

detailed national policy statement.⁸³ It specifies in some detail the standards to be followed by the President in administering the ESA,⁸⁴ including the duty to "be generally fair and equitable."⁸⁵ The amended ESA also provides explicitly for the administration of the stabilization program.⁸⁶ Interestingly, the amendments provide that the APA, with the exception of the rulemaking and public information provisions, shall not be applicable to the ESA.⁸⁷ Nonetheless, it does incorporate detailed provisions for judicial review,⁸⁸ thereby meeting the *Amalgamated Meat Cutters* dictum that effective judicial review is essential. In summary, it may be said that *Amalgamated Meat Cutters* is a case in which the judiciary rendered substantial assistance to Congress and the President in outlining the contours necessary for proper legislation.

II. FREEDOM OF INFORMATION

DEVELOPMENTS UNDER THE FREEDOM OF INFORMATION ACT

Definition of "Agency"

The Freedom of Information Act¹ (FOIA) addresses itself to "each agency"² and in 1971 the courts for the first time attempted to define that term.³ Although it is clear that major units, such as the

83. *Id.* § 4.

84. *Id.* § 203.

85. *Id.* § 203(b)(1).

86. *Id.* §§ 207(b)-(c).

87. *Id.* § 207(a). The portions of the APA which are applicable are: 5 U.S.C. § 552 (1970) (public information, agency rules, opinions, orders, records, and proceedings); *id.* § 553 (rule making); and *id.* § 555(e) (providing for prompt notice of denial of a written application).

88. Economic Stabilization Act Amendments of 1971, §§ 210-11, 1971 U. S. CODE CONG. & AD. NEWS at 3899. Persons suffering "legal wrong" under the Act are authorized to seek redress in any district court, regardless of the amount in controversy. ESA Amendments of 1971 § 210(a). Exclusive appellate review is vested in a new Temporary Emergency Court of Appeals. *Id.* § 211(b). The Supreme Court may grant review by writ of certiorari. *Id.* § 211(g).

1. 5 U.S.C. § 552 (1970). For a discussion of the general operation of the Freedom of Information Act see 1970 *Duke Project* 164-65 and 1969 *Duke Project* 72-76. See also DAVIS (Supp. 1970) § 3A.

2. "Each agency shall make available to the public information as follows . . ." 5 U.S.C. § 552(a) (1970).

3. *International Paper Co. v. FPC*, 438 F.2d 1349 (2d Cir. 1971); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971).

Federal Trade Commission or the Atomic Energy Commission, are “agencies” within the meaning of the FOIA, the status of executive advisory units is unclear. The FOIA itself does not contain a definition of an agency, and the APA’s definition offers little aid.⁴ There is some indication that the courts will look to conventional attributes of an administrative agency, such as rule-making or adjudicatory powers,⁵ however, in *Soucie v. David*⁶ the Court of Appeals for the District of Columbia Circuit refused to rely on such procedural attributes⁷ and applied instead a test which requires an analysis of the source and scope of a unit’s authority.

In *Soucie* several conservation groups filed suit against the Office of Science and Technology⁸ (OST) to force public disclosure of a study of the Supersonic Transport program prepared by OST and ordered by the President. The lower court dismissed the action.⁹ Although the court’s reasoning is unclear, it appears to have held that offices within the Executive Office of the President are not agencies within the meaning of the FOIA, and even if they were such agencies, the doctrine of executive privilege would exempt them from the coverage of the Act. The court of appeals reversed and remanded, holding that the OST was an agency within the meaning of the FOIA and that the claim of executive privilege could be considered only if the privilege was expressly invoked by the government.

The *Soucie* court interpreted the APA definition of “agency”—“each authority of the Government”¹⁰—to mean any

4. “[A]gency means each authority of the Government of the United States, whether or not it is within or subject to review by another agency . . .” 5 U.S.C. § 551(1) (1970).

5. In *International Paper Co. v. FPC*, 438 F.2d 1349 (2d Cir. 1971), the plaintiff requested disclosure of certain memoranda written by the staff of the FPC and directed to the commissioners themselves. The plaintiff argued that the FPC staff was an independent unit and that its memoranda were “final opinions” of an agency made available to the public by the FOIA. 5 U.S.C. § 552(a)(2)(A) (1970). The court summarily rejected that contention, relying on the fact that the authority to make “orders” rested only with the Commission, and therefore held that the staff could not be an independent agency. 438 F.2d at 1358-59.

6. 448 F.2d 1067 (D.C. Cir. 1971).

7. *Id.* at 1073.

8. The Office of Science and Technology is one of twelve “offices” comprising the Executive Office of the President. 1970 CONGRESSIONAL DIRECTORY 420-25.

9. *Soucie v. Dubridge*, 27 AD. L.2d 379 (1970) (oral opinion unpublished in official publications), noted in 1970 *Duke Project* 171-73.

10. 5 U.S.C. § 551(1) (1970). This subsection specifically exempts only the following governmental units from the Freedom of Information portion of the APA: Congress, federal courts, and governments of territories, possessions, and the District of Columbia. *Id.* §§ (A)-(D).

administrative unit with "substantial independent authority in the exercise of specific functions."¹¹ While OST's primary function is to provide the President with advice in matters of science and technology, it is also responsible to Congress for independently evaluating certain federal programs.¹² Finding that this independent grant of authority met the requirement of its test, the court held that OST was an agency.¹³

The *Soucie* court's reliance upon the OST's *authority* from a source independent of the President was misplaced. The legislative history of the FOIA indicates that Congress intended to reveal the operation of all governmental units, regardless of the source of their authority,¹⁴ so that the "agency" determination should be made through a functional analysis of a unit's activities rather than an analysis of the source of the unit's authority. An executive unit which performs a function beyond solely providing advice to the President should be made subject to the FOIA regardless of whether that unit's authority is derived from Congress or the President. Such an analysis will provide reasonable assurance that the FOIA will not be indirectly limited through definitional gymnastics.¹⁵

Definition of "Records"

The lack of definitions within the FOIA again presented a problem in *Nichols v. United States*,¹⁶ where the court sought to define the term "records." The FOIA requires that "each agency, on request for identifiable records . . . shall make the records promptly available to any person."¹⁷ A physician, seeking to study certain items related to the assassination of President Kennedy, brought suit to compel the release of, *inter alia*, the Oswald rifle, bullet fragments,

11. 448 F.2d at 1073.

12. Reorganization Plan No. 2 of 1962, Pt. 1, § 3, 3 C.F.R. 879-80 (1959-63 Compilation).

13. The OST itself believed, in 1967, that it was subject to the FOIA. Specifically stating that it was acting pursuant to the FOIA, it published a notice required by the Act, 5 U.S.C. § 552(a)(1), detailing the types of information it would make available. 32 Fed. Reg. 11060 (1967).

See also U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT 4 (1967) (stating that the FOIA applies to every "organizational unit in the executive branch").

14. Cf. H.R. REP. NO. 1497 (referring to *all* executive branch records).

15. See generally 49 TEXAS L. REV. 780, 790 (1971).

16. 325 F. Supp. 130 (D. Kan. 1971).

17. 5 U.S.C. § 552(a)(3) (1970).

cartridge cases, and clothing worn by the President.¹⁸ The district court dismissed the complaint, holding that these items were not “records” within the meaning of the FOIA. Since neither the Act nor its legislative history offered any indication of the meaning of “records,” the court looked to the statutory definition most often adopted by agencies subsequent to the passage of the FOIA.¹⁹ While the court refrained from making a precise interpretation of the word, it stressed that records generally are items which document acts and events and have knowledge or information impressed upon them.²⁰ Although making physical items more freely available might be desirable as a policy consideration, the court’s result is in accordance with congressional intent, which was directed at information relating to the activities of an agency, and not at physical items being held or stored by an agency.²¹

Final Opinions

The FOIA provides that all final opinions and orders, as well as statements of policy and interpretations, shall be made available to

18. 325 F. Supp. at 135-36. Plaintiff also joined the Department of the Navy, requesting reports of medical studies performed during the Kennedy autopsy at Bethesda Naval Hospital. The Navy submitted an affidavit declaring that the items in question had been delivered to the United States Secret Service in 1963. The court concluded that while the medical reports were records within the meaning of the FOIA, it could not require production of records not in the custody of the challenged agency. *Id.* at 137.

19. As used in this chapter, “records” includes all books, papers, maps, photographs, or other documentary materials, regardless of form or characteristics [M]useum material made or acquired and preserved solely for reference or exhibition purposes . . . [is] not included. 44 U.S.C. § 3301 (1970).

This statute was designed to control the disposal of records throughout the government. The definition, however, is referred to throughout the statute dealing with the handling of government documents. See 44 U.S.C. § 3301 (1970). Many agencies have also adopted this definition. *E.g.*, 41 C.F.R. § 105-60.104(2) (1971) (General Services Administration). See Comment, *Freedom of Information Act—Early Judicial Interpretations*, 44 WASH. L. REV. 641, 643 n.13 (1969).

20. The court also relied upon, without explicitly mentioning, the exemption for documents “specifically exempted from disclosure by statute.” 5 U.S.C. § 552(b)(3) (1970). The Kennedy articles were stored pursuant to 44 U.S.C. §§ 2107, 2108(c) (1970), which restricted general access to the articles until Oct. 26, 1971. *Nichols* was decided on Feb. 24, 1971.

21. Note, *Comments on Proposed Amendments to Section 3 of the Administrative Procedure Act: The Freedom of Information Bill*, 40 NOTRE DAME LAW. 417 (1965). See H.R. REP. NO. 1497, at 1, 3, 6.

the public.²² Where agencies issue orders without an opinion or with only a short summary statement, attempts are made to use the FOIA as a tool for unearthing the policies underlying such orders. An early case, *American Mail Line v. Gulick*,²³ held that where an agency expressly bases its decision on an undisclosed staff memorandum, that document is no longer protected by the intra-agency exemption²⁴ and must be disclosed.²⁵ This holding was expanded in 1971 by two principal cases, *Grumman Aircraft Engineering Corp. v. Renegotiation Board*²⁶ and *Sterling Drug, Inc. v. FTC*.²⁷

In *Grumman* the court held that where the Contract Renegotiation Board adopts a recommendation of a subordinate group in a summary order and that recommendation is transmitted to the Board along with a report containing the facts and reasoning relied upon by the subordinate group, the report must be disclosed as the "final opinion." Disclosure was required even though the summary order

22.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders made in the adjudication of cases;

(B) those statements of policy and general interpretations which have been adopted by the agency and are not published in the *Federal Register*. 5 U.S.C. § 552(a)(2) (1970).

23. 411 F.2d 696 (D.C. Cir. 1969), noted in 1969 *Duke Project* 87.

24. 5 U.S.C. § 552(b)(5) (1970).

25. In *Gulick* the Maritime Subsidy Board stated in an order that it had relied solely upon a particular staff memorandum in reaching its conclusions. The Board released only the last five pages of the memorandum as its official opinion. The appellate court held that the entire document was, in fact, the final opinion and ordered release pursuant to 5 U.S.C. § 552(a)(2)(A) (1970) (see note 22 *supra* for the text of this provision). The Board's lack of enthusiastic support for the *Gulick* decision is amply demonstrated in *Grace Lines, Inc. v. Bethlehem Steel Corp.*, Petition for Reconsideration, 28 AD. L.2D 195 (Maritime Subsidy Bd. 1971).

26. 325 F. Supp. 1146 (D.D.C. 1971). This action was on remand to determine whether the documents in question constituted final opinions. If the district court so determined, it had been ordered by the appellate court to release the documents after deleting any trade secrets or confidential information. 425 F.2d 578 (D.C. Cir. 1970). See 1970 *Duke Project* 174-75.

After the decision to remand was made, but prior to the district court hearing, the Board amended its regulations concerning the availability of information. The previous regulation simply stated that "final opinions" and "statements of general applicability" would be publicly available. 32 C.F.R. § 1480.5 (1971). The amended regulation provides for the availability of the records of certain agency actions (e.g., letters not to proceed, orders determining excessive profits), as well as any "Interpretations," "General Orders," or "Administrative Orders" that affect the public. 36 Fed. Reg. 3808 (1971).

27. 450 F.2d 698 (D.C. Cir. 1971).

contained no reference to the report. In fact it was the policy of the Board to specify that adoption of the recommendation did not imply adoption of the report.

Operating within an atypical infrastructure, the Contract Renegotiation Board, rather than requesting an advisory staff memorandum, first considers cases in a regional board which prepares a confidential recommendation and report. The national board then either approves the recommendation or substitutes its own conclusion. The Board also may appoint a committee of Board members to study and make a second confidential recommendation and report to the full Board. In either case, as noted, approval of a recommendation does not imply "adoption" of its accompanying report.²⁸ The *Grumman* court ordered that whenever the Board approves the recommendation of a regional board or committee without opinion, the accompanying report must be disclosed as a "final opinion" under the FOIA.

Although the reasoning of the court in *Grumman* is unclear, the result is correct. The "final opinion" provision of the FOIA is meant to prevent an agency from developing and applying a body of law without revealing that law to persons outside the agency.²⁹ When the Board adopts a recommendation accompanied by a report, it is extremely likely that the report will be relied upon by the Board and its staff in subsequent proceedings.

The court properly rejected the Board's argument that the adoption of a recommendation might be based on reasons entirely independent of those given in a report. Such an event is unlikely to occur. It might also be argued that the practical effect of the *Grumman* holding is to force the Board to either stand by the reasoning contained in the report or write its own final opinion. Arguably such a result would be inconsistent with Congress' intent to avoid overburdening agencies with the need to write opinions.³⁰ However, the improbability of the Board's adopting a recommendation while rejecting the reasoning upon which that recommendation was based makes it doubtful that *Grumman* will overburden the Board.

The *Grumman* court also held that a report submitted by a Board

28. 325 F. Supp. at 1148-52.

29. "The governing principle [of the Act], which I think is without exception, is that secret law is forbidden." DAVIS (Supp. 1970) 159. See *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 712 (D.C. Cir. 1971) (Bazelon, C.J., dissenting in part).

30. See 450 F.2d 698, 707.

committee or even an individual member of the Board must be disclosed. Such a report represents the opinion of at least one Board member and thus constitutes a concurring or dissenting opinion made equally available by the FOIA.³¹

In the second case, *Sterling*,³² the Court of Appeals for the District of Columbia Circuit ordered release of a memorandum transmitted by the Federal Trade Commission to its staff in explanation of a summary order shortly after that order had been issued, even though such an intra-agency memorandum would ordinarily be exempt from the Act's disclosure requirements.³³ The Commission had issued a complaint alleging that Sterling Drug, Inc., in acquiring Lehn & Fink Products Corp., had violated section 7 of the Clayton Act.³⁴ While this case was pending the Commission approved, in a summary order, a merger between two other firms. Sterling felt that the circumstances of the approved merger were similar to those upon which its alleged violation was based. After failing to obtain the desired information in discovery proceedings, Sterling filed suit under the FOIA to obtain disclosure of documents relating to both mergers, including (1) memoranda prepared by the Commission staff both before and after the issuance of the summary order; (2) memoranda prepared by two individual commissioners; and (3) a memorandum issued by the Commission itself to the staff *after* the issuance of the summary order. Sterling, cited *Gulick*,³⁵ argued that such memoranda constituted final agency opinions and should be made available pursuant to the FOIA.³⁶ The lower court inspected the documents *in camera*, and concluded that all the memoranda were protected from disclosure by the intra-agency memorandum exemption. The circuit court affirmed as to the memoranda prepared by the staff and the two individual

31. 5 U.S.C. § 552(a)(2)(A) (1970).

32. 450 F.2d 698.

33. 5 U.S.C. § 552(b)(5) (1970).

34. 15 U.S.C. § 18 (1970).

35. *American Mail Line v. Gulick*, 411 F.2d 696 (D.C. Cir. 1969). See note 23 *supra* and accompanying text.

36. Sterling also argued that, as a policy matter, disclosure was warranted in this and like cases because it would have the beneficial effect of encouraging agencies to issue opinions with every order. The court considered this request unrealistic when applied to the huge volume of orders and licenses issued by agencies. 450 F.2d at 707 & n.9. The Court's point, however, is not well taken, at least under the circumstances present in this case, because the FTC issues "relatively few orders concerning divestiture proposals. *Id.* at 714-15 n.13 (Bazelon, C.J., dissenting in part).

commissioners, but reversed and remanded as to the memorandum issued by the entire Commission.

Requiring the release of the memorandum issued by the entire Commission to its staff is clearly a correct decision. As discussed earlier,³⁷ such documentation of agency policy, setting forth a body of substantive law to be applied by the agency, is precisely the type of information which Congress intended should be made available to the public under the final opinion provisions of the FOIA. Where such memoranda follow closely after a Commission order, they very likely constitute what would normally be considered part of a final opinion.³⁸

The court's refusal to release the two memoranda written by individual commissioners, however, is troublesome. The exact nature of the memoranda is not made clear in the opinion, but they appear to have been directed to the staff and to have been written for the purpose of comparing the earlier merger with the Sterling merger. The court felt that these memoranda should not be released because they would reveal information concerning a pending decision and also because they might not accurately reflect the reasoning of the entire Commission since they contained only an individual commissioner's reasons for his vote. In relying upon this second point the court is in error. A memorandum which expresses a commissioner's reasoning for his vote would constitute a concurring or dissenting opinion which must also be disclosed.³⁹ In regard to the court's first concern, if such a memorandum dealt with another case under consideration, those portions could be deleted before release.⁴⁰

37. See note 29 *supra* and accompanying text.

38. Although the court did not discuss the point, a time element must be considered here. If the memoranda were written within a reasonable time following the decision, they should be characterized as part of an opinion; however, with the passage of time, a commissioner's explanation would inevitably begin to reflect events which would have occurred subsequent to the decision.

39. 5 U.S.C. § 552(a)(2)(A) (1970); *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 325 F. Supp. 1146, 1152 (D.D.C. 1971). See text accompanying note 31 *supra*. See S. REP. NO. 813, at 7.

40. The guideline established in *Soucie v. David*, 448 F.2d 1067, 1077-78 (D.C. Cir. 1971), permitting nondisclosure of nonexempt information only when inextricably intertwined with exempt material, would also be appropriate in a case where a commissioner's reasons for a past vote are intertwined in a discussion of pending matters.

Equitable Discretion

In a widely criticized 1969 decision,⁴¹ *Consumers Union v. Veterans Administration*,⁴² it was held that, even where there was no applicable statutory exemption under the FOIA, a court had equitable discretion to decline to force an agency to disclose.⁴³ In 1971, one court of appeals expressed disagreement with that holding in dicta,⁴⁴ and in *Getman v. NLRB*⁴⁵ the Court of Appeals for the District of Columbia Circuit purported to reach a holding opposite to that in *Consumers Union*.⁴⁶

The FOIA states that "[t]he district court . . . shall have jurisdiction to enjoin the agency from the withholding of agency records"⁴⁷ The *Consumers Union* court, relying on the use of the word "shall," read this language to be permissive rather than mandatory. The court, citing but one case to support its position,⁴⁸ went on to

41. See 1969 Duke Project 95-98; Note, *Judicial Discretion and the Freedom of Information Act*, 45 IND. L.J. 421 (1970); 44 TULANE L. REV. 800 (1970).

42. 301 F. Supp. 796 (S.D.N.Y. 1969), *dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971).

43. *Consumers Union* filed an appeal from that decision, but before the hearing was held the Veterans Administration retroactively altered its contract solicitation policy to permit disclosure of test data of this type. 436 F.2d at 1364. The counsel for *Consumers Union* in that action appeared as amicus curiae in *Getman v. NLRB*, 450 F.2d 670 (D.D.C. 1971). He stated that the issue of equitable discretion was neither briefed nor argued by either party in *Consumers Union*. *Id.* at 678 n.25.

44. *Soucic v. David*, 448 F.2d 1067, 1076 (D.C. Cir. 1971). See also the language in *Wellford v. Hardin*, 444 F.2d 21, 24 (4th Cir. 1971), relied on by both the *Soucic* and the *Getman* courts. Their reliance is questionable because the *Wellford* decision does not directly discuss the possibility of exercising equitable discretion and the point does not appear to have been argued. *But see Long v. IRS*, P-H 1972 FED. TAXES ¶ 72-349 (W.D. Wash. Nov. 23, 1971). The court refused to employ its "equity powers" to disclose certain tax files when the files were available through related litigation in the Tax Court. *Id.* ¶ 72-350. As noted, there is no statutory basis for such a refusal; nor is the fact that the material may be otherwise obtainable relevant to the determination of whether or not a given record is exempt.

45. 450 F.2d 670 (D.C. Cir. 1971), *noted in* 1971 U. ILL. L.F. 329.

46. Unfortunately the *Getman* decision is not strong authority for the issue as the court clearly had a narrower alternative rationale available. The district court granted the plaintiff's petition for disclosure holding that, even assuming it did have discretion to exercise equitable jurisdiction under the FOIA, it would decline to exercise that discretion because the government had failed to show any danger of significant harm. The court of appeals affirmed the lower court's decision to disclose, but, dodging the easier issue and refusing to rely on the government's failure, went straight to the jurisdictional issue. 450 F.2d at 677-78.

47. Administrative Procedure Act § 3(c), 80 Stat. 250 (1966), *superseded by* 81 Stat. 54 (1967) (emphasis added). The clause in question was altered slightly when the Act was codified: "[T]he district court . . . has jurisdiction to enjoin" 5 U.S.C. § 552(a)(3) (1970) (emphasis added). See DAVIS (Supp. 1970) 35-36 (criticizing the codification of the APA).

48. *Hecht Co. v. Bowles*, 321 U.S. 321, 326-31 (1944), holding that the Government, having established a violation of practices prohibited by the statute, was not entitled to an injunction

establish a test whereby an agency must show that disclosure will result in significantly greater harm than good before a court may deny a petition to disclose.

Support for the *Consumers Union* holding can be found in the Supreme Court statement that whenever Congress intends to deprive the courts of their jurisdiction to exercise equitable discretion it must make “an unequivocal statement” of that intent.⁴⁹ The requirement for an “unequivocal statement,” however, was clarified in *United States v. DuPont & Co.*:⁵⁰

Congress would not be deemed to have restricted the broad remedial powers of courts of equity without explicit language doing so in terms, or *some other strong indication of intent.*⁵¹

The language of the FOIA fulfills this requirement and compels the conclusion that the FOIA does not grant equitable jurisdiction: “This section does not authorize withholding of information . . . except as *specifically* stated in this section.”⁵²

The history of the FOIA makes it further evident that Congress itself performed the necessary balancing of equities and intended that the only authority for denying information to the public is to be found in the FOIA.⁵³ The former Public Information Section of the APA⁵⁴ limited both the parties who could obtain information and the kinds of information available. These limitations led Congress to believe that a major shift in emphasis was necessary. It therefore attempted

as of right. The language of the statute was similar to the FOIA: “[U]pon a showing . . . that such person has . . . or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order *shall* be granted . . .” Emergency Price Control Act, 56 Stat. 23, § 205(a) (1942) (emphasis added). *But see* *United Steelworkers v. United States*, 361 U.S. 39, 55-59 (1959) (Frankfurter & Harlan, J.J., concurring) holding that an injunction is mandatory against a strike that would cause a national emergency even though the applicable statute used the word “shall.” See Note, *Judicial Discretion*, *supra* note 41, for a discussion of the two cases.

49. *Hecht Co. v. Bowles*, 321 U.S. 321, 328 (1944).

50. 366 U.S. 316 (1961).

51. *Id.* at 328 n.9 (emphasis added).

52. 5 U.S.C. § 552(c) (1970) (emphasis added). *But see* DAVIS (Supp. 1970) 177. Davis interprets the “specifically” clause as only limiting the courts’ power to interpret the language of the exemptions to the literal meaning of the words used by Congress. *Id.* As indicated by the *Soucie* and *Getman* decisions, this interpretation has not been accepted.

53. See Note, *Judicial Discretion*, *supra* note 41, at 430-31; 44 TULANE L. REV., *supra* note 41, at 805.

54. Public Information Act, ch. 324, § 3, 60 Stat. 238 (1946), *as amended*, 5 U.S.C. § 552 (1970).

to provide "clearly delineated statutory language."⁵⁵ To allow the courts to perform their own balancing of equities would, in the words of the *Getman* court, seriously undermine "the overriding purpose of the Act . . . to require disclosure in all but a narrow and clearly defined category of situations."⁵⁶ There may be isolated instances in which disclosure would cause more harm than would nondisclosure,⁵⁷ yet, rather than sanction the continued existence of a vague undefined ground for nondisclosure,⁵⁸ Congress has accepted the costs in exchange for the benefits it believed would be derived from the FOIA.

Legislative History

Legislative history in the form of committee reports often provides valuable guidance to courts in the construction and interpretation of vague or ambiguous statutory language. Conflicting interpretations given in the House and Senate reports to the FOIA, however, have multiplied the usual difficulties of divining congressional intent.⁵⁹ The Senate report generally contains statements compatible with the language of the Act and tends to construe the Act in favor of broad disclosure. The House report, on the other hand, often conflicts with the express language of the Act and tends to restrict disclosure.⁶⁰

55. S. REP. NO. 813, at 3. *But see* DAVIS (Supp. 1970) 123-24. *See also* Soucie v. David, 448 F.2d 1067, 1076 (D.C. Cir. 1971); Comment, *Freedom of Information Act*, *supra* note 19, at 663 n.98.

56. 450 F.2d at 679 n.31. It is arguable whether Congress was successful in making the exemptions "clearly delineated"; however, the "specifically" clause, 5 U.S.C. § 552(c) (1970), appears to be an example of clarity. Prof. Davis' analysis notwithstanding, *see* note 52 *supra*, and the effect of that clause clearly was ignored by the *Consumers Union* court in deciding the issue of equitable discretion. *See* 448 F.2d at 1077; *Wellford v. Hardin*, 444 F.2d 21, 24 (4th Cir. 1971).

57. The *Soucie* court left open a possibility that an unusual factual circumstance might occur which would justify a revival of the equitable discretion doctrine. 448 F.2d at 1077. The same court, however, disavowed the existence of such discretion in *Getman*. 450 F.2d at 679 n.31.

58. S. REP. NO. 813, at 3.

59. *E.g.*, DAVIS (Supp. 1970) 31; Comment, *The Freedom of Information Act: Access to Law*, 36 *FORD. L. REV.* 765 (1968); *see* Note, *Comments on Proposed Amendments*, *supra* note 21 (an analysis of the early legislative history of the Act). For a complete list of the documents comprising the legislative history of the FOIA, *see* DAVIS (Supp. 1970) 116 n.6.

60. For example, in regard to the scope of the exemptions, the Senate report clearly states that it is the Act's purpose "to establish a general philosophy of full agency disclosure unless information is exempted under *clearly delineated statutory language*." S. REP. NO. 813, at 3 (emphasis added). The House report, H.R. REP. NO. 1497, however, repeatedly describes the scope of the exemptions in terms which enlarge their coverage far beyond the express language of the Act. *See* DAVIS (Supp. 1970) 174-75.

The Court of Appeals for the District of Columbia Circuit examined this problem in two cases in 1971, stating in *Soucie*⁶¹ and *Getman*⁶² that whenever resort to the conflicting reports was necessary the Senate report was to be preferred.⁶³ The House report was actually published after the Senate's passage of the FOIA.⁶⁴ Since the Senate report was the only one available for consideration by both houses, it is "a better indicator of legislative intent."⁶⁵

These decisions indicate that the Senate report will be preferred when the reports conflict. No court has yet discussed the situation where the Senate report is silent on an issue and the House report is contrary to the thrust of the Act. In this situation, enforcement of the Act, consistent with the purpose of the statute, dictates that the House interpretation should be disregarded.

An extreme example can be found in the respective paragraphs discussing the exemption for matters "relating solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2) (1970). The House report explicitly states that the exemption does *not* cover matters of internal management such as employee relations and working conditions; however, the report states that operating rules, guidelines, and manuals of procedure for government investigators or examiners would be exempt. The Senate report, in contrast, lists examples covered by the exemption as regulations concerning lunch hours, parking facilities, and sick leave. Admittedly it is difficult to understand why such mundane matters were exempted, but at least the Senate report is faithful to the statutory language.

The reasons for the divergent views expressed in the two reports is not entirely clear. A widely held view, however, is that the House committee, under pressure from agency supporters to amend the bill, chose the easier course of writing restrictions into the legislative history. *E.g.*, DAVIS (Supp. 1970) § 3A.2, at 117; Note, *The Freedom of Information Act: A Critical View*, 38 GEO. WASH. L. REV. 150, 153 (1969); 83 HARV. L. REV. 928, 930 n.15 (1970).

Unfortunately the major result of this "rewriting" is to reduce the effectiveness of the FOIA. Maximum feasible disclosure will be attained only when the agencies are convinced that a court action will inevitably result in disclosure of the information in question. So long as possibility remains that a court will accept a particularly restrictive phrase from the House report, agencies will resist disclosure of items which were not meant to be exempt.

61. 448 F.2d at 1077 n.39.

62. 450 F.2d at 673 n.8.

63. The conflict in both cases concerned the issue of whether Congress intended to grant jurisdiction to exercise equitable jurisdiction. See notes 41-58 *supra* and accompanying text. While the Senate report characteristically failed to deal directly with the issue, the committee's attitude is evident from its description of the "specifically" clause. See note 52 *supra* and accompanying text. The report states that all materials are to be made available "unless explicitly allowed to be kept secret by one of the exemptions . . ." S. REP. NO. 813, at 10. The House report, however, blithely comments that a court will have the authority to enjoin an agency "whenever [the court] considers such action *equitable and appropriate*." H.R. REP. NO. 1497, at 9 (emphasis added).

64. The Senate passed the FOIA on Oct. 13, 1965. The House report was ordered to be printed May 9, 1966.

65. 448 F.2d at 1077 n.39; *accord*, 450 F.2d at 673 n.8.

Release of Documents Under § 552(a)(2) and (3)

In *City of Concord v. Ambrose*⁶⁶ a police officer and his city government were denied access to texts used by the Bureau of Customs to train federal law enforcement officers. The court, in a persuasively written opinion, first expressly recognized that Congress had created a presumption in favor of free disclosure and that the burden of defeating that presumption was on the Government. However, the court then determined that release of material pertaining to law enforcement would always be detrimental to the public good, thus effectively creating a category of material which carries a presumption against free disclosure.⁶⁷ The plaintiffs sought release under either section (a)(2), requiring that an agency have available for public inspection *administrative* staff manuals which affect a member of the public,⁶⁸ or section (a)(3), requiring that an agency make all material not otherwise covered by the preceding sections available upon request.⁶⁹ The court correctly noted that the term "administrative" was deliberately used in section (a)(2) to exclude staff manuals pertaining to "law enforcement matters"⁷⁰ and held that the texts sought were materials which fell within this excluded category. The court then erroneously reasoned that in order to "preserve the detailed scheme of classification"⁷¹ of the FOIA, it was necessary to construe section (a)(3) as establishing a separate category of information. The court felt that material in this last category, which the FOIA requires to be made available only upon request, was mutually exclusive of any

66. 333 F. Supp. 958 (N.D. Cal. 1971).

67. The court relied on statements in the House and Senate reports which indicated, to the court, that confidentiality was legitimate "when disclosure would harm the 'government's case in court.'" 333 F. Supp. at 959; *see* S. REP. NO. 813, at 2 (Amendment No. 1), 9; H.R. REP. NO. 1497, at 7, 10.

68. Each agency . . . shall make available for public inspection and copying—

. . . .
(C) administrative staff manuals and instructions to staff that affect a member of the public; . . . 5 U.S.C. § 552(a)(2) (1970).

In *Long v. IRS*, *supra* note 44, the court denied a government motion to dismiss a request for "an IRS manual and certain 'code books.'" P-H 1972 FED. TAXES ¶ 72-350 (W.D. Wash. Nov. 23, 1971).

69. Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records . . . shall make the records promptly available to any person . . . 5 U.S.C. § 552(a)(3) (1970).

70. S. REP. NO. 813, at 2 (Amendment No. 1). *See* DAVIS (Supp. 1970) 136-37.

71. 333 F. Supp. at 960.

material referred to by section (a)(2).⁷² The court then, with a trick of verbal legerdemain, concluded that since the requested manuals were exclusively dealt with by section (a)(2) they could not be released under section (a)(3), and since the manuals pertained to law enforcement rather than purely administrative matters they could not be released under section (a)(2).

The court misunderstood the purpose of the separation of materials made by sections (a)(2) and (3). Section (a)(3) is, in effect, a catchall clause designed to make material in general available *upon request*. Section (a)(2) delineates certain specific categories of records which must be accorded a more particularized treatment—a subdivision of records which must be indexed and maintained available for public inspection and copying. The *Ambrose* court evaded section (a)(3)'s explicit directive that any material *not already* made available by previous sections must be made available upon request, subject only to the specific exemptions found in section (b).⁷³

National Defense and Executive Privilege

In *Soucie v. David*⁷⁴ the Court of Appeals for the District of Columbia Circuit, remanding a refusal to release an Office of Science and Technology report on the Supersonic Transport controversy, established in dicta guidelines for deciding anticipated arguments for nondisclosure based on executive privilege and the exemption for matters involving national defense or foreign policy.⁷⁵ The court indicated that if either claim was accepted, an *in camera* inspection would be necessary to separate and release any unprotected information unless the Government could describe the report's relevant features sufficiently to justify the claim, in which case the district court should forego the inspection and allow the entire report to be withheld. The court did not detail a standard for a "sufficient" description but did cite *Epstein v. Resor*,⁷⁶ implying that an *in camera* inspection would

72. Cf. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 13, at 15, 23. *But see* DAVIS (Supp. 1970) 133 n.40.

73. The court did briefly examine two of the specific exemptions in relation to the material requested here but, in view of its holding, did not think it necessary to base its decision upon either exemption. 333 F. Supp. at 960.

74. 448 F.2d 1067 (D.C. Cir. 1971). *See also* text accompanying note 6 *supra*.

75. "[Matters] specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." 5 U.S.C. § 552(b)(1) (1970).

76. 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970).

be improper so long as the government's claim was not arbitrary and capricious. Application of this standard would weaken the utility of the FOIA by decreasing the likelihood of an *in camera* inspection and the release of any information whatever. This aspect of the *Soucie* decision appears to underline, albeit in a less dramatic tone than *Epstein*, the continuing concern of the courts that they may intrude into an area where judicial expertise would be inadequate to prevent irreparable damage to the national interest.⁷⁷

In *Mink v. EPA*,⁷⁸ it was held that the FOIA abrogated that portion of an Executive Order which granted to an entire document the same security classification as that of the most highly classified component part.⁷⁹ The lower court, in an action brought by a group of Congressmen, had refused to disclose a collection of documents compiled as a report by the National Security Council concerning the Amchitka nuclear test,⁸⁰ holding that such a compilation was protected by the national defense exemption.⁸¹ Stating that "[s]ecrecy by association is not favored,"⁸² the circuit court reversed, ordering the release of all documents which would not be classified if they were separated from the compilation. The FOIA exempts only matter "*specifically* required . . . to be kept secret . . ."⁸³ and the court believed that the group-classification scheme was not sufficiently specific.⁸⁴ Blanket classification represents a return to procedures fol-

77. See generally *United States v. Reynolds*, 345 U.S. 1 (1953).

78. ___ F.2d ___ (D.C. Cir. 1971), cert. granted, 40 U.S.L.W. 3428 (U.S. Mar. 17, 1972) (No. 71-909).

79. Exec. Order No. 10,501, 3 C.F.R. 292 (1971). See generally 83 HARV. L. REV. 928 (1970).

80. Apparently no attempt was made to deny that the National Security Council was an agency. Cf. *Soucie v. David*, 448 F.2d 1067, 1072 (D.C. Cir. 1971). See notes 10-15 *supra* and accompanying text.

81. 5 U.S.C. § 552(b)(1) (1970).

82. ___ F.2d at ___

83. 5 U.S.C. § 552(b)(1) (1970) (emphasis added).

84. Since this appeal had been taken from a summary dismissal, the *Mink* court declined to answer plaintiffs' challenge of the government's entire scheme for the security classification of documents as set out in Executive Order 10501. That system allows the heads of specified executive units to delegate to subordinates the authority to classify any documents or records which, in the subordinate's opinion, were either "vital," "important," or "prejudicial" to the national defense. As this article went to print, Executive Order 11652, 37 Fed. Reg. 5209 (1972), was issued, revoking Executive Order 10501 and providing for more limited delegation of authority to classify materials as well as reducing the number of agencies authorized to classify documents "Top Secret" or "Secret."

lowed before the Public Information Section of the APA⁸⁵ was repealed by the FOIA and is antithetical to the philosophy underlying the FOIA.⁸⁶

The problem of how to handle a claim of executive privilege was presented in *Committee for Nuclear Responsibility, Inc. v. Seaborg*,⁸⁷ a case in which the plaintiffs were seeking through discovery techniques many of the same documents sought in *Mink* through the FOIA. Each of the agency heads involved had made a determination that the disclosure of the documents, even to the judge for *in camera* inspection, would be contrary to the public interest. The Government argued that the doctrine of “true” executive privilege prevented a court from reviewing those determinations. The court rejected this argument⁸⁸ and held that the district court should conduct an *in camera* review.

It is clear from the decisions in *Soucie*, *Mink* and *Nuclear Responsibility* that any claim of executive privilege will be tested by the courts at least to assure that the claim is neither arbitrary nor capricious. However, it is also clear that the essential thrust of the FOIA—full disclosure unless the Government shows good cause not to reveal—will not be applied to the national defense exemption. Even the Court of Appeals for the District of Columbia Circuit, heretofore given to expansive readings of the disclosure provisions of the Act,⁸⁹ reads that exemption as necessarily differing in tone from the remainder of the FOIA due to the character of the information protected.

85. Public Information Act, ch. 324, § 3, 60 Stat. 238 (1946), as amended, 5 U.S.C. § 552 (1970).

86. A problem may arise, however, where the relationship of the documents brought together in a given report may be revealing in and of itself. In such cases a possible solution, suggested in *Epstein v. Resor*, 421 F.2d 930, 933 (9th Cir. 1970), in a slightly different context, would be to permit the Government to classify the documents in question so long as its determination that a compromise of security might otherwise occur is not found by the court to be arbitrary or capricious. A scheme such as this would seem to satisfy the requirement of the FOIA that in order to qualify for an exempt status a document must be one which is “specifically” required to be kept secret—“specifically” meaning, arguably, requiring a document to be given individual consideration. 5 U.S.C. § 552(b)(1) (1970).

87. ___F.2d___ (D.C. Cir. 1971).

88. The court tartly commented that, in its view, “this claim of absolute immunity for documents in possession of an executive department or agency, upon the bald assertion of its head, is not sound law.” *Id.* at ___

89. See, e.g., *Sterling Drug, Inc. v. FTC*, 450 F.2d 698 (D.C. Cir. 1971); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971); *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970).

Intra-agency Memorandum Exemption

In *Sterling Drug, Inc. v. FTC*⁹⁰ the court held that memoranda prepared by the FTC staff during a merger investigation were exempted from the FOIA by the intra-agency exemption.⁹¹ That exemption is applicable only if the memoranda "would not be available by law to a party other than an agency in litigation with the agency."⁹² Acknowledging that the clause is not clear, the court nonetheless held that the proper interpretation was that found in the House report: "[A]ny internal memoranda which would *routinely* be disclosed to a private party through the discovery process in litigation with the agency"⁹³ Although it might appear that this interpretation would block access to virtually all agency memoranda, two alternative techniques for disclosure reduce its impact. First, memoranda comprising part of a final opinion, as defined in *Gulick*,⁹⁴ *Grumman*,⁹⁵ and *Sterling*,⁹⁶ cannot be classified as intra-agency memoranda.⁹⁷ Second, memoranda not written during the decision-formulating process that the exemption was designed to protect⁹⁸ are not intra-agency memoranda in the sense Congress used the term, and therefore are not exempt. With the availability of these alternative means of disclosure, *Sterling's* "routinely discoverable" test is a workable one. Coupled with *in camera* inspections for the separation and release of factual data contained in documents,⁹⁹ this test should prevent interference

90. 450 F.2d 698 (D.C. Cir. 1971). See also notes 32-40 *supra* and accompanying text.

91. "[I]nter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5) (1970).

92. *Id.*

93. H.R. REP. NO. 1497, at 10. In *International Paper Co. v. FPC*, 438 F.2d 1349 (2d Cir. 1971), the court indicated that it would also require plaintiffs to show a "compelling need" for requested intra-agency memoranda. *Id.* at 1359. It is clear, however, that such a requirement would be erroneous. Congress intended that the needs of a particular litigant must no longer be considered. S. REP. NO. 813, at 10; H.R. REP. NO. 1497, at 5-6; DAVIS (Supp. 1970) 120.

94. 411 F.2d 696. See notes 23-25 *supra* and accompanying text.

95. 325 F. Supp. 1146. See notes 26-31 *supra* and accompanying text.

96. 450 F.2d 698. See notes 32-40 *supra* and accompanying text.

97. See notes 22-40 *supra* and accompanying text.

98. See H.R. REP. NO. 1497, at 9; S. REP. NO. 813, at 10. See also DAVIS (Supp. 1970) 157.

99. The Court of Appeals for the District of Columbia Circuit elaborated on the procedure for *in camera* inspections in *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), stating that a court should refuse to release factual data only if it was "so inextricably intertwined with policy making processes" that public disclosure would expose the mental processes of an executive officer. *Id.* at 1077-78. The same court, in *Sterling*, made it clear that whenever factual material

with the deliberative process¹⁰⁰ and yet assure that the goals of the FOIA are accomplished.

Personnel and Medical Files Exemption

The FOIA exempts from its disclosure requirements “personnel and medical files *and similar files*” if their disclosure “would constitute a clearly unwarranted invasion of personal privacy.”¹⁰¹ In *Getman v. NLRB*¹⁰² the Court of Appeals for the District of Columbia Circuit ordered the NLRB to disclose to certain plaintiffs lists containing the names and addresses of employees eligible to vote in thirty-five upcoming representation elections, holding that under the specific circumstances of the case such a disclosure would not “constitute a clearly unwarranted invasion of personal privacy.”¹⁰³ The plaintiffs in the case were labor law specialists who intended to use the “Excelsior lists”¹⁰⁴ to conduct a study of the elections.¹⁰⁵ The court

might be present, the district court must state in its opinion that an inspection was made and consideration given its release. 450 F.2d at 704. See *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 939 (D.C. Cir. 1970); 425 F.2d at 582.

100. See generally S. REP. No. 813, at 9.

101. 5 U.S.C. § 552(b) (6) (1970) (emphasis added).

102. 450 F.2d 670.

103. 5 U.S.C. § 552(b)(6) (1970).

104. Lists of names and home addresses of employees eligible to vote must be made available to the union prior to representation election. See *Excelsior Underwear Inc.*, 156 N.L.R.B. 1236 (1966).

105. Approximately 15,000 elections will be held during the two-year period of the study. 450 F.2d at 676. The court declined to express an opinion as to what it might have decided if the request had been for lists from every election during the test period. The concurring opinion expressed a fear that the case would cause agencies to be overburdened with requests for lists and collections of data. *Id.* at 680-81. The possibility that an agency might be overburdened seems slight in that the fees charged will mount with the volume requested, thus providing a self-limiting factor in most cases. See, for example, the proposed information retrieval fees for the Office of Education, HEW: \$5.00/hr/clerical worker, plus hourly cost and overhead for all professional or supervisory personnel, plus all copying fees. 36 Fed. Reg. 20612 (1971). While an agency should utilize those fees to allocate sufficient resources to promptly handle the ordinary flow of requests, a very large and unusual request need not necessarily require more than a good faith effort to provide the materials as expeditiously as the agency's resources permit.

The concurring opinion also disagreed with the release of the lists because, in its opinion, the FOIA was not intended to apply to information about private parties but rather was intended to apply only to information about government activities which is necessary to properly evaluate governmental performance. Although this does appear to have been the Act's primary purpose, the language of the Act contains no such limitation. The majority opinion, noting that the lists sought in this case were related to such an evaluation, stated that “the Act is not limited to disclosures involving public scrutiny of governmental operations.” 450 F.2d at 680 n.33.

assumed, without an explicit holding, that the lists came within the meaning of "similar files" and centered its discussion upon whether disclosure would be an *unwarranted* invasion of the employees' personal privacy. Finding that the wording of this exemption, in contrast with the other exemptions, required an inquiry into the needs of the plaintiff,¹⁰⁶ the court stated that an agency could refuse to disclose such information only when the damage caused by the invasion of privacy clearly outweighed the benefits that would accrue to the general public if the information were released. Thus, a case by case inquiry is always necessary to determine the qualifications and need of each requesting party, and after disclosure an implicit limitation is always present as to the use of the information and the persons who may have access to it.¹⁰⁷

Investigatory Files Exemption

Wellford v. Hardin,¹⁰⁸ an important 1970 decision, was affirmed by the Court of Appeals for the Fourth Circuit.¹⁰⁹ The plaintiff in that case was attempting to force the Department of Agriculture to produce warning letters sent to non-federally inspected meat and poultry producers suspected of engaging in interstate commerce. The Department argued that the warning letters were part of an investigatory file

106. The intent of Congress to preclude examination of the need of a person requesting information (with the noted exception of the exemption under discussion) is plainly evident. Nonetheless, agencies continue to inquire into the needs of such persons as well as facts supporting the request; furthermore, many agencies condition the release of records upon a finding of public interest, even though the need to delete such a finding was one of the primary reasons for amending the Public Information Section of the APA. *See, e.g.*, 37 Fed. Reg. 69, 70 (1972) (amendment prohibiting the release of certain types of information by the Department of Agriculture which would "adversely affect the public interest"); 36 Fed. Reg. 1893-94 (1971) (amendment stating that the Department of Labor will make material available only if it furthers the public interest). *But see* 36 Fed. Reg. 11440 (1971) (amendment deleting the requirement that persons applying to the FCC for the release of general material not routinely available must submit a statement of reasons and facts supporting the applicant's need). For criticisms of the former practices of the FCC see 1969 *Duke Project* 77 and 1970 *Duke Project* 169-70 n.30.

107. 450 F.2d at 677 n.24. Limitations as to use and further dissemination would seem particularly difficult to implement. It is impracticable for the court to supervise the plaintiff's activities; and as the quantity of information released to an increasing number of parties expands, it will be increasingly burdensome on any given agency to insure compliance with the court decision. While the court made no express reference to this problem, it may have taken it into account when assessing the qualifications and, implicitly, the integrity of the plaintiffs.

108. 315 F. Supp. 175 (D. Md. 1970), noted in 1970 *Duke Project* 181.

109. 444 F.2d 21 (D.C. Cir. 1971).

compiled for law enforcement purposes and thus were protected from disclosure by the investigatory files exemption.¹¹⁰ Both the district and the circuit courts construed the exemption narrowly and rejected that contention, but they relied upon slightly differing theories. The lower court analyzed the purpose of the exemption and found it to be the prevention of premature discovery of the Government's case in a law enforcement proceeding.¹¹¹ Release of the information was ordered because it was already in the hands of the potential defendants and, therefore, the Government could not be further disadvantaged by disclosure to the public.

In contrast, without stating that it was doing so, the circuit court subtly shifted the focus of its inquiry to an analysis of the function which the documents fulfilled.¹¹² The court characterized the letters as "records of official enforcement actions"¹¹³ rather than information gathered during an investigation, reasoning that a warning letter is a vehicle used to gain voluntary compliance and is often the final step in the enforcement process. As such, it would not come under the protection of the investigatory files exemption. This decision substantially narrows the scope of the exemption by limiting the definition of "file" to information which is actually a product of the investigative process.¹¹⁴ When coupled with *Bristol-Meyers Co. v. FTC*,¹¹⁵ an important 1970 case holding that if enforcement proceedings are not "imminent" the investigatory file must be disclosed, the two *Wellford* decisions greatly narrow the scope of the investigatory files exemption.

Two important policy considerations, however, were not presented in those cases: protection of personal privacy and protection of an

110. "[I]nvestigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 5 U.S.C. § 552(b)(7) (1970).

111. See H.R. REP. NO. 1497, at 11; S. REP. NO. 813, at 9.

112. *Wellford v. Hardin*, 444 F.2d 21 (4th Cir. 1971).

113. *Id.* at 24-25.

114. An unresolved question is to what extent must records be kept solely to facilitate the purposes of the FOIA. For example, might the Department of Agriculture keep only a record noting that a letter was sent warning of a possible violation? Information could thus be so limited as to be meaningless to a person attempting to reconstruct the event to which the record refers. A related question is the length of time such records should be kept. Routine disposal might be accelerated so as to remove as soon as practicable records thought by the agency to be sensitive without regard to public use.

115. 424 F.2d 935 (D.C. Cir. 1970), noted in 1970 *Duke Project* 180-84. See also 38 U. CIN. L. REV. 570 (1969).

informant's identity. When these considerations were actually confronted, the resulting decisions produced judicial disharmony concerning the construction of the exemption. In *Cowles Communications, Inc. v. Department of Justice*,¹¹⁶ plaintiff sought the release of a file compiled by the Immigration and Naturalization Service on another individual, claiming the information was needed to defend a libel action. Cowles, relying on *Bristol-Meyers*, argued that since no proceedings were pending, the file should be disclosed. The court erroneously expressed doubt as to whether *Bristol-Myers* would support such a holding, and stated that even if it would, *Bristol-Myers* would not be followed. Expressing concern for the right to privacy of the person who was the subject of the file, the court refused to order disclosure, stating that it was "unthinkable that rights of privacy should be jeopardized further by making investigatory files available to private persons."¹¹⁷

The visceral feeling expressed by the *Cowles* court finds some support in congressional debates on the FOIA.¹¹⁸ However, it was the personnel and medical files exemption¹¹⁹ which was intended to protect personal privacy, not the investigatory files exemption. The investigatory exemption was included only to prevent a party in litigation with the Government from gaining earlier or greater access to investigatory files through the FOIA than he could through discovery.¹²⁰ The applicability of the investigatory exemption, therefore, should be determined by an analysis of the *function* of the file in question, not of its contents. The applicability of the personnel and medical files exemption, in contrast, is determined by the intrinsic nature of the file in question.

The primary purpose of the exemption for "personnel and medical files and similar files"¹²¹ is to protect citizens from unwarranted disclosure of highly personal information submitted to or gathered by an agency.¹²² Such information is ordinarily not of the nature which

116. 325 F. Supp. 726 (N.D. Cal. 1971).

117. *Id.* at 727. The court made no attempt to criticize or distinguish *Bristol-Myers*.

118. *E.g.*, 111 CONG. REC. 26820-21, 26823 (1965); 112 CONG. REC. 13659 (1966).

119. "[P]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (1970).

120. *See* H. R. REP. NO. 1497, at 11; S. REP. NO. 813, at 9.

121. 5 U.S.C. § 552(b)(6) (1970).

122. H.R. REP. NO. 1497, at 11. *See* S. REP. NO. 813, at 9. *See* notes 101-07 *supra* and accompanying text.

citizens need to know in order to oversee agency activities. Had the *Cowles* court realized that the Immigration file might have been exempted as "similar files," personal privacy could have been protected and this conflicting interpretation of the investigatory files exemption thereby avoided.

In *Evans v. Department of Transportation*,¹²³ the Court of Appeals for the Fifth Circuit refused to enjoin the FAA from withholding the name of an informant which was contained in an investigatory file compiled nearly eleven years earlier. Information concerning Evans' mental fitness and ability as an airline pilot had been confidentially communicated by the informant to the FAA in reliance upon an explicit pledge that the informant's identity would not be revealed.¹²⁴ The narrow holding of the case is not troublesome. The FOIA provides that an agency may withhold any record specifically exempted from disclosure by another statute.¹²⁵ The Federal Aviation Act permits such information to be withheld whenever disclosure is not required in the public interest and would adversely affect the interests of the informant.¹²⁶ As the *Evans* court held, the name of the informant was clearly exempt under this statute. However, the court unnecessarily went on to hold that nondisclosure was also justified by the investigatory files exemption since, in the court's opinion, the public interest in air safety demanded that the investigatory functions of the FAA not be crippled by making such persons reluctant to come forward with information.¹²⁷ The decision is weakened by its failure to discuss the holding in *Bristol-Myers Co. v. FTC*,¹²⁸ which makes no provision for the problem of informants. It is probable that information from informants will be reduced if agencies are unable to promise nondisclosure of their identities, and Congress has not yet

123. 446 F.2d 821 (5th Cir. 1971), *petition for cert. filed*, 40 U.S.L.W. 3265 (U.S. Nov. 24, 1971) (No. 71-698).

124. In *Commercial Envelope Mfg. Co. v. SEC*, 29 Ad. L.2d 764 (2d Cir. 1971), the court dismissed an appeal taken from an SEC refusal to disclose an allegedly libelous letter. The court noted that an appeal taken to a court of appeals pursuant to § 9 of the 1933 Securities Act, 15 U.S.C. § 77i (1970), was improper. See 5 U.S.C. § 552(c) (1970).

125. 5 U.S.C. § 552(b)(3) (1970).

126. 49 U.S.C. § 1504 (1970). See generally HOUSE COMM. ON GOVERNMENT OPERATIONS, 86TH CONG., 2D SESS., FEDERAL STATUTES ON THE AVAILABILITY OF INFORMATION (Comm. Print 1960).

127. See S. REP. No. 813, at 824 n.1.

128. 424 F.2d 935. See note 115 *supra* and accompanying text. See also 38 U. CIN. L. REV. 570 (1969).

provided a protective statute for every agency as it has for the FAA. The only solution is to either carve an exception to *Bristol-Myers*, as the alternative rationale of *Evans* does, in effect, or to find a source of protection outside the Act such as the "informant privilege."¹²⁹

III. HEARINGS

A. RIGHT TO A HEARING

The Supreme Court in *Goldberg v. Kelly*¹ held that under the due process clause of the fourteenth amendment a welfare recipient must be afforded an evidentiary hearing prior to the termination of benefits, regardless of a statutory provision requiring a post-termination "fair hearing."² After an initial determination that the right-privilege distinction³ was not applicable to the receipt of welfare benefits, the Court applied the traditional balancing test⁴ to the competing interests at stake.⁵ In striking a balance the Court enumerated the interests on the one side as the fundamental necessity of such payments to the eligible recipient, and the interests of the state in insuring the general welfare of its citizens.⁶ The opposing interests which favored termina-

129. This has been described as the Government's privilege to withhold the identity of persons who furnish information of violations of laws, subject to judicial limitations dependent upon the needs of the defendant. *Roviaro v. United States*, 353 U.S. 53, 59-60 (1957). See Stewart & Ward, *FTC Discovery: Depositions, the Freedom of Information Act and Confidential Informants*, 37 ANTITRUST L.J. 248, 258 (1968). See also Comment, *An Informer's Tale: Its Use in Judicial and Administrative Proceedings*, 63 YALE L.J. 206 (1953).

1. 397 U.S. 254 (1970), noted in 49 J. JUR. L. 186 (1971); 23 U. FLA. L. REV. 422 (1971).

2. 397 U.S. at 259-60 & n.5.

3. See Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Reich, *The New Property*, 73 YALE L.J. 733 (1964). See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

4. Justice Frankfurter first outlined the factors to be weighed in determining whether a particular proceeding was unfair, emphasizing the need to balance "the hurt complained of and good accomplished." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring); accord, *Cafeteria Workers Union v. McElroy*, 367 U.S. 886 (1961); *Hannah v. Larche*, 363 U.S. 420 (1960); *Greene v. McElroy*, 360 U.S. 474 (1959).

5. ". . . consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). See also *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring).

6. 397 U.S. at 264-65.