

## DEVELOPMENTS UNDER THE FREEDOM OF INFORMATION ACT—1987\*

The twenty-first year of the Freedom of Information Act<sup>1</sup> (FOIA) saw reaction by the federal government to amendments passed in 1986.<sup>2</sup> The 1986 amendments directed federal agencies to charge lower fees for information requests by “news media” and “scientific and educational institutions” and higher fees for requests by “commercial users.”<sup>3</sup> In order to ensure uniformity, Congress directed the Office of Management and Budget (OMB) to establish guidelines for determining whether a requester fits into any of the three categories.<sup>4</sup>

The initial OMB proposal met resistance from both requesters and members of Congress.<sup>5</sup> The final guidelines addressed some of the early criticism by defining a commercial use request as one “that furthers the commercial, trade, or profit interests of the requester,”<sup>6</sup> and by broadening the definition of “news media” to include all entities that publish or broadcast news to the public.<sup>7</sup> The final guidelines also define a “scientific institution” as including organizations conducting research in the natural sciences, and define an “educational institution” as excluding scholarly research institutions that do not enroll students.<sup>8</sup>

The 1986 FOIA amendments added new fee waiver provisions that caused further administrative reactions in 1987.<sup>9</sup> The Department of Justice addressed the application of the new fee waiver provision in an advisory memorandum that was substantially like the Department’s strongly criticized guidance on the old fee waiver standard.<sup>10</sup> A number

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\* Steven T. Breaux, Emily V. Karr, Robert S. Michaels and A. Thomas Morris contributed to this note. For a discussion of developments under the Freedom of Information Act in prior years, see the annual FOIA notes in the *Duke Law Journal* from 1970 to 1987.

1. 5 U.S.C. § 552 (1982 & Supp. IV 1986).

2. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §§ 1801-1803, 100 Stat. 3207, 3207-48 to 3207-50.

3. See Note, *Developments Under the Freedom of Information Act—1986*, 1987 DUKE L.J. 521, 529-34 [hereinafter Note, *Developments—1986*].

4. 5 U.S.C. § 552(a)(4)(A)(i) (Supp. IV 1986).

5. See *infra* note 28.

6. The Freedom of Information Reform Act of 1986; Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10,012, 10,017-18 (1987); see *infra* notes 32-36 and accompanying text.

7. See *infra* notes 45-58 and accompanying text.

8. See *infra* notes 59-69 and accompanying text.

9. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1803, 100 Stat. 3207, 3207-49 to 3207-50.

10. See *infra* note 84 and accompanying text.

of agencies continued to follow the Department of Justice's interpretations of the fee waiver provisions, but some agencies adopted language similar to that used in the 1986 amendments or compromise language.<sup>11</sup>

The legislature did not limit its activities to criticism of the proposed OMB guidelines and the Department of Justice's fee waiver memorandum. The House Committee on Government Information held hearings on proposals for alternative dispute resolution of contested FOIA requests. Although the Administrative Conference of the United States rejected proposals for an ombudsman, most witnesses at the hearing favored the idea.<sup>12</sup>

Congress also passed the Computer Security Act of 1987, which is intended to protect "sensitive" but unclassified computer information.<sup>13</sup> The Act specifically states that FOIA provisions concerning information stored in electronic format will not be affected.<sup>14</sup>

One executive order concerned the FOIA. On June 23, 1987, President Reagan ordered all agencies to notify submitters of confidential commercial information if their records were requested under the FOIA. Most agencies already followed this practice.<sup>15</sup>

Federal courts, in distinct contrast to the federal agencies, were not kept busy by the 1986 amendments. The United States Court of Appeals for the Ninth Circuit issued the only decision concerning the amended fee waiver provisions.<sup>16</sup> Its opinion indicates that much pre-amendment analysis may be adopted by courts considering the new language. Decisions issued in 1987 also confirmed that the amendments to the law enforcement exemption were intended to limit disclosure of information.<sup>17</sup>

The United States Court of Appeals for the District of Columbia Circuit was very active in interpreting the FOIA. In 1987, it issued opinions concerning exemptions 3,<sup>18</sup> 4,<sup>19</sup> 5,<sup>20</sup> and 6,<sup>21</sup> as well as the statute of

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11. *See infra* notes 91-95.

12. *See infra* notes 102-07 and accompanying text.

13. Pub. L. No. 100-235, 101 Stat. 1724 (to be codified at 40 U.S.C. § 759 note and scattered sections of 15 U.S.C.).

14. *See infra* notes 96-101 and accompanying text.

15. Exec. Order No. 12,600, 52 Fed. Reg. 23,781 (1987); *see infra* notes 108-18 and accompanying text.

16. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282 (9th Cir. 1987); *see infra* notes 149-70 and accompanying text.

17. *Irons v. FBI*, 811 F.2d 681 (1st Cir. 1987); *Sluby v. Department of Justice*, No. 86-1503, slip op. (D.D.C. Apr. 30, 1987); *see infra* notes 254-71 and accompanying text.

18. *CNA Financial Corp. v. Donovan*, 830 F.2d 1132 (D.C. Cir. 1987) (Trade Secret Act not an exemption 3 statute), *cert. denied*, 108 S. Ct. 1270 (1988); *see infra* notes 196-210 and accompanying text.

19. *Critical Mass Energy Project v. NRC*, 830 F.2d 278 (D.C. Cir. 1987) (government interest in agency efficiency may trigger exemption 4); *see infra* notes 217-22 and accompanying text.

limitations for actions against the government.<sup>22</sup> It also issued a significant opinion concerning exemption 7, which held that courts should weigh the general FOIA policy favoring disclosure, rather than the public interest in disclosure of specific documents, when balancing disclosure against a privacy interest.<sup>23</sup>

The Supreme Court issued only one opinion in 1987 that dealt with the FOIA. *Church of Scientology v. Internal Revenue Service* held that income tax return information, even when it contains no identifying details, is protected from disclosure.<sup>24</sup>

## I. ADMINISTRATIVE DEVELOPMENTS

### A. Implementation of New Fee Structure.

Administrative agencies revised their regulations to incorporate the fee provision amendments included in the FOIA Reform Act of 1986.<sup>25</sup> The amendments increased fees for commercial users while reducing them for representatives of the news media and educational and scientific institutions.<sup>26</sup> To ensure consistent application of the new fee structure, Congress instructed agencies to conform their regulations to a "uniform

20. *Martin v. Office of Special Counsel, Merit Sys. Protection Bd.*, 819 F.2d 1181 (D.C. Cir. 1987) (All factual materials protected from discovery by the attorney work product privilege are protected by exemption 5.); *see infra* notes 223-37 and accompanying text.

21. *New York Times Co. v. NASA*, No. 86-2860, slip op. (D.D.C. June 3, 1987) (communication tape from space shuttle Challenger not a "similar file" protected by exemption 6); *see infra* notes 238-53 and accompanying text.

22. *Spannaus v. Department of Justice*, 824 F.2d 52 (D.C. Cir. 1987) (six-year limitation applies to FOIA requests from date of request, not from date of exhaustion of administrative appeals); *see infra* notes 119-38 and accompanying text.

23. *Reporters Committee for Freedom of the Press v. Department of Justice*, 816 F.2d 730 (D.C. Cir.), *reh'g denied*, 831 F.2d 1124 (D.C. Cir. 1987), *cert. granted*, 108 S. Ct. 1467 (1988); *see infra* notes 272-334 and accompanying text.

24. 108 S. Ct. 271 (1987); *see infra* notes 173-95 and accompanying text.

25. The Freedom of Information Reform Act of 1986 [hereinafter FOIA Reform Act] consisted of sections 1801 to 1804 of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207. The fee amendments were contained in *id.* § 1803, 100 Stat. at 3207-49 to 3207-50 (codified at 5 U.S.C. § 552(a)(4)(A) (Supp. IV 1986)). The legislation also included amendments broadening the FOIA's law enforcement exemption. *Id.* § 1802, 100 Stat. at 3207-48 to 3207-49 (codified at 5 U.S.C. § 552(b)(7) (Supp. IV 1986)); *see Note, Developments—1986, supra* note 3, at 521, 524-29. The law enforcement amendments took effect upon enactment of the legislation, FOIA Reform Act § 1804(a), 100 Stat. at 3207-50, and were incorporated without controversy into agency regulations. *New FOIA Fee Provisions Take Effect*, VIII FOIA UPDATE NO. 1, Winter/Spring 1987, at 2. For a discussion of cases interpreting the law enforcement amendments, *see infra* notes 254-71 and accompanying text.

26. Commercial requesters are charged for reasonable review, duplication, and document search time costs. The news media and educational or noncommercial scientific institutions pay only duplication costs. All other requesters are charged the previously assessed fees for document search and duplication. 5 U.S.C. § 552(a)(4)(A)(ii) (Supp. IV 1986).

schedule of fees" that would be promulgated by the OMB.<sup>27</sup> After receiving extensive public comment on its first proposed guidelines,<sup>28</sup> the OMB published its final guidance on March 27, 1987.<sup>29</sup> Although the guidelines do not set forth specific government-wide charges for FOIA services,<sup>30</sup> they define key terms in the amendment and identify recoverable costs.<sup>31</sup>

1. *Commercial Use Request.* The definition of "commercial use request"<sup>32</sup> in the final OMB guidelines appears to be a compromise between two earlier drafts. An initial unpublished draft adopted language in the legislative history by requiring a "profit-making purpose."<sup>33</sup> A later version, however, defined commercial requests as those made for a purpose "related to commerce, trade, or profit."<sup>34</sup> Senator Patrick Leahy and Representatives Glenn English and Tom Kindness criticized the change, saying that the requirement of a profit-making purpose was more consistent with legislative intent.<sup>35</sup> Although the OMB did not reinstate

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27. *Id.* § 552(a)(4)(A)(i).

28. On January 16, 1987, the OMB published proposed guidelines and requested public comment. The Freedom of Information Reform Act of 1986 (Pub. L. 99-570); Proposed Fee Schedule and Administrative Guidelines, 52 Fed. Reg. 1992 (1987) (proposed Jan. 16, 1987) [hereinafter Proposed OMB Guidelines]. The OMB received 80 comments and significantly revised the guidelines before publishing them in final form. The Freedom of Information Reform Act of 1986; Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10,012, 10,012-17 (1987) [hereinafter Final OMB Guidelines].

29. Final OMB Guidelines, *supra* note 28. Because the OMB did not issue its final guidelines until March 27, very few agencies had their revised regulations in place when the FOIA Reform Act took effect on April 25, 1987. Thus, during the interim period, agencies gave requesters the full benefits of both the old and new fee provisions. *New Fee Provisions Take Effect*, *supra* note 25, at 1-2.

30. The OMB stated that it lacked authority to issue a unitary schedule of fees because it believed that the FOIA Reform Act required agencies to base fees on individual operating costs. Final OMB Guidelines, *supra* note 28, at 10,015.

31. See *infra* notes 32-44 and accompanying text (commercial use); *infra* notes 45-58 and accompanying text (representative of the news media); *infra* notes 59-69 and accompanying text (scientific and educational institutions); *infra* notes 70-81 (recoverable costs).

32. The amended fee provisions authorize the assessment of fees for "document search, duplication, and review, when records are requested for commercial use." 5 U.S.C. § 552(a)(4)(A)(ii)(I) (Supp. IV 1986).

33. *OMB Drafts Regulations on New Fee Provisions*, 12 ACCESS REP. NO. 25, Dec. 17, 1986, at 2-3. The profit-making motive requirement was apparently derived from Representative Glenn English's statement that requests from public interest groups or individuals "may not be presumed to be for commercial use unless the nature of the request suggests that the information is being sought solely for a private, profit making purpose." 132 CONG. REC. E3596 (daily ed. Oct. 10, 1986).

34. Proposed OMB Guidelines, *supra* note 28, at 1993 (emphasis added).

35. *Letters to OMB: FOIA Guidance Disputed*, 13 ACCESS REP. NO. 5, Mar. 11, 1987, at 4; see also 133 CONG. REC. H2104 (daily ed. Apr. 22, 1987) (statement of Rep. English) ("The clear congressional intent supports only the use of a profitmaking standard . . . The words proposed by OMB—commercial, trade, or profit interests—are new, overly broad, unclear, and unhelpful." (discussing final guidelines)).

the profit-making motive requirement, it adopted a final definition of commercial request that requires "a use or purpose that *further*s the commercial, trade, or profit interests of the requester."<sup>36</sup>

The final definition creates some uncertainty as to the status of organizations such as "data brokers" that compile and sell government information for a profit.<sup>37</sup> These groups maintained that Congress did not intend to classify organizations that disseminate information as commercial users<sup>38</sup> and relied on Senator Leahy's statement made during the debate on the fee amendments that "the resale of documents obtained from the Government is not a commercial use."<sup>39</sup> The Department of State and the Department of Defense, however, believed that data brokers should be explicitly classified as commercial users.<sup>40</sup> The final OMB guidelines did not resolve this dispute.

In accord with the final definition of a commercial request, which focuses on the use to which the information will be put rather than the identity of the requester,<sup>41</sup> the OMB also reversed its original instruction that agencies should presume requests are commercial if they are submitted on corporate letterhead.<sup>42</sup> Despite this guidance, the National Aeronautics and Space Administration included such a presumption in its final regulations.<sup>43</sup> Most agencies, however, did not depart from the OMB guidelines, because they interpreted the fee amendments as requiring strict compliance with the guidelines.<sup>44</sup>

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36. Final OMB Guidelines, *supra* note 28, at 10,017-18 (emphasis added).

37. *Letters to OMB: FOIA Guidance Disputed*, *supra* note 35, at 4.

38. *Id.*

39. 132 CONG. REC. S14,297-98 (daily ed. Sept. 30, 1986).

40. *Letters to OMB: FOIA Guidance Disputed*, *supra* note 35, at 4.

41. Final OMB Guidelines, *supra* note 28, at 10,013. The OMB Guidelines do not specifically address the status of attorneys who request information on behalf of clients. *Id.* at 10,017-20. They state that "commercial use requests" include those made on behalf of other persons if the information will further the commercial interests of either party. *Id.* at 10,017-18. The Consumer Product Safety Commission specifically addressed this issue and decided that whether an attorney is a commercial requester depends on the intended use of the information, but "[i]f the client is a victim seeking reimbursement for injuries suffered in an incident involving a consumer product, the request will be an 'other' request and not a 'commercial use' request." Freedom of Information Act Regulations; Final Amendments on Fees, 52 Fed. Reg. 28,977 (1987) (to be codified at 16 C.F.R. pt. 1015).

42. Final OMB Guidelines, *supra* note 28, at 10,013 (Requests submitted on letterheads of corporations or non-profit institutions create no presumption of commercial or noncommercial use.).

43. Availability of Agency Records to Members of the Public, 52 Fed. Reg. 41,406 (1987) (to be codified at 14 C.F.R. § 1206.101).

44. *See, e.g.*, Freedom of Information Act Procedures, 52 Fed. Reg. 29,517, 29,517-19 (1987) (National Archives and Records Administration summarily rejects alternative definitions, noting its obligation to conform with the OMB guidelines.); 52 Fed. Reg. 27,985, 27,986 (1987) (National Credit Union Administration states that it cannot materially alter definitions set forth by the OMB because Congress mandated compliance.).

2. *Representative of the News Media.* The first published version of the OMB guidelines defined a “representative of the news media”<sup>45</sup> as “any representative of established news media outlets, i.e., any organization such as a television or radio station, or a newspaper or magazine of general circulation, or person working for such organization which regularly publishes information for dissemination to the general public whether electronically or in print.”<sup>46</sup> Because this definition appears to require a general readership, the newsletter industry became concerned that their industry would not qualify and waged an extensive lobbying effort to secure inclusion.<sup>47</sup> Other groups feared that the terms “established,” “general circulation,” “working for,” and “regularly” would narrow the definition beyond congressional intent.<sup>48</sup> Specifically, commentators noted that the proposed guidelines could be interpreted to exclude publications established after the regulations were issued, since the guidelines required a publication to be “established.”<sup>49</sup> Moreover, because the definition only covered “media,” technologies that do not involve print or broadcasting, such as cable television, teletext, and on-line databases, might have been excluded.<sup>50</sup>

The OMB responded that the controversial terms in the definition had not been intended to exclude the newsletter industry or otherwise limit eligibility.<sup>51</sup> The final guidelines define “representative of the news media” as a “person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public.”<sup>52</sup> Evolving methods of news dissemination are explicitly included, and newsletters qualify as long as they make their products available to the

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45. The amended fee provisions state that “fees shall be limited to reasonable standard charges for document duplication when records are not sought for a commercial use and the request is made by . . . a representative of the news media.” 5 U.S.C. § 552(a)(4)(A)(ii)(II) (Supp. IV 1986).

46. Proposed OMB Guidelines, *supra* note 28, at 1993.

47. Of 80 comments received by the OMB on the proposed guidelines, 41 were from newsletter publishers. Final OMB Guidelines, *supra* note 28, at 10,012.

48. *Id.* at 10,014. Commentators cited Senator Leahy’s statement made during the debates on the fee amendments that “[i]t is critical that the phrase ‘representative of the news media’ be broadly interpreted if the act is to work as expected.” 132 CONG. REC. S14,298 (daily ed. Sept. 30, 1986).

49. *Letters to OMB: FOIA Guidance Disputed*, *supra* note 35, at 6. Commentators also noted that an application of the term “established” might embroil agencies in decisions over a publication’s legitimacy. *Id.*

50. *Id.*

51. Final OMB Guidelines, *supra* note 28, at 10,014-15 (“Established” means organizations must show some evidence of their identity, such as press accreditation, guild membership, or FCC licensing; “regularly” means organizations must show, a subscription list being sufficient, that they are continuing ventures; “general circulation” means only that the product must be *available* to the public.).

52. *Id.* at 10,018.

general public and disseminate "news."<sup>53</sup>

The final definition of "representative of the news media" also clarified the position of freelance journalists. Under the proposed guidelines, only a journalist who worked for a news organization would have received the benefits of being a representative of the news media.<sup>54</sup> A freelance journalist would have had to show a "solid basis" for expecting publication by a news organization before the journalist could be regarded as working for that organization.<sup>55</sup> Reporters argued that this requirement would be problematic for freelance journalists, who often use FOIA requests to do preliminary research.<sup>56</sup> The final OMB guidelines explain that while "a publication contract would be the clearest proof [that the journalist is representing the media] . . . agencies may also look to the past publication record of a requester in making this determination."<sup>57</sup> One agency added that it would also consider "press accreditation, . . . business registration, Federal Communications Commission licensing, or similar credentials of a requestor in making this determination."<sup>58</sup>

3. *Scientific and Educational Institutions.* The OMB guidelines define a "non-commercial scientific institution"<sup>59</sup> as "an institution that is not operated on a 'commercial basis' . . . and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry."<sup>60</sup> Although several public comments suggested restricting eligibility to in-

53. *Id.* News is defined as "information that is about current events or that would be of current interest to the public." *Id.*

54. Proposed OMB Guidelines, *supra* note 28, at 1993; see also *supra* text accompanying note 46 (defining "organization").

55. Proposed OMB Guidelines, *supra* note 28, at 1933.

56. *Letters to OMB: FOIA Guidance Disputed*, *supra* note 35, at 6.

57. Final OMB Guidelines, *supra* note 28, at 10,018.

58. Implementation of Freedom of Information Reform Act; Changes to Freedom of Information Act and Privacy Act Fee Schedules, 52 Fed. Reg. 13,674, 13,676 (Federal Emergency Management Agency 1987) (to be codified at 44 C.F.R. § 5.42(a)(2)).

At least two agencies deviated from the language in the final OMB guidelines. The National Foundation on the Arts and the Humanities requires a "sound basis" for expecting publication. Statement for the Guidance of the Public; Organization, Procedures, and Availability of Information, 52 Fed. Reg. 48,265, 48,266 (1987) (to be codified at 45 C.F.R. § 1100.1(g)). The State Department requires a "likelihood of publication." Freedom of Information; Revision of Fees, Fee Waiver Policy, and the Law Enforcement Exemption, 52 Fed. Reg. 32,122, 32,124 (1987) (to be codified at 22 C.F.R. § 171.10(k)).

59. The statute provides that "fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research." 5 U.S.C. § 552(a)(4)(A)(ii)(II) (Supp. IV 1986).

60. Final OMB Guidelines, *supra* note 28, at 10,018. This definition incorporates the definition of "commercial use" discussed *supra* at text accompanying note 36.

stitutions conducting research in the natural sciences, the OMB rejected this narrow interpretation, saying it was unsupported by “the statute, the legislative history, or the plain meaning of the [language].”<sup>61</sup>

Commentators also objected to the OMB’s definition of “educational institution,” which is modeled after a Department of Education statute<sup>62</sup> and includes “a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, [or] an institution of vocational education, which operates a program or programs of scholarly research.”<sup>63</sup> The Brookings Institution opposed this interpretation, stating that it would be “totally arbitrary to recognize as “educational” only those institutions that enroll students and grant degrees, while failing to recognize the vital role that scholarly research institutions play in the entire academic community.”<sup>64</sup> Other commentators noted<sup>65</sup> that the definition of educational institution in the proposed guidelines was inconsistent with an Internal Revenue Service regulation that defines “educational” as related to “[t]he instruction or training of the individual for the purpose of improving or developing his capabilities; or . . . [t]he instruction of the public on subjects useful to the individual and beneficial to the community.”<sup>66</sup> Finally, some commentators recommended<sup>67</sup> a definition found in *Webster’s Dictionary* that includes all entities “organized to provide instruction or information.”<sup>68</sup> The OMB rejected these suggestions, saying that the *Webster’s* definition was not “sufficiently discriminating” and that the Internal Revenue Service definition was both too general to be of much use in determining eligibility and inappropriate for FOIA purposes.<sup>69</sup>

4. *Recoverable Costs.* Although much of the criticism received by the OMB related to its categorization of requesters, comments also

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61. Final OMB Guidelines, *supra* note 28, at 10,014.

62. *Id.* (citing 20 U.S.C. § 1681(c) (1982) (defining “educational institution” for prohibition of discrimination based on sex or blindness)).

63. *Id.* at 10,018.

64. *Letters to OMB: FOIA Guidance Disputed, supra* note 35, at 5 (quoting comment of Brookings Institution).

65. *Id.*

66. 26 C.F.R. § 1.501(c)(3)-(d)(3) (1987).

67. Final OMB Guidelines, *supra* note 28, at 10,013.

68. WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1968).

69. Final OMB Guidelines, *supra* note 28, at 10,013-14.

focused on the types of costs that agencies may recover.<sup>70</sup> The OMB guidelines instruct agencies to recover "the full allowable direct costs they incur" and specify expenses that should be included.<sup>71</sup> For example, when fees for document search or review are allowable under the fee amendments,<sup>72</sup> the guidelines direct agencies to recover employee salaries by charging the basic pay rate plus sixteen percent to compensate for employee benefits.<sup>73</sup> Agencies are also instructed to assess search fees when time is spent reading documents line-by-line to locate records, unless reproduction of the whole document would be cheaper and faster.<sup>74</sup> Finally, the guidelines encourage agencies to use their discretionary power to charge fees for special services such as certifying records or sending documents by express mail.<sup>75</sup>

To ensure procedural consistency, the OMB guidelines instruct agencies to adopt several rules governing the assessment and collection of fees. First, an agency should charge interest on unpaid bills, beginning on the thirty-first day after the bill is sent to the requester.<sup>76</sup> Second, an agency should assess fees for unsuccessful searches and should notify requesters of the estimated amount of fees when they are likely to exceed \$25.<sup>77</sup> Third, if an agency reasonably believes that individuals or groups

70. The fee amendments require agencies to provide for the recovery of "only the direct costs of search, duplication, or review" of documents. 5 U.S.C. § 552(a)(4)(A)(iv) (Supp. IV 1986).

71. Final OMB Guidelines, *supra* note 28, at 10,018.

72. Search fees may be charged for all requests except those made for noncommercial use "by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media." 5 U.S.C. § 552(a)(4)(A)(ii) (Supp. IV 1986). Review fees may be assessed only to commercial users. *Id.*

73. Final OMB Guidelines, *supra* note 28, at 10,018. Commentators not associated with federal agencies objected to this charge as a recovery of overhead and not direct costs, while federal agencies thought more than 16% of basic pay should be recovered to offset fringe benefits. The OMB responded that employee salaries "are clearly a direct cost of providing FOIA services" and the 16% figure had been established to compensate for *reasonable* benefits. *Id.* at 10,013. With regard to reasonable benefits, the OMB stated:

Because the agency is permitted to charge only "reasonable" direct costs, the inclusion of some kinds of fringe benefits would be clearly unreasonable. For example, an agency that maintains recreational facilities for employees and their families could not count the cost of operating the facility as a reasonable direct cost for FOIA fee purposes. But, an employer's contribution to a retirement system and to health and life insurance programs are concrete identifiable costs directly associated with the salary of the employee and should be counted as part of the direct costs of providing FOIA services.

*Id.*

74. *Id.* at 10,017.

75. *Id.* at 10,018. Under the Proposed OMB Guidelines, *supra* note 28, at 1993-94, normal mailing was considered a special service for which a requester could be charged. The OMB changed this section after commentators argued that mailing was part of making documents available and that agencies, by using franking privileges, do not incur mailing costs. See *Letters to OMB: FOIA Guidance Disputed*, *supra* note 35, at 7.

76. Final OMB Guidelines, *supra* note 28, at 10,019.

77. *Id.*

are trying to avoid paying fees by breaking requests into smaller parts, the agency may aggregate the separate requests and charge accordingly.<sup>78</sup> When similar requests are made within a thirty-day period, the agency reasonably may presume that the requester is trying to evade fees.<sup>79</sup> Fourth, in accordance with the statute,<sup>80</sup> an agency may not require a requester to pay fees in advance unless the charges are likely to exceed \$250 or the requester is currently delinquent on other payments.<sup>81</sup>

#### B. Implementation of the New Fee Waiver Standard.

In addition to establishing a new fee structure, the FOIA Reform Act changed the standard for reduction or waiver of fees. Agencies must now reduce or waive fees "if disclosure of the information is in the public interest because it 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."<sup>82</sup> This standard is more specific than the prior requirement that fees be waived or reduced whenever waiver or reduction "is in the public interest because furnishing the information can be considered as primarily benefiting the general public."<sup>83</sup> Despite the attempted clarification, the meaning of the new standard is disputed, and its application may not produce a significant change in fee waiver decisions.

When the waiver provisions were debated in Congress in 1986, Senator Patrick Leahy and Representative Glenn English said that the amendments broadened eligibility and specifically overturned the "restrictive" Justice Department guidance found in Assistant Attorney General Jonathon Rose's 1983 memorandum to federal agencies.<sup>84</sup> However,

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78. *Id.* at 10,019-20.

79. *Id.*

80. 5 U.S.C. § 552(a)(4)(A)(v) (Supp. IV 1986).

81. Final OMB Guidelines, *supra* note 28, at 10,020. The OMB Guidelines provide that if [a] requester has previously failed to pay a fee charged in a timely fashion (i.e., within 30 days of the date of the billing), the agency may require the requester to pay the full amount owed plus any applicable interest . . . or demonstrate that he has, in fact, paid the fee, and to make an advance payment of the full amount of the estimated fee before the agency begins to process a new request or a pending request from that requester.

*Id.* This language appears to contemplate advance payment only when the requester is *currently* delinquent on other charges. The fee amendments, however, allow agencies to require advance payment whenever the requester has previously failed to pay in a "timely fashion." See 5 U.S.C. § 552(a)(4)(A)(v) (Supp. IV 1986).

82. 5 U.S.C. § 552(a)(4)(A)(iii) (Supp. IV 1986).

83. 5 U.S.C. § 552(a)(4)(A) (1982) (amended 1986).

84. See 132 CONG. REC. S14,298 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy) (The legislation effects "a change in the current fee waiver language and is specifically intended to overturn the . . . Justice Department fee waiver guidelines."); 132 CONG. REC. H9464 (daily ed. Oct. 8, 1986) (statement of Rep. English) (similar view); see also Note, *Developments—1986, supra* note 3, at 533. At issue was the Memo from Assistant Attorney General Jonathan C. Rose to Heads of All

Senator Orrin Hatch stated that the Justice Department's 1983 guidelines were not being repudiated by the new waiver provisions.<sup>85</sup> This dispute was not resolved. After passage of the Reform Act, the Department of Justice (DOJ) issued an advisory memorandum that supersedes the Rose memorandum but proposes essentially the same evaluative criteria in a different form.<sup>86</sup> In fact, the new DOJ guidance interprets the new fee waiver provisions to be *more* restrictive than the previous provisions, emphasizing that the "subject matter of the requested records must specifically concern identifiable operations of the federal government—with a connection between them that is direct and clear, not remote or

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Federal Departments and Agencies (Jan. 7, 1983), reprinted in 1 Gov't Disclosure Rep. (P-H) ¶ 300,815 (Feb. 8, 1983) [hereinafter Rose Memorandum]. Rose listed five factors to be considered in determining eligibility for fee waivers or reduction:

1. "[A]n agency must determine whether there is a genuine public interest in the subject matter of the documents for which a fee waiver is sought . . . ."
2. "[A]gencies must examine . . . the value to the public of the records themselves."
3. "[Agencies must] consider[ ] whether the requested information is already available in the public domain."
4. "A requester's identity and qualifications—e.g. expertise in the subject area and ability and intention to disseminate the information to the public—should be evaluated."
5. "[Agencies must make] an assessment . . . of any personal interest of the requester . . . [compared with] any discernable public benefit . . . ."

*Id.*

85. 132 CONG. REC. S16,505 (daily ed. Oct. 15, 1986).

86. See Memo from Assistant Attorney General Stephen J. Markman to Heads of All Federal Agencies (Apr. 2, 1987), reprinted in VIII FOIA UPDATE NO. 1, Winter/Spring 1987, at 3-10 [hereinafter Markman Memorandum]. Markman essentially restated the statutory language in terms of six factors to be used in evaluating waiver requests. See *id.* at 5. He then explained the six factors in terms that incorporated the five factors from the Rose Memorandum. Compare the following excerpts from the Rose and Markman Memoranda:

ROSE—"The 'public' to be benefited . . . must be distinct from the requester alone. . . . [I]t is [not] in the public interest to grant a waiver solely on the basis of a requester's indigency . . . ."

MARKMAN—"An agency . . . should consider whether disclosure will contribute to the understanding of the public at large, as opposed to the individual understanding of the requester . . . . [A] requester's indigency, for example, does not entitle him to a fee waiver."

ROSE—"The public is benefited only if the information released meaningfully contributes to the public development or understanding of the subject."

MARKMAN—"An agency must determine that the general public's understanding of the subject matter . . . likely will be enhanced by the disclosure to a significant extent."

ROSE—"Where requested information is already in the public domain . . . the denial of a fee waiver is appropriate."

MARKMAN—"An agency should . . . consider whether the requested information is already in the public domain."

ROSE—"A requester's identity and qualifications—e.g., expertise in the subject matter and ability and intention to disseminate the information to the public—should be evaluated."

MARKMAN—"A requester's identity and qualifications—e.g., expertise in the subject area and ability and intention to disseminate the information to the general public—should be evaluated."

ROSE—"It is necessary to assess the magnitude of any . . . personal interest, and then to compare it with that of any discernable public benefit . . . ."

MARKMAN—"The statute requires the balancing of the requester's commercial interest against the public interest in disclosure that has been identified."

*Id.* at 7-9; Rose Memorandum, *supra* note 84.

attenuated.”<sup>87</sup>

The guidance provoked strong criticism from Representative English, who called upon the DOJ to withdraw the memorandum.<sup>88</sup> According to English, “Congress rewrote the FOIA fee waiver rules in order to make more people eligible for waivers. . . . Whether the Justice Department likes it or not, that is the intent of the amended FOIA.”<sup>89</sup> Representative English urged agencies to ignore the new DOJ guidelines and stated that agency officials who denied waivers to qualified requesters would be “personally invited” to participate in oversight hearings.<sup>90</sup>

The reactions of federal agencies were varied. Most agencies adopted the DOJ guidance in their regulations,<sup>91</sup> but some implicitly rejected it by including only the wording of the Reform Act.<sup>92</sup> At least one agency listed the memorandum’s six factors but declined to place any special reliance on the DOJ’s interpretations of them,<sup>93</sup> while one agency explicitly rejected the DOJ guidelines.<sup>94</sup> The inconsistent application of the DOJ guidelines mirrors the agencies’ reaction to the Rose Memorandum.<sup>95</sup> In fact, it appears that by repeating their acceptance or rejection

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87. Markman Memorandum, *supra* note 86, at 6. “A more general public interest in the subject of a record, which was the broader focus of the previous statutory standard, no longer is sufficient.” *Id.*

88. 133 CONG. REC. H2105 (daily ed. Apr. 22, 1987). English declared that the guidance was “dishonest” because the Justice Department did not objectively summarize the FOIA caselaw and legislative history. *Id.* at H2104-05. Furthermore, English contended, the OMB had been assigned responsibility for preparing guidelines because Congress lacked confidence in the Justice Department and considered the Department to be without authority in this area. *Id.* at H2104.

89. *Id.* at H2105.

90. *Id.*

91. *E.g.*, Freedom of Information Act; Implementing Regulation, 52 Fed. Reg. 49,383, 49,385, 49,392 (Dep’t of Agriculture 1987) (to be codified at 7 C.F.R. pt. 1, app. A) (“USDA . . . has elected to adopt generally the six elements [of the DOJ Guidance.]”); Freedom of Information Act Requests; Fees To Be Charged; General Counsel and Federal Service Impasses Panel, 52 Fed. Reg. 26,127, 26,127, 26,129 (Federal Labor Relations Auth. 1987) (to be codified at 5 C.F.R. § 2411.10) (“Dept. of Justice guidelines will be adhered to by the Authority . . .”).

92. *E.g.*, Implementation of the Freedom of Information Act; Uniform Fee Schedule, Guidelines, and Miscellaneous Amendments, 52 Fed. Reg. 13,215, 13,215, 13,219 (Office of Personnel Management 1987) (to be codified at 5 C.F.R. § 294.109) (new provisions “implement requirements of the Freedom of Information Reform Act”).

93. The Consumer Product Safety Commission included the factors only to isolate and restate the statutory language and did “not plan to rely on the Justice Department’s advice any more or less than it would rely on the legislative history . . . and its own interpretation of the act.” Freedom of Information Act Regulations; Final Amendments on Fees, 52 Fed. Reg. 28,977, 28,978-80 (1987) (to be codified at 16 C.F.R. § 1015.9).

94. Disclosure of Records: Freedom of Information Act and Privacy Act, 52 Fed. Reg. 26,302, 26,304 (Dep’t of Treasury 1987) (to be codified at 31 C.F.R. § 1) (“[DOJ] guidelines have not been included . . .”).

95. See Note, *Developments—1986*, *supra* note 3, at 534 (discussing agencies’ varied reactions to the Department of Justice guidelines in the Rose Memorandum).

of the DOJ guidance, agencies have gravitated toward their earlier fee waiver policies.

## II. LEGISLATIVE DEVELOPMENTS

### A. *Computer Security Act.*

The most significant legislative development in 1987 concerning the FOIA was passage of the Computer Security Act, which was intended to prevent knowledgeable persons from illegally tapping into government computer systems and altering or destroying records.<sup>96</sup> The Act gives the National Bureau of Standards responsibility for promulgating guidelines to protect the security of "sensitive" but unclassified computer information.<sup>97</sup> Originally, the Act did not state whether FOIA requests could be affected by the new security measures.<sup>98</sup> Representative Glenn English believed that the Act might be interpreted to restrict the public's ability to obtain FOIA information in electronic format and protested that "[i]nformation that is not exempt from disclosure should be available in either paper or electronic format at the option of the requester. Agencies should not be allowed to deny access to nonexempt, unclassified records in electronic format on the basis of vague and unsubstantiated 'national security' concerns."<sup>99</sup>

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96. Computer Security Act of 1987, Pub. L. No. 100-235, 101 Stat. 1724 (to be codified at 40 U.S.C. § 759 note and scattered sections of 15 U.S.C.).

97. See H.R. REP. NO. 153, 100th Cong., 1st Sess., pt. 2, at 9-10 (1987) (The purpose of the Act is to prevent illegal access to sensitive information.); see also H.R. 145, 100th Cong., 1st Sess. § 3(e)(4), 133 CONG. REC. H5340 (daily ed. June 22, 1987) (The term "sensitive information" means any non-secret information that could adversely affect the national interest, the conduct of federal programs, or rights created under the Privacy Act.). Currently, the National Telecommunications and Information Systems Security Committee (NTISSC) has similar responsibility for preventing illegal access to classified information. The Committee on Science, Space, and Technology chose not to expand the NTISSC's authority because it believed that the NTISSC favors military and intelligence agencies over requesters of information. Thus, it gave the newly created responsibility to the National Bureau of Standards, a component of the Commerce Department and a civilian agency. H.R. REP. NO. 153, 100th Cong., 1st Sess., pt. 1, at 25-26 (1987).

On October 29, 1986, the National Security Advisor signed a memorandum that addressed the issue of computer security. "*Sensitive Information Memo Likely To Have Impact on FOIA*, 12 ACCESS REP. NO. 23, Nov. 19, 1986, at 1-2. The memorandum ordered protection of "sensitive, but unclassified" information. *Id.* Members of Congress criticized the memo, saying it was overly restrictive of public access to information and was enforced in an "intrusive" manner. The memorandum was rescinded on March 17, 1987, after former National Security Advisor John Poindexter invoked the fifth amendment and declined to testify about it before the National Security subcommittee of the House Government Operations Committee. N.Y. Times, Mar. 18, 1987, § A, at 1, col. 5.

98. H.R. 145, 100th Cong., 1st Sess., 133 CONG. REC. H5339 (daily ed. June 22, 1987).

99. *Subcommittee Holds Hearings on Computer Security Policy*, 13 ACCESS REP. NO. 5, Mar. 11, 1987, at 8.

Representative English's concerns were addressed in the final version of the Computer Security Act, which explicitly states that the FOIA is not affected.<sup>100</sup> Thus, when the government lacks the authority to withhold information in print form, it also lacks the authority to withhold the same information maintained in electronic format.<sup>101</sup>

### B. *Proposal for a FOIA Tribunal or Ombudsman.*

In 1986, the Committee on Judicial Review of the Administrative Conference of the United States sponsored a study that recommended the establishment of an independent tribunal for resolving FOIA disputes, or, alternatively, the appointment of an ombudsman to review FOIA decisions and provide informal assistance to requesters.<sup>102</sup> When the proposals were presented, the Conference expressed reservations about the necessity of a tribunal and the usefulness of an ombudsman.<sup>103</sup> This year, the Conference rejected both recommendations, noting that a tribunal might not be helpful "given the moderate FOIA caseload (approximately 500 new federal court filings per year) and the high degree of public confidence in the current system of *de novo* judicial review of agency FOIA decisions."<sup>104</sup>

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100. The Act states that it shall not be construed:

- (1) to constitute authority to withhold information sought pursuant to [the FOIA] or
- (2) to authorize any Federal agency to limit, restrict, regulate, or control the collection, maintenance, disclosure, use, transfer, or sale of any information (regardless of the medium in which the information may be maintained) that is . . . disclosable under [the FOIA].

Computer Security Act of 1987, Pub. L. No. 100-235, § 8, 101 Stat. 1724 (to be codified at 40 U.S.C. § 759 note).

101. H.R. REP. NO. 153, 100th Cong., 1st Sess., pt. 2, at 30-31 (1987) ("[W]here the government is without authority to restrict or regulate the content or use of information that appears in newspapers, the government remains without such authority with respect to the same information that is maintained on microfiche, computerized data base, optical disk, or other computer system storage medium.").

102. The Conference sponsored two reports from Professor Mark H. Grunewald; the first draft recommended a tribunal and the second draft recommended, as an alternative, an ombudsman. M. Grunewald, *A Study of the Desirability and Feasibility of Establishing an Administrative Tribunal to Resolve Freedom of Information and Other Public Access Disputes 48-87* (draft of Feb. 25, 1986) (Report to the Administrative Conference of the United States); M. Grunewald, *A Study of the Desirability and Feasibility of Establishing an Administrative Tribunal to Resolve Freedom of Information and Other Public Access Disputes 85-127* (draft of Sept. 25, 1986) (Report to the Administrative Conference of the United States) (defining ombudsman as "an independent officer with authority, on the basis of citizen complaints, to investigate specific administrative action and to criticize but not compel a change in the result").

103. See Note, *Developments—1986*, *supra* note 3, at 541.

104. Recommendations of the Administrative Conference Regarding Administrative Practice and Procedure, 52 Fed. Reg. 23,629, 23,636 (1987) (to be codified at 1 C.F.R. § 310.12). Although the Conference did not endorse any changes in the dispute resolution structure, it encouraged agencies to avoid unnecessary litigation by simplifying their review processes and by using informal dispute resolution techniques more frequently. Specifically, the Conference asked agencies to "explore the voluntary use of . . . informal investigation of complaints, mediation or conciliation, and [the]

Late in 1987, however, the House Subcommittee on Government Information used the Administrative Conference study as a "starting point" for hearings on alternative dispute resolution mechanisms.<sup>105</sup> While most witnesses agreed that an ombudsman was a good idea, they disagreed on the appropriate activities and placement of the office. With regard to appropriate activities, testimony suggested that an ombudsman could arbitrate procedural FOIA disputes, act as a clearinghouse for information on how to file a request, or provide representation for requesters who could not afford to hire attorneys. With regard to placement, arguments were raised in favor of placing the ombudsman under the supervision of the Justice Department, the Office of Management and Budget, the National Archives, Congress, and the Subcommittee itself. Other witnesses suggested that the current dispute resolution system could be reformed without the creation of an ombudsman by requiring clearer records of agency proceedings and by allowing expeditious access to "hot" news information.<sup>106</sup> When he concluded the hearings, Representative English noted that changes were probably needed but that there was no consensus on the best location for an ombudsman and that more information was needed on the burdens FOIA litigation places on the court system.<sup>107</sup>

### III. EXECUTIVE DEVELOPMENTS

Although prior to 1987 most agencies voluntarily notified submitters of confidential commercial information when their records were requested under the FOIA,<sup>108</sup> President Reagan mandated such procedures in an executive order signed on June 23, 1987.<sup>109</sup> The executive order provides that after notifying submitters of the pending FOIA request, agencies must give submitters a reasonable time in which to ob-

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provision of a neutral government official to aid the parties in reaching settlement." *Id.* The Conference also recommended that the Justice Department, which operates an informal assistance program for requesters involved in FOIA disputes, make the public more aware of its services. *Id.*

105. *House Hears Testimony on FOIA Dispute Resolution*, 13 ACCESS REP. No. 23, Dec. 2, 1987, at 1.

106. *Id.* at 1-3.

107. *Id.* at 3.

108. See Note, *Developments—1986*, *supra* note 3, at 535 ("While most agencies currently do provide notification to business information submitters, procedures vary widely and submitters are not guaranteed the right to be consulted.").

109. Exec. Order No. 12,600, 52 Fed. Reg. 23,781 (1987). The executive order specifies that the procedures herein discussed are effective for all commercial information submitted on or after January 1, 1988. Information that was submitted prior to this date is subject to the notification requirements when the records are less than ten years old and have been designated as confidential, or when the agency can reasonably foresee that disclosure may cause substantial competitive harm. *Id.*

ject to the disclosure.<sup>110</sup> The agencies must carefully consider these objections before deciding whether to release the records.<sup>111</sup> While the initial burden is on the submitter to designate the information as confidential, the agency may define classes of information that automatically will be treated as if they had been so designated. In addition, the agency must notify a submitter of non-designated information whenever the agency reasonably believes disclosure could cause substantial competitive harm to the submitter.<sup>112</sup>

Although the executive order imposes a broad duty of notification, the duty does not exist in six situations: (1) if the agency determines that the information should not be disclosed;<sup>113</sup> (2) if the information has been published; (3) if the information has been made officially available to the public; (4) if disclosure of the information is required by law; (5) if disclosure is required by an agency rule that was adopted pursuant to notice and public comment, specifies narrow classes of records submitted to the agency that are to be released under the FOIA, and includes exceptions for notice when the submitter has provided written justification that the information could reasonably be expected to cause substantial competitive harm; and (6) if an agency determines that the submitter has frivolously designated information as confidential.<sup>114</sup>

The executive order follows several unsuccessful legislative attempts to create notification procedures and is similar to a bill passed by the House in 1986.<sup>115</sup> The executive order requires notification upon the same general terms as the 1986 bill; the 1986 bill, however, would have placed a higher burden on submitters of information because agencies would not have been required to notify individuals who failed to desig-

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110. *Id.* at 23,782.

111. *Id.* If the agency does not sustain the objections, it must send a written explanation to the submitter. *Id.*

112. *Id.* at 23,781-82.

113. Although the agency is not required to notify the submitter when requests are denied, it must do so if the requester brings suit to compel disclosure. *Id.* at 23,782.

114. *Id.* In the case of frivolous designations, the agency need not provide an opportunity for objection, but it still must notify the submitter of its final decision within a reasonable number of days prior to the disclosure date. *Id.*

115. The 1986 bill passed the House, see H.R. 4862, 99th Cong., 2d Sess., 132 CONG. REC. H7876 (daily ed. Sept. 22, 1986), passed, 132 CONG. REC. H7880 (daily ed. Sept. 22, 1986), but died in the Senate. [1985-1986] 1 Cong. Index (CCH) 2535. Unsuccessful legislation also was introduced in 1985. See S. 150, 99th Cong., 1st Sess., introduced, 131 CONG. REC. S72 (daily ed. Jan. 3, 1985); H.R. 1882, 99th Cong., 1st Sess., introduced, 131 CONG. REC. H1836 (daily ed. Apr. 2, 1985). In fact, discussion of the issue can be traced back more than a decade. See *Business Record Exemption of the Freedom of Information Act: Hearings before the Subcomm. on Gov't Information and Individual Rights of the House Comm. on Gov't Operations*, 95th Cong., 1st Sess. 3 (1977) (statement of Rep. Preyer) (Subcommittee will consider whether submitters should receive advance notice of a pending information release and opportunity to object to the release at the agency level.).

nate the information as confidential.<sup>116</sup> The executive order and the 1986 bill differ most significantly in that the executive order does not provide for judicial review of "reverse-FOIA" suits or for expedited access to information. Under the House bill, submitters could bring suit to enjoin agencies from disclosing records, and requesters could receive records within five days if they demonstrated "a substantial public interest in expeditious consideration of the request."<sup>117</sup> Opponents of the House bill protested that expedited access procedures could involve extra expense for agencies and that de novo review of reverse-FOIA suits could cause unnecessary expense and delay for the government and requesters.<sup>118</sup> These controversial provisions did not appear in President Reagan's executive order.

#### IV. JUDICIAL DEVELOPMENTS

##### A. *The Statute of Limitations for FOIA Actions.*

The statute of limitations is a defense rarely litigated in FOIA actions.<sup>119</sup> In 1987, the United States Court of Appeals for the District of Columbia Circuit held in *Spannaus v. Department of Justice*<sup>120</sup> that the six-year limitations period for actions against the government, 28 U.S.C. § 2401(a), applied to a FOIA suit. Because administrative remedies must be exhausted before a cause of action accrues under the FOIA,<sup>121</sup> most FOIA requesters simply pursue judicial remedies after a final agency decision. In *Spannaus*, however, the application of section 2401(a) barred the suit of a requester whose cause of action was found to have accrued constructively the month he filed his request.<sup>122</sup>

The court held first that the six-year statute of limitations<sup>123</sup> applies

116. The executive order states that an agency must notify submitters if the information is undesignated but the agency believes that disclosure could reasonably be expected to cause substantial competitive harm. Exec. Order No. 12,600, 52 Fed. Reg. 23,781, 23,782 (1987). The House bill contained a similar provision, but only for certain categories of information when the submitter did not have an opportunity to make the designation when the documents were originally submitted. H.R. 4862, 99th Cong., 2d Sess. § 2, 132 CONG. REC. H7876 (daily ed. Sept. 22, 1986).

117. H.R. 4862, § 2(G)(i)(I), 132 CONG. REC. at H7876.

118. See Note, *Developments—1986*, *supra* note 3, at 536-37.

119. See 1 B. BRAVERMAN & F. CHETWYND, INFORMATION LAW § 15-1, at 522 (1985) (citing a case that did not involve the FOIA for the proposition that the six-year statute of limitations for suits against the United States applies to the FOIA); see also *Spannaus v. Department of Justice*, 824 F.2d 52, 54-61 (D.C. Cir. 1987) (citing no controlling authority).

120. *Spannaus*, 824 F.2d at 55-56. See Note, *Developments—1986*, *supra* note 3, at 546-49, for a discussion of the district court decision in *Spannaus*.

121. *Dettmann v. Department of Justice*, 802 F.2d 1472, 1476-77 & n.8 (D.C. Cir. 1986).

122. 824 F.2d at 59.

123. 28 U.S.C. § 2401(a) (1982).

to FOIA suits.<sup>124</sup> Because the statute is a condition of the government's waiver of sovereign immunity, the court found that the statute applies to all actions against the government.<sup>125</sup> The court rejected the plaintiff's contention that the equitable nature of a FOIA action prevented application of the statute of limitations, and found that District of Columbia Circuit precedent compelled application of the statute to both legal and equitable claims.<sup>126</sup> The court also rejected as both irrelevant and unpersuasive the plaintiff's arguments concerning the special nature of FOIA claims.<sup>127</sup>

The court next held that the cause of action could accrue before the plaintiff had exhausted permissive agency review.<sup>128</sup> Because the FOIA provides that a requester "shall be deemed to have exhausted his administrative remedies . . . if the agency fails to comply with the applicable time limit,"<sup>129</sup> the court held that the plaintiff's claim accrued when the government failed to respond to his initial request within ten days.<sup>130</sup> Thus, the statute of limitations was not tolled by the twenty-two-month period during which the plaintiff pursued administrative appeals.<sup>131</sup>

The court rejected the plaintiff's policy arguments against application of the statute of limitations and in favor of tolling during administrative review.<sup>132</sup> The court found its decision to be governed by the fact that a condition of waiver of sovereign immunity must be construed strictly.<sup>133</sup> Additionally, the court found the six-year period sufficiently generous that administrative appeal would not be discouraged.<sup>134</sup> Weighing against the plaintiff was the possibility that without a statute of limitations, agencies would have to maintain files regarding FOIA requests indefinitely.<sup>135</sup> The fact that Spinaus knowingly allowed almost

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124. 824 F.2d at 55.

125. *Id.*

126. *Id.* The court cited several cases that did not involve the FOIA, e.g., *Calhoun v. Lehman*, 725 F.2d 115, 116, 117 (D.C. Cir. 1983); *Walters v. Secretary of Defense*, 725 F.2d 107, 111-14 (D.C. Cir. 1983), for the proposition that the statute of limitations applies to equitable claims.

127. 824 F.2d at 55-56. The plaintiff argued that the fact that a FOIA request can be refiled at any point made application of a statute of limitations absurd and that application of the statute would discourage permissive administrative appeals. *Id.*

128. *Id.* at 56-57. The court explained that language in *Impro Products, Inc. v. Block*, 722 F.2d 845, 850 (D.C. Cir. 1983), *cert. denied*, 469 U.S. 931 (1984), which appeared to support the plaintiff's contentions, was inapplicable. *Impro Products* noted that "the cause of action accrues when all statutorily required or permitted agency review has been exhausted." *Impro Products*, 722 F.2d at 850 (emphasis added).

129. 5 U.S.C. § 552(a)(6)(C) (1982).

130. 824 F.2d at 59.

131. *Id.* at 61.

132. *Id.* at 55-56, 60-61.

133. *Id.* at 55, 60.

134. *Id.* at 56, 60.

135. *Id.* at 55-56.

six years to pass between the agencies' final denial of his request and his filing suit<sup>136</sup> does not appear to have influenced the court, which noted that its reading of the statute of limitations might even preclude relief for an "unwitting" requester whom an agency tricked into awaiting a response for six years.<sup>137</sup> Noting that Spannaus was free to file a new request for the same information, the court observed that "little [was] at stake."<sup>138</sup>

### B. *Litigation Costs Under the Freedom of Information Act.*

Subsection (a)(4)(E) of the FOIA states that a "court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed."<sup>139</sup> In *Kuzma v. Internal Revenue Service*,<sup>140</sup> the United States Court of Appeals for the Second Circuit held that this subsection does not limit the costs awarded under the FOIA to those costs which a court may award under 28 U.S.C. § 1920, the general provision for taxation of costs against the United States.<sup>141</sup> Kuznia, a pro se litigant, sought \$687.43 in costs spent successfully liti-

136. *Id.* at 54.

137. *Id.* at 60-61.

138. *Id.* at 61.

The FOIA gives the courts jurisdiction to enjoin federal agencies from wrongfully withholding "agency records." 5 U.S.C. § 552(a)(4)(B) (1982). In 1986, a district court held that documents are not agency records unless they were compiled or maintained pursuant to legal authority. *Marzen v. Department of Health & Human Servs.*, 632 F. Supp. 785, 802 (N.D. Ill. 1986); see Note, *Developments—1986*, *supra* note 3, at 543-46 (explaining *Marzen* and arguing that its holding was inconsistent with purposes of the FOIA). In 1987, the United States Court of Appeals for the Seventh Circuit affirmed the district court's decision on different grounds, holding that several FOIA exemptions justified withholding the records even if they were "agency records" subject to the FOIA. *Marzen v. Department of Health & Human Servs.*, 825 F.2d 1148, 1153 (7th Cir. 1987). The district court had provided several alternative grounds for withholding. 632 F. Supp. at 815. Under one line of reasoning, the district court read exemption 7(A) broadly to allow withholding when the government shows that disclosure would concretely and substantially interfere with future enforcement proceedings, rather than requiring interference with the particular enforcement effort for which the documents were compiled. *Id.* at 804, 806; see Note, *Developments—1986*, *supra* note 3, at 562-64 (discussing *Marzen's* use of exemption 7(A)). While the court of appeals agreed that exemption 7(A) would shield the records, 825 F.2d at 1153, its analysis was devoted to identification of privacy-related exemptions, *id.* at 1153-54. Thus, the more controversial aspects of the district court's holding do not appear to have been affirmed by the court of appeals.

139. 5 U.S.C. § 552(a)(4)(E) (1982). Litigation over the recovery of costs, as opposed to attorney fees, seems relatively rare. Discussions of cost recovery are brief or absent in treatises dealing with section (a)(4)(E) of the FOIA. See, e.g., 1 B. BRAVERMAN & F. CHETWYND, *supra* note 119, § 16-9; J. FRANKLIN & R. BOUCHARD, *GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS* § 1.14[11] (2d ed. 1987) (devoting majority of discussion to award of attorney fees); 1 J. O'REILLY, *FEDERAL INFORMATION DISCLOSURE* § 8.14A (1987) (same).

140. 821 F.2d 930 (2d Cir. 1987).

141. *Id.* at 933. Section 1920 provides:

A judge or clerk of any court of the United States may tax as costs the following:

gating a FOIA suit. His claimed costs included a filing fee, a marshal fee, postage, photocopying, a typist, exhibits, law books, transportation, and parking fees. The district court ruled that section 1920 lists the only costs that can be awarded. The district court allowed Kuzma to recover only his filing and marshal fees because they were the only costs recoverable under section 1920.<sup>142</sup>

Kuzma appealed, arguing that the "other litigation costs" allowed by the FOIA should not be limited to those recoverable under section 1920.<sup>143</sup> The court of appeals agreed, reasoning that Congress "intended that the phrase 'other litigation costs' would add to the scope of costs already recoverable against the government under § 1920."<sup>144</sup> Any other reading effectively would give no meaning to the FOIA provision because section 1920 provides for the recovery of costs.<sup>145</sup>

The court stated that the FOIA provision is an exception to the general American rule codified in section 1920 and that Congress meant for section (a)(4)(E) to encourage private citizens to act as "'private attorneys general' in furtherance of 'a national policy of disclosure of government information.'"<sup>146</sup> The court also noted the importance of shifting costs "for the class of plaintiffs (*pro se* litigants) perhaps most in need of the statute's cost-shifting benefits."<sup>147</sup> The court allowed Kuzma to recover all of his claimed costs except for the amount he spent on law books, which he could have borrowed from a library.<sup>148</sup>

### C. The 1986 Fee Waiver Amendments.

Only one decision in 1987 analyzed the 1986 changes to the fee waiver standard.<sup>149</sup> The statute, which previously required a waiver or

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- (1) Fees of the clerk and marshal;
  - (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
  - (3) Fees and disbursements for printing and witnesses;
  - (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
  - (5) Docket fees under section 1923 of this title;
  - (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
- A bill of costs shall be filed in the case, and, upon allowance, included in the judgment or decree.

28 U.S.C. § 1920 (1982).

142. 821 F.2d at 931-32.

143. *Id.* at 931.

144. *Id.* at 932.

145. *Id.*

146. *Id.* at 933 (quoting SENATE JUDICIARY COMM., AMENDING THE FREEDOM OF INFORMATION ACT, S. REP. NO. 854, 93d Cong., 2d Sess. 18 (1974)).

147. *Id.* at 934.

148. *Id.* at 933.

149. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282 (9th Cir. 1987). The new fee provisions were also applied in *Southam News v. INS*, 674 F. Supp. 881 (D.D.C. 1987).

reduction of fees when "furnishing the information can be considered as primarily benefiting the general public,"<sup>150</sup> now requires a reduction or waiver "if disclosure of the information is in the public interest because it 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."<sup>151</sup>

In *McClellan Ecological Seepage Situation v. Carlucci*,<sup>152</sup> the United States Court of Appeals for the Ninth Circuit upheld the denial of a fee waiver to a nonprofit association that sought information about water pollution at an Air Force base. The association, McClellan Ecological Seepage Situation (MESS), claimed that disclosure would benefit the general public because the information could be used in litigation to ensure that the Air Force complied with federal law and because the information would ultimately be donated to a public institution.<sup>153</sup> The government had reduced fees by only twenty-five percent after learning that some members of MESS had filed tort claims against the Air Force.<sup>154</sup>

Although the court of appeals adopted a liberal interpretation of the

Under the amended statute, representatives of the news media are required to pay only the cost of duplicating requested documents. 5 U.S.C. § 552(a)(4)(A)(ii)(II) (Supp. IV 1986). In *Southam News*, the court held that a Canadian news organization qualified for this preferential treatment, holding that "[t]here is no requirement in the statute that news media . . . serve the American public exclusively, or even tangentially." 674 F. Supp. at 892.

The court also expressed a novel view of the standard for fee waivers. The requesters sought records concerning the application of an immigration law provision that permits the exclusion of aliens on political grounds. *Id.* at 883-84. The court held that it was "absurd" for the agency to maintain that disclosure of the records would not contribute to public understanding of government activities enough to warrant a fee waiver. *Id.* at 893. The court continued:

Moreover, it is the very purpose of the FOIA to allow the *public* to decide what will aid its understanding of the government. In the absence of an exemption barring release of the information, it is not for the *agency* to make that determination.

*Id.* The court's language would appear to require that fee waivers be granted whenever they are requested.

In a case involving adjudication of a federal prisoner's fee waiver claim under the old statute, Judge Posner "express[ed] concern about the waste of judicial resources that is involved in allowing a person to obtain two levels of federal judicial review of an agency's denial of a claim for \$39.20." *Savage v. CIA*, 826 F.2d 561, 563 (7th Cir. 1987). The court suggested "that Congress consider the establishment of [a small claims procedure] for fee-waiver requests under the Freedom of Information Act." *Id.* The court stated that "[n]o rational system of government burdens its highest courts with a class of litigation dominated by petty cases typically brought for their nuisance value by persons on whose hands time hangs heavy." *Id.* at 563-64. See *supra* notes 102-07 and accompanying text (proposal for FOIA tribunal or ombudsman).

150. 5 U.S.C. § 552(a)(4)(A) (1982) (amended 1986).

151. 5 U.S.C. § 552(a)(4)(A)(iii) (Supp. IV 1986). See Note, *Developments—1986, supra* note 3, at 529-34, for a discussion of the change in the fee waiver standard.

152. 835 F.2d 1282, 1287 (9th Cir. 1987).

153. *Id.* at 1285.

154. *Id.* at 1283-84.

legislative history of the amendment,<sup>155</sup> it refused to exempt public interest groups from the statutory waiver requirements.<sup>156</sup> Citing language in the new waiver provisions, the court first determined whether disclosure was "primarily in the commercial interest of the requester."<sup>157</sup> Finding this prong of the test satisfied, the court held that tort claims do not constitute commercial interests because they are unrelated to commerce, trade, or profit.<sup>158</sup>

The court, however, affirmed the agency's decision to reduce fees by twenty-five percent because it found that the group had not proven that disclosure would be "likely to contribute significantly to public understanding of the operations or activities of the government."<sup>159</sup> The court followed a 1987 decision holding that the old fee waiver provisions required requesters to identify a public interest with "reasonable certainty."<sup>160</sup> In that decision, *National Treasury Employees Union v. Griffin*,<sup>161</sup> the United States Court of Appeals for the District of Columbia Circuit held that a requester must prove that disclosure would produce specific benefits. Applying this analysis to the new fee provisions, the *McClellan* court found that MESS had not adequately shown how the public would be benefited by disclosure of the pollution information. MESS's claim that the information might be used in litigation to ensure agency compliance with federal law was not sufficiently precise, since all government documents might be used for this purpose.<sup>162</sup> Moreover, the association had neither demonstrated its ability to process the information for public use nor presented details about its intention to disseminate the information. Therefore, MESS had failed to show that disclosure would make a significant contribution to public understanding of the government.<sup>163</sup>

The court also approved the government's request that MESS provide information about its "identity and history, [its] ability to absorb and disseminate information, and [its] specific plans to use the informa-

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155. The court found that Senator Patrick Leahy's statements expressed legislative intent. The court quoted Senator Leahy's statements that the statute should be "liberally construed in favor of waivers for noncommercial requesters," *id.* at 1284 (quoting 132 CONG. REC. S14,298 (daily ed. Sept. 30, 1986)), and that the amendment's purpose was "to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees," *id.* (quoting 132 CONG. REC. S16,496 (daily ed. Oct. 15, 1986)).

156. *Id.* at 1284.

157. *Id.* at 1285.

158. *Id.*

159. *Id.* at 1285-86.

160. *National Treasury Employees Union v. Griffin*, 811 F.2d 644, 647 (D.C. Cir. 1987).

161. 811 F.2d at 644, 647.

162. 835 F.2d at 1285.

163. *Id.* at 1285-86.

tion in the public interest."<sup>164</sup> These inquiries were relevant to the determination of whether disclosure would be "likely to contribute significantly to public understanding."<sup>165</sup> The government was also justified in asking MESS about the relationship between the FOIA request and the tort claims, since a "requester's motive for seeking disclosure is a factor for an agency to consider in evaluating the likely effect of disclosure on public understanding."<sup>166</sup> The court added in dicta that "insofar as a requester seeks information merely to advance private lawsuits—or administrative claims—we will consider disclosure less 'likely to contribute . . . to public understanding.'"<sup>167</sup>

Although *McClellan* applied the new fee waiver standard, it did not analyze the differences between the new standard and the previous standard.<sup>168</sup> In fact, the *McClellan* opinion incorporated much of the analysis that the District of Columbia Circuit used in *Griffin*<sup>169</sup> to interpret the old fee waiver criteria.<sup>170</sup> Thus, *McClellan* suggests that the new fee waiver language may be applied to reach the results obtained under the old standard.

#### D. Exemption 3.

Exemption 3 removes from the FOIA's reach matters "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."<sup>171</sup> In general, few statutes are specific enough in denying the possibility of agency discretion to meet subsection 3(A). Most statutes that qualify as exemption 3 statutes qualify under subsection 3(B), which allows information to be exempted by a statute that permits some agency discretion.<sup>172</sup>

##### 1. Section 6103 of the Internal Revenue Code. Whether section 6103 of the Internal Revenue Code, which provides for the confidential-

164. *Id.* at 1287.

165. *Id.* (citing 5 U.S.C. § 552(a)(4)(A)(iii) (Supp. IV 1986)).

166. *Id.* at 1287 n.4.

167. *Id.* at 1287. The court qualified this approach by adding that "[t]he mere possibility of private lawsuits does not justify an agency in refusing to waive fees: public interest may be at its peak precisely when there is potential for private lawsuits against the government." *Id.* at 1287 n.4.

168. *Id.* at 1284.

169. 811 F.2d 644 (D.C. Cir. 1987); see *supra* notes 161-64 and accompanying text.

170. 835 F.2d at 1285.

171. 5 U.S.C. § 552(b)(3) (1982).

172. J. FRANKLIN & R. BOUCHARD, *supra* note 139, § 1.06, at 1-49 to 1-51.

ity of tax returns and return information,<sup>173</sup> qualifies as an exemption 3 statute has divided the federal courts of appeals.<sup>174</sup> In *Church of Scientology v. Internal Revenue Service*,<sup>175</sup> the Supreme Court considered the extent to which a part of section 6103 known as the Haskell Amendment<sup>176</sup> allows the release of tax return information under the FOIA.<sup>177</sup> The parties had agreed that section 6103 is an exemption 3 statute. Thus, the Court did not specifically address the split among the federal circuits.<sup>178</sup> The Court focused its inquiry on whether the requested information<sup>179</sup> met the terms of section 6103 and held that the records should be withheld without determining whether section 6103 displaces the FOIA.<sup>180</sup>

The church argued that even if section 6103 operates as an exemption 3 statute to protect records from disclosure, it is inapplicable to information that does not identify a particular taxpayer.<sup>181</sup> Section 6103(a) of the Internal Revenue Code states that “[r]eturns and return information shall be confidential” and shall not be disclosed “except as authorized by this title.”<sup>182</sup> The church relied on the Haskell Amendment, which states that the term “return information” “does not include data

173. 26 U.S.C. § 6103 (1982).

174. See Note, *Developments—1986, supra* note 3, at 553-54 (The Sixth and Seventh Circuits follow the view that section 6103 protects tax information independently of the FOIA, while the District of Columbia, Third, Fifth, Ninth and Eleventh Circuits follow the view that “section 6103 does not supersede the FOIA but rather falls within the ambit of exemption 3.”).

175. 108 S. Ct. 271 (1987).

176. 26 U.S.C. § 6103(b)(2).

177. 108 S. Ct. at 272.

178. *Id.* at 273.

179. The church sought, among other materials:

“[c]opies of all information relating to or containing the names of Scientology, Church of Scientology, any specific Scientology church or entity identified by containing the words Scientology, Hubbard and/or Dianetics in their names, L. Ron Hubbard or Mary Sue Hubbard in the form of written record, correspondence, document, memorandum, form, computer [sic] tape, computer [sic] program or microfilm, which is contained in” an extensive list of respondent’s case files and data systems.

*Id.* at 272-73 (quoting petitioner’s FOIA request).

180. *Id.* at 272-76. The six participating Justices decided the case unanimously.

181. *Id.* at 274.

182. 26 U.S.C. § 6103(a). Subsection 6103(b)(1) defines “return” as “any tax or information return, declaration of estimated tax, or claim for refund.” *Id.* § 6103(b)(1). Subsection 6103(b)(2) defines return information as:

a taxpayer’s identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, over-assessments, or tax payments, whether the taxpayer’s return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense.

*Id.* § 6103(b)(2). The court noted that “return information” could include information such as IRS audit records. 108 S. Ct. at 274.

in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer."<sup>183</sup> Subsection (b) of the FOIA requires agencies to redact records and disclose segregable nonexempt portions of records that contain exempt information.<sup>184</sup> The church argued that the IRS should be required to redact identifying data from "return information" because, the church argued, redacted return information documents would not be protected by section 6103.<sup>185</sup>

The Court held that the IRS had no duty to redact because even redacted return information would be protected by the tax code's confidentiality provisions.<sup>186</sup> The Court first examined the language of section 6103. Section 6103(b)(2) describes the information relating to returns that the IRS must keep confidential, listing, for example, the taxpayer's identity, net worth, and tax liability. If removing identifying details were enough to put the return information "in a form" contemplated by the Haskell Amendment, the remaining categories of protected information in section 6103(b)(2), such as net worth, "would often be irrelevant."<sup>187</sup> The Court reasoned that Congress could have implemented the church's reading of the Haskell Amendment by simply stating that return information without identifying details could be disclosed.<sup>188</sup> Furthermore, the Court noted that the most natural reading of the Haskell Amendment would prohibit release of all tax return information, because the provision only allows the release of "data in a form" that cannot identify an individual, rather than permitting the release of all data that cannot identify anyone.<sup>189</sup> Finally, the Court noted that other subsections of section 6103 suggested that Congress intended that returns and return information never be released.<sup>190</sup>

The Court then turned to the legislative history of the Haskell Amendment. First, when it revised section 6103, Congress meant to restrict access to return information.<sup>191</sup> To read the proviso as the church suggested would require a determination that Congress intended the amendment "to undercut the legislation's primary purpose of limiting access to tax filings."<sup>192</sup> Second, the circumstances under which Con-

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183. 26 U.S.C. § 6103(b)(2).

184. Subsection(b) provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b) (1982).

185. 108 S. Ct. at 274.

186. *Id.* at 276.

187. *Id.* at 274.

188. *Id.*

189. *Id.* at 274-75 (quoting 26 U.S.C. § 6103(b)(2) (emphasis added by the Court)).

190. *Id.* at 275.

191. *Id.*

192. *Id.*

gress adopted the Haskell provision suggested that the provision was intended to have limited impact.<sup>193</sup> The Court also noted that the remarks Senator Haskell made during debate indicated that he did not mean for the proviso to be read expansively; he referred only to the necessity of permitting the release of statistical studies and compilations.<sup>194</sup> Therefore, the Court held that section 6103 would protect even redacted return information from disclosure.<sup>195</sup>

2. *The Trade Secrets Act.* The Trade Secrets Act prohibits federal employees from releasing trade secret information they receive on the job unless they are legally authorized to do so.<sup>196</sup> In *CNA Financial*

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193. *Id.* Senator Haskell proposed the amendment during debate on the Senate floor. The bill's floor manager responded that the amendment "might not be entirely necessary, but it might serve a good purpose." The amendment was then passed by voice vote. *Id.* at 275-76 (quoting 122 CONG. REC. 24,012 (1976) (statement of Sen. Long)). The Court concluded that it was "difficult to believe that Congress in this manner adopted an amendment which would work such an alteration to the basic thrust of the draft bill." *Id.* at 276.

194. *Id.* Senator Haskell stated, "[T]he purpose of this amendment is to insure that statistical studies and other compilations of data now prepared by the Internal Revenue Service and disclosed by it to outside parties will continue to be subject to disclosure to the extent allowed under present law." *Id.* at 275 (quoting 122 CONG. REC. 24,012 (1976)).

195. *Id.* at 276.

In 1979, the United States Court of Appeals for the Ninth Circuit held, contrary to the Supreme Court's later holding in *Church of Scientology*, that the IRS was required to redact identifying details and release return information under the FOIA. *Long v. IRS*, 596 F.2d 362, 367-68 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980). In a 1987 decision rendered prior to *Church of Scientology*, the Ninth Circuit reviewed factual findings that a district court had made under the Ninth Circuit standard. *Long v. IRS*, 825 F.2d 225 (9th Cir. 1987) [*Long II*], *vacated, cert. granted*, 108 S. Ct. 2839 (1988). Illustrating the difficulties that can result from requests for deletion of identifying details, the court of appeals noted that some of the requests for partial disclosure of tax compliance records "would involve editing so extensive as to amount to the creation of new records." *Long II*, 825 F.2d at 230. The court ordered that the records be withheld, noting that the FOIA only requires disclosure of the "reasonably segregable" portion of records that contain some information that must be withheld. *Id.* (citing 5 U.S.C. § 552(b) (1982)).

If the *Church of Scientology* requirement that tax return records be reformulated prior to release is read in conjunction with the *Long* prohibition of reformulation for a FOIA request, the government will be able to prevent the disclosure of all tax return information by retaining details that identify taxpayers in all files.

196. The Trade Secrets Act provides:

Whoever, being an officer or employee of the United States or of any department or agency thereof, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314) publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person

*Corp. v. Donovan*,<sup>197</sup> the United States Court of Appeals for the District of Columbia Circuit held that the Trade Secrets Act is not an exemption 3 statute, joining the majority of courts that have decided the issue.<sup>198</sup>

CNA, an insurance company doing business with the federal government, submitted information concerning its hiring practices with regard to women and minorities in order to receive government contracts. When a government agency informed CNA that it intended to release the information to a FOIA requester, CNA filed a reverse-FOIA suit.<sup>199</sup> CNA claimed that the Trade Secrets Act qualifies as an exemption 3 statute under both subsection 3(A) and subsection 3(B).<sup>200</sup>

CNA argued that the Trade Secrets Act bars disclosure of all business data, qualifying the Act for exemption 3(A), which exempts information protected by statutes that allow no administrative discretion. The court held that this argument would require ignoring the Act's crucial phrase, which only prohibits disclosure that is "not authorized by law."<sup>201</sup> The court noted that agency regulations can permit disclosure under the Trade Secrets Act. Thus, the phrase "not authorized by law" may refer to the situation in which the agency, rather than Congress, chose not to release the information. This possibility of administrative discretion precluded the application of exemption 3(A).<sup>202</sup>

The court also held that the Trade Secrets Act does not qualify for exemption 3(B),<sup>203</sup> which exempts information protected by statutes that "establish 'particular criteria for withholding'" or "refer to 'particular types of matters to be withheld.'"<sup>204</sup> First, because the Act provides no guidance to the agencies as to what information should be withheld—rather, it only prohibits unauthorized disclosure—agencies can "opt out of its strictures."<sup>205</sup> If the Act were an exemption 3 statute, an agency could use regulations to control the application of exemption 3.<sup>206</sup> Second, the court noted that the Act "appears to cover practically any coin-

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except as provided by law; shall be fined not more than \$1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

18 U.S.C. § 1905 (1982).

197. 830 F.2d 1132, 1138 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1270 (1988).

198. *Id.* at 1141 n.62; see also J. FRANKLIN & R. BOUCHARD, *supra* note 139, § 1.06, at 1-54 to 1-56; 1 B. BRAVERMAN & F. CHETWYND, *supra* note 119, § 7-4.3.3, at 280 & n.194.

199. 830 F.2d at 1134-35. In a reverse-FOIA action, an information submitter tries to enjoin an agency from releasing information. *Id.* at 1133 n.1; J. FRANKLIN & R. BOUCHARD, *supra* note 139, § 1.15, at 1-197 (defining a "reverse FOIA" action).

200. 830 F.2d at 1138.

201. See 18 U.S.C. § 1905 (1982).

202. 830 F.2d at 1138.

203. *Id.* at 1141.

204. *Id.* at 1139 (quoting 5 U.S.C. § 552(b)(3)(B) (1982)).

205. *Id.*

206. *Id.* at 1139-40.

mercial or financial data collected by any federal employee from any source."<sup>207</sup> The court thus found that Congress had not specified *particular* matters to be withheld.<sup>208</sup>

The court relied on the purposes of the Trade Secrets Act and the FOIA to justify its holding.<sup>209</sup> According to the court, the Trade Secrets Act was intended to prevent disclosure in the absence of agency deliberation, not to prevent all disclosure. Therefore, the court's holding was consistent with the congressional purpose implemented by the Trade Secrets Act, because the FOIA provides legal authorization for disclosure. The court noted that information covered by the Trade Secrets Act may also be protected from release under the FOIA by a separate FOIA exemption. The court concluded that its decision would not "undermine the foundation of the Trade Secrets Act by throwing open the door to wholesale, haphazard revelation of private financial and business data in the possession of governmental agencies."<sup>210</sup>

#### E. *Exemption 4: Confidential Commercial Information.*

Although exemption 4 protects confidential commercial information from disclosure, it does not define the term "confidential."<sup>211</sup> The courts have interpreted the term to apply only when the disclosure of information would "harm a specific interest that Congress sought to protect by enacting the exemption."<sup>212</sup> In 1974, in *National Parks & Conservation Association v. Morton*,<sup>213</sup> the United States Court of Appeals for the District of Columbia Circuit fashioned a more specific rule that protects information when disclosure is likely to either "impair the Government's ability to obtain necessary information" or "cause substantial harm to the competitive position of the person from whom the information was obtained."<sup>214</sup> *National Parks*, however, did not decide whether other governmental interests might trigger the confidentiality exemption.<sup>215</sup>

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207. *Id.* at 1140.

208. *Id.* at 1140-41.

209. *Id.* at 1141-42.

210. *Id.*

211. *See* 5 U.S.C. § 552(b)(4) (1982).

212. 9 to 5 Org. for Women Office Workers v. Board of Governors of Fed. Reserve, 721 F.2d 1, 9 (1st Cir. 1983). Courts have also required agencies to prove that the information "would customarily not be released to the public by the person from whom it was obtained." *Critical Mass Energy Project v. NRC*, 830 F.2d 278, 281 (D.C. Cir. 1987) (quoting *Board of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 404 (D.C. Cir. 1980) (quoting S. REP No. 813, 89th Cong., 1st Sess. 9 (1965))).

213. 498 F.2d 765 (D.C. Cir. 1974).

214. *Id.* at 770.

215. *Id.* at n.17.

The District of Columbia Circuit has now followed the First Circuit<sup>216</sup> in recognizing that the government's interest in the efficient and effective administration of the agency may suffice.

The District of Columbia Circuit announced its new rule in *Critical Mass Energy Project v. Nuclear Regulatory Commission*.<sup>217</sup> The case involved a request for safety records that had been voluntarily provided to the Nuclear Regulatory Commission (NRC) by an association of utility companies engaged in the production of nuclear power.<sup>218</sup> Since the agency could mandate submission of the records if the association stopped providing them voluntarily,<sup>219</sup> the court was not persuaded that disclosure would significantly impair the NRC's ability to obtain the information.<sup>220</sup> The NRC also argued that even if the court found that disclosure would not impair the agency's ability to obtain the information, it should exempt the records because " 'the sacrifice in the efficiency of [the agency's] operations and the burdens [the agency] would necessarily bear in securing the information through other means would be too heavy.' " <sup>221</sup> The court agreed that confidentiality could be established if the disclosure would significantly impair the efficient and effective performance of the agency, and remanded the case for further factual findings.<sup>222</sup> Because of this disposition, *Critical Mass* did not clarify what circumstances would constitute significant impairment.

#### F. *Exemption 5 and the Work Product Doctrine.*

Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency."<sup>223</sup> The exemption incorporates several civil discovery

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216. See 9 to 5, 721 F.2d at 11 ("In view of the legitimate governmental interest of efficient operation, it would do violence to the statutory purpose of exemption 4 were the Government to be disadvantaged by disclosing information which serves a valuable purpose and is useful for the effective execution of its statutory responsibilities.").

217. 830 F.2d 278, 286 (D.C. Cir. 1987).

218. *Id.* at 279.

219. *Id.* at 283-84.

220. *Id.* at 286. ("On remand . . . the NRC should be given the opportunity to document its necessarily uncertain prediction that disclosure would impair either the factual base, or analytical quality, of the INPO reports.").

221. *Id.* (citation omitted).

222. *Id.* at 287.

223. 5 U.S.C. § 552(b)(5) (1982).

Of the privileges which exemption 5 protects, the deliberative process privilege is the privilege invoked most frequently. J. FRANKLIN & R. BOUCHARD, *supra* note 139, § 1.08[2], at 1-72.

In 1987, the United States Court of Appeals for the District of Columbia Circuit analyzed the deliberative process privilege in a decision that the court later reversed en banc in 1988. *Wolfe v. Department of Health & Human Servs.*, 815 F.2d 1527 (D.C. Cir. 1987), *rev'd en banc*, 839 F.2d 768 (D.C. Cir. 1988). The case concerned regulatory logs that showed how long the Department of

privileges.<sup>224</sup> While some commentators argue that factual materials covered by the work product doctrine are shielded by exemption 5,<sup>225</sup> others believe that factual materials can never be protected by exemption 5.<sup>226</sup> In *Martin v. Office of Special Counsel, Merit Systems Protection Board*,<sup>227</sup> the United States Court of Appeals for the District of Columbia Circuit held that all factual materials protected by the work product privilege are protected by exemption 5. The court rejected<sup>228</sup> an interpretation adopted in 1977 by the Fourth<sup>229</sup> and Fifth<sup>230</sup> Circuits, under which the exemption shields only nonfactual materials relating to an agency's deliberative processes.<sup>231</sup>

The court held that the distinction between factual and deliberative materials should be drawn when exemption 5 is claimed because the deliberative process privilege applies, but not when exemption 5 is claimed because the work product privilege applies.<sup>232</sup> The court noted that the Supreme Court has rejected the idea that "purely factual material can

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Health and Human Services took to respond to Food and Drug Administration proposals for rules. *Id.* at 1528. Noting that purely factual information that does not reveal the substance of predecisional opinion cannot be withheld under the deliberative process privilege, *id.* at 1529, the panel held that the records had to be classified as fact or opinion "in light of the policies and goals that underlie the deliberative process privilege," *id.* at 1530. The court found that the policy of encouraging "frank and full predecisional discussion by government officials" did not justify protecting the logs from disclosure. *Id.* at 1530-31. The court also rejected the government's argument that executive privilege protected the documents. *Id.* at 1553. Judge Bork, who later wrote the opinion for the en banc court, dissented from both of the panel's holdings. *Id.* at 1534, 1538.

224. See *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984) ("The test under Exemption 5 is whether the documents would be "routinely" or "normally" disclosed upon a showing of relevance." (quoting *FTC v. Grolier Inc.*, 462 U.S. 19, 26 (1983))); *Durns v. Bureau of Prisons*, 804 F.2d 701, 703-04 (D.C. Cir. 1986) (exemption 5 applicable to communications privileged from civil discovery).

225. J. FRANKLIN & R. BOUCHARD, *supra* note 139, § 1.08[3], at 1-82 ("[T]he holdings in *Weber Aircraft* and *Grolier* compel the conclusion that all factual material prepared in contemplation of litigation is protectible under Exemption 5." (discussing *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984), and *FTC v. Grolier, Inc.*, 462 U.S. 19 (1983))); I P. HEIN, *BUSINESS INFORMATION: PROTECTION AND DISCLOSURE* 274 (1983) (criticizing *Robbins Tire & Rubber Co. v. NLRB*, 563 F.2d 724, 734-37 (5th Cir. 1977), *rev'd on other grounds*, 437 U.S. 214 (1978)—a decision limiting the privilege to deliberative processes—for misreading congressional intent.).

226. 1 B. BRAVERMAN & F. CHETWYND, *supra* note 119, § 9-4.4.2, at 380 ("[T]he work product privilege does not protect those parts of a document that are purely factual." (citing *EPA v. Mink*, 410 U.S. 73, 91 (1973))).

227. 819 F.2d 1181, 1187 (D.C. Cir. 1987).

228. *Id.* at 1185-87.

229. *Deering Milliken, Inc. v. Irving*, 548 F.2d 1131, 1138 (4th Cir. 1977).

230. *Robbins Tire & Rubber Co. v. NLRB*, 563 F.2d 724, 725 (5th Cir. 1977), *rev'd on other grounds*, 437 U.S. 214 (1978).

231. *E.g.*, *id.* at 735 ("[P]urely factual" witness statements are not protected by exemption 5 because they are not part of the "deliberative processes" of the agency.).

232. 819 F.2d at 1185-87.

never qualify for protection under Exemption 5."<sup>233</sup> Because the *Martin* court held that exemption 5 is coextensive with the work product doctrine,<sup>234</sup> it did not address the applicability of a FOIA provision that requires disclosure of segregable nonexempt portions of records.<sup>235</sup> Finally, the court noted that work product factual materials are available in civil discovery only when substantial need and undue hardship are shown.<sup>236</sup> Such materials are protected by exemption 5 regardless of any showing of need, because the materials are not "normally" or "routinely" available in civil discovery.<sup>237</sup>

### G. *Exemption 6 and Similar Files.*

Exemption 6 excludes information from the FOIA when necessary to prevent a "clearly unwarranted invasion of personal privacy."<sup>238</sup> The threshold requirement of exemption 6 is that the information must be in "personnel and medical files and similar files."<sup>239</sup> While the definitions of "personnel and medical files" have inspired little debate,<sup>240</sup> the meaning of "similar files" was once the source of substantial disagreement.<sup>241</sup> In 1982, in *Department of State v. Washington Post Co.*,<sup>242</sup> the Supreme Court rejected the District of Columbia Circuit's restrictive interpretation of "similar files"<sup>243</sup> and held that any information that "applies to a particular individual"<sup>244</sup> satisfies the threshold requirement of exemption 6, regardless of the "nature of the file in which the requested information

233. *Id.* at 1186 (citing *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 800 n.17 (1983)). In *Weber Aircraft*, the Court held that witness statements that qualified for a special privilege for air crash investigations were protected by exemption 5. 465 U.S. at 798.

234. 819 F.2d at 1187.

235. 5 U.S.C. § 552(b) (1982) ("Any reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt. . .").

236. 819 F.2d at 1184.

237. *Id.* The court noted that a different interpretation would enlarge the scope of civil discovery by allowing the FOIA to be used as a supplement to obtain factual materials covered by the work product doctrine. *Id.* at 1186. The court rejected as at most "unarticulated dictum" a statement in an earlier District of Columbia Circuit decision that suggested that factual elements can be separated from attorney work product, noting that such separation would "seldom" be possible. *Id.* (citing *Mervin v. FTC*, 591 F.2d 821 (D.C. Cir. 1978)).

238. 5 U.S.C. § 552(b)(6) (1982).

239. *Id.*

240. J. FRANKLIN & R. BOUCHARD, *supra* note 139, § 1.09, at 1-93 (such files are "easily identifiable").

241. *Id.*

242. 456 U.S. 595 (1982).

243. *Washington Post Co. v. Department of State*, 647 F.2d 197, 198-99 (D.C. Cir. 1981) (*per curiam*) (finding that records that contained no "intimate details" about an individual were not "similar files").

244. 456 U.S. at 599, 602.

is contained."<sup>245</sup>

In 1987, the *New York Times* brought suit against NASA to compel the release of the voice communication tape recorded on the space shuttle Challenger.<sup>246</sup> Relying on *Washington Post*, the District Court for the District of Columbia rejected NASA's claim that the tape, which NASA admitted contained "no information about the personal lives of the astronauts or any of their family members,"<sup>247</sup> was a "similar file" under exemption 6.<sup>248</sup>

The district court's holding substantiated the *Washington Post* Court's assertion that the relaxed threshold requirement can still serve a useful screening function.<sup>249</sup> Although NASA's aim of protecting individual privacy is also the general purpose of exemption 6,<sup>250</sup> the *Washington Post* analysis of the relevant legislative history made it clear that the exemption's role in protecting privacy is limited to the prevention of unnecessary disclosure of "information which applies to a particular individual."<sup>251</sup> Since the Challenger tape did not contain such information, the court refused to "read [*Washington Post*] as having eliminated the requirement that a government record contain information about an individual in order to be considered a 'similar file.'"<sup>252</sup> The court granted summary judgment for the requester newspaper without determining whether disclosure would cause an unwarranted invasion of privacy.<sup>253</sup>

## H. Exemption 7.

1. *The 1986 Law Enforcement Exemption Amendments.* In 1986, Congress changed the language of exemption 7, the FOIA's law enforcement exemption.<sup>254</sup> While legislators generally agreed that many of the

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245. *Id.* at 601.

246. *New York Times Co. v. NASA*, 679 F. Supp. 33, 34-35 (D.D.C. 1987), *aff'd*, No. 87-5244 (D.C. Cir. July 29, 1988) (Westlaw, 1988 WL 77,420).

247. *Id.* at 35.

248. *Id.* at 35-36. The court gave no special consideration to the fact that the information was contained in an audio tape instead of a paper file. *Id.* at 35-36. It applied the *Washington Post* threshold test without regard to the medium in which the file was embodied. *Id.*

249. 456 U.S. at 602 n.4.

250. *Department of the Air Force v. Rose*, 425 U.S. 352, 375 n.14 (1976).

251. *Washington Post*, 456 U.S. at 602 (emphasis added).

252. *New York Times*, 679 F. Supp. at 36.

253. *Id.* at 36-37 & n.6.

254. 5 U.S.C. § 552(b)(7) (Supp. IV 1986). The exemption was amended by the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §§ 1801-1802, 100 Stat. 3207, 3207-48 to 3207-49. The law enforcement amendments became effective for pending actions on the day the Act was passed, October 27, 1986. *Id.* § 1804(a), 100 Stat. 3207-50.

changes would simply codify judicial interpretations of the exemption,<sup>255</sup> legislators disagreed over the extent to which the amendments would increase withholding of information.<sup>256</sup> Courts that addressed the scope of the amendments in 1987 appeared to believe that the amendments broadened the exemption only slightly.

The amendments broadened the threshold of exemption 7 to exempt "records or information compiled for law enforcement purposes"<sup>257</sup> rather than only "investigatory records compiled for law enforcement purposes."<sup>258</sup> The Court of Appeals for the District of Columbia Circuit confirmed that this change broadened the threshold<sup>259</sup> without affecting the test for identifying "law enforcement purposes."<sup>260</sup>

A second change altered the test for withholding under exemption 7. Under the previous version of the statute, withholding was appropriate when certain dangers to individuals or to the criminal justice system "would" result.<sup>261</sup> The amended version allows withholding when some of those dangers "could reasonably be expected" to result.<sup>262</sup> The courts confirmed that the amendments eased the government's responsibility of

255. See, e.g., 132 CONG. REC. S14,296-97 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy) (Congressional Research Service report indicated that the "could reasonably" standard and the addition of state and local governments as confidential sources would codify judicial interpretations).

256. Compare 132 CONG. REC. H9462 (daily ed. Oct. 8, 1986) (statement of Rep. English) (Amendments would "make only modest changes.") with 132 CONG. REC. S16,504 (daily ed. Oct. 15, 1986) (statement of Sen. Hatch) (Changes were "intended to broaden the reach of [exemption 7] and to ease considerably a Federal law enforcement agency's burden in invoking it.").

257. 5 U.S.C. § 552(b)(7) (Supp. IV 1986).

258. 5 U.S.C. § 552(b)(7) (1982) (amended 1986).

259. *Keys v. Department of Justice*, 830 F.2d 337, 340 (D.C. Cir. 1987) (Amendments "broadened the scope of the exemption 7 threshold.").

260. *Id.* (affirming allegiance to *Pratt v. Webster*, 673 F.2d 408 (D.C. Cir. 1982)); accord *King v. Department of Justice*, 830 F.2d 210, 229 n.141 (D.C. Cir. 1987) (same). For a discussion of the requirement that records be compiled for law enforcement purposes, see Note, *Developments—1986*, *supra* note 3, at 558-61.

261. 5 U.S.C. § 552(b)(7) (1982) (amended 1986).

262. 5 U.S.C. § 552(b)(7)(A), (C), (D), (E) & (F) (Supp. IV 1986). The full text excludes from FOIA:

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

proving that harm would result from disclosure.<sup>263</sup> No case in 1987, however, provoked an extended discussion of the scope of the amendments, and no decision relied explicitly on the new reasonableness standard.<sup>264</sup>

Two decisions held that the amendments demonstrated congressional intent to enhance withholding. In *Irons v. Federal Bureau of Investigation*,<sup>265</sup> the United States Court of Appeals for the First Circuit held that exemption 7(D) protected the confidentiality of a source even though he had agreed to testify at trial if necessary. The court declined to adopt a per se rule that an informant waives confidentiality by agreeing to testify.<sup>266</sup> The court's conclusion was "reinforce[d]"<sup>267</sup> by Congress's recently demonstrated purpose of "enhanc[ing] the ability of all Federal law enforcement agencies to withhold additional law enforce-

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263. See *Keys*, 830 F.2d at 346 ("At least after the 1986 amendment . . . the government need not 'prov[e] to a certainty that release will lead to an unwarranted invasion of personal privacy . . .'" (quoting *Reporters Comm. for Freedom of the Press v. Department of Justice*, 816 F.2d 730, 738 (D.C. Cir. 1987))); *Reporters Comm. for Freedom of the Press v. Department of Justice*, 816 F.2d 730, 738 (D.C. Cir. 1987) ("The 1986 amendment to FOIA . . . relieves the agency of the burden of proving to a certainty that release will lead to an unwarranted invasion of personal privacy, but does not otherwise alter the test." (citing legislative history of 1986 amendments)), *reh'g denied*, 831 F.2d 1124 (D.C. Cir.), *cert. granted*, 108 S. Ct. 1467 (1988). *Spannaus v. Department of Justice*, 813 F.2d 1285, 1288 (4th Cir. 1987) ("The agency's showing under the amended statute . . . is to be measured by a standard of reasonableness, which takes into account the 'lack of certainty in attempting to predict harm' while providing an objective test." (quoting legislative history of 1986 amendments)); *Curran v. Department of Justice*, 813 F.2d 473, 474 n.1 (1st Cir. 1987) ("Though relatively minor . . . the drift of the changes is to ease—rather than to increase—the government's burden in respect to Exemption 7(A). Because we are persuaded that the district court properly granted summary judgment to the agency under the original exemptive language . . . the order likewise must be upheld under the new (slightly more relaxed) phraseology."); *Struth v. FBI*, 673 F. Supp. 949, 962 (E.D. Wis. 1987) ("to be measured by a standard of reasonableness"); *Korkala v. Department of Justice*, No. 86-0242, slip. op. at 6 n.\* (D.D.C. July 31, 1987) (Westlaw, 1987 WL 15693) (purpose of amendments was to enhance agencies' ability to withhold law enforcement information (quoting *Irons v. FBI*, 811 F.2d 681, 687 (1st Cir. 1987))); *cf.* *Wilkinson v. FBI*, No. 80-1048, slip. op. at 21 n.1 (C.D. Cal. June 17, 1987) (The change "does not 'materially alter the construction' of exemption 7.").

264. See cases cited *supra* note 263; *cf.* *Korkala*, slip. op. at 8 ("The Court is satisfied that defendant has met its burden here, especially in view of the fact that it need only show under Exemption 7(A), as amended, that disclosure 'could reasonably be expected to interfere' with these proceedings, and not that it 'would' interfere." (emphasis added)).

Several cases relied on the amendments to exemption 7(D), which now explicitly allows local government units and private institutions to qualify as confidential sources whose identities and information are protected. 5 U.S.C. § 552(b)(7)(D) (Supp. IV 1986); see *Sluby v. Department of Justice*, No. 86-1503, slip. op. at 3 (D.D.C. Apr. 30, 1987) (Westlaw, 1987 WL 10509) (local police department); *Struth*, 673 F. Supp. at 969 (private commercial institution).

265. 811 F.2d 681, 689 (1st Cir. 1987).

266. *Id.* at 686-88.

267. *Id.* at 688.

ment information,'<sup>268</sup> which the court found demonstrated Congress's continued concern for the confidentiality of informants.<sup>269</sup> Similarly, in *Sluby v. Department of Justice*,<sup>270</sup> the District Court for the District of Columbia found that exemption 7(D) protected information supplied to the FBI by a local law enforcement agency. The court noted that both the original legislative history and "recent Congressional events" supported a "robust" reading of the exemption.<sup>271</sup>

2. *Personal Privacy and the Public Interest in Disclosure.* Exemption 7(C) allows information compiled for law enforcement purposes to be withheld "only to the extent that . . . production . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy."<sup>272</sup> Exemption 6 permits agencies to withhold records not compiled for law enforcement purposes when necessary to prevent a "clearly unwarranted invasion of personal privacy."<sup>273</sup> Both of these exemptions require a reviewing court to balance the privacy interest against the public interest in disclosure of the records.<sup>274</sup> In 1987, the United States Court of Appeals for the District of Columbia Circuit held that it is inappropriate for a court to attempt to quantify the public interest served by disclosure of particular information. *Reporters Committee for Freedom of the Press v. Department of Justice*<sup>275</sup> marked a departure from precedent<sup>276</sup> in that it held that only the general policy of the FOIA in favor of disclosure can be weighed against the privacy interest.<sup>277</sup>

As a normal approach to exemption 7(C) cases, courts evaluate the importance of the public interest that would be served by disclosure.<sup>278</sup> Among the interests that can be served, the public interest in disclosure

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268. *Id.* at 687 (quoting 132 CONG. REC. S16,504 (daily ed. Oct. 15, 1986) (statement of Sen. Hatch) (modifications made by court)). The court also quoted Senator Hatch's statement that there "should be no misunderstanding that . . . [the 1986 modifications] are intended to broaden the reach of this exemption and to ease considerably a Federal law enforcement agency's burden in invoking it." *Id.* (quoting same source (modification made by court)).

269. *Id.*

270. No. 86-1503, slip op. at 2 (D.D.C. Apr. 30, 1987) (Westlaw, 1987 WL 10509).

271. *Id.*

272. 5 U.S.C. § 552(b)(7)(C) (Supp. IV 1986).

273. 5 U.S.C. § 552(b)(6) (1982).

274. *Department of the Air Force v. Rose*, 425 U.S. 352, 372 & n.9 (1976) (balancing required under exemption 6); *Reporters Comm. for Freedom of the Press v. Department of Justice*, 816 F.2d 730, 737-38 (D.C. Cir. 1987) [*Reporters Committee I*] (balancing required under exemptions 6 and 7), *reh'g denied*, 831 F.2d 1124 (D.C. Cir.) [*Reporters Committee II*], *cert. granted*, 108 S. Ct. 1467 (1988).

275. *Reporters Committee II*, 831 F.2d 1124, 1126 (D.C. Cir. 1987) [*Reporters Committee II*].

276. See *infra* notes 284-90 and accompanying text.

277. *Reporters Committee II*, 831 F.2d at 1126.

278. J. FRANKLIN & R. BOUCHARD, *supra* note 139, § 1.09, at 1-99 to 1-103.

of the misconduct of government officials is given great weight.<sup>279</sup> FOIA requesters have also argued that disclosure would help to ensure that public benefit program recipients are properly served,<sup>280</sup> prevent the use of housing funds to segregate cities,<sup>281</sup> and aid the study of union elections.<sup>282</sup> Policies endorsed by other statutes may also justify disclosure.<sup>283</sup>

At times, courts have conducted the balancing test by specifically considering the particular requester's intended use of the information.<sup>284</sup> For example, in *Getman v. National Labor Relations Board*,<sup>285</sup> the United States Court of Appeals for the District of Columbia Circuit approved the release of labor information because the requesters were well-qualified to conduct a useful study of labor relations and because their use of the information would not be very intrusive to individuals. This use-specific approach presents two problems. First, it implicates the administrative problems involved in ensuring that, after disclosure, the information is actually used for the asserted purpose.<sup>286</sup> Second, use-specific balancing may conflict with the FOIA's general mandate that records be released to "the public."<sup>287</sup> Therefore, some courts, including the *Reporters Committee* court,<sup>288</sup> have decided that the public interest in records must be considered independently of the requester's intended use of the records.<sup>289</sup> No court prior to *Reporters Committee*, however, had held that courts should also ignore the content of the requested

279. *Id.* at 1-99 to 1-100.

280. *National Ass'n of Retired Fed. Employees v. Horner*, 633 F. Supp. 1241, 1244 (D.D.C. 1986); *National Ass'n of Atomic Veterans, Inc. v. Director, Defense Nuclear Agency*, 583 F. Supp. 1483, 1487-88 (D.D.C. 1984).

281. *Heights Community Congress v. Veterans Admin.*, 732 F.2d 526, 530 (6th Cir.), *cert. denied*, 469 U.S. 1034 (1984).

282. *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 728 F.2d 1270, 1273 (9th Cir. 1984); *Getman v. NLRB*, 450 F.2d 670, 675-76 (D.C. Cir. 1971).

283. J. FRANKLIN & R. BOUCHARD, *supra* note 139, § 1.09, at 1-102.

284. *See id.* at 1-103 (describing cases examining the likelihood that disclosure would actually result in the public benefits that the requester claimed would result).

285. 450 F.2d 670, 675-76 (D.C. Cir. 1971).

286. *See Ditlow v. Shultz*, 517 F.2d 166, 171 n.18 (D.C. Cir. 1975) ("court would appear to be without authority to impose . . . limitations [on use]").

287. *Id.* at 171 (citing 5 U.S.C. § 552); *see also Washington Post Co. v. Department of Health & Human Servs.*, 690 F.2d 252, 258-59 n.17 (D.C. Cir. 1982) (questioning whether rule would be consistent with FOIA's broad purpose); Note, *The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1974*, 11 HARV. C.R.-C.L. L. REV. 596, 613-616 (1976) (discussing test used in *Getman*).

288. *Reporters Committee II*, 831 F.2d at 1126.

289. *Washington Post*, 690 F.2d at 258-59 & n.17; *Kurzon v. Department of Health & Human Servs.*, 649 F.2d 65, 68 (1st Cir. 1981).

records.<sup>290</sup>

*Reporters Committee* concerned a request by journalists for criminal records that the federal government had collected from state and local governments.<sup>291</sup> The journalists claimed that the records were already publicly available in the locales where they were created.<sup>292</sup> The government argued that the information—rap sheets and other criminal records<sup>293</sup>—was protected from disclosure by exemption 7(C).<sup>294</sup> The court changed its holding after the government petitioned for rehearing,<sup>295</sup> but much of the court's analysis was the same in the two opinions.

In its first opinion, the court found that the only factor to be considered in evaluating the public interest in disclosure was whether a state or local entity had decided to make the records part of the public record.<sup>296</sup> The requesters argued that the public interest in disclosure was enhanced by the fact that they were journalists conducting an investigation of an allegedly corrupt U.S. Congressman.<sup>297</sup> The district court found instead that the public interest in the records was minimal because the records concerned minor offenses that had occurred in the distant past.<sup>298</sup> The court of appeals found that all of these arguments about the public interest were, for the purposes of exemption 7(C), irrelevant.<sup>299</sup> The district court should not have based its evaluation of the public interest in disclosure on the fact that the records concerned minor offenses that occurred long ago because "Congress could not have intended federal judges to

290. Cf. J. FRANKLIN & R. BOUCHARD, *supra* note 139, § 1.09 (discussing cases in which courts examine the content of requested records to determine if disclosure would constitute an unwarranted invasion of personal privacy).

291. *Reporters Committee I*, 816 F.2d at 732.

292. *Id.*

293. *Id.* at 732. The court defined "rap sheet":

Rap sheets, or "identification records," are FBI records on individuals whose fingerprints have been submitted to the FBI in connection with arrests and, in certain instances, employment, naturalization and military service. See 28 C.F.R. § 16.31 (1986). A rap sheet typically contains information concerning an individual's arrests, indictments, convictions and imprisonments, and a notation of the source of the information. The FBI Identification Division does not itself generate the information on rap sheets, but rather compiles information received from local, state and other federal authorities.

816 F.2d at 732 n.2.

294. *Id.* at 737. The government also argued that 28 U.S.C. § 534 (1982), which authorizes the Attorney General to compile and maintain criminal records, is an exemption 3 statute, but the court rejected this argument because the statute does not specifically exempt any information from disclosure. *Id.* at 735-36.

295. *Reporters Committee II*, 831 F.2d at 1125.

296. *Reporters Committee I*, 816 F.2d at 741.

297. *Id.* The subject of the requested documents had been an employee of a company that received federal funds through dealings with the Congressman. *Id.*

298. *Id.* at 741.

299. See *id.* at 740-42.

make such idiosyncratic determinations.”<sup>300</sup> Consideration of the requesters’ status as journalists was inappropriate because the FOIA provides equal access to all.<sup>301</sup> Finally, the court held that the district court should not have considered the use to which the requesters intended to put the materials.<sup>302</sup>

Although the court recognized the public interest in the exposure of government corruption,<sup>303</sup> it held that the judiciary “should seek objective indications of the public interest” in disclosure.<sup>304</sup> The court found that a local government’s decision to release records represented that entity’s determination of the public interest in disclosure and that the determination should be respected.<sup>305</sup> Consequently, the court of appeals instructed the district court to release those records found to be a matter of public record.<sup>306</sup>

The Department of Justice petitioned the court for rehearing, arguing that the court had misinterpreted the term “public interest.”<sup>307</sup> The government argued that the court should not defer to determinations by state or local governments that the public should have access to arrest or conviction records.<sup>308</sup> The court denied the petition for rehearing, reaffirming its previous judgment.<sup>309</sup> The court modified its rationale, however, because conflicting state and local policies on disclosure of arrest records might make it impossible simply to defer to those entities’ judgments as to which records should be publicly available.<sup>310</sup>

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300. *Id.* at 741.

301. *Id.* at 741-42.

302. *Id.* at 742. The court held that a 1982 Supreme Court case required that inquiries into the information cease. *Id.* In *FBI v. Abramson*, 456 U.S. 615 (1982), the Court stated that “Congress did not differentiate between the purposes for which information was requested.” *Id.* at 631. As Judge Starr explained in his concurrence, however, *Abramson* rejected consideration of arguments regarding the public interest in disclosure only *after* exemption 7(C) balancing had been conducted and it had been determined that the invasion of privacy would be “unwarranted.” 816 F.2d at 745-46 & n.3. *Abramson* involved documents that incorporated law enforcement records that the parties agreed were protected by exemption 7(C). The Court did not address the balancing necessary to determine *when* exemption 7(C) applies. *Id.*

303. *Reporters Committee I*, 816 F.2d at 742.

304. *Id.* at 741.

305. *Id.*

306. *Id.* at 742-43.

The court also held that the privacy interest that weighs against disclosure, “while not eliminated, is weakened considerably” if information is a matter of public record. *Id.* at 740. The court explained that a matter of “public record” can only result from some political body’s choosing to create a mechanism for release of records to the public. For example, the privacy interest in records would be “insignificant” if a state legislature made them “freely available.” Sporadic release of records would not make them a matter of public record. *Id.*

307. *Reporters Committee II*, 831 F.2d at 1124.

308. *Id.* at 1125.

309. *Id.*

310. *Id.*

The court of appeals' second opinion directed the district court to evaluate the potential invasion of privacy by conducting a purely factual inquiry.<sup>311</sup> This time, the court did not specifically advocate deference to local governments' determinations of the public interest in disclosure. Instead, it directed the district court to determine whether the subject's privacy interest had faded because the information had become public as a result of local government practices in the jurisdiction that originally forwarded the information to the federal government.<sup>312</sup>

In its second opinion, the court confronted questions it had originally avoided when it decided to rely on local governmental determinations of the public interest in disclosure:

How do we determine, as a matter of law, the public interest in disclosure of the information that [the Reporters Committee] seek[s]? Does FOIA require the judiciary to make an individual determination of the general public interest in information sought in every case in which a section 6 or 7(C) Exemption is asserted.<sup>313</sup>

The court found that nothing in the statutes or in the caselaw told how to measure the public interest in the information sought.<sup>314</sup> Thus, the court concluded that the judiciary cannot measure the public interest in requested information at all. The court held that the phrase "public interest" denotes only the general policy of the FOIA favoring disclosure. Since the FOIA contains no indicia for measurement of the public interest in disclosure, Congress could not have intended for the judiciary to create a hierarchy of public interest in the disclosure of specific information: "[S]uch an unbounded delegation would raise serious constitutional problems."<sup>315</sup> Balancing the public interest against the potential damage to the individual's privacy interest should not cause the public interest to hinge on the federal court's "appraisal of the public's need to know particular information."<sup>316</sup>

The court acknowledged the novelty of its holding, stating that "[p]rior cases of this circuit have purported to appraise and value the public interest in specific information sought, but in no case has this court ever articulated standards or a rationale for that process."<sup>317</sup> The *Reporters Committee* court appeared to base its holding on its analysis of

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311. *Id.* at 1127.

312. *Id.*

313. *Id.* at 1125.

314. *Id.*

315. *Id.* at 1126.

316. *Id.* at 1126-27.

317. *Id.* at 1125; see also *Reporters Committee I*, 816 F.2d at 742 (noting prior decisions that evaluated the public interest in disclosure and citing *Rural Housing Alliance v. Department of Agric.*, 498 F.2d 73, 77 (D.C. Cir. 1974), and *Getman v. NLRB*, 450 F.2d 670, 675 (D.C. Cir. 1971)).

the capabilities of the judiciary. When the court declined to analyze the requesters' intended use of the records in its first opinion, it held that "[w]e *as judges* are unable to distinguish between the public interest in different criminal records."<sup>318</sup> In that opinion, the court also expressed distaste for the specter of the district court's acting as an editor to determine whether records were relevant to the investigation the requesters were conducting.<sup>319</sup> In its second opinion, the court rejected the government's claim that disclosure that would inform citizens of government corruption should somehow be favored, holding that even if a "core purpose" of the FOIA existed, it would not "confer judicial power to predict whether particular information . . . will . . . aid an 'informed citizenry' as to democratic political choices."<sup>320</sup> It also found that Congress's failure to enunciate standards for analysis of the public interest in disclosure demonstrated that Congress did not intend for the judiciary to decide the importance of public interests that could be served by disclosure.<sup>321</sup>

Judge Starr argued, however, that "although [he] share[d] the majority's concern that the judiciary is ill-equipped to make value-laden judgment calls such as assessing the extent of the 'public interest,' " Congress's determination that the judiciary should conduct *de novo* review of the balancing of the two interests compelled the courts to attempt to fulfill this duty.<sup>322</sup> Noting that a number of factors may influence the degree of public benefit that would result from disclosure of particular information, he argued that "the fundamental point is that the public interest in any particular case *can* vary beyond the 'general disclosure policies of the statute' and is to be seriously weighed against the subject's privacy interest."<sup>323</sup>

Although *Reporters Committee* held that courts are incapable of measuring the public interest in disclosure, many decisions have purported to do so.<sup>324</sup> Several decisions announced in 1987 illustrate the conflict between *Reporters Committee* and preceding District of Columbia Circuit decisions and decisions of other circuits. For example, in *Senate of Puerto Rico v. Department of Justice*,<sup>325</sup> which was decided in

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318. *Reporters Committee I*, 816 F.2d at 742.

319. *Id.*

320. *Reporters Committee II*, 831 F.2d at 1125.

321. *Id.* at 1126.

322. *Reporters Committee I*, 816 F.2d at 744 (Starr, J., concurring in the judgment and concurring in part) (citing 5 U.S.C. § 552(a)(4)(B)).

323. *Reporters Committee II*, 831 F.2d at 1128 (Starr, J., dissenting) (quoting majority opinion) (citation omitted).

324. See, e.g., *Getman v. NLRB*, 450 F.2d 670, 675-76 (D.C. Cir. 1971); J. FRANKLIN & R. BOUCHARD, *supra* note 139, § 1.09, at 1-98 to 1-103.

325. 823 F.2d 574 (D.C. Cir. 1987).

the interim between the two *Reporters Committee* decisions, a different District of Columbia Circuit panel reaffirmed a test that weighs "the specific privacy invasion against the value of disclosing a given document."<sup>326</sup> The court held that the Puerto Rican Senate had not "adequately supported its 'public interest' claim with respect to the *specific* information" regarding criminal activity which was withheld under exemption 7(C).<sup>327</sup> In *Multnomah County Medical Society v. Scott*, the United States Court of Appeals for the Ninth Circuit applied its four-factor balancing test to evaluate the public interest in disclosure of the names of Medicare beneficiaries to physicians who argued that they would provide the beneficiaries an informative newsletter.<sup>328</sup> Finally, in *Aronson v. Department of Housing and Urban Development*, the United States Court of Appeals for the First Circuit conducted a detailed examination of the public interest that would be served by providing a private tracer organization with the names of individuals to whom the government owed money.<sup>329</sup> While these decisions vary in their treatment of factors such as the significance to be accorded the commercial interest of the requester,<sup>330</sup> all of them evaluate the public interest in disclosure of the particular records requested. *Reporters Committee* therefore departs significantly from the analysis of other courts.

In *Reporters Committee*, the court of appeals rejected the district court's finding that disclosure was unwarranted because the records lacked information relevant to any public interest.<sup>331</sup> Therefore, the court of appeals' rationale weighed more heavily in favor of disclosure than did the district court's particularized inquiry. The court's approach, however, could restrict disclosure in a case in which a requester argues that a significant violation of personal privacy is justified because disclosure of the information would serve a specific, highly valuable public interest.<sup>332</sup> Particularly because the court stated that its reasoning applied to both exemption 6 and exemption 7(C),<sup>333</sup> the decision could have significant impact. The court did not articulate how heavily the general policy in favor of disclosure would weigh against a significant invasion of privacy. *Reporters Committee* found that the FOIA's general

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326. *Id.* at 588 (quoting *Bast v. Department of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981)).

327. *Id.*

328. 825 F.2d 1410, 1413 (9th Cir. 1987).

329. 822 F.2d 182, 183-88 (1st Cir. 1987).

330. Compare *Aronson*, 822 F.2d at 185 (The requester's commercial motivations were not relevant to evaluation of the public interest in disclosure.) with *Multnomah*, 825 F.2d at 1414 (Nondisclosure is favored where the requester's commercial motivation "significantly outweighs any other motivation favoring disclosure.").

331. *Reporters Committee II*, 831 F.2d at 1125.

332. See, e.g., cases cited *supra* notes 276-82, 324-30.

333. *Reporters Committee II*, 831 F.2d at 1125-26.

policy favoring disclosure could justify release of documents that had become a matter of public record,<sup>334</sup> so the case presented no difficult problems of balancing the public interest in disclosure against an invasion of privacy.

#### CONCLUSION

In 1987, the executive branch implemented the 1986 amendments to the FOIA's fee provisions and law enforcement exemption. The President reacted to the failure of earlier legislative proposals by signing an executive order that ensures notification to confidential business information submitters of contemplated disclosure of the information. Although congressional hearings were conducted on the desirability of an alternative dispute resolution system for FOIA requests, Congress did not consider any significant amendments to the FOIA.

The courts continued to elucidate the procedural and substantive rules for disputes concerning FOIA requests. Courts refined the definitions of the necessary showings for a requester to obtain a fee waiver and for the government to withhold information under exemptions 3, 4, 5 and 6. In perhaps the most significant decision of 1987, the Court of Appeals for the District of Columbia Circuit held that courts must not attempt to quantify the public interest in disclosure of records whose release would cause some invasion of personal privacy. The court weighed only the general FOIA policy favoring disclosure against the privacy interest. Because the case involved no significant invasion of privacy, it is not clear whether this new approach would cause increased or reduced disclosure in other cases.

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334. See *id.* at 1126-27.

