

COMMENTS

DEVELOPMENTS UNDER THE FREEDOM OF INFORMATION ACT—1979

Cases construing the Freedom of Information Act (FOIA)¹ in 1979, the thirteenth year since its enactment, focused on many issues left unresolved by the prior case law.² Two Supreme Court decisions and more than one hundred federal circuit and district court opinions attempted to develop workable judicial interpretations of the statute. In *Chrysler Corp. v. Brown*,³ the Supreme Court addressed the issue of “reverse-FOIA” suits, in which a submitter of information to a federal agency seeks to prevent disclosure in response to an FOIA request.⁴ Although the Court resolved several disputes that had arisen among the circuit courts, it left open important issues in this area.

The year's other Supreme Court decision, *Federal Open Market Committee v. Merrill*,⁵ concerned an agency's refusal to release monthly policy directives while they were in effect. The Court's disposition of this case included a significant and troubling expansion of the fifth exemption of the FOIA, the intra-agency memorandum exemption.⁶ Other courts dealing with this exemption in the past year analyzed the complex interaction between the FOIA and the discovery

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—1978*, 1979 DUKE L.J. 327; 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. 441 U.S. 281 (1979).

4. For 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 TEX. 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).

5. 99 S. Ct. 2800 (1979).

6. 5 U.S.C. § 552(b)(5) (1976).

process.⁷

Several other exemptions to the FOIA's general disclosure requirements⁸ received attention in 1979. Courts reviewing claims of exemption under the national security provision of the Act⁹ applied a new executive order¹⁰ to determine if the documents should be disclosed.¹¹ Cases involving statutes other than the FOIA enabled courts to refine the scope of the Act's third exemption,¹² nondisclosure based on a narrow and specific withholding statute.¹³ A conflict developed between the Second and Third Circuits concerning the effect of the Consumer Product Safety Act¹⁴ on FOIA disclosure.¹⁵

Another provision producing new case law was the investigatory records exemption;¹⁶ several significant cases interpreted the Supreme Court's 1978 *NLRB v. Robbins Tire & Rubber Co.*¹⁷ decision.¹⁸ The previously ignored eighth exemption,¹⁹ limiting disclosure of information about financial institutions, received attention from one court in 1979.²⁰ Moreover, the Supreme Court's decision to review several FOIA cases²¹ in its 1979-80 term promises to refine the case law even

7. See notes 138-48 *infra* and accompanying text.

8. 5 U.S.C. § 552 (1976). Subsection (a) contains the Act's disclosure requirements. The exemptions from mandatory disclosure are enumerated in subsection (b).

9. *Id.* § 552(b)(1) (1976).

10. Exec. Order No. 12,065, 3 C.F.R. 190 (1979), reprinted in 50 U.S.C.A. § 401 note, at 57 (West Supp. 1979). This order took effect December 1, 1978.

11. See notes 56-68 *infra* and accompanying text.

12. 5 U.S.C. § 552(b)(3) (1976).

13. See notes 74-111 *infra* and accompanying text.

14. 15 U.S.C. §§ 2051-2081 (1976).

15. See notes 74-99 *infra* and accompanying text.

16. 5 U.S.C. § 552(b)(7) (1976). See notes 149-88 *infra* and accompanying text.

17. 437 U.S. 214 (1978).

18. See notes 177-88 *infra* and accompanying text.

19. 5 U.S.C. § 552(b)(8) (1976).

20. See *Gregory v. Federal Deposit Ins. Corp.*, 470 F. Supp. 1329 (D.D.C. 1979). See text accompanying notes 189-96 *infra*.

21. See *Consumers Union v. Consumer Prod. Safety Comm'n*, 590 F.2d 1209 (D.C. Cir. 1978), *rev'd sub nom.* *GTE Sylvania, Inc. v. Consumers Union*, 48 U.S.L.W. 4293 (U.S. Mar. 19, 1980); Reporters Comm. for Freedom of the Press v. Vance, 589 F.2d 1116 (D.C. Cir. 1978), *aff'g without opinion*, 442 F. Supp. 383 (D.D.C. 1977), *aff'd in part and rev'd in part sub nom.* *Kissinger v. Reporters Comm. for Freedom of the Press*, 100 S. Ct. 960 (1980); *Forsham v. Califano*, 587 F.2d 1128 (D.C. Cir. 1978), *aff'd sub nom.* *Forsham v. Harris*, 100 S. Ct. 978 (1980). See also *GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n*, 598 F.2d 790 (3d Cir.), *cert. granted*, 100 S. Ct. 479 (1979), discussed at notes 74-99 *infra* and accompanying text.

On March 3, 1980, the Supreme Court handed down opinions in *Kissinger* and *Forsham*. In *Kissinger*, the Court held that notes of telephone conversations, accumulated while Dr. Kissinger served as Assistant to the President for National Security Affairs, were not "agency records." The Court ruled that the "Office of the President"—apparently composed of the President's closest personal advisers—is not an agency subject to the FOIA. The Court also denied a request for similar records accumulated during Kissinger's tenure as Secretary of State. Kissinger had

further.

This Comment will report on these developments under the Freedom of Information Act and will discuss their significance for the future application of the Act.

I. REVERSE-FOIA SUITS

A Freedom of Information Act lawsuit typically arises when a party requesting agency records is dissatisfied with the agency's refusal to release the information and sues to compel disclosure. The FOIA provides for an explicit right of action in such circumstances.²² It does not, however, explicitly authorize a suit by a submitter of information to enjoin agency disclosure of that information in response to another party's FOIA request; whether a submitter can nevertheless bring a "reverse-FOIA" suit has been a lively issue in recent years.²³ Courts have disagreed on the source of the cause of action. They have also differed on the proper scope of judicial review of the agency's decision to disclose. In *Chrysler Corp. v. Brown*,²⁴ the Supreme Court conclusively decided the first issue, but left open the second.

donated these notes to the Library of Congress prior to the State Department's receipt of the FOIA request; the Court found that without possession or control of the documents, the State Department had not "withheld" any records and accordingly could not be ordered to release them, even if the notes might qualify as "agency records" (an issue the Court did not reach).

In *Forsham*, federally funded researchers generated data in a study of diabetics. Although the research group's report resulted in proceedings by the Food and Drug Administration and the Department of Health, Education, and Welfare, the agencies never had possession of the raw data. The Supreme Court affirmed the lower court's denial of a request for this raw data, holding that "written data generated, owned, and possessed by a privately controlled organization receiving federal study grants are not 'agency records' within the meaning of the Act when copies of those data have not been obtained by a federal agency subject to the FOIA." 100 S. Ct. at 980.

On March 19 a unanimous Court ruled, in *GTE Sylvania, Inc. v. Consumers Union*, that requesters could not obtain information in a FOIA suit "when the agency with possession of the documents has been enjoined from disclosing them by a federal district court," 48 U.S.L.W. at 4295. The agency's compliance with the injunction did not constitute "improper" withholding of records; the requesters' FOIA action could therefore not succeed.

22. "[T]he district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B) (1976).

23. See sources cited in note 4 *supra*. For discussion of developments in the reverse-FOIA area in recent years, see Note, *Developments Under FOIA—1978*, *supra* note 2, at 347-53; Note, *Developments Under FOIA—1977*, *supra* note 2, at 204-10; Note, *Developments Under FOIA—1976*, *supra* note 2, at 559-63.

24. 441 U.S. 281 (1979). For a discussion of the case, see Note, *Chrysler Corp. v. Brown: Seeking a Formula for Responsible Disclosure under the FOIA*, 29 CATH. U.L. REV. 159 (1979). Chrysler, a government contractor, was required by regulation to furnish employment statistics and affirmative action information for use by the Defense Logistics Agency in monitoring Chrysler's employment practices. The Defense Logistics Agency informed Chrysler that third parties had requested some of the submitted information under the FOIA, whereupon Chrysler sued to prevent disclosure. The Third Circuit's opinion, *Chrysler Corp. v. Schlesinger*, 565 F.2d

According to most courts that had considered the question, the FOIA creates no private right of action to enjoin disclosure.²⁵ In *Chrysler*, a unanimous Court, speaking through Justice Rehnquist, adopted this majority view, as had the Third Circuit Court of Appeals below.²⁶ The Supreme Court held that while exempt records (which it assumed the documents in issue to be²⁷) could be withheld, the Act did not *require* nondisclosure. An exemption "demarcates the agency's obligation to disclose; it does not foreclose disclosure."²⁸ The Act's clear language and legislative history strongly support the Court's conclusion.²⁹ Moreover, since Congress "did not limit an agency's discretion to disclose information when it enacted the FOIA, [it] necessarily follows that the Act does not afford . . . any right to enjoin agency disclosure."³⁰

The *Chrysler* Court also held that the Trade Secrets Act³¹ did not

1172 (3d Cir. 1977), is discussed in detail in Note, *Developments Under FOIA—1978*, *supra* note 2, at 347-53.

25. See, e.g., *General Dynamics Corp. v. Marshall*, 572 F.2d 1211 (8th Cir. 1978), *vacated and remanded*, 441 U.S. 919 (1979); *Chrysler Corp. v. Schlesinger*, 565 F.2d 1172 (3d Cir. 1977), *vacated and remanded sub nom. Chrysler Corp. v. Brown*, 441 U.S. 281 (1979); *Pennzoil Co. v. FPC*, 534 F.2d 627 (5th Cir. 1976); *Charles River Park "A," Inc. v. HUD*, 519 F.2d 935 (D.C. Cir. 1975). *Contra*, *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977).

26. See *Chrysler Corp. v. Schlesinger*, 565 F.2d at 1185-86.

27. 441 U.S. at 319 n.49. The court of appeals had not decided whether the trade secrets exemption, 5 U.S.C. § 552(b)(4) (1976), applied to these records; it assumed it did apply for purposes of argument. The Supreme Court therefore avoided this issue, leaving open the possibility that, on remand, the court would find the exemption inapplicable and require disclosure.

28. 441 U.S. at 292. But see note 82 *infra*.

Language in an earlier Supreme Court opinion presaged the *Chrysler* Court's permissive construction of the exemptions. In *EPA v. Mink*, 410 U.S. 73 (1973), the Court stated that the FOIA's exemptions "set up concrete, workable standards for determining whether material *may* be withheld or *must* be disclosed." *Id.* at 79 (emphasis added). See *Chrysler Corp. v. Brown*, 441 U.S. at 290 n.9.

29. 5 U.S.C. § 552(b) (1976) merely states that subsection 552(a), containing the Act's disclosure requirements, "does not apply" to records subject to one of the nine exemptions. This in no way affects an agency's discretion to disclose. Moreover, as the *Chrysler* opinion noted, 441 U.S. at 292, the FOIA's jurisdictional provision grants courts authority only to mandate disclosure, not to bar it. See note 22 *supra* and accompanying text.

The legislative history cited by the Court, 441 U.S. at 294 n.16, also contains language indicating the statute is permissive. On several occasions, the House Report plainly refers to exemption from disclosure as permissive rather than mandatory. H.R. REP. NO. 1497, 89th Cong., 2d Sess. 2, 5-7, *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 2418, 2419, 2422-24.

30. *Chrysler Corp. v. Brown*, 441 U.S. at 294. It also follows that a submitter cannot recover money damages under the FOIA for disclosure of exempt information. In *King v. Califano*, 471 F. Supp. 180 (D.D.C. 1979), the court held first that damages were not recoverable for violations of the FOIA and second, citing *Chrysler*, that disclosure of exempt information would not violate the FOIA.

31. 18 U.S.C. § 1905 (1976), which provides in part:

Whoever, being an officer or employee of the United States or of any department or

afford Chrysler a private right of action to enjoin disclosure in violation of the statute. Justice Rehnquist noted that because the Trade Secrets Act was a criminal statute, the Court would imply a private right of action only if a clear basis for the inference existed in the statute or its legislative history.³² The Court discovered none.³³ Moreover, it found such an inference to be unnecessary in light of its decision that section 10(a) of the Administrative Procedure Act³⁴ provided Chrysler with a basis for judicial review of the agency's determination to disclose.³⁵ Although violation of the Trade Secrets Act could not be enjoined in a private action under that statute, "any such violation may have a dispositive effect on the outcome of judicial review of agency action pursuant to § 10 of the APA."³⁶ Since the Trade Secrets Act places substantive limits on agency action, Chrysler could seek review under the Administrative Procedure Act as a person "adversely affected or aggrieved"³⁷ by such action.

The Court did not, however, decide what standard of review a court conducting an Administrative Procedure Act review of the agency's decision to disclose should employ. The Third Circuit Court of Appeals had decided that certain agency regulations³⁸ constituted

agency thereof, 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).

32. See *Cort v. Ash*, 422 U.S. 66 (1975) (discussing circumstances in which court will imply private right of action).

33. 441 U.S. at 316-17.

34. 5 U.S.C. § 702 (1976), which provides in part: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

35. 441 U.S. at 317. The agency's decision is reviewable only if final. 5 U.S.C. § 704 (1976). "This is not a jurisdictional requirement, but rather an exhaustion of administrative remedies requirement." *Dresser Indus., Inc. v. United States*, 596 F.2d 1231, 1238 (5th Cir. 1979), *cert. denied*, 100 S. Ct. 731 (1980); see *Hedley v. United States*, 594 F.2d 1043 (5th Cir. 1979). Jurisdiction to review agency action under the APA is found in the general federal question statute, 28 U.S.C. § 1331 (1976). See *Chrysler Corp. v. Brown*, 441 U.S. at 317 n.47; *Califano v. Sanders*, 430 U.S. 99 (1977).

36. 441 U.S. at 317. Two recent cases from the District of Columbia District Court hold that the Trade Secrets Act, 18 U.S.C. § 1905 (1976), is not violated when material exempt under the FOIA is released to state attorneys general by the Federal Trade Commission. In both *Martin Marietta Corp. v. FTC*, 475 F. Supp. 338 (D.D.C. 1979), and *Interco, Inc. v. FTC*, 478 F. Supp. 103 (D.D.C. 1979), section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f) (1976), was held to constitute authorization by law to release exempt data. The *Martin Marietta* opinion recognized that the Federal Trade Commission Act did not permit the agency to disclose trade secrets, as opposed to other confidential business information, but the court found that the documents contained no trade secrets. 475 F. Supp. at 342.

37. 5 U.S.C. § 702 (1976).

38. 41 C.F.R. §§ 60-40.1 to 40.4 (1979).

“authorization by law” to disclose within the meaning of the Trade Secrets Act,³⁹ and that the Act did not therefore prohibit disclosure.⁴⁰ The Supreme Court disagreed with the court of appeals on this issue, although it agreed that “properly promulgated, substantive agency regulations”⁴¹ could serve as the authorization by law to disclose information otherwise subject to the Act’s prohibition. After an extensive analysis of the question, the Court found that the particular regulations⁴² the agency relied on to support disclosure were neither substantive nor properly promulgated. The regulations were not substantive rules having the force and effect of law because they were not reasonably within congressional delegations of authority under the FOIA,⁴³ under the “housekeeping statute” for executive agencies,⁴⁴ or under any other legislative enactment cited by the agency in question.⁴⁵ Furthermore, procedural defects in the adoption of the regulations precluded them from acquiring the force of law.⁴⁶ The Court therefore vacated the Third Circuit’s determination that disclosure was “author-

39. See note 31 *supra*.

40. 565 F.2d at 1186, 1188.

41. 441 U.S. at 295. A substantive rule, unlike interpretative rules and general statements of agency policy or procedure, affects individual rights and obligations. To be accorded the force of law, the regulation must be the “product of a congressional grant of legislative authority.” *Id.* at 303. It must also be promulgated in accordance with the APA’s requirements of notice of the proposed rule and opportunity to comment before promulgation. 5 U.S.C. § 553 (1976).

42. See note 38 *supra*.

43. Records exempt from mandatory disclosure under the FOIA are “outside the ambit of that Act.” 441 U.S. at 303. The Act cannot, therefore, serve as the authorization for regulations permitting disclosure. *Id.* at 303-04.

44. See 5 U.S.C. § 301 (1976) (providing in part: “The head of an Executive department . . . may prescribe regulations for . . . the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public”). Relying upon the statute’s legislative history, the Court concluded that the Act was meant only to allow “housekeeping”—agency regulation of internal affairs—and not to authorize release of trade secrets or confidential business information. 441 U.S. at 310-12. The Court thereby disagreed with the opinion of the lower court, siding with the District of Columbia Circuit’s decision on this issue in *Charles River Park “A,” Inc. v. HUD*, 519 F.2d 935 (D.C. Cir. 1975).

45. The agency relied upon the Federal Property and Administrative Services Act of 1949, 40 U.S.C. §§ 471-514 (1976), the Equal Employment Opportunity Enforcement Act of 1972, 5 U.S.C. §§ 5108, 5314-5316, 42 U.S.C. §§ 2000e, 2000e-1 to 2000e-6, 2000e-8, 2000e-9, 2000e-13 to 2000e-17 (1976), and Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-4, 2000e to 2000e-17 (1976). However, the Court stated that Congress did not envision, much less authorize, the disclosure regulations cited in note 38 *supra* by enacting any of these statutes. 441 U.S. at 306.

46. 441 U.S. at 312-16. Section 4 of the APA, 5 U.S.C. § 553 (1976), exempts “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice” from that section’s procedural requirements of affording notice of and opportunity to comment on the proposed rule. The Secretary of Labor published the regulations relevant in the *Chrysler* case, 41 C.F.R. §§ 60-40.1 to 40.4 (1979), without adhering to the requirements of section 553, and called the regulations interpretative and thus not subject to the restrictions. 38 Fed. Reg. 3192, 3193

ized by law," and remanded the case for consideration of the issue in light of its decision.⁴⁷

Because the Third Circuit did not resolve "whether the contemplated disclosures would violate the prohibition of § 1905,"⁴⁸ and because "the decision regarding this substantive issue—the scope of § 1905—will necessarily have some effect on the proper form of judicial review pursuant to [the APA],"⁴⁹ the Court decided that expressing a view of the appropriate standard would be premature.⁵⁰ It remains unclear, therefore, whether a court should conduct de novo review, as argued by plaintiff submitters in reverse-FOIA suits, or merely a review of the agency record, as urged by defendant agencies.⁵¹

As Justice Marshall noted in his brief concurrence in *Chrysler*, the number and complexity of the issues addressed by the Court in this case "tend[s] to obscure the dispositive conclusions."⁵² In essence, the

(1973). This procedure reinforced the Court's conclusion that the regulations should not have the force and effect of law. 441 U.S. at 314-15.

47. 441 U.S. at 318-19. Compare *Westchester Gen. Hosp., Inc. v. Department of HEW*, 464 F. Supp. 236 (M.D. Fla. 1979) (decided several months before *Chrysler*) with *Chrysler*. The court in *Westchester* held that an HEW regulation, 20 C.F.R. § 422.435(c) (1979), constituted authorization to disclose information otherwise subject to the Trade Secrets Act, 18 U.S.C. § 1905 (1976). As in *Chrysler*, the court examined the validity of the regulation as a substantive rule having the force of law. It decided that the regulation was contemplated by section 1106 of the Social Security Act, 42 U.S.C. § 1306 (1976), had been properly promulgated, and was therefore valid. The court entered judgment for the agency and against the plaintiff submitter. In accord are two cases decided after *Chrysler*. *St. Mary's Hosp., Inc. v. Harris*, 604 F.2d 407 (5th Cir. 1979); *Cedars Nursing & Convalescent Center, Inc. v. Aetna Life & Cas. Ins. Co.*, 472 F. Supp. 296 (E.D. Pa. 1979).

48. 441 U.S. at 319. The court of appeals had decided only that disclosure was authorized by the cited regulation; it did not consider what the effect of the Trade Secrets Act, 18 U.S.C. § 1905 (1976), would be if the regulations did not authorize disclosure. See *Chrysler Corp. v. Schlesinger*, 565 F.2d at 1192. On remand, the Third Circuit decided that the district court should resolve the questions left open in *Chrysler*. The appellate court therefore remanded the case to the district court, with directions to order the agencies to make a new determination of the disclosure issue in light of the various court opinions. *Chrysler Corp. v. Schlesinger*, 46 Ad. L.2d 81 (3d Cir. 1979).

49. 441 U.S. at 319.

50. The court did state that "[d]e novo review by the District Court is ordinarily not necessary to decide whether a contemplated disclosure runs afoul of § 1905," *id.*, but explicitly reserved judgment on the question. Other unresolved issues include "the relative ambits of Exemption 4 and § 1905" and whether section 1905 is an exempting statute within the meaning of 5 U.S.C. § 552(b)(3) (1976). 441 U.S. at 319 n.49.

51. A brief discussion of pre-*Chrysler* cases deciding which standard of review to apply can be found in Lynch, Cohn, & Vladek, *Exemption 4*, in *LITIGATION UNDER THE AMENDED FREEDOM OF INFORMATION ACT 28-29* (4th ed. C. Marwick 1978). The district court in *United Technologies Corp. v. Marshall*, 464 F. Supp. 845 (D. Conn. 1979), noting that the question of the scope of review was pending before the Supreme Court in *Chrysler*, declined to decide the issue. Instead, it concluded that the submitter failed to show a likelihood of success on the merits under either standard, and denied the motion for preliminary relief enjoining disclosure. *Id.* at 855 n.15.

52. 441 U.S. at 319 (Marshall, J., concurring).

Court held that submitters seeking review of an agency's decision to disclose exempt information must utilize the Administrative Procedure Act, rather than the FOIA or the Trade Secrets Act, as the source of the cause of action. The scope of judicial review under the Administrative Procedure Act is uncertain, but it is clear that agency regulations constitute "authorization by law," permitting disclosure despite the substantive constraints of the Trade Secrets Act, only if they are substantive and procedurally proper. Whether this guidance will prove sufficient to harmonize the disparate approaches of the courts of appeal remains to be seen.⁵³

II. NATIONAL SECURITY EXEMPTION

Exemption 1 of the FOIA⁵⁴ applies only when an executive order, for purposes of national security, permits classification of the requested material and the procedural requirements of the order have been followed.⁵⁵ The terms of the executive order dealing with classification of national security information, therefore, directly affect the outcome of an FOIA suit in which the agency withholds records based on this exemption. On June 28, 1978, President Carter issued Executive Order No. 12,065, entitled "National Security Information," which took effect on December 1, 1978.⁵⁶ While this new executive order left most of the substantive and procedural criteria of the prior executive order⁵⁷ unal-

53. The executive branch has announced its position on the issues the *Chrysler* Court left unresolved. Memorandum from Robert L. Saloschin, Director, Office of Information Law & Policy, Dep't of Justice, to All Federal Dep'ts & Agencies 4 (June 15, 1979) (stating that the Justice Department does not consider the Trade Secrets Act, 18 U.S.C. § 1905 (1976), a withholding statute under Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3) (1976)). See note 50 *supra* for a description of the unresolved issues. The Justice Department also asserts that the scope of the Trade Secrets Act is narrower than the literal language would suggest. Memorandum, *supra* at 5. See also Letter from Barbara Allen Babcock, Asst. Attorney General, Dep't of Justice, to All Agency General Counsels (June 21, 1979) (summarizing *Chrysler* from the government's point of view and advising agencies how to respond to actual and potential reverse-FOIA problems in the future).

Legislative action to counter the *Chrysler* decision is also possible. Senator Robert Dole has announced plans to introduce legislation to eliminate the Court's restrictions on reverse-FOIA suits. The purpose of the proposal would be to prevent the use of the FOIA as "an instrument for industrial espionage." 125 CONG. REC. S4504 (daily ed. April 23, 1979) (remarks of Sen. Dole).

54. 5 U.S.C. § 552(b)(1) (1976).

55. Exemption 1 exempts matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." *Id.*

56. Exec. Order No. 12,065, 3 C.F.R. 190 (1979), reprinted in 50 U.S.C.A. § 401 note, at 57 (West Supp. 1979).

57. Exec. Order No. 11,652, 3 C.F.R. 678 (1971-1975 Compilation), reprinted in 50 U.S.C. § 401 note, at 1839 (1976), as amended by Exec. Order No. 11,714, 3 C.F.R. 764 (1971-1975 Compilation), and Exec. Order No. 11,862, 3 C.F.R. 997 (1971-1975 Compilation).

tered, several important changes were effected.⁵⁸

Three significant changes made by the new executive order should be noted. First, it imposes slightly stricter minimum standards of classification. Whereas the old order permitted authorized officials to classify material as confidential if "its unauthorized disclosure could reasonably be expected to cause damage to the national security,"⁵⁹ Executive Order No. 12,065 stipulates that information is properly classified as confidential if its unauthorized disclosure "reasonably could be expected to cause *identifiable* damage to the national security."⁶⁰ Whether the change in language will have an appreciable effect on officials authorized to classify documents, or on the courts, remains to be seen. The language suggests, however, that the President's intent was to limit the availability of classification by requiring a more concrete demonstration of potential damage to the nation's security.

A second change is that the new order incorporates a provision found in the National Security Council directive implementing the prior order,⁶¹ to the effect that any reasonable doubts should be resolved in favor of declassification. The new order states: "If there is reasonable doubt which designation is appropriate, or whether the information should be classified at all, the less restrictive designation should be used, or the information should not be classified."⁶²

Third, section 3-303 of Executive Order No. 12,065 states that information should be declassified if "the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure."⁶³ This determination is to be made by an official responsible for processing FOIA requests or an official with Top Secret classification authority.⁶⁴ The balancing test is new; Exemption

58. See Halperin, *Exemption (b)(1)*, in LITIGATION UNDER THE AMENDED FREEDOM OF INFORMATION ACT 12-13 (4th ed. C. Marwick 1978).

59. Exec. Order No. 11,652, § 1(C), 3 C.F.R. 679-80 (1971-1975 Compilation).

60. Exec. Order No. 12,065, § 1-104, 3 C.F.R. at 191 (1979) (emphasis added). The standards for classifying matter as "secret" (serious damage) and "top secret" (exceptionally grave damage) are unchanged. Compare Exec. Order No. 12,065, §§ 1-102 & 1-103, 3 C.F.R. 191 (1979), with Exec. Order No. 11,652, §§ 1(A) & 1(B), 3 C.F.R. 679 (1971-1975 Compilation). As the FOIA requires only that the records be "classified," the minimum standard ("identifiable damage to the national security") is the relevant one in FOIA litigation.

61. 37 Fed. Reg. 10,053 (1972), reprinted in 50 U.S.C. § 401 note, at 1843 (1976).

62. Exec. Order No. 12,065, § 1-101, 3 C.F.R. 191 (1979). The National Security Council directive states that any "substantial doubt" should be so resolved; the new order speaks of "reasonable doubt"—again, a standard more favorable to the FOIA requester.

63. Exec. Order No. 12,065, § 3-303, 3 C.F.R. 197 (1979).

64. *Id.*: Section 1-201 lists those officials with authority to classify documents as top secret and states that the President may designate others. President Carter exercised this authority on June 28, 1978, the same day he issued Exec. Order No. 12,065. 3 C.F.R. 190 (1979), reprinted in 50 U.S.C.A. § 401 note, at 64 (West Supp. 1979).

v. Rosen,⁷⁰ despite its refusal to itemize publicly the documents being withheld pursuant to the national security exemption. Judge Wilkey, writing for the majority, accepted the agency's argument that disclosure of the existence of the records, as well as their content, could be withheld on the theory that in some instances the existence of particular records is more sensitive than their substance. Since the court believed that public acknowledgement of the monitoring could endanger the national security, the FOIA did not require disclosure.⁷¹ Under the circumstances, therefore, the public record was adequate.⁷²

III. FEDERAL STATUTES EXEMPTION

A. *The Consumer Product Safety Act*.⁷³

As amended in 1976,⁷⁴ Exemption 3 of the FOIA deals with federal statutes that either require withholding information or, alternatively, specify the criteria for withholding or refer to particular matters to be withheld.⁷⁵ Cases interpreting the third exemption thus hinge on the court's construction of a statute other than the FOIA, and a subsequent determination whether the information requested falls within the ambit of that withholding statute. Two recent cases, *Pierce & Stevens Chemical Corp. v. United States Consumer Product Safety Commission*,⁷⁶ and *GTE Sylvania, Inc. v. Consumer Product Safety Commission*,⁷⁷ examined the Consumer Product Safety Act⁷⁸ and reached

70. 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

71. *Cf. Walter, Conston, Schurman & Gumpel, P.C. v. United States Dep't of Justice*, No. 79-2918 (S.D.N.Y. Oct. 3, 1979). The court in *Walter* held that in an Exemption 7(A) context, where an index of the withheld records would "afford prospective defendants with a complete insight into the case being compiled against them," the index need not be made public. The court characterized its holding as consistent with the national interest and the purposes of the FOIA.

72. The court also held that an *in camera* inspection of the records was unnecessary, and that an affidavit submitted for *in camera* consideration, without the presence of opposing counsel, was sufficient under the circumstances to establish that the documents were within the exemption. 608 F.2d at 1388.

73. 15 U.S.C. §§ 2051-2081 (1976).

74. Pub. L. No. 94-409, § 5(b), 90 Stat. 1247 (1976). The original Exemption 3, Pub. L. No. 89-487, 80 Stat. 250 (1966), applied to matters "specifically exempted from disclosure by statute." Following the Supreme Court's expansive interpretation of the exemption in *FAA v. Robertson*, 422 U.S. 255 (1975), Congress narrowed the scope of the exemption. See H.R. REP. NO. 880, pt. I, 94th Cong., 2d Sess. 22-23, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2183, 2204-05.

75. 5 U.S.C. § 552(b)(3) (1976), which exempts matters specifically exempted from disclosure by statute . . . , provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Id.

76. 585 F.2d 1382 (2d Cir. 1978).

77. 598 F.2d 790 (3d Cir.), *cert. granted*, 100 S. Ct. 479 (1979).

78. 15 U.S.C. §§ 2051-2081 (1976).

different conclusions regarding that Act's effect on FOIA disclosure.⁷⁹ This significant conflict between the Second and Third Circuits may eventually be resolved by the Supreme Court.⁸⁰

In both cases, submitters of information to the Consumer Product Safety Commission sued to prevent disclosure of information in response to an FOIA request. The submitters claimed that disclosure would be inconsistent with section 6(b)(1) of the Consumer Product Safety Act,⁸¹ which they interpreted to be an Exemption 3 withholding statute.⁸² Section 6(b)(1) provides that the Consumer Product Safety Commission, before publicly disclosing information submitted to it, must both notify the submitter of its decision to disclose and insure that the information is accurate.⁸³ In neither *Pierce & Stevens* nor *GTE Sylvania* had the Consumer Product Safety Commission complied with section 6(b)(1).⁸⁴ The Consumer Product Safety Commission argued

79. The Second Circuit's decision in *Pierce & Stevens* and the district court's opinion in *GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n*, 443 F. Supp. 1152 (D. Del. 1977), *aff'd*, 598 F.2d 790 (3d Cir.), *cert. granted* 100 S. Ct. 479 (1979), are discussed in Note, *Developments Under FOIA—1978*, *supra* note 2, at 334-35.

80. It is especially important for the Supreme Court to resolve conflicts between courts of appeals in the reverse-FOIA area. The opportunity for submitters to select a favorable forum, to the disadvantage of FOIA requesters, necessitates Supreme Court review. See Lynch, Cohn, & Vladek, *supra* note 51, at 26-27, and cases cited therein (discussing forum shopping). The Supreme Court decided on March 19, 1980, a case involving the forum shopping problem. *GTE Sylvania, Inc. v. Consumers Union*, 48 U.S.L.W. 4293 (U.S. Mar. 19, 1980). The court held, reversing the appellate court, that a FOIA requester was precluded from litigating his disclosure action by the district court decision in *GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n*, 443 F. Supp. 1152 (D. Del. 1977), *aff'd*, 598 F.2d 790 (3d Cir.), *cert. granted*, 100 S. Ct. 479 (1979) (the court of appeals' affirmance is discussed in text accompanying notes 77-79 *supra* and 81-99 *infra*), which had sustained the submitter's suit to enjoin agency disclosure.

81. 15 U.S.C. § 2055(b)(1) (1976).

82. In a reverse-FOIA suit it is obviously an abuse of discretion for an agency to release information when a statute prohibits it from doing so. In this sense, Exemption 3 is mandatory rather than permissive. See *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979); *GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n*, 598 F.2d at 800.

83. 15 U.S.C. § 2055(b)(1) (1976) provides in part:

[T]he Commission shall, to the extent practicable, notify, and provide a summary of the information to, each manufacturer or private labeler of any consumer product to which such information pertains, if the manner in which such consumer product is to be designated or described in such information will permit the public to ascertain readily the identity of such manufacturer or private labeler, and shall provide such manufacturer or private labeler with a reasonable opportunity to submit comments to the Commission in regard to such information. The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this chapter.

84. The Consumer Product Safety Commission did not argue that the material could be released under section 6(b)(1); it acknowledged that it was inaccurate and misleading. See *GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n*, 598 F.2d at 799-800; *cf. Pierce & Stevens Chem. Corp. v. United States Consumer Prod. Safety Comm'n*, 585 F.2d at 1388 n.28 (encourag-

that the section applies only when the Commission disseminates information to the public on its own initiative, rather than when it merely responds to an FOIA request. In *Pierce & Stevens*, the court adopted the Consumer Product Safety Commission's position, thereby permitting the Commission to disclose;⁸⁵ the *GTE Sylvania* court, on the other hand, rejected that argument, holding that section 6(b)(1) pertains to either type of disclosure, that it is an Exemption 3 withholding statute, and that consequently the agency could not disclose.⁸⁶

Judge Feinberg's decision for the Second Circuit in *Pierce & Stevens* attempted to interpret the Consumer Product Safety Act so as to minimize its conflict with the FOIA. Whereas the FOIA calls for prompt disclosure,⁸⁷ the notification procedures of the Consumer Product Safety Act take much longer.⁸⁸ Moreover, the Consumer Product Safety Act, by advising an agency to review or rewrite a document to make it more accurate,⁸⁹ contrasts with the FOIA, which mandates disclosure only of existing documents, less any exempt portions. Finally,

ing the Consumer Product Safety Commission to include with the records the submitter's statement regarding their inaccuracy).

85. 585 F.2d at 1386-89. Of course, if the Consumer Product Safety Act, 15 U.S.C. §§ 2051-2081 (1976), does not prohibit disclosure, the FOIA presumably mandates release. *But see* 585 F. Supp. at 1389 ("On this view, we need not resolve the argument between the parties over whether section 6(b)(1) meets the criteria of exemption three").

86. 598 F.2d at 814-16.

87. 5 U.S.C. § 552(a)(6)(A) requires that the agency determine whether to release the records within 10 days after reviewing the request, and decide any appeal within 20 days. 5 U.S.C. § 552(a)(6)(B) defines certain "unusual circumstances," not relevant here, in which these deadlines may be extended. Courts differ on when circumstances are so unusual as to allow the agency to have additional time pursuant to this subsection or subsection (a)(6)(C). *See* *Spectator Publishing Co. v. CIA*, No. 78-1705 (S.D.N.Y. Mar. 12, 1979). That case held, based on an undisputed agency affidavit, that the CIA was entitled to additional time because it had demonstrated that "exceptional circumstances" exist and the agency is responding to the request with "due diligence." Slip op. at 4 (quoting 5 U.S.C. § 552(a)(6)(C) (1976)). The court decided that handling appeals in order of receipt, processing by means of a "first in, first out" system, and handling FOIA and Privacy Act claims together demonstrated the agency's due diligence. The high volume of requests matched against the agency's limited personnel and funding constituted the exceptional circumstances. *Id.* at 7-8. Other cases involving workload delays are discussed in Note, *Developments Under FOIA—1977*, *supra* note 2, at 197-99; Note, *Developments Under FOIA—1976*, *supra* note 2, at 533-38.

Several Congressmen introduced bills in 1979 to amend the FOIA's time limitations on agency action. *See* H.R. 2625, 96th Cong., 1st Sess. (1979) (introduced by Rep. Divine) (increasing the initial response time from 10 to 30 days and enabling the agency to obtain extensions more easily); H.R. 4883, 96th Cong., 1st Sess. (1979) (introduced by Rep. Hyde) (similar provisions); H.R. 5129, 96th Cong., 1st Sess. (1979) (introduced by Rep. McClory) (requiring the agency to notify the requester within 30 days as to the number of pages encompassed by the request, but allowing the agency to decide at a later time whether to disclose, depending on the number of pages of records in issue).

88. 15 U.S.C. § 2055(b)(1) (1976), which requires "not less than 30 days" notice to the submitter prior to public disclosure.

89. *Id.*

the Consumer Product Safety Act expressly incorporates the nine exemptions of the FOIA;⁹⁰ this led the court to conclude that Congress did not intend to affect FOIA disclosure of nonexempt documents.⁹¹

In a brief discussion of legislative intent,⁹² the *Pierce & Stevens* court focused upon a statement contained in a congressional committee report studying amendments to the Consumer Product Safety Act after its enactment.⁹³ The court concluded, as had the authors of the report, that section 6(b)(1) and the FOIA addressed different questions: the Consumer Product Safety Act provision referred to *public* disclosure *initiated* by the Commission; the FOIA contemplated "passive" release in response to a valid request by another party.⁹⁴ This construction of the two statutes, the court believed, minimized the conflict between them and effectuated the goals of both.⁹⁵

The more extensive opinion in *GTE Sylvania* disputed the *Pierce & Stevens* argument point by point, concluding that the provisions of section 6(b)(1) apply to FOIA disclosures as well as to Commission-initiated publication. The court explained that the "public disclosure" referred to in section 6(b)(1) could be understood—based on an analysis of the legislative history and statutory language—only as "encompassing disclosure to members of the public through the FOIA."⁹⁶ Any potential conflict between the Consumer Product Safety Act and the FOIA was avoided by the court's finding that section 6(b)(1) qualifies

90. *Id.* § 2055(a)(1).

91. 585 F.2d at 1388.

92. *Id.* at 1387.

93. H.R. REP. NO. 1022, 94th Cong., 2d Sess. 27, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 1017, 1029.

94. 585 F.2d at 1386, 1388. See H.R. REP. NO. 1022, *supra* note 93, at 27, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 1017, 1029. The court conceded that disclosure to the FOIA requester might result in widespread publication, but explained that "in contrast to publicity releases by the Commission, there is no government imprimatur on the document in that situation." 585 F.2d at 1388.

95. 585 F.2d at 1388.

96. 598 F.2d at 803. The court's statutory analysis is somewhat unpersuasive. It noted that the FOIA exemptions were incorporated in the same section as the disclosure provisions—section 6(b)(1)—and relied on this fact to show that the disclosure provisions refer to FOIA disclosure. However, the statute can easily be read, as it was by the *Pierce & Stevens* court, as referring to the FOIA exemptions only as a limitation upon Commission-initiated dissemination that otherwise satisfies the criteria set forth in section 6(b)(1). Similarly, the *GTE Sylvania* court is not persuasive in arguing that section 6(b)(2), by enumerating exceptions to section 6(b)(1) but not including the FOIA among them, implicitly places FOIA requests within the ambit of section 6(b)(1). Only if disclosure pursuant to the FOIA is reached by section 6(b)(1) initially would the absence of an exemption be relevant; the section 6(b)(2) exemptions are all matters to which section 6(b)(1) would unquestionably apply but for section 6(b)(2). More convincing is the court's discussion of legislative history, 598 F.2d at 804-12, citing the various debates and reports, and arguing that the subsequent history contained in the committee report considering Consumer Product Safety Act amendments, relied upon in *Pierce & Stevens*, is entitled to little weight.

as a withholding statute under Exemption 3:

By the very fact that Exemption 3 incorporates specific nondisclosure statutes into the general scheme of the FOIA, inconsistencies will arise as agencies attempt to comply with those specific statutes while processing FOIA requests. Exemption 3 was designed to provide the agencies with the flexibility needed to accommodate those inconsistencies.⁹⁷

The court agreed with the district judge's determination that the statute established particular criteria for withholding as required by Exemption 3. Nondisclosure is permitted under section 6(b)(1) only when the information would identify the manufacturer and the Consumer Product Safety Commission has not taken, or cannot take, "reasonable steps to assure that disclosure would be accurate, fair and related to the Act's purposes. The standards set forth in section 6(b)(1) are sufficiently definite that they provide a reviewing Court with criteria to measure the Commission's compliance with Congress' intent."⁹⁸ Holding that section 6(b)(1) is a withholding statute, and that the material was within the statute's nondisclosure provisions, the court permanently enjoined the Commission from releasing the records.⁹⁹ The disparate approaches of the *GTE Sylvania* and *Pierce & Stevens* courts are perplexing: the courts attack the problem from completely different starting points and fail to agree on a single issue relevant to the litigation. How the Supreme Court, the other courts of appeals, and the Congress respond will significantly affect the future application of the FOIA.

B. *Other Federal Statutes.*

Although the Consumer Product Safety Act precipitated a significant controversy in 1979, most courts considering the applicability of Exemption 3 during the year discussed other federal laws. One statute construed in many cases¹⁰⁰ was section 6103 of the Internal Revenue Code, a provision entitled "Confidentiality and Disclosure of Returns and Return Information."¹⁰¹ All the courts interpreting that provision agreed that it qualified as an Exemption 3 withholding statute;¹⁰² the

97. *Id.* at 813.

98. *Id.* at 814-15.

99. *Id.* at 816.

100. See cases cited in note 102 *infra*.

101. I.R.C. § 6103. This is an extremely long provision that details to whom, and under what conditions, various types of information can be disclosed.

102. See, e.g., *Breuhaus v. IRS*, 609 F.2d 80 (2d Cir. 1979); *Long v. United States IRS*, 596 F.2d 362 (9th Cir. 1979); *Chamberlain v. Kurtz*, 589 F.2d 827 (5th Cir.), *cert. denied*, 100 S. Ct. 82 (1979); *Stephenson v. IRS*, 79-2 U.S. Tax Cas. ¶ 9513 (N.D. Ga. 1979); *Britt v. IRS*, 79-2 U.S. Tax Cas. ¶ 9450 (D.D.C. 1979); *Dixon v. IRS*, 79-1 U.S. Tax Cas. ¶ 9406 (M.D. Ala. 1979); *Anastas v. United States*, 79-2 U.S. Tax Cas. ¶ 9510 (N.D. Cal. 1979).

more significant question in several cases was whether the information sought to be withheld by the Internal Revenue Service actually fell within the ambit of section 6103.¹⁰³

Statutory provisions concerning information gathered by the intelligence community¹⁰⁴ also received considerable attention from both the federal judiciary and the Congress. Several courts discussed whether the FOIA requires the Central Intelligence Agency and the National Security Agency to disclose particular records.¹⁰⁵ A Congressman has proposed legislation¹⁰⁶ that would significantly restrict a FOIA requester's ability to obtain information from the Central Intelligence Agency, the National Security Agency, and the Federal Bureau of Investigation.¹⁰⁷

Courts also decided Exemption 3 cases involving such diverse

103. *See, e.g.*, *Breuhaus v. IRS*, 609 F.2d 80 (2d Cir. 1979) (letter dealing with termination tax upon liquidation of tax-exempt private foundation was exempt from FOIA disclosure under I.R.C. § 6103(b)(2), but disclosure to a Congressman was authorized under I.R.C. § 6103(f)(1); in addition, I.R.C. § 6104 did not apply because the letter was not an application for tax-exempt status); *Chamberlain v. Kurtz*, 589 F.2d 827 (5th Cir.) (disclosure would "seriously impair Federal tax administration" within the meaning of I.R.C. §§ 6103(c) and 6103(e)(6); documents constitute "return information" as defined by section 6103(b)(2)), *cert. denied*, 100 S. Ct. 82 (1979); *Anastas v. United States*, 79-2 U.S. Tax Cas. ¶ 9510 (N.D. Cal. 1979).

104. 50 U.S.C. §§ 403(d)(3), 403g (1976). Section 403(d)(3) provides in part: "[T]he Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." Section 403g provides that to implement subsection 403(d)(3), the CIA is exempt from "the provisions of any . . . law which require[s] the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency . . ." Many courts have held that section 403g is an exempting statute. *See, e.g.*, *National Comm'n on Law Enforcement & Social Justice v. CIA*, 576 F.2d 1373 (9th Cir. 1978); *Ray v. Turner*, 587 F.2d 1187 (D.C. Cir. 1978); *Weissman v. CIA*, 565 F.2d 692 (D.C. Cir. 1977).

105. *See, e.g.*, *Founding Church of Scientology, Inc. v. National Security Agency*, 610 F.2d 824 (D.C. Cir. 1979) (construing Pub. L. No. 86-36, § 6(a), 73 Stat. 64 (1959) (current version at 50 U.S.C. § 402 (1976)), which reads in part: "[N]othing 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 . . ."); *Sims v. CIA*, 479 F. Supp. 84 (D.D.C. 1979); *Ray v. Turner*, 468 F. Supp. 730 (D.D.C. 1979); *Medoff v. United States CIA*, 464 F. Supp. 158 (D.N.J. 1978).

106. H.R. 5129, *supra* note 87; *see* 125 CONG. REC. H7142 (daily ed. Aug. 2, 1979) (remarks of Rep. McClory).

107. The bill is entitled "A bill to enhance the foreign intelligence and law enforcement activities of the United States by improving the protection of information necessary to their effective operation." H.R. 5129, *supra* note 87. It would amend 50 U.S.C. § 403g (1976) by broadening the scope of this exempting statute. It would also amend the FOIA by preventing convicted felons or their agents from utilizing the Act to acquire records from intelligence or law enforcement agencies, and by altering various provisions in the FOIA to exempt many records of such agencies from the Act's purview. The bill, which was referred to the Permanent Select Committee on Intelligence and the Committee on Government Operations, is a reaction to the "significant toll" that the FOIA has allegedly taken "on the ability of our law enforcement and intelligence agencies to perform their congressionally authorized functions." Letter from Rep. Robert McClory to Congressional Colleagues 1 (July 27, 1979).

matters as a criminal investigation by the Postal Service,¹⁰⁸ whether Federal Rule of Civil Procedure 26(c) qualifies as an Exemption 3 statute,¹⁰⁹ and the right of a FOIA requester to patent applications and related information.¹¹⁰ While some of the decisions are interesting and potentially significant, their primary importance is that they demonstrate the ongoing process of straightforward classification of statutes under the amended Exemption 3.¹¹¹

IV. INTRA-AGENCY MEMORANDUM EXEMPTION

A. Confidential Commercial Information.

Exemption 5 of the FOIA permits agencies to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency."¹¹² Several significant federal cases last year interpreted this exemption and its relationship to the federal discovery rules.¹¹³ In *Federal Open Market Committee v. Merrill*,¹¹⁴ a committee of the Federal Reserve System refused, pursuant to regulation,¹¹⁵ to disclose monthly monetary policy directives to the public during the month the directives were in effect. These Domestic Policy Directives indicate what monetary policy the Federal Open Market Committee has decided to pursue in that month.¹¹⁶ The Federal Open Market Committee argued that

108. *Church of Scientology v. United States Postal Serv.*, 593 F.2d 902 (9th Cir. 1979) (remanding to the district court for a decision whether, in light of the 1976 amendment of Exemption 3, Pub. L. No. 94-409, § 5(b), 90 Stat. 1247 (1976), the investigatory file exemption of the Postal Reorganization Act, 39 U.S.C. § 410(c)(6) (1976), is an Exemption 3 statute).

109. *Founding Church of Scientology, Inc. v. Bell*, 603 F.2d 945 (D.C. Cir. 1979) (holding that the rule is not a "statute" for purposes of Exemption 3).

110. *Irons & Sears v. Dann*, 606 F.2d 1215, 1223 (D.C. Cir. 1979) (discussing the Exemption 3 status of section 122 of the Patent Act, 35 U.S.C. § 122 (1976), and holding that whereas documents are exempt "insofar as they relate to pending and abandoned applications, . . . [they are] fully subject to [the FOIA] insofar as they relate to applications that have issued as patents").

111. See Note, *Developments Under FOIA—1978*, *supra* note 2, at 354.

112. 5 U.S.C. § 552(b)(5) (1976).

113. FED. R. CIV. P. 26-37 are the rules for discovery in federal civil litigation.

114. 99 S. Ct. 2800 (1979). The lower court decisions are discussed in Note, *Developments Under FOIA—1977*, *supra* note 2, at 222 n.215; Note, *Developments Under FOIA—1976*, *supra* note 2, at 539-41.

115. 12 C.F.R. § 271.5 (1979).

116. The Federal Open Market Committee regulates the money supply and federal funds rate (the rate at which banks will lend or borrow immediately available reserves on an overnight basis) by purchasing or selling securities in the open market. Selling securities decreases bank reserves and thereby diminishes investment activity; buying securities has the opposite effect. The committee meets monthly to formulate monetary policy for the upcoming period, and sets out its decisions in the directives. After the effective period of a directive has passed, the Federal Open Market Committee releases it for publication in the Federal Register. *Merrill* sued to compel earlier disclosure. See the discussion in 99 S. Ct. at 2803-05.

immediate disclosure, as ordered by the Court of Appeals for the District of Columbia "would seriously interfere with the conduct of national monetary policy."¹¹⁷

With two Justices dissenting,¹¹⁸ the Supreme Court ruled that under Exemption 5, the Federal Open Market Committee could delay publishing the directives, if they "contain sensitive information not otherwise available, and if immediate release of these Directives would significantly harm the Government's monetary functions or commercial interests,"¹¹⁹ as the Federal Open Market Committee claimed.¹²⁰ The Court held that the directives were clearly intra-agency memoranda: the Federal Open Market Committee satisfied the Administrative Procedure Act's definition of "agency,"¹²¹ and the directives were written instructions to the Federal Open Market Committee's Account Manager, who carries out the policies set forth therein.

On the more difficult and significant question of the applicability of a privilege that would make the document nondiscoverable, the Court determined that the records "would not be available by law to a party . . . in litigation with the agency."¹²² Although the directives were not subject to the attorney-client privilege, the attorney's work product privilege, or the executive privilege for predecisional deliberations within the agency¹²³—the only privileges the Court had previously recognized in Exemption 5¹²⁴—the majority nevertheless held

117. *Id.* at 2807. The Federal Open Market Committee conceded that the directives were "statements of general policy . . . formulated and adopted by the agency," that had to be "currently publish[ed] in the Federal Register" under 5 U.S.C. § 552(a)(1) (1976). 99 S. Ct. at 2807. However, the Federal Open Market Committee argued that it was not subject to the current publication requirements because of the applicability of a section 552(b) exemption. The Court commented that there was no conflict between a finding that the directives were final opinions yet exempt under subsection (b)(5), because it was not relying on the privilege for predecisional communications. 99 S. Ct. at 2812-13 n.23. See *Exxon Corp. v. FTC*, 476 F. Supp. 713 (D.D.C. 1979).

118. Justices Stevens and Stewart dissented. See notes 131-37 *infra* and accompanying text.

119. 99 S. Ct. at 2814.

120. The Court instructed the district court on remand to determine if the Federal Open Market Committee's claims were correct with regard to all, or any portion, of the records. *Id.*

121. 5 U.S.C. §§ 551(1), 552(e) (1976). Section 552(e) provides:

For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or an independent regulatory agency.

122. 99 S. Ct. at 2808 (quoting 5 U.S.C. § 552(b)(5) (1976)).

123. The Federal Open Market Committee did not contend that these privileges protected the documents. 99 S. Ct. at 2809 & n.14.

124. The Court had been persuaded to recognize these privileges because they were expressly mentioned in the legislative history and not duplicated in any of the Act's other exemptions. *Id.* at 2809-10. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *EPA v. Mink*, 410 U.S. 73 (1973).

that the exemption did apply to the directives. Justice Blackmun, writing for the Court, explained that Exemption 5 includes a privilege for confidential commercial information pertaining to government contracts. In support of this holding, he referred to Federal Rule of Civil Procedure 26(c)(7), which states that a court may, "for good cause shown, . . . [issue a protective order] that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way."¹²⁵ Although the Court recognized that the FOIA's legislative history provided less support for including this privilege in Exemption 5 than for incorporating the executive and attorney-client privileges, it nonetheless found a sufficient foundation in the House Report and House and Senate committee hearings.¹²⁶ For example, agencies testifying at hearings preceding the FOIA's enactment expressed concern about the disclosure of confidential commercial information. In addition, the House Report on the FOIA states that Exemption 5 is intended to exempt from disclosure "documents or information which it has received or generated before it completes the process of awarding a contract"¹²⁷ Given the agency concerns and this statement from the House Report, the Court decided that it was appropriate to infer that Exemption 5 incorporates "a limited privilege for confidential commercial information pertaining to [government] contracts."¹²⁸ The Court also concluded that the Domestic Policy Directives, which relate to the government's purchase and sale of securities, "are substantially similar to confidential commercial information generated in the process of awarding a contract."¹²⁹ Therefore, upon a showing (to the district court) that immediate disclosure would have a serious detrimental effect,¹³⁰ the directives would be exempt.

125. FED. R. CIV. P. 26(c)(7). "And we see no reason why the Government could not, in an appropriate case, obtain a protective order under Rule 26(c)(7)." 99 S. Ct. at 2810.

126. 99 S. Ct. at 2810-11.

127. H.R. REP. NO. 1497, *supra* note 29, at 10, *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 2427.

128. 99 S. Ct. at 2812. The Court ruled that this privilege would not duplicate other privileges in Exemption 5 or elsewhere in the FOIA. By reaching this result the Court avoided a decision on two other privileges the Federal Open Market Committee asserted: first, a privilege for official government information whose release would not be in the public interest, and second, a privilege based on FED. R. CIV. P. 26(c)(2), permitting a court to restrict discovery to a designated time or place. 99 S. Ct. at 2810 n.17. The Court began its analysis, however, by rejecting the Federal Open Market Committee's claim that Exemption 5 authorizes an agency to delay disclosure of intra-agency memoranda "that would undermine the effectiveness of the agency's policy if released immediately . . . , even if the memoranda in question could be routinely discovered by a party in civil litigation with the agency." *Id.* at 2809.

129. 99 S. Ct. at 2813.

130. See notes 119-20 *supra* and accompanying text.

Justice Stevens' dissent, which Justice Stewart joined "insofar as it expresses views concerning the 'legal question' presented,"¹³¹ attacked the majority's reading of the fifth exemption. In a lengthy footnote, Justice Stevens explained why he was not persuaded by the majority's analysis of the legislative history:

[The Court states] that only those privileges that are recognized in the legislative history of FOIA should be incorporated in the exemption. To the extent, however, that *every* reference in the subcommittee hearings to the danger of disclosing some type of governmental information suffices under this test—virtually every agency appeared before Congress with a list of such "dangers"—the exemption would render the Act meaningless. On the other hand, if the Court's test is designed to limit Exemption 5 to those references in the legislative history that clearly bear on Congress' final understanding of the Act, I see no justification for the Court's recognition of a vague "commercial information" component of that exemption.¹³²

A proper reading of the legislative history, according to the dissent, demonstrates that Congress decided not to incorporate a "commercial information" exemption into the FOIA.¹³³

The dissent also argued that the idea of a "temporary" exemption, as permitted by the majority, is not consistent with the FOIA provision that the disclosure requirement "does not apply" when one of the exemptions is pertinent.¹³⁴ Of course, the majority's reliance on Rule

131. 99 S. Ct. at 2814 n.* Justice Stevens supplemented his own legal analysis by expressing his view—and that of several economists—that disclosure would be beneficial to the market. *Id.* at 2814-15 & n.1.

132. *Id.* at 2815 n.2 (Stevens, J., dissenting) (emphasis in original).

133. The dissent stated:

First, the passage in the House Report that the Court relies on . . . is rather clearly directed both at a different governmental activity (*i.e.*, procurement of goods or services by the government acting as commercial buyer) and at a different stage in the course of that activity (*i.e.*, "before it completes its process") than is involved in this case. Here, the agency is engaged in a clearly governmental activity—the regulation of financial markets—and has already settled upon its final position and has acted upon it. Moreover, the absence in the Senate Report of even this thin reed to support the Court's analysis is significant in light of our recognition that that report, rather than the House Report, is the most accurate reflection of the congressional will with respect to FOIA. *Department of the Air Force v. Rose*, 425 U.S. 352, 363-367 Finally, the fact that Congress did include a "commercial information" exemption in the Act, albeit one that clearly does not apply in this case—Exemption 4—should persuasively counsel against our adopting a novel and strained interpretation of another exemption to encompass such information. This is particularly so in this case in view of the fact that the very agency involved here unsuccessfully requested that Congress amend the proposed Exemption 4 to provide protection for the policy directives involved in this case. Hearings on H.R. 5012, etc. before a Subcommittee of the House Committee on Government Operations, 89th Cong., 1st Sess. 51, 55, 228, 229 (1965). Having failed to provide such protection in Exemption 4, which so clearly relates to commercial information, Congress will no doubt be surprised to find that the Court has read that protection into Exemption 5.

99 S. Ct. at 2815 n.2 (Stevens, J., dissenting) (emphasis in original).

134. 5 U.S.C. § 552(b) (1976). See note 29 *supra*.

26(c)(7), which empowers courts to order that records "be disclosed only in a designated way,"¹³⁵ supports the allowance of a temporary delay in disclosure. Although the majority opinion is logical in a technical sense, it does violence to the spirit of the Act. Congress did not intend to enact a statute with a middle ground "[b]etween 'current' release and total exemption,"¹³⁶ and the Court's extension of Exemption 5 is even more suspect as a result. While the Court's desire to protect the national monetary policy is understandable, the dissent's approach is more honest to the FOIA and properly leaves such policy decisions to the legislature.¹³⁷

B. *Traditional Discovery and the FOIA.*

Whereas most Exemption 5 cases in 1979 involved straightforward applications of accepted legal principles to the particular documents withheld by the agencies,¹³⁸ several cases required courts to address the more complex issue of the relative availability of information to litigants seeking disclosure under the Federal Rules of Civil Procedure on the one hand and the FOIA on the other. In *Canal Authority v. Froehlke*,¹³⁹ the plaintiff sought information through the normal discovery process. The defendants, relying on claims of exemption under

135. FED. R. CIV. P. 26(c)(7).

136. 99 S. Ct. at 2816 (Stevens, J., dissenting).

137. This is especially true since Congress was aware of the problem and chose not to resolve the issue in this statute. See note 133 *supra*. The dissent's position, however—at least if the majority is correct in concluding that the government could assert the confidential commercial information privilege in discovery disputes—leads to the odd result that material exempt from discovery must be disclosed under the FOIA.

138. See, e.g., *Murphy v. Department of the Army*, No. 78-1258 (D.C. Cir. Dec. 21, 1979) (disclosure to a Congressman acting in his official capacity does not waive the Exemption 5 privilege); *Lead Indus. Ass'n v. OSHA*, 610 F.2d 70 (2d Cir. 1979) (analyses based upon public record that are prepared by outside consultants at agency's request are exempt as part of deliberative process); *Falcone v. IRS*, 479 F. Supp. 985 (E.D. Mich. 1979) (exemption for predecisional advice does not apply to memorandum adopted by agency as statement of policy and interpretation of Internal Revenue Code); *Pies v. IRS*, 79-2 U.S. Tax Cas. ¶ 9571 (D.D.C. 1979) (draft of proposed regulation, treated as final work product, is not exempt as predecisional advice); *Kanter v. Department of State*, 479 F. Supp. 921 (D.D.C. 1979) (predecisional legal advice); *Hearnes v. IRS*, 79-2 U.S. Tax Cas. ¶ 9526 (E.D. Mo. 1979) (discussing the attorney-client, work product, and executive privileges); *Brinton v. United States Dep't of State*, 476 F. Supp. 535 (D.D.C. 1979) (attorney-client privilege not waived by public statements of agency officials that utilize the contents of documents without referring to the actual documents), *as amended* (Sept. 21, 1979); *Grolier, Inc. v. FTC*, 1979-1 Trade Cas. ¶ 62,698 (D.D.C. 1979) (incorporation of predecisional memorandum into final decision); *Tabcor Sales Clearing, Inc. v. Department of the Treasury*, 471 F. Supp. 436 (N.D. Ill. 1979) (executive privilege, discussing predecisional-postdecisional and opinion-fact tests); *Mallin v. NLRB*, 101 L.R.R.M. 2656 (N.D. Ill. 1979) (predecisional memoranda); *Dick v. IRS*, 79-1 U.S. Tax Cas. ¶ 9315 (N.D. Ill. 1979) (predecisional memoranda); *Eisenberg v. IRS*, 79-1 U.S. Tax Cas. ¶ 9314 (N.D. Ill. 1979) (predecisional legal advice).

139. 81 F.R.D. 609 (M.D. Fla. 1979).

the FOIA, refused to produce the documents. Rejecting this position, the district court concluded that "the FOIA and its exclusionary provisions are irrelevant to a motion to compel discovery under the Federal Rules";¹⁴⁰ *i.e.*, the FOIA places no limits on the discovery process. This differs from the situation in *ACLU v. Brown*,¹⁴¹ in which the court determined that in civil discovery it is proper to review a claim of exemption under the state secrets privilege by looking to the FOIA's national security exemption¹⁴² for guidance. *Canal Authority* declined to exempt documents from discovery solely because they could have been withheld if requested under the FOIA; in *ACLU v. Brown*,¹⁴³ the FOIA merely provided the standards by which to review a claim of privilege that the court recognized as applicable in the discovery context.¹⁴⁴

Even when a court looks to the FOIA for guidance in a discovery dispute, the Act can suggest only a tentative solution. All courts acknowledge that whereas a litigant's need for the requested information can overcome a claim of privilege in discovery, need is irrelevant in an FOIA action.¹⁴⁵ A good example of this principle is the criminal case

140. *Id.* at 613.

141. 609 F.2d 277 (7th Cir. 1979).

142. 5 U.S.C. § 552(b)(1) (1976).

143. 609 F.2d 277 (7th Cir. 1979).

144. In accord with both cases is *McClelland v. Andrus*, 606 F.2d 1278 (D.C. Cir. 1979). As in *Canal Authority*, the court found reliance on FOIA exemptions to be misplaced. The court determined that the materials were discoverable unless the executive privilege applied; accordingly, it turned to Exemption 5 case law for guidance on this point. In fact, the records in *McClelland* had been requested under the FOIA. The court chose, however, to ignore the form of the request and to treat it as one for discovery in the administrative proceeding between the parties. As long as the court treats the request as arising under the FOIA *or* under discovery procedure—without giving the requester benefits of both procedures—this "switch" seems unobjectionable on FOIA grounds.

Many courts have applied Exemption 5 cases by way of analogy in civil discovery disputes over an assertion of privilege. Justice Brennan, for example, in *Herbert v. Lando*, 441 U.S. 153, 193-94 (1979) (Brennan, J., dissenting in part), described the executive privilege by referring to the Court's Exemption 5 cases. However, since the fifth exemption does not include all discovery privileges (see notes 124 & 128 *supra* and accompanying text with regard to the Supreme Court's attempt to avoid duplicating privileges found in other exemptions by incorporating them in Exemption 5), it may be appropriate, as in *ACLU v. Brown*, 609 F.2d 277 (7th Cir. 1979), to look to other FOIA exemptions as well.

145. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 n.16 (1975); *McClelland v. Andrus*, 606 F.2d at 1287 n.54; *ACLU v. Brown*, 609 F.2d at 280; *id.* at 284 n.1 (Cummings, J., concurring in part and dissenting in part); *Dena v. IRS*, No. 78-3992 (N.D. Ill. Oct. 22, 1979). Agencies considering an FOIA request should ignore the requester's status as a member of the press. *Spectator Publishing Co. v. CIA*, No. 78-1705 (S.D.N.Y. Mar. 12, 1979). *But cf.* Koch & Rubin, *A Proposal for a Comprehensive Restructuring of the Public Information System*, 1979 DUKE L.J. 1, 35-39 (arguing that the press and independent researchers should be provided with greater access to information than the general public). The political status of the requester is also irrelevant. *Hearnes v. IRS*, 79-2 U.S. Tax Cas. ¶ 9526, at 87,876 (E.D. Mo. 1979) (former governor).

An interesting problem is presented when a litigant attempts to use the FOIA, rather than the discovery process, to get information helpful for his case. In *Cooper v. Department of the Navy*,

Irving v. DiLapi,¹⁴⁶ in which the Second Circuit Court of Appeals upheld the district court's decision that union authorization cards should be disclosed to the defendants pursuant to their subpoena.¹⁴⁷ Acknowledging that the cards would be exempt from disclosure under the FOIA,¹⁴⁸ the court nevertheless ordered production because the defendant's need for the material outweighed the government's (public's) interest in confidentiality. While these cases do not effect radical changes in the law, they do help clarify an area important under both the FOIA and the Federal Rules.

V. INVESTIGATORY RECORDS EXEMPTION

A. Law Enforcement Purposes.

Exemption 7 of the FOIA permits agencies to withhold "investigatory records compiled for law enforcement purposes,"¹⁴⁹ if at least one of six other conditions is met.¹⁵⁰ The initial question in adjudicating any Exemption 7 claim, therefore, is whether the records are both investigatory *and* compiled for law enforcement purposes. Records do

594 F.2d 484 (5th Cir.), *cert. denied*, 100 S. Ct. 266 (1979), survivors of a helicopter crash requested access to an agency's report about the accident. The court ordered disclosure, finding that the agency had waived any Exemption 5 privilege when it released the report more widely than necessary in carrying out the government's purpose of assembling the report. Of special concern to the court was that the opposing counsel in the case was given access to the report:

It is intolerable that such confidential documents should be furnished to one side of a lawsuit and not to the other. . . . [W]here, as here, a company representative primarily concerned with litigation is, pursuant to wearing his 'other hat'—a subsidiary responsibility for aircraft design and operational safety, permitted general access to guarded matter and a copy of it appears in defense counsel's hands, a determination that its confidentiality has been waived is not clearly wrong. . . . [L]ike rank, privileges such as these carry corresponding responsibilities, and we concur in the district court's refusal to permit them to be trifled with as they were here.

Id. at 488. Insofar as the court actually based its conclusion on the waiver, it is clearly correct; insofar as the litigant's need figured in the decision, the court is clearly wrong.

146. 600 F.2d 1027 (2d Cir.), *cert. denied*, 100 S. Ct. 137 (1979).

147. Although *Irving* was a criminal case, the holding should apply to civil litigation as well.

148. 600 F.2d at 1035 n.6 (citing *Pacific Molasses Co. v. NLRB*, 577 F.2d 1172 (5th Cir. 1978) and *Committee on Masonic Homes v. NLRB*, 556 F.2d 214 (3d Cir. 1977)). Whether union authorization cards should be considered exempt from FOIA disclosure is discussed in Note, *Developments Under FOIA—1978*, *supra* note 2, at 344-45.

149. 5 U.S.C. § 552(b)(7) (1976).

150. The records are exempt

[o]nly to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) 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, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

Id.

not satisfy this requirement, for example, if submitted to an agency for *other* purposes but later used in a law enforcement investigation.¹⁵¹ In *Pope v. United States*,¹⁵² a Fifth Circuit panel determined that Internal Revenue Service documents containing unsolicited information about misconduct by a lawyer, "where the information subsequently led to the consideration of disciplinary proceedings against the lawyer,"¹⁵³ fell within Exemption 7. The court found that the informants "obviously intended that the information provoke or contribute to an IRS investigation of [the attorney] and various other individuals, and the information was in fact incorporated into an investigation of appellee's fitness to practice before the IRS."¹⁵⁴ The records were thus investigatory and compiled for law enforcement purposes.

The timing of the law enforcement investigation can be critical. In *Gregory v. Federal Deposit Insurance Corp.*,¹⁵⁵ a district court rejected an Exemption 7 claim, stating: "Unless the information was originally gathered for law enforcement purposes, the subsequent inclusion of the material in an investigative report does not affect its characterization under exemption seven."¹⁵⁶ The documents in question related to "routine oversight of a federal program."¹⁵⁷ The court granted summary judgment to the FOIA requester on this issue.

Two courts reached different results in 1979 on whether records compiled during improper FBI investigations are exempt as "investigatory records compiled for law enforcement purposes."¹⁵⁸ In *Lamont v. Department of Justice*,¹⁵⁹ the government attempted to withhold records of a thirty-year investigation of the plaintiff's activities, conducted by the Federal Bureau of Investigation. The government relied heavily on the Smith Act,¹⁶⁰ which makes it unlawful to advocate the overthrow of the government,¹⁶¹ to demonstrate that the records were compiled for law enforcement purposes. The court rejected the govern-

151. Ellsworth, *Exemption 7 of the FOIA: Law Enforcement Records*, in LITIGATION UNDER THE AMENDED FREEDOM OF INFORMATION ACT 57 (4th ed. C. Marwick 1978).

152. 599 F.2d 1383 (5th Cir. 1979).

153. *Id.* at 1384.

154. *Id.* at 1386.

155. 470 F. Supp. 1329 (D.D.C. 1979). For a discussion of the Exemption 8 aspects of this case see text accompanying notes 189-96 *infra*.

156. 470 F. Supp. at 1334.

157. *Id.*

158. 5 U.S.C. § 552(b)(7) (1976).

159. 475 F. Supp. 761 (S.D.N.Y. 1979).

160. Pub. L. No. 76-670, 54 Stat. 670 (1940) (current version at 18 U.S.C. § 2385 (1976)).

161. Under the Act, it is a felony to belong to an organization that advocates the overthrow of the government. The Act provides in part:

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such

ment's argument and concluded that in light of the Supreme Court's restrictive interpretation of the Smith Act's membership provision¹⁶² after 1955,¹⁶³ the Federal Bureau of Investigation could not reasonably, and in good faith, have believed that Lamont had violated the law. Therefore, the Federal Bureau of Investigation had not collected the information for any law enforcement purpose, but rather as part of its general monitoring and surveillance of Lamont. Applying a test of whether the agency believed in good faith that the subject of its investigation had violated the law, the court denied the government's Exemption 7 claim, subject to the introduction of further proof of the investigation's law enforcement purpose.¹⁶⁴

Irons v. Bell,¹⁶⁵ a First Circuit case decided several months before the Southern District of New York's *Lamont* opinion, established a generic classification of Federal Bureau of Investigation investigatory files as Exemption 7 "records." The court found that the Bureau had established no particular law enforcement purpose for the investigation, rejecting "the proposition that merely associating and expressing opposition to government policies, without more, triggers an FBI obligation to conduct a lengthy investigation and infiltration of political and religious associations."¹⁶⁶ Nevertheless, the court concluded that Exemption 7 did apply, because of the FBI's status "as an agency whose functions are almost entirely limited to the enforcement of federal law."¹⁶⁷ The *Irons* opinion explained that the law enforcement purpose of the particular investigation is irrelevant when the Federal Bureau of Investigation is involved.

The character of the materials excluded under Exemption 7 at least suggests that "law enforcement purpose" is as much a description of

government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than \$20,000, or imprisoned not more than twenty years, or both . . .

18 U.S.C. § 2385 (1976) (emphasis added).

162. *Id.* The FBI argued that Lamont was under investigation for violating this provision.

163. The Court's decisions in *Scales v. United States*, 367 U.S. 203 (1961), and *Yates v. United States*, 354 U.S. 298 (1957), construed the Act's membership provision as requiring "active membership" and "specific intent" to aid the overthrow of the government. 367 U.S. at 221-24; 354 U.S. at 319-20.

164. 475 F. Supp. at 780.

165. 596 F.2d 468 (1st Cir. 1979).

166. *Id.* at 472. The investigation concerned the requester's participation in various political organizations and race-related demonstrations. The court agreed with the district court that the FBI's affidavit indicated that the investigation had no law enforcement purpose. The court began its analysis by rejecting the requester's argument that the Privacy Act, 5 U.S.C. § 552a (1976), entitled him to the records. "[T]he Privacy Act adds nothing to appellee's rights under FOIA." 596 F.2d at 471.

167. 596 F.2d at 473.

the type of agency the exemption is aimed at as it is a condition on the use of the exemption by agencies having administrative as well as civil enforcement duties. We see strong policy reasons supporting this reading of "law enforcement purpose" which would, assuming other conditions are met, extend the exemption to all investigative files of a criminal law enforcement agency.¹⁶⁸

The court reasoned that if it did not label the files "law enforcement records," even the presence of one of the six enumerated harms required to exempt such records from disclosure would not permit the agency to withhold them. Furthermore, the court noted that determining whether each investigation had a law enforcement purpose "would place an unmanageable burden upon district courts. Few cases would be as obvious as this at the affidavit stage."¹⁶⁹ In support of its position, the *Irons* court cited various statements in the legislative history, including several references to Exemption 7 records as "investigatory records of the FBI."¹⁷⁰ Reading the legislative history as showing that "investigatory records of law enforcement agencies are inherently records compiled for 'law enforcement purposes' within the meaning of Exemption 7,"¹⁷¹ the opinion noted that "further legislation and not the FOIA, should define and provide sanctions for unjustified surveillance activity."¹⁷²

On balance, the approach of the *Lamont* court seems more defensible than that of the *Irons* decision. The *Irons* court's refusal to "burden" the courts with making decisions such as those made in *Lamont* is difficult to reconcile with the FOIA's provisions for in camera inspection and de novo review,¹⁷³ which indicate that courts are expected to do more than accept an agency's position at face value. Moreover, the *Irons* court's other policy justification—that a contrary holding would mandate disclosure of information that invades personal privacy or identifies a confidential source—overlooks the simple fact that Exemption 7, by encompassing only certain types of records whose disclosure would cause the enumerated harms, requires disclosure of other records whose release would have the same effect. Finally, the First Circuit's reliance on the legislative history is misplaced. The sources cited do not indicate that the speakers contemplated illegal Federal Bureau of Investigation activity as well as good faith efforts to enforce

168. *Id.* at 474.

169. *Id.*

170. *Id.* at 475 (citing 120 CONG. REC. 17,034 (1974) (remarks of Sen. Kennedy), 120 CONG. REC. 36,878 (1974) (remarks of Sen. Bayh), 120 CONG. REC. 36,879 (remarks of Sen. Mondale)).

171. 596 F.2d at 475.

172. *Id.* at 474 n.13.

173. 5 U.S.C. § 552(a)(4)(B) (1976).

the law.¹⁷⁴ The FOIA, enacted as a mechanism to allow public oversight of government,¹⁷⁵ was not meant to shield unauthorized agency activity.¹⁷⁶

B. *Interference With Enforcement Proceedings.*

Under Exemption 7(A) of the FOIA, law enforcement records are not subject to disclosure if their release would "interfere with enforcement proceedings."¹⁷⁷ In 1978 the Supreme Court, in *NLRB v. Robbins Tire & Rubber Co.*,¹⁷⁸ interpreted this provision to exempt, as a class, statements by witnesses given to the National Labor Relations Board in pending unfair labor practice proceedings. Federal courts dealing with Exemption 7(A) in 1979 utilized the *Robbins Tire* decision, and the rationale behind it, to decide analogous issues.

In *Nemacolin Mines Corp. v. NLRB*,¹⁷⁹ the district court denied the NLRB's claim of exemption for witness statements given in the course of an unfair labor practice investigation that had been completed in all

174. See legislative history cited at note 170 *supra*. In fact, the cited remarks of Senator Bayh contain a laudatory reference to the FOIA for its role in uncovering questionable counterintelligence activities. 120 CONG. REC. 36,878 (1974) (remarks of Sen. Bayh).

175. See generally 1 J. O'REILLY, FEDERAL INFORMATION DISCLOSURE: PROCEDURES, FORMS AND THE LAW §§ 2.01, 4.01 (1979), and authorities cited therein.

Legislative intent provided the basis for the decision in *Providence Journal Co. v. FBI*, 602 F.2d 1010 (1st Cir. 1979), in which a requester sought information obtained by means of illegal electronic surveillance. The court reversed the district court's order to disclose, citing Title III of the Omnibus Crime Control & Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1976). Regardless of the possible Exemption 3 status of that statute, the court held that the act showed a congressional balancing of the sort required under Exemption 7(C) between privacy and the public's interest in disclosure. According to the court, "Congress had decided that the risk to privacy created by illegal electronic surveillance is too great to permit any disclosure of the fruits of such surveillance." 602 F.2d at 1013. The court did not dwell on whether the records were investigatory and compiled for law enforcement purposes despite the illegality. Unlike the situations presented in *Irons* and *Lamont*, the investigation in *Providence Journal* was itself legal although the means of obtaining information were not.

176. On June 2, 1977, the Deputy Attorney General sent a memorandum to Justice Department officials urging that Exemption 7 "not be used to conceal unlawful activities, regardless of the intent with which those activities were conducted. . . . Neither the use nor methodology of unlawful investigative techniques or procedures is to be protected by reliance on [Exemption 7]." Memorandum from Peter F. Flaherty, Deputy Attorney General, to Quin Shea, Director, Office of Information and Privacy Appeals (June 2, 1977), reprinted in LITIGATION UNDER THE AMENDED FREEDOM OF INFORMATION ACT app. 96 (4th ed. C. Marwick 1978).

177. 5 U.S.C. § 552(b)(7)(A) (1976).

178. 437 U.S. 214 (1978), discussed in Note, *Developments Under FOIA—1978*, *supra* note 2, at 339-43, 345-47. For a criticism of the *Robbins Tire* decision and a discussion of its impact, see Note, *NLRB Discovery After Robbins: More Peril for Private Litigants*, 47 FORDHAM L. REV. 393 (1978). The author bemoans the Supreme Court's reduction of the availability of the FOIA for use as a discovery tool. However, this analysis apparently misses the point that it was not the purpose of the Act to serve as a mechanism for discovery.

179. 467 F. Supp. 521 (W.D. Pa. 1979).

respects. The National Labor Relations Board argued that disclosure would interfere with future enforcement proceedings by diminishing the agency's ability to induce informants to make statements. According to the plaintiff-requester, on the other hand, statements are exempt only during proceedings in which they are potentially useful. Judge McCune adopted the requester's position, holding that Exemption 7(A) does not bar "post-enforcement disclosure of statements made to the NLRB while investigating an unfair labor practice charge."¹⁸⁰

The court distinguished *Robbins Tire* on the facts and demonstrated that the Supreme Court's rationale for holding the statements exempt in that case required a finding of no exemption in *Nemacolin*. In *Robbins Tire*, the witness statements were sought *before* the hearing on the unfair labor practice charge as a means of supplementing—indeed, circumventing—the National Labor Relations Board's discovery procedures. The Supreme Court was concerned that prehearing disclosure would interfere with the particular proceeding,¹⁸¹ and the Court noted the same concern in the legislative history. But, as the *Nemacolin* court indicated, "[w]here the administrative agency has no intention to use the statements in later enforcement proceedings, there are no 'enforcement proceedings' which disclosure could disrupt."¹⁸² Therefore, the court found that Exemption 7(A) did not authorize the National Labor Relations Board to withhold the documents, regardless of the

180. *Id.* at 523.

181. The concern is that witnesses will be intimidated, or that the company will construct defenses that cause the violations to go unremedied. 437 U.S. at 241. These concerns are present whenever there is an "imminent adjudicatory proceeding." *Clements Wire & Mfg. Co. v. NLRB*, 589 F.2d 894, 897 (5th Cir. 1979) (extending *Robbins Tire* to union elections).

An interesting summary of the cases appears in Judge Goldberg's opinion for the Fifth Circuit in *Anderson Greenwood & Co. v. NLRB*, 604 F.2d 322 (5th Cir. 1979). The court held exempt NLRB witness statements procured during an investigation of a challenged representative election, an issue similar to that decided the same day in *Red Food Stores, Inc. v. NLRB*, 604 F.2d 324 (5th Cir. 1979). Judge Goldberg opined:

Our decision in *Robbins Tire*,
 Interpreting Congresses' reported desires,
 Exposed workers to their bosses' ire.
 The High Court, avoiding this sticky quagmire,
 And fearing employers would threaten to fire,
 Sent our holding to the funeral pyre.
 Then along came *Clements Wire*,
 Soon after its venerable sire.
 To elections, *Wire* extended *Tire*,
 Leaving app'lees arguments higher and drier.
 Now to colors our focus must shift,
 To *Green wood* and stores that are *Red*.
 We hope this attempt at a rhyme, perhaps two,
 Has not left this audience feeling too blue.

604 F.2d at 323 (footnotes omitted).

182. 467 F. Supp. at 524. The court cited *Au & Son v. NLRB*, 538 F.2d 80 (3d Cir. 1976), in support of its restrictive construction of "enforcement proceedings." 467 F. Supp. at 524.

validity of the National Labor Relation Board's fears that disclosure would jeopardize unrelated future proceedings.¹⁸³

While the *Nemacolin* case distinguished *Robbins Tire* so as to reach an opposite result, other courts extended the *Robbins Tire* generic exemption to the analogous facts present in their cases. In *NLRB v. Croft Metals, Inc.*,¹⁸⁴ a Fifth Circuit panel held that contempt proceedings before a special master are enforcement proceedings to which the exemption applies. The court acknowledged that the proceedings were not identical, but saw the essential circumstances—the prosecutorial function and the statute being enforced¹⁸⁵—as the same.¹⁸⁶ Another court applied the *Robbins Tire* holding to a situation in which the witness' statement, located in a file on a withdrawn charge, was relevant to a second, pending proceeding.¹⁸⁷ Once the National Labor Relations Board demonstrated the affidavit's relevance to the pending proceeding, it was exempt under Exemption 7(A) without a "particularized showing of potential harm from disclosure."¹⁸⁸

183. The court also rejected the claim of exemption under 5 U.S.C. § 552(b)(7)(D), which allows agencies to withhold law enforcement records if disclosure would identify a confidential source. Two factors influenced this conclusion. First, every National Labor Relations Board declarant signs a statement that he has been assured confidentiality until and unless he is called to testify as a witness at the hearing.

Since the declarant could expect, at the time his statement was given, to be called as a witness by the NLRB, his justifiable expectation of protection at that time is the protection given to a witness. As a result, disclosure does not substantially compromise the justifiable expectations of the declarant.

467 F. Supp. at 525. Second, the National Labor Relations Board purports to grant confidentiality to all declarants by use of the statement referred to above. The court opined that its holding might differ if only reluctant sources were assured of confidentiality. "[E]xemption 7(D) requires the grant of confidentiality to be made on the basis of good faith discretion, not on the basis of arbitrary rule, as the grant was made in this case." *Id.* But see *Pacheco v. FBI*, 470 F. Supp. 1091, 1100-01 (D.P.R. 1979). In *Pacheco* the court held that Exemption 7(D) exempted the records although the government's affidavit stated that some of the information concerned witnesses to crimes who might be called upon to testify publicly. The court apparently accepted the Bureau's argument that the informants had all received implied assurances of confidentiality. *Nemacolin* and *Pacheco* may be distinguishable, however, in that the FBI, as a criminal law enforcement agency, receives greater protection under Exemption 7(D). See note 150 *supra*.

184. 100 L.R.R.M. 2426 (5th Cir. 1979).

185. The National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976).

186. 100 L.R.R.M. at 2427.

187. *Polynesian Cultural Center, Inc. v. NLRB*, 600 F.2d 1327 (9th Cir. 1979).

188. *Id.* at 1329. Three cases not dealing with the NLRB used *Robbins Tire* to resolve the subsection (b)(7)(A) claim. See *Stephenson v. IRS*, 79-2 U.S. Tax Cas. ¶ 9513 (N.D. Ga. 1979); *Kanter v. IRS*, 478 F. Supp. 552 (N.D. Ill. 1979); *Steinberg v. IRS*, 463 F. Supp. 1272, 1274 (S.D. Fla. 1979). All three courts held that the exemption applied (citing *Robbins Tire*), because disclosure would prejudice the government's case. *Steinberg* also relied on *Robbins Tire* for the proposition that the FOIA was not meant to be a private discovery tool in ongoing criminal litigation. *Id.* at 1274. See also *Grabinski v. IRS*, 478 F. Supp. 486 (E.D. Mo. 1979).

VI. FINANCIAL INSTITUTIONS EXEMPTION

Exemption 8 of the FOIA provides that the Act's disclosure provisions do not apply to matters "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."¹⁸⁹ This exemption has produced little litigation in the thirteen years since the FOIA's enactment; only Exemption 9¹⁹⁰ has produced less.¹⁹¹ In *Gregory v. Federal Deposit Insurance Corp.*,¹⁹² however, a district court discussed the applicability of Exemption 8 to a request for records from the Federal Deposit Insurance Corporation, which, as the insurer, possessed the records of a closed bank.

The narrow question for decision in *Gregory* was whether the exemption permitted agencies to withhold records concerning closed banks. The court held that it did not, despite the court's agreement with the Federal Deposit Insurance Corporation that the statute does not differentiate between open and closed banks. "The FDIC is correct in asserting that these documents fall within the plain language of the statute. . . . [But] when a literal reading leads to an unreasonable result, a court can look behind the plain meaning of the statute."¹⁹³ According to the district judge, the exemption's plain meaning would seal the bank's records for all time, even if the bank had been closed for many years.

The *Gregory* court determined that exempting records of closed banks would not further either of the provision's two purposes. The exemption would not help maintain the bank's financial integrity, for "[o]nce a bank has been closed, its financial soundness cannot be undermined."¹⁹⁴ Therefore, a literal reading of the statute would be irrelevant in effectuating its "central purpose."¹⁹⁵ Moreover, permitting the Federal Deposit Insurance Corporation to withhold the records would not further the statute's second goal of safeguarding the bank-agency relationship. The opinion cautioned against being so concerned with good relations that the purpose of regulation is forgotten, and noted that good relations are certainly immaterial in the context of a closed

189. 5 U.S.C. § 552(b)(8) (1976).

190. *Id.* § 552(b)(9), which exempts "geological and geophysical information and data, including maps, concerning wells."

191. See 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5:41 (2d ed. 1978).

192. 470 F. Supp. 1329 (D.D.C. 1979).

193. *Id.* at 1332.

194. *Id.* at 1333. See generally *Consumers Union v. Heimann*, 589 F.2d 531, 534 (D.C. Cir. 1978).

195. 470 F. Supp. at 1332.

bank.¹⁹⁶ Because the literal interpretation would lead to an unreasonable result, without any countervailing suggestion by the Federal Deposit Insurance Corporation that disclosure was problematic, the court rejected the Federal Deposit Insurance Corporation's claim of exemption.

VII. CONCLUSION

Litigation under the FOIA in 1979 resolved fewer issues than it left open. The Supreme Court's pronouncements in *Chrysler* and *Merrill* failed to settle even the particular disputes under consideration. Furthermore, the Court's reasoning was inconclusive (*Chrysler*) and unsatisfying (*Merrill*). The circuit and district courts made progress in certain areas, most notably with regard to applying the Supreme Court's 1978 decision in *Robbins Tire*¹⁹⁷ and refining the relationship between the FOIA and the discovery process. Again, however, the disturbing developments overshadowed the positive accomplishments. Conflicts erupted between courts over the exempt status of consumer product information and records of unlawful criminal investigations. Moreover, rumblings in the Congress concerning request delays and records of national intelligence agencies forbode the injection of new uncertainties into the law.¹⁹⁸ In sum, the year's FOIA developments demonstrated that the area of federal information disclosure is one of constant and unpredictable change.

Alan S. Madans

196. *Id.* at 1333.

197. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978).

198. See notes 87 & 107 *supra*.