

how would they have been required to seek judicial review of the HEW order: in a subsequently-filed pleading in the district court where the action had originally been brought and was postponed, or in a separate suit filed under the review provisions of the Administrative Procedure Act?<sup>82</sup> Logic and considerations of judicial economy suggest that additional pleadings in the original court would be the more practical solution. But the statutory provision requiring *state* appeals from HEW conformity decisions to be taken to the courts of appeal<sup>83</sup> might lead the Supreme Court to require that a separate action be filed even by non-state litigants.<sup>84</sup>

## II: FREEDOM OF INFORMATION

The Freedom of Information Act<sup>1</sup> (FOIA) remained controversial during 1970; it was followed with hesitancy by administrators and interpreted with difficulty by the courts. The Act was adopted to facilitate public awareness of the activities of the federal government, and it requires that certain materials, such as an agency's procedural regulations and general policy statements, be published in the *Federal Register*<sup>2</sup> and that other materials, including final agency rulings, be made available for public inspection and copying.<sup>3</sup> More importantly, however, the Act compels the release of existing agency records which have been sufficiently identified by the requester<sup>4</sup> and which are not within any of the FOIA's nine specific exemptions.<sup>5</sup> While some litigation has arisen over the sufficiency of agency publication of

---

82. 5 U.S.C. § 702 (Supp. V, 1970); see 305 F. Supp. at 1264 (suggesting the applicability of the APA to the plaintiff-hospitals as aggrieved parties).

83. 42 U.S.C. § 316 (Supp. V, 1970).

84. The Supreme Court has recognized the potential problems in the primary jurisdiction field caused by separate suits to review the subsequent agency action. Yet the Court neither prohibited such bifurcation of litigation nor offered clear guidance for preventing such duplication. See *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 85 (1962) (footnote marked with an asterisk).

---

1. 5 U.S.C. § 552 (Supp. V, 1970).

2. *Id.* § 552(a)(1).

3. *Id.* § 552(a)(2).

4. *Id.* § 552(a)(3).

5. *Id.* § 552(b)(1)-(9).

orders and policies,<sup>6</sup> the more important cases decided under the Act have concerned the interpretation of the exemptions. Briefly, an agency need not release records which concern: defense or foreign affairs where secrecy is required by Executive Order; internal agency personnel matters; materials exempted from disclosure by statute; confidential trade secrets, commercial, or financial information obtained from a person outside the agency; inter- or intra-agency memorandums which would not be available to a party in litigation with the agency; personnel, medical, and other files where disclosure might cause an unwarranted invasion of privacy; law enforcement investigatory files unless available by law to a party; certain financial data utilized by agencies in regulating financial institutions; and geological information concerning oil wells.<sup>7</sup>

The year 1970 began with many unresolved issues remaining from 1969. Was there an equity power in the federal courts to deny disclosure even where no specific FOIA exemption was available, as the court in *Consumers Union of United States, Inc. v. VA*<sup>8</sup> had claimed? Were the agencies properly applying the requirements of the FOIA in their regulations and everyday actions? Some of the 1969 cases provoked much comment, notably *Consumers Union*,<sup>9</sup> but also *Epstein v. Resor*<sup>10</sup> and *American Mail Line, Ltd. v. Gulick*.<sup>11</sup> While

---

6. E.g., *Hogg v. United States*, 428 F.2d 274, 280 (6th Cir. 1970), cert. denied, 39 U.S.L.W. 3360 (Feb. 23, 1971); *United States v. United States Trucking Corp.*, 317 F. Supp. 69, 71 (S.D.N.Y. 1970); *In re Pacific Far East Line, Inc.*, 314 F. Supp. 1339, 1348 (N.D. Calif. 1970).

7. 5 U.S.C. § 552(b)(1)-(9) (Supp. V, 1970). For a more detailed analysis of these exemptions, see *Project, Federal Administrative Law Developments—1969*, 1970 DUKE L.J. 67, 72-77 & n.3 [hereinafter cited as *1969 Project*]. See also Adams, *The Freedom of Information Act and Pretrial Discovery*, 43 MILITARY L. REV. 1, 10-17 (1969).

In order to facilitate references to the FOIA exemptions, the following shortened forms will be utilized:

5 U.S.C. § 552(b)(1) (Supp. V, 1970)—“executive order”; *id.* § (b)(2)—“personale rules”; *id.* § (b)(3)—“statutory exemption”; *id.* § (b)(4)—“trade secrets”; *id.* § (b)(5)—“intra-agency memorandum”; *id.* § (b)(6)—“personal privacy”; *id.* § (b)(7)—“investigatory files”; *id.* § (b)(8)—“regulatory financial data”; *id.* § (b)(9)—“geological data.”

8. 301 F. Supp. 796, 806 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F.2d 1363 (2d Cir. 1971).

9. See Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEXAS L. REV. 1261, 1273 n.67 (1970); *1969 Project* 95-98; 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 121 (1970); 45 IND. L.J. 421 (1970); 44 TUL. L. REV. 800 (1970).

10. 296 F. Supp. 214 (N.D. Cal. 1969), *aff'd*, 421 F.2d 930 (9th Cir.), cert. denied, 398 U.S. 965 (1970). See *1969 Project* 80-81; 83 HARV. L. REV. 928 (1970). See also 116 CONG. REC. 10,156 (daily ed. Oct. 14, 1970); *id.* at 8789 (daily ed. Sept. 30, 1970).

11. 411 F.2d 696 (D.C. Cir. 1969). See Johnstone, *The Freedom of Informaton [sic] Act and*

1970 was not a year in which all FOIA issues were resolved, it was notable for the uniqueness of the problems raised and will be remembered for the citizenry's increased awareness of governmental activities.

### *Agency Rules*

Since relatively few persons seek judicial action to force disclosure of government records, the agency's own performance is more important than what the courts and the Act prescribe.<sup>12</sup> One gauge of administrative responsiveness can be found in an agency's regulations, and this past year saw a few important changes in agency rules regarding information availability. For example, the Securities and Exchange Commission finally revised its regulations to make available for public inspection "interpretative" and "no-action" letters written by the Commission staff, as well as the inquiries to which they responded.<sup>13</sup> This new SEC rule is significant because it uncovers an aspect of agency activity which had previously remained beyond public view—interpretations of factual situations by the SEC staff and assurances by them that no adverse Commission action would be taken.

In another development of significance, President Nixon issued an Executive Order<sup>14</sup> establishing a Consumer Product Information

---

*the FDA*, 25 FOOD DRUG COSM. L.J. 296, 302 (1970); Katz, *supra* note 9, at 1274 n.69-70; 1969 Project 87, 92, 94.

12. 1969 Project 79.

13. 35 *Fed. Reg.* 17779-80 (1970), amending, 17 C.F.R. § 200.80(c)(4) (1970), and adding § 200.81. This development was foreshadowed by Professor Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 772-73 (1967), where disclosure of such communications, under 5 U.S.C. § 552(a)(2)(B) (Supp. V, 1970), was advocated.

The new rule exempts from disclosure "letters of comment or other communications relating to the accuracy or adequacy of any . . . statement, report, . . . or other document filed with the Commission. . . ." 35 *Fed. Reg.* 17779, 17780 (1970). See BNA SECURITIES REG. & L. REP. No. 59, A-13 (July 15, 1970). For some comments regarding the SEC rule, see *id.* No. 67, A-3 (Sept. 9, 1970).

The SEC has noted that "no-action and interpretative responses by the staff are subject to reconsideration and should not be regarded as precedents binding on the Commission." 35 *Fed. Reg.* 17779 (1970). This would seem indeed to place them under 5 U.S.C. § 552(a)(2)(B) (Supp. V, 1970) as "statements of policy and interpretations which have been adopted by the agency," rather than, for example, under section 552(a)(1)(D), which includes the phrase "of general applicability," suggesting precedential value. This point, noted by Professor Davis, *supra* at 773, indicates that precedential value is *not* determinative of public availability—but only of whether such availability will be in the *Federal Register* or in the agency reading rooms.

14. Exec. Order No. 11,566, 35 *Fed. Reg.* 16675 (1970).

Coordinating Center within the General Services Administration. The order specifically does not require the disclosure of any information exempted by the FOIA<sup>15</sup> and notes that much of the product information which the government has accumulated while endeavoring to purchase various items is not useful to consumers, either because they are unaware of its availability or because the information is too technical to be understood by laymen.<sup>16</sup> Thus, the most promising aspect of the new Center is also the most difficult to achieve: translating the technical procurement specifications and data of the government into information useful to the general public.

Also of interest to consumers in 1970 was the fact that the Civil Aeronautics Board relented under pressure and authorized the disclosure of the consumer complaint files compiled by its Bureau of Enforcement.<sup>17</sup> Furthermore, the CAB disclosed plans to propose a new regulation which would require that standardized complaint statistics be maintained by air carriers to facilitate CAB and public comparisons among various air carriers' complaint-handling methods.<sup>18</sup> Despite the noticeable shift within the CAB toward freer

---

15. *Id.* at 16676.

16. The order notes that "certain product information . . . is currently available from various government agencies but lack of awareness greatly restricts the use of such information by the consuming public and by other government agencies." *Id.* at 16675. Since the order disclaims any intent to require any greater disclosure than that required by the FOIA, one might reasonably question the federal government's performance under the Act when previously even other government agencies were unaware of the existence of this information.

The new Center will be assisted by advice from the President's Committee on Consumer Interests, particularly with regard to the use of private media to assist in disseminating available information. *Id.* at 16676.

17. CAB Press Release No. 70-14 (Feb. 2, 1970). See 35 *Fed. Reg.* 6118-21 (1970). The fight to gain access to the CAB's consumer complaint files began in the Summer, 1969, with a request by Mr. Reuben B. Robertson of the Center for Study of Responsive Law, Washington, D.C. On November 25, 1969, *Robertson v. Browne*, Civil No. 3349-69 (D.D.C.), was filed to enjoin the withholding of the requested files and, incidentally, to prohibit the harassment and delay allegedly perpetrated by CAB personnel against the Center's student researchers. On February 2, 1970, Mr. Jack Yohe, Director, Office of Information, CAB, in letter B-7 to Mr. Robertson, announced the CAB's decision to release not only the consumer complaint files but also a 1967 Consumer Survey Report, announced in CAB Press Release No. 67-39 (Mar. 16, 1967), conducted by the Board. See CAB Press Release No. 70-14 (Feb. 2, 1970). Subsequently, in response to Mr. Robertson's further request, the CAB, in letter B-30 of February 10, 1970, from Mr. Troy B. Conner, Executive Director, CAB, released for inspection and copying the letters from the CAB to air carriers considered lacking or deficient in complaint-handling ability, and discussing the results of the 1967 survey. On February 9, 1970, *Robertson v. Browne* was dismissed by stipulation of the parties.

18. CAB Press Release No. 70-144 (Dec. 4, 1970). In other moves aimed at increasing Board communication with air transportation users, the CAB has created a Consumers Affairs

access to Board records—perhaps tied to personnel changes during 1970<sup>19</sup>—it did adopt a rule early in 1970 restricting the availability of information concerning the volume of passengers, cargo, and mail carried by air shuttle operators.<sup>20</sup>

Elsewhere in the federal government, by and large the policies of the various agencies noted in last year's *Project* have not changed.<sup>21</sup> General Services Administration regulations still contain many provisions indicative of a favorable attitude toward the FOIA.<sup>22</sup> The Atomic Energy Commission has expanded its definition of the trade secrets proviso to include material concerning "control and accounting procedures for safeguarding licensed special nuclear material or detailed security measures for the physical protection of a licensed facility,"<sup>23</sup> information arguably intended to be exempted from disclosure by the FOIA. The Federal Trade Commission retains its negative presumption that "[a]ll . . . records and information of the Commission not clearly identifiable as public records pursuant to . . . [FTC rules]<sup>24</sup> and not listed in the current index of the public records of the Commission also constitute a part of its confidential records"<sup>25</sup> and are available to the public only upon a sworn

Office, CAB Press Release No. 70-146 (Dec. 9, 1970), and has released an updated version of its 1967 Consumer Complaint Survey, CAB Press Release No. 70-152 (Dec. 22, 1970). Since the CAB's own consumer complaint files have been publicly available since February, 1970, statistics regarding these files will also be made public.

19. For example, Mr. Reuben Robertson was named to head the CAB's new Consumer Advisory Council. *Washington Post*, Oct. 22, 1970, § F, at 12, col. 1.

20. 35 *Fed. Reg.* 3897 (1970). 14 C.F.R. Part 298 was amended, adding section 298.66. This regulation was strongly criticized by Senator Sam Ervin (D-N.C.) as violating the spirit of the FOIA. 116 CONG. REC. 2910-12 (daily ed. Mar. 4, 1970).

21. 1969 *Project* 77-79 & n.45-59.

22. 41 C.F.R. § 105-60.105-1 (1970), requires no particular interest in the subject matter of the requested record, nor any justification for the request. Moreover, the GSA will compile records not "in being" when it is not too burdensome to do so. Section 105-60.105-2 declares that, even where an exemption under 5 U.S.C. § 552 (Supp. V, 1970), applies, it will not be invoked without a "compelling reason to do so." Section 105-60.401 provides for GSA assistance in identifying requested documents.

In light of these regulations, it is ironic that one of last year's noteworthy FOIA decisions was rendered against this agency. See *GSA v. Benson*, 415 F.2d 878 (9th Cir. 1969), *aff'g* 289 F. Supp. 590 (W.D. Wash. 1968).

23. 35 *Fed. Reg.* 7639-40 (1970), amending 10 C.F.R. § 2.790(a) (1970), and adding a new paragraph (d). Under 10 C.F.R. § 9.10 (1970), such information may still be made available if disclosure is found to be not contrary to the public interest or does not adversely affect any person's rights.

24. 16 C.F.R. § 4.9 (1970).

25. *Id.* § 4.10(c) (1970).

statement in writing showing "good cause" for disclosure.<sup>26</sup> The FTC did, however, revise certain of its regulations to provide somewhat freer access to Commission records, including the assurances of voluntary compliance filed with the Commission,<sup>27</sup> supplemental materials filed in connection with such reports of compliance, materials filed with the FTC concerning Commission orders requiring divestiture of business enterprises, and the record of final votes by each Commission member upon final action in all FTC proceedings.<sup>28</sup> The Department of Labor, the Food and Drug Administration, the Renegotiation Board, and the Department of Agriculture's Stabilization and Conservation Service all revised their fee schedules for making records available to the public,<sup>29</sup> while the Federal Communications Commission moved to expedite requests for records made at hearings, by providing appeal to the Commission's Review Board.<sup>30</sup> Finally, the Post Office Department has decided to provide,

---

26. *Id.* § 4.11(a), (b). This seems contrary to the intent of the FOIA to place the burden upon the agency to sustain its nondisclosure. 5 U.S.C. § 552(a)(3) (Supp. V, 1970). See note 30 *infra*.

27. See 16 C.F.R. § 2.21 (1970).

28. 35 *Fed. Reg.* 5399-400, 12061 (1970). The FTC added section 4.10(a)(8) specifically rendering confidential the votes of Commission members concerning the issuance of complaints or initiation of agency proceedings. *Id.* amending 16 C.F.R. § 4.9 (1970). This seems to conform with the FOIA, for such votes are not truly cast in an agency proceeding, as defined by 5 U.S.C. § 551(12) (Supp. V, 1970), and referred to in *id.* § 552(a)(4), but prior to such activity.

29. 35 *Fed. Reg.* 14771 (1970), amending 29 C.F.R. § 70.6 (1970) (Labor Dept.); 35 *Fed. Reg.* 7299 (1970), amending 21 C.F.R. § 2.115 (1970) (FDA); 35 *Fed. Reg.* 18279 (1970), amending 32 C.F.R. § 1480.12 (1970) (Renegotiation Board); 35 *Fed. Reg.* 7172 (1970), amending 7 C.F.R. § 798.7 (1970) (Agriculture Dept., Agricultural Stabilization and Conservation Service). Both the Renegotiation Board and the Agriculture Department note in their regulations that search fees will be levied even if the requested records are not found, unless performance takes less than 15 minutes. 32 C.F.R. § 1480.12(c), 35 *Fed. Reg.* 18279 (1970); 7 C.F.R. § 798.7(i), 35 *Fed. Reg.* (1970). Copies of documents are 25¢ per page at the FDA, 21 C.F.R. § 2.115(b)(2), 35 *Fed. Reg.* 7299 (1970), while the charge is 30¢ per page at the Labor Dept., 29 C.F.R. § 70.6(a)(ii), 35 *Fed. Reg.* 14771 (1970). By way of comparison, the Department of Transportation charges 50¢ per page for photocopies of its documents. 49 C.F.R. § 7.85(b)(1) (1970).

30. 35 *Fed. Reg.* 8280 (1970), amending 47 C.F.R. § 0.461(e)(3) (1970). While review by the FCC Review Board might be more speedily obtained than a Commission determination, this constitutes still another procedural step and could mean greater delay before ultimate judicial review.

The FCC has retained its questionable rule requiring that the requesting party give his reasons for desiring access to records which the agency claims are exempted from disclosure. 47 C.F.R. § 0.461(a) (1970). This seems contrary to the policy of 5 U.S.C. § 552(a)(3) (Supp. V, 1970). See note 26 *supra*. The FCC has another provision, 47 C.F.R. § 0.456 (1970), which seems overbroad and contrary to the intent of the FOIA. The Commission deems entire

without charge, the number of families or businesses served on a particular route to general distribution mailers.<sup>31</sup>

One of the agency actions having particular significance for environmental protection efforts in 1970 was the controversial position taken by the Council on Environmental Quality (CEQ)<sup>32</sup> that preliminary draft environmental impact statements prepared by federal agencies and the Council's own comments on these statements are not for public disclosure and that the final detailed statements on environmental impact required of all federal agencies by the National Environmental Policy Act of 1969<sup>33</sup> need not be made public prior to ultimate agency action.<sup>34</sup> Despite CEQ Chairman Train's protestations to the contrary,<sup>35</sup> it is not immediately obvious from a reading of the National Environmental Policy Act why "draft statements" and the comments made in response to them need not be made public.<sup>36</sup> A more interesting problem arises from CEQ's

---

correspondence files as "not routinely available for public inspection" and forces a strict standard of specificity in identifying these requested documents. The FOIA should reverse the FCC's presumption, and only those documents falling within the Act's specific exemptions should be withheld from the public. *See, e.g., Grumman Aircraft Eng'g Corp. v. Renegotiator Bd.*, 425 F.2d 578, 580 (D.C. Cir. 1970).

31. 35 *Fed. Reg.* 15850 (1970), amending 39 C.F.R. § 123.4(c)(4) (1970).

32. The Council on Environmental Quality was established by the National Environmental Policy Act of 1969, 42 U.S.C.A. §§ 4342-4347 (Supp. March, 1970).

33. *Id.*

34. Letter from Russell E. Train, Chairman, CEQ, to Senator Henry Jackson, Nov. 19, 1970, reprinted in 1 BNA ENVIRONMENT REP.—CURRENT DEVELOPMENTS 802-04 (1970). For remarks on the letter see *id.* at 781-82. See note 40 *infra*.

42 U.S.C.A. § 4332(2)(c) (Supp. March, 1970), requires that a detailed environmental impact statement be prepared for every legislative proposal or major action affecting the environment contemplated by federal agencies. It further provides that:

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statements and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available . . . to the public as provided by section 552 of Title 5, . . . *Id.* (emphasis added).

The President issued Exec. Order No. 11514, 35 *Fed. Reg.* 4247 (1970), which ordered agency heads to proceed with compliance with this section of the National Environmental Policy Act of 1969. Subsequently, the CEQ issued interim guidelines concerning environmental impact statements. 35 *Fed. Reg.* 7390-93 (1970).

35. 1 BNA ENVIRONMENT REP.—CURRENT DEVELOPMENTS 802 (1970).

36. To its credit, the Department of the Interior recently decided to make its preliminary draft environmental statement concerning the proposed Trans-Alaska Pipeline available to the public prior to the commencement of that project. Dept. of the Interior Press Release No. 30545-70 (Jan. 13, 1971); *id.* No. 31416-71 (Feb. 16, 1971) (noting absence of a requirement that such draft statements be made public).

refusal to disclose its own comments upon environmental impact statements. The crucial issue is whether CEQ qualifies as a federal agency "authorized to develop and enforce environmental standards,"<sup>37</sup> because then its comments would be required to be made public by the Policy Act. That Act and Executive Order 11514<sup>38</sup> arguably lead to the conclusion that CEQ does so qualify, although it is interesting to note the lack of "mandatory" language in the Council's interim guidelines concerning the environmental impact statements,<sup>39</sup> arguably casting some doubt on CEQ's authority. Moreover, if CEQ's comments on *final* detailed environmental impact statements should be made available to the public, it hardly seems in conformity with the intent of the National Environmental Policy Act or the Executive Order to allow the Council to avoid such disclosure by creating a new category of non-public records called preliminary "draft statements" and making its comments on these.<sup>40</sup>

### *Executive Order Exemption*

In *Soucie v. Dubridge*<sup>41</sup> a suit filed by conservation groups seeking disclosure of a report prepared for the President by the Office of Science and Technology (OST) was dismissed for lack of jurisdiction.<sup>42</sup> In its brief decision, the district court asserted that adjudication of the matter would be an "exercise in futility" and held

---

37. 42 U.S.C.A. § 4332(2)(c) (Supp. March, 1970). See note 34 *supra*.

38. 35 *Fed. Reg.* 4247 (1970).

39. 35 *Fed. Reg.* 7390-93 (1970).

40. The CEQ has now reversed itself and in its recently-announced "Guidelines" recommends public availability of *both* preliminary "draft environmental statements" and final "detailed environmental statements" *prior* to any agency action significantly affecting the environment. 36 *Fed. Reg.* 1398, 1399-400 (1971). See 1 BNA ENVIRONMENT REP.—CURRENT DEVELOPMENTS 1034-35, 1054-58 (1971). CEQ also clarified the relationship of the FOIA's exemption for intra-agency memorandums with the National Environmental Policy Act of 1969 by declaring that agency comments on *both* draft and final environmental statements are *not* protected from disclosure by the FOIA. 36 *Fed. Reg.* at 1400. While no mention was made regarding disclosure of CEQ's own comments, there is a suggestion in another section of the Guidelines that CEQ might consider itself not susceptible to the FOIA on a theory of Presidential "executive privilege" similar to that claimed by the Office of Science & Technology in *Soucie v. Dubridge*, 27 Ad. L.2d 379 (D.D.C. Aug. 21, 1970). See 36 *Fed. Reg.* at 1399. For a discussion of *Soucie v. Dubridge* see text accompanying notes 41-54 *infra*.

41. 27 Ad. L.2d 379 (D.D.C. Aug. 21, 1970), *appeal docketed sub nom.*, *Soucie v. David*, No. 24,573 (D.C. Cir. Aug. 24, 1970), *argued* Dec. 7, 1970, *rev'd and rem'd*, April 13, 1971.

42. See generally 1 BNA ENVIRONMENT REP.—FEDERAL LAWS 51:2001 (1970). The report allegedly criticized the proposed Supersonic Transport program for environmental and economic reasons. See 1 BNA ENVIRONMENT REP.—CURRENT DEVELOPMENTS 305-06, 468-69 (1970).

that the FOIA does not apply to the President because Congress could not "dictate the extent of executive privilege" a President could assert.<sup>43</sup> The court further held that the OST is not an agency<sup>44</sup> within the Office of the President but is part of the executive branch of the government, much as the Office of Counsel or Office of Appointments. The basis for this decision is vague, not only because no authority is cited by the court, but also because the court added that Congress had put applicable exemptions in the FOIA. This seems to contradict a previous assertion by the district court that the FOIA does not apply to the OST. Moreover, it is difficult to speculate which of the Act's exemptions the court might have thought relevant, since the contention that the report qualified under the "intra-agency memorandum" exemption was specifically rejected. Only the "executive order" exemption seems to be applicable, but this section was not mentioned by the court, and, in any event, there was no specific executive order which had required that the report be kept classified.<sup>45</sup>

Two other issues are raised by *Soucie v. Dubridge*: whether the Office of Science and Technology is an "agency" and thus susceptible to the FOIA and whether, despite the FOIA, the President *personally* may refuse to disclose records, relying on his executive privilege. The answer to the second question appears to be yes, principally because courts and some commentators seem to accept this as a constitutional proposition.<sup>46</sup> However, the FOIA's exemption for national defense or foreign policy secrets<sup>47</sup> is seemingly broad enough to cover the so-called constitutional executive privilege, which is grounded on the

---

43. 27 Ad. L.2d at 379.

44. The FOIA requires that each "agency" make information available. 5 U.S.C. § 552(a) (Supp. V, 1970). The APA provides the definition of "agency" to be "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," but excluding, *inter alia*, Congress, federal courts, U.S. territorial and possession governments, and the District of Columbia government. *Id.* § 551.

45. See *GSA v. Benson*, 415 F.2d 878, 879 (9th Cir. 1969).

46. Professor Davis expressed relief at the "fortunate [fact] . . . that executive privilege can override the [FOI] Act . . ." Davis, *supra* note 13, at 811. He relied on general constitutional principles, as well as on *United States v. Reynolds*, 345 U.S. 1 (1953). Davis, *supra*, at 763-65. But the Court in *Reynolds* did not attempt to reach any broad constitutional principles, 345 U.S. at 6, settling for the proposition that the privilege must first be asserted by the government, and the judiciary's role is to determine whether the circumstances warrant non-disclosure. And this 1952 decision, under the old FOIA of 1946, § 3, ch. 324, 60 Stat. 238 (1946), coming in the midst of Korean War preparations, involved military secrets, which would now be clearly exempted from disclosure by section 552(b)(1).

47. 5 U.S.C. § 552(b)(1) (Supp. V, 1970).

separation of powers doctrine.<sup>48</sup> Just what the President personally may refuse to make public is an unresolved question.<sup>49</sup> Agencies, however, even those within the executive department, are more clearly within the Act's dictates, despite their attempts to rely on an assertion of presidential executive privilege.<sup>50</sup> The crucial issue in *Soucie* is whether the OST is an "agency" or is to be considered, in effect, as the President himself.<sup>51</sup> The Attorney General's Memorandum<sup>52</sup> on the FOIA interprets the Act to "apply to every department, board, commission, division, or other organizational unit in the executive branch."<sup>53</sup> The Office of Science and Technology arguably is within this category, suggesting that the court's grant of a dismissal in *Soucie* was erroneous. If the OST is indeed an "agency" as defined by the Administrative Procedure Act there is no reason why Mr. DuBridge couldn't have been enjoined from withholding the requested report, in the same manner that other government officials are so enjoined. *Soucie v. DuBridge* only adds to the confusion over the obligations of the President and executive branch offices under the FOIA.<sup>54</sup>

### Statutory Exemption

One of the questions raised in 1969 by the court in *Consumers Union of United States, Inc. v. VA*<sup>55</sup> concerned the interpretation of a statute which regulates the disclosure of confidential information by public officials<sup>56</sup> and its relation to the FOIA.<sup>57</sup> One particular section of the statute in issue, section 1905,<sup>58</sup> prohibits government employees

---

48. See 44 WASH. L. REV. 641, 650-55 (1969).

49. See Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477 (1957).

50. See, e.g., 44 WASH. L. REV., *supra* note 48, at 650-55.

51. Dr. DuBridge, the Director of OST, contended that he retained the report solely as "a custodian of the President's records." Affidavit of Dr. Lee A. DuBridge, July 22, 1970, ¶ 4, reprinted in Brief for Appellants at Appendix 14, *Soucie v. David*, No. 24,573 (D.C. Cir., filed Aug. 24, 1970). See note 44 *supra*.

52. DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT (1967), reprinted at 20 AD. L. REV. 263 (1968).

53. *Id.* at 270-71.

54. Subsequent to the preparation of this article the District of Columbia Circuit, in a sweeping and significant decision, reversed and remanded the district court determination in *Soucie v. David*, No. 24, 573 (D.C. Cir. April 13, 1971).

55. 301 F. Supp. 796, 801-02 (S.D.N.Y. 1969).

56. 18 U.S.C. §§ 1904-08 (1964).

57. Specifically, 5 U.S.C. § 552(b)(4) (Supp. V, 1970).

58. Whoever, being an officer or employee of the United States . . . makes known in any manner or to any extent not authorized by law any information coming to him in the

from divulging trade secrets coming to them in the course of their employment, except as authorized by law. The *Consumers Union* court had raised the possibility of a circular issue because section 1905 prohibits disclosure unless otherwise authorized, and the FOIA requires disclosure unless specifically exempted.<sup>59</sup> However, the *Consumers Union* court was not called upon to resolve this potential difficulty.<sup>60</sup>

The District of Columbia Circuit, however, confronted this question in *Grumman Aircraft Engineering Corporation v. Renegotiation Board*,<sup>61</sup> where an aerospace contractor sought disclosure of Board orders and opinions issued during the 1962-1965 renegotiations of the contracts of 14 other companies and also records relating to its own 1965 contract renegotiations. The *Grumman* court determined that section 1905 merely provided a criminal penalty for unauthorized disclosure of certain confidential information and did not of itself establish a separate category of protected records, since the FOIA's "trade secrets" exemption<sup>62</sup> already protected such information from disclosure.<sup>63</sup> Noting the FOIA's requirement for narrow construction of its exemptions,<sup>64</sup> the court held that section 1905 did not expand the trade secrets exemption already provided by the FOIA. Essentially, the *Grumman* case avoided a circular issue by giving predominance to the presumed FOIA policy of favoring disclosure of government records<sup>65</sup> and by reading section 1905 as not constituting a statutory exemption under the FOIA.<sup>66</sup>

---

course of his employment or official duties or by reason of any examination or investigation . . . which information concerns or relates to the trade secrets [or] confidential statistical data . . . of any person . . . 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 (1964).

59. 5 U.S.C. §§ 552(b)(3), 552(c) (Supp. V, 1970).

60. The court in *Consumers Union* held that the records sought were not trade secrets; thus, 18 U.S.C. § 1905 (1964), did not apply. 301 F. Supp. at 802 n.20. The court also mentioned that the Veterans Administration had cited to the lower court litigation in *Grumman* to support its reliance on section 1905, but since the district court had filed no opinion in that case, this attempted precedent was cast aside by the *Consumers Union* court. 301 F. Supp. at 802.

61. 425 F.2d 578 (D.C. Cir. 1970).

62. 5 U.S.C. § 552(b)(4) (Supp. V, 1970).

63. 425 F.2d at 580 n.5.

64. 5 U.S.C. § 552(c) (Supp. V, 1970).

65. See, e.g., *id.* § 552(a)(3) ("[t]he burden is on the agency to sustain its action [of non-disclosure]").

66. The regulations of at least two agencies still rely on 18 U.S.C. § 1905 (1964), as delineating a separate class of statutorily exempted records. See 41 C.F.R. § 105-60.604(b)(1) (1970) (GSA); 47 C.F.R. § 0.457(d) (1970) (FCC).

### Trade Secrets Exemption

The exemption for “trade secrets and commercial or financial information obtained from a person and privileged or confidential”<sup>67</sup> was considered in several decisions of interest during 1970. In *Grumman* part of the requested records relating to Grumman’s own contract renegotiations during 1965 included correspondence between the Board and Grumman’s prime contractor, which the government asserted was exempted from disclosure, *inter alia*, as confidential trade secrets. The court of appeals held, as to these documents, that the test for availability was “whether they contain commercial or financial information which the contractor would not reveal to the public.”<sup>68</sup> This suggests an objective test to be applied by judges, regardless of whether or not the information was submitted on the express or implied condition that it be kept confidential. If this is a proper interpretation of the court’s directive in *Grumman*, it apparently is a departure from the previously assumed test for confidentiality: whether the materials were submitted or accepted on the premise they would be kept secret.<sup>69</sup>

In another decision, the district court in *Bristol-Myers Co. v. FTC*<sup>70</sup> assumed that the wishes of the submitter of information would govern,<sup>71</sup> but the District of Columbia Circuit, in remanding the action for more particular adjudication on each exemption, suggested that the bare claim by an agency that records are within the “trade secrets” exemption is not determinative.<sup>72</sup> Relying on *Grumman*, the

---

67. 5 U.S.C. § 552(b)(4) (Supp. V, 1970).

68. 425 F.2d at 582.

69. See *Benson v. GSA*, 289 F. Supp. 590 (W.D. Wash. 1968). There, the district court interpreted the “trade secrets” exemption as protecting information that a person wants protected which the government receives after an express or implied promise to preserve secrecy. *Id.* at 594. This language, affirmed by the Ninth Circuit, 415 F.2d 878, 881 (9th Cir. 1969), requires only an assertion that the submitter wanted confidentiality and the government promised it—no inquiry into whether the information really merits exemption seems required. See also *Consumers Union of United States, Inc. v. VA*, 301 F. Supp. 796, 803 (S.D.N.Y. 1969); DEPARTMENT OF JUSTICE, *supra* note 52, at 34.

The objective test for confidentiality under the “trade secrets” exemption would preclude arbitrariness on the part of agency officials while protecting secrets supplied to the government in good faith by private parties. See *Katz*, *supra* note 9, at 1267-70. For a recent survey of the trade secrets area, see *Bender, Trade Secret Protection of Software*, 38 GEO. WASH. L. REV. 909, 926-44 (1970). See also *E. Gcillhorn, Business Secrets in Administrative Agency Adjudication*, 22 AD. L. REV. 515 (1970).

70. 284 F. Supp. 745 (D.D.C. 1968), *rev'd in part and remanded*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

71. 284 F. Supp. at 747.

72. 424 F.2d 938.

court of appeals in *Bristol-Myers* concluded that the lower court would have to consider carefully whether a claimed exemption is proper.<sup>73</sup> While not expressly disapproving of the district court's test, the court of appeals referred only to the *Grumman* decision, suggesting that it was also adopting an objective standard for confidential information. The *Grumman* decision is noteworthy for another point in the "trade secrets" exemption area; the court agreed with earlier judicial interpretations<sup>74</sup> and held that the exemption applied only to information which did not originate within the government.<sup>75</sup>

The FCC had occasion to consider the trade secrets privilege in *In re Request by KOWL, Inc.*,<sup>76</sup> where KOWL was denied access to financial forms filed by an applicant for a competing broadcasting license. The records consisted of annual financial reports which were submitted in confidence and allegedly contained trade secrets.<sup>77</sup> According to Commission regulations, these records are not routinely available for public inspection<sup>78</sup> and a party seeking access to them must establish a "persuasive showing" of need.<sup>79</sup> While these records seem easily within the bounds of the FOIA's "trade secrets" exemption, the matter is complicated by the fact that prior to this decision the FCC had granted a license to the competing applicant,<sup>80</sup> relying in part upon the financial statements which were requested.<sup>81</sup>

---

73. *Id.*

74. *Consumers Union of United States, Inc. v. VA*, 301 F. Supp. 796, 803 (S.D.N.Y. 1969); *Benson v. GSA*, 289 F. Supp. 590, 594 (W.D. Wash. 1968), *aff'd*, 415 F.2d 878, 881 (9th Cir. 1969).

75. 425 F.2d at 582. Grumman had sought access to "inter-departmental and inter-agency communications between the Board and other government agencies with respect to Grumman's performance on its renegotiable contracts." *Id.* at 581. Apparently the court assumed that these records did not qualify under the "intra-agency memorandum" exemption because in an earlier decision, *Boeing Airplane Co. v. Coggeshall*, 280 F.2d 654, 660 (D.C. Cir. 1960), it had ruled similar of the Renegotiation Board's records discoverable under FED. R. CIV. P. 26(b).

76. 20 P & F RADIO REG. 2D 102 (1970).

77. *Id.* at 103.

78. 47 C.F.R. § 0.457(d)(1)(i) (1970).

79. 20 P & F RADIO REG. 2D 102, 103 (1970); *see* 47 C.F.R. § 0.461 (1970).

80. *In re Application of Emerald Broadcasting Co., (KTHO)*, 19 P & F RADIO REG. 2D 149 (1970).

81. *Id.* at 152. At one point in its opinion, the FCC criticized KOWL, which was objecting to the KTHO license application, for failing to present "the type of specific data required" to support its economic allegations. *Id.* at 151.

The importance of the FCC's previous reliance on records in issuing orders or opinions will be more fully discussed below. *See* pp. 188-89 *infra*. Some courts have held the exemption to be unavailable, even for records clearly within its scope, when the agency used the records in a way indicating that secrecy was neither necessary nor equitable. *See American Mail Line, Ltd. v. Gulick*, 411 F.2d 696, 703 (D.C. Cir. 1969).

KOWL, in its letter of request, asserted that a court appeal was contemplated and that access to the records relied upon by the FCC was necessary to make adequate preparations.<sup>82</sup> In his denial, the FCC Executive Director called Commission reliance on the annual financial reports “minimal”<sup>83</sup> and again chided KOWL for failing to come forward with specific allegations with respect to the financial forms,<sup>84</sup> despite the obvious fact that KOWL had never been permitted to examine them. The Executive Director listed two examples where annual financial reports had been released by the Commission.<sup>85</sup> In one of those decisions, *In re Request by Cape Cod Broadcasting, Inc.*,<sup>86</sup> the Director himself had alluded to the value of the records, when he refused to substitute the sworn assurances of accuracy by a submitter of the reports for the actual disclosure of the financial information, declaring that “[the annual financial reports] may prove helpful to [petitioners] beyond the figures selected and relied upon by its adversary.”<sup>87</sup> Even accepting the fact, arguendo, that the financial forms were indeed trade secrets within the FOIA exemption and that FCC reliance on them earlier had been minimal, it appears that the “balancing of interests” standard required by FCC regulations<sup>88</sup> was incorrectly applied.

#### *Intra-Agency Memorandum Exemption*

The “intra-agency memorandum” exemption<sup>89</sup> did not receive as frequent consideration in 1970 as it had in past years; the judicial decisions mostly reiterated and clarified principles announced during 1969. In *Bristol-Myers Co.*<sup>90</sup> the court presented some guidelines to assist the district court in handling that case upon remand. The need to protect the free exchange of ideas within government agencies was recognized, but the court cautioned that “[p]urely factual reports and scientific studies”<sup>91</sup> could not be hidden from public scrutiny by characterizing them as internal memorandums. Moreover, the court

---

82. 20 P & F RADIO REG. 2D at 103.

83. *Id.* at 105.

84. *Id.* at 104.

85. *Id.* at 103-04.

86. 19 P & F RADIO REG. 2D 135 (1970).

87. *Id.* at 136.

88. 47 C.F.R. § 0.461(c)(4) (1970).

89. 5 U.S.C. § 552(b)(5) (Supp. V, 1970).

90. 424 F.2d 935 (D.C. Cir. 1970)

91. *Id.* at 939; *accord*, *GSA v. Benson*, 415 F.2d 878, 880-81 (9th Cir. 1969); *Consumers Union of United States, Inc. v. VA*, 301 F. Supp. 796, 805 (S.D.N.Y. 1969).

of appeals affirmed the notion presented in *American Mail Line, Ltd. v. Gulick*<sup>92</sup> that an internal document may lose its protected status if publicly utilized by an agency as the sole basis for its action.<sup>93</sup> Unfortunately, the *Bristol-Myers* court did not mention an interesting aspect of the FTC action involved in the case: that it was a *proposed* rule making rather than a final decision. It is impossible to know whether the court would consider this kind of agency action sufficient to alter the status of a formerly protected memorandum.<sup>94</sup>

*Ackerly v. Ley*<sup>95</sup> has become a much-cited opinion in the year since it was rendered. The litigation was precipitated by an FDA proposal to ban carbon tetrachloride from interstate commerce.<sup>96</sup> An attorney representing household chemical manufacturers asked to examine various reports and memorandums compiled by the FDA in its investigation of the uses of "carbon tet." The FDA's decision to refuse this request was upheld by the district court.<sup>97</sup> In vacating and remanding that court's ruling, the court of appeals in *Ackerly*, as did the *Bristol-Myers* court, attempted to suggest the framework within which the district court should operate in arriving at a new decision. The District of Columbia Circuit acknowledged the legitimate purpose behind protecting the reasoning processes of government agencies from the inhibiting pressures of public revelation<sup>98</sup> but warned of "the inevitable temptation of a government litigant" to conceal more than necessary to preserve its free interchange of ideas.<sup>99</sup>

One of the more unusual 1970 FOIA cases was the FCC decision in *In re Request of Reuben B. Robertson & Ronald L. Winkler*,<sup>100</sup>

92. 411 F.2d 696, 703 (D.C. Cir. 1969).

93. 424 F.2d at 939. The plaintiff in *Bristol-Myers* was seeking disclosure of certain materials referred to in a "Notice of Trade Regulation Proposed Rulemaking Proceeding," 32 *Fed. Reg.* 9843 (1967), where the FTC had noted: "In taking this action the Commission has considered, among other things, the results of an extensive staff investigation of advertising representations for nonprescription systemic analgesic drugs . . . its accumulated experience and available studies and reports . . ."

94. The court of appeals did not live up to one commentator's prediction that the *Bristol-Myers* adjudication would clarify the FOIA's requirements concerning advance disclosure of materials underlying proposed agency regulatory actions. Johnstone, *supra* note 11, at 304.

95. 420 F.2d 1336 (D.C. Cir. 1969).

96. 33 *Fed. Reg.* 3076 (1968). For a history of FDA actions in this matter, see 35 *Fed. Reg.* 4001 (1970).

97. *Ackerly v. Goddard*, [1967-1970 Transfer Binder] F.D. COSM. L. REP. ¶ 40,338 (D.D.C. 1968).

98. 420 F.2d at 1340-41.

99. *Id.* at 1341.

100. 20 P & F RADIO REG. 2D 377 (1970).

wherein an intra-agency document was released to the public despite its classification. The document requested was a memorandum written by the FCC General Counsel for the use of the Commissioners and contained an analysis and discussion of a recent Supreme Court decision.<sup>101</sup> Clearly, such a document is normally exempted from disclosure by the “intra-agency memorandum” exemption. However, the FCC chose to permit disclosure of this memorandum because it had been “leaked” to a trade publication and had received widespread circulation within the industry itself.<sup>102</sup> The Commissioners emphasized that their action was limited to the special facts confronted and that, in the future, the mere circumstance that an intra-agency memorandum had been leaked would not serve to justify an automatic release of the document to the general public.<sup>103</sup> *In re Robertson* is interesting for its frank discussion of a problem not unique to the FCC: “leaks” of federal agency documents to the regulated industry. The FCC condemned this “insidious practice,”<sup>104</sup> yet has been singularly unable or unwilling to prevent it.<sup>105</sup> The inequity in this situation is glaringly obvious, since the general public is typically without a similar “pipeline” to agency documents and is placed at a comparative disadvantage with the regulated industry in agency proceedings.<sup>106</sup> When an agency has not treated a document as confidential, there is no reason to afford it the privilege from disclosure authorized by the FOIA. Whatever inhibiting effect the disclosure may initially have had, a further release to the general public would not seem to cause any significant additional inhibiting pressure and would certainly be the equitable action to take.<sup>107</sup>

---

101. The case discussed was *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969).

102. 20 P & F RADIO REG. 2D at 378. *Broadcasting Magazine*, Sept. 15, 1969, at 34, carried an article entitled: “A Legal Go-ahead for FCC program controls? General Counsel Geller says broadcasters are subject to spectrum of program obligations because of Red Lion case.”

103. 20 P & F RADIO REG. 2D at 378.

104. *Id.*

105. The petition listed two other examples of “leaks” of FCC information to *Broadcasting Magazine*. Application for Review of Refusal by FCC Executive Director to Permit Public Inspection & Copying of Commission Records, 8-9 (Aug. 13, 1970). The *Red Lion* Memorandum itself had been marked “FOR OFFICIAL USE ONLY,” according to FCC General Counsel Henry Geller, Affidavit of Ronald L. Winkler at 2 (Aug. 12, 1970), placing it under the requirements of 47 C.F.R. § 0.451(b)(4) (1970), which prohibits the unauthorized disclosure of confidential Commission documents.

106. Commissioner Nicholas Johnson, in his concurring opinion, observed that a leak “weights the scales of procedural fairness even more heavily against the public.” 21 P & F RADIO REG. 2D at 379-80.

107. The FCC argued that “the degree of restraint and inhibition would very probably multiply if the fact of a leak became the criterion for determining the continued confidentiality

### *Personal Privacy Exemption*

In *Ackerly v. Ley*<sup>108</sup> the FDA had already released certain medical records concerning a death, purportedly caused by the inhalation of a chemical substance which the FDA had proposed to restrict. While holding the case moot as to these reports,<sup>109</sup> the court, in dictum, noted that the FDA had declared that permission was received from its sources to release the medical information. However, the court indicated that a mere "pledge of confidentiality" would not preclude the effectiveness of the FOIA and that it was for a court to decide whether the "personal privacy" exemption had been properly invoked.<sup>110</sup> This suggests that an objective test<sup>111</sup> is to be applied by the courts, a conclusion consonant with the Act's requirement that a potential invasion of privacy be "clearly unwarranted."<sup>112</sup> Obviously, the individual whose files are involved, or even the agency retaining the information, will not have the same impartiality that a court would have in deciding whether there is sufficient justification to release medical or personnel records.

### *Investigatory Files Exemption*

In *Bristol-Myers Co. v. FTC*<sup>113</sup> the court of appeals interpreted the "investigatory files" exemption to require that enforcement proceedings be "imminent" for files to remain classified under this section of the FOIA and remanded to the district court for the inquiry into the realistic prospects for such agency action.<sup>114</sup> The exemption was said to be intended to restrict parties to agency regulatory action to the same scope of discovery allowed persons charged with

---

of intra-agency memoranda." *Id.* at 378. Commissioner Johnson responded by saying: "It is not easy to envision an instance of a release substantially impairing agency operations. And even in cases where some harm is possible, that harm would no doubt be outweighed by the procedural unfairness to members of the public." *Id.* at 380.

108. 420 F.2d 1336 (D.C. Cir. 1969).

109. *Id.* at 1340.

110. *Id.* at 1339-40 n.3.

111. While it is not entirely clear because the issue was not ruled upon, the court of appeals in *Tuchinsky v. Selective Serv. Sys.*, 418 F.2d 155 (7th Cir. 1969), seems to have assumed that the standard under the "personal privacy" exemption would have been an objective one, since it apparently reserved for itself the right to determine the extent of any possible invasion of privacy and apparently accepted agency discretion to release information regardless of whether the individual involved consented to disclosure. *Id.* at 158. *Cf.* text accompanying notes 69-73 *supra*.

112. 5 U.S.C. § 552(b)(6) (Supp. V, 1970).

113. 424 F.2d 935 (D.C. Cir. 1970).

114. *Id.* at 939.

violations of federal criminal law.<sup>115</sup> Moreover, the court suggested that some of the documents within a particular file may be discoverable, since the agency was not permitted to render non-investigatory materials secret by placing them in investigatory files.<sup>116</sup>

In *Wellford v. Hardin*<sup>117</sup> the district court was asked to require the Secretary of Agriculture to produce warning letters sent to non-federally inspected meat and poultry producers suspected of engaging in interstate commerce, as well as information concerning the detention of meat and poultry products.<sup>118</sup> While mentioning the paucity of authority in this area, the court relied heavily upon *Bristol-Myers* in ordering disclosure.<sup>119</sup> Of prime importance was the fact that those parties potentially the target of enforcement proceedings were already fully aware of the contents of the documents requested. This, the court reasoned, was clearly a different situation from that which the FOIA's "investigatory files" exemption was meant to prevent: "premature discovery by a defendant in an enforcement proceeding."<sup>120</sup> Therefore, the court held that "[d]isclosure of material already in the hands of potential parties to law enforcement proceedings can in no way be said to interfere with the agency's legitimate law-enforcement functions."<sup>121</sup> The importance of this decision can hardly be overemphasized. While *Bristol-Myers* had declared that investigatory files may lose their protection from public disclosure if proceedings are not pending or reasonably anticipated, *Wellford v. Hardin* would require that, even where the enforcement is ongoing, records may become unprotected by the "investigatory files" exemption if parties to agency regulatory action have access to the documents.

The significance of this ruling can be seen by the example of the FAA's Public Enforcement Docket. As of August, 1970, all that was

---

115. *Id.*, citing *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591, 593 (D.P.R. 1967); H.R. REP. NO. 1497, 89th Cong., 2d Sess. 11 (1966).

116. 424 F.2d at 939.

117. 315 F. Supp. 175 (D. Md. 1970). Mr. Wellford is the Director, Center for Study of Responsive Law.

118. *Id.* at 176. Also requested were certain other related records, but they were claimed to be exempted as "intra-agency memoranda," and the district court postponed decision as to them pending an *in camera* review.

119. *Id.* at 177.

120. *Id.* at 178. The court distinguished *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591 (D.P.R. 1967). In that case, the person requesting copies of the statements of witnesses to the NLRB was a party to the proceeding—an employer who had a *pending* unfair labor practice charge against him.

121. 315 F. Supp. at 178.

available for public inspection was a brief record of finalized civil penalty and certificate actions.<sup>122</sup> Not included were any letters from the alleged violator, nor any interim correspondence sent by the FAA to him. And, most importantly, the Public Enforcement Docket contained no letters of warning, nor any other enforcement documents which did not result in a civil penalty or a certificate action. This "subliminal activity" of the FAA may be crucial to an understanding of that agency; it may be as important to know where penalties were *not* assessed as it is to know where they were assessed.<sup>123</sup> Under the *Wellford v. Hardin* decision these materials should be made available for public inspection, at least to the extent alleged violators have knowledge of their contents.

A second *Wellford v. Hardin*<sup>124</sup> case and two agency decisions oppose this position. In this second court case involving Mr. Wellford, he had requested access to records maintained by the Department of Agriculture's Pesticides Regulation Division. The district court, while requiring disclosure of the requested index cards, authorized the deletion of information regarding "citations, seizures or recall" actions<sup>125</sup> under the Federal Insecticides, Fungicides and Rodenticides Act,<sup>126</sup> of products of manufacturers engaged in interstate commerce.<sup>127</sup> These records are exactly the kind of information already in the hands of potential parties to enforcement proceedings that the first *Wellford v. Hardin* decision had declared should be available for public inspection.<sup>128</sup>

---

122. The available materials included a chronological listing by name of offender and date the action was closed, of all completed civil penalties and certificate actions assessed, and, for each violation, one letter to the alleged offender which briefly announced the violation, and a second letter closing the matter or referring it to the Justice Department.

123. Indeed, the FAA has prepared for its own use *A Status History Report of Air Carrier Violations* compiled by the Flight Standards Division, and *Air Carrier Enforcement Cases*, compiled by the General Counsel's Office, which keep track of violation notices and warnings sent by FAA inspectors.

124. 315 F. Supp. 768 (D.D.C. 1970).

125. *Id.* at 769.

126. 7 U.S.C. §§ 135-135K (1964).

127. 315 F. Supp. at 770. The court agreed with Grumman Aircraft Eng'r Corp. v. Renegotiation Board, 425 F.2d 578 (D.C. Cir. 1970), that merely because some part of a file or card is exempt from disclosure does not mean the entire file or card may be withheld. 315 F. Supp. at 769-70.

128. Certainly a manufacturer would be notified of any citations against it or any seizures or recalls of its products. The revelation to the public of agency records containing such information would conform to the FOIA's requirements, since, even under 5 U.S.C. § 552(b)(7) (Supp. V, 1970), a party to a law enforcement proceeding would have to be informed of any complaint against him.

The FTC, in a letter ruling,<sup>129</sup> took a similar position in denying the request of a student group to examine the correspondence between the Commission and the proposed respondents to an unfair practices consent order. While granting the students' requests to examine other information collected in the FTC's investigatory file,<sup>130</sup> the Commission maintained that the correspondence was part of its confidential "investigational files."<sup>131</sup> Ironically, the letter ruling ends with the assertion that the students had been allowed to examine the investigatory file to the same or greater extent than might be allowed to a respondent in litigation with the Commission, yet any respondents who had corresponded with the Commission would naturally have had access to such correspondence as was denied the students.

The FCC in *In re Request by Evening Star*<sup>132</sup> upheld the initial denial of a request by a Washington, D.C., newspaper to examine the violation notices sent by the FCC to certain amateur radio stations in connection with anti-Vietnam war activities. The Executive Director had decided that disclosure would be "unfairly damaging to the stations and prejudicial to the conduct of any further investigations or enforcement proceedings that may be necessary."<sup>133</sup> No support was given for this allegation. Clearly, if the congressional intent in enacting the "investigatory files" exemption to the FOIA, was to prevent defendants in enforcement proceedings from prematurely discovering agency records,<sup>134</sup> the Executive Director's rationale would be irrelevant where the potential defendants had already received copies of the records being requested. The first *Wellford v.*

---

129. Letter (Ruling) from Mr. Joseph W. Shea, Secretary, FTC, to Mr. Aaron Handleman, Feb. 24, 1970, re: Campbell Soup Co., FTC File No. 692 3061. The students, calling themselves Students Opposing Unfair Practices (SOUP), became interested in a proposed consent order which the FTC planned to issue regarding certain alleged unfair advertising by the Campbell Soup Company. See *Campbell Soup Co.*, [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 18,706 (FTC 1969); *id.* ¶ 18,897, 19,006, 19,261 (FTC 1970). For a summary of the FTC action regarding the "SOUP" involvement, see BNA ANTITRUST & TRADE REG. REP. No. 451, A-16 (Mar. 3, 1970).

130. Letter (Ruling), *supra* note 129, at 2 (including copies of television, newspaper and magazine advertisements employing the deception charged in the FTC complaint, which, of course, were already exhibited to the public).

131. Letter (Ruling), *supra* note 129, at 3. The Commission also declared that the correspondence would not be helpful to the students—an allegation which is irrelevant to the threshold question of whether the "investigatory files" exemption is applicable.

132. 19 P & F RADIO REG. 2D 972 (1970).

133. *Id.* at 973.

134. See *Wellford v. Hardin*, 315 F. Supp. 175, 178 (D. Md. 1970).

*Hardin* court recognized that there might be valid policy reasons for extending the scope of the "investigatory files" exemption to other situations but declared that such a change was for Congress to enact.<sup>135</sup> The FCC proceeded to allow disclosure of the violation notices, treating the Evening Star's petition for review as a new request, because the Commission had ended its investigations and contemplated no further action against the amateurs.<sup>136</sup> Yet, seemingly ignoring the *Bristol-Myers* holding that the "investigatory files" exemption is unavailable where enforcement proceedings are not imminent,<sup>137</sup> the FCC persisted in requiring a showing of "good cause" to justify release of the requested violation notices, on the grounds that its rules concerning the release of confidential records were still applicable.<sup>138</sup>

### *Identifiable Records*

The requirement of the FOIA that a request must be for "identifiable records"<sup>139</sup> spawned much litigation in 1970 and poses problems which will no doubt trouble the courts in the future. In the first *Wellford v. Hardin*<sup>140</sup> case the Agriculture Department had asserted that the requested records regarding detentions of meat products were not identifiable because "such information is dispersed in many individual files, some of which are in storage. Assembling this information would require the search of many files and be extremely burdensome."<sup>141</sup> The district court had no trouble rejecting this argument, holding it irrelevant to identifiability that the gathering of the records might be an arduous task, since an agency could make appropriate charges for any effort expended. Because the Agriculture Department clearly knew what information was being sought, the records had been sufficiently identified.<sup>142</sup>

---

135. *Id.*

136. 19 P & F RADIO REG. 2D at 973.

137. See text accompanying note 114 *supra*.

138. 19 P & F RADIO REG. 2D at 973.

139. 5 U.S.C. § 552(a)(3) (Supp. V, 1970).

140. 315 F. Supp. 175 (D. Md. 1970).

141. *Id.* at 177.

142. *Id.* The Department of Agriculture had relied on *Tuchinsky v. Selective Serv. Sys.*, 418 F.2d 155 (7th Cir. 1969), but the district court distinguished that case. *Tuchinsky's* reference to the "identifiability issue" was not only dictum but also was concerned with a non-contested matter. The Seventh Circuit had noted that the Selective Service System's affidavits alleging that the requested records were not identifiable, had not been denied by the plaintiff. *Id.* at 157.

A similar rationale was followed in *Bristol-Myers v. FTC*<sup>143</sup> where the request was for the documents alluded to by the FTC in its notice proposing a new rule concerning advertising practices.<sup>144</sup> Declaring that the necessity of asking for “identifiable records” was not meant to be a barrier to disclosure of agency materials, the court held that, since the FTC knew which records it had used in formulating the proposed rule, it could not complain of insufficient identification.<sup>145</sup> The court used a “reasonable description” test for deciding whether enough information had been given to locate the requested records.<sup>146</sup>

The FCC in *In re National Cable Television Association, Inc.*<sup>147</sup> took a more stringent view of the FOIA’s requirements and refused to grant a request to examine the documents used to determine certain cost factors discussed in an FCC notice<sup>148</sup> of proposed application filing fees.<sup>149</sup> The FCC’s *Federal Register* notice, unlike the FDA announcement discussed above,<sup>150</sup> did not refer specifically to any documents relied upon, yet, in the Executive Director’s letter of denial he asserted that “[y]our blanket request must be denied because it cannot be identified and assembled without totally unreasonable expenditures of Commission manpower.”<sup>151</sup> Furthermore, it seems that the FCC confused the exemptions of the FOIA with the requirement of “identifiable records.” And under *Bristol-Myers* and the first *Wellford v. Hardin* decisions, the difficulty in assembling records must be compensated for by reasonable fees but may not serve to deny access to agency materials.

In the second *Wellford v. Hardin*<sup>152</sup> decision, the district court held

---

143. 424 F.2d 935 (D.C. Cir. 1970).

144. 32 *Fed. Reg.* 9843 (1967).

145. 424 F.2d at 938. In so holding, the court of appeals reversed the district court, which had interpreted the “identifiable records” requirement to mean that the records are so specifically identified that only the ministerial action of some subordinate “would be necessary to lift them from their files,” without the exercise of any judgment to determine what was within the requested category. *Bristol-Myers Co. v. FTC*, 284 F. Supp. 745, 747 (D.D.C. 1968). In a similar situation where an FDA notice of proposed rule making alluded to “information gathered from investigations and other sources,” 33 *Fed. Reg.* 3076 (1968), the FDA made no claim that a request for these materials was not for identifiable records. See *Ackerly v. Ley*, 420 F.2d 1336 (D.C. Cir. 1969).

146. 424 F.2d at 938.

147. 18 P & F RADIO REG. 2D 985 (1970).

148. The initial notice of proposed application filing fee schedules was in 35 *Fed. Reg.* 3815 (1970), and a supplemental notice appeared in *id.* at 4307.

149. 18 P & F RADIO REG. 2D at 987.

150. See note 145 *supra* for a discussion of the FDA notice.

151. 18 P & F RADIO REG. 2D at 987.

152. 315 F. Supp. 768 (D.D.C. 1970).

it a violation of the FOIA for the Pesticides Regulation Division (PRD) of the Department of Agriculture to withhold the sole means for requesting an "identifiable record."<sup>153</sup> In a bizarre attempt at secrecy, the PRD refused to release any documents not specifically identified by its assigned file number. To learn the file number, however, one had to see the master record card index, which the PRD refused to make available to the public. Therefore, it was impossible to learn the appropriate file number, and it was consequently impossible to satisfy the PRD's demand that records be identified by number. The court took little time in declaring such a set-up to be illegal and required the PRD to permit partial inspection of its master file cards.<sup>154</sup>

Two issues arose in 1970 which may present new problems for those seeking information from government agencies. The first problem involves *where* a request for records must be tendered. The FCC in *In re National Cable Television Association, Inc.*<sup>155</sup> refused to release certain reports and working papers used in filling out a Bureau of the Budget<sup>156</sup> form.<sup>157</sup> Since the form was completed at the direction of the Bureau of the Budget, the FCC felt that any request for what it termed an "inter-agency report" should be directed to that agency.<sup>158</sup> The FOIA does not deal expressly with the question of whether records are the property of one agency or another. The Attorney General's Memorandum on the Act expresses the opinion that requests should be directed "to the agency whose interest in the record is paramount" but also makes clear that procedural obstacles should not be erected by virtue of "these essentially internal Government problems" of which agency's records are being requested.<sup>159</sup> The *Grumman Aircraft*<sup>160</sup> decision mentioned that records which are confidential in one agency's hands retain their protection when given to another agency.<sup>161</sup> Unless that court contemplated the possibility of requesting the records from this second agency, the statement would be superfluous, since no protection would be needed for the records

---

153. *Id.* at 770.

154. *Id.*

155. 18 P & F RADIO REG. 2D 985 (1970).

156. Now the Office of Management and Budget.

157. *Id.* at 987, relying on 47 C.F.R. § 0.451(b)(3) (1970).

158. 18 P & F RADIO REG. 2D at 986-87.

159. DEPARTMENT OF JUSTICE, *supra* note 52, at 24.

160. 425 F.2d 578 (D.C. Cir. 1970).

161. *Id.* at 582.

unless they could be requested at the agency which had not initially acquired or originated them. There seems to be no reason why an agency submitting information to another agency cannot decide on its own initiative to release a copy of what it has originated and conveyed.

A second issue arising in 1970 concerned the fees to be charged for making records available. Only one case dealt with this matter, *Reinoehl v. Hershey*,<sup>162</sup> and there the court held that the fees charged by the Selective Service System for copying a registrant's file—\$1.00 per page or \$5.00 per hour for an agency employee to monitor while the registrant himself copies the file—were not unreasonable under the FOIA, since other means to secure the information were available.<sup>163</sup> The more difficult problem would arise when an agency has records in storage<sup>164</sup> or in such a state of disorganization that the difficulty in locating them is greatly magnified.<sup>165</sup> Certainly an agency should not be allowed, consistent with the intent of the FOIA, to price information accessibility effectively out of reach of the public.<sup>166</sup>

#### *Opinions and Orders—Reliance*

To increase the opportunity for citizen awareness of agency activity, the FOIA requires that "final opinions, including concurring and dissenting opinions, as well as orders, made in adjudication of cases"<sup>167</sup> be available for public inspection. In *Grumman Aircraft*<sup>168</sup> this section was utilized to require the Renegotiation Board to make available certain of its orders and opinions for a three-year period despite objections that they contained exempted trade secrets. The court held that the legislative history of the FOIA<sup>169</sup> did not authorize

---

162. 426 F.2d 815 (9th Cir. 1970).

163. *Id.*

164. *See* Wellford v. Hardin, 315 F. Supp. 175, 177 (D. Md. 1970).

165. A parallel problem exists when an agency is so derelict as to not compile, even for its own use, statistics and reports which it should normally be expected to prepare. *See* Tuchinsky v. Selective Serv. Sys., 418 F.2d 155 (7th Cir. 1969), where the court, in quite an understatement, declares it "difficult to understand" how the Selective Service System could keep no "identifiable records" of personal data about board personnel." *Id.* at 157. *See also* Nader, *Freedom From Information: The Act and the Agencies*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1, 12 (1970) (CAB's failure to compile records).

166. *See, e.g.,* notes 29 *supra*, 216 *infra*.

167. 5 U.S.C. § 552(a)(2)(A) (Supp. V, 1970).

168. 425 F.2d 578 (D.C. Cir. 1970).

169. S. REP. NO. 813, 89th Cong., 1st Sess. 7 (1965); H.R. REP. NO. 1497, 89th Cong., 2d Sess. 8 (1966).

concealment of an entire document "merely because it contained some confidential information."<sup>170</sup> Yet, the court also declared that if Renegotiation Board orders or opinions contained any material exempted under the "trade secrets" exemption, such material would be protected by suitable deletions of identifying details.<sup>171</sup> Surprisingly, the court neglected specifically to permit deletion of materials under the "trade secrets" exemption itself. Unless the District of Columbia Circuit was assuming that "identifying details" included useful trade secrets, or that the trade secrets here were useless without identification, its statement apparently renders the FOIA's exemptions inapplicable where the Act requires certain specified records to be made available for public inspection.<sup>172</sup> Hopefully this was unintended: it is without statutory basis and could leave those trade secrets embodied in agency orders or opinions generally unprotected. In an interesting attempt by the *Grumman* court to prescribe a prospective remedy, it suggested that the Renegotiation Board delete identifying materials in advance and make all orders and opinions public as they are declared, cataloging them by code or number.<sup>173</sup>

A doctrine which has developed since *American Mail Line, Ltd. v. Gulick*<sup>174</sup> is that an agency's sole reliance upon a document may vitiate its exempted status under the FOIA.<sup>175</sup> This doctrine was mentioned with approval in *Bristol-Myers*<sup>176</sup> and has received the

---

170. 425 F.2d at 580.

171. *Id.* at 581. While 5 U.S.C. § 552(a)(2) (Supp. V, 1970), authorizes deletions from "opinions" and not "orders," the court extended this provision to cover "orders," since over 90 percent of the Renegotiation Board's actions are by opinionless orders, and the congressional purpose was to "[disclose] agency action while concealing personal identity." 425 F.2d at 580-81 & n.8.

172. That is, section 552(b) might not apply where section 552(a)(2) must be complied with.

173. 425 F.2d at 581. Renegotiation Board regulations require that final opinions need be made public only to the extent the Board deems them potentially significant as precedents. 32 C.F.R. § 1480.5(a)(1) (1970). Moreover, the regulation purports to exempt all orders, as defined by 5 U.S.C. § 551(6) (Supp. V, 1970). 32 C.F.R. § 1480.5(b) (1970). The *Grumman* decision strikes down section 1480.5(b). There seems to be no statutory basis for section 1480.5(a)(1)'s limitation, since section 552(a)(2)(A) does not make precedential value the prerequisite to public availability, although materials not made public cannot normally be relied upon as precedent by the agency under section 552(a)(2). Support for the Renegotiation Board's position is advanced in the Attorney General's Memorandum, *supra* note 52, at 15-16, but Professor Davis has strongly attacked this rationale. Davis, *supra* note 13, at 771-75.

174. 411 F.2d 696 (D.C. Cir. 1969).

175. *Id.* at 703. In *American Mail Line* the Maritime Subsidy Board had for convenience incorporated five pages of an alleged intra-agency memorandum in an order, and the party affected by the agency action sought disclosure of the entire document. Since the memorandum was given as the sole basis for the agency action, the court compelled its release. \

176. 424 F.2d 935, 939 n.13 (D.C. Cir. 1969) (dictum).

support of some commentators.<sup>177</sup> Many questions are as yet unresolved in this area. Will it apply for announcements of *proposed* rule making? The court in *Ackerly v. Ley*<sup>178</sup> did not even mention this possibility despite the FDA's reliance on "information gathered from investigations and other sources" in proposing its new regulation.<sup>179</sup> The FDA's notice suggests another problem: may an agency effectively disguise its reliance upon any particular document, thereby avoiding public disclosure? The FCC may have failed to announce any specific details on the materials underlying its fee schedule changes in *In re National Cable Television Association, Inc.*<sup>180</sup> and precluded the argument of reliance, if that doctrine applies to proposed rules, as well as to orders and opinions.

A final point concerns whether sole reliance on a document for *part* of an order or opinion will invoke the *American Mail Line* doctrine. This question appears in *In re Request by KOWL*,<sup>181</sup> where the FCC expressly used a license applicant's financial statements to establish the credibility of the applicant's revenue estimates, yet refused to release the statements to an intervenor opposing the application on financial grounds.<sup>182</sup>

#### *Nature of the Review Process*

That the federal district courts are not having an easy time with the FOIA is evidenced by frequent remand by courts of appeal for more complete adjudication at the trial level. *Ackerly v. Ley*<sup>183</sup> has become an oft-referred to decision for its handling of the review question. The district court had granted summary judgment for FDA Commissioner Goddard in a brief memorandum and order.<sup>184</sup> Calling the lower court order "abbreviated and tangential,"<sup>185</sup> the District of Columbia Circuit determined that the decision would not lend itself to an adequate appellate review, the district court having been the only

---

177. Johnstone, *supra* note 11, at 304; Katz, *supra* note 9, at 1274-77.

178. 420 F.2d 1336 (D.C. Cir. 1969).

179. *Id.* at 1337, quoting 33 *Fed. Reg.* 3076, 3077 (1968).

180. 18 P & F RADIO REG. 2D 985 (1970). The Executive Director expressly rejected the notion that the Commission had relied on any document or specific data. *Id.* at 986.

181. 20 P & F RADIO REG. 2D 102 (1970).

182. *Id.* at 103, quoting 19 P & F RADIO REG. 2D 149, 152 (1970). The financial estimates were only one of many elements behind the FCC's eventual grant of the requested license.

183. 420 F.2d 1336 (D.C. Cir. 1969).

184. *Ackerly v. Goddard* [1967-1970 Transfer Binder] F.D. COSM. L. REP. ¶ 40,338 (D.D.C. 1968).

185. 420 F.2d at 1341.

one viewing the disputed documents *in camera*. Two glaring faults marred the district court's action. It made no reference to any of the specific exemptions listed by the FOIA, yet still denied disclosure.<sup>186</sup> Furthermore, it alluded to the possibility that "diligent research" could have uncovered the requested material. The court of appeals sharply rejected any notion that "revelation under the Freedom of Information Act [is] contingent upon a showing of exhaustion of one's own ingenuity."<sup>187</sup> The case was remanded with directions to the district court to give an itemized identification of the requested materials and a full discussion of the basis for exempting from disclosure each particular document.<sup>188</sup>

In *Bristol-Myers* the court of appeals also remanded to the district court, which had failed altogether to hold the necessary *in camera* review.<sup>189</sup> The court of appeals emphasized that the FOIA's exemptions were to be narrowly construed and that the lower court was responsible for a thorough analysis of the status of the documents requested to ascertain whether only portions needed secrecy, and if enforcement proceedings were truly imminent.<sup>190</sup> Similarly, the *Grumman* court cited the *Ackerly* decision in ordering that, on remand, the district court proceed with an *in camera* review of the

---

186. *Id.* The fact that the court of appeals relied so heavily on this point seems to place it in conflict with the court in *Consumers Union of United States, Inc. v. VA*, 301 F. Supp. 796 (S.D.N.Y. 1969), which had held that, even where no specific exemption is available, a court may utilize its equity jurisdiction regarding injunctive relief to deny this remedy where the potential harm to the public outweighs any possible benefits. *Id.* at 806. This rationale by the *Consumers Union* court has met with the opposition of many commentators. See the articles cited in note 9 *supra*.

187. 420 F.2d at 1342. Some uncertainty has arisen over whether the requester of information from an agency must have a "need for" or "interest in" the sought-after records. The issue is complicated because there are two levels of inquiry to be analyzed. One deals with the requirement that identifiable records be released to any person. 5 U.S.C. § 552(a)(3) (Supp. V, 1970). The other concerns the "intra-agency memorandum" exemption which speaks in terms of litigation with the agency. Insofar as section 552(a)(3) is concerned, *American Mail Line Ltd. v. Gulick*, 411 F.2d 696, 704 (D.C. Cir. 1969), clearly eliminated any requirement of need by the applicant for identifiable records. *Accord*, *Grumman Aircraft Eng'r Corp. v. Renegotiation Board*, 425 F.2d 578, 582 n.14 (D.C. Cir. 1970); *Skolnick v. Parsons*, 397 F.2d 523, 525 (7th Cir. 1968). *Contra*, *Shakespeare Co. v. United States*, 389 F.2d 772, 778 (Ct. Cl. 1968). With respect to the "intra-agency memorandum" exemption *Consumers Union* indicated that the inquiry was whether there could be any conceivable litigation with the agency in which the requested documents might be relevant—regardless of whether the requester is or may be involved in such litigation. 301 F. Supp. at 804. The standard for discovery to be applied is the federal standard. *GSA v. Benson*, 415 F.2d 878, 880 (9th Cir. 1969).

188. 420 F.2d at 1342.

189. 424 F.2d at 938.

190. *Id.* at 938-39.

materials sought.<sup>191</sup> Apparently, the lower court had granted summary judgment against the party seeking disclosure.<sup>192</sup> This tendency for abrupt handling of FOIA litigation by the district court is typified by *Soucie v. Dubridge*<sup>193</sup> where no *in camera* review is adverted to, no authorities are mentioned, and no attempt is made to balance the conflicting interests involved.<sup>194</sup> The intent of Congress in shaping the FOIA would seem to require something more.

A very disquieting decision regarding judicial review was *Sears, Roebuck & Co. v. NLRB*,<sup>195</sup> which affirmed the district court's refusal to grant injunctive relief against continued NLRB proceedings until requested information had been disclosed. While the court of appeals may be correct regarding the lack of power of federal district courts to enjoin ongoing NLRB proceedings, its characterization, in dictum, of the applicability of the FOIA's injunctive provisions to the Board as "dubious" is regrettable and without statutory or judicial support.<sup>196</sup> The NLRB is an "agency" as defined by the APA<sup>197</sup> and has been the subject of a claim under the FOIA.<sup>198</sup> Moreover, the congressional policy against enjoining the NLRB, which is adverted to in *Sears, Roebuck & Co.*,<sup>199</sup> seems to be applicable only to traditional labor law matters;<sup>200</sup> there is no reason to deny the power of a district court to order disclosure of documents under the FOIA so long as it does not attempt to delay or prevent any NLRB proceedings.<sup>201</sup>

Late in 1970 another decision was handed down which restricted

---

191. 425 F.2d at 582 n.21. See *Wellford v. Hardin*, 315 F. Supp. 768, 769 (D.D.C. 1970); *Wellford v. Hardin*, 315 F. Supp. 175, 179 (D. Md. 1970).

192. 425 F.2d at 579.

193. 27 Ad. L. 2d 379 (D.D.C. Aug. 21, 1970).

194. Cf. *United States v. Reynolds*, 345 U.S. 1, 8n.21, 11 (1953).

195. 433 F.2d 210 (6th Cir. 1970).

196. By finding that the plaintiff had not, in fact, sought the remedy provided for in the FOIA, the court was able to avoid meeting head-on the issue of the Act's applicability to the NLRB. *Id.* at 211.

197. 5 U.S.C. § 551(1) (Supp. V, 1970).

198. See *Polymers, Inc. v. NLRB*, 414 F.2d 999, 1006 (2d Cir. 1969), *cert. denied*, 396 U.S. 1010 (1970). Significantly, the Second Circuit did not deny its power to enforce the FOIA through an injunction and expressed its opinion that there may be circumstances where the Board could be required to produce a requested document. *Id.* at 1006.

199. 433 F.2d at 211.

200. See, e.g., *Leedom v. Kyne*, 358 U.S. 184 (1958); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). See generally M. FORKOSCH, A TREATISE ON LABOR LAW § 296, at 536 n.10; § 341, at 596 n.2; § 372, at 624 n.22; § 512 (2d ed. 1965).

201. In the context of other agencies, however, a denial of access to relevant information might well serve as the basis of a "due process" attack on any subsequent proceedings where such information would have been useful. See *Johnstone*, *supra* note 11, at 305.

the power of federal courts to order disclosure of agency records under the FOIA. In *Skolnick v. Kerner*<sup>202</sup> a report had been requested from the National Advisory Commission on Civil Disorders. Soon after an action to review the Commission's decision denying access to the document was filed in the district court, the Commission tendered its final report to the President. The district court dismissed the complaint, and the Court of Appeals for the Seventh Circuit affirmed, declaring its earlier decision in *Skolnick v. Parsons*<sup>203</sup> determinative of the issues presented. Since the Commission had terminated its existence upon the filing of its final report and since no other governmental authority had succeeded to the Commission's functions, the court of appeals held that the suit had abated because there was no one against whom a disclosure order could operate, and, thus, no remedy under the FOIA.<sup>204</sup> While this decision might be technically correct insofar as the doctrine of substitution of successive parties is concerned,<sup>205</sup> it overlooks the possibility that somewhere in the federal government the requested document may still be retained. Despite the absence of a successor to the *primary* functions of the Commission, some other federal agency, such as the GSA or the Justice Department, may conceivably have succeeded to *another* of the Commission's functions—the storage of Commission records. There should be no bar to the application of the FOIA to these records, newly transferred from the no-longer extant Commission to another agency as custodian.

### *Agency Attitudes*

Under ideal circumstances only one or two instances of honest differences of opinion between a private individual and an agency would require judicial intervention under the FOIA. Such was not the case in 1970, however. So long as federal agencies persist in their blatant disregard of the dictates of the FOIA, judicial review will remain the necessary "club" to hold over the head of administrative malfeasance.<sup>206</sup> The court in *Ackerly v. Ley*<sup>207</sup> repeatedly expressed its

---

202. 435 F.2d 694 (7th Cir. 1970).

203. 397 F.2d 523 (7th Cir. 1968).

204. 435 F.2d at 695.

205. See 397 F.2d at 525.

206. See generally Fellmeth, *The Freedom of Information Act and the Federal Trade Commission: A Study in Malfeasance*, 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 345 (1969); Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1 (1970).

207. 420 F.2d 1336 (D.C. Cir. 1969).

displeasure with FDA handling of the information requests at issue. Especially criticized was the fact that, while the plaintiff had mentioned in his request that he needed the information to assist in the preparation of comments in a proposed FDA rule-making proceeding, the FDA granted limited disclosure two weeks after the announced deadline for the receipt of comments.<sup>208</sup> The District of Columbia Circuit drolly remarked: "We are not impressed with this timing. . . ." <sup>209</sup>

A similar display of judicial displeasure was present in *Wellford v. Hardin*,<sup>210</sup> where the district court branded the performance of the Pesticides Regulation Branch of the Department of Agriculture a circumvention of the FOIA and reminded the agency that secrecy is to be the exception, rather than the rule.<sup>211</sup> Interestingly, the court balanced its remarks by admonishing the plaintiffs to avoid unnecessarily burdening the PRD and to request only those documents they reasonably needed.<sup>212</sup> While the FOIA does not require any allegation of need for requesting identifiable records,<sup>213</sup> it seems only fair that the public operate in good faith vis-à-vis federal administrative agencies.

The most unusual example of an agency's attitudes toward freedom of information in 1970 must be *In re Seaboard Broadcasting Corporation*.<sup>214</sup> While primarily rejecting the requests for Commission documents, the FCC did indicate that one particular letter might be available for disclosure. However, incredibly, this letter, which apparently had served as the basis for a complaint in a license revocation proceeding and thus would be publicly available under FCC regulations,<sup>215</sup> was *lost* by the Commission, which could only declare that "when the [FCC Broadcast] Bureau finds the missing document we expect that it will notify the other parties to the proceeding . . . ." <sup>216</sup>

---

208. *Id.* at 1338 n.1.

209. *Id.*

210. 315 F. Supp. 768 (D.D.C. 1970).

211. *Id.* at 770.

212. *Id.*

213. See note 187 *supra*.

214. 19 P & F RADIO REG. 2D 831 (1970).

215. 47 C.F.R. § 0.457(g)(1) (1970).

216. 19 P & F RADIO REG. 2D at 835 n.8. The FAA is a striking example of an agency intransigent in its non-compliance with the FOIA. During the summer, 1970, several students affiliated with the Center for Study of Responsive Law met repeated delays, hostility, and a