Department of Justice

STATEMENT

OF

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BEFORE

THE SUBCOMMITTEE ON CRIMINAL
LAWS AND PROCEDURES
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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Mr. Chairman and Members of the Subcommittee:

I am Quinlan J. Shea, Jr., Director of the Office of Privacy and Information Appeals, Office of the Deputy Attorney General. I appreciate the opportunity to appear before you today on behalf of Attorney General Bell to provide the views of the Department of Justice regarding the impact of the Freedom of Information and Privacy Acts on the criminal justice law enforcement process.

These two statutes have had a definite impact on the Department of Justice and law enforcement in general, but that impact has not been as adverse as some persons would have you believe. On the other hand, statements to the effect that the adverse impact has been minimal and results primarily or solely from Executive Branch intransigence display either an inability to recognize or unwillingness to accept unpleasant facts. As is true in most controversies, the truth of the matter lies somewhere between the two extreme positions. As I will detail below, the Freedom of Information and Privacy Acts have caused serious problems for and imposed severe burdens on our Department. On the other hand, they have resulted in benefits to the Government as a whole, to the Department of Justice, and even to the criminal justice law enforcement process. Attached to my statement are the Department's answers to the sixteen questions posed by Senator Eastland, but I would appreciate being allowed to make certain additional comments at this time. Before

doing so, however, let me stress that the Department of Justice continues to believe that most problems in this area could be substantially reduced in terms of magnitude by a cooperative effort between Congress and the Executive Branch.

It is the firm and unequivocal position of the Department of Justice that there is no inherent conflict between efficient, effective criminal law enforcement and the principles underlying the Freedom of Information and Privacy Acts. We recognize that we are dealing with two very important societal interests -- openness in Government and the valid needs of the law enforcement process. At certain points these interests do conflict to some extent and decisions have to be made as to which is to control. For the most part, however, we believe that each of these important interests can be served without doing violence to the other.

What kinds of problems do we face as we attempt to satisfy both of these societal interests to the maximum possible extent? Many have their roots in the actual language of the statutes and their respective legislative histories. In 1966 and again in 1974, Congress correctly concluded that the Executive Branch of our Federal Government had abused the discretion vested in it

by then-existing law in making decisions as to what records should be made available to the American public. As a result, however, these two statutes are written to eliminate any Executive Branch discretion as to materials intended to be subject to mandatory release, and the legislative history on which the courts must rely is replete with statements that the statutory exemptions are to be construed as narrowly as possible. The problem with this approach is, as I shall point out more explicitly below, that the statutes themselves lack precision. As a result, we are having trouble defending in the courts propositions we feel are essential to preserving our ability to carry out successfully our law enforcement mission. The Department of Justice has been calling attention to these problems since 1975, and we are encouraged by the interest being shown by this Subcommittee, as well as by others with legislative and oversight jurisdiction.

The second kind of adverse impact has been one of administrative burden and largely unfunded costs. As the answers to certain of the sixteen questions make clear, the dollar cost to the Department of Justice in CY1977 was, at a minimum, between thirteen and fourteen million dollars. For the Federal Bureau of Investigation alone, the figure for the year was in

excess of ten million, six hundred thousand dollars. My own judgment is that the correct total, if we could recover all of our cost data, would be in excess of fourteen million dollars.

The two statutes with which we are concerned today impose definite obligations on the Department of Justice and all other Executive Branch agencies. Resources have not been provided. Therefore, the personnel, supplies and equipment dedicated to activities in these areas have had to be taken from resources appropriated by Congress in contemplation of other departmental missions.

I would like at this time to address briefly some of the more serious specific problems presented by the language and legislative history of the Freedom of Information Act. There are various very sensitive records that are created to enable us to carry out our law enforcement missions. Among these are certain agents manuals and instructions prepared by law enforcement agencies and components, the release of which would assist individuals in breaking the law or avoiding apprehension. One recent court decision held that even the most sensitive portions of the agents manual of the Bureau of Alcohol, Tobacco and Firearms -- specifically found by the court to be too sensitive to be released for the reasons indicated above -- were not exempt from release under any provision of the law. Relying on the manifest intent of Congress, the court nonetheless refused to release these manual portions, on the theory that it had equitable discretion not to order release

of nonexempt records. This is a minority view in the courts, however, and is vigorously resisted by many commentators on the statute. The Department of Justice certainly does not concede that this kind of very sensitive material is not exempt from mandatory release under the Act, but we respectfully suggest that the statute governing access to materials of this kind should be written in such clear and unequivocal terms that there is no room for any doubt. We have had considerable success in relying on 5 U.S.C. 552(b)(2) as a basis for withholding such materials, but this particular court looked to the Senate Report on that provision (rather than the more expansive House Report) and ruled against us. It seems logical that manuals, as well as such materials as lists of radio frequencies in current use by border agents, the formula for the ink used to print our currency, etc., should be subsumed under the provisions of 5 U.S.C. 552(b)(7), which is generally referred to as the law enforcement records exemption. But that exemption is specifically limited to "investigatory records" -- as opposed to encompassing <u>any</u> records created, compiled or maintained for law enforcement purposes -- and we have had some difficulty selling the proposition that agents manuals and other materials of comparable sensitivity are "investigatory" in nature.

Even where records are clearly investigatory in nature, and were compiled for law enforcement purposes, they are not exempt from mandatory release unless they fall within one of the

six clauses of 552(b)(7). The first of these exempts records the release of which would interfere with law enforcement proceedings. Some courts have held that this provision is, in effect, coextensive with the access provisions of the Federal Rules of Criminal procedure, but others have refused to do so and have required records in open, active cases to be reviewed. This is a burden that benefits society not at all and we suggest that the Act should not permit it. Once it is established that there is in fact an open and active investigation in progress, that should ordinarily be the end of the matter. It is unfortunate enough that we have to admit the existence of such records before we can deny access to them, that is, to tell the subject that he is under investigation. This is the result of the "confession and avoidance" nature of the statute. It is hard to understand what societal interest is served by making us stop an investigation and review the records generated in its course to see if any of them can be released to the requester -- most often, of course, the requester is the individual under investigation.

There is no doubt that there has been an adverse impact on our ability to recruit and retain informants and to obtain needed information from such organizations as state and local law enforcement agencies, business enterprises, etc. Until quite recently we had been successful in our efforts to persuade courts that police departments, for example, are "confidential sources" within the meaning of 5 U.S.C. 552(b)(7)(D). In a few recent instances, however, courts have questioned this position. We

were already having a difficult time convincing such agencies that we could and would protect the information they provide us in confidence. For these reasons the Department of Justice would find it preferable to operate under a statute which makes unmistakably clear the fact that "source" is used in the broad, dictionary sense, and is in no way limited by the traditional concept of "informant." The legislative history of the specific provision actually supports our position, but the fact is that at least some courts are relying instead on the numerous indications in the same legislative history that all of the exemptions are to be narrowly construed. If our right to protect the identities of all our sources were clear, as well as our right to protect any information provided by a source that either we or the source felt must be held in confidence, we would in time be able to reverse the current erosion of our information-gathering capability. Absent such clarification in the statute itself, the situation will almost certainly continue to deteriorate.

Several courts have questioned our contention that the identities of law enforcement personnel can lawfully be excised from records, on personal privacy grounds, before they are released. Given the past history of vilification and harassment so often directed against law enforcement personnel and members of their families, our right to protect our agents from potentially serious invasions of personal privacy should be clearly set forth in the

Act. At the present time it appears that 5 U.S.C. 552(b)(7)(C) may not be adequate, while we cannot invoke 5 U.S.C. 552(b)(7)(F) except where the threat of loss of life or personal injury can be shown to exist before the fact. Law enforcement personnel and their families should not be left in this position.

The last specific example I would like to bring to the attention of the Subcommittee is in the area of investigative techniques and procedures. We rely on 5 U.S.C. 552(b)(7)(E) in any instance where release of the information could possibly reduce the effectiveness of a technique or procedure, or could increase the risk to our personnel. Although I am not aware of any case where a court has failed to uphold our position in this area, our experience under some of the other exemptions is enough to cause us some concern here as well.

To sum up all of the examples I have mentioned, Mr. Chairman, it is the view of the Department of Justice that sensitive law enforcement records should be able to be protected for as long as they are in fact sensitive. Criminal justice law enforcement records really warrant separate statutory treatment, because they are too important and too complex for anything less. Absent that, however, the Act should be amended to give them the protection they require, and to enable us to protect them without expending excessive resources in doing so.

Having mentioned that there are definite benefits that have redounded to law enforcement from these two statutes, it seems appropriate to mention at least some of them. In no particular order of importance I note first the fact that the statutes do constitute specific, if imprecise, recognition by Congress that criminal justice records can properly be withheld under certain circumstances. Second, releases under the Acts have definitely tended to assist in the restoration of public confidence in government in general and the criminal justice law enforcement process in particular. In certain cases of great public interest and continuing controversy, such as the Rosenberg and Hiss cases, and the assassinations of President Kennedy and Dr. Martin Luther King, Jr., the releases of our records are tending to demonstrate clearly both the competence of our criminal investigative process and the correctness of the conclusions reached by juries, courts and such bodies as the Warren Commission. Third, instead of merely acquiring and keeping data, our components have begun the desirable process of studying just what data they really need to acquire, how it should be used, and how long it should be retained. The Privacy Act has had even more impact in this area than has the Freedom of Information Act, because of the former's requirement that notices be published concerning systems of records containing data that can affect individuals directly. Within the Department of Justice, as a last and specific example, it is recognized that access by inmates

to most of the records in their prison files has operated to reduce tension in our confinement facilities.

Mr. Chairman, the Department of Justice is committed to both criminal justice law enforcement and openness in government. We have on a number of recent occasions suggested that what is needed is a cooperative effort with Congress to work towards a reasonable reformulation of these two statutes. On behalf of Attorney General Bell, I renew that offer today. We believe that, with no significant reduction in the amount of material that can be made public, it is possible to reduce considerably the burden that these Acts have placed on our Department, particularly the F.B.I., and to restore our damaged ability to carry out our responsibilities to the American people in the area of criminal justice law enforcement. In addition to addressing the substantive points I have covered, such changes should include extending the basic time limits for responses under the Freedom of Information Act, providing that those time limits can be extended based on the volume of the records that must be reviewed pursuant to a request, and eliminating the "quickie" lawsuits -- so terribly burdensome and wasteful of resources -- now permitted under the Act.

That concludes my prepared statement, Mr. Chairman. I ask that the statement and the Department's answers to Senator Eastland's sixteen questions be made a part of the record of the Subcommittee's hearings. I am prepared to respond at this time to any questions the Subcommittee may have.

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