

# NOTES

## DEVELOPMENTS UNDER THE FREEDOM OF INFORMATION ACT—1977

### I. INTRODUCTION

Litigation under the Freedom of Information Act (FOIA)<sup>1</sup> in 1977, the eleventh year since its enactment, reflected the gradual development of judicial policies in the interpretation of the broad terms of the statute.<sup>2</sup> Although the Supreme Court did not consider any FOIA cases during the year, lower courts made significant strides in developing and applying concepts set forth in earlier Supreme Court opinions and in the legislative history. Much attention was directed toward the need for procedures and approaches that will make FOIA litigation workable within the federal court system without sacrificing the right of citizens to effective judicial relief from wrongful withholding of records subject to the Act.

Recent cases construing the FOIA have focused on a broad range of issues. The scope of the Act's applicability was defined in cases dealing with the question of whether requested materials constituted "agency records."<sup>3</sup> Courts examined the role of in camera inspection of documents<sup>4</sup> and considered their jurisdictional power over suits attempting to block FOIA disclosure. Policies were developed improving access to judicial relief under the Act through the award of attorney fees to successful litigants.<sup>5</sup> Plaintiffs frustrated by agency delays in meeting the time limits set by the Act<sup>6</sup> received an encouraging judicial response to the more tolerant decisions of prior years. In addition, several of the statute's specific exemptions were considered. The Act's provisions protecting individual

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#### THE FOLLOWING CITATIONS WILL BE USED IN THIS NOTE:

Note, *Developments Under the Freedom of Information Act—1976*, 1977 DUKE L.J. 532 [hereinafter cited as *FOIA Developments—1976*];

Note, *Protection from Government Disclosure—the Reverse-FOIA Suit*, 1976 DUKE L.J. 330 [hereinafter cited as *Reverse-FOIA Suits*].

1. 5 U.S.C.A. § 552 (West 1977).

2. For discussion of developments under the FOIA in prior years, see *FOIA Developments—1976*; Note, *Developments Under the Freedom of Information Act—1975*, 1976 DUKE L.J. 366; Note, *Developments Under the Freedom of Information Act—1974*, 1975 DUKE L.J. 416; Comment, *Developments Under the Freedom of Information Act—1973*, 1974 DUKE L.J. 251; Note, *Developments Under the Freedom of Information Act—1972*, 1973 DUKE L.J. 178; Note, *Developments Under the Freedom of Information Act—1971*, 1972 DUKE L.J. 136; Project, *Federal Administrative Law Developments—1970*, 1971 DUKE L.J. 149; Project, *Federal Administrative Law Developments—1969*, 1970 DUKE L.J. 67, 72.

3. 5 U.S.C. § 552(a)(4)(B) (Supp. V 1975).

4. *Id.*

5. *Id.* § 552(a)(4)(E).

6. *Id.* § 552(a)(6).

privacy<sup>7</sup> were the subject of widely varying interpretations, and the scope of the intra-agency memorandum exemption<sup>8</sup> was further refined. This Note will report on these developments and analyze their effectiveness in carrying out the purpose of the FOIA.

## II. AGENCY RECORDS

The FOIA grants jurisdiction to district courts to enjoin the improper withholding of "agency records,"<sup>9</sup> presenting in each case brought under the Act the threshold question of whether the information sought to be obtained falls within that category. Because this definitional issue is basic to every FOIA case, the approach taken by the courts has an important impact on the ultimate effectiveness of the Act. The one court addressing this issue in 1977 adopted a functional analysis which reflects the complexity of the relationship between the government and the private sector and helps to bring into sharper focus the boundaries of the FOIA's applicability.

In *CIBA-GEIGY Corp. v. Mathews*,<sup>10</sup> the court faced the problem of whether data compiled by private researchers working under government grants could be reached by an FOIA request. Scientists operating under individual grants from the National Institutes of Health (NIH) sent their data to a coordinating center at the University of Maryland.<sup>11</sup> Because the data showed that the mortality rate for those undergoing certain treatments for diabetes was significantly higher than the norm, the center voluntarily filed a report with the Food and Drug Administration (FDA). On the basis of the report and advice from independent sources, the FDA decided to revise labeling requirements for the drugs involved. Wishing to challenge the findings, plaintiff sought to obtain the raw data under the FOIA.<sup>12</sup>

After determining that the center itself was not an agency,<sup>13</sup> the court considered plaintiff's contention that the data nonetheless qualified as agency records on the theory that the center was acting as an extension of the

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7. 5 U.S.C. § 552(b)(6) (1970); 5 U.S.C. § 552(b)(7)(C) (Supp. V 1975).

8. 5 U.S.C. § 552(b)(5) (1970).

9. 5 U.S.C. § 552(a)(4)(B) (Supp. V 1975).

10. 428 F. Supp. 523 (S.D.N.Y. 1977).

11. The terms of the grants provided that the data would be the property of the center and the individual researchers. Although NIH had a right of access to the data, it customarily relied only on reports. *Id.* at 525.

12. Defendants in the suit were NIH, the FDA, the director of the coordinating center and the University of Maryland. *Id.* at 524-25.

13. Plaintiff's first contention was that the center was a "de facto agency." The court applied the test set forth in the leading case of *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971), which held that for the purposes of the FOIA, an "agency" is "an administrative unit with substantial independent authority in the exercise of specific functions." *Id.* In this case, the center had no authority to make decisions and its recommendations were not automatically adopted by the government. It was privately organized and not subject to close federal supervision. Thus, it failed to meet the *Soucie* test. 428 F. Supp. at 526-28.

government. Since the statute itself offers little guidance in defining the term "records,"<sup>14</sup> the court focused on the underlying purpose of the Act: to provide information about the "structure, operation and decisionmaking functions of Government agencies."<sup>15</sup> In light of this purpose, the court concluded that Congress intended to reach only those records that are owned or controlled by the government and used in the performance of public business: there must be "significant Government involvement with the records themselves" before disclosure may be compelled under the FOIA.<sup>16</sup>

Three elements that might indicate "significant government involvement" were considered: government funding, access and reliance.<sup>17</sup> The first two elements were quickly dismissed by the court. Although federal money financed the studies that produced the data, the research was carried out for private purposes rather than in fulfillment of a specific governmental function. Thus, the court found that the first element alone did not suffice. It reasoned that if mere funding were sufficient to give such information a public character, private research, which is often heavily dependent upon the government purse, might be chilled.<sup>18</sup> The second element, government access, also failed on the facts presented. The data were intended to be private<sup>19</sup> and the government had not used its limited right of access to exercise dominion or control over the records.<sup>20</sup>

Reliance, the third element, presented the strongest case for disclosure. Where the government has relied directly on requested information in reaching a decision affecting the public, the plaintiff's interests are closely aligned with those the Act was designed to protect.<sup>21</sup> However, in this case,

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14. Although the Act fails to define the term directly, the information and documents required to be disclosed or published under sections (a)(1) and (a)(2), 5 U.S.C. §§ 552(a)(1)-(2) (1970 & Supp. V 1975), are referred to as "records" in (a)(3), 5 U.S.C. § 552(a)(3) (Supp. V 1975). The term has been extensively defined by agency regulations, *see generally* Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1041 (1975). The *CIBA-GEIGY* court was guided by the General Service Administration's interpretation of the term, expressed in 41 C.F.R. § 105-60.103 (1976), which focuses on government ownership or control, including within its scope those documentary materials made or received by an agency while transacting public business. 428 F. Supp. at 529.

15. 428 F. Supp. at 529.

16. *Id.*

17. The court did not intend these elements to be exhaustive of the considerations relevant to a determination that government involvement with records was significant enough to bring them under the Act; it merely focused on these three at the suggestion of the plaintiff. *Id.*

18. *Id.* at 530. The analysis used by the court in determining that government funding is not equivalent to government control closely parallels state action analysis under the fourteenth amendment; the analogy was expressly drawn by the court by its reference to *Wahba v. New York University*, 492 F.2d 96 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974). 428 F. Supp. at 530 n.5.

19. *See* note 11 *supra*.

20. 428 F. Supp. at 530-31.

21. The court stated that if the FDA had relied directly on the raw data in reaching its final

the indirect reliance of the FDA through its use of the report that the center drew from its data, was not enough by itself to trigger those interests. The court found that in the absence of agency control or custody, the interests of private ownership outweigh the indirect insight the records might afford into the governmental process.<sup>22</sup>

The approach of the *CIBA-GEIGY* court, which focuses on the underlying purpose of the Act, provides a margin of protection for private ownership interests at the very threshold of the FOIA. Although the overall thrust of the Act is toward increased disclosure as a means of improving interaction between the public and private sectors, too broad an application of its provisions may have the opposite effect.<sup>23</sup> The flexible test relied upon in *CIBA-GEIGY* offers a helpful avenue of analysis which insures that the Act will not be abusively used to reach information bearing only a tangential relationship to governmental function.<sup>24</sup>

### III. IN CAMERA INSPECTION: THE ROLE OF THE COURT

As a part of its *de novo* review of an agency's decision to withhold records, a district court may examine the records *in camera* to determine

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decision, the data would be subject to disclosure under the holding of *Renegotiation Bd. v. Grumman Aircraft Eng'r Corp.*, 421 U.S. 168, 192 (1975), and similar cases which require disclosure of documents relied upon or memoranda adopted by agencies even when prepared by non-agencies. 428 F. Supp. at 532.

22. 428 F. Supp. at 531-32. *CIBA-GEIGY*'s emphasis on the importance of government involvement is echoed, from a somewhat different perspective, in *Tax Reform Research Group v. IRS*, 419 F. Supp. 415 (D.D.C. 1976). In that case, the court held that documents are "agency records" under the FOIA if they have been received by the agency and have been used by it in its decisionmaking. That the documents had not been generated by the defendant IRS and had been returned to the Justice Department was irrelevant, as long as the IRS knew where they were located and could produce them. The court refused to create a "gaping loophole" in the Act by holding that return to another agency after significant involvement by the defendant agency with the records could defeat disclosure. 419 F. Supp. at 425-26. An important distinction between *Tax Reform* and *CIBA-GEIGY* is the absence in *Tax Reform* of any private ownership interest to be weighed in determining that the records could be disclosed. *See Committee on Masonic Homes v. NLRB*, 556 F.2d 214, 218 n.4 (3d Cir. 1977) (dictum) (union cards in possession of agency may be private property). *Cf.* *Richard Shlakman*, 41 Ad. L.2d 213 (FCC 1977) (personal notes of staff members taken for individual use in course of agency work not "agency records").

23. The danger that unrestrained disclosure of government information may inhibit open communication with federal agencies has been explicitly recognized in judicial construction of the Act's confidential records exemption, 5 U.S.C. § 552(b)(4) (1970). *See National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 767 (D.C. Cir. 1974) (information is confidential if disclosure is likely to impair governmental ability to obtain information in the future).

24. The need to check abuse of the Act was presented in a different context in *SDC Development Corp. v. Mathews*, 542 F.2d 1116 (9th Cir. 1976), where the court placed the plaintiff's request beyond the scope of the Act through its construction of the term "records." In that case, the plaintiff sought to acquire a copy of computer tapes compiled by the National Library of Medicine that contained indexed citations and abstracts of over two million medical articles. The agency normally made the tapes available, under specific statutory authority, at a substantial fee that would partially cover the costs of compilation. The plaintiff was seeking to

whether the agency has met its burden of proving that the records are exempt from disclosure.<sup>25</sup> Although in camera inspection provides some protection for the party seeking disclosure, whose lack of access otherwise disables him from effectively contesting the agency claims,<sup>26</sup> the procedure is burdensome to the court,<sup>27</sup> and ultimately fails to restore the benefits of an adversary proceeding.<sup>28</sup> *Vaughn v. Rosen*,<sup>29</sup> a 1973 case requiring agencies to produce a detailed index of the withheld documents, accompanied by specific justifications for its action,<sup>30</sup> provides a procedure that in many cases allows the court to avoid in camera inspection. However, questions remained in 1977 as to when an agency's duty to index arises,<sup>31</sup> and, more fundamentally, whether there might be a conflict between the indexing requirement and the agency's right to withhold exempt information.

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acquire the tapes under the FOIA for only a nominal reproduction fee. The court determined that the tapes were not "agency records." Starting from the premise that disclosure under the FOIA would be inconsistent with the agency's statutory authority, the court attempted to reconcile the two statutes. *Id.* at 1118. The legislative history of the FOIA revealed that its purpose was to provide for disclosure of documents dealing with the structure and function of government, *id.* at 1119, a purpose which would not be met by disclosure of the library system. Where no danger of government secrecy existed and the information itself was readily available to the public, the agency was entitled to protect the method of dissemination provided for by its statutory grant of authority. *Id.* at 1120. Like *CIBA-GEIGY*, the decision protects proprietary rights—this time, rights of government ownership—from the intrusion of FOIA requests that do not advance the underlying purpose of the Act.

25. 5 U.S.C. § 552(a)(4)(B) (Supp. V 1975).

26. *Mead Data Central, Inc. v. United States Dep't of the Air Force*, 566 F.2d 242,250 (D.C. Cir. 1977).

27. *Id.* at 250 n.10; *Weissman v. CIA*, 565 F.2d 692, 697 n.11 (D.C. Cir.1977)("in camera inspection in each FOIA case would create a staggering burden both for this court and the district court"); see *Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973).

28. *Mead Data Central, Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 250 n.10 (D.C. Cir. 1977) (on appeal from a decision based on in camera review, "the disappointed requestor is not in a position to challenge [the district court's] conclusions or even to assist the appellate court in focusing its inquiry"); *Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973) (in camera review "is necessarily conducted without benefit of criticism and illumination by a party with the actual interest in forcing disclosure"). For a discussion of the problems and advantages of in camera review, see Project, *supra* note 14, at 1124-27; Comment, *In Camera Inspections Under the Freedom of Information Act*, 41 U. CHI. L. REV. 557, 558-61 (1974).

29. 484 F.2d 820 (D.C. Cir. 1973).

30. *Id.* at 826-28.

31. In *Mead Data Central, Inc. v. United States Dep't of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977), the court held that although the *Vaughn* requirements apply to agency proceedings, failure to follow proper procedures at the agency level does not taint a district court proceeding where the requirements have been satisfied prior to trial. *Id.* at 251. Neither the district court nor the appellate court is required to inquire into the sufficiency of agency proceedings, since the matter is to be determined de novo on the basis of material before the district court. *Id.*

In *Irons v. Gottschalk*, 548 F.2d 992 (D.C. Cir. 1976), the issue was the degree of specificity required in the request for disclosure in order to place an agency under a duty to index. The plaintiff had made a blanket request for 175 volumes of Patent Office decisions. After determining that FOIA Exemption 3, 5 U.S.C.A. § 552(b)(3) (West 1977), did not apply to all the requested materials, the court determined that the request was as specific as possible under the circumstances. 548 F.2d at 996. Because the agency had not provided usable indices

*Weissman v. CIA*,<sup>32</sup> follows the general rule established by *Vaughn*,<sup>33</sup> and by the legislative history,<sup>34</sup> that in camera inspection is unnecessary and undesirable where there is a public record sufficient to provide a basis for determining whether the requested records are exempt. However, in its application of the rule to the facts before it,<sup>35</sup> the *Weissman* court considered the effect of two additional factors: the good faith efforts of the agency to respond to the requests and the nature of the exemption claimed.

The plaintiff in *Weissman* claimed that the district court's refusal to conduct in camera proceedings was erroneous because although the agency filed an index with supporting affidavits,<sup>36</sup> he was nonetheless left with no means of checking the truthfulness of the agency's characterization of the materials and the completeness of its disclosure of segregable non-exempt material. The court rejected this argument, holding that unless there are sweeping claims of exemption or other indications of bad faith,<sup>37</sup> the court has no obligation to verify the agency's assertions, nor to examine the records for segregable material.<sup>38</sup>

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to the volumes which would have allowed the plaintiff to narrow his request, it was required to bear the entire burden of sorting the exempt and non-exempt materials. "While it would be tempting to recognize the hardship on the agency in 'getting its house in order' and deny the appellant's claim for disclosure for lack of specificity in his request, this would encourage agencies to procrastinate in the formulation of a usable, systematic index or other form or procedure which will allow the framing of precise requests for information." *Id.* The decision is clearly correct: an agency should not be permitted to escape the *Vaughn* requirement on the ground that the request is not sufficiently specific where that lack of specificity was caused by the agency's own laxity in meeting its statutory duty to provide indices under 5 U.S.C. § 552(a)(2)(C) (Supp. V 1975).

32. 565 F.2d 692 (D.C. Cir. 1977).

33. *See* 484 F.2d at 824.

34. "[B]efore the Court orders in camera inspection, the 'Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure.'" H.R. CONF. REP. No. 1380, 93d Cong., 2d Sess. 9 (1974), *cited in* *Weissman v. CIA*, 565 F.2d 692, 696-97 (D.C. Cir. 1977).

35. The plaintiff in *Weissman* sought access to all files completed on him by the CIA. The agency disclosed some of the records, but withheld over 50 documents in whole or in part claiming exemption under the provisions for classified material, 5 U.S.C. § 552(b)(1) (1970), information exempted by statute, 5 U.S.C.A. § 552(b)(3) (West 1977), and investigatory records, 5 U.S.C. § 552(b)(7) (Supp. V 1975). 565 F.2d at 694.

36. 565 F.2d at 698.

37. *Id.* at 696. *See* *Harvey's Wagon Wheel, Inc. v. NLRB*, 550 F.2d 1139, 1143 (9th Cir. 1976) (in camera inspection required only if a factual dispute exists over the nature of the statements sought).

38. The court found no reason to suspect bad faith on the part of the CIA, since it "disclosed much material, . . . came forward with newly discovered documents as located . . . filed an indexed description of all material withheld, and supported the withholding by explicit affidavits." 565 F.2d at 698. Plaintiff had not attempted discovery, and he presented no evidence of bad faith. *Id.* Although it is generally unnecessary for the court to inquire further when it is clear that the agency has not ignored the segregability requirement, *id.*, the court recognized that a stronger standard might be necessary in some cases, such as where "secret law" is involved, *id.* at 698 n.14.

The plaintiff argued that with respect to the documents alleged to have been "properly classified pursuant to . . . Executive order," and thus covered by Exemption 1,<sup>39</sup> the need for in camera inspection was particularly strong.<sup>40</sup> Nonetheless, the court held that in Exemption 1 cases the agency's judgment as to the effect of disclosure of intelligence information should not be questioned where proper procedures have been followed and the description of the withheld document appears reasonably consistent with the claimed exemption.<sup>41</sup> There seems to be no reason why this treatment must be limited to Exemption 1 cases. Similar reasoning might be applied to refuse in camera review of material claimed to fall within other exemptions that involve assessing effects of disclosure which are beyond the court's expertise.<sup>42</sup>

Two other recent cases required more extensive judicial tinkering with the *Vaughn* rule in order to avoid compromising the secrecy of exempt material. In *Phillippi v. CIA*,<sup>43</sup> the plaintiff requested records relating to alleged CIA efforts to "hush" media reports of secret government operations. The CIA argued that the fact of the existence or nonexistence of the requested records was itself exempt under Exemptions 1 and 3.<sup>44</sup> In support of its motion for summary judgment, the agency submitted sealed affidavits to the district court explaining its position. The court granted the agency's

39. 5 U.S.C. § 552(b)(1)(Supp. v 1975).

40. 565 F.2d at 696.

41. If exemption is claimed on the basis of national security the District Court must, of course, be satisfied that proper procedures have been followed, and that the claim is not pretextual or unreasonable, and that by its sufficient description the contested document logically falls into the category of the exemption indicated. It need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith.

*Id.* at 697. *Accord*, *Bell v. United States*, 563 F.2d 484, 487 (1st Cir. 1977) (court has no competence to determine whether disclosure would be likely to harm national security; therefore, no in camera examination will be held where adequate affidavits demonstrate conscientious classification); *Klaus v. Blake*, 428 F. Supp. 37 (D.D.C. 1976). These holdings are directly supported by the legislative history, which states that the court should order Exemption 1 documents released only where the withholding is "without a reasonable basis under the applicable Executive order or statute." S. REP. NO. 854, 93d Cong., 2d Sess. 16 (1974).

42. The most likely areas of extension are Exemptions 5 and 7, 5 U.S.C. §§ 552(b)(5), (7) (1970 & Supp. V 1975), with respect to which the agency may claim peculiar expertise. These exemptions cover agency memoranda and investigatory records, respectively. A somewhat analogous situation is presented by Exemption 3, 5 U.S.C.A. § 552(b)(3) (West 1977), relating to information protected from disclosure by other statutes, where the factual content of the documents arguably is irrelevant. *See Ray v. Bush*, 41 Ad. L.2d 28, 31 (D.D.C. 1977) (considering language of Exemption 3 prior to its amendment in 1976).

43. 546 F.2d 1009 (D.C. Cir. 1976).

44. The CIA claimed that "any records that might exist . . . and, indeed, any data that might reveal the existence of any such records . . . would be classified," and therefore exempt under 5 U.S.C. § 552(b)(1) (1970). 546 F.2d at 1011. The agency also asserted that such information would "relate to information pertaining to intelligence sources and methods," which is protected from disclosure by 50 U.S.C. § 403(d)(3) (1970), and thus exempt under 5 U.S.C.A. § 552(b)(3) (West 1977). 546 F.2d at 1011.

motion, but on appeal, the District of Columbia Circuit reversed. Although affidavits may properly be considered in in camera proceedings, at least where the agency contends that the very existence of the requested records may not be disclosed, the appellate court held that such in camera consideration should not be resorted to until the agency has created as complete a public record as possible.<sup>45</sup> The case was remanded to the district court with instructions to order the agency to provide a public affidavit explaining in as much detail as possible the basis for its position.<sup>46</sup> No *Vaughn* index would be required unless the court determined that the refusal to admit or deny the existence of the records was unjustified.<sup>47</sup>

The court in *Kanter v. IRS*<sup>48</sup> was also forced to strike a balance between the plaintiff's right to an adversary proceeding and the agency's claim of exemption. There, the plaintiff sought documents related to the agency's case against him in a pending criminal prosecution; disclosure was resisted under Exemption 7(A) on the ground that the documents constituted investigatory records the disclosure of which would "interfere with enforcement proceedings."<sup>49</sup> The court held that the IRS could be excused from submitting a publicly available *Vaughn* index because of the danger that the detailed description of the government's documents would cause as much interference with prosecution as revealing the documents themselves.<sup>50</sup> However, the court refused to grant summary judgment for the agency under the doctrine announced in *Weissman* on the grounds that the affidavits submitted were not sufficiently detailed and that other circumstances existed casting doubt on the good faith of the IRS.<sup>51</sup> Because direct in camera review of the documents would not be helpful and since the court lacked expertise to determine how disclosure would affect the enforcement proceedings,<sup>52</sup> the court ordered the agency to submit a complete, verified index to be considered in camera.<sup>53</sup>

*Kanter* and *Phillippi* demonstrate the willingness of the judiciary to alter the general principles set forth in *Vaughn* and *Weissman* where necessary to carry out the purpose of the FOIA exemptions. Without such a flexible application, principles designed to effectuate a more equitable

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45. 546 F.2d at 1013.

46. *Id.*

47. *Id.* at 1013 n.7.

48. 433 F. Supp. 812 (N.D. Ill. 1977).

49. 5 U.S.C. § 552(b)(7)(A) (Supp. V 1975).

50. 433 F. Supp. at 820.

51. *Id.* at 820-23. The court was particularly suspicious of the agency's motives in keeping the documents secret because the investigation which gave rise to them, Project Haven, had been declared in another suit to be purposefully illegal and an intentional violation of constitutional rights. Although the record before the court might have given no cause for suspicion, the court was not required to rely on the agency's generalized assertions. *Id.* at 823.

52. *Id.* at 820. See note 42 *supra* and accompanying text.

53. 433 F. Supp. at 825.

administration of the Act might result in distortion of Congress' effort to balance the Act's disclosure provisions with exemptions protecting important governmental interests.

#### IV. WORKLOAD DELAYS—AN ANSWER TO *OPEN AMERICA*

The FOIA was amended in 1974<sup>54</sup> to provide strict time limitations within which agencies must respond to requests for records.<sup>55</sup> The agency may extend these time limits for ten working days in statutorily prescribed "unusual circumstances";<sup>56</sup> if it fails to comply with the regular or extended time limits set by the statute, the party making the request is deemed to have exhausted his administrative remedies<sup>57</sup> and may bring suit to force disclosure.<sup>58</sup> Upon a showing by the agency that "exceptional circumstances" exist and that it is exercising "due diligence" in complying with the request, the court may allow it additional time.<sup>59</sup> In its 1976 decision in *Open America v. Watergate Special Prosecution Force*,<sup>60</sup> the District of Columbia Circuit construed "exceptional circumstances" to include the immense backlog of FOIA requests that had been filed with the FBI and found that by using a "first-in, first-out" system, the Bureau was exercising "due diligence" in responding to the requests.<sup>61</sup>

With no consideration of the *Open America* decision, an Illinois district court in 1977 facing similar circumstances reached the opposite conclusion. The court in *Hamlin v. Kelley*<sup>62</sup> held that "[i]nadequate staff, insufficient funding, or a great number of requests are not within the meaning of 'exceptional circumstances' as that language is used in the statute nor were they within the contemplation of its framers as evidenced by the legislative history."<sup>63</sup> The court also rejected the FBI's argument that each FOIA plaintiff should be required to "wait his turn":

This is an extraordinary argument. Defendants have not only delayed plaintiff's request for more than a year in clear violation of the statu-

54. Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561-65 (1974).

55. 5 U.S.C. § 552(a)(6)(A) (Supp. V 1975).

56. *Id.* § 552(a)(6)(B).

57. *Id.* § 552(a)(6)(C).

58. *Id.* § 552(a)(4)(B).

59. *Id.* § 552(a)(6)(C).

60. 547 F.2d 605 (D.C. Cir. 1976).

61. For a detailed discussion and analysis of the problem of workload delay and the *Open America* decision, see *FOIA Developments—1976* at 533-38.

62. 433 F. Supp. 180 (N.D. Ill. 1977). In *Hamlin*, plaintiff requested information from FBI files on the American Civil Liberties Union, the Illinois Division of the ACLU and the Roger Baldwin Foundation of the ACLU. He received a response from the Bureau stating that because of the heavy volume of requests it had received, his request would be substantially delayed. He appealed to the Attorney General but received no response within the time limit and filed this suit. Almost ten months after the first request was made, the agency moved for a "stay of proceedings" under 5 U.S.C. § 552(a)(6)(C) (Supp. V 1975).

63. 433 F. Supp. at 182.

tory time limits, but now suggest that this court become a party to their denial of documents and violation of the statute by holding plaintiff in his place in the line of those awaiting the agencies' convenience.<sup>64</sup>

Although the court's rhetoric is appealing, its reading of the legislative history as supporting its position is inaccurate. The court quoted a passage from the Senate Report<sup>65</sup> which stated that a special procedure that would abrogate the time limits of the FOIA could not be used by agencies that "simply processed large volumes of requests or frequently faced novel questions of legal interpretation."<sup>66</sup> However, this comment did not refer to the allowance of additional time in exceptional circumstances,<sup>67</sup> as the court apparently assumed.<sup>68</sup> Rather, the passage dealt with a provision that was not included in the bill as enacted which would have allowed certain agencies to operate under slightly more lenient time limits after certification by the Attorney General.<sup>69</sup>

The Senate Committee used more general terms to explain the bill's provision for discretionary extension by the court in exceptional circumstances. The Committee's report noted as a general proposition that persons seeking information under the FOIA tend to be sincere in their desire for the requested records and thus will voluntarily refrain from bringing suit where the agency is making a diligent effort to locate the materials.<sup>70</sup> However, the Committee stated that an agency's failure to observe the deadlines would nonetheless give parties making requests a right to sue.<sup>71</sup> A court could then prevent the agency from being penalized by using its power to allow additional time in exceptional circumstances. The language of the report suggests that "exceptional circumstances" exist where the agency is unable to meet deadlines despite the exercise of due diligence:

Such "exceptional circumstances" will not be found where the agency had not, during the period before administrative remedies had been exhausted, committed all appropriate and available personnel to the review and deliberation process. This final court-supervised extension of time *is to be allowed* where the agency is clearly making a diligent, good-faith effort to complete its review but could not practically meet the time deadlines.<sup>72</sup>

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64. *Id.*

65. S. REP. NO. 854, *supra* note 41, at 27.

66. 433 F. Supp. at 182.

67. 5 U.S.C. § 552(a)(6)(C) (Supp. V 1975).

68. *See* 433 F. Supp. at 182, where the court prefaces its quotation by stating that the Senate Report specifically discusses circumstances warranting a court-supervised extension.

69. *See* S. REP. NO. 854, *supra* note 41, at 26-27; H.R. CONF. REP. NO. 1380, *supra* note 34, at 11.

70. *See* S. REP. NO. 854, *supra* note 41, at 25-26.

71. *Id.* at 26.

72. *Id.* (emphasis added).

Thus, the report seems to merge the dual requirements of the statute<sup>73</sup> into a single test of diligence by the agency.

Although the *Hamlin* court quoted the Senate Report out of context, the report's language, which denied use of the proposed certification procedure to agencies that merely had abnormally large workloads, does offer some aid in resolving the workload delay issue. Clearly, the Committee contemplated that agencies bogged down by a heavy flow of FOIA requests should not be granted special treatment.<sup>74</sup> However, the *Hamlin* approach may be too unyielding. The court was apparently unwilling to consider the circumstances leading to the agency's overload<sup>75</sup> and would deny an extension even where an unexpected increase in an agency's FOIA requests makes compliance a practical impossibility. Such a result is not justified by the indirect support lent by the legislative history, nor by the plain language of the "exceptional circumstances" provision. On the other hand, the *Hamlin* view has an advantage over the majority opinion in *Open America* which effectively sacrificed the FOIA's time limitations where agencies face a heavy workload; at least the *Hamlin* approach relieves courts of the need to consider the complex managerial issues of personnel and budget allocation within government agencies. Relief from such administrative problems comes more appropriately from Congress than from the courts.

There is no need for other courts facing similar circumstances to choose between these two courses and the problems that each presents. Judge Leventhal's *Open America* concurrence offers a middle ground. Judge Leventhal would grant a discretionary extension to an overburdened agency only upon finding that exceptional circumstances exist in the form of an "unexpected surge in requests combined with the lack of trained personnel," and that the agency was exercising due diligence in resolving its problems by requesting additional funds and streamlining review procedures.<sup>76</sup> By thus narrowly defining the circumstances in which FOIA overloads might lead to judicial lenience, his analysis provides an appropriate enforcement role for the courts, leaving them free to exercise some discretion in truly exceptional cases without undertaking to resolve administrative problems posed by the statute.<sup>77</sup>

## V. AWARD OF ATTORNEY FEES

The 1974 amendments to the FOIA added a provision for the discre-

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73. The statute provides for an extension upon a showing of both exceptional circumstances and due diligence. 5 U.S.C. § 552 (a)(6)(C) (Supp. V 1975).

74. See *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 618 (D.C. Cir. 1976) (Leventhal, J. concurring).

75. See 433 F. Supp. at 182.

76. 547 F.2d at 618.

77. Judge Leventhal pointed out that a stricter judicial enforcement role than that contemplated by the majority would serve to attract congressional attention to the problem. *Id.*

tionary award of "reasonable attorney fees and other litigation costs reasonably incurred" by plaintiffs who have "substantially prevailed" in a suit brought under the Act.<sup>78</sup> There was extensive legislative debate concerning this provision,<sup>79</sup> and this history is an important source for courts in fashioning standards for the exercise of their discretionary power. In litigation in 1977, definitive principles relating to the award of attorney fees in FOIA cases have emerged as a result of the courts' melding of existing common law concepts with special considerations gleaned from the legislative history.

*Nationwide Building Maintenance, Inc. v. Sampson*<sup>80</sup> provides a comprehensive overview of the judicial treatment of this issue. There, plaintiff sought documents relating to cleaning services contracts awarded by the General Services Administration to plaintiff's competitors.<sup>81</sup> The agency did not act on the requests within the statutory time period,<sup>82</sup> and plaintiff sued for disclosure. Subsequently, the agency released the requested documents over a period of several months, stating that although some of the material was exempt under the Act, it had been found not to be prejudicial to the government or the private firms involved.<sup>83</sup> Further, the parties stipulated that the agency had complied completely with plaintiff's request. The district court granted the government's motion for summary judgment and denied plaintiff's cross-motion for attorney fees on the ground that it had not "substantially prevailed."<sup>84</sup>

After determining on appeal that a court order compelling disclosure is not a prerequisite to an award of attorney fees under the Act,<sup>85</sup> the District of Columbia Circuit tackled the more difficult problem of defining the scope of

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78. 5 U.S.C. § 552(a)(4)(E) (Supp. V 1975).

79. The history of the amendment is discussed in detail in *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 710-11 (D.C. Cir. 1977), and *Vermont Low Income Advocacy Council, Inc. v. Usery*, 546 F.2d 509, 512-13 (2d Cir. 1976).

80. 559 F.2d 704 (D.C. Cir. 1977).

81. The documents were sought in connection with bid protests filed by Nationwide with the General Accounting Office requesting that the contracts be canceled and that GSA be directed to award them to Nationwide. *Id.* at 706.

82. GSA responded to Nationwide's requests with letters stating that no decision had been made. Even if these letters gave adequate notice of extension under 5 U.S.C. § 552(a)(6)(B) (Supp. V 1975), the agency failed to follow through within the maximum extended time limit and Nationwide was deemed to have exhausted administrative remedies under 5 U.S.C. § 552(a)(6)(C) (Supp. V 1975). 559 F.2d at 706 & n.6.

83. The first disclosure was made immediately after Nationwide filed its motion for preliminary injunction. At that time, GSA claimed that the material that was withheld was exempt from disclosure, but that the decision was being processed through the agency's internal appeal procedure. The agency later revised its opinion and released documents it determined to be nonexempt; subsequent disclosures were stated to be exempt, but non-prejudicial. 559 F.2d at 707.

84. *Id.* The judgment was based on the fact that the disclosures were made before the court made any finding of wrongful withholding. *Id.* at 705.

85. In making this determination, the court followed the great weight of authority. The

judicial discretion to award fees.<sup>86</sup> The foundation of the court's approach was the "American Rule," which provides that "attorney fees should not generally be awarded in the absence of explicit statutory authorizations."<sup>87</sup> In its 1975 decision in *Alyeska Pipeline Service Co. v. Wilderness Society*,<sup>88</sup> the Supreme Court reaffirmed this rule, holding that Congress alone has the authority to depart from the traditional policy.<sup>89</sup> The *Alyeska* holding led the *Nationwide* court to conclude that its construction of the provision should be based upon the specific legislative intent behind the FOIA provision, rather than upon judicial construction of similar statutes awarding attorney fees.<sup>90</sup> From its examination of the legislative history, the court concluded that the award of attorney fees was not intended to serve as a reward for successful litigants. Rather, "[i]t had a more limited purpose—to remove the incentive for administrative resistance to disclosure requests based not on the merits of exemption claims, but on the knowledge that many FOIA plaintiffs do not have the financial resources or economic incentives to pursue their requests through expensive litigation."<sup>91</sup> After

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Second Circuit, the first appellate court to consider the issue, held in *Vermont Low Income Advocacy Council v. Usery*, 546 F.2d 509, 513 (2d Cir. 1976), that an order directing disclosure is not a necessary condition to recovery of attorney fees. The District of Columbia Circuit itself had adopted this position shortly before the *Nationwide* decision in *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1364-65 (D.C. Cir. 1977). District courts considering the question generally have reached a similar conclusion. *See, e.g.*, *Pope v. United States*, 424 F. Supp. 962, 965 (S.D. Tex. 1977).

In both *Nationwide* and *Cuneo*, the District of Columbia Circuit justified its decision by adopting the following language, quoted from *Communist Party v. Department of Justice*, No. 75-1770, slip op. at 3 (D.D.C. Mar. 23, 1976):

If the government could avoid liability for fees merely by conceding the cases before final judgment, the impact of the fee provision would be greatly reduced. The government would remain free to assert boilerplate defenses, and private parties who served the public interest by enforcing the Act's mandates would be deprived of compensation for the undertaking.

559 F.2d at 710; 553 F.2d at 1365.

86. The question of whether the court should exercise its discretion to award attorney fees theoretically should arise only after a determination has been made that the plaintiff has "substantially prevailed." 5 U.S.C. § 552(a)(4)(E) (Supp. V 1975). In practice, however, the concepts tend to merge, and a court may state that a plaintiff has not substantially prevailed where he has failed to meet the criteria for a discretionary award. *Cf. Halperin v. Department of State*, 565 F.2d 699, 706 n.11 (D.C. Cir. 1977) (where plaintiff has vindicated the public interest, he has substantially prevailed, regardless of whether he ultimately obtains disclosure).

87. 559 F.2d at 709.

88. 421 U.S. 240 (1975).

89. *See* 559 F.2d at 709.

90. *Id.* This does not mean that the common law is irrelevant; it shapes the interpretation of the statute to the extent that it is incorporated into the legislative intent. *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1367 (D.C. Cir. 1977) ("The legislative history, however, reveals that Congress intended that the courts should look to the existing body of law on the award of attorney fees in determining whether an award is appropriate.").

91. 559 F.2d at 711. The court's conclusion is supported by specific language from the Senate Judiciary Committee Report on the Senate version of the amendment, S. REP. NO. 854, *supra* note 41, at 17-18.

considering criteria derived from the legislative history<sup>92</sup> and judicial decisions,<sup>93</sup> the court found that the essential theme underlying the standards was a consideration of whether an award of attorney fees will effectuate the purposes of the Act. Finding that the plaintiff in the case had "substantially prevailed" in its request, the court remanded the case for a determination of whether a discretionary award of attorney fees was warranted.<sup>94</sup>

The court's approach clearly is consistent with the legislative history and it encourages courts to apply existing principles with an eye toward the unique goals of the FOIA. It does not completely bury the "private attorney general" theory as a justification for the award.<sup>95</sup> However, it rejects an approach that would appropriate in toto the concepts developed under

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92. The Senate version of the amendment listed four factors to be considered by a court in awarding attorney fees: public benefit, commercial benefit to the plaintiff, the nature of the plaintiff's interest in the records, and the reasonableness of the agency's action in withholding the records. See S. REP. NO. 854, *supra* note 41, at 19. Although this specific listing was deleted by the Conference Committee prior to final enactment, the Committee Report makes it clear that the deletion did not indicate disapproval of the factors. It merely represented the committee's determination that the listing was unnecessary since the factors were included in the existing law on awards of attorney fees. H.R. CONF. REP. NO. 1380, *supra* note 34, at 10.

93. In addition to the four criteria listed in the Senate bill, see note 92 *supra*, the Second Circuit in *Vermont Low Income Advisory Council v. Usery*, 546 F.2d 509, 513 (2d Cir. 1976), considered two other factors: "In order to obtain an award of attorney fees in an FOIA action, a plaintiff must show at minimum that the prosecution of the action could reasonably have been regarded as necessary and that the action had substantial causative effect on the delivery of the information." The court went on to deny the award. Under the facts of the case, the agency had had trouble locating the requested records. It notified the plaintiff of this difficulty, and requested his telephone number so that further arrangements could be made. The court held that although the plaintiff was within his technical rights under the Act in filing suit, he had acted so unreasonably in not responding to the request that there was "no reason for rewarding VLIAC with moneys from the public treasury for . . . adding what turned out to be a needless suit to the heavy docket . . ." *Id.* at 514. The court also approved the lower court's finding that the suit did not cause the disclosure; as soon as the agency located the requested records, it made prompt disclosure. *Id.* at 514-15.

The factors of necessity and causation were considered by the court in granting the plaintiff's request for an award of attorney fees in *Exner v. FBI*, 46 U.S.L.W. 2398 (U.S., S.D. Cal. Jan. 27, 1978). Plaintiff believed that inaccurate information in FBI files had exposed her to danger. The court held that her need for immediate review of the files was sufficient to meet the criterion of reasonable necessity. The agency contended that no causal relationship was shown because it would have disclosed the material eventually under its first-in, first-out system of processing FOIA requests. The court rejected this argument, holding that a suit which affects the timing of a disclosure may meet the causation test. "When the information is delivered may be as important as what information is delivered." *Id.* at 2399.

94. 559 F.2d at 716.

95. *Id.* at 716 & n.43. The notion that litigants should be rewarded for their service to the public remains a vital concept. This was made clear in *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1366 (D.C. Cir. 1977), which held that an award could be made to an attorney appearing on his own behalf. In part, the holding was based on a construction of the statute. The court adopted the reasoning expressed in *Holly v. Acree*, 72 F.R.D. 115, 116 (D.D.C. 1976), where it was held that the use of the word "reasonable" as a modifier of "attorney fees" prevents the conclusion that the phrase "reasonably incurred" also modifies that term; the statute does not require attorney fees to be actually incurred as a prerequisite to eligibility for an award. The *Cuneo* court went

statutes such as Title II and Title VII of the Civil Rights Act of 1964,<sup>96</sup> where commercial interests are far less likely to prompt plaintiffs to bring suits enforcing the statutory policies.<sup>97</sup>

The critical consideration under the FOIA's attorney fees provision is the extent to which the respective parties' positions are consistent with the underlying purposes of the Act. A successful plaintiff, by definition, has advanced the cause of disclosure; yet, where disclosure is less in the interest of the public than in the interest of the individual litigant, attorney fees may not be appropriate.<sup>98</sup> On the other hand, where the agency justifiably resists disclosure of exempt material, but later yields voluntarily to the plaintiff's request, an award of costs might operate to discourage settlement and liberal disclosure.<sup>99</sup> The *Nationwide* approach directs judicial consideration of accepted criteria for the award of fees<sup>100</sup> in a way that encourages good faith compliance with the underlying policies of the FOIA.<sup>101</sup>

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further, however, stating that the conclusion was supported by policy considerations: "successful FOIA litigants enhance the public interest by bringing the government into compliance with the law. As agents of the national policy of public disclosure it is equitable that they be awarded [sic] for their service." 533 F.2d at 1366. The court drew an analogy to the treatment of litigants under other federal attorney fee statutes "when the social service rendered by the prevailing party is substantial." *Id.* But see *Burke v. Department of Justice*, 432 F. Supp. 251 (D. Kan. 1976) (plaintiff appearing pro se not entitled to award of attorney fees; the statute does not provide for hourly compensation for pro se litigants).

The continued importance of the public benefit factor in the award of attorney fees under the Act is also evidenced by the court's statement in *Halperin v. Department of State*, 565 F.2d 599, 706 n.11 (D.C. Cir. 1977), that because plaintiff had "benefited the nation" by pointing out to the State Department the dangers inherent in its practice of holding "background press conferences" without properly classifying the information disseminated, he had "substantially prevailed" for purposes of 5 U.S.C. § 552(a)(4)(E) (Supp. V 1975), regardless of the outcome of the proceedings.

96. 42 U.S.C. §§ 2000a-3(b), 2000e-5(k) (1970).

97. Thus, the court rejected *Nationwide's* contention that it was entitled to a presumption in favor of the award of attorney fees, such as that which courts have read into the civil rights provisions. 559 F.2d at 713-14.

98. See S. REP. NO. 854, *supra* note 41, at 19. The court in *Nationwide* quoted the following language from that report: "there will seldom be an award of attorneys' fees when the suit is to advance the private commercial interests of the complainant. In these cases there is usually no need to award attorneys' fees to insure that the action will be brought." 559 F.2d at 712. The point was also emphasized in *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1367-68 (D.C. Cir. 1977), where the lower court was instructed to consider on remand the plaintiff's private commercial incentive in pursuing his request.

Where an FOIA litigant has dual motives, it is possible to make a partial award. See *MCA, Inc. v. IRS*, 434 F. Supp. 212 (C.D. Cal. 1977) (where primary purpose of FOIA litigation was public benefit, but some self-interest present, plaintiff entitled to 60% of his attorney fees).

99. 559 F.2d at 712 n.34.

100. See notes 92-93 *supra*. It is important to observe that the application of these criteria involves a close analysis of the factual context of the litigation and is generally within the expertise of the trial court, 559 F.2d at 716; *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1368 (D.C. Cir. 1977), although an appellate court may have power to make its own discretionary determination. Cf. *Vermont Low Income Advocacy Council v. Usery*, 546 F.2d 509 (2d Cir. 1976) (appellate court affirmed denial of fees for reasons different from those of lower court).

101. Where consistent with this goal, principles relating to the award of attorney fees in

## VI. SUBJECT MATTER JURISDICTION IN REVERSE-FOIA CASES

The FOIA represents a balance between the public interest in providing access to information that illuminates the operation of government, and the need for preserving the confidentiality of certain types of information.<sup>102</sup> The Act provides a direct right of action to enforce the disclosure interest through the jurisdiction of the federal courts,<sup>103</sup> but it is silent as to the means by which confidentiality may be protected. Although the agencies in possession of records may be presumed to protect their own confidentiality interests through their initial right to refuse disclosure,<sup>104</sup> the agencies cannot be expected to safeguard adequately the legitimate privacy interests of persons who have submitted information to them.<sup>105</sup> Parties seeking to keep confidential information from being released pursuant to FOIA re-

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other contexts may be applied in FOIA cases. See *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1366-67 (D.C. Cir. 1977) (attorney fees may be awarded in action instituted before effective date of FOIA's attorney fees provision, 5 U.S.C. § 552(a)(4)(E) (Supp. V 1975), based on precedent that the right to costs is controlled by the law at the time an action is terminated).

102. See H.R. REP. NO. 1497, 89th Cong., 2d Sess. 6, reprinted in [1966] U.S. CODE CONG. & AD. NEWS 2423 (emphasizing need "to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary"). See generally *Reverse-FOIA Suits*.

103. 5 U.S.C. § 552(a)(4) (Supp. V 1975).

104. Cf. *Metropolitan Life Ins. Co. v. Utery*, 426 F. Supp. 150, 169 (D.D.C. 1976), cert. denied, 431 U.S. 924 (1977) (private party lacks standing to challenge government's voluntary disclosure of records allegedly exempt under 5 U.S.C. § 552(b)(7) (Supp. V 1975), because that exemption protects governmental interest in confidentiality).

105. See O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act*, 30 BUS. LAW. 1125, 1134 (1975); Note, *Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection*, 70 NW. U.L. REV. 995, 998-99 (1976).

Confidential information is often submitted to the government in return for receipt of a government benefit. See, e.g., *Planning Research Corp. v. FPC*, 555 F.2d 970 (D.C. Cir. 1977) (information submitted as part of proposal for government contract); *Metropolitan Life Ins. Co. v. Utery*, 426 F. Supp. 150 (D.D.C. 1976), cert. denied, 431 U.S. 924 (1977) (information on past and projected employment of minority groups by government contractors submitted in compliance with regulations); *Sonderegger v. Department of Interior*, 424 F. Supp. 847 (D. Idaho 1976) (information submitted as part of claims filed for disaster relief). Such information may also be acquired by the government through its licensing, regulatory and enforcement functions. See, e.g., *Westinghouse Elec. Corp. v. Nuclear Regulatory Comm.*, 555 F.2d 82 (3d Cir. 1977).

A party who has been forced to place private information in the hands of the government is highly dependent upon the government to protect the confidentiality of that information; he presents an appealing case for protection from arbitrary disclosure, see *Reverse-FOIA Suits* 333 n.14. However, a party required by law to submit information to an agency is dealing with the government as sovereign; in that context, the information loses its quality as a privately-owned asset. Thus, the need to protect private interests in nondisclosure is arguably less than where the relationship more closely resembles an ordinary business transaction. In addition, the countervailing disclosure interests may be stronger. The fact that the information was obtained by the government in the exercise of its sovereign powers means that it is more likely to be relevant to government operations and procedures. Thus, its disclosure is more in line with the underlying purpose of the FOIA, see note 15 *supra* and accompanying text, than is disclosure of information obtained in the course of the government's business dealings.

quests have often looked to the federal courts to enjoin disclosure.<sup>106</sup> A major difficulty faced by the courts in dealing with these "reverse-FOIA" suits has been the need to find a basis for federal subject matter jurisdiction.<sup>107</sup>

Prior to 1977, three separate theories of reverse-FOIA jurisdiction had gained some acceptance:<sup>108</sup> an implied grant of subject-matter jurisdiction

106. For a complete discussion of such cases, see *Reverse-FOIA Suits*; Note, *supra* note 105.

Many reverse-FOIA suits are brought to protect confidential commercial and financial information. Because of this, litigants are often able to invoke the Trade Secrets Act, 18 U.S.C. § 1905 (1970), a criminal statute prohibiting disclosure by federal employees "in any manner and to any extent not authorized by law" of information relating to "the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation or association." *Id.*

Although it might be thought that the nondisclosure provisions of the Trade Secrets Act are incorporated into the FOIA through the statutory exemption, 5 U.S.C.A. § 552(b)(3) (West 1977), the legislative history of the 1976 amendments to that exemption expressly precludes such a result. See H.R. REP. NO. 880 (pt. 1), 94th Cong., 2d Sess. 23, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2183, 2205. The two statutes do interact, however. The coverage of section 1905 has been seen to be coextensive with the scope of Exemption 4, 5 U.S.C. § 552(b)(4) (1970). See *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1204 n.38 (4th Cir. 1976), cert. denied, 431 U.S. 924 (1977); *FOIA Developments—1976* at 563 & n.225. The Trade Secrets Act affects only disclosures not authorized by law. Since the FOIA does not authorize disclosure of exempt material, section 1905 operates to make disclosure of Exemption 4 information illegal unless some other statutory authority for the disclosure exists. Agency action "not in accordance with law" may be struck down under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1970). See *Reverse-FOIA Suits* 340-43; *FOIA Developments—1976* at 563.

In 1977, two district courts applied the Trade Secrets Act to reverse-FOIA suits, and then struck down an HEW regulation requiring disclosure of confidential information submitted by hospitals participating in the medicare program. *Westchester Gen. Hosp., Inc. v. HEW*, 434 F. Supp. 435 (M.D. Fla. 1977) (preliminary injunction against disclosure ordered pending action on the merits); *Parkridge Hosp., Inc. v. Blue Cross & Blue Shield*, 430 F. Supp. 1093 (E.D. Tenn. 1977). The *Parkridge* opinion provided an extensive analysis of the issues presented and was heavily relied upon in *Westchester*. The *Parkridge* court explored HEW's alleged authority to promulgate the regulation. The FOIA itself could not provide that authority because the information was exempt. 430 F. Supp. at 1097. Although general authority for the regulation was found in 42 U.S.C. § 1306(a) (Supp. V 1975), which prohibits disclosure "except as the Secretary . . . may by regulations prescribe," the exercise of that authority was held to be in derogation of the Trade Secrets Act and thus an abuse of discretion under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1970). 430 F. Supp. at 1097-98. The court rejected the argument that the regulation itself could provide the requisite authority for disclosure, and thus prevent the Trade Secrets Act from operating; the very issue before the court was the regulation's validity. *Id.* at 1098.

Under the reasoning of *Parkridge*, any disclosure of confidential information protected by the Trade Secrets Act may be struck down as an abuse of discretion unless affirmatively authorized by another statute. A regulation promulgated pursuant to more general authority, such as 5 U.S.C. § 301 (1970), is not sufficient to satisfy the Trade Secrets Act.

107. There has been "substantial disagreement" as to the proper basis for jurisdiction. *Reverse-FOIA Suits* 347. This uncertainty has in turn led to inconsistency in the standards of review applied. See notes 108-11 *infra* and accompanying text.

108. See generally *Reverse-FOIA Suits* 347-53.

under section 10 of the Administrative Procedure Act (APA),<sup>109</sup> an implied private right of action to enforce a separate nondisclosure statute<sup>110</sup> and general federal question jurisdiction.<sup>111</sup> In 1977, the first of these theories was eliminated by an authoritative ruling of the Supreme Court,<sup>112</sup> and judicial attention has been directed toward refining the concept of federal question jurisdiction as a source of authority for private parties to gain access to the federal courts in reverse-FOIA cases.<sup>113</sup>

The jurisdictional issue was sharply presented in 1977 in *Planning Research Corporation v. Federal Power Commission*.<sup>114</sup> There, the Associated Press had sought release under the FOIA of a contract awarded by the Federal Power Commission to Planning Research. The contract included by reference a highly detailed proposal.<sup>115</sup> Acting upon informal advice from the Department of Justice, the Commission decided to release all material representing the "essence of the contract,"<sup>116</sup> without regard to whether such material was exempt from mandatory disclosure under the

109. 5 U.S.C. § 702 (1970). This section has been amended, Pub. L. No. 94-574, § 1, 90 Stat. 2721 (1976) (codified at 5 U.S.C.A. § 702 (West 1977)) (removing defense of sovereign immunity), but still provides in relevant part: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." The leading reverse-FOIA case finding jurisdiction under the APA is *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935 (D.C. Cir. 1975). *Accord*, *Parkridge Hosp, Inc. v. Blue Cross & Blue Shield*, 430 F. Supp. 1093, 1095-96 (E.D. Tenn. 1977); *Metropolitan Life Ins. Co. v. Usery*, 426 F. Supp. 150, 156 (D.D.C. 1976), *cert. denied*, 431 U.S. 924 (1977).

110. *See* *Planning Research Corp. v. FPC*, 555 F.2d 970, 977 n.12 (D.C. Cir. 1977); *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 941 n.6 (D.C. Cir. 1975). *See also Reverse-FOIA Suits* 349-51.

111. 28 U.S.C.A. § 1331 (West Supp. 1977).

112. *Califano v. Sanders*, 430 U.S. 99 (1977) (Section 10 of APA is not an implied grant of subject-matter jurisdiction to the federal courts). *See* notes 127-33 *infra* and accompanying text.

113. *See* notes 134-44 *infra* and accompanying text.

114. 555 F.2d 970 (D.C. Cir. 1977).

115. The information that Planning Research included in the proposal was characterized by the Commission as setting forth "all of the company's trade and marketing secrets, developed over more than 20 years of experience at great expense." *Id.* at 972. The proposal went beyond the specific information solicited by the Request of Proposals, offering "innovative options" and alternatives to the government's plan. *Id.*

116. The Commission had originally determined that the requested material was partially exempt under the "trade secrets" exemption to the FOIA, 5 U.S.C. § 552(b)(4) (1970), and sought the advice of the Justice Department on whether it was proper to withhold it on that basis. Because the advice was relayed to the Commission informally by telephone, the court noted "we are without the benefit of the rationale, if any, underlying the Department's telephonic musings on this score." 555 F.2d at 975-76. It is possible that the Justice Department considered the essential terms of the contract to be a "final opinion" or "statement of policy" and thus subject to the affirmative disclosure provisions of 5 U.S.C. § 552(a)(2) (Supp. V 1975). Although the Supreme Court has held in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), that the Act's affirmative disclosure provisions may limit the scope of certain exemptions, that holding was intended to apply only to cases in which disclosure does not thwart the purpose underlying the exemption claimed. 421 U.S. at 166. *See generally* Note, *Developments Under*

FOIA, and to release any additional non-exempt material.<sup>117</sup> An administrative law judge reviewed the Commission's determination after making a detailed in camera inspection of the material requested. He found the bulk of the material to be covered by Exemption 4 of the FOIA,<sup>118</sup> and recommended against discretionary disclosure by the agency.<sup>119</sup> However, the Commission decided to follow its initial determination, and Planning Research sued in the district court to enjoin release of the information.<sup>120</sup> The district court dismissed for lack of subject matter jurisdiction, accepting the Commission's argument that the claim sounded in contract<sup>121</sup> and thus was exclusively within the jurisdiction of the Court of Claims.<sup>122</sup>

Recognizing that the district court's treatment of the jurisdictional issue failed to consider the plaintiff's argument that the Commission was acting beyond its authority in releasing the proprietary information,<sup>123</sup> the District of Columbia Circuit, on appeal, remanded the case for a consideration of whether the Commission applied the correct standard in deciding to release the information.<sup>124</sup> Before this issue could be remanded to the district court, however, it was necessary to find a source of subject matter jurisdiction over the controversy.

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*the Freedom of Information Act—1975, supra* note 2, at 372-77. Because disclosure of the trade secret information embodied in the requested documents would be destructive of the interests the exemption was designed to protect, such an approach would clearly be inappropriate here.

117. 555 F.2d at 972.

118. 5 U.S.C. § 552(b)(4) (1970).

119. 555 F.2d at 973-74. The judge based his recommendation on a balancing of public and private interests. Because a summary of the contract terms had already been made available to the Associated Press, the public interest to be served by disclosure of the technical details of the proposal did not outweigh the "private interests and property rights" involved. *Id.* at 974. In addition, the judge found that the Commission's discretion was limited by a federal procurement regulation, 41 C.F.R. § 1-3.103(b) (1977), prohibiting disclosure of offerors' "cost breakdown, profit, overhead rates, trade secrets, or other confidential business information" to other offerors. 555 F.2d at 974.

120. 555 F.2d at 974.

121. The district court regarded the controversy as turning upon whether the material to be disclosed was part of the contract—a matter of contractual interpretation. *Id.* at 976 n.9. The plaintiff did *not* claim a contractual *right* of nondisclosure, and that was not the basis of the decision. *Id.* at 975 n.7.

122. The court relied upon *International Eng. Co. v. Richardson*, 512 F.2d 573 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1048 (1976) (dispute over right to possession of technical data, turning upon interpretation of clause in government contract governing such rights, within jurisdiction of Court of Claims). 555 F.2d at 976 n.9.

123. 555 F.2d at 975 n.7.

124. *Id.* at 978. By treating the contractual question as dominant, the district court had neglected the initial stage of the analysis necessary to determine the plaintiff's right to injunction: whether there was any authority in the Commission to make disclosure, and, if so, whether the agency had acted within that authority. Presumably, if the district court determines on remand that the "essence of the contract" standard was indeed proper, the contractual interpretation problem may again arise. The court could then go forward with the resolution of that question under its general federal question jurisdiction. See notes 141-44 *infra* and accompanying text.

The court considered each of the prevalent theories of reverse-FOIA jurisdiction.<sup>125</sup> Jurisdiction under the APA, upon which it had relied earlier,<sup>126</sup> was foreclosed by the Supreme Court's ruling in *Califano v. Sanders*,<sup>127</sup> which resolved a long-standing dispute among the courts<sup>128</sup> and commentators<sup>129</sup> by holding that section 10 of the APA<sup>130</sup> is not an implied grant of subject-matter jurisdiction to the federal courts for review of agency actions.<sup>131</sup> The *Sanders* court reasoned that by eliminating the amount-in-controversy requirement for federal question actions against federal entities,<sup>132</sup> Congress made it unnecessary for the courts to imply another basis for jurisdiction to review agency actions.<sup>133</sup> Following the lead of *Sanders*, the *Planning Research* court adopted the position that the general federal question jurisdiction statute<sup>134</sup> grants jurisdiction to review decisions by agencies to release exempt material.<sup>135</sup> It is still unclear, however, exactly

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125. See notes 108-11 *supra* and accompanying text. The court found it unnecessary to consider the possibility of finding jurisdiction based on an implied right of action to enforce the nondisclosure provisions of 18 U.S.C. § 1905 (1970):

In *Charles River Park* [*Charles River Park "A," Inc. v. HUD*, 519 F.2d 935 (D.C. Cir. 1975)], this court declared its unwillingness to imply a private right of action from § 1905 "unnecessarily." See 519 F.2d at 941 n.6 . . . [W]e believe that appellant's claim is cognizable under the District Court's federal question jurisdiction. Therefore, like the *Charles River Park* panel, we express no opinion on whether § 1905 may constitute an independent basis of jurisdiction for at least some "reverse-FOIA" suits.

555 F.2d at 977 n.12.

The court also considered the plaintiff's contention that jurisdiction could be founded upon the Tucker Act, 28 U.S.C. § 1346(a)(2) (1970), if the amount in controversy were found to be less than \$10,000; this theory was dismissed as part of the misconception that the action was founded upon contract. 555 F.2d at 976 n.11.

126. See, e.g., *Charles River Park "A," Inc. v. HUD*, 519 F.2d 935 (D.C. Cir. 1975).

127. 430 U.S. 99 (1977).

128. Compare *Charles River Park "A," Inc. v. HUD*, 519 F.2d 935, 939 (D.C. Cir. 1975) with *Bramblett v. Desobry*, 490 F.2d 405, 407 (6th Cir.), *cert. denied*, 419 U.S. 872 (1974). See generally *Reverse-FOIA Suits* 349 & n.95.

129. Compare K. DAVIS, *ADMINISTRATIVE LAW IN THE SEVENTIES* § 23.02, at 530 (1976) with 13 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3568, at 465-67 (1975).

130. 5 U.S.C.A. § 702 (West 1977).

131. 430 U.S. at 105.

132. On October 21, 1976, Congress enacted Pub. L. No. 94-574, 90 Stat. 2721 (1976) (codified at 28 U.S.C.A. § 1331 (West Supp. 1977)), amending 28 U.S.C. § 1331 to eliminate the \$10,000 amount-in-controversy requirement for federal question actions against the United States, or federal agencies, officers or employees.

133. 430 U.S. at 105.

134. 28 U.S.C.A. § 1331 (West Supp. 1977). The court did not find it necessary to consider whether the elimination of the amount-in-controversy requirement, see note 132 *supra*, applied retroactively to a suit brought prior to the effective date of the amendment, holding that the \$10,000 requirement was satisfied due to the "obvious value and importance of the material" plaintiff sought to have withheld. 555 F.2d at 976 n.10; *accord*, *Sears, Roebuck & Co. v. GSA*, 553 F.2d 1378, 1380 n.6 (D.C. Cir.), *cert. denied*, 98 S. Ct. 74 (1977).

135. The court noted that scholarly opinion supported this view. 555 F.2d at 977 & n.14. See *Reverse-FOIA Suits* 351; Note, *supra* note 105, at 1007.

what federal law operates as the object of the "arising under" language of the statute.<sup>136</sup> The court in *Planning Research* stated that because the agency had not considered whether the material characterized as the "essence of the contract" was exempt from the FOIA, and the suit sought to compel the agency to apply the standard set by the FOIA in making its disclosure determination, the action could be characterized as arising under the FOIA itself.<sup>137</sup> This characterization is illuminating because it recog-

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136. The phrase "arises under the Constitution, laws or treaties of the United States" used in the statute, 28 U.S.C.A. § 1331(a) (West Supp. 1977), has no commonly accepted meaning. Professor Mishkin's statement that there must be a claim "founded 'directly' upon national law," Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 165 (1953), has been described as providing a "succinct test," but one that is subject to exceptions and pragmatic considerations. C. WRIGHT, *LAW OF FEDERAL COURTS* § 17, at 67 (3d ed. 1976).

In cases involving the statutory exemption, 5 U.S.C.A. § 552(b)(3) (West Supp. 1977), the statute prohibiting disclosure may provide a proper object for the "arising under" language. See *Pierce & Stevens Chemical Corp. v. United States Consumer Prod. Safety Comm.*, 439 F. Supp. 247, 249 (W.D.N.Y. 1977).

137. 555 F.2d at 977-78 n.15. In *Sears, Roebuck & Co. v. GSA*, 553 F.2d 1378, 1380-81 n.7 (D.C. Cir.), cert. denied, 98 S. Ct. 74 (1977), the court similarly held that a reverse-FOIA case had arisen under the FOIA and thus was subject to federal question jurisdiction. However, the court's rationale in that case was less convincing. The plaintiff in *Sears* was seeking a declaratory judgment that certain material was exempt from disclosure although no FOIA request for the information had been filed. The court based its finding of jurisdiction on the fact that a factual issue had been presented in the district court as to the applicability of Exemption 4, 5 U.S.C. § 552(b)(4) (1970), to the materials in dispute. Because the agency had shifted its position from its initial decision to disclose the materials even if not compelled to do so by the FOIA, and was reserving its determination pending the court's decision regarding the applicability of the exemption, 553 F.2d at 1381, the suit is distinguishable from *Planning Research*. It was not necessary to compel the agency to apply FOIA standards, because it professed a willingness to consider the exempt nature of the materials in making its decision. In fact, no decision had been made adversely affecting the plaintiffs. The court characterized the "actual controversy" as "whether the records sought are exempt from disclosure under the FOIA," and stated that declaratory judgment was appropriate. *Id.* Yet, in effect, the plaintiff was seeking the same thing as the plaintiff in *Usery v. Whitin Machine Works, Inc.*, 554 F.2d 498 (1st Cir. 1977)—a judicial determination before any disclosure decision had been made that records submitted to the agency were exempt under the FOIA. The First Circuit in *Whitin Machine* refused to make such a determination, stating that it would not be binding on third parties and would delay the agency's procedures. The *Sears* court might have followed this reasoning and refused to intervene until the agency had completed its decision-making process. However, in view of both the agency's earlier position and the protracted litigation, the probability that disclosure would be made and the plaintiff thereby injured was far less remote and speculative than in *Whitin Machine*; declaratory judgment on the FOIA issue was thus appropriate. Nonstatutory federal question jurisdiction might have been preferable, however. See notes 141-44 *infra* and accompanying text.

*Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), cert. denied, 431 U.S. 924 (1977), is another case in which a reverse-FOIA action was held to have arisen under the Act itself for purposes of federal question jurisdiction. The *Westinghouse* court was more direct in its approach than the court in *Planning Research*; the FOIA was said to provide to suppliers of private information an implied right of action to enjoin disclosure of exempt material. *Id.* at 1210. Although the court specifically held that the FOIA exemptions are not mandatory, and that disclosure of exempt information is discretionary with the agency, *id.* at 1197, its theory was that discretionary disclosure is restricted by the clear legislative policy

nizes that in making disclosure determinations agencies have a duty to consider the policies underlying the FOIA exemptions, notwithstanding the consistent position of the District of Columbia Circuit that the FOIA exemptions are "permissive" in that the agencies are not obligated to withhold material found to be exempt.<sup>138</sup> The duty may arise from the fact that disclosure of exempt material lies within the agency's discretion;<sup>139</sup> the agency may exercise that discretion only after giving meaningful consideration to applicable statutes and legislative policies.<sup>140</sup>

However, because of the permissive nature of the FOIA exemptions, the court in *Planning Research* recognized that where an agency has properly considered the standards set forth in the FOIA and "has determined, as a matter of discretion, to release information concededly exempt . . . an injunction suit charging abuse of agency discretion probably could not be classified as 'arising under' the FOIA."<sup>141</sup> The court stated that in such situations a nonstatutory basis for federal question jurisdiction could appropriately be found: "[A] suit to block discretionary disclosure would raise a federal question simply by virtue of the fact that the action would be brought against a *federal* agency for the purpose of challenging *federal* administrative action allegedly not authorized by law."<sup>142</sup> The nonstatutory approach has the advantage of providing a comprehensive basis for jurisdiction without the need for strained or artificial construction of the terms of the Act itself.<sup>143</sup> It provides a means of overcoming the jurisdictional barrier in every case involving a proposed release of information where disclosure would be harmful to the interests of a private party.<sup>144</sup>

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embodied in the exemptions. See Note, *supra* note 105, at 1011. Because this legislative policy is designed to benefit private parties rather than governmental agencies, the court held that private parties have a right to enforce it. In substance, this approach is equivalent to the nonstatutory federal question jurisdiction approved by the *Planning Research* court, 555 F.2d at 977-78 n.15, see notes 141-44 *infra* and accompanying text, but has the advantage of avoiding the standard of review problems that arise under the nonstatutory approach, see note 144 *infra*.

138. 555 F.2d at 973 n.4; Charles River Park "A", Inc. v. HUD, 519 F.2d 935, 941 (D.C. Cir. 1975). See generally *Reverse-FOIA Suits* 334-39.

139. See Charles River Park "A", Inc. v. HUD, 519 F.2d 935, 941 (D.C. Cir. 1975) (authority for discretionary disclosure of exempt material found in 5 U.S.C. § 301 (1970)).

140. See Metropolitan Life Ins. Co. v. Usery, 426 F. Supp. 150, 170-71 (D.D.C. 1976), *cert. denied*, 431 U.S. 924 (1977) (agency found exempt and decided to disclose; upon finding by court that material was exempt, the disclosure could not be upheld, since failure to give meaningful consideration to the exempt nature of materials was abuse of discretion).

141. 555 F.2d at 977-78 n.15. But see *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1197, 1210-14 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977) (basis found for federal question jurisdiction under FOIA despite characterization of exemptions as permissive). See note 137 *supra*.

142. 555 F.2d at 977-78 n.15 (emphasis in original). See generally *Reverse-FOIA Suits* 352 & nn.114-16.

143. In contrast, the approach of the *Westinghouse* court, see note 137 *supra*, requires the finding of an implied right of action on the exemptions—a finding which must be justified by resort to the legislative history, rather than by the words of the statute itself.

144. Because it is based upon an allegation that the agency's action was not in accordance

## VII. PROTECTION OF INDIVIDUAL PRIVACY UNDER THE FOIA

An important interest to be balanced against the FOIA's general policy favoring disclosure is the privacy of individuals who are the subject of agency records. Congress sought to protect this interest by exempting from mandatory disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."<sup>145</sup> Investigatory records containing personal data are given somewhat broader protection.<sup>146</sup> The concept of personal privacy has received intensive judicial attention in recent years as a matter of both constitutional<sup>147</sup> and tort<sup>148</sup> law. The rapid growth and uncertain contours of the concept are reflected in recent decisions construing the privacy exemptions of the FOIA. In their efforts to find protection for all of the legitimate interests of FOIA litigants, the courts have often relied upon the privacy concept as a convenient catch-all and may have stretched the privacy exemptions far beyond their intended scope.<sup>149</sup>

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with law, the pattern of analysis under the nonstatutory jurisdictional basis is substantially equivalent to that followed in cases finding jurisdiction based upon an implied grant under the APA. *See Metropolitan Life Ins. Co. v. Usery*, 426 F. Supp. 150, 156-57 (D.D.C. 1976), *cert. denied*, 431 U.S. 924 (1977).

The use of the nonstatutory approach to jurisdiction raises the problem of the level of judicial review appropriate to such an action. Although it is clear that the FOIA does not contemplate that agencies should have wide discretion in making disclosure determinations, *see Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1215 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977), the reverse-FOIA suit, which is brought to protest federal action not authorized by law, is apparently subject to the APA's narrow standards of review. *See Reverse-FOIA Suits* 344-46 & n.73. Although the courts have consistently found that a *de novo* evidentiary hearing is appropriate to determine the threshold issue of the applicability of the FOIA exemptions, *see Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 940 (D.C. Cir. 1975); *Metropolitan Life Ins. Co. v. Usery*, 426 F. Supp. 150, 156 (D.D.C. 1976), *cert. denied*, 431 U.S. 924 (1977), it is more difficult to justify *de novo* review of a decision to disclose concededly exempt material. It seems likely that the courts will exercise close control over agency discretion in such cases, although they are still ostensibly acting under the APA. A more careful balancing of interests may be required of the agencies in each case, with less weight given to the administrative record compiled in the course of the deliberations.

145. 5 U.S.C. § 552(b)(6) (1970).

146. The Act exempts "investigatory records compiled for law enforcement purposes, but only to the extent that production of such records would . . . (C) constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7) (Supp. V 1975). The absence of the word "clearly" as a modifier of "unwarranted" points to a broader construction of the exemption's coverage than is possible under Exemption 6. *See Department of Air Force v. Rose*, 425 U.S. 352, 378 n.16 (1976).

147. *See, e.g., Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

148. Dean William Prosser has made the most extensive analysis of judicial treatment of the common law tort of invasion of privacy, as it has developed since the publication of a seminal law review article by Samuel Warren and Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117 (4th ed. 1971); Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

149. The personal files exemption was apparently included in the Act because of congres-

### A. *The Personal Files Exemption.*

Exemption 6, the personal files exemption,<sup>150</sup> was "designed to protect individuals from public disclosure of intimate details of their lives" and "from a wide range of embarrassing disclosures."<sup>151</sup> Although its meaning is not precise, the term "intimate" connotes information closely associated with an individual's physical and mental health and family life—information which is usually revealed only in the context of close personal relationships.<sup>152</sup> It is not clear, however, whether such intimate details are the only type of information protected by the exemption, or whether they merely are illustrative of the types of disclosure which would constitute a "clearly unwarranted invasion of personal privacy."<sup>153</sup> Because the exemption is limited to "personnel and medical files and similar files," the meaning given to "similar files" assumes critical importance; if only those materials that disclose intimate details about individuals may be characterized as "similar" to personnel and medical files, information that arguably would invade privacy in other ways will not be protected by the exemption.<sup>154</sup> Recent decisions have failed to resolve this issue, and in many cases effective analysis has been precluded by the use of conclusory language and vague generalities.

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sional concern that the files of agencies such as the Veterans Administration or HEW, "containing intimate details about millions of citizens," might be released. H.R. REP. NO. 1497, *supra* note 102, at 11, *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 2418, 2428. A general exemption was seen as "more practical" than specific provisions for various types of personal records. The exemption was "intended to cover detailed Government records on an individual which can be identified as applying to that individual," as opposed to general facts about pension or benefit awards or unidentified statistics. *Id.* The Senate Report evidences substantially similar purposes, stating that the exemption's balancing of public and private interests "should lend itself particularly to those Government agencies where persons are required to submit vast amounts of personal data usually for limited purposes." S. REP. NO. 813, 89th Cong., 1st Sess. 9 (1965).

150. 5 U.S.C. § 552(b)(6) (1970). The Supreme Court has held that this exemption incorporates a balancing test between the individual's right of privacy and the basic purpose of the FOIA. *Department of Air Force v. Rose*, 425 U.S. 352, 372 (1975). *See generally FOIA Developments—1976* at 541-45.

151. *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 77 (D.C. Cir. 1974). The court based its statement on a reading of the legislative history. *See* note 149 *supra*.

152. Information characterized as "intimate details" in the *Rural Housing Alliance* case included "information regarding marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, reputation, and so on." *Id.* *See Pacific Molasses Co. v. NLRB*, 41 Ad. L.2d 335, 340 (E.D. La. 1977) (Exemption 6 applies to "intimate family relations, personal health, religious and philosophical beliefs and matters that would prove personally embarrassing to an individual of normal sensibilities").

153. 5 U.S.C. § 552(b)(6) (1970).

154. The court in *Rural Housing Alliance v. United States Dep't of Agriculture*, 498 F.2d 73, 77 (D.C. Cir. 1974), gave this narrow reading to the term "similar." The opposite view was taken by the Third Circuit in *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133, 135 (3d Cir. 1974), where the court stated: "We do not believe that the use of the term 'similar' was intended to

In *Committee on Masonic Homes v. NLRB*,<sup>155</sup> an employer sought to obtain under the FOIA copies of individual union cards filed with the NLRB in support of a petition for representation.<sup>156</sup> The court ruled that the cards were exempt from disclosure under the personal files exemption.<sup>157</sup> Although the court acknowledged that to be exempt under Exemption 6, the records must be "personnel and medical files and similar files,"<sup>158</sup> it construed this qualification broadly. The cards were found to meet the test simply because they stated the employees' job class and status.<sup>159</sup> The court then stated, without analysis or justification, that disclosure of the cards would constitute an invasion of privacy<sup>160</sup> since the employees were entitled under the policies of the National Labor Relations Act to make a private choice as to whether to support a union.<sup>161</sup> Thus, the court equated the governmental policy behind secret union elections<sup>162</sup> with the individual employees' interest in personal privacy—an equation that disregards the obvious fact that they are distinct interests.<sup>163</sup> Although the result seems just

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narrow the exemption from disclosure and permit the release of files which would otherwise be exempt because of the resultant invasion of privacy." See Comment, *The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1974*, 11 HARV. C.R.-C.L. L. REV. 596, 601-04 (1976). The Supreme Court was noncommittal in its treatment of the issue in *Department of Air Force v. Rose*, 425 U.S. 352, 376-77 (1976). There, the Court found that summaries of honor code hearings were "similar files." The Court considered two factors: the superficial resemblance of the requested records to personnel files, and "most significantly," the similarity of the privacy values involved in the requested files to those implicated by disclosure of personnel files. In discussing the second factor, the Court equated privacy values with the harm that might be expected to result from disclosure, and found that the risk of embarrassment, disgrace and loss of employment or friends that could result from disclosure was sufficient to invoke the exemption. This treatment is ambiguous; it might be seen as following the *Wine Hobby* rule that any invasion of privacy is sufficient to meet the threshold "similar files" test. But it seems to resemble the *Rural Housing* approach more closely. The Court was impressed by the fact that *similar* privacy interests would be invaded, not just by the fact that some invasion might occur. Both *Rose* and *Rural Housing* involved disclosures of what might be called "private facts," while *Wine Hobby* dealt with the possibility of "intrusion" into privacy through unwanted solicitations. See W. PROSSER, *supra* note 148, at § 117.

155. 556 F.2d 214 (3d Cir. 1977).

156. Although the sufficiency of such cards generally is not litigable, *id.* at 217; 29 C.F.R. § 202.2(f) (1976), the employer sought to attack the validity of the signatures. 556 F.2d at 216.

157. 556 F.2d at 219-21.

158. 5 U.S.C. § 552(b)(6) (1970).

159. 556 F.2d at 220. The court's approach appears to be substantially equivalent to that used by the court in *Wine Hobby*. See note 154 *supra*.

160. *Contra*, *Pacific Molasses Co. v. NLRB*, 41 Ad. L.2d 335, 360 (E.D. La. 1977) (assuming union cards are "similar files," they do not involve intimate details or embarrassing facts and thus are not within Exemption 6).

161. 556 F.2d at 220.

162. See *id.* at 221.

163. The fact of union support is not an intimate detail the disclosure of which would be embarrassing to people of ordinary sensibilities. Thus the employer was not seeking "public disclosure of private facts," see W. PROSSER, *supra* note 148, at 809-12, nor were the employees' interests similar to the interests protected in *Rose* and *Rural Housing*, see note 154 *supra*. Arguably, the government policy behind secrecy may be characterized as protective of the right

on the facts of the case,<sup>164</sup> it bends the personal files exemption to protect an interest that it was not designed to serve.<sup>165</sup>

In other recent cases, the privacy exemption has been held to protect information concerning employment status and financial position. In *Metropolitan Life Insurance Co. v. Usery*,<sup>166</sup> information contained in affirmative action plans dealing with promotions, terminations, performance and evaluation of employees was held to constitute "similar files" within the meaning of Exemption 6.<sup>167</sup> Although the superficial similarity of such job-related information to "personnel files" is obvious, it is less clear that personal privacy interests would be endangered by its disclosure. In the 1976 case of *Department of Air Force v. Rose*,<sup>168</sup> the Supreme Court clearly indicated that personnel files are not subject to an absolute exemption from disclosure; the interest of disclosure must be balanced against the privacy rights of the affected individuals.<sup>169</sup> Although the *Metropolitan Life* court appeared to apply the principle of *Rose*,<sup>170</sup> which would exempt information only where personal privacy interests outweighed the public interest in

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to be free from unwanted intrusions upon physical solitude, see W. PROSSER, *supra* note 148, at 807-09, because it is based upon a fear of employer harassment of employees supporting union representation. Support for this analysis may be found in *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133 (3d Cir. 1974) (see note 154 *supra*). But it is difficult to see how the mere release of information, not "private" in itself, may be deemed a "clearly unwarranted invasion of privacy," 5 U.S.C. § 552(b)(6) (1970), on the basis of a possible future intrusion in the form of commercial solicitation or harassment—an intrusion which is uncertain to occur and which may not reach the level of an actual invasion of privacy if it does occur. *But cf.* Project, *Government Information and the Rights of Citizens*, *supra* note 14, at 1231-42, where it is argued that traditional privacy tort analysis is insufficient to protect individuals from privacy invasion by governmental entities.

15.4. Because the employer had no right to attack the validity of the Board's determination that the cards were sufficient, see note 156 *supra*, and would have been unable to acquire the names through discovery or any other procedure, its interest in disclosure was very weak. On the other hand, the agency wished to protect an important policy of secrecy and also to fulfill an express assurance of confidentiality. However, the FOIA specifically forecloses such balancing by requiring disclosure of all nonexempt material without regard to the purpose for which it is sought. See H.R. REP. NO. 1497, *supra* note 102, at 8, reprinted in [1966] U.S. CODE CONG. & AD. NEWS 2418, 2426; *FOIA Developments—1976* at 543-44.

165. Although many of the exemptions under the FOIA were clearly intended to advance governmental policies favoring secrecy in certain instances, see, e.g., 5 U.S.C. § 552(b)(1), (2), (5) & (7) (1970 & Supp. V 1975), Exemption 6, 5 U.S.C. § 552(b)(6) (1970), was intended to benefit private interests. See note 149 *supra*.

15.6. 426 F. Supp. 150 (D.D.C. 1976), *cert. denied*, 431 U.S. 924 (1977).

167. 426 F. Supp. at 167-69.

168. 425 U.S. 352 (1976).

169. *Id.* at 374-75. The Court's discussion was only dictum, but nevertheless provides strong authority. See *FOIA Developments—1976* at 544-45.

170. Because the court was dealing with "similar files" rather than "personnel files," 426 F. Supp. at 168, the *Rose* issue was presented only by analogy. The court was called upon to determine whether, because of the superficial similarity of employment information to personnel files, such information *a ways* involves a "privacy right" to be balanced against the disclosure interest, or whether the court must examine the specific employment information in

disclosure,<sup>171</sup> an examination of the information that was protected belies the court's analysis. Although some of the information withheld might be deemed to reflect upon the employees' intelligence or personality,<sup>172</sup> and thus to involve personal privacy interests, other statements revealed only factual information about employment status<sup>173</sup>—clearly not one of the "intimate details" the exemption was designed to protect.<sup>174</sup>

In *Sonderegger v. United States Department of Interior*,<sup>175</sup> a district court extended privacy exemption protection to commercial and financial information. The information sought in that case had been submitted to the government by victims of the Teton Dam disaster who filed claims for assistance in rebuilding their homes and businesses. The court stated that release of names and loan information would lead to harassment, unwanted solicitations, prejudice in future business relations with builders, and an increase in the psychological stress suffered by victims of the disaster.<sup>176</sup> The court's reliance on the danger of prejudice in business relationships as a factor in applying the privacy exemption evidences some confusion between the standards applied under Exemption 6 and those applied under the trade secrets provision, Exemption 4.<sup>177</sup> The District of Columbia Circuit in *National Parks and Conservation Association v. Kleppe*<sup>178</sup> convincingly

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dispute to determine if any threat to personal privacy exists. The same question may also be considered in making the initial determination whether "similar files" are involved. See note 154 *supra*.

171. 426 F. Supp. at 168.

172. For example, the court held that a comment that minority group members in a particular department did not show much potential was exempt. *Id.* at 167. To the extent that such persons were identifiable, the comment arguably denigrates their intellectual or personal abilities.

173. The court held that statements that an employee was training for a particular job and that promotions were not expected to be made in a particular department were within the protection of the privacy exemption. *Id.* Any connection of such statements to personal abilities or goals is highly tenuous.

174. See notes 150-52 *supra* and accompanying text. Similarly, in *Duncan v. Civil Service Comm'n*, 426 F. Supp. 41 (E.D. La. 1976), the court held factual job status data to be exempt under Exemption 6. The plaintiff, who had a case pending before the Commission, sought disclosure of an appendix to a report about an office in which she had worked; the appendix gave the names of four employees, and concluded that their jobs were classified too high. The court held that this constituted a "similar file" and that disclosure would invade privacy "unnecessarily," since the plaintiff could make her comparisons with other employees through normal discovery procedures. Clearly, the court was engaged in balancing the need of the particular plaintiff against some interest it perceived in nondisclosure. Such balancing is inappropriate, however, unless it is a "personal privacy" interest that would be endangered by disclosure. Information regarding the classification of job descriptions in government service is in no way personal, since individual performance or ability is not implicated in the classification decision.

175. 424 F. Supp. 847 (D. Idaho 1976).

176. *Id.* at 853-55.

177. 5 U.S.C. § 552(b)(4) (1970).

178. 547 F.2d 673 (D.C. Cir. 1976).

reasoned that "personal" financial information is not protected by the trade secrets exemption to any greater extent than other confidential financial information.<sup>179</sup> The court in that case pointed out that the burden of proof under Exemption 4 is lighter than that posed by the "clearly unwarranted" language of Exemption 6, and that personal financial data should not be more readily protected than other, "far more intimate information."<sup>180</sup> The *National Parks* court concluded that such information may be exempt if it meets the tests developed under the privacy exemption.<sup>181</sup> Although *Sonderegger* purported to apply these tests, it actually took a hybrid approach, importing the business orientation of the fourth exemption into its consideration of personal privacy interests. The failure of the court to distinguish sharply between the two exemptions leads to the same anomalous result rejected in *National Parks*. The structure of the FOIA contemplates that each exemption will be considered independently. The exemptions represent a congressional intent to carve out limited exceptions to the overriding mandate of the Act, and the courts have developed criteria designed to carry that intent into effect. By allowing factors relevant to the trade secrets provision to compensate for incomplete satisfaction of privacy exemption criteria, the *Sonderegger* approach undercuts the balance of the FOIA.

#### B. *The Investigatory Records Exemption.*

Definitional problems have been especially acute under Exemption 7(C), which protects "investigatory records compiled for law enforcement purposes," to the extent that disclosure would "constitute an unwarranted invasion of personal privacy."<sup>182</sup> Two recent cases have construed this

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179. *Id.* at 685-86.

180. *Id.* at 685.

181. *Id.* The court followed *Rural Housing Alliance v. United States Dep't of Agriculture*, 498 F.2d 73, 77 (D.C. Cir. 1974), stating that material might be characterized as "similar files" under Exemption 6 if it contains "embarrassing disclosures" or involved "sufficiently intimate details."

182. 5 U.S.C. § 552(b)(7)(C) (Supp. V 1975). The effect of the requirement that the records in question be "compiled for law enforcement purposes" has been the subject of some debate. For example, in *Committee on Masonic Homes v. NLRB*, 556 F.2d 214 (3d Cir. 1977), discussed at notes 155-65 *supra* and accompanying text, the court was unable to find protection for union cards under Exemption 7: "'law enforcement purposes' must relate to some type of formal proceeding, and one that is pending." *Id.* at 219 (footnote omitted). The court rejected the Board's contention that enforcement of the National Labor Relations Act generally could be such a purpose. If that were sufficient, the Board would have been effectively exempted from the FOIA. *Id. Accord*, *Metropolitan Life Ins. Co. v. Usery*, 426 F. Supp. 150, 169-70 (D.D.C. 1976), *cert. denied*, 431 U.S. 924 (1977) (records submitted in connection with general monitoring process not within Exemption 7). A somewhat different problem was presented by *Tax Reform Research Group v. IRS*, 419 F. Supp. 415 (D.D.C. 1976). The court in that case held that a memo from the White House to the IRS, listing names and allegations of tax violations, was not within Exemption 7 because it was not compiled in the course of a normal investigation, but rather as part of "highly questionable activity." *Id.* at 421 n.5.

provision so broadly that it threatens to negate the narrowing effect of the limitations placed upon Exemption 7 by the 1974 amendments to the FOIA.<sup>183</sup> *Forrester v. United States Department of Labor*<sup>184</sup> presented the question of whether a summary report, compiled by an agency officer in the course of his investigation of age discrimination charges, and containing the names of witnesses and information that they had voluntarily supplied, was exempt from disclosure under Exemption 7(C). Although the court properly found, by analogy to the test set forth in *Rose*, that a balancing of public and private interests was appropriate,<sup>185</sup> it failed to define the nature of the private interest that must be present to invoke the exemption. Rather than considering whether embarrassing private facts would be disclosed, as is conventional in privacy cases,<sup>186</sup> the court based its finding that disclosure would invade the witnesses' privacy upon an ill-defined right to anonymity when confiding in the government.<sup>187</sup> Although this "public policy" argument was bolstered by a felt need to protect the investigative process by avoiding the "chilling effect" that might result from exposure of sources, the court relied solely on personal privacy as the basis for its holding.<sup>188</sup>

*Shaver v. Bell*<sup>189</sup> employed similar reasoning in applying Exemption 7(C) to records compiled in the course of a criminal investigation conducted by the FBI. The court equated the privacy interest protected by the exemption with a right to be free from the physical danger which might result from

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183. Before 1974, Exemption 7 covered "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 5 U.S.C. § 552(b)(7) (1970). The 1974 amendments added six specific limitations to the exemption's scope, with the intended effect of overruling judicial decisions which had read the exemption very broadly. See H.R. CONF. REP. NO. 1380, *supra* note 34, at 12; S. CONF. REP. NO. 1200, 93d Cong., 2d Sess. 12 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6285, 6290-91.

184. 433 F. Supp. 987 (S.D.N.Y. 1977).

185. *Id.* at 989. See note 150 *supra*. See generally *FOIA Developments—1976* at 541-45.

186. See notes 150-52 *supra* and accompanying text. Because Exemption 7(C) is broader than Exemption 6, see note 146 *supra*, it might be argued that the privacy interests protected are broader in scope. Disclosure of an individual's connection with an enforcement proceeding might in itself be deserving of protection because it would place him in a "false light." See *W. PROSSER, supra* note 148, at 812-14; *cf.* *Congressional News Syndicate v. United States Dep't of Justice*, 438 F. Supp. 538, 541-42 (D.D.C. 1977) (mere appearance of name in investigatory file may give rise to "rumor and innuendo").

187. The court stated:

We conclude that disclosure of the names and the information provided by witnesses, who cooperated with the officer without formal subpoena or other process, would constitute an unwarranted invasion of privacy. Such individuals, providing information to federal agencies in furtherance of enforcement of the laws, must be free to do so without fear of possible reprisals or disclosure of their identities to persons in whom they have not confided. That is not to say that any such reprisals or other actions are threatened or even likely in this case, but public policy requires that individuals may furnish investigative information to the government with complete candor and without the understandable tendency to hedge or withhold information out of fear that their names and the information they provide will later be open to public view.

433 F. Supp. at 989.

188. *Id.*

189. 433 F. Supp. 438 (N.D. Ga. 1977).

disclosure of the identity of persons assisting in law enforcement efforts,<sup>190</sup> and stated that the agency's concern with the "safety and rights" of such persons is supported by its need for their services.<sup>191</sup>

Both *Shaver* and *Forrester* treat the right of privacy protected by Exemption 7(C) as the equivalent of a right of freedom from reprisal, reading into the language of the provision a policy that is protective of the investigative process generally, and of sources of information specifically. The interests protected by the courts in these cases are legitimate ones and the results reached might well have been justified if the cases had been decided under Exemption 7(A), relating to records the disclosure of which would interfere with enforcement proceedings,<sup>192</sup> or Exemption 7(D) which protects confidential sources of information.<sup>193</sup> Because it included those two specific provisions in the exemption, it is clear that Congress intended

190. *Id.* at 440 & n.2.

191. *Id.* at 441 n.2. The court also applied Exemption 7(D) in an attempt to protect the confidentiality of sources. See note 193 *infra*.

192. 5 U.S.C. § 552(b)(7)(A) (Supp. V 1975). The primary application of this exemption has been the protection of employees' statements during the pendency of unfair labor practices proceedings before the NLRB; a judicial rule has developed in such cases that disclosure may be presumed to interfere with the proceedings. *Climax Molybdenum Co. v. NLRB*, 539 F.2d 63, 65 (10th Cir. 1976); *Title Guarantee Co. v. NLRB*, 534 F.2d 484 (2d Cir.), *cert. denied*, 429 U.S. 834 (1976). See generally *FOIA Developments—1976* at 547-51. The rule has been extended to non-employee statements in open files and to statements in closed files that are related to pending proceedings. *New England Medical Center Hosp. v. NLRB*, 548 F.2d 377 (1st Cir. 1976). *But see* *Robbins Tire & Rubber Co. v. NLRB*, 563 F.2d 724 (5th Cir. 1977) (requiring Board to bear burden of showing that release of statements of prospective witness would lead to a pre-trial intimidation or other interference with proceedings); *Harvey's Wagon Wheel, Inc. v. NLRB*, 550 F.2d 1139 (9th Cir. 1976) (requiring Board to bear burden of proving that disclosure of non-employee materials would interfere with proceedings). Although the exemption continues during judicial review of Board action, *AMF Head v. NLRB*, 564 F.2d 374 (10th Cir. 1977), it does not apply when the Board has decided to take no action, *Poss v. NLRB*, 565 F.2d 654, 657-58 (10th Cir. 1977).

The principle that Exemption 7(A) may be used to protect policies served by criminal discovery rules has been extended to tax fraud cases. *Kanter v. IRS*, 433 F. Supp. 812, 819 (N.D. Ill. 1977). *Cf.* *United States v. Murdock*, 548 F.2d 599, 601-03 (5th Cir. 1977) (holding that FOIA does not broaden right to discovery in criminal case). Although it is not clear whether interference with enforcement proceedings will be presumed in non-NLRB cases, or must be proved in each case, the "chilling effect" relied upon by the *Shaver* and *Forrester* courts clearly would have been appropriate for consideration under Exemption 7(A).

193. Exemption 7(D), 5 U.S.C. § 552(b)(7)(D) (Supp. V 1975), applies to investigatory records to the extent that disclosure would "disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source."

The *Forrester* court clearly was attempting to protect the identity of, and the information supplied by, witnesses who had cooperated in the investigation. 433 F. Supp. at 989. By relying upon 7(C) rather than 7(D), the court avoided the restrictions imposed by Congress: that only confidential sources whose cooperation was obtained through assurances of anonymity, see *Poss v. NLRB*, 565 F.2d 654, 658 (10th Cir. 1977), are protected, and that in non-criminal investigations, only their identity will be protected, leaving non-identifying information open to disclosure. The *Forrester* court made no attempt to sever non-identifying information.

to confine judicial consideration of those interests to a construction of the statutory language. The *Shaver* and *Forrester* decisions thwart this congressional purpose by reading "personal privacy" so broadly that reference to the legislative formulation becomes unnecessary. Merely by invoking the ambiguous privacy concept, and applying an equally vague balancing test, courts following *Shaver* and *Forrester* would be free to evade the requirements of Exemptions 7(A) and 7(D). Such a result is clearly inconsistent with the congressional intent in enacting the amendments to Exemption 7,<sup>194</sup> and with the general rule that the exemptions are to be read narrowly.<sup>195</sup>

### VIII. INTRA-AGENCY MEMORANDUM EXEMPTION

Exemption 5 of the FOIA exempts from mandatory disclosure "intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."<sup>196</sup> The Supreme Court has construed this provision as protecting documents that are "normally privileged in the civil discovery context."<sup>197</sup> However, the Court recognized that because the FOIA does not contemplate that the individual need of the plaintiff will be considered as a factor in determining whether disclosure is proper,<sup>198</sup> a somewhat different standard from that applied in the discovery context must be used in FOIA cases.<sup>199</sup> Several recent cases have applied the general principles announced by the Supreme Court to the attorney-client and attorney's work-product privileges, and have added to the judicial gloss on the executive privilege surrounding the government's decision-making processes.

The District of Columbia Circuit's decision in *Mead Data Central, Inc. v. United States Department of the Air Force*<sup>200</sup> is illustrative. There, Mead Data sought documents dealing with the Air Force's computerized legal research system. Several of the documents were withheld on the ground that

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Although the *Shaver* court used language indicating that it read Exemption 7(C) to apply to persons other than information sources, 433 F. Supp. at 440, its concern was clearly for physical protection of informants, *id.* at 440 & nn.1 & 2. The court applied Exemption 7(D) to some of the requested material, *id.* at 441, but because few of the salient facts were related in the opinion, it is difficult to understand why Exemption 7(C) was needed at all. To the extent that Exemption 7(C) was used to avoid the "confidential source" requirement in protecting informants, its use seems unjustified.

194. See note 183 *supra*.

195. See *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976); *Vaughn v. Rosen*, 523 F.2d 1136, 1142 (D.C. Cir. 1975).

196. 5 U.S.C. § 552(b)(5) (1970).

197. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). See generally *Note, Developments Under the Freedom of Information Act—1975*, *supra* note 2, at 382-89.

198. See H.R. REP. NO. 1497, *supra* note 102, at 8, reprinted in [1966] U.S. CODE CONG. & AD. NEWS 2418, 2426.

199. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 n.16 (1975); *Firestone Tire & Rubber Co. v. Coleman*, 432 F. Supp. 1359, 1371 (N.D. Ohio 1976).

200. 566 F.2d 242 (D.C. Cir. 1977).

they represented confidential attorney-client communications,<sup>201</sup> while others were seen to reflect deliberations related to Air Force negotiations with West Publishing Company for a licensing agreement.<sup>202</sup> The court held that the attorney-client privilege is clearly within the scope of Exemption 5,<sup>203</sup> and that its protection extends to an agency's communications with its own attorneys.<sup>204</sup> However, the privilege applies only to communications containing or based upon<sup>205</sup> *confidential* information. Because the district court had not required proof that the information upon which the legal opinions in dispute were based was confidential, the court remanded the case for further findings.<sup>206</sup> The court indicated that a strict reading of the tests for applying the privilege would be appropriate. Even information disclosed to West Publishing Company in the course of confidential negotiations would fail to meet the test of confidentiality.<sup>207</sup> Although Judge McGowan in dissent pointed out that the majority's view narrows the privilege almost to the point of eliminating it,<sup>208</sup> it seems that such a narrow construction is appropriate in the context of the FOIA.<sup>209</sup>

The second aspect of Exemption 5 that the court was called upon to consider was the "governmental privilege"<sup>210</sup> which protects an agency's decision-making process from undue scrutiny. One test that has been outlined by the Supreme Court in applying this privilege is to distinguish between "factual" and "deliberative" materials and to exempt only the latter.<sup>211</sup> Although the court in *Mead Data* recognized that in most cases this

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201. *Id.* at 252.

202. *Id.* at 255-56.

203. *Id.* at 252-53. The court relied on dictum in the *Sears* opinion, 421 U.S. at 154, and on the legislative history. *Mead Data*, 566 F.2d at 253 n.20.

204. *Mead Data*, 566 F.2d at 252.

205. Although the privilege traditionally applies solely to client-to-attorney communications, the court noted that in federal courts it also covers communications from attorney to client, provided they are based on confidential information which the client has provided. *Id.* at 254. This broader federal reading of the privilege was stated to be especially appropriate in the context of an FOIA suit "since exemption five is explicitly intended to encourage the free flow of advisory opinions and recommendations within an agency." *Id.* at 254 n.25.

206. *Id.* at 254.

207. *Id.* at 255. Information not restricted to agency personnel directly responsible for the negotiation would also fail to provide a sufficiently confidential base to invoke the privilege. *Id.*

208. *Id.* at 263-64 (McGowan, J., dissenting).

209. *Id.* at 254 n.28. The court responded to Judge McGowan's arguments by emphasizing the "general precept that the FOIA's exemptions are to be narrowly construed." *Id.* at 252. This emphasis seems to contradict an earlier statement that a broad reading of the privilege is proper in determining that attorney-to-client communications are included within its scope, see note 205 *supra*. The two statements may be reconciled by noting that the inclusion of attorney-to-client communications advances the purpose of freedom of intra-agency deliberation, while a weakening of the confidentiality standard would not.

210. *Mead Data*, 566 F.2d at 256.

211. This distinction was applied by the Supreme Court in *EPA v. Mink*, 410 U.S. 73, 87-88 (1973).

approach would be sufficient, it devised a more functional test: "A decision that certain information falls within exemption five should . . . rest fundamentally on the conclusion that, unless protected from public disclosure, information of that type would not flow freely within the agency."<sup>212</sup> Applying the test, the court concluded that documents revealing discussion of negotiating positions by agency personnel and internal recommendations regarding the agency's dealings with West were exempt.<sup>213</sup> By contrast, summaries of the actual negotiations were outside the exemption's protection, even though they were "predecisional," a common test for determining whether the exemption applies.<sup>214</sup> It is not enough to invoke the privilege that a document be predecisional; it must also reflect the internal

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212. *Mead Data*, 556 F.2d at 256. The functional approach taken by the court does not reject the factual/deliberative distinction. It merely emphasizes that factual material may in certain cases require protection because of the degree to which it exposes group thinking, while documents which on their face are deliberative may not require protection if they present no danger to the agency's internal functioning. *Id.* at 256 & n.40. *Cf.* Tax Reform Research Group v. IRS, 419 F. Supp. 415, 423-24 (D.D.C. 1976) (deliberative material disclosed with names of personnel deleted; upheld as means of providing maximum disclosure at minimum risk to decision-making process).

A functional approach to the distinction is also consistent with decisions holding that purely factual material may be protected by executive privilege where disclosure would interfere with future efforts to obtain similar information. *See* Cooper v. Department of Navy, 558 F.2d 274, 276-78 (5th Cir. 1977) (factual material in accident investigation report within Exemption 5 where obtained by assurances of confidentiality); *accord*, Brockway v. Department of Air Force, 518 F.2d 1184, 1189-94 (8th Cir. 1975) (discussed in Note, *Developments Under the Freedom of Information Act—1975*, *supra* note 2, at 386-88). *But cf.* Association for Women in Science v. Califano, 566 F.2d 339, 344 (D.C. Cir. 1977) (factual matter not within discovery privilege for "confidential reports" unless confidentiality has a statutory base).

The distinction between factual and deliberative material has been extended to the attorney's work-product privilege in *Deering Milliken, Inc. v. Irving*, 548 F.2d 1131, 1137 (4th Cir. 1977); *accord*, *Robbins Tire & Rubber Co. v. NLRB*, 563 F.2d 724, 735 (5th Cir. 1977); *see* *Fonda v. CIA*, 434 F. Supp. 498, 505 (D.D.C. 1977). However, the *Mead Data* court concluded that the distinction does not apply to information that falls under the attorney-client privilege; its purpose is to protect confidential facts, not advice or opinion. *Mead Data*, 566 F.2d at 254 n.28.

213. *Mead Data*, 566 F.2d at 257.

214. *Id.* The "predecisional" requirement in Exemption 5 cases was developed in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151-52 (1975). Although the Court's opinion in *Sears* might be read to create a presumption that all predecisional material is exempt, *see* Note, *Developments Under the Freedom of Information Act—1975*, *supra* note 2, at 385-86, the *Mead Data* court refused to take such a rigid approach, requiring a further showing that nondisclosure would serve the purposes of the exemption.

The "predecisional" factor is still important in Exemption 5 cases because of the need to avoid violation of 5 U.S.C. § 552(a)(2)(B) (Supp. V 1975), which requires disclosure of policy decisions and interpretations. *See* *Aug v. National R.R. Passenger Corp.*, 425 F. Supp. 946, 950 (D.D.C. 1976) (agency must disclose minutes of board of directors' meetings to the extent they reflect policy decisions affecting future agency actions). *Cf.* *National Public Radio v. Bell*, 431 F. Supp. 509, 511-12 (D.D.C. 1977) (memoranda dealing with agency's decision to take no action may still be predecisional; attorney's notes may be within work-product privilege despite fact that no further legal action in view).

deliberative process of the agency, which the privilege was designed to protect.<sup>215</sup>

Although the *Mead Data* decision does not significantly alter the existing law on Exemption 5, it does provide a framework for reconciling the various factors that must be considered in applying the exemption. The narrow scope that the court gave to the attorney-client privilege as it is incorporated into the exemption is appropriate in the context of an Act which stresses disclosure, and it prevents the agency abuse that might result from a broader reading. The functional definition applied to the vague concept of governmental privilege provides an effective focus for the diver-

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215. The other policy objective of the governmental privilege—avoiding premature disclosure of agency decisions—was found equally lacking in the case of negotiations with third parties. Because all of the information had already been disclosed to West, it could no longer be considered confidential. *Mead Data*, 566 F.2d at 258. However, the confidentiality requirement is not as strictly applied as in the attorney-client privilege context, see notes 205-09 *supra* and accompanying text. See *Cooper v. Department of Navy*, 558 F.2d 274, 279 (5th Cir. 1977) (limited disclosures to nongovernmental personnel on a need to know basis does not waive executive privilege); *Safeway Stores, Inc. v. FTC*, 428 F. Supp. 346 (D.D.C. 1977) (protection of predecisional intra-agency memoranda not compromised by disclosure to authorized congressional committee, nor by unauthorized leak).

Protection from premature disclosure was the central issue in *Merrill v. Federal Open Mkt. Comm'n*, 565 F.2d 778 (D.C. Cir. 1977). The court struck down a regulation calling for a 45-day delay in disclosure of policy directives issued to the official managing open market investments by Reserve Banks. As "statements of policy and interpretations" the directives fell within the affirmative disclosure requirement of 5 U.S.C. § 552(a)(2)(B) (Supp. V 1975), and immediate disclosure was required unless the material was held to be exempt. See *FOIA Developments—1976* at 538-41.

By determining that the directives were effective policy statements, the court ruled out the possibility that they could come under the predecisional, deliberative process privilege incorporated by Exemption 5. *Merrill*, 565 F.2d at 784 n.15. The agency argued that even if the instructions were not predecisional, they were nonetheless protected by Exemption 5 during the 45-day period because their premature disclosure would adversely affect government control of monetary policy. *Id.* at 784. However, the court held on the basis of the legislative history, S. REP. NO. 813, *supra* note 149, at 9; H.R. REP. NO. 1497, *supra* note 102, at 5-6, reprinted in [1966] U.S. CODE CONG. & AD. NEWS 2418, 2422-23, that congressional concern centered on protecting predecisional materials and that there was no intent to allow withholding of materials which constitute the "effective working policy of an agency." *Merrill*, at 784 & n.16. The court held open the question whether an agency might delay disclosure of a final decision prior to its effective date. *Id.* at 784 n.16. Even if Congress intended to allow delayed disclosure of agency policies in certain cases, the agency must bear the burden of showing that the material would be privileged under discovery law. *Id.* at 785-86. None of the established discovery privileges applied to the directives, *id.* at 786-87, and the court declined to create a new privilege protecting governmental financial information, *id.* at 787. An asserted public interest in non-disclosure was held insufficient to outweigh the legislative policy of broad disclosure expressed in the FOIA:

Appellant's position ultimately rests on the claim that its information is privileged and thereby exempt because its disclosure would allegedly adversely affect the public interest. This argument runs counter to Congress' express rejection of the public interest standard in favor of the broad disclosure policy embodied in the FOIA. We cannot perceive anything in the legislative history to persuade us that Congress intended in Exemption 5 to reintroduce the rejected public interest standard.

*Id.* at 786 n.22.

gent rules that have arisen under that doctrine, and permits judicial tailoring of the exemption so that clumsy definitions do not act to hinder effective application of the privilege.

#### IX. CONCLUSION

There has been little tendency in 1977 for courts to break away from established policies developed under the FOIA. Yet, the year's FOIA litigation evidences real progress in refining and applying those policies. Courts have for the most part rejected mechanical rules that would prove restrictive and arbitrary over the broad range of situations covered by the Act, opting instead for a functional approach that seeks to maximize the Act's effectiveness in carrying out its underlying purpose. This approach has been successfully applied both to construction of substantive provisions, such as the scope of the term "agency records" and the applicability of the exemption for intra-agency communications, and to procedural problems, such as the award of attorney fees and the court's power of *in camera* review.

Many problems still exist, however. Where private interests compete with the broad purpose of disclosure, the policy of the FOIA is less sharply defined and functional tests become more difficult to apply. Though some progress has been made in untangling the problems presented by reverse-FOIA suits, courts in 1977 have continued to struggle with the complex issues connected with the Act's provisions protecting personal privacy. In addition, the problem of agencies' failure to comply with disclosure deadlines remains unsettled. Until definitive guidance comes from Congress or the Supreme Court, the lower courts will continue to grope for a workable balance among personal property and privacy rights, governmental interests in efficiency and practicality, and the hope that full disclosure of government records will promote open communication between the public and private sectors.