Plesser/Lynch Memo

Ron Plesser of Ralph Nader's group

TAB A

Justification for Administrative Time Limits in Amendments To The Freedom of Information Act

One of the primary concerns of the House and Senate subcommittees in drafting this legislation was the problem of the time it takes for a Freedom of Information request to be processed on the administrative level. The hearing record of both committees indicate that delays of over six months is not unusual for a citizen obtaining information from the government. The House committee in its landmark review of the Freedom of Information Act published in September 1972, stated that the administration of the Act was marked by bureaucratic foot-dragging and delay.

Time delay has rendered the Act almost useless to members of the press. A story may hold a week or even a month during the processing of a Freedom of Information Act request, but it will not hold for six months or more. Carl Stern of NBC News who recently obtained information from the FBI pursuant to the Act had to wait almost a year before he received a final denial and was able to go to court.

Therefore, of primary concern to both the House and the Senate in passing amendments to the Freedom of Information Act was to provide stringent, yet liveable time limits for the administrative process. The House bill simply and clearly states that an agency shall determine initial requests within 10 working days and appeals within 20 working days. If the agency does not meet its deadlines, the requestor will be able to consider the request denied and may immediately file a court case.

The Senate version has the same basic framework as the House version, but as the result of negotiations in Committee, it contains exceptions to the time limits and is generally cumbersome and confusing. As will be detailed below the Senate version allows for a certification in certain circumstances allowing the time on initial requests to be extended to 30 days. The Senate version also allows for a 10 day delay to either the initial request or the appeal where there is an "unusual circumstance" as that term is defined in the proposed amendment. The basic problem with the Senate approach is that it allows for what is seen as unnecessary delays in access and that it creates a very confusing and complex atmosphere.

Under the House version the requestor unfamilar with law and the refinements of the administrative process will know precisely

what the government's obligations are in responding to a request. The government must respond in 10 days to an initial request and 20 days to an appeal. The same is not the case in the Senate version. The government must respond in 10 days except if there is a certification, but if there is not a certification then the government's time may be expanded under anyone of four "unusual circumstances". A requestor not experienced with the Federal agencies will be at their mercy in interpreting this rather complex section and the possibility of delay will be multiplied.

It is very important that the House approach prevail, if these amendments are to reflect the intent of Congress in granting maximum public access to government information. Confusing and complex sections, such as the Senate time section, is not in keeping with that intent and will give agencies reticent to comply with the Freedom of Information Act possible loopholes to avoid swift compliance.

Specifically, the Senate language proposes that a head of an agency be able to certify with the consent of the Attorney General certain categories of documents where initial responses will take 30 days instead of ten days. This certification, while conceptually having some merit, is unacceptable because there are no standards set forth as to when certification may be obtained. The Senate amendment requires the head of an agency to set forth in detail the reasons for such certification, but nowhere are there standards against which those reasons are to be applied. If history is to be a teacher, then it is only reasonable to expect that without appropriate standards, certification will be requested by a head of an agency in almost every situation. An example would be meat inspection reports of the United States Department of Agriculture or similar type information. Therefore, the lack of triggering standards almost automatically allows the initial response period to be 30 working days.

Section (6)(C) of the Senate amendment provides that the government's time to respond to either an initial request or an appeal may be extended for a period of ten working days under "unusual circumstances." In other words, where there is no certification the total time that the agency may respond to a request may be extended from 30 working days to 40 working days. Where certification has occured the total response time will be expanded from 30 working days to 50 working days.

The time extensions in Section (6)(C) can be used by any person in the agency. It does not require high level, non-delegable centralized responsibility. The response period may

be extended simply by written notice to the requestor, setting forth the reasons for such extension and the date on which such determination is expected. If this section is adopted, the decision to extend may be routinely made by almost anyone in the particular agency.

This section defines "unusual circumstance" and presents standards under which it can be applied. The standards for unusual circumstances are as follows:

(a) "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;" this would be applicable mainly to initial requests. It is conceivable that this "unusual circumstance" could exist in every single response to Freedom of Information Act requests if the processing office is designated to be the Public Affairs office or Public Information office, as it is in many agencies. A Public Information office by definition, has no substantive files of its own. It must go to field facilities or other establishments to locate records. This seems to be a built-in exemption for Public Information offices to use in response to initial requests.

(b) "the need to assign professional or managerial personnel with sufficient experience to assist in efforts to locate records that have been requested in categorical terms, or with sufficient competence and discretion to aid in determing by examination of large numbers of records whether they are exempt from compulsory disclosure under this section and if so, whether they should nevertheless be made available as a matter of sound policy with or without appropriate deletions;" This is applicable both on the initial request level and on the appeal level. In all but the simplest cases, it is clear that this can be used as a basis for an extension of time. In appeal, if documents are determined to be unavailable, it is the practice of most agencies to determine whether or not that material, even though exempt, in the discretion of the agency can be made available. This discretionary analysis occurs in most initial denials and should occur in all appeal denials. To say that this process is an unusual circumstance is without basis. It is a standard practice and therefore this unusual circumstance would be always present.

(c) "the need for consultation, which shall be conducted with all practicable speed with another agency having a substantial interest in determination of the request, or among two or more components of the agency having substantial interests therein in order to resolve novel and difficult questions of law and policy "

There may be some legitimate basis for claiming an unusual circumstance, therefore justifying an extension of time, where consultation is needed between two agencies on an initial request. However, there are two points that must be brought out in connection with this section. First, it is Department of Justice policy by regulation that whenever an agency is to finally deny access to documents under the Freedom of Information Act, that agency must consult with the Department of Justice's committee on Freedom of Information. Under this definition of unusual circumstance, it is clearly possible that consultation between the agency and Department of Justice's Freedom of Information committee would be the basis for extension of the appeal time. Since the agencies have to consult with the Department of Justice as to every final denial, the extension of time would be warranted in every instance. The Senate report indicates that consultation with the Justice Department should not serve as the basis for an extension. However, the language of the section clearly allows it and it should be stricken. Second, on initial requests whoever makes the decision to release or not release a document must consult with another component of that agency, i.e., the Public Affairs office and/or the General Counsel's office. In addition, in many agencies all requests for access to information must go to the "component" of the agency known as the Public Affairs or Public Information Office. That office never has any substantive files and must confer with other compenents of the agency to determine whether or not access can be made. It is therefore conceivable that not only on appeals but also as to initial requests this "unusual circumstance" could be used in every instance to cause time delay.

(d) "the death, resignation, illness or unavailability due to circumstances the agency could not reasonably forsee or control of key personnel whose assistance is required in processing the request and who would ordinarily be readily available for such duties." This is indeed the only one of the four proposed definitions for unusual circumstance which would be considered as a valid basis for an extension of time as an unusual circumstance.

The Senate finally in its time limit section suggests that whenever practical, an agency be allowed to establish by regulation a procedure where requests from mainly news media sources could be expedited. This section is not as good as the regulation of the Federal Energy Office recently promulgated, which permits response to all news media requests within 48 hours. This section is merely a grant of discretion to the agency in an area where agencies already have that discretion. There is no purpose seen by this suggestion since it places the matter firmly within the discretion of

the agency and does not provide new mandates.

The House section presents none of these complex and confusing elements. There is a strong interest in having the amendments as simple and as straight forward as possible. The Senate version does not do that and should be rejected.

TAB B

JUSTIFICATION FOR ADMINISTRATIVE SANCTIONS

The Senate version of H.R. 12471 creates an administrative sanction to be applied against federal employees who violate the FOIA.

> (F) Whenever records are ordered by the court to be made available under this section, the court shall on motion by the complainant find whether the withholding of such records was without reasonable basis in law and which federal officer or employee was responsible for the withholding. Before such findings are made, any officers or employees named in the complainant's motion shall be personally served a copy of such motion and shall have 20 days in which to respond thereto, and shall be afforded an opportunity to be heard by the court. If such findings are made, the court shall, upon consideration of the recommendation of the agency, direct that an appropriate official of the agency which employs such responsible officer or employee suspend such officer or employee without pay for a period of not more than 60 days, or take other appropriate disciplinary or corrective action against him.

The Freedom of Information Act has been in existence seven years and one of its great failures has been that it does not hold federal officials accountable for not disclosing information. The only way for the public to enforce the Act has been for individuals to go to court and get an injunction on a case-by-case basis -- a very expensive and not always effective approach. The effect of the sanction would be to encourage administrators responsible for the administration of the FOIA to make sure that their agencies comply with the terms of the Act.

The two major problems in this regard have been the agencies' refusal to follow precedent and to ignore the Act's mandate for disclosure when it suits their purposes. Typical of the refusal to follow precedent is the case of Malvin Schecter, a senior editor of Hospital Practice Magazine. For several years, Mr. Schecter has been attempting to obtain from the Social Security Administration (SSA) access to the Medicare survey reports done on nursing homes and other medical facilities receiving federal payments under Medicare.

He brought an action under the FOIA and Judge Joseph Waddy of the United States District Court for the District of Columbia granted Mr. Schechter access to 15 reports of nursing homes in the Washington metropolitan area. The government did not appeal. Yet in response to Mr. Schechter's next request for similar documents the SSA refused access and stated "we do not acquiesce in the opinion of Judge Waddy." Mr. Schechter had to go to court again.

Peter Schuck, then of the Center for Study of Responsive Law, brought a suit under the FOIA to obtain access to certain meat inspection reports done on meat processing plants by the U.S. Department of Agriculture. His suit was successful and the USDA did not appeal. At the time that the meat inspection reports were made available to Mr. Schuck, the USDA stated that all similar reports would also be made available. About one year later an individual who had taken over some of Mr. Schuck's duties at the Center for Study of Responsive Law requested certain meat inspection reports from the USDA. The information officer replied that those reports were exempt from disclosure under the FOIA. After Mr. Schuck's counsel in the first case spoke to an official at the USDA and pointed out that this withholding was contrary to USDA's prior commitment to make the reports available, the USDA made the reports available. But what would have happened if the second requester did not know or have access to the particular counsel who handled the prior case? It is not at all unreasonable to conclude that the USDA would refuse access to meat inspection reports to all who do not personally know about Mr. Schuck's case.

If the persons responsible for these decisions--which had no reasonable basis in law--knew that their actions could possibly have resulted in the imposition of administrative sanctions, their decisions would have been better conceived and the citizen seeking access would not have to resort time after time to the courts to enforce the law.

The second category of circumstances where administrative sanctions are appropriate is where the agencies refuse access to information merely because they do not want it released and dare the requester to bring them to court which will in all cases result in a lengthy time delay. The best example of this is the recent struggle of Ms. Lois Oakley and Mr. Robert Fellmuth to obtain access to the 1972 annual report of the

Office of Economic Opportunity. Pursuant to statute, 42 U.S.C. 2948, the OEO must prepare an annual report and within 120 days of the end of the fiscal year, submit it to Congress and the President. The OEO prepared such an annual report for fiscal year 1972, which presumably reflected favorably on the agency's activities. However, before the report was released, the administration decided to disassemble OEO and therefore wanted to suppress any document that made it look good. The 1972 Annual Report was not submitted to Congress or released to the public. Ms. Oakley and Mr. Fellmeth requested and were denied access to the Report. They filed suit under the FOIA. In court, the Justice Department told the judge that they would not defend OEO's withholding of the report. Notwithstanding the Justice Department's position, OEO persisted in withholding the report until the judge directed its disclosure.

The Administrators of OEO acted with impunity and disregarded the advice of their own attorneys. The only remedy is for a citizen to go through the long and costly ordeal of a law suit. Although the suit resulted in disclosure of the Annual Report, there is no sanction that could be applied to prevent this same type of thing from happening again and again. If the responsible officials at OEO had known that their actions could result in the imposition of administrative sanctions, perhaps these citizens would not have had to wait so long for a final adjudication of their rights.

The concept of administrative sanctions for the non-performance of a federal employee's duties is not a new one. Under Title 5 of the Code of Federal Regulations, a federal employee can be reprimanded or suspended without the benefit of a hearing. That sanction applies to a wide range of derelictions ranging from insubordination to tardiness to failure to follow work regulations. Under the adverse action procedures of Title 5 of the Code of Federal Regulations, an employee may be suspended for more than 30 days or removed from his job. Although a hearing is required, it is not required until after an employee is removed. An adverse action is used where it is determined that the employee should be disciplined or removed from the efficiency of the service. Under the conflict of interest regulations of 5 CFR 735, an employee who is involved in an activity that may give the appearance of a conflict of interest and that may affect public confidence in the government, may be administratively reassigned or given different duties than he presently holds without a hearing or a right of review.

All that the administrative sanctions section of S.2543 provides is that if a Court has found that the withholding of access to a particular document was without reasonable basis in law, the employee, after being given notice and an opportunity to present his own defense, may be subject to suspension without pay in the discretion of a United States District Court Judge. This is far more protective of an employee's rights than those presently in Title 5 of the Code of Federal Regulations.

Moreover, sanctions for non-compliance with disclosure laws have ample precedent in state codes. Fifteen states have penalties for the violation of their particular freedom of information or public records statutes. Indeed, most of these penalties are criminal in nature and charge the violating individual with a misdemeanor.

The only way that the intent and purposes of Congress in passing the Freedom of Information Act will be fulfilled is to provide a workable mechanism for enforcement. The administrative sanctions contained in the proposed amendments will create an incentive to government administrators to withhold access to information only when the Act specifically exempts disclosure. Without such a sanction the Freedom of Information Act will remain a right without an effective remedy.

TAB C

Explanation of the Senate Amendment to the Seventh Exemption of the Freedom of Information Act in H.R. 12471

The following amendment as proposed by Senator Hart on the floor of the Senate was agreed to by a vote of 51-33 and is a part of H.R. 12471 as passed by the Senate:

> (3) Sections 552(b)(7) is amended to read as follows: "Investigating records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication or constitute a clearly unwarranted invasion of personal privacy, (C) disclose the identity of an informer or (D) disclose investigative techniques and procedures."

The present form of the seventh exemption states that the Freedom of Information Act does not apply to "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 5USC §552(b)(7)

When the present amendments to the F.O.I.A. were being considered in the House and the Senate, the relevant subcommittees had before them legislation that would have amended in various ways a number of exemptions of the F.O.I.A. These proposals, including changes to the seventh exemption, were fully discussed and debated. Nonetheless, when the final versions of the House and Senate bills were introduced the sponsors correctly determined that the public was secure in its right to obtain information and that the current interpretation of the seventh exemption was in keeping with the intent of Congress in mandating "maximum disclosure" when it enacted the F.O.I.A. in 1966. As Attorney General, Elliot Richardson told the Senate subcommittee considering the amendments: "The Courts have resolved almost all legal doubts in favor of disclosure."

However, beginning in October 1973 a series of decisions from the District of Columbia Circuit has applied the seventh exemption of the act woodenly and mechanically in contravention of congressional intent. One Court several years ago correctly stated the intent of Congress when it said:

> "The touchstone of any proceeding under the act must be the clear legislative intent to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests."

Yet in the most recent decisions interpreting the seventh exemption of the F.O.I.A., the court has stated:

> "The sole question before us is whether the materials in question are 'investigatory files compiled for law enforcement purposes.' Should we answer that question in the affirmative, our role is at an end."

What the Courts have done is to expand the exemption to encompass any information which "could conceivably lead to an enforcement proceeding." The seventh exemption as now interpreted by the D.C. Court of Appeals would have the exemption applied without the need of the witholding agency showing why the disclosure of the particular document should not be made. The exemption could and will be applied by all regulatory and enforcement agencies. The Department of Agriculture, the Food and Drug Administration, Federal Trade Commission, the Social Security Administration, as well as the FBI will be able to claim the seventh exemption. Law enforcement purposes have been expanded to cover situations where H.E.W. determines whether school districts receiving Federal aid are in compliance with the civil rights law, the ultimate outcome being loss of Federal funding, not jail or other penalty.

The Senate amendment was proposed by the Administrative Law Section of the American Bar Association and endorsed by the Committee on Federal Legislation of the Bar of the City of New York. It explicitly places the burden of justifying nondisclosure on the Government, which would have to show that disclosure would interfere with enforcement proceedings, deprive a person of a right to a fair trial, constitute an unwarranted invasion of personal privacy, reveal the identity of informants, or disclose investigative techniques or procedures.

Under the interpretation by the courts in recent cases, the seventh exemption may deny public access to information even previously available. For example, such information as meat inspection reports, civil rights compliance information, and medicare nursing home reports may be considered exempt under the seventh exemption.

The amendment is broadly written, and when any one of the reasons for nondisclosure is met, the material will be unavailable. But the material cannot be and ought not be exempt merely because it can be categorized as an investigatory file compiled for law enforcement purposes.

The instances in which nondisclosure would obtain is as follows:

First, where the production of a record would interfere with enforcement procedures. This would apply whenever the Government's case in court - a concrete prospective law enforcement proceeding - would be harmed by the premature release of evidence or information not in the possession of known or potential defendants. This would apply also where the agency could show that the disclosure of the information would substantially harm such proceedings by impeding any necessary investigation before the proceeding. In determining whether or not the information to be released will interfere with a law enforcement proceeding it is only relevant to make such determination in the context of the particular enforcement proceeding.

Second, the protection for personal privacy included in clause (B) of the amendment was not explicitly included in the ABA Administrative Law Section's amendment but is a part of the sixth exemption in the present law. By adding the protective language here, it is clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh exemption. In any case, there is no doubt that this clause is intended to protect the privacy of any person mentioned in the requested files, and not only the person who is the object of investigation.

Third, investigatory files compiled for law enforcement purposes would not be made available where production would deprive a person of a right to a fair trial or an impartial adjudication.

Fourth, the amendment protects without exception and without limitation the identity of informers. It protects both the identity of informers and information which might reasonably be found to lead to such disclosure. These may be paid informers or simply concerned citizens who give information to enforcement agencies and desire their identity to be kept confidential.

Finally, the amendment would protect against the release of investigative techniques and procedures where such techniques and procedures are not generally known outside the Government. It would not generally apply to techniques of questioning witnesses.

The purpose of the Freedom of Information Act is to provide maximum public access while at the same time recognizing valid governmental and individual interests in confidentiality. This amendment balances those two interests and is critical to a free and open society. This amendment is by no means a radical departure from existing case law under the Freedom of Information Act. Until a year ago the courts looked to the reasons for the seventh exemption before allowing the withholding of documents. That approach is in keeping with the intent of Congress and this amendment reinstalls it as the basis for access to information.

Objections
@Burden