

NOTE

DEVELOPMENTS UNDER THE FREEDOM OF INFORMATION ACT—1985

The nineteenth year of the Freedom of Information Act (FOIA)¹ witnessed a number of developments the net result of which is that public access to government information has been further curtailed.² In the legislative arena, Congress continued to debate whether the FOIA should be extensively amended, particularly in two areas—fees and waivers,³ and business information.⁴ The President's Commission on Industrial Competitiveness issued a report indicating that the FOIA's furtherance of open access to business information substantially inhibited competition.⁵ In response, Congress enacted a statute that exempts information pertaining to certain types of research and development projects.⁶ Congress also responded to obstacles in the dissemination of government information by subjecting the National Endowment for Democracy to the FOIA's disclosure provisions.⁷ In other activity, Congress considered amendments to counter the inhibiting effects of the 1984 computer crime legislation⁸ on FOIA-mandated disclosure and to remedy the delays encountered by those seeking records from the Consumer Products Safety Commission.⁹

The most significant administrative development affecting the FOIA in 1985 was the publication of a proposed circular by the Office of Man-

1. 5 U.S.C. § 552 (1982).

2. The recent trend toward restricting public access to government information is recognized in Note, *Developments Under the Freedom of Information Act—1984*, 1985 DUKE L.J. 742 [hereinafter Note, *Developments—1984*]. For a discussion of developments under the FOIA in prior years, see the annual FOIA note in the *Duke Law Journal* from 1970 to 1984.

3. See *infra* notes 63-72 and accompanying text.

4. See *infra* notes 73-79 and accompanying text.

5. PRESIDENT'S COMMISSION ON INDUSTRIAL COMPETITIVENESS, GLOBAL COMPETITION: THE NEW REALITY 25 (1985) [hereinafter PRESIDENT'S COMM'N ON COMPETITIVENESS]. See *infra* notes 81-92 and accompanying text.

6. National Cooperative Research Act of 1984, Pub. L. No. 98-462, 98 Stat. 1815. See *infra* notes 28-33 and accompanying text.

7. Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, § 210(a), 99 Stat. 405, 432 (1985) (amending 22 U.S.C. § 4415 (1982)). See *infra* notes 34-44 and accompanying text.

8. S. 610, 99th Cong., 1st Sess., 131 CONG. REC. S2729 (daily ed. Mar. 7, 1985). See *infra* notes 45-53 and accompanying text.

9. H.R. 2630, 99th Cong., 1st Sess. (1985). See *infra* notes 93-103 and accompanying text.

agement and Budget (OMB).¹⁰ The circular seeks, among other things, to limit the amount of information that agencies provide on their own initiative—without FOIA requests—as part of a cost-effective policy of placing “maximum reliance on the private sector” for disseminating government information.¹¹ Other efforts of the OMB in 1985 were calculated to clarify the responsibilities of agencies under the Privacy Act.¹² In other administrative activity, the Environmental Protection Agency (EPA) responded to public criticism by amending its policy of requiring full payment of charges before processing FOIA requests.¹³

It was the activity of the federal courts that most severely limited the sweep of the FOIA in 1985. The Council of Economic Advisers was excluded from FOIA coverage.¹⁴ In the troublesome area of national security, the Supreme Court interpreted the National Security Act of 1947 to give the CIA wide-ranging authority to withhold information.¹⁵ The lower federal courts also indicated a willingness to expand exemptions dealing with confidential and privileged business information; as a result, the amount of information that will be available to the public is likely to diminish.¹⁶

The Supreme Court's 1984 decision in *United States v. Weber Aircraft*¹⁷ continued to be significant in 1985. In the exemption 4 context, *Weber Aircraft* was broadly read by the United States District Court for the District of Columbia.¹⁸ Under exemption 5, however, *Weber Aircraft* was less generously received by two lower federal courts.¹⁹

Reverse-FOIA litigation in 1985 raised a variety of issues. In an interesting case before the United States Court of Appeals for the District of Columbia Circuit, former President Nixon successfully enjoined the disclosure of certain Watergate transcripts.²⁰ The United States Court of Appeals for the Eleventh Circuit held that the disclosure of

10. 50 Fed. Reg. 10,734 (1985).

11. See *infra* notes 104-11 and accompanying text.

12. 5 U.S.C. § 552a (1982). See *infra* notes 112-27 and accompanying text.

13. 50 Fed. Reg. 32,950 (1985) (to be codified at 40 C.F.R. § 2.120). See *infra* notes 128-44 and accompanying text.

14. *Rushforth v. Council of Economic Advisers*, 762 F.2d 1038, 1043 (D.C. Cir. 1985). See *infra* notes 145-63 and accompanying text.

15. *CIA v. Sims*, 105 S. Ct. 1881, 1887 (1985). See *infra* notes 164-89 and accompanying text.

16. See *infra* notes 190-222 and accompanying text.

17. 465 U.S. 792 (1984).

18. *Washington Post Co. v. Department of Health & Human Servs.*, 603 F. Supp. 235 (D.D.C. 1985). See *infra* notes 213-22 and accompanying text.

19. *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 984-85 (9th Cir. 1985); *NAACP Legal Defense Fund v. United States Dep't of Justice*, 612 F. Supp. 1143 (D.D.C. 1985). See *infra* notes 223-52 and accompanying text.

20. *Ricchio v. Kline*, 773 F.2d 1389, 1392 (D.C. Cir. 1985). See *infra* notes 262-74 and accompanying text.

some types of information may be permitted under the Privacy Act's exception for material falling within the FOIA's mandatory disclosure provisions,²¹ even in the absence of a formal FOIA request.²²

As in preceding years,²³ agency withholding under exemption 7(D) received favorable judicial treatment in 1985, with one circuit court of appeals holding that personnel of the withholding agency may be considered "confidential sources."²⁴ Another circuit rejected the "potential witness rule" and held that those who provide information to an agency may receive "confidential source" status even if they are potential witnesses in subsequent agency proceedings.²⁵ Finally, the United States Court of Appeals for the Seventh Circuit distinguished between solicited and unsolicited information obtained by an agency, and applied a different standard of confidentiality to each of the two categories.²⁶

I. LEGISLATIVE DEVELOPMENTS

A. *The Research and Development Exemption 3 Statute.*

Near the end of the ninety-eighth Congress, the National Cooperative Research Act of 1984 (the "Research Act") was passed; the law qualifies as an exemption 3 statute under the FOIA.²⁷ The Research Act was designed to encourage joint research and development projects by limiting antitrust liability for companies that notify the Federal Trade Commission (FTC) and the Attorney General about planned joint projects.²⁸ The law requires a party seeking protection to file simultaneously with the FTC and the Attorney General a written notification of the identities of any parties to the joint venture and of the venture's nature and objectives.²⁹

21. 5 U.S.C. § 552a(b)(2) (1982).

22. *Cochran v. United States*, 770 F.2d 949, 959 (11th Cir. 1985). See *infra* notes 275-89 and accompanying text.

23. See Note, *Developments—1984*, *supra* note 2, at 769-74.

24. *Kuzma v. IRS*, 775 F.2d 66, 69-70 (2d Cir. 1985) (per curiam). See *infra* notes 294-309 and accompanying text.

25. *United Technologies Corp. v. NLRB*, 777 F.2d 90, 95 (2d Cir. 1985). See *infra* notes 310-17 and accompanying text.

26. *Brant Constr. Co. v. EPA*, 778 F.2d 1258, 1263-65 (7th Cir. 1985). See *infra* notes 318-30 and accompanying text.

27. National Cooperative Research Act of 1984, Pub. L. No. 98-462, 98 Stat. 1815. For a discussion of the legislation that predates its enactment, see Note, *Developments—1984*, *supra* note 2, at 758-59.

28. See generally H.R. REP. NO. 1044, 98th Cong., 2d Sess. 16-21, reprinted in 1984 U.S. CODE CONG. & AD. NEWS 3131, 3140-46.

29. National Cooperative Research Act of 1984, Pub. L. No. 98-462, § 6(a), 98 Stat. 1815, 1818. After receiving this information, the Commission or Attorney General is to publish a notice thereof in the *Federal Register*. *Id.* § 6(b), 98 Stat. at 1818. The law limits the potential antitrust

Most significantly, the new law mandates nondisclosure by the FTC of information submitted pursuant to its terms, even if a request is made under the FOIA.³⁰ This provision is an adaptation of the House version of the bill, which gave no discretion to the FTC or the Attorney General to disclose such information.³¹ As an exemption 3 statute,³² the Research Act does not permit any agency discretion regarding disclosure.³³

B. *National Endowment for Democracy.*

In 1985, both houses of Congress moved to amend the State Department Authorization Bill³⁴ to require the National Endowment for Democracy (NED) to disclose information not exempt under FOIA.³⁵ The House and Senate versions differed. The House bill did not *formally* bring the NED under the scope of the FOIA; thus, it was unclear whether denials of requested information would be reviewable in federal district courts, and, if so, whether review would be *de novo*, as it is when an agency is formally governed by the FOIA.³⁶ The Senate version made

liability of a party complying with its notification provisions to actual, as opposed to treble, damages. *Id.* § 4, 98 Stat. at 1816-17.

30. *Id.* § 6(d), 98 Stat. at 1818.

31. H.R. REP. NO. 1044, 98th Cong., 2d Sess. 20, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3131, 3145. The Senate version would not have made nondisclosure mandatory; it would have given the Attorney General or the FTC authority to disclose the information even when a business had requested that the information not be released. *See* S. 1841, 98th Cong., 2d Sess. § 204(c), *reprinted in* S. REP. NO. 427, 98th Cong., 2d Sess. 6 (1984).

The Conference Report specifically rejected the Senate approach, emphasizing that "[t]he Attorney General and Federal Trade Commission do not have discretion to release to the public any of the information relating to the joint venture, except for publication under subsection (b), whether or not it is exempt under the Freedom of Information Act." H.R. REP. NO. 1044, 98th Cong., 2d Sess. 20, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3131, 3145.

32. 5 U.S.C. § 552(b)(3) (1982) states that the FOIA shall not apply to matters that are "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

33. *See* H.R. REP. NO. 1044, 98th Cong., 2d Sess. 20 (1984), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3131, 3145.

34. The bill has been enacted into law. *See* Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, 99 Stat. 405 (1985).

35. The NED is a quasi-private group that receives government funds. Until this legislation was enacted, the FOIA did not apply to the NED. *See* 131 CONG. REC. H3079 (daily ed. May 9, 1985) (remarks of Rep. McCain in offering the amendment).

36. *Public Access to Information Held by Government-Funded Group Approved by House*, 11 ACCESS REPORTS No. 11, May 22, 1985, at 4-5.

The sponsor of the House amendment stated that "[t]his amendment recognizes the valid concerns of those who feel that the National Endowment for Democracy is a private organization and should not be covered by the FOIA." 131 CONG. REC. H3079 (daily ed. May 9, 1985) (remarks of Rep. McCain). The House amendment calls for review to be conducted by the general counsel of the NED. *Id.*

the NED formally subject to the FOIA,³⁷ thus allowing an unsuccessful FOIA requester to bring suit against the NED for disclosure, and subjecting the NED's decision to de novo review.³⁸ Although the sponsors of the Senate bill would have preferred to abolish the NED,³⁹ they offered this bill as a means of curtailing the organization's autonomy by making information concerning the group's activities and expenditures available to the public.⁴⁰

The conference committee resolved the dispute in favor of the Senate version,⁴¹ the conference report stating that the NED must henceforth "fully comply with the provisions of the Freedom of Information Act,"⁴² and the bill subsequently became law.⁴³ The new legislation also makes the United States Information Agency (USIA) responsible for FOIA actions brought against the NED.⁴⁴

37. S. 1003, 99th Cong., 1st Sess. § 403, 131 CONG. REC. S7798 (daily ed. June 7, 1985).

38. *Id.* (NED required to "fully comply" with FOIA).

39. 131 CONG. REC. S7798 (daily ed. June 7, 1985) (statement of Sen. Zorinsky).

40. *Id.* at S7799. Senators Weicker and Zorinsky argued that full disclosure and accountability would help keep the public informed of how its tax dollars were spent. *Id.*

41. H.R. REP. NO. 240, 99th Cong., 1st Sess. 79, reprinted in 131 CONG. REC. H6812, H6834 (daily ed. July 30, 1985).

The conference committee agreed on the following language:

(a) COMPLIANCE WITH THE FREEDOM OF INFORMATION ACT - Notwithstanding the fact that the Endowment is not an agency or establishment of the United States Government, the Endowment shall fully comply with all of the provisions of section 552 of title 4, United States Code.

(b) PUBLICATION IN FEDERAL REGISTER - . . . [T]he Endowment shall make available to the Director of the United States Information Agency such records and other information as the Director determines may be necessary for such purposes. The Director shall cause such records and other information to be published in the Federal Register.

(c) REVIEW BY USIA - (1) In the event that the Endowment determines not to comply with a request for records under section 552, the Endowment shall submit a report to the Director of the United States Information Agency explaining the reasons for not complying with such request.

(2) If the Director approves the determination not to comply with such request, the United States Information Agency shall assume full responsibility, including financial responsibility, for defending the Endowment in any litigation relating to such request.

(3) If the Director disapproves the determination not to comply with such request, the Endowment shall comply with such request.

Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, § 210, 99 Stat. 405, 432 (1985).

42. H.R. REP. NO. 240, 99th Cong., 1st Sess. 79, reprinted in 131 CONG. REC. H6812, H6834 (daily ed. July 30, 1985).

43. See *supra* note 34.

44. H.R. REP. NO. 240, 99th Cong., 1st Sess. 79, reprinted in 131 CONG. REC. H6812, H6834 (daily ed. July 30, 1985). The conference report noted that an individual may make a FOIA request either to the NED or the USIA. *Id.*

Another, more minor, provision affecting the FOIA was attached to the State Department Authorization Bill. Congress exempted from FOIA disclosure all records pertaining to arbitration claims before the Iran-United States Claims Tribunal. *Id.* at 36, reprinted in 131 CONG. REC. at H6822. The bill states in relevant part:

Notwithstanding section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act), records pertaining to the arbitration of claims before the

C. *Computer Crime Legislation.*

The provision commonly known as the "Computer Crime Law" was enacted in the final days of the ninety-eighth Congress.⁴⁵ The provision prohibits unauthorized accessing and disclosure of data stored in government-operated computers.⁴⁶ Critics of the Computer Crime Law fear that it may discourage government workers from fulfilling FOIA requests for information stored in government computers.⁴⁷ In response to this concern, the Senate considered a bill to amend the Computer Crime Law.⁴⁸ The amendment would apply a penalty only to one who knowingly "uses or discloses individually identifiable information in such [a] computer, the disclosure of which is prohibited by section 552a(i) of title 5 [the Privacy Act]."⁴⁹

Senator Mathias, a sponsor of the bill, argued that the Computer Crime Law sweeps too broadly, stating:

The Freedom of Information Act . . . expresses the principle that all government information ought to be readily available to the American people, subject only to the specific exceptions contained in the FOIA or other applicable statutes. But [the Computer Crime Law] seems to

Iran-United States Claims Tribunal may not be disclosed to the general public, except that—

(1) rules, awards, and other decisions of the Tribunal and claims and responsive pleadings filed at the Tribunal by the United States on its own behalf shall be made available to the public, unless the Secretary of State determines that public disclosure would be prejudicial to the interests of the United States or United States claimants in proceedings before the Tribunal, or that public disclosure would be contrary to the rules of the Tribunal; and

(2) the Secretary of State may determine on a case-by-case basis to make such information available when in the judgment of the Secretary the interests of justice so require.

Id. Subsection (1) of the amendment, by allowing disclosure of information concerning some claims filed by or on behalf of the United States, implies that the general nondisclosure requirement is designed to protect the records of *private* claims.

45. Counterfeit Access Device and Computer Fraud and Abuse Act of 1984, Pub. L. No. 98-473, § 2102, 98 Stat. 1837, 2190-91 (to be codified at 18 U.S.C. § 1030).

46. The law calls for punishment of one who

knowingly accesses a computer without authorization, or having accessed a computer with authorization, uses the opportunity such access provides for purposes to which such authorization does not extend, and by means of such conduct knowingly uses, modifies, destroys, or discloses information in, or prevents authorized use of, such computer, if such computer is operated for or on behalf of the Government of the United States and such conduct affects such operation.

Id.

47. *Senators Introduce Amendment to Limit Computer Crime Bill*, 11 ACCESS REPORTS No. 6, Mar. 13, 1985, at 4.

48. S. 610, 99th Cong., 1st Sess., 131 CONG. REC. S2729 (daily ed. Mar. 7, 1985).

49. *Id.* The Privacy Act limitation would apply only to "use or disclosure" of information; one who modifies, destroys, or prevents the use of information in a computer would be subject to punishment without regard to the Privacy Act. The reason for this distinction is that conduct that modifies, destroys, or prevents the use of computerized information is similar to a trespass at common law and does not significantly implicate first amendment rights. 131 CONG. REC. S2730 (daily ed. Mar. 7, 1985) (statement of Sen. Leahy).

apply even if the FOIA mandates that the information be disclosed upon proper request. As a result, information to which the public has an unfettered right to access may not be released by the government employee whose authority to obtain it from a computerized file is in doubt.⁵⁰

Such concern is well-founded. Individual federal employees initially decide whether to disclose particular documents pursuant to FOIA requests.⁵¹ An employee who faces possible prosecution and imprisonment for a mistake in asserting his authority will be likely to resolve any doubt in favor of nondisclosure.⁵² This amendment would give the employee guidelines for making a decision; unauthorized use or disclosure of computerized information would be prohibited only where such disclosure is prohibited by the Privacy Act.⁵³

D. *Freedom of Information Reform Act.*

On the first day of the first session of the ninety-ninth Congress Senator Hatch resubmitted his Freedom of Information Reform Act.⁵⁴ Undaunted by the bill's death in the ninety-eighth Congress, Senator Hatch was confident that major FOIA reform legislation would be enacted in 1985.⁵⁵ No major reform was enacted in 1985, though, and substantial change in the FOIA in the near future appears unlikely. First, Glenn English, the chairman of the House committee that deals with FOIA

50. 131 CONG. REC. S2728-29 (daily ed. Mar. 7, 1985) (statement of Sen. Mathias).

51. *Id.* at S2729.

52. *Id.* If Mathias is correct in his belief that the Computer Crime Law will encourage denials of FOIA requests, such an increase in denials may well lead to more litigation and, thus, a greater burden on the judiciary. As Mathias pointed out, "any prudent agency official would play it safe and let the courts decide." *Id.*

The Senator is not alone in his fears. Even before the Computer Crime Law was passed in 1984, an editorial in the *New York Times* speculated that the law would cut off access to much legitimately available information simply because it was stored in computers. *N.Y. Times*, Oct. 11, 1984, at A26, col. 1. The editorial also expressed concern that "agencies bent on secrecy" could write regulations calling for criminal sanctions for employees divulging even nonsensitive and unclassified information. *Id.*

The Senate tried to respond to these concerns before final passage of the Computer Crime Law, passing an amendment similar to S.610 by a wide margin. 130 CONG. REC. S14,247-48 (daily ed. Oct. 11, 1984). The House, however, adjourned without acting on the amendment. 131 CONG. REC. S2729 (daily ed. Mar. 7, 1985) (statement of Sen. Mathias).

53. 131 CONG. REC. S2730 (daily ed. Mar. 7, 1985) (statement of Sen. Leahy).

54. S. 150, 99th Cong., 1st Sess. 131 CONG. REC. S263 (daily ed. Jan. 3, 1985). Hatch had offered a very similar reform bill in the ninety-eighth Congress. S. 774, 98th Cong., 1st Sess. (1984). That bill easily passed the Senate and received a full schedule of hearings before the House Government Operations Committee, but never reached the House floor. For a discussion of S. 774 and its legislative history, see Note, *Developments—1984*, *supra* note 2, at 744-53.

55. The Senator stated that his "meetings with the House subcommittee chairman in charge of information policy [led him] to believe that the House will pass some FOIA reforms in this Congress." 131 CONG. REC. S263 (daily ed. Jan. 3, 1985) (remarks of Sen. Hatch).

legislation, does not "believe that the FOIA needs the major overhaul" contemplated by Hatch,⁵⁶ although he does admit the law should be fine-tuned.⁵⁷ Second, although Hatch's FOIA reform plan has been around in some form since the ninety-seventh Congress,⁵⁸ it still has not garnered House approval.

Senate action on the Hatch bill has been slow. Although Hatch has indicated that he wants markup of the legislation to proceed quickly,⁵⁹ the only action taken thus far has been the bill's approval, without amendment, by the Senate Constitution Subcommittee in May, 1985.⁶⁰

A separate bill to reform the FOIA was proposed in the House in 1985 by Representative English.⁶¹ Although the English bill differs from the Hatch bill appreciably,⁶² both bills focus on the same areas for reform—fees and business information.

1. *Fees and Waivers.* The FOIA currently allows an agency to recover only the "direct costs" of search and duplication; the agency has discretion to waive or reduce the fee if the information would benefit not only the requester but the general public.⁶³ Senator Hatch contends that the costs of search and duplication "are only a fraction of the true costs of answering a FOIA request."⁶⁴ Hatch's bill would amend the fees section of FOIA by allowing fee schedules to "provide for the payment of all costs reasonably and directly attributable to responding to the request."⁶⁵ The bill has been criticized, however, for failing to suggest any standard

56. *Washington Focus*, 11 ACCESS REPORTS No. 2, Jan. 16, 1985, at 1 [hereinafter *Washington Focus—Hatch*].

57. *Id.*

58. See 131 CONG. REC. S263 (daily ed. Jan. 3, 1985). See also Note, *Developments—1984*, *supra* note 2, at 744-45; Note, *Developments Under the Freedom of Information Act—1983*, 1984 DUKE L.J. 377, 420 [hereinafter Note, *Developments—1983*]; Note, *Developments Under the Freedom of Information Act—1982*, 1983 DUKE L.J. 390, 392; Comment, *Developments Under the Freedom of Information Act—1981*, 1982 DUKE L.J. 423, 426.

59. *Washington Focus—Hatch*, *supra* note 56, at 1.

60. [1985-86] 1 CONG. INDEX (CCH) 21,002 (Jan. 24, 1986).

61. H.R. 1882, 99th Cong., 1st Sess. (1985).

62. Hatch has expressed wide-ranging concern with the way the FOIA works today, calling for sharp cutbacks in the law. See 131 CONG. REC. S263-65 (daily ed. Jan. 3, 1985). English, on the other hand, has suggested that only minor reforms are necessary. See *The Freedom of Information Reform Act: Hearings on S. 774 Before the Subcomm. on Gov't Information, Justice, and Agriculture of the House Comm. on Gov't Operations*, 98th Cong., 2d Sess. 30 (statement of Rep. English, Chairman) (1985).

63. 5 U.S.C. § 552(a)(4)(A) (1982).

64. 131 CONG. REC. S265 (daily ed. Jan. 3, 1985) (statement of Sen. Hatch). The Senator went on to note that actual FOIA costs were \$60 million in 1980, as compared to original estimates of \$40,000 to \$100,000 per year. Currently agencies collect only about two percent of actual costs. *Id.*

65. S. 150, 99th Cong., 1st Sess. § 2, 131 CONG. REC. S263 (daily ed. Jan. 3, 1985). This section defines "costs" as those for "services by agency personnel in search, duplication, and other processing of the request." *Id.* (emphasis added).

for determining the legitimate costs of review. Hearings conducted for S. 774 in the ninety-eighth Congress indicated that the administrative process varies so widely from agency to agency, with varying fee rates and items subject to charge, that the amendment would be difficult to apply.⁶⁶

The English bill sets up a different fee regime, establishing three levels of fees. A requester of records for commercial use would pay "fees . . . limited to reasonable standard charges for document search, duplication, and review."⁶⁷ When records are requested for noncommercial use, the fee would be limited to reasonable standard duplication charges,⁶⁸ thus actually reducing the fee for such requests⁶⁹ as compared with the present FOIA rules. For other types of requests, fees would be limited to document search and duplication costs.⁷⁰ Thus, while the Hatch bill would increase fees across the board by including review costs, the English bill would increase fees only for commercially valuable information and would reduce fees for many other types of information by limiting fees to duplication charges.

The English bill also proposes to expand the fee waiver provision, an area not addressed at all by the Hatch bill. The current FOIA calls for a waiver of all fees "where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public."⁷¹ The English bill would broaden the area of waiver by requiring waiver of fees if "disclosure of the information is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester; or . . . a requester is indigent and can demonstrate a compelling need for the documents."⁷²

66. See *The Freedom of Information Reform Act: Hearings on S. 774 Before the Subcomm. on Gov't Information, Justice, and Agriculture of the House Comm. on Gov't Operations*, 98th Cong., 2d Sess. 932 (testimony of Allan R. Adler, ACLU) (1985).

67. H.R. 1882, 99th Cong., 1st Sess. § 4 (1985). This provision allows a charge for time spent reviewing documents requested for a commercial purpose.

68. *Id.*

69. For this limit to apply, the request must be made

by or on behalf of an individual, or an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; a representative of the news media; or a nonprofit group that intends to make the information available to the news media, any branch or agency of Federal, State or local government, or the general public.

Id.

70. *Id.*

71. 5 U.S.C. § 552(a)(4)(A) (1982).

72. H.R. 1882, 99th Cong., 1st Sess. § 4 (1985). The proposed amendment also calls for fee waiver where the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee, or if the request requires less than two hours of search time and involves copying less than one hundred pages. *Id.*

2. *Business Confidentiality Procedures.* Under the present FOIA, a businessperson or other private party who submits information to a government agency has no right to receive notice that those records have been requested by a third party, nor a right to de novo federal court review of a decision to release information over his or her objection.⁷³ The Hatch and English bills both address this situation, and their responses are similar in several respects. Both establish procedures by which a submitter of confidential business information would be required to designate at the time of submission that the information is exempted from mandatory disclosure by subsection (b)(4)⁷⁴ of the FOIA.⁷⁵ When a request is made for such information, both bills would require that the agency notify the submitter of the request.⁷⁶ The submitter would then be given an opportunity to object to disclosure, and the agency would be required to inform the submitter of its final decision.⁷⁷

The two bills differ, however, on the standards they propose for judicial review of these disclosure decisions. The Hatch bill allows judicial review of an agency decision to disclose confidential business records against the wishes of a submitter, and provides that the court is to consider the matter de novo.⁷⁸ The Hatch bill would not alter the de novo review standard that the FOIA currently applies to agency decisions *not* to disclose. The English bill, in contrast, does not allow de novo review of an agency decision to *disclose* information; where a submitter seeks to enjoin the disclosure of information, judicial review would be limited to the record of the agency decision. De novo review would still be required, however, when the agency decides to *withhold* information.⁷⁹

73. 131 CONG. REC. S266 (daily ed. Jan. 3, 1985) (remarks of Sen. Hatch).

74. Exemption 4 states that "trade secrets and commercial or financial information obtained from a person and privileged or confidential" are exempt from the FOIA's mandatory disclosure provisions. 5 U.S.C. § 552(b)(4) (1982).

75. S. 150, 99th Cong., 1st Sess. § 4, 131 CONG. REC. S263 (daily ed. Jan. 3, 1985); H.R. 1882, 99th Cong., 1st Sess. § 2 (1985).

76. S. 150, 99th Cong., 1st Sess. § 4, 131 CONG. REC. S263 (daily ed. Jan. 3, 1985); H.R. 1882, 99th Cong., 1st Sess. § 2 (1985).

77. S. 150, 99th Cong., 1st Sess. § 4, 131 CONG. REC. S263 (daily ed. Jan. 3, 1985) ("[T]he submitter may, within ten working days of the forwarding of such notification, submit to the agency written objection to such disclosure." The agency then "shall notify the submitter of any final decision regarding the release of such information.").

The language of H.R. 1882, 99th Cong., 1st Sess. § 2 (1985), is similar, except that "the agency shall determine, within ten working days of the date when the submitter's objections are due, whether to comply with the request and shall notify the submitter of any final decision regarding the release of such information."

78. S. 150, 99th Cong., 1st Sess. § 5, 131 CONG. REC. S263 (daily ed. Jan. 3, 1985).

79. H.R. 1882, 99th Cong., 1st Sess. § 3 (1985). The bill provides that "[i]n any case to enjoin the withholding or the disclosure of records . . . the court shall determine the matter de novo, *except that in a case to enjoin the disclosure of requested records*, the court shall examine only the record of the agency decision." *Id.* (emphasis added).

There is a sound theoretical basis for the English bill's dichotomy. When an agency decides to withhold information, there is a possibility that the agency is acting in a self-interested manner. Thus, the higher standard of review is appropriate where information is withheld. But when the agency grants disclosure, it is unlikely to be acting out of self-interest, and there is thus less need for judicial scrutiny.

E. *Commission on Industrial Competitiveness Report.*

The thirty-member Commission on Industrial Competitiveness, appointed by President Reagan in 1983, recently issued a report that points to the FOIA as a cause of the loss of intellectual property by American companies.⁸⁰ The crux of the Commission's findings is that protection of American technological innovation is crucial to protecting the country's competitive position in the world economy. The report indicates that the nation must develop a clear policy for protecting intellectual property and protect that property from foreign expropriation to remain competitive in world markets.⁸¹ To combat foreign expropriation, "the United States must *continuously* review the adequacy of its own laws in light of the fast pace of technological advance and the rapidly increasing ability of infringers to make copies."⁸² The report argues that initiatives are needed that "extend beyond the intellectual property system itself to other Federal laws and practices that weaken the protection of intellectual property rights."⁸³

Specifically, the report identifies a problem in the FOIA's protection of trade secrets and business information. Because the FOIA is a compulsory disclosure statute with discretionary exemptions, there is no guarantee that a given exemption—such as that for trade secrets or other confidential business information—will actually prevent disclosure.⁸⁴ The report also lists several of what it considers serious problems with the FOIA "as it applies to research-intensive, high-technology companies": (1) that foreign nationals are not barred from access altogether; (2) that submitters of information are not notified prior to its release; (3) that there is no private right of action to prevent disclosure (in contrast to the burdensome APA procedure); (4) that Congress has never

80. *Presidential Commission Says FOIA has Contributed to Intellectual Property Loss*, 11 ACCESS REPORTS No. 5, Feb. 27, 1985, at 2.

81. PRESIDENT'S COMM'N ON COMPETITIVENESS, *supra* note 5, at 304, 305, 312.

82. *Id.* at 313 (emphasis in original).

83. *Id.* The report indicates that the FOIA is one of these "other Federal laws." See *id.* at 322-24.

84. *Id.* at 323. The applicable section of the FOIA is exemption 4. For the text of that exemption, see *supra* note 74.

defined "trade secrets" as used in exemption 4.⁸⁵

The commission offers a number of remedies for these problems. First, the report urges that "FOIA requests from foreign nationals, including requests from U.S. agents on behalf of foreign clients, should be barred."⁸⁶ While this recommendation may prevent some loss of American intellectual property, it appears to be overbroad. By completely banning foreign nationals from obtaining *any* government information under the FOIA, the proposal goes beyond its announced goal of protecting American trade secrets.

Second, the report recommends that a notification procedure be established, placing submitters of trade secrets on a more equal footing with requesters.⁸⁷ The commission suggests that submitters of trade secrets be allowed to claim confidentiality and to oppose disclosure in hearings before the agency.⁸⁸ Once an agency makes a final decision regarding release of information under a FOIA request, the submitter should be notified of the decision before the information is released.⁸⁹ The commission also recommends an amendment to FOIA to allow submitters to bring an action to enjoin release of confidential business information.⁹⁰

Finally, the report urges clarification of the terms "trade secrets" and "confidential commercial or financial information." Such clarification, the commission argues, is necessary if exemption 4 and the Trade Secrets Act⁹¹ are to have any teeth in protecting trade secrets.⁹²

F. *Consumer Product Safety Commission Legislation.*

In 1985, an effort was made in the House to reduce the backlog of FOIA requests at the Consumer Product Safety Commission (CPSC) by

85. PRESIDENT'S COMM'N ON COMPETITIVENESS, *supra* note 5, at 323-24.

86. PRESIDENT'S COMM'N ON COMPETITIVENESS, *supra* note 5, at 324. Any attempt to limit foreign requesters' access to government information about themselves would be likely to face opposition in Congress. There is also fear that such a law could cause a backlash against American access to information held by foreign governments. *See* H.R. REP. NO. 455, 98th Cong., 1st Sess. 32-33 (1983).

87. This is the position taken in both of the current FOIA reform bills. *See supra* notes 73-79 and accompanying text.

88. PRESIDENT'S COMM'N ON COMPETITIVENESS, *supra* note 5, at 324.

89. *Id.*

90. *Id.* The report does not specifically mention whether its authors prefer *de novo* review, as the Hatch bill does, *see supra* note 78 and accompanying text, or review limited to the agency record, as the English bill recommends, *see supra* note 79 and accompanying text.

91. 18 U.S.C. § 1905 (1982).

92. PRESIDENT'S COMM'N ON COMPETITIVENESS, *supra* note 5, at 324. Neither the Senate nor the House FOIA reform defines those terms.

amending the public disclosure section of the CPSC authorizing statute⁹³ to facilitate CPSC response to FOIA requests.⁹⁴ Currently, the CPSC must undertake a complex procedure each time it receives a FOIA request. First, the CPSC must send information that it intends to disclose, but which would also reveal the identity of a manufacturer or labeler, to that manufacturer or labeler.⁹⁵ The Commission also must "take reasonable steps to assure, prior to its public disclosure . . . that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate."⁹⁶ Should a manufacturer claim that the information for proposed disclosure is inaccurate, the FOIA request can be delayed for months.⁹⁷

The proposed amendment would repeal that part of the authorizing statute that requires the Commission to offer the manufacturer an opportunity to mark information "confidential" and thus preclude disclosure.⁹⁸ The amendment substitutes a requirement that the CPSC mark each document released with a statement that such document has not been reviewed for accuracy.⁹⁹

93. 15 U.S.C. § 2055 (1982). The applicable regulations are found at 16 C.F.R. §§ 1101.1-.71 (1985).

94. H.R. 2630, 99th Cong., 1st Sess. § 301 (1985).

95. 15 U.S.C. § 2055(b)(1) (1982).

96. *Id.*

97. *House Panel to Consider Bill to Ease CPSC Backlog of FOIA Requests*, 11 ACCESS REPORTS No. 12, June 5, 1985, at 2, 3 [hereinafter *CPSC Backlog*].

98. 15 U.S.C. § 2055(a)(3) (1982), the subject of the repeal effort, states:

The Commission shall, prior to the disclosure of any information which will permit the public to ascertain readily the identity of a manufacturer or private labeler of a consumer product, offer such manufacturer or private labeler an opportunity to mark such information as confidential and therefore barred from disclosure under paragraph (2) [paragraph 2 requires that information that contains or relates to a trade secret is to be considered confidential and not to be disclosed].

Even under this law, a document designated as confidential by the manufacturer can be disclosed by the CPSC if "the Commission determines [that such information] may be disclosed because it is not confidential information as provided in paragraph (2)." 15 U.S.C. § 2055(a)(5) (1982). The Commission must, however, notify the submitter that it intends to disclose the document. *Id.* The submitter may, before the proposed date of disclosure, bring an action in federal court to stay disclosure of the document. *Id.* § 2055(a)(6). No disclosure shall be made until the court has ruled on the motion to stay. *Id.*

99. The proposed section reads as follows:

Except as provided in paragraph (2), in responding to requests for information which were made under section 552 of title 5, United States Code, the Commission shall mark, in a prominent place, each document to be released pursuant to such a request with the following statement: "This Document has been Released by the Consumer Product Safety Commission Pursuant to the Freedom of Information Requirements of Title 5 and It has not been Reviewed for Accuracy for the Purpose of Your Request."

H.R. 2630, 99th Cong., 1st Sess. § 301(d) (1985).

The current regulations outline reasonable steps for the CPSC to take to assure the accuracy of information prior to release. 16 C.F.R. § 1101.32 (1985). Such steps would of course become unnecessary should the proposed amendment pass.

The amendment is aimed at reducing the time it takes for the CPSC to process FOIA requests. Before the present procedures were established, the CPSC was able to process eighty percent of its FOIA requests within ten days and one hundred percent within thirty days.¹⁰⁰ Under the present procedures, the CPSC processes only sixty percent within ten days, and it occasionally takes months or years to process some of the remaining forty percent.¹⁰¹

Scheduled markup sessions for the proposal were twice delayed by the subcommittee overseeing the bill.¹⁰² That subcommittee approved a clean version of the bill on September 19, 1985.¹⁰³

II. ADMINISTRATIVE DEVELOPMENTS

A. *Office of Management and Budget.*

1. *Management of Federal Information.* In March, 1985, the Office of Management and Budget (OMB) issued a proposed circular on management of federal information services¹⁰⁴ that seeks to curtail information availability sharply. The proposed circular has two main themes: first, that by requiring public access to information, federal law only requires agencies to release information that is the subject of valid *requests*; and second, that information should be disseminated in the most cost-effective manner with "maximum reliance on the private sector."¹⁰⁵ The

100. *CPSC Backlog*, *supra* note 97, at 3.

101. *Id.* (quoting Robert Adler, counsel to the Subcomm. on Health and Env't of the House Energy and Commerce Comm.).

The CPSC recently promulgated a final rule concerning appeals of Commission denials of FOIA requests. 50 Fed. Reg. 7753 (1985) (to be codified at 16 C.F.R. § 1015.7). This new rule provides that requesters may appeal denials of FOIA requests to the General Counsel of the CPSC, instead of to the Commission, and the decisions of the General Counsel will constitute final agency action. *Id.* at 7753-54. The Commission did not specifically indicate whether this new procedure was designed to reduce the request backlog.

102. *Washington Focus*, 11 ACCESS REPORTS NO. 13, June 19, 1985, at 1.

103. [1985-86] 2 CONG. INDEX (CCH) 35,033 (Jan. 24, 1986).

104. 50 Fed. Reg. 10,734 (1985).

105. *Id.* at 10,735. The circular states:

The mere fact that an agency has created or collected information is not itself a valid reason for creating a program to disseminate the information to the public. Agencies create and collect much information . . . that is not intended for dissemination, for which there is no public demand, and the dissemination of which would serve no public purpose and would not be cost-justified. . . . While such information may be subject to access upon request under provisions of agency statutes, the Freedom of Information Act, or the Privacy Act, the agency must demonstrate in each case the need *actively* to disseminate such information.

Id. (emphasis added). The circular later states:

When agencies have justified and made the basic decision to disseminate information, they must also satisfy conditions regarding the manner of dissemination. . . . [A]gencies must act in the most effective manner, which includes maximum reliance on the private sector. . . . It is "the general policy of the government to rely on commercial sources to supply

circular also recommends increased use of advanced information technology, such as the use of computer and telecommunications systems.¹⁰⁶

The OMB proposal has received some negative comment. The American Library Association (ALA) has charged that the circular seeks to make access to government information so costly that many users will be unable to afford it.¹⁰⁷ One of the ALA's concerns is that, while the same amount of information will theoretically be available, public access will be limited if government agencies are restricted in their *active* dissemination of the material. Such a policy would require the public to submit FOIA requests for many kinds of information that the government had actively supplied before—an expense that could force many requesters out of the information market.¹⁰⁸ The ALA is also critical of the OMB's call for maximum reliance on the private sector for information dissemination, claiming that this, too, will increase the price of information for users.¹⁰⁹

The ALA also warned that the OMB's proposal for the use of advanced computer and telecommunications technologies for data collection, storage, retrieval, and dissemination would, if effected, diminish public access to information by placing those who could not afford computers or computer time at a disadvantage.¹¹⁰ The ALA also criticized the OMB for cutting agencies' budgets, effectively forcing agencies to cut back on information publication programs, without any consideration by the OMB of the information's value to the public or its role in fulfilling "the agency's mission."¹¹¹

the products and services the government needs," including products and services the government needs in order to disseminate information to the public.

Id. Finally, the circular discusses user charges in certain situations:

The Federal Government is the sole possessor and supplier of certain types of information, which is frequently of substantial commercial value. Dissemination of such information, or its dissemination in a specific form or medium, may represent a government service from which recipients derive special benefits [in which case user charges may be appropriate].

Id. at 10,736.

106. *Id.* at 10,737-38.

107. *Library Group Testifies Against Proposed OMB Approach to Information Management*, 11 ACCESS REPORTS No. 10, May 8, 1985, at 7 [hereinafter *Library Group*].

108. *Id.* The expense of making a FOIA request can be great; the total cost includes the filing fee, the opportunity costs associated with the time it takes to file a request, and the expense of litigation if the request is denied. The ALA claims that recent increases in filing fees will aggravate the problem. *Id.* at 7-8.

109. *Id.* The group did not, however, specify why.

110. *Id.* at 8. This issue goes beyond questions of cost in light of the current law providing strict penalties for government employees who improperly access computers—the Computer Crime Law. See *supra* notes 45-53 and accompanying text. Because the Computer Crime Law may make it more difficult for information stored in computers to be disclosed than other types of information, the proposed increase in computerization would also lead to diminished public access to information.

111. *Library Group, supra* note 107, at 8. Such criticism may be well founded—some have charged that the federal agencies are currently not following the FOIA's requirements for the publi-

2. *Privacy Act Guidance.* In June, 1985, the OMB issued an advisory memorandum offering federal agencies a survey of legislative and judicial developments under the Privacy Act,¹¹² and specifically addressing three areas: the disclosure of Privacy Act material during litigation; the disclosure, in the absence of a FOIA request, of Privacy Act material subject to mandatory disclosure under the FOIA; and the relationship between the Privacy Act and the FOIA.¹¹³

The first OMB concern—Privacy Act material used by an agency during litigation—grew out of the decision of the United States District Court for the District of Columbia in *Krohn v. United States Department of Justice* that the “routine use” exception to the Privacy Act does not include information used “during appropriate legal proceedings”—the standard that the Federal Bureau of Investigation (FBI) had adopted.¹¹⁴

cation and availability of certain types of information. Representative Glenn English has asked the General Accounting Office (GAO) to investigate whether agencies are complying with subsections (a)(1) and (a)(2) of the FOIA. See *English Asks GAO to Look into Agency Compliance with FOIA's Affirmative Disclosure Mandates*, 11 ACCESS REPORTS NO. 1, Jan. 2, 1985, at 5.

The FOIA requires agencies to publish in the *Federal Register* five types of information “for the guidance of the public.” 5 U.S.C. § 552(a)(1) (1982). This information includes descriptions of agency organization, statements of the general course and method of agency functions, procedural rules, substantive rules of general applicability, and any amendments or revisions of the above. *Id.* Agencies are also required to make available three types of information for public inspection and copying, including final opinions in adjudication of cases, statements of policy and interpretations not published in the *Federal Register*, and administrative staff manuals that affect a member of the public. 5 U.S.C. § 552(a)(2) (1982).

112. See *OMB Issues New Privacy Act Guidance Reflecting Court Rulings and New Legislation*, 11 ACCESS REPORTS NO. 12, June 5, 1985, at 3-4 [hereinafter *OMB Guidance*].

The OMB was criticized in a report by the Committee for not taking an active enough role in establishing privacy policy. See H.R. REP. NO. 455, 98th Cong., 1st Sess. 35-36 (1983). The report concluded that “interest in the Privacy Act at OMB has diminished steadily since 1975. Since issuing extensive guidelines when the Privacy Act became effective, OMB has not actively pursued its responsibility to revise and update that guidance.” *Id.* at 2. The most significant criticism was that “OMB’s oversight is reactive to proposals for change made by agencies. OMB does not actively supervise, review, or monitor agency compliance with Privacy Act guidelines.” *Id.* Indeed, one could argue that the latest OMB guidelines, see *infra* notes 114-27 and accompanying text, are primarily reactive to legislative and judicial developments, and do not take an independent lead in mapping out Privacy Act policy.

In response to this perceived inaction at OMB, Representative Glenn English has introduced a bill to establish a Data Protection Board, which would assume OMB’s oversight of the Privacy Act and policy-making responsibilities. H.R. 1721, 99th Cong., 1st Sess. (1985); see also *English Introduces Bill to Create Data Protection Board*, 11 ACCESS REPORTS NO. 7, Mar. 27, 1985, at 3-4. The House has not acted on the bill.

113. *OMB Guidance*, *supra* note 112, at 3.

114. *Krohn v. United States Dep’t of Justice*, No. 78-1536, slip op. at 6 (D.D.C. May 19, 1984). The FBI had published a list of “routine uses,” including “appropriate legal proceedings.” *Id.* at 4-5. The court concluded that the term “during appropriate legal proceedings” was too vague, noting that if the FBI could disclose documents containing personal information protected by the Privacy Act during FOIA-related or other litigation, the rights secured by the Privacy Act would be worth little. *Id.* at 6-7.

In response to *Krohn*, OMB now recommends that agencies adopt a "routine use" definition that is narrow enough to avoid violating *Krohn*, but not so limited as to restrict the flow of necessary and relevant information during litigation.¹¹⁵ Specifically, the OMB suggests that agencies adopt standards allowing disclosure of any records subject to the Privacy Act that are relevant to litigation to which the agency is a party or in which it has an interest, so long as disclosure is compatible with the purposes for which the records were originally collected.¹¹⁶

The OMB's concern with disclosure of Privacy Act material subject to the FOIA was also triggered by a judicial decision. In *Bartel v. FAA*,¹¹⁷ the United States Court of Appeals for the District of Columbia held that an agency must have an actual FOIA request in hand before disclosing information that is subject both to the Privacy Act and to the FOIA.¹¹⁸

A broad reading of *Bartel* could bar an agency's disclosure of "all kinds of records traditionally treated as being in the public domain";¹¹⁹ as a result, the OMB gives *Bartel* a narrow reading. The OMB suggests that agencies recognize a new category of records—those "traditionally held to be in the public domain or which are required to be disclosed to the public, such as many of the final orders and opinions of quasi-judicial agencies, press releases, telephone directories, organizational charts, etc."¹²⁰ Under the OMB's interpretation of *Bartel*, information in this category would be subject to disclosure without a FOIA request.¹²¹ OMB recommends that records falling outside of this category not be disclosed absent an actual FOIA request.¹²²

The OMB also advised agencies on the appropriate response to Congress's 1984 legislation declaring that the Privacy Act is not an exemption 3 statute.¹²³ Under the OMB's guidelines, agencies should base their

115. *OMB Guidance*, *supra* note 112, at 3-4.

116. *Id.* at 4. One may wonder whether the OMB guideline here is any less vague than the standard struck down by *Krohn*. See *supra* note 114.

117. 725 F.2d 1403 (D.C. Cir. 1984).

118. *Id.* at 1412. The Privacy Act bars disclosure of certain material unless that material is also subject to the FOIA. 5 U.S.C. § 552a(b)(2) (1982).

119. *OMB Guidelines*, *supra* note 112, at 4. The OMB listed as examples agency telephone directories compiled by personnel systems and press releases on employee accomplishments. *Id.*

120. *Id.*

121. *Id.* The OMB's list of subjects to include in this category does not indicate that the category would be very broad.

122. *Id.*

123. OMB also advised federal agencies concerning the issue whether the Privacy Act is an exemption 3 statute. This issue, which had been the subject of a split among the federal courts of appeals, compare *Porter v. United States Dep't of Justice*, 717 F.2d 787 (3d Cir. 1983) (Privacy Act not an exemption 3 statute) with *Shapiro v. DEA*, 721 F.2d 215 (7th Cir. 1983) (Privacy Act is an exemption 3 statute), was settled by legislation in 1984—Congress decided that the Privacy Act is

disclosure decisions upon whichever authority the FOIA requester cites. For example, if a party requests first-party information and cites the Privacy Act, the agency would process the request under the Privacy Act, applying the exemptions, time limits, fee provisions and appeal processes specified therein.¹²⁴ Conversely, if a requester of first-party information cites the FOIA, the agency should process that request under the FOIA.¹²⁵ If neither or both statutes are cited, the agency is to process the request under both laws.¹²⁶ This mirrors the current practice of many agencies, including the FBI, of processing all first-party requests under both statutes.¹²⁷

B. *Environmental Protection Agency.*

The EPA recently amended its regulations concerning the payment of FOIA fees.¹²⁸ The new regulations respond in part to the public's negative reaction to a rule the EPA promulgated in March, 1983.¹²⁹ That rule sought to "preserve public funds by requiring full payment in advance, thereby reducing costs to the Government of collecting fees and to avoid defaults by individuals who request costly record searches."¹³⁰

The 1983 rule, however, turned out to be a particularly controversial source of public concern.¹³¹ In response, and to put an end to litigation on the matter, the EPA published an interim final rule that reinstates the procedures in effect prior to March 17, 1985.¹³² The new rule does not require actual prepayment, but does require that the requester either prepay or make "acceptable arrangements to pay" the to-

not an exemption 3 statute. Pub. L. No. 98-477, § 702, 98 Stat. 2209, 2212 (1984) ("No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title."). An agency may not now base a decision to withhold first-party information, available under the FOIA, on the Privacy Act.

124. *OMB Guidelines*, *supra* note 112, at 4.

125. *Id.*

126. *Id.*

127. *Id.*

128. See 50 Fed. Reg. 51,654 (1985) (to be codified at 40 C.F.R. § 2.100-.311).

129. 48 Fed. Reg. 11,270 (1983) (codified at 40 C.F.R. § 2.120 (1984)).

130. *Id.* The 1983 rule was designed to solve the problem of requesters who defaulted on fee payments after receiving EPA records. The EPA claimed that an internal audit disclosed "that a number of requesters who have received records under FOIA are not making timely payments for such records." *Id.*

The 1983 rule stated that where the potential fee is estimated to be over \$25, "a [FOIA] request will not be deemed to have been received until the requester is notified of the estimated fees and the requester pays the total amount of fees due (or estimated to become due)." 40 C.F.R. § 2.120(c) (1984).

131. 50 Fed. Reg. 32,950 (1985).

132. *Id.*

tal fees due.¹³³ The EPA has indicated that this may not be the final word on fee prepayment, however, and the agency still considers some form of prepayment necessary to avoid defaults and reduce processing costs.¹³⁴

The EPA also amended its regulations concerning public information and confidentiality.¹³⁵ Changes were made in both subpart A of the EPA regulations,¹³⁶ which addresses response to FOIA requests in general, and subpart B,¹³⁷ which outlines procedures for handling business information. Although the changes in subpart A are relatively technical, a few are notable. The regulations had provided that FOIA search fees "may" be reduced if the public interest would be served thereby.¹³⁸ The EPA has changed "may" to "shall," making the regulation's language more consistent with language of the rate statute.¹³⁹ Further, although the new rule increases the hourly rate charged for search fees, it also increases the number of search hours for which no charge will be made.¹⁴⁰ Finally, the rule clarifies the appeals process for denials of FOIA requests by specifying that only initial denials of requests for existing and located records may be appealed to the agency.¹⁴¹

The most significant amendment to subpart B eliminates the requirement that business submitters receive ten days' notice before the agency discloses confidential business information to Congress or the

133. 50 Fed. Reg. 51,654, 51,660 (1985) (to be codified at 40 C.F.R. § 2.120(c)). The new rule also requires any requester who does not pay his fees within sixty calendar days of a request for payment to be placed on a delinquent list. *Id.* The EPA will not process any requests submitted by a person on the delinquent list. *Id.*

134. 50 Fed. Reg. 32,950 (1985).

135. 50 Fed. Reg. 51,654, 51,655 (1985) (to be codified at 40 C.F.R. § 2).

136. 40 C.F.R. §§ 2.100-120 (1984).

137. 40 C.F.R. §§ 2.202-305 (1984).

138. 40 C.F.R. § 2.120(d) (1984).

139. 50 Fed. Reg. 51,654, 51,660 (1985) (to be codified at 40 C.F.R. § 2.120(d)). The FOIA states that "[d]ocuments *shall* be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as *primarily benefitting the general public.*" 5 U.S.C. § 552(a)(4)(A) (1982) (emphasis added).

140. For a discussion of the rule at the time it was being proposed, see 50 Fed. Reg. 32,952 (1985). See also 50 Fed. Reg. 51,654, 51,660 (1985) (to be codified at 40 C.F.R. § 2.120(a)) (final rule).

141. 50 Fed. Reg. 51,654, 51,657 (1985). The new rule specifies that because an agency response stating that a requested record is not known to exist is not a denial, it is therefore not appealable. See *id.* at 51,657, 51,659 (to be codified at 40 C.F.R. §§ 2.112, 2.113, 2.114).

This rule could be misused. The EPA could claim that it does not know that a certain record exists and thus deny an administrative appeal. Individual requesters who do not have the resources to pursue the matter to litigation would be unable to have the agency's initial determination reviewed.

Comptroller General.¹⁴² The agency believes that this notice requirement unduly delays the reporting of necessary information to Congress and the Comptroller General.¹⁴³ Under the new rule, the affected business would still receive notice, but not necessarily before disclosure.¹⁴⁴

III. JUDICIAL DEVELOPMENTS

A. *Threshold Issues: Application of the FOIA to Departments within the Executive Office of the President.*

The Freedom of Information Act establishes mandatory disclosure requirements that apply exclusively to "agencies."¹⁴⁵ In 1985, in *Rushforth v. Council of Economic Advisers*,¹⁴⁶ the United States Court of Appeals for the District of Columbia Circuit held that the Council of Economic Advisers (the "Council") was not an "agency" and that its records were therefore not subject to the disclosure requirements of the FOIA.

142. The current rules are found at 40 C.F.R. § 2.209(b) (1985). The new rule is at 50 Fed. Reg. 51,654, 51,661 (1985) (to be codified at 40 C.F.R. § 2.209(b)(1)).

143. 50 Fed. Reg. 32,953 (1985).

144. 50 Fed. Reg. 51,654, 51,661 (1985) (to be codified at 40 C.F.R. § 2.209(b)(2)). The new rule calls for notice to be given ten days in advance of disclosure to Congress "except where it is not possible to provide notice ten days in advance of any date established by the requesting body for responding to the request." *Id.*

In addition to the activity noted, the Nuclear Regulatory Commission (NRC) has promulgated new rules pertaining to FOIA. Currently, any identifiable record, "whether in the possession of the NRC, its contractors, its subcontractors, or others, shall be made available for inspection and copying." 10 C.F.R. § 9.4 (1985). Agency practice, however, is that records not actually in possession or control of the *agency itself* (here, the NRC) are not considered "records" and thus are not subject to the mandatory disclosure requirements of the FOIA. *See Forsham v. Harris*, 445 U.S. 169, 178 (1980); *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150-54 (1980). To conform with this practice, the NRC is changing the rule to read "[a]ny identifiable record in the possession of the NRC shall be made available." 50 Fed. Reg. 41,128 (1985) (to be codified at 10 C.F.R. § 9.4).

The NRC has also followed the lead of other federal agencies in establishing a central decision-making approach for handling subpoenas of Commission records in litigation not involving the NRC as a party. 50 Fed. Reg. 37,642, 37,643 (1985) (to be codified at 10 C.F.R. § 9). The new regulations specify that all subpoenas or other judicial and quasi-judicial demands for records that are served on NRC employees are to be referred to the Commission's general counsel who will "review the proposed discovery, ascertain the scope of the proposal, and decide on the approach to be followed in each case, including authorizing litigation, if necessary, to resolve disputes between the NRC and the party seeking discovery." *Id.* at 37,643.

145. *See* 5 U.S.C. § 552(a)(1)-(6) (1982). Subsection (a)(3), the most commonly invoked portion of the FOIA, provides:

Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each *agency*, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

146. 762 F.2d 1038, 1043 (D.C. Cir. 1985).

Under the FOIA, an agency is defined as "any executive department . . . or other establishment in the executive branch of the Government (including the Executive Office of the President)."¹⁴⁷ Although the Council would seem to qualify as such an "establishment,"¹⁴⁸ the *Rushforth* court concluded that the statutory definition should not be applied literally.¹⁴⁹ The legislative history of the 1974 FOIA amendments reveals Congress's desire to codify the functional test of agency status that the judiciary had already developed.¹⁵⁰ Under this test, the

147. 5 U.S.C. § 552(e) (1982).

148. See 15 U.S.C. § 1023(a) (1982). Other entities within the Executive Office of the President include the Office of Management and Budget, the National Security Council, the Office of Policy Development, the Office of the United States Trade Representative, the Council on Environmental Quality, the Office of Science and Technology Policy, and the Office of Administration. See UNITED STATES GOVERNMENT MANUAL 81-90 (1985).

149. *Rushforth*, 762 F.2d at 1040 (citing *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980)).

150. *Rushforth*, 762 F.2d at 1040-41. The legislative history is ambiguous as to whether the Council may be considered a FOIA "agency." Subsection (e) was added during the extensive amendment of the FOIA in 1974. The House Report on the amendments explains that the reference to the "Executive Office of the President" contained in subsection (e) "means such functional entities as . . . the Council of Economic Advisers." H.R. REP. NO. 876, 93d Cong., 2d Sess. 8 (1974). The Conference Report upon which the court of appeals relied, however, states that "[w]ith respect to the meaning of the term 'Executive Office of the President' the conferees intend the result reached in *Soucie v. David*, 448 F.2d 1067 (D.C. Cir.] 1971). The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." S. REP. NO. 1200, 93d Cong., 2d Sess. 15 (1974).

The court of appeals ultimately found that the House Report could not be squared with the Conference Report or the result reached in *Soucie*. *Rushforth*, 762 F.2d at 1040. The court stated:

Where, as here, the specific mention of the CEA in the House Report was dropped and a specific, judicially formulated test was adopted by the Conference Committee for determining the FOIA status of such entities, the House Report is entitled to little weight in this respect. Manifestly, the Conference elected to embrace a test to be substituted for a listing of the entities to be included; the outcome of the case before us should, accordingly, turn on an examination of *Soucie* and the sole-function test enunciated in that case.

Id. at 1040-41.

It may be possible, however, to reconcile the House Report with the Conference Report and the result in *Soucie*. In *Soucie*, the entity whose agency status was under consideration was the Office of Science and Technology (OST)—now the Office of Science and Technology Policy, see *supra* note 148. For the *Soucie* court, the determinative factors in concluding that OST was an agency included the OST's status as a distinct entity and its statutory function of evaluating the scientific research programs of various federal agencies. *Soucie*, 448 F.2d at 1075. Put more generally, the *Soucie* court resolved the agency question by determining that the OST had "substantial independent authority in the exercise of specific functions." *Id.* at 1073. In similar respects, the Council of Economic Advisers' authorization statute contemplates some degree of functional independence and directs the Council to appraise various federal programs and activities. See 15 U.S.C. § 1023(C)(3) (1982). The similarities between the CEA and the OST are also evidenced by the legislative history of the reorganization plan under which the OST was created. See 108 CONG. REC. 8473 (1962) ("[C]ongressional committees will be able to deal with [the OST] on the same basis as they do with the Bureau of the Budget and the Council of Economic Advisers.") (statement of Rep. Hollifield), quoted in *Soucie*, 448 F.2d at 1075; H.R. REP. NO. 1635, 87 Cong., 2d Sess. 9 (1962) (the President sought to establish the OST "on roughly the same basis as the . . . Council of Economic Advisers") (quoting *Hearings on Reorganization Plan No. 2 of 1962 Before the Subcomm. on Executive and*

FOIA applies only to executive organizations with some measure of independent authority.¹⁵¹ In other words, if "the sole function of the entity within the Executive Office is to advise and assist the President," that organization is not an "agency" subject to the FOIA.¹⁵²

The *Rushforth* court applied this test by evaluating the Council's duties under its organic statute.¹⁵³ Unlike other entities within the Executive Office that may properly be termed "agencies,"¹⁵⁴ the Council is not empowered to promulgate regulations, issue guidelines, or take any other form of "direct action."¹⁵⁵ On this basis, the court of appeals concluded that the Council was created only to provide advice and assistance to the President and, as a consequence, was excluded from FOIA disclosure coverage.¹⁵⁶

The purpose of the "sole function" test is to limit the reach of the FOIA in such a way as to exclude those entities having no real decision-making authority in the administration of national policies.¹⁵⁷ This limitation insulates the deliberative process of executive decisionmaking from disruptive public scrutiny—protection commonly referred to as "executive privilege."¹⁵⁸ In *Rushforth*, the court of appeals expanded that pro-

Legislative Reorganization of the House Comm. on Gov't Operations, 87th Cong., 2d Sess. 11 (1962) (statement of Elmer B. Staats, Deputy Director, Bureau of the Budget)), quoted in *Soucie*, 448 F.2d at 1074; see also *Pacific Legal Found. v. Council on Env'tl. Quality*, 636 F.2d 1259, 1263-64, 1263 n.4 (D.C. Cir. 1980) (citing the House Report referring to inclusion of Council of Economic Advisers in subsection (e) definition).

151. *Rushforth*, 762 F.2d at 1041 ("By virtue of its independent function of evaluating federal programs, the OST must be regarded as an agency subject to the [FOIA].") (quoting *Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971)); see also *Washington Research Project, Inc. v. HEW*, 504 F.2d 238, 248 (D.C. Cir. 1974) (agency status under the FOIA turns on "whether [the entity] has any authority in law to make decisions").

152. *Rushforth*, at 1040-41.

153. *Id.* at 1042 & n.6; see also *supra* note 151.

154. See *Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971) (Office of Science and Technology is an "agency" under FOIA); see also *Pacific Legal Found. v. Council on Env'tl. Quality*, 636 F.2d 1259, 1263 (D.C. Cir. 1980) (Council on Environmental Quality is an agency under FOIA for purposes of the Sunshine Act).

155. *Rushforth*, 762 F.2d at 1042-43; see also 15 U.S.C. § 1023 (1982).

156. *Rushforth*, 762 F.2d at 1042-43.

157. See *supra* notes 155-56 and accompanying text.

158. The executive privilege finds expression in the FOIA through exemption 5, 5 U.S.C. § 552(b)(5) (1982). That subsection excludes from the mandatory disclosure requirements of the FOIA "inter-agency or intra-agency memorandums . . . not available by law to a party other than an agency in litigation with the agency." *Id.* The exemption has been construed to protect advice, recommendations, and opinions that are a part of the deliberative process of executive decisionmaking. See, e.g., *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-54 (1975) (distinguishing between records used in deliberative process and records "which not only invariably explain agency action already taken or an agency decision already made, but also constitute 'final dispositions' of matters by an agency"); *EPA v. Mink*, 410 U.S. 73, 85-91 (1973) (discussing scope of exemption 5); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (purpose of privilege is to encourage frank, open discussion on policy matters between subordinate and chief, protect

tection beyond the communications between decisionmaker and adviser. Under the "sole function" test, ancillary functions performed by a strictly advisory organization are not subject to mandatory FOIA disclosure even when they are non-advisory in nature.¹⁵⁹

The "sole function" test may be over-inclusive. General pre-deliberative functions, such as gathering and analyzing information, produce the data upon which decisionmakers rely.¹⁶⁰ These functions can be meaningfully distinguished from purely advisory functions.¹⁶¹ For example, to fulfill its statutory duty to provide the President with effective advice and assistance, the Council must engage in extensive fact-finding

against premature disclosure of proposed policies, and insure that the public is cognizant of the rationale and motivations that lie behind a specific policy, not those that are rejected); *Washington Post Co. v. Department of the Air Force*, 617 F. Supp. 602, 604 (D.D.C. 1985) (exemption 5 or "executive" privilege "protects advice, recommendations, and opinions which are part of the deliberative decision making processes of government").

159. The court's denial of agency status to the CEA, *Rushforth*, 762 F.2d at 1043, relieves the agency of responsibility to disclose any materials requested under the FOIA, even information relating to nonadvisory functions.

160. These ancillary functions may usefully be generalized as "investigatory" in nature. The distinction between investigatory and "legislative" functions, while evident, cannot always be clearly drawn. For example, the court in *Soucie v. David*, 448 F.2d 1067, 1075 n.27 (D.C. Cir. 1971), noted that "[t]he power of investigation has long been recognized as an incident of legislative power necessary to the enactment and effective enforcement of wise laws. . . . Congress has often delegated portions of its investigatory power to administrative agencies." The essential point for present purposes is that just as the power of investigation is "an incident to legislative power," such investigatory power is similarly incidental to administrative decisionmaking.

161. An analogy may be drawn to decisions under exemption 5 in which the courts have distinguished purely "factual" material which must be disclosed, from "opinion" material which may be withheld. *See, e.g., EPA v. Mink*, 410 U.S. 73, 89 (1973) (distinction between "materials reflecting deliberative or policy-making process on the one hand, and purely factual, investigative matters on the other"); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980) (the privilege protected under exemption 5 "applies only to the 'opinion' or 'recommendatory' portion . . . not to factual information which is contained in the document"); *Ryan v. Department of Justice*, 617 F.2d 781, 790-91 (D.C. Cir. 1980) (facts in predecisional documents subject to disclosure unless they are "inextricably intertwined" with exempt material); *Washington Post Co. v. Department of the Air Force*, 617 F. Supp. 602, 606 (D.D.C. 1985) ("As a general rule, regardless of whatever other privileges may apply, factual material must be disclosed while advisory material may be withheld.").

Many courts have been particularly rigorous in insisting that agencies segregate factual from "advisory" materials in requested agency records. *See, e.g., Exxon Corp. v. FTC*, 466 F. Supp. 1088, 1097-99 (D.D.C. 1978), *aff'd*, 663 F.2d 120 (D.C. Cir. 1980); *Washington Post Co. v. Department of the Air Force*, 617 F. Supp. 602, 606 (D.D.C. 1985); *Morton-Norwich Products, Inc. v. Mathews*, 415 F. Supp. 78, 82 (D.D.C. 1976). Such rigor may indicate the courts' recognition of the public's interest in the facts that inform agency decisions. In the case of the Council of Economic Advisers, its evaluations of other agencies, 15 U.S.C. § 1023(c)(3) (1982), economic forecasts and appraisals, 15 U.S.C. § 1023(c)(2)-(5) (1982), and decisions with respect to the hiring of specialists to assist the Council in the performance of its statutory duties, 15 U.S.C. § 1023(b), would similarly include "facts" implicating public interests of a high order.

followed by analysis of the economic data it has collected.¹⁶² The Council must then present the President with these facts, its interpretation of them, *and* its recommendations. All three types of information can have profound effects on national economic policies.¹⁶³ By excluding all three types of information from FOIA coverage, the "sole function" test shields facts and interpretations used in policy decisions from being evaluated by concerned observers.

B. *National Security and the CIA: Expanded Protection Under Exemption 3.*

Exemption 3 of the FOIA allows an agency to withhold records that have been "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave [the agency] no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."¹⁶⁴ In 1985, in *Central Intelligence Agency v. Sims*,¹⁶⁵ the Supreme Court of the United States held that section 102(d)(3) of the National Security Act of 1947 (the "Security Act")¹⁶⁶ is a statute referring to "particular types of matters to be withheld" and thus acts as a shield against the mandatory disclosure requirements of the FOIA.¹⁶⁷

In *Sims*, the CIA had received a FOIA request for records listing the names and institutional affiliations of researchers who had participated in a CIA program, code-named MKULTRA, that was conducted between 1953 and 1966.¹⁶⁸ The CIA undertook this program to redress a

162. For example, the Council is given power to "employ, and fix the compensation of, such specialists and other experts as may be necessary for the carrying out of its functions," 5 U.S.C. § 1023(b) (1982), "to gather timely and authoritative information concerning economic developments and economic trends," 5 U.S.C. § 1023(c)(2) (1982), and "to appraise the various programs and activities of the Federal Government," 5 U.S.C. § 1023(c)(3) (1982).

163. See Flash, *The Knowledge-Power Relationship: The Council of Economic Advisers*, in *BUREAUCRATIC POWER IN NATIONAL POLITICS* 97, 98 (F. Rourke 3d ed. 1978). ("The acceptance of the Council's expertise as the President's economists increases the acceptance of his authority in matters of economic policy . . ."). As Flash cogently observes, the influence of the Council largely depends on the President's confidence in its expertise. *Id.* at 101. To the extent the President uses economic analysis in the formulation of national policies, the Council is the source to which the President is most likely to turn for "economic facts." The Council's members are, after all, appointed by the President, 15 U.S.C. § 1023(a) (1982), and he presumably views them as competent.

164. 5 U.S.C. § 552(b)(3) (1982).

165. 105 S. Ct. 1881 (1985).

166. 50 U.S.C. § 403(d)(3) (1982).

167. *Sims*, 105 S. Ct. at 1887.

168. *Sims v. CIA*, 642 F.2d 562, 563-64 (D.C. Cir. 1980). The records at issue involved the names of universities and other institutions along with the individual researchers that had received funding either directly or indirectly from the CIA to engage in the research program. Also involved were specific grant proposals and contracts awarded under the program. *Sims v. CIA*, 479 F. Supp.

perceived imbalance between the brainwashing and interrogation techniques of the United States and those of communist regimes.¹⁶⁹ The CIA refused to disclose the names of the researchers and of twenty-one of the institutions involved,¹⁷⁰ relying on exemption 3 and the Security Act.¹⁷¹ Under the Security Act, the Director of Central Intelligence is "responsible for protecting intelligence sources and methods from unauthorized disclosure."¹⁷² Therefore, the propriety of the CIA's refusal to disclose turned on two questions: (1) whether the term "intelligence sources and methods" as used in the Security Act specifies "particular matters to be withheld" so as to qualify as an exemption 3 statute; and (2) if so, whether the MKULTRA researchers and institutions qualified as "intelligence sources."¹⁷³

84, 84-85 (D.D.C. 1979). The MKULTRA project involved at least 80 institutions and 185 individual researchers, many of which had no knowledge of the CIA's involvement because they obtained funding from "front" organizations. *Sims*, 642 F.2d at 564.

169. *Sims*, 105 S. Ct. at 1884. The MKULTRA program was originally conceived as a defensive measure, based on the government's "concern[] about inexplicable behavior of persons behind the 'iron curtain' and American prisoners of war who had been subjected to so-called 'brainwashing.' . . . [T]his defensive counterintelligence orientation became secondary as the possibilities for the use of such techniques to obtain information from enemy agents became apparent." *Sims v. CIA*, 479 F. Supp. 84, 91 (D.D.C. 1979) (affidavit of Stansfield Turner, Director of Central Intelligence). In some cases, the research involved the use of mind-altering "chemical and biological substances" administered to "unwitting" subjects, *Sims v. CIA*, 642 F.2d 562, 564 (D.C. Cir. 1980), many of whom were American students. *Sims*, 479 F. Supp. at 87. The experiments led to tragic results with at least two known deaths and untold (probably as yet unknown) health damage. *Sims*, 642 F.2d at 564.

The mystery surrounding the MKULTRA project is the consequence of a 1973 CIA purge of MKULTRA records ordered by former Director Richard Helms. Most of the details surrounding the project were lost. The records sought by the plaintiffs in the instant case were part of some 8,000 documents relating to MKULTRA that had escaped the purge and were discovered by the Agency in 1977. MKULTRA was subjected to intense congressional and executive scrutiny under the committee leadership of Frank Church in the Senate and former Vice President Nelson Rockefeller. *Sims*, 642 F.2d at 564.

170. The Agency released the names of 59 institutions after obtaining their consent. The Agency did not try to obtain the consent of the individual researchers. *Sims v. CIA*, 642 F.2d 562, 565 (D.C. Cir. 1980).

171. *Sims*, 105 S. Ct. at 1885.

172. 50 U.S.C. § 403(d)(3) (1982).

173. *Sims*, 105 S. Ct. at 1887. The Court's approach to the issues in *Sims* is somewhat perplexing. Rather than determine precisely what "intelligence sources" means before asking whether that term is sufficiently specific to pass muster under exemption 3(B), the Court addressed these issues in reverse order. In contrast, the district court concluded that it could not

validate the Director's determination that the institutions and researchers involved were 'intelligence sources' without a strong and detailed showing of the work done under the auspices of MKULTRA or, if that does not make it obvious that intelligence sources are involved, by the identification of *clear, non-discretionary* guidelines to test whether an intelligence source is involved in a particular case.

Sims v. CIA, 479 F. Supp. 84, 87-88 (D.D.C. 1979) (emphasis added). The district court's approach was born out of reluctance to adopt a standard under exemption 3 and the National Security Act that is "susceptible to discretionary application and overbroad interpretation." *Id.* at 87 (footnote omitted).

The Supreme Court agreed with the United States Court of Appeals for the District of Columbia Circuit that the Security Act qualifies as an exemption 3 statute.¹⁷⁴ It rejected, however, the court of appeals' definition of "intelligence sources."¹⁷⁵ The lower court had adopted a need-for-confidentiality test under which the courts were independently to appraise the actual necessity of withholding the requested information.¹⁷⁶ The Supreme Court rejected this test for two reasons: the wide-ranging scope of modern intelligence gathering,¹⁷⁷ and the CIA's expertise in assessing the need for confidentiality in matters involving national security.¹⁷⁸

Recognizing that "secret agents as depicted in novels and the media are not the typical intelligence source,"¹⁷⁹ the Court read the Security

174. *Sims*, 105 S. Ct. at 1887. See also *Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984) (Security Act is an exemption 3 statute); *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982) ("It is settled, in this court, that [the Security Act] is a statute falling within Exemption 3."); *National Comm'n on Law Enforcement and Social Justice v. CIA*, 576 F.2d 1373, 1376 (9th Cir. 1978) ("We conclude that [the Security Act] describe[s] . . . with sufficient particularity the types of information to be withheld [as required under exemption 3]."); *Navasky v. CIA*, 499 F. Supp. 269, 273-275 (S.D.N.Y. 1980) (nondisclosure of "intelligence sources" proper under exemption 3).

175. *Sims*, 105 S. Ct. at 1890-91.

176. *Sims v. CIA*, 642 F.2d 562, 569-71 (D.C. Cir. 1980). The court of appeals defined "intelligence source" as "a person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it." *Id.* at 571. The court relied on a "mosaic of relevant statutory enactments" in adopting this narrow definition, concluding that absent a strict standard focusing on the "practical necessity of secrecy," the CIA would possess a degree of discretion over the disclosure of requested records that is inconsistent with the FOIA. *Id.* at 569-71.

The attempt to limit the Agency's discretion was even more explicit when the case came before the court of appeals for the second time. Insisting upon an independent judgment by the reviewing court as to the practical necessity for withholding, the appellate court held that explicit guarantees of confidentiality by the Agency to those who provide information to the CIA were not dispositive of the submitter's status as an intelligence source. In determining whether a person or entity supplying information to the CIA is an "intelligence source," the court must focus its attention on the type of information supplied. This demanding standard of review was premised on two considerations: (1) an automatic exemption based on CIA guarantees of confidentiality creates a "serious potential for widespread evasion of the letter and spirit of the FOIA"; and (2) if national security concerns were implicated by the disclosure of an informant's identity, the CIA may classify the document, rendering it exempt from disclosure under exemption 1. *Sims v. CIA*, 709 F.2d 95, 99 (D.C. Cir. 1983).

177. *Sims*, 105 S. Ct. at 1888. ("Congress knew quite well that the Agency would gather intelligence from almost an infinite variety of diverse sources.").

178. *Id.* at 1888.

179. *Id.* To underscore the breadth of protected sources of information under the National Security Act, the Court noted that even the fact of a CIA subscription to "an obscure but publicly available Eastern European technical journal," if disclosed, "could thwart the Agency's efforts to exploit its value as a source of intelligence information." *Id.* at 1892. But see *Navasky v. CIA*, 499 F. Supp. 269, 275 (S.D.N.Y. 1980) (intelligence is essentially "original collection of information"; the National Security Act is not applicable to "authors, publishers and books involved in clandestine propaganda").

Act broadly:

The "plain meaning" of [section] 102(d)(3) may not be squared with any limiting definition that goes beyond the statutory requirement that the information fall within the Agency's mandate to conduct foreign intelligence Section 102(d)(3) contains no such limiting language. Congress simply and pointedly protected all sources of intelligence that provide, or are engaged to provide, information the Agency needs to perform its statutory duties with respect to foreign intelligence.¹⁸⁰

Using this definition, the Court held that the Agency's decision to undertake the MKULTRA project was a reasonable exercise of its statutory intelligence function.¹⁸¹ Having established this nexus between the information provided by the researchers and the performance of an intelligence function by the Agency, the Court concluded that the researchers' names and institutional affiliations were both exempt from disclosure.¹⁸² Noting that the Security Act commanded the Director of Central Intelligence to protect intelligence sources from *unauthorized* disclosure, the Court held the institutional affiliations to be exempt because the CIA "has power to withhold superficially innocuous information on the grounds that it might enable an observer to discover the identity of an intelligence source."¹⁸³

The Court's view of the broad-ranging nature of modern intelligence gathering also led it to defer to the CIA's expertise in determining the types of information that may compromise national security,¹⁸⁴ holding that where such a question arises, a statute—in this case, the Security Act—may be found to fall within exemption 3 even if it fails to place strict limits on an agency's discretion to withhold information requested under the FOIA.¹⁸⁵ The same considerations led the Court to hold that,

180. *Sims*, 105 S. Ct. at 1888. Justice Marshall rejected the notion that the term "intelligence sources" is self-defining by its "plain meaning." "'[P]lain meaning, like beauty, is sometimes in the eye of the beholder,' and in an instance such as this one, in which the term at issue carries with it more than one plausible meaning, it is simply inappropriate to select a single reading and label it the 'plain meaning.'" *Id.* at 1897 (Marshall, J., concurring) (quoting *Florida Power & Light Co. v. Larion*, 105 S. Ct. 1598, 1605 (1985) (citations omitted)).

181. *Id.* at 1890 ("[T]he record shows that the MKULTRA research was related to the Agency's intelligence-gathering function in part because it revealed information about the ability of foreign governments to use drugs and other biological, chemical, or physical agents in warfare or intelligence operations against adversaries.").

182. *Id.* at 1892, 1894.

183. *Id.* at 1893.

184. See *infra* note 186 and accompanying text.

185. *Sims*, 105 S. Ct. at 1891 ("The dangerous consequences of [a narrow interpretation of the Security Act] suggest why Congress chose to vest the Director of Central Intelligence with the *broad discretion* to safeguard the Agency's sources and methods of operation.") (emphasis added). Cf. *Long v. IRS*, 742 F.2d 1173, 1182 (9th Cir. 1984) (existence of exemption 3 statute does not suggest a lowered standard of review; full de novo review is appropriate); *Church of Scientology v. United States Postal Serv.*, 633 F.2d 1327, 1330 (9th Cir. 1980) (Postal Reorganization Act, 39 U.S.C.

within the ill-defined parameters of "national security," the CIA's burden of justification in withholding requested information is significantly less than that triggered by the typical FOIA request:

The decisions of the Director [of Central Intelligence], who must of course be familiar with "the whole picture," as judges are not, are worthy of *great deference* given the magnitude of the national security interests and potential risks at stake. It is conceivable that the *mere explanation* of why information must be withheld can convey valuable information to a foreign intelligence agency.¹⁸⁶

The Court's decision in *Sims* illustrates the uneasiness of the federal judiciary when it is asked to rule on agency disclosure decisions allegedly

§ 410(c)(6) is not an exemption 3 statute because it leaves agency with "complete discretion" to grant or withhold investigatory files); *American Jewish Congress v. Kreps*, 574 F.2d 624, 628-29 (D.C. Cir. 1978) (to qualify as an exemption 3 statute, the legislation must prescribe "a formula whereby the administrator may determine precisely whether disclosure in any instance would pose the hazard that Congress foresaw"). In contrast to these decisions, the Supreme Court's decision in *Sims* indicates that broad discretionary authority to withhold information in a non-FOIA statute does not defeat the exemption 3 status of that statute.

186. *Sims*, 105 S. Ct. at 1893 (emphasis added). The Court repeatedly alluded to the lack of judicial competence to evaluate national security claims. *See id.* at 1891 ("We seriously doubt whether a potential intelligence source will rest assured knowing that judges, who have little or no background in the delicate business of intelligence gathering, will order his identity revealed only after examining the facts . . . to determine whether the Agency actually needed to promise confidentiality in order to obtain the information."); *id.* ("There is no reason for a potential intelligence source, whose welfare and safety may be at stake, to have great confidence in the ability of judges to make those judgments correctly."); *id.* at 1894 ("[I]t is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process."). *See also* *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980) (federal judiciary "lack[s] the expertise necessary to second guess such agency opinions in the typical national security FOIA case"); *Katz v. Webster*, No. 82-1092, slip op. at 6 (S.D.N.Y. May 20, 1985) ("Determinations of what is not appropriately protected in the interests of national security involves [sic] an analysis where intuition must often control in the absence of hard evidence. This intuition develops from experience quite unlike that of most judges . . .") (quoting *Klaus v. Blake*, 428 F. Supp. 37, 38 (D.D.C. 1976)).

To be compared with the Court's lack of confidence in the judiciary's ability to discern overbroad agency withholding under the banner of national security are the expressions of confidence in the courts made by members of Congress during the 1974 amendment of the FOIA. *See, e.g.*, *FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974* (P.L. 93-502), *SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS* 449 (Joint Comm. Print 1975) (remarks of Sen. Muskie) ("I cannot understand why we should trust a Federal judge to sort out valid from invalid claims of executive privilege in litigation involving criminal conduct, but not trust him or his colleagues to make the same unfettered judgments in matters allegedly connected to the conduct of foreign policy.") [hereinafter *SOURCE BOOK*]; *id.* at 461 (remarks of Sen. Baker) ("In balancing the minimal risks that a Federal judge might disclose legitimate national security information against the potential for mischief and criminal activity under the cloak of secrecy, I must conclude that a fully informed citizenry provides the most secure protection for democracy."). These views apparently prevailed. President Ford vetoed the amendments, proposing in their stead a "reasonable basis" standard of judicial review under exemption 1. Congress responded by overriding the veto by a vote of 371 to 31. *Id.* at 431.

made in the interest of national security.¹⁸⁷ *Sims* adopted a flexible approach under exemption 3 that is a significant addition to the already broad protection available to the CIA under the FOIA's exemption 1 exclusion for matters involving national security.¹⁸⁸ As a result, the Court has given the CIA an indeterminate degree of latitude in making

187. See *infra* note 188 and accompanying text.

188. The majority was concerned that national security would be compromised under the need-for-confidentiality test proposed by the court of appeals. *Sims*, 105 S. Ct. at 1887-88. Justice Marshall, in a concurring opinion, agreed that the standard adopted by the court of appeals was too narrow, but disagreed with the majority on the national security issue. Justice Marshall argued that exemption 1 provided adequate protection: "Exemption 1 is the keystone of a congressional scheme that balances deference to the Executive's interest in maintaining secrecy with continued judicial and congressional oversight." *Sims*, 105 S. Ct. at 1895 (Marshall, J., concurring). Justice Marshall was also uncomfortable with what he referred to as "a curious example of the Government's litigation strategy." *Id.* at 1895 n.3. He noted that:

Exemption 1 . . . plays a crucial role in the protection of Central Intelligence Agency Information. That the Court does not mention this exemption even once, in the course of its lengthy analysis on the *policy* reasons for broadly interpreting the "intelligence source" provision, is extraordinary. By focusing myopically on the single statutory provision on which the Agency has chosen to rely . . . , the Court rewards the agency's decision not to invoke Exemption 1 in this case. . . . The cost of acceding to the Agency's litigation strategy, rather than undertaking a thorough analysis of the entire statutory scheme, is to manage, seriously, a carefully crafted statutory scheme.

Id. at 1895-96 (footnote omitted).

The exemption 1 alternative clearly concerned the district court and the court of appeals as well. In its first opinion, the trial court noted that "the policy objectives which concern the Director might very well be accommodated by classifying the [records] . . . so that the [records] would be exempt from disclosure by 5 U.S.C. § 552(b)(1)." *Sims v. CIA*, 479 F. Supp. 84, 88 (D.D.C. 1979) (footnote omitted). That court went so far as to delay the effective date of the disclosure order so as to permit the agency to reexamine the documents and prepare the exemption 1 claim. *Id.*; see also *Sims v. CIA*, 642 F.2d 562, 567-68 (D.C. Cir. 1980).

Of course, there is no reason why the CIA may not independently invoke exemption 3. *Sims*, 642 F.2d at 567-68. In fact, the courts have treated exemption 3 and the Security Act in much the same fashion as exemption 1 claims. See, e.g., *Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978) (exemption 1 considerations "also apply to Exemption 3 when the statute providing criteria for withholding is in furtherance of national security interests"). Justice Marshall was concerned that the majority's decision "enables the Agency to avoid making the showing required under the carefully crafted balance embodied in Exemption 1 and thereby thwarts Congress' effort to limit the Agency's discretion." *Sims*, 105 S. Ct. at 1898 (Marshall, J., concurring); see also *United States Student Ass'n v. CIA*, 620 F. Supp. 565, 570 (D.D.C. 1985) (citing *Sims* for the proposition that "Exemption 3 casts a much wider net than the more technical Exemption 1"). Under exemption 3, the agency avoids the cumbersome classification and court procedures required under exemption 1, yet still receives the wide-ranging disclosure prerogatives that accompany exemption 1.

Realistically, however, the deference paid to agencies by the federal courts in exemption 1 claims vitiates the practical force of Justice Marshall's argument. The 1985 cases decided under exemption 1 demonstrate that the courts are following the trend toward a very deferential standard of review noticed in Comment, *supra* note 58, at 429-37. These courts have adopted what is tantamount to a rational basis test in determining whether an agency has properly withheld classified records. In *Abbotts v. Nuclear Regulatory Comm'n*, 766 F.2d 604 (D.C. Cir. 1985), for example, the court of appeals held that "plausible" and "uncontradicted" assertions set forth in agency affidavits are sufficient to grant summary judgment for the withholding agency. *Id.* at 608 (quoting *Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984)). The *Abbotts* court established the following standard of review under exemption 1:

disclosure decisions within the context of intelligence-gathering and the Court's "great deference" standard may encourage the CIA to assert national security justifications in an effort to hide improvident agency behavior.¹⁸⁹

[A]n agency is entitled to summary judgment if its affidavits "describe the withheld information and the justification for withholding with reasonable specificity, demonstrating a logical connection between the information and the claimed exemption," and "are not controverted by either contrary evidence in the record nor [sic] by evidence of agency bad faith."

Abbotts, 766 F.2d at 606 (quoting *Salisbury v. United States*, 690 F.2d 966, 970 (D.C. Cir. 1982)) (citations omitted). See also *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)).

While this standard indicates that agency classification decisions may be overturned by the courts in theory, the practical difficulties faced by the FOIA plaintiff in producing sufficient evidence render this possibility a metaphysical one at best. For examples of the extreme burden a FOIA plaintiff must carry in exemption 1 cases, see *Abbotts*, 766 F.2d at 607 n.3 (reversing lower court for "not giv[ing] the required 'substantial weight' " to agency affidavits); *Katz v. Webster*, No. 82-1092, slip op. at 6 (S.D.N.Y. May 20, 1985) ("The national security issue is necessarily speculative. Intelligence deals with possibilities.") (quoting *Klaus v. Blake*, 428 F. Supp. 37, 38 (D.D.C. 1976)). See generally 1 J. O'REILLY, *FEDERAL INFORMATION DISCLOSURE*, § 11.13 (1977 & Supp. 1979) ("discovery motion practice will be the key to success" for FOIA plaintiffs in exemption 1 cases); Comment, *supra* note 58, at 430-31.

Other 1985 decisions have adopted the *Abbotts* standard of review. See *Doherty v. United States Dep't of Justice*, 775 F.2d 49, 52-53 (2d Cir. 1985) (summary judgment appropriate if "documents withheld logically fall within the claimed exemption" and there is "no doubt as to agency good faith"); *United States Student Ass'n v. CIA*, 620 F. Supp. 565, 569 (D.D.C. 1985) (test is whether "a logical connection" exists "between the information [and] the claimed exemption") (quoting *Salisbury v. United States*, 690 F.2d 966, 970 (D.C. Cir. 1982)).

The adoption of a "reasonable basis" standard is curious in light of the legislative history of the 1974 amendments to the FOIA. In passing these amendments, Congress rejected an explicit appeal by the Ford administration urging the legislators to adopt such a standard. See SOURCE BOOK, *supra* note 186, at 431-34, 484 (Congress voted to override President Ford's veto of the amendments; veto message proposed "reasonable basis" standard). The amendments in 1974 to exemption 1 and in 1976 to exemption 3 were born of congressional dissatisfaction with the judiciary's reluctance to independently evaluate agency decisions to withhold. See, e.g., *Allen v. CIA*, 636 F.2d 1287, 1294 (D.C. Cir. 1980) (discussing legislative history of 1974 and 1976 FOIA amendments); *Ray v. Turner*, 587 F.2d 1187, 1199-214 (D.C. Cir. 1978) (Wright, C.J., concurring) (extensive discussion of the FOIA's legislative history, with emphasis on the amendments); see also *supra* note 187.

189. The only limit that the FOIA places on the CIA in protecting its sources of information is that the information provided must be reasonably related to the agency's statutory intelligence function. See *supra* note 181 and accompanying text. Yet, the Court goes on to state that if disclosure of information could possibly lead to the exposure of an intelligence source, such information is also protected under the Security Act. See *supra* note 185 and accompanying text. As Justice Marshall observed, "the class that the Court defines is boundless. It is difficult to conceive of anything the Central Intelligence Agency might have within its many files that might not disclose or enable an observer to discover something about where the Agency gathers information." *Sims*, 105 S. Ct. at 1899 (Marshall, J., concurring). Even claims that certain CIA activities are *ultra vires* do not seem capable of defeating the Agency's withholding. See, e.g., *Navasky v. CIA*, 499 F. Supp. 269, 274 (S.D.N.Y. 1980) ("claim of activities *ultra vires* the CIA charter is irrelevant to an exemption 3 claim"); see also *Founding Church of Scientology v. National Sec. Agency*, 610 F.2d 824, 829 n.49 (D.C. Cir. 1979) ("Although NSA would have no protectable interest in suppressing information simply because its release might uncloak an illegal operation, it may properly withhold records gathered illegally if divulgence would reveal currently viable information channels . . ."). In this respect the *Sims* requirement of a nexus between some identifiable intelligence function and the requested

C. *Privileged and Confidential Commercial Information.*

Under exemption 4, agencies may withhold from FOIA requesters "trade secrets and commercial or financial information obtained from a person and privileged or confidential."¹⁹⁰ This exemption has been narrowly construed by the courts, which have found its legislative history uninformative.¹⁹¹ Although the courts of appeals take various approaches to the question of what may be considered a "trade secret,"¹⁹² the courts generally find that the "commercial or financial information" and "submitted by a person" requirements are satisfied if the information fits the ordinary meaning of those terms.¹⁹³

Courts have generally defined the scope of the terms "privileged and confidential" in exemption 4 according to the objective test established in

information evaporates under the additional inquiry whether disclosure would allow one to reconstruct the source of the information on the basis of "superficially innocuous information." The CIA could simply assert that the source engaged in the ultra vires activity in question has or is currently engaged in a legitimate intelligence operation and is thus deserving of continued protection in the form of nondisclosure.

190. 5 U.S.C. § 552(b)(4) (1982). In order for agency records to fall within the exemption they must meet each of the statutory requirements: (1) they must involve a "trade secret" that is "commercial or financial" in nature, (2) that was submitted by a "person," and (3) which is "privileged" or "confidential." See *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983); *Washington Post Co. v. United States Dep't of Health & Human Servs.*, 690 F.2d 252, 266 (D.C. Cir. 1982); *Board of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 403 (D.C. Cir. 1980); *Washington Research Project, Inc. v. HEW*, 504 F.2d 238, 244-45 n.6 (D.C. Cir. 1974); *Getman v. NLRB*, 450 F.2d 670, 673 (D.C. Cir.), *stay denied*, 404 U.S. 1204 (1971).

191. See, e.g., 9 to 5 Org. for Women Office Workers v. Board of Governors of the Federal Reserve, 721 F.2d 1 (1st Cir. 1983) ("At least part of the confusion surrounding exemption 4 must be attributed to what has been described as 'the tortured, not to say obfuscating, legislative history of the FOIA . . .'" (quoting *American Airlines, Inc. v. National Mediation Bd.*, 588 F.2d 863, 865 (2d Cir. 1978)); *Brockway v. Department of the Air Force*, 518 F.2d 1184, 1189 (8th Cir. 1975) ("The tendency has been to grant little weight to [the legislative history of Exemption 4]."); see generally Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1061-62 (1975) ("Although [exemption 4's] language and legislative history would permit [its application] to a wide range of information, the courts have limited its application.").

192. See Note, *Developments—1983*, *supra* note 58, at 405-07.

193. For discussion of the meaning of "commercial or financial" as those terms are used in exemption 4, see *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983); *Washington Post Co. v. United States Dep't of Health & Human Servs.*, 690 F.2d 252, 266 (D.C. Cir. 1982). One area of controversy concerns information submitted by nonprofit organizations. Compare *Washington Research Project, Inc. v. HEW*, 504 F.2d 238, 244-45 (D.C. Cir. 1974) (information provided by nonprofit organization is not "commercial or financial") with *American Airlines, Inc. v. National Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978) (term "commercial" includes information "pertaining or relating to or dealing with commerce").

The only significant exclusion from exemption 4 arising from the requirement that information be "submitted by a person" is information generated by the government. See *Grumman Aircraft Eng'g Corp. v. Renegotiation Bd.*, 425 F.2d 578, 582 (D.C. Cir. 1970); *Consumers Union of the United States v. Veterans Admin.*, 301 F. Supp. 796, 803 (S.D.N.Y. 1969), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971).

National Parks and Conservation Association v. Morton:¹⁹⁴

[C]ommercial or financial matter is "confidential" for purposes of [exemption 4] if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.¹⁹⁵

Although the distinction has received scant judicial treatment,¹⁹⁶ it is clear that the term "privileged" is not synonymous with "confidential."¹⁹⁷ The legislative history of exemption 4 indicates that the term "privileged" was intended to shield from disclosure "information customarily subject to the doctor-patient, lawyer-client, or lender-borrower privileges"—privileges that arise from concerns distinguishable from those addressed in *National Parks*.¹⁹⁸ Two judicial decisions in 1985 indicate that the "privileges" recognized in exemption 4 may have far-reaching effects on the ability of agencies to withhold commercial and financial information.

In a "reverse FOIA" case, *Sharyland Water Supply Corp. v. Block*,¹⁹⁹ the United States Court of Appeals for the Fifth Circuit defined the scope of the exemption 4 "privilege." The plaintiff, Sharyland Water Supply Corporation ("Sharyland") brought suit to enjoin disclosure of audit reports the corporation had filed with the Farmers Home Adminis-

194. 498 F.2d 765 (D.C. Cir. 1974). See GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS: 1984 SUPPLEMENT 31-32 (R. Bouchard ed. 1984) ("[E]arlier tests have been superseded by the rule of *National Parks*, . . . the leading case on the issue of 'confidentiality' under Exemption 4.") (citation omitted).

195. *National Parks*, 498 F.2d at 770 (footnotes omitted).

196. Two district court cases have discussed the "privileged" component of exemption 4. In *Indian Law Resource Center v. Department of the Interior*, 477 F. Supp. 144, 148 (D.D.C. 1979), the court upheld agency nondisclosure of work performed by a law firm for the Hopi Indians on the ground that the information was "privileged" commercial information. The "attorney-client" privilege was again recognized under exemption 4 in *Miller, Anderson, Nash, Yerke & Weiner v. United States Dep't of Energy*, 499 F. Supp. 767, 770-71 (D. Or. 1980).

197. *Washington Post Co. v. United States Dep't of Health & Human Servs.*, 690 F.2d 252, 267 n.50 (D.C. Cir. 1982).

198. H. REP. NO. 1497, 89th Cong., 2d Sess. 10, reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2418, 2427. The report states that exemption 4

would assure the confidentiality of information obtained by the Government through questionnaires or through material submitted and disclosures made in procedures such as the mediation of labor-management controversies. It exempts such material if it would not customarily be made public by the person from whom it was obtained It would include information customarily subject to the doctor-patient, lawyer-client, or lender-borrower privileges such as technical or financial data submitted by an applicant to a Government lending or loan guarantee agency. It would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations.

Id. (footnotes omitted).

199. 755 F.2d 397 (5th Cir. 1985).

tration (FHA).²⁰⁰ The FHA had previously agreed to release the reports to parties in litigation with Sharyland in pending state court proceedings.²⁰¹ The FOIA request was submitted after the state court refused to order discovery of the disputed documents.²⁰² Sharyland argued before the court of appeals that the report constituted privileged and confidential financial information protected from disclosure by exemption 4.²⁰³

Using a variation of the *National Parks* test, the court of appeals accepted the district court's finding that disclosure was not likely to impair Sharyland's competitive position.²⁰⁴ The information in question, therefore, could not be considered "confidential."²⁰⁵ Sharyland argued that the information was nonetheless exempt from disclosure under the lender-borrower privilege recognized in the legislative history of exemption 4.²⁰⁶

The court of appeals rejected this argument. It held that "the term 'privileged' refers only to privileges created by the Constitution, statute, or the common law" and concluded that "[n]one of these sources recognizes a lender-borrower privilege."²⁰⁷

To an extent, the Fifth Circuit construes the privileges protected in exemption 4 in the same way that the Supreme Court construed the scope of exemption 5 in *United States v. Weber Aircraft Corp.*²⁰⁸ In *Weber Aircraft*, the Court held that the privileges mentioned in the legislative history were not an exclusive list.²⁰⁹ Rather, it held that exemp-

200. *Id.* at 398.

201. *Id.*

202. *Id.*

203. *Id.* at 398-99.

204. *Id.*

205. *Id.* at 399.

206. *Id.*

207. *Id.* at 400 (footnotes omitted). The court noted that the House report referring to specific privileges, *see supra* note 236, was made in reference to an earlier bill preceding the introduction of the terms "commercial or financial" to the language of exemption 4. The addition of these terms without modifications of the congressional reports led the court to conclude that the FOIA "creates no privileges . . . [.] neither does it diminish those existing." *Id.* (quoting Chamber of Commerce of the United States v. Legal Aid Soc'y, 423 U.S. 1309, 1310 (1975)).

208. 465 U.S. 792 (1984).

209. *Id.* at 802. Unlike that of *Weber Aircraft*, however, the rationale of *Sharyland* directly contradicts that of Congress as revealed in the legislative history. *Weber Aircraft* did not reject the privileges recognized in the legislative history, but held that those mentioned provided but "rough analogies." *Id.* (citing *EPA v. Mink*, 410 U.S. 73, 86 (1973)); *see also* Note, *Developments—1984*, *supra* note 2, at 764-66 (discussing *Weber Aircraft*). The *Sharyland* court, however, rejected a privilege recognized in the legislative history, *Sharyland*, 755 F.2d at 400, stating: "[W]e are not inclined to subordinate the unambiguous language of the statute to clearly contradictory legislative history. To hold otherwise would be to undermine the principle that enacted legislation should be generally considered the final and authoritative expression of the will of Congress on a matter." *Id.* (quoting *Brockway v. Department of Air Force*, 518 F.2d 1184, 1189 (8th Cir. 1975)). The court's reasoning in this respect is perplexing. The statutory language of exemption 4 neither defines nor offers any

tion 5 incorporates well-recognized statutory and common law privileges.²¹⁰ Unlike *Weber Aircraft*, however, the *Sharyland* court gave little weight to the fact that the FOIA was being used to circumvent discovery limitations placed on the FOIA requester;²¹¹ the court's opinion did not discuss the possibility that privileges against discovery might be recognized in exemption 4. As a consequence, the *Sharyland* court upheld the district court's refusal to enjoin the FHA's disclosure of the reports.²¹²

In contrast, in *Washington Post Co. v. Department of Health and Human Services*,²¹³ the federal district court in the District of Columbia Circuit held that "[*Weber Aircraft's*] analytical approach to the incorporation of discovery privileges into Exemption 5 applies equally in the Exemption 4 context."²¹⁴

The plaintiff in *Washington Post* sought disclosure of forms entitled "Confidential Statement of Employment and Financial Interest" (Form 474). These forms were submitted to the Department of Health and Human Services (HHS) by members of the advisory boards and committees of the National Cancer Institute, a division of the National Institute of Health²¹⁵ as required by the Ethics in Government Act.²¹⁶ Because the forms require a list of the consultants' financial interests, they qualify

guidance whatsoever on what the term "privileged" is meant to embrace. Thus, it is difficult to see how it excludes privileges explicitly mentioned in the legislative history.

210. *Weber Aircraft*, 465 U.S. at 800-02.

211. In *Weber Aircraft*, the Court noted that it "would create an anomaly [if] the FOIA could be used to supplement civil discovery." *Id.* at 801 (citing *Baldrige v. Shapiro*, 455 U.S. 345, 360 n.14 (1982)).

212. *Sharyland*, 755 F.2d at 400.

In looking to FOIA exemption 4 as a source for challenging the propriety of the FHA's decision to disclose the audit reports, the court failed to consider whether the FOIA may properly be invoked by a plaintiff seeking to halt agency disclosure of information. The Supreme Court has squarely held that the FOIA provides no cause of action for persons seeking such relief. *Chrysler Corp. v. Brown*, 441 U.S. 281, 292 (1979); see also *infra* notes 253-57 and accompanying text. The FOIA exemptions define the parameters of an agency's discretion to withhold information; the exemptions do not require an agency to withhold information that falls within their terms. *Chrysler*, 441 U.S. at 291-92. An agency's decision to *disclose* information is unassailable under the FOIA, even by the person who submitted the information to the agency in the first instance. *Id.* *Sharyland* is important nonetheless; it is the only appellate decision to squarely consider the meaning of the term "privileged" in exemption 4.

213. 603 F. Supp. 235 (D.D.C. 1985).

214. *Id.* at 238 n.10.

215. *Id.* at 236.

216. 5 U.S.C. app. § 201(j) (1982 & Supp. II 1984). Form 474 contains a "limited pledge of confidentiality," indicating that the submitted information may be disclosed "for good cause" at the discretion of the chairman of the Civil Service Commission or the head of the "principal operating component or designee." See *Washington Post*, 603 F. Supp. at 236 (quoting Form 474).

as "financial information obtained from a person" under exemption 4.²¹⁷ The significant issue in *Washington Post*, therefore, was whether the forms were "privileged."

In holding that Form 474 information is "privileged" under exemption 4, the district court relied on *Weber Aircraft* and an earlier decision by the United States Court of Appeals for the District of Columbia Circuit²¹⁸ recognizing a "confidential report privilege."²¹⁹ The earlier case had held that a completed Form 474 was not discoverable under Rule 26(b)(1) of the Federal Rules of Civil Procedure.²²⁰ In upholding the agency's decision to withhold the forms, the *Washington Post* court reasoned that "the policies underlying this discovery privilege would be thwarted if a party could obtain through the FOIA information not discoverable under the Federal Rules."²²¹

Although the scope of the "confidential report privilege" is uncertain,²²² *Washington Post* may signal a significant shift in the treatment given commercial information under exemption 4. Such a shift would afford broader protection of commercial information submitted to the government than does the narrower reading traditionally given exemption 4 under the *National Parks* test.

D. Exemption 5 and "Inter-agency or Intra-agency" Memoranda.

In 1985, two decisions construing exemption 5²²³ of the FOIA held that the corpus of well-established discovery privileges incorporated into exemption 5 in *United States v. Weber Aircraft Corp.*²²⁴ is inapplicable if the withheld records are not "inter-agency or intra-agency memorandums or letters."²²⁵

217. See *Washington Post Co. v. United States Dep't of Health & Human Servs.*, 690 F.2d 252, 266 (D.C. Cir. 1982) (list of financial interests required under Form 474 includes "financial" information within exemption 4).

218. *Association for Women in Science v. Califano*, 566 F.2d 339 (D.C. Cir. 1977). The *Women in Science* court held that the "confidential report privilege" may be invoked only by the government and only in situations where it is necessary to ensure that the government will receive the type of information that is contained in the disputed record. *Id.* at 343-44.

219. See *Washington Post*, 603 F. Supp. at 238.

220. *Association for Women in Science v. Califano*, 566 F.2d 339, 348 (D.C. Cir. 1977).

221. *Washington Post*, 603 F. Supp. at 239.

222. See generally Note, *Discovery of Government Documents and the Official Information Privilege*, 76 COLUM. L. REV. 142, 149-52 (1976).

223. *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982 (9th Cir. 1985); *NAACP Legal Defense & Educ. Fund v. United States Dep't of Justice*, 612 F. Supp. 1143 (D.D.C. 1985).

224. 465 U.S. 792, 798-800 (1984).

225. Exemption 5 allows an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5) (1982).

In *Van Bourg, Allen, Weinberg & Roger v. NLRB*,²²⁶ the United States Court of Appeals for the Ninth Circuit noted that

Weber did not decide what constitutes internal agency documents; the decision expressly left open the question whether exemption 5 could cover documents submitted to an agency by persons outside the government. *Weber* stands for the proposition that once it is determined that internal agency documents are involved, exemption 5 incorporates all civil discovery privileges.²²⁷

At issue in *Van Bourg* were affidavits submitted to the NLRB as part of an unfair labor practices investigation.²²⁸ In addition to arguing that these documents could be withheld under exemption 7(c), the NLRB argued that they were immune from civil discovery and thus, under *Weber Aircraft*, came within exemption 5.²²⁹

The court of appeals disagreed,²³⁰ holding that statements that are made by witnesses who are not agency employees²³¹ and that are not prepared by an agency as internal documents or for use in litigation are not "internal agency" documents; thus, they do not meet the threshold test of exemption 5.²³² Having found that the documents failed to meet the first of exemption 5's requirements, the court declined to address the question of whether any civil discovery privileges might apply to the records.²³³

The district court in the District of Columbia Circuit reached a similar conclusion in *NAACP Legal Defense and Educational Fund v. United States Department of Justice*.²³⁴ After the Supreme Court decided *Fire Fighters Local Union No. 1784 v. Stotts*,²³⁵ the Department of Justice sent letters to fifty local governments seeking voluntary modification of affirmative action provisions arrived at in consent decrees to which these governments were subject.²³⁶ The plaintiff in this case sought copies of the letters sent by local governments in reply to these Department of

226. 751 F.2d 982 (9th Cir. 1985).

227. *Id.* at 984-85 (citations omitted).

228. *Id.* at 983.

229. *Id.* at 983-84.

230. *Id.* at 985.

231. *Cf. Weber Aircraft*, 465 U.S. at 798 n.13 ("[T]he material at issue here includes only statements made by Air Force personnel.").

232. *Van Bourg*, 751 F.2d at 985.

233. *Id.*

234. 612 F. Supp. 1143 (D.D.C. 1985).

235. 104 S. Ct. 2576 (1984). In *Stotts*, the Supreme Court held that a district court may not, for the sake of an affirmative action program, order a municipality to bypass a bona fide seniority system. The Court held that title VII "permits the routine application of a seniority system absent proof of an intention to discriminate." *Id.* at 2587.

236. *NAACP Legal Defense*, 612 F. Supp. at 1144.

Justice inquiries.²³⁷

The Department refused to disclose five of the requested documents.²³⁸ Because these reply letters were part of settlement negotiations, the Department argued that they were immune from civil discovery and that therefore, under *Weber Aircraft*, exemption 5 shielded the Department's withholding decision.²³⁹ As in *Van Bourg*, the court in *NAACP Legal Defense* found that the Department had failed to satisfy the threshold requirement of exemption 5; the documents were "clearly not inter or intra-agency memoranda."²⁴⁰ Even assuming that the initial inquiry had been satisfied, the court noted, the "negotiation privilege" recognized in Rule 408 of the Federal Rules of Evidence²⁴¹ failed to meet the standard of *Weber Aircraft*.²⁴² Rule 408 merely "limits a document's relevance at trial, not its disclosure for other purposes."²⁴³

Van Bourg and *NAACP Legal Defense* both focused on the *source* of the requested information in determining whether agency withholding met with the requirements of exemption 5. The information in these cases was acquired by the withholding agencies from sources independent from the agencies themselves, and it was this factor that disqualified the exemption's application.²⁴⁴ Other cases, however, have seemed to

237. *Id.*

238. *Id.*

239. *Id.* at 1145.

240. *Id.* at 1146. In examining case law on the issue, the court concluded that in order for a document to fall within the exemption, the "author" of the requested document must be "part of a federal agency or acting in consultation with the agency." *Id.* See also *Hoover v. United States Dep't of the Interior*, 611 F.2d 1132, 1138 (5th Cir. 1980) (advice received from outside consultants "plays an integral function in the government's decision" and is exempt under (b)(5)); *Lead Industries Ass'n v. OSHA*, 610 F.2d 70, 83-84 (2d Cir. 1979) (information obtained from private consultant held exempt under (b)(5)); *Brush Wellman, Inc. v. Department of Labor*, 500 F. Supp. 519, 522 (N.D. Ohio 1980) (memos from technical contract consultant receive exemption 5 protection); *Mobil Oil Corp. v. FTC*, 406 F. Supp. 305, 314-15 (S.D.N.Y. 1976) (advice from state government agencies is exempt under (b)(5)).

241. FED. R. EVID. 408.

242. *NAACP Legal Defense*, 612 F. Supp. at 1146 ("[T]he documents at issue . . . are not protected by some long-standing or universally recognized privilege.").

243. *Id.* (quoting *Center for Auto Safety v. Department of Justice*, 576 F. Supp. 739, 749 (D.D.C. 1983); see also *id.* at 1146 n.1 (quoting 2 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* 408[01], at 408-14 (1985)) ("It should be pointed out that the rule should not be construed so as to render evidence otherwise discoverable, inadmissible solely because it was presented during settlement negotiations. The policy of allowing open and free negotiations between parties by excluding conduct or statements made during the course of these discussions is not intended to conflict with the liberal rules of discovery embodied in the Federal Rules of Civil Procedure.").

244. See *Van Bourg*, 751 F.2d at 985 ("None of the six contested documents was prepared as an internal document, by an NLRB official, or for any NLRB attorney as part of litigation. Documents submitted by private parties in the course of an unfair labor practices investigation are not internal agency documents."); *NAACP Legal Defense*, 612 F. Supp. at 1146 ("None of the entities which authored the letters in question could be viewed as being part of a federal agency or acting in consultation with the agency.").

disregard the source of the information; they have instead looked to the use to which the agency applies the information.²⁴⁵ In 1985, in *Badhwar v. United States Department of the Air Force*,²⁴⁶ for example, a district court upheld an agency's decision to withhold statements made by persons who had witnessed military air accidents. Without considering whether these statements were internal agency documents, the court found exemption 5 applicable on the basis of *Weber Aircraft*.²⁴⁷

The *Badhwar* court focused on how the agency used the witnesses' statements.²⁴⁸ The agency incorporated the statements into a safety board report which itself contained intra-agency recommendations. These reports were then forwarded within the agency to those responsible for instituting corrective measures.²⁴⁹ In such a situation, there would seem to be little doubt that the documents are "deliberative, predecisional, and exempt from disclosure" as internal agency documents.²⁵⁰ The difficult issue is whether documents or statements submitted to an agency by persons independent of that agency are transformed into "intra-agency memorandums" by virtue of their inclusion in internal agency reports.

The 1985 decisions in the lower courts indicate that the expansive pressure on exemption 5 created by *Weber Aircraft* may be offset by more searching inquiries into the source of the record in question and the use made of it by the withholding agency. While *Weber Aircraft* limited

245. See, e.g., *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 187 (1975) (recommendations of a regional board fall within "intra-agency memorandum" category because they are "functionally indistinguishable from the recommendation[s] of any agency staff member whose judgment has earned the respect of a decision-maker"); *Ryan v. Department of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980) ("Congress apparently did not intend 'inter-agency and intra-agency' to be rigidly exclusive terms, but rather to include any agency document that is part of the deliberative process."); *Soucie v. David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971) ("The Government may have a special need for the opinions and recommendations of temporary consultants, and those individuals should be able to give their judgments freely without fear of publicity.").

246. 615 F. Supp. 698, 708 (D.D.C. 1985).

247. *Id.* at 703. Although *Weber Aircraft* and *Badhwar* involved similar factual situations, the Court in *Weber Aircraft* noted that the witness statements in that case were made by agency employees. *Weber Aircraft*, 465 U.S. at 798 n.13. The *Badhwar* court made no finding on the issue. Instead, the court interpreted *Weber Aircraft* as "bar[ring] disclosure of statements by witnesses who have given them in confidence." *Badhwar*, 615 F. Supp. at 701; see also *Washington Post Co. v. United States Dep't of the Air Force*, 617 F. Supp. 602, 606 (D.D.C. 1985) ("The rationale for [the rule of *Weber Aircraft*] is that the privilege encourages those with pertinent information to cooperate with disaster investigators.").

248. *Badhwar*, 615 F. Supp. at 703 ("[T]he agency's decisionmaking mechanisms and the documents' significance within that structure' . . . establish that . . . the safety board findings, conclusions and recommendations are deliberative, predecisional, and exempt from disclosure under Exemption 5.") (quoting *Murphy v. TVA*, 571 F. Supp. 502, 505 (D.D.C. 1983)).

249. *Id.* at 700.

250. *Id.* at 703.

the use of the FOIA as a device to circumvent restraints on civil discovery,²⁵¹ 1985 decisions have shown that exemption 5 may have a narrower ambit than *Weber Aircraft* suggested. These decisions emphasized "the narrow scope of exemption (b)(5) and the strong public policy that the public is entitled to know what the government is doing and why."²⁵² At the same time, substantial questions remain concerning the scope of the term "inter-agency or intra-agency memorandum."

E. Reverse FOIA.

The FOIA is "exclusively a disclosure statute";²⁵³ the nine specific exemptions of subsection (b)²⁵⁴ are merely limits on an agency's discretion to withhold requested information, and "were not meant to mandate nondisclosure."²⁵⁵ Questions involving the propriety of agency withholding thus generally depend on the applicability of these exemptions and the strength of the policy considerations underlying them.²⁵⁶ The proper approach to reviewing an agency's decision to *disclose* information is not as well-settled, and the basis on which disclosure may be successfully challenged is uncertain.²⁵⁷

In 1985, the United States Court of Appeals for the District of Columbia Circuit upheld a claim by former President Nixon that the Presidential Recordings and Materials Preservation Act (the "Materials

251. *Weber Aircraft*, 465 U.S. at 800-02.

252. *NAACP Legal Defense*, 612 F. Supp. at 1146-47.

253. *Chrysler Corp. v. Brown*, 441 U.S. 281, 292 (1979).

254. 5 U.S.C. § 552(b)(1)-(9) (1982).

255. *Chrysler Corp. v. Brown*, 441 U.S. 281, 294 (1979). The Court described the general outline of the FOIA:

The organization of the [FOIA] is straightforward. Subsection (a), 5 U.S.C. § 552(a), places a general obligation on the agency to make information available to the public and sets out specific modes of disclosure for certain classes of information. Subsection (b), 5 U.S.C. § 552(b), which lists the exemptions, simply states that the specified material is not subject to the disclosure obligations set out in subsection (a). By its terms, subsection (b) demarcates the agency's obligation to disclose; it does not foreclose disclosure.

Id. at 291-92.

256. 5 U.S.C. § 552(c) (1982) provides: "This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section." See also *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) ("These exemptions are specifically made exclusive . . . and must be narrowly construed."). But see *infra* notes 320-40 and accompanying text.

257. Compare *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 398 (5th Cir. 1985) (assuming existence of cause of action to enjoin agency disclosure of information under FOIA) with *Chrysler Corp. v. Brown*, 441 U.S. 281, 294 (1979) (no cause of action to enjoin disclosure under FOIA). See generally 1 J. O'REILLY, *supra* note 188, § 10.06, at 10-26 (noting that reverse-FOIA suits before *Chrysler* "had been like an illegitimate child, without statutory parents but very much alive"); Campbell, *Reverse FOIA Litigation*, in *LITIGATION UNDER THE FEDERAL FREEDOM OF INFORMATION ACT AND PRIVACY ACT* 74 (A. Adler & M. Halperin 9th ed. 1984).

Preservation Act")²⁵⁸ displaces the mandatory disclosure requirements of the FOIA and provides the exclusive mechanism by which certain records falling within the terms of the Materials Preservation Act may be disclosed.²⁵⁹ In another case, the United States Court of Appeals for the Eleventh Circuit held that the Privacy Act²⁶⁰ does not prohibit an agency from disclosing information not exempt under the FOIA, even if no formal request under the FOIA has been filed.²⁶¹

1. *Displacement of the FOIA by Other Statutes.* In order to provide guidance for the management and public disclosure of thousands of documents and recordings either acquired by the Watergate special prosecution force or otherwise related to the presidency of Richard Nixon, Congress passed the Materials Preservation Act.²⁶² In 1985, eleven years after the Act's passage, the United States Court of Appeals for the District of Columbia Circuit held in *Ricchio v. Kline* that the FOIA does not govern disclosure of transcripts made from recorded White House conversations involving former President Nixon.²⁶³ Rather, those seeking disclosure of these records must conform to procedures and regulations promulgated by the Administrator of the General Services Administration (GSA) pursuant to the Materials Preservation Act.²⁶⁴

The plaintiff in *Ricchio* brought suit under the FOIA to compel disclosure of certain transcripts of tapes acquired by the Watergate special prosecution force.²⁶⁵ The GSA agreed to release most, but not all, of the requested documents.²⁶⁶ With the consent of the parties, President Nixon intervened to enjoin the disclosure of all the requested documents.²⁶⁷ The court of appeals held that President Nixon had standing to seek such an injunction under the APA as a person "adversely affected or aggrieved" by the agency action.²⁶⁸

Section 104(d) of the Materials Preservation Act provides: "The provisions of this title shall not in any way affect the rights, limitations or

258. Pub. L. No. 93-526, 88 Stat. 1695 (1974).

259. See *infra* notes 262-74 and accompanying text.

260. 5 U.S.C. § 552a (1982).

261. See *infra* notes 275-89 and accompanying text.

262. Pub. L. No. 93-526, 88 Stat. 1695 (1974).

263. *Ricchio v. Kline*, 773 F.2d 1389, 1395 (D.C. Cir. 1985).

264. *Id.* at 1393, 1395.

265. *Id.* at 1391.

266. *Id.*

267. *Id.*

268. *Id.* at 1392; see also Administrative Procedure Act, 5 U.S.C. § 702 (1982) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof.").

exemptions applicable under the Freedom of Information Act"²⁶⁹ The Act directs the Administrator of the GSA to fashion regulations governing disclosure of the information falling within the Materials Preservation Act's provisions.²⁷⁰ Despite the Act's specific statement that rights under the FOIA were unaffected, the court held that the Materials Preservation Act's procedures displaced FOIA procedures by virtue of the former's "comprehensive, carefully tailored and detailed procedure designed to protect both the interest of the public in obtaining disclosure of President Nixon's papers and of President Nixon in protecting the confidentiality of Presidential conversations and deliberations."²⁷¹ To disclose these materials under the general provisions of the FOIA "might frustrate the achievement of the legislative goals of orderly processing and protection of the rights of all affected persons." Simply stated, "the policies of the [Materials Preservation] Act can best be carried out under the Act itself."²⁷²

"Displacement" or preemption theories such as that adopted in *Ricchio* have generally not been accepted by the courts.²⁷³ Whether the "comprehensive, carefully tailored and detailed procedure" analysis employed by the court of appeals may be viewed as a "test" to determine the applicability of the FOIA to information controlled by other statutes is uncertain. The unique and historically specific nature of the information sought in *Ricchio* may lessen the precedential value of the case.²⁷⁴ Nonetheless, *Ricchio*'s analysis in applying the displacement theory provides a

269. Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, § 104(d), 88 Stat. 1695, 1698 (1974).

270. *Id.* § 101(a), 88 Stat. at 1695; see also *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 429 (1977) ("[The Materials Preservation Act] directs the Administrator of General Services, an official of the Executive Branch, to take custody of the Presidential papers and tape recordings of . . . former President Nixon, and promulgate regulations that (1) provide for the orderly processing and screening by Executive Branch archivists of such materials for the purpose of returning to appellant those that are personal and private in nature, and (2) determine the terms and conditions upon which public access may eventually be had to those materials that are retained."), quoted in *Ricchio*, 773 F.2d at 1393. As of the time of suit, the Administrator of GSA had not fashioned suitable disclosure regulations. This delay was largely the result of a legislative veto provision contained in the Materials Preservation Act. See *Allen v. Carmen*, 578 F. Supp. 951, 971-72 (D.D.C. 1983) (invalidating regulations promulgated under Materials Preservation Act due to one-house legislative veto provision of the type found unconstitutional in *INS v. Chadha*, 462 U.S. 919 (1983)).

271. *Ricchio*, 773 F.2d at 1395.

272. *Id.* at 1394-95 (quoting *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 606 (1978)).

273. See, e.g., *Long v. IRS*, 742 F.2d 1173, 1177-78 (9th Cir. 1984); *Linsteadt v. IRS*, 729 F.2d 998, 1001-03 (5th Cir. 1984); see also Note, *Developments—1984, supra* note 2, at 783-87.

274. Unlike other agency records, the information covered by the Materials Preservation Act is of a distinct and unvarying nature. This information is primarily of historical value and does not specifically refer to ongoing agency activity. The FOIA, while not excluding materials of historical value, arguably was designed to inform the public of the nature and extent of agency activity, encouraging communication between the centers of ongoing administrative action and the citizenry. See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) ("The basic purpose of FOIA is

potentially powerful new tool for enjoining agency disclosure of information.

2. *Reverse FOIA Actions and the Privacy Act.* Under the Privacy Act, disclosure is proper if "required under [the FOIA]."²⁷⁵ Ordinarily, the FOIA mandates agency disclosure of all records *pursuant to a proper request*, provided the records do not fall within one of the nine exemptions listed in subsection (b) of the FOIA.²⁷⁶ In *Cochran v. United States*,²⁷⁷ the United States Court of Appeals for the Eleventh Circuit held that disclosure of information that does not fall within a specific FOIA exemption and has been the subject of "longstanding oral requests by the media" was "required under the FOIA" within the meaning of the Privacy Act; a formal FOIA request was not required to trigger the agency's obligation to disclose.

In *Cochran*, the Army issued a press release indicating that Major General James F. Cochran had been fined and reprimanded for misuse of government resources during his tenure at Fort Stewart, Georgia.²⁷⁸ Cochran sued for damages, arguing that the disclosure of this information violated subsection (b) of the Privacy Act.²⁷⁹

Cochran argued that the press release was not "required" under the FOIA because the disclosure constituted a "clearly unwarranted invasion of privacy"²⁸⁰ that entitles an agency to withhold requested information under exemption 6.²⁸¹ The court of appeals, however, characterized the press release as a "textbook example" of the type of information that the FOIA directs agencies to disclose.²⁸² In weighing the privacy interests of the plaintiff against the public interest in disclosure,²⁸³ the court held

to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.").

275. 5 U.S.C. § 552a(b)(2) (1982).

276. 5 U.S.C. § 552(a)(6)(A) (1982).

277. 770 F.2d 949, 957-59 (11th Cir. 1985).

278. *Id.* at 952 n.2.

279. *Id.* at 952-53. The Privacy Act provides that a person who is aggrieved by agency activity that violates the provisions of the Act may collect "actual damages sustained . . . as a result of the [agency action], but in no case . . . less than the sum of \$1,000." 5 U.S.C. § 552a(g)(4)(A) (1982).

280. *Cochran*, 770 F.2d at 953.

281. Under exemption 6, disclosure is not required of "personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (1982).

282. *Cochran*, 770 F.2d at 957.

283. In the Senate and House Reports on the section, Congress made it clear that agencies and the courts were to undertake a "balancing of interests" under exemption 6: "The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information." S. REP. NO. 813, 89th Cong., 1st Sess. 9 (1965); *see also* H.R. REP. NO. 1497, 89th Cong., 2d Sess. 11 (1966).

that the balance struck under FOIA exemption six overwhelmingly favors the disclosure of information relating to a violation of the public trust by a government official "To forestall future abuses, the public has an interest in any deterrent effect disclosure might provide."²⁸⁴

The absence of a formal written FOIA request, as required by regulations promulgated by the Army in implementing the FOIA,²⁸⁵ posed a perplexing problem for the court. It is unclear on what basis the court held that such a request was unnecessary to render the press release "required under the FOIA."²⁸⁶ The court observed that "it might be ques-

The courts have construed the term "clearly unwarranted" as "instruct[ing] the court to tilt the balance in favor of disclosure." *Getman v. NLRB*, 450 F.2d 670, 674 (D.C. Cir. 1971). In order for an agency to withhold records under this exemption, the invasion of privacy must be substantial; "Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities." *Department of the Air Force v. Rose*, 425 U.S. 352, 380 n.19 (1976).

284. *Cochran*, 770 F.2d at 956. In *Department of the Air Force v. Rose*, 425 U.S. 352, 380-82 (1976), the Supreme Court approved an order requiring disclosure of Air Force records concerning proceedings instituted against cadets for honor code violations. *Cochran* argued that this decision established that disclosure of military disciplinary proceedings was a per se invasion of privacy protected by exemption 6. In *Rose*, however, all information identifying the cadets was deleted in order to protect their personal privacy interests. *Rose*, 425 U.S. at 355. The *Cochran* court distinguished *Rose*, noting that while

deletion of identifying information may often provide a workable compromise between an individual's privacy right and the public's right to know, such deletion is inappropriate in the case of a high-ranking government official who has misappropriated government facilities. In this situation, identifying information is crucial to the public's interest in holding such officials accountable to the public and deterring others from similar behavior.

Cochran, 770 F.2d at 956 n.9.

285. 32 C.F.R. § 518.4(d) (1984).

286. The court seemed to assume that the only real violation on the part of the agency was the failure of the Army information officer to abide by the Army's published FOIA procedures. Indeed, the court stated that "the Privacy Act does not provide a civil remedy for a violation of regulations promulgated under the FOIA." *Cochran*, 770 F.2d at 958. This way of characterizing the issue avoids an overly formalistic approach to the Privacy Act's requirements. *See id.* Yet, the Privacy Act prohibits an agency from disclosing information unless it falls within a specific exemption. 5 U.S.C. § 552a(b) (1982). If the term "required under [the FOIA]," 5 U.S.C. § 552a(b)(2) (1982) (emphasis added), is strictly construed, the disclosure in this case did not fall within a Privacy Act exemption, and presumably violated the Act. Two cases have held that a specific FOIA request is needed in order for disclosure to fall within the "required under [the FOIA]" exemption of the Privacy Act: *Bartel v. FAA*, 725 F.2d 1403, 1412-13 (D.C. Cir. 1984), and *Zeller v. United States*, 467 F. Supp. 487, 503 (E.D.N.Y. 1979). The *Cochran* court distinguished these decisions:

Those cases involved situations where information was gratuitously disclosed without any kind of request for the information. In contrast, the media representatives in the present case had lodged standing oral inquiries for information relating to the *Cochran* investigation. Furthermore, the present case involves dissemination of current, newsworthy information to members of the press, as opposed to disclosure of stale personal information to purely private individuals.

Cochran, 770 F.2d at 958 n.14. While these distinctions are certainly meaningful, they do not address the question whether the press release was *required*, rather than merely *desirable*. It seems quite clear that had the Army information officer refused to disclose the information on *Cochran*'s disciplinary proceedings, the press's failure to follow the Army's published FOIA procedures would defeat any claim of improper withholding advanced by the press requesters. *See* 5 U.S.C.

tioned whether current newsworthy information of interest to the community, such as contained in the press release . . . even falls within the strictures of the Privacy Act.”²⁸⁷ Although it declined to address that “intriguing” question,²⁸⁸ the court noted that “[p]rompt responses to requests for information from news media representatives should be encouraged to eliminate the need for these requesters to invoke the provisions of the FOIA and thereby assist in providing timely information to the public.”²⁸⁹ If, in order to avoid liability under the Privacy Act, agencies feel compelled to withhold information relating to official misconduct until disclosure is “required under the FOIA,” openness in government is likely to be diminished and responsible disclosure delayed, if not frustrated.

F. *Investigatory Records and the Confidential Source Exemption.*

Exemption 7(D) of the FOIA allows an agency to withhold the identity of a confidential source.²⁹⁰ In 1985, the United States Court of Appeals for the Second Circuit held that an agency investigator may qualify as a “confidential source” within the meaning of exemption 7(D).²⁹¹ The Second Circuit also rejected the “potential witness rule” and held that an employee providing information to the NLRB during the course of an unfair labor practice investigation is a “confidential source” even if that employee may be required to serve as a witness at a subsequent NLRB hearing.²⁹² Finally, the United States Court of Appeals for the Seventh Circuit held that a person reporting unsolicited information to an agency regarding alleged illegal activities may also be considered a “confidential source.”²⁹³

§ 552(a)(3)(B) (1982) (conditioning agency duty to disclose on a request “made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed”).

287. *Cochran*, 770 F.2d at 959 n.15. The case may be read as holding that, even if disclosure was not required by the FOIA, the plaintiff had not established the requisite injury to prevail under the Privacy Act. The court noted that “appellant has suffered no ‘adverse effect’ ” as required under the Privacy Act, 5 U.S.C. § 552a(g)(1)(D) (1982). *Cochran*, 770 F.2d at 958.

288. *Cochran*, 770 F.2d at 959 n.15. Such a holding would recognize that those who abuse the public trust have no protectible privacy interest in information detailing the circumstances of such a breach. As the *Cochran* court noted: “The legislative history of the [Privacy] Act does not evidence any intent to prevent the disclosure by the government to the press of current, newsworthy information of importance and interest to a large number of people.” *Id.*

289. *Id.* at 957 n.11 (quoting 32 C.F.R. § 518.2(a) (1984)) (emphasis added). The quotation comes from a provision in Army regulations that was promulgated after the commencement of the instant case.

290. 5 U.S.C. § 552(b)(7)(D) (1982).

291. See *infra* notes 294-309 and accompanying text.

292. See *infra* notes 310-17 and accompanying text.

293. See *infra* notes 318-30 and accompanying text.

1. *Agency Personnel and Confidential Source Protection.* The legislative history of exemption 7(D)²⁹⁴ and the relevant case law²⁹⁵ indicate that the term "confidential source" may be applied to a variety of sources from which an agency derives information relevant to law enforcement investigations. A person is considered a confidential source if the withholding agency gave "an express or implied assurance of confidentiality" in return for information.²⁹⁶ In 1985, in *Kuzma v. IRS*, the United States Court of Appeals for the Second Circuit held that even agency personnel may be considered confidential sources if they receive such assurances.²⁹⁷

In *Kuzma*, the IRS refused to disclose to the plaintiff records related to the agency's investigation of the plaintiff's compliance with the Internal Revenue Code.²⁹⁸ According to agency affidavits, the plaintiff was a member of a "protest tax movement" that had engaged in a campaign of harassment and threats aimed at IRS employees.²⁹⁹ Under these circumstances, the trial court agreed to review *in camera* IRS affidavits supporting the agency's decision to withhold and containing the names of IRS agents.³⁰⁰

The court of appeals, addressing the exemption 7(D) claim, defined

294. See S. REP. NO. 1200, 93d Cong., 2d Sess. 13, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 6285, 6291 ("The substitution of the term 'confidential source' in section 552(b)(7)(D) is to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which an assurance could be reasonably inferred.").

295. For example, the courts have held the term "confidential source" to include state and local law enforcement agencies, see *Kimberlin v. Department of the Treasury*, 774 F.2d 204, 209 (7th Cir. 1985); inmates and state prison officials, see *Parton v. Department of Justice*, 727 F.2d 774, 775-77 (8th Cir. 1984); foreign law enforcement agencies, see *Founding Church of Scientology v. Regan*, 670 F.2d 1158, 1161-62 (D.C. Cir. 1981), cert. denied, 456 U.S. 976 (1982); commercial or financial institutions, see *Biberman v. FBI*, 528 F. Supp. 1140, 1143 (S.D.N.Y. 1982); and "indirect confidential sources," i.e., persons receiving assurance from one agency that in turn supplies the information to the withholding agency, see *Sands v. Murphy*, 633 F.2d 968, 970 (1st Cir. 1980). See also *infra* note 301 and accompanying text. But see *Ferguson v. Kelley*, 448 F. Supp. 919, 925 (N.D. Ill. 1977) (term "confidential source" applies only to persons providing information); *Katz v. Department of Justice*, 498 F. Supp. 177, 184 (S.D.N.Y. 1979) (exemption 7 not applicable to state and local organizations other than law enforcement agencies).

296. See *supra* note 294.

297. *Kuzma v. IRS*, 775 F.2d 66, 69-70 (2d Cir. 1985) (per curiam).

298. *Id.* at 67-68.

299. *Id.* at 68.

300. *Id.* at 68-69. The trial court held that *in camera* affidavits were appropriate because of the necessity of protecting the identities of the IRS agents. The court of appeals noted:

If the [trial] court had insisted that the information contained in [the] affidavit . . . be submitted publicly or not at all, it would have defeated the purpose for which the further showing was initially requested; obviously, the court would have forced the IRS to disclose the identities of some of its agents before it determined whether identities of IRS agents should be shielded from disclosure.

Id. at 69.

a "source" to include "[t]hat from which anything comes forth."³⁰¹ Finding that agency personnel fell within this definition, the court then inquired whether the IRS agents had been given express or implied assurances of confidentiality.³⁰² Concluding without discussion that such assurances had been given,³⁰³ the court held that the records were exempt from disclosure under exemption 7(D).³⁰⁴

The decision in *Kuzma* represents a broad interpretation of exemption 7(D). The purpose of the exemption is to ensure that those who provide information to an agency will be protected³⁰⁵ and "that law enforcement agencies [will] not be faced with a 'drying up' of their sources of information or have their criminal investigative work be seriously impaired."³⁰⁶ Agency personnel receive explicit protection from inadvertent disclosure under exemption 7(F).³⁰⁷ Applying exemption 7(D)—rather than the 7(F) exemption—to information provided by agency personnel has an important consequence. Under exemption 7(D), once it is established that information was provided by a confidential source *and* that this information was compiled for criminal law enforcement or national security investigations, the information provided by the source, as well as the source's identity, may be withheld.³⁰⁸ By contrast, exemption 7(F) only protects the informant's identity; it does not *necessarily* ex-

301. *Id.* (citation omitted) (quoting *Keeney v. FBI*, 630 F.2d 114, 117 (2d Cir. 1980) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, 2405 (2d ed. 1957))).

302. *Id.*

303. *Id.*

304. *Id.* at 69-70.

305. *See id.* at 68; *Brant Constr. Co. v. EPA*, 778 F.2d 1258, 1262 (7th Cir. 1985) (recognizing the need for a "robust" 7(D) exemption to prevent retaliation against sources).

306. *Church of Scientology v. United States Dep't of Justice*, 612 F.2d 417, 425 (9th Cir. 1979).

307. Exemption 7 provides that "investigatory records compiled for law enforcement purposes" may be withheld, "to the extent that the production of such records would . . . endanger the life or physical safety of law enforcement personnel." 5 U.S.C. § 552(b)(7) (1982).

308. 5 U.S.C. § 552(b)(7)(D) (1982); S. REP. NO. 1200, 93d Cong., 2d Sess. 13, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6285, 6291; *Lesar v. United States Dep't of Justice*, 636 F.2d 472, 492 (D.C. Cir. 1980) (if information is supplied by confidential source during course of a criminal investigation all such information provided by source is confidential).

Exemption 7(D) protects

investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records 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.

5 U.S.C. § 552(b)(7)(D) (1982).

The courts have held that this exemption protects all confidential information provided by a confidential source, regardless of whether the information may tend to reveal the source's identity. *See, e.g., Radowich v. United States Attorney*, 658 F.2d 957, 964 (4th Cir. 1981) ("Congress [intended] to cast a veil of protection over *all* information furnished by a confidential source."); *Duffin v. Carlson*, 636 F.2d 709, 712 (D.C. Cir. 1980) ("A plain reading of the statute indicates that confi-

clude the information that the confidential source has provided.³⁰⁹ Thus, the decision in *Kuzma* expands the scope of permissible agency withholding beyond that which the language of statute, taken as a whole, would apparently allow.

2. *The Potential Witness Rule.* In a 1985 decision, *United Technologies Corp. v. NLRB*, the United States Court of Appeals for the Second Circuit held that "the proper interpretation of the term 'confidential source' includes an informant who is promised or reasonably expects confidentiality unless and until the agency needs to call him as a witness at trial."³¹⁰ In *United Technologies*, an employee of the plaintiff corporation gave an NLRB agent some corporate documents that the employee had acquired without the plaintiff's consent. Upon discovering the nature of these documents, the agent returned them to the employee, explaining the seriousness of possessing such documents without the corporation's approval.³¹¹ After the union withdrew the unfair labor practice charge, United Technologies sought records from the NLRB that would reveal the identities of the employee who had provided the tainted documents and the agent who had received them.³¹² The NLRB refused to disclose this information on the basis of exemption 7(D).³¹³

United Technologies argued that an employee-informant may not be considered a confidential source if that employee was a potential witness in subsequent NLRB proceedings.³¹⁴ The court of appeals rejected this argument, reading exemption 7(D) in "practical" terms and giving it a construction "that reflects the realities of the agencies' law enforcement capabilities."³¹⁵ Without assurances of confidentiality, the court reasoned, employees would be hesitant to provide information about the unfair labor practices of their employer to the NLRB out of fear of retaliation.³¹⁶ Because the exemption was designed to protect those who provide information to agencies, "[a] person who is otherwise a 'confidential source' should not lose that status simply because he *could have*

dential information furnished only by a confidential source need not divulge the 'identity' of the confidential source in order to be protected from disclosure.").

309. Exemption 7(F) only exempts information tending to "endanger the life or physical safety of law enforcement personnel." 5 U.S.C. § 552(b)(7)(F) (1982). For this exemption to apply, the information apparently must tend to identify the law enforcement personnel who supplies it.

310. *United Technologies Corp. v. NLRB*, 777 F.2d 90, 94 (2d Cir. 1985).

311. *Id.* at 92.

312. *Id.*

313. *Id.*

314. *Id.* at 94.

315. *Id.* at 95.

316. *Id.* at 94-95.

been called or *might yet* be called as a witness.”³¹⁷

3. *Confidentiality and Unsolicited Information.* In *Brant Construction Co. v. EPA*, the United States Court of Appeals for the Seventh Circuit held that there may be an implicit assurance of confidentiality when individuals provide unsolicited information to an agency.³¹⁸ Such a person may therefore be a “confidential source” under exemption 7(D) if the court finds, based on the type of information submitted and the “surrounding circumstances,” that “the communication in all likelihood would not have been made if confidentiality had not been assured.”³¹⁹

In *Brant* the EPA received three unsolicited letters from a minority firm acting as subcontractor on an EPA-funded construction project supervised by the plaintiff.³²⁰ These letters alleged that the plaintiff had attempted to fix bids and solicit firms to act as a minority front for a “white firm” on federally funded projects.³²¹ The plaintiff filed a FOIA request for these letters, apparently after the EPA stopped funding its project.³²² The EPA refused to disclose the letters, invoking exemption 7(D).³²³

The court of appeals viewed solicited information as different in kind from unsolicited information, and found that different standards of proof were therefore appropriate in determining whether an assurance of confidentiality was implicit.³²⁴ “Nonetheless,” the court held, “formalistic barriers to the protection of confidential sources would defeat the purpose of 7(D), as it is beyond dispute that unsolicited information is vitally important to law enforcement efforts.”³²⁵ The court then adopted a two-part test to determine whether a source of agency information may be considered confidential. Under this approach, the court must first determine whether a request for confidentiality was implicit—whether, “in light of the information and surrounding circumstances, the communication in all likelihood would not have been made if confidentiality had not been assured.”³²⁶ Secondly, the reviewing court must determine whether

317. *Id.* at 95.

318. *Brant Constr. Co. v. EPA*, 778 F.2d 1258, 1264-65 (7th Cir. 1985).

319. *Id.* at 1264.

320. *Id.* at 1260.

321. *Id.* at 1260-61.

322. *Id.* at 1260.

323. *Id.* at 1261.

324. *Id.* at 1263. The court noted that when an agency actively solicits information during a criminal investigation, assurances of confidentiality are “inherently implicit.” *Id.* For a discussion of the conflicting standards of confidentiality under exemption 7, see Note, *Developments—1984*, *supra* note 2, at 769-74.

325. *Brant*, 778 F.2d at 1263.

326. *Id.* at 1264.

the information has been treated confidentially by the withholding agency.³²⁷

The *Brant* court found that the first prong of this test was satisfied "[i]n view of [the submitters'] subordinate position as subcontractors on the project and the concern expressed for retaliation."³²⁸ The court found that the second prong was satisfied by the EPA's assertions that the agency affords sources of information an "implied confidential relationship" and the absence of any evidence to the contrary in the record.³²⁹ As a result, the agency's decision to withhold the letters was upheld.³³⁰

The 1985 decisions under exemption 7(D) illustrate the range of information that may be withheld by an agency invoking the exemption's protection. By expanding that range to include agency personnel, potential witnesses, and, although perhaps less significantly, unsolicited information, these decisions also illustrate the difficulty of confining the exemption to narrow, predetermined categories. Thus, the usefulness of distinctions between potential witnesses and non-witnesses, agency and non-agency personnel, and solicited and unsolicited information depends on the nature of the information provided to the agency. In each of the 1985 decisions, the source protected by the agency faced the possibility of retaliation if the source's identity were revealed. In those circumstances, it would seem, courts will uphold an agency's decision not to disclose a source's identity.

IV. CONCLUSION

In 1985, despite the persistent efforts of Senator Hatch, Congress did not produce any significant amendment of the FOIA. Most reform proposals focused on amending the fee structure and fee waiver provisions and on enhancing the protection of sensitive business information. Some progress was seen in the latter area with the passage of the National Cooperative Research Act.

327. *Id.* The plaintiff in this case also argued that the EPA was not a "criminal law enforcement authority." The court noted: "Exemption 7(D) does not state that the agency from whom the records are requested must also be the criminal law enforcement authority that compiles the disputed record." The fact that the records were forwarded to the EPA's Office of the Inspector General and to the FBI was sufficient to draw the records within the exemption's protection. *Id.* at 1265.

328. *Id.* at 1264. The district court had characterized the sources' fear of retaliation in this case as "a flight of fancy." The court of appeals held that "[t]he question is not whether the fear was well-founded. . . . The dispositive point is that the [source] express[ed] a fear of reprisal, which firmly supports a request for confidentiality." *Id.*

329. *Id.*

330. *Id.* at 1265-66.

Congress expanded the reach of the FOIA by subjecting the National Endowment for Democracy to the FOIA's provisions. Proposals were introduced to diminish the delays in processing FOIA requests at the Consumer Products Safety Commission and to correct the inhibiting effects of existing computer crime legislation.

Administrative activity reflected the same concerns that motivated congressional reform proposals. The OMB issued a policy statement to federal agencies calling for cost-effective implementation of the FOIA and stressing reliance on private enterprise to provide the public with information. The report issued by the President's Commission on Industrial Competitiveness provides forceful and politically attractive arguments for restricting access to business information.

In the courts, the Supreme Court expanded permissible exemption 3 withholding by the CIA in a manner that may virtually exempt the agency from FOIA coverage, and, in the lower federal courts, the "sole function" test definition of "agency" provided by the District of Columbia Circuit resulted in the exclusion of the Council of Economic Advisers from the mandatory disclosure requirements of the FOIA. New points of emphasis may be emerging for the protection of business information, and the courts seem ready to abandon any restrictive reading of the commercial and financial records exemption. The courts were also willing, however, to restrain the expansive pressure of *United States v. Weber Aircraft Corp.* on the agency memoranda exemption.

Reverse-FOIA cases continued to arise in a variety of circumstances and to receive varied analytical treatment. While former President Nixon forced an exception to FOIA coverage by interposing the Presidential Recordings and Materials Preservation Act, the Privacy Act proved insufficient to enjoin agency disclosure of information relating to an official's violation of the public trust.

Finally, the federal courts of appeals gave liberal interpretations to the investigatory records exemption for "confidential sources," exempting the identity and information provided by agency personnel and potential witnesses. In the case of unsolicited information, the Seventh Circuit rejected any "formalistic" reading of the exemption and held that such information may receive the exemption's protection.

Lawrence J. Goode and Douglas R. Williams

