

DEVELOPMENTS UNDER THE FREEDOM OF INFORMATION ACT—1972

The Freedom of Information Act (FOIA),¹ which was enacted in 1966, completely amended the "Public Information" section of the Administrative Procedure Act.² Until the amendment, the APA had been regarded as a withholding statute rather than a disclosure statute.³ The FOIA establishes a pattern of full agency disclosure unless the information sought is exempted under clearly delineated statutory language, and provides a procedure by which citizens and the press may obtain information wrongfully withheld.⁴ Congressional hearings conducted in 1972⁵ represent the first detailed review of agency performance under the FOIA.⁶ As a result of those hearings, the House Committee on Government Operations concluded that many agencies either had failed to comply or had delayed in complying with the provisions of the Act.⁷ This recalcitrant attitude on the part of the federal agencies is reflected in the large volume of FOIA litigation in 1972.

TRADITIONAL EQUITY POWERS AND THE FOIA

Although much litigation under the FOIA⁸ has dealt with delineation of specific exemptions, there have also been significant cases exploring the existence and extent of the traditional equity powers available to enforce the Act.⁹ Heretofore, the courts have not been

1. 5 U.S.C. § 552 (1970).

2. Ch. 324, § 3, 60 Stat. 237 (1946).

3. HOUSE COMMITTEE ON GOVERNMENT OPERATIONS, ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT, H.R. REP. NO. 1419, 92d Cong., 2d Sess. 2 (1972); H.R. REP. NO. 1497, 89th Cong., 2d Sess. 6 (1966); S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965).

4. S. REP. NO. 813, *supra* note 3, at 3.

5. The hearings are reported in: *Hearings on U.S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act Before a Subcomm. of the House Comm. on Government Operations*, 92d Cong., 2d Sess. pts. 4-8 (1972).

6. 1972 H.R. REP., *supra* note 3, at 4.

7. *Id.* at 8-11.

8. An action for disclosure is permitted under 5 U.S.C. § 552(a)(3) (1970).

9. Those decisions which most nearly approach the issue are concerned with the existence of equitable discretion to refuse enforcement in FOIA cases when the material sought is found or conceded not to come within a specific exemption.

required to decide whether the Act allows the exercise of equitable power to enjoin an ongoing administrative proceeding pending disposition of an FOIA claim concerning records relevant to that administrative proceeding.

In *Bannercraft Clothing Co. v. Renegotiation Board*,¹⁰ the Court of Appeals for the District of Columbia Circuit affirmed the granting of temporary injunctions enjoining administrative proceedings. The court held, in a decision encompassing three cases in which the Renegotiation Board¹¹ had decided to proceed with renegotiation of

The Court of Appeals for the Ninth Circuit stated in *GSA v. Benson*, 415 F.2d 878 (9th Cir. 1969), that district courts could exercise their equitable discretion in considering whether to order production of documents not exempt from the Act's disclosure requirements. *Id.* at 880. A similar result was reached in *Consumers Union v. VA*, 301 F. Supp. 796 (S.D.N.Y. 1969), *dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971). For a discussion of this case, see 1971 *Duke Project* 144-45. However, a statement with contrary implications was made by the Fourth Circuit in *Wellford v. Hardin*, 444 F.2d 21, 24 (4th Cir. 1971), and by the District of Columbia Circuit in *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971), and in *Soucie v. David*, 448 F.2d 1067, 1076 (D.C. Cir. 1971) (dictum).

Several decisions in 1972 dealt with the equitable discretion question. The conflict of opinion, however, was intensified rather than resolved. See *Long v. IRS*, 349 F. Supp. 871 (W.D. Wash. 1972) (the pro-discretion statement of the Ninth Circuit in *GSA v. Benson*, *supra*, was adopted); *Cuneo v. Laird*, 338 F. Supp. 504 (D.D.C.), *appeal docketed*, No. 72-1328, D.C. Cir., April 11, 1972 (the court's summary disposition of the case and its colorful quotation, *id.* at 506, indicate that the court considered itself possessed of some kind of discretion). In *Wu v. National Endowment for Humanities*, 460 F.2d 1030 (5th Cir. 1972), *cert. denied*, 41 U.S.L.W. 3447 (U.S. Feb. 20, 1973) the Fifth Circuit, in employing an interest-balancing test, may have indicated a position favoring equitable discretion.

The opposite position was adopted in four cases. In *Sears, Roebuck & Co. v. NLRB*, 346 F. Supp. 751 (D.D.C. 1972), the District Court for the District of Columbia held that material outside the exemption must be disclosed. In *Hawkes v. IRS*, 467 F.2d 787, 792 n.6 (6th Cir. 1972) and *Tennessean Newspapers, Inc. v. FHA*, 464 F.2d 657, 661-62 (6th Cir. 1972), the Court of Appeals for the Sixth Circuit rejected the possibility of equitable discretion. A concurrence by Judge Miller in each case, 464 F.2d at 662, 467 F.2d at 797, refused to accept this position. In *Stokes v. Hodgson*, 347 F. Supp. 1371, 1377 (N.D. Ga. 1972), the court cited *Wellford v. Hardin*, *supra*, for the proposition that equitable discretion is not available.

By the end of 1972, the Fifth and Ninth Circuits had affirmed the existence of equitable discretion while the Fourth, Sixth, and District of Columbia Circuits had rejected it. Although many of these positions were taken only in dictum or by implication, the opinions have been frequently cited, and the conflict is serious enough to merit Supreme Court resolution.

10. 466 F.2d 345 (D.C. Cir. 1972), *cert. granted*, 41 U.S.L.W. 3409 (U.S. Jan. 22, 1973) (No. 72-822).

11. The Renegotiation Act empowers the Renegotiation Board to recover excessive profits made by defense contractors and subcontractors. 50 U.S.C. app., § 1191(c) (1970). If a decision to renegotiate is reached, a detailed financial

contracts,¹² that the district court had acted correctly in enjoining further agency proceedings¹³ pending final determination of FOIA suits to force production of documents related to those agency proceedings.

In *Bannercraft*, after entry into the renegotiation process, the plaintiffs had filed requests pursuant to the FOIA¹⁴ for certain documents. Subsequent to the Board's rejection of these requests,¹⁵ the contractors filed suit in the district court seeking to force release of these documents.¹⁶ On appeal from the district court's grant of preliminary injunctions against further renegotiation¹⁷ pending its deci-

report is prepared and renegotiation begins. *Id.* § 1215(e)(1); 32 C.F.R. § 1470.3 (a) (1972). Renegotiation may be carried on through several steps culminating in full Board proceedings at the contractor's option, but a de novo determination of excess profits will be made at each level. 32 C.F.R. §§ 1472.3(d)-(f), (h)-(i), .4(b) (1972). From the final order of the Board, the contractor has an appeal of right to the Court of Claims, which *again* makes a de novo interpretation. 50 U.S.C.A. app., § 1218 (Snpp. 1972). This decision is reviewable in the Supreme Court by writ of certiorari. *Id.* § 1218a. Thus, below the Court of Claims level the contractor is under the implicit threat that, if he persists to the next level, a determination of higher excessive profits may be imposed.

In *Bannercraft*, the court emphasized the minimal effect of its decision on renegotiation, perhaps indicating that it saw no further implications of its decision. 466 F.2d at 361.

12. *Bannercraft Clothing Co. v. Renegotiation Bd.*, No. 24,685; *Astro Communication Lab. v. Renegotiation Bd.*, No. 24,778; *David B. Lilly Co. v. Renegotiation Bd.*, No. 71-1025.

13. The proceedings enjoined were contract renegotiations between the Renegotiation Board and the contractors pursuant to 50 U.S.C. app., §§ 1211-33 (1970).

14. The requests were filed pursuant to 5 U.S.C. § 552(a)(3) (1970).

15. The Board broadly claimed one or more of the exemptions contained in 5 U.S.C. § 552(b) (1970) to be applicable. 466 F.2d at 348.

16. 5 U.S.C. § 552(a)(3) (1970) provides, in part: "On complaint, the district court of the United States . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant."

17. In No. 24,778 the Eastern Regional Board had made a tentative determination that Astro Communications Laboratory had received excessive profits. A conference with the Eastern Regional Board personnel assigned to the case had been held and a meeting with a panel of the Regional Board had been scheduled when the district court issued the injunction. In No. 24,685, following *Bannercraft's* appeal of determination of excessive profits by the Regional Board, the Renegotiation Board had announced its similar determination. The injunction prevented the completion of the last stages of negotiation, a condition precedent to a binding order. 32 C.F.R. § 1472.4(d) (1972). In No. 71-1025, personnel of the Eastern Regional Board had informed the David B. Lilly Company that a recommendation of an assessment for excessive profits would be made to the Regional Board. The preliminary injunction was granted before Lilly had decided whether to confer with the Regional Board. 466 F.2d at 351.

sion on the merits on the FOIA claim, the court of appeals held that the district court did have jurisdiction to issue the injunctions and that the doctrine of exhaustion of administrative remedies did not bar such relief.¹⁸

In finding equitable jurisdiction, the court relied upon case precedents in which courts found the necessity to act, or to refrain from acting, in order to enforce legislative intent. It is significant, however, that the cases cited by the court provide only weak support for this conclusion.¹⁹ The court then reasoned that the FOIA evidenced an intent to aid parties involved in agency proceedings—a “subsidiary statutory purpose”²⁰—and then found the power of injunctive enforcement of that intention to be a necessary, albeit implied, power granted by the Act.²¹ The court’s reasoning in finding the subsidiary statutory purpose, however, is also unpersuasive.²²

18. 466 F.2d at 354. The exhaustion doctrine is typified by the Supreme Court’s holding in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). In *Myers*, the Court held that an allegation by a party in an NLRB proceeding that the Board had no jurisdiction over the question presented was not sufficient to invoke a district court’s equity power to enjoin the NLRB proceeding, and that no relief could be granted until the prescribed administrative remedy had been exhausted. The exhaustion requirement, however, has never been absolute, and many exceptions to the rule have developed. See *McKart v. United States*, 395 U.S. 185 (1969). The court in *Bannercraft* agreed with the following statement by Professor Davis:

Despite the many absolute statements in judicial opinions that judicial relief is withheld until administrative remedies have been exhausted, the holdings show that exhaustion is sometimes required and sometimes not. No opinion of the Supreme Court explains the contrariety of holdings . . . 3 DAVIS § 20.10, at 114, *quoted in* 466 F.2d at 355.

See JAFFE 426-27. See also pp. 275-300 *infra*. The requirement has been applied to the renegotiation process. *E.g.*, *Lichter v. United States*, 334 U.S. 742 (1948); *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752 (1947); *Macauley v. Waterman S.S. Corp.*, 327 U.S. 540 (1946). None of these exceptions, however, had been applied to the process before 1972.

19. 466 F.2d at 353. The cases cited for this proposition were: *Clark v. Smith*, 38 U.S. (13 Pet.) 195 (1839), which involved a title dispute; *Hecht Co. v. Bowles*, 321 U.S. 321 (1944), and *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288 (1960), which spoke directly to equitable discretion. *Mitchell* squarely holds that powers necessary to legislative intent are available. These cases can be easily distinguished, as the dissent in *Bannercraft* points out, 466 F.2d at 364, because the statute construed therein included an express grant of jurisdiction to issue “other order[s].” In contrast, see 5 U.S.C. § 552(a)(3) (1970).

20. 466 F.2d at 352. The court found evidence of this statutory purpose in the Act itself, 5 U.S.C. § 552(a)(2) (1970), and in the legislative history, S. REP. No. 813, *supra* note 3, at 7. *But see* 466 F.2d at 363 (dissenting opinion).

21. 466 F.2d at 354.

22. The language cited by the court, 466 F.2d at 352, indicates only that the FOIA was intended in part to require that no “secret law” could be used by an agency. The comments were directed at 5 U.S.C. § 552(a)(2) (1970), which con-

With respect to the doctrine of exhaustion of administrative remedies, the court reasoned that the plaintiffs should be required to exhaust administrative remedies only if doing so would be consistent with the purposes underlying the exhaustion doctrine.²³ An analysis of the exhaustion doctrine led the court to conclude that judicial intervention was proper only when: (1) irreparable injury to substantive rights is threatened;²⁴ (2) no adequate remedy at law is available through statutory modes of relief;²⁵ and (3) the intervention would not be in derogation of the agency's jurisdiction.²⁶ The court noted that the FOIA granted sole jurisdiction for enforcement of FOIA claims to the federal district courts, and consequently, there could be no proper grounds for asserting that the availability of a legal remedy or the need to respect administrative jurisdiction required exhaustion.²⁷ The court stated that the possibility that the companies would be forced to negotiate without information which they had a right to obtain²⁸ constituted a threat to a substantive "statutory right."²⁹ Reasoning that renegotiation could not work properly unless the information was supplied beforehand, the court found an impending irreparable injury.³⁰ Unfortunately, the court neither clearly expressed its concept of the "irreparable injury" nor described with particularity the "statutory right" threatened.³¹

The manner in which the *Bannercraft* court found equitable jurisdiction suggests that the applicability of the holding is not limited

cerns agency opinions, orders, and rules. See 1966 H.R. REP., *supra* note 3, at 7; S. REP. No. 813, *supra* note 3, at 6-7.

23. See 466 F.2d at 355.

24. *Id.* at 355-56.

25. *Id.* at 356 & n.9, 357-59.

26. *Id.* at 359-60.

27. "The plain fact is that there *are* no administrative remedies under the Freedom of Information Act. Once a party has properly requested information from an agency, he has exhausted all the administrative avenues of relief which the act provides." *Id.* at 358; see *id.* at 360. Cf. *Murray v. Kunzig*, 462 F.2d 871, *cert. granted*, 41 U.S.L.W. 3502 (U.S. Mar. 19, 1973) (No. 72-403).

28. 466 F.2d at 356.

29. The court's opinion is somewhat vague as to the precise source of the threatened "statutory right." The statement follows the court's reiteration of the plaintiffs' asserted "need" for the documents to participate properly in the renegotiation process and their present inability to do so absent Board compliance with the FOIA. *Id.* See note 11 *supra*.

30. 466 F.2d at 356. This case presented appeals from the granting of preliminary injunctions. Therefore, the court "found" the irreparable injury based on the assumption that all the facts were as the complaints alleged—an assumption of facts which the trial court must make. *Id.*

31. See note 36 *infra*.

to Renegotiation Board proceedings.³² Assuming that Congress, in enacting the FOIA, intended to aid parties involved in agency proceedings by allowing the district courts to exercise their broad equitable power, Congress clearly did not require that this equitable power be exercised only to stay renegotiation proceedings. Furthermore, in finding the exhaustion requirement inapplicable, the court relied upon a similarly non-limiting argument with respect to “no adequate remedy at law” and “respect for administrative jurisdiction”: that the Act grants *exclusive* jurisdiction to district courts for all FOIA claims.³³ Therefore, the ultimate breadth of application of the *Bannercraft* holding depends upon the interpretation of “irreparable injury” and of the “statutory right” threatened.³⁴ The injury found is referred to as a “clear threat to a statutory right,”³⁵—a notion apparently premised upon the unique nature of the statutorily prescribed renegotiation process, which is based on the right

32. Other circuits have often been disinclined to follow the District of Columbia Circuit's liberal interpretation of the FOIA disclosure provisions. See text accompanying notes 164-75 *infra*. See also 1972 H.R. REP., *supra* note 3, at 70.

33. 466 F.2d at 360. See 5 U.S.C. § 552(a)(3) (1970).

34. An additional factor bearing upon the breadth of application of *Bannercraft* will be the ultimate resolution of the apparent conflict between *Bannercraft* and *Sears, Roebuck & Co. v. NLRB*, 433 F.2d 210 (6th Cir. 1970).

In *Sears*, the Court of Appeals for the Sixth Circuit held that a district court lacked jurisdiction to enjoin NLRB proceedings pending a final determination of an action seeking disclosure of information under the FOIA. Finding that the injunction sought was not of the type authorized by the FOIA, the *Sears* court said:

Even assuming that the dubious proposition that Congress intended to create an exception to its long-standing policy against enjoining the Board, plaintiff seeks neither an injunction nor an order of the type described above [referring to 5 U.S.C. § 552(a)(3) (1970)]. We therefore conclude that the district court properly dismissed the complaint for lack of jurisdiction, since it does not have the power to enjoin or review decisions of the National Labor Relations Board. *Id.* at 211 (emphasis added).

Because the statutory language, legislative history, and prior decisions do not clearly command either result, the correct resolution of this conflict is best ascertained by considering the effects of a widespread following of *Sears* and *Bannercraft*, respectively. If *Sears* is followed, the party engaged in an administrative proceeding and denied information will be forced to litigate his FOIA action while simultaneously continuing with the agency proceeding. If he is successful on his FOIA disclosure claim, he might have grounds for reversal of an adverse administrative decision based on a “denial of fair and full hearing.” The urging of such a claim will necessitate the development of some standards for what constitutes deprivation of information sufficient for reversal, perhaps analogous to the “harmless error” doctrine of the criminal law. The advantage of this solution, short-run expediency, would perhaps be outweighed by the ominous prospect of a remand to the agency for a *de novo* administrative proceeding, which would be required where the district court has ordered disclosure and the appellate court determines that failure to make such disclosure constituted a “denial of fair and full hearing.”

35. 466 F.2d at 356.

to engage in meaningful negotiations during the non-reviewable, multi-level de novo determinations.³⁶ Therefore, even if *Bannercraft* is not expressly limited to renegotiation proceedings, the holding would appear to be limited to administrative proceedings of an analogous nature in which a binding non-reviewable agreement is sought pursuant to statute.³⁷ The typical adjudicatory proceeding, where a court of review could remand an administrative decision with an order to rehear the case after the desired information had been disclosed, would not seem to be within the scope of the *Bannercraft* decision.

Two cases in 1972 have applied the *Bannercraft* decision. In *Missouri Portland Cement Co. v. FTC*,³⁸ the District Court for the District of Columbia rejected a motion to enjoin FTC proceedings pending the decision of an FOIA disclosure action. The court distinguished *Bannercraft* on two points: first, the FTC proceedings involved no "informed negotiation"; second, the series of de novo reviews seen in the renegotiation process were absent in the FTC action. These distinctions, which are directed at the irreparable injury requirement of *Bannercraft*, suggest that the *Bannercraft* holding might be given limited application.

36. See note 11 *supra*. Perhaps an indication that the decision should only apply to renegotiation proceedings can be taken from the court's statement that:

Appellee's point is that the administrative process cannot function as it was intended to function until they are given access to the documents [O]ur appellees would like to take advantage of the renegotiation process, but claim an inability to do so effectively until the Board complies with the Freedom of Information Act. 466 F.2d at 356.

A contrary indication, however, may be derived from the failure of the court in *Bannercraft* to use this point in distinguishing *Sterling Drug, Inc. v. FTC*, 450 F.2d 698 (D.C. Cir. 1971). In *Sterling*, the drug company requested certain documents for preparation of its case before the FTC. The request was refused. The company then brought an action to force production of those documents which were denied at the district court level and on appeal. *Id.* at 710. The company also included a complaint that failure to provide the documents would deny them the full and fair hearing guaranteed by the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1970). The *Sterling* court never reached the merits of this latter contention, however, because it found jurisdiction barred by the exhaustion requirement. 450 F.2d at 712. The court, in *Bannercraft*, distinguished *Sterling* in two ways: first, because the *Sterling* request for an injunction was framed in due process terms (not FOIA rights), 466 F.2d at 358; and second, because assumption of jurisdiction would have necessitated a decision on a difficult constitutional question, *id.* at n.10.

37. Cf. 16 C.F.R. § 2.31-2.35 (1972), the FTC consent order procedure under the authority of 15 U.S.C. § 46 (1970). The desired disclosure should aid in obtaining such agreement, however, rather than simply improving the litigational strength of the private party in subsequent adjudication.

38. 31 Ad. L.2d 503 (D.D.C. 1972).

In *Sears, Roebuck & Co. v. NLRB*³⁹ the District Court for the District of Columbia issued a preliminary injunction⁴⁰ against NLRB proceedings pending a decision on the merits of Sears' claim for disclosure of memoranda prepared by the NLRB.⁴¹ Reaffirming the district court's power to issue such an injunction, the court of appeals nevertheless granted a summary reversal of the injunction.⁴² The reversal was based upon Sears' failure to show that irreparable injury might result from its failure to have the information sought while participating as a *charging party* in the NLRB proceeding.⁴³ The court based its finding of no irreparable injury on two grounds: first, the Regional Board's attorney did have the documents available in his prosecution of the complaint;⁴⁴ second, the court stated that "an appropriate remedy can be fashioned by the Board, or by the court of appeals with jurisdiction of the petition for review or enforcement in the event the Board issues an order" if Sears was harmed significantly by not having later-disclosed information.⁴⁵ Because of complainant Sears' unusual procedural position in the case, the first ground would seem to be of limited importance.⁴⁶ The second ground, however, seems applicable to any case in which a party seeks to enjoin adjudicatory proceedings. In

39. 473 F.2d 91 (D.C. Cir. 1972). None of the judges who heard the case participated in *Bannercraft*.

40. *Id.* at 92.

41. The memoranda were prepared in deciding whether to issue a complaint against the Retail Clerk's International Union, which Sears charged with violating section 8(b)(3) of the National Labor Relations Act, 29 U.S.C. § 158(b)(3) (1970). 473 F.2d at 92.

42. This position on jurisdiction correctly destroys any possibility that subsequent courts may rely upon the "traditional immunity of the NLRB" as a means of distinguishing the former *Sears* case. See note 34 *supra*.

43. 473 F.2d at 93. A charging party may call, examine, and cross-examine witnesses, introduce evidence into the record, submit briefs, participate in oral argument and submit proposed findings and conclusions to the trial examiner; however, an attorney of the Board's regional office presents the evidence supporting the complaint. See 29 C.F.R. §§ 101.4, .10 (1972).

44. 473 F.2d at 92. See 29 C.F.R. § 101.10 (1972).

45. 473 F.2d at 93. The suggestion of a remedy being applied in a later decision by the Board or court of appeals raises the problems of developing standards for determining "reversible deprivation." See note 34 *supra*. This case, however, indicates the situation in which the remote possibility of harm and the likely reparable nature of any harm dictate that no injunction should issue. See text accompanying notes 50-52 *infra*, for a discussion of criteria to be considered.

46. The improbability of substantial harm to Sears leaves open the possibility that a litigant in an adjudicatory process, who could show a more substantial probability of serious injury resulting from being forced to litigate without information, might obtain an injunction under *Bannercraft*.

this regard, the *Sears* holding is consistent with *Bannercraft's* emphasis on the unique nature of renegotiation proceedings⁴⁷ as well as *Bannercraft's* insistence that no adequate statutory remedy be available⁴⁸ before an injunction will issue.

Whether or not *Bannercraft's* application is limited to the Renegotiation Board, injunctions staying agency action pending FOIA determinations could result in substantial delays of administrative proceedings. These delays can, however, be minimized by compliance with the legislative mandate to expedite FOIA claims.⁴⁹ Other potential problems, such as the use of spurious disclosure actions for delays, the resulting docket problems, and the administrative expense of defending numerous actions could be minimized by the use of a multiple-factor test to determine the threshold applicability of the *Bannercraft* holding. Such a test, in part suggested by the *Bannercraft* opinion, might include consideration of the following: the extent of the probable delay of the administrative proceeding;⁵⁰ the effect of such a delay;⁵¹ the public interest involved;⁵² the probability of plaintiff's success on the merits; and the importance of the requested information to the protection of the complainant's rights in the administrative proceeding. All of these factors could properly be weighed after an in camera examination of the documents. The utilization of this test could lead to a proper protection of the plaintiff's "right to know," while producing only a minimal sacrifice of administrative efficiency and no usurpation of agency powers.

PERSONNEL RULES AND PRACTICES

Two distinct problems of statutory interpretation were presented in the 1972 cases involving the internal personnel rules and

47. See 466 F.2d at 349-51. See note 11 *supra*.

48. See 466 F.2d at 350-51. See text accompanying notes 34-37 *supra*.

49. See 5 U.S.C. § 552(a)(3) (1970); 466 F.2d at 361. The *Bannercraft* decision noted that the cases before the court were test cases and therefore had been meticulously briefed. In order to allow such time-consuming consideration, the contractors agreed to suspend the two year time limit on the renegotiation process after which a contractor's liability is dismissed unless a final order has been entered. *Id.* at 361 n.12. See 50 U.S.C.A. app. § 1215(c) (Supp. 1972).

It has been strongly argued that the direction to expedite FOIA actions has not been followed and that considerable delays have resulted. See 1972 H.R. REP., *supra* note 3, at 76; 1972 *Hearings*, *supra* note 5, pt. 5, at 1398.

50. See 466 F.2d at 361.

51. *Id.*

52. *Id.*

practices exemption.⁵³ The first problem was whether the finding that an exemption is applicable to an agency rule of procedure circumvents the FOIA requirement that such a rule⁵⁴ be published before a person can be adversely affected by it.⁵⁵ In *Alvarado v. Saxby*,⁵⁶ the District Court for the District of Puerto Rico found that an unpublished army regulation⁵⁷ was subject to the exemption for internal personnel rules,⁵⁸ and then held that the regulation could be used against the plaintiff, despite the absence of prior publication. Although this holding is supported by a literal reading of the statute,⁵⁹ the case law⁶⁰ and commentators,⁶¹ it seems incongruous that a statute designed to prevent the government from using a "secret body of law" to adversely affect individuals⁶² should support such a result.

The second issue concerning the internal personnel rule exemption in 1972 was whether the exemption should apply to manuals which instruct agency personnel in techniques and procedures for the detection of noncompliance or violations of agency rules or statutes. The legislative history of the exemption is contradictory and provides little guidance in resolving this issue. In fact, the conflict between the House and Senate Reports on this point has been cited

53. See 5 U.S.C. § 552(b)(2) (1970), which exempts matters "related solely to the internal personnel rules and practices of an agency."

54. 5 U.S.C. §§ 552(a)(1)(c)-(e) (1970).

55. *Id.* § 552(a)(1). This provision forbids the use of unpublished rules, statements of policy, or amendments thereto against a party unless he has "actual and timely notice of the terms thereof . . ." *Id.*

56. 337 F. Supp. 1324 (D.P.R. 1972).

57. The change was an alteration in Army Regulation 635-200, para. 6-8(b)(1), which specified the factors a commander should consider when deciding whether to forward a request for separation, hardship, discharge, or reassignment to the applicant's State Director of Selective Service. 337 F. Supp. at 1327, n.5.

58. 337 F. Supp. at 1328.

59. The exemptions are found in 5 U.S.C. § 552(b) (1970), and all of the disclosure requirements are found in *id.* § 552(a). The first words of *id.* § 552(b) are as follows: "This section does not apply to matters that are [exempt] . . ." (emphasis added).

60. See *Pfifer v. Laird*, 328 F. Supp. 649 (D.D.C. 1971). The *Alvarado* court quoted the following language from *Pfifer*: "Manifestly the army's regulations relating to discharge for conscientious objection are internal personnel matters within the meaning of the . . . exceptions." 337 F. Supp. at 1328, quoting 328 F. Supp. at 652.

61. Cf. Note, *Comments on Proposed Amendments to Section 3 of the Administrative Procedure Act: The Freedom of Information Bill*, 40 NOTRE DAME LAW. 417, 428, 443-44, 451 (1965); see S. REP. NO. 813, *supra* note 3, at 10; cf. DAVIS § 3A.9, at 130-31 (Supp. 1970).

62. See DAVIS § 3A.21, at 159 (Supp. 1970).

as the best example of the Reports' disparity.⁶³ The House Report adopts an interpretation of the exemption which places such manuals squarely within the exemption,⁶⁴ while the Senate Report's interpretation places them totally without it.⁶⁵ Predictably, the courts which have considered the problem have reached conflicting results.

In *Hawkes v. IRS*,⁶⁶ the IRS was ordered to produce an Internal Revenue Service manual providing instructions to agents for the auditing of returns; and in *Stokes v. Hodgson*,⁶⁷ a similar manual⁶⁸ was ordered produced. In both cases, the courts expressly adopted the Senate Report's narrow interpretation of the exemption.⁶⁹ In *Cuneo v. Laird*,⁷⁰ however, a defense contract audit manual⁷¹ which provides operating guidelines for investigations was found to be exempt from disclosure under both the internal personnel rules and practices exemption and the intra-agency memorandum exemption.⁷² The reliance upon two exemptions creates a problem of interpretation as to whether the court held that *both* exemptions protected all of the manual sought or whether parts of the manual were included in *each* exemption. However, because no part of the material sought would have been protected by the internal personnel rules and practices exemption if the court had adopted the Senate

63. Note, *The Freedom of Information Act: A Critical Review*, 38 GEO. WASH. L. REV. 150, 153-54 (1969). See 1971 *Duke Project* 146 n.60.

64. The House Report provides: "Matters related solely to the internal personnel rules and practices of any agency: Operating rules, guidelines, and manuals of procedure for Government investigators or examiners would be exempt from disclosure. . . ." 1966 H.R. REP., *supra* note 3, at 10.

65. The Senate Report provides: "Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave and the like." S. REP. NO. 813, *supra* note 3, at 8.

66. 467 F.2d 787 (6th Cir. 1972).

67. 347 F. Supp. 1371 (N.D. Ga. 1972).

68. At issue in *Stokes* was the Training Manual of the Occupational Safety and Health Administration, which includes "duties of compliance inspectors, the best methods for carrying out these duties . . . [and] the proper emphasis to be placed on different types of health and safety violations. . . ." 347 F. Supp. at 1373.

69. 467 F.2d at 796; 347 F. Supp. at 1374. The courts cited *Benson v. GSA*, 289 F. Supp. 590, 595 (W.D. Wash. 1968), *aff'd on other grounds*, 415 F.2d 878 (9th Cir. 1969), and *Consumers Union of the United States v. VA*, 301 F. Supp. 796, 801 (S.D.N.Y. 1969), as decisions which accepted the interpretation suggested in the Senate Report.

70. 338 F. Supp. 504 (D.D.C. 1972).

71. The document involved was a 3-volume Contract Audit Manual (DCAAM-7640.1) of the Department of Defense.

72. See notes 132-59 *infra* and accompanying text.

Report's interpretation,⁷³ it seems likely that the court adopted, without citation, the interpretation presented in the House Report.⁷⁴ This assertion is supported by the fact that the adoption of the House interpretation would result in exactly the type of summary decision rendered in this case.

The authorities are divided on the question of which congressional report more accurately reflects the intent of Congress.⁷⁵ While the Senate Report is usually considered more authoritative,⁷⁶ the interpretation suggested in that report would render the exemption meaningless.⁷⁷ The 1972 House Committee on Government Operations Report recommends that the exemption be amended specifically to protect "sensitive operating manuals and guidelines, the disclosure of which would significantly impede or nullify a proper agency function,"⁷⁸ and the same recommendation was made by the Section of Administrative Law of the ABA.⁷⁹

IDENTIFIABLE RECORDS

The FOIA requires in part: "Except with respect to 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."⁸⁰ Prior cases which

73. See note 65 *supra*.

74. See note 64 *supra*.

75. For the position that the exemption does not cover such manuals, see DAVIS § 3A.12, at 137 (Supp. 1970); Note, *supra* note 61, at 445. For the opposite position, see 1972 H.R. REP., *supra* note 3, at 83; 1972 Hearings, *supra* note 5, pt. 4, at 1436.

76. See *German v. NLRB*, 450 F.2d 670, 673 n.8 (D.C. Cir. 1971); *Soucie v. David*, 448 F.2d 1067, 1077 n.39 (D.C. Cir. 1971); DAVIS § 3A.2, at 117 (Supp. 1970).

77. See note 65 *supra*. It is questionable that the exemption was meant to protect only material that few persons not employed by an agency would want, while not protecting manuals which could be of great benefit to those who would evade detection. The proposed amendments would no longer exempt the mundane material covered by the Senate Report. See 1972 H.R. REP., *supra* note 3, at 83; 1972 Hearings, *supra* note 5, pt. 4, at 1436.

78. 1972 H.R. REP., *supra* note 3, at 83.

79. 1972 Hearings, *supra* note 5, pt. 4, at 1436. The Section's report states that such manuals sometimes include "allowable tolerances for prosecution, negotiating techniques for contracting officers, schedules of surprise audits inspections, and similar matters which cannot be disclosed without nullifying the effectiveness of the particular agency function which they concern." *Id.*

80. 5 U.S.C. § 552(a)(3) (1970) (emphasis added). The provision further authorizes federal district courts to enjoin agencies improperly withholding agency records.

have dealt with this provision have been concerned with the degree of specificity with which a request must describe the materials sought. In *Irons v. Schuyler*,⁸¹ the plaintiff requested that the Commissioner of Patents provide "all unpublished manuscript decisions of the Patent Office."⁸² The manuscript decisions that plaintiff sought included approximately 175 volumes of bound decisions through 1954, and all remaining decisions—now located in scattered files—handed down since that time.⁸³ The Court of Appeals for the District of Columbia Circuit rejected the plaintiff's assertion that only those items not specifically ordered disclosed by sections 1 and 2⁸⁴ of the Act were subject to the identifiable records requirement. The court, citing its own decision in *American Mail Line, Ltd. v. Gullick*,⁸⁵ held that the exception to the identifiable records requirement for documents "made available" by sections 1 and 2 referred only to documents which an agency had *already* "made available,"⁸⁶ therefore making the identifiable records requirement absolute in any enforcement action.⁸⁷ The court also held that the request made

81. — F.2d — (D.C. Cir. 1972).

82. The plaintiff requested both the manuscript decisions and "such indices [of the decisions] as are available." *Id.* at —. The Commissioner responded that the manuscript decisions, which are typed records of final decisions on patent applications and which are kept in the particular file of the patent request involved, could only be assembled by searching over 3,500,000 files. *Id.* at —.

The request for indices was remanded with directions to the district court to inspect in camera any indices that were available and to determine whether they should be disclosed. *Id.* at .

83. *Id.* at —.

84. 5 U.S.C. § 552(a)(1) (1970) provides that each agency shall publish, in the *Federal Register*, its rules of procedure and substantive rules of general applicability.

Id. § 552(a)(2) commands each agency to make available to the public final opinions, statements of policy, and administrative staff manuals.

85. 411 F.2d 696 (D.C. Cir. 1969). The court in *American Mail Line* was faced with the question of whether a memorandum, which was incorporated by reference into a final opinion of the Maritime Subsidy Board, could be ordered disclosed in a section 552(a)(3) action, since the memorandum was required to be made available by section 552(a)(2). *Id.* at 701. The court held that an affirmative decision was necessary to prevent the FOIA from creating a right without a remedy, and found implications of this construction in the legislative history. *Id.* at 701, n.8. The court admitted that there could be other equitable remedies available for failure to comply with sections 552(a)(1)-(2), but noted that an action for such a remedy would have to meet the stringent requirements for an injunction. *Id.* at 699. For a discussion of this case, see 1970 *Duke Project* 188.

86. 411 F.2d at 701.

87. This means, for example, that in order to obtain final opinions which an agency refuses to publish in compliance with 5 U.S.C. § 552(a)(2), the plaintiff must request a specific group of opinions.

did not meet the identifiable records requirement—which had not been rigorously enforced previously.⁸⁸

A correct analysis of *Irons* may turn upon the importance attached to the court's failure to sever the plaintiff's request for manuscript decisions into two parts—a request for the post-1954 decisions now scattered through millions of files,⁸⁹ and a request for the pre-1955 decisions gathered in 170-175 bound volumes.⁹⁰ The court merely referred to the entire request for unpublished decisions as “a broad, sweeping, nondiscriminate request . . . lacking any specificity.”⁹¹ The refusal to order production of the scattered decisions may easily have been prompted by the time and effort which would have been necessary to comply; however, the FOIA's legislative history indicates that *identifiability*, not the difficulty of retrieval, should be the sole criterion of availability.⁹² Furthermore, the bound volumes involved were easily retrievable, yet the court refused to order release of those decisions.⁹³ Thus, assuming that the court recognized that two groups of documents were present, its refusal to release the bound volumes lends support to the conclusion that the rationale underlying the denial of the claim was the “unreasonable” breadth of the request. In this regard, it is significant that the court repeatedly stressed the factor of reasonableness,⁹⁴ implying that an

88. See *Bristol-Myers v. FTC*, 424 F.2d 935, 938 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970), where the court utilized a test of whether the agency could tell which of its records were requested. See also *Wellford v. Hardin*, 315 F. Supp. 175, 177 (D. Md. 1970), *aff'd on other grounds*, 444 F.2d 21 (4th Cir. 1971) (disorganization of agency files was held not to defeat disclosure); 1970 *Duke Project* 184-86.

89. — F.2d at —. See note 82 *supra*.

90. — F.2d at —.

91. *Id.* at —.

92. See S. REP. NO. 813, *supra* note 3, at 8; *cf. id.* at 2; U.S. DEP'T OF JUSTICE ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT 24 (1967).

93. The *Irons* court did remand the case for consideration of the request for indices, and it left open the possibility of amending the request for manuscript decisions to provide greater specificity. — F.2d at —.

94. The court characterized the request as: not one for “records of a ‘reasonably identifiable description,’” — F.2d at —; nor was it a request coming “within a reasonable interpretation of ‘identifiable records,’” *id.* at —; nor a request which met the test set out in *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970), of a “reasonable description enabling the Government employee to locate the records requested.” — F.2d at —, *quoting* 424 F.2d at 938.

The case also leaves open the possibility that disorganization can totally defeat an FOIA plaintiff, because the expense of collecting disorganized material will have an independent deterrent effect. *Cf.* 1971 *Duke Project* 153 n.105. In this regard,

FOIA request for an entire category of information will be regarded as unreasonable—whether or not the information is easy to collect.

STATUTORY EXEMPTION

When interpreting the exemption for material specifically exempted from disclosure by other statutes,⁹⁵ the courts have again received little guidance from the legislative reports.⁹⁶ Both Congressional reports merely rephrase the wording of the exemption,⁹⁷ although the less authoritative House Report⁹⁸ does state that there are “nearly one-hundred statutes or parts of statutes which restrict” disclosure of information and which are not modified by the FOIA.⁹⁹ At the time of congressional consideration of the FOIA, government departments and agencies expressed concern that the bill could be interpreted as an implicit repeal of existing statutes.¹⁰⁰ While these fears were calmed¹⁰¹ by strong congressional statements to the contrary,¹⁰² those mollifying statements were not incorporated in the key legislative reports. However, this portion of the legislative history which suggests the continued viability of non-disclosure statutes¹⁰³ must be balanced against frequent indications that the FOIA grew out of Congressional dissatisfaction with the agencies’ abuse of former APA section 3’s grant of discretionary power to withhold information.

The broadest non-disclosure statute which has been claimed to qualify material for the statutory exemption is section 1905 of the Criminal Code.¹⁰⁴ This act provides criminal sanctions against an

also see the table of agency fees in 1972 *Hearings*, note 5 *supra*, pt. 4, at 1245, for production of documents (as much as \$1 per page, with many agencies charging 25 cents to 50 cents per page) and for search time (\$3-\$5 per hour for many agencies). The fees may become a major problem for persons who seek a large volume of documents or poorly filed documents. 1972 H.R. REP., *supra* note 3, at 10; 1972 *Hearings*, *supra* note 5, pt. 4, at 1223.

95. 5 U.S.C. § 552(b)(3) (1970).

96. See DAVIS § 3A.19, at 150 (Supp. 1970).

97. 1966 H.R. REP., *supra* note 3, at 10; S. REP. NO. 813, *supra* note 3, at 9.

98. See DAVIS § 3A.2, at 117 (Supp. 1970). See notes 75-77 *supra* and accompanying text.

99. 1966 H.R. REP., *supra* note 3, at 10.

100. See, e.g., *Hearings on S. 1666 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 268, 270-72 (1963).

101. See Note, *supra* note 61, at 453-54.

102. *Hearings on S. 1666*, *supra* note 100, at 6 (statement of Senator Edward V. Long).

103. For a partial listing of such statutes, see STAFF OF HOUSE COMM. ON GOVERNMENT OPERATION, 89TH CONG., 2D SESS., FEDERAL STATUTES ON THE AVAILABILITY OF INFORMATION (Comm. Print 1960).

104. 18 U.S.C. § 1905 (1970).

officer or employee of any agency who discloses any trade secrets or commercial and financial material to which he has gained access through his employment, "except as provided by law." Cases prior to 1972 have uniformly held that section 1905 does not "specifically" exempt materials from disclosure as the FOIA requires.¹⁰⁵ A similar result was reached in a 1972 decision, *M.A. Shapiro & Co. v. SEC*.¹⁰⁶ The *Shapiro* court held that the statutory exemption of the FOIA applies only to statutes which "restrict public access to *specific* government records."¹⁰⁷ *Shapiro* and the older cases reaching this result appear to be straining to implement the basic purpose of the FOIA, despite the strong indication in the legislative history that repeals by implication were not intended.¹⁰⁸ An equally effective result was reached in *California v. Richardson*,¹⁰⁹ but notably, by means of a more defensible rationale. The *California* court simply noted that section 1905 allows disclosure when "provided by law."¹¹⁰ Reasoning that disclosures are only made when provided for in the FOIA, the *California* court ruled that section 1905 is of no effect on disclosures made pursuant to an FOIA claim.¹¹¹

Another broadly worded statute which restricts disclosure in a manner radically different from section 1905 was raised as a defense to disclosure in three 1972 cases. Section 1306 of the Social Security Act¹¹² provides that disclosure of certain broad categories of material will not be made except as the Secretary of HEW or of Labor shall by regulation prescribe. Section 1306 gives these Secretaries discretion over release of the information obtained in all the programs under the Social Security Act.¹¹³ In *Serchuk v. Richardson*,¹¹⁴ the court stated that section 1306 was "in blatant contravention of the liberal disclosure requirements of the [FOIA],"¹¹⁵ and held that HEW

105. *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 425 F.2d 578 (D.C. Cir. 1970); *Frankel v. SEC*, 336 F. Supp. 675 (S.D.N.Y. 1971), *rev'd on other grounds*, 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972).

106. 339 F. Supp. 467, 469-70 (D.D.C. 1972).

107. *Id.* at 470 (emphasis added).

108. See text accompanying notes 100-102 *supra*.

109. — F. Supp. — (N.D. Cal. 1972).

110. *Id.* at —.

111. *Id.*

112. 42 U.S.C. § 1306 (1970).

113. *Id.* The Act encompasses such programs as unemployment compensation, child welfare, aid to the infirm, health insurance, Medicare, and grants to states for various social welfare purposes.

114. — F. Supp. — (S.D. Fla. 1972).

115. *Id.* at —. The court also categorized § 1306 as "a blanket exclusion" which

regulations prohibiting disclosure did not provide exemption from the Act. Similarly, in *Schechter v. Richardson*,¹¹⁶ the court rejected the agency's contention that section 1306 was a statute within the meaning of the statutory exemption of the FOIA. In *California v. Richardson*,¹¹⁷ however, this statute was held to satisfy the "specifically exempted from disclosure" requirement of the FOIA. These three holdings illustrate the conflict which is also seen in the section 1905 cases: balancing the non-discretionary intent of the FOIA¹¹⁸ against legislative history which denies an intent to repeal non-disclosure statutes by implication. Although the distaste for discretionary non-disclosure shown by *Serchuk* is understandable, the language and purpose of the exemption with respect to these statutes are reasonably clear. So long as Congress permits discretionary non-disclosure statutes to remain on the books, the courts should allow agencies to utilize them. In this regard, the 1972 House Committee on Government Operations Report has specifically recommended that *California v. Richardson* be overruled by statute¹¹⁹ and that all statutes¹²⁰ similar to 1306 be reviewed.¹²¹ Until Congress acts, however, it is submitted that section 1306 and other such discretionary non-disclosure statutes should be enforced.

CONFIDENTIAL INFORMATION

Information which can be described as "commercial" or "finan-

contravenes the requirement that exemptions are to be narrowly construed. *Id.* at —; cf. *Mink v. EPA*, 464 F.2d 742, 745 (D.C. Cir. 1971), *rev'd on other grounds*, 41 U.S.L.W. 4201 (U.S. Jan. 22, 1973).

116. — F. Supp. — (D.D.C. 1972). See *California v. Richardson*, 351 F. Supp. 733, 734 n.1 (N.D. Cal. 1972).

117. 351 F. Supp. 733 (N.D. Cal. 1972). The materials sought were the Extended Care Facilities Reports which certify whether Medicare program requirements are met by different nursing homes. The suit was brought by two senior citizens groups and the California Attorney General on behalf of the people of the State. *Id.* at 734.

118. 1966 H.R. REP., *supra* note 3, at 9; cf. S. REP. No. 813, *supra* note 3, at 5-6; DAVIS § 3A.4, at 120-21 (Supp. 1970).

119. 1972 H.R. REP., *supra* note 3, at 85.

120. At least one other discretionary statute of similar scope gives the SEC discretionary authority over any report, etc. filed with the Commission. See 15 U.S.C. § 79v (1970). See also *id.* §§ 80a-44(a), 80b-10(a), which provide specific authority over reports filed by investment companies and investment advisors, and *id.* § 78x (1970) which provides authority to withhold material where the party submitting the material requests that it remain secret. This statute is cited as an example and considered by Professor Davis to be within the exemption. DAVIS § 3A.18, at 146 (Supp. 1970). He rejects the argument that under such discretionary statutes it is the agency head who exempts material, and not the statute. *Id.*

121. 1972 H.R. REP., *supra* note 3, at 85.

cial" is exempted from disclosure under the FOIA if it is "obtained from a person and privileged or confidential."¹²² Under the prevailing "objective" standard of disclosure, only documents which "contain commercial or financial information which the [person submitting the information] would not reveal to the public" are exempt.¹²³ However, since the underlying purpose of the exemption is the necessity of protecting the competitive business position of the person or enterprise submitting the information,¹²⁴ the courts have typically ordered disclosure of information concededly financial or commercial and submitted in confidence if sufficient deletions can be made to protect the identity of the party submitting the information.¹²⁵

In a 1972 case, *Fisher v. Renegotiation Board*,¹²⁶ the Board had engaged in a practice of deleting identifying materials before disclosing the information sought.¹²⁷ In defense of this practice, the Board contended that details which would identify the party submitting any commercial or financial information disclosed are per se exempt.¹²⁸ In rejecting this argument, the Court of Appeals for the District of Columbia Circuit held that the test for exemption was confidentiality, and not merely whether the person who submitted the material could be identified. The court ordered the district court on remand to make an in camera inspection of the documents requested to determine whether commercial and financial data con-

122. 5 U.S.C. § 552(b)(4) (1970).

123. *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 425 F.2d 578, 582 (D.C. Cir. 1970).

While this standard is more objective than a blanket exemption for anything labelled "confidential" by the Board, the test nevertheless does require that the judge decide whether the contractor involved would reveal the information to the public. The answer to that subjective inquiry may depend, *inter alia*, upon whether the contractor is subject to the registration and disclosure requirements of the Securities Act of 1933 or the Securities Exchange Act of 1934, and whether it is a corporation, proprietorship, or partnership. Alternatively, a court could apply some variation of the "reasonable man" standard—that is, would a reasonable person or enterprise reveal this information to the public.

124. See 1966 H.R. REP., *supra* note 3, at 10; S. REP. NO. 813, *supra* note 3, at 9.

125. The practice was originally sanctioned in *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 425 F.2d 578, 580-88 (1970), and was used in *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938-39 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970), and, in another 1972 case, *M.A. Shapiro & Co. v. SEC*, 339 F. Supp. 467 (D.D.C. 1972), deletion was held to be permissible when requested by the person who gave the information. *Id.* at 471.

126. 473 F.2d 109 (D.C. Cir. 1972).

127. *Id.* at 112-13.

128. *Id.* at 113.

tained therein were confidential, under the "objective" standard, *with identifying details included*.¹²⁹ If the district court found the documents to be confidential, the deletions could be sustained; but absent such a finding the district court would have to order the details disclosed.¹³⁰

INTRA-AGENCY MEMORANDUM EXEMPTION

The portion of the FOIA which drew the most frequent judicial attention in 1972 was the exemption for "inter-agency or intra-agency memorandums."¹³¹ Several areas of dispute were involved, and the issues were most frequently resolved in favor of a view of the exemption which expanded disclosure.

In *Sears, Roebuck & Co., v. NLRB*,¹³² the District Court for the District of Columbia held that advice and appeals memoranda prepared by the NLRB's Office of General Counsel did not qualify for the exemption. These memoranda, which provide guidance to the NLRB Regional Director upon whether to issue complaints in novel and significant cases,¹³³ actually operate as mandatory instructions reducing the discretionary authority of the Director to a "ministerial function."¹³⁴ The court found that the instructions function as "instruction to staff that affect a member of the public,"¹³⁵ —a category of information which is specifically required by the FOIA to be disclosed.¹³⁶ This resolution indicates a healthy willingness on the part of the court to prevent the abuse of the inter-agency memorandum exemption which *Bristol-Myers Co. v. FTC*¹³⁷ refused to permit: the casting of information in memorandum form to protect it from disclosure.¹³⁸

A similarly narrow interpretation of the exemption appeared in several 1972 decisions which treated the distinction between facts and

129. *Id.* at 113.

130. *Id.* at 115.

131. "[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" are exempt from disclosure. 5 U.S.C. § 552(b)(5) (1970).

132. 346 F. Supp. 751 (D.D.C. 1972).

133. *Id.* at 753.

134. *Id.*

135. *Id.*

136. 5 U.S.C. § 552(a)(2)(c) (1970).

137. 424 F.2d 935, 939 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

138. The court did not, however, accuse the agency of any wrongful attempt to mislabel.

final opinion on the one hand, and elements of agency discussion leading to decision on the other. The two prior cases which influenced these courts were *Soucie v. David*,¹³⁹ and *Bristol-Myers Co. v. FTC*,¹⁴⁰ which construed the exemption narrowly and held, respectively, that it protects "advice, recommendations, opinion, and other material reflecting deliberative or policy-making processes, but not purely factual or investigatory reports"¹⁴¹ and only "those internal working papers in which opinions are expressed or policies formulated and recommended."¹⁴²

In *Wu v. National Endowment for Humanities*,¹⁴³ the Court of Appeals for the Fifth Circuit held that the documents sought clearly fell within even the narrow interpretation of the exemption evidenced in *Soucie* and *Bristol-Myers*. The plaintiff sought memoranda of consultants retained by the agency which had influenced the decision to deny him a grant.¹⁴⁴ The court characterized these memoranda as precisely the type of advice and opinion that the *Soucie* opinion held to be protected. The most interesting aspect of the *Wu* case

139. 448 F.2d 1067 (D.C. Cir. 1971).

140. 424 F.2d 935 (D.C. Cir. 1970).

141. 448 F.2d at 1077. *Soucie* also holds that factual material is not covered by the exemption unless it is "inextricably intertwined in the policy-making process." *Accord*, *Fisher v. Renegotiation Bd.*, 473 F.2d 109 (D.C. Cir. 1972); *Long v. IRS*, 349 F. Supp. 871 (W.D. Wash. 1972). This distinction was ignored in *Tennessean Newspapers, Inc. v. FHA*, 464 F.2d 657 (6th Cir. 1972), where it might have been dispositive of the issue presented, because only the appraiser's name which had been deleted was sought.

142. 424 F.2d at 939. This position is squarely supported by the legislative history. See 1966 H.R. REP., *supra* note 3, at 10, and S. REP. No. 813, *supra* note 3, at 9, both of which reflect the position that effective agency performance requires protection from disclosure of decision-making processes to protect the frankness of discussion. Professor Davis recommends a similar construction. DAVIS § 3A.21, at 157 (Supp. 1970).

The status of manuals instructing enforcement personnel on procedures and criteria was considered in *Long v. IRS*, 349 F. Supp. 871 (W.D. Wash. 1972) and *Stokes v. Hodgson*, 347 F. Supp. 1371 (N.D. Ga. 1972). In both cases, the materials sought were found not to be exempt after an in camera inspection because the manuals did not reveal deliberative processes that might be impeded by disclosure. A claim of exemption as an intra-agency memorandum was considered in *M.A. Shapiro & Co. v. SEC*, 339 F. Supp. 467 (D.D.C. 1972), in which the documents sought were an SEC staff study and the material submitted during the investigation. After an in camera inspection, the court ordered disclosure after finding: "None of these documents express an exchange of ideas between agencies or their respective staff members." *Id.* at 470.

143. 460 F.2d 1030 (5th Cir. 1972), *cert. denied*, 41 U.S.L.W. 3447 (U.S. Feb. 20, 1973) (No. 72-137).

144. Plaintiff sought funds to enable him to write a comprehensive history of China. *Id.* at 1030-31.

is that the court, following *Soucie*, extended the exemption to memoranda prepared by *non-employees* of an agency. Literally, these documents are neither "intra-agency" nor "inter-agency" memoranda; nevertheless, the justification for the exemption—preservation of the free interchange of ideas and opinion—dictates that such "extra-agency" memoranda are within its scope.

In *Tennessean Newspapers, Inc. v. FHA*,¹⁴⁵ the Court of Appeals for the Sixth Circuit held that the appraisal of a house by an FHA employee, complete with his name, was a "finished work product" and therefore subject to disclosure.¹⁴⁶ Characterizing the appraisal as an analysis of facts, the court found that it was not advocacy of ideas and therefore was not exempt.¹⁴⁷ This distinction appears valid, because the appraisal is not the position of one of a group of persons involved in a discussion in an effort to reach a decision, but is instead the final decision of one to whom the authority to make that decision is delegated.¹⁴⁸ A related issue in *Tennessean* was whether or not the *name* of the author of disclosed documents was exempted as an intra-agency memorandum. The court held that an appraiser's name is a relevant and necessary part of the appraisal which is his work product and is therefore discoverable.¹⁴⁹

The distinction between *Tennessean*, involving an appraisal as a finished product and *Wu*, involving a consultant's opinion, is tenuous at best.¹⁵⁰ The intimation in *Wu* that the decision was influenced by the necessity of anonymity for experts to achieve frankness¹⁵¹ seems diametrically contrary to the result in *Tennessean*. Perhaps a distinction is necessary, however, in a situation like *Wu* where few objective, standardized criteria for evaluation are available, and the pool of consultants is so small that all are considered "colleagues." The problem for future cases in this area will be to

145. 464 F.2d 657 (6th Cir. 1972).

146. *Id.* at 660.

147. The court also cited *GSA v. Benson*, 415 F.2d 878 (9th Cir. 1969) for the proposition that such appraisals are discoverable under FED. R. Crv. P. 26(b) and therefore available to a non-agency party in litigation with an agency. 464 F.2d at 660; see 5 U.S.C. § 552(b)(5) (1970).

148. See 24 C.F.R. § 200.98 (1972).

149. 464 F.2d at 660; accord, *Philadelphia Newspapers, Inc. v. HUD*, 343 F. Supp. 1176 (E.D. Pa. 1972).

150. Indeed, it would be easy to cast the opinions of the consultants there as "appraisals" of plaintiff's credentials and the merits of his project. However, the appraisal of a house does have elements of objectivity and standardization which are lacking in the grant application situation.

151. 460 F.2d at 1034.

draw the lines which distinguish “work product” from “advice,” and a large group of appraisers¹⁵² from a small group of colleagues.¹⁵³

Another question which confronted the courts in 1972 was whether documents pertaining to a particular decision still qualified for the intra-agency memorandum exemption after that decision had been reached. This question was considered in *Fisher v. Renegotiation Board*,¹⁵⁴ where the court held that the exemption continues unabated after a decision is reached and announced.¹⁵⁵ The *Fisher* court reached its decision by distinguishing *American Mail Line, Ltd. v. Gulick*¹⁵⁶ as a case in which the memorandum was incorporated by reference in the final agency decision.¹⁵⁷ This distinction is valid¹⁵⁸ because the statutory purpose of protecting frank discussion in the decision-making processes would not be served if the exemption ended when the decision was reached. If *Fisher* had reached an opposite conclusion, indecision and/or concealment of the fact of decision would have been rewarded. Obviously, either result would be undesirable.¹⁵⁹

152. Appraiser's names will be available in the future from the Department of Housing and Urban Development. See 1972 H.R. REP., *supra* note 3, at 34. This policy and the *Tennessean* decision are in accord with the position of the Society of Real Estate Appraisers, the official national organization of appraisers. *Id.* at 25.

153. The drawing of this line might be obviated by an amendment providing that the advice of consultants, when requested to be kept confidential, could be disclosed only with their names or identifying details deleted. For the operation of a similar exemption with respect to confidential financial information, 5 U.S.C. § 552(b)(4) (1970), see *M.A. Shapiro & Co. v. SEC*, 339 F. Supp. 467, 471 (D.D.C. 1972). See notes 133-37 *supra* and accompanying text. Such an amendment is not advisable, however, because the distinctions of objectivity and of the role of the author in the decision-making process, see notes 148-50 *supra* and accompanying text, can be effectively utilized. Also, any legislation would either draw an arbitrary line of exemption which would not be served in every case, or, alternatively, would vest the courts with the same degree of discretion for case-by-case analysis which they now possess under *Wu* and *Tennessean*.

154. — F.2d — (D.C. Cir. 1972).

155. *Id.* at —.

156. 411 F.2d 696 (D.C. Cir. 1969). The Maritime Subsidy Board stated publicly in a ruling on proper crew sizes that it had based its ruling on the memorandum sought to be disclosed, and used the last pages of the memorandum as its finding and determination. *Id.* at 698.

157. — F.2d at —. See 411 F.2d at 702.

158. See 1970 *Duke Project* 178.

159. See DAVIS § 3A.21, at 159 (Supp. 1970). *But see* Nader, *Freedom From Information: The Act and the Agencies*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1, 7 (1970); 1972 *Hearings*, *supra* note 5, pt. 4, at 1156.

Perhaps the weakness of this position explains the absence of any consideration of this exemption termination argument in *Tennessean* and *Wu*—both of

INVESTIGATORY FILES EXEMPTION

Courts and commentators agree that the investigatory files exemption¹⁶⁰ is intended to protect the Government's "case in court"¹⁶¹—that is, to prevent premature discovery of the Government's position prior to litigation.¹⁶² However, two divergent lines of reasoning have developed as to whether the exemption protects concededly "investigatory" files when the litigation or proceedings for which the files were prepared have terminated or have been abandoned, and no further enforcement action is contemplated.¹⁶³ The conflict—which results from different interpretations of congressional intent—and the resulting dichotomy of authority are reflected in two 1972 cases which construed the exemption.

In *M.A. Shapiro & Co. v. SEC*,¹⁶⁴ the District Court for the District of Columbia ordered disclosure of materials gathered during an SEC staff study¹⁶⁵ because it was not alleged that the materials would be the basis for any criminal or civil action against anyone.¹⁶⁶ *Shapiro* followed the 1970 decision in *Bristol-Myers Co. v. FTC*¹⁶⁷ and implicitly adopts the conception of congressional intent adopted in that case: the exemption was incorporated solely to prevent a party charged with violation of a federal regulatory statute from using the FOIA to obtain information denied him by the discovery process.¹⁶⁸ This interpretation of legislative purpose compels the conclusion that the exemption becomes inapplicable when adjudica-

which involved claims of exemption for files on which all action had been concluded, and the latter of which held that the exemption was available.

160. 5 U.S.C. § 552(b)(7) (1970) exempts "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."

161. S. REP. No. 813, *supra* note 3, at 9.

162. See *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 939 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970); *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708, 711-12 (E.D. Pa. 1968); *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591, 593 (D.P.R. 1967); *DAVIS* §§ 3A.19, at 159, 3A.23, at 164-65 (Supp. 1970).

163. For the position that the exemption is still in force, see *Evans v. DOT*, 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972). For the contrary position, see *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 939 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

164. 339 F. Supp. 467 (D.D.C. 1972).

165. The relevant materials were the "Commission's Staff Study on the off-board trading problem raised by the New York Stock Exchange's original rule 394; and all transcripts made and documents received by the . . . Commission in the course of that investigation." *Id.* at 468-69.

166. *Id.* at 470.

167. 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

168. 424 F.2d at 939.

tory proceedings are not imminent.¹⁶⁹ Although the *Shapiro* opinion contains dictum which could produce anomalous results,¹⁷⁰ the approach of the court nonetheless provides a clear test for the application of the exemption: if proceedings are “imminent,” all of the relevant investigatory material is protected; if proceedings are not “imminent,” none of the material is protected.

In contrast to *Shapiro*, the Court of Appeals for the Second Circuit, in *Frankel v. SEC*,¹⁷¹ held that the exemption extended beyond the conclusion of all relevant proceedings. In *Frankel*, shareholders of a corporation were refused an order for disclosure of information collected in a prior SEC action against the corporation. *Frankel* joins a 1971 Fifth Circuit case, *Evans v. DOT*,¹⁷² in rejecting the view that the exemption was intended *solely* to prevent FOIA use by potential litigants.¹⁷³ An additional purpose for the exemption—protecting the confidentiality of both agency investigatory procedures and the identity of those who provide information—was recognized in *Frankel*.¹⁷⁴ In effecting this additional policy, the *Frankel* court

169. This is the holding of *Bristol-Myers*.

170. Since the investigation involved had been concluded six years before the decision, 339 F. Supp. at 470, the court's implication that the exemption may *still* have been available upon a showing that an enforcement proceeding was “imminent” is disturbing. This dictum could mean that an action for production of these documents brought in one year would be successful if a proceeding which would use the documents was not then imminent, while the very same action, if brought in a later year, would fail if use of the documents subsequently became imminent. Hence, an anomalous situation develops because material which was once disclosable, and possibly widely distributed, may later become “private,” and therefore exempt from disclosure.

171. 460 F.2d 813 (2d Cir.), *cert. denied*, 93 S. Ct. 125 (1972).

172. 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972).

173. 460 F.2d at 817. *See* 446 F.2d at 824.

174. 460 F.2d at 817. The court quotes legislative history which does not support this secondary purpose at all, but which is the source of the interpretation adopted in *Bristol-Myers*. The court quotes the following statements:

Exemption No. 7 deals with ‘investigatory files compiled for law enforcement purposes.’ These are the files prepared by Government agencies to prosecute law violators. The disclosure of such files, except to the extent available by law to a private party, *could harm the Government's case in court*. S. REP. NO. 813, *supra* note 3, at 9 (emphasis added).

This exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws. This would include files prepared in connection with related Government litigation and adjudicative proceedings. *SI160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings*. 1966 H.R. REP., *supra* note 4, at 11 (emphasis added).

The court also quotes one sentence from the *introductory portion* of the Senate Report which conceivably could support its position:

It is also necessary for the very operation of our Government to allow it

indicated that the plaintiff should be denied *any* FOIA disclosure order which would affect *any* material within an investigatory file.¹⁷⁶ Thus, the *Frankel* court's test is as lucid as that of courts following *Bristol-Myers*: if the material is within an investigatory file, it is exempt from FOIA disclosure both before and after any enforcement proceedings. Accepting, *arguendo*, the additional purpose advanced in *Frankel*, the technique utilized to advance this purpose—permanent extension of the exemption—lacks merit. If litigation is complete or no longer imminent, the Government's "case in court" no longer needs protection; therefore, the continuing existence of the exemption should be limited to provide *only* for protection of the witnesses' identity and the investigatory techniques.¹⁷⁶ The remaining factual information in the file could be disclosed without contravening either purpose.¹⁷⁷

The continuing protection of identities and investigatory techniques could also be achieved under the *Bristol-Myers* rationale if another exemption or common law privilege could be utilized to prevent disclosure.¹⁷⁸ Three possibilities suggest themselves: the statutory exemption,¹⁷⁹ the trade secrets and confidential information

to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation. S. REP. NO. 813, *supra* note 3, at 3.

A less strained reading of this sentence casts no light on the additional purpose controversy. The issue as to investigatory techniques may have been mooted by such decisions as *Long v. IRS*, 349 F. Supp. 871 (W.D. Wash. 1972), and *Stokes v. Hodgson*, 347 F. Supp. 1371 (N.D. Ga. 1972), which give access to the manuals used to instruct agency employees in such techniques. See note 142 *supra*.

175. 460 F.2d at 817-18.

176. Overly broad protection would violate the spirit if not the letter of 5 U.S.C. § 552(c) (1970): "This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section." See 1966 H.R. REP., *supra* note 3, at 1.

177. An approach which could modify the *Bristol-Myers* interpretation to allow partial exemption after all enforcement proceedings have ended, was adopted in *Weisberg v. United States Dep't of Justice*, — F.2d — (D.C. Cir. 1973), in which the court implied that the prospect of serious harm to agency efficiency might allow continuing application of the exemption. *Cf. Evans v. DOT*, 446 F.2d 821, 824 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972).

As a minimum protective measure, the court could have required the district court to make an in camera inspection of the materials requested in order to release the now unprotected material. Although the plaintiff admittedly sought material which appears to be investigatory by definition, see text accompanying note 172 *supra*, the *Bristol-Myers* court and commentators have stated that such an inspection is necessary to prevent abusive use of the investigatory files exemption. See 424 F.2d at 938-39; 41 GEO. WASH. L. REV. 93, 104 (1972). See generally *Nader*, *supra* note 159.

178. See 1971 *Duke Project* 158.

179. 5 U.S.C. § 552(b)(3) (1970).

exemption,¹⁸⁰ and the “informant privilege.”¹⁸¹ The statutory exemption could serve this function only if there were either a single statute protecting identities for all agencies or a multitude of statutes which collectively cover each agency completely. Neither of these conditions yet exist.¹⁸² The trade secret and confidential information exemption cannot protect all informants and witnesses unless it is construed to protect confidential information which is neither commercial nor financial, and it is unlikely that it will be consistently so construed.¹⁸³ The “informant’s privilege” has not yet been applied as such in an FOIA action, but it is not necessarily inapplicable; the traditional concept of “informant,”¹⁸⁴ however, would have to be strained to include all witnesses in agency investigations, and it is not at all clear that the privilege is applicable to a situation in which the requesting party is not being prosecuted.¹⁸⁵

In view of the weakness of these alternative grounds for exclusion, the goal of limiting post-litigation protection to witnesses’ and informants’ identities might be achieved only by a construction which makes the exemption generally unavailable after proceedings have terminated but yet allows the continued selective exemption of portions of files. The weakness of *Evans* and *Frankel* is that in achieving continued protection of the sensitive portions of the file they require suppression of the entire file. Achieving selective exemption, however, requires strained statutory construction: the exemption for “files” must be read as “portions of files,” or “inaterials.” Obviously, the most direct method of achieving such a con-

180. 5 U.S.C. § 552(b)(4) (1970).

181. The informant privilege is the limited privilege of the Government in certain circumstances to withhold the identity of those who provide information of violations of law. It exists in recognition of the duty of citizens to provide their knowledge of crimes to law enforcement officials. See *Roviaro v. United States*, 353 U.S. 53, 59 (1957).

182. See STAFF OF HOUSE COMM. ON GOVERNMENT OPERATIONS, 86TH CONG., 2D SESS., FEDERAL STATUTES ON THE AVAILABILITY OF INFORMATION (Comm. Print 1960). A typical exemption provision is contained in the Federal Aviation Act of 1958, 19 U.S.C. § 1504 (1970) which was construed in *Evans v. DOT*, 446 F.2d 821, 823 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972).

183. See DAVIS § 3A.19, at 149-50 (Supp. 1970).

184. See, e.g., *McCray v. Illinois*, 386 U.S. 300 (1967); *Massiah v. United States*, 377 U.S. 201 (1964); *Jones v. United States*, 362 U.S. 257 (1960); *Roviaro v. United States*, 353 U.S. 53 (1957).

185. In view of the FOIA’s language that disclosure be made available to “any person,” 5 U.S.C. § 552(a)(3) (1970), the exemption cannot be construed to prevent only potential defendants from gaining access to information. DAVIS § 3A.4 at 120 (Supp. 1970).

struction is statutory amendment,¹⁸⁶ but the inertia of the legislative process and the failure of the 1972 Report by the House Committee on Government Operations to recommend that such a change be made¹⁸⁷ suggest that the exemption will not be amended in the near future.

The conflict between the two concepts of congressional intent and the resulting statutory constructions cannot be resolved by reference to the legislative history of the exemption.¹⁸⁸ The weight of sound policy, however, requires that there be some exemption to protect the identity of those who supply information vital to investigation both before and after the termination of proceedings.¹⁸⁹ Since an amendment protecting informants and witnesses is probably not imminent, and, arguably, no other exemption or privilege as currently defined protects such sources, the investigatory files exemption should not be construed to lapse at the end of proceedings. But in extending the exemption past the point of proceedings, the courts should review files *in camera* and order disclosure of all mate-

186. Amendments of this type were proposed by representatives of three different organizations and are contained in *1972 Hearings, supra* note 5. See *id.* pt. 4, at 1156 (statement of David Parson, Chairman, Committee on Government Information, Federal Bar Association); *id.*, pt. 5, at 1436 (statement of the Section of Administrative Law of the American Bar Association, Milton M. Carrow, Chairman); *id.*, pt. 6, at 2235 (statement of Sanford Jay Rosen, Assistant Legal Director, American Civil Liberties Union).

187. See 1972 H.R. REP., *supra* note 3, at 84. After making specific recommendations as to changes that should be made, the Report adds:

It could also be amended . . . to make clear that once an investigatory record becomes public information, informants' names or identities or such information which would necessarily lead to the identification of such informant may continue to be withheld *Id.*

This statement rejects the possible construction that the committee's proposed amendment, changing "files" to "records," would, by breaking the protective "shell" of the file evidenced in *Frankel*, provide the authority for courts to eliminate all but witnesses' and informants' identification from the exemption protection upon *in camera* review.

188. *Frankel v. SEC*, 460 F.2d 813, 818 (2d Cir. 1972) (dissenting opinion). See note 174 *supra*. For the propositions that these reports represent the useful legislative history and that the Senate Report is to be considered authoritative, see DAVIS § 3A.2, at 116-17 (Supp. 1970). One author finds support in the congressional floor debates for the position taken in *Evans* and *Frankel*, but the portions upon which the author relied supply no such support. See 41 GEO. WASH. L. REV. 93, 101, n.68 (1972).

189. 460 F.2d at 817-18; *Evans v. DOT*, 446 F.2d 821, 824 (5th Cir. 1971); *Wellford v. Hardin*, 315 F. Supp. 175, 178 (D. Md. 1970), *aff'd on other grounds*, 444 F.2d 21 (4th Cir. 1971); 1971 *Duke Project* 158 n.129; 41 GEO. WASH. L. REV. 93, 103 (1972). This is the same type of problem considered by the court in a non-enforcement context in *Wu*. See text accompanying note 143 *supra*.

rials therein which will not divulge the identities of sources. Any other construction would protect material for which no protection is needed or provided by the FOIA.

IDENTIFICATION OF THE CORRECT AGENCY

In at least two FOIA cases, courts have refused to order disclosure of "identifiable records" even if they were not protected by any exemption. In *Nichols v. United States*,¹⁹⁰ a physician sought medical records related to the autopsy of President Kennedy. In an action for disclosure under the FOIA, the court refused to grant an order, holding that the material was exempted from disclosure by statute.¹⁹¹ The most disturbing element of the decision is the court's acceptance of a sworn statement by the Navy that it no longer had the material in its custody as dispositive of the request for those items.¹⁹² The *Nichols* decision is similar to that in *Skolnick v. Kerner*,¹⁹³ a 1970 case in which a request for a report was dismissed because the commission which had prepared the report had been disbanded.¹⁹⁴ The *Skolnick* court ignored the possibility that another agency might have possession of the report, and that the plaintiff might be incapable of identifying the successor. Similarly, the *Nichols* court ignored the high probability that the items sought in that case were preserved elsewhere within the federal bureaucracy. These decisions refuse to place the burden of finding the requested materials upon the government when the plaintiff seeks disclosure from the agency (1) which admits it once had them, (2) which is the most likely agency to possess them, and (3) whose records should show to whom the materials were transferred. Thus, the decisions place the tremendous burden upon the plaintiff of determining which agency has the documents before filing suit.

An opposite result in these cases—compelling the defendant agency (or its successor in interest) to disclose the current custodian of the material, or at least the identity of the agency to which it passed from the defendant¹⁹⁵—would obviously further the dis-

190. — F.2d — (10th Cir. 1972).

191. *Id.* at —.

192. *Id.* at —.

193. 435 F.2d 694 (7th Cir. 1970), noted in 1970 *Duke Project* 192.

194. *Id.* at 695.

195. Such an order could be premised upon the jurisdiction to grant orders compelling disclosure given to district courts by the FOIA, or upon the traditional equitable powers of the federal courts. Compare *Bannercraft Clothing Co. v. Renegotiation Bd.*, 466 F.2d 345, 353 (D.C. Cir. 1972), cert. granted, 41 U.S.L.W.

closure of non-exempt information. Furthermore, unless some such method is developed to shift the onerous burden¹⁰⁶ that these decisions place upon plaintiffs, the only course open to them may be to name as parties-defendant in the original action every conceivable agency which might possess the material, forcing each to disavow possession in order to have the case against it dismissed.

3409 (U.S. Jan. 22, 1973) (No. 72-822). See notes 19-22 *supra* and accompanying text.

At the time of the FOIA's passage, the Department of Justice recognized the difficulty individuals might encounter in addressing their requests to the proper agency. Consequently, the Department instructed that agencies refer requests to the proper agency. See U.S. DEP'T OF JUSTICE ATTORNEY GENERAL'S MEMORANDUM, *supra* note 92, at 24.

196. A sample of the type of actual problems generated by documents passed between agencies is given in 1972 H.R. REP., *supra* note 3, at 26.