

U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20590

2
STATEMENT OF JOHN W. BARNUM, GENERAL COUNSEL, DEPARTMENT OF TRANSPORTATION
BEFORE THE FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE OF
THE HOUSE COMMITTEE ON GOVERNMENT OPERATIONS ON THE FREEDOM OF INFORMATION
ACT, TUESDAY, MARCH 28, 1972.

Mr. Chairman and Members of the Committee:

I appreciate this opportunity to appear before you today to discuss
the administration of the Freedom of Information Act.

At the outset, I would like to outline for you the regulations we
have established in the Department respecting the public availability
of information. These regulations were first promulgated in June 1967
shortly before the Freedom of Information Act became effective. However,
we have just revised them in several important respects. Therefore,
in describing them to you, I will try to point out the most significant
changes included in this revision.

The sequence of the subject matter of our implementing regulations
follows closely that of section 552 of title 5, United States Code. The
regulations include provisions respecting the publication of the Depart-
ment's organization and operating procedure, and the inspection and
indexing of Departmental orders and policies that affect members of the
public. They also provide guidelines to the public respecting the
availability of identifiable records other than those that are published
or indexed. Next and perhaps most important, the regulations set forth

guidelines respecting the exemption of certain records from public inspection. The only group of records which are not to be made available for public inspection at any time are those protected from disclosure by Executive order in the interests of national defense or foreign policy, and those specifically exempted from disclosure by statute. The Department's policy is to release a record authorized to be withheld under other exemptions of the Freedom of Information Act unless it is determined that the release of the record would be inconsistent with the purpose of the exemption.

A number of the amendments we have just made to our regulations have the effect of narrowing the scope of some of these exemption provisions. For example, the provision dealing with trade secrets and confidential information was revised to state less broadly various examples of records to be considered within the exemption. Also, the provision dealing with intra-governmental exchanges was revised to indicate that any memoranda made part of an agency action are not within the exemption, and to specify that factual information contained in intra-agency memoranda may be made available unless the facts are so inextricably intertwined with deliberative or policy-making processes that the factual information cannot be separated without disclosing those processes. Finally, the provision dealing with records related solely to internal personnel rules and practices was revised to reflect the position that the words "internal personnel" modify both the words "rules" and "practices", and that the exemption in this more limited interpretation

applies to rules and practices concerning the relations between the Department and its personnel, rather than to rules and practices concerning relations between the Department and outsiders.

We have one set of regulations on the Freedom of Information Act applicable to all elements of the Department. However, the authority to administer the regulations is decentralized. In the Office of the Secretary, the Director of the Office of Public Affairs is responsible for arranging for the public inspection, copying, and release of information. However, if there is a denial of a request for records in the Office of the Secretary and the requesting party appeals to the Department for reconsideration of the case, our revised regulations call upon the General Counsel to issue the final decision of the Department as to the releasability of the information. With respect to records in each operating administration, the authority to administer the regulations is delegated to the head of the administration and, in turn, may be redelegated to subordinate officers in connection with defined groups of records. However, the head of an operating administration may delegate his authority to issue a final denial of a request for a record only to his deputy and to not more than one other officer in the headquarters of the administration who reports directly to the head of the administration.

Our regulations require each person desiring to see or copy Department records to make a written request to the appropriate Departmental officer specified in the regulations. (The regulations list in

appendices document inspection facilities for the Office of the Secretary and the various administrations of the Department, including those in regional and district offices throughout the country.) There are two basic requirements associated with the making of such a request. First, the request must describe the particular record in enough detail to allow the record to be identified and located with a reasonable amount of effort. Secondly, each request must be accompanied by the prescribed fee if that fee can be readily ascertained from our published fee schedules.

The procedure for handling an individual request for information varies somewhat in different elements of the Department, as many details respecting the implementation of our regulations are left to the discretion of our operating administrations. Typically, however, a request received by one of our administrations is routed to the office which has actual custody of the records in question and the decision to provide or deny access to the information is made by an officer of the administration associated with the activities of that office. Under our revised internal directive on Public Availability of Information, the initial denial of a request normally is to be coordinated with the Chief Counsel of the administration, his designee, or the appropriate field legal officer. Our regulations then provide that the officer who makes the determination that the record is not to be disclosed must provide the requesting party a written statement of his reasons for the determination.

Upon receipt of an initial denial of access to information, the requesting party may apply in writing to the head of the operating administration (or his designee) for reconsideration of his request. Under our revised procedures, the head of the administration must coordinate a denial of a request for reconsideration with the General Counsel of the Department. If a denial is then issued by the head of the administration, or his designee, that action is considered to be a withholding by the Secretary for the purposes of section 552(a)(3) of title 5, United States Code.

I would like to add a note about our new requirement for legal review of both initial and final denials. Our intent in establishing this requirement is to assure that documents are not withheld unless it is clear that one of the exemptions of the Act is applicable, and even if applicable, that release would be inconsistent with the purpose of the particular exemption involved. Thus, we believe the use of this procedure should promote the release of information rather than make its release more difficult.

It has been suggested that it might be appropriate to impose on agencies a time limit for responding to requests for information. We agree that agency responses should be made as promptly as possible and we recognize that, in some cases, a long delay in receiving information might substantially reduce its value to the requesting party. We would recommend against the establishment of any flat requirement in this

regard, however, because special problems frequently arise which make it difficult to act upon a request in a short period of time. In some cases, it may be discovered that records sought at the headquarters level are stored in field offices of one of our administrations. In other cases, the request may require a lengthy search because it is couched in imprecise terms or seeks a voluminous quantity of records. On other occasions, there may be a need for a thorough legal review of a request to determine how much of the desired information can be provided. I should point out, however, that our regulations require an officer handling a request which will require an extended search to notify the requesting party of the estimated time that will be needed to fill his request. The regulations also provide that where a record is not made available within a reasonable time, the requesting party may treat his request as denied and move directly to the appeal stage.

Now I would like to discuss the fees we charge for supplying information to the public. Prior to the revision of our regulations, our fee schedule included a \$3.00 charge for a record search, a copying fee of 50 cents per page, and a minimum copying fee of \$1.00. The revised regulations provide that a search fee is to be charged only if a search is necessary, and that no fee is to be charged for time spent in preparing correspondence relating to a request, or in making legal determinations as to releasability. Under the revised regulations, the copying fee has been reduced to 25 cents per page and the minimum copying fee has been

abolished. Also, a new section has been added listing specific requests for which no fee will be charged. These include requests by employees or former employees for personnel records, and requests by members of Congress, the courts, and other governments. In addition the regulations now provide that documents may be furnished without charge or at a reduced charge if the head of the operating administration concerned determines that the furnishing of the information primarily benefits the general public. Examples of such situations are requests from groups engaged in nonprofit activities designed for the public safety, health, or welfare, and requests from schools and students.

We have also changed our regulations as they apply to the availability of transcripts of hearings and oral arguments. In the past copies of these transcripts have been available only from the nongovernment reporting service which retained the exclusive sales privilege for duplicate copies, usually at a price much higher than that listed in our fee schedule. Last year, the General Services Administration modified its contract solicitations to provide Government agencies the option of contracting for transcription service with or without the sales privilege. A new section of our regulations assures that where the Department has the right to handle the reproduction of copies of these transcripts, the usual fee schedule applies.

Finally, our revision calls attention to **alternate** sources of information in the interest of making documents of general interest publicly available as cheaply as possible. Appropriate material will be published

and offered for sale by the U.S. Government Printing Office, the Commerce Department's National Technical Information Service, the National Audio Visual Center and the Consumer Product Information Coordinating Center.

The revisions we have just made to our regulations are based on experience we have gained in the administration of the Act over the past few years. While the revisions are not broad sweeping changes, we believe they will help make it easier for members of the public to obtain certain Department records. There is no doubt that the changes in the fee structure will make it less expensive to acquire records in many cases. We recognize the need to continue seeking ways to improve the administration of the Act and, at present, are now looking into the possibility of restructuring filing systems in various elements of the Department so that requests for information can be dealt with more promptly, and releasable portions of records can be separated more easily from materials falling under exemptions of the Act. We also will be following with interest the course of your hearings. We believe they should provide a considerable amount of constructive thought as to how the administration of the Act can be improved.

Mr. Chairman, that completes my prepared statement. Now I will be happy to answer any questions the Committee may have.