

DEVELOPMENTS UNDER THE FREEDOM OF INFORMATION ACT—1978

Of the more than one hundred federal court opinions dealing with the Freedom of Information Act (FOIA)¹ during the last year,² decisions addressing four parts of the Act contributed to the evolution of judicial construction of the FOIA. One group of cases from the District of Columbia Circuit sought to clarify the accessibility of documents that move between federal government entities. A second large group of cases interpreted the third exemption³ of the FOIA—nondisclosure in the presence of a narrowly defined withholding statute—as amended in 1976. Although these cases are primarily instructive for their examination of other statutes, rather than the FOIA exemption itself, they do continue the classification of withholding statutes as “exempting” or “non-exempting,” a classification rooted in the legislative history of the 1976 amendment.⁴

A third set of cases, including the single FOIA decision from the Supreme Court in 1978, *NLRB v. Robbins Tire & Rubber Co.*,⁵ answered specific questions concerning exemption⁶ from FOIA disclosure for certain witness statements and related documents relied on by particular federal agencies in their investigative capacities. Left unresolved by these cases was the broader issue of exemptions for entire classes of documents *other* than pre-hearing NLRB witness statements, an issue especially troubling inasmuch as the FOIA requires *de novo*

1. 5 U.S.C. § 552 (1976).

2. For discussion of developments under the FOIA in prior years, see Note, *Developments Under the Freedom of Information Act—1977*, 1978 DUKE L.J. 189; Note, *Developments Under the Freedom of Information Act—1976*, 1977 DUKE L.J. 532; Note, *Developments Under the Freedom of Information Act—1975*, 1976 DUKE L.J. 366; Note, *Developments Under the Freedom of Information Act—1974*, 1975 DUKE L.J. 416; 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; Project, *Federal Administrative Law Developments—1971*, 1972 DUKE L.J. 115, 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. § 552(b)(3) (1976).

4. See H.R. REP. NO. 880, Part I, 94th Cong., 2d Sess. 22-23, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2183, 2204-05; H.R. CONF. REP. NO. 1441, 94th Cong., 2d Sess. 25, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2244, 2260-61.

5. 437 U.S. 214 (1978).

6. The cases deal primarily with Exemption 6, 5 U.S.C. § 552(b)(6) (1976), for “private” information and Exemptions 7(A) and 7(C), 5 U.S.C. §§ 552(b)(7)(A), (C) (1976), for investigatory records the disclosure of which would “interfere with enforcement proceedings” or “constitute an unwarranted invasion of personal privacy.”

review in each case where an exemption is claimed⁷ and allows the court to examine the documents to identify segregable, non-exempt portions.

The fourth major category of cases adding new dimensions to the FOIA case law did not technically address a specific portion of the FOIA. These are the so-called "reverse-FOIA" suits⁸ initiated by a submitter of information to a federal agency in an effort to prevent disclosure in response to a FOIA request. Whether or not the right to bring such an action may be implied from the language of the Act remains in doubt; the question is central to the split among the circuit courts regarding the appropriate procedure for obtaining judicial review and the proper standard of review to be applied. A pivotal reverse-FOIA case, *Chrysler Corp. v. Brown*,⁹ is now before the Supreme Court. One congressional committee¹⁰ suggests legislative resolution, should the Court fail to provide a definitive clarification of the matter.

This Note discusses these four areas of judicial development under the Freedom of Information Act and suggests implications for future FOIA requests.

I. AMBULATORY AGENCY RECORDS: CONTROL AND POSSESSION

The FOIA does not address the problem of physical possession and actual or constructive control of documents whose location has changed or could change, nor does it specifically state whether such documents constitute disclosable "records."¹¹ Congress did not anticipate the inmobile document problem in the legislative history of the Act. However, three recent District of Columbia cases¹² discussed aspects of control and possession: one echoed a 1977 New York district court case¹³ that had held that research data generated by and in the physical

7. 5 U.S.C. § 552(a)(4)(B) (1976).

8. For more comprehensive discussion of reverse-FOIA suits, see Clement, *The Rights of Submitters To Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit*, 55 TEXAS L. REV. 587 (1977); Note, *Protection from Government Disclosure—The Reverse-FOIA Suit*, 1976 DUKE L.J. 330; Comment, *Reverse Freedom of Information Act Suits: Confidential Information in Search of Protection*, 70 NW. U.L. REV. 995 (1976).

9. *Chrysler Corp. v. Schlesinger*, 565 F.2d 1172 (3d Cir. 1977), *vacated and remanded sub nom. Chrysler Corp. v. Brown*, 99 S. Ct. 1705 (1979).

10. HOUSE COMM. ON GOV'T OPERATIONS, FREEDOM OF INFORMATION ACT REQUESTS FOR BUSINESS DATA & REVERSE-FOIA LAWSUITS, H.R. REP. NO. 1382, 95th Cong., 2d Sess. 4 (1978).

11. See 5 U.S.C. §§ 552(a)(3), (a)(4)(B) (1976).

12. *Forsham v. Califano*, 587 F.2d 1128 (D.C. Cir. 1978); *Goland v. CIA*, 43 Ad. L.2d 407 (D.C. Cir. 1978); *Reporters Comm. for Freedom of the Press v. Vance*, 442 F. Supp. 383 (D.D.C. 1977).

13. *CIBA-GEIGY Corp. v. Mathews*, 428 F. Supp. 523 (S.D.N.Y. 1977). For an extensive discussion of this decision, see Note, *Developments Under the Freedom of Information Act—1977*, *supra* note 2, at 190-92.

possession of federally funded private researchers did not constitute "agency records"; another declared that the FOIA gave courts the power to retrieve documents improperly removed from an agency; the third held that a congressional hearing transcript physically located in an agency's files for thirty years still could not be classified as an agency document.

While the new decision dealing with private research data, *Forsham v. Califano*,¹⁴ neither supersedes nor overrules the decision in the 1977 case *CIBA-GEIGY Corp. v. Mathews*,¹⁵ the three separate opinions in *Forsham* reinject uncertainties into the question of the degree of control an agency must have over private research data in order to subject the data to FOIA requests. Plaintiffs in *Forsham* and in *CIBA-GEIGY* sought disclosure of raw data still in the possession of federally funded researchers. The data was generated during a study of diabetic patients that resulted in heightened Food and Drug Administration (FDA) concern over certain oral hypoglycemic drugs. Neither federal funding nor FDA access to the data in *CIBA-GEIGY* was considered sufficient government control to transform the data into "agency records." On balance, the FDA's indirect reliance on the data through a summary report did not outweigh the researchers' private ownership interests.

Judge Leventhal's opinion for the *Forsham* court stressed the non-involvement of any government agency in the "core" of the research program, its daily operations or even in the planning stages of the research project.¹⁶ He was unwilling to expand the definition of "agency records" to include documents in someone else's possession that the agency *could* obtain but had not yet obtained:¹⁷ "The governing principle is that only if a federal agency has created or obtained a record (or has a duty to obtain the record) in the course of doing its work, is there an agency record that can be demanded under FOIA."¹⁸ Judge MacKinnon concurred in the judgment but would have restricted the decision to the facts of the case, leaving open the question of "the extent to which FOIA should be interpreted to cover records not created by, obtained by, or otherwise in the possession of an agency."¹⁹

Judge Bazelon, dissenting in *Forsham*, urged the adoption of the *CIBA-GEIGY* standard—government ownership or "substantial Gov-

14. 587 F.2d 1128 (D.C. Cir. 1978).

15. 428 F. Supp. 523 (S.D.N.Y. 1977).

16. 587 F.2d at 1138-39.

17. *Id.* at 1136.

18. *Id.* (dictum) (citations omitted).

19. *Id.* at 1139.

ernment control or use"²⁰ of the records—measured by the factors of funding, access and agency reliance. The *Forsham* dissent considered agency reliance on the data in its decisionmaking to be the crucial factor, but in contrast to the *CIBA-GEIGY* court and the majority opinions in *Forsham*, Judge Bazelon found the ongoing FDA/pharmaceutical industry controversy spawned by the test results to constitute sufficient reliance to warrant disclosure. Unlike the majority,²¹ he did not fear the possible "chilling" effect of this specific disclosure on the scientific community.²²

Two months before the *Forsham* decision Judge Bazelon wrote an equally forceful dissent in *Goland v. CIA*,²³ urging that an unpublished congressional hearing transcript from 1947 that had been housed in CIA files from that date until the present and had been used by the CIA to interpret "its organic legislation"²⁴ had become an agency record²⁵ of the CIA. He noted that agency records often include documents received from other divisions of the federal government. Judge Bazelon's view did not prevail; the majority in *Goland* held the transcript to be a congressional record released to the CIA "for limited purposes as a reference document only,"²⁶ and therefore not subject to disclosure under the FOIA.

Goland presented the mirror issue to that of *Forsham*: in *Goland*, the agency claimed that the hearing transcript was not under its control and therefore not disclosable under the FOIA *even though* the document was in the agency's possession; the private research data in *Forsham* was claimed not to be disclosable *because* it was not in the agency's possession. The congressional source of the *Goland* transcript outweighed the fact of agency possession, while the research data in *Forsham* remained private largely because it was not in the agency's possession. At this point, the District of Columbia Circuit Court appears to be making policy judgments in the middle ground of "control," areas in which an agency has utilized either the documents or a summary of them and has relied on them in the course of its opera-

20. 428 F. Supp. at 529.

21. 587 F.2d at 1138-39.

22. *Id.* at 1147-48.

23. 43 Ad. L.2d 407 (D.C. Cir. 1978).

24. 43 Ad. L.2d at 434. See National Security Act of 1947, Pub. L. No. 253, 61 Stat. 495; Central Intelligence Agency Act of 1949, 50 U.S.C. §§ 403a-403j (1976).

25. Congress and its records are not subject to FOIA requests because Congress is not an "agency" for purposes of the FOIA. 5 U.S.C. § 552(e) (1976). The relationship between Congress and documents that *are* FOIA records, but are exempt from disclosure, is discussed at note 79 *infra*.

26. 43 Ad. L.2d at 412 (quoting district court's unpublished opinion from the bench (May 26, 1976)).

tions. Under these circumstances, the court apparently will hold that the documents should not be disclosed if they are also private materials or non-FOIA congressional documents.²⁷ Questions of mixed "ownership" will continue to arise until the courts categorically deny or grant such documents the status of "agency records."

The third District of Columbia case, *Reporters Committee for Freedom of the Press v. Vance*,²⁸ addressed the problem of records wrongfully transferred between governmental departments. Access was sought to telephone records made by Henry Kissinger during his tenure at the State Department. The records had, circuitously, arrived at the Library of Congress, a branch of Congress not subject to FOIA requests.²⁹ Kissinger denied access to both the news media and the Archivist of the United States who sought to review the records for permanent historical value. Kissinger also argued that the "plaintiffs lack[ed] standing under the Federal Records Act to challenge the transfer from the [State] Department."³⁰ In response, the district court stated that the plaintiffs need not rely on the Federal Records Act³¹ at all, particularly "where a statutory retrieval action appears unlikely."³² As an alternative, the plaintiffs could "invoke the broad equitable powers granted to the district courts in aid of their role as the 'enforcement arm' of the Freedom of Information Act"³³ to order the documents returned³⁴ to the State Department, which would presumably make the

27. Judicial proceedings, like congressional documents, are not "agency records" subject to FOIA disclosure. In an attempt to transform secret grand jury testimony into records obtainable through the FOIA, Alger Hiss sought release of the testimony to the Justice Department, an FOIA "agency." *Hiss v. Department of Justice*, 441 F. Supp. 69 (S.D.N.Y. 1977). Hiss relied on Rule 6(e) of the Federal Rules of Criminal Procedure, which allows "disclosure of grand jury proceedings under three and only three circumstances, [one of which is] in connection with or preliminarily to 'a judicial proceeding.'" 441 F. Supp. at 70. The FOIA was held not to apply to this request, since the court considered Rule 6(e) to be an Exemption 3 statute. See text accompanying notes 40-42 *infra*. The court need not have addressed the Exemption 3 question; even in the absence of Rule 6(e), these records would not qualify as FOIA "agency records" since they were judicial records, not agency records. Under the *Forsham*, *CIBA-GEIGY* and *Goland* standards the testimony would not constitute "agency records" until and unless the Justice Department obtained physical possession of the documents and relied on them to conduct agency business, beyond using them merely as "reference" materials.

28. 442 F. Supp. 383 (D.D.C. 1977).

29. See note 25 *supra*.

30. 442 F. Supp. at 385 (citations omitted).

31. 44 U.S.C. §§ 3101-3107 (1976).

32. 442 F. Supp. at 386.

33. *Id.* at 385-86.

34. The court determined that Kissinger's telephone records were government property because they were "produced not only in accordance with [State] Department regulations but also on government time and with the aid of department . . . resources." 442 F. Supp. at 387. See 41 C.F.R. § 101-11.202-2 (1977). Because the records were government property their disposition was governed by the Federal Records Act of 1950, 44 U.S.C. §§ 3101-3303a (1976), and removal

documents accessible through a FOIA request. In this case, neither the element of privacy central to the *Forsham* decision nor the involvement of a non-FOIA congressional office central to the *Goland* decision prevented the court from granting "agency records" status to documents wrongfully removed from the agency. Unlike the records involved in *Forsham* and *Goland*, Kissinger's notes were agency records when they were created and did not lose that character through transfer to a non-FOIA repository.

II. FEDERAL WITHHOLDING STATUTES AND EXEMPTION 3

As originally enacted, Exemption 3³⁵ of the FOIA applied to information "specifically exempted from disclosure by statute."³⁶ In 1975 the Supreme Court in *FAA v. Robertson*³⁷ granted Exemption 3 status to a federal statute³⁸ that allowed an agency to withhold information whenever, in the agency administrator's judgment, disclosure "would adversely affect the interests of [the objecting party] and was not required in the interest of the public."³⁹ As a result of this decision,⁴⁰ Congress amended Exemption 3 in 1976 to narrow the range of statutes that would qualify for exemption. A federal statute falls within the ambit of the amended version of Exemption 3 only if it "leave[s] no discretion on the issue" of withholding,⁴¹ or, in the alternative, if the withholding statute specifies the materials to be withheld or the "particular criteria" to be used in making the decision to withhold.⁴² Federal courts examining the amended exemption have, for the most part, relied on the statutory language alone to classify withholding statutes. For example, in *American Jewish Congress v. Kreps*⁴³ the court held that the Export Administration Act of 1969⁴⁴ failed to qualify as an Exemption 3 statute under either branch of the test set forth in the amended exemption. The Export Administration Act authorizes the Secretary of Commerce to require exporters to report requests they re-

to the Library of Congress through any means not authorized by the Records Act was "wrongful." 442 F. Supp. at 387.

35. 5 U.S.C. § 552(b)(3) (1976).

36. Pub. L. No. 89-487, 80 Stat. 250 (1966).

37. 422 U.S. 255 (1975).

38. Federal Aviation Act of 1958, 49 U.S.C. § 1504 (1976).

39. *Id.*

40. The amendment's legislative history explicitly states this congressional purpose. H.R. REP. NO. 880, *supra* note 4, at 22-23.

41. 5 U.S.C. § 552(b)(3)(A) (1976).

42. *Id.* § 552(b)(3)(B).

43. 574 F.2d 624 (D.C. Cir. 1978).

44. 50 U.S.C. App. §§ 2401-2413 (1976).

ceive to boycott other countries⁴⁵ and gives the Secretary discretion to decide what portion of that information should be released to the public.⁴⁶ Because the Secretary has discretion on the issue of withholding, the Export Administration Act cannot support a FOIA Exemption 3 claim. Further, the only guidance provided by the export statute regarding information to be withheld is stated in terms of the "national interest,"⁴⁷ language the court found insufficient to establish the "particular criteria" required under the alternate test of Exemption 3.⁴⁸

Several federal withholding statutes do qualify under Exemption 3 because they list with sufficient particularity the material to be withheld. FOIA requests to the CIA, for instance, often give rise to a claim, which is usually sustained,⁴⁹ for exemption under section 6 of the Central Intelligence Agency Act of 1949.⁵⁰ Section 6 provides in part that "the Agency shall be exempted from . . . the provisions of any . . . law which require[s] the . . . disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency."⁵¹ The statute exempting National Security Agency documents may be even more protective:⁵² it covers not only personnel information, but also all functions or activities of the agency itself.⁵³ The

45. *Id.* § 2403(c).

46. *Id.* § 2406(c).

47. *Id.*

48. 574 F.2d at 631-32.

49. *See, e.g.,* National Comm'n on Law Enforcement & Social Justice v. CIA, 576 F.2d 1373 (9th Cir. 1978) (in the absence of an allegation of agency bad faith, the court's inquiry consists of two questions, both answered affirmatively in this case: Is there a (b)(3) statute? Is the requested material exempted by the language of that statute?); Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978); Baker v. CIA, 580 F.2d 664 (D.C. Cir. 1978); Goland v. CIA, 43 Ad. L.2d 407 (D.C. Cir. 1978); Weissman v. CIA, 565 F.2d 692 (D.C. Cir. 1977) (Exemption 3 status explicitly stated in legislative history of 1976 amendment); Cervený v. CIA, 445 F. Supp. 772 (D. Colo. 1978).

50. 50 U.S.C. § 403g (1976).

51. *Id.* For an extended discussion of the proper role of a court in reviewing exemption claims on national security grounds—either for classified documents under Exemption 1 or CIA Act documents under Exemption 3—see Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978). The standard of review utilized in the original January 6, 1977, *Weissman* opinion, ("the court was not to substitute its judgment for that of the agency," *Weissman v. CIA*, 40 Ad. L.2d 829, 835 (D.C. Cir. 1977)), was based on outdated and superseded legislative history that was extremely deferential to the CIA. The amended version of the opinion, dated April 4, 1977, 565 F.2d 692 (D.C. Cir. 1977), no longer requires the court to accept without question an agency's affidavits in support of a national security exemption. Instead, the court will review national security claims *de novo* as it does other claims of exemption and if the court finds it necessary to examine the documents in camera, it may do so. *Id.* at 696-97. See authorities cited in Ray v. Turner, 587 F.2d at 1202-05 nn.14-22 and accompanying text; Raven v. Panama Canal Co., 583 F.2d 169, 172 (5th Cir. 1978).

52. Pub. L. No. 86-36 § 6(a), 73 Stat. 64 (1959), which reads in part: "nothing in this Act or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency. . . ."

53. Hayden v. National Security Agency, 452 F. Supp. 247, 252 n.17 (D.D.C. 1978). *But cf.*

Patent Act⁵⁴ also qualifies as an Exemption 3 statute according to the holding by the Ninth Circuit in *Lee Pharmaceuticals v. Kreps*.⁵⁵ Although the Patent Act grants some discretion to the Patent Office Commissioner, it does satisfy the alternate test because the statute specifies the Patent Office records to be withheld. The Act requires secrecy for applications but does not protect other agency records—decisions, reports and manuals—from disclosure.⁵⁶

Federal statutes may also provide exemption from disclosure if the statute "establishes particular criteria for withholding."⁵⁷ The federal district court in *GTE Sylvania, Inc. v. Consumer Product Safety Commission*⁵⁸ examined the Consumer Product Safety Act (CPSA)⁵⁹ and determined that it qualifies as an Exemption 3 statute even though the "particular criteria" set forth in that statute specify the requirements for disclosure rather than withholding.⁶⁰ The CPSA provides that the Consumer Product Safety Commission, before disclosing data submitted to it, must assure the accuracy of any information to be disclosed, the fairness of disclosure and the reasonable relationship between disclosure and fulfillment of the purposes of the CPSA.⁶¹ The *GTE Sylvania* court regarded the determination of "accuracy" and "fairness" standards required by the CPSA as "more definite and objective"⁶² than the "public interest" test of the Federal Aviation Act that

Baez v. National Security Agency, 43 Ad. L.2d 820, 825 (D.D.C. 1978) ("language" and "purpose" of statutes exempting CIA and NSA documents are "almost identical").

54. 35 U.S.C. § 122 (1976), which provides in full:

Applications for patents shall be kept in confidence by the Patent and Trademark Office and no information concerning the same given without authority of the applicant or owner unless necessary to carry out the provisions of any Act of Congress or in such special circumstances as may be determined by the Commissioner.

55. 577 F.2d 610 (9th Cir. 1978); *accord*, *Sears v. Gottschalk*, 502 F.2d 122 (4th Cir. 1974), *cert. denied*, 422 U.S. 1056 (1975), *rehearing denied*, 423 U.S. 885 (1975), *cert. denied*, 425 U.S. 904 (1976) (pre-1976 amendment case holding that both pending and abandoned patent applications are exempt from FOIA disclosure); *Misegades & Douglas v. Schuyler*, 328 F. Supp. 619, 619-20 (E.D. Va. 1971), *appeal dismissed as moot*, 456 F.2d 255 (4th Cir. 1972) (Patent Act protects "all pertinent information" related to pending applications).

56. *Cf.* *Irons v. Gottschalk*, 548 F.2d 992, 997 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 965 (1977) (Patent Office decisions not protected from disclosure by § 122).

57. 5 U.S.C. § 552(b)(3)(B) (1976).

58. 443 F. Supp. 1152 (D. Del. 1977). See note 186 *infra* for discussion of the reverse-FOIA aspects of this case.

59. 15 U.S.C. §§ 2051-2081 (1976).

60. 443 F. Supp. at 1160. *But cf.* *Mobil Oil v. FTC*, 406 F. Supp. 305 (S.D.N.Y. 1976) (statute setting forth criteria for disclosure does not satisfy the converse FOIA requirement of a statute specifying criteria for withholding).

61. 15 U.S.C. § 2055(b)(1) (1976). In addition, the Commission is absolutely forbidden to disclose a "trade secret or other [confidential] matter." *Id.* § 2055(a)(2).

62. 443 F. Supp. at 1158-59.

prompted the congressional amendment to Exemption 3,⁶³ or the “national interest” test of the Export Administration Act. Thus, the CPSA was held to qualify as an Exemption 3 statute.⁶⁴ Since the Commission had failed to meet the accuracy, fairness and fulfillment criteria, it was enjoined from releasing data exempted from the FOIA by the CPSA.⁶⁵

Congress may provide protection from FOIA disclosure through the enactment of statutes meeting the requirements of amended Exemption 3. In addition, however, Congress may completely foreclose access to information under the FOIA. One such preempting statute is section 6110 of the Internal Revenue Code, added as part of the Tax Reform Act of 1976.⁶⁶ According to the Senate report on the bill, section 6110 provides that “the public inspection of rulings, technical advice memoranda, and determination letters and related background files could be accomplished only pursuant to the rules and procedures set forth in the amendment, and not those of any other provision of law, *such as the FOIA*.”⁶⁷ Court decisions after the effective date of this section⁶⁸ have properly denied access to section 6110 materials through a FOIA request.⁶⁹

63. See text accompanying notes 35-42 *supra*.

64. 443 F. Supp. at 1160.

65. According to the Second Circuit, however, the accuracy and fairness standards of the CPSA “do not apply when the [Consumer Product Safety] Commission merely responds to a request under the FOIA.” *Pierce & Stevens Chem. Corp. v. CPSC*, 585 F.2d 1382, 1385 (2d Cir. 1978). The court of appeals held that the precautions in the CPSA governed only information released to the general public at the initiative of the Commission. Thus, the court concluded that it was not necessary to determine the Exemption 3 status of the CPSA. The appellate court failed to recognize that the release to a FOIA requester *is* release to the public. See authorities cited in notes 76-79 *infra*.

66. Pub. L. No. 94-455, § 1201(a), 90 Stat. 1660 (1976) (codified at I.R.C. § 6110(l)).

67. S. REP. No. 938, 94th Cong., 2d Sess. 314-15, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 3439, 3744 (emphasis added). Subsection 6110 (l) is entitled “Exclusive remedy” and provides in full:

Except as otherwise provided in this title, or with respect to a discovery order made in connection with a judicial proceeding, the Secretary shall not be required by any Court to make any written determination or background file document open or available to public inspection, or to refrain from disclosure of any such documents.

68. Section 6110 as a whole became effective on November 1, 1976. Pub. L. No. 94-455, § 1201(e), 90 Stat. 1660 (1976). Any files requested pursuant to the FOIA before November 1, 1976, and involved in a FOIA suit commenced before January 1, 1976, are exempt from § 6110 and must be provided to the FOIA requester. Pub. L. No. 94-455, § 1201(b), 90 Stat. 1520 (1976).

69. *See Grenier v. IRS*, 449 F. Supp. 834 (D. Md. 1978) (§ 6110 now precludes access via FOIA requests); *Conway v. IRS*, 447 F. Supp. 1128 (D.D.C. 1978) (§ 6110 removes subject matter jurisdiction for FOIA requester seeking § 6110 information when suit filed after January 1, 1976, even though FOIA request made prior to effective date of § 6110). *See also Fruehauf Corp. v. IRS*, 566 F.2d 574, 577 (6th Cir. 1977) (action commenced prior to January 1, 1976, may proceed, although in general § 6110 is now the “exclusive means of public access” to this information). The *Grenier* opinion includes extensive history of the cases that prompted the change of procedure embodied in § 6110. 449 F. Supp. at 836-37.

Section 6110 was enacted to ensure equal access to materials falling within the scope of that statute. In blocking access through the FOIA, Congress demonstrated a preference for total disclosure in limited locations rather than piecemeal disclosure wherever the FOIA request originates. Section 6110 and similar legislation enacted to provide access to agency records outside the FOIA structure⁷⁰ have the potential to diminish significantly the central role assumed by the FOIA during the last decade as a window on governmental operations. Information acquisition procedures unique to each agency offer an alternative to the broad access provisions of the FOIA and could result in either more responsive and carefully tailored access or a return to the secrecy and uncertain effectiveness of pre-FOIA disclosure laws. At the very least, these statutes will serve to counter the argument that agencies lack the resources to make information available to the public within the brief time period allotted by the FOIA.⁷¹

The Fourth Circuit offered a troublesome interpretation of amended Exemption 3 in *Charlotte-Mecklenburg Hospital Authority v. Perry*.⁷² The employer-hospital filed a FOIA request, that was subsequently denied, for statements taken by the Equal Opportunity Employment Commission (EEOC) from hospital employees who had filed employment discrimination charges with the EEOC pursuant to Title VII.⁷³ At the time of the FOIA request, the EEOC had not filed suit against the employer-hospital. In opposing disclosure of the employees' statements to the employer, the EEOC argued that because section 709(e)⁷⁴ of Title VII prohibits disclosure to the public of investigative materials gathered by the Commission prior to initiating an action,

70. See, e.g., Copyright Act of 1976, 17 U.S.C. § 706(b) (1976), which limits access to copies of articles deposited with the Copyright Office. The legislative history of the new Copyright Act states that "reproduction and distribution of copyright deposit copies would be made under the Freedom of Information Act only to the extent permitted by the Copyright Office regulations." H.R. REP. NO. 1476, 94th Cong., 2d Sess. 171, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5659, 5787. The regulations issued by the Copyright Office severely restrict access to these materials: "Requests for photocopies of copyright deposits will be granted when one or more of the following conditions are fulfilled: (i) *Authorization by owner* . . . (ii) *Request by attorney* [in connection with related litigation], (iii) *Court order*." 37 C.F.R. § 201.2(d)(4) (1978). While a central purpose of the FOIA is to provide access without regard to the identity of the requester, see notes 77-81 *infra* and accompanying text, the Copyright Office regulations provide for selective disclosure.

71. As one commentator who discussed the burdens placed on agencies by the FOIA observed, "[r]elief from such administrative problems [as overloads] comes more appropriately from Congress than from the courts." Note, *Developments Under the Freedom of Information Act—1977*, *supra* note 2, at 199. See also Note, *Developments Under the Freedom of Information Act—1976*, *supra* note 2, at 533-41.

72. 571 F.2d 195 (4th Cir. 1978).

73. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976).

74. *Id.* § 2000e-8(e), set out in part in text accompanying note 90 *infra*.

Title VII should be classified as an exempting statute under the FOIA.⁷⁵ Although the EEOC has discretion to provide the employer directly with information about the charges leveled,⁷⁶ the EEOC maintained that for purposes of FOIA requests the Title VII prohibition of disclosure to anyone operates to prohibit disclosure to all. The EEOC relied on the frequent judicial admonitions⁷⁷ that the FOIA is not designed to benefit private litigants⁷⁸ and that the requester's status is irrelevant to the right to disclosure.⁷⁹ In short, the EEOC argued that release to "any person"⁸⁰ pursuant to a FOIA request would constitute release to "the public."⁸¹

The employer-hospital based its claim on the "prima facie right"⁸² to disclosure guaranteed by the FOIA, a right that can be denied only if the requested material falls within one of the narrowly construed ex-

75. For a discussion of the Commission's alternate claim under Exemption 7 of the FOIA for investigative records, see text accompanying notes 139-55 *infra*.

76. In fact, the Commission must "serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice)" on the employer. 42 U.S.C. § 2000e-5(b) (1976). This section does not, however, specifically require or even authorize disclosure of statements taken by the EEOC after the employee files charges.

77. See, e.g., *Sterling Drug Inc. v. FTC*, 450 F.2d 698, 705 (D.C. Cir. 1971) ("disclosure under the Act is not to depend upon the needs of a particular litigant").

78. See, e.g., *Columbia Packing Co. v. Department of Agriculture*, 563 F.2d 495, 499 (1st Cir. 1977) ("the disclosure provisions of FOIA are not a substitute for discovery and a party's asserted need for documents in connection with litigation will not affect, one way or the other, a determination of whether disclosure is warranted under FOIA").

79. See, e.g., *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975) (requester's FOIA rights "are neither increased nor decreased by reason of . . . an interest . . . greater than that shared by the average member of the public"); *Brandon v. Eckard*, 569 F.2d 683 (D.C. Cir. 1977); *Mercy Hosp. v. NLRB*, 449 F. Supp. 594 (S.D. Iowa 1978).

Although documents may be exempt from disclosure under the FOIA, their exempt status may not be relied upon to prevent a federal agency from releasing the documents to Congress. *Exxon Corp. v. FTC*, 585 F.2d 582 (D.C. Cir. 1978) (denial of injunction against FTC to prevent transfer of plaintiff's trade secrets to Congress even though the material would be exempt under the FOIA).

80. 5 U.S.C. § 552(a)(3) (1976).

81. See text accompanying note 90 *infra*. In a case involving an atypical FOIA requester, the Eighth Circuit forcefully reiterated the FOIA policy of releasing or withholding information without regard to the requester's identity. *North Dakota v. Andrus*, 581 F.2d 177 (8th Cir. 1978). FOIA-exempt documents were held to have lost their exempt status once released to a third party and could not subsequently be withheld from the plaintiff in that case: "The selective disclosure exhibited by the government in this action is offensive to the purposes underlying the FOIA and intolerable as a matter of policy." *Id.* at 182.

For the argument that exempt information that is not subject to disclosure under the FOIA may be released to persons chosen by the agency, *i.e.*, selective disclosure, see J. O'REILLY, *FEDERAL INFORMATION DISCLOSURE: PROCEDURES, FORMS AND THE LAW* § 9.07 (1977), and authorities cited therein. If the EEOC does have this type of discretion with respect to exempt information, then the Commission could refuse to disclose the exempt statements to the hospital, as argued by the Commission in response to the FOIA request in *Charlotte-Mecklenburg*. Section 2000e-8(e) would, of course, continue to prevent disclosure to "the public."

82. 571 F.2d at 200.

emptions. Since Title VII does not prohibit the EEOC from providing the charged party with information concerning the charges leveled, but merely proscribes disclosures of investigative materials to the public, the hospital asserted that its prima facie right to disclosure could not be denied under Title VII.

The *Charlotte-Mecklenburg* case illustrates the potential for conflict inherent in the policies underlying the FOIA: the overriding goal of opening up the business of government by disclosing information⁸³ to any member of the public, regardless of the identity, status or interests of the requester,⁸⁴ except when the requested information falls within one of the narrowly construed statutory exemptions.⁸⁵ The hospital argued in favor of disclosure and a narrow reading of Exemption 3, while the EEOC emphasized the requirement of blindness to the identity of the requester.

The circuit court ruled in favor of disclosure and a narrow construction, denying the Exemption 3 claim as to the requesting employer by using a beguiling rationale that misread the exemption. The court found that "since the EEOC itself claims discretion to disclose or not in the context of this case, it is not entitled to exemption from disclosure under the terms of exemption 3, as amended."⁸⁶ According to the court, Title VII "is not a statute prohibiting disclosure to the Hospital and will not, therefore, defeat the Hospital's 'prima facie right' to disclosure, even though it may prohibit disclosure to some other party."⁸⁷

A more appropriate analysis would have focused on the requirements for exemption, dealing exclusively with the information sought rather than the person requesting it, in accordance with the purposes of the FOIA.⁸⁸ Exemption 3, as amended, is not available if the withholding statute leaves discretion with the agency—as section 709(e) of Title VII arguably does⁸⁹—unless the statute specifies the material to be

83. S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965), reprinted in SUBCOMM. ON ADMINISTRATIVE PRACTICE & PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES 38 (Comm. Print 1974).

84. See cases cited in notes 77-79 *supra*.

85. *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citing *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974)).

86. 571 F.2d at 199.

87. *Id.* at 200-01. *But cf.* *Sears, Roebuck & Co. v. EEOC*, 581 F.2d 941, 946 (D.C. Cir. 1978) ("We hold that by enacting § 709(e), Congress meant to prohibit the EEOC from giving information from its investigative files to any individual outside the government") (citation omitted). Moreover, the legislative history of the 1976 amendment to Exemption 3 explicitly names § 709(e) of Title VII as a statute that "could justify withholding under the amended exemption (3)." H.R. REP. NO. 880, *supra* note 4, at 23.

88. See text accompanying notes 83-85 *supra*.

89. Since the EEOC must give the employer notice of the charge filed, see note 76 *supra*, but

withheld or the criteria to be applied in determining whether information should be withheld. Title VII satisfies each of these requirements: it specifies that "[i]t shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section [to obtain any relevant information] prior to the institution of any proceeding under [Title VII]."⁹⁰ Not all EEOC records are protected from disclosure: the section is specifically limited to those records gathered by the Commission during its investigation. The criteria for withholding specify that the information may not be made public in any manner, including by resort to the FOIA.

Section 709(e) of Title VII should be considered an Exemption 3 statute.⁹¹ Because the requested information falls within the disclosure prohibition of Title VII, the FOIA should not apply to the request. Under this analysis, the agency would not be prohibited by other subsections of Title VII from providing the employer with the information sought indirectly through the FOIA. However, the presence of an Exemption 3 statute and information that falls within the scope of that statute would serve to eliminate any affirmative FOIA *duty* to disclose the information, thus allowing the Commission rather than the courts to decide whether disclosure would be appropriate under the circumstances.

III. WITNESS STATEMENTS AND RELATED AGENCY DOCUMENTS

A. *NLRB Witness Statements—A Generic Exemption.*

The single FOIA case decided by the Supreme Court during 1978, *NLRB v. Robbins Tire & Rubber Co.*,⁹² resolved a lopsided split among the circuits concerning pre-hearing disclosure of witness statements given to the National Labor Relations Board (NLRB), statements for which a claim of exemption as investigatory records⁹³ had been pro-

may not release the information to the public, see text accompanying note 90 *infra*, as between the EEOC and the employer, absent the intervening FOIA request, the employer is not "the public."

90. 42 U.S.C. § 2000e-8(e) (1976).

91. If Title VII did not qualify as an Exemption 3 statute and the documents were not otherwise exempt from disclosure, then disclosure would be required and the requester's identity or status would be irrelevant. If Title VII did qualify as an Exemption 3 statute, the fact that the EEOC could, directly and without a FOIA request, provide information to the employer concerning the charges filed against it would be equally irrelevant. The FOIA would not apply to the information, and disclosure would be governed by the provisions of Title VII.

92. 437 U.S. 214 (1978).

93. See 5 U.S.C. § 552(b)(7)(A) (1976), which provides: "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 interfere with enforcement proceedings."

posed. Several circuits⁹⁴ had endorsed the reasoning of the Second Circuit⁹⁵ that disclosure of witness statements "could well" interfere with the NLRB's proceedings and that the statements as a class should be granted a (b)(7)(A) exemption from pre-hearing disclosure.⁹⁶ The Fifth Circuit, on the other hand, had refused in *Robbins Tire*⁹⁷ to recognize a per se exemption for witness statements. The Fifth Circuit would have required a case-by-case inquiry: "would disclosure [pursuant to the FOIA] *actually* 'interfere' with the Board's case?"⁹⁸

The Supreme Court's decision "that witness statements in pending unfair labor practice proceedings are exempt from FOIA disclosure [without the need for case-by-case review] at least until completion of the Board's hearing"⁹⁹ rests on the Court's interpretation of Exemption 7(A) as a "generic" exemption¹⁰⁰ and on its review of the legislative history of the exemption.¹⁰¹ The Court relied on the distinction drawn by the language of the FOIA itself between the class of "enforcement proceedings" included in Exemption 7(A) and the particularity of Exemptions 7(B) through (D)—"a person," "a . . . source"¹⁰²—to justify a determination that "with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.'"¹⁰³ The Court's finding that NLRB witness statements qualify as exempt "particular" documents was based upon its examination of statements made during congressional debate on the original FOIA and Senate floor debate on the 1974 amendments. Specifically,

94. See, e.g., *AMF Head Div. of AMF, Inc. v. NLRB*, 564 F.2d 374 (10th Cir. 1977); *Abrahamson Chrysler-Plymouth, Inc. v. NLRB*, 561 F.2d 63 (7th Cir. 1977); *NLRB v. Hardeman Garment Corp.*, 557 F.2d 559 (6th Cir. 1977); *Harvey's Wagon Wheel, Inc. v. NLRB*, 550 F.2d 1139 (9th Cir. 1976); *New Eng. Med. Center Hosp. v. NLRB*, 548 F.2d 377 (1st Cir. 1976); *Roger J. Au & Son v. NLRB*, 538 F.2d 80 (3d Cir. 1976). See generally Note, *Developments Under the Freedom of Information Act—1976*, *supra* note 2, at 547-51; Note, *Developments Under the Freedom of Information Act—1975*, *supra* note 2, at 399-408.

95. *Title Guar. Co. v. NLRB*, 534 F.2d 484 (2d Cir.), *cert. denied*, 429 U.S. 834 (1976).

96. 534 F.2d at 491.

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

98. 563 F.2d at 727 (emphasis added). The circuit court, in requiring evidence of "specific harm to agency processes that disclosure might produce," *id.* at 728 n.8, rejected the Board's argument that disclosure pursuant to an FOIA request would give the plaintiff discovery rights greater than those available through the Board's own regulations. See, e.g., 29 C.F.R. § 102.118 (b)(1) (1978) (access to witness statements). The circuit court also noted that no evidence had been produced to show that disclosure would result in intimidation. 563 F.2d at 732.

99. 437 U.S. at 236.

100. *Id.* at 224.

101. *Id.* at 224-36.

102. *Id.* at 223-24; 5 U.S.C. § 552(b)(7) (1976).

103. 437 U.S. at 236.

the Court considered the concern expressed by Senator Humphrey during the original FOIA debates that potential witnesses for NLRB proceedings "would be loath to give statements"¹⁰⁴ if there were a possibility that those statements would be disclosed prior to the hearing.¹⁰⁵ The Court also noted Senator Hart's statements in 1974 that the amendments to Exemption 7 were "by no means a radical departure from existing case law."¹⁰⁶ The Court concluded that Exemption 7, as amended in 1974 to eliminate its connection with discovery procedures, continued to provide exemption for certain types of documents such as NLRB witness statements, notwithstanding respondent's argument that Congress intended to require a case-by-case showing of interference.¹⁰⁷ The final step in granting a generic exemption for NLRB witness statements¹⁰⁸ was the Court's determination that the "profound altera-

104. S. REP. NO. 1219, 88th Cong., 2d Sess. 26 (1964), reprinted in SUBCOMM. ON ADMINISTRATIVE PRACTICE & PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES 111 (Comm. Print 1974).

105. Senator Humphrey's concerns were not limited to NLRB proceedings. His amendment to the proposed exemption for investigatory files would have exempted "statement[s] of agency witnesses until such witnesses are called to testify in an action or proceeding." S. REP. NO. 1219, *supra* note 104, at 110 (emphasis added). Had this amendment been enacted as part of the FOIA, the problem of adapting the Supreme Court's decision in *Robbins Tire* to witness statements obtained by other federal agencies might have been avoided. See text accompanying notes 139-55 *infra*.

In response to Senator Humphrey's concerns, the language of the original Exemption 7 (investigatory files are exempt "until they . . . affect an action or proceeding." S. DOC. NO. 82, *supra* note 104, at 99) was changed to provide exemption "except to the extent available by law to a party other than an agency." Pub. L. No. 89-487, § 3(e)(7), 80 Stat. 251 (1966). See O'REILLY, *supra* note 81, §§ 17.05-17.06.

106. HOUSE COMM. ON GOVERNMENT OPERATIONS & SENATE COMM. ON THE JUDICIARY, 94TH CONG., 1ST SESS., FREEDOM OF INFORMATION ACT & AMENDMENTS OF 1974 (PUB. L. NO. 93-502) SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 334 (Joint Comm. Print 1975).

107. 437 U.S. at 234. Robbins argued that the language of the FOIA, considered in its entirety, requires individualized determinations. Records may be examined in camera in order to identify segregable, disclosable portions of otherwise exempt documents. The exemptions ordinarily place the burden on the agency to establish the appropriateness of non-disclosure in a particular case, rather than on the requester to justify disclosure of what might be considered secret information. See also authorities cited in notes 111-12 *infra*.

108. The *Robbins Tire* court did not include in the generic exemption witness statements obtained during an investigation of a challenge to an NLRB representation election. However, the same rationale that exempts statements taken during unfair labor practice proceedings applies to election proceedings: in both instances, the requester's prior access would, under the Supreme Court's analysis, "disturb the existing balance of relations," 437 U.S. at 236, between the parties and would violate Board policies governing discovery and interfere with an ongoing investigation. The First Circuit so held in *Trustees of Boston Univ. v. NLRB*, 575 F.2d 301 (1st Cir. 1978), noting in addition that Boston University's method for challenging the election was to refuse to bargain with the new union, thereby triggering an unfair labor practice charge with subsequent review in the courts. *Id.* at 310. The similarity between the interference caused by disclosure in unfair labor practice proceedings and in election proceedings was also emphasized by the brief

tion"¹⁰⁹ in strategy that would occur if NLRB witness statements were disclosed prior to the Board's hearing would constitute sufficient interference to outweigh the presumption in favor of disclosure in every FOIA case.¹¹⁰

The *Robbins Tire* decision is expansive in that the Court unanimously agreed to authorize a per se exemption to the FOIA despite congressional¹¹¹ and prior judicial language¹¹² calling for a case-by-case examination of the agency's exemption claim. However, the exemption is limited in such a way that many questions are left unanswered. For example, three members of the Court¹¹³ joined the opinion with the understanding that its rationale should not be limited to the NLRB, but should apply "equally to any enforcement proceeding."¹¹⁴ Two members of the Court¹¹⁵ agreed that employees' statements criticizing their current employer should be exempt in every case, but felt that favorable statements and the unfavorable statements of former employees should be disclosed because questions of coercion or intimidation would not be relevant.¹¹⁶ This procedure would create a hybrid standard combining case-by-case review with the generic exemption. Although none of the three opinions in *Robbins Tire* discussed a generic exemption for other types of NLRB records, several lower federal courts have recently addressed this question as well as the applicability of Exemption 7(A) to the proceedings of other federal

order in *Fotomat Corp. v. NLRB*, 573 F.2d 959 (6th Cir. 1978), in which the court affirmed a district court decision not to compel disclosure of the names and addresses of witnesses in an election challenge. Without distinguishing between the two types of NLRB proceedings, the *Fotomat* court relied on *NLRB v. Hardeman Garment Corp.*, 557 F.2d 559 (6th Cir. 1977), an unfair labor practice case.

109. 437 U.S. at 237.

110. In particular, the Court stated that coercion and deterrence from speaking out are very real possibilities, *id.* at 239, despite the prohibitions against intimidation contained in the National Labor Relations Act, 29 U.S.C. § 158(a)(4) (1976). Both favorable and unfavorable statements of employees and non-employees were included within the court's interpretation of the exemption in order to deprive the alleged violator of any opportunity to frustrate the proceedings or "construct defenses which would permit violations to go unremedied." 437 U.S. at 241 (quoting *Title Guarantee Co. v. NLRB*, 534 F.2d 484, 491 (2d Cir.), *cert. denied*, 429 U.S. 834 (1976)). See also *New Eng. Med. Center Hosp. v. NLRB*, 548 F.2d 377, 382 (1st Cir. 1977).

111. See, e.g., 1975 SOURCE BOOK, *supra* note 106, at 293, 333.

112. See, e.g., *Cessna Aircraft Co. v. NLRB*, 405 F. Supp. 1042 (D.C. Kan. 1975), *rev'd*, 542 F.2d 834 (10th Cir. 1976).

113. Justices Stevens and Rehnquist and Chief Justice Burger.

114. 437 U.S. at 243. See text accompanying notes 139-55 *infra*.

115. Justices Powell and Brennan.

116. 437 U.S. at 252-54. The favorable/unfavorable classification would place a heavy burden on courts to evaluate the overall content of witness statements and presumably to segregate favorable portions for disclosure. Exemption 7 relates to proceedings, not witness attitudes, and determinations of exempt material should focus on interference with the proceeding, not interference with the witnesses' personal lives or employment status.

agencies.

B. *NLRB Documents in Other Contexts.*

Federal courts have equated disclosure of witness statements taken by the NLRB during unfair labor proceedings with disclosure of similar statements taken during union election challenge proceedings.¹¹⁷ However, the exemption granted in each of these situations has not been extended to witness statements taken on deposition in a private, non-NLRB civil action. In *Halloran v. Fisher Foods, Inc.*,¹¹⁸ a private action not involving a request for information under the FOIA, a group of employees filed a class action suit against their employer, alleging breach of duty. On deposition the plaintiff union employees refused to answer questions relevant to a parallel unfair labor practice proceeding before the NLRB, citing two FOIA cases, *Title Guarantee Co. v. NLRB*¹¹⁹ and *NLRB v. Hardeman Garment Corp.*,¹²⁰ for the proposition that witness statements are exempt from disclosure when "developed within and part of" the pending NLRB action.¹²¹ In denying the plaintiffs' objection and ordering them to answer the deposition questions the court emphasized the difference between the nature of the NLRB proceeding and that of the private lawsuit as well as the distinction between the limited discovery policy of the NLRB,¹²² noted in *Robbins Tire*¹²³ and its predecessors,¹²⁴ and the more lenient discovery policies of the Federal Rules of Civil Procedure.¹²⁵ The court refused to apply a judicial standard developed in response to the relationship between the FOIA and NLRB proceedings in the context of a non-FOIA, non-NLRB suit.

FOIA requests for NLRB documents continue to elicit inconsistent judicial responses in the area of personal files (Exemption 6).¹²⁶

117. See note 108 *supra*.

118. 42 Ad. L.2d 239 (N.D. Ohio 1977).

119. 534 F.2d 484 (2d Cir.), *cert. denied*, 429 U.S. 834 (1976).

120. 557 F.2d 559 (6th Cir. 1977). See text accompanying notes 94-96 *supra*.

121. 42 Ad. L.2d at 241.

122. The NLRB discovery policy is authorized by § 6 of the NLRA, 29 U.S.C. § 156 (1976). See, e.g., 29 C.F.R. § 102.30 (1978) ("Witnesses, Depositions, and Subpenas"); 29 C.F.R. § 102.118 (1978) (restrictions on production of or testimony concerning NLRB records and documents).

123. 437 U.S. at 236-38, 241.

124. See cases cited in note 94 *supra*.

125. FED. R. CIV. P. 26-37.

126. 5 U.S.C. § 552(b)(6) (1976), which provides in full: "This section does not apply to matters that are personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." This exemption, and union authorization cards in particular, is discussed in Note, *Developments Under the Freedom of Information Act—1977*, *supra* note 2, at 212-16.

Union authorization cards are claimed by the NLRB to be exempt from disclosure as personal files, a position first accepted by the Third Circuit in *Committee on Masonic Homes v. NLRB*¹²⁷ and more recently espoused by the Fifth Circuit in *Pacific Molasses Co. v. NLRB*.¹²⁸ The *Pacific Molasses* court effectively skirted the issue of how an employee's name and address could be classified as "intimate details"¹²⁹ so personal as to fall within Exemption 6 by emphasizing another test: the extent of the invasion of privacy that could result from disclosure.¹³⁰ The court found a very strong privacy interest, as had the *Masonic Homes* court,¹³¹ but apparently did not consider it necessary to link that interest to a statutorily exempt document.¹³²

The dissent in *Pacific Molasses* focused on the majority's failure to determine the exempt status of the authorization cards on the basis of the documents themselves, rather than the interests at stake. It observed that the cards were the property of the union rather than the company and contained only names, addresses and work data, not family history or any of the evaluative data ordinarily found in personnel or "similar" files. In fact, the employer had access to the data on the cards through its own files. The employer's real goal was to obtain access to the signatures—information that the dissent declined to classify as "personnel" or "similar to personnel" information.¹³³

[The majority's] result has been reached by reverse reasoning and, in my opinion, contrary to the expressed intent and purpose of Congress. Under this holding any invasion of personal privacy would result in non-disclosure regardless of whether the material was [an Exemption 6 document].

. . . The test under Exemption 6 should not be whether the material is personal or private, but whether or not it is a personnel, medical or similar file, and, if not, as in the case before us, it must be disclosed.¹³⁴

A year prior to the *Pacific Molasses* decision a federal district court

127. 556 F.2d 214 (3d Cir. 1977).

128. 577 F.2d 1172 (5th Cir. 1978); *accord*, *United Supermarkets, Inc. v. NLRB*, 449 F. Supp. 407 (N.D. Tex. 1978).

129. 577 F.2d at 1180 (quoting *Rural Hous. Alliance v. Department of Agriculture*, 498 F.2d 73, 77 (D.C. Cir. 1974)).

130. 577 F.2d at 1181.

131. 556 F.2d at 220-21.

132. 577 F.2d at 1185-86 (Skelton, J., concurring in part and dissenting in part).

133. *Id.* at 1186.

134. *Id.* at 1188. Also, see *National Treasury Employees Union*, 43 Ad. L.2d 462 (F.C.C. 1978) for an agency's partial denial of a FOIA request for names and addresses "of all bargaining unit employees of the Commission." *Id.* at 463. The employees' addresses, but not their names, were considered exempt because disclosure would constitute an Exemption 6 invasion of privacy. The Commission did not discuss to what extent, if any, the addresses constituted "personnel" or "similar" files.

had held, without explanation, that union authorization cards were "similar" Exemption 6 files.¹³⁵ The court did conclude, however, that the NLRB and the *Masonic Homes* opinion had erred in claiming that disclosure would "chill" employees' exercise of their rights to organize and bargain.¹³⁶ In the court's view, the employer was merely "invok[ing] the procedure provided by law for obtaining agency records"¹³⁷—the FOIA—and the cards were not exempt from disclosure.¹³⁸

The continuing debate over the FOIA status of union authorization cards illustrates the difficult task faced by the courts in addressing issues not anticipated by the language or legislative history of the Act. The dissent in *Pacific Molasses* correctly noted that the cards should not be treated as Exemption 6 files. However, the *public* interest would not appear to require disclosure of the union preferences of individual employees. Until either the FOIA or the National Labor Relations Act is amended to resolve the issue, the courts should continue to order disclosure of such information in order to prevent Exemption 6 from becoming a vehicle for federal agencies to withhold information that should be available to the public.

C. *Witness Statements and Other Agencies.*

Statements taken from parties filing an employment discrimination charge with the EEOC under Title VII¹³⁹ provided the background for the court's finding in *Charlotte-Mecklenburg Hospital Authority v. Perry*¹⁴⁰ that Exemption 7(A) does not provide a per se exemption for witness statements.¹⁴¹ The *Charlotte-Mecklenburg* court, referring frequently to the Fifth Circuit's now overruled¹⁴² decision in *Robbins*

135. *Howard Johnson Co. v. NLRB*, 444 F. Supp. 843 (E.D. Mich. 1977).

136. *Id.* at 844.

137. *Id.* at 845.

138. In a situation analogous to NLRB authorization procedures, an employer sought disclosure of the *number* of authorization cards submitted to the National Mediation Board in a quest for union certification. *American Airlines, Inc. v. National Mediation Bd.*, [1979] LAB. L. REP. (CCH)(85 Lab. Cas.) ¶ 10,971, at 19,729 (2d Cir. Dec. 4, 1978). The Mediation Board claimed two exemptions, Exemption 7(A) for investigatory files and Exemption 4 for trade secrets. The court granted Exemption 4 status to the number of cards, based on "the clearly commercial nature of the activity of a labor organization seeking to organize and its substantial effect on commerce," *id.* at 19,733, and the "apparent" harm to the union's competitive position if the information were disclosed.

139. 42 U.S.C. § 2000e-2 (1976).

140. 571 F.2d 195 (4th Cir. 1978).

141. For a discussion of the court's additional holding that Title VII is not an Exemption 3 statute, at least in the instant case, see notes 72-91 *supra* and accompanying text.

142. See notes 92-116 *supra* and accompanying text.

Tire,¹⁴³ denied exemption to statements taken by EEOC investigators in the initial stages of an investigation and prior to the filing of an action under Title VII without undertaking a case-by-case review. The court was unable to reconcile a generic exemption with the legislative history¹⁴⁴ and text¹⁴⁵ of the 1974 amendments to the FOIA,¹⁴⁶ the intent of Congress was interpreted to require an in camera, factual inquiry.¹⁴⁷ After making such an inquiry, the *Charlotte-Mecklenburg* court concluded that statements of current employees should be exempt, but ordered disclosure of statements made by past employees.¹⁴⁸ This result is almost identical to the outcome favored by the dissenting opinion of Justices Powell and Brennan in *Robbins Tire*.¹⁴⁹

Neither the Supreme Court majority in *Robbins Tire* nor the Fourth Circuit in *Charlotte-Mecklenburg* openly advocated the application of different standards in evaluating FOIA requests made to the NLRB as opposed to other federal agencies. However, the concurring Justices in *Robbins Tire* would have extended the per se exemption to other agencies, making it equally applicable to "any enforcement proceeding."¹⁵⁰ Nonetheless, the *Robbins Tire* majority did emphasize the particular concern for NLRB proceedings exhibited by Congress at the time the original FOIA was enacted¹⁵¹ and interpreted the legislative history of the 1974 amendments to preserve that concern.¹⁵² The *Charlotte-Mecklenburg* decision appears to force the issue: the courts must either acknowledge that special treatment will be afforded to the NLRB, despite the fact that the language of the FOIA is agency-neutral and that the "overriding purpose"¹⁵³ of the Act is to disclose information except in the presence of an exemption narrowly construed,¹⁵⁴ or

143. 563 F.2d 724 (5th Cir. 1977), *rev'd*, 437 U.S. 214 (1978).

144. 1975 SOURCE BOOK, *supra* note 106, at 293, 333.

145. See note 93 *supra*.

146. 571 F.2d at 201-02.

147. *Id.* at 202.

148. *Id.* at 202-03.

149. 437 U.S. at 252-54. See text accompanying notes 115-16 *supra*.

150. 437 U.S. at 243 (Stevens, J., concurring) (emphasis added). A District of Columbia Circuit Court case decided after *Robbins Tire* provides a further illustration of the difference of opinion among the courts concerning the scope of the *Robbins Tire* decision. *Bristol-Myers Co. v. FTC*, 1978-2 Trade Cas. (CCH) ¶ 62,227 (D.C. Cir. 1978). Two circuit judges insisted that in order to keep investigative documents secret the FTC must show that release in the particular case would interfere with enforcement proceedings. The dissenting third judge urged adoption of the *Robbins Tire* standard, claiming that disclosure would go beyond the agency's own rules of discovery and would constitute "interference" without a factual showing of interference in the particular situation.

151. 437 U.S. at 225-26.

152. *Id.* at 232.

153. See text accompanying notes 83-85 *supra*.

154. See note 85 *supra*.

provide an explicit statement of the Supreme Court's inference that the proceedings of the NLRB do warrant separate consideration because the danger of "disturb[ing] the existing balance of relations"¹⁵⁵ is somehow greater for the NLRB than for analogous proceedings before other agencies such as the EEOC.

IV. REVERSE-FOIA SUITS

The efforts of individuals or corporations who are required to submit information to federal agencies to enjoin disclosure of that information pursuant to an FOIA request—the so-called "reverse-FOIA" suits¹⁵⁶—continue to produce inconsistent judicial results and have recently prompted an investigation of the problem by a House of Representatives committee.¹⁵⁷ The courts are not in agreement as to the source of the cause of action in a reverse-FOIA lawsuit, the agency's discretion to disclose FOIA-exempt information, or the proper standard of judicial review to be applied in evaluating a decision to enjoin disclosure.

Two lines of decision have emerged. Courts adopting¹⁵⁸ the approach articulated in *Chrysler Corp. v. Schlesinger*¹⁵⁹ find no authority for a cause of action in either the FOIA itself¹⁶⁰ or the Trade Secrets Act.¹⁶¹ These circuits recognize a cause of action only under the Administrative Procedure Act (APA).¹⁶² The APA provides for limited review of federal agencies' decisions to determine agency abuse or arbitrary behavior¹⁶³ and the courts have premised a cause of action on the agency's authority to disclose exempt information.¹⁶⁴ On the other hand, courts adopting the approach developed in extended litigation¹⁶⁵ involving the Westinghouse Corporation have found an implied cause

155. 437 U.S. at 236.

156. See note 8 *supra*.

157. H.R. REP. NO. 1382, *supra* note 10. See text accompanying note 212 *infra*.

158. See note 186 *infra*.

159. 565 F.2d 1172 (3d Cir. 1977), *vacated and remanded sub nom. Chrysler Corp. v. Brown*, 99 S. Ct. 1705 (1979).

160. See text accompanying notes 167-86 *infra*.

161. 18 U.S.C. § 1905 (1976), set out in part in note 175 *infra*.

162. 5 U.S.C. §§ 701-706 (1976).

163. *Id.* § 706, set out in part in note 183 *infra*.

164. See *EPA v. Mink*, 410 U.S. 73, 80 (1973) (the exemptions represent "the congressional determination of the types of information that the Executive Branch must have *the option* to keep confidential, *if it so chooses*") (emphasis added).

165. *Westinghouse Elec. Corp. v. Nuclear Regulatory Comm'n*, 555 F.2d 82 (3d Cir. 1977); *Westinghouse Elec. Corp.—Research & Dev. Center v. Brown*, 443 F. Supp. 1225 (E.D. Va. 1977); *Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1246 (E.D. Va. 1974), *aff'd*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977).

of action for the submitter in the FOIA¹⁶⁶ and express authorization for such a cause of action in the Trade Secrets Act. These courts conduct a *de novo* review of the agency's actions in deciding whether to disclose information; if the information is found by the court to be exempt, then it may not be disclosed.

The *Chrysler*¹⁶⁷ court's rationale, relied on by two other circuit courts and by district courts in another circuit,¹⁶⁸ rests on its initial finding that a cause of action exists under the FOIA only for persons seeking disclosure and not for persons resisting disclosure. The FOIA forbids withholding non-exempt information¹⁶⁹ and provides a judicial remedy to requesters wrongfully denied disclosure.¹⁷⁰ According to the *Chrysler* line of cases, however, the FOIA does not mandate withholding exempt information¹⁷¹ and consequently does not provide a judicial remedy for the submitter when an agency chooses to disclose exempt information.¹⁷² After citing legislative history¹⁷³ in support of its interpretation of the general exemption subsection of the FOIA, the court stated that "either a mandatory duty of non-disclosure or a cause of action to prevent disclosure would be inconsistent with the basic purpose of the FOIA, which . . . is that of full agency disclosure to provide the public with speedy access to relevant information."¹⁷⁴

The *Chrysler* court also refused to recognize a cause of action under the Trade Secrets Act,¹⁷⁵ since disclosure could, in accordance with that statute, be "authorized by law" pursuant to regulations issued by the agency under the authority of the federal housekeeping statute.¹⁷⁶ Agency regulations "have the force of law for purposes of

166. See text accompanying notes 187-199 *infra*.

167. *Chrysler* sought to prevent disclosure of employment statistics and affirmative action information submitted to appropriate federal agencies. The circuit court remanded to the agency for lack of an adequate record on which to assess the issue of agency discretion or abuse.

168. See note 186 *infra*.

169. 5 U.S.C. § 552(c) (1976).

170. *Id.* § 552(a)(4)(B).

171. 565 F.2d at 1185.

172. *Id.*

173. See, e.g., H.R. REP. NO. 1497, 89th Cong., 2d Sess. 2, 5-7, reprinted in [1966] U.S. CODE CONG. & AD. NEWS 2418, 2419, 2422-2424; S. REP. NO. 813, *supra* note 83, at 45.

174. 565 F.2d at 1185 (citation omitted).

175. 18 U.S.C. § 1905 (1976), which reads in part:

Whoever, being an officer or employee of the United States . . . , publishes, divulges, discloses or makes known in any manner or to any extent not authorized by law any information . . . which . . . concerns or relates to the trade secrets [or confidential business information] of any person, firm, partnership, corporation, or association . . . shall be fined not more than \$1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment (emphasis added).

176. 5 U.S.C. § 301 (1976), which reads in part: "The head of an Executive department . . . may prescribe regulations for . . . the custody, use, and preservation of its records, papers, and

§ 1905,¹⁷⁷ the Trade Secrets Act, as recognized by a prior decision of the same circuit¹⁷⁸ and by legislative history.¹⁷⁹

The court was willing to review the agency's action under the Administrative Procedure Act,¹⁸⁰ however, because a person submitting information to a federal agency and later resisting disclosure of that information may "suffer legal wrong because of agency action"¹⁸¹ in disclosing pursuant to the FOIA.¹⁸² Judicial review by courts adhering to the *Chrysler* analysis is limited, therefore, to an examination of the agency record as provided in the APA.¹⁸³ The *Chrysler* court suggested the following analysis.¹⁸⁴ First, a court must determine whether an Exemption 3 statute or regulation applies. If so, the agency abuses its discretion if it discloses the information. If no Exemption 3 statute applies, the next consideration is whether the agency used the correct standard in determining that no other FOIA exemptions applied. If the agency decided to disclose the information after determining that it was exempt, the court must determine whether the agency used the correct standard in finding an exemption and whether the agency followed its own regulations in deciding to disclose. If the court cannot determine on the basis of the agency record whether the agency abused its discretion, the court must "remand to the agency for an additional record or explanation";¹⁸⁵ the court may not itself decide the substantive merits of the case.¹⁸⁶

property. This section does not authorize withholding information from the public or limiting the availability of records to the public."

177. 565 F.2d at 1186.

178. *Westinghouse Elec. Corp. v. Nuclear Regulatory Comm'n*, 555 F.2d 82, 94 (3d Cir. 1977) (although the regulations here were issued under 42 U.S.C. § 103(b)(3) (1976) and not under 5 U.S.C. § 301 (1976)).

179. 565 F.2d at 1186-87, and authorities cited therein.

180. 5 U.S.C. §§ 701-706 (1976).

181. *Id.* § 702.

182. 565 F.2d at 1190-91.

183. 5 U.S.C. § 706 (1976), which provides in part:

The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or] (C) in excess of statutory jurisdiction, authority, or limitations. . . . In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

184. 565 F.2d at 1192.

185. *Id.*

186. For a fuller discussion of a similar analytical approach, see Clement, *supra* note 8, at 632.

Several courts have explicitly adopted the analytical approach of the *Chrysler* court. Three months after the Third Circuit's *Chrysler* decision, twelve television manufacturers, in *GTEsylvania, Inc. v. Consumer Prod. Safety Comm'n*, 443 F. Supp. 1152 (D. Del. 1977), successfully enjoined disclosure of data concerning television-related accidents to Consumers Union. To reach its decision, the Delaware District Court stated that its "determinations . . . concerning the scope of judicial review and the materials to be reviewed comport completely with the principles ex-

Submitters of information seeking to enjoin FOIA disclosure will find a more hospitable forum in the Fourth Circuit, the locus of the major Westinghouse decisions. The circuit court in *Westinghouse Electric Corp. v. Schlesinger (Westinghouse)*¹⁸⁷ found an implied cause of action in the FOIA itself based on the right of a "private party to protect his right to protection from disclosure, stated as a general over-all legislative policy in Exemption 4."¹⁸⁸ At least when trade secrets are involved,¹⁸⁹ the Fourth Circuit reads the FOIA exemption as protective of personal rights as well as of governmental secrecy interests.¹⁹⁰ The same trade secrets claim will provide the basis for the submitter's cause of action under the Trade Secrets Act¹⁹¹ because, in the view of the *Westinghouse* court, section 1905 mandates non-disclosure of trade secrets information meeting the requirements of Exemption 4.¹⁹² The

pressed in the *Chrysler* case," *id.* at 1162 n.32, and the court applied the *Chrysler* analysis point by point. *Id.* at 1160-61. Litigation over this same accident data continues in the District of Columbia courts. *Consumers Union of the United States, Inc. v. Consumer Prod. Safety Comm'n*, No. 75-2059 (D.C. Cir., filed Dec. 22, 1978).

Data submitted by a pesticide manufacturer to the Environmental Protection Agency was claimed by the company to be exempt from disclosure in *Chevron Chem. Co. v. Costle*, 443 F. Supp. 1024 (N.D. Cal. 1978). The district court relied on *Chrysler* to set the level of review at "agency abuse" rather than permitting de novo review of the agency's decision to make the data public. *Id.* at 1029-30. In passing, the court agreed with *Chrysler* that the FOIA exemptions do not alone mandate withholding and that the Trade Secrets Act "may not afford affirmative relief against disclosure." *Id.* at 1032.

In a reverse-FOIA case which, like *Chrysler*, involved employment information submitted by a federal contractor, *General Dynamics Corp. v. Marshall*, 572 F.2d 1211 (8th Cir. 1978), the Eighth Circuit called the *Chrysler* decision "a well-reasoned opinion," *id.* at 1216, and proceeded to follow both its reasoning and analysis: exemptions are permissive, no cause of action exists under 18 U.S.C. § 1905 (1976), and the scope of review is limited to "agency abuse." Another federal contractor's employment data had been ordered withheld by a district court, but in *Sears, Roebuck & Co. v. Eckerd*, 575 F.2d 1197 (7th Cir. 1978), the Seventh Circuit lifted the injunction because the submitter seeking the injunction had no cause of action under the Trade Secrets Act. This court cited both *General Dynamics* and *Chrysler* for the position that valid regulations are sufficient "authority" under 18 U.S.C. § 1905 (1976), see note 175 *supra*, to fall within the exemption to the Trade Secrets Act's withholding requirement, 575 F.2d at 1202, and that the FOIA itself provides a cause of action only for the person seeking disclosure. *Id.* at 1203.

187. 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977); see Note, *Developments Under the Freedom of Information Act—1976*, *supra* note 2, at 562-63.

188. 542 F.2d at 1214.

189. Presumably, the court would extend its finding of mandatory non-disclosure to include the personal private information protected by Exemptions 6 and 7(C).

190. The legislative history of the original FOIA fully supports the court's position:

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. . . . It is also necessary for the very operation of our Government to allow it to keep confidential certain material. . . .

S. REP. NO. 813, *supra* note 83, at 38.

191. 18 U.S.C. § 1905 (1976), set out in part in note 175 *supra*.

192. 542 F.2d at 1198, 1202-03. The *Westinghouse* decision included a finding that § 1905 was a qualifying Exemption 3 statute that prohibited disclosure. The legislative history of the 1976

Westinghouse court also held de novo review of the matter to be appropriate; if a court determines that the trade secrets exemption applies the court must order non-disclosure.¹⁹³ Because the FOIA provides a cause of action for requesters and the court found an implied cause of action under the FOIA for submitters as well, the fact that de novo review is appropriate in an action by the requester indicates that de novo review will also be appropriate in an action by the submitter.¹⁹⁴ According to the *Westinghouse* court, “[i]t would be an incredible rule”¹⁹⁵ if the agency’s actions in violation of section 1905 could only be examined for arbitrariness.

The latest *Westinghouse* reverse-FOIA decision, *Westinghouse Electric Corp.—Research & Development Center v. Brown (Westinghouse Research)*,¹⁹⁶ came after the *Chrysler* decision and commented on the differing approaches of the two circuits. *Westinghouse Research* specifically endorsed the earlier holdings of its own circuit court, that section 1905¹⁹⁷ and the FOIA both provide a cause of action to the submitter and that a “full trial at which the Court determines *de novo* the plaintiff’s right to have the information ordered withheld”¹⁹⁸ is required. Unfortunately, the district court did not conduct a comparative analysis of the *Chrysler* and earlier *Westinghouse* decisions, but merely invoked its obligation to follow its own circuit’s decisions.¹⁹⁹

amendment to the FOIA, see text accompanying notes 40-42 *supra*, indicates that 18 U.S.C. § 1905 (1976) no longer qualifies for Exemption 3 status, but “if material is within the trade secrets exemption of the Freedom of Information Act and therefore subject to disclosure if the agency determines that disclosure is in the public interest, section 1905 must be considered to ascertain whether the agency is forbidden from disclosing the information.” H.R. REP. NO. 880, *supra* note 4, at 23.

193. 542 F.2d at 1215.

194. *Id.* at 1213-14.

195. *Id.* at 1215.

196. 443 F. Supp. 1225 (E.D. Va. 1977).

197. The *Westinghouse Research* court, like the *Chrysler* court, used a piggyback approach to § 1905, but to reach opposite results: in *Westinghouse Research*, § 1905 was held to prohibit disclosure because Exemption 4 removed the information from FOIA coverage. Thus, disclosure was “not authorized by law” and § 1905 applied to protect the information. In *Chrysler*, on the other hand, § 1905 was irrelevant because disclosure was “authorized by law” because the regulations were made pursuant to another federal statute. See text accompanying notes 175-79 *supra*.

198. 443 F. Supp. at 1232.

199. *Id.* A more recent reverse-FOIA case from a district court in the Fourth Circuit, *Nationwide Mut. Ins. Co. v. Friedman*, 451 F. Supp. 736 (D. Md. 1978), involved information submitted to several federal agencies as part of an investigation of the religious composition of Nationwide’s work force. Following its own circuit’s decision in *Westinghouse*, the district court recognized an “implied right of action under the FOIA itself” for the submitter. *Id.* at 741. The agencies had determined that no exemptions applied, making disclosure mandatory. After a de novo examination of the submitter’s arguments for exemption, the court concluded that Exemption 3 did not apply because the Trade Secrets Act was too broad and that Exemption 6 did not apply since only statistics and not employees’ names had been submitted to the agencies.

The clearest illustration of the divergent judicial approaches taken in reverse-FOIA lawsuits in 1978 is found in two district court cases from the Fourth and Fifth Circuits, *Humana of Virginia, Inc. v. Blue Cross*²⁰⁰ and *Doctors Hospital Inc. v. Califano*.²⁰¹ Both suits were initiated by Medicare health care providers in an attempt to enjoin disclosure of cost reports submitted to HEW. The plaintiffs challenged an HEW regulation that provides that "[u]pon request in writing, cost reports submitted by providers of [health care services] . . . to enable the Secretary to determine amounts due such providers" shall be made available to the public.²⁰² The *Humana* court, following the decisions of its own circuit in the Westinghouse cases, stated that the FOIA gave Humana the right to seek an injunction and that the Trade Secrets Act would forbid disclosure if the trade secrets exemption applied to the cost reports.²⁰³ Finding the cost reports clearly commercial, financial and confidential, the court prohibited disclosure and, by implication, found the HEW regulation invalid.²⁰⁴

The *Doctors Hospital* court used the *Chrysler* approach in declaring that the FOIA is not a prohibitory statute.²⁰⁵ Consequently, the question of exemption for trade secrets or commercial information was relevant only in determining whether the agency had abused its discretion. According to that court, even if the cost reports did constitute trade secrets, their exemption would allow the agency to decide whether to disclose the material. Only the validity of the regulation was at issue. If the regulation was valid, disclosure would be "authorized" and the Trade Secrets Act would not apply.²⁰⁶ The court balanced the strong public interest in disclosure against the minimal interest in secrecy of physicians who are "not compet[ing] in the market place"²⁰⁷ and who choose to participate in the Medicare program. In finding the regulation valid, the court emphasized the distinction between these voluntary participants and regulated industries that are forced to submit confidential commercial information to the federal government in order to exist.²⁰⁸ Thus, one district court ordered disclosure as required by the FOIA and an agency regulation and another prohibited disclosure as unauthorized by either the FOIA or the regula-

200. 455 F. Supp. 1174 (E.D. Va. 1978).

201. 455 F. Supp. 476 (M.D. Fla. 1978).

202. 20 C.F.R. § 422.435(c) (1978).

203. 455 F. Supp. at 1176.

204. *Id.* at 1179.

205. 455 F. Supp. at 479.

206. *Id.* at 481-82.

207. *Id.* at 480.

208. *Id.* at 481.

tion. In these two cases, the courts' decisions on the issue of whether FOIA exemptions should be regarded as mandatory or permissive effectively dictated the outcome of the cases. The other two major issues in reverse-FOIA lawsuits, the source of the cause of action and the scope of judicial review,²⁰⁹ were not even addressed by the *Doctors Hospital* court.

The continuing uncertainty surrounding the reverse-FOIA suit has provoked more than judicial response. One commentator, critical of the restricted review of the *Chrysler* court, urges an amendment to the FOIA that would require agencies to notify submitters of "private, confidential" information prior to release under the FOIA and that would give the submitter an explicit cause of action in the district court, with the court determining de novo the existence of an exemption and the public interest in disclosure or non-disclosure.²¹⁰ Others assume that the *Chrysler* decision was correct, that Congress intended that the exemptions be permissive in nature, and presumably that the "abuse of discretion" standard is the appropriate standard of review.²¹¹ The House of Representatives Committee on Government Operations has responded to the reverse-FOIA confusion by issuing a report²¹² analyzing the judicial decisions and recommending procedures for agencies that deal with business data, procedures that would include notice to the submitters prior to FOIA disclosure. The Committee's report advocates amendment of the FOIA to embrace the "abuse of discretion" standard of *Chrysler* in the event that the Supreme Court's decision in *Chrysler* does not prove adequate to solve the scope-of-review problem.²¹³

CONCLUSION

Of the four categories of significant FOIA litigation in 1978, only

209. See text accompanying notes 156-66 *supra*.

210. O'REILLY, *supra* note 81, § 10.10.

211. Lynch, Cohn & Vladek, *Exemption 4*, in LITIGATION UNDER THE AMENDED FEDERAL FREEDOM OF INFORMATION ACT 28 (4th ed. C. Marwick 1978); Comment, *supra* note 8, at 1009-11. See generally Clement, *supra* note 8.

212. H.R. REP. NO. 1382, *supra* note 10.

213. *Id.* 4. On April 18, 1979, the Supreme Court vacated the circuit court's decision in *Chrysler* and remanded to the district court for a determination of the applicability of the Trade Secrets Act to the documents involved. The Court affirmed that neither the FOIA nor the Trade Secrets Act gives the submitter a private cause of action to enjoin disclosure, but that judicial review is available through the Administrative Procedure Act. In addition, the Court confirmed the permissive nature of the FOIA exemptions, so that even if an exemption applies, the agency may still release the documents unless another statute prohibits disclosure; the decision to disclose would then be subject to judicial review for abuse of discretion. *Chrysler Corp. v. Brown*, 97 S. Ct. 1705 (1979).

one—the Exemption 3 litigation—is likely to recede in importance in the near future. So long as the courts continue to apply a two-part test to determine whether statutes qualify under Exemption 3—allowing withholding either in the absence of discretion or in the presence of specific criteria—then the classification of qualifying statutes and exempt information should remain a straightforward process.

Litigation will continue, however, in the areas of private research data and other “obtainable” records until the courts fashion more definitive contours for the concepts of agency “control,” “ownership” and “possession.” There are also a number of unanswered questions concerning investigative records that may be protected by Exemption 7, particularly the problem of different judicial treatment of various agencies. Finally, even if the Supreme Court does establish a clear standard of review for reverse-FOIA cases, submitters of information will continue to seek protection under the vague trade secrets exemption.²¹⁴

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214. For an extensive discussion of this problem, see Note, *FDA Disclosure of Safety and Effectiveness Data: A Legal and Policy Analysis*, 1979 DUKE L.J. 286.