. § 552(a)(6)(C)(ii) (Supp. II 1996)).

While it is unfortunate that people will have to be satisfied with less information if they want to receive it in a timely manner, such a result is unavoidable given Congress's refusal to allocate sufficient resources to agencies for FOIA processing.

B. E-FOIA's Likely Effect

Congress passed E-FOIA to accomplish two goals. The first goal, which it largely achieved, was to "encourage electronic access to Government information."²²⁹ The requirement that agencies release as much information as possible in the format requested, including on CD-ROM or diskette, was a long-overdue step.²³⁰ The provisions relating to on-line publication of government information promise to make information maintained and collected by the government more accessible to a larger segment of the American public.²³¹ The second goal, to encourage and assist reduction of agency backlogs of FOIA requests, will likely prove more elusive. Although increased funding for FOIA processing is the action most likely to reduce backlogs significantly,²³² such an increase was noticeably absent from the reforms.²³³

The changes the amendments did accomplish will likely have a mixed effect on the backlogs. As agencies publish more information on the Internet, people will need to turn to FOIA less frequently to obtain desired information and multiple requests for the same information will certainly be reduced.²³⁴ But FOIA will still continue to be widely used; agency FOIA processing teams will continue to be un-

229. S. REP. NO. 104-272, at 5 (1996); *see also* E-FOIA, *supra* note 24, § 2(a)(6), 110 Stat. at 3048 ("Government agencies should use new technology to enhance public access to agency records and information.").

230. *See Electronic Freedom of Information Improvement: Hearing on S. 1090 Before the Subcomm. on Gov't Management, Info., and Tech. of the House Comm. on Gov't Reform and Oversight*, 104th Cong. 98 (1996) (testimony of James P. Lucier, Jr.) (categorizing E-FOIA's technological provisions as not "particularly astonishing" and "little more fundamental than requiring agencies to publish their telephone numbers now that telephones have been invented").

231. *See* E-FOIA Signing Statement, *supra* note 145, at 1949.

232. *See* O'Brien Testimony, *supra* note 167, at 51 ("It is clear, however, that only more analysts, trained to process requests, can significantly diminish the backlogs . . .").

233. *See* MacDonald, *supra* note 150, at 384 (calling the failure to fund "[t]he first and primary failure" of E-FOIA). For a discussion of the Senate proposal to fund the amendments that was not passed, as well as other proposed ways to fund FOIA, *see infra* Part IV.B.

234. *See* S. REP. NO. 104-272, at 9 (1996) ("Government dissemination of more varieties and greater amounts of its information holdings via a 'superhighway' may reduce the volume of FOIA requests.").

derfunded and understaffed; and the time required to process requests will continue to result in backlogs. The provisions authorizing multi-tracking will probably speed up the processing of simpler requests, but the fact that the FBI had a system of multi-tracking in place prior to E-FOIA,²³⁵ yet had one of the worst backlogs,²³⁶ demonstrates that multi-tracking is not a panacea. It remains to be seen how expedited review will work in practice, because the amendments leave the details to agency regulations.²³⁷ While the expedited processing provisions may lead to more litigation²³⁸ and may increase overall delay and costs,²³⁹ their benefits outweigh these drawbacks. Expedited review will secure rapid access to information for those requesters with the most urgent need for information, and it will accelerate the media's efforts to provide the public with important information about governmental activities. Finally, the twenty-day time limit may help agencies with minor backlogs, but it will have only a minor effect on agencies with the largest backlogs, and congressional attempts to limit the judiciary's ability to grant these agencies time extensions likely will be ineffective. Thus, since it is doubtful that E-FOIA will substantially improve the speed at which FOIA requests are processed, more invasive surgery is required.

IV. ADDITIONAL SUGGESTIONS TO STREAMLINE FOIA

Congressional attempts in the 1970s and 1980s to reduce the cost and delays associated with FOIA were inadequate. Likewise, it appears that E-FOIA will not substantially accelerate agency processing of FOIA requests. These failures result from Congress's apparent

235. See Gellman, *E-FOIA Will Slow Down Agency Responses*, *supra* note 148, at 27.

236. See 142 CONG. REC. S10,894 (daily ed. Sept. 18, 1996) (statement of Sen. Leahy) (noting that FOIA requests to the FBI can take up to four years to be processed).

237. See E-FOIA, *supra* note 24, § 8, 110 Stat. at 3051 (codified at 5 U.S.C. § 552(a)(6)(E)(i) (Supp. II 1996)). For example, it is unknown how expedited review will function in combination with multi-track processing. One commentator suggests that an agency might put all other requests on hold so it can devote all of its FOIA resources to processing the expedited cases. See Gellman, *E-FOIA Will Slow Down Agency Responses*, *supra* note 148, at 27. One of the only firm requirements that the amendments place on agency regulations is that they ensure "expeditious consideration of administrative appeals of [the] determinations of whether to provide expedited processing." E-FOIA, *supra* note 24, § 8, 110 Stat. at 3052 (codified at 5 U.S.C. § 552(a)(6)(E)(ii)(II) (Supp. II 1996)).

238. Cf. Gellman Testimony, *supra* note 158, at 74 (noting that "virtually every word in the FOIA has been the subject of intense litigation").

239. See MacDonald, *supra* note 150, at 383 (arguing that the expedited review provisions "will add significant costs to administrative overhead" and will "further drain agency resources and slow down FOIA compliance overall").

preference for administrative solutions, such as multi-track processing and expanded time limits. This focus on administrative improvements shifts the debate away from the underlying cause of FOIA's problems: a lack of adequate funding and staffing for agencies' FOIA-processing divisions.

One group of scholars has suggested expanding the central purpose doctrine as a means of making FOIA more efficient and less costly.²⁴⁰ Their claim is that this proposal would return the statute to its intended purpose as a tool for citizens to open governmental operations to the light of public scrutiny.²⁴¹ It would also avoid the need for additional funding. This Part examines this proposal as well as a funding provision that was in the original Senate E-FOIA bill²⁴² but that was not included in the final Act. These proposals are analyzed both for their potential effects on the cost and delays associated with FOIA and for their ability to conform to an overarching commitment to openness in government.

A. Returning FOIA to Its Roots: Expanding the Central Purpose Doctrine

Anyone may use FOIA to procure non-exempt information for any reason.²⁴³ Some critics have attacked the absence of a purpose requirement because public dollars are not unlimited and other public causes may be more deserving.²⁴⁴ The absence of such a requirement invites abuse,²⁴⁵ "bring[ing] into the system requests that are not

240. See, e.g., Cate et al., *supra* note 118, at 67-69.

241. See *id.* at 45.

242. S. 1090, 104th Cong. (1996).

243. The statute itself places no limitations on who may request records or for what reason. As long as the records do not fall within one of the statutory exemptions, an agency, "upon any request for records which (A) reasonably describes such records and (B) 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." 5 U.S.C. § 552(a)(3) (1994) (emphases added). Courts have reaffirmed this basic principle of FOIA, noting that Congress "clearly intended the FOIA to give any member of the public as much right to disclosure as one with a special interest in a particular document." *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989) (internal quotation marks omitted); see also H.R. REP. NO. 104-795, at 6 (1996) ("Requesters do not have to show a need or reason for seeking information."), reprinted in 1996 U.S.C.C.A.N. 3448, 3449.

244. See Scalia, *supra* note 1, at 17 (criticizing FOIA and its costs because requests that "may be motivated by no more than idle curiosity" take "money from the Treasury that could be better spent elsewhere").

245. See Scott Shane, *Panning for Gold in Government Files: Businesses Make Most of Public Right to Know*, BALTIMORE SUN, July 28, 1997, at 1A (noting that some people have

really important enough to be there, [and] crowding out the genuinely desirable ones to the end of the line."²⁴⁶ One possible solution to these problems is to expand the central purpose doctrine²⁴⁷ beyond the realm of the privacy exemptions, empowering agencies to apply the doctrine directly to *all* FOIA requests received.²⁴⁸ Advocates of a universal central purpose standard argue that it would dramatically reduce the costs and delays currently associated with FOIA.²⁴⁹ Agencies could use the doctrine to decide quickly whether to deny a request as being outside the scope of FOIA, or whether to process the request more fully. Supporters argue that the doctrine would help eliminate FOIA abuses and would help return FOIA to its original purpose of enabling citizens to learn about the activities of government.²⁵⁰ Such a proposal is theoretically feasible, given the apparent willingness within some federal courts to expand the central purpose doctrine beyond the privacy exemptions.²⁵¹ There are, however, several problems with such a proposal.

At a practical level, the current Congress appears to be moving away from limiting the scope of FOIA and has, in fact, reaffirmed its commitment to universal access to FOIA for any purpose. The findings accompanying E-FOIA explicitly state that "the purpose of [FOIA] is to . . . establish and enable enforcement of the right of *any person* to obtain access to the records of [agencies of the Federal

become "FOIA hobbyists"). One such FOIA hobbyist, Michael J. Ravnitsky of St. Paul, Minnesota, "has flooded a dozen agencies with 2,200 FOIA requests." *Id.* Ravnitsky, who recently got a bill from the FBI for \$18,000 in costs, stated: "I think FOIA is great fun. It's a national treasure." *Id.* He says that he is not planning on paying the bill. *See id.*

246. Scalia, *supra* note 1, at 17.

247. See discussion *supra* Part II.B. (discussing the central purpose doctrine, which has been used to uphold the denial, based on the privacy exemptions, of FOIA requests that do not serve FOIA's "central purpose," which is to ensure access to information concerning the activities of government, not those of private citizens).

248. See Cate et al., *supra* note 118, at 67 ("The test for whether a request seeks 'official information' should be the touchstone for disclosure under FOIA. . . . [O]nly information that will serve the purpose of ensuring that 'the Government's activities be opened to the sharp eye of public scrutiny' should ever be subject to disclosure under the FOIA." (quoting *Reporters Comm.*, 489 U.S. at 774)). *But see* Beall, *supra* note 23, at 1279-80, 1300 (criticizing the central purpose doctrine as "contrary to the original spirit of FOIA," and expressing dismay over the doctrine's "exaltation of privacy doctrines" that erode "one of the central bulwarks to a free democracy," access to information).

249. See Cate et al., *supra* note 118, at 69, 72.

250. See *id.* at 67-68.

251. See Beall, *supra* note 23, at 1273-80 (reviewing cases in which lower courts incorporated the central purpose doctrine's language in non-privacy exemption cases).

Government], subject to statutory exemptions, *for any public or private purpose*.²⁵² Senator Leahy explained the finding as follows:

This finding is intended to address concerns that the reasoning of the Supreme Court in *Department of Justice v. Reporters Committee* and the *U.S. Department of Defense v. Federal Labor Relations Authority* analyzed the purpose of the FOIA too narrowly. . . . Efforts by the courts to articulate a 'core purpose' for which information should be released imposes a limitation on the FOIA which Congress did not intend and which cannot be found in its language, and distorts the broader import of the Act in effectuating Government openness.²⁵³

Senator Leahy's comments illustrate his dissatisfaction with the central purpose doctrine. Nonetheless, the central purpose doctrine will likely survive within its present boundaries because nothing in the statute expressly prohibits courts from employing the doctrine as part of the privacy exemptions' balancing tests.²⁵⁴ The legislative findings, however, may prevent courts from expanding the central purpose doctrine to other areas of FOIA, and they send a strong signal that Congress is not likely to limit the scope of FOIA in the near future.

A second practical problem with the proposed expansion of the central purpose doctrine is that agencies might exercise a broader power too expansively. Agency determinations would have to be reviewable by the courts, and this increased litigation would dramatically increase the costs and delays associated with FOIA—the very problems such a solution was intended to fix.²⁵⁵

252. E-FOIA, *supra* note 24, § 2(a)(1), 110 Stat. at 3048 (emphases added).

253. S. REP. NO. 104-272, at 24 (1996) (additional views of Senator Leahy) (citations omitted).

254. In fact, it is difficult to avoid the use of a balancing test. For example, under Exemption 7(C), material may be withheld if disclosure would result in an "unwarranted invasion" of privacy. See 5 U.S.C. § 552(b)(7)(C) (1994). In order to determine whether an invasion of privacy would be unwarranted, a court is forced to weigh the relative merits of the interest in disclosure and the privacy interest involved. See Dickinson, *supra* note 130, at 209-10 ("[B]y casting the personal privacy exemptions as balancing tests, Congress reintroduced into disclosure disputes the issue of merit."). Senator Leahy appears to have recognized this necessity. His attachment to the Senate report accompanying E-FOIA states that the requester's intended use can properly be considered when balancing the public interest in disclosure against the privacy interest. See S. REP. NO. 104-272, at 27 (additional views of Senator Leahy). Most likely, any congressional attempt to fully overturn *Reporters Committee* and its progeny and to eliminate the central purpose doctrine would need to be more explicit.

255. One way to avoid such a problem would be to require FOIA requesters to state how the information they are requesting is likely to shed light on the activities and operations of the government. This type of initial purpose statement would assist agencies in making the initial

A final practical problem is that requesters often do not know in advance what their requests will reveal. Thus, while it is true that FOIA is being used by corporate lawyers to conduct industrial espionage,²⁵⁶ the information they obtain occasionally reveals hidden governmental abuses;²⁵⁷ corporate requesters cannot anticipate these contents until after the agencies have disclosed the material and the requesters have had the opportunity to examine it. Thus, while such requesters may have selfish motives for making their requests, the public may benefit from the information as well. While such occasional indirect benefits may be difficult to justify given that government resources are limited,²⁵⁸ the proper response to this problem is not to limit the scope of FOIA; the proper response was made in 1986 when FOIA's fee provisions were amended to shift the cost of processing primarily commercial requests to the requester.²⁵⁹ It is unwise to place limits on who can use FOIA and for what purposes they can use it, because limiting a basic freedom can end up having the unintended consequence of hurting those who need it most.²⁶⁰ Any initial limitation of a freedom facilitates subsequent limitations of that freedom; it is preferable not to start down that road.

Expansion of the central purpose doctrine would perform the undesired service of further tipping the scales toward government se-

determination. *But see* Cate et al., *supra* note 118, at 68 n.229 (arguing that a congressional attempt to limit the use of FOIA for purely private purposes by requiring that requesters demonstrate a "public purpose use" for the requested information would be ineffective and ultimately "unworkable").

256. *See* Wald, *supra* note 25, at 666.

257. *See id.* at 670 (noting the risk of "increas[ing] the cozy, closed door government-business dealings which were the very sort of practices the Act was designed to root out") (internal quotation marks omitted). Public interest groups argue that moving too quickly to cut off public disclosure of business data would be unwise, claiming that such a move would shield such embarrassing information as "drug company tests on humans [that are performed] before completing animal tests, toxic chemicals dumped into streams and rivers, inspection reports of the Department of Agriculture concerning unwholesome meat, [and] misleading reports by a utility to its ratepayers about the costs of a new nuclear plant." *Id.* at 669-70 (footnotes omitted).

258. *See* Scalia, *supra* note 1, at 17-18 ("[FOIA's] defects . . . might not be defects in the best of all possible worlds. They are foolish extravagances only because we do not have an unlimited amount of federal money to spend, [or] an unlimited number of agency employees to assign . . .").

259. *See* 1986 Reform Act, *supra* note 37, § 1803, 100 Stat. at 3207-48 (codified at 5 U.S.C. § 552(a)(4)(A)(iii) (1994)). For a discussion of the 1986 amendments, see *supra* Part I.C.

260. *Cf. The Electronic Freedom of Information Improvement Act: Hearings on S. 1940 Before the Subcomm. on Tech. and the Law of the Senate Comm. on the Judiciary*, 100th Cong. 96 (1992) (statement of Sen. Leahy) ("[A]ll of us would look at some requests as frivolous, but that is part of the price of democracy.").

crecy and away from disclosure.²⁶¹ The central purpose doctrine was ostensibly intended to return FOIA to its original purposes. In deciding the central purpose doctrine cases, however, the Supreme Court ignored one of FOIA's important original purposes. Section 3 of the Administrative Procedure Act had required agencies to disclose information only "to persons properly and directly concerned."²⁶² The passage of FOIA in 1966 was specifically intended to eliminate "the test of who shall have the right to different information."²⁶³ That change was essential to the new scheme that FOIA established.²⁶⁴ FOIA represents the basic idea that information in the government's possession should be made available to anyone for *any* purpose, unless the information is explicitly exempted.²⁶⁵ It is too simplistic to suggest that FOIA has one single, central purpose that should override this equally important ideal. Limiting the scope of FOIA also ignores the collateral benefits of having a broad public disclosure law, such as "ensur[ing] for the individual citizen a sense of empowerment and control over a government that can at times appear monolithic and imperious."²⁶⁶ It ignores the idea that if "information is power, then to deny public ownership of government information is to deny public control over the government."²⁶⁷ Limiting the amount of information available through FOIA does limit, in a sense, the amount of power we have over our government. Since government resources are not infinite, however, it is proper, in some cases, to place a price on access to certain types of information. FOIA's current fee provisions appropriately balance the philosophy of open government with fiscal realities, however, and it would be unwise to expand the central purpose doctrine.²⁶⁸

261. See Beall, *supra* note 23, at 1262 (arguing that the use of the central purpose doctrine as a gatekeeper "would work a dramatic *volte face* from the principles of FOIA, improperly shifting the Act from one that favors disclosure to one that favors secrecy").

262. Pub. L. No. 79-404, ch. 324, § 3, 60 Stat. 237, 238 (1946).

263. S. REP. NO. 89-813, at 40 (1965).

264. See H.R. REP. NO. 99-832, at 7 (1986) ("The inclusion of any type of purpose test would have made the FOIA as useless as the disclosure statute it replaced.").

265. See S. REP. NO. 89-813, at 3. This 1965 Senate Report states that the primary purposes of the law were "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld." *Id.*

266. Beall, *supra* note 23, at 1299.

267. *Id.*

268. See discussion *supra* Part I.C (arguing that the 1986 Amendments strike the proper balance between keeping government activities open to the light of public scrutiny and fiscal realities).

B. Fee provisions: Let the Agencies Keep the Money

In passing E-FOIA, Congress recognized that inadequate agency resources are one of the primary causes of delay in FOIA administration.²⁶⁹ This is not a novel insight; previous legislators, as well as scholars and agency heads, have all highlighted the need for more FOIA funding to ensure the effective operation of the statute.²⁷⁰ Congress attempted to recoup some of the costs of FOIA by amending the statute's fee structure in 1986.²⁷¹ In 1992, agencies spent about \$108 million processing FOIA requests, and charged \$8 million in fees.²⁷² Under the current scheme, however, agencies do not keep those fees; the money is deposited in the Treasury.²⁷³ This fee collection structure does nothing to help agencies process FOIA requests more rapidly.

In 1996, Senator Leahy introduced a bill that would have permitted agencies to collect a portion of FOIA fees directly if, looking at all of their requests, they were in "substantial compliance" with FOIA's time limits.²⁷⁴ The purpose of the Senate bill was to give agencies an incentive to comply with the statutory time limits.²⁷⁵

269. See H.R. REP. NO. 104-795, at 13 (1996) ("A principal constraint to the full effectiveness of the FOIA has been the lack of adequate agency resources."), *reprinted in* 1996 U.S.C.C.A.N. 3448, 3456; S. REP. NO. 104-272, at 16 (1996) ("The reasons for [the backlogs] may vary, but principally it appears to be a problem of too few resources in the face of too heavy a workload.").

270. See, e.g., H.R. REP. NO. 99-832, at 11 (1986) (citing inadequate resources as a reason for delay in FOIA processing); Memorandum from Attorney General Janet Reno on FOIA to Heads and Departments of Agencies (Oct. 4, 1993) (noting that the principal reason for backlogs appears to be "too few resources in the face of too heavy a workload"), *reprinted in* FOIA UPDATE (Office of Info. and Privacy, U.S. Dep't of Justice), Summer/Fall 1993, at 5; Sinrod, *supra* note 44, at 334 ("Congress' failure to fund FOIA adequately led to backlogs and delays in many agencies . . .").

271. See discussion *supra* Part I.C (noting that the 1986 Amendments significantly increased agencies' ability to charge requesters for the costs of processing requests).

272. See S. REP. NO. 104-272, at 21.

273. See *id.*

274. S. 1090, 104th Cong. § 6(a) (1996). The bill's language provided:

If at an agency's request, the Comptroller General determines that the agency annually has either provided responsive documents or denied requests in substantial compliance with the [time limit] requirements of [5 U.S.C. § 552(a)] (6)(A), one-half of the fees collected under this section shall be credited to the collecting agency and expended to offset the costs of complying with this section through staff development and acquisition of additional request processing resources. The remaining fees collected under this section shall be remitted to the Treasury as general funds or miscellaneous receipts.

Id.

275. See S. REP. NO. 104-272, at 16.

These fee-sharing provisions, however, failed to make it into the final draft of E-FOIA. While Senator Leahy had good intentions, his bill would not have been the most effective solution. First, it would have helped the agencies that needed the least assistance, while the agencies with the biggest backlogs would not have received the additional money needed to reduce their backlogs.²⁷⁶ Second, an agency can be in "substantial compliance" by either providing responsive documents *or by denying requests*.²⁷⁷ Since the stated purpose of the proposed requirement was to provide agencies with a financial incentive to reduce backlogs, it is possible that agencies would have denied requests in order to attain "substantial compliance." This would have threatened to shift FOIA's delicate balance towards initial non-disclosure, an undesirable result. Finally, the administrative costs to the GAO would have outweighed the benefits of the procedure.²⁷⁸ Under the provision, the GAO might have been required to conduct a substantial number of FOIA audits annually.²⁷⁹ Since the GAO's budget, like that of many agencies, has recently been cut, some critics argued that "meeting demands for FOIA audits would diminish the agency's ability to carry out other functions."²⁸⁰

One positive feature of the Leahy proposal is that it required that agencies use the fees collected to improve their FOIA processing capabilities.²⁸¹ That aspect of the Leahy bill could be integrated into a provision that would allow agencies to keep all the FOIA fees that they collect, irrespective of their level of compliance with the time limits.²⁸² This solution would eliminate the expense of agency performance audits, and, "rather than simply rewarding agencies that already are in compliance with FOIA time limits, funds [would] become available to those agencies that experience backlogs to assist them in overcoming their timing problems."²⁸³

276. *See id.* at 21 (estimating that, in 1992, agencies that would likely be eligible to retain fees accounted for only about 10% of the total fees collected, while the four agencies with the largest backlogs accounted for almost 75% of the total fees collected).

277. *See* S. 1090, § 6(a).

278. *See* Gellman Testimony, *supra* note 158, at 74 (stating that the provision was "guaranteed to lose money for the government").

279. *See id.* at 75.

280. *Id.*

281. *See* S. 1090, § 6(a).

282. *See* Sinrod, *supra* note 44, at 361.

283. *Id.* at 361-63 (footnote omitted).

CONCLUSION

FOIA is not perfect. It is often used by the “wrong” people for the “wrong” reasons.²⁸⁴ But the basic principle underlying FOIA should not be abandoned. In the context of a \$1.63 trillion federal budget,²⁸⁵ the \$100 to \$200 million that FOIA costs each year is minuscule. When one considers that FOIA spending is roughly equivalent to federal spending on military bands,²⁸⁶ FOIA suddenly does not seem so extravagant and wasteful. Spending \$200 million or more on open government is worth the price even after “the era of big government is over.”²⁸⁷ FOIA today is very different than its creators could have imagined; it is indeed “a far cry from John Q. Public finding out how his government works.”²⁸⁸ Still, FOIA serves many valuable purposes,²⁸⁹ and the lofty rhetoric used by early supporters of open government²⁹⁰ continues to have merit. The specter of a se-

284. See Wald, *supra* note 25, at 683 (noting that FOIA “sometimes helps the unworthy”).

285. See 1998 INFORMATION PLEASE ALMANAC 125 (Borgna Brunner ed., 1998).

286. See Harvey L. Pitt & Karen L. Shapiro, *Securities Regulation by Enforcement: A Look Ahead at the Next Decade*, 7 YALE J. ON REG. 149, 283 & n.568 (1990) (“\$167.5 million [was] allocated [in Fiscal Year 1989] to military bands.”); Wald, *supra* note 25, at 665 (arguing that one must put the cost of FOIA in context and noting that in 1984 “we spent nearly \$100 million annually on military bands”).

287. William J. Clinton, Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 79, 79 (Jan. 23, 1996); *cf.* Wald, *supra* note 25, at 650 (“It is seductively easy to let go of legislated freedoms on the ground that they are too costly for a beleaguered Twentieth Century democracy.”) (emphasis omitted).

288. Scalia, *supra* note 1, at 16.

289. As the House Report accompanying the 1986 FOIA amendments stated:

If it were possible to trace all of the disclosures made under the FOIA, the identifiable dollar savings to the taxpayer resulting from those disclosures would almost certainly exceed the cost of the FOIA. In fact, the savings from a single FOIA disclosure can pay the cost of the entire FOIA for an entire year or even longer. When [one considers] the non-monetary benefits that result from FOIA disclosures—such as fairer and more responsive government, better agency policy, health and safety improvements, and a better informed citizenry—the total benefits of the FOIA far exceed the costs.

H.R. REP. NO. 99-832, at 10-11 (1986) (internal citations omitted). This House Report recounts several instances where use of FOIA led to recovery of misspent tax dollars. See *id.* at 9-10. Sometimes the amount recovered is relatively small. For example, the Better Government Association used FOIA “to document that a [government official] illegally used an agency chauffeur for non-official transportation.” *Id.* at 10. The official eventually reimbursed the government \$6,411. See *id.* The savings can be substantial, however, such as when the Better Government Association used FOIA during an investigation of a Navy shipbuilding contractor. See *id.* at 9. The investigation uncovered waste and false billing by the contractor, and “[u]ltimately a settlement was reached with the contractor that resulted in potential savings to the government of \$170 million.” *Id.*

290. See *supra* notes 25-27 and accompanying text.

cretive federal government, especially one as large and impersonal as the current one, is reason enough to continue efforts to perfect the statute. FOIA has many obvious benefits, but there are hidden benefits as well. Simply having a public disclosure statute in the United States Code “serves as an effective deterrent to government waste, abuse, and mismanagement.”²⁹¹ With all of the benefits—tangible and intangible—FOIA is worth the cost. As Judge Patricia Wald observed: “It takes constant vigilance, commitment, and common sense to make any law work. I hope we as citizens have all these qualities—in large measure—to keep the FOIA around for a long time *and to make it work.*”²⁹²

E-FOIA is illustrative of Congress’s adherence to this goal. In passing E-FOIA, Congress demonstrated both a willingness to adapt FOIA to changing times and a desire to continue searching for ways to make FOIA more effective. Internet publication of government information will facilitate broad public access to information without requiring people to bear the added time and expense of making a FOIA request. E-FOIA’s administrative improvements are a small step toward increased efficiency in FOIA processing. Nevertheless, E-FOIA should not be the final effort to perfect FOIA. Future efforts should be directed at funding agency FOIA-processing divisions. Only adequate funding will enable agencies to eliminate backlogs and delay and allow FOIA to reach its full potential.

291. H.R. REP. NO. 99-832, at 9; *accord* H.R. REP. NO. 104-795, at 7 (1996) (noting that FOIA “may have a certain degree of preventive effect, prompting a higher degree of probity and conscientiousness in the performance of government operations”), *reprinted in* 1996 U.S.C.C.A.N. 3448, 3450; William Safire, Essay, *Free Speech v. Scalia*, N.Y. TIMES, Apr. 29, 1985, at A17 (asserting that FOIA “has done more to inhibit the abuse of Government power . . . than any legislation in our lifetime”). This deterrent value exists because “[a]gency managers know that many of their actions are subject to public oversight through documents obtained by the press and by citizens through the FOIA.” H.R. REP. NO. 99-832, at 9.

292. Wald, *supra* note 25, at 683 (emphasis added).