

NOTES

DEVELOPMENTS UNDER THE FREEDOM OF INFORMATION ACT — 1982

The sixteenth year of the Freedom of Information Act (FOIA)¹ held few bright spots for advocates of increased disclosure of government information. The Reagan administration continued its trend of increased information withholding and as a result, developments outside the courts equalled or even overshadowed significant judicial activity.² Responding to perceived problems of over-disclosure, the Justice Department issued a memorandum establishing agency procedures for the protection of trade secret information.³ Its provisions parallel those of the still-unenacted Hatch FOIA amendment bill, S. 1730.⁴ In the same vein, President Reagan signed a controversial new Executive order that has the potential to greatly increase national security information withholding under FOIA exemption (b)(1).⁵

In the courts, one Supreme Court decision and two circuit splits dominated 1982 litigation under the FOIA (b)(3) federal statutes exemption. In *Baldrige v. Shapiro*,⁶ a case with important constitutional implications, the Supreme Court held that Census Act

1. 5 U.S.C. § 552 (1976)(as amended).

2. The Reagan administration continued the trend of increased information withholding identified in past installments of this note. For discussion of developments under the FOIA in prior years, see Comment, *Developments Under the Freedom of Information Act—1981*, 1982 DUKE L.J. 423; Comment, *Developments Under the Freedom of Information Act—1980*, 1981 DUKE L.J. 338; Comment, *Developments Under the Freedom of Information Act—1979*, 1980 DUKE L.J. 139; 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. See *infra* text accompanying notes 28-30.

4. See *infra* notes 21-30 and accompanying text.

5. See *infra* notes 32-71 and accompanying text.

6. 455 U.S. 345 (1982).

sections 8(b) and 9(a) qualify as (b)(3) statutes and that the scope of these statutes precludes the release of raw census data.⁷ In *Greentree v. United States Customs Service*,⁸ the Court of Appeals for the District of Columbia Circuit split with the Courts of Appeals for the Fifth and Seventh Circuits by holding that the Privacy Act does not qualify as a (b)(3) exemption statute.⁹ The Court of Appeals for the Seventh Circuit revived an issue apparently resolved by *Long v. IRS*¹⁰ and *Neufeld v. IRS*¹¹ when it split with the Courts of Appeals for the Ninth and District of Columbia Circuits over the scope of Internal Revenue Code section 6103.¹²

Finally, in *FBI v. Abramson*¹³ and *State Department v. Washington Post, Inc.*,¹⁴ the Supreme Court also addressed the FOIA's personal privacy exemptions. Both *Abramson* and *Washington Post* significantly revise the two-part withholding tests commonly applied in exemption (b)(6) and (b)(7)(C) analyses, although their effect on the quantity of information withheld is uncertain.¹⁵

I. DEVELOPMENTS OUTSIDE THE COURTS

In its 1979 decision in *Chrysler Corp. v. Brown*,¹⁶ the Supreme Court limited the rights of "private parties who, having submitted information to federal agencies, seek to prevent agency disclosure of this information pursuant to FOIA requests."¹⁷ The Court held that neither the FOIA nor the Trade Secrets Act¹⁸ provides a private right of action to enjoin disclosure,¹⁹ leaving section 10 of the Administrative

7. See *infra* notes 79-105 and accompanying text.

8. 674 F.2d 74 (D.C. Cir. 1982).

9. See *infra* notes 106-36 and accompanying text.

10. 596 F.2d 362 (9th Cir. 1979), cert. denied, 446 U.S. 917 (1980).

11. 646 F.2d 661 (D.C. Cir. 1981).

12. *King v. IRS*, 688 F.2d 488 (7th Cir. 1982); see *infra* notes 137-60 and accompanying text.

13. 102 S. Ct. 2054 (1982).

14. 456 U.S. 395 (1982).

15. See *infra* notes 168-202 and accompanying text.

16. 441 U.S. 281 (1979).

17. Memorandum from Assistant Attorney General Barbara Allen Babcock to All [Federal] Agency General Counsels (June 21, 1979), reprinted in 1 GOV'T DISCLOSURE (P-H) ¶ 300,791, at 300,792 Oct. 9, 1979 [hereinafter cited as Babcock Memorandum].

18. 18 U.S.C. § 1905 (Supp. IV 1980). This section provides, in part, that
Whoever, being an officer or employee of the United States or of any department or agency thereof publishes, divulges, discloses, or makes known in any manner . . . any information . . . which . . . concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditure 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 . . .

Id.

19. 441 U.S. at 290-94, 316-17.

Procedure Act²⁰ as the sole basis for such "reverse-FOIA" actions. In an effort to expand the limited scope of "submitters' rights," Senator Orrin Hatch proposed two amendments to the FOIA—his own Freedom of Information Reform Act, S. 1730,²¹ and President Reagan's Freedom of Information Improvements Act, S. 1751.²² A compromise bill, S. 1730,²³ which incorporates parts of both the Reagan and Hatch bills, would require the government to consult the submitter before releasing information to a FOIA requester. This bill would also give submitters the opportunity to challenge in federal court an agency's decision to release that information.²⁴

Although the bill's opponents have clearly outlobbied its proponents to date,²⁵ anticipated industry response to a recent Environmen-

20. 5 U.S.C. § 702 (1976). This section provides, in part, that 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." The Court determined that this section allowed judicial review of disclosures of information within both a FOIA exemption and the Trade Secrets Act, 18 U.S.C. § 1905 (Supp. IV 1980). See *Chrysler Corp. v. Brown*, 441 U.S. at 318.

21. S. 1730, 97th Cong., 1st Sess., 127 CONG. REC. S11,296 (daily ed. Oct. 7, 1981).

22. S. 1751, 97th Cong., 1st Sess., 127 CONG. REC. S11,702 (daily ed. Oct. 20, 1981).

23. SENATE COMM. ON THE JUDICIARY, 97TH CONG., 2D SESS., REPORT ON S. 1730 (Comm. Print 1982) (this print is the Constitution Subcommittee markup of S. 1730) [hereinafter cited as S. 1730 Markup].

24. *Id.* at 32-34. This proposed FOIA amendment bill adds to 5 U.S.C. § 552(a) a new paragraph, (7)(A), which states:

(7)(A) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying procedures by which—

(i) a submitter may be required to designate, at the time it submits or provides to the agency or thereafter, any information consisting of trade secrets, or commercial, research, financial, or business information which is exempt from disclosure under subsection (b)(4);

(ii) the agency shall notify the submitter that a request has been made for information provided by the submitter, within ten working days after the receipt of such request, and shall describe the nature and scope of the request and advise the submitter of his right to submit written objections in response to the request;

(iii) the submitter may, within ten working days of the forwarding of such notification, submit to the agency written objection to such disclosure, specifying all grounds upon which it is contended that the information should not be disclosed

Id. at 29-30.

To remedy the lack of federal court jurisdiction for "reverse FOIA" suits, this proposed FOIA amendment bill adds to section 552(a)(4) the following language:

(B) On complaint filed by a . . . submitter after a final decision to disclose submitted information but prior to its release, the district court of the United States . . . has jurisdiction—

(ii) to enjoin the agency from any disclosure of records which was objected to by a submitter under paragraph (7)(A)(iii) or which would have been objected to had notice been given as required by paragraph (7)(A)(i). . . .

Id. at 32.

25. See 40 CONG. Q. WEEKLY REP. 1267 (1982). Despite widespread support from submitters of confidential business information, the bill stalled in the Senate Judiciary Committee at the end of the 97th Congress. *Id.* Lobbyists for the media, which viewed the bill as emasculating the FOIA, persuaded the committee to delay the bill. See *id.* at 1229. In some cases, their fear that

tal Protection Agency (EPA) blunder may turn the tide. In September, 1982, a rival of the Monsanto Company filed a FOIA request with the EPA for information regarding Monsanto's "Roundup," a herbicide that produced \$450 million in sales and 40 percent of the company's profits in 1981. The EPA responded by inadvertently giving the requester the herbicide's top-secret formula.²⁶ The resulting furor in the chemical industry, which for years has urged Congress to tighten restrictions on FOIA disclosures,²⁷ will probably lead to a renewed campaign in the 98th Congress in support of the Hatch amendments and their increased protection of submitters' rights.

Private industry may find temporary solace, however, in the Justice Department's 1982 memorandum to all federal agencies²⁸ which establishes specific guidelines that parallel the Hatch "submitters' rights" proposals. The memorandum directs all federal agencies to:

Provide business submitters with prompt written notice of any FOIA request for submitted information

Afford business submitters a period of at least ten working days in which to object to the disclosure of any specified portion of the information and to state fully all grounds upon which disclosure is opposed.

Give careful consideration to all such specified grounds for non-disclosure prior to making an administrative determination of the issue

. . . .

Establish formal written procedures, preferably by regulation, according to which the above steps are to be followed agency-wide in all instances.²⁹

This temporary measure was designed to fill the gap until S. 1730 is passed.³⁰ It represents one of two recent attempts by the Reagan

the bill would cut back the amount of information currently available is justified. See S. 1730 MARKUP, *supra* note 23 at 29-34, 36-38, 40-42. Their anti-FOIA-reform campaign, which swept Utah several months before Senator Hatch's reelection campaign, sent news releases to media in Utah in an attack on Senator Hatch's efforts. In a reelection year, such boat-rocking can be devastating, and in fact, the barrage did appear to prompt the Senate Constitutional Subcommittee Advocacy Committee to eliminate some of the most controversial proposals dealing with terrorist activity and business trade-secret information. See 40 CONG. Q. WEEKLY REP. 1267, 1229 (1982).

26. According to the EPA, a GS-9 employee released the trade secrets while processing the FOIA request. The Agency uses a "special magic marker" to delete any confidential information from files that are ordinarily releasable without it. The reproduction process then blacks out the information marked. Apparently, the machine did not work properly that day. Washington Post, Sept. 18, 1982, at A1, col. 1.

27. *Id.*

28. Memorandum from the Office of Information and Policy Guidance: Submitters' Rights, reprinted in 1 GOV'T DISCLOSURE (P-H) ¶ 300,813 (Sept. 14, 1982) [hereinafter cited as Submitters' Rights Memorandum]; see also Babcock Memorandum, *supra* note 17.

29. Submitters' Rights Memorandum, *supra* note 28, at 300,813-14.

30. See *id.* at 300,814.

administration to change the FOIA's impact unilaterally and materially without changing the Act itself. The second is President Reagan's 1982 Executive order governing national security information.³¹

II. THE NATIONAL SECURITY EXEMPTION

Section (b)(1) of the FOIA³² exempts from compulsory disclosure sensitive national security information classified pursuant to Executive order guidelines. Although President Carter's Executive order³³ and its predecessors³⁴ attempted to balance the public's right to know against national security interests, President Reagan, in an effort to correct a perceived imbalance favoring public access,³⁵ signed Executive Order 12,356³⁶ in 1982. A comparison of the language of the Reagan order and the Carter order reveals the Reagan administration's movement toward restricting public access under the FOIA.³⁷ The Reagan order creates new classification categories, eliminates the Carter order's pre-

31. See *infra* notes 32-71 and accompanying text.

32. 5 U.S.C. § 552(b)(1) (1976). This provision states "(b) This section does not apply to matters that are—(1)(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 classified pursuant to such Executive order. . . ." *Id.*

33. See Exec. Order No. 12,065, 3 C.F.R. 190 (1979), reprinted in 50 U.S.C. § 401 app. at 706-12 (Supp. IV 1980).

34. Exec. Order No. 11,652, 3 C.F.R. 678 (1971-1975 Comp.), reprinted in 3 U.S. CODE CONG & AD. NEWS 5513 (1972). From the Eisenhower administration to the Carter administration, there has been a constant movement toward increased public access to information in the national security area. See *infra* note 43 and text accompanying notes 43-45.

35. This balance between national security and public access is delicate. If it tips to allow too little disclosure, the FOIA is rendered useless. If it tips to allow too much disclosure, our national security is jeopardized. Apparently, the Reagan administration believes that the government is releasing too much information.

In a January 12, 1982 press release, President Reagan expressed his concern that unauthorized disclosures of national security information had become a "problem of major proportions." N.Y. Times, Jan. 13, 1982, at B22, col. 5. In an interim effort to curb this problem, the President established policies designed to limit such releases. Among the policies were provisions governing contacts with the media, investigation of unauthorized information releases, and access to government information. *Id.* Although this order dealt primarily with *unauthorized* classified information disclosures, the Reagan administration clearly demonstrated its displeasure at the release of *any* information.

36. Exec. Order No. 12,356, 47 Fed. Reg. 14,874 (1982).

37. See Comment, *Developments Under the Freedom of Information Act—1981*, *supra* note 2, at 425 for an analysis of another step in the Reagan administration's trend toward increased secrecy; see also 128 CONG. REC. S4211-12 (daily ed. Apr. 28, 1982) (statement of Sen. Durenberger), S4212-13 (statement of Sen. Leahy), S4213-16 (statement of Sen. Huddleston); 128 CONG. REC. H784 (daily ed. Mar. 9, 1982) (statement of Mr. English); 128 CONG. REC. E1012-13, (daily ed. Mar. 16, 1982) (letter of Ambassador (ret.) Samuel R. Gammon, Exec. Dir. American Historical Ass'n). For a thought-provoking answer to these criticisms of the Reagan administration's information policies, see Reichel, *Reagan Administration's Position on FOIA is Misinterpreted*, 110 N.J.L.J. at 1, col. 4 (Nov. 4, 1982).

sumption against classification, and increases the duration of classifications.³⁸

A. *New Classification Categories.*

Because courts generally defer to agency document classification under exemption (b)(1),³⁹ the classification standards in fact determine the amount of information released. The Reagan order, like its predecessor, establishes a threshold beyond which all information must be classified. The Carter order stated that "information . . . may not be classified unless . . . its unauthorized disclosure reasonably could be expected to cause *at least identifiable damage* to the national security."⁴⁰ In contrast, the Reagan order provides that "information . . . shall be classified when . . . its unauthorized disclosure, either by itself *or in the context of other information*, reasonably could be expected to cause *damage* to the national security."⁴¹ As these language differences demonstrate, the Reagan order establishes two new classification categories that strengthen the limitations on public access to government information.

The "damage" standard creates the first new category. Although the Carter order prohibited classification unless disclosure might cause "identifiable damage," the Reagan order allows classification if disclosure might cause "damage"—presumably, any damage.⁴² This "damage" standard is not new to Executive orders governing national security information; President Nixon's order also used it.⁴³ President

38. For an excellent exhaustive and in-depth comparison of Executive Orders 12,065 and 12,356, see 128 CONG. REC. S4211-16 (daily ed. Apr. 28, 1982) (proposal of S. 2452, "Freedom of Information Protection Act").

39. See *Baez v. United States Dep't of Justice*, 647 F.2d 1328 (D.C. Cir. 1980); *Lesar v. United States Dep't. of Justice*, 636 F.2d 472 (D.C. Cir. 1980); *Hayden v. National Sec. Agency*, 452 F. Supp. 247 (D.D.C. 1978) (the disclosure of certain National Security Agency operations, intelligence sources, and methods is exempt under exemption (b)(1)), *aff'd sub nom. Hayden v. National Sec. Agency/Cent. Sec. Serv.*, 608 F.2d 1381, 1388 (D.C. Cir. 1979) ("This is precisely the sort of situation where Congress intended reviewing courts to respect the expertise of an agency."), *cert. denied*, 446 U.S. 937 (1980); see also Comment, *Developments under the Freedom of Information Act—1981*, *supra* note 2, at 429-37; Comment, *Developments Under the Freedom of Information Act—1980*, *supra* note 2, at 354-59.

40. Exec. Order No. 12,065, *supra* note 33, § 1-302, at 193 (emphasis added).

41. Exec. Order No. 12,356, *supra* note 36, § 1.3(b), at 14,876 (emphasis added).

42. Although the deletion of "identifiable" is, on its face, an innocuous change, it created a great deal of controversy in Congress. The word was deleted because it placed an excessive burden on the government to defend denials of FOIA national security information requests. See *infra* note 46 and accompanying text.

43. National security information during the Nixon and Ford administrations was governed by the Nixon order, Exec. Order No. 11,652, *supra* note 34. The comparable provision stated: "The test for assigning [the lowest] classification shall be whether its unauthorized disclosure could reasonably be expected to cause damage to the national security." *Id.* at 679-80.

President Nixon designed his order to increase public access to national security information under the FOIA. This purpose is described in its introduction:

Nixon's weak attempt to increase public access to national security information under the FOIA dissatisfied many⁴⁴; this dissatisfaction prompted President Carter to decrease further the amount of classifiable information by raising the threshold to a stricter "identifiable damage" standard.⁴⁵ Thus, the Reagan administration's deletion of "identifiable" signifies a return to the looser Nixon standard—a standard that allows increased withholding by classifying information that falls below the "identifiable damage" threshold but above the simple "damage" threshold. As the Reagan administration has noted, no longer will the word "identifiable" [place] an excessive burden on the government to defend in court decisions to deny FOIA requests on national security grounds."⁴⁶

The Reagan order's "mosaic theory" of classification provides the basis for the second new category.⁴⁷ The Reagan order allows agencies to classify information when its release might cause damage either alone or when combined with other information from the same document or from other sources available to the requester.⁴⁸ Comparing the "mosaic-theory" provision with other FOIA standards demonstrates how it may severely restrict public access to government information.⁴⁹

The interests of the United States and its citizens are best served by making information regarding the affairs of Government readily available to the public. This concept of an informed citizenry is reflected in the Freedom of Information Act and in the current public information policies of the executive branch.

Id. at 678; see also 128 CONG. REC. S4211, S4214 (daily ed. Apr. 28, 1982); N.Y. Times, Apr. 11, 1982, at E17, col. 5.

44. 128 CONG. REC. S4211, S4214 (daily ed. Apr. 28, 1982).

45. See generally *id.*

46. *Id.* at S4213. The "damage" threshold is more easily defensible but its adoption touched off a furor in the Senate. A group of senators, led by Senator David F. Durenberger, proposed S. 2452, the Freedom of Information *Protection* Act, which would amend FOIA exemption (b)(1) in two respects. First, (b)(1) would condition exemption on a showing that disclosure would cause "identifiable damage." *Id.* Second, (b)(1) could only exempt "matters in which the need to protect the information outweighs the public interest in disclosure." *Id.* These changes would reimplement those portions of the Carter order that these senators felt were most conducive to maximum public access. *Id.*

47. See *Id.*; 128 CONG. REC. E1012-13 (daily ed. Mar. 16, 1982) (letter from Samuel R. Gammon, Exec. Dir. of Am. Hist. Ass'n, to Rep. Boland).

48. Exec. Order No. 12,356, *supra* note 36, § 1.3(b), at 14,876. For example, if *A* and *B* are pieces of information in the same document that are unclassified by themselves but classified when combined, the mosaic theory classifies each, even if *A* is released without *B*. See 128 CONG. REC. S4211, S4215 (daily ed. Apr. 28, 1982) (statement of Sen. Huddleston). In practice, this theory creates a synergistic effect on pieces of classified information—although the individual piece may be unclassified, the entire document is classified—hence, the whole is greater than the sum of its parts.

49. The prevailing fear is that the "mosaic theory" alone provides sufficient incentive for overclassification. When the "mosaic theory" is combined with the lowered threshold, see *supra* notes 42-46 and accompanying text, and the elimination of the Carter order presumption against classification, see *infra* notes 59-63 and accompanying text, some feel that there will be no restraint

Under all nine FOIA exemptions, "any reasonably segregable portion of a record shall be provided to any person requesting such record."⁵⁰ In contrast, the new exemption (b)(1) "mosaic theory" requires agencies to classify information that is harmless when segregated—and, therefore, "reasonably segregable"—but potentially damaging to national security interests when combined with other information. Thus, under the Reagan order, the government may classify some information that the FOIA would ordinarily release.⁵¹ Such classification poses a dilemma for the courts: should a court release all "reasonably segregable" information or withhold it when the agency classifies it under the "mosaic theory"? Prior to the Reagan order, some courts released all such information, even when it comprised practically all of a classified document's contents,⁵² and without regard to the requester's ability to "use the non-exempt portion as a piece of some intelligence jigsaw puzzle and learn what the exempt portions say."⁵³ The Reagan order clearly contemplates nondisclosure, however.⁵⁴

on classification. See 128 CONG. REC. S4215 (daily ed. Apr. 28, 1982). See generally N.Y. Times, Apr. 11, 1982, at E17, col. 5. *Contra* Reichel, *supra* note 37, at 10.

50. 5 U.S.C. § 552(b) (1976). The segregability requirement applies equally to documents exempted under (b)(1). *Founding Church of Scientology v. Bell*, 603 F.2d 945, 950-51 (D.C. Cir. 1979).

51. The language of the Reagan order cited at the text accompanying *supra* note 41 classifies two categories of information: nonsegregable (harmful in itself) and segregable (harmless in itself, but harmful in combination with other information). The Reagan order classifies both while the FOIA demands that the latter be released.

52. See, e.g., *Florence v. United States Dep't of Defense*, 415 F. Supp. 156 (D.D.C. 1976).

53. See generally *Freedom of Information Act: Hearings on S. 587, S.1235, S. 1247, S. 1730, and S. 1751 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 887 (1981) (joint statement of Allan R. Adler, Morton H. Halperin, and Cornish F. Hitchcock) [hereinafter cited as *Hatch Amendment Hearings*].

54. See *supra* notes 48-51 and accompanying text. This result follows the more recent decisions of the Court of Appeals for the District of Columbia Circuit that have adopted the "mosaic theory." See, e.g., *Taylor v. United States Dep't of the Army*, 684 F.2d 99 (D.C. Cir. 1982); *Halperin v. CIA*, 629 F.2d 144 (D.C. Cir. 1980).

In *Florence v. United States Dep't of Defense*, 415 F. Supp. 156 (D.D.C. 1976), the court more easily resolved this conflict between segregation and nondisclosure because the segregable information was labeled "unclassified" in the document. The court did not have to decide whether the document itself was properly classified—it could release almost all of it by labeling it "reasonably segregable." In future cases, however, information that is normally segregable but is classified under the "mosaic theory" presumably will be labeled "classified." Classifying such information will force the courts to consider the reasonableness of the classification and then determine whether the information is "reasonably segregable." This burden in itself may lead many courts to accept agency classification more readily.

The new Information Security Oversight Office Implementing Directive, 47 Fed. Reg. 27,836 (1982) (to be codified at 32 C.F.R. pt. 2001) [hereinafter cited as ISOO Directive], which implements the Reagan order, now requires a written explanation supporting any classification under the "mosaic theory." Although its effect on a court's segregability determination is unclear, the written justification will probably prompt courts to determine that, even if segregable, such "mosaic theory" information is no longer "reasonably segregable."

There may be a middle ground when the information sought and the "other information" are segregable parts of the same document. A court could release one part and withhold the other part so that the two cannot be combined;⁵⁵ however, when the "other information" is available to the requester through another source, there appears to be no middle ground.⁵⁶ The approach taken by the courts will depend on the deference given the Executive order vis-a-vis the FOIA as a whole. Given the recent willingness of the Court of Appeals for the District of Columbia Circuit to follow the "mosaic theory"⁵⁷ and the overall judicial deference to past Executive orders,⁵⁸ the Reagan order probably will prevail.

B. *Elimination of the Carter Order Presumption Against Classification.*

The pro-disclosure approach of the Carter order was exemplified by its presumption against classification: "[I]nformation *may not* be

This dilemma may become a moot point if S. 1730 is passed. S. 1730 Markup, *supra* note 23. This bill will add the following provision after the last sentence of 5 U.S.C. § 552(b) (1976) (the "reasonably segregable" provision):

In determining which portions are reasonably segregable in the case of records containing material covered by paragraphs (1) or (7) of this subsection [exemptions (b)(1) and (b)(7)], the agency may consider whether the disclosure of particular information would, *in the context of other information* available to the requester, cause the harm specified in such paragraph.

S. 1730 Markup, *supra* note 23, at 38 (emphasis added). With respect to exemptions (b)(1) and (b)(7), this revision "would create a new [mosaic theory] exemption under which an agency could concede that certain segregable material is not exempt but should nonetheless be withheld because some unspecified person could use the non-exempt portion as a piece of some intelligence jigsaw puzzle and learn what the exempt portions say." *Hatch Amendment Hearings, supra* note 53, at 887. This provision would, in effect, make the "mosaic theory" a permanent part of the FOIA.

55. This is the purpose of classifying each piece of information in a document. The new ISOO Directive, *supra* note 54, requires paragraph markings that designate the classification level of each piece of information. The requirement may be waived, however. *Id.* at 27837.

56. Such an inquiry into the other information available to the requester has been criticized as contrary to the essence of the FOIA. First, it gives the FOIA a "tenth exemption" by "allowing agencies to say, in effect, this record cannot be withheld under any exemption, but we are going to deny access to it anyway." *Hatch Amendment Hearings, supra* note 53, at 885. Second, this mosaic theory "gives agency personnel the discretion to inquire into why requesters seek particular records, even though the FOIA has been interpreted to make records available, regardless of the purpose for which they are sought." *Id.*

57. See *Taylor v. United States Dep't of the Army*, 684 F.2d 99 (D.C. Cir. 1982); *Halperin v. CIA*, 629 F.2d 144 (D.C. Cir. 1980); see also *supra* note 54.

58. The District of Columbia Circuit has concluded that courts must weigh the conflicting "reasonably segregable" and "Executive order" provisions on a case-by-case basis. See *Fonnding Church of Scientology v. Bell*, 603 F.2d 945, 951 (D.C. Cir. 1979). Subsequent case-by-case analyses, however, have largely deferred to agency classification. See, e.g., *Military Audit Project v. Casey*, No. 75-2103 (D.D.C. June 10, 1980), *aff'd*, 656 F.2d 724 (D.C. Cir. 1981); *supra* note 39 and accompanying text.

classified” unless it satisfies the “identifiable damage” threshold.⁵⁹ In contrast, the corresponding Reagan order section states that “information . . . shall be classified” when it meets the “damage” threshold.⁶⁰ Changing “may not” to “shall” eliminates the presumption against classification, contributing significantly to the Reagan order’s anti-disclosure approach.

In addition, the Reagan and Carter orders take different approaches toward resolving reasonable doubt about the need to classify and the appropriate level of classification. Section 1-101 of the Carter order reiterated the presumption against classification: “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.”⁶¹ Section 1-1 of the Reagan order again eliminates that presumption: “[i]f there is reasonable doubt about the need to classify information, it shall be safeguarded as if it were classified If there is reasonable doubt about the appropriate level of classification, it shall be safeguarded at the higher level of classification.”⁶²

Eliminating the presumption against classification will not affect clearly classifiable or nonclassifiable information; it will probably result, however, in more classification of borderline information. Because the Reagan order also moved the borderline back to the “damage” threshold, a much wider range of information can be classified and thus made exempt from FOIA disclosure.⁶³

C. *Increasing Classification Duration.*

The Carter order provided that information should be declassified when the need to protect it is “outweighed by the public interest in disclosure.”⁶⁴ In contrast, the Reagan order states that information will be declassified when “national security considerations permit,”⁶⁵ a

59. Exec. Order No. 12,065, *supra* note 33, § 1-302, at 193.

60. Exec. Order No. 12,356, *supra* note 36, § 1.3(b), at 14,876.

61. Exec. Order No. 12,065, *supra* note 33, § 1-101, at 191.

62. Exec. Order No. 12,356, *supra* note 36, § 1-1(c), at 14,874.

63. *See supra* note 46.

64. Exec. Order No. 12,065, *supra* note 33, § 3-303, at 197. This balancing test also appears in the preamble to the Carter order: “By the authority vested in me as President by the Constitution and laws of the United States of America, in order to balance the public’s interest in access to Government information with the need to protect certain national security information from disclosure” The deletion of this balancing test created considerable controversy in Congress. It prompted several senators to propose a bill designed to insert the “identifiable” damage standard and this balancing test into exemption (b)(1) of the FOIA. *See supra* note 46.

65. Exec. Order No. 12,356, *supra* note 36, § 3.1(a), at 14,878.

standard allowing much greater discretion.⁶⁶ The Carter order's balancing test required agencies to demonstrate a need to protect information that exceeded the public interest in that information, but the Reagan order apparently allows the slightest national security consideration to justify continued classification.⁶⁷ As a result, the order increases the potential for longer classification durations.

Because declassification standards are useful only if applied, the interval between classification reviews also determines classification duration. Section 1-402 of the Carter order established maximum classification or review periods of twenty years for domestic information and thirty years for foreign information. At the end of the period, information was either automatically declassified or reviewed to determine whether classification should continue. This section provided also that declassification or review must occur "as [soon] as national security permits."⁶⁸ Section 1.4(a) of the Reagan order eliminates the twenty and thirty year time limits and merely states that information "shall be classified as long as required by national security considerations."⁶⁹ Under the Reagan order, therefore, mandatory review of classification occurs only when the information is initially classified.⁷⁰ This open-ended standard in effect translates the Reagan order classification

66. Although the Carter order balancing test was also discretionary, it at least required a comparison of national security interests and a quantifiable public interest. *See Marks v. Turner*, 1 (P-H) 80,151 (D.D.C. 1980) (courts can order the government to balance public interest against national security). *But see Navasky v. CIA*, 499 F. Supp. 269 (S.D.N.Y. 1980) (balancing is at the agency's discretion, *aff'd*, 521 F. Supp. 128 (S.D.N.Y.), *aff'd*, 679 F.2d 873 (2d Cir. 1981), *cert. denied*, 103 S. Ct. 51 (1982)). The Reagan order provides no standard against which "national security considerations" can be measured.

67. Senator Huddleston identified this theme of the Reagan order by focusing on its declassification guidelines:

The new Executive order makes extensive changes in the system for declassification of documents. The full scope of these revisions is not entirely clear, because much will depend upon an implementing directive to be issued by the Information Security Oversight Office. Nevertheless, the thrust of the Reagan administration's policy is reflected in the deletion of the statement from the Carter order that declassification "shall be given emphasis comparable to that accorded classification." Exec. Order No. 12,065, *supra* note 33, § 3-301, at 197.

128 CONG. REC. S4215 (daily ed. Apr. 28, 1982). The ISOO implementing directive referred to by Senator Huddleston presents no change from the philosophy established in the Reagan order. ISOO Directive, *supra* note 54.

68. Exec. Order No. 12,065, *supra* note 33, § 1-402, at 193. This provision states, in part: Only officials with Top Secret classification authority and agency heads listed in Section 1-2 may classify information for more than six years In such cases, a declassification date or event, or a date for review, shall be set. This date or event shall be as early as national security permits and shall be no more than twenty years after original classification, except that for foreign government information the date or event may be up to thirty years after original classification.

Id. (emphasis added).

69. Exec. Order No. 12,356, *supra* note 36, § 1.4(a), at 14,877.

70. *Id.* § 1.4, at 14,877.

period from "as long as required by national security considerations" to "until the government again considers these national security considerations." Information may thus remain classified forever.⁷¹

III. THE FEDERAL STATUTES EXEMPTION

The FOIA's third exemption, section (b)(3), allows agencies to withhold information that is "specifically exempted from discovery by statute," if that statute "(A) requires that the matters be withheld . . . in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding."⁷² In 1982, the federal courts examined the relationship of three statutes to the (b)(3) exemption. In *Baldrige v. Shapiro*,⁷³ the Supreme Court held that Census Act sections 8(b) and 9(a) qualify as FOIA (b)(3) statutes.⁷⁴ In *Greentree v. United States Customs Service*,⁷⁵ the Court of Appeals for the District of Columbia Circuit split with the Courts of Appeals for the Fifth and Sev-

71. See *id.* § 1.4(a), at 14,874. Although this section additionally provides that when "it can be determined, a specific date or event for declassification shall be set by the original classification authority at the time the information is originally classified," the order provides little incentive to establish such dates. *Id.*; see also *supra* note 68. Unless specifically requested under FOIA, most domestic national security information classified under the Carter order will not be reviewed for declassification for at least fourteen more years. See *supra* note 68. Under the open-ended review standards of the Reagan order, this period before review could be longer.

72. 5 U.S.C. § 552(b)(3) (1976). In the sixteen years since the FOIA was passed, a great deal of litigation has identified some of the statutes that satisfy the exemption, see, e.g., *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102 (1980) (Consumer Product Safety Act § 6(b)(1) is a (b)(3) statute); *Founding Church of Scientology v. National Sec. Agency*, 610 F.2d 824 (D.C. Cir. 1979) (50 U.S.C. § 402); *Goland v. CIA*, 607 F.2d 339 (D.C. Cir. 1978) (50 U.S.C. § 403(d)(3)), *cert. denied*, 445 U.S. 927 (1980); *Fruehauf Corp. v. IRS*, 566 F.2d 574 (6th Cir. 1977) (26 U.S.C. § 6103); *Seymour v. Barabba*, 559 F.2d 806 (D.C. Cir. 1977) (13 U.S.C. § 9(a)(1)); *Parker v. EEOC*, 534 F.2d 977 (D.C. Cir. 1976) (42 U.S.C. § 2000e-5(b)); *United Technologies Corp. v. Marshall*, 464 F. Supp. 845 (D. Coun. 1979) (42 U.S.C. § 2000e-8(e)), and some that do not, see, e.g., *Founding Church of Scientology v. Bell*, 603 F.2d 945 (D.C. Cir. 1979) (Fed. R. Civ. P. 26(c) is not a (b)(3) statute); *American Jewish Congress v. Kreps*, 574 F.2d 624 (D.C. Cir. 1978) (50 U.S.C. § 2406(c)).

73. 455 U.S. 345 (1982).

74. 13 U.S.C. §§ 8(b), 9(a) (1976). These sections provide, in part:

8(b) Subject to the limitations contained in sections 6(c) and 9 of this title, the Secretary may furnish copies of tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent

9(a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—

(1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

Id.

75. 515 F. Supp. 1145 (D.D.C. 1981), *rev'd*, 674 F.2d 74 (D.C. Cir. 1982).

enth Circuits over whether the Privacy Act⁷⁶ is a (b)(3) statute. Finally, in *King v. IRS*,⁷⁷ the Court of Appeals for the Seventh Circuit disagreed with the Courts of Appeals for the Ninth and District of Columbia Circuits over the scope of Internal Revenue Code section 6103.⁷⁸

A. *The Census Act and Baldrige v. Shapiro.*

For the past two years, municipalities across the nation have taken the Commerce Department and the Census Bureau to court in efforts to obtain information necessary to challenge the Bureau's final figures and thereby correct alleged inaccuracies in the 1980 census.⁷⁹ At issue was whether Census Act sections 8(b) and 9(a) qualify as (b)(3) statutes and, if so, whether they exempt all raw census data from discovery. In 1982, these issues reached the Supreme Court.

Baldrige v. Shapiro and its companion case, *McNichols v. Baldrige*,⁸⁰ were attempts to acquire all or part of the Census Bureau's master address lists.⁸¹ *Shapiro* was filed in 1980 after preliminary census data showed 70,000 fewer people in Essex County, New Jersey than were reflected in the local tax rolls.⁸² County officials disputed this figure under the Bureau's local review program, which allows municipal governments ten working days "to provide the Bureau with data challenging the accuracy of preliminary housing and head counts."⁸³

76. 5 U.S.C. § 552a (1976).

77. 688 F.2d 488 (7th Cir. 1982).

78. I.R.C. § 6103 (1976).

79. As of the date *Baldrige v. Shapiro* was decided, there were approximately fifty cases in federal courts challenging various aspects of the 1980 Census. *Baldrige v. Shapiro*, 455 U.S. 345 (1982). Examples of the types of remedies sought include demands that the Census Bureau release its data so the cities can correct the figures themselves, *see, e.g.*, *Baldrige v. Shapiro*, 455 U.S. 345 (1982), or that the Bureau include undercount estimates in its 1980 figures, *see, e.g.*, *Young v. Klutznick*, 497 F. Supp. 1318 (E.D. Mich. 1980), *rev'd*, 652 F.2d 617 (6th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982); *Carey v. Klutznick*, 508 F. Supp. 420 (S.D.N.Y. 1980), *rev'd and remanded*, 653 F.2d 732 (2d Cir. 1981), *cert. denied*, 455 U.S. 999 (1982).

80. *McNichols v. Klutznick*, No. 80-C-1151 (D. Colo. Sept. 17, 1980), *rev'd*, 644 F.2d 844 (10th Cir. 1981), *aff'd sub nom. Baldrige v. Shapiro*, 455 U.S. 345 (1982).

81. *See infra* notes 82-86 and accompanying text. The master address lists, also known as the Follow-up Address Registers (FARs), are lists of all addresses in a given municipality. These lists are useful in double-checking census figures because, by determining the addresses the Census Bureau actually counted, the cities can calculate the addresses not counted. *See McNichols v. Klutznick*, No. 80-C-1151 (D. Colo. Sept. 17, 1980), *reprinted in* Petition for Certiorari, (*McNichols v. Baldrige*), app. at A-1, A-3, *Baldrige v. Shapiro*, 455 U.S. 435 (1982) [hereinafter cited as *McNichols Cert. Petition*].

82. *Shapiro v. Klutznick*, No. 80-2638, (D.N.J. Aug. 27, 1980), *aff'd mem.*, 636 F.2d 1210 (3d Cir. 1980), *rev'd sub nom. Baldrige v. Shapiro* 455 U.S. 435 (1982), *reprinted in* Petition for Certiorari (No. 80-1436), app. D, at 7a, *Baldrige v. Shapiro*, 455 U.S. 435 (1982) [hereinafter cited as *Shapiro Cert. Petition*].

83. Revised Local Review Program Information Booklet (Census 1980), *reprinted in Shapiro Cert. Petition, supra* note 82, at app. G, at 22-48.

To acquire such data, the county sought to compare its tax records with the Bureau's master address list. Similarly, in *McNichols*, the City of Denver's preliminary census figures also reflected an undercount and a much higher residence vacancy rate than expected.⁸⁴ To dispute these figures, Denver requested the part of the Bureau's master address list pertaining to vacant housing.⁸⁵ The Bureau denied both Essex County's FOIA request and Denver's request for discovery under Federal Rule of Civil Procedure 26(b)(1).⁸⁶

In *Shapiro*, the Court of Appeals for the Third Circuit upheld a lower court order releasing the Census Bureau's master address list.⁸⁷ In *McNichols*, however, the Court of Appeals for the Tenth Circuit reached the opposite conclusion, holding that Congress' goal in enacting the Census Act in general and sections 8(b) and 9(a) in particular was to provide "both a rigid immunity from publication or discovery and a liberal construction of that immunity that would assure confidentiality."⁸⁸ In response to this circuit split the Supreme Court granted certiorari on two questions: Are Census Act sections 8(b) and 9(a) exemption (b)(3) statutes and, if so, do they provide confidentiality for the master address lists sought to be released?⁸⁹ In the hope that *Shapiro* would lead to the success of all similar census litigation, the municipalities and their amici combined their arguments with positions previ-

84. See *McNichols v. Klutznick*, No. 80-C-1151 (D. Colo. Sept. 17, 1980), reprinted in *McNichols* Cert. Petition, *supra* note 81, app. at 114.

85. The City of Denver contended that the Census Bureau overcounted the number of vacant residences by "a factor of 46%." To contest the Bureau's figures, Denver needed to correlate its vacancy information with the Bureau's vacancy data. The litigation resulted from the Bureau's refusal to release the data. *Id.*

86. FED. R. CIV. P. 26(b)(1) states, in part:

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) *In General*. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . including the existence, description, nature, custody, condition and location of any books, documents or other tangible things . . .

Id.

87. By holding that the information did not fall within the confidentiality provisions of sections 8(b) and 9(a), the district court only superficially touched the exemption (b)(3) issue. The court's analysis of whether or not 13 U.S.C. § 9(a) is a FOIA (b)(3) statute consisted of one statement:

Title 13 . . . does not provide a blanket of confidentiality for any and all census materials; instead the confidentiality requirement is structured solely to require that census material be used in furtherance of the Bureau's statistical mission and to ensure against disclosure of any particular individual's response.

Shapiro v. Klutznick, No. 80-2638 (D.N.J. Aug. 27, 1980), reprinted in *Shapiro* Cert. Petition, *supra* note 82, at app. D, at 9a-10a. Cf. *infra* notes 99-102 and accompanying text (discussion of Supreme Court ruling that census data is protected confidential information).

88. *McNichols v. Klutznick*, 644 F.2d 844, 845 (10th Cir. 1981), *aff'd sub nom. Baldrige v. Shapiro*, 455 U.S. 345 (1982).

89. *Baldrige v. Shapiro*, 455 U.S. at 352-53.

ously taken by other cities.⁹⁰ Against this backdrop, the Court's narrow decision was disappointing and anticlimatic.⁹¹

The Court dealt only briefly with whether Census Act sections 8(b) and 9(a) are FOIA (b)(3) statutes. It held that they are: both sections "explicitly provide for the nondisclosure of certain census data," thereby satisfying the (b)(3) "specifically exempted from discovery" requirement, and both sections provide "no discretion . . . to the Census Bureau on whether or not to disclose the information," thus satisfying (b)(3)(A).⁹²

The Court went into much greater depth in determining whether the master address lists were within the scope of 8(b) and 9(a)'s protection.⁹³ Arguing against such a broad scope, the plaintiff municipalities

90. The State of New York presented perhaps the most significant additional argument in its constitutional attack on the Census Act. New York's case against the Census Bureau was at that time on petition for certiorari from the Court of Appeals for the Second Circuit. It was subsequently denied. *See Carey v. Klutznick*, 508 F. Supp. 420 (S.D.N.Y. 1980), *rev'd and remanded*, 653 F.2d 732 (2d Cir. 1981), *cert. denied*, 455 U.S. 999 (1982). In its amicus brief, the State of New York stated:

While the precise question presented by these cases is a narrow one—whether census address and vacancy lists are immune from disclosure to litigants challenging the accuracy of the census—the ramifications of these and similar actions are of profound constitutional importance. The decennial census is central to the allocation of political rights under the Constitution. On the census rest (1) The Great Compromise between the original states, large and small; (2) the direct election of the House of Representatives "by the people of the several States" (art. I, § 2) with representatives apportioned among the states "according to their respective numbers" based on a census which is to count "the whole numbers of persons in each state" (amend. XIV, § 2); (3) the allocation of votes in the Electoral College (art. II, § 1); and ultimately (4) the constitutional guarantee of equal votes for equal numbers of people (*see Baker v. Carr*, 369 U.S. 186 (1962), and its progeny). Given the vital role the decennial census plays in our system of government, Federal statutes providing for the taking of the census must be construed in a manner consistent with its constitutional purpose.

The Constitution requires that the census reflect, "as nearly as is practicable," the whole number of persons in each state. That is the sole constitutional function of the census and that high duty of accuracy flows from the constitutional purpose that the census serves, from the language of the Constitution, and from the decisions of this Court.

Brief of Amicus Curiae, The State of New York, at 14, *Baldrige v. Shapiro*, 455 U.S. 359 (1982) [hereinafter cited as New York Amicus Brief].

91. Several commentators and court decisions have addressed the constitutional issues surrounding the 1980 Census. *See Note, The Courts and the 1980 Census Challenges: Tailoring Rights to Fit Remedies*, 15 U. MICH. J.J. REF. 153, at 156-59, 172-76 (1981). The Court's failure to consider these issues in *Shapiro*, and its refusal to hear them in *Carey v. Baldrige*, *cert. denied*, 455 U.S. 999 (1982), and in *Young v. Baldrige*, *cert. denied*, 455 U.S. 939 (1982), left many observers unsatisfied. *See infra* notes 98-105 and accompanying text.

92. *Baldrige v. Shapiro*, 455 U.S. at 355 (1982).

93. Discussion of the scope of the Census Act dominated the opinion, indicating that the Court considered the scope of the Act the most important issue. The issue is relevant to the FOIA because the scope of any exemption (b)(3) statute determines the amount of information that may be withheld.

Another argument deserving brief mention was that section 9(a)'s prohibition of census data use for other than statistical purposes was irrelevant because the cities wanted to use the data for statistical purposes. *See Id.* at 359. The district courts agreed that the cities' intended uses were

and their amici contended that one of the underlying purposes of the census, the constitutional requirement of "one man, one vote," depends on an *accurate* enumeration.⁹⁴ Accuracy in turn depends on a balance of two factors: (1) census data confidentiality, which encourages citizen participation, and (2) the municipalities' ability to dispute grossly erroneous census figures.⁹⁵ Plaintiffs argued that the Court's job was to achieve optimum accuracy by resolving the conflict between these two factors and suggested a balancing approach as an appropriate means to that end.⁹⁶ Under this approach, only information or data that might identify an individual respondent would remain confidential.⁹⁷ This would protect the confidentiality of the respondent's identity and provide a way for the municipalities to meaningfully challenge erroneous

proper ones. See *Shapiro* Cert. Petition, *supra* note 82, app. D, at 9a-10a; *McNichols* Cert. Petition, *supra* note 81, app. at 11. The *Shapiro* district court distinguished *Seymour v. Barabba*, 559 F.2d 806 (D.C. Cir. 1977), on this basis. In that case, census data was withheld from plaintiffs who intended to use it for private purposes. The Court summarily rejected this argument, holding that the statistical purposes to which use of this data is limited are Bureau statistical purposes. 455 U.S. at 345.

94. See *McNichols* Cert. Petition, *supra* note 81, at 9-11; see also *supra* note 90.

95. Up to a point, confidentiality enhances accuracy because, with confidentiality guaranteed, citizens are more likely to participate in the census. See New York Amicus Brief, *supra* note 90, at 26-29; *Baldrige v. Shapiro*, 455 U.S. at 354 ("[A]n accurate census depends in large part on public cooperation. To stimulate that cooperation Congress has provided assurances that information furnished . . . by individuals is to be treated as confidential."). Municipal monitoring also promotes accuracy, up to a point, because local governments can ensure the proper canvassing and counting of their populations. This is the admitted purpose of the Census Bureau's local review program:

The local review program is one of several Census Bureau efforts especially designed to improve the completeness and the accuracy of the 1980 Census. Its purpose is to allow for the review of population and housing count by local government officials before the count becomes final Local review is aimed at improving the accuracy of the census by helping to pinpoint such major problems as clusters of missed housing units

Shapiro Cert. Petition, *supra* note 82, app. D, at 12a. The "point" is reached, however, when one factor is emphasized over the other. When this occurs, the factors work against each other and accuracy suffers—either confidentiality prevents municipalities from getting enough information to make a meaningful challenge of census inaccuracies or oversights, or municipal demands for information invade the respondents' personal privacy. See Petitioner's Reply Brief at 3, *Shapiro v. Baldrige*, 455 U.S. at 345. The Census Bureau's position in both *Shapiro* and *McNichols* clearly emphasized confidentiality to the total exclusion of both Essex County and Denver's ability to challenge its statistics. *Shapiro v. Baldrige*, 455 U.S. at 349-52. The *Shapiro* district court recognized the resulting adverse impact on accuracy: "[C]laiming confidentiality for such materials [as address lists] impedes the goal of accurate and complete enumeration which the confidentiality provisions were designed to further." *Shapiro v. Klutznick*, reprinted in *Shapiro* Cert. Petition, *supra* note 82, app. D, at 11a.

96. See *McNichols* Cert. Petition, *supra* note 81, at 11-12; *supra* note 81 and accompanying text.

97. See *McNichols* Cert. Petition, *supra* note 81, at 12.

census data.⁹⁸ Despite this argument, a unanimous Court failed to acknowledge the underlying constitutional issues. The Court's holding for the Census Bureau relied instead on a narrow and unconvincing interpretation of the Census Act's purpose and language.

Focusing on the words "information" and "data" scattered throughout 8(b) and 9(a), the Court concluded that Congress meant to protect information and data itself—not only data that could possibly identify an individual.⁹⁹ The Court then looked to the Census Act's legislative history and found that during the Act's evolution, Congress became increasingly concerned about the confidentiality of raw data accumulated by the decennial census.¹⁰⁰ The present Act reflects this concern by treating as confidential all "information reported by or on behalf of" individuals responding to the census.¹⁰¹ Because addresses and vacancy data are "information," they are protected.¹⁰²

One of this decision's most interesting aspects is its apparent break from the Supreme Court's voting apportionment decisions, in which the Court often implied that accuracy is the census' constitutionally-mandated goal.¹⁰³ In *Shapiro*, however, it relegated accuracy to a position second to congressionally-mandated confidentiality. Clearly, the Court thought that maximizing confidentiality would also maximize accuracy.¹⁰⁴ But, because accuracy might have been increased if some non-identifiable data had been released to the municipalities,¹⁰⁵ the Court clearly did not consider accuracy its foremost objective.

98. The *Shapiro* district court agreed that this compromise did not conflict with the Census Act's purpose to prevent identification of individual census respondents. See *Shapiro v. Klutznick*, reprinted in *Shapiro* Cert. Petition, *supra* note 82, app. D, at 10a-11a.

99. See *Baldrige v. Shapiro*, 455 U.S. at 356.

100. *Id.* at 356-58.

101. 13 U.S.C. § 8(b) (1976) (emphasis added). For the relevant text of this statute, see *supra* note 74.

102. *Id.*; see *Baldrige v. Shapiro*, 455 U.S. at 358.

103. In the leading voting apportionment case of *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Supreme Court held that the vote of one person must be worth as much as the vote of any other person. *Id.* at 8; see also Note, Constitutional Implications of a Population Undercount: Making Sense of the Census Clause, 69 GEO. L.J. 1427, 1448 (1981). This has been interpreted as implying that the census upon which voting apportionment is based must, as a constitutional matter, be accurate. *Id.* at 1442-50; see also *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *supra* note 90.

104. Throughout *Shapiro*, the Court alluded to the argument that confidentiality enhances accuracy. See, e.g., 455 U.S. at 361.

105. Because the purpose of the Bureau's local review program was to make the census more accurate and because the municipalities alleged large census errors, it is reasonable to assume that releasing data to these municipalities would considerably reduce the magnitude of any errors that occurred.

B. *The Privacy Act and Greentree v. United States Customs Service.*

The Privacy Act's status as a (b)(3) statute has been uncertain since its enactment in 1976.¹⁰⁶ This confusion was recently heightened by the decision in *Greentree v. United States Customs Service*.¹⁰⁷ In *Greentree* the Court of Appeals for the District of Columbia Circuit held that the Act is not a (b)(3) statute, thereby splitting with the Courts of Appeals for the Fifth and Seventh Circuits.

In *Painter v. FBI*¹⁰⁸ the Court of Appeals for the Fifth Circuit held that Privacy Act exemptions are also FOIA (b)(3) statutes. *Painter* involved a combined Privacy Act/FOIA request for certain FBI documents that were exempt under Privacy Act exemption (k)(5),¹⁰⁹ but not under the nonstatutory FOIA exemptions. The district court allowed disclosure. It reasoned that, because the Privacy Act "provides rights to the individual with respect to his records beyond the point where access to the public to such records ends and was not intended to restrict his rights as a member of that public,"¹¹⁰ it would be "anomalous" to allow the Privacy Act to prohibit Painter's access to personal records otherwise available to the public under the FOIA. The Court of Appeals for the Fifth Circuit disagreed, preferring instead to read subsection (b)(3) broadly in the absence of congressional indications otherwise.¹¹¹ The court reasoned that Congress recognized that the Pri-

106. 5 U.S.C. § 552a (1976). Since the passage of the Privacy Act, courts have taken several positions on this issue. Some have concluded that the issue is moot because the Privacy Act and the FOIA provide the same rights of access to the same information. See, e.g., *Exner v. FBI*, 612 F.2d 1202, 1207-09 (9th Cir. 1980) (Pregerson, J., concurring). A second position is that the Privacy Act is a FOIA (b)(3) statute. See *Painter v. FBI*, 615 F.2d 689 (5th Cir. 1980); *Terkel v. Kelley*, 599 F.2d 214 (7th Cir. 1979), cert. denied, 444 U.S. 1013 (1980). The new third position, a clear split with the Fifth and Seventh Circuits, states that the Privacy Act is not a FOIA (b)(3) statute. See *Greentree v. United States Customs Serv.*, 674 F.2d 74 (D.C. Cir. 1982).

107. 674 F.2d 74 (D.C. Cir. 1982).

108. 615 F.2d 689 (5th Cir. 1980).

109. The court dealt specifically with 5 U.S.C. § 552a(k)(5) (1976), which exempts

investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

Id.

110. *Painter v. FBI*, 615 F.2d at 690 n.2 (district court decision was unreported).

111. *Id.* at 691. In *United States Dep't of the Air Force v. Rose*, 425 U.S. 352 (1976), the Supreme Court decreed that the limited exemptions of the FOIA "must be narrowly construed." *Id.* at 361. The Court of Appeals for the Fifth Circuit appears not to have followed that presumption in this case, weakening its argument that the Privacy Act is a FOIA (b)(3) statute.

vacy and Sunshine Acts,¹¹² overlap with the FOIA when it specifically stated that FOIA exemptions should not apply to disclosures required by the Privacy Act¹¹³ and that Sunshine Act exemptions should not apply to disclosures required by the FOIA.¹¹⁴ Congress did not similarly state that Privacy Act exemptions do not apply to FOIA disclosures; therefore, the court concluded that they do apply.¹¹⁵ It agreed with the bald assertion of the Court of Appeals for the Seventh Circuit in *Terkel v. Kelley*¹¹⁶ that the Privacy Act and the FOIA "must be read together, and that the [FOIA] cannot compel the disclosure of information that the Privacy Act clearly contemplates to be exempt."¹¹⁷

The Court of Appeals for the District of Columbia Circuit's contrary decision in *Greentree v. United States Customs Service* involved a Privacy Act/FOIA request in which the information was exempt under Privacy Act exemption (j)(2) and not exempt under the FOIA.¹¹⁸ The Court of Appeals reversed the district court,¹¹⁹ holding that the Privacy Act exemption is not a FOIA (b)(3) statute. In support of its decision, the court first examined the "third party anomaly" identified in

112. 5 U.S.C. § 552b (1976).

113. 5 U.S.C. § 552a(q) (1976). This section states: "No agency shall rely on any exemption contained in section 552 of this title [the FOIA] to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section." *Id.*

114. Government in the Sunshine Act, Pub. L. No. 94-409, § 5(b), 90 Stat. 1247 (1976). This Act amended FOIA (b)(3) to read:

(b) [t]his section does not apply to matters that are—

(3) specifically exempted from disclosure by statute (*other than section 552b of this title* [Sunshine Act]), 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. . . .

5 U.S.C. § 552(b)(3) (1976) (emphasis added).

115. 615 F.2d at 691. The essence of the court's argument was that Congress recognized the interaction among the Privacy Act, the Sunshine Act, and the FOIA; in these two cases, it provided that the exemptions of one Act would not affect information releasable under another. Because Congress did not specifically address the Privacy Act's effect on the FOIA, the court did not assume that Congress did not intend the Privacy Act to be a (b)(3) statute. *See supra* notes 113-14 and accompanying text.

116. 599 F.2d 214, 216 (7th Cir. 1979).

117. *Id.* *Terkel* involved a request for investigatory information on the requester that had been compiled by the FBI. The FBI invoked Privacy Act exemption (k)(5) to withhold the documents. The Seventh Circuit held that Privacy Act exemption (k)(5) qualified as a FOIA (b)(3) exemption.

118. The records sought in *Greentree* pertained to a drug smuggling conviction. The Drug Enforcement Agency and the United States Customs Service refused to release certain requested material, relying on Privacy Act and FOIA exemptions. On its own initiative, the district court requested briefs on the question of whether the Privacy Act exemptions were statutes within the FOIA (b)(3) exemption. It subsequently held that they are. The court cited both *Terkel* and *Painter* in support of its decision. *Greentree v. United States Customs Serv.*, 515 F. Supp. 1145 (D.D.C. 1981), *rev'd*, 674 F.2d 74 (D.C. Cir. 1982).

119. 674 F.2d 74 (D.C. Cir. 1982).

Painter.¹²⁰ If the Privacy Act exempts from disclosure information normally available under the FOIA, then the public "might gain access to material under FOIA about an individual unavailable to that individual himself."¹²¹ Conversely, the government expressed its fear that allowing an individual access under the FOIA to information exempted under the Privacy Act would "render [the Privacy Act] meaningless."¹²² The court labeled this a "false anomaly," noting that the Privacy Act would continue to protect "whole systems of records."¹²³ Under this analysis, exempting a system of records means only that the individual cannot gain access to *all* of the records; it does not mean that he cannot gain access to *any* record within that system.¹²⁴ Therefore, the particular records within the exempted system that are otherwise releasable under the FOIA should be released to the first party as well as to the public.

The court then examined the legislative history of both the FOIA and the Privacy Act. The analysis focused on the legislative intent evidenced by Privacy Act section (b)(2), which provides that the Privacy Act will not interfere with public access under the FOIA,¹²⁵ and by section (q), which states that the FOIA's exemptions should not apply to disclosures under the Privacy Act.¹²⁶ The court reasoned that these provisions held "separate each Act's exemptions from disclosure."¹²⁷

120. 615 F.2d 689 (5th Cir. 1980). See *supra* notes 110-11 and accompanying text.

121. *Greentree v. United States Customs Serv.*, 674 F.2d at 79. Even so, the Privacy Act could be circumvented easily by "the first party's simply locating someone else to act as a third party FOIA requester." *Id.* (Third party access to information is determined solely by the FOIA, but a first party's access is governed by both the Privacy Act and the FOIA.)

122. *Id.* at 80.

123. *Id.* at 81.

124. *Id.* at 80-81. Judge Wald had "no difficulty understanding why Congress allowed law enforcement agencies to restrict individual access to *whole systems* of records under the Privacy Act, while allowing the public, including the first party, more limited access to some of the same material under FOIA." *Id.* at 81. (emphasis added). A major reason to restrict access to the whole system is to relieve the information-managing agencies from the strict administrative requirements of non-exempt Privacy Act record systems. The court noted several such burdens that are removed by a (j)(2) exemption. See *Id.*; see also 5 U.S.C. § 552a(j) (1976) (list of administrative exemptions for certain classes of systems of records). The administrative advantages to exempting a record system should not, however, restrict access to those individual records within that system normally available under the FOIA. See *id.* at 81.

125. 5 U.S.C. § 552a(b)(2) (1976). This provision states in part:

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be . . . (2) required under section 552 of this title [the FOIA]

Id.

126. 5 U.S.C. § 552a(q) (1976). For the text of this provision, see *supra* note 113.

127. It is interesting to note that the Court of Appeals for the Fifth Circuit used a similar argument in *Painter* to support a broader interpretation of the FOIA (b)(3) exemption. That

The court also examined the timing of the passage of the Acts. The district court had held that, because Congress passed the Privacy Act after the amendments to FOIA exemption (b)(7),¹²⁸ the Privacy Act should prevail in resolving conflicts between the Acts.¹²⁹ The Court of Appeals for the District of Columbia Circuit noted, however, that Congress enacted the FOIA (b)(7) amendments over President Ford's veto only several weeks before enactment of the Privacy Act.¹³⁰ Considering this temporal relationship between two laws controlling access to basically the same information, the court was "hard pressed to accept an interpretation of the Privacy Act that in effect repeals, for first party requesters, those amendments only a few weeks after they were enacted over a Presidential veto."¹³¹

Finally, the court addressed the interaction of the Acts since their enactment. In particular, it noted the Justice Department's policy that the Privacy Act is not a FOIA (b)(3) statute:¹³²

[T]o the extent that the individual seeks access to records from systems of records which have been exempted from the provisions of the Privacy Act, the individual shall receive, in addition to access to those records he is entitled to receive under the Privacy Act[,] . . . access to all records within the scope of his request to which *he would have been entitled under the Freedom of Information Act* . . . but for the enactment of the Privacy Act and the exemption of the pertinent systems of records pursuant thereto.¹³³

The *Greentree* opinion is one of the few 1982 FOIA developments that did not restrict access to government information. Whether it will prevail is unclear. On the one hand, *Greentree* follows a fundamental tenet of FOIA statutory construction: FOIA exemptions must be *narrowly* construed.¹³⁴ The Courts of Appeals for the Fifth and Seventh

court, instead of focusing on the presence of these provisions and arriving at the conclusion that Congress intended to keep the acts separate, focused on the notable absence of a provision that specifically limits the effect of Privacy Act exemptions on FOIA disclosures. *See supra* notes 113-15 and accompanying text.

128. FOIA exemption (b)(7) and Privacy Act exemption (j) govern basically the same law enforcement information; section (b)(7), however, provides greater public access to some information normally exempted under the Privacy Act. For example, the information at issue in *Greentree* was not exempt under FOIA (b)(7), but was exempt under Privacy Act (j)(2).

129. 515 F. Supp. at 1148, *rev'd*, 674 F.2d 74 (D.C. Cir. 1982).

130. *See* 3 U.S. CODE CONG. AND AD. NEWS 6267, 6290-92 (1974).

131. 674 F.2d at 84.

132. *Id.* at 85. In fact, both *Greentree* and the government argued in district court that the Privacy Act is not a (b)(3) statute. The government adopted this position after Senator Edward Kennedy protested an Internal Revenue determination that the Privacy Act is the exclusive means available to an individual to secure information about himself. Concerned that the greatest possible access be accorded to all, Senator Kennedy emphasized that both the Privacy Act and the FOIA apply to such an individual. *Id.* at 84.

133. 28 C.F.R. § 16.57(b) (1981) (emphasis added).

134. *United States Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976); *see supra* note 111.

Circuits' admittedly broad interpretation of FOIA section (b)(3) violates this principle.¹³⁵ On the other hand, the broad view is consistent with the Supreme Court's 1982 FOIA decisions, all of which immediately restricted public access to government information.¹³⁶ Therefore, the success of the *Greentree* approach depends on whether the Supreme Court will adhere to its principle of narrow construction or whether it has undertaken a concerted effort to limit disclosure under the FOIA.

C. Internal Revenue Code Section 6103 and *King v. IRS*.

Section 6103 of the Internal Revenue Code, either alone or as a FOIA exemption (b)(3) statute,¹³⁷ exempts tax "return information"¹³⁸ from disclosure. In 1979, the Court of Appeals for the Ninth Circuit in *Long v. IRS*¹³⁹ substantially narrowed the scope of section 6103 by interpreting "return information" to include only tax information that could be "associated with or otherwise identify, directly or indirectly, a particular taxpayer."¹⁴⁰ Although the Economic Recovery Tax Act of 1981 (ERTA)¹⁴¹ specifically overruled *Long*,¹⁴² this so-called "identity

135. See *Painter v. FBI*, 615 F.2d at 691; see also *supra* note 111.

136. See *supra* notes 99-105 and accompanying text; *infra* notes 178-82, 195-99 and accompanying text.

137. In *Zale Corp. v. IRS*, 481 F. Supp. 486 (D.D.C. 1979), the district court determined that I.R.C. § 6103 is the "sole standard governing release of tax return information." *Id.* at 490. This decision has led to two views of the relationship between section 6103 and FOIA exemption (b)(3). One view is that section 6103 is completely independent of the FOIA: "If section 6103 is the governing statute, reference to the policies of the FOIA is irrelevant; the segregability requirements of the FOIA are inapplicable; and the Secretary's decision is not subject to the FOIA strictures on burden of proof and standard of review in the district court." *King v. IRS*, 688 F.2d 488 (7th Cir. 1982). Other courts view section 6103 as a FOIA (b)(3) statute. See, e.g., *Chamberlain v. Kurtz*, 589 F.2d 827 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979).

138. I.R.C. § 6103(b)(2) (1976) defines "return information" as:

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, over-assessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing . . .

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection . . . but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

Id.

139. 596 F.2d 362 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980).

140. *Id.* at 365 (quoting I.R.C. § 6103(b)(2)); see *Neufeld v. IRS*, 646 F.2d 661, 665 (D.C. Cir. 1981); see also *supra* note 138.

141. Pub. L. No. 97-34, § 701(a), 95 Stat. 340 (1981)(codified at I.R.C. § 6103(b)).

142. *Long* released Taxpayer Compliance Measurement Program (TCMP) data to private individuals. TCMP involves a random selection of tax returns that are screened and weighted under a scoring system that identifies those returns with a high tax change potential. Such returns are the most likely to be audited. This system provides the standards used for the selection of returns for audit or examination and is the object of the ERTA amendment, Pub. L. No. 97-34, § 701(a), 95 Stat. 340 (1981), which states

test" remains and was subsequently followed by the Court of Appeals for the District of Columbia Circuit in *Neufeld v. IRS*.¹⁴³ In 1982, however, the Court of Appeals for the Seventh Circuit in *King v. IRS*¹⁴⁴ rejected the identity test, preferring instead its own, more expansive definition.

Both the *Long* and *King* courts interpreted the Haskell amendment¹⁴⁵ to section 6103 to support their definition of "return information." The Haskell amendment states that return information "does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer."¹⁴⁶ From this, the Court of Appeals for the Ninth Circuit concluded that, unless data could identify the taxpayer, it could not be withheld as return information.¹⁴⁷ Application of the test in *Long* and *Neufeld* illustrates its flexibility; the test allows the district court to determine on an ad hoc basis whether the release of particular data would "entail a significant risk of identification."¹⁴⁸ In other words, it balances the privacy interests inherent in the information with the public's right of access under the FOIA.

The Court of Appeals for the Seventh Circuit dismissed this interpretation as a failure to consider the phrase "data in a form."¹⁴⁹ It agreed with the IRS that, if read to include this phrase, the amendment allows the release of tax data only if it is "changed in form, by amalgamation with data from other taxpayers to form statistical tables or studies."¹⁵⁰ Compared to the identity test, this standard is inflexible, leaving no room for judicial discretion: whether or not raw data could identify the submitter, unless it is compiled in statistical form with sim-

Nothing in the preceding sentence [defining "return information"], or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.

Id. Recently, the Ninth Circuit questioned whether the ERTA did, in fact, overrule *Long's* result. It remanded the case to District Court, ordering the IRS to release non-exempt information. *Long v. IRS*, No. 82-3030 (9th Cir. Dec. 1, 1982).

143. 646 F.2d 661 (D.C. Cir. 1981).

144. 688 F.2d at 488.

145. Tax Reform Act of 1976, Pub. L. No. 94-455, § 1202, 90 Stat. 1525, 1668 (codified at I.R.C. § 6103(b) (1976)).

146. *Id.*

147. *Long v. IRS*, 596 F.2d at 367.

148. *Id.* The *Neufeld* court described this flexibility best: "We do not hold . . . that mere deletion of names and addresses removes all return information The District Court has discretion to determine what information, other than name and address, poses a risk of identifying a taxpayer and how great that risk is." 646 F.2d at 665.

149. *King v. IRS*, 688 F.2d at 491.

150. *Id.* (emphasis added).

ilar data from other taxpayers, it is return information per se and is subject to withholding.

The *King* court also sharply criticized the *Long-Neufeld* identity test for "importing the policies of the FOIA into the interpretation of section 6103, a statute whose privacy-protecting purpose is precisely the opposite of that of FOIA."¹⁵¹ Although *Long* balanced section 6103's privacy interests against the FOIA's public access interests, it also adopted the identity test to balance taxpayer privacy against the purpose of the Haskell amendment to permit disclosure when no serious risk to that privacy exists.¹⁵² The *King* court dismissed the latter position by concluding that the only purpose of the Haskell amendment is to provide "for the disclosure of *statistical tabulations* which are not associated with or do not identify particular taxpayers."¹⁵³ Thus, the *King* court held that there are no countervailing freedom of information interests within section 6103 to balance, and that such a balancing of interests "completely overlooks the deleterious impact upon our voluntary system of tax payment which is likely to result if taxpayers know their private financial information is subject to exposure upon the mere striking of their names and addresses."¹⁵⁴ Each court's definition of "return information" is entirely consistent with the purposes it imputes to section 6103 and the Haskell amendment.

Predicting the view more likely to prevail is easier here than in the *Greentree-Painter* circuit split¹⁵⁵ because the *King* decision closely re-

151. *Id.* at 493. One other argument is worth mentioning. Both the *Long* and *King* courts examined the Haskell Amendment's "scant" legislative history, *id.* at 492; each court drew opposite conclusions. The history consisted of Senator Haskell's comments regarding the purpose of his amendment, the gist of which was that the IRS should not "evade its previously existing obligation to disclose statistical studies simply by adding identifying information." *Id.* at 493. In *Long*, the IRS argued that, because the amendment's purpose was to freeze the status quo at the time of its enactment and because the requirement to disclose edited raw data would be a significant extension of its duty to disclose under the law prior to the amendment, it should not be required to release such edited data. The *Long* court summarily dismissed this argument as unsupported by Senator Haskell's statement. See 596 F.2d at 368. The court also implied that the statement was consistent with its identity test. The *King* court, on the other hand, asserted that Senator Haskell's statement "in no way" supported the identity test, 688 F.2d at 493, and in fact was consistent with the IRS's position. The courts' differing interpretations indicate that the legislative history of the Amendment is too inconclusive to be of significant value.

152. 596 F.2d at 368; see Merritt, *The Use of the Freedom of Information Act in Federal Tax Matters*, 39 INST. ON FED. TAX. § 38-1 (1981). The 1976 amendments to § 6103 "provide a detailed balancing of an individual's or other government agency's right to obtain information from the [Internal Revenue] Service with the need of taxpayers generally to consider that the information which they provide to the Service or which the Service gathers in auditing a taxpayer's return will remain confidential." *Id.* at § 38.04[2].

153. 688 F.2d at 493 (emphasis added).

154. *Id.* at 494.

155. See *supra* notes I06-36 and accompanying text.

sembles the Supreme Court's 1982 construction of sections 8(b) and 9(a) of the Census Act in *Baldrige v. Shapiro*.¹⁵⁶ There are at least four points of congruity. First, both decisions firmly reject the identity test as a way of measuring privacy interests in the data that citizens voluntarily supply to federal agencies.¹⁵⁷ Second, both decisions specifically conclude that data regarding individuals may be released only in statistical form.¹⁵⁸ Third, both decisions emphasize that the efficacy of "voluntary" programs, like federal income taxation and the decennial census, depends on the public's confidence that information supplied to the government will not be released to others.¹⁵⁹ Finally, and most importantly, both decisions refuse to accept that the particular statutes at issue may incorporate both privacy *and* freedom of information interests.¹⁶⁰ These similarities suggest that, if the Supreme Court considers the issue, it will defer to its own reasoning and favor the *King* decision.

IV. THE PERSONAL PRIVACY EXEMPTIONS

A principal reason for enacting the FOIA was to provide maximum public access to government information while protecting the individual's right to privacy.¹⁶¹ The personal privacy exemptions, sections (b)(6) and (b)(7)(C), establish this delicate balance. Exemption (b)(6) allows withholding of "personnel and medical records and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy";¹⁶² exemption (b)(7)(C) permits withholding of "investigatory records compiled for law enforcement pur-

156. See *supra* notes 79-105 and accompanying text.

157. Compare *supra* notes 97-99 and accompanying text with *supra* notes 145-50 and accompanying text.

158. Compare *supra* note 93 and accompanying text with *supra* notes 150-53 and accompanying text.

159. Compare *King v. IRS*, 688 F.2d at 494 with *Baldrige v. Shapiro*, 455 U.S. at 354. Although the Supreme Court in *Baldrige v. Shapiro* recognized that the Secretary of Commerce has enforcement powers to ensure compliance with the census, it based its argument for census data confidentiality on the proposition that, for all practical purposes, census response is voluntary. *Id.* ("Although Congress has broad power to require individuals to submit responses, an accurate census depends in large part on public cooperation."). The *King* court, however, paid no attention to enforcement provisions available to the IRS. See I.R.C. § 7203 (1976). This detracts somewhat from the *King* court's argument that data release will undermine taxpayer participation in the payment of federal income taxes. See *supra* note 154 and accompanying text.

160. Compare *supra* notes 99-105 and accompanying text with *supra* notes 151-54 and accompanying text.

161. "The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to government information." S. REP. NO. 813, 89th Cong., 1st Sess. 9 (1965), reprinted in *THE 1981 EDITION OF LITIGATION UNDER THE FREEDOM OF INFORMATION ACT AND PRIVACY ACT 77* (C. Marwick ed. 1980).

162. 5 U.S.C. § 552(b)(6) (1976).

poses . . . to the extent that the production of such records would . . . constitute an unwarranted invasion of personal privacy."¹⁶³

In 1982, the Supreme Court addressed these exemptions in *FBI v. Abramson*¹⁶⁴ and *State Department v. Washington Post, Inc.*¹⁶⁵ Both decisions dealt with the lower courts' increasing emphasis on form (statutory language) over substance (statutory purpose), an emphasis that often led to absurd or anomalous results. By focusing on whether information was a "similar" file under (b)(6) or an "investigatory record" under (b)(7)(C), the lower courts had lost sight of the delicate balance between public access and privacy.¹⁶⁶ *Abramson* and *Washington Post* represent the Supreme Court's attempt to direct judicial attention toward the effects of withholding or releasing particular information. Thus, in the future, the central question in any FOIA personal privacy analysis will be whether release of the information constitutes an "unwarranted invasion of personal privacy," not whether the information falls within certain predetermined and artificial categories.¹⁶⁷

163. 5 U.S.C. § 552(b)(7)(C) (1976). Exemption (b)(7), in full, states

(b) This section does not apply to matters that are—

(7) investigatory records compiled for law enforcement purposes, but only 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.

164. 658 F.2d 806 (D.C. Cir. 1980), *rev'd*, 102 S. Ct. 2054 (1982).

165. 647 F.2d 197 (D.C. Cir. 1981), *rev'd*, 456 U.S. 595 (1982).

166. In *Abramson*, the Court of Appeals for the District of Columbia Circuit determined that a record compiled for political purposes but which contained *information* extracted from exempt law enforcement documents was not exempt. 658 F.2d at 812-14. Its justification was that "investigatory records" meant documents and since the *document* was not exempt, it did not matter whether the information it contained was exempt. Similarly, in *Washington Post*, the Court of Appeals for the District of Columbia Circuit considered whether the document at issue was similar to other files withheld in the past. The court likened the document to one previously released and concluded that, regardless of the private nature of the information contained within the document, it was not a "similar file" that might be withheld. 647 F.2d at 199. The information was not "intimate" enough to warrant withholding. Judge Lumbard, in his concurrence, stated that, if this case were one of first impression, he would vote to withhold. However, because such a ruling would overrule *Simpson v. Vance*, 648 F.2d 10 (D.C. Cir. 1980) (in which the similar document was released), he had to vote to release the information. 647 F.2d at 200. These narrow approaches focused on narrow issues and failed to review Congress' purposes for the (b)(6) and (b)(7)(C) exemptions.

167. *See infra* notes 174-78, 192-95 and accompanying text. The Court, in reestablishing its priorities, in effect watered down these threshold requirements. In *Abramson*, this is clearly illustrated by a statement by Justice White: "It is . . . critical that the compiled-for-law-enforcement requirement be construed to avoid the release of information that would produce the undesirable

A. Exemption (b)(7)(C) and *FBI v. Abramson*.

FBI v. Abramson dealt specifically with exemption (b)(7)(C) and its application to a document that the Court of Appeals for the District of Columbia Circuit held did not meet the "investigatory records" threshold. The case arose when the plaintiff journalist filed a FOIA request with the FBI, seeking a one-page memorandum from J. Edgar Hoover to John D. Ehrlichman and "name check summaries" containing information about eleven public figures.¹⁶⁸ The court held that, although the summaries might contain information exempt under (b)(7)(C), the document containing the information was drafted for political, not law enforcement purposes.¹⁶⁹ Thus, its narrow decision turned on the threshold criterion that the document was not an "investigatory record compiled for law enforcement purposes."¹⁷⁰

results specified." 102 S. Ct. at 2063. In *Washington Post*, this is illustrated by the text accompanying *infra* notes 193-95.

168. The documents requested contained information regarding eleven public figures. The information was summarized from FBI law enforcement documents. Mr. Abramson requested the information to test his hypothesis that the White House used FBI resources to obtain derogatory information about "political opponents and those that it perceived as enemies." *Abramson v. FBI*, 658 F.2d at 808.

169. *Id.* at 814.

170. *Id.* Because the document failed the first step of the two-part test, the court did not consider the second-step inquiry into whether its release would constitute an "unwarranted invasion of personal privacy." *Id.* The holding of the Court of Appeals for the District of Columbia Circuit suggests the crucial question: What is a "record"?

Since the 1974 FOIA amendments, there has been considerable confusion as to the meaning of the word "records," particularly as it appears in the threshold "investigatory records" inquiry. Prior to 1974, exemption (b)(7) applied to "investigatory files." 5 U.S.C. § 552(b)(7) (1966)(amended 1974). In 1974, Congress revised this language to read "investigatory records." 5 U.S.C. § 552(b)(7) (1976). See HOUSE COMM. ON GOV'T OPERATIONS AND SENATE COMM. ON THE JUDICIARY, 94TH CONG., 1ST SESS., SOURCE BOOK ON FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974, at 515 (Joint Comm. Print 1975) [hereinafter cited as FOIA SOURCE BOOK]. This particular amendment was prompted, in part, by congressional concern that agencies were "commingling non-exempt information with exempt files." *Id.* at 451. Because the courts applied the section (b)(7) criteria to entire files, this commingling effectively shielded the non-exempt information from disclosure. By amending section (b)(7) to apply to "records" instead of "files," Congress hoped to compel the courts to evaluate individually each record within a file to determine its status. *Id.* at 515 (Attorney General's Memorandum). By providing additionally that "any reasonably segregable portion of a record" which is not exempt must be released, Congress hoped to eliminate the umbrella (b)(7) exemption. *Id.* at 524.

In this confusion, the courts have variously applied the (b)(7) criteria to files, see *Moorefield v. United States Secret Serv.*, 611 F.2d 1021 (5th Cir.), cert. denied, 449 U.S. 909, 909-12 (1980)(White, J., dissenting), documents, see *Abramson v. FBI*, portions of documents, see *Lesar v. United States Dep't of Justice*, 636 F.2d 472, 489-92 (D.C. Cir. 1980), and other information groupings. The distinctions are important because they ultimately determine the volume of information released. For example, if the (b)(7) threshold criterion is applied to "documents," the status of the entire document often determines its releasability. If applied to a smaller grouping, only the specific exempt portions of the document may be withheld. In *Abramson*, because the entire document was non-exempt, it was released.

The Supreme Court reversed in an opinion by Justice White. The Court began by establishing (b)(7)(C)'s "two-part inquiry": "First, a requested document must be shown to have been an investigatory record 'compiled for law enforcement purposes.' [Second], the agency must demonstrate that release of the material would have one of the six results specified in the Act [in subsections (b)(7)(A)-(F)]."¹⁷¹

The Court then examined the lower court's application of this test. Although the Supreme Court used the term "documents" in its own articulation of the two-part inquiry and labeled the court of appeals' application of this inquiry to documents a "tenable" construction of section (b)(7),¹⁷² the Court expressed concern about the anomalous results of such an application.¹⁷³ The two-part inquiry in *Abramson* allowed law enforcement information normally exempt under the FOIA to be released when recompiled in a non-exempt document even if such release would be an "unwarranted invasion of personal privacy." Therefore, to ensure that all law enforcement information, no matter where compiled, is subject to both parts of the (b)(7)(C) test, the Court defined "records" to mean "information."¹⁷⁴

The "reasonably segregable" provision of 5 U.S.C. § 552(b) (1976) has alleviated the problem of exempting non-exempt information within an exempt document. As *Lesar* demonstrates, however, such information is sometimes withheld because analysis under section (b)(7)(C) focuses on the document, and the document is exempt. See also *infra* note 180 and accompanying text.

171. 102 S. Ct. at 2059; see also *infra* note 178 and accompanying text.

172. 102 S. Ct. at 2060.

173. The Court of Appeals would protect information compiled in a law enforcement record when transferred in original form to another agency for non-exempt purposes but would withdraw that protection of the same information or record if transmitted in slightly different form. In terms of statutory objectives, this distinction makes little sense.

Id. at 2062. The majority believed that its construction of the (b)(7)(C) test would alleviate this anomalous result and would be more in keeping with Congress' purpose.

In contrast, Justice O'Connor concluded in a vigorous dissent that the "plain meaning" of exemption (b)(7) could lead to no other alternative than that arrived at by the District of Columbia Circuit. Even if there were doubts about the true meaning of the statutory language, "those doubts would have to be resolved in favor of disclosure." *Id.* at 2067.

174. Justice Blackmun, in his dissent, makes perhaps the clearest statement of this definition. He concluded that "the Court has simply substituted the word 'information' for the word 'records' in Exemption 7(C)." *Id.* at 2065. This holding must be clarified because of Justice White's inconsistent use of many synonyms for "records" throughout his opinion. His intent to focus on *information* is consistent only in his restatement of the two-part inquiry. See *infra* text accompanying note 178.

Although this new focus on information subjects all of the information in *Abramson* to both parts of the (b)(7)(C) test, there are situations in which it might prevent such a two-stage analysis. For example, in *Lesar v. United States Dep't of Justice*, 636 F.2d 472 (D.C. Cir. 1980), the information contained within a law enforcement document was invalidly obtained law enforcement information not subject to (b)(7)(C)'s protection and was withheld. Under *Abramson's* new focus, the information would be released after it fails to pass the threshold "investigatory records" inquiry. In this way, the increased information withholding in cases like *Abramson* may be offset by the increased information released in cases like *Lesar*. See *infra* note 180 and accompanying text.

To support this new interpretation, the Court looked to the legislative history of the FOIA and its 1974 amendments. Although the FOIA does not expressly define "records,"¹⁷⁵ the Court concluded that Congress intended that (b)(7) analysis focus on "information." First, the Court examined Congress' list of six specific (b)(7) subsections describing information which, if disclosed, would cause more harm than benefit.¹⁷⁶ Second, the Court found that the 1974 substitution of "records" for "files" implied that "Congress intended for courts to 'consider the *nature* of the particular document . . . in order to avoid the possibility of impermissible 'commingling . . .'"¹⁷⁷ The Court, therefore, revised the two-part inquiry: "Once it is established that information was compiled pursuant to a legitimate law enforcement investigation and that disclosure of such information would lead to one of the listed harms, the information is exempt."¹⁷⁸

Because *Abramson* exempts information contained in a non-exempt document, the Court appears to have construed (b)(7)(C) broadly to restrict public access under the FOIA. This is true, however, only if *Abramson* is read to apply solely to exempt information in non-exempt documents. This decision purports to eliminate altogether the concept of exempt and non-exempt documents under (b)(7)(C).¹⁷⁹ Therefore, the increased release of some information and increased withholding of other information may have little effect on the total volume of releasable information. Although "reasonably segregable" non-exempt information has always been releasable under FOIA section (b), *Abramson* complements this provision:¹⁸⁰ all non-exempt information in documents once considered exempt is releasable under both the

175. 102 S. Ct. at 2061.

176. *Id.* at 2062.

177. *Id.* (emphasis supplied); see *supra* note 170.

178. *Id.* at 2064.

179. The Court rejects the concept of exempt and non-exempt documents by (1) prohibiting the commingling of non-exempt information in exempt documents, *id.* at 2062, and (2) prohibiting the release of exempt information contained within non-exempt documents. This new focus on information now appears to require courts to examine "information in the abstract," contrary to its holding in *Forsham v. Harris*, 445 U.S. 169, 185 (1980), *quoted in* *FBI v. Abramson*, 102 S. Ct. at 2065 (Blackmun, J., dissenting).

180. By providing that "information" must satisfy the (b)(7)(C) analysis, exempt information will be withheld and non-exempt information will be released. Assuming that the "reasonably segregable" provision, 5 U.S.C. § 552(b) (1976), has always been followed—at least with respect to (b)(7)(C)—then non-exempt information has always been released and this new focus on information will only result in increased information withholding. If the "reasonably segregable" rule has not always been strictly followed, however, then this decision will also result in increased information release. For an example of one instance in which information obtained during an invalid law enforcement investigation—and not exempt under (b)(7)(C)—was exempted by the court because it was contained in a law enforcement document, see *Lesar v. United States Dep't of Justice*, 636 F.2d 472 (D.C. Cir. 1980).

“reasonably segregable” provision and the *Abramson* test. Similarly, exempt information in documents once considered non-exempt is now subject to withholding. *Abramson* also greatly increases the agency’s burden of proving exemption; it now must show that each piece of information in a document is exempt.¹⁸¹ Finally, *Abramson* increases the burden on the courts because they must “parse agency records and determine whether any piece of information contained in these records was originally compiled for a law enforcement purpose.”¹⁸²

B. *Exemption (b)(6) and State Department v. Washington Post, Inc.*

To facilitate application of exemption (b)(6) to particular government records, the courts have adopted a two-part test similar to the one used for section (b)(7)(C) exemptions.¹⁸³ The court first determines whether the record is a personnel, medical, or “similar” file and, second, whether the disclosure of the record would “constitute a clearly unwarranted invasion of personal privacy.”¹⁸⁴ Through mechanical application of this test in recent years, courts have developed categories of “similar” files.¹⁸⁵ In cases of first impression, courts usually compare the document in question with others previously categorized. If the privacy interest is “similar” to a document previously withheld under (b)(6), the threshold is satisfied, and the court will go to the second step. If, however, the privacy interest is “similar” to a non-(b)(6) document the inquiry ends and the document is released.¹⁸⁶

The Court of Appeals for the District of Columbia Circuit applied this two-part test in *State Department v. Washington Post, Inc.*,¹⁸⁷ to determine that (b)(6) did not exempt State Department records indicating the citizenship status of two Iranian nationals. The court compared the privacy interest in these documents to the privacy interest in similar records that included naturalization dates. Because the court had de-

181. See 102 S. Ct. at 2064.

182. *Id.* at 2065 (Blackmun, J., dissenting).

183. See *supra* notes 168-71 and accompanying text.

184. 5 U.S.C. § 552(b)(6) (1976). This two-part test is adapted from the language of the statute, which states: “(b) This section does not apply to matters that are— . . . (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. . . .”

185. See, e.g., *United States Dep’t of the Air Force v. Rose*, 425 U.S. 352 (1976) (summaries of Air Force Academy disciplinary actions are “similar files”); *Howard Johnson Co. v. NLRB*, 618 F.2d 1 (6th Cir. 1980) (union authorization cards are “similar files”).

186. For a criticism of past uses of this test, see Comment, *Developments Under the Freedom of Information Act—1981*, *supra* note 2.

187. 456 U.S. 595 (1982).

mied (b)(6) exemption to these similar records in an earlier case,¹⁸⁸ it held that the requested documents failed the "similar files" threshold and thus could be released.

The Supreme Court disagreed. Its primary concern was that the court of appeals' decision led to results not contemplated by Congress. In an opinion joined by seven other Justices, Justice Rehnquist examined the legislative history of the exemption and asserted that "Congress' primary purpose in enacting [(b)(6)] was to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information."¹⁸⁹ A narrow interpretation of "similar files" detracts from this purpose by releasing some records without a second-step inquiry into possible injury or embarrassment.¹⁹⁰ The Court thus concluded that "similar files" must be read broadly.

The Court also found that Congress intended (b)(6) to be a "general exemption" statute that excludes from mandatory disclosure those kinds of files "the disclosure of which might harm the individual."¹⁹¹ On the other hand, Congress also enacted the FOIA to increase public access to government information.¹⁹² The court of appeals' narrow construction of "similar files" appeared to resolve these conflicting goals by releasing all records that lack privacy interests similar to medical and personnel files.¹⁹³ Justice Rehnquist argued, however, that the second step, not the first, limits exemption (b)(6):

"[T]he scope of the exemption is held within bounds by use of the limitation of 'a clearly unwarranted invasion of personal privacy.'" . . .

. . . Had the words "similar files" been intended to be only a narrow addition to "personnel and medical files," there would seem to be no reason for [Congress'] concern about the exemption's being "held within bounds," and there surely would be clear suggestion in the legislative history that such a narrow meaning was intended. We have found none.¹⁹⁴

Therefore, the Court broadly defined "similar files" as "detailed government records on an individual which can be identified as applying to that individual."¹⁹⁵ If requested information satisfies this expanded

188. The Court of Appeals for the District of Columbia Circuit compared the files at issue to ones previously released in *Simpson v. Vance*, 648 F.2d 10 (D.C. Cir. 1980). See *supra* note 166.

189. 456 U.S. at 599.

190. *Id.* at 600-01.

191. *Id.* at 601 (quoting H.R. REP. NO. 1497, 89th Cong., 2d Sess. 11 (1966)).

192. See generally *supra* text accompanying notes 108-117, 128.

193. See 456 U.S. at 600-01.

194. *Id.* at 600 (citations omitted).

195. *Id.* at 602 (quoting H.R. REP. NO. 1497, 89th Cong., 2d Sess. 11 (1966)).

threshold, the second prong determines whether its release will cause injury or embarrassment and thus will not be permitted.

The Court also noted the anomalous results of the court of appeals' approach. Under the plain language of section (b)(6), any information contained within a personnel or medical file can be withheld "if its release would constitute a clearly unwarranted invasion of personal privacy."¹⁹⁶ Because the court of appeals' test would subject to mandatory disclosure identical information contained within a non-"similar file,"¹⁹⁷ the Court found that the test improperly emphasized form over substance.¹⁹⁸

Washington Post permits the critical balancing of public access and personal privacy by relaxing the "similar files" threshold to include any file containing information personal to an individual. As in *Abramson*, *Washington Post*'s immediate effect will be to restrict information disclosure.¹⁹⁹ Both decisions also focus on whether the release of information would constitute an "unwarranted invasion of personal privacy."²⁰⁰ Furthermore, by emphasizing the common second steps of the exemption (b)(7)(C) and (b)(6) analyses, both decisions give meaning to the "reasonably segregable" requirement.²⁰¹ The implication is that increased withholding of exempt information contained in what were once non-"similar files" may be offset by the rejuvenated requirement that non-exempt information contained in "similar files" must be released.²⁰² Thus, the net effect on the volume of released information may be slight.

196. *Id.* at 602.

197. *Id.* at 601.

198. *Id.*

199. The *Abramson* decision withheld law enforcement information that the Court of Appeals for the District of Columbia Circuit was willing to release, *see supra* note 174 and accompanying text, while *Washington Post* withheld information in what the Court of Appeals for the District of Columbia Circuit had ruled a non-"similar file." *See supra* note 188 and accompanying text.

200. Compare *supra* notes 173-74 and accompanying text with *supra* notes 193-94 and accompanying text.

201. The Court in both *Abramson* and *Washington Post* focuses on whether the release of the information within the document will result in invasions of personal privacy. In so doing, the Court shifts the focus away from the nature of the document as either an "investigatory record" or a "similar file" and toward the nature of the information contained therein. Compare *supra* note 178 and accompanying text with *supra* note 194-95 and accompanying text.

202. In exemption (b)(6) cases, the federal courts appear to have diligently applied the "reasonably segregable" provision so that non-exempt information will be released. Therefore, the conclusion that increased withholding of information will be offset by increased release is not as certain as it is in *Abramson*. But even if such increased withholding is not offset it does not appear that the increased withholding will have a significant effect on the current volume of information released.

V. CONCLUSION

In 1982, the Reagan administration made full use of its discretion under the FOIA to unilaterally change the Act's impact without changing its language. The Justice Department's "submitters' rights" memorandum implemented several Hatch amendment proposals at the agency level, and President Reagan used his latitude under exemption (b)(1) to replace the pro-disclosure Carter Executive order with his own pro-withholding order. These nonjudicial FOIA developments make clear the Reagan administration's philosophy that many aspects of the FOIA provide greater burdens than benefits to the federal government and the nation.

The 1982 federal court developments generally paralleled this trend toward increased information withholding. In *Abramson* and *Washington Post*, the Supreme Court overhauled the (b)(6) "similar files" and (b)(7)(C) "investigatory records" criteria in an effort to focus future analyses on the heart of these exemptions—personal privacy. Of the three significant cases addressing the (b)(3) federal statutes exemption, only the decision of the Court of Appeals for the District of Columbia Circuit in *Greentree v. United States Customs Service* increased information disclosure. In *King v. IRS*, the Court of Appeals for the Seventh Circuit broadened the scope of Internal Revenue Code section 6103 to withhold all raw tax data, thereby diverging from prior decisions in other circuits that limited withholding to data that could identify a particular taxpayer. Finally, in *Baldrige v. Shapiro*, the Supreme Court established that Census Act sections 8(b) and 9(a) are exemption (b)(3) statutes. The Court went on to interpret the scope of those provisions broadly, thereby departing significantly from its prior decisions that stressed accuracy as the census' constitutionally-mandated goal.

Although the 1982 developments largely restricted federal information disclosure, they fall far short of the restrictions contemplated by the Hatch amendments. Until now, public access supporters have lobbied successfully against some of the Hatch bill's most controversial proposals. If the pro-withholding trend in the Reagan administration and the courts continues, however, the Hatch amendments may be yet another step in the same direction.

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