

ARTICLES

FREEDOM OF INFORMATION ACT RESPONSE DEADLINES: BRIDGING THE GAP BETWEEN LEGISLATIVE INTENT AND ECONOMIC REALITY*

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INTRODUCTION

The 1974 amendments to the Freedom of Information Act ("FOIA" or "the Act")¹ impose strict deadlines on federal agencies to respond to public requests for government information.² Congress, however, has failed to provide sufficient resources to agencies to enable them to comply with these deadlines, even though many agencies are deluged with FOIA requests.³ As a result, courts generally have not enforced the Act's response deadlines,⁴ and requesters have experi-

1. Freedom of Information Act, 5 U.S.C. § 552 (1988).

2. *Id.* § 552(a)(6).

3. See *Requests, Costs Go Up in 1992 Annual Reports*, ACCESS REP., Mar. 31, 1993, at 3, 3-4 [hereinafter *Requests, Costs Go Up*] (reporting that federal agencies received total of 589,391 FOIA requests in calendar year 1991).

4. See *infra* part III (discussing judicial reluctance to enforce statutory response deadlines).

enced substantial delays in obtaining government information. These delays in many instances have caused severe harm to requesters.⁵

The Clinton Administration has taken notice of agency backlogs of FOIA requests and has implemented a special review of the problem in an effort to eliminate backlogs. On October 4, 1993, President Clinton and Attorney General Reno issued policy memoranda to the heads of agencies regarding FOIA compliance shortcomings. President Clinton, calling the FOIA "a vital part of the participatory system of government," directed federal agencies to "take a fresh look at the administration of the Act" and "to reduce backlogs of Freedom of Information Act requests."⁶ Attorney General Reno explained the existence and cause of FOIA backlogs as follows:

Many Federal departments and agencies are often unable to meet the Act's ten-day time limit for processing FOIA requests, and some agencies—especially those dealing with high-volume demands for particularly sensitive records—maintain large FOIA backlogs greatly exceeding the mandated time period. The reasons for this may vary, but principally it appears to be a problem of too few resources in the face of too heavy a workload. This is a serious problem—one of growing concern and frustration to both FOIA requesters and Congress, and to agency FOIA officers as well.⁷

The Attorney General solicited the input of heads of agencies with respect to their backlogs and their recommendations for improvement with a goal of reducing backlogs over the next year.⁸ She also requested that each agency submit "a letter describing the extent of any present FOIA backlog, FOIA staffing difficulties and any other observations" to the Office of Information and Privacy at the Department of Justice.⁹ Some heads of agencies already have made a strong showing of support for the administration's policy goal.¹⁰

Administration officials recently confirmed that no further personnel or monetary resources will be provided to reduce FOIA

5. See *infra* part IV (explaining that untimely delays can cause harm to aliens facing deportation proceedings and to public by impeding access to information critical to life-threatening circumstances).

6. Memorandum from President William J. Clinton for Heads of Departments and Agencies 1 (Oct. 4, 1993) (on file with *The American University Law Review*).

7. Memorandum from Attorney General Janet Reno for Heads of Departments and Agencies 2-3 (Oct. 4, 1993) (on file with *The American University Law Review*).

8. *Id.* at 2-3.

9. *Id.* at 3; see also *infra* notes 74-90 and accompanying text (discussing agency responses to Attorney General's request).

10. See *Justice Dept. Moves to Change Agency Attitudes*, ACCESS REP., Nov. 10, 1993, at 1, 1-3 (noting that Departments of Defense, Health and Human Services, and Labor, and the Food and Drug Administration have issued supporting memoranda).

backlogs.¹¹ Furthermore, the new policy goal has not been backed up by any substantive changes in the law pertaining to the timing of FOIA responses.¹² To date, FOIA requesters have not experienced improvements in FOIA processing since the issuance of the administration's policy memoranda.¹³ Given the magnitude of the backlogs and incoming requests faced by agencies as shown in this Article, it is probable that although the renewed administration commitment is an encouraging sign, it will be as unsuccessful at eliminating backlogs as were the 1974 FOIA Amendments. Indeed, to the extent the new commitment brings even more FOIA requests into government from previously discouraged requesters, the end result could be even greater backlogs. Without a vastly expanded dedication of resources, efforts to eliminate FOIA backlogs will have to come from new agency methods of processing FOIA requests and amendments to the Act.

This Article makes the following realistic recommendations designed to help bridge the gap between the legislative intent (as well as current administration goals) and the economic reality of the FOIA's response deadlines. First, agencies should process urgent requests for government information ahead of other requests. Second, agencies should process simple and complex requests separately so that complex requests will not unduly delay the processing of simple requests. Third, the Act should be amended to require agencies to complete FOIA requests within twenty business days, as opposed to ten business days. Fourth, specialized FOIA procedures should be adopted by certain agencies that experience high FOIA administrative costs. Fifth, Congress should define the statutory terms "exceptional circumstances" and "due diligence" in accordance with legislative intent of the 1974 amendments. Sixth, agencies should search electronic databases for responsive information. Seventh, agency FOIA performance should be tracked more precisely and the results should be published publicly in the Federal Register. Finally, agencies should be permitted to recoup FOIA fees directly for the purpose of using those funds to improve FOIA

11. See Michael Isikoff, *Reno Eases Guidelines for FOIA*, WASH. POST, Oct. 5, 1993, at A17. This is not surprising in light of the fact that President Clinton and Vice President Gore have pledged to reduce the federal workforce by at least 250,000 employees by the end of fiscal year 1995. See Ann Devroy & Stephen Barr, *Clinton Offers Plan to Fix a "Broken" Government*, WASH. POST, Sept. 8, 1993, at A1.

12. See *Changing Substance Must Follow Changes in Attitude*, ACCESS REP., Nov. 24, 1993, at 3-6 (stating that Attorney General's memorandum "is aimed at changing nothing but attitudes" and it "does not work any substantive change in the law").

13. See Terry Carter, *'Where's the Openness?' Demand FOIA Litigants, Still Kept Waiting*, DAILY JOURNAL, Nov. 17, 1993, at 7.

processing. Because it is unlikely that Congress will fully fund the current Act, notwithstanding the best intentions of the current administration, the practical solution provided by these recommendations should be considered by Congress and the administration.¹⁴

Part I of this Article examines the specific FOIA provisions pertaining to agency response deadlines and the legislative history behind those deadlines. Parts II and III then explore the general failure of agencies to comply with these deadlines and judicial ratification of that delay. In Part IV, the Article presents examples of specific harms experienced by requesters resulting from agency delay, and Parts V and VI examine one case that led to a settlement that accommodated the most critical interests of the requester and the agency. Finally, based in part on that settlement, Part VII proposes recommendations intended to benefit both requesters and agencies by providing a solution to the longstanding problem of FOIA backlogs.

I. THE FREEDOM OF INFORMATION ACT (FOIA)

A. *The Statutory Provisions*

The FOIA, enacted by Congress in 1966,¹⁵ mandates public access to federal agency information¹⁶ subject to certain narrow statutory exemptions.¹⁷ Congress amended the FOIA in 1974 to require

14. Some of these recommendations have been adopted as part of a lawsuit settlement and have been successful in reducing backlogs and ensuring timely FOIA processing. In the month of August 1993, the San Francisco District Office of the Immigration and Naturalization Service completed 457 FOIA requests in an average of eight days. See *Average Age of FOIA Requests Completed and Pending*, INS, Department of Justice (month ending August, 1993). At the end of the month, 114 requests remained pending, with an average completion time of four days. *Id.* This result was achieved by the settlement agreement set forth in the Settlement Agreement and Incorporated Documents, *Mayock v. INS*, 714 F. Supp. 1558 (N.D. Cal. 1989), *rev'd and remanded sub nom. Mayock v. Nelson*, 938 F.2d 1006 (9th Cir. 1991) (No. C-85-5269-CAL.) [hereinafter *Mayock Settlement*]. The full text of the *Mayock Settlement* and its incorporated documents are set forth as an Appendix to this Article.

15. Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C. § 552 (1988)).

16. Freedom of Information Act, 5 U.S.C. § 552(a) (1988). The Act defines an "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." *Id.* § 552(e).

17. *Id.* § 552(b)(1)-(9). The statutory exemptions are: (1) classified materials regarding national defense or foreign policy, (2) internal personnel rules and practices, (3) materials prohibited from disclosure by non-FOIA statutory rules, (4) trade secrets and related information, (5) inter-agency or intra-agency correspondence not made available by law, (6) information that would cause a clearly unwarranted invasion of personal privacy, (7) certain investigatory records compiled for law enforcement purposes, (8) regulatory materials relating to financial institutions, and (9) geological and geophysical information pertaining to wells. *Id.*

federal agencies to respond to requests and produce responsive documents within limited time frames.¹⁸ The amended FOIA requires agencies to make a determination on a FOIA request within ten business days (the "ten-day rule").¹⁹ In the event of narrowly defined "unusual circumstances,"²⁰ the amended FOIA grants agencies an extra ten business days to process a request if the agency provides notice of this extension to the requester.²¹ The amended FOIA also provides that an additional undefined extension may be granted in the discretion of a court, but a federal agency first must prove that it faces "exceptional circumstances" and that it has been processing the FOIA request with "due diligence."²²

B. *The Enactment of the Freedom of Information Act*

While the nation's founders recognized that democracy demanded an informed electorate, for almost 200 years there was no legislation allowing citizens to request government records.²³ In 1946, Congress enacted the Administrative Procedure Act (APA),²⁴ which permitted public inspection of certain government records, but failed to afford a remedy to requesters who were denied access to information.²⁵ In response to dissatisfaction with the limitations of the APA and in a determined effort to create greater public access to records compiled and created by the Federal Government, Congress passed the FOIA

18. Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561 (1974) (codified as amended at 5 U.S.C. § 552 (1988)).

19. 5 U.S.C. § 552(a) (6) (A) (i) (1988). Courts have interpreted this provision to mean that an agency must "either comply or deny a FOIA request within ten working days." *Morrow v. FBI*, 2 F.3d 642, 644 n.5 (5th Cir. 1993); *Open Am. v. Watergate Special Prosecution Force*, 547 F.2d 605, 608-10 (D.C. Cir. 1976).

20. 5 U.S.C. § 552 (a) (6) (B) (i)-(iii). "Unusual circumstances" are: "the need to search for and collect the requested records" from other offices; "the need to search for, collect and appropriately examine a voluminous amount of separate and distinct records"; or "the need for consultation . . . with another . . . agency . . . or two or more components of the agency . . ." *Id.*

21. *Id.* § 552(a) (6) (B).

22. *Id.* § 552(a) (6) (C). The Act itself does not define the terms "exceptional circumstances" or "due diligence."

23. See John Moon, Comment, *The Freedom of Information Act: A Fundamental Contradiction*, 34 AM. U. L. REV. 1157, 1169 (1985) (suggesting that Framers of Constitution intended First Amendment to include right to government access) (citing Letter from James Madison to W.T. Barry (Aug. 4, 1822), reprinted in THE COMPLETE MADISON 337 (S. Padover ed., 1953)).

24. Administrative Procedure Act, ch. 324, § 3, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559 (1988)).

25. See H.R. REP. NO. 1497, 89th Cong., 2d Sess. 5 (1966) (noting that because APA did not provide remedy to force disclosure, improper denials occurred frequently); 120 CONG. REC. 17,016 (1974) (statement of Sen. Kennedy) (recognizing that under APA, administrators had broad discretion to deny information, yet there was no appeal process).

in 1966.²⁶

Nevertheless, the FOIA, as originally enacted, was not entirely successful in its efforts to allow citizens access to government records. Complaints regarding agency performance and testimony during oversight hearings²⁷ led to the 1974 FOIA amendments, originally introduced in 1972.²⁸ Senator Edward Kennedy, a leading sponsor of the bill, addressed the need for amendments, noting that after extensive hearings on the operation of FOIA, a House subcommittee concluded that serious gaps in the language of the law enabled agencies to delay responses, hinder public access, and withhold information from the public.²⁹ Senator Kennedy observed that "the final report of the House Government Operations Committee described the failure of the Act to realize fully its lofty goals because of agency antagonism to its objectives."³⁰ With this problem of noncompliance and antagonism squarely in view, Congress passed the 1974 amendments³¹ to make the promise of FOIA compliance a reality.³²

C. The 1974 Amendments and Their Legislative Intent

One of the central purposes of the 1974 FOIA amendments was to

26. Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C. § 552 (1988)); see Janice Toran, *Information Disclosure in Civil Actions: The Freedom of Information Act and the Federal Discovery Rules*, 49 GEO. WASH. L. REV. 843, 844 (1981) (stating that Congress enacted FOIA to ensure informed electorate). By enacting the FOIA, Congress recognized the wisdom of James Madison, who wrote: "Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both." S. REP. NO. 813, 89th Cong., 1st Sess. 2-3 (1965) (quoting Letter from James Madison to W.T. Barry (Aug. 4, 1882), reprinted in THE COMPLETE MADISON, *supra* note 23, at 337).

27. See *FBI Oversight and Authorization Request for Fiscal Year 1991: Hearings Before the Subcomm. on Civil and Const. Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 3 (1990) [hereinafter *FBI Oversight Hearings*].

28. H.R. 5425, 93d Cong., 1st Sess. (1973).

29. 120 CONG. REC. 17,016 (1974) (statement of Sen. Kennedy). Senator Kennedy was referring to the U.S. Gov't Info. Policies and Practices - Admin. and Operation of the Freedom of Information Act: *Hearings Before the Subcomm. on Gov't Operations*, 92d Cong., 2d Sess. (1972).

30. *Id.*

31. Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561 (1974) (codified as amended at 5 U.S.C. § 552 (1988)).

32. The 1974 FOIA amendments passed as a result of Congress overriding President Gerald Ford's veto of the pertinent bill. President Ford was concerned that the short statutory time frame for responding to requests would cause agencies to be so overburdened with requests that they could not effectively perform their primary duties. See STAFFS OF THE SUBCOMM. ON GOV'T INFO. AND INDIVIDUAL RIGHTS OF THE HOUSE COMM. ON GOV'T OPERATIONS AND SUBCOMM. ON ADMIN. PRAC. AND PROC. OF THE SENATE COMM. ON THE JUDICIARY, 94TH CONG., 1ST SESS., FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (P.L. 93-502) 178, 380, 382, 407, 438-39, 471, 484 (Joint Comm. Print 1975).

expedite FOIA processing by federal agencies.³³ The House Report noted that processing delays often thwarted the public benefit that the Act was intended to produce: "[E]xcessive delay by the agency in its response is often tantamount to denial. It is the intent of this bill that the affected agencies be required to respond to inquiries and administrative appeals within specified time limits."³⁴ The House Report also stated that one of the purposes of the 1974 amendments was to accelerate federal agency responses to requests in an effort to foster the rapid release of information.³⁵ Similarly, the Senate Report cautioned against allowing agencies to follow their own schedules in responding to FOIA requests: "Frequent instances of agencies failing to follow their own regulations militate against allowing them to govern their own performance."³⁶

Because Congress understood that certain FOIA requests would be impossible to respond to within the contemplated time limits, certain automatic extensions were proposed, only one of which passed.³⁷ Congress rejected an automatic thirty-day extension provision narrowly drafted to take into account the special exigencies facing agencies such as the Immigration and Naturalization Service (INS), which at the time processed an average of 90,000 formal requests for records each year.³⁸ The automatic provision that Congress did enact allows for an additional extension of ten business days only.³⁹ The 1974 FOIA amendments also allow for discretionary court-supervised extensions when an agency faces exceptional circumstances and proceeds with due diligence to satisfy the request.⁴⁰

Even though the 1974 amendments provide one automatic extension and one discretionary extension to the ten-day rule, the legislative history is replete with the concerns of Congress regarding the need for agencies to respond to FOIA requests on a timely basis.

33. See 120 CONG. REC. 17,021 (1974) (statement of Sen. Hruska) (stating that bill was designed to remove obstacles that hinder timely FOIA responses).

34. H.R. REP. NO. 876, 93d Cong., 2d Sess. 6 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6271.

35. *Id.* at 2, 1974 U.S.C.C.A.N. at 6271.

36. S. REP. NO. 854, 93d Cong., 2d Sess. 24, 27 (1974); *see also* Hamlin v. Kelley, 433 F. Supp. 180, 182 (N.D. Ill. 1977) (observing that Congress intentionally withdrew agency discretion to delay responses to FOIA requests).

37. S. REP. NO. 854, *supra* note 36, at 27.

38. See S. REP. NO. 854, *supra* note 36, at 26 (stating that special exigencies included need to collect records from various agencies and cities and large volume of requests).

39. 5 U.S.C. § 552(a)(6)(B) (1988).

40. *Id.* § 552(a)(6)(C). The provision reads, in pertinent part: "If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records." *Id.*

Speaking of the proposed extensions, Senator Kennedy confirmed that the "language of these escape clauses was not lightly arrived at . . . [and w]e do not expect them to be lightly invoked."⁴¹ The extensions were to be the rare exception and not the rule. Senator Edmund Muskie also commented on the importance of timely responses: "[T]he bill will require agencies to be prompt in responding to requests for access to information. It will bar the stalling tactics which too many agencies have used to frustrate requests for material until the material loses its timeliness to an issue under public debate."⁴²

The legislative history of the 1974 FOIA amendments also shows that Congress did not intend for the exceptional circumstances/due diligence provision to apply to expected agency backlogs. The Senate Report stated that agencies could not use the exceptional circumstances/due diligence exception simply because they processed "large volumes of requests," handled "novel questions of legal interpretation," or "had been unable to regularly meet standard deadlines."⁴³ Indeed, in a concurring opinion in *Open America v. Watergate Special Prosecution Force*,⁴⁴ Judge Leventhal concluded from the legislative history that "[i]t would be anomalous to interpret the 'exceptional circumstances' provision . . . to permit open-ended approval of agency failure to meet the Act's specific time limits, when a much more rigorous standard for granting a limited 30-day extension was rejected as too lax."⁴⁵ Thus, although the 1974 amendments allow an automatic ten-day extension and provide the possibility of a further court-ordered extension, Congress expected that agencies and courts would rarely use these extensions.⁴⁶

II. GENERAL AGENCY INABILITY TO COMPLY WITH THE TEN-DAY RULE

A. *The Refusal of Congress to Fund the 1974 Amendments*

Many agencies strongly opposed the enactment of the 1974 FOIA

41. 120 CONG. REC. 17,020 (1974).

42. *Id.* at 17,022.

43. S. REP. NO. 854, *supra* note 36, at 26.

44. 547 F.2d 605 (D.C. Cir. 1976).

45. *Open Am. v. Watergate Special Prosecution Force*, 547 F.2d 605, 618 (D.C. Cir. 1976) (Leventhal, J., concurring) (citing *Hayden v. United States Dep't of Justice*, 413 F. Supp. 1288, 1289 (D.D.C. 1976)).

46. S. REP. NO. 854, *supra* note 36, at 27 (stating that extensions will only be given under "unusual circumstances" and only to the extent "reasonably necessary"). The Senate Report noted that the need to research and collect records from different facilities within an agency would not constitute such a circumstance. *Id.*

time deadlines because of limited government resources and personnel. These agencies feared that they would have to shift personnel from matters within their primary responsibilities to FOIA processing teams.⁴⁷ They also argued that if they added additional staff to enable them to respond within the FOIA's time limits, the added costs of such measures would total many millions of dollars.⁴⁸

Congress considered but rejected the agencies' requests for additional funding, reasoning that the operating budgets of the agencies should have been sufficient to absorb additional costs related to the implementation of the FOIA amendments.⁴⁹ Indeed, the House Committee on Government Operations projected that the additional funding needed to meet the new deadlines for *all agencies* would total \$50,000 for 1974 and \$100,000 for each of the succeeding five years.⁵⁰ Congress therefore appropriated no additional resources to implement the 1974 FOIA amendments.⁵¹ Yet, as the *Open America* Court pointed out, the actual cost of implementing the FOIA amendments for the FBI alone in fiscal years 1974, 1975, and 1976 was \$160,000, \$462,000 and \$2,675,000, respectively.⁵² For calendar year 1991, agencies reported total FOIA costs of \$91,405,744, which represented an increase of \$8,320,054 from calendar year 1990, when total costs were \$83,085,690.⁵³ Congress' failure to fund FOIA adequately led to backlogs and delays in many agencies, including the State Department, the INS, the Federal Bureau of Investigation, and other components of the Department of Justice.⁵⁴

B. State Department Backlogs and Delays

Statistics recently provided to the author pursuant to FOIA requests show that the State Department has had sizeable backlogs of FOIA

47. See H.R. REP. NO. 876, *supra* note 34, at 17, 1974 U.S.C.C.A.N. at 6279 (statement of Malcolm D. Hawk, Acting Assistant Attorney General) (expressing Justice Department's opposition to 1974 amendments).

48. See H.R. REP. NO. 876, *supra* note 34, at 22, 1974 U.S.C.C.A.N. at 6283 (statement of Leonard Niederlehner, Acting General Counsel, Department of Defense) (estimating enormous costs of complying with 1974 amendments).

49. H.R. REP. NO. 876, *supra* note 34, at 9, 1974 U.S.C.C.A.N. at 6274-75.

50. H.R. REP. NO. 876, *supra* note 34, at 9, 1974 U.S.C.C.A.N. at 6275.

51. H.R. REP. NO. 876, *supra* note 34, at 9, 1974 U.S.C.C.A.N. at 6274-75 ("Activities required by this bill should be carried out by Federal agencies with existing staff, so that significant amounts of additional funds will not be required.").

52. *Open Am. v. Watergate Special Prosecution Force*, 547 F.2d 605, 612 (D.C. Cir. 1976).

53. *Requests, Costs Go Up*, *supra* note 3, at 3 (reporting on results provided to Congress pursuant to 5 U.S.C. § 552(d) (1988)).

54. See, e.g., *FBI Oversight Hearings*, *supra* note 27, at 3 (statement of Emil P. Moschella, Chief, Freedom of Information and Privacy Acts Section, FBI) (discussing reasons for FBI's FOIA backlog). See also *infra* parts II.B-D.

requests and has experienced tremendous delays in processing requests. From 1989 through 1993, State Department backlogs ranged from a low of 1565 FOIA requests to a high of 2823 requests.⁵⁵ During that period, the number of days to complete requests ranged from 243 days to 483 days.⁵⁶

C. *INS Backlogs and Delays*

Although the INS annually processed at least 90,000 FOIA requests commencing in 1974,⁵⁷ the funds recently available for INS information and records management activities (only a small portion of which goes to FOIA processing) totalled less than five percent of the agency budget.⁵⁸ One INS monthly report reveals that practically all the INS offices nationwide fail generally to comply with the ten-day rule.⁵⁹ Of the forty-six INS offices that completed at least ten requests in August 1993, only six complied generally with the ten-day rule.⁶⁰ One of those six offices was the San Francisco District Office,

55. The complete statistics for these years are provided in the table below.

STATE DEPARTMENT STATISTICS				
<i>Year</i>	<i>New Requests</i>	<i>Completions</i>	<i>Average Days to Complete</i>	<i>Backlog of Requests</i>
1989	1560	2184	483	1565
1990	1570	1513	329	1615
1991	2071	1847	243	1823
1992	2234	1320	264	2465
1993(projected)	2232	1956	265	2823

Submission of Statistics from Department of State to Department of Justice, Office of Information and Privacy (Nov. 1, 1993) (on file with *The American University Law Review*).

56. *Id.*

57. 120 CONG. REC. 17,020 (1974) (statement of Sen. Kennedy).

58. AUDIT STAFF, U.S. DEP'T OF JUSTICE, SPECIAL AUDIT OF THE INS 4 (1989). Agencies not only have limited FOIA resources, but some agencies, like the INS, admittedly make poor use of the resources they do have. For example, in one year, the INS purchased Chrysler New Yorker automobiles, used chartered jets, and inappropriately granted overtime hours to its employees. *Id.* at 22-31.

59. *Average Age of FOIA Requests Completed and Pending*, *supra* note 14, at 1-3.

60. *Average Age of FOIA Requests Completed and Pending*, *supra* note 14, at 2-3. The magnitude of the problem is highlighted by reviewing the tracking data for just some of the INS offices for

which was obligated to comply with the ten-day rule by an injunction⁶¹ and a subsequent settlement agreement after appeal.⁶²

Information recently provided to the author pursuant to FOIA requests shows that the current average INS response time to a FOIA request is 85 days.⁶³ The INS also has 12,536 pending requests with 2636 requests pending for more than one year, 1420 requests pending for up to one year, 1575 requests pending for up to six months, and 6905 requests pending for up to three months.⁶⁴

the month ending August 1993. *Id.*

INS FOIA STATISTICS				
INS Office	Total Completed	Average Days to Complete	Total Pending	Average Days Pending
Anchorage	8	168	17	177
Buffalo	89	89	267	99
Chicago	42	32	231	72
Cleveland	33	64	110	80
Houston	150	39	253	42
Indianapolis	6	341	44	141
Miami	661	41	381	26
Newark	174	46	203	45
New Orleans	15	59	147	86
Philadelphia	88	50	179	42
Portland	42	112	48	61
Seattle	53	142	268	171

Id.

61. *Mayock v. INS*, 714 F. Supp. 1558, 1568 (N.D. Cal. 1989), *rev'd and remanded sub nom. Mayock v. Nelson*, 938 F.2d 1006 (9th Cir. 1991).

62. *See Mayock Settlement*, *supra* note 14.

63. *See* Memorandum from Jack H. Weil, Associate Counsel to the Director, Executive Office of Immigration Review, to Margaret Irving, Associate Director, Office of Information and Privacy, Department of Justice (Oct. 20, 1993) (on file with *The American University Law Review*).

64. *Id.*

D. *FBI Backlogs and Delays*

In response to the FBI's increasing delays in responding to FOIA requests, Congress in 1990 called on agency officials to explain the backlog.⁶⁵ The Chief of the FBI's FOIA unit testified that the number of requests the FBI had received increased each year, from 11,738 requests in 1983 to 15,593 in 1989.⁶⁶ Further, the FBI's backlog of requests had increased from 5021 in 1982 to 9002 in 1990, and the average response time increased from 180 days in 1982 to 340 days in 1990.⁶⁷ In fact, as the number of FOIA requests had increased, the staff assigned to handle the requests had decreased, from 224 people in 1982 to 193 in 1990.⁶⁸ The FBI noted that there were "no additional funds for FOIA compliance,"⁶⁹ resulting in delays of more than ten years in extreme cases.⁷⁰

Worthy of note, and of great concern, is the fact that an increasing number of requests processed by the FBI were completed without producing any records.⁷¹ Indeed, the FBI closed seventy-eight per-

65. See *FBI Oversight Hearings*, *supra* note 27, at 2 (statement of Emil P. Moschella, Chief, Freedom of Information and Privacy Acts Section, FBI) (discussing problems encountered in efforts to reduce backlog of FOIA requests); see also Seth Rosenfeld, *Keeping Secrets: The FBI's Information Bottleneck*, 31 COLUM. JOURNALISM REV. 14, 14 (1992) (commenting that due to backlog, FBI frequently closes FOIA requests for administrative reasons without releasing any information). Mr. Rosenfeld, a reporter for the San Francisco Examiner, obtained internal FBI information and figures in the course of a FOIA lawsuit he brought independently against the FBI in connection with a book he is writing. *Id.*

66. See *FBI Oversight Hearings*, *supra* note 27, at 8 (statement of Emil P. Moschella, Chief, Freedom of Information and Privacy Acts Section, FBI) (providing figures to show increase of FOIA requests over past 10 years).

67. *FBI Oversight Hearings*, *supra* note 27, at 14 (statement of Emil P. Moschella, Chief, Freedom of Information and Privacy Acts Section, FBI).

68. *FBI Oversight Hearings*, *supra* note 27, at 18 (statement of Emil P. Moschella, Chief, Freedom of Information and Privacy Acts Section, FBI).

69. *FBI Oversight Hearings*, *supra* note 27, at 23 (statement of Emil P. Moschella, Chief, Freedom of Information and Privacy Acts Section, FBI). The FOIA unit of the FBI received \$8.2 million in funding in 1982 and \$9.1 million in funding in 1990, an increase of only \$.9 million over ten years. Rosenfeld, *supra* note 65, at 14. Although the total funding of the FBI nearly tripled in that time, the Bureau did not request any additional funds for FOIA compliance. *Id.*

70. See *FBI Oversight Hearings*, *supra* note 27, at 41 (statement of David J. Garrow, Professor of Political Science, City College of New York and City University Graduate Center) (noting from personal experience that appeals of decisions to deny information can take up to 10 years).

71. See Rosenfeld, *supra* note 65, at 14 (demonstrating that in many cases, FOIA responses from FBI did not result in any disclosure of information).

cent of its 1990 requests by not producing documents.⁷² The FBI asserted that these requests were flawed or that responsive documents did not exist.⁷³ Current statistics reveal that the FBI's average time to respond to FOIA requests is now 517 calendar days when records are reviewed and 204 calendar days for all requests.⁷⁴

E. Backlogs and Delays in Other Agencies

Information recently provided to the author by the Department of Justice reveals current backlogs and delays at other agencies and other Department of Justice divisions. The Department of Agriculture has a backlog of 640 requests.⁷⁵ Amtrak processes requests between ten and 300 days.⁷⁶ The Consumer Product Safety Commission has a

⁷² Rosenfeld, *supra* note 65, at 14. The chart set forth below is based on information that Mr. Rosenfeld obtained through discovery in his FOIA suit. *Id.*

FIGURES PRESENTED TO CONGRESS BY THE FBI IN 1990								
Year	FOIA Unit Funding (Millions)	FOIA Unit Staff	New Requests	Backlogged Requests	Average Response Time (Days)	Total Requests Closed	Closed by Processing Records	Closed without Processing Records
1982	\$ 8.2	224	N/A	5021	180	12,804	4574	8230
1983	\$ 7.8	216	11,738	5380	200	11,504	4102	7402
1984	\$ 7.8	210	12,092	4495	227	11,954	4382	7572
1985	\$ 8.4	204	11,361	5116	222	10,854	4149	6705
1986	\$ 8.3	203	12,982	6547	232	11,761	4168	7593
1987	\$ 8.6	198	13,676	7917	250	12,535	4134	8401
1988	\$ 9.1	205	16,496	9619	288	14,795	4135	10,660
1989	\$ 9.6	191	15,593	9813	326	16,733	4450	12,283
1990	\$ 9.1	193	N/A	9002	340	18,981	4084	14,897

Id.

⁷³ Rosenfeld, *supra* note 65, at 14. Although FOIA requesters seek responses on a more rapid basis from agencies, flat rejections to requests for information, even if provided on a timely basis, are of little value unless a statement is provided that no records exist.

⁷⁴ FBI Response to FOIPA Backlog Questions from the Office of Information and Privacy, Department of Justice (Oct. 20, 1993) (on file with *The American University Law Review*).

⁷⁵ Letter from ALI Webb, Director of Public Affairs, Department of Agriculture, to Richard L. Huff and Daniel J. Metcalfe, Office of Information and Privacy, Department of Justice 1 (Nov. 9, 1993) (on file with *The American University Law Review*).

⁷⁶ Letter from Medaris Oliveri, FOIA Officer, Amtrak, to Richard L. Huff and Daniel J. Metcalfe, Office of Information and Privacy, Department of Justice 1 (Nov. 3, 1993) (on file with

backlog of 1158 requests; 598 have been pending for more than six months, 306 have been pending for two to five months, and 254 have been pending for approximately one month, with the oldest request pending since 1990.⁷⁷ In 1993, the Environmental Protection Agency responded to 19,535 requests after the expiration of the ten-day limit, with 1670 of those responses more than thirty days late.⁷⁸ The EPA also experiences a backlog of 221 FOIA appeals, including six pending since 1990, forty-six pending since 1991, and seventy-six from 1992.⁷⁹ The Federal Emergency Management Agency has one request pending since 1990, one request pending since 1991, eighteen pending since 1992, and nine overdue requests for 1993.⁸⁰ The Federal Reserve Board has a backlog of fifty-one requests, with eight older than 110 days, and fourteen between sixty-one and 110 days old.⁸¹ The General Services Administration has an average response time of sixteen working days, with two requests pending since 1990.⁸² The United States Information Agency has a backlog of eighty-five requests, with two pending since 1990 and three pending since 1992.⁸³ The United States Postal Service has a backlog of seventy-five requests within the Inspection Service and a backlog of twenty-five requests within the Procurement Section.⁸⁴

With respect to the Department of Justice, the Federal Bureau of Prisons has 418 requests older than thirty days, with 113 from 1992.⁸⁵

The American University Law Review).

77. Letter from Todd A. Stevenson, FOIA Officer, Consumer Product Safety Commission, to Richard L. Huff and Daniel J. Metcalfe, Office of Information and Privacy, Department of Justice 1 (Nov. 3, 1993) (on file with *The American University Law Review*).

78. Memorandum from Jeralene B. Green, FOIA Officer, Environmental Protection Agency, to Richard L. Huff and Daniel J. Metcalfe, Office of Information and Privacy, Department of Justice 2 (Nov. 3, 1993) (on file with *The American University Law Review*).

79. *Id.*

80. Memorandum from FOIA Specialist, Federal Emergency Management Agency, to Richard L. Huff and Daniel J. Metcalfe, Office of Information and Privacy, Department of Justice 2 (Nov. 3, 1993) (on file with *The American University Law Review*).

81. Letter from William W. Wiles, Secretary, Board of Governors of the Federal Reserve, to Daniel J. Metcalfe, Office of Information and Privacy, Department of Justice 1 (Nov. 9, 1993) (on file with *The American University Law Review*).

82. Letter from Mary L. Cunningham, FOIA Officer, General Services Administration, to Richard L. Huff and Daniel J. Metcalfe, Office of Information and Privacy, Department of Justice 1 (Nov. 2, 1993) (on file with *The American University Law Review*).

83. Memorandum from Lola L. Secora, FOIA Officer, United States Information Agency, to Richard L. Huff and Daniel J. Metcalfe, Office of Information and Privacy, Department of Justice 2 (Nov. 3, 1993) (on file with *The American University Law Review*).

84. Letter from Betty E. Sherriff, USPS Records Officer, United States Postal Service, to Richard L. Huff and Daniel J. Metcalfe, Office of Information and Privacy, Department of Justice 1-2 (Nov. 5, 1993) (on file with *The American University Law Review*).

85. Memorandum from George E. Pruden II, Associate General Counsel, Federal Bureau of Prisons, to Richard L. Huff and Daniel J. Metcalfe, Office of Information and Privacy, Department of Justice 2 (Oct. 20, 1993) (on file with *The American University Law Review*).

The Civil Rights Division reports a backlog of eighty-eight requests, with response delays ranging from one month to fifteen years.⁸⁶ The Criminal Division has three requests that are five years old, 202 requests that are one year old, fifty-six requests that are six months old, and 328 requests that are one month old.⁸⁷ The Drug Enforcement Administration has thirty-seven requests older than one year and fifty-three requests older than six months.⁸⁸ The Marshals Service reports that it processes requests on average in four months, and has thirty requests that are five years old, fifty-three requests that are a year old, 342 requests that are six months old, and thirty-two requests that are a month old.⁸⁹ The Tax Division processes requests in an average of one month, but it has twelve requests that are more than a year old and fifty-nine requests that are more than ten months old.⁹⁰

F. Agencies Generally Are Inundated with FOIA Requests

Many other agencies are deluged with FOIA requests, a fact that makes compliance with the ten-day rule, in the face of current budgetary constraints, a practical impossibility. Agencies and departments together received 589,391 FOIA requests in calendar year 1991,⁹¹ an increase of 98,092 requests from calendar year 1990, when they received 491,299 requests.⁹² Further, departments and agencies were inundated with FOIA requests in 1992. For example, the Department of Health and Human Services received 142,610 requests,⁹³ the Department of Defense received 121,144 re-

86. Memorandum from Nelson D. Hermilla, Chief, FOI/PA Branch, Civil Rights Division, to Peggy Irving, Associate Director, Office of Information and Privacy, Department of Justice 2 (Oct. 27, 1993) (on file with *The American University Law Review*).

87. Memorandum from Marshall A. Williams, Chief, FOI/PA Unit, Office of Enforcement Operations, Criminal Division, to Office of Information and Privacy, Department of Justice 3-4 (undated document on file with *The American University Law Review*).

88. Memorandum from Christopher Bradley, Chief, Operations Unit, Drug Enforcement Administration, to Peggy Irving, Associate Director, Office of Information and Privacy, Department of Justice (Oct. 19, 1993) (on file with *The American University Law Review*).

89. Memorandum from Florastine P. Graham, FOI/PA Officer, Office of General Counsel, United States Marshals Service, to Margaret Ann Irving, Acting Deputy Director, Office of Information and Privacy, Department of Justice 1 (Oct. 20, 1993) (on file with *The American University Law Review*).

90. Memorandum from Pamela J. Martin, Tax Division, to Margaret Irving, Office of Information and Privacy, Department of Justice (undated document on file with *The American University Law Review*).

91. See *Requests, Costs Go Up*, *supra* note 3, at 3-4 (reporting on agency results of FOIA requests provided to Congress pursuant to 5 U.S.C. § 552(d) (1988)).

92. *Requests, Costs Go Up*, *supra* note 3, at 3-4.

93. DEPARTMENT OF HEALTH AND HUMAN SERVICES, FREEDOM OF INFORMATION ACTIVITIES ANNUAL REPORT (1992).

quests,⁹⁴ the Department of Justice received 88,154 requests,⁹⁵ and the Environmental Protection Agency received 41,159 requests.⁹⁶

G. Agencies Can Process Requests Rapidly in Specific Instances: The Clinton Passport File Request

Although agencies generally do not have the resources to comply with the ten-day rule, agencies have shown that they are capable of compliance in special instances when it serves government objectives. A recent noteworthy example is the handling by the State Department of FOIA requests concerning then-presidential candidate Clinton's passport files.⁹⁷ Apparently fueled by Republican allegations that Mr. Clinton considered renouncing his American citizenship to avoid the military draft while he was a Rhodes scholar in England, several reporters made FOIA requests in late September 1992 for Mr. Clinton's passport and other files.⁹⁸

These FOIA requests did not follow the normal processing trail through the State Department, where responses to requests are typically measured in months and years. These requests apparently were routed to the Assistant Secretary for Consular Affairs, a political appointee with ties to the former White House Chief of Staff.⁹⁹ The Assistant Secretary for Consular Affairs then apparently personally arranged a thorough review of records in storage at Suitland, Maryland and at the U.S. embassies in London, England and Oslo, Norway.¹⁰⁰ Three high-ranking career officials from the State Department apparently spent an entire evening searching through records for files on Mr. Clinton and Mr. Clinton's mother.¹⁰¹

94. OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE, FREEDOM OF INFORMATION ACT ANNUAL REPORT (1992).

95. Letter from Webster L. Hubbell, Associate Attorney General, to Vice President of the United States 2 (Aug. 19, 1993) (on file with *The American University Law Review*).

96. ENVIRONMENTAL PROTECTION AGENCY, 1992 ANNUAL REPORT ON FREEDOM OF INFORMATION ACTIVITIES (1993).

97. See *FOIA Becomes Issue in Campaign*, ACCESS REP., Oct. 28, 1992, at 3, 3 (reporting on FOIA request for Clinton's files); Michael Isikoff & Walter Pincus, *Official Dismissed in Passport Search*, WASH. POST, Nov. 11, 1992, at A1 (reporting that State Department official was dismissed for improperly expediting request for Clinton's files); Walter Pincus, *White House Implicated Four Days After Firing*, WASH. POST, Nov. 17, 1992, at A1 (reporting that State Department official claimed White House had ordered inquiry into Mr. Clinton's files); Eric Schmitt, *State Department Admits Violating Own Rules in Clinton File Search*, N.Y. TIMES, Oct. 16, 1992, at A22 (reporting that request was not processed through normal channels).

98. Schmitt, *supra* note 97, at A22. The requests were made by two news organizations, the Associated Press and Hearst newspapers. *Id.*

99. See Schmitt, *supra* note 97, at A22 (noting that FOIA requests for Clinton's files received special attention and were expedited).

100. Isikoff & Pincus, *supra* note 97, at A6.

101. Michael Isikoff & Walter Pincus, *Clinton's Mother Subject of File Search*, WASH. POST, Oct. 22, 1992, at A1, A11.

When first asked about the peculiarities, a State Department spokesperson claimed that the requests had met agency criteria for expedited review because of their relation to the upcoming presidential election.¹⁰² The Departments of Justice and State eventually admitted that the expedited processing of the requests had been a mistake under the circumstances.¹⁰³ Whether or not this expedited procedure truly was a mistake, it shows that agencies can comply with the FOIA time deadlines when it suits government interests.¹⁰⁴

III. THE COURTS RATIFY AGENCY DELAY

A. *The Majority Opinion in the Open America Case*

Since enactment of the 1974 amendments, agencies, citing their lack of resources, have used the exceptional circumstances/due diligence provision as a blanket excuse for failure to comply with the ten-day rule.¹⁰⁵ They frequently claim exceptional circumstances when backlogs of FOIA requests exist, and they typically claim that first-in, first-out processing of FOIA requests constitutes due diligence.¹⁰⁶ FOIA processing delays are caused in part by limited government resources and by an agency perception that FOIA responses are not within an agency's core mission.¹⁰⁷ As a result, compliance with FOIA's ten-day rule has become the exception rather than the norm, and ironically, the condition of "exceptional circumstances" has become the norm.

102. Michael Isikoff & Walter Pincus, *Aide Sought Prompt Search of Clinton's Files, State Memo Called Data "Time Sensitive"*, WASH. POST, Oct. 15, 1992, at A1, A9. The State Department did not expedite other pending FOIA requests regarding President Bush, Vice President Quayle, presidential candidate Perot, vice presidential candidate Stockdale, or vice presidential candidate Gore. *Nation Magazine v. Department of State*, 805 F. Supp. 68, 70-71, 74 (D.D.C. 1992) (declining to expedite requests because of harm that would have been caused by further delay to other preexisting requests and because State Department's policy of first-in, first-out processing of FOIA requests satisfied due diligence requirement).

103. See Schmitt, *supra* note 97, at A22 (reporting that Assistant Secretary for Consular Affairs said that "low level people had erred in classifying the request for expedited handling . . . such classification is for situations where somebody's going to die or get injured, or if somebody's Constitutional rights are going to be violated by any delay").

104. See, e.g., *Average Age of FOIA Requests Completed and Pending*, *supra* note 14, at 3 (showing that San Francisco INS District Office has been in compliance with 10-day rule since issuance of injunction requiring compliance).

105. See, e.g., *Mayock v. INS*, 714 F. Supp. 1558, 1564-65 (N.D. Cal. 1989), *rev'd and remanded sub nom. Mayock v. Nelson*, 938 F.2d 1006 (9th Cir. 1991).

106. *Id.* at 1568 (holding that first-in, first-out processing policy did not constitute due diligence because INS did not prioritize requests needed for immigration proceedings). *But see Exner v. FBI*, 542 F.2d 1121, 1123 (9th Cir. 1976) (holding first-in, first-out consideration of requests reasonable).

107. See, e.g., H.R. REP. NO. 876, *supra* note 34, at 22, 1974 U.S.C.C.A.N. at 6279 (statement of Malcolm D. Hawk, Acting Assistant Attorney General) (suggesting that in order to comply, staff would have to be transferred out of sections within agency's core mission).

Because federal agencies were unable to meet the deadlines of the 1974 amendments, disputes advanced through the federal court system regarding the applicability of the exceptional circumstances/due diligence provision. The most influential case to interpret this provision is *Open America v. Watergate Special Prosecution Force*,¹⁰⁸ which, depending on one's point of view, either gutted the 1974 amendments or granted federal agencies well-deserved relief from impractical FOIA deadlines.¹⁰⁹

In *Open America*, a law professor, law students, and a public interest group sought disclosure of government records regarding the involvement of the former Acting Director of the FBI, L. Patrick Gray, in the Watergate scandal.¹¹⁰ The FBI noted in its response to the FOIA request that it had a backlog of 5137 previously submitted requests and that it was in the process of completing 1084 of those requests.¹¹¹ At the time of the appellate decision, the FBI had located 38,000 pages of documents responsive to the particular request that it believed were deserving of special review; included in this group were at least 9800 pages that appeared to be directly on point.¹¹² The number of FOIA requests to the FBI had increased from 447 in 1974 to 13,875 in 1975, an increase of 3000% in a single year.¹¹³ The number of requests received in 1975 far exceeded the number of requests anticipated by Congress in the authorization process for that year.¹¹⁴ Upon receiving notice of the requesters' appeal, the FBI stated that it would continue to process FOIA requests in the order in which they were received.¹¹⁵

108. 547 F.2d 605 (D.C. Cir. 1976).

109. Before *Open America*, there was no precise consensus as to what constituted the exceptional circumstances and due diligence required to permit a court-ordered suspension of the 10-day rule. Within the D.C. Circuit, the district court was divided on the issue. In *Hayden v. United States Dep't of Justice*, 413 F. Supp. 1285, 1288-89 (D.D.C. 1976), the court was not persuaded that a claim of many uncompleted requests and court orders compelling compliance constituted exceptional circumstances. The *Hayden* court also could not find due diligence in light of the agency's request for a four-year suspension of the 10-day rule. *Id.* at 1288. Nevertheless, the court allowed the agency three and one-half months from the date of the decision to produce the requested documents, approximately 17 months after the plaintiff submitted his FOIA request. *Id.* at 1289. In *Cleaver v. Kelley*, 415 F. Supp. 174, 176 (D.D.C. 1976), however, the court ruled that a request covering extensive information, at least 29 volumes containing about 200 pages each, coupled with an unpredictable backlog of FOIA requests, constituted exceptional circumstances, and that the agency's practice of responding on a first-in, first-out basis showed due diligence. *Id.*

110. *Open Am. v. Watergate Special Prosecution Force*, 547 F.2d 605, 608 (D.C. Cir. 1976).

111. *Id.*

112. *Id.* at 612.

113. *Id.* at 617 n.3 (Leventhal, J., concurring); see also *supra* notes 50-52 and accompanying text (discussing estimated and actual costs of implementing 1974 FOIA amendments).

114. *Open Am.*, 547 F.2d at 608.

115. *Id.*

The requesters filed suit to compel production.¹¹⁶ The requesters noted no special need for the documents;¹¹⁷ instead, they argued that the plain meaning of the FOIA required the agency to process the request within the strict time limits of the 1974 amendments.¹¹⁸ The requesters declined to challenge the FBI's method of processing requests or, according to the appellate opinion, to argue that the FBI should have utilized more personnel to process FOIA requests "given its present budgetary limitations."¹¹⁹ The requesters successfully convinced the district court that their plain meaning interpretation was correct.¹²⁰ On appeal, however, the panel majority adopted a broad rule that has served to justify agency delay in subsequent cases.¹²¹

The *Open America* panel majority focused on the FBI's backlog of FOIA requests, the erroneous congressional projections regarding the implementation costs of the 1974 FOIA amendments, and the Act's legislative history to find that the FBI faced exceptional circumstances.¹²² The FBI's first-in, first-out method of processing requests led the majority to find that the agency acted with due diligence.¹²³ The *Open America* panel majority expressed concern about the other 5137 requesters who would have experienced further FOIA processing delays by an order requiring the FBI to expedite the request at issue.¹²⁴ The *Open America* panel majority noted that the "fulfillment

116. *Id.*

117. *Id.* at 609.

118. *Id.* Apparently the requesters deliberately chose this course of action. As explicitly noted in the majority opinion:

There is some indication that the [requesters] . . . are desirous of making this a test case on subsection (a)(6)(A). Accordingly, they have not alleged any facts which would bolster their claim, preferring instead to rely on the bare words of the statute in an effort to secure a decision favorable to the meaning they ascribe to it.

Id. at 609 n.9. Perhaps the requesters did not set up the ideal test case, because their request was extremely broad (seeking all information relating to the director of the FBI and Watergate), they immediately went to court when the response was not completed on time, they did not challenge government affidavits concerning government response capabilities, and the request could not possibly have been completed within 10 business days. *See id.* at 614-15.

119. *Id.* at 614.

120. *Id.* at 609.

121. *See id.* at 616.

122. *See id.* at 610-13, 616 (concluding that under such circumstances, court has jurisdiction to grant additional time to agency).

123. *See id.* at 612-16.

124. *Id.* at 614-15. The majority explained its holding as follows:

[W]e interpret Section 552(a)(6)(C) to mean that "exceptional circumstances exist" when an agency, like the FBI here, is deluged with a volume of requests for information vastly in excess of that anticipated by Congress, when the existing resources are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A), and when the agency can show that it "is exercising due diligence" in processing the requests. In such a situation, in the language of subsection (6)(C), "the court may retain jurisdiction and allow the agency additional

of the objectives of the Freedom of Information Act is a matter in which Congress has shown keen interest and exercised continuous oversight."¹²⁵ According to the majority, if the agency's response time "is not satisfactory to Congress, and the obvious cause is a lack of available resources considering the agency's other primary functions, the equally obvious remedy is for Congress to supply the necessary resources and to designate their use for FOIA purposes."¹²⁶

B. The Concurring Opinion in the Open America Case

Although agreeing with the majority's result, Judge Harold Leventhal was troubled by dicta presented in the majority opinion.¹²⁷ In his concurring opinion, Judge Leventhal specifically cautioned against the use of the majority opinion as a blanket excuse by the government to vitiate the FOIA's time requirements:

The Justice Department has protested to Congress about the difficulty of meeting the FOIA's new time limits on administrative processing of requests under the Act; failing to get a remedy from Congress, the Department has apparently chosen this case to seek broad court relief. The majority has obliged—and . . . delivers dictum accepting the broad premise for relief asserted by the Department of Justice, dictum in which I do not join.¹²⁸

Judge Leventhal concluded on the facts of the case that exceptional circumstances existed because the government had proved that FOIA requests had increased at a rate that had been "unforeseen and unforeseeable," and as a result, training and personnel hiring lagged, causing a backlog.¹²⁹ Judge Leventhal commented that an agency might show due diligence by applying for additional resources from Congress to handle FOIA requests, disgorging part of the documents reviewed as determinations are made on those records, and deferring consideration of any voluntary actions of disclosure that are plainly outside the scope of the FOIA.¹³⁰

time to complete its review of the records" The good faith effort and due diligence of the agency to comply with all lawful demands under the Freedom of Information Act in as short a time as is possible by assigning all requests on a first-in, first-out basis, except where exceptional need or urgency is shown, is compliance with the Act.

Id. at 616.

125. *Id.* at 615 n.17.

126. *Id.*

127. *See id.* at 616 (Leventhal, J., concurring).

128. *Id.* (footnote omitted).

129. *Id.* at 617 (Leventhal, J., concurring).

130. *Id.* at 618 (Leventhal, J., concurring).

Judge Leventhal criticized the majority because their opinion "range[d] more broadly than [was] necessary to decide the issue in this appeal . . . [and] turn[ed] the burden of proof mandated by Congress upside down":

No longer must the Government make out a case of exceptional circumstances; instead the *plaintiff* will be required to show a "genuine need and reason for urgency" This seems to me a clear departure from the very premise of the section we are engaged in interpreting. It is not supported by statutory language, and indeed seems in conflict with the entire remedial thrust of the 1974 amendments to FOIA.¹³¹

Judge Leventhal obviously was concerned about shifting the decision whether to grant FOIA extensions from a supervising court, as the statute provides, to the responding agency.

Judge Leventhal further noted that because the government was excused from FOIA's specific time provisions on the particular facts of the case, "there is no need to seek to forecast the reasonableness of [the government's] administrative approach once adjustments to deal with the increased volume of FOIA requests are fully implemented."¹³² Yet, "the majority assumes that [the government's] troubles in meeting FOIA's time limits will continue and the opinion seeks to justify those failures in advance."¹³³ Judge Leventhal found those justifications "to be dubious and problematic."¹³⁴

Judge Leventhal found that the "majority's opinion appears to go well beyond the peculiar circumstances of the instant case,"¹³⁵ concluding broadly that "an agency complies with the Act so long as it processes requests in 'good faith' and with 'due diligence' by 'assigning all requests on a first in, first out basis,' . . . no matter what delay is caused thereby."¹³⁶ The majority opinion thus was a "self-fulfilling prophecy in derogation of Congressional intent for expedition."¹³⁷ Judge Leventhal realistically understood that there would be no impetus for agencies to "adjust to the explicit time limits imposed by Congress [when] this Act is interpreted to grant them leeway so long as requests are processed in the order of their arrival."¹³⁸

131. *Id.* at 617 (Leventhal, J., concurring) (citation omitted).

132. *Id.* at 619 (Leventhal, J., concurring).

133. *Id.* (Leventhal, J., concurring).

134. *Id.* (Leventhal, J., concurring).

135. *Id.* at 621 (Leventhal, J., concurring).

136. *Id.* (Leventhal, J., concurring).

137. *Id.* (Leventhal, J., concurring).

138. *Id.* (Leventhal, J., concurring).

C. Subsequent Cases Generally Have Permitted Extensions

Since *Open America*, the vast majority of courts considering whether an agency should comply with the ten-day rule have allowed additional time to respond to FOIA requests pursuant to the exceptional circumstances/due diligence provision. The United States District Court for the District of Columbia has followed the lead of the *Open America* majority, ruling that routine agency backlogs create exceptional circumstances and granting federal agencies extensions well past the ten-day rule.¹³⁹ Like the *Open America* majority, various courts have found due diligence based on first-in, first-out FOIA processing and have granted lengthy FOIA processing extensions.¹⁴⁰

Some courts that originally granted FOIA response extensions have denied further extensions when agencies have not made progress in reducing their backlogs so that they can respond to the request at issue.¹⁴¹ While agreeing with the *Open America* majority that an agency backlog satisfies the exceptional circumstances/due diligence

139. See, e.g., *Hunsberger v. United States Dep't of Justice*, No. 92-2587, 1993 U.S. Dist. LEXIS 15471, at *1-*2 (D.D.C. Oct. 29, 1993) (granting seven-month stay from date of order); *Dacosta v. United States Dep't of Justice*, 782 F. Supp. 147, 148-49 (D.D.C. 1992) (requiring agency to submit status report to court every 60 days regarding progress on FOIA request after one year had passed from date of plaintiff's initial request); *Billington v. United States Dep't of Justice*, No. 92-462, slip op. at 2-3 (D.D.C. July 27, 1992) (granting nearly three-year stay from date of order); *Samuel Gruber Educ. Project v. United States Dep't of Justice*, No. 90-1912, slip op. at 6 (D.D.C. Feb. 8, 1991) (granting 22-month stay from date of order); *Lisee v. CIA*, 741 F. Supp. 988, 990-91 (D.D.C. 1990) (granting FBI and National Security Council's motion to stay proceedings based on declarations stating that processing plaintiff's FOIA request would take between one and two years); *Summers v. United States Dep't of Justice*, 733 F. Supp. 443, 443-44 (D.D.C. 1990) (granting stay of FOIA deadlines and requiring status reports every 60 days regarding status of processing of plaintiff's request); *Benny v. United States Dep't of Justice*, No. 86-1172, slip op. at 4-6 (D.D.C. Oct. 21, 1986) (granting one-year stay from date of order); *Ely v. Executive Office for U.S. Attorneys*, No. 84-2962, slip op. at 1 (D.D.C. Dec. 21, 1984) (granting two-year stay from date of FOIA request); *Reagan-Bush Comm. v. FEC*, 525 F. Supp. 1330, 1337 (D.D.C. 1981) (holding that agency responded "promptly" even though not "precisely within the period within which the statute requires disclosure"). But see *Narducci v. United States Dep't of Justice*, No. 91-2972, slip op. at 2 (D.D.C. June 16, 1992) (denying government motion to dismiss because one year had passed since FOIA request was made, request would not be processed soon, and FBI did not request additional staff to address backlog).

140. See, e.g., *Freeman v. United States Dep't of Justice*, 822 F. Supp. 1064, 1067 (S.D.N.Y. 1993) (finding due diligence based on processing requests "as quickly as possible within [agency's] financial ability"); *Russell v. Barr*, No. 92-2546, slip op. at 1-2 (D.D.C. Mar. 5, 1993); *Cohen v. FBI*, No. 93-6186, slip op. at 3 (S.D. Fla. Mar. 17, 1993) (holding that first-in, first-out processing satisfies due diligence requirements); *Williamson v. INS*, No. 89-3421, slip op. at 2-3 (S.D. Tex. Apr. 11, 1991) (finding due diligence based on first-in, first-out processing of "seemingly limitless number of FOIA requests"), *aff'd per curiam*, No. 91-2526, slip op. at 2 (5th Cir. May 4, 1992); *Wisconsin Project on Nuclear Arms Control v. United States Dep't of Energy*, No. 90-1432, slip op. 2-5 (D.D.C. Dec. 18, 1990).

141. See, e.g., *Laroque v. United States Dep't of Justice*, No. 86-2677, slip op. at 1-2 (D.D.C. Aug. 11, 1987) (denying further stays because agency failed to either produce records during year since previous court deadline or give reason for delay); *Ely v. United States Marshals Serv.*, No. 83-569, slip op. at 2 (W.D. Wis. Oct. 31, 1983) (denying stay for lack of backlog improvement in six years).

provision for the purpose of extending the response time beyond the ten-day rule, certain courts have held that a requester's truly urgent need for information moves the requester ahead in the line of pending FOIA requests.¹⁴² Other courts have refused to prioritize FOIA requests based on urgent need.¹⁴³

Some courts that have disagreed with the broad holding in *Open America* nevertheless remain generally sympathetic to the competing duties of federal agencies. These courts have ordered partial production or production within a shortened time frame that still exceeds the ten days mandated by FOIA.¹⁴⁴ Even courts that have

142. For example, in *Cleaver v. Kelley*, 427 F. Supp. 80 (D.D.C. 1976), the requesters needed their FOIA requests complied with quickly due to an upcoming criminal trial. *Id.* at 81. The court held that although the agency had fulfilled the exceptional circumstances/due diligence burden, the requester's need for the information created such "an exceptional and urgent need" that the requester should be given priority. *Id.* at 81-82. The requester was not entitled to receive all the information quickly, but just that information concerning "covert law enforcement and counterintelligence activities." *Id.* at 82. The court ordered the agency to provide documents eight months after the request was modified. *Id.* Similarly, in *Ferguson v. FBI*, 722 F. Supp. 1137 (S.D.N.Y. 1989), the court held that "[p]laintiff's desire for the documents rests upon needs for uses in a post-conviction challenge uniquely deserving of FOIA attention, as well as an upcoming criminal trial." *Id.* at 1141. The court ordered the agency to produce high priority documents within 85 days of the court's order, or approximately nine months after the FOIA request was made. *Id.* at 1144. See also *Freeman v. United States Dep't of Justice*, No. 92-557, slip op. at 6 (D.D.C. Oct. 2, 1992) (granting expedited processing regarding request for "Jenks Act" type material unavailable in state prosecution and useful to criminal defense); *Florida Rural Legal Serv. v. United States Dep't of Justice*, No. 87-1264, slip op. at 3-4 (S.D. Fla. Feb. 10, 1988) (granting expedited processing for nonprofit organization seeking list of undocumented aliens in order to assist them in making timely applications for legalization); *Boult v. Department of Justice*, No. 76-1217A, slip op. at 3-4 (N.D. Ga. Oct. 22, 1976) (granting expedited processing because requested information could help prevent deportation that could endanger requester's physical safety). But see *Freeman v. United States Dep't of Justice*, No. 92-557, slip op. at 11-12 (D.D.C. June 28, 1993) (denying further expedited treatment with respect to material that could aid in defense of criminal prosecution where expedition "would require a hand search of approximately 50,000 pages, taking approximately 120 days").

143. *Price v. CIA*, No. 90-1507, slip op. at 2 (4th Cir. Oct. 2, 1990); *Russell v. Barr*, No. 92-2546, slip op. at 2 (D.D.C. Mar. 5, 1993) (denying expedition even though requester claimed that requested information could aid in civil and criminal proceedings); *Billington v. United States Dep't of Justice*, No. 92-462, slip op. at 3-5 (D.D.C. July 27, 1992) (denying expeditious treatment despite pendency of criminal prosecutions where it was unlikely that files contained "exculpatory information"); *Thompson v. FBI*, No. 90-3020, slip op. at 3 (D.D.C. July 8, 1991); *Shilling v. Bureau of Alcohol, Tobacco & Firearms*, No. 90-1422, slip op. at 3 (D.D.C. Dec. 3, 1990); *Steffen v. United States Dep't of Justice*, No. 89-3434, slip op. at 3 (D.D.C. July 12, 1990); *Crabtree v. United States Dep't of Justice*, No. 88-0861, slip op. at 5 (D.D.C. Aug. 26, 1988); *Benny v. United States Dep't of Justice*, No. 86-1172, slip op. at 5 (D.D.C. Oct. 21, 1986); *Antonelli v. FBI*, No. 84-1047, slip op. at 2-3 (D.D.C. Nov. 13, 1984); *Grandison v. DEA*, No. 81-1001, slip op. at 2 (D.D.C. July 9, 1981); *Gonzales v. DEA*, 2 Gov't Disclosure Serv. (P-H) ¶ 81,016, 81,069 (D.D.C. Nov. 20, 1980); cf. *Armstrong v. Bush*, 807 F. Supp. 816, 819 (D.D.C. 1992) (granting priority to FOIA requests added to those already the subject of litigation where responsive records might otherwise be destroyed).

144. See, e.g., *Caifano v. Wampler*, 588 F. Supp. 1392, 1394-95, n.2 (N.D. Ill. 1984) (finding that adoption of *Open America* holding "would render the ten-day clause a non-entity," ordering piecemeal production, and stating that "[t]here is nothing we can do at this time to give plaintiff relief, or to vindicate any rights he may have"); *Ettlinger v. FBI*, 596 F. Supp. 867, 879 (D. Mass.

explicitly rejected the reasoning of the *Open America* majority, holding that the government is responsible for following the law as enacted by Congress, have granted agencies additional time beyond the statutory ten days to respond to FOIA requests.¹⁴⁵ In one case, the appellate court remanded an action to the district court to consider whether the production of some documents and implementation of first-in, first-out processing were sufficient to allow the agency an extension of time to respond to the request at issue.¹⁴⁶ Another court, when confronted with an agency that claimed it could not complete a request that had been pending for more than a year, held that "[i]nadequate staff, insufficient funding or a great number of requests are not within the meaning of 'exceptional circumstances' as that language is used in the statute nor were they within the contemplation of its framers as evidenced by the legislative history."¹⁴⁷ The court ordered immediate production of twenty percent of the requested records and ordered another twenty percent produced each month thereafter.¹⁴⁸

In a recent decision, one court held that in the absence of a showing that deliberate agency FOIA abuse or delay routinely rendered information useless, injunctive relief was not an appropriate remedy for an agency's failure to meet the FOIA's statutory deadlines.¹⁴⁹ In another recent case, a death-row inmate submitted a FOIA request to the FBI seeking copies of all documents and photographs concerning his arrest.¹⁵⁰ The inmate claimed that he needed the documents to prove that state and local authorities had

1984) (refusing to grant FBI desired 22-month extension, and ordering full production of redacted documents within two months of decision and two and one-half years after original FOIA request); *Hinton v. FBI*, 527 F. Supp. 223, 225 (E.D. Pa. 1981) (ordering piecemeal production of 21,000 documents in 90 day intervals with most important documents processed first). See also *Samuel Gruber Educ. Project v. United States Dep't of Justice*, No. 90-1912, slip op. at 6 (D.D.C. Feb. 8, 1991) (allowing timed release of 71,000 pages of documents).

145. See *Exner v. FBI*, 542 F.2d 1121, 1123 (9th Cir. 1976) (remanding case in order to evaluate evidence in accordance with Judge Leventhal's concurring opinion in *Open America*); *Rosenfeld v. United States Dep't of Justice*, No. 90-3576, slip op. at 8-13 (N.D. Cal. Feb. 18, 1992) (ruling exceptional circumstances not present where, despite substantial backlog, FBI made no real effort to increase resources to satisfy FOIA obligations, but allowing FBI one year to process FOIA request seeking voluminous documents); *Hamlin v. Kelley*, 433 F. Supp. 180, 182 (N.D. Ill. 1977) (finding that agency must deliver requested material to requesters within five months).

146. *Exner*, 542 F.2d at 1123.

147. *Hamlin*, 433 F. Supp. at 183.

148. *Id.*

149. *Gilmore v. National Sec. Agency*, No. 92-3646, slip op. at 11-21 (N.D. Cal. Sept. 13, 1993) (refusing to grant injunctive relief ordering agency to shift resources to ensure compliance with statutory deadlines).

150. *Morrow v. FBI*, 2 F.3d 642, 643 (5th Cir. 1993).

used fabricated evidence to convict him.¹⁵¹ The appellate panel remanded the case to the district court to consider whether the FBI could show exceptional circumstances and due diligence to justify delay in responding to the request.¹⁵² A concurring judge, however, found that the inmate was "certainly in the zone of immediate jeopardy of a death warrant which, when issued, starts a 30-day countdown to execution."¹⁵³

IV. FAILURE TO RESPOND ON A TIMELY BASIS CAUSES REAL HARM TO CERTAIN REQUESTERS

Although *Open America* and its progeny allow extensions past the ten-day limit,¹⁵⁴ the resulting delay at times creates great harm to FOIA requesters¹⁵⁵ and delays the benefits that result from the disclosure of government information.¹⁵⁶ For example, timely FOIA responses are essential to aliens facing exclusion or deportation proceedings.¹⁵⁷ While aliens theoretically must be afforded due process and a "full and fair hearing,"¹⁵⁸ discovery is not permitted in immigration proceedings.¹⁵⁹ Thus, aliens must rely on the FOIA to obtain information relevant to their cases from the INS.¹⁶⁰ Unfortunately, this avenue for obtaining information is futile unless

151. *Id.* at 643.

152. *Id.* at 645.

153. *Id.*

154. See *supra* notes 139-42 and accompanying text.

155. See Eve Pell, *Judge Orders INS to Stop Delays*, PROGRESSIVE, Sept. 1989, at 13, 14 (discussing numerous occasions where people were deported when FOIA requests were not promptly answered).

156. See Edward Humes, *Hearing Puts Night Goggles in Spotlight*, ORANGE COUNTY REG., Mar. 19, 1989, at A1 (reporting that FOIA disclosures on military helicopter crashes helped news reporter establish safety problems of night-vision goggles and led to congressional investigation of equipment).

157. See *Mayock v. INS*, 714 F. Supp. 1558, 1568 (N.D. Cal. 1989) (ordering that due consideration be afforded to aliens who are in urgent need of information to challenge their deportation hearings), *rev'd and remanded sub nom.* *Mayock v. Nelson*, 938 F.2d 1006 (9th Cir. 1991).

158. *United States v. Nicolas-Armenta*, 763 F.2d 1089, 1090 (9th Cir. 1985) (stating that even though aliens are entitled to full and fair hearing, they are not entitled to "a full panoply of constitutional safeguards") (citing *Tejeda-Mata v. INS*, 626 F.2d 721, 726 (9th Cir. 1980), *cert. denied*, 456 U.S. 994 (1982)).

159. See *Kulle v. INS*, 825 F.2d 1188, 1194 (7th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988); *Mayock*, 714 F. Supp. at 1560 (finding that FOIA requests are essential to alien's case because he cannot obtain information in any other manner). Other agencies also fail to provide discovery in administrative proceedings. See, e.g., *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236-37, 243 (1978) (noting that NLRB "has provided little pre-hearing discovery in unfair labor practice hearings" and ultimately holding that witness statements were properly withheld from release to prevent interference with enforcement proceedings pursuant to FOIA exemption 7(a)).

160. See *Mayock*, 714 F. Supp. at 1560 (finding that aliens are limited to FOIA procedure to obtain information for deportation hearings).

the alien receives the information in time to use it in the immigration proceedings.¹⁶¹

In the case of Hassan Tehranijam, an Iranian alien residing in the United States, the INS delayed production of much needed information requested under FOIA for a political asylum hearing.¹⁶² Mr. Tehranijam had petitioned for political asylum because of a fear of persecution upon deportation back to Iran.¹⁶³ The presiding immigration judge doubted the authenticity of Mr. Tehranijam's political asylum claim and ordered him deported.¹⁶⁴ Mr. Tehranijam's attorney, thwarted by a delayed FOIA response, could not produce government evidence supporting his client's claim, and Mr. Tehranijam therefore returned to Iran.¹⁶⁵

Investigative reporters often require timely FOIA responses to expose and help cure life-threatening conditions. For example, a reporter for *The Orange County Register* made FOIA requests seeking to refute military claims that there was no pattern to military helicopter crashes.¹⁶⁶ After interviewing people involved with the crashes, whose names ultimately were revealed pursuant to the FOIA requests, the reporter established that obsolete night-vision goggles worn by military pilots had caused at least fifty-six crashes and 134 deaths in a series of Pulitzer Prize winning articles.¹⁶⁷ The reporter's articles led to a congressional investigation, new safety regulations, and improved equipment.¹⁶⁸ The sooner the government discloses

161. See *Nishnic v. United States Dep't of Justice*, 671 F. Supp. 776, 791 (D.D.C. 1987) ("A bona fide request for the production of documents must be honored in time for that information to be useful.").

162. See *Mayock*, 714 F. Supp. at 1560 (noting that suit was brought against INS because of earlier delays in responding to FOIA request).

163. See Pell, *supra* note 155, at 13, 14 (reporting that upon arriving in United States, Hassan Tehranijam immediately turned himself in and requested political asylum).

164. See Pell, *supra* note 155, at 13, 14 (noting that Tehranijam was not able to produce any contrary evidence because his FOIA requests were not processed).

165. See Pell, *supra* note 155, at 13, 14.

166. See Edward Humes, *Death in the Dark*, ORANGE COUNTY REG., Dec. 4, 1988, at K1 (stating that Humes received 50 investigative reports on military crashes and other documents using FOIA).

167. Humes, *supra* note 166, at K1; see also *Register's Humes Wins Pulitzer Prize*, ORANGE COUNTY REG., Mar. 31, 1989, at A1 (reporting that Humes won Pulitzer Prize for reporting on defective night-vision goggles).

168. See Humes, *supra* note 166, at K10 (determining that there were 103 injuries and \$180 million in damages caused by defective night-vision goggles); see also *Halt Goggle Training, Pilot Urges Congress*, ORANGE COUNTY REG., Mar. 21, 1989, at A1 (stating that Army instructor testified at congressional hearing and presented study detailing ineffectiveness of night-vision goggles); Humes, *supra* note 156, at A1 (reporting that Congress will hold hearings questioning safety of night-vision goggles); Jean O. Paco & Edward Humes, *Army Will Evaluate Night-Goggle Safety*, ORANGE COUNTY REG., Mar. 21, 1989, at A1 (reporting that congressional hearings led Army to investigate safety of night-vision goggles); Gary A. Warner, *Congress Urges Testing of Night-Vision Goggles*, ORANGE COUNTY REG., Nov. 17, 1989, at A1 (finding that Congress recommended that

information in life-threatening situations, the faster remedial action can be taken.¹⁶⁹

V. THE *MAYOCK* CASE: SEEKING STRICT JUDICIAL ENFORCEMENT OF THE TEN-DAY RULE

For years, Mr. Tehranijam's attorney routinely made FOIA requests to the INS seeking information contained in the immigration files of his clients.¹⁷⁰ Just as routinely, the attorney never received positive responses in time to be of use at the aliens' hearings.¹⁷¹ Accordingly, in 1985, Mr. Tehranijam's attorney, as plaintiff, initiated the case *Mayock v. INS*.¹⁷² The lawsuit attacked the *Open America* majority opinion by generally challenging the INS' "pattern and practice" of delay in processing FOIA requests.¹⁷³ Mr. Tehranijam's attorney claimed that this pattern and practice of failing to process FOIA requests in a timely manner deprived his clients and other aliens of information necessary to enable them to resist deportation and exclusion.¹⁷⁴

After four years of contentious litigation, the district court in *Mayock* ultimately held that the systematic failure of the INS to provide timely access to information contained in the files of aliens facing immediate deportation or exclusion was a serious and recurring detriment.¹⁷⁵ Although the INS claimed exceptional circumstances due to unexpected annual increases in FOIA requests from 1981 to 1988, the actual number of requests had increased by a fairly predictable thirty-five percent per year.¹⁷⁶ The INS failed to prove exceptional circum-

every pair of goggles be tested by Defense Department).

169. See also Rosenfeld, *supra* note 65, at 14 (noting testimony of authors and journalists at 1990 FOIA congressional hearing that long delays in responding to FOIA requests "will inflict serious if not fatal injury" to research and writing).

170. See *Mayock v. INS*, 714 F. Supp. 1558, 1559-1560 (N.D. Cal. 1989) (finding that INS had shown pattern and practice of failure to respond on a timely basis to FOIA requests), *rev'd and remanded sub nom.* *Mayock v. Nelson*, 938 F.2d 1006 (9th Cir. 1991); Pell, *supra* note 155, at 14 (noting existence of hundreds of cases in which responses were delayed).

171. *Mayock*, 714 F. Supp. at 1561 (noting declarations showing that FOIA responses usually take months instead of days).

172. 714 F. Supp. 1558 (N.D. Cal. 1989), *rev'd and remanded sub nom.* *Mayock v. Nelson*, 938 F.2d 1006 (9th Cir. 1991). The author represented Mr. Tehranijam's attorney, the plaintiff, at the district court, at the appellate court, and during later settlement proceedings.

Mr. Tehranijam's attorney had standing as a plaintiff to seek broad FOIA relief against the agency because of his repeated and continually pending FOIA requests to the agency on behalf of his clients. *Id.* at 1560. See also *Kreindler v. Department of Navy*, 363 F. Supp. 611, 613 (S.D.N.Y. 1973) (holding that attorney had standing to sue agency under FOIA); *Gilmore v. National Sec. Agency*, No. 92-3646, slip op. at 6-8 (N.D. Cal. Sept. 13, 1993).

173. *Mayock*, 714 F. Supp. at 1560.

174. *Id.* at 1560-61.

175. See *id.* at 1561-62.

176. *Mayock v. Nelson*, 938 F.2d 1006, 1007 n.2 (9th Cir. 1991).

stances, the district court held, because the FOIA requests sought routine information and the annual increase in the number of requests was steady and predictable.¹⁷⁷ Relying in part on Judge Leventhal's concurring opinion in *Open America*,¹⁷⁸ the district court also held that the INS' failure to afford priority to those requesters with urgent need showed that the INS did not satisfy the due diligence test.¹⁷⁹ Of greatest significance, the *Mayock* court held that the INS could not invoke the exceptional circumstances/due diligence provision as a general exemption from the ten-day rule; rather, "the exemption is applicable primarily to individual requests which are large or complicated."¹⁸⁰ The court therefore ordered the San Francisco District Office of the INS, the office where the FOIA requests originally had been sent, to "refrain from failing to comply with the [FOIA] time requirements."¹⁸¹

Because the district court decided the *Mayock* case on cross-motions for summary judgment and because the appellate court believed that the district court should have considered certain facts, the appellate court remanded the case.¹⁸² After remand, and seven years after the case was filed, the parties, through extensive settlement negotiations, finally solved what the district court had previously observed to be "the obvious tension between congressional aspirations and agency realities."¹⁸³ They bridged the "gap between expectation and implementation" of FOIA.¹⁸⁴

VI. THE *MAYOCK* SETTLEMENT HELPS BRIDGE THE GAP

Recognizing the inherent tension between the strict statutory language on FOIA time deadlines and the budgetary constraints on agencies, the *Mayock* parties crafted a settlement agreement that

177. *Mayock*, 714 F. Supp. at 1565-66.

178. See *supra* part III.B (discussing Judge Leventhal's concurring opinion in *Open America*).

179. See *Mayock*, 714 F. Supp. at 1566 (explaining that balance must be found between competing interests of agency and requester and that this balance was recognized by Judge Leventhal in his concurring opinion in *Open Am. v. Watergate Special Prosecution Task Force*, 547 F.2d 605 (D.C. Cir. 1976)).

180. *Mayock*, 714 F. Supp. at 1568.

181. *Id.*

182. See *Mayock v. Nelson*, 938 F.2d 1006, 1008 (9th Cir. 1991) (stating that it is in dispute whether or not government applied for more funds to process requests).

183. *Mayock*, 714 F. Supp. at 1564.

184. *Id.* at 1564. Another case, *Ray v. United States Dep't of Justice*, 770 F. Supp. 1544 (S.D. Fla. 1990), presented similar INS FOIA issues. The district court in *Ray* held that FOIA backlogs did not constitute exceptional circumstances and due diligence was not exercised because priority was not given to requesters with urgent need in deportation or exclusion hearings. *Id.* at 1549-52. Accordingly, the court ordered the Miami INS District Office to comply with the FOIA's time requirements. *Id.* The government did not appeal.

accommodates the most critical interests of both FOIA requesters and agencies.¹⁸⁵ The settlement includes arrangements for priority processing and a multi-track processing system.¹⁸⁶

A. *The National Prioritization Program*

The *Mayock* settlement agreement contains a national prioritization program that allows requesters with urgent need to receive immediate processing of FOIA requests ahead of other requesters.¹⁸⁷ An agency will provide such treatment to a request when the requester demonstrates that "an individual's life or personal safety would be jeopardized by the failure to process a request immediately; or substantial due process rights of the requester would be impaired by the failure to process immediately, and the information sought is not otherwise available."¹⁸⁸ Requesters are notified immediately of whether or not their specific request for expedited treatment has been granted and, if the request is denied, the procedure to appeal such denial.¹⁸⁹ While some courts have criticized expedited processing as unfair to those requesters whose requests are already pending,¹⁹⁰ the above limitations should grant this relief only in truly deserving situations and will prevent the most serious types of harm caused by delayed FOIA responses.¹⁹¹ Moreover, limiting prioritization to only the most dire situations should minimize concerns that determining priority will unduly increase the FOIA burden on agencies.

185. *Mayock Settlement*, *supra* note 14.

186. *Mayock Settlement*, *supra* note 14, attachment A, at 1-3.

187. *Mayock Settlement*, *supra* note 14, attachment A, at 2-3. Senator Patrick Leahy recently introduced a bill that would allow FOIA requesters to seek expedited access to information and require agencies to determine, within five business days, whether to grant expedited access. S. 1782, 103d Cong., 1st Sess. § 5 (1993).

188. In *Morrow v. FBI*, 2 F.3d 642, 645 (5th Cir. 1993), the majority panel declined to decide whether an immediate execution date warranted expedited processing of a FOIA request submitted by a death-row inmate seeking information that allegedly would show that his conviction was based on fabricated evidence. The panel instead remanded the case on other grounds. The concurring judge disagreed and found that the death-row inmate had presented facts "requiring expedited handling of his FOIA request, entitling him to have his request 'go to the head of the line.'" *Id.* (Wiener, J., concurring). Under the *Mayock* national prioritization program, this request plainly would be entitled to priority. *Mayock Settlement*, *supra* note 14, attachment A, at 2-3.

189. *Mayock Settlement*, *supra* note 14, attachment A, at 3.

190. See *supra* note 143; see also *Open Am. v. Watergate Special Prosecution Force*, 547 F.2d 605, 614 (D.C. Cir. 1976) (stating that other parties requesting information must be treated fairly).

191. See *Mayock Settlement*, *supra* note 14, attachment A, at 2-3 (stating that requester must demonstrate "exceptional need or urgency").

B. Multi-Track FOIA Processing

The *Mayock* settlement agreement allows for general first-in, first-out processing of FOIA requests.¹⁹² But if strict adherence to this rule would require simple requests to be delayed for “extraordinary” periods of time while a few massive requests are serviced, then individual INS offices may adopt a multi-track system to permit further processing of the more simple requests.¹⁹³ This system is intended to prevent a few very broad “*Open America*-type” requests from occupying all of an office’s FOIA resources.¹⁹⁴

The multi-track processing system, with one track for simple requests and another for complex requests, calls for the INS to process FOIA requests on a first-in, first-out basis within each track so that the processing of complex requests will not delay the processing of simple requests.¹⁹⁵ Simple requests are defined as those requiring five days or fewer to process, seeking a limited number of documents, and involving minimal review for claims exemptions.¹⁹⁶ Complex requests are defined as those requiring more than five days to locate, review, and prepare for disclosure, involving more than a limited number of documents, and requiring more than minimal review for claims exemptions.¹⁹⁷ INS offices are not permitted to devote all of their resources to only one track.¹⁹⁸ Under the settlement agreement, this abrogation from the first-in, first-out method will not “negate a claim of due diligence” as long as the method is followed within each track and “a good faith effort is made to process all requests as expeditiously as possible.”¹⁹⁹ These achievements, along with other recommendations, serve as a model for all federal agencies to bridge the gap between legislative intent and resource capabilities with respect to timely FOIA processing.²⁰⁰

192. See *Mayock Settlement*, *supra* note 14, attachment A, at 1 (establishing that each INS office must adopt first-in, first-out processing policy as its general guideline).

193. See *Mayock Settlement*, *supra* note 14, attachment A, at 1-2.

194. See *Mayock Settlement*, *supra* note 14, attachment A, at 2 (allowing for simple requests to be processed separate from complex requests).

195. *Mayock Settlement*, *supra* note 4.2, attachment A, at 2.

196. *Mayock Settlement*, *supra* note 14, attachment A, at 2.

197. *Mayock Settlement*, *supra* note 14, attachment A, at 2. The more detailed review could involve line-by-line examination of numerous pages of personal and classified information.

198. *Mayock Settlement*, *supra* note 14, attachment A, at 2.

199. *Mayock Settlement*, *supra* note 14, attachment A, at 2. The *Mayock* Settlement Agreement also requires the San Francisco District Office of the INS to comply with the 10-day rule, to search electronic databases in responding to FOIA requests, and to substantiate claims of exemptions with specificity. *Id.* attachment B, at 2-4. The Settlement Agreement also requires the INS to submit its monthly FOIA tracking data to the author. *Mayock Settlement*, *supra* note 14, at 3-4.

200. The Antitrust Division of the Department of Justice utilizes a four-track processing system. Memorandum from Leo D. Neshkes, FOIA/PA Control Officer, Antitrust Division, to

VII. RECOMMENDATIONS FOR MORE TIMELY DISCLOSURE

A. *Prioritization and Multi-Track Processing*

The prioritization and multi-track processing features of the *Mayock* settlement should help to provide balance for agencies deluged with FOIA requests and operating with limited financial and personnel resources.²⁰¹ This Article makes further recommendations regarding the statutory response period, specific agency response procedures, the definitions of "exceptional circumstances" and "due diligence," procedures for searching electronic databases for relevant records, public tracking of agency FOIA performance, and FOIA fees.²⁰²

B. *A Twenty-Day Rule*

The 1974 amendments require agencies to process FOIA requests within ten business days.²⁰³ By these amendments, Congress allowed

Margaret A. Irving, Associate Director, Office of Information and Privacy, Department of Justice 1 (Oct. 20, 1993) (on file with *The American University Law Review*). The first track is designed for "clearly public information," the second track for "simple" requests, the third track for "difficult" requests, and the fourth track for very large "project" requests. *Id.* The Marshals Service uses two tracks, one for "routine" requests, and one for "sensitive/complex" requests. Memorandum from Florestine P. Graham, FOI/PA Officer, Office of General Counsel, United States Marshals Service, to Margaret Ann Irving, Acting Deputy Director, Office of Information and Privacy, Department of Justice 4 (Oct. 27, 1993) (on file with *The American University Law Review*).

201. Russell Powell, Chief of the FOIA Branch at the Nuclear Regulatory Commission, stated his private view that prioritization and multi-track processing in some instances are appropriate solutions in a climate of limited government resources and backlogs of FOIA requests. Telephone Interview with Russell Powell, Chief, FOIA Branch, Nuclear Regulatory Commission (Oct. 20, 1993). He also suggested another possible approach whereby the government would establish a specific dollar limit to the amount of government service that would be allowed for each FOIA requester. *Id.* If the cost to process a request would exceed the established dollar limit, the requester would be required to justify having the request processed further (similar to current requirements for justifying a waiver of fees) or, where possible, to pay for the direct costs that exceed the limit. *Id.* Under this possible approach, the large and complicated requests of a few requesters would not, in theory, unfairly usurp limited government resources to the detriment of other requesters.

Certain concerns arise with respect to this suggested approach. First, there is the danger that an agency may not provide important government information to the public because a requester may not be able to convince the government that FOIA processing beyond the specific dollar limit is appropriate. Moreover, requiring requesters to pay for FOIA processing above a certain limit could lead to inequities; those requesters with greater financial wealth could finance fuller and more rapid access to government information than requesters with less financial ability. The FOIA currently allows agencies to charge requesters for direct costs of searches and duplication. 5 U.S.C. § 552(a)(4)(A)(i) (1988). In practice, however, this rarely occurs. In calendar year 1991, for example, fees collected by agencies only represented 6.7% of overall FOIA costs. *Requests, supra* note 3, at 3-4 (explaining that agencies collected \$6,018,936 in fees to be applied against \$91,405,744 in costs).

202. See *infra* part VII A-G.

203. 5 U.S.C. § 552(a)(6)(A)(i) (1988).

an automatic additional ten business days if an agency provided written notice to the requester of the extension and so long as the agency faced "unusual circumstances."²⁰⁴ Congress obviously found that a FOIA determination within twenty business days of a request was satisfactory; otherwise, it would not have given agencies the unilateral ability to extend the determination period for unusual circumstances. Accordingly, rather than increasing the workload of agencies further by requiring them to send notices of extensions to requesters, agencies simply should be required to respond to FOIA requests within twenty working days and the unusual circumstances provision should be eliminated.

C. Specific Agency Response Procedures

The average cost of processing a FOIA request is fairly similar among agencies that receive the largest number of requests.²⁰⁵ Agencies receiving fewer FOIA requests, however, differ greatly with respect to their average processing costs.²⁰⁶ Agencies that do not

204. *Id.* § 552(a) (6) (B).

205.

1991 CALENDAR YEAR		
<i>Agency/Department</i>	<i>Number of Requests</i>	<i>Average Response Cost</i>
Department of Defense	129,437	\$ 179
Health & Human Services	121,297	\$ 93
Department of Justice (including INS and FBI)	71,265	\$ 185
Department of Agriculture	63,775	\$ 55
Department of the Treasury	56,017	\$ 161
Environmental Protection Agency	38,614	\$ 117

Requests, Costs Go Up, supra note 3, at 3-5 (reporting results provided to Congress pursuant to 5 U.S.C. § 552(d) (1988)).

206.

1991 CALENDAR YEAR		
<i>Agency/Department</i>	<i>Number of Requests</i>	<i>Average Response Cost</i>
Housing & Urban Development	10,020	\$ 7
Department of Energy	8247	\$ 491

receive an enormous amount of FOIA requests, but have very high average processing costs, are appropriate candidates for implementation of specific procedures designed to create greater efficiency in the handling of FOIA requests. For these agencies, such procedures may be more important than multi-track first-in, first-out processing. The *Mayock* settlement agreement contains special procedures suitable to these agencies on a variety of issues pertaining to FOIA handling, including receipt and logging of requests, screening of requests and obtaining files, working requests, extensions of time, information disclosure, and review and distribution of completed requests.²⁰⁷

D. "Exceptional Circumstances" and "Due Diligence" Defined

Congress should provide a definition of exceptional circumstances that follows the reasoning of Judge Leventhal's concurring opinion in *Open America*.²⁰⁸ Specifically, exceptional circumstances should be defined to encompass increases in FOIA request rates that are "unforeseen and unforeseeable,"²⁰⁹ a limitation which should reduce, if not eliminate, the argument that predictable agency backlogs excuse performance.

Given the regime set forth above, it is hoped that an expedited or simple request would rarely go uncompleted for more than twenty business days. Regarding complex requests, Congress should adopt

1991 CALENDAR YEAR		
<i>Agency/Department</i>	<i>Number of Requests</i>	<i>Average Response Cost</i>
State Department	5311	\$ 1092
Department of the Interior	4782	\$ 362
Central Intelligence Agency	4563	\$ 495
Office of Personnel Management	1040	\$ 38
Federal Trade Commission	804	\$ 371
Export-Import Bank	88	\$ 29
Nat'l Endowment for Democracy	17	\$ 1476

Requests, Costs Go Up, *supra* note 3, at 3-5.

207. See *Mayock Settlement*, *supra* note 14, attachment B at 1-5.

208. See *Open Am. v. Watergate Special Prosecution Task Force*, 547 F.2d 605, 618 (D.C. Cir. 1976) (Leventhal, J., concurring); see also *supra* part III.B (discussing Judge Leventhal's concurring opinion in *Open America*).

209. See *Open America*, 547 F.2d at 617-18 (Leventhal, J., concurring).

Judge Leventhal's definition of due diligence. According to Judge Leventhal, an agency can show due diligence by specifically applying to Congress for more funds to meet the need, disgorging part of the documents reviewed as determinations on withholding other records are made, and deferring consideration of voluntary actions of disclosure that are plainly outside the scope of FOIA.²¹⁰ So defined, due diligence encompasses actual attempts to complete FOIA requests on a more rapid basis.

E. Electronic Database Searches

During the pendency of the *Mayock* case, the government initially took the position that electronic databases and other magnetic/electrical means of storing data were beyond the scope of a FOIA request.²¹¹ Although the court decided against the government on this issue in *Mayock*,²¹² Congress should amend FOIA specifically to provide for the search and production of information stored by the government in any format, including magnetic, optical, and electrical formats.²¹³ This would allow fuller public access to government

210. *Id.*

211. See *Mayock v. INS*, 714 F. Supp. 1558, 1566 (N.D. Cal. 1989) (finding that government searched these records only late in case, after repeated requests), *rev'd and remanded sub nom. Mayock v. Nelson*, 938 F.2d 1006 (9th Cir. 1991).

212. See *id.* (noting that government has burden to show that requested records fall within one of exceptions set forth by statute).

213. See *id.* (holding that agency must search electronic databases as part of FOIA request); *accord* *Yeager v. DEA*, 678 F.2d 315, 321 (D.C. Cir. 1982) (finding that computer-stored records are "records" for purposes of FOIA); *Long v. IRS*, 596 F.2d 362, 365 (9th Cir. 1979) (arguing that term "records" includes computer tape), *cert. denied*, 446 U.S. 917 (1980); *cf. Dolphins v. Department of Commerce*, 404 F. Supp. 407, 411 (N.D. Cal. 1975) (contending that motion picture film is "record" pursuant to FOIA). The Act's legislative history supports this case law. See S. REP. NO. 854, *supra* note 36, at 12 (stating that it is desirable for agencies to process requests for computerized information).

Much has been made recently of the prospect of permitting electronic "on-line" searches of government databases. See Jeremy Lewis, *New Technologies and FOIA Processing: Part I*, ACCESS REP., July 21, 1993, at 2, 2-7; Jeremy Lewis, *New Technologies and FOIA Processing: Part II*, ACCESS REP., Aug. 4, 1993, at 4, 4-9. It is likely that certain classes of information on databases could be made readily available over modems nationwide. At least one bill addressing the issue of access to government electronic databases has been proposed and is pending in Congress. See S. 1782, 103d Cong., 1st Sess. § 4(4) (1993) (proposing to amend 5 U.S.C. § 552(a)(3) to require agencies to "provide records in any form in which such records are maintained . . . as requested by any person" and to "make reasonable efforts to provide records in an electronic form requested by any person, even where such records are not usually maintained in such form"). Senator Patrick Leahy, the bill's primary sponsor, states that his proposal "makes an important contribution to the President's plan for the national information infrastructure," which "envision[s] the development of interconnected computer networks and databases that can put vast amounts of information at users' fingertips." 139 CONG. REC. S17,056, S17,056 (Nov. 23, 1993) (statement of Sen. Leahy).

The Securities and Exchange Commission already has established an electronic data gathering, analysis, and retrieval system (referred to as EDGAR) for filings under the Federal securities laws. 15 U.S.C. § 7811. The Nuclear Regulatory Commission has established local

information. Moreover, in many instances, agencies would be able to process FOIA responses more rapidly by accessing computer records than by searching through paper files.

F. *Public Tracking of Agency Performance*

The FOIA currently requires each agency to supply annual FOIA reports to Congress.²¹⁴ The annual reports contain information on the number of determinations made not to comply with FOIA requests, the number of appeals and results of appeals, identification

public document rooms near the site of each commercial nuclear reactor. These rooms maintain a microfiche file of all documents made publicly available by the Commission since 1981 and documents about the nearby nuclear facility. NUCLEAR REGULATORY COMMISSION, INFORMATION DIGEST xi (1993). The Defense Nuclear Facilities Safety Board maintains a public document room, a computer system for searches of documents on request, and provides free literature regarding the Board's recommendations and a mailing list. Letter from Carole C. Morgan, Director, Reference and Document Management, Defense Nuclear Facilities Safety Board, to Richard L. Huff and Daniel J. Metcalfe, Office of Information and Privacy, Department of Justice 1 (Nov. 2, 1993) (on file with *The American University Law Review*). The Environmental Protection Agency provides computer on-line accessibility and transfer of routinely requested records to the National Technical Information Service and Government Printing Office for dissemination and places records in EPA dockets for public inspection and copying. Memorandum from Jeralene B. Green, Agency FOIA Officer, Environmental Protection Agency, to Richard L. Huff and Daniel J. Metcalfe, Office of Information and Privacy, Department of Justice 2 (Nov. 3, 1993) (on file with *The American University Law Review*).

Although Congress is exempt from the requirements of FOIA (Mayo v. U.S. Government Printing Office, No. 92-16148, slip op. at 1, 93 C.D.O.S. 8727 (Nov. 29, 1993)), it is worth noting that the California Legislature has committed to make a wide variety of information available to the public in electronic form. Legislation signed by the Governor of California on October 11, 1993, *see* Assembly Bill No. 1624, 1993-1994 Reg. Sess. (enacted) (codified at CAL. GOV'T CODE § 10248 (West 1994)), provides that:

(a) The Legislative Counsel shall . . . make all of the following information available to the public in electronic form:

(1) The Legislative calendar, the schedule of legislative committee hearings, a list of matters pending on the floors of both houses of the Legislature, and a list of the committees of the Legislature and their members.

(2) The text of each bill introduced in each current legislative session, including each amended, enrolled and chaptered form of each bill.

(3) The bill history of each bill introduced and amended in each current legislative session.

(4) The bill status of each bill introduced and amended in each current legislative session.

(5) All bill analyses prepared by legislative committees in connection with each bill in each current legislative session.

(6) All code information concerning each bill in each current legislative session.

(7) Any veto message concerning a bill in each current legislative session.

(8) The California Codes.

(9) The California Constitution.

(10) All statutes enacted on or after January 1, 1993.

CAL. GOV'T CODE § 10248(a) (West 1994). The new law further provides that information so provided "shall be made available to the public by means of access by way of the largest non-proprietary, non-profit cooperative public computer network." CAL. GOV'T CODE § 10248(b) (West 1994). Finally, information obtained through the computer network must be provided free of charge. CAL. GOV'T CODE § 10248(e) (West 1994).

214. 5 U.S.C. § 552(d) (1988).

of personnel responsible for denials of information, any determinations of improper withholding, agency rules relating to the report to Congress, FOIA fees collected by the agency, and other efforts to comply with the statute.²¹⁵

Agencies should be required to include additional information in these reports, including: total numbers of FOIA requests received, total numbers of requests completed, average time to complete requests, total numbers of pending requests, average time of pending requests, total agency fiscal resources devoted to FOIA processing, and percentages of agency fiscal resources devoted to FOIA activities. In an effort to make these performance results available for public scrutiny, the reports should be published in the Federal Register. The aim would be to provide internal incentives for agencies to complete FOIA requests on as timely a basis as possible. Publishing these statistics also would show whether only those agencies with the most FOIA requests and the least relative resources have fallen behind, or whether some agencies do not take their FOIA responsibilities seriously.

G. *Agency Recovery of FOIA Fees*

Senator Patrick Leahy recently introduced the Electronic Freedom of Information Improvement Act, which includes provisions intended to clear up agency FOIA backlogs.²¹⁶ The bill proposes to allow agencies to recover one-half of their FOIA fees directly, rather than sending them to the general treasury revenue fund, so long as the agencies are in substantial compliance with the ten-day rule.²¹⁷ While that idea may be difficult to administer, agencies should be authorized to recoup *all* of their FOIA fees regardless of their performance so long as they dedicate those funds to improving FOIA processing.²¹⁸ Thus, rather than simply rewarding agencies that

215. *Id.* § 552(d)(1)-(7).

216. *See* S. 1782, 103d Cong., 1st Sess. (1993).

217. *Id.* The bill's language provides:

If at an agency's request, the Comptroller General determines that the agency annually has either provided responsive documents or denied requests in substantial compliance with the requirements of [5 U.S.C. § 552(a)] (6)(A), one-half of the fees collected under this section shall be credited to the collecting agency and expended to offset the costs of complying with this section through staff development and acquisition of additional request processing resources. The remaining fees collected under this section shall be remitted to the Treasury as general funds or miscellaneous receipts.

Id. § 5(a).

218. *Id.*

already are in compliance with FOIA time limits,²¹⁹ funds will

219. A minority of agencies that receive relatively few FOIA requests claim not to have FOIA backlogs and apparently are processing FOIA requests on a timely basis. These are: ACTION, *see* Letter from Edward F. Carey, FOIA/PA Officer, ACTION, to Richard Huff and Daniel Metcalfe, Office of Information and Privacy, Department of Justice 1 (Oct. 7, 1993) (on file with *The American University Law Review*); the Administrative Conference of the United States, *see* Letter from Gary J. Edles, General Counsel, Administrative Conference of the United States, to Pamela Maida, Office of Information and Privacy, Department of Justice 1 (Oct. 27, 1993) (on file with *The American University Law Review*); the Defense Nuclear Facilities Safety Board, *see* Letter from Carole C. Morgan, Director, Reference and Document Management, Defense Nuclear Facilities Safety Board, to Richard L. Huff and Daniel J. Metcalfe, Office of Information and Privacy, Department of Justice 1 (Nov. 2, 1993) (on file with *The American University Law Review*); the Equal Employment Opportunity Commission, *see* Letter from Thomas J. Schlageter, Assistant Legal Counsel, EEOC, to Richard L. Huff and Daniel J. Metcalfe, Office of Information and Privacy, Department of Justice 1 (undated letter on file with *The American University Law Review*); the Farm Credit Administration, *see* Letter from Ronald H. Erickson, Freedom of Information Officer, Farm Credit Administration, to Attorney General Janet Reno 1 (Nov. 2, 1993) (on file with *The American University Law Review*); the Federal Election Commission, *see* Letter from Fred S. Eiland, Freedom of Information Officer, Federal Election Commission, to Richard L. Huff and Daniel J. Metcalfe, Office of Information and Privacy, Department of Justice 1 (Nov. 3, 1993) (on file with *The American University Law Review*); the Federal Labor Relations Authority, *see* Letter from David M. Smith, Solicitor, Federal Labor Relations Authority, to Margaret Irving, Office of Information and Privacy, Department of Justice 1 (Nov. 3, 1993) (on file with *The American University Law Review*); the Federal Maritime Commission, *see* Letter from Joseph C. Polking, Secretary, Federal Maritime Commission, to Richard L. Huff, Office of Information and Privacy, Department of Justice 1 (Oct. 22, 1993) (on file with *The American University Law Review*); the Federal Mediation & Conciliation Service, *see* Letter from Eileen B. Hoffman, General Counsel, Federal Mediation & Conciliation Service, to Richard L. Huff and Daniel J. Metcalfe, Office of Information and Privacy, Department of Justice 1 (Oct. 7, 1993) (on file with *The American University Law Review*); the International Trade Commission, *see* Letter from Donnal R. Koehnke, Secretary, USITC, to Richard L. Huff and Daniel J. Metcalfe, Office of Information and Privacy, Department of Justice 1 (Oct. 26, 1993) (on file with *The American University Law Review*); the Legal Services Corporation, *see* Letter from JoAnn Gretch, FOIA Coordinator, Office of the General Counsel, Legal Services Corporation, to Richard L. Huff and Daniel J. Metcalfe, Office of Information and Privacy, Department of Justice 1 (Oct. 13, 1993) (on file with *The American University Law Review*); the Merit Systems Protection Board, *see* Letter from Robert E. Taylor, MSPB, to Richard L. Huff and Daniel J. Metcalfe, Office of Information and Privacy, Department of Justice 1 (Oct. 20, 1993) (on file with *The American University Law Review*); the National Credit Union Administration, *see* Letter from Wilmer A. Theard, Freedom of Information Officer, National Credit Union Administration, to Richard L. Huff and Daniel J. Metcalfe, Office of Information and Privacy, Department of Justice 1 (Oct. 13, 1993) (on file with *The American University Law Review*); the National Endowment for the Humanities, *see* Letter from David C. Fisher, Jr., Deputy General Counsel and Freedom of Information Act Officer, National Endowment for the Humanities, to Richard L. Huff and Daniel J. Metcalfe, Office of Information and Privacy, Department of Justice 1 (Nov. 8, 1993) (on file with *The American University Law Review*); the National Mediation Board, *see* Letter from William A. Gill, Jr., Executive Director, National Mediation Board, to Richard L. Huff and Daniel J. Metcalfe, Office of Information and Privacy, Department of Justice 1 (Oct. 28, 1993) (on file with *The American University Law Review*); the National Science Foundation, *see* Letter from Raymond E. Bye, Director, Office of Legislative and Public Affairs, National Science Foundation, to Richard L. Huff and Daniel J. Metcalfe, Office of Information and Privacy, Department of Justice 1 (Nov. 2, 1993) (on file with *The American University Law Review*); the National Transportation Safety Board, *see* Letter from Daniel D. Campbell, General Counsel, NTSB, to Richard L. Huff and Daniel J. Metcalfe, Office of Information and Privacy, Department of Justice 1 (Oct. 26, 1993) (on file with *The American University Law Review*); the Occupational Safety and Health Review Commission, *see* Letter from Edwin G. Foulke, Jr., Chairman, Occupational Safety and Health Review Commission, to Richard L. Huff and Daniel J. Metcalfe, Office of Information and Privacy, Department of Justice 1 (Nov. 8, 1993) (on file with *The American University Law Review*);

become available to those agencies that experience backlogs to assist them in overcoming their timing problems.

CONCLUSION

Agencies are inundated with FOIA requests, resulting in large backlogs and practically precluding the possibility of processing requests within ten business days as mandated by the 1974 amendments to FOIA. The current administration has issued policy memoranda supporting the principles of the FOIA, stating that FOIA backlogs should be eliminated, and declaring that FOIA requests should be responded to on a timely basis. These well-intentioned statements will not solve the FOIA backlog problem without a serious commitment of further government personnel, equipment and monetary resources.²²⁰

Recognizing that such a commitment of resources is highly unlikely in the foreseeable future, the recommendations provided in this Article help bridge the gap between legislative intent and economic reality with respect to Freedom of Information Act disclosure deadlines. These recommendations suggest: (1) expediting urgent requests ahead of other requests; (2) processing simple requests separately from complex requests; (3) amending the standard FOIA response deadline to twenty business days; (4) implementing

the Peace Corps, see Letter from Tom Pierce, PA/FOIA Officer, Office of Administrative Services, Peace Corps, to Richard L. Huff and Daniel J. Metcalfe, Office of Information and Privacy, Department of Justice 1 (Nov. 3, 1993) (on file with *The American University Law Review*); the Records Office of the United States Postal Service, see Letter from Betty E. Sherrieff, USPS Records Officer, to Richard L. Huff and Daniel J. Metcalfe, Office of Information and Privacy, Department of Justice 1 (Nov. 5, 1993) (on file with *The American University Law Review*); and the Selective Service System, see Letter from Paula D. Sweeney, Records Manager, Selective Service System, to Richard L. Huff, Office of Information and Privacy, Department of Justice 1 (Nov. 10, 1993) (on file with *The American University Law Review*). In the Department of Justice, the Pardon Attorney, see Memorandum from Margaret C. Love, Pardon Attorney, to Richard L. Huff, Office of Information and Privacy 1 (Oct. 26, 1993) (on file with *The American University Law Review*), the Solicitor General, see Memorandum from Harriet S. Shapiro to Richard L. Huff and Daniel J. Metcalfe, Office of Information and Privacy 1 (Oct. 8, 1993) (on file with *The American University Law Review*), and the Office of Special Counsel for Immigration Related Unfair Employment Practices, see Facsimile from Dan Sutherland, FOIA Officer, Office of Special Counsel for Immigration Related Unfair Employment Practices, to Margaret Irving, Office of Information and Privacy 2 (Oct. 26, 1993) (on file with *The American University Law Review*), claim to have no FOIA backlog.

220. This is especially so when some federal FOIA processors do not feel highly valued and may view backlogs as a source of job security. See, e.g., Memorandum from Tax Division, to Peggy Irving, Office of Information and Privacy 6 (undated document on file with *The American University Law Review*) (reporting that some feel that "FOI/PA personnel are not recognized as an intricate part of the Department"); Memorandum from FOIA Operations Unit, Drug Enforcement Administration, to Peggy Irving, Associate Director, Office of Information and Privacy 2 (undated document on file with *The American University Law Review*) ("Recognize that within the FOIA community, backlog is viewed in positive terms as it relates to job security.").

specialized FOIA procedures for certain agencies; (5) obtaining a precise and sensible definition of "exceptional circumstances" and "due diligence"; (6) searching electronic databases for information; (7) tracking agency FOIA performance; and (8) allowing agencies to recoup FOIA fees directly. It is hoped that Congress will examine these recommendations and that the Attorney General will consider them as she undertakes her review of agency backlogs.

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JAMES R. MAYOCK,)	
Plaintiff,)	
v.)	Civil No. C-85-5169-CAL
)	
IMMIGRATION AND)	
NATURALIZATION)	SETTLEMENT AGREEMENT
SERVICE, <i>et al.</i> ,)	
Defendants.)	
)	

Plaintiff, JAMES R. MAYOCK, and defendants, the IMMIGRATION AND NATURALIZATION SERVICE ("I.N.S."), et al. (hereinafter "defendant"), through their undersigned counsel, hereby agree as follows:

1. The parties do hereby resolve, settle and compromise all outstanding claims and issues, including all attorneys' fees and costs, arising from Civil Action No. 85-5169-CAL, United States District Court for the Northern District of California ("the action").

2. This Settlement Agreement does not constitute an admission by the defendant that defendant, or any of its employees, has violated any law or statute as alleged in the complaint filed by plaintiff in the action. Defendant specifically disclaims that it has engaged in any unlawful pattern and practice either by failing to produce certain categories of Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, information or by failing to respond timely to requests as required by the FOIA.

3. This Settlement Agreement does not constitute an admission by plaintiff that its allegations that defendant engaged in a pattern and practice of violating various FOIA requirements lack merit. Plaintiff also does not subscribe to defendants' legal interpretation of 5 U.S.C. § 552(a)(6)(C) and the applicable case law as specifically

set forth in Attachment A to this Settlement Agreement. Plaintiff otherwise does not necessarily agree that the electronic databases identified on page 2 of Attachment B to this Settlement Agreement constitute all relevant electronic databases to be searched.

4. Defendant agrees to establish a national Policy on Priority for Processing Freedom of Information Act/Privacy Act ("FOIA/PA") Requests, which policy shall be disseminated to all Regional Record Managers, conspicuously posted in all I.N.S. district offices and a copy mailed to plaintiffs counsel, Eric J. Sinrod, and to Lory Rosenberg, American Immigration Lawyers Foundation, Legal Action Center in Washington, D.C. within two weeks of the execution of this Settlement Agreement. The terms of that national policy shall be as set forth in Attachment A to this Settlement Agreement.

5. Defendant further agrees that the San Francisco District Office ("SFDO") will continue its present policies and procedures for handling FOIA/PA requests and that the SFDO District Director shall issue a policy statement setting forth the terms of that present SFDO policy. That policy shall be conspicuously posted at the SFDO and a copy mailed to plaintiff's counsel, Eric J. Sinrod, and to Lory Rosenberg, American Immigration Lawyers Foundation, Legal Action Center in Washington, D.C. within two weeks of the execution of this Settlement Agreement. The terms of that SFDO policy statement shall be as set forth in Attachment B to this Settlement Agreement.

6. Defendant further agrees to provide to plaintiff's counsel, Eric J. Sinrod, and to Lory Rosenberg, American Immigration Lawyers Foundation, Legal Action Center in Washington, D.C. with national FOIA tracking data for all district offices, concerning the total number of requests processed during the month, average days necessary to complete those requests, the number of cases pending and the average number of days that those cases have been pending, which shall be mailed to Mr. Sinrod and to Ms. Rosenberg by prepaid first class mail on or before the fifteenth of each month for a period of two years after the execution of this Settlement Agreement.

7. Defendant further agrees to pay plaintiff the lump sum amount of \$250,000 in attorneys' fees and costs, which amount shall be paid in full satisfaction of all claims for attorneys' fees and costs that have been made or could have been made by any attorney who participat-

ed in the litigation of this case in any capacity. No deductions of any type shall be taken from this lump sum payment, which defendant shall tender to plaintiff by means of a check or electronic transfer payable jointly to James R. Mayock and Hancock,, Rothert & Bunshoft. Plaintiff and/or his counsel are liable for payment of all applicable taxes and other deductions from this amount. If this payment is not tendered before June 26, 1992, plaintiff shall retain the right to request the district court to postpone dismissal provided for in the District Court's Order of Dismissal, dated April 28, 1992, but only until such time as plaintiff receives such payment.

8. In exchange for the consideration to be provided by defendant, as set forth above, plaintiff forever waives and releases all claims and causes of action that plaintiff has alleged or could have alleged against the defendant and all I.N.S. employees in this litigation. Plaintiff reserves the right to bring a subsequent action should he believe that an I.N.S pattern and practice of failing to comply with FOIA has occurred after this litigation has concluded.

9. Plaintiff further agrees not to challenge the District Court's Order of Dismissal, dated April 28, 1992, within the 60 day time period provided in that Order, provided that defendant fulfills all of its obligations set forth in paragraphs 4, 5, 6 and 7, above. Plaintiff and defendant further agree voluntarily to dismiss their respective attorneys' fees appeals in the United States Court of Appeals for the Ninth Circuit, appeal numbers 90-16681 and 90-16725 with prejudice, by simultaneously executing this Settlement Agreement and the stipulation of dismissal attached hereto as Attachment C and immediately filing the executed stipulation of dismissal with the Ninth Circuit Court of Appeals.

10. The parties agree that should plaintiff believe there has been any breach of this Settlement Agreement, he shall provide the SFDO District Director with notice in writing of any such perceived breach. The SFDO shall, within two weeks of the date of receipt of that notice, respond in writing to the substance of that claim and shall undertake a good faith effort to resolve plaintiff's concerns. The SFDO would then have an additional two weeks to meet with and/or make a good faith effort to resolve plaintiff's claim. During the four weeks following the receipt of plaintiff's written notice at the SFDO, plaintiff shall not institute any pattern and practice lawsuit in district court concerning a perceived breach of the Settlement Agreement.

At the end of that four week period, however, plaintiff shall be free to seek relief in district court for any perceived breach of the Settlement Agreement that he believes have not been corrected by the SFDO.

11. Defendant retains the right to amend, change, revise, or terminate any practice or policy of concern herein. Plaintiff, in the event of any such amendment, change, revision, or termination by defendant of any practice or policy of concern herein, shall retain the right to institute a new action challenging any such amendment, change, revision or termination and any of its consequences.

12. The parties acknowledge that they enter into this agreement freely and voluntarily and that this agreement is intended by the parties to be the full and final settlement of the matters encompassed herein, and there are no terms and conditions of settlement not set forth herein.

May 22, 1992
DATE

//s// Eric Sinrod
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May 22, 1992
DATE

//s// James R. Mayock
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May 21, 1992
DATE

//s// Paul W. Bridenhagen
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ATTACHMENT A

PRIORITY PROCESSING PROGRAM

The purpose of this memorandum is to set policy for establishing priority for processing Freedom of Information Act/Privacy Act ("FOIA/PA") requests and the procedures to be used by INS offices when acting on requests that ask for "expedited processing."

The FOIA, 5 U.S.C. § 552(a) (6) (A), requires federal agencies to determine whether to release requested documents within 10 working days. If an agency fails to comply with this requirement, the requester may treat the failure as an exhaustion of administrative remedies and file suit. 5 U.S.C. § 552(a) (6) (B) allows this period to be extended for an additional 10 working days in the event of "unusual circumstances" as follows:

- (i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;
- (ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or
- (iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

Those INS FOIA/PA offices which have such a backlog that the extension authorized in these unusual circumstances would be irrelevant should rely on the language of 5 U.S.C. § 552(a) (6) (C). The leading case on this provision is *Open American v. Watergate Special Prosecuting Force*, 547 F.2d 605 (D.C. Cir. 1976), which provides that a volume of requests beyond that which an agency could reasonably have anticipated constitutes "exceptional circumstances," and that processing these requests on a "first-in, first-out" basis satisfies the

requirement that an agency exercise due diligence in dealing with this backlog.

In general, each INS FOIA/PA office must adopt a first-in, first-out (FIFO) processing policy as its basic guideline in determining the order in which it processes requests. If strict FIFO processing of all requests regardless of the volume of records requested would cause some requesters with simple requests to wait for extraordinary periods of time while a limited number requesters with exceptionally complex requests are served, individual offices may adopt a multi-track system as follows:

Track I - Simple Requests

- Require five days or less to process.
- Request a limited number of documents.
- Involve minimal review for claims exemptions.

Simple requests are those which require five days or less to process, including requests for only one or two specific documents that are easily accessed and which, by their nature would not normally be exempt from the requester (*e.g.*, request for a copy of one's own birth certificate or naturalization certificate).

Track 2 - Complex Requests

- Require more than five days to locate, review and prepare for disclosure.
- Request more than a limited number of documents.
- Involve more than a minimal review for claims exemption.

Complex requests are those which it is estimated that the records sought in the request will take more than five days to locate, review, and prepare the requested records for disclosure (*e.g.* files requiring line-by-line review of numerous pages of personal information; classified files requiring review for national security implications; investigative files, particularly those that are of current or recent

investigations, that require careful coordination with investigative personnel; and sensitive internal memoranda that are part of the decision-making process).

Simultaneous Two-Track FIFO Processing

Under this two-track system some simple requests will be processed ahead of more complex ones which may have been received earlier. This procedure, however, will not negate a claim of due diligence as long as the FIFO approach within each track is maintained, and a good faith effort is made to process all requests as expeditiously as possible. FOIA offices may not, however, devote all, of their resources to processing Track 1 over Track 2, or vice-versa.

Expedited Processing for Demonstrated Exceptional Need or Urgency

A requester who demonstrates, consistent with applicable guidances and law, an "exceptional need or urgency", shall have his/her request processed out of turn on an "expedited" basis. The currently applicable guidance, set forth in the Attached Department of Justice FOIA UPDATE, Summer 1983, provides that FOIA offices are to grant such treatment when the requester demonstrates that:

- a. an individual's life or personal safety would be jeopardized by the failure to process a request immediately; or
- b. substantial due process rights of the requester would be impaired by the failure to process immediately, and the information sought is not otherwise available.

Procedures for Expedited Processing

A request for expedited processing which demonstrates either of the above circumstances shall be processed immediately.

A request which fails to meet the above criteria shall be denied expedited processing and shall be processed on the appropriate track. A requester must be notified in writing of the decision not to grant the request for expedited treatment, and advised of his/her right and the procedures to appeal the decision. Sample letters for this notification are enclosed.

Please disseminate this policy to your FOIA/PA Officers and insure that each is fully aware of these requirements. This rescinds HQINF memorandum 1491-P, dated March 1990, same subject. Any questions concerning this policy should be directed to Mildred Carter, FOIA/PA Specialist, or Russell Powell, Chief of FOIA/PA Section, on FTS 368-1722.

Robert L. Martinez
Assistant Commissioner

Enclosures

cc: Regional Administrators
District Directors

ATTACHMENT B

IMMIGRATION AND NATURALIZATION SERVICE San Francisco District Office **Policies & Procedures for Handling FOIA Requests**

The purpose of this memorandum is to set forth the San Francisco District Office's ("SFDO's") policies and procedures for handling Freedom of Information Act ("FOIA") requests. All SFDO FOIA personnel shall adhere to the policies and procedures set forth below in responding to a FOIA request.

I. Receipt and Logging of Requests

A. Mailed Requests

1. The FOIA unit will promptly retrieve its mail each time the mail is delivered and date stamp all requests with that day's date.
2. After date stamping the request, the request will be entered into the FOIA computer tracking system in the appropriate category.
3. An acknowledgement of receipt of the FOIA request will be mailed to the requester within two days of the receipt of the request.

B. Hand Delivered Requests

1. All requests that are hand-delivered will be date stamped with that day's date promptly upon receipt.
2. After date stamping the request, the request will be entered into the FOIA computer tracking system in the appropriate category.
3. An acknowledgement of receipt of the FOIA request will be mailed to the requester within two days of the date the request is received if not handed to the requester while he is still in the office.

II. Screening Requests and Obtaining Alien File

- A. The location of the Alien File from which information has been requested will be determined promptly.
- B. If the Alien File is located in another files control office (FCO):
 - 1. The FOIA request will be immediately forwarded to that office.
 - 2. The requester will be mailed a notice of the request's transfer to another office within two days of the date the transfer is made.
 - 3. If the request is for "all files", a search of electronic data bases will be made and releasable information located will be sent to the requester with the notice of transfer.
- C. If the Alien File is located in the Immigration Card Facility, a request for the file will be made immediately. The request will then be treated as if this office were the original FCO.
- D. If the Alien File is located in this District, it will be obtained promptly so that work can begin.

III. Working the Request

- A. The Alien File will be received and appropriate deletions made and identified in accordance with statutes, regulations and established procedures.
- B. The following electronic databases will be searched by name and date of birth of the subject of the request, as necessary for each request.
 - 1. Central Index System (CIS)
 - 2. Deportable Alien Control System (DACS)
 - 3. Fees Applications Receipt Entry System (FARES)
 - 4. Naturalization Casework System (NACS)
 - 5. Non-Immigrant Information System (NIIS)
 - 6. Student/School System (STSC)

7. Legalization Application System (LAPS)
8. Any pertinent systems established subsequently.

- C. Information obtained from the electronic data bases listed in III.B. above will be processed in a like manner to information in the Alien-Files.
- D. Audio/video records pertaining to the subject of the request will also be considered for release.

IV. Extension of Time

- A. All SFDO FOIA personnel shall comply with the time requirements set forth in 5 U.S.C. § 552(a)(6)(A), (B), and (C).
- B. An extension of time under 5 U.S.C § 552(a)(6)(B) for a response to the requester can be used only in the following circumstances:
 1. Some or all of the requested records/ information must be obtained from another office.
 2. The volume of records to be reviewed is unusually large.
 3. Other federal government agencies of Department of Justice component must be consulted.
- C. If an extension of time is appropriate under 5 U.S.C § 552(a)(6)(B), a letter of explanation will be sent promptly to the requester explaining the reason for the delay and setting a new response date.
- D. Where an extension of time pursuant to 5 U.S.C § 552(a)(6)(B) is determined to be appropriate, the final response shall be within 20 working days of the original request date.

V. Information Disclosure

- A. Entire Page Withhold
 1. When an entire page of a file is withheld from

disclosure to a FOIA requester, the specific subject matter of the withheld sheet need not be identified.

2. When an entire page of a file is withheld, however, the following information will be released in lieu of the page itself:
 - a. The "in lieu of" page will be identified in its upper right hand corner with the page number of the page withheld, e.g. L-7, R-29, etc.
 - b. "Entire Page" will than be placed immediately beneath the page number.
 - c. Centered in the upper half of the "in lieu of" page will be the U.S.C. citation that exempts from disclosure the withheld page.
 - d. Centered in the lower half of the "in lieu of" page will be the identification of the withheld page by type, form number and date, as applicable, e.g. Attorneys' Worksheet, 1/23/89 or Investigator's Worksheet, SF-10, 2/14/88.

B. Less Than Entire Page Withheld

1. When less than an entire page is withheld, a numerical citation to the statutory section relied upon for exemption from disclosure will be placed adjacent to redacted information.
2. The form number, date, and any information which generally describes the type of form will ordinarily not be redacted, in order to assist the requestor in making a decision as to whether or not to appeal the decision to exempt information from disclosure.

VI. Review and Distribution of Completed Request

- A. After the requested records and information have been gathered, a cover letter will be prepared indicating what types of documents are being withheld and correlating that with the exemption(s) relied upon.

- B. After approval by appropriate officials, the cover letter will be signed by the District Director, or his designee, and the package then mailed to the requester.
- C. If the requester has an urgent need for the information and has asked to pick-up the package rather than having it mailed, the requester will be notified by phone that the package is ready.
- D. A copy of any material not released to the requester will be kept by this office for the specified time period.
- E. As the final step, the request will be closed out of the FOIA computer tracking system.

