Department of Justice

ADDRESS

BY

THE HONORABLE BENJAMIN R. CIVILETTI
ATTORNEY GENERAL OF THE UNITED STATES

AT

OPENING SESSION

ANNUAL MEETING OF THE CANADIAN BAR ASSOCIATION

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MONTREAL, CANADA

It is exciting for me to be with you in this marvelous country at this convention of the Canadian Bar Association. You have selected as your theme: The Challenges to the Individual Practitioner and the Legal Profession in the Eighties. Based on the narrowest and most self-centered perspective, whatever the challenges may be, I suppose that we lawyers can expect to have a very good ten years in the eighties -- at least I believe we in the States have never had it so good. We continue our headlong trend, noted over 150 years ago by de Tocqueville, to have an ever-increasing number of our national controversies end up in the courts for ultimate decision. Since courts, of course, operate through an adversary system, any tendency toward judicialization of our national problems is bound to be good for the occupational health of lawyers.

When you speak of the challenges to our profession in the eighties, I am confident that your interest and your vision extend beyond the occupational advantages that our profession has enjoyed in the seventies and will enjoy in the eighties. Rather, you refer to the difficult substantive problems that lawyers and judges will be called upon to help resolve in the best interests of your nation as a whole. This is indeed a broad theme for a convention of lawyers. It should be an occasion for vision and creative endeavor rather than generalizations and windy pomposity. The topic I would like to address today, the Freedom of Information Act, is one which lends itself to this kind of review.

I understand your government is considering adopting a law somewhat similar to our Freedom of Information Act some time soon. If your experience is similar to ours, that legislation will provide you personally and professionally with a monumental challenge. The Freedom of Information Act has indeed proved for us to be a challenge for individual practitioners, the profession as a whole, and -- most of all -- for the United States Attorneys General who are primarily responsible for carrying out the Act's commands. I have therefore determined in the balance of my remarks today to review the American experience in the seventies in the context of this single piece of legislation.

The first thing to understand about our Freedom of Information Act is that it is misnamed; in reality, it is a freedom of records act, applying only to records and not, of course, to any unrecorded information.[1/] Second, it applies only to records maintained by executive agencies in our federal government. The Act does not apply to records of our Congress or our courts.[2/] Certainly, one very important issue for you to address while considering your freedom of information proposal is the proper breadth of such a law. Should it apply to all parts of government or just one, as the American law does?

Our Act is essentially divided into two parts: one mandating publication of certain records, the other requiring disclosure on request of specified records unless expressly

exempted by the terms of the Act. More specifically, the first part covers records such as final opinions and orders made by the executive departments, statements of policy that have been adopted by an agency, and staff manuals that affect a member of the public. These records all agencies must make available to the public, whether or not specifically requested to do so.[3/]

This first section of the Act is often overlooked. It has lifted the curtain for the public showing how its government works and what is actually going on in government. A single illustration will make the point. Some years ago the United States Board of Parole, the federal agency that reviews prison sentences for possible early release, was asked to make public the records of its decisions granting or denying parole. It declined to do so, arguing that these records were not agency adjudications. A prisoner who wanted to see the records went to court, the court held for him,[4/] and thereafter the Board commenced to publish and index its decisions.

The second part of the Act has given rise to the greatest public notoriety and debate. That part requires each agency, upon request from any person (a citizen of <u>your</u> country, for example, can request records from an executive agency in <u>our</u> federal government) to provide that person with every record reasonably described in the request, unless the records requested fall within one or more of nine categories called exemptions.[5/]

Even if these records might be exempt, it is worth noting that an agency, in its discretion, may provide them nevertheless. If an agency refuses to provide them for any reason, the requester may go into a federal district court and seek an order compelling their production.[6] If the requester substantially prevails in his suit, the federal government may be required to pay the requester's reasonable attorney fees and costs.[7]

The nine exemptions have given rise to the most controversy under the Act and are of varying breadth and clarity. Litigation that arises when one of the exemptions is asserted by an agency often exposes to public view some of the conflicts in our society which are both perplexing and significant. These conflicts frequently lie at the very heart of the value systems of Western democracies. A discussion of these conflicts may assist you and your legislators in considering your proposed legislation. I would like to illustrate these conflicts through a series of actual examples.

The second exemption under our Freedom of Information Act is for documents "related solely to the internal personnel rules and practices of an agency."[8] One case in which this exemption was at issue illustrates how the Act raises a conflict between the right of the people to know how and when the criminal law will be enforced with the right of the government to keep some of this information secret in order to avoid encouraging

crime or aiding those who would disobey our laws. In this case, an individual requested from one of the Justice Department's local prosecuting offices the guidelines that office had adopted for deciding which kinds of crimes to prosecute. The prosecutor's office from which the guidelines were requested asserted Exemption Two to deny the request. One of our highest appellate courts -- the District of Columbia Circuit -- ruled that these guidelines must be disclosed to the public. The Department has guidelines dealing with drug offenses which disclose the minimum amount of drugs that must be involved in an unlawful sale to warrant prosecution. Most large drug dealers are sophisticated businessmen who have lawyers who advise them on the consequences of their acts. To disclose to the public minimum amounts of drugs necessary to invoke federal prosecution is, at least arguably, not in the public interest for it may encourage traffic in illegal drugs. Yet, apparently such disclosure will be required by the courts unless the Act is amended, since the Court ruled that Exemption Two as well as other exemptions did not cover such guidelines.[9/]

Another conflict created by the Act is that between the right of the public to know what their government is doing and the right of individuals to have their privacy maintained. These two competing values are frequently at war. To accommodate these competing interests, the Act contains two exemptions[10/]

which protect from disclosure certain records the disclosure of which would constitute unwarranted invasions of personal privacy. These exemptions require a court to balance the desirability of disclosure of records against the desirability of keeping records secret. Drawing the line in such conflicts can sometimes be agonizingly difficult.

One of the most interesting and illustrative cases involving one of these exemptions arose out of a request by the editors of a law review for summaries of the records of our Air Force Academy's hearings on cadets' violations of the Academy's honor and ethics code. The Air Force contended that disclosure of these records would constitute a clearly unwarranted invasion of the privacy of the cadets who were under investigation. The Supreme Court, balancing the right of the public to know what was going on with the accused's right to privacy, found that the scales tipped in favor of the public.[11]

My own inclination would be to respect privacy interests of individuals to a greater extent than those of large publicly owned corporations or institutions. But this generalization, while easy to utter, will not decide specific cases. As you know, our federal government is engaged in massive, detailed regulation of business. These regulations relate not only to economic and competitive aspects of business but also to health and safety. As a consequence, our agencies are filled with

recorded information obtained from private business. Our courts are clogged with FOIA cases that clearly raise the conflict between the businessman's right to keep his secrets from his competitors, his suppliers, his customers and his employees, and the right of any member of the public to access to these records.

Cases raising this conflict are litigated under the fourth exemption of the Act, one of the three most important in my view, which covers "trade secrets and commercial or financial information" obtained from corporations or private citizens that is "privileged or confidential."[12/] Our courts have ruled that if disclosure of the records either would inhibit the submitters from sharing information with the government or would work a competitive injury to them, then the records are "confidential" and need not be disclosed.[13/]

The leading case interpreting this exemption involved the profit and loss statements of concessioners in our national parks. These records are required to be furnished to the National Park Service by the private hotel and restaurant operators in our parks. An environmental group requested the government agency to disclose the records. The Park Service, asserting this fourth exemption, refused. Suit was filed and the issue was whether or not disclosure of the records would cause competitive injury. The requester's position was that

these concessioners enjoy a government-granted monopoly; disclosure of their profits therefore could not work a competitive injury. After trial, the court found that most of the concessioners did not enjoy local monopolies but competed with similar establishments located at the perimeters of the parks. Others, it was found, did enjoy local monopolies. It was held, therefore, that the records relating to those having monopolies must be disclosed but the others need not be made public.[14/] You can readily see how the availability of this exemption has an effect on how willingly American businesses reveal information to the government. In fact, this exemption has even created a new phrase in our legal language: "the reverse FOIA suit;" reverse because it is a suit by a company that produced a record to a government agency seeking to enjoin the agency from producing it for inspection by a requester.[15/]

The fifth exemption of the Act is in my opinion the most important, and yet its language is the most opaque. It exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[16/] What these phrases mean has been the subject of much litigation. Courts have agreed that under Exemption Five an agency need not disclose attorney work product, matters covered by Executive branch privilege and the pre-decisional writings by subordinates of an agency head recommending

one course of action or another. Applying these standards, however, requires time and patience.

One case in particular demonstrates this difficulty. In 1971, an American newspaper reported that a panel appointed by the President had disagreed on whether the Administration should conduct an underground nuclear test in Alaska. Following this news report, a number of members of Congress requested the conflicting recommendations that had been made to the President. These reports were denied and one of the bases for the denial was Exemption Five of the Freedom of Information Act. In sustaining the exemption claim made by the government, the Supreme Court established some guidelines which determine whether an advice memorandum has to be disclosed. The Court took account of the argument made by the government against too narrow an application of this exemption when it stated that the "efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced 'to operate in a fishbowl.'"[17/] Despite this decision, many still fear that the Act has a chilling or inhibiting effect on writing memoranda. In view of the already bloated volume of federal records, this consequence may not be wholly undesirable. On the other hand, I agree that the Act may have caused government officials to hold more meetings to discuss government problems rather than to convey their thoughts in writing, thus avoiding the creation

of records subject to production under the Act. Moreover, the Act may inhibit people from suggesting innovative or creative approaches because they fear release of this written information. These consequences are unfortunate.

Although the law is clear that pre-decisional writings by subordinates or from subordinates to government policy-makers are exempt from disclosure, I think it highly probable that many government employees fail to be frank and candid in their writings because they fear that the writings will be disclosed under the Freedom of Information Act. This, to my mind, is the greatest danger of any freedom of information act. There is considerable debate in our country as to whether the Act has had this effect. But there is no debate on the proposition that Congress should pass no law which will have the effect of inhibiting free and frank discussion among subordinates in their effort to advise a cabinet officer or an agency head as to the decision they recommend their chief should make. This too will be a major issue for your legislators to consider before any freedom of information proposal is enacted.

While the Freedom of Information Act has been a positive step forward in our country's efforts to achieve a more open and just society, it has not been without costs, and they have not been inconsiderable. When Congress enacted the Freedom of Information Act, it estimated the annual cost of compliance to be $100,000. We now estimate, however, that it costs the taxpayers about fifty million dollars a year to comply with

the Act. I suspect that estimate to be on the low side. In addition, the Act has other costs that cannot be measured in dollars and cents. Due to the stringent time requirements, agencies are forced to make processing requests the highest priority -- perhaps to the detriment of performing other agency business.

A federal agency now must respond to most requests for records in ten days.[18/] Very often records cannot even be located within this time. Agencies which are struggling to meet this impossible deadline are often likely to make mistakes. When the names or other identifying information of informants are involved, the haste required by the law could have tragic results.

Compliance with the FOIA also demands enormous use of the time of government personnel to process requests. These resources could be directed to actual investigations and cases. At one time the Federal Bureau of Investigation had over 500 people working on requests. These numbers, incidentally, are only for initial requests. The Department has an entire unit of attorneys, paralegals and secretaries to process administrative appeals and a separate part of one of its divisions to handle law suits.

A second undesirable effect has arisen out of the extent to which Congress and the courts have required records relating to law enforcement to be disclosed to the public. We are deeply concerned that the Freedom of Information Act, by

making too many records available too soon, may impede the proper function of the government as an enforcer of our laws. Moreover, we have found that a disproportionate number of requests are made by convicted felons serving criminal sentences. While these individuals have legitimate rights to discover the process behind their convictions, in most cases they have exhausted this right during litigation. Providing them with another and still another chance only results in backlogs and unfair delays for other requesters.

To remedy these serious procedural and substantive problems, we intend to propose several amendments. The first of these will address the Act's unrealistic time limits and tie the schedule for processing a request to its complexity and the actual work required. Another will specifically exempt internal manuals and instructions to investigators, inspectors, auditors, or negotiators. Although many courts have found these materials exempt under the Act's existing language, we have had no express resolution or clarification by the Supreme Court. We are also considering an amendment that would preclude felons from obtaining records under the Freedom of Information Act.

In an effort to safeguard the confidentiality of our sources, we also intend to recommend to Congress that it limit the release of records compiled by criminal law

enforcement agencies pertaining to organized crime, terrorism, or foreign counterintelligence and to the release of criminal law enforcement investigative files.

Recently, an entirely different problem under the FOIA arose. A departing government officer took with him some of his official files, thus rendering them unavailable for inspection upon request to an agency under the Freedom of Information Act.[19] Because such a practice could circumvent the entire design of the Act, I intend to ask Congress for an amendment to allow a court to join in an FOIA suit any party who possesses government records so that, unless exempt, they may be made promptly available on request of a member of the public. I favor such an amendment because of my conviction that the Freedom of Information Act is vitally important to the functioning of our federal government.

As I have demonstrated, the Freedom of Information Act has raised many issues concerning competing interests in our society. I hope the experiences we have had with the Act -- the problems, the costs, the difficult balances required -- may help you in deciding what type of law you should enact. While the Act has cost both the Executive branch and the courts a very considerable amount in terms of money and man-power, freedom of access by members of the public to most government records is a cardinal principle of democracy. While not drawn with the breadth or felicity of expression

found in our Constitution, I believe that the FOIA, in time, will be regarded as comparable in fundamental importance to the Bill of Rights in our Constitution. Our citizens will come to regard the Act as having an importance analogous to the importance we attach, for example, to the right Americans have to a public trial by jury in criminal cases.

The Act has, I believe, worked somewhat of a revolution. It has made our federal government far more open and it has exposed government wrongdoing. The consequence has been that many of these wrongs have been righted. The Act tends to make our citizens better informed and provides them with the data needed for intelligent debate. In addition to these benefits, the Act undoubtedly has served to deter wrongful conduct by government officials because of fear of disclosure as a result of the commands of the Act.

I close where I began, by referring to the theme of this convention. The question whether your nation should adopt a freedom of information law is indeed a challenging one. I have tried to identify just some of the many issues your consideration of such a law must entail. In the United States the Act has, on the whole, been well received and fairly administered. More significantly, I believe it has made a positive contribution to our never-ending quest for a more nearly perfect, just, and open society. I wish you success in your endeavor.

FOOTNOTES

1. For a discussion of the definition of "agency records" see Forsham v. Harris, ___ U.S. ___ (1980), 48 U.S.L.W. 4232 (S.Ct., March 3, 1980; N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132 (1975); Disabled Officers' Assoc. v. Rumsfeld, 428 F.Supp. 454 (D.D.C. 1977), aff'd., No. 77-1564 (D.C. Cir. April 18, 1978).

2. The Act defines agency as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." (5 U.S.C. § 552(e) (1976).

3. 5 U.S.C. § 552(a)(1) and (2) (1976).

4. National Prison Project of the American Civil Liberties Union Foundation, Inc. v. Sigler, 390 F.Supp. 789 (D.D.C. 1975).

5. 5 U.S.C. §§ 552(b)(1)-(9) (1976).

6. 5 U.S.C. § 552(a)(4)(B) (1976).

7. 5 U.S.C. § 552(a)(4)(E) (1976).

8. 5 U.S.C. § 552(b)(2) (1976).

9. Jordan v. U.S. Department of Justice, 591 F.2d 753 (D.C. Cir. 1978)

10. 5 U.S.C. § 552(b)(6), (7)(C) (1976).

11. Department of Air Force v. Rose, 425 U.S. 352 (1976).

12. 5 U.S.C. § 552(b)(4) (1976).

13. National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 769-70 (D.C.Cir. 1974).

14. National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C.Cir. 1976); National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C.Cir. 1974).

15. See Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

16. 5 U.S.C. § 552(b)(5) (1976).

17. Environmental Protection Agency v. Mink, 410 U.S. 73, 87 (1973) (quoting S. Rep. No. 813, p. 9).

18. 5 U.S.C. § 552(a)(6)(A) and (B) (1976).

19. Kissinger v. Reporters Committee for Freedom of the Press, ___ U.S. ___, 48 U.S.L.W. 4223 (S.Ct., March 3, 1980).