Open Files: Letting Exxon In

by Thomas Redburn

No piece of legislation has ever reached the altar with a richer dowry of good-government approbation than the Freedom of Information Act, known in government circles as the FOIA. It was embraced publicly by nearly every politician with a fervor previously reserved (in the days before population explosion) for celebrations of motherhood. The struggle was long, beginning way back in the late 1950s, when the issue was first raised, to 1966, when John Moss of California forced the first information act through Congress, up to 1974, when a fearless legislative branch overrode President Ford's veto to add new teeth to the FOIA; and at every stage the air was thick with praise. A typical example comes from Ralph Nader's Freedom of Information Clearinghouse: "Information is necessary to determine whether the government is protecting the public interest. Access to such information is the lifeblood of a democracy, and if it does not flow to the citizenry, democracy withers."

If the results of the Freedom of Information Act have not completely lived up to these high sentiments, they have, at least, opened a few little cracks in the edifice of government operations. Nader and his own associates have used the Act repeatedly to pry documents and data out of recalcitrant agencies and have brought lawsuits which have set precedents in interpreting the law. A handful of newspapers, theoretically among the principal beneficiaries of the law, have bestirred themselves to file requests for information their reporters were denied. Most recently, private citizens have sent their cards and letters streaming into Washington demanding to find out what the FBI and the CIA may be hiding from them in the files.

Yet despite all the good it has done, the Freedom of Information Act has also had consequences rather different from those advertised by its sponsors. Just as freedom of the press is, in Liebling's phrase, guaranteed only to those who own one, freedom of information has been guaranteed mainly to those who can hire high-powered lawyers to Indian-wrestle the government into submission. The mixed results of this well-intentioned act add another small chapter to the majestic saga of the American law. They also suggest that Congress could take a second look at the fine-sounding reform bills it periodically deigns to pass.

After the more restricted, original

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act was passed in 1966, comparatively few people tried to take advantage of it. Even so, moans went up from bureaucracies all over Washington, as civil servants complained about the crushing burden of the Act. The burden most often mentioned was that imposed by over-curious Nader's Raiders and other public-interest zealots, who were bogging down the government with limitless requests for secret information. Thousands of man-hours were invested in the fight to determine whether the most innocuous government memo should be classified confidential or not. Agencies resorted to a variety of backhanded methods in an attempt to keep the public-interest people away from the government's hoards of data. They grew ever more creative in interpreting the several categories of "exemptions" which, under the provisions of the 1966 Act, permitted certain kinds of information to remain secret. The bureaucrats' intransigence on this point was part of the reason the 1974 amendments, which greatly limited the exemptions, sailed through the Congress.

But as soon as these new amendments went into effect, the moans arose anew, this time primarily for a different reason. The tales of terrible burdens were there again; it seemed that hundreds of overworked civil servants were nailed to their desks as they coped with the FOIA crisis. This time, however, the burden was imposed not by the insatiable Naderites but by Washington's large law firms and the corporations they represent. Fairly trampling down the few public-interest representatives, the handmaidens of the nation's concentrations of economic power rushed to take advantage of a new twist in the government-business game.

There are several types of requests, with different effects. One category of requests comes from corporations trying to discover the trade secrets of their competitors. These have been especially prevalent at the Food and Drug Administration, which, because it must approve applications for new drugs and food additives, has enormous amounts of secret commercial information in its possession. The chairman of the FDA, Alexander Schmidt, announced in June that eight out of ten requests coming into his agency were from corporations—and a great number of these, apparently, from companies trying to find out what their competitors were up to. Theoretically they will not find out, for the Act contains a provision exempting trade secrets and confidential financial data from

public disclosure. But this provision has not kept companies from trying. One reason they consider the effort worthwhile is that a new provision of the law requires the government to decide within ten days after a request is made whether it will release the information or withhold it. Hopeful that, in the rush to answer a complicated information request within a limited time, a secret will slip out by mistake, the corporations have inundated the courts with lawsuits. "What's wrong with that?" asks Mark Green of the Corporate Accountability Research Group. "We think that if companies are going after each other's secrets, it can only enhance competition."

It is in another of its effects that the Act has more profoundly backfired, and that has happened when the corporations take on the government rather than squabble among themselves. The most dramatic illustration has occured at the Federal Trade Commission, which, like the FDA, is uniquely susceptible to this kind of suit. Under its recently invigorated management, the FTC has become one of the tougher regulatory agencies (considering the competition, this, of course, is modest praise). It spends most of its time conducting investigations of various industries, and many of these investigations lead to lawsuits and complaints.

Soon after the new provisions went into effect in February 1975, officials at the FTC began to realize that they were receiving an unusual number of requests for information under the FOIA. Moreover, the requests were not at all what was expected. In 1968, the FTC itself had been the target of the original Nader's Raiders project and was constantly coping with public interest requests. Now the flood came not from the FTC's critics, but from the corporations.

In the old days, the FTC would conduct its investigations in secret; then if it did file a suit against a company, the company's lawyers were required to use the time-consuming and elaborate legal process of "discovery" to find out what goods the FTC had on them. Within the corporate world, someone quickly figured out that the FOIA could serve as a shortcut to discovery, and many companies filed requests in an effort to find out how far the government investigators had gone. Exxon, for example, filed a FOIA case to learn about the FTC's study of vertical integration in the oil industry. The Washington law firm of Covington and Burling made sure to cover every base by filing a blanket FOIA request on all the cases its corporate clients had pending before the FTC. Several other lawyers who were interviewed said that they had not yet used this quickie discovery method, but would not hesitate to if the circumstances were right.

Relief from the Court

The overall results haven't exactly turned upside down the history of the government's relationship to its supplicants. Of the 91 cases in 1975 in which the FTC has decided to turn over the requested information, ten came from public interest groups, reporters, newspapers, and the like. All the rest were from corporations and their legal counsel. To name just a few: Kirkland and Ellis asking for documents concerning their client, Polaroid; the American Association of Advertising Agencies requesting a 1971 study on the relationship between advertising and drug abuse; a request from a number of law firms for the files on an investigation of the plastics industry.

Quite recently, the Supreme Court stepped into the arena to offer a bit of relief for the FTC. On April 28 the Court ruled that government officials faced with FOIA requests can exercise a degree of discretion that might thwart the "discovery" ruse. In *NLRB v. Sears, Roebuck,* the Court said that agencies henceforth could distinguish between "pre-decision" material, the sort of evidence on which a lawsuit

might later be based, and "post-decision" material, the files illuminating why the government chose a certain course of action. Under the law, the "post-decision" documents must generally be made public; but the agencies may use the "pre-decision" classification to prevent the targets of an investigation from sabotaging it. That, at least, is the feeling of people now working with the law, most of whom admit that the effect of the FOIA will not be clear until the substantial amount of litigation now under way is decided one way or another.

Fraudulent Fairness

Like the campaign reform laws, which were supposed to make politics clean but in many cases made it harder to knock off incumbents, the well-intentioned Freedom of Information Act illustrates some of the difficulties of proposing simple answers to the more complicated questions about the balance of power between industry and government, and citizen and state. In the short run, the one clear beneficiary of the system is the legal profession, which has a whole new category of litigation opened up to it. With the law schools producing thousands of extra lawyers each year, the profession may well be greeting the muddled language of many reform laws with the same sense of relief and pleasure medieval scholars must have felt toward the ambiguities of the Bible.

In the longer run, the Freedom of Information Act illustrates the difficulty of trying to redress the balance of legal power without altering the spurious "fairness" of the adversary system of justice. It is, of course, only "fair" that Exxon and its brothers should be able to take advantage of the Act, just as it is "fair" that John Connally should have been able to hire Edward Bennett Williams to get him off the hook. This is the glorious impartiality of the American legal system, which says that any man who can afford to hire Edward Bennett Williams will get a good defense—and that a few lucky indigents, who happen to have one of the good public defenders assigned to them, will have a chance, too. So it is with the Freedom of Information Act: anyone who can afford to have his Washington powerhouse law firm breathing down the FTC's neck, or who happens to work for Ralph Nader, will have a wonderful chance of having his "freedom of information" recognized. As for the rest of us. . . well, it often does not seem worth the bother.

Laws like the Freedom of Information Act are undoubtedly steps in the right direction; the fact that large economic powers benefit by them should not necessarily reduce their value to the people who originally sponsored them. But the recent experience with the Act suggests that the next time we're ready to "open up the government" or "give some power to the little guy," the first priority might be to find an escape route from the trap of adversary justice. ■