

Letters

We welcome letters from readers, particularly commentaries that reflect upon or take issue with material we have published. The writer's name, affiliation, address, and telephone number should be included. Because of space limitations, letters are subject to abridgment.

Freedom of Information Act

TO THE EDITOR:

Like the proverbial dog whose bark is worse than its bite, Antonin Scalia's article ("The Freedom of Information Act Has No Clothes," *Regulation*, March/April 1982) has a title more fierce than some of its specific comments. Nonetheless, his principal claim—that the act is unduly rigid, imposes excessive costs on the taxpayer, and produces very little benefit—deserves a response.

To start, we should put the cost issue in perspective. The Justice Department has estimated the annual cost of FOIA compliance at \$57 million. That is an unsubstantiated figure; many observers believe it has been inflated by the agencies, which are not enamored of the act, and it may include budgets for press operations that would continue even if the act were repealed tomorrow. Even if the figure were accurate, however, it would not be a big item in the federal budget. The Defense Department plans to spend some \$30 million more than that this year on military bands—which, to my knowledge, have not been the subject of any rigorous benefit-cost analysis recently.

Some of Scalia's criticisms are overstated because they focus on what the act *says* instead of how it *works*. It is true that the act does contain some strict standards on paper. In practice, however, agencies have greater leeway than the literal wording might suggest. For example, the time limits in the act (ten working days for answering a request, twenty for an appeal) are strict, but also essential, at least as

a goal—especially if one believes in Parkinson's Law. Moreover, they can be extended. As a practical matter, they do not force agencies to drop everything (or, for that matter, very much of anything) in order to comply. The D.C. circuit court of appeals has ruled that agencies can ignore the deadlines so long as they are processing requests on a "first-come, first-served" basis. These days, it is not unusual to wait thirteen months for the Justice Department to process an appeal, and it is not the slowest agency.

If an FOIA case does go to court, the act requires that it be given expedited consideration, but so do over a dozen other statutes involving various cases from federal agencies. Moreover, in an FOIA context, expedition makes sense. Information can be a perishable commodity, and if a journalist has to go through three years of litigation to get a story, any ultimate victory he gains may be Pyrrhic at best.

As for the act's provision for sanctions against employees who arbitrarily withhold records, Scalia's comments are unfounded. Sanctions have never been applied and probably never will, since they are available only if a court orders the records disclosed. Thus an agency can litigate a case for years, turn over the records just before a decision is announced, and still avoid sanctions, no matter how egregious the withholding has been. How cost-effective is that type of litigation strategy to the taxpayer?

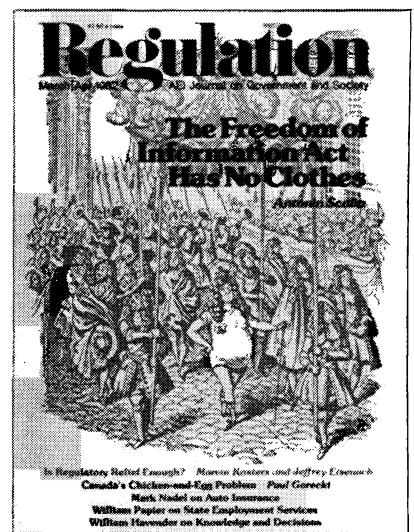
With respect to the act's direct costs, Scalia is correct that there should be more reliance on the price mechanism, but Congress should be careful to prevent agencies from using fees as a defensive weapon in cases where information would benefit the public. A useful solution would be to let an agency charge commercial requesters for the time its employees spend reviewing documents to see if they are exempt, in addition to the search and copying costs which it can now levy. At the same time, however, there should be a mandatory fee waiver if disclosure is in the public interest.

Since at least 60 percent of all FOIA requests come from commercial requesters, the first reform would make the act more cost-effective and could cut down on corporate "fishing expeditions." The latter would ensure that journalists and others could obtain important data promptly without a lot of preliminary skirmishing over fees.

If Scalia's analysis of the act's costs thus seems overstated, his review of the benefits seems equally understated. Perhaps most troubling is his suggestion that the act is extraneous to its goal of government accountability. His evidence is the fact that the "major exposés" of the 1970s, from Watergate to the FBI and CIA, came about through "institutional checks and balances within our system of representative democracy."

The first problem with this argument is that it overlooks a number of FOIA disclosures that may not have toppled presidents, but that are still noteworthy. For example, the Better Government Association, a Chicago-based citizens' group, used the act to uncover some \$2 million in seemingly fraudulent claims in a Small Business Administration bond guarantee program.

Such uses of the act are hardly unique. A 1981 study by the Library of Congress cited almost 300 articles which mentioned the act as a source, and there were undoubtedly other articles whose authors used the act but did not name it as a source. In May 1982 the Campaign for Political Rights released "Former Secrets," a compendium of 500 major disclosures under the act, a number of which spurred corrective action.



Scalia's criticism of "do-it-yourself oversight" seems to contain a hidden assumption that the "institutional checks and balances" of our system are a closed (or very limited) circle, at least between elections. The problem with this approach is that checks and balances are often triggered by a push from the outside, as the SBA example demonstrates. Without a mechanism such as the Freedom of Information Act to ensure participation from the press and public—and to call attention to matters that might not otherwise receive the attention they deserve—a vital link in the chain would be missing.

*Cornish F. Hitchcock,
Director, Freedom of
Information Clearinghouse*

TO THE EDITOR:

I can add my own experience to Antonin Scalia's account. In January 1981 I filed a FOIA request for documents pertaining to the "PACE" consent decree signed by the Department of Justice on behalf of the Office of Personnel Management. In March 1982 I received a large package of materials from the department, along with a letter saying that certain portions of the documents had been withheld because they contained "privileged communications of the Department with client agencies." (It was, of course, precisely this information that I was after.) A typical document, dutifully sent me, read as follows:

Stuart E. Schiffer
Acting Assistant Attorney General
Civil Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Schiffer:

Sincerely,
Arnold I. Melnick
Colonel, JAGC
Chief, Litigation Division

I should say that many months earlier I had made discreet inquiries at the OPM and learned what I wanted to know.

*Walter Berns,
American Enterprise Institute*

ANTONIN SCALIA responds:

I would guess that the \$57 million figure for annual FOIA "compliance costs" is greatly *understated*—that it does not include, for example, the cost of litigating the complicated exemptions or the time that high-level officials (who do not keep time sheets) spend in reviewing denials, planning litigation strategy, or screening classified files that only they can properly evaluate. Even so, to everyone except the ghost of Senator Dirksen ("\$57 million here, \$57 million there, pretty soon you're talking about real money!"), the direct costs are insignificant. The real damage consists in the disruption of important private and governmental activities.

I mentioned direct cost principally because that was the area in which congressional expectations (\$100,000 per year) can most readily be shown to be at odds with subsequent reality; and also because most of the direct expense that is incurred is not only unnecessary but even counterproductive, since it eliminates a needed rationing mechanism. I gather Hitchcock substantially agrees with the latter point. Anyway, let me note for the record that I would consider it worth at least \$30 million, plus the scrapping of the entire FOIA, not to have to march into battle to the hum of a kazoo.

I feel no need to apologize for addressing the act as it is written rather than the act as it is ignored. Those provisions so absurd that they cannot even be complied with are even riper for revision than the absurdities that are obeyed.

Finally, although I am not familiar with the specific instances of beneficial use of the FOIA that Hitchcock recites, I am willing to stipulate that his account of them is accurate. One does not have to favor the abolition of all "not guilty" verdicts to oppose the insanity defense. That is to say, my quarrel is not with the unquestionably sound concept of public access to government information, but only with the features of the 1974 amendments that produce the bizarre character of the current FOIA. The key question is not whether the act has benefits, but rather how many of those benefits would be forgone under a more rational access scheme. I think very few.

I will stand by the allegorical aptness of the title of my piece. If Hitchcock thinks its bark is worse than its bite, he may be mistaking what is barked and bitten at. ■

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