DEVELOPMENTS UNDER THE FREEDOM 
OF INFORMATION ACT—1975

Although 1975 marked the ninth year since the enactment of the Freedom of Information Act (FOIA), the Act, as in previous years, continued to be the source of much litigation and the subject of significant judicial interpretation. This litigation was in part the product of new questions raised by the recent amendments to the FOIA which took effect in 1975. Yet a number of issues not at all related to the amendments received judicial attention as well. Of major importance in this regard were three Supreme Court decisions in which the Court resolved for the first time several areas of uncertainty, as its general approach to the proper construction of the Act began to crystallize.

The 1975 litigation under the FOIA focused on a wide range of specific questions. First, the courts again addressed the recurring issue of whether traditional equity powers are available to courts enforcing the Act. In addition, the mandate to disclose “final opinions” and its relationship to the exemptions received attention by the Supreme Court in two of its three decisions. Finally, three of the Act’s nine exemptions were the subject of significant judicial interpretation: the intra-agency memorandum exemption, the statutory exemption, and the newly amended investigatory records exemption. The purpose of this Note is to describe these developments and attempt to evaluate their impact in

THE FOLLOWING CITATIONS WILL BE USED IN THIS NOTE:


5. Id. § 552(b)(5).

6. Id. § 552(b)(3).

terms of the underlying policy of the FOIA which favors the disclosure of information acquired by the federal government.

POWER OF THE COURTS UNDER THE FOIA

A recurring issue in FOIA litigation is to what extent traditional equity powers are available to the courts for the enforcement of the Act. Two particular questions arising from that issue were the subject of FOIA litigation in 1975: (1) whether courts have the power to enjoin administrative proceedings pending the ultimate resolution of an FOIA claim, and (2) whether courts have the equitable power to refuse to order disclosure of material which is not otherwise exempt under the Act.

Power to Enjoin Ongoing Agency Proceedings

The FOIA does not expressly grant courts the power to enjoin administrative proceedings pending a decision on the merits of a related FOIA action. Nevertheless, courts have generally been willing in appropriate cases to imply such equitable power, and those courts which faced the issue in 1975 continued to support this position. In *General Cigar Co. v. Nash,* General Cigar sought from the National Labor Relations Board certain statements by witnesses taken by the Board in its prosecution of an unfair labor practice complaint against the company. Also requested was a preliminary injunction enjoining the Board from hearing the case pending final adjudication of the FOIA claim. Though refusing to issue the injunction, the court recognized that such relief would have been appropriate if the company had been able to establish that it would have suffered irreparable injury absent an injunction. The question was also addressed by a single judge of the

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8. See *FOIA Developments* 417-42.


10. See *id.* at 19-20 (dictum); *Sears, Roebuck & Co. v. NLRB,* 473 F.2d 91, 93 (D.C. Cir. 1972) (per curiam), *cert. denied,* 415 U.S. 950 (1974); *Bristol-Myers Co. v. FTC,* 424 F.2d 935, 940 (D.C. Cir.), *cert. denied,* 400 U.S. 824 (1970). See also *FOIA Developments* 419-21 (arguing that *Bannercraft* "suggests that, in a proper case, an FOIA court may enjoin other ongoing administrative proceedings.")


12. *Id.* "[A] preliminary injunction is an injunction that is issued to protect a plaintiff from irreparable injury and to preserve the court's power to render a meaningful decision after a trial on the merits." *11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE* § 2947 (1973). It is a matter for the trial court's discretion. *Id.*

13. *36 Ad. L.2d* at 1073-74. See generally *11 C. WRIGHT & A. MILLER,* *supra* note 12, § 2948 (“Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a showing of irreparable harm.").
Seventh Circuit in Encyclopedia Britannica, Inc. v. FTC,\textsuperscript{14} where the corporation, a respondent in a pending FTC proceeding, asked the court to enjoin the proceeding until it "had an adequate opportunity to pursue [its] remedies" under the FOIA.\textsuperscript{15} Although the court again denied the motion, reasoning that to go forward with the administrative proceeding would not "irreparably foreclose the possibility of adequate relief,"\textsuperscript{16} its approach to the question makes clear its assumption that it had the power to grant injunctive relief.

Both General Cigar and Encyclopedia Britannica suggest that courts do possess the equitable power to enjoin administrative proceedings pending the outcome of an FOIA action. Yet those same cases also make clear that courts will not readily find that the moving party has made the requisite showing of irreparable injury, and thus will seldom grant such relief. The policy reason for this reluctance is a relatively straightforward one: "there is a significant public interest in permitting litigation to go forward on an orderly basis and in avoiding delays and interruptions to orderly procedure . . . ."\textsuperscript{17} Thus, at least where an FOIA plaintiff has not yet demonstrated a right to specific documents, he is not likely to be able to enjoin concurrent administrative proceedings pending the outcome of his FOIA litigation.

A somewhat different situation arises when the FOIA plaintiff, after obtaining relief, asks the court to enjoin an administrative proceeding until the agency complies with the court's order to produce the documents sought.\textsuperscript{18} A request of this type was made in Title Guaranty...
tee Co. v. NLRB,19 where the company, which had been charged by the
NLRB with an unfair labor practice, asked the court to enjoin the Board
from conducting hearings until the Board complied with the court's
order to turn over certain material relevant to those hearings.20 After
concluding that it did have the power to grant such relief,21 and finding
that "the nature of an unfair labor practice proceeding is such that
plaintiff will be irreparably harmed if the material is not disclosed prior
to those hearings," the court enjoined the Board "from conducting any
hearings in this matter until such time as it complies with this deci-
sion."22

The result reached by the court in Title Guarantee on the issue of
irreparable injury should be contrasted with that reached in General
Cigar.23 In both cases the FOIA plaintiff sought to enjoin an NLRB
unfair labor practice hearing until it had a chance to examine certain
statements by witnesses in the possession of the Board. Finding poten-
tial irreparable injury to the plaintiff, the court in Title Guarantee
granted the injunction, while the court in General Cigar reached the
opposite conclusion. The only real difference between the cases is that
the plaintiff in the former had already demonstrated his right to the
documents, whereas in the latter the plaintiff sought the injunction
pending proof of the FOIA claim. This difference is hardly sufficient
to distinguish the cases on the question of irreparable harm. So long as
the General Cigar plaintiff could prove some chance of ultimately
succeeding on the merits, he would be at precisely the same disadvan-
tage in the unfair labor practice hearing as would a plaintiff who had
already established a right to material under the FOIA, but who did not
have the benefit of that material at the hearing due to the recalcitrance
of the agency.

It is suggested, however, that the cases are reconcilable, for if one
looks beneath the irreparable harm language employed by both courts, it
is possible to detect a broader concern. Not only does it appear that
the courts take into account the extent to which the plaintiff may be in-
jured if an injunction is not issued, but they also consider the extent to

20. Id. at 686.
21. Id. at 688. The court relied heavily on the Supreme Court's dictum in
Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1 (1974), that "[w]ith the
express vesting of equitable jurisdiction in the district court by § 552(a) there is little to
suggest, despite the Act's primary purpose, that Congress sought to limit the inherent
powers of an equity court." Id. at 20.
23. See notes 11-13 supra and accompanying text.
which an injunction will disrupt the administrative process and whether the remedy will promote the disclosure goals of the Act. There are thus three policy reasons which arguably might persuade a court to grant an injunction to a plaintiff who has already demonstrated his right to government information under the FOIA while refusing to issue that injunction to a similarly situated plaintiff who has not yet won his FOIA claim. First, a plaintiff who has won on the merits is not likely to be using the FOIA injunction merely to delay the orderly administrative process. Second, granting an injunction to the successful FOIA litigant may be viewed as a direct means of promoting one goal of the Act—to get the information into the public domain while the public has some use for it. If the administrative hearing to which the information is relevant is conducted after a court has ordered disclosure but before the material is made available to the plaintiff, he has won a pyrrhic victory indeed. Finally, issuing an injunction only after it has been settled that the FOIA requires disclosure of the information in question ensures that any delay of the administrative process will be the fault of the agency itself. The sooner it produces the documents over which it has control, the sooner it can conduct its business.

Discretion to Refuse to Compel Disclosure of Non-exempt Information

A related and perhaps more important question which arises under the FOIA is whether a court has equitable discretion to refuse to compel disclosure of non-exempt information. At least one distinguished commentator and several courts have indicated that such equitable discretion does exist, relying on some of the language in the Act itself and certain parts of its legislative history. The majority of the courts which have considered the matter, however, have declined to find equitable discretion to refuse to compel disclosure of non-exempt information. These courts also rely upon the language of the Act and

25. K. Davis, ADMINISTRATIVE LAW TREATISE § 3A.6 (Supp. 1970). Professor Davis relies on the language in the statute which gives the district court “jurisdiction to enjoin” an agency from withholding information. See note 27 infra. In his view “the word ‘enjoin’ is enough to invoke the traditions of equity. And an equity court by its intrinsic nature has a discretionary power to refuse to participate in bringing about results that are inconsistent with sound equitable practice.” Id.
26. See FOIA Developments 424 n.35 and cases cited therein.
27. The support for this interpretation is discussed in id. 424-25 & nn.36-37. The language in the FOIA itself on which the courts have relied provides that “[o]n complaint, the district court . . . has jurisdiction to enjoin the agency from withholding records . . . .” 5 U.S.C.A. § 552(a)(4)(B) (Supp. 1976).
29. “This section does not authorize withholding of information or limit the availa-
parts of the legislative history.\footnote{The Supreme Court has not directly faced the issue, although there is a dictum in Renegotiation Board v. Bannercraft Clothing Co.\cite{footnote31} which, if read broadly, could be taken to sanction such equitable discretion. Specifically, the Court stated that “there is nothing [in the FOIA] to suggest . . . that Congress sought to limit the inherent powers of an equity court.”\cite{footnote32}}

In \textit{Fruehauf Corp. v. IRS},\cite{footnote33} the only 1975 case to address the question, the government, relying on \textit{Bannercraft}, asked the Sixth Circuit Court of Appeals to reverse the district court's decision to order release of non-exempt information.\footnote{The court, however, refused to interpret the \textit{Bannercraft} dictum broadly. Rather, it distinguished \textit{Bannercraft} as dealing with the issue of whether a court has equitable discretion to grant additional remedies (for instance, injunctions against ongoing administrative proceedings) in order to effectuate the purposes of the Act, and not as involving the question of whether a court has discretion to withhold relief otherwise mandated by the Act.\cite{footnote35}} The \textit{Fruehauf} court found the legislative history of the Act demonstrative of a clear intent to preclude the exercise of the latter equitable power.\footnote{Almost unquestionably the court reached the correct result. The FOIA is a mandate for disclosure, and contains only narrow exceptions. If it is to have the effect of making access to government information an orderly, reasonably predictable, and less arbitrary process, the grounds for nondisclosure must be confined to those situations expressly enumerated in the Act. Only in this manner will the statute realize its potential

\footnotetext[30]{5 U.S.C. § 552(c) (1970); \textit{FOIA Developments} 425 n.39.}
\footnotetext[31]{\textit{Id.} at 425.}
\footnotetext[32]{415 U.S. 1, 20 (1974); \textit{cf. FOIA Developments} 424.}
\footnotetext[33]{415 U.S. at 20.}
\footnotetext[34]{522 F.2d 284 (6th Cir. 1975).}
\footnotetext[35]{\textit{Id.} at 286. The documents sought were mostly “unpublished private and letter rulings relating to the manufacturers' excise tax as imposed upon sales of trucks and trailers.” \textit{Id.} The case was before the circuit court on an appeal by the government from an order that the documents be made available without deletion subject to \textit{in camera} review by the district court. \textit{Id.}}
to create an atmosphere in which disclosure of government information without endless litigation is the norm and not, as it has been, the exception.\footnote{37}

\textbf{FINAL OPINIONS: A LIMITATION ON THE SCOPE OF THE EXEMPTIONS}

An important issue which received Supreme Court attention in 1975 is whether the affirmative disclosure provisions of the FOIA\footnote{38} limit the scope of the exemptions.\footnote{39} Since the Act explicitly states that the affirmative disclosure provisions do not apply to material which falls within any of the enumerated exemptions,\footnote{40} one might conclude that once an exemption is found to apply, the affirmative disclosure provisions become irrelevant.\footnote{41} It might also be argued, however, that given the vague language of most of the exemptions, the limitations on their scope are necessarily provided in part by both legislative history and the rest of the Act. If one assumes that the affirmative disclosure provisions and the exemptions are mutually exclusive, then the fact that a particular document has characteristics of both categories may lead to the conclusion that the congressional intent was to exclude such a document altogether from the scope of the exemption.\footnote{42}

\footnote{37. It should be noted, however, that courts do not always opt for a narrow construction of the exemptions. Indeed, in its analysis of the statutory exemption, 5 U.S.C. § 552(b)(3) (1970), the Supreme Court construed the exemption in such a way as to leave the application of that exemption in the virtually unrestrained discretion of any agency which can invoke a broad withholding statute. FAA Administrator v. Robertson, 95 S. Ct. 2140 (1975). For a full discussion of the case and the statutory exemption see notes 166-87 infra and accompanying text.}

\footnote{By analogy to Robertson, where the Court refused to find a repeal by implication of existing withholding statutes in the absence of an explicit congressional authorization, the Court might find that the FOIA did not divest the courts of their traditional equity power by implication. The analogy, however, is a weak one because in Robertson the Court refused to find another statute repealed by implication, whereas in the case of divesting the courts of a part of their equity powers, no express congressional grant of those powers exists.}

\footnote{38. E.g., 5 U.S.C.A. § 552(a)(2)(A) (Supp. 1976) "Each agency . . . shall make available for public inspection and copying . . . final opinions . . . made in the adjudication of cases . . . ."}

\footnote{39. \textit{Id.} §§ 552(b)(1)-(9).}

\footnote{40. 5 U.S.C. § 552(b) (1970): "This section [section 552] does not apply to matters that are [specifically enumerated in the exemptions]."}

\footnote{41. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 154 n.21 (1975) ("Technically . . . if a document could be . . . both a 'final opinion' and an intra-agency memorandum within Exemption 5, it would be nondisclosable, since the Act 'does not apply' to documents falling within any of the exemptions.").}

\footnote{42. See 5 U.S.C. § 552(b) (1970); \textit{Intra-Agency Memoranda Exemption} 1059. See note 41 supra.}
The Supreme Court addressed this general issue in two separate contexts in 1975. First, the Court was called on to delineate the relationship between the exemption for intra-agency memoranda and the Act's mandate that "[e]ach agency . . . shall make available for public inspection and copying final opinions . . . made in the adjudication of cases." Second, it addressed the question whether the express incorporation of an otherwise exempt document into such a "final opinion" removes the document from exempt status.

It is by no means clear from the face of the FOIA how a court should treat a document that is a "final opinion" under the Act, and thus must be disclosed, but that also arguably qualifies under exemption which excludes from the Act's disclosure provisions "intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." As noted above, a literal reading of the statute suggests that the requirement to disclose final opinions simply does not apply to material which falls within the exemption. Nevertheless, the Supreme Court in *NLRB v. Sears, Roebuck & Co.*, adopting the analysis used by the lower courts which had previously considered the question, found that the express mandate to disclose "final opinions" does indeed limit the scope of the intra-agency memorandum exemption. In this case, Sears argued that the NLRB was required to disclose the documents in question since they were "expressions of legal and policy decisions already adopted by the agency and constitute[d] 'final opinions' and 'instructions to staff that affect a member of the public.'" The NLRB, on the other hand, contended

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45. Id.
47. 421 U.S. 132 (1975). Other aspects of Sears are discussed at notes 69-81, 100-126 infra and accompanying text.
48. Sterling Drug, Inc. v. FTC, 450 F.2d 698, 708 (D.C. Cir. 1971) (relying on policy of the Act to prevent the development of secret law); American Mail Line, Ltd. v. Gullick, 411 F.2d 696, 703 (D.C. Cir. 1969). See also *Intra-Agency Memorandum Exemption* 1059-61 (arguing that an "adopted policy" limitation to the intra-agency memorandum exemption is consistent with the policies underlying that exemption).
49. 421 U.S. at 137, quoting 5 U.S.C. §§ 552(a)(2)(A), (C). Sears had requested certain Advice and Appeals Memoranda generated by the Office of the General Counsel of the NLRB during the process by which that office determined whether to file a complaint with the full Board on behalf of the charging party. 421 U.S. at 135-36. In order to have a complaint heard before the full NLRB, an aggrieved party must first bring his charge before the Office of General Counsel, to which Congress has delegated the unreviewable authority to determine whether a complaint will be filed. 29 U.S.C. § 153(d), 160(b) (1970). In most instances the General Counsel has delegated the power to make the initial determination whether to issue a complaint to a Regional
that even if the documents were "final opinions," they still fell within the intra-agency memorandum exemption. Rejecting the NLRB's argument, the Court found that "[e]xemption 5 does not apply to any document which falls within the meaning of the phrase 'final opinion . . . made in the adjudication of cases' . . . ." In other words, once it has been determined that a particular document is a "final opinion," the document must be released regardless of the fact that it also arguably qualifies as an intra-agency memorandum.

The Court's interpretation seems entirely supportable. Given the ambiguities of the intra-agency memorandum exemption, it is quite sensible to look to other sections of the Act in order to define its scope. In essence what the Court did was to balance the ultimate goal of the FOIA, which is reflected in the mandate to disclose "final opinions," against the interests which the exemption was intended to protect and the damage which might result to those interests should the documents in question be disclosed. The Court justified its interpretation by looking to the policy behind the intra-agency memorandum exemption. Since final opinions are essentially post-decisional documents,

Director. 29 C.F.R. § 101.2 (1975). After an investigation, id. § 101.4, if the charge has no merit the Regional Director will so inform the complainant. Id. § 101.5. The complainant then has the right to appeal to the General Counsel. Id. § 101.6. The General Counsel reaches a decision which is set forth in an Appeals Memorandum, which is sent to the Regional Director who simply follows its instructions. 421 U.S. at 140-41.

When certain issues designated by the General Counsel are raised by a complainant's charge, the Regional Board must first submit the charge to the General Counsel's advice branch. A committee of high-ranking members of the General Counsel's office studies the matter and makes a recommendation. The General Counsel decides the issue and communicates his decision to the Regional Director in an Advice Memorandum. The memorandum contains the General Counsel's answer to the legal or policy issue, together with a detailed legal rationale and instructions for the final processing of the case. Based on this, the Regional Director renders his decision and, if it is adverse to the complainant, informs him of his right to appeal. Id. at 141-42. This right to appeal is illusory since, as a practical matter, the General Counsel has already considered the question. Id. at 157-58. The practical effect of this administrative scheme is that a party believing himself the victim of an unfair labor practice "can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of General Counsel that his claim is sufficiently meritorious to warrant Board consideration." Id. at 139.

50. 421 U.S. at 138.
51. Id. at 148, 153-54.
52. Id. at 154 n.21. See note 42 supra and accompanying text. This approach avoids the technical operation of the language in the FOIA which makes the Act inapplicable to any documents falling within any of the exemptions.
53. See id. at 153. The purpose of exemption 5 is to permit the agency to withhold documents which reflect the agency's group thinking in the process of formulating policy. Davis, The Information Act: A Preliminary Analysis, 34 U. Chi L. Rev. 761, 797 (1967).
the Court reasoned, their disclosure "poses a negligible risk of denying to agency decisionmakers the uninhibited advice which is so important to agency decisions."\(^{54}\) Furthermore, the Court found that the FOIA embodies a strong "congressional purpose to require disclosure of documents which have 'the force and effect of law.'"\(^{55}\)

The second question addressed by the Court was whether the express incorporation by reference of an otherwise exempt document into a "final opinion" deprives the document of its exempt status. In *Sears*, the NLRB had expressly incorporated into such a final opinion documents that fell within exemption 5,\(^{56}\) the intra-agency memorandum exemption,\(^{57}\) and other documents that fell within exemption 7,\(^{58}\) which exempts records compiled for law enforcement purposes.\(^{59}\)

While accepting Sears' argument that the documents which qualified for the intra-agency memorandum exemption lost their exempt status upon incorporation, the Court rejected the analogous argument for the documents that fell within exemption 7. With regard to the former, the Court held that "if an agency chooses expressly to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion, that memorandum may be withheld only on the ground that it falls within the coverage of some exemption other than Exemption 5."\(^{60}\) The Court's rationale for this decision was simply that disclosure in these circumstances would not contravene the purposes of the exemption.\(^{61}\) Specifically, the Court found that the policies in favor of applying the exemption should yield because an employee whose advice has been adopted is not likely to be inhibited by a fear that the adopted advice will be made public, and because public interest in knowing the reasons for a policy actually adopted outweigh any slight inhibition which might result from disclosure.\(^{62}\) On the other hand, the Court

\(^{54}\) 421 U.S. at 152 n.19.

\(^{55}\) *Id.* at 153. Given this strong policy of disclosure of an agency's "working law" and given that much of this "law" is likely to be contained in documents which are in form intra-agency memorandum, "[i]t would be unreasonable to ascribe" to Congress an intention to protect such documents in exemption 5. *Intra-Agency Memoranda Exemption* 1059.

\(^{56}\) 421 U.S. at 161.


\(^{58}\) 421 U.S. at 165-66.


\(^{60}\) 421 U.S. at 161 (emphasis in original).

\(^{61}\) *Id.* See note 53 supra. See generally *Intra-Agency Memoranda Exemption* 1058-62 ("[I]ntra-agency communications in general . . . will not be significantly inhibited by a requirement that adopted policies and rationales be disclosed.").

\(^{62}\) 421 U.S. at 161; see *Intra-Agency Memoranda Exemption* 1061.
found that the documents which fell within the exemption for investigatory records did not lose their exempt status, apparently because it believed that requiring disclosure in this case would thwart the purposes underlying that exemption.\(^6\)

Though it reached the opposite result, the Court's approach to the issue under the exemption for investigatory records was clearly consistent with the approach taken under the intra-agency memorandum exemption. The fact that an otherwise exempt document is expressly incorporated by reference in a "final opinion" does not in itself mandate disclosure. It merely indicates that a court must make a further inquiry into whether the policies embodied in the particular exemption would be contravened by giving precedence to the mandate to disclose "final opinions."

The Court's analysis in delineating the relationship between the exemptions and the mandate to disclose "final opinions" is bound to have important ramifications in subsequent constructions of the Act, since this same analysis should be applicable in determining the relationship between any of the affirmative disclosure provisions and any of the exemptions.\(^4\) What the Court has done is to construe the exemptions

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\(^6\) 421 U.S. at 166. The purposes underlying the investigatory records exemption are not difficult to discern since they are enumerated in the exemption itself. "[T]he exemption applies when the production of records will interfere with enforcement proceedings, deprive a person of a fair trial, constitute an invasion of privacy, reveal a confidential source, disclose investigative techniques, or endanger the safety of law enforcement personnel." Clark, *Holding Government Accountable: The Amended Freedom of Information Act*, 84 *Yale L.J.* 741, 762 (1975), citing 5 U.S.C.A. § 552(b)(7) (Supp. 1976). To the extent that the disclosure of a particular investigative record would, for example, deprive a person of a fair trial, 5 U.S.C.A. § 552(b)(7)(B) (Supp. 1976), that consequence would surely follow even though the particular documents were disclosed only when expressly incorporated in a "final opinion." On the other hand, it is at least arguable that an agency's decisionmaking process is not inhibited when a document otherwise privileged under the intra-agency memorandum exemption is disclosed when incorporated in a "final opinion" since the agency and not any individual must then defend the material. *See Intra-Agency Memoranda Exemption* 1060-61.

\(^4\) It is by no means clear, however, that the Court would be willing to resolve any conflict between the exemptions and the "final opinion" provision or other affirmative disclosure provisions in favor of disclosure. For example, the Court also addressed the relationship between section (a)(2)(C) of the Act, 5 U.S.C. § 552(a)(2)(C) (1970), making available "instructions to staff that affect a member of the public," and the intra-agency memorandum exemption. Although it indicated that it would be "reluctant to construe exemption five to apply" to documents so classified, 421 U.S. at 153-54, it in fact applied the exemption to exclude from disclosure documents arguably containing such "instructions to staff." *Id.* at 160. To distinguish "final opinions" from "instructions to staff," making only the former an absolute limitation on exemption 5, does not comport with the rationale for implying the limitations in the first instance. If the policy underlying the limitation is that "an agency should not be permitted to maintain a body of 'secret law' which it applies in cases before it," *Intra-Agency Memoranda*
where ambiguity exists in the context of the statute as a whole. The Court indicated that it will balance the goal of disclosure as expressed in the applicable affirmative disclosure provision against the interests protected by the arguably applicable exemption. Where a strong congressional intent appears that certain materials be disclosed, it may be that Congress did not intend that a particular exemption thwart such disclosure, especially where the release of the documents in question would not substantially impair the interest sought to be protected by the particular exemption involved.65

**WHAT IS A "FINAL OPINION"?**

Because of the fact that "final opinions" and "intra-agency memo-

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65. Related to the issue of incorporation of an otherwise exempt document is the situation in which a memorandum expressing a final opinion neither explicitly states its rationale nor expressly incorporates another memorandum by reference. Instead it may refer only vaguely to the "circumstances of the case" as part of its rationale. Several of the memoranda ordered disclosed by the Court in *Sears* contained just such references. The lower court had ordered the General Counsel to create explanatory material wherever the memoranda referred to the "circumstances of the case." 421 U.S. at 161. The Supreme Court disagreed, holding that the courts have no power under the FOIA to order an agency to create explanatory material or even to identify those pre-existing documents which contain the "circumstances of the case" to which the opinion refers and which are not identified by the party seeking disclosure. *Id.* at 161-62. Analytically, of course, this is a much different problem from the situation in which an agency document already exists. Where there is no document, by definition neither the exemptions nor the requirement to disclose "final opinions" can apply. And the Act may not be used as a sword to force an agency to put in writing that which it is not required by law to write. *Id.*

As the Court recognizes, an analysis which refuses to compel disclosure of all documents expressly incorporated by reference in a "final opinion" and which permits "final opinions" to be vaguely worded and to refer to extrinsic circumstances which may or may not be evidenced in some government file by a document implies "that some 'final opinions' will not be as easily understood as they would otherwise be. However . . . the Act does not give the public a right to intelligible opinions in all cases." *Id.* at 166. The problem with this approach, nevertheless, is that an agency could thwart a basic purpose of the Act simply by drafting its "final opinions" in a particular manner. Indeed, this approach seems to reward agencies for writing unintelligible final opinions rife with mystical references to "the circumstances of the case."
"Randums" are mutually exclusive concepts under the FOIA, the precise meaning of "final opinions . . . made in the adjudication of cases" becomes critical both in terms of the mandate to disclose such opinions and in the interpretation of the exemption for intra-agency memoranda. The Supreme Court, in two 1975 cases, addressed this issue in two distinct factual contexts. The approach taken by the Court in both cases to delineate the meaning of "final opinion" was clearly a functional one. Particular documents were included within this classification according to "the function of the documents in issue in the context of the administrative process which generated them."

The first of these two cases was *NLRB v. Sears, Roebuck & Co.*, in which Sears, the charged party in an NLRB proceeding, sought the release of Advice and Appeals Memoranda generated in the case by the General Counsel of the Board. Sears claimed disclosure was required because the memoranda were "final opinions" within the meaning of the Act. In evaluating this claim, the Court examined the administrative origin and function of these documents. It first noted that the NLRB commences unfair labor practice proceedings only upon the issuance of a complaint, and that Congress has delegated the "final authority on behalf of the board" to issue such complaints to the General Counsel. Further, if the General Counsel decides a complainant's charge is without merit, the decision is not reviewable by either the Board itself or by the courts. On the other hand, a favorable disposition at the General Counsel stage is a mere prelude to the commencement of litigation before the Board. The Court therefore concluded that "those Advice and Appeals Memoranda which explain decisions by the General Counsel not to file a complaint are 'final opinions' made in the adjudication of a case;" accordingly, the documents had to be disclosed unless an

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66. See notes 51-52 supra and accompanying text.
69. Id.
70. Other aspects of *Sears* are discussed at notes 47-65 supra, and notes 100-26 infra and accompanying text.
71. Id. at 137.
72. Id. at 138; see 29 U.S.C. § 160(b) (1970).
74. 421 U.S. at 148, 160.
75. Id. at 148 (emphasis added). The NLRB tried to distinguish Appeals Memoranda from Advice Memoranda, arguing that the latter were not "final opinions" because an appeal to the General Counsel was still procedurally possible following the Regional Director's adverse disposition of a charge pursuant to the instructions contained in the Advice Memorandum. See note 49 supra. But the Court rejected this as a distinction without a difference since, as a practical matter, the General Counsel would have already passed on the issue being appealed. Id. at 157-58.
exemption were applicable. Conversely, the Court held that Advice and Appeals Memoranda which explain the decision of the General Counsel to file a complaint do not embody a final disposition of the case, and thus "are not 'final opinions' made in the adjudication of a case."

The Court's analysis suggests that a document must constitute a "final disposition" or an explanation of a "final disposition" of a case in order to qualify as a "final opinion . . . made in the adjudication of cases." The term "final disposition," in turn, would appear to be limited to administrative actions which have some legally operative effect on the issues in a case. In Sears, the memoranda explaining the General Counsel's decision not to file a complaint with the NLRB in effect decided all substantive issues in the complaint adversely to the complainant. This was clearly "final agency action of predeceential import." In contrast, the decision to file a complaint and the memoranda explaining it did not settle any substantive issues in the case. At most, such a decision indicated only "that a legal issue [was] sufficiently in doubt to warrant determination by another body"—hardly a "final disposition."

The Court adopted a similar approach to the problem in Renegotiation Board v. Grumman Aircraft Engineering Corp. The documents sought in this case were generated by the Renegotiation Board during the course of deciding whether certain government contractors had earned, and therefore had to refund, "excessive profits" on their government contracts. Under the enforcement scheme employed by the Board, various documents were completed at different stages of the proceeding. The first step of the proceeding was an initial determination by the Board of excessive profits, at which time the case was referred to a Regional Board. If the Regional Board found no excessive profits,

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76. Of course, the intra-agency memorandum exemption does not apply to documents classified as "final opinions." Id.; see notes 51-52 supra and accompanying text.
77. Id. at 148, 160.
78. Id. at 158-59, 160.
79. See id. at 159. See also Renegotiation Bd. v. Grumman Aircraft Eng'r Corp., 421 U.S. 168, 184-85 (1975) (recommendation of an advisory board to a decisionmaker which carries no legal weight—either de jure or de facto—before the decisionmaker is not a "final opinion"). Grumman Aircraft is discussed at notes 82-93 infra and accompanying text.
80. 421 U.S. at 157.
81. Id. at 160.
82. 421 U.S. 168 (1975).
84. The Board's authority to delegate responsibilities to Regional Boards is derived from the Renegotiation Act. Id. § 1217(d); 32 C.F.R. § 1451.32 (1975).
it would send a recommendation to the Renegotiation Board that no action be taken against the contractor and, if the Board approved, the case was simply closed. Apparently, the Board sent no explanation to the contractor of its reasons for agreeing with the Regional Board's recommendation.\textsuperscript{86} On the other hand, in cases where the Regional Board did find excessive profits, the case was then referred to a division of the Renegotiation Board consisting of three of the five members of the Board,\textsuperscript{88} which, after an investigation, made a decision and sent a report to the full Board. Although this report formed a basis for the discussion of the case, it did not bind any member of the Board.\textsuperscript{87} Grumman sought both Regional Board reports which recommended that no action be taken against the contractor and also the Division reports.

In holding that the Regional Board reports were not "final opinions," the Court noted that only the full Board had the power to render the legal decision on the existence of excessive profits,\textsuperscript{88} and further that there was no indication in this case that the Board had adopted the reports as its opinion.\textsuperscript{89} The Regional Board's recommendation was "functionally indistinguishable from the recommendation of any agency staff member whose judgment has earned the respect of a decisionmaker."\textsuperscript{90} The key was that the Regional Board simply lacked any "decisional authority" whatsoever, and without such authority its reports did not rise to the level of "final opinions."\textsuperscript{91}

The Court also held that the Division reports were not "final opinions."\textsuperscript{92} As it did in the analysis concerning the status of Regional Board reports, the Court focused on whether the Division had any power to decide the issue of excessive profits or whether the function it exercised was merely that of analysis and recommendation. The Court found the Division to be powerless in terms of actually deciding any question and further found that the analysis of the Division report itself

\textsuperscript{85} At least no reasons were sent in the Grumman case. 421 U.S. at 178-79.
\textsuperscript{86} 50 U.S.C. App. § 1217(e) (1970); 32 C.F.R. § 1472.4(b) (1975).
\textsuperscript{87} Cf. 32 C.F.R. § 1472.4(b) (1975).
\textsuperscript{88} 421 U.S. at 184. The Court pointed out, however, that this case is distinguishable from one where a Regional Board has de facto decisional authority. In other words, if the Board received the Regional Board's recommendation under a deferential standard, or even if the Board failed to review the vast bulk of the reports absent some special circumstances, then the Regional Board reports might be held to constitute "final opinions." Id. at 185 n.22.
\textsuperscript{89} Id. at 185-86.
\textsuperscript{90} Id. at 187.
\textsuperscript{91} Id. at 188.
\textsuperscript{92} Id. at 184-85, 190.
was never adopted by the full Board, as its reasoning, though the Division's conclusion might have been.93

Combining the Sears and Grumman Aircraft analyses makes it clear that there are two separate issues which must be dealt with in deciding whether a particular agency document is a "final opinion . . . made in the adjudication of cases." First, the power of the governmental unit which renders the final opinion must be examined. If the particular decision carries no weight in a legal sense (as opposed to a recommendation), then it is not a "final opinion." For example, in Grumman the Regional Board reports which recommended that no action be taken against the contractor had no operative effect independent of review by the Renegotiation Board. Indeed, review by the full Board was automatic.94 In Sears, on the other hand, the decision of the General Counsel of the NLRB not to issue a complaint clearly had a legally operative effect, since it effectively barred the complainant from access to the Labor Board.

After it has determined that the governmental unit rendering the opinion has the requisite power, a court must ask whether the opinion was issued in conjunction with an "adjudication" of a case. This second issue explains the distinction made by the Supreme Court in Sears between the General Counsel's decision not to file a complaint with the NLRB and his decision to file such a complaint.95 Certainly the decision to file a complaint has a legally operative effect just as did a decision not to file a complaint. The distinction is that the decision to file a complaint requires the General Counsel to adjudicate none of the issues in the case. In deciding not to file a complaint, on the other hand, the General Counsel effectively adjudicates all of the issues against the complainant.97

93. Id. at 188-90.
94. Id. at 187 ("The recommendation of the Regional Board carries no legal weight whatever before the Board." (emphasis in original)).
95. See notes 71-77 supra and accompanying text.
96. "Although not a "final opinion" in the "adjudication" of a "case" because it does not effect a "final disposition," the memorandum [directing the filing of a complaint] does explain a decision already reached by the General Counsel which has real operative effect—it permits litigation before the Board . . . ." Id. at 160.
97. One lower court case in 1975 dealt with the final opinion issue. National Prison Project v. Sigler, 390 F. Supp. 789 (D.D.C. 1975). The plaintiff there claimed that the failure of the United States Board of Parole to make available for public inspection and copying the records which contained the final opinions of the agency denying inmates' applications for parole violated the mandate to reveal "final opinions . . . made in the adjudication of cases." Id. at 791. The real question in the case was whether "the process by which the Board determines whether or not parole should be granted" is an adjudication. Id. Though the case was decided before Sears, the court in Sigler took a
INTRA-AGENCY MEMORANDUM EXEMPTION

Exemption 5 of the FOIA excludes from the disclosure provisions of the Act "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." An external limitation on the scope of this exemption has already been discussed, but it should be noted that the exemption also contains its own internal standards which limit its scope. First, it applies only to material which would not be discoverable by a party in litigation with the agency. Second, the exemption covers only those documents which qualify as "memorandums or letters." Both of these limitations were the subject of detailed analysis by the courts in 1975.

The Discovery Limitation

In NLRB v. Sears, Roebuck & Co., the Supreme Court attempted to give this vague discovery limitation some meaning consistent with the goals and purposes of the Act. The language of the exemption previously had been interpreted by several lower courts and to a limited extent by the Supreme Court itself. The lower courts had generally defined the limitation in terms of a distinction between those memoranda which contained factual material and those which contained only advice or opinions. This distinction, the courts reasoned, was necessary in order to implement the legislative policy of the exemption to protect the "frank discussion of legal or policy matter in writing" within the government.

99. See notes 43-55 supra and accompanying text.
100. 421 U.S. 132 (1975). Other aspects of Sears are discussed at notes 47-65, 69-81 supra and accompanying text.
101. See EPA v. Mink, 410 U.S. 73, 86 (1973) ("In many important respects, the rules governing discovery in such litigation [with a government agency] have remained uncertain from the very beginnings of the Republic.").
102. See id. at 89 n.16 (and cases cited therein).
103. Id. at 85-91.
104. Id. at 89 & n.16 (citing cases).
The approach taken by the Court in *Sears* may be viewed as a departure from the analysis used in these earlier cases. The Court began with the words of the exemption itself—"[e]xemption 5 withholds from a member of the public documents which a private party could not discover in litigation with the agency."107 Of course, as the Court in *Sears* noted, "virtually any document not privileged may be discovered by the appropriate litigant, if it is relevant to his litigation . . . ."108 Yet the whole thrust of the FOIA is to divorce the public’s right to government information from a showing of a particularized need for it.109 In a manner consistent with this goal, the Court interpreted the provision “to exempt those documents, and only those documents normally privileged in the civil discovery context.”110 In other words, so long as the material in question would “routinely be disclosed in private litigation,”111 a party has a right to disclosure under the FOIA.

107. 421 U.S. at 148, citing EPA v. Mink, 410 U.S. 73, 85-86 (1973). Of course, exemption 5 does not exempt “documents”; it literally exempts “memorandums or letters.” 5 U.S.C. § 552(b)(5) (1970). There was no question in *Sears* as to whether the documents in issue were such “memorandums or letters.” Thus one should not conclude that this limit on the scope of the exemption has become a nullity through the Court’s use of unnecessarily broad language. See Title Guarantee Co. v. NLRB, 37 Ad. L.2d 685, 689 (S.D.N.Y. 1975) (pointing out that *Sears* did not address the “memorandums or letters” issue). See notes 153-57 infra and accompanying text.

108. 421 U.S. at 149 & n.16.


Sears’ rights under the Act are neither increased nor decreased by reason of the fact that it claims an interest in the Advice and Appeals Memoranda greater than that shared by the average member of the public. The Act is fundamentally designed to inform the public about agency action and not to benefit private litigants. Id. at 143 n.10.

110. 421 U.S. at 149 (emphasis added).

111. Id. at 149 n.16, quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966); see Sterling Drug, Inc. v. FTC, 450 F.2d 698, 705 (D.C. Cir. 1971) (“disclosure under the Act is not to depend upon the needs of a particular litigant”). The Court apparently did not consider the argument that, although the Act precludes an inquiry into the needs of a particular claimant in deciding whether a document would be discoverable in litigation with an agency, it might permit an inquiry into the general public’s need for the document. On this analysis a sufficiently strong public interest might warrant the disclosure of a document which would not “routinely be disclosed in private litigation.” Such a general public interest standard is implicit in the Act. Indeed, in the section of the statute authorizing agencies to charge reasonable fees for providing requested information, the agencies are explicitly told that they may waive or reduce fees where it “is in the public interest because furnishing the information can be considered as primarily benefiting the general public.” 5 U.S.C.A. § 552(a)(4)(A) (Supp. 1976). Moreover, any damage done to the decisionmaking process by releasing such information would be more than outweighed by the countervailing benefit to the public which, assuming a showing of strong public need, would result from disclosure.

Nevertheless, the refusal to extend the explicit civil discovery analogy of the intra-
regardless of his ability to demonstrate the type of special interest which might be required to obtain the documents in the civil discovery context. Thus, the Court shifted the focus of analysis under the exemption from whether the requested letters or memoranda contain facts or opinions to whether the government can find any common law or statutory privilege which would arguably prevent disclosure in the normal case.

The Court went on to examine the applicability of specific privileges to the documents sought by Sears. The government claimed that the documents—Advice and Appeals Memoranda of the General Counsel of the NLRB which recommended that the Board commence an unfair labor practice proceeding against Sears—were covered by an attorney work product privilege and by executive privilege.\textsuperscript{112}

With little difficulty, the Court concluded that these memoranda fell within the attorney work product privilege. In its view, the privilege, as incorporated by Congress into the exemption, applies to memoranda prepared by an attorney in contemplation of litigation which sets forth his theory of the case.\textsuperscript{113} Since the General Counsel "must become a litigating party to the case with respect to which he has made his decision,"\textsuperscript{114} the Advice and Appeals Memoranda which directed the filing of the complaint fell squarely within the privilege.

While concluding that executive privilege did not apply to these documents, the Court had more difficulty in defining the "precise contours" of that privilege.\textsuperscript{115} The main purpose of the privilege in the

\textsuperscript{112} Those Advice and Appeals Memoranda in which the General Counsel refused to file a complaint were not in issue here since the Court had already found these to be "final opinions" and thus outside the scope of the fifth exemption. See notes 51-52 supra and accompanying text.

\textsuperscript{113} 421 U.S. at 154, citing S. Rep. No. 813, 89th Cong., 1st Sess. 2 (1965) (exemption 5 includes working papers of the agency attorney "and documents which would come within the attorney-client privilege if applied to private parties").

\textsuperscript{114} 421 U.S. at 160.

\textsuperscript{115} Id. at 150.
context of the FOIA, the Court noted, is to "prevent injury to the quality of agency decisions."\footnote{116} This rationale enabled the Court to make use of a distinction designed to confine the scope of the privilege to protection of the "ingredients of the decisionmaking process":\footnote{117} in deciding whether this privilege is available, a court should distinguish "between predecisional communications, which are privileged, and communications made after the decision and designed to explain it [postdecisional], which are not."\footnote{118}

Read broadly, this distinction, which the Court itself recognized "may not always be a bright one,"\footnote{119} might include within the privilege all matters considered by an agency in the formulation of its policies and exclude only those communications which explain an agency decision already adopted. Arguably, under this formulation such things as predecisional statistical studies and factual surveys would be privileged.

The practical effect of the distinction drawn by the Court, however, is not at all clear. It is evident that the Court's purpose in making the distinction was to substitute for the fact-opinion dichotomy a standard which recognizes that withholding purely factual matter may be appropriate in some circumstances because of its function in the decision-making process. The new problem raised is determining the circumstances in which such factual material should be privileged, even though it is generated in a "predecisional" context.\footnote{120} Certainly such material may be as crucial to the decisionmaking process as advice and opinions.\footnote{121} Yet the real question in terms of the Act is not necessarily whether the factual material is crucial to a decision, but whether its disclosure will so inhibit the decisionmaking processes of an agency as to justify an exception to the general policy of disclosure which the Act embodies.\footnote{122}

This does not, however, appear to be the approach taken by the Court. Instead of establishing a procedure in which each predecisional document containing factual matter is examined in order to decide

\footnotesize{\begin{itemize}
\item \footnote{116}{Id. at 151.}
\item \footnote{117}{Id.}
\item \footnote{118}{Id. at 151-52 (citations omitted). The Court made two arguments in support of this distinction. First, the possibility of injuring the decisionmaking process by publication of postdecisional communications is considerably less than the potential harm from publication of predecisional communications. Second, and more importantly, there is an increased public interest in knowing the basis for an agency policy already adopted. Id.}
\item \footnote{119}{Id. at 152 n.19.}
\item \footnote{120}{It is difficult to imagine many factual documents being generated by an agency other than in a predecisional context.}
\item \footnote{121}{See Intra-Agency Memoranda Exemption 1055.}
\item \footnote{122}{See id. at 1055-56.}
\end{itemize}}
whether the particular document should be withheld, the Court has created a broad presumption that any letters or memoranda which can be classified as predecisional are privileged. Arguably, this classification of a document as either predecisional or postdecisional requires an analysis of its contents, so that a factual document, although actually generated before the decision and used in the decisionmaking process, could be classified as a postdecisional document if disclosure would not injure the “quality of agency decisions.” But a literal reading of the Court’s statement of the distinction suggests that the inquiry is a narrower one, aimed merely at identifying the point within the agency process at which the document came into existence. This presumption that all matter, whether fact or opinion, generated by an agency before it reaches a decision is privileged entails an unwarranted expansion of the scope of exemption 5. It does not improve on the fact-opinion dichotomy. Indeed, it is far more mechanical in its application. Furthermore, as one commentator has suggested, “the general disclosure policy that underlies the entire FOIA will tolerate exemption for nonfactual material . . . far better than it will tolerate exemption for clearly factual material.” There is little justification beyond expediency for expanding the executive privilege component of the intragency memorandum exemption to factual predecisional matter absent a specific showing in each case of injury to the decisionmaking process.

Several lower courts have addressed the executive privilege facet of exemption 5 subsequent to Sears. In Brockway v. Department of the Air Force, an FOIA plaintiff sought to compel the disclosure of certain statements by witnesses gathered by the Air Force in the course of an investigation into a plane crash. Because of the Air Force’s need to get all relevant information in order to prevent further accidents, the witnesses were assured that the information given would be kept confidential.
dential and would not be used for any purpose other than for accident prevention. In light of the fact that the material sought did not consist of advice, recommendations, opinions, and other material reflecting deliberative processes, but rather consisted of purely factual or investigatory reports, the Eighth Circuit had to face squarely the contention that the intra-agency memorandum exemption “protects from disclosure only memoranda which are deliberative in nature, and that no other standard is permissible in any instance for determining if a document comes within the scope of” the exemption.

Relying in part on Sears, the court rejected the argument that exemption 5 applies only to policy memoranda and not to factual matter. Instead, it approached the claim of privilege from the perspective of the “purposes and goals of the FOIA and this specific exemption.” The court found that the purpose of the exemption, as expressed by the Supreme Court in Sears, is “to prevent injury to the quality of agency decisions.” The court noted that the wording of exemption 5 itself does not make a factual-deliberative distinction, but rather speaks in terms of whether material sought under the FOIA would be discoverable in general proceedings. In this instance there was authority, in a non-FOIA setting, which recognized a qualified executive privilege in pretrial discovery for witness statements given in a military aircraft safety investigation, even though such statements were not deliberative documents. Thus the statements in question came

128. Id. After every crash the Air Force conducts two separate investigations. One, called the “collateral investigation,” is designed “to obtain and preserve all available evidence for use in claims, litigation, disciplinary action, and for all other purposes except for safety and accident prevention purposes.” Id. The results of this investigation were not in question here. The second investigation, the “aircraft accident investigation” or “safety investigation,” is designed “for the sole purpose of accident prevention.” Id. No law enforcement or other purposes are contemplated. The theory behind the two separate investigations is that a witness might be hesitant to testify freely before the collateral investigation board for fear of revealing his own negligence or misconduct. Id. at 1185-86. The promise of confidentiality removes this inhibition for the safety investigation.

129. Id. at 1190.

130. Id. at 1192.

131. Id.


134. 518 F.2d at 1191, citing Machin v. Zuckert, 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963). The grounds for extending the privilege to cover these statements were that disclosure would “hamper the efficient operation of an important Government program and perhaps even . . . impair the national security by weakening a branch of the military . . . .” 316 F.2d at 339. In Machin, the plaintiff sought to subpoena an Air Force Aircraft Accident Investigative Report of a plane crash in which the plaintiff was the sole survivor. The information had been solicited from witnesses with
within the literal words of the exemption: they "would not be available
by law to a party . . . in litigation with the agency." The court,
however, did not rest its decision on this ground alone. Rather, it
proceeded independently to balance the general policy of disclosure
under the Act against the purpose of the exemption to ensure a free flow
of information and discussion within an agency. In its judgment,
releasing the information sought would have injured the "deliberative
processes of the Air Force in establishing appropriate safety policies,"
and hence the intra-agency memorandum exemption was clearly appli-
cable.

The facts of Brockway directly raise the issue of whether predeci-
sional factual matter falls within the executive privilege component of
the intra-agency memorandum exemption. Sears seems to extend the
exemption to all predecisional documents whether factual or deliberative.
Yet the Brockway court did not adopt this analysis; indeed, the
court did not mention the predecisional-postdecisional issue. Rather,
the court interpreted Sears to compel an analysis of a claim of privilege
for factual material in terms of the underlying purpose of the exemption.
If the disclosure of the factual matter would hinder the gathering of the
facts themselves, as it surely would have in the Brockway case, then
nondisclosure is justified.

The District of Columbia Circuit has applied the
predecisional-postdecisional analysis in Vaughn v. Rosen. In that
case the government invoked exemption 5 in an effort to resist disclo-
sure of certain personnel reports compiled by the Civil Service Commiss-
sion's Bureau of Personnel Management. The government claimed
that the reports were within the predecisional deliberative process be-
cause they played a consultive role in the process "by which the agency
evaluates and changes its personnel policies, rules, regulations, and
standards . . . ." In rejecting this argument, the court noted that

136. 518 F.2d at 1193.
137. Id. at 1194.
138. See id. The court did not reject "the general fact-deliberation criterion estab-
lished in the decisions of other courts." Rather, it held that on the narrow facts involved
"common sense as reflected in the general law of discovery . . . indicates disclosure of
these statements would defeat rather than further the purposes of the FOIA and is not
required by the language of the FOIA itself." Id.
139. 523 F.2d 1136 (D.C. Cir. 1975).
140. Id. at 1139, 1143. The government also raised an issue in the case involving
141. 523 F.2d at 1143.
the documents provided only "raw data upon which decisions can be made; they are not themselves a part of the decisional process." The fact that a document is used by a decisionmaker to determine policy does not in itself make that document "predecisional":

Unevaluated factual reports or summaries of past administrative determinations are frequently used by decisionmakers in coming to a determination, and yet it is beyond dispute that such documents would not be exempt from disclosure. Rather, to come within the privilege and thus within exemption 5, the document must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. Put another way, pre-decisional materials are not exempt merely because they are pre-decisional; they must also be a part of the agency give-and-take—of the deliberative process—by which the decision itself is made.

Unlike the Brockway court, which failed even to mention the predecisional-postdecisional test enunciated in Sears when evaluating the claim that the executive privilege component of the fifth exemption applied to the material in question, the Rosen court used a reasoned application of the predecisional-postdecisional analysis. Consequently, its approach to the problem at least offers some guidance to the proper interpretation of the Sears test. The Rosen court's analysis suggests that the predecisional-postdecisional distinction must not be used in the mechanical sense that a literal reading of Sears implies. Rather, the court attempted to apply the distinction with reference to the ultimate goal of the exemption to "prevent injury to the quality of agency decisions." Thus, while the documents in question in Rosen were generated prior to the agency decision to which they related and, further, were actually used in the decisionmaking process, the court held that they did not fall within the exemption because the requisite harm to establish executive privilege had not been demonstrated.

Memorandums or Letters

The other limitation on the scope of the intra-agency memorandum exemption, which also was subject to analysis in 1975, is that the

142. Id. at 1146.
143. Id. at 1144.
144. Id. at 1144.
exemption applies only to "memorandums or letters." In cases decided prior to 1975 the lower courts did not often directly face this issue. In applying the fact-opinion distinction which was used at that time to determine whether the documents in question fell within the exemption, the courts did not explicitly break down their analysis into two parts; that is, whether the document was a letter or memorandum, and if so, whether the document was privileged pursuant to the exemption. Instead, they simply approached the issue by determining whether a particular document contained factual matter or opinion. If it contained factual matter, the government could not invoke the exemption to prevent disclosure; if it contained opinion, it was treated as exempt without inquiry into whether it was a "memorandum or letter."

146. 5 U.S.C. § 552(b)(5) (1970). This issue is a crucial one because of the extensive breadth of the executive privilege applicable to those documents which fall within the scope of the exemption. Since it is possible for purely factual material to come within the executive privilege component of exemption 5, e.g., Brockway v. Department of the Air Force, 518 F.2d 1184 (8th Cir. 1975) (discussed at text accompanying notes 127-38 supra); Montrose Chemical Corp. v. Train, 491 F.2d 63, 71 (D.C. Cir. 1974) (summaries of factual material prepared from public record of a formal proceeding by staff for administrator); Cooper v. Department of the Navy, 396 F. Supp. 1040, 1042 (D.C. La. 1975) (witness statements gathered in a safety investigation under promise of confidentiality), the best argument left for compelling its disclosure may be that the exemption itself has no application, thus preventing the invocation of any of its component privileges.


One reason the courts did not address the "memorandums" requirement before Sears may be suggested. In a case in which a court determined that the material requested was "factual," there was no need to determine whether the exemption did not apply because the documents were not "memorandums" or because the documents would have been available to a party in litigation with the agency. It was assumed that the latter requirement was meant to exclude all factual matter from the scope of the exemption. On the other hand, once a court decided that the material in issue reflected opinions and would therefore not be available to a party in litigation with the agency, the "memorandum" requirement would not realistically be an issue since the "opinions" contained in the documents sought would necessarily contain an agency's thinking on issues—which, of course, would satisfy the most stringent definition of "memorandums."

Indeed, the "letters or memorandums" issue will arise only in the context of an interpretation of exemption 5 which includes, within the scope of its "available by law to a party . . . in litigation with the agency" limitation, factual matter. Since Sears appears to sanction this interpretation in its predecisional-postdecisional distinction and since Sears has been read by some lower courts to permit the withholding of purely factual matter when it would not normally be available to a party in litigation with the agency, Brockway v. Department of the Air Force, 518 F.2d 1184 (8th Cir. 1975); Cooper v. Department of the Navy, 396 F. Supp. 1040 (D.C. La. 1975), the issue has now in fact arisen. See Title Guarantee Co. v. NLRB, 37 Ad. L2d 685 (S.D.N.Y. 1975).
Two courts, however, did refuse to sanction the government's invocation of exemption 5 on the precise ground that the documents in issue were not "letters or memorandums." In Stokes v. Brennan, the government argued that certain manuals and films used in training OSHA inspectors were privileged under the intra-agency memorandum exemption. The court rejected this argument because the training manuals were "impersonal, mass-produced statement[s] of established policy designed to be utilized as an educational and reference tool" and hence could not be characterized as memorandums. Similarly, in M.A. Schapiro & Co. v. SEC, the court refused to accept the government's contention that an SEC staff investigation of certain aspects of the stock market was privileged pursuant to exemption 5. The court concluded that "the documents involved are not inter-agency or intra-agency memoranda or letters. Thus, they are not encompassed by [exemption 5]." This conclusion rested on the court's evaluation of the documents which it determined did not "express an exchange of ideas between agencies or their respective staff-members." Thus, while the courts prior to 1975 had not delineated anything like a precise definition of "letters or memorandums," they had clearly indicated that it was a substantial requirement which limits the scope of the intra-agency memorandum exemption.

One 1975 FOIA case directly addressed this issue. In Title Guarantee Co. v. NLRB, the company, a charged party in an unfair labor practice proceeding, requested the NLRB to disclose written reports or signed affidavits which the Board had obtained through interviews of witnesses offered by the charging party. In an effort to prevent disclosure, the Board invoked the intra-agency memorandum exemption,

148. 476 F.2d 699 (5th Cir. 1973).
149. Id. at 704. If the material it had before it were "memorandums," the court noted the term "would cover virtually all government documents of any description or nature." Id.
151. Id. at 470.
152. Id. There was no "administrative policy-making process exhibited in any of the . . . documents presented." A frequently cited passage which illustrates the manner in which the court approached the "memorandums" requirement came from the court in Bristol-Myers:

[Exemption 5] encourages the free exchange of ideas among government policy makers, but it does not authorize an agency to throw a protective blanket over all information by casting it in the form of an internal memorandum. Purely factual reports and scientific studies cannot be cloaked in secrecy by an exemption designed to protect only "those internal working papers in which opinions are expressed and policies formulated and recommended." 424 F.2d 935, 939 (D.C. Cir.), cert. denled, 400 U.S. 824 (1970) (emphasis added).
claiming that under NLRB v. Sears, Roebuck & Co.,154 "the scope of this exemption is parallel to that of the privilege doctrine in the civil discovery context."155 The court rejected the argument that Sears was dispositive of the issue, reasoning that the documents involved in that case "clearly fell within the category envisioned by Congress through its use of the phrase 'inter-agency or intra-agency memorandums or letters.'"156 The witness statements involved in Title Guarantee, on the other hand, were not the sort of documents that Congress intended to include within the meaning of "memorandums or letters." In the court's view, such statements were "purely factual, investigative matters" to which exemption 5 did not apply. They were to be distinguished from "material reflecting deliberative or policy-making processes" which came within the scope of the exemption.157

In reaching its decision, the Title Guarantee court had to consider an earlier 1975 case, Brockway v. Department of the Air Force,158 in which the court had reached the opposite result on similar facts. In Brockway, the court held that certain witness statements given during a safety investigation under a promise of confidentiality were covered by exemption 5 because the information would literally not have been "available by law to a party . . . in litigation with the agency" and because the release of the statements would in any case have injured the Air Force's ability to investigate accidents with a view toward prevention.159 The court's analysis of the problem is inadequate, however, since it assumed without discussion that the witness statements demanded were comprehended within the "memorandums or letters" limitation of the intra-agency memorandum exemption.160

155. 37 A.D. L.2d at 688. The Board maintained that under both executive privilege and the attorney work-product privilege the witness statements were protected.
156. Id. at 689.
157. Id. "In the case at bar . . . the material requested consists solely of statements made in support of the union's charges. . . . This material does not fall within the scope of the 'memorandums or letters' exemption of exemption 5." Id.
158. 518 F.2d 1184 (8th Cir. 1975). Other aspects of Brockway are discussed at notes 127-38 supra and accompanying text.
159. Id. at 1192-93.
160. 5 U.S.C. § 552(b)(5) (1970). It is possible, of course, that the court would have reached the conclusion that the information was of a type included in the "memorandums" requirement of the exemption. See note 161 infra and accompanying text. That the court in Brockway did not consider the issue to be critical may be traced to some broad language used by the Supreme Court in Sears to describe the scope of exemption 5. "Exemption 5 withholds from a member of the public documents which a private party could not discover in litigation with the agency." NLRB v. Sears, Roebuck & Co., 421 U.S. at 148, citing EPA v. Mink, 410 U.S. 73, 85-86 (1973) (emphasis added). Read literally such a statement would remove whatever limitation on the exemp-
Yet without reference to this defect in the Brockway court's analysis, and in spite of the fact that the type of documents involved in both cases were so similar—in Title Guarantee they were witness statements gathered for law enforcement purposes and in Brockway they were witness statements gathered for the purpose of future accident prevention—the Title Guarantee court managed to distinguish Brockway. The court noted that unlike the witness statements in the case before it, those in Brockway, though purely "factual in nature, were of use in the Department's future planning." Consequently they were part of the "policy-making process" and ipso facto "memorandums" within the meaning of exemption 5.

In any event, the approach of the court in Title Guarantee is preferable to that of the court in Brockway because it takes into account all of the language of exemption 5. It has the virtue of placing a substantial limitation on the scope of an exemption which has been the focus of much pressure for expansion. Indeed, without the limitation suggested in Title Guarantee, the exemption has the potential to swallow many of the other specific exemptions.

The meaning the court attributed to "memorandums" is not, however, particularly clear or necessarily correct. Evidently the term includes all "material reflecting deliberative or policy-making processes." Because the court agreed with the result in Brockway, it may also be inferred that certain sensitive factual material gathered by an agency and that may be conveyed by the "memorandums or letters" requirement. There is, however, no reason to believe the Court intended that result or that the use of the word "documents" was anything more than an unfortunate use of broad language. Indeed in none of the Court's decisions involving exemption 5 has there been any issue as to whether particular documents were "memorandums or letters." Title Guarantee Co. v. NLRB, 37 A.D. 2d 685, 689 (S.D.N.Y. 1975). See notes 156-57 supra and accompanying text and note 107 supra.

161. 37 A.D. 2d at 690.
162. A good example of how exemption 5 may be used to swallow the other exemptions is provided by Title Guarantee itself. The witness statements at issue had been gathered for law enforcement purposes. Id. at 691-92. Thus, the most appropriate exemption would have been the seventh, which generally exempts investigatory records. 5 U.S.C.A. § 552(b)(7) (Supp. 1976). The government, however, failed to prove that any of the enumerated reasons justifying the privilege under exemption 7 existed. 37 A.D. 2d at 692. Thus, the government attempted to invoke the broad component privileges contained in exemption 5. See also Deering Milliken, Inc. v. Nash, 37 A.D. 2d 933, 949 (D.S.C. 1975) ("[Exemption 5 harbors a vast potential for frustration of the purposes of the FOIA Act when employed by an agency intent on shrouding its operations in a veil of secrecy."); Vaughn v. Rosen, 523 F.2d 1136, 1145 (D.C. Cir. 1975) (interpretation of exemption 5 urged by government would "virtually foreclose all public knowledge regarding implementation of personnel policies in any given agency.").
directly related to future planning and policy is included within the definition. On the other hand, investigative material gathered for law enforcement purposes, including witness statements, does not come within the meaning of "memorandums." It is difficult to justify distinguishing between witness statements gathered for non-law enforcement purposes such as future planning and witness statements gathered for law enforcement purposes. Neither kind of statement reflects the deliberative or policy-making process in the sense that an agency's thinking on any matter is exposed by or reflected in it. Rather, both are simply information-gathering devices. The court in *Title Guarantee*, by stretching the term "memorandum" to protect information gathering by an agency for "planning" purposes, has expanded the fifth exemption beyond protecting the decisionmaking process to protecting the information-gathering ability of the agencies. Yet it is arguable that several of the other exemptions are more precisely tailored to accomplish that purpose. For example, exemption 3 (protecting material "specifically exempt from disclosure by statute"), exemption 4 (protecting trade secrets and commercial information obtained from a person), exemption 6 (protecting personnel and medical files), exemption 7 (protecting investigatory records compiled for law enforcement purposes), and exemption 8 (protecting information gathered from or about financial institutions) all seem designed to protect the sources of government information. To argue, then, that the disclosure of *Brockway*-type material would inhibit the decisionmaking process and thus that exemption 5 should apply misses the point. For the intra-agency memorandum exemption does not protect from disclosure any material the disclosure of which may inhibit the agency from making a decision. It protects only "memorandums or letters" which, it is suggested, should be construed to mean only those communications, both factual and

163. Arguably the court should not have distinguished *Brockway*, but rather included the witness statements there in controversy within the definition of "memorandums." In distinguishing the case the court sanctioned a very broad meaning for the term. Clearly such factual matter does not itself reflect the deliberative or policy-making processes, and its disclosure would in no way have revealed the internal decisionmaking processes of the agency. Although the effect of disclosure may have been to impair the agency's ability to plan in order to avoid other accidents by making it very difficult for the agency to gather accident information in the future, the witness statements in *Brockway* were simply not documents which reflected the agency's thinking on a particular matter. The fact that the court in *Title Guarantee* felt the need to stretch the definition to include them demonstrates the practical necessity for withholding material of this sort. But a better result would be to acknowledge that the FOIA is deficient in not recognizing an exemption for investigative material solicited with a promise of confidentiality from individuals for a purpose other than for law enforcement and not involving trade secrets or commercial or financial information.
FOIA DEVELOPMENTS

RECOMMENDATORY, which reflect the agency's decisionmaking process.\(^{164}\)

**STATUTORY EXEMPTION**

Exemption 3 of the FOIA excludes from the coverage of the Act those matters "specifically exempted from disclosure by statute."\(^{165}\) In recent years the scope of this exemption has been the subject of much disagreement among the lower courts.\(^{166}\) However, a 1975 Supreme Court case, *FAA Administrator v. Robertson*,\(^{167}\) appears to have settled the controversy, though in a manner not fully anticipated by any of the lower courts.

Prior to the Supreme Court's decision in *Robertson*, the lower federal courts had reached at least three different interpretations of the scope of exemption 3. In one line of cases, the phrase "specifically exempted from disclosure by statute" was construed to apply "only if a statute either identifies some class or category of items that Congress considers appropriate for exemption, or at least, sets out legislatively prescribed standards or guidelines that the Secretary must follow in determining what matter shall be exempted from disclosure."\(^{168}\) This narrower interpretation of the scope of the exemption rested upon a perception of the FOIA as a response to the abuse of broad discretion given under the old Administrative Procedure Act to officers in the executive branch.\(^{169}\)

Courts which adopted a second interpretation of the statutory exemption distinguished between statutes which contained words prohibiting disclosure followed by words "allowing the Secretary to relax the

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\(^{164}\) See Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975) (quoted in part at text accompanying note 143 supra).


\(^{166}\) See *FOIA Developments* 432-33.

\(^{167}\) 422 U.S. 255 (1975).

\(^{168}\) Stretch v. Weinberger, 495 F.2d 639, 640 (3d Cir. 1974); *FOIA Developments* 432. The court in *Stretch* held that a provision of the Social Security Act, 42 U.S.C. § 1306(a) (1970), giving the agency authority to withhold any information except insofar as agency regulations permitted disclosure, was not the kind of statute contemplated by exemption 3 because it failed to prescribe some basis for the exercise of the Secretary's discretion. 495 F.2d at 640. *Accord*, Schecter v. Weinberger, 506 F.2d 1275 (D.C. Cir. 1974). Similarly, in Robertson v. Butterfield, 498 F.2d 1031 (D.C. Cir. 1974), rev'd *sub nom.* FAA Administrator v. Robertson, 422 U.S. 255 (1975), the court held that a statute giving an agency the power to withhold information when disclosure would not be in the public interest did not come within the scope of exemption 3, 498 F.2d at 1031-32, *construing* 49 U.S.C. § 1504 (1970). This holding was based on the fact that, as in *Stretch*, the statute did not "itself specify the documents or categories of documents it authorizes to be withheld from public scrutiny." 498 F.2d at 1032; *accord*, Cutler v. CAB, 375 F. Supp. 722 (D.D.C. 1974).

\(^{169}\) Stretch v. Weinberger, 495 F.2d 639, 641 (3d Cir. 1974).
absolute prohibition established by Congress, and those which merely authorized the administrator to exercise his discretion to order nondisclosure. The former type of statute would come within exemption 3 while the latter would not. These courts construed the word "specifically" in the exemption to require "no more than that the exemption be found in the words of the statute rather than the implication of it." It is clear that this construction broadens the sweep of the exemption from the first construction discussed above.

Judge MacKinnon of the District of Columbia Circuit had suggested yet a third interpretation of exemption 3. He argued that the issue in each case should be whether Congress intended to include the particular statute in question within the third exemption. If so, then the statute "specifically" exempted the material within the meaning of the statutory exemption without regard to the amount of discretion vested in the agency by the statute. To discern the congressional intent one needed only to look to the legislative history of the Act. Assuming Congress was aware of the existence of such statutes at the time the FOIA was enacted, "[i]f Congress had not intended to include [a particular] statute within Exemption Three, it could easily have done so either by explicitly narrowing the coverage of the exemption or by amending" the statute in question. Clearly this construction is the broadest of the three interpretations which had been suggested prior to Robertson, since it clearly rejects the notion that the FOIA can be read in any sense as repealing or modifying by implication a statute authorizing nondisclosure which existed prior to the enactment of the FOIA.

The construction of exemption 3 adopted by the Court in Robertson is similar in both theory and consequence to the broad construction advanced by Judge MacKinnon. The plaintiffs in Robertson sought certain documents which contained information gathered by the Federal Aviation Administration on the commercial airlines. The FAA denied the requests on the ground that the documents were protected by

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170. California v. Weinberger, 505 F.2d 767, 768 (9th Cir. 1974).
171. Id.; see FOIA Developments 435-36.
172. 505 F.2d at 768.
174. 498 F.2d at 1015-16.
175. Id.
176. 422 U.S. at 256-57. Specifically the documents requested were known as Systems Worthiness Analysis Program Reports (SWAP). Id. They contained analyses made by the FAA of the operation and maintenance performance of commercial airlines. Id.; see 49 U.S.C. § 1421 (1970).
section 1104 of the Federal Aviation Act, which permits the FAA Administrator to withhold information the disclosure of which, in his judgment, is not required in the public interest. The District of Columbia Circuit, applying the narrowest of the three interpretations described above, held the statutory exemption inapplicable because section 1104 did not specify or categorize the documents it authorized to be withheld. In reversing this holding, the Supreme Court noted that the language of the exemption itself was ambiguous and that it could find no support in the legislative history of the Act to justify the narrow construction adopted by the lower court: "No distinction seems to have been made on the basis of the standards articulated in the exempting statute or on the degree of discretion which it vested in a particular Government officer." Instead, taking the type of approach suggested by Judge MacKinnon, the Court looked to the legislative history of the FOIA in order to discover whether Congress intended statutes like section 1104 to come within exemption 3.

In the Court's view, the answer to this inquiry was clear. Not only was Congress aware of section 1104 and similar statutes at the time the FOIA was being considered, but there was also express evidence that Congress did not intend to modify them through the enactment of the FOIA. Furthermore, to hold that material falling within section 1104 did not come within the statutory exemption would have been, in effect, to read the FOIA as having repealed "by implication all existing


Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of this chapter or of information obtained by the Board or the Administrator . . . stating the grounds for such objection. Whenever such objection is made, the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public . . . .

178. Robertson v. Butterfield, 498 F.2d 1031 (D.C. Cir. 1974). Indeed even under the broader construction urged by the court in California v. Weinberger, 505 F.2d 767 (9th Cir. 1974), it is clear that documents covered by section 1104 would not come within exemption 3 because the statute merely permits the administrator to exercise his discretion to withhold the information. FOIA Developments 437 n.98.

179. 422 U.S. at 262-63.
180. Id. at 263-64.
181. Id. at 263-65.
182. Id. at 264, citing Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. 6 (1963) (statement of Sen. Long).
183. 422 U.S. at 265, citing H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966) (noting numerous statutes restricting public access to agency records and asserting that these statutes would not be modified by the proposed legislation).
statutes 'which restrict public access to specific public records.'”\textsuperscript{184} The Court did not attribute to Congress any such intent and, absent "a clearly expressed congressional intention to the contrary," held the material in question to be exempt from disclosure.\textsuperscript{185}

Although the particular arguments adduced by the Court clearly support its holding, which gives the exemption its broadest possible construction, the ultimate effects of the decision arguably comport neither with the express language of the FOIA nor with the general disclosure policy of the statute.\textsuperscript{186} The problem is that there are scores of statutes like section 1104 of the Federal Aviation Act which, if given similar effect pursuant to exemption 3, will leave virtually unrestrained discretion in government bureaucrats to withhold information which would otherwise have to be disclosed under the FOIA.\textsuperscript{187} The words of implementation may be different but the end result is precisely that reached under the old Administrative Procedure Act in \textit{every} case controlled by the statutory exemption.\textsuperscript{188}

\textsuperscript{184} There was simply no evidence that Congress “intended to repeal, by implication alone, those statutes that make disclosure a matter of agency discretion. It simply is impossible fairly to discern any such intention on the part of Congress.” 422 U.S. at 269 (Stewart, J., concurring).

\textsuperscript{185} \textit{Id.} at 266, \textit{quoting} Regional Rail Reorganizational Cases, 419 U.S. 103 (1974). This interpretation of “specifically” in exemption 3 parallels the Court’s previous construction of “specifically” in exemption 1 of the Act prior to the 1974 amendments. \textit{See FOIA Developments} 434 n.83. At that time, exemption 1 exempted from the Act matters “specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy.” 5 U.S.C. § 552(b)(1) (1970). The only matter to be determined by a court under that exemption was “whether in fact the President has required by Executive Order that the documents in question are to be kept secret.” EPA v. Mink, 410 U.S. 73, 95 (1973) (Stewart, J., concurring). The only “specificity” required was the broad executive order itself; there was no necessity for a specific order to issue for each document which the executive desired to classify. \textit{Id.} at 83. Similarly, under exemption 3 the only “specificity” demanded is that there be a statute which allows someone, under any criteria, to withhold information. If such a statute exists, then exemption 3 will be applicable “regardless of how unwise, self-protective, or inadvertent the enactment might be.” \textit{Id.} at 95 n. (Stewart, J., concurring).

\textsuperscript{186} The Court itself was fully cognizant of the tension between its interpretation of exemption 3 and the ultimate goal of the Act when it sanguinely noted that there was no “inevitable inconsistency between the general congressional intent to replace the broad standard of the former Administrative Procedure Act and its intent to preserve, for air transportation regulation, a broad degree of discretion on what information is to be protected in the public interest . . . .” 422 U.S. at 266.

\textsuperscript{187} Professor Davis cites one lengthy compilation of such statutes published in 1960. Davis, \textit{supra} note 53, at 786, \textit{citing} \textit{SPECIAL SUBCOMM. ON GOVERNMENT INFORMATION OF THE HOUSE COMM. ON GOVERNMENT OPERATIONS, 86TH CONG., 2D SESS., FEDERAL STATUTES ON THE AVAILABILITY OF INFORMATION} (Comm. Print 1960).

\textsuperscript{188} Two lower courts also dealt with exemption 3 issues in 1975. In Parker v. EEOC, 36 Ad. L.Ed.2d 1074 (D.D.C. 1975), the issue presented did not directly involve the scope of exemption 3; rather it was whether certain documents which reflected settlement
THE INVESTIGATORY RECORDS EXEMPTION

Of the two exemptions substantively amended in 1974, only the seventh exemption, which excludes from mandatory disclosure "investigatory records compiled for law enforcement purposes" in specified situations, received judicial scrutiny in 1975. The obvious ques-

189 Prior to amendment, exemption 7 protected "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency," 5 U.S.C. § 552(b)(7) (1970). The newly amended exemption protects:

(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
tions which the courts were required to address in applying this exemption were to what extent Congress intended the amendments to change prior judicial interpretations of the provision and to modify prior judicial approaches to the issues arising under it. The quality of the answers given by the courts to these questions varied rather noticeably. Some courts seemed unwilling to come to terms with the amendments or to adequately take into account the congressional intent underlying them, while other courts attached greater importance to the new language of the exemption, from both a substantive and a philosophical point of view. The purpose of this section is to examine these new developments in an attempt to delineate some guidelines for future application of the exemption.

Prior to amendment, the exemption covered investigatory files "except to the extent available by law to a party other than an agency." The courts construed this single limitation narrowly, and as one commentator has concluded, "[i]n practice, files labeled as investigatory became exempt, and it had become practically impossible to challenge the classification as unjustified under the purpose of the exemption." In general, the 1974 amendments specifically delineate the only situations in which the exemption does apply, thus completely reversing the thrust of the exemption. As explained by the Supreme Court in NLRB v. Sears, Roebuck & Co., the purpose of the amendments was to

limit application of Exemption 7 to agency records so that it would apply only to the extent that "the production of such records would interfere with enforcement proceedings, deprive a person of a right to a fair trial or an impartial adjudication, constitute [an] . . . unwarranted invasion of personal privacy, disclose the identity of an informer, or disclose investigative techniques and procedures."
Furthermore, not only do the amendments specifically describe the situations in which application of the exemption is appropriate, but they also make it clear that the burden is on the agency invoking the exemption to show that the disclosure of a document would “cause the government harm in one of the areas set out in the statute.”

This emphasis on the limited number of justifications which an agency can make in order to invoke the exemption, plus the insistence that the agency prove that a particular justification exists for each record for which the exemption is claimed, are evident in one line of 1975 cases construing exemption 7. In a second line of cases, however, the courts failed to give adequate weight to these new points of emphasis in their analyses under the exemption, thus reaching inconsistent and arguably incorrect results.

The proper application of the amended exemption is illustrated by *Kaminer v. NLRB,* in which two of the specifically enumerated justifications were applied. The case arose out of a labor dispute. Upon receipt of an unfair labor practice charge by a union, the NLRB conducted its usual investigation, interviewing witnesses and taking affidavits. Before the Board could act on the results of this investigation, however, the union requested and received permission to withdraw the charges. The union subsequently filed a civil suit against the employer involved in the dispute, who, in turn, brought an action under the FOIA against the NLRB to obtain the affidavits which had been taken by the Board or its agents in the course of their investigation. The government invoked subsections (A), (C) and (D) of exemption 7 to justify refusing the request.

The court, in construing exemption 7(A) which protects investigatory records to the extent that their production would “interfere with enforcement proceedings,” cited a portion of the legislative debate on the exemption to the effect that it “should apply only when ‘the Government’s case in court... would be harmed by the premature release of evidence...’ or where disclosure would ‘harm such proceedings by impeding any necessary investigation before the proceeding.’”

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197. *Id.* at 422.
198. *Id.* at 423. See note 189 supra.
cause the Board's file in the case had already been closed, there was simply "no possibility of future enforcement proceedings and exemption 7(A) does not apply." On the other hand, the court found exemption 7(D), which provides for the protection of the identity of "confidential source[s]," to be applicable to the documents in question. The court agreed that the term "confidential source" was meant to encompass the identity of all persons giving information "under an expressed assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred." Though no express promise of confidentiality had been given to the sources, such a promise was "clearly inferred in this case" from the very nature of the Board's "investigatory function" which required confidentiality.

Another case which clearly follows the legislative mandate of the amendments by adopting a particularized approach to the investigatory files exemption is *Deering Milliken, Inc. v. Nash.* In this case, the NLRB contended that exemption 7(C), which covers "investigatory records compiled for law enforcement purposes" to the extent that disclosure would "constitute an unwarranted invasion of personal privacy," gave it the authority to withhold certain documents relating to a pending back pay proceeding. The court agreed that the claim of exemption was valid. In its investigation of the scope of subsection (C), the court looked to the personnel files exemption for guidance since the operative standards in the two provisions are nearly identical. It noted that exemption 7(C) differed only in that the word "clearly" had been omitted. The court interpreted this "purposeful omission" in the investigatory records exemption as evidencing a congressional intent to grant "agencies broader license to withhold documents than does [the

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200. 37 AD. L.2d at 423.
202. 37 AD. L.2d at 424. The court also noted that exemption 7(D) was not absolute. Consequently any "reasonably segregable portion" of the affidavits sought had to be disclosed after deletions of material which would disclose the identity of the Board's informants. Id. at 425.
205. 37 AD. L.2d at 949.
206. Exemption 6, 5 U.S.C. § 552(b)(6) (1970), covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."
personnel files exemption]." Although it did not decide how "unwarranted [an] invasion of personal privacy" must be to trigger exemption 7, the court quite logically concluded that the cases arising under the personnel files exemption could be relied on to the extent that any document which was covered by that exemption would also fall within the broader proscription of exemption 7. After examining these cases, the court concluded that the documents in question were covered by the personnel files exemption, and thus were also exempt under subsection (C) of the investigatory records exemption.

Other cases in which the newly amended exemption was properly applied emphasize the point that the burden of proof under the investigatory records exemption is now clearly on the agency invoking the provision. For example, in Title Guarantee Co. v. NLRB, the government invoked the seventh exemption on the ground that disclosure of certain signed affidavits or written reports which had been prepared by the Board from interviews of witnesses for a pending unfair labor practice proceeding would interfere with the agency's future enforcement proceedings. Specifically, the NLRB claimed that the effect of disclosure would be to reduce its ability to obtain information from the public in future investigations since prospective witnesses would be reluctant to volunteer information because of the publicity. The court rejected this argument, holding that "these general contentions are insufficient under the amended exemption." The government had simply not sustained its burden to prove any of the specific types of interference. Similarly, the court in Cessna Aircraft Co. v.

207. 37 Ad. L.2d at 950.
208. Id. at 951. Elements of exemption 6 analysis are also relevant to the exemption 7(C) issue of what factors a court must weigh in deciding whether an invasion of privacy is unwarranted. As under the personnel files exemption, the question of whose interests must be evaluated in making this decision arises under 7(C). Applying exemption 6 analysis, the court in Deering Milliken assumed that a balancing test was appropriate, although it refused to consider the individual FOIA plaintiff's need for the information. Rather, adopting the position advanced in some cases interpreting exemption 6 which emphasized the need to divorce access to government information from individualized need, the court asserted that it would look only to the general public's interest in the disclosure of the information in making its determination of whether the resulting invasion of privacy would be "unwarranted." Id. at 953.
209. 37 Ad. L.2d 685 (S.D.N.Y. 1975). Other aspects of this case are discussed in notes 153-64 supra and accompanying text.
210. Id. at 691. The court noted that the purpose of the amendments was "to limit the exemption to instances where disclosure would interfere with one of a specific set of interests" and that the court in order to achieve this "must examine each situation individually and determine if any of the specific harms enumerated by the statute would result from disclosure." Id.; accord, NLRB v. Hardeman Garment Corp., 37 Ad. L.2d 1074, 1076-77 (W.D. Tenn. 1975).
211. 37 Ad. L.2d at 692. The court concluded that the only way the release of the
thought that the government was presenting an overbread assertion of the exemption, observing that "[the Board . . . may not avoid the consequences of the [FOIA] by simply asserting that the requested documents are all subject to exemption."218

In two other 1975 cases the courts appeared not to follow the mandate of the newly amended exemption. *Russell Stover Candies, Inc. v. NLRB*214 involved a dispute concerning an NLRB certification proceeding. After the employees at one of its plants had elected a particular union as their bargaining agent, the employer filed objections to the election with the Board. The Regional Director conducted the required investigation and filed a report overruling all the objections. Subsequently, the employer brought an action under the FOIA to obtain certain witness statements and affidavits and all names and statements of persons involved in the investigation. In a truncated opinion, the court held that this information was privileged pursuant to exemption 7, finding that an earlier case, *Wellman Industries, Inc. v. NLRB*,215 was dispositive of all the issues.216 In *Wellman*, the court had denied access under the FOIA to affidavits obtained by an NLRB investigator during an investigation of a union representation election. The court had based this holding on the ground that disclosure of an employee's statements would inhibit future Board investigations and that premature disclosure of the investigation reports would prevent the Board from presenting its strongest case.217

The problem with the court's approach in *Russell Stover Candies* is that it ignored the legislative mandate embodied in the 1974 amend-

Information could hurt enforcement proceedings is that the FOIA plaintiff, also a party to an NLRB action, would be able to determine whether any of the material contained in the requested documents supported its contentions in the labor case. "This value is precisely that which is contemplated by the Freedom of Information Act and is not restricted by the exemptions of the Act." *Id.*

In *NLRB v. Hardeman Garment Corp.*, 37 A.L.R.2d 1074 (W.D. Tenn. 1975), the government sought to withhold affidavits of prospective government witnesses in an unfair labor practice hearing under the investigatory records exemption. In denying the government's motion for summary judgment, the court stressed that the government had failed to sustain the burden of proof mandated by the amended exemption. *Id.* at 1076-77. The *Hardeman* court expressly approved the court's analysis in *Title Guarantee* concerning the effect of the amendments to exemption 7. *Id.*

213. *Id.* at 1047. "Blanket assertions of privilege and exemption are not to be rubber-stamped by court approval, and . . . the agency will be required to assume its burden of proof that a withheld document is covered by specific statutory exemption." *Id.* at 1049.
215. 490 F.2d 427 (4th Cir. 1974).
216. 37 A.L.R.2d at 36.
217. 490 F.2d at 431.
ments that agencies justify nondisclosure in terms of one of the situations specifically enumerated in the amended exemption. From the citation to Wellman one may infer that subsection (A) of exemption 7, which applies when release would "interfere with enforcement proceedings," is the basis of the decision. Yet there are other subsections which arguably may be applicable, and it is impossible to know for sure on which of these provisions the court relied.\textsuperscript{218}

The other 1975 case in which the court apparently ignored the mandate of the 1974 amendments is Climax Molybdenum Co. v. NLRB.\textsuperscript{219} This case also involved a labor dispute in which the NLRB had scheduled a hearing to examine charges that an employer had committed unfair labor practices. Prior to the hearing, the employer brought an action to obtain various statements, notes, memoranda, and other records of information taken from witnesses interviewed by the NLRB in the course of its investigation into the charges. The NLRB claimed that exemption 7(A) was applicable and moved for summary judgment,\textsuperscript{220} apparently without making any effort to show why the particular documents should come within the exemption. The employer, on the other hand, argued "that because the FOIA . . . places the burden of establishing the exemption on the agency, the NLRB is required to produce evidence to show that in this particular case the requested disclosure would interfere with the specific enforcement proceeding involved."\textsuperscript{221} Remarkably, the court rejected plaintiff's proposition and held exemption 7(A) applicable as a matter of law to the documents requested, irrespective of whether their disclosure would actually have interfered with law enforcement proceedings.\textsuperscript{222}

The court adopted an unprecedented analysis to support this holding in the face of the newly amended exemption. The FOIA, the court argued, has to be construed in conjunction with other federal statutes. In this case, the other statute was the National Labor Relations Act, which has a "clearly defined policy of establishing the [NLRB] as the primary

\textsuperscript{218} One district court has indicated that it would not rely on Wellman to decide issues which arise under the newly amended investigatory files exemption. NLRB v. Hardeman Garment Corp., 37 Ad. L.2d 1074, 1076 (W.D. Tenn. 1975) (holding that the government had not sustained its burden of proof under exemption 7 and thus denying government motion for summary judgment).

\textsuperscript{219} 37 Ad. L.2d 956 (D. Colo. 1975).

\textsuperscript{220} Id. at 957.

\textsuperscript{221} Id.

\textsuperscript{222} Id. Evidently the court was creating an irrebuttable presumption that disclosure of this type of information, gathered for this particular type of law enforcement purpose, necessarily would interfere with the enforcement proceedings.
national governmental agency in the area of labor-management law.\textsuperscript{223} The NLRB has the power to prevent unfair labor practices, and is "expressly authorized to establish its own" enforcement procedures in exercising this power. Further, the Board has the authority to prevent discovery in advance of an unfair labor practice hearing.\textsuperscript{224} Therefore, "[t]o hold that there should be no judicial intrusion into the Board's determination that disclosure of its investigatory files would interfere with the enforcement proceeding relevant in this case is a consistent application of the policy expressed in the labor statute."\textsuperscript{225} In addition, the court argued, to make the NLRB show in every case how the disclosure of particular documents would impinge on the interests protected by exemption 7(A) "would impose an intolerable burden on the federal district courts" by encouraging all parties to an NLRB investigation to institute FOIA actions to seek discovery.\textsuperscript{226}

The effect of the holding in \textit{Climax Molybdenum Co.} is to make conclusive the NLRB's determination that disclosure of any investigatory file pertaining to an unfair labor practice hearing would interfere with enforcement proceedings. Under this analysis the Board would become the final arbiter of the FOIA issue. However, there are several problems with the court's analysis of the new exemption 7(A) and the statute in general. In the first place, the court apparently ignored the Supreme Court's admonition that the legislative history of exemption 7 "clearly indicates that Congress disapproves of those cases . . . which relieve the Government of the obligation to show that disclosure of a particular investigatory file would contravene the purposes of Exemption 7."\textsuperscript{227} In addition, by accepting the NLRB's determination as conclusive, the court seems to have disregarded the express language of the FOIA which gives the federal district courts jurisdiction to order the production of agency records improperly withheld. The Act specifically provides that on complaint of a party seeking disclosure "the court shall determine the matter de novo . . . and the burden is on the agency to sustain its action" under any of the exemptions.\textsuperscript{228} Clearly the result reached by the court flies in the face of this explicit language.

\textsuperscript{223} Id.
\textsuperscript{225} 37 AD. L.2d at 958.
\textsuperscript{226} Id.
Furthermore, the court’s argument that it would place an “intolerable burden” on the district courts to require a particularized inquiry in every case into whether disclosure would interfere with the specific enforcement proceeding involved is both incorrect and irrelevant. It is incorrect because there is no reason to suppose, assuming an increased number of FOIA requests as a result of a revitalized seventh exemption, that these requests will result in an avalanche of lawsuits brought pursuant to the Act if the agency processes them in good faith. The court has obviously lost sight of the fact that a lawsuit is not the primary mode of pressing a claim under the FOIA. Further, the argument is irrelevant for two reasons. First, the FOIA permits “any person” to obtain information under the Act, regardless of purpose. Second, since Congress has chosen to impose the burden of the FOIA litigation on the district courts, it would seem as though the extent of that burden should not enter into the determination of what Congress intended by a particular provision of the Act.

In the final analysis the Climax Molybdenum Co. court’s holding seems to rest on some rather vague notion that the same statutory policies which justify the NLRB in refusing to allow pre-hearing discovery also justify nondisclosure under exemption 7(A) of the FOIA and thus make the Board’s determination of the issue unreviewable. That contention, as has been suggested, receives no support from the language of the FOIA as the court itself must have known, since it cited no language to support its construction. Furthermore, to import the policy of unrelated statutes into an exemption would not seem to comport with the express provision in the Act that the exemption section “does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section.”

229. Id. § 552(a)(3).
230. Id. § 552(a)(4)(B).
231. Id. § 552(c). If there were any statutes actually authorizing or permitting the NLRB to withhold the information then the statutory exemption, id. § 552(b)(3), would be applicable. This situation is the only one in which other federal statutes should be considered in deciding whether to compel disclosure.

The proper application of exemption 7(A) in an analogous situation is exemplified by Deering Milliken, Inc. v. Nash, 37 Ad. L.2d 933 (D.S.C. 1975). In that case the FOIA plaintiff requested that the NLRB disclose certain documents generated in preparation for a back pay hearing which the Board was shortly to conduct. The Board refused, claiming that exemption 7(A) protected all the documents sought. Id. at 937. The issue, as the court noted, was whether or not this particular back pay proceeding would be “interfered with” by production of the requested documents. Id. at 941. The NLRB contended, as it had in Climax Molybdenum Co., “that (7)(A) exempts from production the documents in question here simply because they would not be discoverable under the current procedures employed in NLRB hearings.” Id. at 944. The court
rejected this construction on the ground that it was "totally inconsistent with the policy of the 1974 amendments to exempt NLRB files solely because the Board's own regulations would not allow their discovery in an NLRB proceeding." Id. That policy "was to compel any government agency withholding documents to justify that action by establishing specifically the manner in which production of the documents would harm one or more of several enumerated interests." Id. Further the court stated that "[i]n determining whether or not the information to be released will interfere with a law enforcement proceeding it is only relevant to make such determination in the context of the particular enforcement proceeding." Id. at 943, quoting 120 CONG. REC. 9329-30 (daily ed. May 30, 1974) (remarks of Senator Hart). Thus, the fact that the Board itself does not allow discovery cannot preclude a court from examining whether disclosure under exemption 7(A) would interfere with enforcement proceedings.

The NLRB also argued as a slight variation of the reasoning just discussed that because the documents sought would not normally be discoverable, their production under the FOIA should itself be presumed to interfere with enforcement proceedings without a more specific showing. Needless to say, the court rejected "such a conclusion [because it] . . . would represent the wooden and mechanical application of the FOIA which Congress sought to eliminate" in the 1974 amendments. 37 A. L.2d at 945. The court refused to abdicate its responsibility under the Act "to determine whether the NLRB has proved the applicability of the exemptions it claims . . . ." Id.

The court went on to find that in this particular case the NLRB could not possibly have made a showing of interference with the back pay proceeding involved sufficient to invoke exemption 7(A). The court reached this conclusion by considering both the nature of the documents sought and the nature of the proceeding. In the first place, the documents related solely to the issue of the amount of back pay owed by the employer to certain former employees. The Board had no authority to exact any punitive damages. Thus the nature of the proceeding was remedial and compensatory, its purpose being to determine objectively the amount of back pay owed by the employer. Assuming the documents sought related to this issue the only use they could have had would be to enable the employer to contest the accuracy of the amount of pay which the Board asserted that it owed. This could not interfere with a proceeding the very purpose of which was to objectively determine that very amount. Id.