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Report to the Chairman, Subcommittee on
Government Information, Justice, and
Agriculture, Committee on Government
Operations
House of Representatives

April 1986

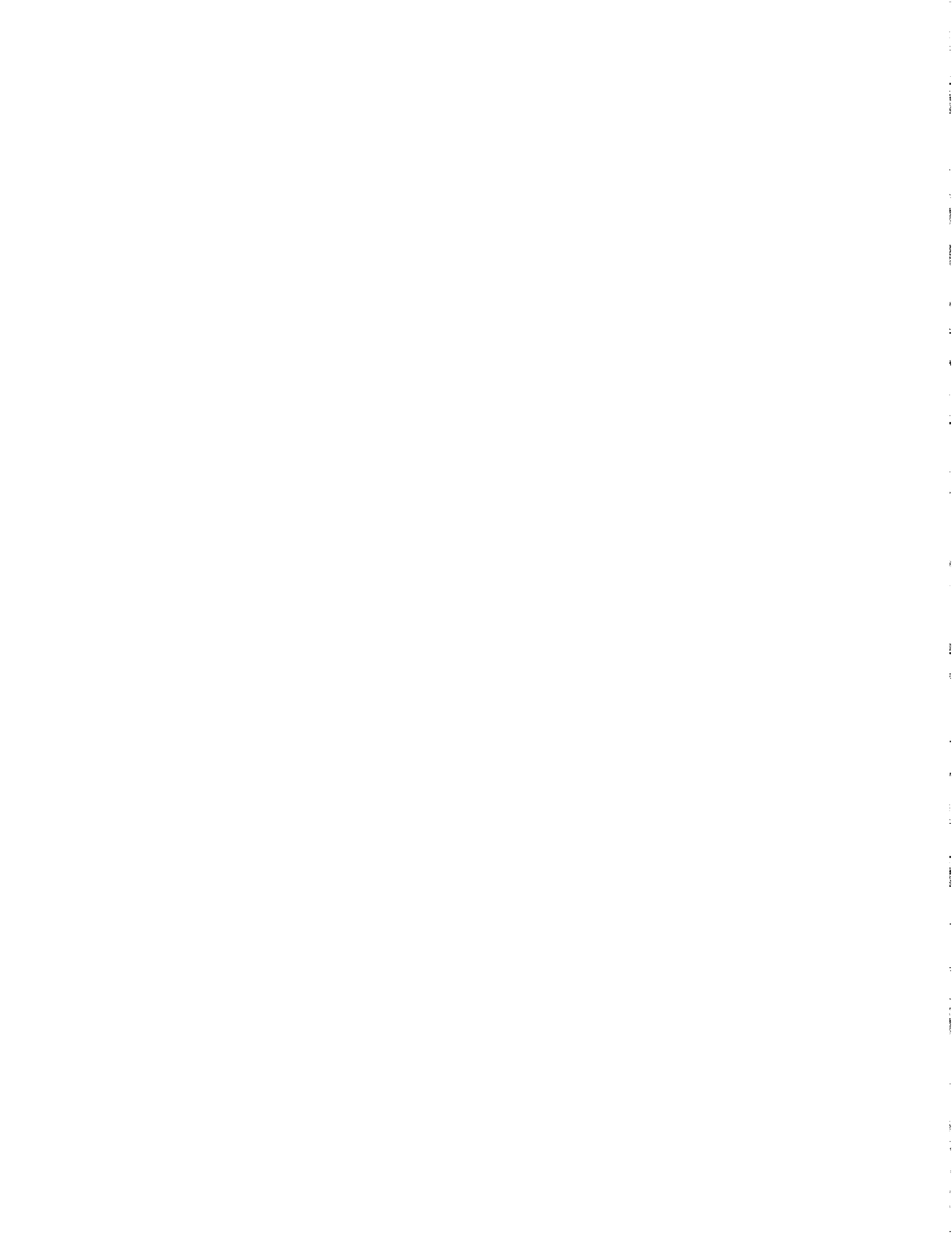
FREEDOM OF INFORMATION ACT

Noncompliance With Affirmative Disclosure Provisions



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United States
General Accounting Office
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General Government Division
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April 15, 1986

The Honorable Glenn English
Chairman, Subcommittee on Government
Information, Justice, and Agriculture
Committee on Government Operations
House of Representatives

Dear Mr. Chairman:

This is in response to your request that we evaluate federal agencies' compliance with the affirmative disclosure provisions of the Freedom of Information Act (FOIA). As you pointed out, the FOIA provision requiring agencies to disclose reasonably described records upon request has been the subject of most of the debate and litigation since FOIA's passage in 1966. FOIA's two affirmative disclosure provisions have, heretofore, received little attention or study.

FOIA's affirmative disclosure provisions are contained in 5 U.S.C. 552 subsections (a)(1) and (2). They require federal agencies to make certain information on their organization, operations, and regulations available for public use so the public can deal with the agencies effectively and knowledgeably.

To determine whether federal agencies were complying with FOIA's affirmative disclosure requirements, we interviewed officials of component organizations of the 13 cabinet-level departments and the Veterans Administration and evaluated their procedures. The organizations were selected in consultation with your office and included at least one organization in each of the departments and the Veterans Administration. Our review was designed to assess compliance efforts at these organizations only, and the results can not be projected to the departments as a whole or to other organizations subject to FOIA requirements. (See app. I for a more detailed discussion of the objectives, scope, and methodology of this review.)

The results of our work are summarized below and are presented in greater detail in appendixes I through IV.

Compliance With FOIA Subsection (a)(1) Requirements

In general, subsection (a)(1) requires agencies to publish in the Federal Register information on

- agencies' central and field organizations and locations and methods whereby the public may obtain information,
- procedures established to accomplish agencies' functions,
- regulations adopted as authorized by law, and
- any revision of the foregoing.

The Federal Register is a government publication in which executive orders, proclamations, other presidential documents, and documents required to be published by act of Congress are recorded. The Federal Register is published each official federal working day.

Although all organizations took steps to comply with subsection (a)(1) requirements, in 20 instances 14 organizations had not published all required information. As a result, the public may not have had all of the information necessary to deal with the organizations effectively.

At the 14 organizations we found that:

- In 13 instances, organizations did not publish or keep current information on their central and field organizations.
- In six instances, organizations' published statements on where the public could obtain information were out of date.
- One organization did not publish procedural information on its system of hearings and appeals.

Table III.1, appendix III, summarizes the instances of noncompliance observed by organization.

Officials in the 14 organizations attributed noncompliance with subsection (a)(1) to such reasons as delays in internal rules clearance processes, frequent agency reorganizations, and administrative error. Officials in some organizations also felt that publication of organization material in The United States Government Manual was sufficient compliance. We can not agree with this view since FOIA explicitly directs publication of information on agencies' organization in the Federal Register.

At the conclusion of our review, officials advised us that corrective action was being taken or would be initiated to remedy 14 of the 20 instances of noncompliance observed. In the other six instances, officials

either did not advise us of any planned corrective action or did not agree with our findings.

Compliance With FOIA Subsection (a)(2) Requirements

Subsection (a)(2) requires agencies to, in accordance with published rules, make certain materials available for public inspection and copying unless the materials are promptly published and offered for sale. The materials to be made available include final opinions and orders made in the adjudication of cases, statements of policy and interpretation adopted by the agency but not published in the Federal Register, and administrative staff manuals and instructions to staff that pertain to members of the public. Agencies must also make available for public inspection and copying current indexes providing identifying information for these materials. An agency must promptly publish at least quarterly and distribute copies of each index or supplements thereto unless it determines by order published in the Federal Register that publication would be unnecessary and impracticable, in which case the agency shall provide copies of such index on request.

In 20 instances, 15 of the 25 organizations were not in full compliance with subsection (a)(2) requirements. Thus, these organizations did not provide members of the public the means to routinely identify and inspect all materials they might require in dealing with the organizations.

At the 15 organizations we found that:

- One organization did not index final opinions for cases that it considered nonprecedential, although it did publish and index final opinions that it considered precedential.
- In five instances, organizations made (a)(2) materials available at locations other than the locations specified in the Federal Register.
- One organization did not have all of its (a)(2) materials available in its designated reading facility.
- One organization's published rule on the availability of (a)(2) material and indexes did not identify locations where the indexes and materials were available to the public.
- In 10 instances, organizations did not keep complete indexes of subsection (a)(2) materials or did not update them at least quarterly as the statute requires.

- Two organizations did not publish their (a)(2) indexes and did not publish the required statements in the Federal Register to advise that publication of their (a)(2) indexes was considered unnecessary and impracticable, although they did maintain unpublished indexes.

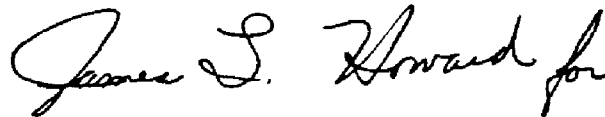
Table IV.1, appendix IV, summarizes the instances of noncompliance observed by organization.

According to officials in the 15 organizations, noncompliance with subsection (a)(2) was caused by such reasons as lack of knowledge of applicable departmental rules and regulations, lack of sufficient staff, and administrative error. Some of the officials also noted that few changes to indexes were necessary on a quarterly basis. The organization that did not index and make available all of its final opinions felt subsection (a)(2) did not apply to nonprecedential opinions. In our opinion, the language of subsection (a)(2) is clear. It states that final opinions and orders will be indexed and made available to the public. Moreover, a 1975 Federal District Court decision held that all material, regardless of whether the agency considers it precedential, is covered by the statute's language. At the conclusion of our review, officials advised us that corrective actions were being taken or would be initiated to remedy 14 of the 20 instances of noncompliance observed. In the other instances, officials either did not advise us of any planned action or disagreed with our findings.

As requested by your office, we did not obtain official comments from the agencies regarding the information contained in this report. However, we did discuss the results of our review with agency officials and incorporated their views where appropriate.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of the report. At that time, we will send copies to the heads of the organizations included in our review and other interested parties upon request.

Sincerely yours,

A handwritten signature in cursive script that reads "James S. Howard for". The signature is written in black ink and is positioned above the typed name of the signatory.

William J. Anderson
Director

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Abbreviations

APHIS	Animal and Plant Health Inspection Service
ASCS	Agricultural Stabilization and Conservation Service
BATF	Bureau of Alcohol, Tobacco and Firearms
CFR	Code of Federal Regulations
DEA	Drug Enforcement Administration
DOE	Department of Energy
DOL	Department of Labor
ESA	Employment Standards Administration
EOIR	Executive Office for Immigration Review
FCIC	Federal Crop Insurance Corporation
FHEO	Office of Fair Housing and Equal Opportunity
FOIA	Freedom of Information Act
HHS	Department of Health and Human Services
HUD	Department of Housing and Urban Development
MMS	Minerals Management Service
NCPB	Naval Council of Personnel Boards
NHTSA	National Highway Traffic Safety Administration
NOAA	National Oceanic and Atmospheric Administration
OHA	Office of Hearings and Appeals
OWCP	Office of Workers' Compensation Programs
OJP	Office of Justice Programs
SSA	Social Security Administration
VA	Veterans Administration

Objective, Scope, and Methodology

The objective of this review was to determine whether federal agencies comply with FOIA's affirmative disclosure provisions, 5 U.S.C. 552(a)(1) and (2).

To determine FOIA requirements we researched the act's legislative history, identified and evaluated Department of Justice guidance on actions needed to implement and comply with the affirmative disclosure provisions, and analyzed federal court decisions indexed in Justice's "Freedom of Information Case List," 1984 Edition, and decisions maintained by Justice's Office of Information and Privacy as of May 1, 1985.

As agreed with the requester's office, we did not attempt to independently determine whether each agency had published in the Federal Register all required (a)(1)-type material because of the impracticability of identifying all such material with any degree of certainty. However, we did determine whether agencies had published information of the type required by subsection (a)(1). Also, we selected portions of the published material and determined if it met the requirement that it be categorized properly. To test whether agencies were currently publishing material and changes to previously published material, we traced selected agency publishing transactions from agency records to publication in the Federal Register and compared agency adoption or approval dates with Federal Register publication dates. We also compared material agencies had published on their organizational structures with the agencies' organization manual or documents.

To assess compliance with subsection (a)(2), we interviewed agency officials to determine how the agencies made required material available to the public for inspection and copying or whether they promptly publish and offer the material for sale. In cases where agencies used full-time dedicated reading rooms, we visited reading rooms in the Washington, D.C., area and observed their operation and tested the availability of materials at them using the agency's index of subsection (a)(2) materials. In cases where agencies made information available upon request, we reviewed agency files of written requests for (a)(2) materials and indexes received by the Washington headquarters offices of the agencies in our review during the period January 1984 to June 1985. Nothing came to our attention that would warrant extending our review of requests to field locations. Where requests for (a)(2) materials were commingled with other FOIA requests, we either reviewed all requests contained in the files or a random sample of the requests. To assess the adequacy of agency indexes, we compared their physical makeup with requirements contained in the act, its legislative history, and Justice

guidance to the agencies. As agreed with the requester's office, we did not attempt to determine whether agency indexes identified all (a)(2)-type material issued since July 1967, when the indexing requirement became effective.

Locations Where We
Performed Work

As requested, we included in this review at least one organization in each cabinet-level department and the Veterans Administration; several organizations in the Departments of Agriculture and Justice, departments for which the subcommittee has specific oversight responsibility; and, due to its size, several organizations in the Department of Defense. In consultation with the requester's office, the following organizations were selected. They all have regulatory or adjudicative responsibilities.

Department of Agriculture
Agricultural Stabilization and Conservation Service
Animal and Plant Health Inspection Service
Federal Crop Insurance Corporation
Food and Nutrition Service
Packers and Stockyards Administration

Department of Justice
Antitrust Division
Civil Rights Division
Drug Enforcement Administration
Executive Office for Immigration Review
Immigration and Naturalization Service
Office of Justice Programs

Department of Defense
Army Corps of Engineers
Air Force Judge Advocate General
Naval Council of Personnel Boards

Department of Health and Human Services
Social Security Administration

Department of the Treasury
Bureau of Alcohol, Tobacco and Firearms

Department of State
Bureau of Refugee Programs

Appendix I
Objective, Scope, and Methodology

Department of Labor
Employment Standards Administration

Department of Education
Office of Civil Rights

Department of Housing and Urban Development
Office of Fair Housing and Equal Opportunity

Department of the Interior
Minerals Management Service

Department of Commerce
National Oceanic and Atmospheric Administration

Department of Energy
Office of Hearings and Appeals

Department of Transportation
National Highway Traffic Safety Administration

Veterans Administration

Our review was designed to assess FOIA operations only at the organizations visited. Therefore, the results can not be projected either to the departments as a whole or other agencies subject to FOIA provisions.

Our review was performed between April and December 1985 in accordance with generally accepted government auditing standards.

FOIA Affirmative Disclosure Provisions

FOIA subsections (a)(1) and (2) require federal agencies to routinely make certain information available to the public.

Subsection (a)(1)

Subsection (a)(1) lists those materials which must be published in the Federal Register for the public's information. The purpose of publishing material in the Federal Register is to enable the public to determine where and by whom agency decisions are made as well as where they may secure information and make requests. Specifically, subsection (a)(1) provides that each agency shall separately state and currently publish the following in the Federal Register:

“(A) descriptions of its central and field organization, and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby the public may obtain information, make submissions or requests, or obtain decisions;

“(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

“(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

“(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

“(F) each amendment, revision, or repeal of the foregoing.

“Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to or be adversely affected by a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.”

Subsection (a)(2)

Subsection (a)(2) describes materials which must be made available for public inspection and copying unless published and offered for sale. It also provides that the materials be indexed. The legislative history indicates the purpose of requiring agencies to make the materials available for public inspection and copying is to afford private citizens the information necessary for them to deal effectively and knowledgeably with federal agencies. The history also states the indexing requirement is

intended to prevent citizens from losing disputes with agencies because of some obscure order or opinion which the agencies know about but which the citizen had no way to discover. Specifically, subsection (a)(2) provides that each agency, in accordance with published rules, shall make available for public inspection and copying:

“(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

“(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

“(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.”

Department of Justice Role

As required by FOIA, the Department of Justice provides guidance to assist agencies in uniformly implementing the act. Most written guidance concerning subsections (a)(1) and (2) has been provided in three documents:

- Attorney General's Manual on the Administrative Procedure Act, 1947;
- Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, 1967; and

Appendix II
FOIA Affirmative Disclosure Provisions

- Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act, 1975.

In addition, the Department of Justice has established the Office of Information and Privacy to advise federal agencies on the interpretation and implementation of FOIA. The Office provides counseling services, publishes a quarterly newsletter on FOIA matters, publishes an index of FOIA cases, and issues policy memorandums on major FOIA issues.

Compliance With FOIA Subsection (a)(1) Requirements to Publish Information in the Federal Register

Although all 25 organizations took steps to comply with subsection (a)(1) requirements, in 20 instances 14 organizations had not published all required information in the Federal Register. In 13 instances the organizations did not publish or keep current descriptions of their central and field organizations. In six instances, the published statements on where the public could obtain information were out of date. In the remaining instance, an organization did not publish procedural information on its system of hearings and appeals. Table III.1 summarizes the instances of noncompliance observed.

According to officials in the 14 organizations, their noncompliance with requirements of subsection (a)(1) was caused by various reasons, such as delays in internal rules clearance processes, frequent agency reorganizations, and administrative error. Officials in some organizations also felt that publication of organization material in The United States Government Manual was sufficient compliance. We can not agree with this interpretation. The act specifically directs that subsection (a)(1) material be published in the Federal Register.

At the conclusion of our review, officials in the organizations advised us that corrective action was being taken or would be initiated to remedy 14 of the 20 instances of noncompliance observed. In one instance an organization official said that in view of our position that publication of organizational material in the Government Manual does not constitute compliance with subpart (a)(1)(A), he would initiate action to publish the material in the Federal Register. In six instances organization officials said they plan to publish revisions to their statements of organization in the Federal Register. In five instances organization officials said they were planning to publish revisions to their statements on where the public may obtain information. In one instance a rule on an organization's system of hearings and appeals had been submitted to the Office of Management and Budget for approval. And, in one instance, during the review one organization published an updated description of its central and field structure. In the other six instances organization officials either did not advise us of any planned corrective action or did not agree with our findings.

**Appendix III
Compliance With FOIA Subsection (a)(1)
Requirements to Publish Information in the
Federal Register**

**Table III.1: Instances of Noncompliance
With Subsection (a)(1)**

Organization	Noncompliance Observed
Department of Agriculture Animal and Plant Health Inspection Service	c
Agricultural Stabilization and Conservation Service	b,c
Federal Crop Insurance Corporation	b,c,d
Department of Commerce National Oceanic and Atmospheric Administration	b,c
Department of Defense Army Corps of Engineers	a
Department of Energy Office of Hearings and Appeals	a
Department of Housing and Urban Development Office of Fair Housing and Equal Opportunity	a,c
Department of the Interior Minerals Management Service	a
Department of Justice Antitrust Division	a
Drug Enforcement Administration	b
Department of Labor Employment Standards Administration	a
Department of State Bureau of Refugee Programs	a
Department of the Treasury Bureau of Alcohol, Tobacco and Firearms	b,c
Veterans Administration	b

^aDescriptions of central and field organization were not published or were incomplete.

^bRevisions to descriptions of central and field organization were not published.

^cRevisions to statements on methods whereby the public may obtain information were not published.

^dProcedural information on system of hearings and appeals was not published.

**Descriptions of Central
and Field
Organizations Were
Not Published, Current,
or Complete**

Thirteen of the 25 organizations did not publish or keep current in the Federal Register all of the information on their central and field organizations as required by subsection (a)(1).

Bureau of Refugee Programs, Department of State: The Department of State published a rule in the Federal Register in 1968 directing members of the public to three 1967 Federal Register notices for information on its central, domestic field, and foreign field organization. Since 1967, State published in the Federal Register three revisions to its organization, all dealing with field structure. The Bureau of Refugee Programs was not cited in any of this material.

Appendix III
Compliance With FOIA Subsection (a)(1)
Requirements to Publish Information in the
Federal Register

A State official said the Bureau of Refugee Programs' organization was not published and other Department organization material was not revised on a regular basis because of administrative error. He noted that no State official was assigned responsibility for keeping this information current in the Federal Register. We were told that a description of the Bureau's organization will be published to comply with FOIA.

Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development: Although Department of Housing and Urban Development (HUD) regulations (24 CFR 15) require current Federal Register publication of descriptions of central and field offices, no organizational description of the Office of Fair Housing and Equal Opportunity (FHEO) had been published in the Federal Register.

A HUD official said the organizational description of the Office of Fair Housing and Equal Opportunity had been published in The United States Government Manual. The official said HUD believed this publication along with periodic notices in the Federal Register on current delegations of authority was sufficient compliance. The United States Government Manual, a special edition of the Federal Register, is the official handbook of the federal government. It contains information on agencies' purposes and roles, histories, and principal officials and descriptions of their public programs and activities. The preface of the Government Manual refers persons interested in agencies' detailed organization structure to the Federal Register.

In our opinion, the Department's position is inconsistent with the statutory language and Department of Justice guidance on what constitutes adequate compliance with subsection (a)(1). The statute clearly states that descriptions of central and field organizations are to be published in the Federal Register. Also, in interpreting the statutory language, the Attorney General's June 1967 memorandum to agencies stated:

"The Office of the Federal Register suggests that publication of organization information in the United States Government Manual should not be regarded as a substitute for, but merely a useful supplement to, the requirement to 'currently publish' such information in the Federal Register."

In addition, in March 1985 the Department of Interior sought approval from the Office of the Federal Register to incorporate by reference in the Federal Register its organization description as published in the Government Manual. In disapproving the request, the director of the Federal Register wrote:

**Appendix III
Compliance With FOIA Subsection (a)(1)
Requirements to Publish Information in the
Federal Register**

“The proposed incorporation conflicts with relevant statutes and regulations. A plain reading of [subpart (a)(1)(A)] is that each agency must print the required descriptions, currently, in the Federal Register for the information of the public.”

Office of Hearings and Appeals, Department of Energy: Neither the Department of Energy (DOE) nor its Office of Hearings and Appeals (OHA) published a final description of OHA’s organization in the Federal Register. DOE published a notice of the creation of OHA in 1978 and a proposed rule on DOE organization and functions, including OHA, in 1980.

A DOE official said the Department did not publish a final rule on its organization because it would have been outdated almost on publication because of ongoing agency reorganization. He also said DOE felt that the 1979 publication of organizational information in the Government Manual was sufficient.

As previously discussed, we do not believe publication of organizational information in the Government Manual constitutes compliance with subsection (a)(1).

Employment Standards Administration (ESA), Department of Labor: Neither the Department of Labor (DOL) nor ESA published a description of ESA’s organization in the Federal Register. However, a listing of the titles and addresses of responsible central and field officials of various DOL agencies, including ESA, was published in July 1985 to instruct the public on where to obtain information.

According to DOL’s organization manual the Solicitor of Labor is responsible for publishing and maintaining the list of FOIA disclosure officers. However, DOL manuals did not address the subpart (a)(1)(A) requirement for publishing a description of its organizations. An official said that a complete description of DOL’s organization was not published in the Federal Register because the Department felt that publication of its instructions on where to obtain information and publication of organizational information in the Government Manual were sufficient to comply with the subpart. As previously discussed, we do not believe that publishing organization information in the Government Manual constitutes adequate compliance.

Corps of Engineers, Department of the Army: Neither the Department of the Army nor its Corps of Engineers published a description of the Corps’ organization in the Federal Register, although an Army regulation requires publication of this material. According to a Corps’ Office of

Appendix III
Compliance With FOIA Subsection (a)(1)
Requirements to Publish Information in the
Federal Register

Counsel official, the regulation had not been followed because the Corps believed that publication of an organizational description in the U.S. Government Manual was sufficient compliance. Upon consideration of our position that this did not constitute adequate compliance, the official said the Corps would publish appropriate organization information in the Federal Register by March or April 1986.

Antitrust Division, Department of Justice: The Antitrust Division did not publish a description of its field structure, although it did publish information on its central organization. Neither the Department of Justice nor the Antitrust Division established internal written procedures for complying with subsection (a)(1). However, an Antitrust Division official said the failure to publish a description of its seven field offices was caused by administrative error.

Subsequently, an Antitrust Division official told us that the Division had obtained guidance from Justice's Office of Information and Privacy that the Division did not have to comply with the subsection (a)(1) requirement to publish a description of its field structure. The Office interpreted the (a)(1) requirement to publish in the Federal Register "descriptions of its central and field organization and the established places at which . . . the public may obtain information . . . or obtain decisions" to mean an agency need only publish those parts of its organization that respond to requests for information or make decisions. As a result, the Antitrust Division official stated that its field offices do not respond to requests for information or make decisions.

In our opinion, the provision requires a description of an agency's field organization to be published in the Federal Register. This is consistent with the practices of other agencies in our review.

Agricultural Stabilization and Conservation Service, Department of Agriculture: The Agricultural Stabilization and Conservation Service (ASCS) published its last complete organizational description in the Federal Register in 1975, with a minor revision in 1976. A comparison of the published material with current organizational information showed that changes had occurred. For example, a new deputy administrator position was created, operating divisions increased from 18 to 20, and only 6 divisions have kept the same title and location in the organization since 1976.

Appendix III
Compliance With FOIA Subsection (a)(1)
Requirements to Publish Information in the
Federal Register

An ASCS handbook contained instructions for publishing this material, but an official said the instructions were not followed because of administrative error. ASCS has prepared a draft revision of its statement of organization, functions, and delegations of authority to submit for publication in the Federal Register.

Federal Crop Insurance Corporation, Department of Agriculture: The Federal Crop Insurance Corporation (FCIC) published its last complete organizational description in 1976 and a minor revision in 1981. However, the FCIC central and field organizations have changed since the descriptions were published. For example, FCIC currently maintains 11 actuarial field offices, but only 4 were listed in the Federal Register. In addition, current organization charts showed 18 operations field offices, but the Federal Register described only 14. The operating divisions have also been restructured and renamed.

The Secretary to the Board of Directors is responsible for publication of subpart (a)(1)(A) information. This official said he was aware that the published organizational description was not current and cited an ongoing agency reorganization as the reason for not updating it. He said a revised organization statement was drafted in 1984, but it was not published because the organization was not final, and it would have been out of date on publication or shortly thereafter. He stated that the reorganization is expected to be completed shortly and that a revised organizational description would be published at that time.

Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury: The Bureau of Alcohol, Tobacco and Firearms (BATF) published a Federal Register notice of its organization in 1974 and a minor revision in 1976. Since publication of this material, the BATF central and field structures were reorganized. For example, current organization documents showed five staff positions reporting to the Director, while the published description showed three staff positions. Also, the titles of 9 of the 14 operating divisions have changed, and 2 of the 7 regions were eliminated.

A BATF regulation (27 CFR 71) requires publication of a current description of central and field organizations in the Federal Register. According to a BATF official, the material was not kept up to date because of an ongoing reorganization. He said that the organizational structure has now stabilized and BATF planned to publish a revised organization description in the Federal Register by the spring of 1986.

**Appendix III
Compliance With FOIA Subsection (a)(1)
Requirements to Publish Information in the
Federal Register**

Veterans Administration (VA): Although a VA regulation (38 CFR 1.551) requires that a description of central and field organizations be currently published in the Federal Register, no organizational material has been published since 1979. Comparison of the 1979 Federal Register description to headquarters organization information, current as of April 1985, showed several changes had occurred. For example, two associate deputy administrator positions were created. The Board of Contract Appeals and the Controller, which formerly reported to associate or assistant deputy administrators, now report to the deputy administrator.

Officials of the VA Paperwork Management and Regulations Services were aware that the organizational description needed to be revised. They said they had been working to update the staff office portion of the VA organization manual to reflect the current organization structure. The officials said they would update the description of organization published in the Federal Register when this manual is approved.

Drug Enforcement Administration, Department of Justice: The Drug Enforcement Administration's (DEA) description of its central organization was current. However, the published field structure description was out of date because some of the field offices had been closed, while several new offices had been opened since the description was published in July 1984.

DEA did not have written procedures to require compliance with subsection (a)(1) but relied on its attorneys versed in the publication requirements of FOIA. An official advised us that DEA was not in full compliance with the subpart because it publishes its field organization annually rather than as changes occur. A DEA official informed us that appropriate corrective action would be taken to keep its description of organization current.

National Oceanic and Atmospheric Administration, Department of Commerce: The description of the National Oceanic and Atmospheric Administration's (NOAA) organization was last published by the Department of Commerce in the Federal Register in 1980. A 1982 Federal Register notice advised readers that NOAA had been reorganized but did not include the actual revisions made to NOAA's organizational structure. From 1983 to 1985, Commerce issued eight orders concerning NOAA organization changes, none of which were published in the Federal Register. A comparison of NOAA's current organization to the published description showed that several changes occurred. For example, five

new offices under the NOAA Administrator were created: Business Affairs, Administrative Management, Aircraft Operations, Extension Program, and Regional Administrative Support Center Operations. In addition, the Administrative Management and Technical Services Office was abolished.

A Commerce regulation outlined procedures for publishing current descriptions of organization. According to a Commerce official, revisions to organizational descriptions were published regularly prior to 1980 but have not been regularly published since then because of printing budget reductions. He stated that Commerce does attempt to periodically publish notices in the Federal Register advising that revisions to organization have occurred and providing information on how to obtain descriptions of the changes. In January 1986, Commerce published such a statement in the Federal Register on organization changes made during 1985 at all its components including NOAA.

Minerals Management Service, Department of the Interior: While the Department of the Interior and the Minerals Management Service (MMS) published information on MMS' headquarters organization and its functions, as well as changes made since its establishment in January 1982, neither Interior nor MMS published information describing MMS' field structure prior to December 1985. MMS is responsible for all Outer Continental Shelf leasing activities and royalty and mineral revenue management functions and has established four regional offices, three administrative service centers, and one accounting center to aid its headquarters in carrying out these functions.

In March 1985, Interior requested the Office of Federal Register to incorporate by reference its organizational description including MMS' headquarters and field organization, as published annually in the Government Manual. Interior believed that this reference would satisfy the subsection (a)(1) requirement to publish material on its organization in the Federal Register and, thereby, reduce its publishing costs. In April 1985, the Director of the Office of Federal Register denied Interior's request because it conflicted with the FOIA requirement to publish material on organization in the Federal Register. In the Director's view, a plain reading of the requirement is that each agency must print the required descriptions, currently, in the Federal Register for the information of the public. In addition, he said the Office of Federal Register must protect the Federal Register system from indiscriminate use of incorporation of information by reference and by so doing, prevent it from becoming merely a finding aid or directory.

On December 17, 1985, after our review was completed, the Department of the Interior published in the Federal Register an updated description of organization including MMS' field structure, satisfying the requirement.

Some Statements on Methods for the Public to Obtain Information Were Not Current

Six of the 25 organizations did not keep current their published statements on the availability of information to the public, as required by subsection (a)(1). Agencies are required to currently publish these statements in the Federal Register so that citizens can determine where they may secure information to assist them in their dealings with the agencies. When agencies do not publish necessary revisions to their statements on the availability of information, the effect is potential inconvenience to members of the public who follow published instruction when seeking material but find that the procedures they followed are not current.

Agency officials cited administrative error and frequent relocations of their FOIA offices as reasons for not complying fully with this subsection (a)(1) requirement.

Animal and Plant Health Inspection Service, Department of Agriculture: The Animal and Plant Health Inspection Service's (APHIS) statement on the availability of information to the public (7 CFR 370) listed an incorrect room number where the public could make written FOIA requests and inspect and copy APHIS records. APHIS did not have written procedures for keeping this material current. An official stated that the revision had not been made because of administrative error when FOIA functions were moved in 1984 from the Administrative Services Division to the Legislative and Public Affairs Staff. He said that APHIS would publish the necessary revision as expeditiously as possible.

Federal Crop Insurance Corporation, Department of Agriculture: The FCIC statement on the availability of information to the public (7 CFR 412) listed an incorrect room number for the Records Management Officer. It directed the public to make requests for some information under FOIA at this location. An FCIC official said that the statement was not revised because of administrative error, but that corrective action would be taken.

Agricultural Stabilization and Conservation Service, Department of Agriculture: The ASCS statement on availability of information (7 CFR 798) listed an incorrect division from which to make FOIA requests. The

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Federal Register

statement directed the public to the Management Service Division. Since January 1985, the Information Division has been responsible for managing FOIA requests. Although procedures for keeping this information current were published in an ASCS handbook, officials stated that the procedures were not followed because of administrative error and that a revision has been drafted for submission to the Federal Register.

Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury: BATF's statement on the availability of information to the public (27 CFR 71) was not current. The room number identified for submission of written FOIA requests had changed, and the statement's description of the existence of a headquarters reading room with shelved material on hand for public inspection and copying was inaccurate. BATF did not have a central reading room. The Chief of the Disclosure Branch said that his staff locates material for the public to review on request. According to this official, revisions to these statements were not published because of administrative error. He said the appropriate revisions would be published by the spring of 1986.

National Oceanic and Atmospheric Administration, Department of Commerce: The published location of the NOAA public reference facility/FOIA office (15 CFR 4, Appendix B) was not current. The published location was the Department of Commerce, Washington, D.C., but the office is currently located at NOAA headquarters in Rockville, Maryland. A NOAA official explained that the FOIA office may be moving again to another site and that the published information will be corrected when a permanent location is established.

Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development: The published location of a Central Department of Housing and Urban Development Information Center was not current. The facility moved from its published HUD headquarters location to another room in the building. A HUD official said the room change had not been published in the Federal Register because of administrative error. An FHEO official told us that she was uncertain when corrective action would be taken since the head of FHEO had resigned and a permanent replacement had not been appointed.

One Organization Had Not Published Appeals Procedures

Federal Crop Insurance Corporation, Department of Agriculture: FCIC, whose primary mission is to administer a system of crop insurance for farmers, published procedural information in the Federal Register on how it operates these programs for the various agricultural crops for which coverage is available. But at the time of our review FCIC officials told us FCIC had not published information on its system of administrative hearings and appeals to resolve contractual disputes with program participants.

In the absence of published procedures, FCIC provides written notice to claimants of their rights to appeal unfavorable determinations. When a loss adjuster makes an unfavorable initial determination on a claim, the director of the local field operations office writes a letter of denial to the claimant and gives notice of the right to request a review of the decision by the Operations Office in Kansas City, Missouri. If the determination by this office is unfavorable, the claimant is advised in writing of the right to appeal a decision to the Office of the Manager, FCIC, Washington, D.C.

According to an official of the FCIC Manager's Office, delays in Agriculture's clearance process for rule issuances were responsible for the non-publication of the material in the Federal Register. He said FCIC had been preparing a rule on appeal procedures since 1983. On August 13, 1985, a proposed rule was published in the Federal Register. On November 5, 1985, Agriculture's General Counsel approved the proposed final rule, and it was forwarded to the Office of Management and Budget for review prior to publication in the Federal Register.

Compliance With FOIA Subsection (a)(2) Requirements to Make Materials Available for Public Inspection and Copying

Although all 25 organizations took steps to comply with subsection (a)(2) requirements, in 20 instances, 15 organizations were not in full compliance.

- One organization did not index its final opinions for cases that it considered nonprecedential, although it did publish final opinions that it considered precedential.
- In five instances, organizations made (a)(2) materials available at locations other than the locations specified in the Federal Register.
- One organization did not make all of its (a)(2) materials available in its designated reading facility.
- One organization's published rule on the availability of (a)(2) information and indexes did not identify locations where the material and indexes were available to the public.
- In 10 instances, organizations did not maintain complete or current indexes as required.
- In two instances, organizations did not publish their (a)(2) indexes and did not comply with the subsection (a)(2) requirement that a statement be published in the Federal Register advising that publication of the indexes was considered unnecessary and impracticable.

Table IV.1 shows these instances of noncompliance by organization.

According to officials in the 15 organizations, their noncompliance with requirements of subsection (a)(2) was caused by such reasons as lack of knowledge of applicable departmental rules and regulations, insufficient staff, administrative error, and the belief that the number of index changes required on a quarterly basis did not warrant the expense of publication that frequently. One organization did not index and make available its nonprecedential final opinions because it felt they did not constitute the kind of case law to which subsection (a)(2) was intended to apply. In our view, subsection (a)(2) requires that final opinions be indexed and made available to the public whether or not the agency considers them to be precedential. Our view is consistent with a federal court decision rejecting the argument that only precedential opinions and orders are subject to subsection (a)(2).

At the conclusion of our review, officials advised that corrective action was being taken or would be initiated to remedy 14 of the 20 instances of noncompliance we observed. In the other six instances, officials either did not advise us of any planned corrective action or did not agree with our findings.

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Compliance With FOIA Subsection (a)(2)
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**Table IV.1: Instances of Noncompliance
With Subsection (a)(2)**

Organization	Noncompliance Observed
Department of Agriculture Agricultural Stabilization and Conservation Service	e
Department of Defense Army Corps of Engineers Navy Council of Personnel Boards	f d
Department of Education Office of Civil Rights	g
Department of Health and Human Services Social Security Administration	a,f
Department of Housing and Urban Development Office of Fair Housing and Equal Opportunity	f
Department of the Interior Minerals Management Service	g
Department of Justice Antitrust Division Civil Rights Division Drug Enforcement Administration Executive Office for Immigration Review Office of Justice Programs	c,f b b,f b b,f
Department of Labor Employment Standards Administration	f
Department of Transportation National Highway Traffic Safety Administration	b,f
Veterans Administration	f

^aNonprecedential final opinions in adjudication of cases not indexed nor available for public inspection

^bSubsection (a)(2) materials not available at published locations.

^cAll (a)(2) materials not available in designated reading facility.

^dPublished rule on availability of subsection (a)(2) material and indexes did not identify location where they were available

^eIndexes incomplete or not provided in their entirety in response to public requests.

^fIndexes of (a)(2) material not revised at least quarterly.

^gStatement not published in the Federal Register to advise that publication of the (a)(2) index is unnecessary or impracticable

One Organization Did Not Index Its Nonprecedential Opinions in the Adjudication of Cases

Social Security Administration, Department of Health and Human Services: The Office of Hearings and Appeals (Office), Social Security Administration (SSA), did not index and make available its final opinions that it considered to be nonprecedential. Thus, these opinions were not used as precedent in deciding cases involving members of the public.

The Office indexes and publishes in Social Security Rulings selected opinions which represent its position on legal or policy matters in particular situations. These decisions are binding on all SSA components and are relied upon as precedents in determining other cases in similar factual situations. The Office does not generally index and make available final opinions on benefit claims that are not relied on as precedents and published in Social Security Rulings. The Office's position is that these opinions are relevant only to the individual appeals out of which they arise and should not be relied upon or consulted in deciding subsequent cases. As such, the Office does not believe they constitute the kind of agency case law to which subsection (a)(2) was intended to apply.

The Office's position is based on

- the legislative history as discussed in House Report Number 1497, 89th Congress, which states that each agency is to maintain an index of all documents having precedential significance; and
- the guidance provided to agencies in the Attorney General's June 1967 memorandum interpreting FOIA which, in effect, states that the scope of the subsection (a)(2) seems to be limited to those orders which may have precedential effect. (Underscoring added.)

In our view, subsection (a)(2) provides that all final opinions in the adjudication of cases be made available for inspection and copying and indexed whether or not an agency considers them to be precedential. Our view is also consistent with a federal court decision, National Prison Project of the American Civil Liberties Union Foundation, Inc. v. Sigler, 390 F. Supp. 789 (1975). The District Court in the Sigler case held that the wording of the provision requiring agencies to make their final opinions and orders available to the public is "too straightforward and unambiguous to be diluted by defendants' proposed construction" that only precedential opinions and orders are subject to the provisions' reach. The court rejected the defendants' argument that the last sentence of (a)(2) which states that "a final order, opinion. . . may be. . . cited as precedent. . . only if it has been indexed and either made available or published as provided by this paragraph" limits the scope of (a)(2)(A) to only those opinions or orders which have precedential

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value. In the Court's view, the fact that an agency may not use an order or opinion as precedent does not compel the conclusion that only orders and opinions having precedential potential are subject to the requirements of subsection (a)(2)(A).

The Office informed us that literal compliance with the subsection could result in considerable administrative burden and cost. The Office told us that over 250,000 decisions are issued annually and that few of these are published as precedential decisions. The Office estimated that the cost to collect and file all nonprecedential decisions, delete personally identifying information, and index the issues covered by each decision could exceed \$10,000,000 annually.

Some Organizations' (a)(2) Materials Were Not Available at Published Locations

In five instances, organizations did not make subsection (a)(2) materials available at the public reference facilities published, but they generally made them available at other unpublished locations. The potential effect of not maintaining (a)(2) materials according to published rule is potential inconvenience to members of the public seeking material at published locations but being referred to other locations to obtain it. Officials of the components cited administrative oversight and lack of knowledge of departmental rules designating the required locations of their (a)(2) materials as reasons for noncompliance.

Drug Enforcement Administration, Executive Office for Immigration Review, Civil Rights Division, and Office of Justice Programs, Department of Justice: The Drug Enforcement Administration (DEA), the Office of Justice Programs (OJP), the Executive Office for Immigration Review (EOIR), and the Civil Rights Division made their (a)(2) materials available to the public in their own public reference facilities or headquarters offices. However, Department of Justice regulations require these organizations to maintain their (a)(2) materials and make them available for public inspection and copying at a public reference facility located at the Department of Justice, 10th Street and Constitution Avenue, N.W., Washington, D.C.

The Justice instruction on where (a)(2) materials would be made available to the public was published in a March 1984 edition of the Federal Register. However, neither DEA, OJP, EOIR, the Civil Rights Division, nor the Justice Management Division, the Justice component responsible for operating the public reference facility, had taken action to implement the 1984 order.

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A DEA official said his agency was unaware of the 1984 change in the Justice instruction. A previous order published in 1978 had cited DEA's public reference facility at its central office as the location at which (a)(2) materials could be obtained, and DEA assumed that the 1978 order had been updated annually without change. Its (a)(2) material was available to the public as described in the 1978 order. The official indicated that appropriate corrective action would be taken to inform the public as to the availability of its (a)(2) material.

A spokesperson for EOIR cited inadvertent administrative error as the reason EOIR materials were not available at the Justice public reference facility. By order published in 1981, Justice had provided notice to the public that EOIR's (a)(2) materials were available for inspection at its offices in Falls Church, Virginia, and they were still being made available to the public at that location. The spokesperson said that EOIR is aware of the problem and is considering options available to it to correct the instance of noncompliance.

A Civil Rights Division official said he did not know why Justice published information stating the Division's (a)(2) material was available for inspection at the central reference facility. He was also uncertain as to why a statement was included on the (a)(2) index that Division (a)(2) materials, consisting of submissions under Section 5 of the Voting Rights Act, were available in the Division library. An official of the Division's Voting Rights Section said that Voting Rights Act submissions have always been available for public inspection through his office rather than the Division Library.

An OJP official informed us that he was unaware of the 1984 rule for making (a)(2) materials available to the public. By order published in 1981, Justice provided public notice that OJP's materials were available for public inspection and copying at OJP's central office. They continued to be maintained at that location. The OJP official told us that corrective action was planned to remedy the noncompliance.

National Highway Traffic Safety Administration, Department of Transportation: Although NHTSA made its final opinions and interpretations available for public inspection and copying at the published documents inspection facility, it did not make its administrative policies, procedures, and orders available at that location. These materials were available at the Management Systems Division in another location in the same building. An NHTSA official cited administrative error as the cause for the discrepancy and said corrective action would be taken.

One Organization Did Not Make All (a)(2) Materials Available in Its Designated Reading Facility

Antitrust Division, Department of Justice: One of 11 indexed Antitrust Division (a)(2) documents and one unindexed (a)(2) document were not available for public inspection and copying at the Justice public reference facility. Both documents were Attorney General reports that were available from the Antitrust Division in the same building. An Antitrust Division official speculated that the indexed document might have been lost since 10 other indexed documents were available at the public reference facility. He said the unindexed document was not transmitted to the public reference facility because of administrative error. The official said that corrective action would be taken.

One Organization's Published Rule on the Availability of (a)(2) Material and Indexes Did Not Identify Locations Where the Material and Indexes Were Available to the Public

Naval Council of Personnel Boards, Department of the Navy: The Department of the Navy published its rule on the availability of (a)(2) materials and indexes in the Federal Register and codified it at 32 CFR 701.58 in the July 1, 1985, edition of the Code of Federal Regulations. This rule did not identify the locations where records were available to the public for inspection and copying. Rather, it referred readers to 32 CFR 701.32 to find the locations at which Navy records, including those of the Naval Council of Personnel Boards, are available to the public for inspection and copying. However, since this section had been deleted in its entirety from the most recent publication of the Code of Federal Regulations, there was no available list at that time indicating the locations where Navy (a)(2) materials were available for inspection and copying.

A Navy official noted that locations and the telephone numbers for Navy components were published in the Government Manual and that the missing CFR subpart, 32 CFR 701.32, was deleted through administrative error. She said corrective action would be taken.

One Organization Did Not Provide the Public Complete Indexes

Agricultural Stabilization and Conservation Service, Department of Agriculture: Although ASCS regulations (7 CFR 798) defined ASCS' (a)(2) index as four documents (an index of national handbooks, the dockets of the Commodity Credit Corporation, decisions of the Agriculture Board of Contract Appeals, and marketing quota review determinations), ASCS did not provide the public with all of these documents in response to requests for the index. One requester was provided a listing of the systems of records ASCS maintains along with copies of several handbooks. Another requester was sent only the index of handbooks. Officials cite low public demand and the fact that they had just assumed FOIA responsibilities in January 1985 as the reasons for their uncertainty over wha

comprised their (a)(2) index. Of the FOIA requests received between January 1983 and June 1985 by ASCS headquarters, three requests were for the index. Agency officials said that future requests for the index would be processed according to the published regulations.

Some (a)(2) Indexes Were Not Updated at Least Quarterly

In nine instances, organizations' components did not revise their indexes of (a)(2) material quarterly or more frequently as required by the statute. The degree of noncompliance ranged from publishing revised indexes semiannually to not updating an index since 1975.

Reasons officials gave for not updating indexes at least quarterly include lack of sufficient staff, administrative error, the belief that the small number of index changes required on a quarterly basis did not warrant the expense of quarterly updating, no demand from the public, and lack of an organization procedure requiring a quarterly update.

Employment Standards Administration, Department of Labor: Although instructions in the Department of Labor manuals assigned the Solicitor of Labor responsibility for quarterly updating of the FOIA index, the index had not been updated since July 1975. Numerous (a)(2) materials were issued by the three ESA programs since 1975. For example, ESA identified 82 Office of Federal Contract Compliance Program directives issued from January 1982 through June 1985 as subsection (a)(2) materials which should have been incorporated into the index. ESA also identified 345 Office of Workers' Compensation Programs (OWCP) circulars and 218 OWCP bulletins issued since the last publication of the index. While the published FOIA index was not current, ESA program offices had routinely maintained unpublished indexes of some (a)(2) material. For example, the table of contents to the Office of Federal Compliance Programs' directives and notices was revised quarterly, and a current computerized index of final opinions was maintained. Also, OWCP officials told us that their program offices kept procedure manuals, circulars, bulletins, and memorandums currently indexed and would make these indexes available to the public on request.

A Solicitor's Office official said the index had not been maintained because the Office lacked sufficient personnel. An index update project was started in February 1984, but the official did not know when it would be completed. He also noted that no procedures had been established to provide for regular quarterly updates in the future.

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Corps of Engineers, Department of the Army: Army regulations require Army components to update indexes of (a)(2) material quarterly or more frequently, but the Corps of Engineers published revisions to its Index of Publications approximately twice a year.

A Corps official said the Index of Publications was not revised quarterly because of a lack of sufficient personnel. He said the Corps has now computerized much of the data in the index and future updates will require fewer personnel resources. With the computerized system in place the Corps expected to issue a revised index and make subsequent revisions on a quarterly basis.

Social Security Administration, Department of Health and Human Services: SSA published updates of its Index of Administrative Staff Manuals and Instructions semiannually or slightly less frequently. In addition, SSA orders and some opinions made in the adjudication of claims were published in Social Security Rulings and available for sale.

Neither Department of Health and Human Services (HHS) nor SSA regulations specified that (a)(2) indexes be updated quarterly. Departmental regulations (45 CFR 5) required maintenance of "current" indexes. SSA regulations did not address the issue of currency. An SSA Office of Regulations employee responsible for updating the index of manuals and instructions said the document was updated quarterly until about 6 years ago when the Office changed to a semiannual publishing schedule because there were not enough changes being made to warrant more frequent updates.

Veterans Administration: The VA annually published revisions to its Index of Publications, a listing of directives published to comply with subsection (a)(2). However, the Board of Veterans Appeals properly published a quarterly index of decisions made in the adjudication of claims.

Neither VA regulations on public access to information (38 CFR 1.552) nor instructions in VA manuals specifically required quarterly publication of the indexes. An official responsible for updating the Index of Publications said there had been some discussion within the Publications Service of issuing quarterly supplements to the index, but no action had been taken to do so.

National Highway Traffic Safety Administration, Department of Transportation: NHTSA updated its index of directives semiannually and its

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index of settlement sums and civil penalties (final opinions in the adjudication of cases) annually rather than quarterly.

Department of Transportation regulations (49 CFR 7, Subpart E) did not address the subsection (a)(2) requirement for quarterly revisions of these documents. According to officials, NHTSA had not updated its indexes quarterly because the limited number of changes required did not justify the cost of reproducing the indexes that frequently.

Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development: HUD published an Issuances Index of handbooks, notices, and other materials for its components, including FHEO, twice a year.

HUD regulations require quarterly publication of (a)(2) indexes. However, an official of the Office of Administrative and Management Services said HUD was not updating the index quarterly because its semiannual publishing schedule seemed to meet the needs of users. An FHEO official told us that she was uncertain when corrective action would be taken since the head of FHEO had resigned and a permanent replacement had not been appointed.

Antitrust Division, Department of Justice: The Antitrust Division had not updated its index of subsection (a)(2) materials since 1981. The index did not identify nine documents officials stated were (a)(2) materials that had been issued since 1980.

The Antitrust Division had not established written procedures to implement the requirement to maintain a current index of its (a)(2) materials. It updated its index only when it received a request from the Justice Management Division to do so. The Justice Management Division is the Justice component responsible for operating the Department's public reference facility and maintaining the departmental index of (a)(2) materials. A Justice Management Division official said he had not requested Justice components to update and provide him copies of their indexes because he believed his role was merely custodial in nature—providing access to the public reference facility when requested by the public. An Antitrust Division official said corrective action will be taken to keep its index current.

Office of Justice Programs, Department of Justice: The most current material contained in the OJP index was dated August 1980. OJP officials acknowledged its index was not revised on a quarterly basis and was

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not current. The 1980 index consisted of a 3-page document listing 33 materials available in the public reference facility.

An OJP official said the index was not updated because there was no demand for it from the public. OJP's FOIA officer told us OJP had not received an oral or written request for the index since 1975. An OJP official told us OJP plans to take corrective action to update and keep current its (a)(2) index.

Drug Enforcement Administration, Department of Justice: DEA last updated its index of (a)(2) materials in April 1984, and the index did not include four legal opinions (statements of policy and interpretation) which were issued after the last index revision.

According to a DEA FOIA official, DEA had not updated its index of (a)(2) materials at least quarterly because its policy was to revise the index annually unless (a)(2) material of a significant nature was issued during the year. He said DEA adopted this policy because of the small amount of (a)(2) material it issued. A DEA official told us that DEA plans to take appropriate corrective action to update and maintain its index.

Two Organizations Did Not Publish Federal Register Statements Advising That Publication of Their (a)(2) Indexes Was Unnecessary or Impracticable

The requirement to "publish" subsection (a)(2) indexes merely means to produce a quantity of them, according to the Attorney General's Memorandum on the 1974 FOIA amendments. Subsection (a)(2) requires that agencies publish indexes unless they publish an order in the Federal Register stating that publication would be unnecessary and impracticable, in which case they must provide copies of such index on request at a cost not to exceed the direct cost of duplication.

In two instances, organizations did not publish their (a)(2) indexes and did not publish the required statement in the Federal Register that it was not necessary nor practicable to do so.

Office of Civil Rights, Department of Education: The Office of Civil Rights maintained quarterly unpublished indexes dating back to the 1980 creation of the Department of Education. However, the Department's FOIA officer was unaware of the subsection (a)(2) requirement that either indexes be published or an order be published in the Federal Register that publication was unnecessary and impracticable. He said he was initiating action for compliance.

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Minerals Management Service, Department of the Interior: While MMS indexed and made available its administrative staff manual, it did not maintain and make available a public index of its final opinions and orders in the adjudication of cases. The Director, MMS, issued between 20 and 98 decisions a year during the period 1982 and 1985. The decisions were issued to resolve disputes between the public and MMS. The Chief, Appeals Division, told us that he was not aware of the FOIA requirement to maintain a public index of MMS' final opinions and orders. In addition, MMS operating procedures did not address actions to be taken by MMS to comply with subsection (a)(2); the procedures dealt only with other FOIA subsections. MMS did maintain an index of its decisions for its internal use. MMS would comply fully by updating and publishing its internal index or by publishing an order in the Federal Register to the effect that publishing the MMS index is unnecessary and impracticable but that copies are available to the public on request. The MMS Director told us that MMS would take corrective action to comply fully with the requirement.

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