Freedom of Information: Officials Thwart Public Right to Know

"The public's need for information is especially great in the field of science and technology, for the growth of specialized scientific knowledge threatens to outstrip our collective ability to control its effects on our lives. . . . It would defeat . . . the purposes of the Act to withhold from the public factual information on a federal scientific program whose future is at the center of public debate."

So ruled David L. Bazelon, chief judge of the U.S. Court of Appeals in the District of Columbia, in a decision that ultimately flushed out a confidential scientific study of the supersonic transport compiled for the President's science adviser. The act that Bazelon interpreted is the Freedom of Information Act, an important but underexposed statute which formally enshrines the public's right to know what its government does. The act stipulates that every government agency shall, with certain specified exceptions, make its records promptly available to any person on request.

The willingness with which government officials would reveal the private records of their activities to anyone who asked, and promptly at that, is not difficult to imagine. The act did not have an easy birth—Congress gestated it for 11 years—and the Department of Justice has made determined attempts first to throttle the infant law, and more recently to emasculate it when it began to show signs of potency.

How well is the Freedom of Information Act working? "If an applicant appeals to the director of an agency and shows willingness to go to court, he will generally get his information," says an aide to Representative William S. Moorhead (D–Pa.), chairman of the House committee that oversees the act. Probably the vast bulk of requests for information addressed to the federal government by press and public are satisfied without recourse to the Freedom of Information Act and, judged by standards elsewhere, the U.S. government is a paragon of open-handedness. Nonetheless, Congress found it necessary to pass the act, and there exists an important category of information supposedly within purview of the act that is not easily come by. Behavior under the act varies widely from agency to agency—two of the most recalcitrant, in the opinion of public interest groups, are the Food and Drug Administration (FDA) and the Department of Agriculture. The Environmental Protection Agency (EPA), on the other hand, seems to be adopting a more liberal interpretation. The sticking point at which many bureaucrats start to deny requests under the act is with information that reflects in any way on the internal workings and performance of the agency.

Delays and Evasions

The Freedom of Information Act has received rather little judicial attention since it came into force on 4 July 1967 and its eventual impact is hard to assess until further precedents are established. But several weaknesses are already apparent. By and large, government officials are able, when they wish, to thwart the intent of the law simply by delay. A requester of information can wait up to 2 years or more before all the administrative remedies have been exhausted and a case has come to court. Few newsmen have that kind of time to spare. For this, among other reasons, of more than 200 cases brought under the act, fewer than 10 have been filed by newspapers, which were envisaged as the chief beneficiaries of the act.

The principal users of the law are corporations, which have the time and money to make it work for them, and public interest groups representing the consumer and environmentalist movements. The latter have won some famous victories, such as the release of a confidential report on the supersonic transport and, more recently, the publication of environmental impact statements on the Cannikin underground bomb test at Amchitka. Equally important were two cases concerning meat inspection records and pesticide registration, which were won by Harrison Welford, a consultant to Ralph Nader's Center for the Study of Responsive Law, against the Department of Agriculture. But the impact of these and other precedents has fallen far short of shaping the act into an effective instrument of public information.

The most vocal critics of the act are the public interest groups, which have found their requests for seemingly innocuous information, such as scientific data, repeatedly rebuffed by the government. "It's a very sketchy law which was badly drafted to begin with, and it's not terribly useful," says an attorney with the Environmental Defense Fund. According to Harrison Welford of the Nader center, the act has not lived up to its initial promise because of the evasion techniques developed by government officials. In *Sowing the Wind*, a study of Department of Agriculture policies on meat and pesticide regulation, Welford lists some of the common tactics used by agency officials for thwarting the act.

► *Contamination tactic*: Unclassified material that may prove embarrassing is mixed with a few items of information that can be withheld under the act, such as trade secrets, and the whole file is labeled as classified.

► *Specificity tactic*: The agency delays replying to a request for several weeks and then states that the request is not specific enough.

► *Search fee tactic*: Even if the agency concedes that the information should be made public, it may impose an arbitrarily high fee for collecting it.

► *Trade secrets tactic*: The formula of a pesticide or other chemical is a trade secret that is properly exempt under the act, but the agency applies the exemption to all of the other information provided by the manufacturer.

Representative John E. Moss (D–Calif.), the author of the act, intended it to represent "an in-between solution which will guarantee the right of every citizen to know the facts of his government while protecting that information which is necessary to the functioning of government." Nine categories of information are protected by the act, including matters of national security, trade secrets, inter- and intra-agency memoranda, files compiled for law enforcement purposes, and matters specifically exempted from disclosure by other statutes. The legislative intent of the act was to make disclosure of information the general rule, not the exception, and to place on the government the burden of justifying the withholding of a document.

The bill passed the House to the

sound of a 307 to 0 vote and many elevated observations on the people's right to know. Representative Donald Rumsfeld (R–Ill.), for example, now a counselor to the President, described the act as one of the most important measures to be considered in Congress in 20 years. The bill, he said during the House debate on 20 June 1966, "Will make it considerably more difficult for secrecy-minded bureaucrats to decide arbitrarily that the people should be denied access to information on the conduct of government or on how an individual government official is in handling his job."

The bureaucrats have not suddenly changed their mental habits in the Administration of which Rumsfeld is an eminent member. Here is a not untypical example of how an unwelcome request for information may be handled. On 7 July 1970, Dale Hattis, a researcher at the Stanford University School of Medicine, asked the FDA for the data on which its officials assessed the safety of various food additives and pesticide residues. It took the FDA 11 months and 28 days to compose a reply, in which Hattis was told that he should be more specific. (This is an identical version of the specificity tactic used in the Department of Agriculture.)

Hattis then narrowed his request down to data on a single food additive, sodium nitrite. Sam D. Fine, FDA associate commissioner for compliance, replied that "toxicological and other technical information is valuable commercial property that is regarded as confidential information." Hence the data on sodium nitrite safety supplied by the manufacturers counts as a trade secret and is exempt from disclosure under the act, Fine told Hattis (the trade secrets tactic). The FDA possesses some toxicological data on sodium nitrite not supplied by manufacturers; Fine offers this data for a compilation and copying fee of $99.50 (the search fee tactic). Hattis has enlisted the advice of an attorney at the Environmental Defense Fund, which is now contemplating bringing suit against the FDA under the act.

"I have always believed that freedom of information is so vital that only the national security, not the desire of public officials or private citizens, should determine when it must be restricted," President Johnson proclaimed on signing the act into law. Another example of the government's interpretation of the act is the response to a request by Carolyn Morgan, a Washington, D.C., housewife, for the toxicological data relating to birth control pills. Replying on behalf of the FDA, Roger O. Egeberg, then assistant secretary of Health, Education, and Welfare, told Morgan that some of the information she requested was protected under the act by exemption number 3 (matter exempted by other statutes), number 4 (trade secrets and confidential), number 5 (intra-agency memoranda), and number 6 (personnel and medical files). (It is a standard stratagem to claim as many exemptions as possible—in a court case there's more chance that one may stick.)

Egeberg proceeded to point out that the exempt and nonexempt information in the material Morgan had requested were mixed together in 1929 files, and that to separate the two categories would cost $12,600 in labor (a combination of the contamination and search fee tactics). There would also be a copying charge of 25¢ per page, and an advance fee of $5000 would be required. "We think that such a search would be wasteful for both parties," Egeberg opined to Morgan. Morgan has since brought a suit against the FDA which is now in the appeal stage.

One reason why agencies have been able to run circles around the law is that the government's campaign against the threat to bureaucratic secrecy is skillfully generaled by the Justice Department. When the act first came into force, a memorandum was issued by the attorney general (then Ramsey Clark) which in effect instructed the agencies how to make the broadest interpretations of the nine exceptions. The memo was also not above putting the agencies up to such tricks as charging fees, covering indirect costs as well as copying, in order to "discourage frivolous requests."

The effect of these instructions as they percolated down through government has been noted by Wayne Winters, editor of the weekly *Epitaph*, published at Tombstone, Arizona. When the act was first passed, Winters successfully obtained internal documents from the local offices of the Forest Service at Tucson and Albuquerque. (The documents concerned the Forest Service's methods of evicting gold miners from forest lands. They form the basis for an article by Winters in the 27 March 1969 issue of the *Tombstone Epitaph* entitled "A Harassed Miner is Blown to Kingdom Come—Red Run Their Hands—Bureaucrats Drove Miner to Death Via Continued Harassment".) Later the local Forest Service offices took a more restrictive view of the Freedom of Information Act. Winters told *Science*: "They became evasive because information came out of Washington telling them how to get around the law. We have a law we didn't have before—I don't think any of us uses it as much as we ought to."

Justice Department Defense

Under Justice Department tutelage, the agencies interpreted the act's exemptions as broadly as possible in order to discourage intruders. But the courts often construed the exemption more narrowly and the government started to lose a few cases, including one in which the Consumers Union sued the Veterans Administration for the results of tests conducted on various brands of hearing aids. More seriously, the summer of 1969 was the first time that students working for the Nader Center—Nader's raiders—descended on the agencies in massive force. A second memo was dispatched from the Justice Department to the general counsels of all federal agencies, calling for a change in government tactics. The memo, dated 8 December 1969, was drawn up by two assistant attorneys general, William H. Rehnquist, now a justice of the Supreme Court, and William D. Ruckelshaus, now the administrator of the EPA. "Although the legal basis for denying a particular request under the Act may seem quite strong to an agency at the time it elects finally to refuse access to the requested records," warned the memo, "the justification may appear considerably less strong when later viewed, in the context of adversary litigation, from the detached perspective of a court and from the standpoint of the broad public policy of the Act." The memo, in so many words, warned that agencies should consult with the Justice Department before letting anyone drag them to court, lest a body of precedents be built up in favor of the public and against the government. The memo concluded with an oblique reference to the consumer movement's growing curiosity about agency methods of regulation and an invitation for agencies to collaborate on methods of meeting the threat ("If the activities of your agency involve testing or information pertaining thereto, we would welcome any statements of experience, policies or views which you may care to provide").

Rather few cases have come to court under the act—about 200 since 1967—presumably because, in accordance with Justice Department strategy, agencies are often advised to yield up their secrets to a persistent requester rather than risk a court case. A questionnaire sent out to all agencies by Representative Moorhead reveals that the Department of Health, Education, and Welfare (HEW) has received 368 formal requests under the act in the 4 years of its existence. Of these, 258 were granted, 77 were denied entirely, 16 were denied in part, and a further 17 cases are pending. Examples of information denied by HEW are a request from the Homestake Mining Co., San Francisco, for data about mine workers who have contracted lung cancer; a request by the Washington, D.C., public relations firm Hill and Knowlton for correspondence between Ralph Nader and the FDA; an application from the pharmaceutical company Upjohn to view HEW's 5-year budget projections; a request by CBS/KNX of Los Angeles for access to the FDA's files on stannous chloride.

HEW does not seem to have been involved in any landmark cases, unlike the Department of Agriculture, which has managed to fight and lose three cases, two to Welford of the Nader Center and one to Aviation Specialties, a company that sued to see the records of a contract it had bid for unsuccessfully. Probably the case that has hurt the government most as far as setting precedents is concerned was the skirmish over the report on the supersonic transport prepared for the Office of Science and Technology (OST).

The report, an adverse critique of the SST, was written by a committee under IBM physicist Richard L. Garwin in 1969. The OST was sued by a number of environmental groups for refusing to make the Garwin report public. A lower court ruled that the OST was part of the President's personal staff, not an agency, and that its records were therefore protected by the mysterious but unchallenged doctrine of executive privilege. On appeal, Judge Bazelon ruled that the Garwin report was not covered by executive privilege unless the President expressly invoked the doctrine, which he had not done in the Garwin report case. (This state of affairs owes much to Representative Moss, the progenitor of the act, who helped persuade President Nixon and his two predecessors to say that they would claim executive privilege only personally and *in extremis*. Formerly, the agencies had made free with the privilege in the President's name.)

Bazelon directed the lower court to consider whether any of the nine exemptions of the Freedom of Information Act was applicable to the Garwin report. But the exemptions were to be interpreted narrowly, Bazelon declared in his 23-page opinion: "The touchstone of any proceedings under the Act must be the clear legislative intent to assure public access to all government records whose disclosure would not significantly harm specific governmental interests. The policy of the Act requires that the disclosure requirement be construed broadly, the exemptions narrowly."

Bazelon's opinion represented just the kind of interpretation the Justice Department had been striving to avoid. A week before the lower court was due to reconsider the case, the Administration eschewed the risk of a further unfavorable precedent by releasing the Garwin report, declaring that it did so to "dispel any further misconception . . . that the government may be concealing factual data on the SST program."

Two other recent events that have served to narrow the scope of the exemptions are the Cannikin case, which unfolded in August and October last year, and a ruling by the EPA on the toxicological data relating to pesticides. Ironically, both of these rulings were effected by men who, while in the Justice Department, had directed government strategy for broadening the act's exemptions. Ramsey Clark, who was responsible for the 1967 memorandum on the act, acted as attorney for 33 members of Congress who last year sued to see a report on the underground nuclear bomb test at Amchitka, codenamed Cannikin. The report, classified as secret, included the assessments of the weapon's likely impact on the environment prepared by the EPA and the Council on Environmental Quality.

Cannikin Hazards Revealed

A lower court held that the report was covered by the act's exemption for national security matters, but the government's position was not assisted by the public comment of EPA administrator Ruckelshaus that he saw no reason to classify the EPA contribution to the report as top secret. An appeals court reversed the lower court's ruling, saying that there was no basis for "withholding on security grounds a document that, although separately unclassified, is regarded as secret merely because it has been incorporated into a secret file." The ruling led to a requirement that the Administration release those parts of the Cannikin report dealing with the environmental impact of the explosion. The public learned that the chairman of the Council on Environmental Quality had advised the President that the test might trigger a tsunami, a danger that "it is not possible at this time to assess quantitatively."

Another important interpretation of the act is a ruling made last month by Ruckelshaus, who had been coauthor of the Justice Department's December 1969 memorandum on the Freedom of Information Act. In a notice published in the *Federal Register* of 18 December, Ruckelshaus states that data on the toxicity and efficacy of registered pesticides, as supplied by their manufacturers, should be made available to the public under the act. These data, Ruckelshaus rules, do not fall into the category of trade secrets or confidential information.

The EPA's new policy on manufacturer's toxicity data is diametrically opposed to that of the FDA and of the Department of Agriculture, before the latter's administration of pesticide regulation was transferred to the EPA. According to Welford, who sued the Department of Agriculture for this among other data, "Ruckelshaus was surprised at the degree to which USDA had withheld information when it was in control of pesticide regulation."

Apart from corporations, it is public interest groups such as the Nader center that have made most use of the Freedom of Information Act. But even they are skeptical about its effectiveness. Says Welford: "The legal process is too ponderous to handle something as perishable as information. Because of the delays involved, I doubt if many public interest groups will use the act." In Welford's meat case against the Department of Agriculture (he was suing for access to the letters of warning sent out to processors found violating the wholesome meat regulations), some 2½ years elapsed between the filing of the suit and the final court verdict in Welford's favor. (A Nader's raider sent to inspect the long-sought files has found that 99 percent of all alleged violations of meat regulations are treated only by letters of warning.) But even this victory has been blunted because, in what the Nader lawyers consider a clear contravention of the

court ruling, the Department of Agriculture refuses to grant access to the back-up files on which each letter of warning is based.

Another consultant to the Nader center, Peter H. Schuck, considers the Freedom of Information Act to be almost impossible to enforce because it creates no incentives for officials to comply promptly with a request for information. "The pervasive attitude in government is 'If you don't like it, sue us,'" Schuck says. He and Welford believe that the law should provide penalties for officials who are found to have withheld information unjustifiably.

Despite the act's many deficiencies in practice, there seems to be agreement that it is worth having. The Nader center, for example, is consider-

Public-Interest Advocates Examine Role of Scientists

More than half a dozen organizations representing various flowerings of the non-Establishment science movement took part in a conference last week on "science in the public interest," arranged by the Center for Science in the Public Interest (CSPI), a small, nonprofit Washington research group (*Science*, 9 July 1971).

The conference was open to anyone who cared to attend. Present were 100 or so scientists, students, bureaucrats, consumer advocate types, and at least one curious businessman.

Discussions encompassed two complementary themes: the need for the public to stand up and demand that science and technology respond to social needs, and the need for scientists to broaden their concepts of their roles and public responsibilities. In fact, one thing that emerged from the talk was that scientists may be ripe for their own "lib" movement. Scientists, like women (a comparison that was not made explicit, but that seemed apt to some viewers), have long been passive when it comes to asserting themselves outside their assigned roles, and have been to some extent oblivious of their real power. They have also confused allegiance to their employers with allegiance to their professions, thereby losing sight of the fact that the welfare of science and society go hand in hand.

James Turner, a former Ralph Nader lawyer who now works with Consumer Action for Improved Foods and Drugs, said that "the vindictiveness of the scientific establishment" forces scientists to be over-cautious in order to retain their jobs. He cited several instances, both in government and in industry, where scientists have been demoted, harrassed, or deprived of necessary resources when they took controversial positions or openly questioned employer policies and practices. Scientists need to know when and how to take legal action and how to negotiate with their employers for their rights, said Turner. He suggested an appropriate starting point might be the creation of an "ACLU [American Civil Liberties Union] for science."

Alan Nixon, president-elect of the American Chemical Society, had similar opinions. The first loyalty of chemists—70 percent of whom work for industry—he said, has always been to their employers. But for a chemist to properly discharge his responsibility to society, he must have a "professional atmosphere where [he] will identify with his profession rather than his employer." He indicated that professional societies could contribute to this atmosphere by forcefully backing up members who got into disputes with their employers.

Jeremy Stone of the Federation of American Scientists (FAS) proposed another way in which large professional organizations could bolster the public-interest cause. Through a "passback" system of dues, a member, if he chose, could add a couple of dollars to his annual dues and designate the public-interest group he wanted the sum sent to. The society would forward the money, and the group would reimburse it for administrative costs, thus saving the expense of a direct-mail campaign.

The conference also dwelt on the difficulty citizens' groups have in gaining access to the scientific information required for carrying on battles against highways and environmental poisons. Former New York Representative Richard Ottinger said the group he heads, "Grassroots," spent a fruitless 2 years trying to locate a scientist who would testify that the proposed Storm King power plant on the Hudson River would (as research had indicated) endanger a bass spawning ground.

Said Michael Jacobson, a scientist and CSPI member, "it's as difficult as pulling a tiger's tooth to get a technical expert to speak out on a public matter."*

David Baltimore, a molecular biologist from the Massachusetts Institute of Technology, warned that, if scientists continue to eschew taking independent and aggressive stands on social matters, the whole profession will suffer. "American science," starting with the moonshot program, he said, "is rapidly becoming a State Science." The result is that politicians are increasingly making the decisions on what fields are ripe for investigation and who should get the money. "Unless the scientific community reacts soon, it will be too late to salvage the freedom which has allowed scientists to make significant contributions to society."

Such a reaction may be difficult to mobilize. There were no yelps of denial from listeners when management consultant Carl Pacifico, the panel's token industrialist, proclaimed: "Most scientists choose their profession because they don't want to get involved in the real world. . . . Most of them are as unaware of what's going on as they ever were."

The conference ended with a passionate warning from Albert Fritsch, the scientist-priest in CSPI's quadrumvirate. Industry opposition to science in the public interest, he says, has gone through three stages—from indifference, to soothing advertising campaigns, to subtle hostility. Next, fears Fritsch, there will be "open opposition to public interest as a threat to the system."

—CONSTANCE HOLDEN

* To ameliorate this problem, CSPI is developing a computer service to match consumer groups seeking information with scientists possessing relevant expertise.

ing hiring an attorney to work full time on freedom of information suits. And the threat of being taken to court has some moderating influence on the natural secrecy of bureaucrats. The meat inspection case, Welford says, "really scared the hell out of the USDA when they lost, and has clearly made a difference to our relationships over there."

Public interest groups and others might have less reason to be disappointed with the way the act is working if Congress had taken a closer interest in it. "They should be very interested in the act," says Schuck. "After all, a lot of groups like us are doing the jobs that Congress should be doing, and we are after the same kind of information that Congress needs to perform its oversight function." Representative Moorhead's subcommittee is now preparing to hold hearings on the act, the first since it was passed. But unless Congress decides to give it some teeth, the Freedom of Information Act will continue to guarantee the public's right to know only what government officials don't mind revealing.

—NICHOLAS WADE

National Science Foundation: The House That McElroy Built

When William D. McElroy took over as director of the National Science Foundation, he said he hoped NSF's annual budget would rise to $1 billion in 3 years. McElroy has departed before the 3 years were out, and the budget still falls far shy of the billion-dollar mark. But McElroy, now chancellor of the University of California, San Diego, left NSF with a materially increased budget,* a revamped management structure, and flourishing relations with Congress.

The consensus seems to be that McElroy is one of those more fortunate public servants who quit while he was ahead, but that he also left his successor, H. Guyford Stever, former president of Carnegie-Mellon University, in charge of an agency that faces substantially increased risks.

The new risks as well as new opportunities are centered in NSF efforts to mount a campaign of research on the nation's social and economic problems. These efforts are concentrated in the RANN (Research Applied to National Needs) program and an Experimental R & D Incentives Program proposed in the President's new budget (*Science*, 28 January).

To award sole credit or blame to McElroy for NSF's new departures would be to take a one-dimensional view. When McElroy took office in the summer of 1969, an NSF reorganization measure sponsored by former Representative Emilio Q. Daddario had been enacted but not really implemented. The reorganization bill, among other things, gave NSF the option of supporting applied research. Previously, in principle and practice, NSF confined itself to supporting basic research. And that, in fact, was the way the scientific community preferred it. Congress, however, was sending strong signals that it wished NSF to exercise the option given it in the reorganization bill and to begin to move ahead on "relevant" research. In addition, the Nixon Administration had come into office declaring its interest in increasing practical payoffs from domestic R & D.

Coincidentally, NSF became the chief legatee of the Mansfield amendment to a defense procurement bill that restricted mission-oriented federal agencies to supporting only that basic research which could be shown to contribute directly to the agency's mission. The Mansfield amendment had a rather short, turbulent, legislative history, but the chief practical effect for NSF was that some fairly large research programs were shifted from the Department of Defense to NSF, with all the financial and management consequences that entailed.

All this was happening at a time when public concern over the environment was becoming acute, and it was natural to ask what NSF could do about such things as pollution, population pressure, and poverty. Collaterally, it was a period of disillusionment with science, when to many people the scientist had assumed the image of a wayward sorcerer's apprentice.

Most important, McElroy arrived at NSF when the federal science budget was being subjected to the most severe squeeze since NSF had been established after World War II. The costs of the Vietnam war and the accompanying inflation had begun the recession in science during the Johnson Administration, and there was widespread apprehension in the scientific community that the Nixon Administration might lean particularly hard on NSF and its basic research programs. As it turned out, the worst fears were not realized, but it became increasingly clear that the Foundation was in for some changes that would be far more than cosmetic.

During the 1950's NSF had assumed the form its influential godfathers had contemplated—an agency that received research proposals from university scientists, judged them on merit with the help of university scientists, and awarded research grants accordingly. Especially after Sputnik, NSF broadened its activities in science education and in creating new "centers of excellence" in universities, but it continued to act essentially on the assumption that the curiosity of the individual scientist was the best guide to science policy. It should be noted that while, nominally, NSF was the premier federal agency for support of fundamental research, for two decades NSF lagged behind the Defense Department, National Institutes of Health, and even NASA and the Atomic Energy Commission as a patron of basic research. Nevertheless, NSF managed its basic research program with a skill and fairness that was never seriously questioned, and the foundation enjoyed generally warm relations with its clients in the universities.

Perhaps in large part because of its special style of operation, NSF was administratively underpowered. The agency was regarded as weak in planning and particularly deficient in man-

* In 1969 when McElroy took over, the NSF budget was about $440 million; the budget request for the agency for the coming year is $653 million.