

## DEVELOPMENTS UNDER THE FREEDOM OF INFORMATION ACT—1976

In 1976, the tenth year since its enactment, the Freedom of Information Act (FOIA) <sup>1</sup> was the subject of judicial interpretation reflecting both its youth and its maturity.<sup>2</sup> Several of the statute's provisions received judicial attention for the first time; one was significantly amended. Yet, in many instances, cases went beyond a simple construction of the statute to an attempt to forge a place in the federal administrative structure for the FOIA's policy favoring disclosure of government information. This effort often conflicted with existing demands, such as discovery procedures, the need for confidentiality, and general workload pressures, and these conflicts required that compromises be struck. In some cases, a consensus has been reached; in others, division remains.

The issues with which the courts dealt concerned both the Act's affirmative disclosure provisions<sup>3</sup> and its exemptions from disclosure.<sup>4</sup> First, the courts addressed the question of whether there are justifications for agency delay in the release of information required to be disclosed under the Act. Also receiving judicial attention were three of the statute's exemptions, relating to the protection of private personal files,<sup>5</sup> personnel rules<sup>6</sup> and investigatory records.<sup>7</sup> Another exemption, covering information exempted from disclosure by other statutes,<sup>8</sup> was amended by Congress. The courts

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### THE FOLLOWING CITATIONS WILL BE USED IN THIS NOTE:

Note, *Developments Under the Freedom of Information Act—1974*, 1975 DUKE L.J. 416 [hereinafter cited as *FOIA Developments—1974*];

Note, *Developments Under the Freedom of Information Act—1975*, 1976 DUKE L.J. 366 [hereinafter cited as *FOIA Developments—1975*];

Note, *Protection from Government Disclosure—the Reverse-FOIA Suit*, 1976 DUKE L.J. 330 [hereinafter cited as *Reverse-FOIA Suits*].

1. 5 U.S.C.A. § 552 (West Supp. 1976).

2. For discussion of developments under the FOIA in prior years, see *FOIA Developments—1975*; *FOIA Developments—1974*; Comment, *Developments Under the Freedom of Information Act—1973*, 1974 DUKE L.J. 251; Note, *Developments Under the Freedom of Information Act—1972*, 1973 DUKE L.J. 178; Note, *Developments Under the Freedom of Information Act—1971*, 1972 DUKE L.J. 136; Project, *Federal Administrative Law Developments—1970*, 1971 DUKE L.J. 149, 164; Project, *Federal Administrative Law Developments—1969*, 1970 DUKE L.J. 67, 72.

3. 5 U.S.C.A. § 552(a) (West Supp. 1976).

4. *Id.* § 552(b).

5. 5 U.S.C. § 552(b)(6) (1970).

6. *Id.* § 552(b)(2).

7. 5 U.S.C.A. § 552(b)(7) (West Supp. 1976).

8. 5 U.S.C. § 552(b)(3) (1970), as amended by the Government in the Sunshine Act, Pub. L. No. 94-409 § 5(b), 90 Stat. 1241, 1247 (1976).

considered whether there might be limitations on their equitable power to enjoin agency proceedings. Finally, the courts continued the development of a policy regarding the attempted use of the FOIA to *block* disclosure of information. This Note will describe these developments and assess their probable impact on the future application of the FOIA.

### I. DELAYS IN DISCLOSURE

As a means of promoting the FOIA's basic objective of "fuller and faster release of information,"<sup>9</sup> the 1974 amendments provided for the "prompt" disclosure of records by agencies<sup>10</sup> and established specific time periods within which agencies must respond to requests for records.<sup>11</sup> The justification for imposing these requirements, as seen by the House committee considering the amendments, was that "information is often useful only if it is timely. Thus, excessive delay by the agency in its response is often tantamount to denial."<sup>12</sup> The speed of agencies in fulfilling the requirements of the FOIA came to the fore as an issue in 1976. Courts were faced with two specific questions: first, whether the strict time requirements for responding to requests could be extended if an agency found it impossible to meet them due to workload pressures, and second, whether an agency could delay the release of non-exempt materials for policy reasons.

#### A. Workload Delays

The FOIA requires any agency which receives a request for information pursuant to the Act to determine within ten working days whether it will comply.<sup>13</sup> It must immediately notify the person making the request of its decision and, if the request is refused, notify him of his right to appeal.<sup>14</sup> Appeals must be acted upon within twenty working days.<sup>15</sup> President Ford objected to these time restraints because of their inflexibility.<sup>16</sup> He proposed

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9. H.R. REP. NO. 876, 93rd Cong., 2d Sess. 2 (1974).

10. 5 U.S.C.A. § 552(a)(1)-(3) (West Supp. 1976) (originally enacted as Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561-65).

11. 5 U.S.C.A. § 552(a)(6)(A) (West Supp. 1976).

12. H.R. REP. NO. 876, *supra* note 9, at 6.

13. 5 U.S.C.A. § 552(a)(6)(A)(i) (West Supp. 1976).

14. *Id.*

15. *Id.*

16. The amendments eventually were passed over President Ford's veto by a vote of 371 to 31 (32 not voting) in the House of Representatives, 120 CONG. REC. H10,875 (daily ed. Nov. 20, 1974), and 65 to 27 (8 not voting) in the Senate, 120 CONG. REC. S19,823 (daily ed. Nov. 21, 1974).

In a letter to Sen. Edward M. Kennedy, chairman of the Senate conferees considering the FOIA amendments, President Ford stated:

I . . . believe that the time limits for agency action are unnecessarily restrictive in that they fail to recognize valid examples of where providing flexibility in several specific instances would permit more carefully considered decisions in special cases without compromising the principle of timely implementation of the Act.

120 CONG. REC. S17,829 (daily ed. Oct. 1, 1974).

two exceptions to the rigid time requirements which were ultimately incorporated into the 1974 amendments:<sup>17</sup> (1) in certain specified "unusual circumstances," where the request requires compiling records from field offices, sifting through voluminous records or consulting with another agency, the time limits may be extended by the agency for up to ten additional days;<sup>18</sup> and (2) in "exceptional circumstances," where the agency in the exercise of "due diligence" is unable to comply with the time requirements, the court in which the requesting party brings suit to force compliance<sup>19</sup> may allow the agency additional time.<sup>20</sup> The question confronting courts in 1976 was whether a flood of FOIA requests, which often delayed responses and in some cases appeared to make the ten- and twenty-day time limits hopelessly inadequate, would qualify as an "unusual" or "exceptional" circumstance.

Within a span of less than a week, two District of Columbia District Court judges considered the question and reached opposite results. In *Hayden v. United States Department of Justice*,<sup>21</sup> it was held that a request by one-time antiwar activist Tom Hayden for all FBI files relating to himself, which the Bureau said would take four years to process, presented an "unusual" circumstance, but not an "exceptional" one that would permit an indefinite time extension. In *Cleaver v. Kelley*,<sup>22</sup> on the other hand, a similar request, this time by Eldridge Cleaver and his wife for all FBI and Justice Department files concerning themselves, when coupled with a backlog of pending FOIA requests, was held to involve "exceptional circumstances." While the cases are not distinguishable on their facts, since both involved requests for massive amounts of information from the same agency,<sup>23</sup> they differ with respect to the focus of the courts' attention.

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17. In response to the President's letter, see note 16 *supra*, Sen. Kennedy and Rep. William S. Moorhead, chairman of the House conferees, wrote:

The conference adopted at its first meeting the Senate language allowing agencies an additional ten days to respond to a request or determine an appeal in unusual circumstances. Pursuant to your suggestion we included language from the Senate version making clear that a court can give an agency additional time to review requested materials in exceptional circumstances where the agency has exercised due diligence but still could not meet the statutory deadlines.

120 CONG. REC. S17,830 (daily ed. Oct. 1, 1974).

18. See 5 U.S.C.A. § 552(a)(6)(B) (West Supp. 1976).

19. If the agency fails to meet the time limits, the person making the request "shall be deemed to have exhausted his administrative remedies with respect to such request." *Id.* § 552(a)(6)(C). He may then bring suit in the appropriate district court to have the agency enjoined from withholding the requested records. *Id.* § 552(a)(2)(B).

20. *Id.* § 552(a)(6)(C).

21. 413 F. Supp. 1285 (D.D.C. 1976).

22. 415 F. Supp. 174 (D.D.C. 1976).

23. It was estimated in *Hayden* that there were 18,000 pages of information on file that were responsive to the plaintiff's request. 413 F. Supp. at 1288. In *Cleaver*, it was estimated that at least 5,800 pages on file were potentially responsive. 415 F. Supp. at 176.

In *Cleaver*, the court looked to the workload the FBI faced generally in complying with FOIA requests, the extent to which the number of requests had risen in recent years, and the delays that had ensued,<sup>24</sup> and concluded that "the backlog with which the Agency is now faced was not predictable or expected; indeed, it is exceptional."<sup>25</sup> On finding that the FBI was exercising "due diligence" in responding to FOIA requests, the court retained jurisdiction of the case and permitted the Bureau additional time to comply.<sup>26</sup>

While the *Hayden* court acknowledged that the FBI was faced with "numerous other FOIA requests and court orders enforcing those requests,"<sup>27</sup> it dismissed this fact as a basis for an "exceptional circumstances" extension. In so doing, the court seemed to rely in part on its belief that "in situations like the present one, where voluminous materials must be processed, the applicable provision" is that relating to "unusual circumstances" and not "exceptional circumstances."<sup>28</sup> The court's conclusion that the Hayden request fell within the 10-day-delay "unusual circumstances" provision was obviously correct as far as it went; that portion of the statute explicitly refers to the need to examine "a voluminous amount of separate and distinct records."<sup>29</sup> Yet this finding should in no way imply that the same facts may not also constitute "exceptional circumstances." It is perhaps unfortunate that both Hayden and Cleaver requested such a great quantity of records, because this obscured the fact that there were two distinct considerations involved: the work required to fill the particular plaintiff's request, and the workload the agency faced generally in complying with all requests. It was this latter factor alone that formed the basis of the *Cleaver* holding.<sup>30</sup>

The conflict between the district courts was resolved in favor of the *Cleaver* approach when the Court of Appeals for the District of Columbia Circuit considered the question six weeks later in *Open America v. Water-*

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24. According to an affidavit, the FBI processed approximately one request per working day in 1973 and experienced no significant delays. In 1975, it averaged 53 requests per workday. 415 F. Supp. at 176.

25. *Id.*

26. *Id.* The court took favorable note of the fact that the FBI had increased its FOIA staff from 8 to 161 in three years. *See id.*

27. 413 F. Supp. at 1288.

28. *Id.* Inexplicably, however, the court granted the FBI approximately 14 weeks from the issuance of the order to comply, rather than ordering immediate compliance. The order, dated May 21, 1976, provided: "That defendants shall, not later than September 1, 1976, release to plaintiff all material responsive to his request for which defendants do not claim an exemption." *Id.* at 1289.

29. 5 U.S.C.A. § 552(a)(6)(B)(i) (West Supp. 1976).

30. The court noted only in passing that Cleaver's request itself required a search of voluminous records. 415 F. Supp. at 176.

gate Special Prosecution Force.<sup>31</sup> Indeed, the court went beyond *Cleaver*. Its language was so broad as to suggest that the existence of "exceptional circumstances" may be *presumed*, at least with regard to FBI requests. As long as the Bureau can show that it is exercising due diligence in processing FOIA requests, it appears that for the foreseeable future those requesting information under the FOIA will have to resort to court action in order to secure compliance anywhere near the statutory time limits.

In *Open America*, a request was made of the FBI, the Department of Justice and the Watergate Special Prosecutor<sup>32</sup> for release of all files relating to the role of then-Acting FBI Director L. Patrick Gray in any aspect of the "Watergate affair."<sup>33</sup> In accord with the *Cleaver* approach, the court did not consider the extent of the work that would be required to comply with the specific request<sup>34</sup> in reaching its determination that there were "exceptional circumstances" which warranted an indefinite time extension. Instead, it looked to the Bureau's overall costs in complying with FOIA requests. According to an FBI affidavit, FOIA compliance would cost the Bureau nearly sixteen times more in fiscal year 1976 than it did in fiscal year 1974, the year the amendments were passed.<sup>35</sup> When compared with a congressional estimate that the additional cost burden generated by the 1974 amendments initially would not exceed \$100,000 per year for all agencies<sup>36</sup>—about one-third the added cost to the FBI alone in 1975—this precipitous rise was seen to constitute an "exceptional circumstance" in and of itself.<sup>37</sup> Upon finding that the Bureau's "first-in, first-out" system of processing FOIA requests and its allocation of manpower to the task satisfied the due diligence requirement,<sup>38</sup> the court was left with the question of whether it could or should expedite the processing of the particular request before it. The court declined to take action to speed up the FBI's handling of the *Open America* request, but the majority of the three-judge panel stated in dicta that "when a plaintiff can show a genuine need and reason for

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31. 547 F.2d 605 (D.C. Cir. 1976).

32. The Watergate Special Prosecutor expressed an intention to justify his refusal to comply with the request, and so was not involved in the appeal. *Id.* at 608 n.7.

33. *Id.* at 608.

34. The court did note that at least 38,000 pages of potentially responsive material on file had been found and that review could not be completed until approximately 10 months after receipt of the request. *Id.* at 612.

35. The cost for fiscal year 1974 was \$160,000. In fiscal year 1975 it rose to \$462,000, and it was estimated that the cost in fiscal year 1976 would be \$2,675,000. *Id.*

36. See H.R. REP. NO. 876, *supra* note 9, at 10.

37. 547 F.2d at 612.

38. Actually, the Bureau's system operated on two "tracks," one for simple requests, the other for more complex, time-consuming matters. On each track, however, requests were processed on a "first-in, first-out" basis, with occasional cases being expedited by a court order or upon some other showing of special need. *Id.* at 612-13, 613 nn.15, 16.

See note 26 *supra* regarding the FBI's allocation of manpower to FOIA matters.

urgency in gaining access to Government records ahead of prior applicants for information," the issuance of an order granting priority to the request would be proper.<sup>39</sup> No particular urgency was seen in the *Open America* request.<sup>40</sup> The majority's view was vigorously disputed by a concurring judge<sup>41</sup> and by another circuit court,<sup>42</sup> both arguing instead for priority based on diligence by the plaintiff in pursuing court remedies.

The majority's approach to the diligence question has since been applied by the District of Columbia District Court in *Mitsubishi Electric Corp. v. Department of Justice*.<sup>43</sup> A defendant in a civil antitrust suit, unable to secure access to Department of Justice records through discovery, sought to have the information released under the FOIA. The request was delayed because of the Justice Department's workload, and the FOIA plaintiff asked the court to compel expedition of its request because of the urgency of its need for the information. The court denied preferential treatment, finding that the need to use the information in collateral litigation did not itself provide sufficient urgency; it was only "a single factor to be considered in determining whether plaintiffs have shown a genuine need for preferential handling of their administrative appeal."<sup>44</sup>

The circumstances in which priority may be granted on the ground of the plaintiff's "urgent need" would seem to be narrow. Nonetheless, as Judge Leventhal pointed out in his concurrence in *Open America*,<sup>45</sup> granting *any* priority on this basis is questionable. The FOIA purports not to focus on the individual making the request; ideally, his identity and purpose should be of no consequence to the agency involved.<sup>46</sup> Judicial action

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39. 547 F.2d at 615-16.

40. The court operated on the assumption that the plaintiff's request was made and the action brought as a test case. See *id.* at 609 n.9.

41. Judge Leventhal, concurring in the holding, suggested that diligence in pursuing judicial relief would be preferable as a standard for assigning priority to certain FOIA requests over others: "We cannot say that diligent litigation is without significance as a rough indicator of priority. A priority continually unfolding on that basis is reasonable enough and does not conflict with the FOIA provision that an applicant is not required to show 'need' to be entitled to relief." *Id.* at 620.

42. In *Exner v. FBI*, 542 F.2d 1121 (9th Cir. 1976), in which Judith Campbell Exner, self-described paramour of President John F. Kennedy, sought release of all FBI files concerning herself, the court cited with approval Judge Leventhal's concurring opinion in *Open America*, see note 41 *supra*, and stated:

We hold the "first in-first out" consideration of demands, based on date of filing with the FBI, ordinarily seems reasonable, and we hold that the filing of suit by a person demanding information can (but does not necessarily) move such petitioner "up the line," *i.e.*, create a preference, particularly if a Federal Court orders it.

542 F.2d at 1123.

43. 39 AD. L.2D 1133 (D.D.C. 1976).

44. *Id.* at 1141.

45. See note 41 *supra*.

46. See notes 83-84 *infra* and accompanying text.

granting priority on the basis of need thus contravenes a basic premise of the statute. The priority method proposed in the concurrence—a determination based on plaintiff's diligence—would not seem to be subject to this criticism. In addition, the FOIA relies largely on litigation for its enforcement if an agency chooses to withhold information. If the result of such litigation were to force new agencies to respond immediately only to the FOIA requests of plaintiffs who convince the courts of their "genuine need" while permitting them to leave all other requests behind a huge backlog, interested parties might often choose not to litigate and many agency abuses therefore would go uncorrected.

The priority question aside, *Open America* represents a broad judicial capitulation to the budgetary exigencies of processing FOIA requests. At least for the immediate future, a showing by an agency, similar to that made by the FBI, that FOIA requests and the cost of processing them have increased substantially may be all that is required for an effective suspension of the statute's time requirements. Regardless of which method of assigning priority to claims is used, the nature of the FOIA thus could be fundamentally altered. Securing disclosure of information from agencies ultimately may become a court-administered function. It seems clear that for the short term, however, the *Open America* solution is the only realistic one available; the agencies operate with a finite number of dollars and employees that can reasonably be assigned to implementing the FOIA. That this is only a short-term solution, though, must be emphasized. As Judge Leventhal's *Open America* concurrence noted, whether in the future an agency will be able to invoke the "exceptional circumstances" provision because of workload pressures ought to depend on whether it has used "due diligence" in taking steps to deal with the problem.<sup>47</sup> But because the problem has just recently surfaced and because the effects of the 1974 amendments are only now beginning to be felt, it remains to be seen how short the "short term" will be. Whether effective steps can be taken will depend on whether the number of FOIA requests, or at least the rate of their increase, stabilizes, and how fast the agencies are able to react.

## B. Policy Delays

Related to the problem of workload delays dealt with in *Open America* is the question of whether an agency may delay the release of records for

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47. Judge Leventhal wrote:

An effective demonstration of due diligence might . . . depend on whether the agency has applied for additional funds to meet the unexpected upsurge in requests, whether it has been or is now willing to allow partial release of documents rather than conditioning release on complete processing of the request, and whether it has or will defer considering any voluntary actions of disclosure which are plainly outside the scope of FOIA, in the interest of expediting disclosure of material expressly covered by the Act.

547 F.2d at 618 (Leventhal, J., concurring).

policy reasons when it does not claim that the records are exempt from disclosure under the FOIA. Two cases decided in 1976, *Aviation Consumer Action Project v. CAB*<sup>48</sup> and *Merrill v. Federal Open Market Committee*,<sup>49</sup> held that it may not.

At issue here is not whether the agencies have complied with the ten- and twenty-day limits for responding to FOIA requests, but rather whether the "affirmative disclosure" provisions of the Act have been met. The FOIA provides that each agency must "currently publish" in the Federal Register certain specified statements of general organization, procedure and policy.<sup>50</sup> It must make available for public inspection all final opinions in the adjudication of cases, statements of policy not published in the Federal Register, and staff manuals that affect the public, unless they are "promptly published" and offered for sale.<sup>51</sup> And it must make "promptly available" to any person requesting them all other records not otherwise exempted.<sup>52</sup> Because the statute nowhere defines the terms "currently" or "promptly," a problem arose concerning whether the presence of those words precluded short, justifiable delays in disclosure.

*Aviation Consumer Action Project (ACAP)* concerned an FOIA request for a copy of a Civil Aeronautics Board decision relating to the certification of air carriers. The relevant statute provides that such decisions are subject to review by the President and may not be published until they are submitted to him.<sup>53</sup> By Executive Order,<sup>54</sup> the President required the CAB to delay disclosure of decisions for five days after they were submitted to him in order to allow time for a determination of whether they were to be classified.<sup>55</sup> The CAB in turn promulgated a regulation complying with the Executive Order and going one step further: it provided that all affected decisions would be made public "as promptly as possible but no later than

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48. 418 F. Supp. 634 (D.D.C. 1976).

49. 413 F. Supp. 494 (D.D.C. 1976).

50. 5 U.S.C. § 552(a)(1) (1970).

51. 5 U.S.C.A. § 552(a)(2) (West Supp. 1976).

52. *Id.* § 552(a)(3).

53. 49 U.S.C. § 1461(a) (1970).

54. Exec. Order No. 11,920, 41 Fed. Reg. 23,665 (1976).

55. Such decisions may be classified pursuant to Exec. Order No. 11,652, 3 C.F.R. § 339 (1974).

The delay in disclosure of the decisions which the Executive Order would necessitate was seen to be justified by 49 U.S.C. § 1504 (1970), which provides that "any person" may object to the disclosure of CAB decisions, and that the CAB will withhold the decision if it finds that "a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public." Although the President had not invoked section 1504 as a basis for the Executive Order, the *ACAP* court found that he could have, and "[i]t would be purposeless to require both the President and the Board to re-promulgate for cosmetic purposes actions which clearly have a basis in law. . . ." 418 F. Supp. at 637.

the tenth working day following submission of such decision to the President."<sup>56</sup> The regulation envisioned that the release of the decisions would be delayed so as to permit the President to make his determination and the CAB "thereafter to print and process its decision for publication."<sup>57</sup> By this, the CAB meant that it would "print sufficient copies of its decision so that it may be distributed simultaneously to all persons interested in the decision."<sup>58</sup> The justification for this distribution plan was to minimize the possibility that "those who become aware of the decision before others 'through fortuity or sophistication' will be given unfair advantage over others in the stock or other financial markets."<sup>59</sup>

In determining whether this regulation complied with the FOIA's requirement that requested records be made "promptly available,"<sup>60</sup> the court construed the statute quite strictly:

The FOIA specifically states that a requested record not otherwise exempt shall be made promptly available "to any person"; it does not state that a requestor need wait until the agency determines that enough copies are available to satisfy all prospective requestors beside himself. Nor does it state that a record is not releasable until it has been printed and processed for publication on a mass distribution basis.<sup>61</sup>

While the records would not have to be made available *immediately* after the President's determination, the court held that they could not be withheld for the purpose of a large-scale printing. The court suggested that to comply with the "promptly available" language of the FOIA, the CAB should make the records available "for public inspection and copying at a public place within a reasonable time necessary to prepare a releasable copy" and that requestors be referred to that copy "until the decision is printed and processed for publication on a mass distribution basis."<sup>62</sup>

In *Merrill*, a Federal Open Market Committee (FOMC) regulation provided that the release of domestic policy directives relating to the operation of the Federal Reserve banks and other materials was to be delayed for

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56. 41 Fed. Reg. 28,946 (1976) (to be codified in 14 C.F.R. § 339.101(b)).

57. 41 Fed. Reg. at 28,946-47.

58. 418 F. Supp. at 638.

59. *Id.*

60. 5 U.S.C.A. § 552(a)(3) (West Supp. 1976).

61. 418 F. Supp. at 638. The court also dismissed the argument that the 10-day delay was justified by 5 U.S.C.A. § 552(a)(6)(A)(i) (West Supp. 1976), which permits 10 days for a determination of whether to comply with an FOIA request. In this litigation, it was found that decisions made pursuant to 49 U.S.C. § 1461 (1970), see note 53 *supra* and accompanying text, are not exempt from the FOIA. Therefore, the court concluded that *no time* was required for such a determination. The only issue was whether the delay required by the regulation violated the statute's command to make records "promptly available." 418 F. Supp. at 637-37.

62. 418 F. Supp. at 639.

forty-five days after their adoption.<sup>63</sup> Despite the FOMC's justifications for the delay, which involved a desire to reduce the possibility of disruptions to monetary and securities markets that could be caused by premature disclosure,<sup>64</sup> the court found that if the material was not otherwise exempt from the FOIA, the forty-five-day delay was unwarranted:

The Court is not unmindful of the repeated insistence by the [FOMC] . . . that such disclosure would be injurious to its function and the nation's monetary and economic status. But the Freedom of Information Act requires prompt disclosure of non-exempt materials . . . . If it is necessary for the FOMC to carry out its monetary policy in secrecy then that determination must be made by Congress and not by this Court.<sup>65</sup>

It is clear that the *ACAP* and *Merrill* holdings are correct. They are in line with the legislative intent that the affirmative disclosure provisions of the FOIA be read broadly and that all official information which would otherwise be "shielded unnecessarily" be disclosed.<sup>66</sup> Moreover, the holdings comport with the view of the Supreme Court that the FOIA's enumerated exemptions<sup>67</sup> are the exclusive means of withholding information under the Act.<sup>68</sup> Indeed, it would be difficult to justify a contrary holding in either case. It may be, however, that in addition to the force of their specific holdings, these cases have a broader significance. They stand in sharp contrast to the *Open America* situation, in which the time requirements for disclosure effectively yielded to workload demands.<sup>69</sup> Thus, they may serve as a counterbalance to *Open America*, helping to maintain the integrity of the FOIA's purpose of prompt disclosure in the face of powerful economic and administrative pressures.<sup>70</sup>

## II. PRIVATE FILES EXEMPTION

One of the nine specific exemptions from disclosure contained in the FOIA, Exemption 6, provides that "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" need not be released.<sup>71</sup> This exemption was the focus

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63. 12 C.F.R. § 271.5 (1976). The time period had been reduced from 90 to 45 days in March, 1975. See 40 Fed. Reg. 13,204 (1975).

64. 12 C.F.R. § 271.5(b) (1976).

65. 413 F. Supp. at 506.

66. S. REP. NO. 813, 89th Cong., 2d Sess. 3 (1965).

67. 5 U.S.C.A. § 552(b) (West Supp. 1976).

68. See, e.g., *EPA v. Mink*, 410 U.S. 73, 79 (1973).

69. See notes 31-47 *supra* and accompanying text.

70. See H.R. REP. NO. 876, *supra* note 9, at 6.

71. 5 U.S.C. § 552(b)(6) (1970).

of the Supreme Court's 1976 decision in *Department of Air Force v. Rose*.<sup>72</sup> In grappling with the language of the exemption, the Court was faced with the problems of how to determine whether the release of information would constitute an invasion of privacy, and whether such a showing need be made for personnel and medical files or only for files "similar" to them.

Lower courts interpreting Exemption 6 had reached conflicting decisions as to whether it required the privacy interests of affected individuals to be balanced against the interest in disclosure, or whether the degree of the invasion of personal privacy would be measured according to an absolute standard, without regard to the desirability of disclosure.<sup>73</sup> Furthermore, if there was to be a balancing test, the question arose whether the factor to be weighed against privacy should be the need of the individual making the request for the information or the interest of the public generally in having access to the information.<sup>74</sup> In *Rose*, the Supreme Court answered the former question definitively, holding that a balancing test indeed would be applied. However, the Court's treatment of the issues raised by the latter question provides no clear guidance for resolution of the matter in subsequent litigations.

*Rose* involved an FOIA request by several law review editors for copies of case summaries of honor and ethics code hearings at the United States Air Force Academy. After the request was denied by the Academy,<sup>75</sup> suit was brought under the FOIA for disclosure.<sup>76</sup> A five-member majority of the Supreme Court held that the case summaries were "similar" to personnel files, and thus fell within the scope of the exemption. Neverthe-

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72. 425 U.S. 352 (1976).

73. In *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971), a balancing test was applied: "Exemption (6) requires a court reviewing the matter *de novo* to balance the right of privacy of affected individuals against the right of the public to be informed." *Id.* at 674. On the other hand, in *Robles v. EPA*, 484 F.2d 843, 848 (4th Cir. 1973), the court held that "the right to disclosure under the Act is not to be resolved by a balancing of equities or a weighing of need or even benefit. The only ground for denial of disclosure in this situation is that the disclosure would represent a 'clearly unwarranted invasion of personal privacy.'" *See FOIA Developments—1974*, at 445-49.

74. *See FOIA Developments—1974*, at 448.

75. In addition to relying on Exemption 6, the Academy also based its refusal on Exemption 2, relating to "internal personnel rules and practices." 5 U.S.C. § 552(b)(2) (1970). The *Rose* Court's treatment of Exemption 2 is discussed in text accompanying notes 90-106 *infra*.

76. The District Court for the Southern District of New York, in an unreported decision, granted a motion for summary judgment by the Air Force Academy, holding that although the case summaries did not fall within Exemption 6, they were covered by Exemption 2. *See Department of Air Force v. Rose*, 425 U.S. at 355-57. The Second Circuit Court of Appeals reversed, holding that the summaries did not fall within Exemption 2, but it remanded the case to the district court for *in camera* inspection of the case summaries to determine whether Exemption 6 would apply. *Rose v. Department of Air Force*, 495 F.2d 261 (2d Cir. 1974).

less, the Court remanded the case with an order that the files were to be released if the district court, after *in camera* review of the summaries,<sup>77</sup> determined that it was possible to edit the files so as to eliminate identifying references and protect the privacy interests of the affected cadets. In the majority's view, a "workable compromise" would have to be struck "between individual rights 'and the preservation of public rights to Government information.'" <sup>78</sup>

Thus, a balancing test was employed by the Court.<sup>79</sup> But it is not at all clear what was being balanced against the cadets' right to privacy. The language the Court used— "public rights to Government information"<sup>80</sup>—implies that what was being assessed was the general desirability of public disclosure of the information, rather than the merits of the use to which the particular plaintiff proposed to put the material. Such an interpretation would comport with that applied by the lower court.<sup>81</sup> However, the point was not developed by the Court and it was called into question by the dissenting opinion of Chief Justice Burger. Without distinguishing or challenging the language of the majority, the Chief Justice argued that the potential for injury to innocent cadets resulting from disclosure of the summaries, when balanced against the interest of the *individual* plaintiffs in the case, necessitated a finding that release of the reports would constitute a "clearly unwarranted invasion of personal privacy":

[A]ny . . . attempt to "sanitize" these summaries would still leave the very distinct possibility that the individual would still be identifiable and thereby injured . . . [I]t is indeed difficult to attribute to Congress a willingness to subject an individual citizen to the risk of possible severe damage to his reputation simply to permit law students to invade individual privacy to prepare a law journal article.<sup>82</sup>

In view of the language of the FOIA, which provides that non-exempt requested materials must be made available "to any person,"<sup>83</sup> and its legislative history, which indicates that disclosure must be made without regard to the particular need for the information of the person making the request,<sup>84</sup> it would appear that any direct emphasis on the plaintiff's purpose

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77. See 5 U.S.C.A. § 552(a)(4)(B) (West Supp. 1976).

78. 425 U.S. at 381 (quoting the court of appeals decision, 495 F.2d 261, 269 (2d Cir. 1974)).

79. See *Campbell v. United States Civil Service Comm'n*, 539 F.2d 58, 61-62 (10th Cir. 1976) ("The Supreme Court's decision [in *Rose*]. . . express[ed] a policy which favored disclosure and also it carefully balanced the competing interests").

80. 425 U.S. at 381.

81. See *Rose v. Department of Air Force*, 495 F.2d 261, 270 (2d Cir. 1974), *aff'd*, 425 U.S. 352 (1976).

82. 425 U.S. at 384 (Burger, C.J., dissenting).

83. 5 U.S.C.A. § 552(a)(3) (West Supp. 1976).

84. "In place of the negative approach of the present law (5 U.S.C. § 1002) which permits

in making the request, such as was proposed in the Chief Justice's dissent, would be improper. This is not to say, however, that the plaintiff's purpose cannot legitimately play a role in a court's balancing of privacy interests against interests of disclosure in Exemption 6 cases. Surely a court's perception of the depth of a particular plaintiff's need for the information is one element to be considered in determining the level of public interest to be served by disclosure. While there may be cases in which there is a strong public need for the materials sought while the individual plaintiff's purpose in securing them is frivolous, in many other cases the plaintiff's need may serve as a rough indicator of the public's need.

The second problem dealt with by the *Rose* Court in interpreting Exemption 6 involved a grammatical construction of the statute. The exemption refers to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."<sup>85</sup> It is obvious from this language that "similar" files are only exempted if their disclosure would invade personal privacy. The question is whether personnel and medical files are similarly subject to this qualification or whether the second "and" in the provision was meant to separate two independent clauses, so that personnel and medical files are to be exempted without qualification.

The issue was raised only in dictum in *Rose* because of the Court's finding that the case summaries were "similar" to personnel files. Nevertheless, the Court considered the question at length. Its reading of the legislative history of the FOIA, which did not distinguish among personnel, medical and other files in discussing the element of invasion of privacy,<sup>86</sup> and its interpretation of the congressional attitude evinced by the 1974 amendments, which provided means for courts to evaluate the impact of

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only persons properly and directly concerned to have access to official records if the records are not held confidential for good cause found, . . . [the FOIA] establishes the basic principle of a public records law by making the records available to any person." H.R. REP. NO. 1497, 89th Cong., 2d Sess. 8 (1966).

85. 5 U.S.C. § 552(b)(6) (1970).

86. The Court read the House report ("The limitation of a 'clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual"), H.R. REP. NO. 1497, *supra* note 84, at 11, and the Senate report ("At the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records"), S. REP. NO. 813, *supra* note 66, at 9, as implying that "Congress did not itself strike the balance as to 'personnel files' and confine the courts to striking the balance only as to 'similar files.' To the contrary, Congress enunciated a single policy to be enforced in both cases by the courts, 'that will involve a balancing' of the private and public interests." 425 U.S. at 373.

disclosure of specific records without relying on "labels,"<sup>87</sup> led the majority to conclude that no blanket exemption was intended for personnel and medical files.<sup>88</sup> Although Justice Blackmun, in dissent, objected to this interpretation,<sup>89</sup> the strength of the majority's language, albeit in dictum, would indicate that this question as to the interpretation of Exemption 6 is now largely resolved.

### III. PERSONNEL RULES EXEMPTION

In addition to considering whether Exemption 6 applied to the case summaries of the Air Force Academy's honor and ethics code hearings,<sup>90</sup> the Supreme Court in *Department of Air Force v. Rose*<sup>91</sup> was also faced with the contention that the summaries fell within Exemption 2, relating to "internal personnel rules and practices."<sup>92</sup> The Court rejected this contention, resolving what formerly had been a point of controversy among lower courts.<sup>93</sup> It construed Exemption 2 narrowly, distinguishing between trivial and substantive records, and concluding that except where disclosure of the records would lead to circumvention of agency rules,<sup>94</sup> the exemption covered only "matter in which the public could not reasonably be expected to have an interest."<sup>95</sup>

The uncertainty as to the proper interpretation of the exemption was caused by a conflict between the Senate and House reports on the statute. In its brief treatment of the exemption, the Senate report gave examples of areas where it would apply: ". . . use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like."<sup>96</sup> The House report provided examples reflecting a far broader range for the

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87. The Court cited the addition in 5 U.S.C.A. § 552(b) (West Supp. 1976) of a provision requiring that any "segregable portion" of a record be released after all exempt portions are deleted, and the provision in 5 U.S.C.A. § 552(a)(4)(B) (West Supp. 1976) requiring that, after de novo review, the district court is to determine whether the records "or any part thereof" shall be withheld, as evidence of a congressional intent that agencies and courts look "beneath the label on a file" to determine whether it is to be exempt. 425 U.S. at 374.

88. This is contrary to the conclusion reached by at least one circuit. *Robles v. EPA*, 484 F.2d 843, 846 (4th Cir. 1973).

89. In finding that the qualifying phrase should apply only to "similar files," Justice Blackmun relied on *Robles*, see notes 73 & 88 *supra*, his reading of the language of the statute ("The exemption as to personnel files and as to medical files is clear and unembellished." 425 U.S. at 387 (Blackmun, J., dissenting)), and his belief that no qualification ought to be attached to the exemption of medical files (" . . . almost the essence of ultimate privacy." *Id.*).

90. See notes 71-89 *supra* and accompanying text.

91. 425 U.S. 352 (1976).

92. 5 U.S.C. § 552(b)(2) (1970).

93. See Note, *Developments Under the Freedom of Information Act—1972*, *supra* note 2, at 187-89.

94. See notes 105-106 *infra* and accompanying text.

95. 425 U.S. at 369-70.

96. S. REP. NO. 813, *supra* note 66, at 8.

exemption: "operating rules, guidelines, and manuals of procedure for Government investigators or examiners."<sup>97</sup>

Early decisions applying the exemption generally considered the Senate report to be the more correct expression of the congressional purpose.<sup>98</sup> This interpretation received support in the 1975 decision of the District of Columbia Circuit Court of Appeals in *Vaughn v. Rosen*.<sup>99</sup> After a lengthy discussion of the two reports, the *Vaughn* court adopted the narrow Senate construction, holding that reports compiled by the Civil Service Commission evaluating the performance of the agencies' supervisors were not exempt from disclosure under Exemption 2 because they did not pertain to "house-keeping" matters.<sup>100</sup> *Vaughn's* formulation of the exemption, delineating "between minor or trivial matters and those more substantial matters which might be the subject of legitimate public interest,"<sup>101</sup> was supported by three considerations: first, an indication that Congress was dissatisfied with a corresponding provision in the disclosure statute that preceded the FOIA, which was as broad and as vague as the House interpretation would make Exemption 2;<sup>102</sup> second, the rule of construction that the FOIA exemptions are to be read narrowly;<sup>103</sup> and third, the fact that the Senate report, but not the House report, was before both houses of Congress prior to their votes on the FOIA.<sup>104</sup>

The Supreme Court in *Rose* adopted all of these rationales, and added a fourth that seems likely to result in the creation of a separate class of Exemption 2 cases. The Court noted that the cases adopting the broad House

97. H.R. REP. NO. 1497, *supra* note 84, at 10.

98. See *Stokes v. Brennan*, 476 F.2d 699, 702-03 (5th Cir. 1973); *Hawkes v. IRS*, 467 F.2d 787, 796-97 (6th Cir. 1972); *Stern v. Richardson*, 367 F. Supp. 1316, 1320 (D.D.C. 1973); *Stokes v. Hodgson*, 347 F. Supp. 1371, 1373-75 (N.D. Ga. 1972); *Benson v. GSA*, 289 F. Supp. 590, 593-95 (W.D. Wash. 1968), *aff'd on other grounds*, 415 F.2d 878 (9th Cir. 1969). See also K. DAVIS, ADMINISTRATIVE LAW TEXT § 3A.17 (1972) ("The view of the Senate committee is in accord with the statutory words"). Cf. *Cuneo v. Laird*, 338 F. Supp. 504 (D.D.C. 1972), *rev'd on other grounds sub nom.* *Cuneo v. Schlesinger*, 484 F.2d 1086 (D.C. Cir. 1973).

99. 523 F.2d 1136 (D.C. Cir. 1975).

100. *Id.* at 1143. The *Vaughn* court also held that the reports were not exempt under Exemption 5, relating to "inter-agency or intra-agency memorandums or letters," 5 U.S.C. § 552(b) (5) (1970). For a thorough discussion of *Vaughn's* application of this exemption and of the exemption generally, see *FOIA Developments—1975*, at 382-95.

101. 523 F.2d at 1142.

102. Section 3 of the Administrative Procedure Act, 5 U.S.C. § 1002 (1964), exempted "any matter relating solely to the internal management of an agency. . . ." The *Vaughn* court noted that in discussing Exemption 2 to the FOIA, the chairman of the House subcommittee considering the bill said that it would replace the old statute with "workable standards . . . [containing] specific definitions of information which may be withheld." 112 CONG. REC. 13,642 (1966). It was the court's view that only the Senate interpretation would provide "certainty, consistency and clarity." 523 F.2d at 1142.

103. 523 F.2d at 1142 (citing *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971)).

104. 523 F.2d at 1142; see *Getman 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).

interpretation had done so "only where necessary to prevent circumvention of agency regulations that might result from disclosure to the subjects of regulation of the procedural manuals and guidelines used by the agency in discharging its regulatory functions."<sup>105</sup> In *Rose*, of course, no such danger existed. Knowledge of the case summaries would not aid in avoiding regulations, but rather would result in greater adherence to them by the cadets. Accordingly, the Court specifically excluded from its discussion of Exemption 2 those cases in which the disclosure of records could aid in the circumvention of regulations.<sup>106</sup> Although the breadth of the exemption in such situations will have to be determined in the future, *Rose* clearly indicates that under certain circumstances Exemption 2 will not be limited to "house-keeping" matters.

#### IV. INVESTIGATORY RECORDS EXEMPTION

Of the two exemptions extensively amended in 1974,<sup>107</sup> only Exemption 7, which excludes from disclosure certain investigatory records compiled for law enforcement purposes,<sup>108</sup> received judicial scrutiny in 1976. As amended, the exemption covers six specified sub-classes of investigatory records.<sup>109</sup> Two of those have been the subject of significant interpretation: 7(A), covering records the disclosure of which would "interfere with enforcement proceedings";<sup>110</sup> and 7(D), covering records acquired from confidential sources.<sup>111</sup>

##### A. *Interference with Enforcement Proceedings.*

The question that has arisen in the interpretation and application of Exemption 7(A) concerns the extent to which specific harm to an enforcement proceeding must be shown in order to justify nondisclosure. The forum for the debate has been National Labor Relations Board unfair labor practice

105. 425 U.S. at 364; see *Tietze v. Richardson*, 342 F. Supp. 610 (S.D. Tex. 1972); *Cuneo v. Laird*, 338 F. Supp. 504 (D.D.C. 1972), *rev'd on other grounds sub nom. Cuneo v. Schlesinger*, 484 F.2d 1086 (D.C. Cir. 1973); *City of Concord v. Ambrose*, 333 F. Supp. 958 (N.D. Cal. 1971).

106. 425 U.S. at 369 ("In sum, we think that, at least where the situation is not one where disclosure may risk circumvention of agency regulation, Exemption 2 is not applicable to matters subject to such a genuine and significant public interest").

107. In addition to Exemption 7, Exemption 1, relating to classified documents, was amended. 5 U.S.C.A. § 552(b)(1) (West Supp. 1976).

108. *Id.* § 552(b)(7).

109. Coverage is limited to those investigatory records the disclosure of which would:

- (A) interfere with enforcement proceedings,
- (B) impede a fair trial,
- (C) invade personal privacy,
- (D) disclose a confidential source,
- (E) disclose investigative techniques, or
- (F) endanger enforcement personnel.

*Id.*

110. *Id.* § 552(b)(7)(A).

111. *Id.* § 552(b)(7)(D).

proceedings. The NLRB's restrictive pretrial discovery procedures permit the taking of depositions only on a showing of "good cause" and not just as a means of aiding counsel;<sup>112</sup> additionally, the release of a witness' affidavit as a matter of right is allowed only after the witness has testified on the subject of the affidavit.<sup>113</sup> Despite a statement by the Supreme Court that "[d]iscovery for litigation purposes is not an expressly indicated purpose" of the FOIA,<sup>114</sup> litigants before the NLRB have attempted to use the Act to fill the gaps created by the Board's restrictive discovery rules.<sup>115</sup> The NLRB, in turn, has invoked Exemption 7(A) as a defense.

There existed a split of authority among early decisions applying Exemption 7(A): some held that specific harm to enforcement proceedings would have to be shown in each case;<sup>116</sup> others held that records compiled for use in pending NLRB proceedings were per se nondisclosable and that no specific harm need be shown.<sup>117</sup> But with the 1976 decision of the Second Circuit in *Title Guarantee Co. v. NLRB*,<sup>118</sup> a consensus seems to have emerged in support of the latter position.<sup>119</sup>

112. 29 C.F.R. § 102.30 (1976); see *NLRB v. Interboro Contractors, Inc.*, 432 F.2d 854, 858 (2d Cir. 1970): "The Board . . . has construed [§ 102.30] . . . as requiring more than a showing that the taking of depositions would aid counsel in the preparation of his case for trial."

"Good cause" ordinarily involves a showing that "there is reason to believe that the witness whose deposition is sought may be unavailable at the hearing." *Id.* at 857.

113. 29 C.F.R. § 102.118(b)(1) (1976).

114. *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 24 (1974). See also *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1974). This, of course, does not imply that discovery is an illicit purpose for invoking the FOIA. It simply does not give the plaintiff a preferential status.

115. For this procedure to be effective, in most cases the district court hearing the FOIA case would have to have the power to enjoin the NLRB proceedings from continuing while the FOIA request was pending. Whether such power exists has been the subject of debate. See discussion at notes 162-90 *infra* and accompanying text.

116. See *Goodfriend Western Corp. v. Fuchs*, 411 F. Supp. 454 (D. Mass.), *rev'd*, 535 F.2d 145 (1st Cir. 1976); *Maremont Corp. v. NLRB*, 38 Ad. L.2d 1010 (W.D. Okla. 1976); *Cessna Aircraft Co. v. NLRB*, 405 F. Supp. 1042 (D. Kan. 1975), *rev'd*, 542 F.2d 834 (10th Cir. 1976).

117. See *Capital Cities Communications, Inc. v. NLRB*, 409 F. Supp. 971 (N.D. Cal. 1976); *Harvey's Wagon Wheel, Inc. v. NLRB*, 38 Ad. L.2d 276 (N.D. Cal. 1976); *Mylan Pharmaceuticals, Inc. v. NLRB*, 407 F. Supp. 1124 (W.D. Pa. 1976); *Climax Molybdenum Co. v. NLRB*, 407 F. Supp. 208 (D. Colo. 1975), *aff'd*, 539 F.2d 63 (10th Cir. 1976). See generally *FOIA Developments—1975*, at 399-408.

118. 534 F.2d 484 (2d Cir. 1976).

119. In addition to the line of cases that had been in accord with the *Title Guarantee* decision previously, see note 117 *supra*, at least three courts of appeals and six district courts have cited the *Title Guarantee* opinion with approval and have joined in its interpretation of Exemption 7(A). See *Cessna Aircraft Co. v. NLRB*, 542 F.2d 834 (10th Cir. 1976); *Roger J. Au & Son, Inc. v. NLRB*, 538 F.2d 80 (3d Cir. 1976); *Goodfriend Western Corp. v. Fuchs*, 535 F.2d 145 (1st Cir. 1976); *ITT Continental Baking Co. v. FTC*, 40 Ad. L.2d 183 (D.D.C. 1976); *Chrysler Corp. v. NLRB*, 39 Ad. L.2d 132 (E.D. Mich. 1976); *E.L. Rice & Co. v. Nash*, 39 Ad. L.2d 141 (E.D. Mich. 1976); *Pacific Photo Type v. NLRB*, 39 Ad. L.2d 43 (D. Haw. 1976); *Marathon LeTourneau Co. v. NLRB*, 414 F. Supp. 1074 (S.D. Miss. 1976); *Electri-Flex Co. v. NLRB*, 412 F. Supp. 698 (N.D. Ill. 1976); *NLRB v. Biophysics Systems, Inc.*, 39 Ad. L.2d 704 (S.D.N.Y. 1976).

In *Title Guarantee*, the NLRB had taken written statements and affidavits from witnesses pursuant to a complaint against the company alleging unfair labor practices in violation of the National Labor Relations Act.<sup>120</sup> The company requested copies of the witnesses' statements under the FOIA, but the request was denied.<sup>121</sup> Finding that "the specific enforcement proceeding would not be harmed" by disclosure, the district court determined that Exemption 7(A) was inapplicable, ordered disclosure and enjoined the NLRB proceeding until the order was complied with.<sup>122</sup> On appeal, the Second Circuit reversed. The appellate court found that "if statements obtained by the NLRB from employees, or their representatives, in connection with unfair labor practice proceedings against an employer were required to be disclosed, interference with the proceedings could well result" in two ways. First, the employer could use the information to "frustrate the proceedings or construct defenses" which would inhibit the prosecution. Second, affiants and deponents "who are interviewed may be reluctant, for fear of employer displeasure, to have it known that they have given information. . . , or union officials might not want to volunteer information for fear of compromising the union's position in negotiations."<sup>123</sup> For these reasons, the court concluded that "statements of employees, and their representatives, obtained in connection with unfair labor practice enforcement proceedings, are not subject to disclosure as a result of Exemption 7(A)."<sup>124</sup> In such cases, no specific harm—either to the proceeding for which the information was gathered or to subsequent proceedings—would have to be proven; the harm is presumed.<sup>125</sup>

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120. See 29 U.S.C. § 158(a)(1), (3), (5) (1970).

121. 534 F.2d at 486.

122. 407 F. Supp. 498, 505-06 (S.D.N.Y. 1975).

123. 534 F.2d at 491.

124. *Id.* at 492.

125. One dispute that has emerged among the courts attempting to apply *Title Guarantee's* holding is over the issue of whether statements supplied to the NLRB by affiants who are already scheduled to testify (and which will thus become available to opposing litigants in the course of the proceedings, see 29 C.F. R. § 102.118(b)(1) (1976)) are covered by Exemption 7(A). In *Robbin's Tire & Rubber Co. v. NLRB*, 39 Ad. L.2d 248 (N.D. Ala. 1976), the court held that they were not. It was the court's finding that the "Board has not demonstrated how the delivery several days prior to the scheduled hearing of routine statements or affidavits will interfere with enforcement proceedings of the Board." *Id.* at 252. However, in identical circumstances, the Court of Appeals for the First Circuit in *Goodfriend Western Corp. v. Fuchs*, 535 F.2d 145 (1st Cir. 1976), correctly interpreted the language of the *Title Guarantee* opinion and found that it was not distinguishable:

While it may well be that the circumstances minimize the possible interference with the pending proceedings, the present order is nonetheless controlled by the reasoning in *Title Guarantee*. Even in this case we cannot rule out all possibility that the company may 'be able to use disclosure to learn the Board's case in advance and frustrate the proceedings.'

*Id.* at 147.

The *Title Guarantee* court expressly limited its holding to NLRB cases where the materials sought were compiled for use in an investigation that was still pending at the time the FOIA request was made.<sup>126</sup> It was necessarily limited to NLRB cases because the motivating force behind the court's interpretation of the statute was its conclusion that the FOIA was not intended to alter the "carefully arrived at limitations and procedures for discovery in unfair labor practice proceedings."<sup>127</sup> It may indeed be, as the court found, that a contrary holding, one in accord with the lower court's restrictive reading of Exemption 7(A),<sup>128</sup> would change the nature of NLRB discovery practices. But in protecting the traditional discovery procedures, the court in *Title Guarantee* appears to have compromised its fidelity to the legislative history of the exemption. While the court admitted that the plaintiff's argument in support of the district court's holding was "not without force,"<sup>129</sup> and that it was "almost persuaded" by the plaintiff's reasoning,<sup>130</sup> the court found the legislative history of the exemption to be unclear.<sup>131</sup> In debate on the amendment, however, its sponsor, Senator Philip A. Hart, had sought to clarify the circumstances under which Exemption 7(A) could be invoked:

This would apply wherever the Government's case in court—a concrete prospective law enforcement proceeding—would be harmed by the premature release of evidence or information not in the possession of known or potential defendants. This would apply also where the agency could show that the disclosure of the information would substantially harm such proceedings by impeding any necessary investigation before the proceeding. In determining whether or not the information to be released will interfere with a law enforcement proceeding it is only relevant to make such determination in the context of the particular enforcement proceeding.<sup>132</sup>

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126. "We feel it unnecessary to make the broad determination that any investigative information obtained in connection with a pending enforcement proceeding is per se nondisclosable . . . [W]e do not intend our comments to apply broadly to administrative contexts other than unfair labor practice enforcement proceedings before the NLRB." 534 F.2d at 491-92. See also *Amerace Corp. v. NLRB*, 39 Ad. L.2d 566 (W.D. Tenn. 1976) (disclosure of documents used at unfair labor practice hearing *after* hearing has taken place).

127. 534 F.2d. at 492. The Second Circuit added:

We cannot envisage that Congress intended to overrule the line of cases dealing with labor board discovery in pending enforcement proceedings by virtue of a back-door amendment to the FOIA when it could very easily have done so by direct amendment to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), or by a blanket enactment pertaining to discovery in pending administrative enforcement proceedings.

*Id.* at 491-92. See notes 112-113 *supra* and accompanying text.

128. See text accompanying note 122 *supra*.

129. 534 F.2d at 491.

130. *Id.* at 492.

131. *Id.* at 491.

132. 120 CONG. REC. S9330 (daily ed. May 30, 1974).

Surely this explanation suggests that Congress envisioned that use of Exemption 7(A) would require some demonstration of specific harm to an enforcement proceeding. Moreover, as one commentator has pointed out, there are two further problems with the *Title Guarantee* result.<sup>133</sup> First, the Supreme Court has read the 1974 amendments to Exemption 7 as indicating "that Congress disapproves of those cases . . . which relieve the Government of the obligation to show that the disclosure of a particular investigatory file would contravene the purposes of Exemption 7."<sup>134</sup> Second, the Act specifically provides that the district courts, upon complaint by an FOIA plaintiff, "shall determine the matter de novo, . . . and the burden is on the agency to sustain its action" under the exemptions.<sup>135</sup> Both of these factors militate against giving conclusive effect to an NLRB determination that records compiled for pending proceedings are within Exemption 7(A). Furthermore, the rule of construction enunciated by the Supreme Court, that the exemptions to the FOIA are to be interpreted narrowly,<sup>136</sup> would seem to mandate a result contrary to the *Title Guarantee* holding.

It remains to be seen whether the *Title Guarantee* interpretation of Exemption 7(A) will find applicability in contexts other than NLRB proceedings.<sup>137</sup> It is of course possible that it will. But without the peculiar justification provided by the NLRB discovery rules, which the *Title Guarantee* court acknowledged was strong enough to overcome a reasonably compelling argument to the contrary,<sup>138</sup> it would appear that such an interpretation would be in error.

## B. Confidential Sources

The second facet of the investigatory records exemption to be given significant judicial attention in 1976—Exemption 7(D), protecting the identity of confidential sources<sup>139</sup>—appears to be receiving a very narrow read-

133. *FOIA Developments—1975*, at 406.

134. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 164 (1975).

Before 1974, Exemption 7 covered "investigatory 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). In limiting the exemption's scope to the six specified sub-classes of investigatory files, the 1974 amendments sought to "clarify Congressional intent disapproving of certain court interpretations which have tended to expand the scope of agency authority to withhold" information under Exemption 7. H.R. CONF. REP. NO. 1380, 93d Cong., 2d Sess. 12 (1974); S. CONF. REP. NO. 1200, 93d Cong., 2d Sess. 12 (1974).

135. 5 U.S.C.A. § 552(a)(4)(B) (West Supp. 1976).

136. *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

137. A similarly liberal reading was applied in one pre-*Title Guarantee* non-NLRB case. Exemption 7(A) was held to be applicable in a Federal Trade Commission case because "[i]f citizens believed that government agencies would disclose their names upon their complaining about possible violations of law, it would have a chilling effect on the government's enforcement activities." *Amway Corp. v. FTC*, 38 Ad. L.2d 1015, 1019 (D.D.C. 1976).

138. See text accompanying notes 129-30 *supra*.

139. 5 U.S.C.A. § 552(b)(7)(D) (West Supp. 1976).

ing. Unlike Exemption 7(A), which arguably has been extended in scope beyond that suggested by its legislative history, Exemption 7(D) has been construed so as to restrict its applicability and adhere to the FOIA's "general philosophy of full agency disclosure."<sup>140</sup> Two questions have arisen in its interpretation. It has been asked, first, whether the content of the records as well as the identity of the informer may be withheld, and second, whether the identity of the informer may be withheld if, in the future, his name would be disclosed anyway. The first question is very nearly answered by the bare language of the statute.

The exemption consists of two clauses: the first speaks generally of protecting only the identity of confidential sources; the second provides that for criminal or national security intelligence investigations, both the identity of the confidential source and the information supplied may be withheld.<sup>141</sup> The one court to have considered the question in 1976 has held that the special reference to criminal and national security cases in the second clause implies that all other cases are controlled by the first clause alone.<sup>142</sup> This is clearly the correct result. Not only is it strongly suggested by the literal terms of the statute, but it is compelled by its legislative history.<sup>143</sup>

It should be noted, however, that there is one basis on which the information supplied by a confidential source in a proceeding controlled by the more general first clause may be withheld. If the identifying matter cannot be segregated from the contents so as to protect fully the identity of the informer, the entire record will be exempted.<sup>144</sup> If the superficial and deferential treatment accorded this precept in the single 1976 decision

140. S. REP. NO. 813, *supra* note 66, at 3.

141. This section does not apply to matters that are . . . investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source.

5 U.S.C.A. § 552(b)(7)(D) (West Supp. 1976).

142. *Furr's Cafeteria, Inc. v. NLRB*, 416 F. Supp. 629, 631 (N.D., Tex. 1976).

143. In its discussion of the exemption, the conference report on the amendments noted:

In every case where the investigatory records sought were compiled for law enforcement purposes—either civil or criminal in nature—the agency can withhold the names, addresses, and other information that would reveal the identity of a confidential source who furnished the information. However, where the records are compiled by a criminal law enforcement authority, *all* of the information furnished only by a confidential source may be withheld if the information was compiled in the course of a criminal investigation . . . . Personnel, regulatory, and civil enforcement investigations are covered by the first clause authorizing withholding of information that would reveal the identity of a confidential source but are not encompassed by the second clause authorizing withholding of all confidential information under the specific circumstances.

H.R. CONF. REP. NO. 1380, *supra* note 134, at 13; S. CONF. REP. NO. 1200, *supra* note 134, at 13.

144. See *Baptist Memorial Hosp. v. NLRB*, 39 Ad. L.2d 244, 248 (W.D. Tenn. 1976).

applying it<sup>145</sup> provides any reliable indication, the rule may potentially play a larger role in Exemption 7(D) cases.

The answer to the second question—whether the FOIA will protect the confidentiality of an informer's identity if it will be disclosed at a later date—appears to be negative. The three courts which have considered the matter are in agreement.<sup>146</sup> Where all of the records contain information from confidential sources who are scheduled to testify in open proceedings and whose identities will be disclosed when they testify, Exemption 7(D) does not apply:

Weighing their interest in retaining their confidential status for a limited period of time against the FOIA's public policy of disclosure, we find no basis to consider such persons confidential sources within the meaning of Exemption 7(D), except for those persons whom the [agency] will stipulate that it will not call as witnesses.<sup>147</sup>

There is no legislative history directly authorizing this holding. But it is clear that the result is in accord with the Supreme Court's rule that exemptions to the FOIA are to be construed narrowly so as to promote the fullest disclosure possible.<sup>148</sup>

## V. STATUTORY EXEMPTION

Exemption 3, which as originally enacted covered records "specifically exempted from disclosure by statute,"<sup>149</sup> was amended in 1976 so as to greatly restrict its applicability.<sup>150</sup> The amendment qualified Exemption 3 by providing that for a statute to affect the FOIA's disclosure requirements, it must possess one of two characteristics. Either it must require "that the matters be withheld in such a manner as to leave no discretion on the issue," or it must establish "particular criteria for withholding" or refer "to particular types of matters to be withheld."<sup>151</sup> In so limiting Exemption 3,

145. The court wrote simply: "We further conclude that the statements are of such a nature that there are no segregable portions which can be provided to [the FOIA plaintiff] without disclosing the identity of the persons giving the statements." *Id.*

146. *Marathon LeTourneau Co. v. NLRB*, 414 F. Supp. 1074 (S.D. Miss. 1976); *Mylan Pharmaceuticals, Inc. v. NLRB*, 407 F. Supp. 1124 (W.D. Pa. 1976); *Climax Molybdenum Co. v. NLRB*, 407 F. Supp. 208 (D. Colo. 1975), *aff'd*, 539 F.2d 63 (10th Cir. 1976).

147. *Marathon LeTourneau Co. v. NLRB*, 414 F. Supp. 1074, 1084 (S.D. Miss. 1976).

148. *See, e.g.*, *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

149. 5 U.S.C. § 552(b)(3) (1970).

150. The amendment was enacted as part of the Government in the Sunshine Act, Pub. L. No. 94-409, § 5, 90 Stat. 1241, 1247-48, (1976) (to be codified in 5 U.S.C. § 552b). *See generally* Note, *The Government in the Sunshine Act—An Overview*, 1977 DUKE L.J. 565.

151. Government in the Sunshine Act, § 5(b), Pub. L. No. 94-409, § 5(b), 90 Stat. 1241, 1247 (1976). The language of the amended Exemption 3 conforms to a corresponding exemption to the Sunshine Act's requirement of open government meetings. *Id.* § 3(a)(c)(3) (to be codified in 5 U.S.C. § 552b(c)(3)). *See* Note, *supra* note 150, at 576.

the amendment overruled a far more liberal interpretation of the exemption by the Supreme Court in *FAA Administrator v. Robertson*.<sup>152</sup>

The plaintiffs in *Robertson* had requested reports compiled by the FAA containing analyses of the operation and maintenance performance of commercial airlines.<sup>153</sup> Refusing to comply with the request, the FAA invoked Exemption 3, relying on section 1504 of the Federal Aviation Act of 1958, which gives the FAA Administrator and Board the power to withhold such reports "when, in their judgment, a disclosure of such information would adversely affect the interests of [any party objecting to disclosure] . . . and is not required in the interest of the public."<sup>154</sup> The Court found that this statute qualified under Exemption 3. In so holding, it rejected a lower court determination<sup>155</sup> that because the statute conferred on the FAA broad discretionary power to prevent disclosure, it could not be considered a "specific exemption."<sup>156</sup> The Court read the legislative history of the FOIA as implying that Congress did not intend to distinguish between statutes that exempted specified materials from disclosure and those that delegated the power to withhold materials to the agencies.<sup>157</sup>

The amendment makes clear that Congress did indeed intend to make that distinction. The House report on the amendment specifically noted that *Robertson* would be overruled and that the statute which *Robertson* construed, "which affords the FAA Administrator *carte blanche* to withhold any information he pleases," would not fall within Exemption 3 as amended.<sup>158</sup> The report cited several tightly drawn prohibitions against the disclosure of specified records as examples of statutes which would fall within the exemption.<sup>159</sup>

152. 422 U.S. 255 (1975); see *FOIA Developments—1975*, at 395-98.

153. 422 U.S. at 257.

154. 49 U.S.C. § 1504 (1970).

155. *Robertson v. Butterfield*, 498 F.2d 1031, 1036 (D.C. Cir. 1974); *accord*, *Schechter v. Weinberger*, 506 F.2d 1275 (D.C. Cir. 1974); *Stretch v. Weinberger*, 495 F.2d 639 (3d Cir. 1974); *Cutler v. CAB*, 375 F. Supp. 722 (D.D.C. 1974); See *FOIA Developments—1975*, at 395.

156. 422 U.S. at 261.

157. *Id.* at 263-67. Specifically, the Court referred to the remarks of Senator Long, discussing S. 1666, a predecessor of the FOIA: "It should be made clear that this bill in no way limits statutes specifically written with the congressional intent of curtailing the flow of information as a supplement necessary to the proper functioning of certain agencies." *Hearings on S. 1666 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 6 (1963).

158. H.R. REP. NO. 880 (pt. 1), 94th Cong., 2d Sess. 23 (1976). The House report cited the Trade Secrets Act, 18 U.S.C. § 1905 (1970), as another example of a statute which does not fall within Exemption 3. See notes 217-25 *infra* and accompanying text.

159. The report referred to the Atomic Energy Act, 42 U.S.C. §§ 2161-2166 (1970), which provides for the nondisclosure of restricted data concerning nuclear energy; the Civil Rights Act of 1964, 42 U.S.C. § 2000e-8(e) (1970), which prohibits the disclosure of information gathered by the Equal Employment Opportunity Commission in an investigation pursuant to a complaint; the Federal Election Campaign Act, 2 U.S.C.A. § 437g(a)(3) (West Supp. 1975),

In limiting the application of Exemption 3 to cases in which a statute specifically identifies the records it protects, Congress has reaffirmed its intention to allow agencies to withhold only that information which the Government has a demonstrated need to keep in confidence. It has erased the danger that Exemption 3, if broadly construed, could effectively place unlimited discretion in the hands of agencies with respect to the release of a significant proportion of their records.<sup>160</sup> And it has made clear when the FOIA refers to information specifically exempted from disclosure by *statute*, it truly means exempted by statute, and not by an agency's ad hoc determination that the information ought not to be released.<sup>161</sup>

## VI. POWER TO ENJOIN ONGOING AGENCY PROCEEDINGS

As a general rule, it is agreed that courts considering FOIA requests possess the jurisdiction to enjoin agency proceedings pending disposition of the FOIA claim.<sup>162</sup> One question that has provoked sharp disagreement among courts in 1976, however, is whether the proceedings of the NLRB constitute an exception to this rule. As was discussed above with respect to Exemption 7(A),<sup>163</sup> because the NLRB has promulgated restrictive discovery rules, litigants before that agency have sought to use the FOIA as a substitute means of gaining access to information not otherwise available to them. For such a tactic to be effective, it is essential that the records be disclosed prior to the litigation for which they were sought. An FOIA request may not be enforced by a court pursuant only to a discovery subpoena; a separate FOIA request must be filed, and a de novo hearing must be held.<sup>164</sup> Thus, in many cases, in order for the release of information

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which prohibits the disclosure of information compiled during an investigation by the Federal Election Commission; and the Federal Aviation Act, 49 U.S.C. § 1461 (1970), which prohibits the disclosure of decisions of the FAA affecting the certification of air carriers until the decision is submitted to the President. H.R. REP. NO. 880 (pt.1), *supra* note 158, at 23.

160. See *FOIA Developments—1975*, at 398.

161. This point was raised in 1966 by Professor Kenneth C. Davis, when he noted that with respect to the applicability of Exemption 3 to a provision of the Securities Exchange Act, 15 U.S.C. § 78x (1970), which gives the SEC unlimited discretion to withhold records except "when in its judgment a disclosure of such information is in the public interest," a "respectable argument may be made that the information is exempted by the Commission and not by the statute." Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 787 (1966).

162. See *FOIA Developments—1974*, at 417-24; *FOIA Developments—1975*, at 367-70.

163. See notes 112-138 *supra* and accompanying text.

164. See *Lincoln Nat'l Bank v. Lampe*, 421 F. Supp. 346 (N.D. Ill. 1976). There, a litigant in a securities fraud civil action sought discovery of FBI records in a related criminal fraud case. Confronted with Department of Justice regulations giving the Attorney General discretion to refuse to comply with such discovery subpoenas, 28 C.F.R. § 16.21-26 (1976), the plaintiff sought to substitute the FOIA as the basis of his request. The court refused to entertain the request when made by such a procedure. Citing the danger that FOIA requests made without the formality of FOIA complaints would not give agencies adequate notice upon which to

to be of use to a litigant, a temporary injunction against the agency proceedings would be required.

The District of Columbia Circuit and the Sixth Circuit Courts of Appeals are the centers of the two conflicting views. By coincidence, the controlling cases in both circuits are entitled *Sears, Roebuck & Co. v. NLRB*. For the sake of clarity and convenience here, the District of Columbia case will be referred to as *Sears* (D.C. Cir.),<sup>165</sup> and the Sixth Circuit case will be called *Sears* (6th Cir.).<sup>166</sup>

The *Sears* (D.C. Cir.) court held simply that the federal courts have "jurisdiction to enjoin agency proceedings pending resolution of a Freedom of Information Act claim."<sup>167</sup> No exception was made for NLRB proceedings. The holding was founded on the District of Columbia court's 1972 opinion in *Bannercraft Clothing Co. v. Renegotiation Board*,<sup>168</sup> which noted that while the FOIA nowhere confers injunctive power on the district courts,<sup>169</sup> there is similarly no indication of a congressional intention to withhold "the tools necessary for courts to implement" the substantive goals of the statute.<sup>170</sup> The court found that Congress, by its failure to withhold injunctive power, had implicitly sanctioned the courts' "inherent authority to preserve the status quo pending a judicial review of the merits."<sup>171</sup> Furthermore, the court read the legislative history of the FOIA as indicating that at least one purpose of the Act was to aid litigants in pursuing their cases before agencies.<sup>172</sup>

After the *Sears* (D.C. Cir.) decision, the same court's decision in *Bannercraft* was reviewed by the Supreme Court, and its treatment of the

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prepare their responses and the possibility that litigants would be given an unfair advantage over nonlitigating FOIA plaintiffs, the court held that "a separate complaint [must] be filed under FOIA before a federal court obtains jurisdiction to enjoin a withholding of official information." 421 F. Supp. at 349.

165. 473 F.2d 91 (D.C. Cir. 1972), *cert. denied*, 415 U.S. 950 (1974).

166. 433 F.2d 210 (6th Cir. 1970).

167. 473 F.2d at 93. There must, of course, be the usual showing of irreparable harm, inadequacy of legal remedies, and probability of prevailing on the merits before the court will interpose the equitable remedy. *Id.*

168. 466 F.2d 345 (D.C. Cir. 1972), *rev'd*, 415 U.S. 1 (1974). For a discussion of the Supreme Court's reversal of the decision in *Renegotiation Board*, see notes 173-75 *infra* and accompanying text. See also *FOIA Developments—1974*, at 418-27.

169. 466 F.2d at 351-52.

170. *Id.* at 354.

171. *Id.* at 353 (citing *Scripps-Howard Radio v. FCC*, 316 U.S. 4 (1942)).

172. 466 F.2d at 352. The Senate Report on the FOIA stated that the provision later codified as 5 U.S.C. § 552(a)(2) (1970) (amended, but not altered in any way relevant to this discussion, by the Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561 (1974)), requiring agencies to publish an index of their opinions and orders, "will prevent a citizen from losing a controversy with an agency because of some obscure and hidden order or opinion which the agency knows about but which has been unavailable to the citizen because he has no way in which to discover it." S. REP. NO. 813, *supra* note 66, at 3.

injunctive power of FOIA courts was reversed with respect to the proceedings of the Renegotiation Board.<sup>173</sup> The basis for the Court's holding was that the nature of the negotiation process requires that it be conducted without judicial intervention.<sup>174</sup> The opinion was limited to renegotiation cases, and the question of "whether or under what circumstances, it would be proper for the District Court to exercise jurisdiction to enjoin action pending the resolution of an asserted FOIA claim" was expressly left open.<sup>175</sup> Despite the Court's refusal to address the jurisdictional question in the abstract, one of the 1976 cases holding that FOIA courts possess the power to enjoin NLRB proceedings was based directly on the Supreme Court's *Bannerkraft* opinion;<sup>176</sup> another was based on *Sears* (D.C. Cir.) and cited *Bannerkraft*.<sup>177</sup>

But as has been pointed out in the recent cases applying the *Sears* (6th Cir.) rule that district courts do "not have the power to enjoin or review decisions" of the NLRB,<sup>178</sup> *Bannerkraft* provides rather weak authority for upholding the existence of such power in NLRB cases. *Sears* (6th Cir.) was based on a finding that the statutorily mandated procedure for review of NLRB cases (placing jurisdiction in the courts of appeals)<sup>179</sup> was exclusive, and that injunctive relief by district courts in FOIA cases would interfere with such later judicial review.<sup>180</sup> *Bannerkraft*, of course, in no way

173. 415 U.S. 1, 20 (1974). The Renegotiation Board is empowered by 50 U.S.C. §§ 1211-1233 (1970) to conduct informal negotiations with United States defense contractors for the purpose of eliminating "excessive profits."

174. See 415 U.S. at 22: "Nothing new by way of due process emerged with the FOIA. Nothing therein indicates that Congress wished to change the Renegotiation Act's purposeful design of negotiation without interruption for judicial review."

175. *Id.* at 20.

176. *Saint Elizabeth's Hosp. v. NLRB*, 407 F. Supp. 1357, 1358 (N.D. Ill. 1976), cites *Bannerkraft* as authority for a holding that the court "clearly has jurisdiction" to enjoin an NLRB proceeding pending disposition of an FOIA request.

177. *Pepsi-Cola Bottling Co. v. NLRB*, 39 Ad. L.2d 265 (D. Kan. 1976). Other 1976 cases holding that there is injunctive power either so held without supplying authority, see *Barnes & Noble Bookstores, Inc. v. NLRB*, 38 Ad. L.2d 1102 (S.D.N.Y. 1976); *Goodfriend Western Corp. v. Fuchs*, 411 F. Supp. 454 (D. Mass.), *rev'd on other grounds*, 535 F.2d 145 (1st Cir. 1976), or assumed so without supplying authority and proceeded to discuss the merits of issuing an injunction in the particular case, see *Abrahamson Chrysler-Plymouth, Inc. v. NLRB*, 38 Ad. L.2d 1095 (N.D. Ill. 1976).

*Committee on Masonic Homes v. NLRB*, 414 F. Supp. 426 (E.D. Pa. 1976), like *Bannerkraft*, left open the question of whether there is injunctive power. It did not have to reach the question, as the court found that the absence of irreparable injury warranted denial of the injunction on general equitable grounds. *Electri-Flex Co. v. NLRB*, 412 F. Supp. 698 (N.D. Ill. 1976), correctly cited *Bannerkraft* as leaving open the question of the court's power to issue an injunction. Inexplicably, however, the court found support for the existence of the power in 5 U.S.C. § 552(a)(4)(B) (1970), which confers power on the district courts to enjoin the wrongful withholding of non-exempt records.

178. *Sears, Roebuck & Co. v. NLRB*, 433 F.2d 210, 211 (6th Cir. 1970).

179. 29 U.S.C. § 160(f) (1970).

180. 433 F.2d at 211. One court, following *Sears* (6th Cir.), objected to this as a justification,

addressed this issue, and courts have noted that it did not undermine the validity of *Sears* (6th Cir.).<sup>181</sup>

Additional support for the proposition that there is no power of injunction in FOIA cases concerning the NLRB has been found by analogizing to the Supreme Court's treatment of renegotiation cases. In *Bannercraft*, the nature of the negotiation process—the “give and take,” the “stress upon and use of the strengths of one's own position and the weaknesses of the position of the other party”—was seen to necessitate an immunity from interim judicial interference.<sup>182</sup> “[W]ere it otherwise, the effect would be that renegotiation, and its aims, would be supplanted and defeated by an FOIA suit.”<sup>183</sup> One court has argued that the NLRB's function of settling and adjudicating labor disputes is subject to a similar risk of interference by FOIA suits.<sup>184</sup>

The arguments of *Sears* (D.C. Cir.) and its progeny, permitting FOIA courts to enjoin NLRB proceedings, and those of *Sears* (6th Cir.) and the cases following it, refusing to permit the exercise of such power, seem to leave no middle ground. The conflict boils down to a choice between what one court perceived as the legislative intent behind the statute<sup>185</sup> and what the other viewed as the exclusivity of a statutory mode of review.<sup>186</sup> But one more factor should be added to the dispute. As justification for refusing to permit injunctions against NLRB proceedings, at least two courts following *Sears* (6th Cir.) have noted the danger that, if such injunctions were allowed, the FOIA could be used as a tool of discovery.<sup>187</sup> Dicta from the Supreme Court indicate that this is not a favored purpose of the FOIA.<sup>188</sup>

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pointing out that section 160(f) review, see note 179 *supra*, is limited to a determination of whether there was substantial evidence to support the Board's findings of fact. “This scarcely amounts to a full appellate review to an aggrieved employer akin to the ordinary appeal procedures.” *NLRB v. Hardeman Garment Corp.*, 38 Ad. L.2d 631, 633 (W.D. Tenn. 1976).

181. See *Amerace Corp. v. NLRB*, 38 Ad. L.2d 1093 (W.D. Tenn. 1975); *Chassen Bakers, Inc. v. NLRB*, 38 Ad. L.2d 1096 (M.D. Pa. 1975).

182. *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 21-22 (1974).

183. *Id.* at 20.

184. *Southwest Motor Freight, Inc. v. NLRB*, 411 F. Supp. 1019 (E.D. Tenn. 1976). The court did not spell out the parallel it perceived between renegotiation and labor cases, but apparently it was concerned with a lack of resources or commitment to litigation on the part of NLRB adversaries. The court referred to the danger that “the delay and expense incident to a suit for injunctive relief under FOIA could defeat the purposes of the National Labor Relations Act.” *Id.* at 1021.

185. See notes 167-72 *supra* and accompanying text.

186. See notes 178-80 *supra* and accompanying text.

187. See *Amerace Corp. v. NLRB*, 38 Ad. L.2d 1093, 1094-95 (W.D. Tenn. 1975); *Chassen Bakers, Inc. v. NLRB*, 38 Ad. L.2d 1096, 1097-98 (M.D. Pa. 1975).

188. In *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1 (1974), the Court wrote: “Interference with the agency proceeding opens the way to the use of the FOIA as a tool of discovery. . . . Discovery for litigation purposes is not an expressly indicated purpose of the Act.” *Id.* at 24.

More importantly, however, as discussed above, the courts dealing with the applicability of Exemption 7(A) to NLRB cases have found that the problems that might be encountered if the FOIA could be used to usurp and extend the function of the limited NLRB discovery procedures were sufficient to compel the conclusion that all investigatory records compiled for pending NLRB litigation fall within the exemption.<sup>189</sup> This conclusion was reached despite reasonably compelling arguments in favor of a contrary interpretation.<sup>190</sup> There does not seem to be any reason why the dangers of using the FOIA as a broad discovery tool should be any less of a factor in dealing with the court's equitable power than in the context of the applicability of Exemption 7(A). If greater attention is given to the issue in this context, the balance could well be tipped in favor of *Sears* (6th Cir.) and against the power of FOIA courts to issue injunctions in NLRB cases.

## VII. REVERSE-FOIA CASES

Although the primary purpose of the FOIA is to "permit access to official information"<sup>191</sup> and although it establishes "a general philosophy of full agency disclosure,"<sup>192</sup> that goal is not unconstrained. The Act's nine enumerated exemptions<sup>193</sup> attempt to strike a "workable balance between the right of the public to know and the need of the Government to keep information in confidence."<sup>194</sup> The conflict thus recognized by the statute's drafters has given rise to a legal dispute that they perhaps did not anticipate.<sup>195</sup> private parties who have submitted to agencies information or records that arguably are exempt from disclosure under the FOIA have attempted to prevent disclosure and to have their privacy interests protected by courts through injunctive or declaratory relief. Such an action has come to be known as a reverse-FOIA suit.<sup>196</sup>

Although the prerequisites to a reverse-FOIA cause of action are by no means settled,<sup>197</sup> they may be roughly sketched as follows: first, the court's

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189. See notes 126-38 *supra* and accompanying text.

190. *Id.*

191. *EPA v. Mink*, 410 U.S. 73, 80 (1973). See also *Department of Air Force v. Rose*, 425 U.S. 352 (1976).

192. S. REP. NO. 813, *supra* note 66, at 3.

193. 5 U.S.C.A. § 552(b) (West Supp. 1976).

194. S. REP. NO. 813, *supra* note 66, at 6.

195. See Note, *Reverse-Freedom of Information Act Suits; Confidential Information in Search of Protection*, 70 Nw. U.L. REV. 995, 996-97 (1976): "Congress intended the FOIA to be a weapon against the propensity of Government agencies to withhold information from private citizens. Using the FOIA to prevent disclosure probably was beyond the contemplation of the Act's supporters."

196. See generally *Reverse-FOIA Suits*; Note, *supra* note 195.

197. See Note, *supra* note 195, at 999-1000.

jurisdiction must be established;<sup>198</sup> second, the material sought to be kept from disclosure must be shown to fall within one of the nine exemptions;<sup>199</sup> and third, a legal basis must be established upon which the agency's disclosure of the material would be unlawful. This last-mentioned requirement has been a primary point of controversy. It has been noted that the requirement can be met in two ways.<sup>200</sup> The exemption under which the material is withheld may be construed to be compulsory, thus making disclosure automatically unlawful. Alternatively, the exemption may be construed to be permissive, meaning that while an FOIA plaintiff could not *compel* disclosure of the covered records, the agency would be free to release them if it *chose* to do so, notwithstanding the exemption. Under the latter interpretation, disclosure of the information would be unlawful only if it was shown to constitute a violation of the Administrative Procedure Act (APA) as being "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>201</sup>

With respect to one of the exemptions—Exemption 3, covering information specifically exempted from disclosure by statute<sup>202</sup> this distinction clearly makes no difference. Whether the exemption is construed to be "compulsory" or "permissive," the effect is the same. This is because of the APA's language, which proscribes agency actions "not in accordance with law."<sup>203</sup> Any statute falling within Exemption 3 serves two purposes:

198. At least three separate theories of jurisdiction have been offered, *see Reverse-FOIA Suits* at 347-59:

(1) under the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (1970); *see* Charles River Park "A," Inc. v. HUD, 519 F.2d 935 (D.C. Cir. 1974); *Babcock & Wilcox Co. v. Rumsfeld*, 70 F.R.D. 595 (N.D. Ohio 1976);

(2) under a specific statute requiring nondisclosure; *see* Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967);

(3) on the basis of 28 U.S.C. § 1331 (1970), "arising under the . . . laws" of the United States; *see* Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190, 1214 (4th Cir. 1976).

199. Obviously, if the FOIA does not *exempt* the materials from disclosure, it *compels* their disclosure, and there would therefore be no basis upon which to seek a protective order. *See* United States v. Trucking Employers, Inc., 39 AD. L.2d 694, 696 (D.D.C. 1976).

It should be emphasized that reverse-FOIA suits are different from cases in which the agency seeks to withhold information *not exempt* from disclosure under the Act. Apparently, such an act by an agency is impermissible. "The majority of the courts which have considered the matter . . . have declined to find equitable discretion to refuse to compel disclosure of non-exempt information." *FOIA Developments—1975*, at 370; *see* Fruehauf Corp. v. IRS, 522 F.2d 284 (6th Cir. 1975).

200. *See Reverse-FOIA Suits* at 333-39.

201. 5 U.S.C. § 706(2)(A) (1970); *see* *Babcock & Wilcox Co. v. Rumsfeld*, 70 F.R.D. 595 (N.D. Ohio 1976). The elements necessary to prove a violation of §706(2)(A) are discussed in *Reverse-FOIA Suits* at 339-47.

202. 5 U.S.C.A. § 552(b)(3) (West Supp. 1976), *as amended* by the Government in the Sunshine Act, Pub. L. No. 94-409 § 5(b), 90 Stat. 1241, 1247 (1976). *See* notes 149-161 *supra* and accompanying text.

203. *See* text accompanying note 201 *supra*.

under the FOIA, it exempts the information from mandatory disclosure, and under the APA, it prohibits the agency from disclosing the information. Thus, even if Exemption 3 is construed to be "permissive," it is in effect "compulsory," because the same statute that exempts the information from disclosure also takes away the agency's discretion to release it.<sup>204</sup> Although there has been a lively debate in recent years as to whether the "permissive" or "compulsory" approach is correct,<sup>205</sup> developments in 1976 have shown that this distinction may be without significance with respect to one other exemption, Exemption 4, relating to trade secrets and confidential commercial and financial information.<sup>206</sup>

The argument in favor of an overall "permissive" approach is plain on the face of the general provisions of the statute. In subsection (a), the FOIA provides for the general disclosure of records and sets out the means of enforcing the disclosure provisions.<sup>207</sup> In subsection (b), it provides that the Act "does not apply to matters" that fall within the exemptions.<sup>208</sup> This has been read to imply that "the FOIA is neutral with respect to exempt information; it neither authorizes or [sic] prohibits the disclosure of such information."<sup>209</sup> This was the approach taken by the Fifth Circuit in 1976 in *Pennzoil Co. v. FPC*.<sup>210</sup> Under *Pennzoil*, a reverse-FOIA plaintiff is required to show that disclosure of the information claimed to be exempt under Exemption 4 would be an abuse of the agency's discretion.<sup>211</sup>

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204. See *Westinghouse Electric Corp. v. Schlesinger*, 542 F.2d 1190, 1198-99 (4th Cir. 1976); *Reverse-FOIA Suits* at 340-43.

205. See *Reverse-FOIA Suits* at 333-39.

206. 5 U.S.C. § 552(b)(4) (1970).

207. 5 U.S.C.A. § 552(a) (West Supp. 1976).

208. *Id.* § 552(b).

209. *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 942 (D.C. Cir. 1975).

210. 534 F.2d 627 (5th Cir. 1976).

211. *Id.* at 630-32. A similar result was reached by the Ninth Circuit in *Union Oil Co. v. FPC*, 542 F.2d 1036 (9th Cir. 1976). The holding in *Union Oil* came on a rehearing in which the court retracted an earlier determination that Exemption 4 prescribed compulsory nondisclosure, characterizing that earlier finding as "premature." *Id.* at 1045-46.

Interestingly, the Fifth Circuit in *Pennzoil* called for the use of what one commentator, *see* Note, *supra* note 195, at 1011, has described as an "indirect" application of the FOIA in determining whether there has been an abuse of discretion:

FOIA is not irrelevant in determining whether information encompassed in its exclusions should be disclosed. In reviewing the agency's exercise of discretion concerning the release of such information, this court must be cognizant of the fact that Congress in drafting a broad disclosure statute found sufficient justification for withholding this type of information from public perusal.

534 F.2d at 630.

In *Pennzoil*, the Fifth Circuit appears to have shifted from an interpretation that the FOIA exemptions warrant compulsory nondisclosure to its present position that they are permissive only. In *Continental Oil Co. v. FPC*, 519 F.2d 31 (5th Cir. 1975), *cert. denied*, 426 U.S. 941 (1976), a suit attacking an FPC order which directed natural gas companies to disclose sales information, the court upheld a cause of action by the affected oil companies founded on Exemption 4 of the FOIA. In rejecting an FPC argument that the exemptions were permissive

One of the strongest statements of the contrary "compulsory" position is found in the 1974 case of *Westinghouse Electric Corp. v. Schlesinger*,<sup>212</sup> which was reviewed by the Fourth Circuit in 1976.<sup>213</sup> The plaintiffs in *Westinghouse* had supplied to the Department of Defense confidential reports which contained information on employment patterns, pay scales, promotions and seniority pursuant to an Executive Order requiring such information of government contractors. When third parties sought access to the reports under the FOIA, the plaintiffs brought suit to block their release.<sup>214</sup>

The district court enjoined disclosure of the information, interpreting Exemption 4 as a mandate for compulsory nondisclosure which left no discretion in the agency.<sup>215</sup> The Fourth Circuit affirmed the holding, but in so doing, it ignored the lower court's interpretation of Exemption 4 as a compulsory provision, resting its decision instead on a permissive reading of the statute.<sup>216</sup> When the appellate court's reasoning is viewed in light of developments subsequent to the decision, it becomes clear that its "permissive" interpretation of Exemption 4 nonetheless may be "compulsory" in effect.

The Fourth Circuit found that the material sought was protected by the Trade Secrets Act, which makes it a crime for a government employee to disclose confidential financial information "to any extent not authorized by law."<sup>217</sup> This statute was seen by the court to trigger Exemption 3, thereby removing both the agency's duty to release the records and its discretion to do so.<sup>218</sup> Under Exemption 3, of course, the "compulsory"/"permissive"

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and not compulsory, the court ordered that any disclosure of the sales information be limited so as to protect the identity of the particular companies supplying it. Although this was a limited application of the "compulsory" approach, it did acknowledge the existence of a cause of action based directly on an exemption, without regard to the agency's discretion.

212. 392 F. Supp. 1246 (E.D. Va. 1974).

213. 542 F.2d 1190 (4th Cir. 1976).

214. *Id.* at 1196.

215. The court wrote:

The defendants argue that the FOIA is authority only for *disclosing* information, not withholding it, and consequently cannot be used as a vehicle to prevent disclosure; that the exemptions are permissive only, being categories of information which *may* be exempt by an agency; and that this is a matter largely committed to agency discretion. The Court rejects this argument. It makes the statutory exemption meaningless and flies in the face of the protective purpose of the exemption as enunciated in the Senate and House Reports.

392 F. Supp. at 1250 (emphasis in original); see *Reverse-FOIA Suits* at 334-35.

216. 542 F.2d at 1197-1203.

217. 18 U.S.C. § 1905 (1970).

218. 542 F.2d at 1197-1203; see notes 201-04 *supra* and accompanying text. The district court also considered this as a possible basis for its holding ("18 U.S.C. § 1905 . . . also supports the relief requested by plaintiffs." 392 F. Supp. at 1250) but based its holding instead on its "compulsory" interpretation of Exemption 4. See note 215 *supra* and accompanying text.

distinction is functionally irrelevant.<sup>219</sup>

After the *Westinghouse* appeal was decided, however, Exemption 3 was amended, as discussed above.<sup>220</sup> The Trade Secrets Act no longer falls within its scope.<sup>221</sup> The Act may still form a basis for a reverse-FOIA action, but the suit must now be grounded on Exemption 4 rather than Exemption 3.

The House report on the amendment to Exemption 3 pointed out that although the Trade Secrets Act did not fall within the exemption, if information qualified under some other exemption to the FOIA, the Trade Secrets Act might then operate to remove the agency's discretion to release the information.<sup>222</sup> The Act prohibits the disclosure of confidential financial information "to any extent not authorized by law."<sup>223</sup> Obviously, if the information is not exempt from disclosure under the FOIA, then the FOIA itself furnishes authorization for its disclosure and the Trade Secrets Act cannot apply. However, if the information falls within one of the FOIA exemptions, there is no such affirmative authorization. Unless some other statute requires that the information be disclosed, the Trade Secrets Act will squarely apply, making the agency's disclosure of the information an abuse of discretion.<sup>224</sup>

In cases such as *Westinghouse*, then, where the information sought is covered by both Exemption 4 and the Trade Secrets Act, the effect will be the same whether the exemption is construed to be "compulsory" or "permissive." If "compulsory," the exemption itself will impose a duty of nondisclosure; if "permissive," the exemption will remove the agency's duty to disclose the information, and the Trade Secrets Act will foreclose its discretion to do so. Several courts have stated that the Trade Secrets Act is generally coterminous in scope with Exemption 4.<sup>225</sup> Although the precise extent of the overlap between the Trade Secrets Act and Exemption 4 must be determined in individual cases, the effect of the Act—at least with respect to some of the information covered by Exemption 4—is to make nondisclosure under the exemption compulsory.

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219. See notes 202-05 *supra* and accompanying text.

220. See notes 149-62 *supra* and accompanying text.

221. The legislative history of the amendment explicitly referred to the Trade Secrets Act as an example of a statute that would not fall within Exemption 3 as amended. H.R. REP. NO. 880 (pt. 1), *supra* note 158, at 23.

222. *Id.* See note 201 *supra* and accompanying text.

223. 18 U.S.C. § 1905 (1970).

224. See note 201 *supra* and accompanying text.

225. See *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 425 F.2d 578, 580 n.5 (D.C. Cir. 1970) ("[T]his type of information [information covered by the Trade Secrets Act] is already protected from disclosure under the Act by §552(b)(4)"); *Ditlow v. Volpe*, 362 F. Supp. 1321, 1324 (D.D.C. 1973), *rev'd on other grounds*, 494 F.2d 1073 (D.C. Cir. 1974) (The Trade Secrets Act "is co-extensive with Exemption 4"). See also *Pharmaceutical Manufacturers Ass'n v. Weinberger*, 401 F. Supp. 444, 446 (D.D.C. 1975).

## VIII. CONCLUSION

Judicial and legislative developments in 1976 have left unanswered as many existing questions concerning the FOIA as they have resolved, and they have raised many new questions as well. Several issues, such as whether FOIA courts possess jurisdiction to enjoin NLRB proceedings and whether the exemptions to the FOIA require compulsory nondisclosure, are still the subjects of substantially divided authority. An amendment to the FOIA's statutory exemption has given the courts a new topic for interpretation. Some questions, such as whether delays in disclosure for workload or policy reasons will be tolerated and how confidential investigatory records will be treated, were the subjects of significant judicial attention in 1976 for the first time. In other areas, such as the treatment of investigatory files compiled for pending NLRB proceedings, a consensus appears to have emerged from a former diversity of opinion, but the question remains whether it will continue. Finally, in those areas where the Supreme Court has spoken authoritatively, as in the interpretation of the personal files and personnel rules exemptions, it has yet to be seen whether the Court's treatment will meet with congressional approval and whether it will be implemented effectively by the lower courts. It appears certain that because of the frequency of litigation involving the FOIA, all of these questions will be before courts in the near future. And because of the complex balancing of interests involved in any FOIA decision, new questions will emerge as quickly as present problems are resolved.