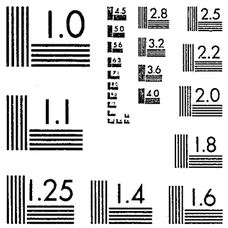
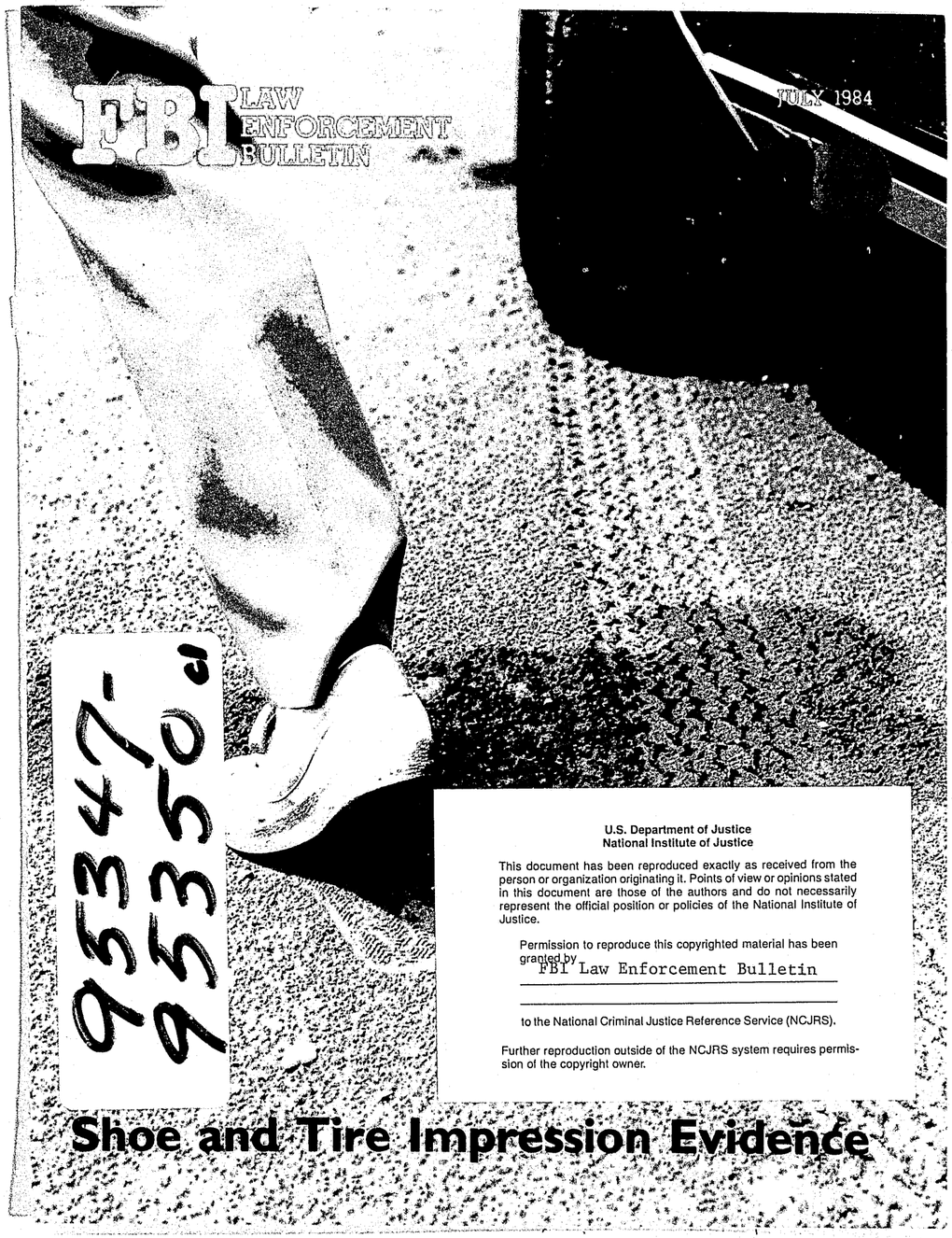




Shoe and Tire Impression Evidence

FBI LAW ENFORCEMENT BULLETIN

JULY 1984, VOLUME 53, NUMBER 7

Contents

The Cover: Shoe and tire impression evidence, when properly collected, can be important in placing a suspect at the crime scene. See article p. 2.

Federal Bureau of Investigation
United States Department of Justice
Washington, D.C. 20535

William H. Webster, Director

The Attorney General has determined that the publication of this periodical is necessary in the transaction of the public business required by law of the Department of Justice. Use of funds for printing this periodical has been approved by the Director of the Office of Management and Budget through June 6, 1988.

Published by the Office of Congressional and Public Affairs,
William M. Baker, *Assistant Director*

Editor—Thomas J. Deakin
Assistant Editor—Kathryn E. Sulewski
Art Director—Kevin J. Mulholland
Writer/Editor—Karen McCarron
Production Manager—Jeffrey L. Summers
Reprints—Marlethia S. Black

ISSN 0014-5688 USPS 383-310

Director's Message

For the first time since 1960, this country experienced a significant decrease in crime reported to police for a second consecutive year. The 1983 decline in crime was 7 percent, the greatest in any year since 1960.

This may signal that crime, as measured by the Uniform Crime Reporting system, is being managed more effectively by our law enforcement community.

All categories of the Crime Index—murder, forcible rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, and arson—decreased in 1983; violent crime declined by 5 percent, property crime by 7 percent. In contrast, the volume of reported crime reached an all-time high in 1980, which continued through the following year. But in 1982, decreases in the amount of crime reported were experienced.

During the first quarter of 1983, a decrease of 2 percent was reported. Then, in the second and third quarters, 8-percent declines were recorded. In the last quarter of 1983, there was a 10-percent drop, for a year-long average drop of 7 percent.

While there are many influences affecting the volume of crime, there are indications that the criminal justice system is beginning to function with a higher degree of effectiveness, which is reflected in our crime figures.

Especially noteworthy, too, is the fact that while crime counts for the past 2 years have diminished, the number of persons arrested for crime continues to rise. Recent efforts by law enforcement to concentrate on the "career criminal," coupled with better prosecutive and judicial handling of those who commit large numbers of crimes, whether to support narcotics habits or for other reasons, have resulted in jail populations reaching new highs, while reported crime has declined.

Increased citizen involvement in community action groups, such as neighborhood watch and similar programs, has also favorably affected these crime statistics, as have the actions of individuals concerned with their potential of becoming the victims of crime.

Attorney General William French Smith noted that today, criminals are more likely to be arrested and incarcerated than they were in 1980. He pointed out the "tighter coordination within federal law enforcement and among federal, state and local law enforcement agencies."

While these crime figures are a sign of hope—larger cities and suburban and rural areas alike recorded similar declines—this trend does not mean that the law enforcement community can relax. Even the statistically valid decline in the percentage of the arrest-prone age group of 15–24 years is not overly reassuring, as the number of older people being arrested for property crimes is increasing.

Increased emphasis, by law enforcement and community together, on successful programs that demonstrate the ability to reduce crime is still needed if we are to envisage a time when our children can live relatively free of crime.

William H. Webster
Director
July 1, 1984

95348

U.S. Information Access Laws

Are They a Threat to Law Enforcement?

". . . the Freedom of Information Act . . . and the Privacy Act . . . provide varying degrees of access to information held by the Federal Government."

By
STEPHEN P. RIGGIN
Assistant Section Chief
Freedom of Information/
Privacy Acts Section
Records Management Division
Federal Bureau of Investigation
Washington, D.C.

Late one night, two detectives emerged from a cruiser parked outside a brightly lit amusement park. After strolling lazily through the dwindling crowd for several minutes, they spotted their man. He also saw them as he glided into the shadows of a nearby vendor's booth. The detectives nodded recognition as they approached to accompany the man deeper into the darkness. He was quick to speak, "I've got trouble. Curtis * got some stuff from the FBI with that freedom of information thing and I'm scared to death. I made up my mind; I can't talk to you guys no more. In fact, I'm leavin' tonight—going out west. I'm through with this whole bit."

Was his fear justified?

As the FBI Agent stepped from the elevator into the third floor corridor of the U.S. courthouse, he noticed the highly polished mahogany door bearing the words "Honorable Garland T. Lewis.*" On entering the judge's reception room, he was greeted by one of the secretaries. After announcing his presence over the office intercom, she ushered the Agent into the judge's private office. Identifying himself to the judge, the Agent stated the purpose of his visit and asked the judge whether he would recommend a fellow jurist to a seat on the circuit court. To the Agent's astonishment, the judge replied he was not in a position to comment on the qualifications of the other jurist, a man he had known for years. When pressed for reasons, the judge explained he was quite familiar with the Privacy Act and knew the other jurist could obtain copies of whatever record was made of his comments. The judge confided that his comments would be uncomplimentary and he feared their personal and professional relationship would be severely damaged if the comments were made known.

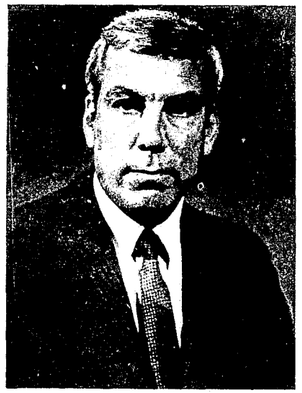
Was his fear justified?

These two fictional accounts dramatize what has become a common reaction to the passage of two Federal statutes—the Freedom of Information Act (FOIA) [1] and the Privacy Act.[2] Both laws provide varying degrees of access to information held by the Federal Government.

The Freedom of Information Act

Originally enacted in 1966, the Freedom of Information Act was designed to open records of the executive branch of the Federal Government to public inspection. While the records of all Federal agencies were subject to the statute in practice, only those of regulatory agencies were affected because the 1966 law contained a provision exempting investigatory files compiled for law enforce-

* Fictitious.



Special Agent Riggin

ment from public access. This was a blanket exemption which was used to withhold from the public all investigative records maintained by the U.S. Department of Justice, the U.S. Secret Service, and similar law enforcement agencies.

Six years later, after 2 weeks of oversight hearings, a House subcommittee concluded that the Federal Government had "dragged its feet" for 5 years in its management of the FOIA. In 1974, Congress substantially amended the 1966 law over the veto of then President Gerald R. Ford; the amendments became law in February 1975.[3]

As a result of the amendments, the blanket exemption for investigatory files compiled for law enforcement was dramatically revised.[4] The word "records" replaced the word "files," which meant that an entire investigative file could no longer be exempt from disclosure. It is possible that the entire file would be subject to one of the FOIA exemptions applicable to all records, not just those compiled for law enforcement, e.g., if the file is subject to national security classification pursuant to Executive order of the President. In addition, the amended law contains only six specific types of investigatory records to which the law enforcement exemption can be applied. Unless a law enforcement record meets the definition of one or more of the six types, release to the public is required. Moreover, even if an investigative record is one of the six types described in the statute, it could contain information not subject to exemption, thus requiring release of that part of the record containing the nonexempt information.

Six types of investigatory records compiled for law enforcement can be withheld from public access.

Records which would interfere with enforcement proceedings

This provision permits the Government to withhold all records which relate to an ongoing and active criminal or intelligence investigation. This exemption can be used also to withhold records of an inactive investigation where there is still a reasonable chance for an eventual law enforcement proceeding or to exclude records of a Federal agency where release to the public could damage an ongoing investigation being conducted by a State or local criminal justice agency.

Records which would deprive a person of the right to a fair trial or an impartial adjudication

This exemption has been used infrequently by Federal law enforcement agencies because most requests are received after legal proceedings have been concluded. It is designed to prevent the release of information which would have an extensive or prejudicial effect on the rights of private parties.

Records which would constitute an unwarranted invasion of personal privacy

This exemption is applied to information pertaining to identifiable individuals which, if released to the public, would result in an unjustifiable invasion of the person's right to privacy. The law requires a Federal agency maintaining the information to balance the interests of the public against the privacy interests of the individual. The result of the balancing test determines whether the invasion of privacy which might occur from disclosure would be justified by the public's right to know.

". . . the Freedom of Information Act is designed to prevent the public from obtaining certain investigative records compiled for law enforcement."

In this context, a generally accepted concept is that persons who are considered "public figures," i.e., well-known to the public or occupying a position in the public spotlight, enjoy less privacy. As an example, the public could possibly have a right to know of the misconduct of a State governor, although not of the misconduct of a lower-level State employee. It also is generally accepted that a deceased person has no privacy rights, although the surviving relatives may have a privacy interest justifying the withholding of personal information about the decedent which would be embarrassing to the survivors. The exemption is not applied to information pertaining to organizations or corporations. It is used routinely to withhold the identities of most law enforcement personnel whose names appear on investigative records.

Records which would disclose the identity of a confidential source, and in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by a confidential source

This exemption is applied most frequently by Federal law enforcement agencies, such as the Department of Justice (including the FBI and the Drug Enforcement Agency (DEA) and other investigative components) and the U.S. Secret Service. It is used to withhold information provided in confidence by a variety of sources—paid informants, witnesses, relatives, associates, financial or commercial institutions, and State, local, and foreign law enforcement agencies.

Both Congress and the Federal court system have recognized the need to preserve the Government's ability to give complete protection to informants and other sources who furnish information in confidence during the course of a criminal or national security investigation. Their protection is essential, and the information they provide to the Federal Government must be safeguarded when contained in criminal and national security investigative files being processed pursuant to the FOIA.

Records which would disclose investigative techniques and procedures

This exemption permits Federal law enforcement agencies to withhold records or information which would reveal an especially sensitive investigative technique. Routine, well-known techniques, such as the use of physical surveillance, generally cannot be protected, unless the information is subject to one or more of the other FOIA exemptions, e.g., disclosure which would interfere with enforcement proceedings or which would identify a confidential source. This exemption also can be applied to information reporting the use of an investigative technique employed by a State or local criminal justice agency.

The types of investigative techniques, the withholding of which have been supported by various Federal courts, include laboratory methods used in arson investigations, the use of "bait" money, security devices used by banks, techniques used in the protection of the President, and the specific types of equipment used for electronic eavesdropping.

Records which would endanger the life or physical safety of law enforcement personnel

This exemption is used in FOIA processing of federally maintained criminal and national security investigative records to excise from the records the names and other identifying information of law enforcement personnel at the Federal, State, and local levels when disclosure could be reasonably expected to endanger the life or safety of the officer.

From this it is evident the Freedom of Information Act is designed to prevent the public from obtaining certain investigative records compiled for law enforcement. Information relating to active investigations, informants, and other sources of information, sensitive investigative techniques, and police personnel is given the closest scrutiny by records specialists responding to FOIA requests to protect these legitimate law enforcement interests.

The Privacy Act

The Privacy Act, enacted in 1974 (the same year in which the FOIA was amended), became effective on September 27, 1975. It was the culmination of several years of public and congressional concern over the threat to personal privacy created by the Federal Government's continued acquisition of personal information on

"The principal purpose of the [Privacy Act] is to give U.S. citizens and permanent resident aliens some degree of control over information about them collected by the Federal Government and how the information is used."

U.S. citizens. The principal purpose of the act is to give U.S. citizens and permanent resident aliens some degree of control over information about them collected by the Federal Government and how the information is used. This is accomplished in five basic ways:

1) Each Federal (executive branch) agency must publish in the *Federal Register*[5] a complete description of all records systems the agency maintains. The system notice describes the types of information in the system and the procedures to be followed by a citizen seeking access to this information.
2) The information in the system must be accurate, relevant, timely, and complete to ensure fairness to the citizen.
3) The act permits citizens to review and request amendment of information about them contained in the system.
4) Information collected for one purpose cannot be used for a different purpose without the citizen's written consent.
5) Federal agencies must maintain an accounting of all disclosures of a record, and with certain exceptions, provide the citizen a copy of the accounting.[6]

The act contains provisions which permit a citizen to bring a civil action in Federal district court to enforce the above requirements. Also, the act contains criminal penalties for a Federal agency official or employee who knowingly and willfully discloses protected information to a person or other agency not entitled to receive it or who maintains a records system without publishing a system notice. Additionally, it is a misdemeanor punishable by a fine not to exceed $5,000 for any person, including police personnel, to knowingly and willfully obtain or attempt to obtain a record about a citizen from a Federal agency under false pretenses.

It must be understood the act applies only to records maintained by an agency of the executive branch of the Federal Government. The act does not cover records maintained by Congress, the Federal court system, State and local government agencies, or corporations and other organizations in the private sector.

An exception to this is the act's treatment of uses made of an individual's Social Security Account Number (SSAN). The statute prohibits a Federal, State, or local government agency from denying an individual any right, benefit, or privilege provided by law because of the individual's refusal to disclose his SSAN, unless disclosure was required by law in effect prior to January 1, 1975, to verify an individual's identity. Furthermore, the act requires a Federal, State, or local agency which requests an individual to disclose his SSAN to advise the individual if such disclosure is mandatory or voluntary, by what statutory or other authority the number is being solicited, and what uses will be made of the number.[7]

Even though the law contains these restrictions on the use of an individual's SSAN, Congress did not incorporate any provisions into the statute whereby such requirements can be enforced by either Federal or State law enforcement agencies. All other portions of the act can be enforced through both criminal penalties and civil remedies.

A major provision of the Privacy Act controls the dissemination of personal information maintained by a Federal agency. The law prohibits disclosing a record without the written consent of the subject. However, there are exceptions to this written consent rule:

1) To officers or employees of the same agency which maintains the records, who need the records in the performance of their official duties;
2) Records which are required to be disclosed by the Freedom of Information Act;
3) For purposes compatible with the reasons for which the records were collected, providing that all such uses are published in the *Federal Register* as a part of the records system notice. Under this exception, a Federal law enforcement agency, e.g., the FBI, may disclose information for a law enforcement purpose. This would include disclosure to a State or local police agency to assist in conducting a lawful criminal or intelligence activity;
4) To the Bureau of Census;
5) Records used in nonidentifiable form for statistical purposes;
6) To the National Archives;
7) To other Federal, State, or local government agencies within the United States for a lawful criminal or civil law enforcement activity, if the head of the agency submits a written request which describes the records sought and the criminal or civil law enforcement activity for which the records are needed. This would permit a Federal regulatory agency (also a Federal law enforcement agency, although the latter may disclose the records pursuant to exception 3) to disclose records to a State or local police agency for a law enforcement activity;
8) To any person under emergency circumstances affecting the health or safety of any individual;
9) To any committee or subcommittee of either House of Congress to the extent of a matter within its jurisdiction;
10) To the General Accounting Office in the performance of its official duties; and
11) Pursuant to a lawful order of a court of competent jurisdiction.

State and local criminal justice agencies, such as police departments, sheriff's offices, prosecutors, penal institutions, and parole and probation officers, should experience no difficulty in obtaining criminal justice records from a Federal agency for use in a law enforcement activity. State regulatory agencies, however, may find the Privacy Act restrictions barring access to criminal justice records for use in a regulatory or licensing function unless they obtain the written consent of the individual. This will depend on the rules and regulations of each Federal agency.

Another major provision of the act is an individual's right to request from a Federal agency access to records pertaining to the individual. Unlike the FOIA which gives any person access to all records of a Federal agency, the Privacy Act restricts access to only those records identifiable with the individual making the request. Any person requesting information under the Privacy Act must be a U.S. citizen or an alien admitted for permanent residence.

Once the individual determines what information the agency maintains on him, he can request information believed to be inaccurate, irrelevant, untimely, or incomplete to be amended. A civil action in a U.S. district court may be initiated to compel the agency to amend the record.

There are several Privacy Act exemptions, similar to those of the FOIA, on which an agency can rely to withhold access to information. Two general exemptions permit the Government to withhold information maintained by the Central Intelligence Agency (CIA) and also information maintained by a Federal law enforcement agency, e.g., U.S. Secret Service or the FBI, which was compiled for a criminal investigation. Other specific Privacy Act exemptions permit the Government to withhold the following from access:

1) Records lawfully classified to safeguard national security;
2) Investigatory material compiled for a law enforcement purpose other than criminal, e.g., a civil law enforcement purpose, or which is maintained by a Federal agency, the principal function of which is not law enforcement. Such material cannot be withheld, however, if it was the basis for denying the citizen a right, benefit, or privilege to which he or she would otherwise be entitled under Federal law. When used by the agency as a basis for such action, the citizen must be given access to the records, except to the extent disclosure would reveal the identity of a source who furnished the information in confidence;
3) Records maintained relative to providing protective services to the President;
4) Records required by law to be maintained for statistical purposes;
5) Investigatory material compiled to determine suitability for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent disclosure would reveal a confidential source;
6) Testing or examination material used to determine qualifications for appointment or promotion in the Federal service, the disclosure of which would compromise the testing or evaluation process; and
7) Evaluation material used to determine potential for promotion in the military to the extent that disclosure would reveal the identity of a confidential source.

"While the [Freedom of Information Act] is designed to provide public access to varied and numerous categories of subject matter, the Privacy Act limits access to only those records pertaining to the individual making the request."

As can be seen, the Privacy Act differs somewhat from the FOIA in providing citizen access to Government records. While the FOIA is designed to provide public access to varied and numerous categories of subject matter, the Privacy Act limits access to only those records pertaining to the individual citizen making the request. However, both statutes provide for withholding investigatory records compiled for law enforcement, especially information from a confidential source, including a State or local criminal justice agency. Congress, the executive branch, and the courts recognize the absolute need to preserve the confidentiality of information exchanged between police agencies at the Federal and State level which is essential to their mutual law enforcement mission.

Similar to the FOIA's purpose of "providing for a more informed electorate," the Privacy Act contains certain notice requirements designed to inform the American public of the various types of records maintained by the executive branch. For each system of records maintained by an agency, the law requires the agency to publish in the *Federal Register* a comprehensive notice describing the system. The following information must be included:

1) The name and specific location of where the records are stored;
2) The name of the system manager and the address to which a citizen can direct a request for access to records in the system;
3) The categories of records in the system and the categories of individuals on whom records in the system are maintained;
4) All of the routine uses made of records in the system and the purposes of such uses; and
5) The practices of the agency regarding the storage, retrievability, safeguards, retention, and disposal of records in the system.

In addition to the notice requirements, Federal agencies also must comply with other provisions of the Privacy Act. For example, each agency can maintain only information about a citizen that is both relevant and necessary to accomplish an authorized purpose of the agency. Information describing an individual's exercise of a right guaranteed by the first amendment can be maintained only if authorized by law or by the individual or if it is "pertinent to and within the scope of an authorized law enforcement activity." In addition, prior to disseminating information to persons or agencies outside the executive branch, an agency must make reasonable efforts to assure the accuracy, relevance, timeliness, and completeness of the information.

In addition to the criminal penalties discussed earlier, the Privacy Act contains a provision which permits a citizen to bring a civil action in Federal district court for an agency's failure to comply with any of these requirements. This action may also be initiated if an agency refuses to amend a record at the individual's request or if the agency fails to comply with other provisions of the act in such a way as to have an adverse effect on the individual.

Conclusion

Both the FOIA and the Privacy Act were designed by Congress at a time when the public's trust and confidence in the integrity of its Government were severely shaken by the revelations of the Watergate affair and related instances of official misuse of information about U.S. citizens. In theory, public access to Government information is in full keeping with our open society and should be helpful in curbing official misconduct. But the experience of Federal law enforcement agencies in 8 years of managing the FOIA has shown that the American people might be paying a rather high price for the right to inspect and copy Government records. This is due primarily to the indisputable fact that the criminal element in this country and elsewhere has discovered that the FOIA does not discriminate against it. Records of Federal law enforcement agencies are available in varying degree to anyone who requests access, whether the person is the convict seeking to identify the "snitch" who was responsible for his imprisonment, or the international terrorist trying to determine if his activities have been noticed, or the Mafia don searching for the informant within his organization, or the foreign intelligence agent seeking to undermine the Government's efforts to discover his espionage objectives.

The price being paid, therefore, is the proven reduced efficiency of such agencies as the FBI, DEA, the Secret Service, and others in attempting to accomplish their law enforcement mission. Needed personnel have been diverted from investigative duties to manage the FOIA and Privacy Act programs; tremendous costs of these programs cut into agencies' budgets (over $12 million per year for the FBI alone); and there is always the fear that human error will one day result in the inadvertent disclosure of sensitive information to the wrong person with devastating results.

In addition, there have been numerous examples, such as the two cited at the outset of this article, where paid informants and other sources of information have "dried up" or have shown extreme reluctance to provide the Government with valuable information which would spell the difference between success and failure in meeting a law enforcement objective.

The answer to the question posed in the title of this article is "yes." The present access laws do pose a threat to law enforcement. The threat is not imagined—it is real, it is documented, and the criminal and the subversive both have recognized and taken full advantage of certain weaknesses within the FOIA.

Recognizing this threat, a new law has been introduced in Congress which, if enacted, will amend the FOIA in such a way as to better protect investigative records of the Federal Government. For example, under the proposed legislation, there would be a 5-year moratorium placed on the availability of information collected in organized crime investigations. Foreign nationals no longer would be able to access records maintained by agencies of the U.S. Government, and records of Federal agencies pertaining to informants would be excluded entirely from access by third parties. It is believed enactment of this new law would do much to alleviate some of the current problems faced by law enforcement agencies in complying with the FOIA.

In the meantime, law enforcement must continue to meet the threat; criminal justice agencies at the Federal, State, and local levels cannot afford to throw up their hands in frustration. They must continue to work together to persuade the informant and the ordinary citizen that the Government will exercise every legal means to protect his or her identity. Confronted with the fears of the criminal informant and the Federal judge described above, the law enforcement officer can explain that both the Congress and the courts throughout the country have consistently supported and continue to support the Government's withholding from public access any information provided in confidence. The law enforcement community must be vigilant for signs the FOIA is being misused, and Federal agencies must take every precaution to ensure the law is administered in such a way as to preclude the disclosure of damaging information.

Effective law enforcement can be achieved within an open society, but care must be taken to make certain the rights of the law-abiding are not made subservient to the rights of those breaking the law. **FBI**

Footnotes

[1] 5 U.S.C. § 552.
[2] 5 U.S.C. § 552a.
[3] House Committee on Operations, A Citizen's Guide on How to Use the Freedom of Information Act and the Privacy Act in Requesting Government, Documents H.R. Report No. 95-796, 95th Cong., 1st Sess. 13(1977)
[4] 5 U.S.C. § 552(b)(7).
[5] *The Federal Register*, published daily, contains all the rules and regulations of the executive branch of Government. It may be obtained for a fee from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C.
[6] "A Citizen's Guide," supra, at 16.
[7] Pub. L. 93-579, § 7. (This law is the entire Privacy Act, of which only §3 was codified into 5 U.S.C. §552a.)