May 5, 1977

Office of the Attorney General
Washington, D. C. 20530

LETTER TO HEADS OF ALL FEDERAL DEPARTMENTS AND AGENCIES

Re: Freedom of Information Act

I am writing in a matter of great mutual concern to seek your cooperation.

Freedom of Information Act litigation has increased in recent years to the point where there are over 600 cases now pending in federal courts. The actual cases represent only the "tip of the iceberg" and reflect a much larger volume of administrative disputes over access to documents. I am convinced that we should jointly seek to reduce these disputes through concerted action to impress upon all levels of government the requirements, and the spirit, of the Freedom of Information Act. The government should not withhold documents unless it is important to the public interest to do so, even if there is some arguable legal basis for the withholding. In order to implement this view, the Justice Department will defend Freedom of Information Act suits only when disclosure is demonstrably harmful, even if the documents technically fall within the exemptions in the Act. Let me assure you that we will certainly counsel and consult with your personnel in making the decision whether to defend. To perform our job adequately, however, we need full access to documents that you desire to withhold, as well as the earliest possible response to our information requests. In the past, we have often filed answers in court without having an adequate exchange with the agencies over the reasons and necessity for the withholding. I hope that this will not occur in the future.

In addition to setting these guidelines, I have requested Barbara Allen Babcock, Assistant Attorney General for the Civil Division, to conduct a review of all pending Freedom of Information Act litigation being handled by the Division. One result of that review may be to determine that litigation against your agency should no longer be continued and that information previously withheld should be released. In that event, I request that you ensure that your personnel work cooperatively with the Civil Division to bring the litigation to an end.

Please refer to 28 CFR 50.9 and accompanying March 9, 1976 memorandum from the Deputy Attorney General. These documents remain in effect, but the following new and additional elements are hereby prescribed:

In determining whether a suit against an agency under the Act challenging its denial of access to requested records merits defense, consideration shall be given to four criteria:

(a) Whether the agency's denial seems to have a substantial legal basis,

(b) Whether defense of the agency's denial involves an acceptable risk of adverse impact on other agencies,

(c) Whether there is a sufficient prospect of actual harm to legitimate public or private interests if access to the requested records were to be granted to justify the defense of the suit, and

(d) Whether there is sufficient information about the controversy to support a reasonable judgment that the agency's denial merits defense under the three preceding criteria.

The criteria set forth above shall be considered both by the Freedom of Information Committee and by the litigating divisions. The Committee shall, so far as practical, employ such criteria in its consultations with agencies prior to litigation and in its review of complaints thereafter. The litigating divisions shall promptly and independently consider these factors as to each suit filed.

Together I hope that we can enhance the spirit, appearance and reality of open government.

Yours sincerely,

Griffin Bell

Griffin B. Bell
Attorney General