

THE FREEDOM OF INFORMATION ACT IN 1993-1994

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[The Freedom of Information Act] is the Taj Mahal of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored.¹

INTRODUCTION

In 1966, Congress enacted the Freedom of Information Act (FOIA)² to allow citizens greater access to government information. The statute established an unprecedented public right to disclosure of information from federal agencies, limited only by nine exemptions.³ Some observers viewed it as fundamentally

1. Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REG., Mar.-Apr. 1982, at 14, 15.

2. 5 U.S.C. § 552 (1988).

3. FOIA exempts from disclosure 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 properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), 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;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement

transforming American democracy by finally allowing the public to hold the government accountable.⁴ Since its passage, however, FOIA has attracted much criticism because of its unanticipated consequences. Many commentators now observe that FOIA is neither operating effectively to promote public disclosure nor promoting the interests of federal agencies.⁵

One unanticipated consequence is the high cost of FOIA. In 1966, estimates placed the cost of FOIA at about \$50,000 per year.⁶ However, the unexpected flood of FOIA requests⁷ during

authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

5 U.S.C. § 552(b).

4. See, e.g., Elias Clark, *Holding Government Accountable: The Amended Freedom of Information Act*, 84 YALE L.J. 741 (1975). "[T]he Freedom of Information Act lets the citizen strip away the secrecy that surrounds the lawmaking process and discover who is making the law, for what purposes, to affect whom." *Id.* at 742-43. Clark concluded that "[t]he amended Act will affect fundamentally the way we govern ourselves." *Id.* at 768.

5. Even observers such as Judge Patricia M. Wald, who strongly supports the principles behind a freedom of information statute, acknowledge that "there is probably much room for improvement in FOIA." Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 679 (1984).

6. *Id.* at 660 (citation omitted).

7. A major cause of the large number of FOIA requests is the unexpectedly wide range of uses for which FOIA is now being employed. Although FOIA's enactors envisioned the statute as a method for the public to gain information about the government, the most popular use of FOIA has been by businessmen and lawyers as an aid in industry and in court. In fact, the Department of Justice found that only one of every 20 FOIA requestors was a journalist, scholar, or public interest organization. *Freedom of Information Act: Hearings Before the Subcommittee on the Constitution of the Committee on the Judiciary*, 97th Cong., 1st Sess. 161 (1981) [hereinafter *Freedom of Information Act Hearings*] (statement of Jonathan C. Rose, Assistant Attorney General, Office of Legal Policy, Department of Justice). Four of five FOIA requestors were business executives or their lawyers. *Id.* This wide variety of uses of FOIA is possible because Congress did not require that any specific reason be given to invoke FOIA. Consequently, as long as Congress leaves the statute in its current form, the right of businessmen and lawyers to use FOIA for any purpose will continue. This Note uses the term "the public's interest in disclosure" to encompass the different possible uses of FOIA, including requests by businessmen and lawyers as well as those made by the other members of the public and the

the years following FOIA's enactment⁸ has resulted in annual costs of anywhere from \$47 million to \$250 million.⁹ Although agencies may charge requestors for search and duplication costs,¹⁰ the agencies must bear the cost of examining the requested documents to determine whether any of the material is exempt from disclosure. As Justice Antonin Scalia and Senator Orrin Hatch have pointed out, this determination is the most costly part of FOIA processing because it requires highly trained agency personnel to review the requested materials.¹¹ For instance, the Central Intelligence Agency (CIA) has had to assign two hundred senior intelligence officers to review FOIA requests to ensure that confidential information is not disclosed.¹² As Justice Scalia has stated, these high costs entailed by FOIA "might not be defects in the best of all possible worlds. They are foolish extravagances only because we do not have an unlimited amount of federal money to spend, [or] an unlimited number of agency employees to assign"¹³

Because agencies do not have unlimited budgets to absorb the high costs of FOIA, another unanticipated result of the Act has been the emergence of long backlogs of FOIA requests at many federal agencies. The drafters of the 1974 amendments to FOIA clearly did not foresee such delays in answering requests when they imposed strict statutory deadlines on agencies.¹⁴ Robert Vaughn recognizes these limits as a flaw in the very structure of FOIA, because the deadlines are rendered meaningless in practice

press.

8. A 1983 estimate placed the number of annual FOIA requests at about one million. Glen O. Robinson, *Access to Government Information: The American Experience*, 14 *FED. L. REV.* 35, 36 (1983) (citation omitted).

9. Wald, *supra* note 5, at 660 (footnote omitted) (citing a 1981 estimate).

10. FOIA provides for a waiver of these costs if the request is considered primarily to benefit the general public. 5 U.S.C. § 552(a)(4)(A)(iii).

11. See Orrin G. Hatch, *Balancing Freedom of Information with Confidentiality for Law Enforcement*, 9 *J. CONTEMP. L.* 1, 9 (1983); Scalia, *supra* note 1, at 16.

12. *Freedom of Information Act Hearings*, *supra* note 7, at 579 (statement of CIA Director William J. Casey).

13. Scalia, *supra* note 1, at 17-18.

14. Under FOIA, agencies must respond to a request within ten working days. Agencies are allowed an extra ten working days "in unusual circumstances." 5 U.S.C. § 552(a)(6). Courts have not enforced these deadlines, however. See Robert G. Vaughn, *Administrative Alternatives and the Federal Freedom of Information Act*, 45 *OHIO ST. L.J.* 185, 189 (1984); Andrew Blum, *Freedom to Battle for Data: FOIA Still Perplexes Some of Its Critics*, *NAT'L L.J.*, Mar. 12, 1990, at 1, 28.

by widespread agency backlogs.¹⁵ Requestors often have had to wait months or even years to receive answers to their FOIA requests. A General Accounting Office study in 1983 found that, excluding requests for which no records were available, the average time taken to answer a FOIA request was 191 days at the Federal Bureau of Investigation (FBI) and 270 days at the Office of Information and Privacy.¹⁶ As of 1990, the FBI's combined backlog of FOIA and Privacy Act requests amounted to about eight thousand.¹⁷ Most federal agencies are overwhelmed by the number of FOIA requests and lack adequate resources to process them.¹⁸ Even Attorney General Janet Reno has recognized that the backlogs "appear[] to be a problem of too few resources in the face of too heavy a workload."¹⁹

However, prospects for agencies to obtain more resources to meet the demand appear bleak. For instance, in 1989, an FBI request for forty-three additional staffers to process FOIA requests was denied by the Office of Management and Budget.²⁰ With the current emphasis on "reinventing government" and reducing the government's size, agencies are not likely to receive more resources for handling FOIA requests. Instead, backlogs likely will continue at most federal agencies, frustrating FOIA requestors seeking to assert their statutory right of disclosure and placing a continual burden on the agencies.

Today, FOIA is not operating as Congress intended. Nevertheless, in the absence of statutory changes, the public's right to disclosure must continue to be respected to the greatest extent possible. At the same time, because agencies are having trouble handling the volume of FOIA requests, new and existing burdens on the agencies must be minimized so that agencies can use their resources to process requests most effectively. Thus, when courts interpret FOIA provisions or the executive establishes new FOIA

15. Vaughn, *supra* note 14, at 188.

16. *Id.* at 188 n.24 (citing GENERAL ACCOUNTING OFFICE, FREEDOM OF INFORMATION ACT OPERATIONS AT SIX DEPARTMENT OF JUSTICE UNITS 1-2 (1983)).

17. Blum, *supra* note 14, at 29.

18. Of course, indigenous factors such as agency recalcitrance often are present and can combine with insufficient resources to produce long FOIA backlogs.

19. Memorandum from Attorney General Janet Reno for Heads of Departments and Agencies 3 (Oct. 4, 1993) [hereinafter Reno Memo] (on file with author).

20. Blum, *supra* note 14, at 28.

guidelines, it is imperative that the interests of the agencies be recognized along with the public's right to disclosure.

This Note addresses the important developments under FOIA in 1993 and early 1994. Part I analyzes the impact of recent decisions of the U.S. Supreme Court and the U.S. Court of Appeals for the District of Columbia Circuit on pro se litigants' entitlement to attorney's fees under FOIA. Part II discusses the 1994 Supreme Court case, *Department of Defense v. FLRA*,²¹ which held that FOIA does not allow federal sector labor unions to receive lists of employees' names and addresses. Part III considers the Supreme Court's 1993 opinion in *Department of Justice v. Landano*,²² which clarified the FBI's burden when it seeks to exempt confidential sources and information from disclosure under FOIA. Part IV evaluates the Clinton administration's 1993 guidelines for agency review of FOIA requests. Throughout this survey, this Note examines whether the recent legal developments properly accommodate both the public's disclosure interest and the government's interest in minimizing the burden imposed by FOIA. Finally, this Note concludes that the courts and the Clinton administration achieved only mixed success in 1993 and early 1994 in addressing these important concerns.

I. THE AWARDING OF ATTORNEY'S FEES TO PRO SE LITIGANTS AFTER *KAY V. EHRLER*

In 1974, Congress amended FOIA to provide for attorney's fee awards. Under section 552(a)(4)(E), courts "may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed."²³ As FOIA claimants began invoking this section, the courts began considering whether pro se litigants could receive attorney's fees. These cases involved two types of pro se litigants—non-attorney and attorney FOIA requestors. In 1991, the Supreme Court in *Kay v. Ehrler* resolved a disagreement among the circuit courts over whether pro se attorney litigants in civil rights actions should be entitled to attorney's fees under 42 U.S.C. § 1988,²⁴ providing new insight into whether

21. 114 S. Ct. 1006 (1994).

22. 113 S. Ct. 2014 (1993).

23. 5 U.S.C. § 552(a)(4)(E).

24. 499 U.S. 432, 435 (1991).

either pro se attorney litigants or pro se non-attorney litigants should receive attorney's fees under FOIA.

A. *Background*

Before the Supreme Court's decision in *Kay*, almost all the courts of appeals had ruled that pro se non-attorney litigants were not entitled to attorney's fees under section 552(a)(4)(E) of FOIA.²⁵ Only the D.C. Circuit had held that pro se non-attorney litigants were eligible to receive attorney's fees.²⁶ With respect to pro se attorney litigants, four circuits considered this issue. The Sixth and First Circuits held that pro se attorney litigants were not entitled to attorney's fees under FOIA.²⁷ The Fifth Circuit, however, ruled that although pro se non-attorney litigants were ineligible for attorney's fees under circuit precedent, pro se attorney litigants could receive attorney's fees.²⁸ The D.C. Circuit remained consistent with its earlier holding allowing awards for pro se non-attorney litigants and ruled that pro se attorney litigants also were eligible for attorney's fees.²⁹

These circuit splits remained in 1991 when the Supreme Court decided *Kay v. Ehrler*. The facts of *Kay* did not directly involve FOIA but instead dealt with a pro se attorney litigant seeking attorney's fees under 42 U.S.C. § 1988.³⁰ Holding that pro se attor-

25. See *Kuzma v. IRS*, 821 F.2d 930, 933 (2d Cir. 1987); *Merrell v. Block*, 809 F.2d 639, 642 (9th Cir. 1987); *Clarkson v. IRS*, 811 F.2d 1396, 1397 n.1 (11th Cir.), *cert. denied*, 481 U.S. 1031 (1987); *DeBold v. Stimson*, 735 F.2d 1037, 1041-43 (7th Cir. 1984); *Wolfel v. United States*, 711 F.2d 66, 67-68 (6th Cir. 1983); *Cunningham v. FBI*, 664 F.2d 383, 384-87 (3d Cir. 1981); *Barrett v. Bureau of Customs*, 651 F.2d 1087, 1088-89 (5th Cir. 1981), *cert. denied*, 455 U.S. 950 (1982); *Crooker v. Department of Justice*, 632 F.2d 916, 920-21 (1st Cir. 1980); *Burke v. Department of Justice*, 559 F.2d 1182, 1182 (10th Cir. 1977).

26. See *Cox v. Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979).

27. See *Aronson v. Department of Hous. and Urban Dev.*, 866 F.2d 1, 4-6 (1st Cir. 1989); *Falcone v. IRS*, 714 F.2d 646, 648 (6th Cir. 1983), *cert. denied*, 466 U.S. 908 (1984).

28. See *Cazalas v. Department of Justice*, 709 F.2d 1051, 1055-57 (5th Cir. 1983).

29. See *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1366 (D.C. Cir. 1977).

30. Although *Kay* involved the fee-shifting provision under 42 U.S.C. § 1988 (1988), its interpretation of that provision can be applied to the fee-shifting provision under FOIA. Section 1988(b) provides that courts "may allow the prevailing party . . . a reasonable attorney's fee" in civil rights litigation. Because the Court in *Kay* interpreted the plain meaning of general language that appears in both § 1988 and § 552(a)(4)(E), the Court would not likely adopt a different interpretation of the word "attorney" under FOIA.

ney litigants are not entitled to attorney's fees under section 1988, the Court in *Kay* interpreted the term "attorney" as requiring an attorney-client relationship. Two years later, in *Benavides v. Bureau of Prisons*,³¹ the D.C. Circuit, as a result of *Kay*, reversed itself regarding the awarding of attorney's fees to pro se non-attorney litigants under FOIA.³² In *Benavides*, the petitioner, a pro se non-attorney, had prevailed in his suit against the Bureau of Prisons for disclosure of documents and had then sought attorney's fees under section 552(a)(4)(E). After the district court refused Benavides's request for attorney's fees, he appealed. By holding that pro se non-attorney litigants are ineligible for attorney's fees under FOIA, the D.C. Circuit joined the other circuits' interpretation of section 552(a)(4)(E).

B. *Kay's Application to Pro Se Litigants' Requests for Attorney's Fees Under FOIA*

The D.C. Circuit recognized in *Benavides* that the Supreme Court's opinion in *Kay* supports the interpretation that pro se non-attorney litigants should not be entitled to attorney's fees under section 552(a)(4)(E). Moreover, although the holding in *Benavides* is limited to pro se non-attorney litigants, the application of the Court's analysis in *Kay* demonstrates that pro se attorney litigants likewise should be denied attorney's fees under FOIA. As a result, after *Kay*, courts should deny attorney's fees to pro se attorney and non-attorney litigants alike under FOIA.

Section 552(a)(4)(E) does not specifically refer to pro se litigants but states only that courts have discretion to award "reasonable attorney fees" when a requestor has "substantially prevailed" in a case.³³ In *Kay*, the Court discussed the meaning of the word "attorney." The Court acknowledged that the petitioner in *Kay* was an "attorney" and stated that "[t]he Circuits are in agreement . . . on the proposition that a *pro se* litigant who is *not* a lawyer is *not* entitled to attorney's fees," adding that it was "satisfied that [these cases] were correctly decided."³⁴ As the D.C. Circuit in *Benavides* asserted, "the opinion [in *Kay*] gives a clear indication that, absent congressional intent to the contrary, the

31. 993 F.2d 257 (D.C. Cir.), *cert denied*, 114 S. Ct. 559 (1993).

32. *Id.* at 259.

33. 5 U.S.C. § 552(a)(4)(E).

34. *Kay v. Ehrler*, 499 U.S. 432, 435 (1991).

Supreme Court believes that the word 'attorney,' when used in the context of a fee-shifting statute, does not encompass a lay-person proceeding on his own behalf.³⁵ As a result, pro se non-attorney litigants under FOIA are not entitled to attorney's fees, because the language of the fee-shifting provision as interpreted by the Court in *Kay* dictates that attorney's fees accrue only if an attorney is present.³⁶

The rationale of *Kay* also demonstrates that pro se attorney litigants are not covered by FOIA's fee-shifting provision. The Court stated that "the word 'attorney' assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under § 1988."³⁷ In supporting this assumption, the Court referred to several dictionary definitions of the word "attorney" that show that it denotes an agency relationship.³⁸ Because, as stressed in *Kay*, the phrase "attorney's fees" requires the presence of an agency relationship between a client and an attorney, pro se attorney litigants should not come within the ambit of section 552(a)(4)(E).

The legislative purpose behind section 552(a)(4)(E) also indicates that pro se litigants should not be entitled to receive attor-

35. *Benavides*, 993 F.2d at 259.

36. The Seventh Circuit, in *DeBold v. Stimson*, 735 F.2d 1037 (7th Cir. 1984), also came to this conclusion:

The term "attorney fees" contemplates that the services of an attorney be utilized. The simple language of the statute controls. Attorney means attorney. We have no doubt that Blue Cross/Blue Shield would balk at a request for doctor fees from a person who removed his own appendix, or more realistically, a request for dental fees from someone who extracted his own tooth. No one would be entitled to reimbursement for therapist fees for attempts at self-improvement or for finding solutions to one's own problems. . . . Myriad examples leap to mind that need not be repeated here.

Id. at 1042 (citations omitted).

The *DeBold* court reiterated its prior finding in *Langer Roofing & Sheet Metal, Inc. v. Secretary of Labor*, 524 F.2d 1337, 1339 n.3 (7th Cir. 1975), that it had expressly disavowed non-liberal, unreasonable interpretation of words and expressly rejected the Humpty Dumpty theory of language.

"When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

"The question is" said Humpty Dumpty, "which is to be master—that's all."

Debold, 735 F.2d at 1042 n.3 (quoting LEWIS CARROLL, *THROUGH THE LOOKING GLASS* 190 (Washington Square Press 1951) (1871)).

37. *Kay*, 499 U.S. at 435-36 (footnote omitted).

38. *Id.* at 436 n.6.

ney's fees. Because the legislative history of the 1974 amendments does not specifically refer to pro se litigants,³⁹ there has been sharp disagreement among the circuits and other courts over whether Congress's purpose in enacting section 552(a)(4)(E) supports the awarding of attorney's fees to pro se litigants. Some courts, arguing that pro se attorney litigants should be eligible for section 552(a)(4)(E) attorney's fees, have asserted that deterrence and enforcement were crucial goals of the 1974 amendments and that the attorney's fees provision was intended in part to increase the compliance of government agencies.⁴⁰ According to this interpretation, the awarding of attorney's fees to pro se litigants furthers the legislative purpose of FOIA's fee-shifting provision, because the deterrent effect of such awards encourages government compliance regardless of whether an attorney is actually involved in the suit.

The majority of the circuits, however, have countered that agency compliance was not the significant legislative purpose behind the enactment of FOIA's fee-shifting provision⁴¹ and that instead "the fundamental purpose of section 552(a)(4)(E) [was] to facilitate citizen access to the courts to vindicate their statutory rights."⁴² The First Circuit, in *Aronson v. Department of Housing*

39. See Janet A. Bradley, Note, *Pro Se Complainants and the Freedom of Information Act: Neglected, Not Rejected*, 37 ADMIN. L. REV. 15, 16, 28 (1985); Lisa A. Mednick, Note, *Awarding Fees to the Self-Represented Attorney Under the Freedom of Information Act*, 53 GEO. WASH. L. REV. 291, 292-96 (1984-1985); Cathy Seibel, Note, *Fee Awards for Pro Se Attorney and Nonattorney Plaintiffs Under the Freedom of Information Act*, 52 FORDHAM L. REV. 374, 383 (1983).

40. See *Cazalas v. Department of Justice*, 709 F.2d 1051, 1057 (5th Cir. 1983) (stating that "the provision serves a deterrent and, to a lesser extent, a punitive purpose"); *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1366 (D.C. Cir. 1977) (describing how successful FOIA litigants help to bring "the government into compliance with the law"); *McReady v. Department of Consumer & Regulatory Affairs*, 618 A.2d 609, 621 (D.C. 1992) (Ferre, J., dissenting) (stressing the importance of the enforcement purpose of FOIA's attorney's fee provision). The dissenting opinion in *McReady* also referred to the purposes of the 1974 amendments, as indicated in the accompanying Senate Report:

[T]o facilitate freer and more expeditious public access to government information, to encourage more faithful compliance with the terms and objectives of the FOIA, to strengthen the citizen's remedy against agencies and officials who violate the Act, and to provide for closer congressional oversight of agency performance under the Act.

Id. at 621 n.12 (quoting S. REP. No. 854, 93d Cong., 2d Sess. 1 (1974)).

41. See, e.g., *Benavides v. Bureau of Prisons*, 993 F.2d 257, 259-60 (D.C. Cir.), *cert. denied*, 114 S. Ct. 559 (1993).

42. *Id.* at 260 (quoting *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 715 (D.C. Cir. 1977)).

and *Urban Development*,⁴³ declared that “the purpose of the fee section of the Act was to eliminate the obstacle of attorney fees so that all litigants would have access to the courts to pursue their rights under FOIA.”⁴⁴ Several courts pointed to the Senate Report accompanying the 1974 amendments, which stated that “[t]oo often the barriers presented by court costs and attorneys’ fees are insumountable [sic] for the average person requesting information.”⁴⁵ Thus, according to these courts, the dominant purpose of FOIA’s fee-shifting provision was to increase citizens’ access to the courts rather than to provide deterrence or to help enforce government compliance with FOIA.⁴⁶

The Court’s opinion in *Kay* implicitly endorsed the view that improving access to the courts is the most important legislative purpose behind FOIA’s fee-shifting provision. In a footnote, the *Kay* Court discussed the Sixth Circuit’s decision in *Falcone v. IRS*.

In *Falcone*, the Court of Appeals declined to award attorney’s fees to a *pro se* attorney in a successful action under [FOIA]. The Court of Appeals reasoned that attorney’s fees in FOIA actions were inappropriate because the award was intended “to relieve plaintiffs with legitimate claims of the burden of legal costs” and “to encourage potential claimants to seek legal advice before commencing litigation.”⁴⁷

By referring to *Falcone*’s interpretation of the legislative purpose of FOIA’s fee-shifting provision without disapproval and identifying it as essentially the same rationale as that underlying the fee-

43. 866 F.2d 1 (1st Cir. 1989).

44. *Id.* at 5.

45. *Sampson*, 559 F.2d at 711 (quoting S. REP. No. 854, 93d Cong., 2d Sess. 17 (1974)) (alteration in original).

46. See *Benavides*, 993 F.2d. at 260 (“To the extent that the fee-shifting provision in FOIA helps deter violations of the law, that result is only a serendipitous by-product of encouraging aggrieved individuals to obtain an attorney.”); *Aronson*, 866 F.2d at 5 (“[W]e disagree with the Fifth Circuit that the purpose of the fee provision of FOIA is to deter and punish the government for unnecessarily withholding information.”); *Cunningham v. FBI*, 664 F.2d 383, 387 (3d Cir. 1981) (“Congress certainly gave no evidence of seeking to do more than to lift those barriers, as it might have by, for example, authorizing punitive damages or some other noncompensatory award.”); *Crooker v. Department of Justice*, 632 F.2d 916, 920-21 (1st Cir. 1980) (“The amendment was ‘not enacted to provide a reward for any litigant who successfully force[d] the government to disclose information it wish[ed] to withhold,’ or to penalize government agencies who were forced to disclose.”) (quoting *Sampson*, 559 F.2d at 711).

47. *Kay v. Ehrler*, 499 U.S. 432, 434 n.4 (1991) (quoting *Falcone v. IRS*, 714 F.2d 646, 647 (6th Cir. 1983) (citation omitted), *cert. denied*, 466 U.S. 908 (1984)).

shifting provision in 42 U.S.C. § 1988, the *Kay* Court implicitly endorsed the purpose stated in *Falcone* as the primary legislative purpose behind section 552(a)(4)(E).⁴⁸

Pro se attorney litigants, on the other hand, might argue that the purpose behind section 552(a)(4)(E) would still be served if they were awarded attorney's fees, because they are acting as counsel by representing themselves in court. However, the Court in *Kay* asserted that such representation by attorneys on their own behalf does not further the purpose stated in *Falcone* of "encourag[ing] potential claimants to seek legal advice before commencing litigation."⁴⁹ The Court explained that

[e]ven a skilled lawyer who represents himself is at a disadvantage in contested litigation. Ethical considerations may make it inappropriate for him to appear as a witness. He is deprived of the judgment of an independent third party in framing the theory of the case, evaluating alternative methods of presenting the evidence, cross-examining hostile witnesses, formulating legal arguments, and in making sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom. The adage that "a lawyer who represents himself has a fool for a client" is the product of years of experience by seasoned litigators.⁵⁰

Because an attorney representing himself gives up the benefits of representation by another attorney, encouraging pro se attorney litigation does not serve the purpose of improving *adequate* access to the courts. Consequently, the Court's opinion in *Kay*, as applied to the analysis of both the text and the legislative purpose of section 552(a)(4)(E), supports the position that pro se attorney and non-attorney litigants should not be eligible for attorney's fees under FOIA's fee-shifting provision.

Not only is the denial of attorney's fees to pro se attorney and non-attorney litigants consistent with the Supreme Court's opinion in *Kay*, but it also comports with the need to satisfy the public's right to disclosure while alleviating the burden on agen-

48. See also *Benavides*, 993 F.2d at 260 ("In discussing *Falcone*, the Supreme Court in *Kay* says absolutely nothing to suggest that the rationale given to support the holding in *Falcone* was wanting or that the considerations affecting the disposition of fee claims under FOIA and section 1988 should be viewed differently.").

49. *Falcone*, 714 F.2d at 647.

50. *Kay*, 499 U.S. at 437-38 (footnote omitted).

cies. Arguably, allowing the award of attorney's fees to pro se litigants might in certain circumstances further the interest of disclosure under FOIA. The First Circuit in *Crooker v. Department of Justice* acknowledged that "[w]e are not unmindful that pro se litigation does sometimes advance the policy aims of FOIA."⁵¹ The Third Circuit in *Cunningham v. FBI* added that "providing attorney fees to pro se litigants may serve some of these interests by increasing enforcement of legitimate rights" under FOIA.⁵² For instance, the awarding of attorney's fees to successful pro se litigants might cause previously recalcitrant agencies to be more compliant in future cases and thereby further the interest in disclosure. In the aggregate, however, the public's interest in disclosure would be furthered not by allowing attorney's fees to be awarded to pro se litigants but instead by encouraging claimants to obtain independent counsel. As the Court in *Kay* asserted, claims are promoted much more effectively when claimants are assisted by objective and detached independent counsel.⁵³

Disallowing attorney's fees for pro se litigants also reduces the burdens on government agencies. Federal agencies, already short on resources due to the large number of FOIA requests, must not be additionally burdened by the frivolous litigation that could result from encouraging pro se litigation. As the Fifth Circuit in *Barrett v. Bureau of Customs*⁵⁴ asserted,

Persons contemplating legal action should be encouraged to consult with attorneys. Litigation may not be necessary. Frustrations and misunderstandings or failures of understanding by the intended complainant may be quickly soothed and resolved by counsel. We do not believe it naive to expect that the result of the intervention of counsel will be compliance with the law by the agency involved, a furnishing of the information sought, and an avoidance of unnecessary litigation.⁵⁵

By establishing that pro se litigants are ineligible for attorney's fees, the courts encourage FOIA litigants to obtain independent

51. 632 F.2d 916, 921 (1st Cir. 1980).

52. 664 F.2d 383, 387 (3d Cir. 1981).

53. *Kay*, 499 U.S. at 437; see also *McNeil v. United States*, 113 S. Ct. 1980, 1984 n.10 (1993) (stating that the *Kay* Court "recognized a systemic interest in having a party represented by independent counsel even when the party is a lawyer").

54. 651 F.2d 1087 (5th Cir. Unit A July 1981), cert. denied, 455 U.S. 950 (1982).

55. *Id.* at 1089-90.

counsel and thereby help reduce the burden of litigation on government agencies.⁵⁶

II. *DEPARTMENT OF DEFENSE V. FLRA*: THE DISCLOSURE OF FEDERAL EMPLOYEES' NAMES AND ADDRESSES UNDER THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE AND FOIA

During the years following the enactment of the Federal Service Labor-Management Relations Statute (FLRS)⁵⁷ in 1978, a consensus among the circuit courts emerged that federal sector labor unions could gain access to employee lists from federal employers. In 1989, however, the U.S. Supreme Court decided *Department of Justice v. Reporters Committee for Freedom of the Press*,⁵⁸ causing a majority of circuits to reverse their precedents and deny federal unions access to personnel data. This circuit split persisted until 1994, when the U.S. Supreme Court held in *Department of Defense v. FLRA* that FOIA does not allow federal sector labor unions access to employee lists.⁵⁹

A. *Background*

In 1978, Congress adopted the FLRS to guarantee the collective bargaining rights of federal employees in the civil service. Congress proclaimed that

the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them (A) safeguards the public interest, (B) contributes to the effective conduct of public business, and (C) facilitates and encourages the

56. Of course, in some circumstances, this argument may be merely theoretical. In real life, many pro se litigants are unaware before they go to court whether they are entitled to attorney's fees as pro se litigants under FOIA. Thus, whether or not the law makes them eligible for attorney's fees is unlikely to encourage them to seek counsel before beginning litigation. Journalists, attorneys, and certain other requestors may, on the other hand, be apprised of the current legal situation and thus may be encouraged to seek counsel if, suing on their own behalf, they would not be entitled to attorney's fees under FOIA.

57. 5 U.S.C. §§ 7101-7135 (1988).

58. 489 U.S. 749 (1989).

59. 114 S. Ct. 1006, 1009 (1994).

amicable settlements of disputes between employees and their employers involving conditions of employment.⁶⁰

To facilitate such collective bargaining, the FLRS outlines the responsibilities of both federal employee unions and federal employers. Labor organizations in the federal sector must represent all employees of a particular federal employer, including those employees who do not belong to the union.⁶¹ Federal employers, for their part, must “furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data . . . which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining.”⁶²

. After the enactment of the FLRS, labor organizations began to seek lists of employees’ names and addresses as part of their effort to represent federal employees. The federal unions argued that such information was “reasonably available and necessary” for purposes of collective bargaining and thus must be made available under the FLRS. Certain federal employers, however, refused to provide the requested information, and the respective unions subsequently filed unfair labor practice charges with the Federal Labor Relations Authority (FLRA). The FLRA consistently took the position that employees’ names and addresses were “reasonably available and necessary” for collective bargaining.⁶³ In *Farmers Home Administration Finance Office v. American Federation of Government Employees*, the FLRA reasoned that because section 7114(a)(1) of the FLRS requires a federal labor union to represent all members of a unit regardless of whether they belong to the union, “it is obvious that a union must be able to identify and communicate with [all its] bargaining unit members if it is to adequately represent them.”⁶⁴ Thus, according to the FLRA, disclosure of employees’ names and addresses is necessary for the collective bargaining process because it “enable[s] the Union to com-

60. 5 U.S.C. § 7101(a)(1).

61. *Id.* § 7114(a)(1).

62. *Id.* § 7114(b)(4)(B).

63. See, e.g., *Department of the Navy, Portsmouth Naval Shipyard v. International Fed’n of Professional & Technical Eng’rs Local 4*, 37 F.L.R.A. 515 (1990); *Farmers Home Admin. Fin. Office v. American Fed’n of Gov’t Employees Local 3354*, 23 F.L.R.A. 788 (1986).

64. *Farmers Home*, 23 F.L.R.A. at 796.

municate effectively and efficiently, through direct mailings to individual employees."⁶⁵

The circuit courts of appeals "uniformly upheld"⁶⁶ the FLRA's ruling that disclosure of employees' names and addresses is "reasonably available and necessary" for collective bargaining within the meaning of section 7114(b)(4)(B).⁶⁷ Yet, under the terms of the FLRS, even though such information may be "reasonable and necessary,"⁶⁸ it can be disclosed only "to the extent not prohibited by law."⁶⁹ Such disclosure, in fact, generally is prohibited by the Privacy Act, which forbids the release of personnel information without an employee's consent.⁷⁰ The Privacy Act, however, contains two exceptions: information may be disclosed if it would be "required under section 552 of [FOIA or] for a routine use as defined in subsection (a)(7) of [section 552a]."⁷¹ If disclosure of employees' names and addresses is required under FOIA, then the Privacy Act does not apply and such disclosure is not prohibited by law. FOIA, in turn, generally mandates disclosure, except when one of its exemptions applies. Exemption 6 of FOIA covers information in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."⁷² Thus, if Exemption 6 applies, disclosure of information is not required under FOIA. Consequently, FOIA would not serve as an exception to the Privacy Act, and the release of such information would be prohibited by both the Privacy Act and the FLRS. Accordingly, in the cases before the circuits, the determination of whether unions are enti-

65. *Id.*

66. *FLRA v. Department of Defense*, 975 F.2d 1105, 1108 (5th Cir. 1992), *rev'd*, *Department of Defense v. FLRA*, 114 S. Ct. 1006 (1994).

67. *Id.* at 1101 (quoting *Farmers Home*, 23 F.L.R.A. at 796).

68. 5 U.S.C. § 7114(b)(4)(B).

69. *Id.* § 7114(b)(4).

70. 5 U.S.C. § 552a (1988). This provision states in pertinent 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 . . ." *Id.* § 552a(b)(2).

71. *Id.* § 552a(b)(2)-(b)(3). This Note does not analyze the routine use exception because it does not pertain to FOIA. In addition, the Supreme Court in *Department of Defense* did not consider this exception. *See Department of Defense v. FLRA*, 114 S. Ct. 1006, 1012 n.5 (1994).

72. 5 U.S.C. § 552(b)(6).

tled to the disclosure of employees' names and addresses centered on the interpretation of Exemption 6 of FOIA.

In the initial round of cases before 1989, the circuit courts evaluated whether Exemption 6 applied so as to prevent labor organizations from obtaining employee lists. In *Department of the Air Force v. Rose*, the Supreme Court held that the determination of whether a certain disclosure constitutes such an invasion of privacy involves a balancing of the harm to the individual whose privacy is affected against the public interest served if disclosure is allowed.⁷³ Prior to 1989, courts held that the public interest involved in the disclosure of employees' names and addresses outweighed the relevant privacy interests.⁷⁴ The courts all found that employees had at least some privacy interest in keeping their names and addresses undisclosed.⁷⁵ The courts, however, found the furtherance of collective bargaining through such disclosure to be a particularly weighty public interest.⁷⁶ After all, Congress itself stated in the FLRS that "the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing . . . safeguards the public interest."⁷⁷

Because these courts found that the public interest served by disclosure of employees' names and addresses outweighed the privacy interests affected by such disclosure, they held that the release of this data to the unions did not constitute an "invasion

73. 425 U.S. 352, 372 (1976).

74. See *Department of the Navy v. FLRA*, 840 F.2d 1131, 1137 (3d Cir.) (upholding FLRA's disclosure order and characterizing the invasion of privacy as "minimal"), *cert. dismissed*, 488 U.S. 881 (1988); *Department of the Air Force, Scott Air Force Base v. FLRA*, 838 F.2d 229, 232-33 (7th Cir.) (describing the privacy interest as slight), *cert. dismissed*, 488 U.S. 880 (1988); *Department of Agric. v. FLRA*, 836 F.2d 1139, 1143-44 (8th Cir. 1988) (deferring to the agency's judgment), *vacated and remanded*, 488 U.S. 1025 (1989); *Department of Health and Human Servs., Social Sec. Admin. v. FLRA*, 833 F.2d 1129, 1135 (4th Cir. 1987) (deferring to the Authority's ruling), *cert. dismissed*, 488 U.S. 880 (1988); *American Fed'n of Gov't Employees Local 1760 v. FLRA*, 786 F.2d 554, 556-57 (2d Cir. 1986) (noting that the privacy interest was not compelling).

75. Circuits found the privacy interests to be everything from "modest," "minimal," and "not particularly compelling" to "strong." *FLRA v. Department of the Treasury*, 884 F.2d 1446, 1459 (D.C. Cir. 1989) (Ginsburg, J., concurring) (citing numerous cases as examples of these characterizations), *cert. denied*, 493 U.S. 1055 (1990).

76. See *Department of the Navy*, 840 F.2d at 1135-37; *Department of Agric.*, 836 F.2d at 1142-44; *Department of Health and Human Servs.*, 833 F.2d at 1134-36; *American Fed'n of Gov't Employees*, 786 F.2d at 556-57.

77. 5 U.S.C. § 7101(a)(1)(A).

of personal privacy"⁷⁸ within the meaning of Exemption 6 of FOIA. As a result, the circuit courts agreed that FOIA required the release of employee data to the unions, thereby serving as a valid exception to the Privacy Act, so that disclosure of the names and addresses was not prohibited by law within the meaning of the FLRS.⁷⁹

B. *Department of Justice v. Reporters Committee for Freedom of the Press and the Resulting Split Among the Circuits over the Disclosure of Employee Lists*

After the initial round of FLRS cases, a consensus among the circuits had emerged that the disclosure of employees' names and addresses to the labor organizations must be permitted under the FLRS.⁸⁰ Then, in 1989, the Supreme Court decided *Department of Justice v. Reporters Committee for Freedom of the Press*.⁸¹ In *Reporters Committee*, the Court addressed how courts should balance the public and private interests in determining whether disclosure constitutes an "unwarranted invasion of personal privacy" under Exemption 7(C) of FOIA.⁸² The Court found that the only public interest to be recognized in such balancing is that of "open[ing] agency action to the light of public scrutiny" and helping citizens to be "informed about 'what their government is up to.'"⁸³ The Court held that any public interest involved in the disclosure of "rap sheets" fell "outside the ambit of the public interest that the FOIA was enacted to serve," because it did not further the public purpose of opening up agencies to public scrutiny.⁸⁴

After *Reporters Committee*, a split among the circuits developed in cases involving the disclosure of employees' names and addresses to federal sector labor organizations. A majority of the

78. 5 U.S.C. § 552(b)(6).

79. *Department of the Navy*, 840 F.2d at 1137; *Department of Agric.*, 836 F.2d at 1144; *Department of Health & Human Servs.*, 833 F.2d at 1134; *American Fed'n of Gov't Employees*, 786 F.2d at 556.

80. See *FLRA v. Department of Defense*, 975 F.2d 1105, 1111 (5th Cir. 1992), *rev'd*, *Department of Defense v. FLRA*, 114 S. Ct. 1006 (1994).

81. 489 U.S. 749 (1989).

82. See 5 U.S.C. § 552(b)(7)(C).

83. *Reporters Comm.*, 489 U.S. at 772-73 (quoting *Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976)).

84. *Id.* at 775.

circuits held that the public interest involved in collective bargaining could no longer be recognized as a relevant public interest for purposes of interest balancing under Exemption 6 of FOIA.⁸⁵ Because the privacy interests affected by disclosure of personnel data outweighed a now unrecognized public interest, disclosure constituted an invasion of privacy prohibited under FOIA. A minority of the circuits, on the other hand, insisted that *Reporters Committee* was inapplicable to the FLRS cases and that disclosure of employees' names and addresses should continue to be allowed.⁸⁶

According to the minority circuits, *Reporters Committee* was not relevant to the analysis of Exemption 6 in FLRS cases. The Fifth Circuit, for instance, in *FLRA v. Department of Defense*, held that *Reporters Committee* was inapplicable because it involved Exemption 7(C) of FOIA whereas the FLRS cases implicated Exemption 6.⁸⁷ The court stated that “[w]hile the language in these two exemptions is somewhat similar, the Supreme Court pointed out that there are significant enough differences between them that Exemption 7(C) should be applied more broadly than Exemption 6.”⁸⁸ For instance, Exemption 6 states that an invasion of privacy must be “clearly unwarranted,”⁸⁹ but under Exemption 7(C) the invasion of privacy need only be “unwarranted.”⁹⁰ In addition, “while Exemption 6 applies to disclosures which ‘would constitute’ an invasion of privacy, Exemption 7(C) pertains to

85. See *FLRA v. Department of Defense*, 984 F.2d 370, 374-75 (10th Cir. 1993); *FLRA v. Department of Veterans Affairs*, 958 F.2d 503, 511-13 (2d Cir. 1992); *Department of the Navy v. FLRA*, 975 F.2d 348, 355 (7th Cir. 1992); *FLRA v. Department of Defense*, 977 F.2d 545, 547-48 (11th Cir. 1992); *FLRA v. Department of the Navy*, 963 F.2d 124, 125 (6th Cir. 1992); *FLRA v. Department of the Navy*, 941 F.2d 49, 56-57 (1st Cir. 1991); *FLRA v. Department of the Treasury*, 884 F.2d 1446, 1451-53 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1055 (1990).

86. See *FLRA v. Department of Defense*, 975 F.2d 1105, 1113-16 (5th Cir. 1992), *rev'd*, 114 S. Ct. 1006 (1994); *FLRA v. Department of the Navy*, 966 F.2d 747, 756-58 (3d Cir. 1992); *FLRA v. Department of the Navy*, 958 F.2d 1490, 1497 (9th Cir. 1992).

87. *Department of Defense*, 975 F.2d at 1113. Exemption 7(C) of FOIA exempts from disclosure “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7) (emphasis added). Exemption 6 exempts from disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” *Id.* § 552(b)(6) (emphasis added).

88. *Department of Defense*, 975 F.2d at 1113.

89. *Id.* (quoting 5 U.S.C. § 552(b)(6)) (alteration in original).

90. *Id.* (quoting 5 U.S.C. § 552(b)(7)(c)).

disclosures which 'could reasonably be expected to constitute' such an invasion."⁹¹ Consequently, the Fifth Circuit reasoned that if Exemption 7(C) was intended to be a broader standard, any rules that correspond to such a standard and restrict the type of public interest that may be balanced against private interests should not as a matter of course also be used with the narrower Exemption 6.⁹² Because the Fifth Circuit found *Reporters Committee's* statement that the only relevant public interest is that of opening agencies to public scrutiny inapplicable to Exemption 6, the public interest served by collective bargaining would continue to be weighed against private interests under Exemption 6 in the FLRS cases.

The minority circuits also claimed that *Reporters Committee* did not apply to the employee disclosure cases because these cases arose under the FLRS rather than under FOIA.⁹³ For instance, in *Department of Defense*, the Fifth Circuit stated that although *Reporters Committee* specifies the relevant public interest to be weighed in evaluating disclosure requests made through FOIA, when disclosure requests originate from another statute, such as the FLRS, other public interests also must be considered.⁹⁴ According to the court, "*Reporters[] Committee* has absolutely nothing to say about the FLRS, or the situation that arises when disclosure is initially required by some other statute other than the FOIA, and the FOIA is employed only secondarily."⁹⁵ The court insisted that

[w]hen, as here, disclosure is sought through the FOIA only because the FOIA has been incorporated into another statute as a mechanism for disclosure of information, it is entirely proper and necessary—if all of Congress' aims are to be achieved—to weigh into the balance the interests recognized by the statute which generates the request for information.⁹⁶

According to this minority view, the public interest in collective bargaining still needed to be weighed in determining under Ex-

91. *Id.* (quoting 5 U.S.C. § 552(b)(6), (b)(7)(C)).

92. *Id.*

93. *See id.*; *FLRA v. Department of the Navy*, 966 F.2d 747, 758 (3d Cir. 1992); *FLRA v. Department of the Navy*, 958 F.2d 1490, 1496 (9th Cir. 1992).

94. *Department of Defense*, 975 F.2d at 1115.

95. *Id.* at 1113.

96. *Id.* at 1115.

emption 6 whether personnel data could be disclosed to federal sector labor organizations.

The minority circuits also argued that common sense dictated that federal employees' names and addresses should be disclosed to the unions. The Fifth Circuit, for instance, found it absurd that, even though every circuit that had previously considered the question had held that the public interest in collective bargaining outweighed the private interests affected by disclosure, a completely new position should be adopted after *Reporters Committee*.⁹⁷ The court asserted that "[a]s with the language of the statutes, whatever else *Reporters[] Committee* may have done, it certainly did not alter the Congressional intent embodied in these statutes."⁹⁸ Judge Ruth Bader Ginsburg of the D.C. Circuit, concurring in *Department of the Treasury*, also noted that "[p]erhaps the most persuasive indication that neither Congress nor the Supreme Court anticipated the outcome in this case is that the balance between the public interest in disclosure and the individual interests in privacy, when viewed unfiltered by the lens of *Reporters Committee*, overwhelmingly favors disclosure."⁹⁹ In sum, the minority circuits argued that the disclosure of employees' names and addresses under the FLRS should continue despite the holding of *Reporters Committee*.

The majority of the circuits, however, criticized this approach, arguing that *Reporters Committee* changed the analysis of Exemption 6 so that disclosure of personnel data should no longer be permitted under the FLRS. These circuits first argued that the analysis of *Reporters Committee* extends to Exemption 6, even though the case involved Exemption 7(C). As the D.C. Circuit stated,

Although the context in *Reporters Committee* was the special privacy exemption for law enforcement records, exemption 7(C), we see no reason why the *character* of the disclosure interest should be different under exemption 6. While exemption 6 pre-

97. *Id.* at 1114.

98. *Id.*; see also *FLRA v. Department of the Navy*, 958 F.2d 1490, 1496 ("We doubt that Congress intended that its statement of the public interest in section 7101(a)(1) be ignored when examining the public interest element incorporated into section 7114(b)(4) through FOIA. Nor does *Reporters Committee* compel such a result.").

99. *FLRA v. Department of the Treasury*, 884 F.2d 1446, 1459 (D.C. Cir. 1989) (Ginsburg, J., concurring), *cert. denied*, 493 U.S. 1055 (1990).

cludes only "a *clearly* unwarranted invasion of personal privacy" (emphasis added), that difference between it and exemption 7(C) goes only to the *weight* of the privacy interest needed to outweigh disclosure.¹⁰⁰

In other words, even though the two exemptions differ in the weight of the privacy interests needed to prevent disclosure, the court did not think that standards of what may serve as a public interest also should be different depending on whether a case involved Exemption 7(C) or Exemption 6. Moreover, as the Seventh Circuit recognized, *Reporters Committee's* extensive reliance on an Exemption 6 case, *Department of the Air Force v. Rose*,¹⁰¹ further demonstrated the interchangeability of Exemption 6 and Exemption 7(C) analyses.¹⁰² Thus, the majority circuits argued that the Court's characterization of the public interest in Exemption 7(C) balancing as "opening agencies to public scrutiny"¹⁰³ also should be determinative in Exemption 6 cases involving the FLRS.

The majority circuits also disagreed with the minority circuits' contention that cases under the FLRS and FOIA should be treated differently depending on whether they arise under the FLRS or directly through FOIA. These courts showed that such an interpretation departs from the plain language of the FLRS. Neither the FLRS nor the Privacy Act calls for the introduction of a different public interest from that allowed under conventional FOIA jurisprudence. The dissenting opinion in the Third Circuit case *Department of the Navy* explained,

[S]ection [7114(b)(4) of the FLRS] requires employers to provide necessary information to federal sector union representatives only "to the extent not prohibited by law." Thus, Congress recognized the possible limitations of other statutory and decisional law. Nothing in the text of this section lessens the full thrust of such prohibiting laws; no reference is made to the independent public interest advanced by the Labor Statute. The majority interprets this statute to modify the FOIA itself by relying on the federal sector labor statute's own general objectives. Such an imaginative

100. *Id.* at 1451-52 (quoting 5 U.S.C. § 552(b)(6)).

101. 425 U.S. 352 (1976).

102. See *Department of the Navy v. FLRA*, 975 F.2d 348, 353 n.2 (7th Cir. 1992).

103. *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772-73 (quoting *Rose*, 425 U.S. at 372).

interpretation finds no support in the text of the statute; “to the extent not prohibited by law” notably lacks any qualification or modification.¹⁰⁴

Because the FLRS directly picks up the Privacy Act, which in turn directly implicates FOIA, there is no room within the statutes to include an additional public interest just because the disclosure request was initiated under the FLRS. As the D.C. Circuit stated, “[w]e do not believe we are entitled to engage in the sort of imaginative reconstruction that would be necessary to introduce collective bargaining values into the balancing process.”¹⁰⁵

As a result, the majority circuits insisted that the sole public interest to be considered in the FLRS cases was increasing the “public understanding of the operations or activities of the government,”¹⁰⁶ thus excluding consideration of any public interest in furthering the process of collective bargaining from Exemption 6 balancing. Furthermore, they held that this interest in “opening agencies to public scrutiny” was not served by disclosing the names and addresses of employees to federal unions.¹⁰⁷ Conse-

104. *FLRA v. Department of the Navy*, 966 F.2d 747, 769 (3d Cir. 1992) (Rosenn, J., dissenting). In her concurrence in *Department of the Treasury*, Judge Ginsburg also stated that

the logic of the court’s opinion [the majority circuits’ rationale] is irreproachable. The broad cross-reference in 5 U.S.C. § 7114(b)(4)—“to the extent not prohibited by law”—picks up the Privacy Act unmodified; that Act, in turn, shelters personal records absent the consent of the person to whom the record pertains, unless disclosure would be required under the Freedom of Information Act.

Department of the Treasury, 884 F.2d at 1457 (Ginsburg, J., concurring).

105. *Department of the Treasury*, 884 F.2d at 1453.

106. *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775 (1989) (quoting 5 U.S.C. § 552(a)(4)(A)(iii)).

107. See, e.g., *FLRA v. Department of Defense*, 984 F.2d 370, 375 (10th Cir. 1993) (stating that “disclosure of federal employees’ home addresses has nothing to do with public scrutiny of government activities”); *Department of the Navy v. FLRA*, 975 F.2d 348, 355 (7th Cir. 1992) (“The release of the names and home addresses of federal employees will not serve th[e] purpose [of letting the citizenry know what its government is up to].”).

The FLRA in these cases tried to argue that disclosure of employees’ names and addresses did serve the purpose of letting citizens know what their government was doing under a “derivative use theory,” whereby disclosure is said to contribute to a second-stage benefit advancing the public interest. For instance, there is “the potential that additional, publicly valuable information may be generated by further investigative efforts that disclosure of the [employees’ names and addresses] will make possible.” *Department of State v. Ray*, 112 S. Ct. 541, 550 (1991) (Scalia, J., concurring in part and concurring in the judgment). The D.C. Circuit suggested a hypothetical situation in which “the release of the employees’ home addresses would . . . make the work of an investigative reporter

quently, the majority circuits concluded that the privacy interests affected by the disclosure of employees' names and addresses necessarily outweighed the "nonexistent" public interest¹⁰⁸ and that therefore such disclosure would constitute a "clearly unwarranted invasion of personal privacy" under Exemption 6 of FOIA.

C. *The Supreme Court's Decision in Department of Defense v. FLRA*

In *Department of Defense v. FLRA*,¹⁰⁹ the Supreme Court agreed with the majority circuits' approach and held that federal sector labor unions may not receive access to employee lists under the FLRS.¹¹⁰ The Court held that for the purpose of FOIA analysis, it did not matter that *Reporters Committee* involved Exemption 7(C) and the FLRS cases involved Exemption 6, stating,

[T]he fact that *Reporters Committee* dealt with a different FOIA exemption than the one we focus on today is of little import. Exemptions 7(C) and 6 differ in the magnitude of the public interest that is required to override the respective privacy interests protected by the exemptions [H]owever, the dispositive issue here is the *identification* of the relevant public interest to be weighed in the balance, not the *magnitude* of that interest.¹¹¹

Because the principles of *Reporters Committee* were thereby applicable to the FLRS cases, the Supreme Court asserted that these standards must be followed. Accordingly, the "only relevant 'public interest in disclosure' to be weighed in [Exemption 6 balancing] is the extent to which disclosure would serve the 'core purpose of the FOIA,' which is 'contribut[ing] significantly to public understanding of the operations or activities of the govern-

attempting to ferret out 'what the government is up to' easier." *Department of the Navy*, 975 F.2d at 355 n.3 (quoting *Department of the Treasury*, 884 F.2d at 1452). To find that disclosure fulfills the public purpose of opening agency activity to public scrutiny, however, requires quite a stretch. As the Second Circuit recognized, "[c]ompelling disclosure of personal information, that has no relationship to an agency's activities, on so attenuated a basis would inevitably result in the disclosure of virtually all personal information, thereby effectively eviscerating the protections of privacy provided by Exemption 6." *FLRA v. Department of Veterans Affairs*, 958 F.2d 503, 512 (2d Cir. 1992); see also *Department of the Navy*, 975 F.2d at 355 n.3 ("To find a public interest in disclosure on so attenuated a basis would dismantle the privacy protections Congress erected through Exemption 6.")

108. See *Department of Defense*, 984 F.2d at 375.

109. 114 S. Ct. 1006 (1994).

110. *Id.* at 1009 (1994).

111. *Id.* at 1013 n.6.

ment.’”¹¹² Although the minority circuits argued that other policy considerations, such as the interest in collective bargaining, also should be included as part of FOIA analysis in FLRS cases, the Court “decline[d] to accept [this] ambitious invitation to rewrite the statutes before [it] and to disregard the FOIA principles reaffirmed in *Reporters Committee*.”¹¹³ The Court ruled that, as the majority circuits had previously argued, neither the FLRS nor the Privacy Act nor FOIA creates such a special standard for federal sector labor unions requesting employee lists.¹¹⁴ As a result, the Court stated that “the fact that respondents are seeking to vindicate the policies behind the Labor Statute is irrelevant to the FOIA analysis.”¹¹⁵

Applying *Reporters Committee*’s standard for Exemption 6 analysis, the Court found the public interest that would be furthered by the release of personnel data to the labor unions to be “negligible, at best.”¹¹⁶ According to the Court, “[d]isclosure of the addresses might allow the unions to communicate more effectively with employees, but it would not appreciably further ‘the citizens’ right to be informed about what their government is up to.’”¹¹⁷ The Court held that, on the other hand, the privacy interest of employees in the nondisclosure of personnel information is “not insubstantial,” stating that “it is clear that [employees] have *some* nontrivial privacy interest in nondisclosure, and in avoiding the influx of union-related mail, and, perhaps, union-related telephone calls or visits, that would follow disclosure.”¹¹⁸ Because this privacy interest outweighs a practically nonexistent public interest in disclosure, the Court agreed with the majority circuits that FOIA does not mandate the release of personnel information to federal sector unions and that the Privacy Act therefore prohibits such disclosure through the FLRS.¹¹⁹

112. *Id.* at 1012 (quoting *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775 (1989)) (alteration in original).

113. *Id.* at 1014.

114. *Id.*

115. *Id.*; see also *Reporters Comm.*, 489 U.S. at 771 (holding that “whether an invasion of privacy is warranted cannot turn on the purposes for which the request for information is made”).

116. *Department of Defense*, 114 S. Ct. at 1014.

117. *Id.*

118. *Id.* at 1015.

119. See *id.* at 1013-17.

Although the Supreme Court's holding was dictated by *Reporters Committee*,¹²⁰ the consequent nondisclosure of employee data to federal sector labor organizations does not properly balance the interests of the labor organizations and the agencies.¹²¹ The denial of the unions' access to personnel information does not satisfy the labor organizations' strong interest in disclosure. In the FLRS, Congress emphasized that collective bargaining serves the public interest.¹²² Moreover, because the courts have found that releasing employees' names and addresses to the unions furthers the process of collective bargaining, such disclosure must be seen as furthering the public interest.¹²³

Not only are the interests served by disclosure very strong, but the burden on the agencies in providing this information seems to be light. Many of the costs incurred by agencies in processing disclosure requests stem from the need to evaluate whether the requested material is exempt from disclosure.¹²⁴ Once disclosure of employees' names and addresses is held permissible under the FLRS, however, the agencies would not have to evaluate any information or records to determine whether future requests will fall within the exemptions of FOIA. Instead, agencies would need only to provide unions with a list of employees' names and addresses. This small burden on the agencies, in light of the significant public interest in disclosure, demonstrates that the respective interests would be more properly balanced if release of personnel data were permitted.

120. *Id.* at 1018 (Ginsburg, J., concurring) (stating that "[t]he Court convincingly demonstrates that *Reporters Committee*, unmodified, requires this result"); see also *FLRA v. Department of the Treasury*, 884 F.2d 1446, 1457 (D.C. Cir. 1989) (Ginsburg, J., concurring) (asserting that the majority circuits' approach is logically "irreproachable"), *cert denied*, 493 U.S. 1055 (1990).

121. Although the disclosure requests in these cases technically originate under the FLRS rather than under FOIA, they have the same practical effect as FOIA requests. Therefore, jurisprudence involving FLRS disclosure requests should be analyzed to see whether it adequately recognizes the public's right to disclosure (represented, here, by the unions) along with the agencies' interests.

122. See *supra* text accompanying note 60.

123. In fact, as Justice Ginsburg recognized in her concurrence and the majority noted in its opinion, the nondisclosure of personnel data to federal sector labor organizations creates a disparity between public and private sector unions. *Department of Defense*, 114 S. Ct. at 1019 (Ginsburg, J., concurring). This unequal treatment arises because private sector unions routinely have access to employee lists under the NLRA. *Id.* (citing *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *Prudential Ins. Co. of Am. v. NLRB*, 412 F.2d 77 (2d Cir.), *cert. denied*, 396 U.S. 928 (1969)).

124. See *supra* notes 11-13 and accompanying text.

Although this analysis of union and agency interests weighs in favor of the disclosure of employee information, the Court's decision in *Department of Defense* prohibits the release of such information. Even Justice Ginsburg, who expressed her discontent with *Reporters Committee*¹²⁵ and the resulting disparity between public and private sector unions, felt obliged to concur in the judgment because of the weight of judicial authority.¹²⁶ Justice Ginsburg acknowledged that Congress likely did not intend for the statutes to interact so as to prohibit the disclosure of employee data to public sector unions.¹²⁷ However, neither she nor the majority was willing to alter the FOIA precedent of *Reporters Committee*; they instead offered that "Congress may correct the disparity."¹²⁸ In fact, Justice Ginsburg had previously stated that Congress often needs to amend statutes that have created ambiguities and other problems: "Judges . . . regularly call in alarms to the legislature for the law revisions needed to curb or cohesively resolve litigation The problem has been that, too often, no one in Congress hears the plea."¹²⁹ Congress needs to respond to the plea in *Department of Defense* and amend either the FLRS, the Privacy Act, or FOIA to allow public sector labor unions access to personnel information.

III. *DEPARTMENT OF JUSTICE V. LANDANO*: THE FEDERAL BUREAU OF INVESTIGATION AND THE DISCLOSURE OF CONFIDENTIAL SOURCES AND INFORMATION UNDER FOIA

Under Exemption 7(D) of FOIA, an agency does not have to disclose

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforce-

125. Justice Ginsburg stated, "The *Reporters Committee* 'core purpose' limitation is not found in FOIA's language Just as the FOIA requestor confronts no 'core purpose' obstacle at the outset, no such limitation appears in the text of any FOIA exemption." *Department of Defense*, 114 S. Ct. at 1018-19 (Ginsburg, J., concurring).

126. Justice Ginsburg explained that "I am mindful . . . that the preservation of *Reporters Committee*, unmodified, is the position solidly approved by my colleagues, and I am also mindful that the pull of precedent is strongest in statutory cases." *Id.* at 1019 (Ginsburg, J., concurring).

127. *Id.*

128. *Id.* at 1016.

129. Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1420, 1429 (1987).

ment records or information . . . could reasonably be expected to disclose the identity of a *confidential source*, . . . and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation . . . , information furnished by a *confidential source*.¹³⁰

According to the Conference Report on the 1974 amendments to FOIA, a source is confidential if the source "provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred."¹³¹ The Federal Bureau of Investigation (FBI) rarely can demonstrate that its sources received an express assurance of confidentiality. Thus, the issue arose as to how the FBI may show that a source was operating under an implied assurance of confidentiality and thereby exempt information involving confidential sources from disclosure under Exemption 7(D) of FOIA. Until the U.S. Supreme Court's decision in *United States Department of Justice v. Landano*,¹³² the circuit courts were split over how the FBI may prove such an assurance.

A. Background

In *Lame v. Department of Justice*,¹³³ the Third Circuit adopted a lone minority position regarding how the FBI could show that a source operated under an implied assurance of confidentiality. The court declared that "[w]hether there is an expressed or implied assurance of confidentiality is a question of fact to be determined in regard to each source."¹³⁴ To establish this fact, the FBI must provide a court "with detailed explanations relating to each alleged confidential source."¹³⁵ The court rejected the contention that the FBI's evidentiary burden could be met by the agency's bare assertion that "information was furnished by a confidential source and it is exempt."¹³⁶ Instead, the court insisted

130. 5 U.S.C. § 552(b)(7)(D) (emphasis added).

131. S. CONF. REP. NO. 1200, 93d Cong., 1st. Sess. 13 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6291.

132. 113 S. Ct. 2014 (1993).

133. 654 F.2d 917 (3d Cir. 1981).

134. *Id.* at 923 (citation omitted).

135. *Id.* at 928.

136. *Id.* at 924 n.7 (quoting 120 CONG. REC. 36,871 (1974) (statement of Sen. Hart)). The court in *Lame* also stated that, as of that time, no other court granted the FBI a presumption of sources' confidentiality. *Id.*

that only detailed explanations could show whether a person had provided information under an implied assurance of confidentiality.¹³⁷

All the other circuits that considered the issue, on the other hand, held that “promises of confidentiality are inherently implicit in FBI interviews conducted pursuant to a criminal investigation.”¹³⁸ These circuits noted two policy rationales supporting such a presumption of confidentiality. First, it ensured that sources themselves would be protected.¹³⁹ Without a blanket presumption, there would always be the chance that some individual’s confidentiality might be breached with the possible result of harm to the informant. Second, the presumption of confidentiality was necessary “to insure the continuing efficacy of FBI criminal investigation.”¹⁴⁰ According to the Eleventh Circuit,

[A] rule requiring the FBI to produce evidence regarding each individual source’s particular expectations as to confidentiality would cause potential sources to fear that the information they relay to the FBI will become public knowledge along with their identity and the fact that they freely disclosed the information to the FBI. Moreover, it is beyond dispute that an increased fear of exposure would chill the public’s willingness to cooperate with the FBI in the course of criminal investigations.¹⁴¹

Thus, according to the majority circuits, a presumption of confidentiality was essential, not only to protect FBI sources, but also to allow the FBI to continue to receive information and carry out its investigative functions effectively.

B. *The Supreme Court’s Holding in Landano*

In *Landano*, the Court opted for neither the approach advocated by the majority circuits nor the Third Circuit approach. Instead, the Court established an intermediate approach that allows

137. *Id.* at 928-29.

138. *Miller v. Bell*, 661 F.2d 623, 627 (7th Cir. 1981) (per curiam), *cert. denied*, 456 U.S. 960 (1982); *see also Nadler v. Department of Justice*, 955 F.2d 1479, 1486 (11th Cir. 1992); *Schmerler v. FBI*, 900 F.2d 333, 337 (D.C. Cir. 1990); *Keys v. Department of Justice*, 830 F.2d 337, 345 (D.C. Cir. 1987); *Donovan v. FBI*, 806 F.2d 55, 61 (2d Cir. 1986); *Johnson v. Department of Justice*, 739 F.2d 1514, 1517-18 (10th Cir. 1984); *Ingle v. Department of Justice*, 698 F.2d 259, 269 (6th Cir. 1983).

139. *See, e.g., Miller*, 661 F.2d at 627-28.

140. *Id.* at 627.

141. *Nadler*, 955 F.2d at 1486.

the FBI to demonstrate confidentiality in certain situations while denying the Bureau a categorical presumption of confidentiality for all sources.

The Court rejected as unsound an implicit presumption of confidentiality in all situations. The Court recognized that, although many sources likely provide information under an expectation of confidentiality, the FBI had not shown that all its sources have such expectations.¹⁴² The Court noted the wide variety of sources that provide information to the FBI, from “the paid informant who infiltrates an underworld organization” and “the eyewitness to a violent crime” to “the telephone company that releases phone records” and “the state agency that furnishes an address.”¹⁴³ Although confidentiality would be very important to those such as the paid informants and key witnesses, it would be unrealistic to assume that all FBI informants, such as the telephone company, believe they are speaking to the FBI confidentially.¹⁴⁴ In light of this wide diversity of sources, the Court asserted that a blanket presumption of confidentiality for all FBI sources would be unreasonable.¹⁴⁵

The Court also stated that a blanket presumption for the FBI would be unfair to FOIA requestors seeking to ascertain the source of the FBI’s information. The Court noted that in *Basic Inc. v. Levinson*,¹⁴⁶ a securities case, it had upheld the use of presumptions that comport with “fairness, public policy, and probability, as well as judicial economy.”¹⁴⁷ The *Landano* Court asserted that a blanket presumption in favor of the FBI would not promote fairness, because it would almost always result in the denial of FOIA requests.¹⁴⁸ Even the government recognized that the presumption it was seeking would become essentially irrebuttable in practice.¹⁴⁹ Under such a presumption, once the FBI stated that information had been provided by a confidential source, the person seeking disclosure probably would not have access to any

142. *Department of Justice v. Landano*, 113 S. Ct. 2014, 2020 (1993).

143. *Id.* at 2021.

144. *Id.*

145. *Id.* at 2022.

146. 485 U.S. 224 (1988).

147. *Id.* at 245.

148. *Landano*, 113 S. Ct. at 2022.

149. *Id.*

evidence concerning whether the FBI source actually had operated under an assurance of confidentiality.

Additionally, the Court noted that *Reporters Committee* does not support a blanket presumption of confidentiality for the FBI under Exemption 7(D). In *Reporters Committee*, the Court held that FBI rap sheets are exempt from disclosure because they categorically constitute an unwarranted invasion of privacy under Exemption 7(C).¹⁵⁰ The Court allowed this presumption because the privacy interests in the nondisclosure of rap sheets invariably outweigh the public interest in their disclosure. In *Landano*, the Court acknowledged that “when certain circumstances characteristically support an inference of confidentiality, the Government similarly should be able to claim an exemption under Exemption 7(D) without detailing the circumstances surrounding a particular interview.”¹⁵¹ However, Exemption 7(D) does not lend itself to a similar categorical presumption because of the variety of FBI sources.

The *Landano* Court also considered the legislative history of Exemption 7(D). In its argument for a presumption of confidentiality for the FBI, the government offered evidence that legislators had been concerned about the importance of confidentiality to the FBI.¹⁵² The Court, however, responded that Congress’s recognition of the FBI’s interest in confidentiality did not mean that “Congress intended for the Bureau to be able to satisfy its burden in every instance simply by asserting that a source communicated with the Bureau during the course of a criminal investigation.”¹⁵³ If Congress had intended this, then, according to the Court, “it could have done so much more clearly.”¹⁵⁴

Despite its rejection of a blanket presumption of confidentiality, the Court refrained from adopting *Lame*’s requirement that the FBI provide detailed explanations each time it alleged the confidentiality of a source.¹⁵⁵ Instead, *Landano* established that the FBI must “point to more narrowly defined circumstances that will support the inference” that a source is confidential and provided guidelines for how the FBI should demonstrate these circumstanc-

150. *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989) (Blackmun, J., concurring).

151. *Landano*, 113 S. Ct. at 2022.

152. *See id.* (quoting 120 CONG. REC. 17,037 (1974) (statement of Sen. Thurmond)).

153. *Id.* at 2023.

154. *Id.*

155. *See Lame v. Department of Justice*, 654 F.2d 917, 928 (3d Cir. 1981).

es.¹⁵⁶ In particular, the Court pointed to two factors—“the character of the crime at issue” and “the source’s relation to the crime”—that “may be relevant to determining whether a source cooperated with the FBI with an implied assurance of confidentiality.”¹⁵⁷ For example, the Court stated that, on consideration of these two factors, a reviewing court should infer that a witness to a gang-related murder would have provided the FBI with information only if there had been some assurance of confidentiality.¹⁵⁸

Furthermore, the Court remarked that there are “generic circumstances in which an implied assurance of confidentiality” should be inferred.¹⁵⁹ The Court provided the example of a paid informant whose ongoing relationship with the Bureau would make it reasonable for a court to infer an assurance of confidentiality.¹⁶⁰ The illustrations given in *Landano* are not the only factors and generic circumstances available to the FBI for demonstrating an inference of confidentiality; the Bureau may try to use other means as well.¹⁶¹ By providing these methods for the FBI to demonstrate an assurance of confidentiality, *Landano* does not go as far as to allow the Bureau a blanket presumption of confidentiality, but it does provide adequate means for the FBI to prove that nondisclosure is warranted under Exemption 7(D) of FOIA due to a source’s expectation of confidentiality.

In *Landano*, the Court properly addressed both the public’s right to disclosure and the FBI’s interests as it determined the Bureau’s evidentiary burden under Exemption 7(D). The Court established an intermediate approach, rather than either allowing the government a complete presumption of confidentiality or forcing the FBI to provide detailed explanations establishing confidentiality for each source. This position adequately protects the right of the public to disclosure of FBI materials. By requiring the FBI to “point to more narrowly defined circumstances”¹⁶² rather than

156. *Landano*, 113 S. Ct. at 2023.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. The Court stated that “[t]here may well be other generic circumstances in which an implied assurance of confidentiality fairly can be inferred.” *Id.* In addition, when the Court listed the two factors that can be used to support such an inference, it used the introductory phrase “for example” to indicate that these are only suggestions and not exclusive factors for establishing confidentiality. *Id.* at 2024.

162. *Id.* at 2023.

merely asserting that a source is confidential, the Court allowed the FOIA requestor an opportunity to argue that particular circumstances do not warrant an inference of confidentiality. If the Court instead had allowed a presumption of confidentiality for all the FBI's sources, FOIA requestors would have difficulty rebutting the presumption.¹⁶³

The *Landano* Court also recognized the interests of the FBI. The Court realized that the approach established by the Third Circuit in *Lame*, requiring detailed explanations from the FBI for every source, would greatly burden the Bureau. Even the Third Circuit had previously acknowledged the possibility that its holding would "unduly tax limited FBI resources."¹⁶⁴ Thus, the Court's decision in *Landano* places as minimal a burden as possible on the FBI while ensuring that the public's right to disclosure under FOIA is protected.

IV. THE CLINTON ADMINISTRATION'S 1993 FOIA GUIDELINES FOR FEDERAL AGENCIES AND DEPARTMENTS

On October 4, 1993, President William Clinton and Attorney General Janet Reno issued memoranda to the heads of federal departments and agencies on how to satisfy the rules and spirit of FOIA. These memoranda established new guidelines that rescinded the Reagan administration rules of 1981 and demonstrated the Clinton administration's desire to instill in federal agencies a more receptive attitude toward FOIA requests.

In his executive memorandum, President Clinton described the new open approach that he wants agencies to adopt toward FOIA requests. Clinton declared that he is "committed to enhancing [FOIA's] effectiveness in [his] Administration" and stressed that FOIA plays a "unique role in strengthening our democratic form of government."¹⁶⁵ To meet these goals, Clinton

call[ed] upon all Federal departments and agencies to renew their commitment to the Freedom of Information Act, to its underlying principles of government openness, and to its sound admin-

163. See *id.* at 2022 (noting that "very rarely will [the requestor] be in a position to offer persuasive evidence that the source in fact had no interest in confidentiality").

164. *Landano v. Department of Justice*, 956 F.2d 422, 435 (3d Cir. 1992), *vacated*, 113 S. Ct. 2014 (1993).

165. Memorandum from President William J. Clinton for Heads of Departments and Agencies 1 (Oct. 4, 1993) (on file with author).

istration. This is an appropriate time for all agencies to take a fresh look at their administration of the Act, to reduce backlogs of Freedom of Information Act requests, and to conform agency practice to the new litigation guidance issued by the Attorney General¹⁶⁶

By following this new approach, agencies, according to Clinton, will abide by the spirit of FOIA and further the democratic purposes Congress intended FOIA to serve.

Attorney General Reno's memorandum reinforced and applied the President's message.¹⁶⁷ Following Clinton's order that agencies be more open to FOIA requests, Reno rescinded the Department of Justice's 1981 FOIA guidelines that had been issued by the Reagan administration.¹⁶⁸ Under the Reagan guidelines, the Department of Justice defended federal agencies in FOIA suits if there was a "substantial legal basis" for denying the FOIA request.¹⁶⁹ This standard allowed agencies to scrutinize FOIA requests carefully, rejecting borderline ones that technically fell within a FOIA exemption, and still receive the support of the Justice Department in court. Reno's guidelines reversed this policy and provided that the Department of Justice will "defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption."¹⁷⁰ Under this new standard, agencies should not withhold information merely because the data "might technically or arguably fall within an exemption."¹⁷¹ The Department of Justice now will "apply a presumption of disclosure" when deciding whether to defend an agency in a FOIA suit.¹⁷²

Reno's memorandum also requested that the U.S. Attorneys and the Assistant Attorneys General for the Department's Civil and Tax Divisions review the merits of all pending FOIA litigation in light of the new guidelines. In addition, Reno instructed the

166. *Id.*

167. *See* Reno Memo, *supra* note 19.

168. *See* Letter of Attorney General William French Smith to All Federal Departments and Agencies (May 5, 1981), *cited in* Christopher M. Mason, Note, *Developments Under the Freedom of Information Act—1981*, 1982 DUKE L.J. 423, 425 n.17.

169. *Id.*

170. Reno Memo, *supra* note 19, at 1.

171. *Id.*

172. *Id.*

Department of Justice to review and revise all regulations relating to FOIA and to examine all current FOIA forms for their accuracy and clarity. In an attempt to address the large backlogs at the federal agencies in processing FOIA requests, Reno also requested that each agency send to the Department of Justice its annual FOIA report for 1992 to Congress, along with a description of the agency's current FOIA backlog and staffing difficulties. Reno concluded that these efforts should improve the effectiveness of FOIA and make "the executive branch more open, more responsive, and more accountable."¹⁷³

Although the memoranda from President Clinton and Attorney General Reno clearly recognized the importance of the public's interest in disclosure under FOIA, they failed to protect agency interests adequately. Reno's memorandum did acknowledge the burden on agencies in processing FOIA requests, which is currently manifested by the large backlogs at many federal agencies. In her memorandum, she stated that the Department of Justice would review the backlogs at each federal agency and work with the agencies and Congress to alleviate the agencies' problems.¹⁷⁴ However, by requiring greater compliance from agencies without first resolving the agencies' difficulties in processing requests, the executive guidelines are likely to aggravate the burden on the agencies and increase the resulting FOIA backlogs. The new standards likely will increase the number of FOIA requests because of the mandate that agencies apply a "presumption of disclosure."¹⁷⁵ At the same time, the new memoranda do not provide for more resources or other means for the agencies to accommodate the demand, making it all the more difficult for agencies to consider and fulfill each FOIA request promptly. A more sensible approach would have been first to study the current problems of the agencies in handling FOIA requests and then, only after having established a plan to ease the agencies' burdens, to alter the guidelines for agencies under FOIA. By focusing instead on the public's interest in disclosure and inadequately addressing the interests of the federal agencies, the Clinton administration's 1993 FOIA guidelines will only further hamper the public's access to government information.

173. *Id.* at 3.

174. *Id.*

175. *Id.* at 1.

V. CONCLUSION

In 1993 and early 1994, high costs and backlogs continued to hamper the administration of FOIA. Recent developments under FOIA, however, demonstrated only mixed success in addressing both the public's right to disclosure and agency interests. On the one hand, the Supreme Court's decision in *Landano* illustrated a proper effort to provide for adequate disclosure while minimizing the burden on the FBI. Moreover, the approach indicated by the Supreme Court in *Kay* and followed by the D.C. Circuit in *Benavides* concerning the right of pro se litigants to attorney's fees also resulted in an adequate balancing of interests under FOIA. On the other hand, the denial of access by federal sector unions to lists of employees' names and addresses as a result of the Supreme Court's decision in *Department of Defense v. FLRA* likely will have to be remedied by Congress to reach a result that accommodates the interests of both the public and the agencies. Finally, the executive memoranda issued in October 1993 by the Clinton administration failed to address realistically the large burden that FOIA requests have placed on federal agencies. Unless these concerns are recognized by the courts and the executive branch, the current unanticipated problems of FOIA will continue, frustrating Congress's purpose of establishing the right to access government information.