

It was a memo outlining the arrangement that until then had been cooperative. All that had been required of his office was to provide records to me. Contract specialists were not required to pore over those records to identify exempt information. That was my responsibility. Nonetheless, the increasing volume of FOIA requests was seriously interfering with the work of the contracts office because of the requirement that the responsible contract specialist locate and copy the records for me.

For this reason the Division of Contract Operations found it necessary to drop out of the FOIA program.

Oh, we patched it up of course. But somehow things were never the same as before that "Dear John" letter.

Russ Roberts was FOIA/PA Officer for the Department of Health and Human Services. Now retired, he continues to work as a consultant on information issues.

Tom Susman

Hooked on Freedom of Information: A Personal Confession

My name is Tom Susman. I am in private law practice in Washington, D.C. I stand before you today to confess: I am a Freedom of Information Act junkie.

I have been hooked on FOIA for almost half my life. It began in 1968, when, as a special assistant in the Justice Department's Office of Legal Counsel, I participated in advising the Veterans Administration that they should not resist Consumers Union's request to disclose hearing aid test records. (The VA did not follow our advice and was sued; it lost the case.)

In the early '70s I was counsel to the Senate Subcommittee on Administrative Practice and Procedure. My FOIA habit grew. I fed it by compiling an FOIA Sourcebook, by working on oversight hearings on the FOIA, Executive privilege, and classification, and, most rewarding of all, by contributing to enactment of the 1974 FOIA Amendments.

The 1974 Amendments would have been weaker -- and would absolutely have avoided amending the First and Seventh Exemptions -- had the administration (including the Justice Department and the FBI) negotiated rather than stonewalled. The House bill proposed no amendments to the exemptions, and the bill that emerged from the Senate Subcommittee only proposed that the word "files" be changed to "records" in the law enforcement exemption. (The original exemption applied to "files compiled for law enforcement purposes," leaving agencies free to commingle exempt and nonexempt records within a file and withhold it all.) But Justice would not agree to support the bill, and the

FBI covertly attempted to get Senator McClellan to change the word "records" back to "files" during a closed committee mark-up! They failed, but they also alienated the bill's supporters.

When the legislation got to the floor, no agreements were in place. Thus the door was open to amendments -- from Senators Muskie and Hart -- that changed the face of the national security and law enforcement exemptions. Changed them a lot, too. Things would never be the same for the Bureau or intelligence and defense agencies. That adrenalin rush from the one-vote Senate margin to override President Ford's veto kept me wallowing in FOIA long after the end of the Watergate era. (The record vote on the override was slightly wider; Senator Hugh Scott had told the administration he would support the veto if his vote would make the difference, but it didn't.)

In the '80s, I sustained my FOIA habit from many sources. I represented clients in litigation. (One client, Steve Schlesinger never saw a single page of the 120,000 classified CIA documents on the 1954 Guatemala coup. This underlined once again how strong was the judicial deference to agency determinations regarding classification. I occasionally rue my involvement in putting into the 1974 Conference Report the managers' statement supporting that much deference!)

I chaired the American Bar Association committee on Access to Government Information and vividly remember Professor (now Mr. Justice) Scalia's victory in overturning my proposal to reaffirm *de novo* review of classification decisions. (The ABA supported deference to an agency determination if the agency head certified the validity of the classification decision.)

In the '80s I lectured often and wrote diverse articles on the FOIA, focusing on government contracting and protection of business information. I even lobbied for a business coalition in support of predisclosure notification. (We lost the battle: when Congress amended the Act in 1986 to change the law enforcement exemption and the fee provisions, it did nothing for business submitters. But we won the war: the following year, President Reagan signed an Executive order requiring agencies to give notice before disclosing confidential commercial information.)

I also FOIAed my father's files from Justice and the FBI; he used to work for the Department. (Since he died when I was six, I never heard anything about those years.) For the first time I learned why my Dad was sent to Texas, where he settled: to prosecute a federal fraud case. I learned why he left Justice: to save the government \$5 a day living expenses after a mistrial occurred in his case and a second trial was ordered. (He tried the case the second time as a special appointee.) And I discovered, though the sentence in the FBI record was initially redacted, that Dad had been a confidential source for the FBI in the '40s; my appeal led to the revelation of that sensitive fact.

Now the FOIA is nearing its 25th anniversary, and my habit hasn't diminished. I still need a FOIA fix from time to time. A conference on electronic data: I'll be there. An ASAP project: I never can say no. A new ABA proposal on data dissemination: can't keep me away. Senator Leahy's latest FOIA reform bill: my comments are in the mail. A FOIA for South Africa: count on me to participate. A series of personal reminiscences on the FOIA in *Access Reports*: I wouldn't miss out for anything.

After all, I'm still hooked on the Freedom of Information Act. If I live that long, I hope to contribute to the FOIA's 50th anniversary celebration as well.

Tom Susman served as chief counsel to the Senate Subcommittee on Administrative Practice and Procedure and was instrumental in writing and securing passage of the 1974 Amendments. He is now a partner in the Washington office of Ropes & Gray, where he continues to be active in FOIA issues, most recently as the chairman-elect of the ABA's Administrative Law Section.

Charlie Hinkle

A few years ago, I offered my perception of the significance of the Freedom of Information Act (FOIA) in an article reviewing the five-year record of the Defense Freedom of Information Program, saying:

"We share the view that the Freedom of Information Act is one of the most significant developments in the recent history of democratic government. Within the Office of the Assistant Secretary of Defense (Public Affairs), the FOIA Program is thought of as an extension of the public affairs program, since it provides the public an additional channel to request and receive information in a timely way. The Act has done so much to reverse the public's cynical distrust of government institutions and public officials. Openness in government has become a reality -- not something that is just talked about."

That remains my view today. At the time that I made the above statement, an Assistant Secretary of Defense for Public Affairs admonished public affairs officers that anytime a newsperson is forced to resort to the Freedom of Information Act, such action constituted a public affairs failure.

We included in the DoD Directive governing the FOIA Program a policy statement that requested records qualifying for exemption under the provisions of the FOIA would *not* be withheld unless a significant government purpose was served by withholding.

This language was deleted subsequently by the general counsel for the Office of the Secretary of Defense. The negative impact upon our FOIA Program was disheartening. Moreover, the counter-intelligence community continued to characterize the FOIA as the worst law ever enacted. The wide resistance throughout the Department did not appear so intolerable, however, after August 1980 when the Chairman of the House Government