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Comment

TIME LIMITS UNDER THE FREEDOM OF INFORMATION ACT: ANOTHER PROBLEMATIC NEW PROPERTY REFORM

Karen Czapanskiy*

Professor Simon argues that the New Property jurisprudences may have taken something of a wrong path in their efforts to reform the welfare system. While praising their substantive goal of establishing welfare as an entitlement, he criticizes their limited jurisprudential foresight and hindsight as well as their practical results. He suggests, further, that social work jurisprudence, while not immune from criticism, contains valuable insights for a rethinking of the modern law of public benefits.

The New Property theories Professor Simon examines in the welfare area animated other legal reform efforts during the 1960s and 1970s. One example is the effort to increase public access to government information, which produced legislation twice during the height of the New Property jurisprudence movement: in 1966, when the Freedom of Information Act (FOIA) was enacted, and in

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1. Simon, The Invention and Reinvention of Welfare Rights, 44 Md. L. Rev. 1 (1985) [hereinafter cited as Simon, Welfare Rights]; see also Simon, Legality, Bureaucracy, and Class in the Welfare System, 92 Yale L.J. 1198 (1983) [hereinafter cited as Simon, Welfare System]. Professor Simon's focus in Welfare Rights is on the ideas articulated in Reich, The New Property, 73 Yale L.J. 733 (1964), but he also discusses the ideas of those who followed Reich, see generally sources cited infra note 13. In the Yale article, Professor Simon explains at greater length several of the themes of Welfare Rights that are central to this Comment. My discussion, therefore, draws on both pieces.
1974 when it was amended.² If Professor Simon is correct that New Property-style welfare reforms were imperfect, other reforms, such as the FOIA, may be flawed as well. To use a metaphor from the natural sciences, I ask in this Comment whether Professor Simon's critique can be reproduced in another laboratory. I conclude that his critique may be applied to an important FOIA reform: the time limits within which government agencies are required to respond to information requests. And I conclude that his determination that social work jurisprudence provides a better reform model than does the New Property jurisprudence is validated in some respects by the FOIA experience.

I. NEW PROPERTY AND SOCIAL WORK JURISPRUDENCE

According to Professor Simon, the New Property jurisprudence notion of welfare entitlement is derived to a significant degree from classical jurisprudence.³ The classical jurisprudences believed that certain property rights constituted a zone of immunity protected both from governmental interference and from intrusion by others.⁴ Similarly, the New Property jurisprudences defined public benefits as constituting a zone of immunity.⁵ The goal of New Property jurisprudences in establishing the zone of immunity was to reduce oppressive and punitive moralism, invasion of privacy, and personal favor.⁶

Professor Simon criticizes the New Property entitlements theory as being no more than an extension of classical notions of right. Further, he asserts that the New Property jurisprudences failed to reconcile New Property rights with an appropriate principle for the distribution of those rights.⁷ The classical principle of distribution was based on effort and exchange; welfare benefits are the product of neither. The distributive premise of welfare is need, a notion that the classical legalists could not reconcile with the notion of right.⁸

³. Simon, Welfare Rights, supra note 1, at 22.
⁵. Simon, Welfare Rights, supra note 1, at 9, 22.
⁶. Id. at 22.
⁹. Id. at 10.
Professor Simon argues that the New Property jurisprudence merely recategorizes classical rights and fails to recognize that those rights must be grounded in a new distributive principle, that of need. In contrast, social work jurisprudence both recognized welfare as a right and argued that the distributive premise of this public benefit was need, not the classical premise of effort and exchange.

Professor Simon's criticism of the New Property jurisprudences is not limited to an attack on their concept of property rights as zones of immunity and a condemnation of their failure to recognize that public benefit rights must rest on a different distributive principle. He also argues that certain New Property principles of public administration have to be questioned in light of the experience of two decades.

Three procedural goals of the New Property jurisprudences are the most problematical: the formalization or standardization of entitlement, the bureaucratization of administration, and the proletarianization of the lower tier of the workforce. In Professor Simon's analysis, formalization means the definition of eligibility norms as rules, bureaucratization means establishment of a formally hierarchical organization, and proletarianization means as-

10. Id. at 24-25.
11. Id. at 13-15.
12. Id. at 32-35.

These New Property procedural goals were derived from the ideas of sociologist Max Weber. Id. at 1224 n.75, 1224-40. Weber stated that citizens' interaction with government must be routinized; government responses to citizens' requests must be standardized; and the government work force must be proletarianized so that standards will be followed consistently. Id. at 1199, 1223-26. Furthermore, Professor Simon states that the procedural goals articulated by those who followed Reich were derived from the Reichian notion of freedom from state power, and that freedom in general was grounded in the control of state power. Simon, Welfare Rights, supra note 1, at 26. Professor Simon explores these concepts in the context of welfare distribution, using the terms "formality," "bureaucratization," and "proletarianization" that those who followed Reich developed.

Formality was supposed to limit state power by limiting the number of factors the state could consider in decisionmaking; bureaucratization was supposed to do so by subjecting initial decisionmakers to the control of higher level decisionmakers; and proletarianization was supposed to do so by recruiting and socializing people who would divorce their personal goals from their work.

Id. at 28.

14. A rule is more precise and explicit than a standard because a rule decreases the number of factors that can be considered by the decisionmaker. As a result, a rule, with respect to its purpose, is overinclusive and underinclusive. In contrast to a rule's mechanical application, a standard encompasses the element of discretion. In implementing the standard, the decisionmaker will be guided by the purpose of the standard;
signing work to line-level workers who have little status, skill, and education. The New Property thinkers adopted these procedural goals, according to Professor Simon, as a logical result of their rejection of bureaucratic discretion as a central tenet of public administration. Prior to the New Property reforms, bureaucrats in the welfare system operating according to the tenets of social work jurisprudence were to exercise their discretion in interpreting the standards and in applying them to individual cases based on the purpose of the standard. As a result of New Property reforms, bureaucrats were to make fewer and simpler substantive judgments, to consistently apply formal standards and to give less consideration to individual claims.

The social work thinkers of the Progressive Era had an entirely different model of public administration. Because they considered their client's entitlement to public benefits as part of a continuing dialectical process, they emphasized individualized treatment of each client, professionalization of those who administered the benefits, the social workers, and substantial discretion entrusted to workers at the lowest levels.

The fundamental difference between the New Property and the social work jurisprudences thus was not in their view of the substantive entitlement of poor people to public benefits. It was instead in their

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15. Id. at 1199.
17. Simon, Welfare System, supra note 1, at 1204, 1225. According to Professor Simon, formalization may be antithetical to fairness because the unique needs of individuals may be ignored. For example, the mechanical application of rules by the government may result in extreme disparity of resources allocated to two beneficiaries who are alike only in that they fit the formalized category (e.g., both are poor). Their needs, which are based on their unique situations, may be quite different. Cf. Capowski, Accuracy and Consistency in Categorical Decisionmaking: A Study of Social Security's Medical-Vocational Guidelines—Two Birds With One Stone or Pigeon-holing Claimants?, 42 MD. L. REV. 329, 349 (1983) ("The Medical-Vocational Guidelines . . . have been criticized and challenged as replacing individualized decision-making with an 'average man' concept."). In addition, a formalized system is subject to manipulation by the supervising political or judicial hierarchy. Simon, Welfare Rights, supra note 1, at 32. As Simon notes, when those in control of that hierarchy disfavor public benefits, this New Property procedural reform can be used to attack a New Property right. Id. at 34.

A proletarianized workforce is supposed to churn out public benefits decisions rapidly and impartially. But, as Simon notes, a particular public benefit applicant may be disadvantaged for lack of information or interest. Further, under a bureaucratic system the line-level worker will be particularly responsive to changes in standards imposed by the politically controlled hierarchy because the worker is less involved with the client being served.

view of how to implement the right. The social work jurisprudences agreed with the New Property jurisprudences that the welfare recipient should not be subject to manipulation and arbitrariness, but disagreed that bureaucratic formalism was the method by which to accomplish this goal. The New Property jurisprudences rejected bureaucratic discretion in favor of formalized rules. They entrusted policy determinations and supervision to high-level administrators and the judiciary. In contrast, the social workers sought to decentralize bureaucratic authority and enlarge the scope of discretion exercised by line-level workers, and they considered a dialectical exchange between line-level workers and their clients to be crucial to implementing the right. They stressed education and professionalization, so that the workers would properly perform their role. A major role of the higher officials was to enhance the professionalism of workers through educational supervision. Virtually no role was envisioned for the judiciary.

Professor Simon considers the social work heritage to be superior in some respects to the New Property notions that supplanted it. To evaluate the accuracy of that conclusion, I will use his ideas to examine the portion of the statutory scheme governing access to government information that sets the time limits for administrative action. I think my discussion will show that social work jurisprudence may provide a promising alternative for solving certain problems created by the New Property heritage of the Freedom of Information Act.

II. FOIA: Access to Federal Government Information

The general right of public access to government information is codified in the Freedom of Information Act (FOIA), which was enacted in 1966, and amended in major ways in 1974. Its purpose is to foster the education of the general public about the government. In New Property terms, the Act entitles all members of the

19. Id. at 18-19. Both the New Property and the social work jurisprudences agreed that condescending moralism, invasion of privacy and personal favor should be excised from distribution of welfare entitlements. See supra, text accompanying note 7.
20. Id. at 19-20.
21. Id. at 28.
22. Id. at 18-20.
23. See supra note 2.
24. Recognition of the people's right to learn what their government is doing through access to government information can be traced back to the early days of our Nation. Open government has been recognized as the best insur-
general public to inspect any information in government files that is not specifically exempt from inspection.

In contrast, the prior public information statute, section 3 of the Administrative Procedure Act, provided that a limited segment of the general public could inspect government information if the agency saw fit to permit inspection. Only those members of the public who were "properly and directly concerned" could request information; the request could be denied whenever "good cause" was found. Agency discretion was not reviewable.

The FOIA was adopted in response to typical 1960s and 1970s criticisms of government conduct. The "good cause" language of section 3 established no explicit or precise rules for what information was to be released and what could be withheld. Under the "properly and directly concerned" language, the section allowed distinctions to be drawn among requesters and requests to be denied based on the identity of the requester. Critics cited the section's lack of rules as the reason for bureaucratic decisions to withhold information about controversial or embarrassing agency actions. The section did not require high-level appointees and the

ance that government is being conducted in the public interest, and the First Amendment reflects the understanding of the Founding Fathers that the public's right to information is basic to the maintenance of a popular form of government. Since the First Amendment protects not only the right of citizens to speak and publish, but also to receive information, freedom of information legislation can be seen as an affirmative congressional effort to give meaningful content to constitutional freedom of expression. Moreover, to exercise effectively their First Amendment rights, the people must know what their government is doing.


26. The Administrative Procedure Act provided: "Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found." Id.

27. Id. § 3(a), (b).

28. Examples of the wide range of interpretations given by agencies to their public information obligations can be found in the public information regulations promulgated during the late 1940s. See, e.g., 18 C.F.R. § 302.4 (1948) (Tennessee Valley Authority) (engineering drawings, plans and designs available to "persons conducting or planning to conduct operations involving [their] use"); 32 C.F.R. § 8402.7 (1947) (War Assets Administration) (no release of information "which appears to be of a confidential nature"); 42 C.F.R. § 1.112 (1947) (Public Health Service) (information disclosable if disclosure "would be in the public interest"); 43 C.F.R. §§ 2.1-2.5 (1948) (Public Lands: Interior) (information to be released unless disclosure "would be prejudicial to the interests of the government").

29. See supra note 28.

30. See, e.g., H.R. REP. No. 1497, 89th Cong., 2d Sess. 1, 5-10, reprinted in 1966 U.S.
courts to supervise the work of line-level workers. Critics argued that lineworkers used their freedom to act arbitrarily; their solution was bureaucratization in the form of accountability and judicial review. Finally, the section’s grants of wide discretion to withhold information meant that decisions to release information often required the approval of high-level officials, a slow and cumbersome process. The solution offered by New Property-style critics was a proletarianized system with clear rules that clerical personnel would follow under the supervision of the courts.

The Freedom of Information Act that emerged from the criticism was typically New Property on the procedural questions and strongly influenced by New Property jurisprudence on the substantive questions. Public entitlement to some types of information is absolute; to other types of information, the entitlement is bounded by clear and straightforward criteria. For example, the public has an absolute right to view statements of agency policy and interpretation. The apparent goal of the legislative scheme was to create a type of “zone of immunity” around the public’s right to these materials. The limits to the zone are exemptions allowing agen-


32. See supra notes 28, 30; Giannella, supra note 31, at 223, 238-39.


34. See, e.g., H.R. REP. No. 1497, 89th Cong., 2d Sess. 1, reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2418 (purpose of bill is “to provide a true Federal public records statute by requiring the availability, to any member of the public, of all of the executive branch records described in its requirements, except those involving matters which are within nine stated exemptions”). “Subsection (b) of the Act creates nine exemptions from compelled disclosures. These exemptions are explicitly made exclusive, 5 U.S.C. § 552(c), and are plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed.” EPA v. Mink, 410 U.S. 73, 79 (1973).

The exclusive exemptions from disclosure apply to matters that are:

(1)(A) specifically authorized under criteria established by an Executive order
cies to withhold, for example, predecisional memoranda and material related solely to "internal personnel rules and practices." Public entitlement to other types of information is subject to more fluid standards or to balancing tests. When the government's files include private information, for example, public entitlement is limited to information whose release would not constitute a "clearly unwarranted invasion of personal privacy." The statutory plan is particularly fluid in its treatment of national security materials. Properly classified information is withholdable. Classification is a flexible concept, however; the executive branch, by executive order, defines what is classifiable and can change the criteria for classification without congressional approval. In exercising this power,


35. Compare NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975) (Advice and Appeals Memoranda directing the filing of a complaint are exempt) with EPA v. Mink, 410 U.S. 73 (1973) (not all portions of predecisional memoranda may be withheld; test is whether material reflects deliberative process or factual investigative matters).


39. Id. § 552(b)(1)(A).

40. See Halperin, Security Classification and the Secrecy System, 1 Gov't Information Q.
recent presidents have qualified different types and quantities of material for classification and, therefore, for exemption from public release under the FOIA.\textsuperscript{41}

New Property theories of public administration that became dominant in the welfare programs during the 1960s and 1970s also are evident in the FOIA. Like the procedures for awarding welfare benefits, FOIA procedures are characterized by bureaucratization, formalization, and proletarianization. As a result, low-level bureaucratic discretion has been circumscribed.\textsuperscript{42} The opportunities for bureaucrats to distinguish among members of the public are few;\textsuperscript{43} judgment calls are rare while specific standardized answers are many;\textsuperscript{44} and the judiciary is entrusted with the task of ensuring compliance with the statute.\textsuperscript{45}


41. Compare the Carter Administration's Exec. Order No. 12,065, 3 C.F.R. 190 (1979), revoked by Exec. Order No. 12,356, 3 C.F.R. 166 (1983), reprinted in 50 U.S.C.A. § 401 (West Supp. 1984) [hereinafter cited as Carter Exec. Order] ("If there is a reasonable doubt which designation is appropriate, or whether the information should be classified at all, the less restrictive designation should be used, or the information should not be classified."); \textit{with} the Reagan Administration's Exec. Order No. 12,356, 3 C.F.R. 166 (1983) [hereinafter cited as Reagan Exec. Order] ("If there is reasonable doubt about the need to classify information, it shall be safeguarded as if it were classified pending a determination by an original classification authority . . . . If there is reasonable doubt about the appropriate level of classification, it shall be safeguarded at the higher level of classification pending a determination by an original classification authority . . . . "). Compare Carter Exec. Order, § 1-104 (" 'Confidential' shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause \textit{identifiable} damage to the national security.") (emphasis added), \textit{with} Reagan Exec. Order, § 1.1(a)(3) (" 'Confidential' shall be applied to information, the unauthorized disclosure of which, reasonably could be expected to cause damage to national security."). Compare Carter Exec. Order, § 1-401 (For secret and confidential classifications "at the time of the original classification each original classification authority shall set a date or event for automatic declassification no more than six years later."). \textit{with} Reagan Exec. Order, § 1.4(a) ("Information shall be classified as long as required by national security considerations.").

42. Compare 5 U.S.C. § 552(b) (1982) (describing records specifically exempted from the FOIA's public access provisions), \textit{with} Administrative Procedure Act, ch. 324, § 3(c), 60 Stat. 237, 238 (1946) (discretion remained with agency to determine whether requested information should be "held confidential for good cause found").


45. Agency decisions are reviewed de novo by the district court, which has the authority to examine the disputed records \textit{in camera}. 5 U.S.C. § 552(a)(4)(B) (1982). Further, if a court finds that an agency has acted arbitrarily in withholding records, the Civil
The implementation of the FOIA by government agencies reflects New Property norms described by Professor Simon. For example, he notes that granting lawyers the authority to make policy and control bureaucratic behavior is a typical action of the New Property jurisprudences.\textsuperscript{46} In FOIA administration, initial responses to requests usually are made by non-lawyer personnel such as public information office staff, program analysts, or professionals within the agency.\textsuperscript{47} If a requester, dissatisfied with the initial response, files an appeal, however, the review authority typically is exercised by an agency attorney. Further, general FOIA policy is developed by lawyers in the Department of Justice’s Office of Information and Privacy.\textsuperscript{48} In addition to setting broad policy on access questions, the Office is responsible for advising other agencies on whether exemption claims and administrative procedures are appropriate and will be defended in court, and for training personnel of other agencies about the FOIA.\textsuperscript{49}

A typical FOIA example of New Property theories of public administration is found in the time limit provisions adopted in 1974 in response to the problems of slow agency response times to FOIA requests. As first enacted in 1966, the FOIA required that records be made “promptly available.”\textsuperscript{50} Thus, agencies were not required to respond to requests within specific time periods. Problems were noted almost immediately.\textsuperscript{51} In response, the Administrative Conference of the United States recommended in 1971 that agencies change their practices by responding to requests within ten days, absent special circumstances,\textsuperscript{52} but complaints about slower re-

\textsuperscript{46} The administrative reforms prescribed and rationalized by the New Property had the effect of eliminating the influence over public assistance of a profession dominated by women (social work), in favor of professions dominated by men (law and management)." Simon, \textit{Welfare Rights, supra} note 1, at 36.

\textsuperscript{47} For example, the FBI uses special agents to supervise or do initial processing of the more difficult requests. Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 612 (D.C. Cir. 1976); \textit{see also} S. \textit{Rep.} No. 854, 93d Cong., 2d Sess. 34 (1974) ("most of the personnel, units, and facilities involved in administering the Act are the same as those involved in performing other agency functions").

\textsuperscript{48} 28 C.F.R. §§ 0.23(c), 0.23a (1983).

\textsuperscript{49} Id.


\textsuperscript{51} See K.C. Davis, \textit{supra} note 37, at 309-10.

\textsuperscript{52} Administrative Conference of the United States, 1970-71 Report, § (B)(4), at 53-54 (1971) (Recommendation No. 24) (special circumstances warranting delays include cases in which the requested records are stored at other locations or have not been located in the course of a routine search and additional efforts are being made to locate
sponse times remained common.\textsuperscript{53} The source of the complaints often was the news media: Unless information was provided quickly, it became yesterday's news, useless to a media requester.\textsuperscript{54} The delayed processing of requests effectively denied the press its entitlement to information under the FOIA.

By 1974, Congress recognized that the delays were a significant reason for the relative lack of use of the FOIA by the news media.\textsuperscript{55} Resolution of the time problem became a challenge to those in Congress who considered delays as symptomatic of agency reluctance to comply with any public access statute. Congress considered two types of corrective measures. The first stressed the New Property goal of formalization and mandated brief time limits to be applied to all requests.\textsuperscript{56} The second type, stressing improved bureaucratic performance, proposed new structures for encouraging agency personnel to favor disclosure of information over secrecy.\textsuperscript{57} Congress opted for the first: Ten days were allowed for the first agency response to a request in most circumstances and twenty days for deciding an administrative appeal.\textsuperscript{58} Congress intended that requesters could use the specific time limit mandates to be effective them, or where the request requires an extensive search or the collection of substantial numbers of records).

\textsuperscript{53} See, e.g., \textit{U.S. Gov't Information Policies and Practices—Administration and Operation of the Freedom of Information Act: Hearings Before a Subcomm. of the House Comm. on Gov't Operations} (pt. 4), 92d Cong., 2d Sess. 1219, 1221 (1972) (statement of Roger C. Cramton, Chairman, Administrative Conference of the United States) [hereinafter cited as \textit{House Hearings} (1972)] ("Complaints continued to abound of foot dragging and unnecessary red tape on the part of some agencies in making information available that the statute clearly contemplates should be made available.").


\textsuperscript{55} See, e.g., \textit{S. REP. No. 854, 93d Cong., 2d Sess. 3, 5, 24 (1974)}.


\textsuperscript{57} \textit{Id.} at 1492 (statement M. Rogovin, General Counsel, Common Cause, suggesting that "a spirit of open access can be instilled and maintained through the legislative and oversight powers of Congress combined with the pressures of public opinion"); \textit{The Freedom of Information Act: Hearings on H.R. 5425 and H.R. 4960 Before a Subcomm. of the House Comm. on Gov't Operations}, 93d Cong. 1st Sess. 29 (1973) [hereinafter cited as \textit{House Hearings} (1973)] (statement of Rep. J. Erlenborn in support of his proposed bill, H.R. 4960, which created a seven member advisory Freedom of Information Commission: "Enactment of legislation has little meaning, frequently, if the means does not exist to enforce it effectively."). The Commission, with its expertise, would investigate an agency's alleged improper withholding and its finding would be prima facie evidence in a court proceeding. The bill was never approved but the idea of a FOIA Commission resurfaced in later hearings in the numerous proposals for a lead agency.

\textsuperscript{58} 5 U.S.C. \textsection{} 552(a)(6)(A) (1982).
in fights against recalcitrant agencies. The time periods were believed brief enough to permit the news media and public interest requesters to meet their deadlines.\textsuperscript{59}

The time limit changes created clear, precise rules. The government must answer a request for information within ten working days\textsuperscript{60} except in certain carefully defined situations that justify a ten-day extension.\textsuperscript{61} An administrative appeal must be decided in twenty days unless one of the narrow criteria for an extension is satisfied.\textsuperscript{62} Formalization is apparent in the requirement that every requester be treated exactly the same. "Any person" may make a request under the Act and no power is granted to bureaucrats to distinguish among requesters based on their individual merit or

\textsuperscript{59} S. Rep. No. 854, 93d Cong., 2d Sess. 23-28, 42-61 (1974). As originally passed by the Senate, agencies could expand the time limits in some circumstances to a period as long as 30 days. At the same time, the bill provided for expedited treatment of requests to serve a public interest. The news media were the only group mentioned in the legislation as intended recipients of the priority treatment, although agencies were permitted to give priority treatment to non-media requesters as well. S. 2543, 93d Cong., 2d Sess. § 1(c) (1974). In conference both the expandable time limits and the expedited treatment provisions were dropped and the shorter time limits maintained for all requests and all requesters. S. Rep. No. 1200, 93d Cong., 2d Sess. (1974). No explanation for this change was given in the Conference Report.

\textsuperscript{60} 5 U.S.C. § 552(a)(6)(A) (1982) provides: "Each agency, upon any request for records . . . shall—(1) determine within ten [working] days . . . after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefore . . . ."

\textsuperscript{61} 5 U.S.C. § 552(a)(6)(B) (1982) provides:

In unusual circumstances as specified in this subparagraph, the time limits . . . may be extended by written notice . . . . No such notice shall specify a date that would result in an extension for more than ten working days . . . . "[U]nusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having substituted interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

need. In addition, the time limit provisions illustrate the proletarization intended by Congress for the information access program. The bureaucrat's role is to process the information request quickly. No time is allowed for lengthy deliberation about what information should be released and what should be withheld. The job description is not that of a professional who will treat each request as a unique event. Instead, the position is to be filled by a clerk who will apply rigid rules to readily discoverable information. Finally, the statute establishes a hierarchical system in which the clerk's work is supervised by courts with de novo review power over every decision to withhold information.

A central goal of these time limit reforms was to create a reliably quick public administration system under which public benefit requesters can realize their entitlement to information access. Have they worked? No statistically reliable studies are available, but the ample anecdotal evidence is unequivocally negative. While the


64. 5 U.S.C. § 552(a)(6)(A)(i) (1982). According to some witnesses at the various hearings, inadequate deliberation time leads to greater withholding of information. See, e.g., House Hearings (1973), supra note 57, at 112-13 (statement by Assistant Attorney Gen. R.G. Dixon, Jr., that "[t]he amendment favoring strict time limits is likely to be counter-productive of the general purpose of maximizing disclosure, by discouraging the careful and sympathetic processing of requests. The amendment probably would encourage hasty initial decisions to deny . . . ."); House Hearings (1972)(pt. 6), supra note 53, at 2043 (IRS representative's testimony that "[i]f a grant would require extensive effort, a time limit could create a predisposition toward an immediate denial").

Others, however, state that strict time limits could lead to the greater release of sensitive information because decisions would be too hasty. See, e.g., The Freedom of Information Act: Federal Law Enforcement Implementation Hearing Before a Subcomm. of the House Comm. on Gov't Operations, 96th Cong., 1st Sess. 110 app. III (1979) (statement from letter by FBI Director Webster submitting proposals to amend the FOIA and stating that if the FBI did not use its slow, line-by-line examination of each requested document, "classified data, valid law enforcement interests, and third-party privacy considerations" would be jeopardized).

It is quite likely that Congress, in imposing the time limits, knew that some inaccuracy might result. The relationship between the time provided to make a decision and the quality of the decision is not unique to the FOIA. For example, the Court has held that Congress deliberately set no time limits for disability determinations under the Social Security Act because of concern that mandatory deadlines would impair the accuracy and uniformity of the decisions. Heckler v. Day, 104 S. Ct. 2249, 2254-57 (1984).


FOIA works for the many private benefit requesters for whom timeliness is not critical, it fails to work for public benefit requesters for whom timeliness matters and who continue to experience intolerable delays.

The significance of the need of the media and other public benefit requesters for timely information should not be underestimated. The major purpose for the FOIA was and is to keep the public informed of the government's activities. The media and many public interest groups fulfill the function in our democracy of collecting information as the public's surrogate, for the purpose of transmitting the information to the public. Yet, they cannot fulfill this function unless they can gain timely access to government informa-


The author's many conversations since 1977 with public interest and media requesters reconfirm the testimony that delays are so frequent that the FOIA cannot be relied on to produce timely results.

Beginning with the hearings of the 96th Congress, journalists made a concerted effort to amend the FOIA to give preference to media and other requesters who sought information for the public benefit. See, e.g., Senate Hearings (1980), supra, at 51 (testimony of the FOIA Clearinghouse: "[T]he overriding purpose of the act was to give the public access to the Government and to provide for Government accountability. This can best be done . . . through . . . the widest dissemination of information . . . [through] the press . . . . [I]n keeping with the overall spirit of the act to ensure that the public is as informed as possible about the workings of its Government, it makes sense for the press to have some priority in that regard."); see also id. at 120, 273-74 (similar testimony by the Reporters Committee for Freedom of the Press and the Radio Television News Directors Association).


68. The role of the media as surrogate information gatherers, for example, is evident in access to judicial branch information. The right of access by the public and the media to trials and related documents and proceedings has been found to be implicit in the first amendment's "core purpose" of assuring free public discussion. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia, 448
tion. Thus the media's statutory right of timely access to information is tied to the core purpose of the first amendment, facilitating public discussion, because this right enhances the ability of the media to transmit information to the public on public issues.69

If the media are so important, why were they not given priority treatment in the FOIA time limits provisions? New Property thinking on formalization suggests the answer: One standard that applies to all persons is preferable to giving unreliable bureaucrats the discretion to choose. The argument for formalized information access rules is especially compelling: They preclude news manipulation by preventing bureaucrats from favoring one journalist over another. Congress resolved the tension between the need of the media for speedy access and the need of the public for assurances of unmanipulated news by telling agencies to treat all requesters alike, but to do it quickly. Thus rigid time limits in a formalized system were intended to solve the media's need for quick access to information.

Unfortunately, formalization has only made the problem worse, given a finite level of agency resources.70 When a FOIA office lacks

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69. See H.R. Rep. No. 1497, 89th Cong., 2d Sess. 2 (1966) (citing H. Cross' conviction that "inherent in the right to speak and the right to print is the right to know. The right to speak and the right to print, without the right to know, are pretty empty . . . "); 112 Cong. Rec. 13,642 (1966) (remarks by Rep. Moss):

- Our Constitution recognized this need by guaranteeing free speech and a free press. Mr. Speaker, those wise men who wrote that document—which was then and is now a most radical document—could not have intended to give us empty rights. Inherent in the right of free speech and of free press is the right to know. It is our solemn responsibility as inheritors of the cause to do all in our power to strengthen those rights—to give them meaning. Our actions today in this House will do precisely that.

See also id. at 13,643 (remarks by Rep. King); id. at 13,648 (remarks by Rep. Pucinski);


Beyond this functional argument, there is explicit preference in the FOIA for public interest groups in the fee waiver and attorneys' fee provisions codified at 5 U.S.C. § 552 (A)(4)(A), and (A)(4)(E) (1982). According to the statute, fee waivers and attorneys' fees may be granted only for the public benefit. Public benefit has been interpreted to encompass the functions of the news media in gathering and disseminating news about the government, as well as the functions of nonprofit public interests groups in studying and challenging government actions. See Bonine, Public-Interest Fee Waivers Under the Freedom of Information Act, 1981 DUKE L.J. 213, 243-44, 248-49, 249 n.198, 259-60.

70. An interesting analogy can be made here to the problem of resource allocation in the welfare area described by Professor Simon. He noted that although the New Property theorists recognized welfare and other public benefits as rights, they did not de-
resources to comply with the time limits, attempts will still be made
to treat requesters in an evenhanded manner that looks fair. An of-
face may decide which of many backlogged requests will be handled
next according to chronological order: The first one received is the
first one answered.\textsuperscript{71} Other offices use a two-track system to mete
out faster and slower treatment to those requesters who make, re-

develop a distributive principle for such rights. This failure obscured the need to address
the fact that public benefits are paid through income redistribution. When general eco-
nomic resources stopped expanding, the extent of the welfare "right" became limited by
governmental reluctance to increase funding, despite proven need. The right was cur-
tailed to match available funds. Simon, \textit{Welfare Rights}, supra note 1 at 29-30, 33. Con-
gress has treated the information access program similarly: Requesters have an absolute
right to obtain information, but no credible "distributive principle" has been established
that requires agencies to dedicate resources adequate to do the job.

The theoretical distributive principle for FOIA is one of need: Whatever it takes
to do the job is what agencies should spend. But Congress has never appropriated
funds for FOIA. A House report accompanying the 1974 amendments to the Act ex-
plained that the Act created no need for costly new administrative structures, so no
significant additional funding would be required. The costs of administering the Act
were to "be absorbed within the operating budgets of the agencies." H.R. REP. No. 93-
876, 93d Cong., 2d Sess. 9 (1974). The Senate report concurred except that it author-
ized funds to solve highly unusual and temporary problems. S. 2543, 93d Cong., 1st
Sess. S 4; S. REP. No. 854, 93d Cong., 2d Sess. 34 (1974). At the same time, the Senate
report reiterated the expectation of absolute compliance regardless of cost: "This [au-
thorization] language is used advisedly, to assure that no agency can cite a failure to
receive funds which the bill authorizes as an excuse for not complying with the letter of
FOIA in every respect." \textit{Id.}; see also \textit{Bonine}, supra note 69, at 250-55.

From the start it has been clear that this theoretical distributive principle was
purely theoretical. The cost to the government of providing access to information has
been much higher than Congress contemplated, and would increase further if agencies
were to comply with the time limits. \textit{See generally O'Hanlon, \textit{Fee or Free: Public Interest and
the Freedom of Information Act}, 1 GOV'T INFORMATION Q. 366-69 (1985)}. Despite the reality
that agencies cannot fully perform FOIA functions without cutting into program funds,
Congress has not altered its paradoxical stance. Agency leaders are well aware, how-
ever, that Congress will hold them accountable for programs for which funds \textit{are}
appropriated, and will pay little attention to an unfunded FOIA function.

Congress may wish to avoid the budget process for FOIA to avoid making un-
comfortable budgetary compromises. But until it accepts the necessity for funding
FOIA functions separately, no decisions will be made about what are the most valuable
aspects of an information access program, or whether there should be a tradeoff be-
tween program expenditures and information access expenditures. If Congress were to
make such decisions and they were unpopular, pressure could be applied at the budget
hearings to seek change. The theoretical distributive principle, in contrast, allows Con-
gress to claim that every aspect of the information access program is equally valuable.
Unfortunately, this leaves decisionmaking in the agency, with no process to assure that
agency decisions are consistent with the public interest.

\textsuperscript{71} \textit{See, e.g., Open America v. Watergate Special Prosecution Force, 547 F.2d 605,
616 (D.C. Cir. 1976)} (chronological order upheld as a good faith effort except where
exceptional need or urgency is shown).
spectively, small and large requests. The courts have tended to uphold these distinctions as "good faith" efforts to comply with the statute so long as offices apply them consistently. Rarely, however, have the personal characteristics of the requester—as opposed to the needs of the government agency—justified "expedited" treatment, that is, processing a request prior to one higher on the routine agenda.

The result of formalization thus has been that public benefit requesters wait in line with private benefit requesters. A journalist writing about an issue of general concern, for example, will be using the FOIA to add to the public's knowledge about the issue. A business seeking information about a competitor will be using the FOIA for commercial purposes. A prisoner seeking information about the investigation that led to her conviction will be using the FOIA for a private purpose. Whether the multitude of competing requests are lined up chronologically or by size, the result is that requesters providing a public benefit are not given faster treatment than those serving a private or commercial purpose. The public's need for information is not well served by this system. Formalization has combined with the lack of adequate resources to produce a system that fails to serve the public's needs and subverts the information entitlement system established by the FOIA.

New Property jurisprudes argue that a successful system of public administration is bureaucratic and hierarchical; that is, higher officials and courts will make street-level personnel abide by the rules. The FOIA reflects this thinking; courts were to enforce the time limits when agencies did not comply. Like formalization, bureaucratization has failed. Three reasons seem to explain this phenomenon. First, the courts will not order the immediate release of the requested information when an agency delays, because the documents may contain exempt material. Concern for interests protected by the exemptions, such as national security and personal privacy, outweighs the incentive to ensure expeditious access to in-

72. For example, the FBI uses this system, labeling requests as "project" (difficult) or "non-project" (simple). Id. at 612.
73. Id. at 616.
74. The only noteworthy exception is the request of Eldridge Cleaver, whose request was expedited because he persuaded courts that delay might cost him life or liberty. Cleaver v. Kelley, 427 F. Supp. 80, 81-82 (D.D.C. 1976) (court concluded that Cleaver was confronted with an exceptional need for the information requested from the FBI, since the records might prove exculpatory in a state criminal trial, and found that the public had a great interest in a complete adjudication of criminal matters).
Second, to my knowledge courts have not ordered recalcitrant agencies to allocate more resources to the FOIA office. While consistent with the New Property theory of judicial supervision of the bureaucracy, such an order may be beyond judicial power unless it is limited to the schedule of a particular case. Third, the time limits are so short that they must be self-actuating; on a case-by-case basis courts have no practical enforcement means. Even the thirty-day period that elapses before a defendant agency is required to answer the complaint doubles the time permitted under the statute. Recognizing this, courts have declined sub silentio to supervise agency compliance; instead, they typically defer to the agency's timetable. In unusual cases, the agency's timetable has been shortened, but only to periods three and four times longer.

75. Alternatively, a court may order the release of nonexempt materials upon its own de novo review. See Giannella, supra note 31, at 251. Without benefit of the agency's knowledge about the requested documents, however, a court ordinarily will not be capable of distinguishing between the exempt and the nonexempt. What appears to be a nonexempt factual account of a meeting, for example, may be exempt in some circumstances as attorney work-product, 5 U.S.C. § 552(b)(5) (1982), in other circumstances as a central document in an open criminal investigation, 5 U.S.C. § 552(b)(7) (1982), and in still others as purely private information about a person other than the requester, 5 U.S.C. § 552(b)(6) (1982). By the time the agency advised the court of the background information, either by testimony or, more typically, by an index, the time limits would have expired. See generally Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

76. Cf. Kissinger v. Reporters Comm., 445 U.S. 136, 150-51(1980) (judicial authority to devise remedies can only be invoked if agency has improperly withheld agency records); Chrysler Corp. v. Brown, 441 U.S. 281, 292-93 (1979) (FOIA does not authorize courts to bar disclosure of agency records); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 161-62 (1975)(district court erroneously required agency to create explanatory material for disclosure); Renegotiation Bd. v. Grumman Aircraft, 421 U.S. 168, 191 (1975) (order of court of appeals requiring disclosure of certain documents rested on erroneous assumption that the FOIA can be used to require administrative board to write an opinion).


78. 5 U.S.C. § 552(a)(4)(C) (1982). Prior to the 1974 amendments, the government was allowed the normal 60 days to answer a FOIA complaint. The 1974 amendments reduced the time to 30 days.

79. The controlling standard for judicial review allows agencies to take into account the volume of requests. In Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (1976), the District of Columbia Circuit held that an agency would not be required to meet the statutory time limits when the agency faced a "volume of requests... vastly in excess of that anticipated by Congress [and] when existing resources are inadequate..." Id. at 616. The court articulated the standard: An agency is re-
than the statutory maximum. In no instance has a court ordered an agency to respond to a request within the statutory period.

Guided by New Property jurisprudence, Congress attempted to ensure timely access to government information through a formalized, bureaucratized and proletarianized system of time limits for answering requests for information. That system has failed. Inadequate agency resources mean that relatively few FOIA requests are answered within the statutory period. Congress has never confronted this problem by ordering agencies to provide more resources, and it is not likely to do so in a time of budget cutting. Agency personnel may not routinely give speedier treatment to the media and public interest requesters without violating the FOIA's mandate of equal treatment for all. Requesters who provide a public benefit, therefore, stand in line with everyone else. Despite their supervisory role, courts do not enforce the time limits. In sum, the statutory time limit reforms have not only failed to live up to their promise, they have meant that the public benefit groups that should have benefitted from the time limits instead have been harmed.

The last three Congresses have examined the interdependent problems of delay and agency attitudes. Just as in 1974, journalists testified before committees of each Congress that slow replies required to make a "good faith effort" to comply with the Act and to exercise "due diligence." *Id.*

80. *See, e.g., Hayden, 413 F. Supp. at 1289 (three months); Hamlin, 433 F. Supp. at 183 (four months).*

81. For example, in one early case the trial court accepted the plaintiffs', public interest requesters', argument that they had an absolute right under 5 U.S.C. § 552(a)(6)(A) (1982) to have their request processed within the statutory period. Accordingly, without any hearing or findings of fact, the district court ordered the release of the documents within thirty days—ten days for the initial review and twenty days for the appeal. Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 609 (D.C. Cir. 1976). The order was vacated by the Court of Appeals, which found "exceptional circumstances" existed justifying the agency's delay. *Id.* at 616. Judicial acceptance of lengthy delays is also shown in decisions on attorneys' fee petitions. Courts typically disfavor fee petitions if the requester failed to engage in lengthy negotiations with an agency prior to filing suit for release of information. *Compare Lacy v. United States Dep't of Justice, CA M-83-2727 (D.Md. June 14, 1984) with Weisberg v. United States Dep't of Justice, No. 82-1229 (D.C. Cir. Oct. 5, 1984); Cox v. United States Dep't of Justice, 601 F.2d 1 (D.C. Cir. 1979).* Denying attorney's fees to media requesters because their deadlines preclude long negotiations impairs their ability to obtain counsel.

defeated them, regardless of what information ultimately was released.\(^3\) Agencies replied—as they had in 1974—that short time limits could not be met.\(^4\) Congress considered proposals to make the time limits more flexible, such as enlarging the time allowed to process a request encompassing a large number of pages and contracting the time allowed when the requester demonstrates an urgent need for the information.\(^5\) No bill has been enacted as yet, although one has passed the Senate.\(^6\)

These proposals of the 1980s echo those of the 1970s. To solve the continuing problem of agency unwillingness to meet the needs for public access to government information, the FOIA reformers tinker with a statutory scheme of standardized time periods to give agencies more time. Unless more resources are dedicated to the effort, modifying the time limits will increase the average legal response time to conform with the actual average time; actual average times will not decrease. The solutions may decrease bureaucratic anxiety about lawbreaking, but they will not solve the problem of delays in answering public benefit requests for information.

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83. See supra note 66 and accompanying text.
84. See, e.g. Senate Hearings (1983), supra note 66, at 29 (testimony by Asst. Att’y Gen. Rose that “[t]he FOIA’s unrealistic time limits have also caused serious problems for the Government and FOIA requesters alike . . . [because] [t]he short 10-day time limit . . . often forces agencies to respond prematurely or hurriedly”); Senate Hearings (1980), supra note 66, at 19 (testimony of J. Shenefield, Dep’t of Justice that “[t]he current ten-day limit has caused the government great difficulty since the likelihood for mistakes . . . is great and public confidence is undercut when the government fails, regardless of good faith effort, to meet the limit”); id. at 434 (statement of FBI director, W.H. Webster, that “[t]he volume and nature of work involved and, to an extent the limited resources available, render it impossible for the FBI to meet the 10-day time limit”).
85. See, e.g., Senate Hearings (1980), supra note 66, at 437-39 (FBI proposal calling for establishing “a relationship between the amount of work required to respond to a request and the amount of time permitted to do the work”); id. at 26 (Dep’t of Justice proposal that the “time limit [be] tied to the work load required. Obviously, requests requiring a massive search should be permitted more time than those requiring cursory review.”).
86. S. 774, 98th Cong., 1st Sess., 130 Cong. Rec. S1794-1822 (1984). The bill calls for the standard 10-day time limit for initial review, 20 days for appeal to be used for uncomplicated requests. Id. § 3(6)(A)(i)-(ii). In “unusual circumstances” (records held in separate locations, voluminous records requested, need for consultation with another agency, meeting deadline would impair “statutory agency functions,” need to notify submitter of information, or unusual and substantial backlog at agency) an agency may extend the standard time limits up to thirty working days. Id. § 3(6)(B). The bill retains the “exceptional circumstances” provision of the FOIA, id. § 3(6)(C), and adds an “expedited access” provision for those demonstrating “compelling need,” id. § 3(6)(E). S. Rep. No. 221, 98th Cong., 1st Sess. 14 (1983) interprets the compelling need provision of S. 774 as giving expedited access to those “who can demonstrate a genuine need and reason for urgency” and uses the example of a “journalist seeking information about a newsworthy event.”
III. A Speculative Proposal

If Professor Simon's criticisms of the New Property reforms of the 1960s and 1970s concerning welfare administration are valid, current FOIA reforms are on the wrong track. What is the alternative? I think it may be time to consider applying the principles of social work jurisprudence, which granted street-level bureaucrats the discretion to address at least some of the needs of individual recipients. To do something similar with information access would mean, first, amending the FOIA to eliminate rigid time periods governing every requester and every request, and to permit bureaucrats to give priority to certain requesters. The needs of media and public interest requesters would be met speedily; other requesters would have to wait until resources were available to accommodate their requests. The statute would thus allow the administration of the FOIA to effectuate, not impede, the public's right to know.

Second, to follow further on the path of social work jurisprudence, one would have to ask what kind of bureaucrats would be empowered to make choices among requesters. Professor Simon suggests that, in social work jurisprudence, the role of the street-level bureaucrat is that of a professional who is socialized, educated, accountable, and who occupies a position of high status and reward. Professional qualities are necessary, the social work jurisprudes reasoned, because the bureaucrats would be empowered to respond flexibly to individual claims of welfare entitlements by looking to the purposes of the welfare system.

The analogous occupation in the information access field is the public information specialist. This is a title held by many of those who now perform street-level FOIA functions. Although many of the specialists demonstrate a personal commitment to the ideal of public access to information, the prevailing norm within government is, in my experience, the opposite; to most civil servants, public information is considered contrary to the proper functioning of

87. Simon, Welfare Rights, supra note 1, at 35.
88. Ascertaining which requesters qualify for preferential treatment should not prove difficult. Media and other public benefit requesters can be identified according to the same criteria applicable under the public benefit criteria of the fee waiver and attorneys' fees provisions. See supra note 69. Agencies can articulate their specific criteria in detail by adopting rules pursuant to the usual notice and comment procedures of the Administrative Procedures Act, 5 U.S.C. § 553 (1982).
89. Simon, Welfare System, supra note 1, at 1243.
government. Today's public information specialist, therefore, usually works in an environment hostile to his or her professional goals.

As the social work jurisprudes stressed, a discretionary system depends on people who have a strong and continuing commitment to the goals of the program. The public information specialist, in the system I am proposing, would be developed through a professionalizing system of recruitment, education, and support.\textsuperscript{90} Recruitment efforts should focus, in my opinion, on journalists, whose training, experience, and personal inclination often produce a strong commitment to informing the public. Their commitment should be enhanced through continuing education and supportive supervision. To reinforce their professional status and their commitment to public information goals, frequent contact with nongovernment journalists and other public benefit requesters should be maintained. Once professionalized, public interest specialists, like social workers, could be trusted with the discretion to distinguish among requesters on public benefit grounds.

We can look to one piece of FOIA history for evidence that street-level personnel can exercise discretion to the public's benefit in implementing the FOIA: the history of fee waivers. Under the FOIA, waivers from the usual search and copying fees are granted whenever the release of the requested information will "primarily benefit the general public."\textsuperscript{91} Until 1981, whatever policies existed on assessing fees and granting fee waivers were established by each agency.\textsuperscript{92} Agencies were criticized for the lack of uniformity,\textsuperscript{93} but

\begin{itemize}
  \item \textsuperscript{90} The value of upgrading the training, status, and responsibilities of the public information officers with FOIA duties was discussed at length by the House Committee in 1972, but no legislation developed. Administration of the Freedom of Information Act, H.R. REP. No. 1419, 92d Cong., 2d Sess. 10, 49-50 (1972).
  \item \textsuperscript{91} 5 U.S.C. § 552(a)(4)(A) (1982) provides:
    \begin{quote}
      In order to carry out the provisions of this section, each agency shall promulgate regulations . . . specifying a uniform schedule of fees . . . . Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be finished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.
    \end{quote}
  \item \textsuperscript{92} Bonine, supra note 69, at 227. Early in 1981 the Department of Justice issued a memorandum on fees and fee waivers. This attempt at creating a uniform policy was ineffective because the guidance was extremely complex. Att'y Gen. Memorandum on Freedom of Information Act Fee Waivers (Jan. 5, 1981); Office of Information Law and Policy Memorandum, Interim Fee Waiver Policy (Dec. 18, 1980), both reprinted in 1 Gov't DISCLOSURE (P-H) ¶ 300,793 (Feb. 10, 1981).
  \item \textsuperscript{93} Bonine, supra note 69, at 216-17.
\end{itemize}
despite the relative anarchy, two things seemed clear to this observer: (1) many—probably most—media and public interest requesters did not pay many fees, and (2) decisions not to charge fees and to waive fees were being made at a low level, often in the public information office.

In 1983, under the Reagan Administration, the Justice Department lawyers promulgated guidelines on fees under which far fewer media and public interest requesters can qualify for fee waivers. Further, the guidelines authorize agencies to require the payment of a fee or deposit before documents are processed to determine exemption claims. These guidelines have been criticized because they are used to discourage requests by the media for information on subjects of public importance.

While I cannot prove this with absolute certainty, it appears that, prior to the implementation of these guidelines, fee waiver decisions usually were made by street-level bureaucrats and public benefit requesters gained access to more records at lower cost and with less litigation. This served the public by allowing the public's information gathering surrogate more access to information.

In contrast, now that lawyers have created guidelines that cur-

95. "[A]ll agency personnel should be aware of the dual policy objectives embodied in the statutory fee waiver provisions: (1) the fostering of disclosure of nonexempt agency records where it will primarily benefit the general public, and (2) the preservation of public funds where there will be insufficient public benefit derived from disclosure." Id. The additional requirement that agencies weigh fiscal concerns in determining whether to grant fee waivers diminishes the chances that public requesters will qualify for fee waivers. Further, the requirement may be beyond agency authority. See Bonine, supra note 69, at 250-55 ("[T]he FOIA does not permit agencies to make cost to the government a criterion by which fee-waiver or fee-reduction decisions may be made.") The second factor outlined in the 1983 guidelines places an emphasis on what documents will eventually be disclosed and their relative value to the public. As a result, agencies are advised to examine the requested documents before determining whether a fee waiver meets the criterion. Many agencies are reluctant to process documents without a firm commitment to pay the fees and, in many cases, a deposit.
96. "High costs associated with obtaining government documents . . . presented serious obstacles to many potential users, including the news media, scholars, researchers, and nonprofit organizations." Agency Fee Waiver Policies Under the Freedom of Information Act, A Common Cause Study 1 (1984) (on file with the Maryland Law Review). A restrictive fee waiver policy "could result in limited public access to information of concern to the general public . . . ." Id. at 5. "Restrictive policies could . . . seriously affect the public's access to government documents. The reported changes in fee waiver policy occurring in response to the Justice Department's January 1983 guidelines at several agencies suggest that serious obstacles to obtaining information may well have been imposed." Id. at 6-7. See Note, Developments Under the Freedom of Information Act—1983, 1984 DUKE L.J. 377, 391-93.
tail the use of fee waivers, information flow to the public is impeded. Prior to this lawyerly intervention, street-level bureaucrats could, and in my observation did, emphasize the public’s right to information over particular agency interests. Under the lawyers, the balance has shifted towards non-disclosure.

The fee waiver experience suggests that discretion can be used effectively when it is entrusted to the right civil servants. The public administration system I am proposing to assure timely responses to public benefit requesters blends the successful characteristics of the fee waiver experience with characteristics of social work jurisprudence. Properly recruited, trained, and supervised street-level bureaucrats are given discretion to distinguish among requesters and allocate resources to those who could benefit the public. They are not held to inflexible timetables; instead, their discretion is guided by the standard that public benefit requesters should not have to wait for information. Lawyers and other non-relevant professionals have no substantive role in the decision-making process.

Under my proposal, the judicial role also changes. Courts would be relieved of routine supervision of time limits compliance. Instead, they would defer to the professional judgment of the public information specialist unless her action was arbitrary or capricious. It would be arbitrary, for example, for a public information specialist to make a public benefit requester wait for service while a private benefit requester was served. Similarly, a reasonable public information specialist would not assign a public benefit request to a staff

97. A similarly suggestive example was uncovered by Professor Tomlinson in his research on the interrelationship between the FOIA and discovery. He found that public information officers were more inclined to release documents than the government’s litigating attorneys wanted them to be. He discovered by interviewing attorneys and public information officials that:

Inadvertent or careless FOIA releases of exempt records are a rarity. More frequently, the public information officer’s release decision is, in the words of government litigators, “mistaken.” It is perhaps more accurate to say that the officer’s perspective on claiming an exemption is different than that of a litigating attorney. This difference is particularly apparent with respect to the deliberative process component of exemption b(5). The public information officer’s job is to release as much information as possible, while the attorney’s job is to defend the government’s position in litigation. The attorney is particularly sensitive about releasing internal documents critical of the agency’s present position or advocating a contrary position; public information officers and lower level program people are likely to be less sensitive. In addition, deliberative process and work-product claims have special cogency when raised in litigation and lose much of their force when considered in the abstract in response to a FOIA request.

member whose work schedule precluded a speedy response. The more difficult problems would continue to be resources. Courts would be expected, under my proposal, to evaluate whether a public information specialist has dedicated all available agency resources to satisfy public benefit requesters. Because FOIA functions are not separately funded, deciding what agency resources are "available" can be a difficult factual question. If an agency can show that all available resources are being dedicated to public benefit requesters, but public benefit requesters still consistently experience long delays, a court under my proposal would order that more resources be allocated. Without this authority, courts would continue to be unable to insist that agencies satisfy the FOIA's fundamental public information objectives.

How would my proposed reform avoid the pitfalls of its predecessor, section 3 of the Public Information Section of the APA? First, my proposal does not restore section 3's authority to deny information to a member of the public by determining that she is not a "proper person" to see information, or to withhold information for "good cause." Second, in contrast to section 3, here agency discretion to delay answering a request would not be unlimited. If the request is from a public benefit requester, immediate action would be the norm. The only exception would be when an agency is experiencing a temporary shortage of resources. Private benefit requesters should be delayed only to benefit public benefit requesters; an agency would have no discretion to permit additional delays.

Third, section 3 had no provision for judicial review. The review I propose, while limited, should be effective in motivating reluctant agencies. Finally, requests under section 3 could be answered by any agency employee. I propose, instead, to rely on public information specialists whose professional motivation will direct them to help requesters achieve effective access to government records.

IV. Conclusion

Our democracy relies on the existence of a citizenry well-informed about the government's policy choices and administration. The FOIA was designed to foster public education, especially through the work of information gathering surrogates, such as the news media. The permanent shortage of resources dedicated to the FOIA, however, has crippled it for the purposes of the groups it was

98. See supra note 70 and accompanying text.
intended to serve. Revising the statutory scheme without recognizing and confronting the interactive problems of resource shortages and the needs of public benefit requesters will not produce the best solution. Extending time limits for everyone is a poor solution because the media must report on fresh news. Demanding increases in resources is, quite simply, futile. On the other hand, both problems are addressed by a proposal to create a zone of discretion within which professionalized public information specialists are instructed to prefer public benefit requesters over private and commercial requesters. No more resources normally would be needed, but more public benefit requesters could get what they need when they need it.

Under the present system, expecting consistent compliance with the time limits is futile. While a few agencies meet them most of the time, most agencies will not or cannot. In response, public benefit requesters either resign themselves to intolerable waiting periods or refuse to use the FOIA. Professor Simon's reconsideration of New Property and social work jurisprudence suggests that the continued failure of the FOIA as a public information vehicle may be avoidable. His critique convinces me that the failure of the time limit reforms is attributable in large measure to their formalized, bureaucratized, and proletarianized system of administration. I am also convinced that changing the roles of the street-level bureaucrats and the courts, consistent in large measure with social work jurisprudence, would increase the FOIA's contribution to public life.

Applying social work jurisprudence to the time limit reforms does not suggest to me that a discretionary system is appropriate for every aspect of an information access system. For example, I do not think that social work jurisprudence would justify eliminating the public's entitlement to certain types of information, nor do I read Professor Simon's critique as suggesting such a result. The insights of social work jurisprudence can, however, be applied to the public administration concepts of the FOIA, in order to allow its substantive entitlement to be more completely realized.

The last several decades have been rich in attempts to solve problems through new systems of public action and administration. The strengths of some approaches and the weaknesses of others now can be examined and assessed. Professor Simon has exhumed

99. But see Simon, Welfare System, supra note 1, at 1257 (professionalism may require too many resources to educate the bureaucrats and restructure the work setting).
social work jurisprudence in an attempt to demonstrate that (New Property assumptions about public benefits may be problematic. His critique is valuable in the field of information access as well. More research is needed before we can evaluate the different approaches suggested by his critique. Professor Simon's heresies will, I hope, inspire that research.