COMMENTS

DEVELOPMENTS UNDER THE FREEDOM OF INFORMATION ACT—1979

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

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

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

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

7. See notes 138-48 infra and accompanying text.
8. 5 U.S.C. § 552 (1976). Subsection (a) contains the Act’s disclosure requirements. The exemptions from mandatory disclosure are enumerated in subsection (b).
11. See notes 56-68 infra and accompanying text.
13. See notes 74-111 infra and accompanying text.
15. See notes 74-99 infra and accompanying text.
18. See notes 177-88 infra and accompanying text.

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

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

I. REVERSE-FOIA SUITS

A Freedom of Information Act lawsuit typically arises when a party requesting agency records is dissatisfied with the agency's refusal to release the information and sues to compel disclosure. The FOIA provides for an explicit right of action in such circumstances.\(^2\) It does not, however, explicitly authorize a suit by a submitter of information to enjoin agency disclosure of that information in response to another party's FOIA request; whether a submitter can nevertheless bring a "reverse-FOIA" suit has been a lively issue in recent years.\(^3\) Courts have disagreed on the source of the cause of action. They have also differed on the proper scope of judicial review of the agency's decision to disclose. In *Chrysler Corp. v. Brown*,\(^4\) the Supreme Court conclusively decided the first issue, but left open the second.

\(^2\) "The district court...has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B) (1976).


\(^4\) 441 U.S. 281 (1979). For a discussion of the case, see Note, *Chrysler Corp. v. Brown: Seeking a Formula for Responsible Disclosure under the FOIA*, 29 CATH. U.L. REV. 159 (1979). Chrysler, a government contractor, was required by regulation to furnish employment statistics and affirmative action information for use by the Defense Logistics Agency in monitoring Chrysler's employment practices. The Defense Logistics Agency informed Chrysler that third parties had requested some of the submitted information under the FOIA, whereupon Chrysler sued to prevent disclosure. The Third Circuit's opinion, *Chrysler Corp. v. Schlesinger*, 565 F.2d...
According to most courts that had considered the question, the FOIA creates no private right of action to enjoin disclosure.\(^{25}\) In *Chrysler*, a unanimous Court, speaking through Justice Rehnquist, adopted this majority view, as had the Third Circuit Court of Appeals below.\(^{26}\) The Supreme Court held that while exempt records (which it assumed the documents in issue to be\(^{27}\)) could be withheld, the Act did not require nondisclosure. An exemption “denarates the agency’s obligation to disclose; it does not foreclose disclosure.”\(^{28}\) The Act’s clear language and legislative history strongly support the Court’s conclusion.\(^{29}\) Moreover, since Congress “did not limit an agency’s discretion to disclose information when it enacted the FOIA, [it] necessarily follows that the Act does not afford . . . any right to enjoin agency disclosure.”\(^{30}\)

The *Chrysler* Court also held that the Trade Secrets Act\(^{31}\) did not
afford Chrysler a private right of action to enjoin disclosure in violation of the statute. Justice Rehnquist noted that because the Trade Secrets Act was a criminal statute, the Court would imply a private right of action only if a clear basis for the inference existed in the statute or its legislative history. The Court discovered none. Moreover, it found such an inference to be unnecessary in light of its decision that section 10(a) of the Administrative Procedure Act provided Chrysler with a basis for judicial review of the agency's determination to disclose. Although violation of the Trade Secrets Act could not be enjoined in a private action under that statute, “any such violation may have a dispositive effect on the outcome of judicial review of agency action pursuant to § 10 of the APA.” Since the Trade Secrets Act places substantive limits on agency action, Chrysler could seek review under the Administrative Procedure Act as a person “adversely affected or aggrieved” by such action.

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

agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information . . . which . . . concerns or relates to the trade secrets [or confidential business information] of any person, firm, partnership, corporation, or association . . . shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

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

39. See note 31 supra.
40. 565 F.2d at 1186, 1188.
41. 441 U.S. at 295. A substantive rule, unlike interpretative rules and general statements of agency policy or procedure, affects individual rights and obligations. To be accorded the force of law, the regulation must be the “product of a congressional grant of legislative authority.” Id. at 303. It must also be promulgated in accordance with the APA’s requirements of notice of the proposed rule and opportunity to comment before promulgation. 5 U.S.C. § 553 (1976).
42. See note 38 supra.
43. Records exempt from mandatory disclosure under the FOIA are “outside the ambit of that Act.” 441 U.S. at 303. The Act cannot, therefore, serve as the authorization for regulations permitting disclosure. Id. at 303-04.
44. See 5 U.S.C. § 301 (1976) (providing in part: “The head of an Executive department . . . may prescribe regulations for . . . the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public”). Relying upon the statute’s legislative history, the Court concluded that the Act was meant only to allow “housekeeping”—agency regulation of internal affairs—and not to authorize release of trade secrets or confidential business information. 441 U.S. at 310-12. The Court thereby disagreed with the opinion of the lower court, siding with the District of Columbia Circuit’s decision on this issue in Charles River Park “A,” Inc. v. HUD, 519 F.2d 935 (D.C. Cir. 1975).
46. 441 U.S. at 312-16. Section 4 of the APA, 5 U.S.C. § 553 (1976), exempts “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice” from that section’s procedural requirements of affording notice of and opportunity to comment on the proposed rule. The Secretary of Labor published the regulations relevant in the Chrysler case, 41 C.F.R. §§ 60-40.1 to 40.4 (1979), without adhering to the requirements of section 553, and called the regulations interpretative and thus not subject to the restrictions. 38 Fed. Reg. 3192, 3193
ized by law," and remanded the case for consideration of the issue in light of its decision.47

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

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

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

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

49. 441 U.S. at 319.

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

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

52. 441 U.S. at 319 (Marshall, J., concurring).
Court held that submitters seeking review of an agency's decision to disclose exempt information must utilize the Administrative Procedure Act, rather than the FOIA or the Trade Secrets Act, as the source of the cause of action. The scope of judicial review under the Administrative Procedure Act is uncertain, but it is clear that agency regulations constitute "authorization by law," permitting disclosure despite the substantive constraints of the Trade Secrets Act, only if they are substantive and procedurally proper. Whether this guidance will prove sufficient to harmonize the disparate approaches of the courts of appeal remains to be seen.\textsuperscript{53}

\section*{II. National Security Exemption}

Exemption 1 of the FOIA\textsuperscript{54} applies only when an executive order, for purposes of national security, permits classification of the requested material and the procedural requirements of the order have been followed.\textsuperscript{55} The terms of the executive order dealing with classification of national security information, therefore, directly affect the outcome of an FOIA suit in which the agency withholds records based on this exemption. On June 28, 1978, President Carter issued Executive Order No. 12,065, entitled "National Security Information," which took effect on December 1, 1978.\textsuperscript{56} While this new executive order left most of the substantive and procedural criteria of the prior executive order\textsuperscript{57} unal-

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

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


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


tered, several important changes were effected.  

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

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

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

60. Exec. Order No. 12,065, § 1-104, 3 C.F.R. at 191 (1979) (emphasis added). The standards for classifying matter as "secret" (serious damage) and "top secret" (exceptionally grave damage) are unchanged. Compare Exec. Order No. 12,065, §§ 1-102 & 1-103, 3 C.F.R. 191 (1979), with Exec. Order No. 11,652, §§ 1(A) & 1(B), 3 C.F.R. 679 (1971-1975 Compilation). As the FOIA requires only that the records be "classified," the minimum standard ("identifiable damage to the national security") is the relevant one in FOIA litigation.
62. Exec. Order No. 12,065, § 1-101, 3 C.F.R. 191 (1979). The National Security Council directive states that any "substantial doubt" should be so resolved; the new order speaks of "reasonable doubt"—again, a standard more favorable to the FOIA requester.
64. Id: Section 1-201 lists those officials with authority to classify documents as top secret and states that the President may designate others. President Carter exercised this authority on June 28, 1978, the same day he issued Exec. Order No. 12,065. 3 C.F.R. 190 (1979), reprinted in 50 U.S.C.A. § 401 note, at 64 (West Supp. 1979).
1 does not indicate that the public's interest in disclosure is necessarily a relevant consideration, and the prior order contained no such provision. It is too soon to tell what the effect of this rule and the other new aspects of President Carter's order will be, but the order is clearly designed to decrease the use of classification when withholding the document from the public serves no legitimate purpose.

Interestingly, the year's most significant case concerning Exemption 1 did not discuss the new executive order. In Hayden v. National Security Agency/Central Security Service, Tom Hayden and Jane Fonda sought disclosure of information obtained through National Security Agency monitoring of foreign electromagnetic signals. The Court of Appeals for the District of Columbia held that the agency had made the public record as complete as possible, as required by Vaughn

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65. One commentator asserts that section 3-303 "open[s] up substantial new possibilities and is in effect an amendment to exemption (b)(1)." Halperin, supra note 58, at 13. This conclusion is misleading. While the provision is potentially of great significance, it in no way "amends" the FOIA. The first exemption permits agencies to withhold only those materials that meet the substantive and procedural precepts of an executive order. The FOIA does not define or limit the terms of this order; the public interest provision is merely a new term in the executive order, not a change in the FOIA itself.

66. Exec. Order No. 11,652, § 12, 3 C.F.R. 689 (1971-1975 Compilation), did provide for access by historical researchers and former government officials, on a case-by-case basis. The new order contains a similar provision in section 4-3, 3 C.F.R. 200 (1979). This rule, however, differs substantially from the public interest balancing test of section 3-303 of Exec. Order No. 12,065, 3 C.F.R. 197 (1979), as evidenced by the continued presence of the researcher-former official provision in Exec. Order. No. 12,065, 3 C.F.R. 190 (1979).

67. Although several 1979 cases mentioned the new order, none reached particularly significant conclusions. Two cases referred to the public interest balancing test of section 3-303. In Kanter v. Department of State, 479 F. Supp. 921 (D.D.C. 1979), the court determined that the documents were exempt under subsection (b)(1), after having ordered the defendant to perform the balancing test of section 3-303. Although the court stated that balancing was not required in all cases, it held that it could determine when balancing was necessary as part of its scrutiny of the agency's compliance with the order's procedural guidelines. In ACLU v. Brown, 609 F.2d 277 (7th Cir. 1979), Judge Cummings, concurring in part and dissenting in part, noted that "the Executive order requires the declassification of documents when, as here, there is a 'public interest in
v. Rosen,\textsuperscript{70} despite its refusal to itemize publicly the documents being withheld pursuant to the national security exemption. Judge Wilkey, writing for the majority, accepted the agency's argument that disclosure of the existence of the records, as well as their content, could be withheld on the theory that in some instances the existence of particular records is more sensitive than their substance. Since the court believed that public acknowledgement of the monitoring could endanger the national security, the FOIA did not require disclosure.\textsuperscript{71} Under the circumstances, therefore, the public record was adequate.\textsuperscript{72}

III. Federal Statutes Exemption

A. The Consumer Product Safety Act.\textsuperscript{73}

As amended in 1976,\textsuperscript{74} Exemption 3 of the FOIA deals with federal statutes that either require withholding information or, alternatively, specify the criteria for withholding or refer to particular matters to be withheld.\textsuperscript{75} Cases interpreting the third exemption thus hinge on the court's construction of a statute other than the FOIA, and a subsequent determination whether the information requested falls within the ambit of that withholding statute. Two recent cases, Pierce & Stevens Chemical Corp. v. United States Consumer Product Safety Commission,\textsuperscript{76} and GTE Sylvania, Inc. v. Consumer Product Safety Commission,\textsuperscript{77} examined the Consumer Product Safety Act\textsuperscript{78} and reached

\begin{itemize}
\item \textsuperscript{70} 484 F.2d 820 (D.C. Cir. 1973), \textit{cert. denied}, 415 U.S. 977 (1974).
\item \textsuperscript{71} \textit{Cf.} Walter, Conston, Schurtman & Gumpel, P.C. v. United States Dep't of Justice, No. 79-2918 (S.D.N.Y. Oct. 3, 1979). The court in \textit{Walter} held that in an Exemption 7(A) context, where an index of the withheld records would "afford prospective defendants with a complete insight into the case being compiled against them," the index need not be made public. The court characterized its holding as consistent with the national interest and the purposes of the FOIA.
\item \textsuperscript{72} The court also held that an in camera inspection of the records was unnecessary, and that an affidavit submitted for in camera consideration, without the presence of opposing counsel, was sufficient under the circumstances to establish that the documents were within the exemption. 608 F.2d at 1388.
\item \textsuperscript{73} 15 U.S.C. §§ 2051-2081 (1976).
\item \textsuperscript{75} 5 U.S.C. § 552(b)(3) (1976), which exempts matters specifically exempted from disclosure by statute . . . , provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.
\item \textsuperscript{76} 585 F.2d 1382 (2d Cir. 1978).
\item \textsuperscript{77} 598 F.2d 790 (3d Cir.), \textit{cert. granted}, 100 S. Ct. 479 (1979).
\item \textsuperscript{78} 15 U.S.C. §§ 2051-2081 (1976).
\end{itemize}
different conclusions regarding that Act's effect on FOIA disclosure.79 This significant conflict between the Second and Third Circuits may eventually be resolved by the Supreme Court.80

In both cases, submitters of information to the Consumer Product Safety Commission sued to prevent disclosure of information in response to an FOIA request. The submitters claimed that disclosure would be inconsistent with section 6(b)(1) of the Consumer Product Safety Act,81 which they interpreted to be an Exemption 3 withholding statute.82 Section 6(b)(1) provides that the Consumer Product Safety Commission, before publicly disclosing information submitted to it, must both notify the submitter of its decision to disclose and insure that the information is accurate.83 In neither 

Pierce & Stevens nor GTE Sylvania had the Consumer Product Safety Commission complied with section 6(b)(1).84 The Consumer Product Safety Commission argued


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


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

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

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

84. The Consumer Product Safety Commission did not argue that the material could be released under section 6(b)(1); it acknowledged that it was inaccurate and misleading. See GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n, 598 F.2d at 799-800; cf. Pierce & Stevens Chem. Corp. v. United States Consumer Prod. Safety Comm'n, 585 F.2d at 1388 n.28 (encourag-
that the section applies only when the Commission disseminates information to the public on its own initiative, rather than when it merely responds to an FOIA request. In *Pierce & Stevens*, the court adopted the Consumer Product Safety Commission's position, thereby permitting the Commission to disclose; the *GTE Sylvania* court, on the other hand, rejected that argument, holding that section 6(b)(1) pertains to either type of disclosure, that it is an Exemption 3 withholding statute, and that consequently the agency could not disclose.

Judge Feinberg's decision for the Second Circuit in *Pierce & Stevens* attempted to interpret the Consumer Product Safety Act so as to minimize its conflict with the FOIA. Whereas the FOIA calls for prompt disclosure, the notification procedures of the Consumer Product Safety Act take much longer. Moreover, the Consumer Product Safety Act, by advising an agency to review or rewrite a document to make it more accurate, contrasts with the FOIA, which mandates disclosure only of existing documents, less any exempt portions. Finally,
the Consumer Product Safety Act expressly incorporates the nine exemptions of the FOIA; this led the court to conclude that Congress did not intend to affect FOIA disclosure of nonexempt documents.

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

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

90. Id. § 2055(a)(1).
91. 585 F.2d at 1387.
92. Id. at 1387.
94. 585 F.2d at 1386, 1388. See H.R. REP. No. 1022, supra note 93, at 27, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 1017, 1029. The court conceded that disclosure to the FOIA requester might result in widespread publication, but explained that "in contrast to publicity releases by the Commission, there is no government imprimatur on the document in that situation." 585 F.2d at 1388.
95. 585 F.2d at 1388.
96. 598 F.2d at 803. The court's statutory analysis is somewhat unpersuasive. It noted that the FOIA exemptions were incorporated in the same section as the disclosure provisions—section 6(b)(1)—and relied on this fact to show that the disclosure provisions refer to FOIA disclosure. However, the statute can easily be read, as it was by the Pierce & Stevens court, as referring to the FOIA exemptions only as a limitation upon Commission-initiated dissemination that otherwise satisfies the criteria set forth in section 6(b)(1). Similarly, the GTE Sylvania court is not persuasive in arguing that section 6(b)(2), by enumerating exceptions to section 6(b)(1) but not including the FOIA among them, implicitly places FOIA requests within the ambit of section 6(b)(1). Only if disclosure pursuant to the FOIA is reached by section 6(b)(1) initially would the absence of an exemption be relevant; the section 6(b)(2) exemptions are all matters to which section 6(b)(1) would unquestionably apply but for section 6(b)(2). More convincing is the court's discussion of legislative history, 598 F.2d at 804-12, citing the various debates and reports, and arguing that the subsequent history contained in the committee report considering Consumer Product Safety Act amendments, relied upon in Pierce & Stevens, is entitled to little weight.
as a withholding statute under Exemption 3:

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

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

B. Other Federal Statutes.

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

97. Id. at 813.
98. Id. at 814-15.
99. Id. at 816.
100. See cases cited in note 102 infra.
101. I.R.C. § 6103. This is an extremely long provision that details to whom, and under what conditions, various types of information can be disclosed.
102. See, e.g., Breuhaus v. IRS, 609 F.2d 80 (2d Cir. 1979); Long v. United States IRS, 596 F.2d 362 (9th Cir. 1979); Chamberlain v. Kurtz, 589 F.2d 827 (5th Cir.), cert. denied, 100 S. Ct. 82 (1979); Stephenson v. IRS, 79-2 U.S. Tax Cas. ¶ 9513 (N.D. Ga. 1979); Britt v. IRS, 79-2 U.S. Tax Cas. ¶ 9450 (D.D.C. 1979); Dixon v. IRS, 79-1 U.S. Tax Cas. ¶ 9406 (M.D. Ala. 1979); Anastas v. United States, 79-2 U.S. Tax Cas. ¶ 9510 (N.D. Cal. 1979).
more significant question in several cases was whether the information sought to be withheld by the Internal Revenue Service actually fell within the ambit of section 6103.103

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

Courts also decided Exemption 3 cases involving such diverse

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

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


107. The bill is entitled "A bill to enhance the foreign intelligence and law enforcement activities of the United States by improving the protection of information necessary to their effective operation." H.R. 5129, supra note 87. It would amend 50 U.S.C. § 403g (1976) by broadening the scope of this exempting statute. It would also amend the FOIA by preventing convicted felons or their agents from utilizing the Act to acquire records from intelligence or law enforcement agencies, and by altering various provisions in the FOIA to exempt many records of such agencies from the Act's purview. The bill, which was referred to the Permanent Select Committee on Intelligence and the Committee on Government Operations, is a reaction to the "significant toll" that the FOIA has allegedly taken "on the ability of our law enforcement and intelligence agencies to perform their congressionally authorized functions." Letter from Rep. Robert McClory to Congressional Colleagues 1 (July 27, 1979).
matters as a criminal investigation by the Postal Service,\textsuperscript{108} whether Federal Rule of Civil Procedure 26(c) qualifies as an Exemption 3 statute,\textsuperscript{109} and the right of a FOIA requester to patent applications and related information.\textsuperscript{110} While some of the decisions are interesting and potentially significant, their primary importance is that they demonstrate the ongoing process of straightforward classification of statutes under the amended Exemption 3.\textsuperscript{111}

IV. INTRA-AGENCY MEMORANDUM EXEMPTION

A. Confidential Commercial Information.

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

\begin{itemize}
  \item \textsuperscript{108} Church of Scientology v. United States Postal Serv., 593 F.2d 902 (9th Cir. 1979) (remanding to the district court for a decision whether, in light of the 1976 amendment of Exemption 3, Pub. L. No. 94-409, § 5(b), 90 Stat. 1247 (1976), the investigatory file exemption of the Postal Reorganization Act, 39 U.S.C. § 410(c)(6) (1976), is an Exemption 3 statute).
  \item \textsuperscript{109} Founding Church of Scientology, Inc. v. Bell, 603 F.2d 945 (D.C. Cir. 1979) (holding that the rule is not a "statute" for purposes of Exemption 3).
  \item \textsuperscript{110} Irons & Sears v. Dann, 606 F.2d 1215, 1223 (D.C. Cir. 1979) (discussing the Exemption 3 status of section 122 of the Patent Act, 35 U.S.C. § 122 (1976), and holding that whereas documents are exempt "insofar as they relate to pending and abandoned applications, . . . [they are] fully subject to [the FOIA] insofar as they relate to applications that have issued as patents").
  \item \textsuperscript{111} See Note, Developments Under FOIA—1978, supra note 2, at 354.
  \item \textsuperscript{112} 5 U.S.C. § 552(b)(5) (1976).
  \item \textsuperscript{113} Fed. R. Civ. P. 26-37 are the rules for discovery in federal civil litigation.
  \item \textsuperscript{114} 99 S. Ct. 2800 (1979). The lower court decisions are discussed in Note, Developments Under FOIA—1977, supra note 2, at 222 n.215; Note, Developments Under FOIA—1976, supra note 2, at 539-41.
  \item \textsuperscript{115} 12 C.F.R. § 271.5 (1979).
  \item \textsuperscript{116} The Federal Open Market Committee regulates the money supply and federal funds rate (the rate at which banks will lend or borrow immediately available reserves on an overnight basis) by purchasing or selling securities in the open market. Selling securities decreases bank reserves and thereby diminishes investment activity; buying securities has the opposite effect. The committee meets monthly to formulate monetary policy for the upcoming period, and sets out its decisions in the directives. After the effective period of a directive has passed, the Federal Open Market Committee releases it for publication in the Federal Register. Merrill sued to compel earlier disclosure. See the discussion in 99 S. Ct. at 2803-05.
\end{itemize}
immediate disclosure, as ordered by the Court of Appeals for the District of Columbia "would seriously interfere with the conduct of national monetary policy." 117

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

On the more difficult and significant question of the applicability of a privilege that would make the document nondiscoverable, the Court determined that the records "would not be available by law to a party . . . in litigation with the agency." 1122 Although the directives were not subject to the attorney-client privilege, the attorney's work product privilege, or the executive privilege for predecisional deliberations within the agency 123—the only privileges the Court had previously recognized in Exemption 5 124—the majority nevertheless held

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

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

119. 99 S. Ct. at 2814.

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

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

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

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

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

124. The Court had been persuaded to recognize these privileges because they were expressly mentioned in the legislative history and not duplicated in any of the Act's other exemptions. Id. at 2809-10. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975); EPA v. Mink, 410 U.S. 73 (1973).
that the exemption did apply to the directives. Justice Blackmun, writing for the Court, explained that Exemption 5 includes a privilege for confidential commercial information pertaining to government contracts. In support of this holding, he referred to Federal Rule of Civil Procedure 26(c)(7), which states that a court may, "for good cause shown, . . . [issue a protective order] that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." Although the Court recognized that the FOIA's legislative history provided less support for including this privilege in Exemption 5 than for incorporating the executive and attorney-client privileges, it nonetheless found a sufficient foundation in the House Report and House and Senate committee hearings. For example, agencies testifying at hearings preceding the FOIA's enactment expressed concern about the disclosure of confidential commercial information. In addition, the House Report on the FOIA states that Exemption 5 is intended to exempt from disclosure "documents or information which it has received or generated before it completes the process of awarding a contract . . . ." Given the agency concerns and this statement from the House Report, the Court decided that it was appropriate to infer that Exemption 5 incorporates "a limited privilege for confidential commercial information pertaining to [government] contracts." The Court also concluded that the Domestic Policy Directives, which relate to the government's purchase and sale of securities, "are substantially similar to confidential commercial information generated in the process of awarding a contract." Therefore, upon a showing (to the district court) that immediate disclosure would have a serious detrimental effect, the directives would be exempt.

125. Fed. R. Civ. P. 26(c)(7). "And we see no reason why the Government could not, in an appropriate case, obtain a protective order under Rule 26(c)(7)." 99 S. Ct. at 2810.
126. 99 S. Ct. at 2810-11.
127. 99 S. Ct. at 2810-11.
128. 99 S. Ct. at 2812. The Court ruled that this privilege would not duplicate other privileges in Exemption 5 or elsewhere in the FOIA. By reaching this result the Court avoided a decision on two other privileges the Federal Open Market Committee asserted: first, a privilege for official government information whose release would not be in the public interest, and second, a privilege based on Fed. R. Civ. P. 26(c)(2), permitting a court to restrict discovery to a designated time or place. 99 S. Ct. at 2810 n.17. The Court began its analysis, however, by rejecting the Federal Open Market Committee's claim that Exemption 5 authorizes an agency to delay disclosure of intra-agency memoranda "that would undermine the effectiveness of the agency's policy if released immediately . . . . even if the memoranda in question could be routinely discovered by a party in civil litigation with the agency." Id. at 2809.
129. 99 S. Ct. at 2813.
130. See notes 119-20 supra and accompanying text.
Justice Stevens' dissent, which Justice Stewart joined "insofar as it expresses views concerning the 'legal question' presented,"\textsuperscript{131} attacked the majority's reading of the fifth exemption. In a lengthy footnote, Justice Stevens explained why he was not persuaded by the majority's analysis of the legislative history:

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

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

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

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

\textsuperscript{132} \textit{Id.} at 2815 n.2 (Stevens, J., dissenting) (emphasis in original).

\textsuperscript{133} The dissent stated:

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

\textsuperscript{134} 5 U.S.C. § 552(b) (1976). See note 29 \textit{supra}.
26(c)(7), which empowers courts to order that records "be disclosed only in a designated way," supports the allowance of a temporary delay in disclosure. Although the majority opinion is logical in a technical sense, it does violence to the spirit of the Act. Congress did not intend to enact a statute with a middle ground "between 'current' release and total exemption," and the Court's extension of Exemption 5 is even more suspect as a result. While the Court's desire to protect the national monetary policy is understandable, the dissent's approach is more honest to the FOIA and properly leaves such policy decisions to the legislature.

B. Traditional Discovery and the FOIA.

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

135. FED. R. CIV. P. 26(c)(7).
136. 99 S. Ct. at 2816 (Stevens, J., dissenting).
137. This is especially true since Congress was aware of the problem and chose not to resolve the issue in this statute. See note 133 supra. The dissent's position, however—at least if the majority is correct in concluding that the government could assert the confidential commercial information privilege in discovery disputes—leads to the odd result that material exempt from discovery must be disclosed under the FOIA.
138. See, e.g., Murphy v. Department of the Army, No. 78-1258 (D.C. Cir. Dec. 21, 1979) (disclosure to a Congressman acting in his official capacity does not waive the Exemption 5 privilege); Lead Indus. Ass'n v. OSHA, 610 F.2d 70 (2d Cir. 1979) (analyses based upon public record that are prepared by outside consultants at agency's request are exempt as part of deliberative process); Falcone v. IRS, 479 F. Supp. 985 (E.D. Mich. 1979) (exemption for predecisional advice does not apply to memorandum adopted by agency as statement of policy and interpretation of Internal Revenue Code); Pies v. IRS, 79-2 U.S. Tax Cas. ¶ 9571 (D.D.C. 1979) (draft of proposed regulation, treated as final work product, is not exempt as predecisional advice); Kanter v. Department of State, 479 F. Supp. 921 (D.D.C. 1979) (predecisional legal advice); Hearnes v. IRS, 79-2 U.S. Tax Cas. ¶ 9526 (E.D. Mo. 1979) (discussing the attorney-client, work product, and executive privileges); Brinton v. United States Dep't of State, 476 F. Supp. 535 (D.D.C. 1979) (attorney-client privilege not waived by public statements of agency officials that utilize the contents of documents without referring to the actual documents), as amended (Sept. 21, 1979); Grolier, Inc. v. FTC, 1979-1 Trade Cas. ¶ 62,698 (D.D.C. 1979) (incorporation of predecisional memorandum into final decision); Taboor Sales Clearing, Inc. v. Department of the Treasury, 471 F. Supp. 436 (N.D. Ill. 1979) (executive privilege, discussing predecisional-postdecisional and opinion-fact tests); Mallin v. NLRB, 101 L.R.R.M. 2656 (N.D. Ill. 1979) (predecisional memoranda); Dick v. IRS, 79-1 U.S. Tax Cas. ¶ 9315 (N.D. Ill. 1979) (predecisional memoranda); Eisenberg v. IRS, 79-1 U.S. Tax Cas. ¶ 9314 (N.D. Ill. 1979) (predecisional legal advice).
139. 81 F.R.D. 609 (M.D. Fla. 1979).
the FOIA, refused to produce the documents. Rejecting this position, the district court concluded that "the FOIA and its exclusionary provisions are irrelevant to a motion to compel discovery under the Federal Rules";\(^{140}\) *i.e.*, the FOIA places no limits on the discovery process. This differs from the situation in *ACLU v. Brown*,\(^ {141}\) in which the court determined that in civil discovery it is proper to review a claim of exemption under the state secrets privilege by looking to the FOIA's national security exemption\(^ {142}\) for guidance. *Canal Authority* declined to exempt documents from discovery solely because they could have been withheld if requested under the FOIA; in *ACLU v. Brown*,\(^ {143}\) the FOIA merely provided the standards by which to review a claim of privilege that the court recognized as applicable in the discovery context.\(^ {144}\) Even when a court looks to the FOIA for guidance in a discovery dispute, the Act can suggest only a tentative solution. All courts acknowledge that whereas a litigant's need for the requested information can overcome a claim of privilege in discovery, need is irrelevant in an FOIA action.\(^ {145}\) A good example of this principle is the criminal case

\(^{140}\) *Id.* at 613.

\(^{141}\) 609 F.2d 277 (7th Cir. 1979).


\(^{143}\) 609 F.2d 277 (7th Cir. 1979).

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

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


An interesting problem is presented when a litigant attempts to use the FOIA, rather than the discovery process, to get information helpful for his case. In *Cooper v. Department of the Navy*,
Irving v. DiLapi, in which the Second Circuit Court of Appeals upheld the district court's decision that union authorization cards should be disclosed to the defendants pursuant to their subpoena. Acknowledging that the cards would be exempt from disclosure under the FOIA, the court nevertheless ordered production because the defendant's need for the material outweighed the government's (public's) interest in confidentiality. While these cases do not effect radical changes in the law, they do help clarify an area important under both the FOIA and the Federal Rules.

V. INVESTIGATORY RECORDS EXEMPTION

A. Law Enforcement Purposes.

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

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

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

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

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

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

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


150. The records are exempt only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

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

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

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

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152. 599 F.2d 1383 (5th Cir. 1979).
153. *Id.* at 1384.
154. *Id.* at 1386.
156. 470 F. Supp. at 1334.
157. *Id.*
161. Under the Act, it is a felony to belong to an organization that advocates the overthrow of the government. The Act provides in part:

> Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such
ment's argument and concluded that in light of the Supreme Court's restrictive interpretation of the Smith Act's membership provision, after 1955, the Federal Bureau of Investigation could not reasonably, and in good faith, have believed that Lamont had violated the law. Therefore, the Federal Bureau of Investigation had not collected the information for any law enforcement purpose, but rather as part of its general monitoring and surveillance of Lamont. Applying a test of whether the agency believed in good faith that the subject of its investigation had violated the law, the court denied the government's Exemption 7 claim, subject to the introduction of further proof of the investigation's law enforcement purpose.

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

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


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


164. 475 F. Supp. at 780.

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

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

167. 596 F.2d at 473.
the type of agency the exemption is aimed at as it is a condition on the use of the exemption by agencies having administrative as well as civil enforcement duties. We see strong policy reasons supporting this reading of “law enforcement purpose” which would, assuming other conditions are met, extend the exemption to all investigative files of a criminal law enforcement agency.\textsuperscript{168}

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

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

\begin{itemize}
\item \textsuperscript{168} Id. at 474.
\item \textsuperscript{169} Id.
\item \textsuperscript{170} Id. at 475 (citing 120 CONG. REC. 17,034 (1974) (remarks of Sen. Kennedy), 120 CONG. REC. 36,878 (1974) (remarks of Sen. Bayh), 120 CONG. REC. 36,879 (remarks of Sen. Mondale)).
\item \textsuperscript{171} 596 F.2d at 475.
\item \textsuperscript{172} Id. at 474 n.13.
\end{itemize}
the law. The FOIA, enacted as a mechanism to allow public oversight of government, was not meant to shield unauthorized agency activity.

B. Interference With Enforcement Proceedings.

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

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

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

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

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


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

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

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

180. Id. at 523.

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

An interesting summary of the cases appears in Judge Goldberg's opinion for the Fifth Circuit in Anderson Greenwood & Co. v. NLRB, 604 F.2d 322 (5th Cir. 1979). The court held exempt NLRB witness statements procured during an investigation of a challenged representative election, an issue similar to that decided the same day in Red Food Stores, Inc. v. NLRB, 59 F.2d 324 (5th Cir. 1979). Judge Goldberg opined:

Our decision in Robbins Tire,
Interpreting Congresses' reported desires,
Exposed workers to their bosses' ire.
The High Court, avoiding this sticky quagmire,
And fearing employers would threaten to fire,
Sent our holding to the funeral pyre.
Then along came Clements Wire,
Soon after its venerable sire.
To elections, Wire extended Tire,
Leaving app'lees arguments higher and drier.
Now to colors our focus must shift,
To Green wood and stores that are Red.
We hope this attempt at a rhyme, perhaps two,
Has not left this audience feeling too blue.
604 F.2d at 323 (footnotes omitted).

validity of the National Labor Relation Board’s fears that disclosure would jeopardize unrelated future proceedings.\textsuperscript{183}

While the \textit{Nemacolin} case distinguished \textit{Robbins Tire} so as to reach an opposite result, other courts extended the \textit{Robbins Tire} generic exemption to the analogous facts present in their cases. In \textit{NLRB v. Croft Metals, Inc.},\textsuperscript{184} a Fifth Circuit panel held that contempt proceedings before a special master are enforcement proceedings to which the exemption applies. The court acknowledged that the proceedings were not identical, but saw the essential circumstances—the prosecutorial function and the statute being enforced\textsuperscript{185}—as the same.\textsuperscript{186} Another court applied the \textit{Robbins Tire} holding to a situation in which the witness’ statement, located in a file on a withdrawn charge, was relevant to a second, pending proceeding.\textsuperscript{187} Once the National Labor Relations Board demonstrated the affidavit’s relevance to the pending proceeding, it was exempt under Exemption 7(A) without a “particularized showing of potential harm from disclosure.”\textsuperscript{188}

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

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

\textsuperscript{184} 467 F. Supp. at 525. Second, the National Labor Relations Board purports to grant confidentiality to all declarants by use of the statement referred to above. The court opined that its holding might differ if only reluctant sources were assured of confidentiality. “[E]xemption 7(D) requires the grant of confidentiality to be made on the basis of good faith discretion, not on the basis of arbitrary rule, as the grant was made in this case.” \textit{Id.} But see \textit{Pacheco v. FBI}, 470 F. Supp. 1091, 1100-01 (D.P.R. 1979). In \textit{Pacheco} the court held that Exemption 7(D) exempted the records although the government’s affidavit stated that some of the information concerned witnesses to crimes who might be called upon to testify publicly. The court apparently accepted the Bureau’s argument that the informants had all received implied assurances of confidentiality. \textit{Nemacolin} and \textit{Pacheco} may be distinguishable, however, in that the FBI, as a criminal law enforcement agency, receives greater protection under Exemption 7(D). See note 150 supra.

\textsuperscript{185} 100 L.R.R.M. 2426 (5th Cir. 1979).


\textsuperscript{187} 100 L.R.R.M. at 2427.

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

Exemption 8 of the FOIA provides that the Act’s disclosure provisions do not apply to matters “contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.” This exemption has produced little litigation in the thirteen years since the FOIA’s enactment; only Exemption 9 has produced less. In Gregory v. Federal Deposit Insurance Corp., however, a district court discussed the applicability of Exemption 8 to a request for records from the Federal Deposit Insurance Corporation, which, as the insurer, possessed the records of a closed bank.

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

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

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190. Id. § 552(b)(9), which exempts “geological and geophysical information and data, including maps, concerning wells.”
193. Id. at 1332.
194. Id. at 1333. See generally Consumers Union v. Heimann, 589 F.2d 531, 534 (D.C. Cir. 1978).
195. 470 F. Supp. at 1332.
Because the literal interpretation would lead to an unreasonable result, without any countervailing suggestion by the Federal Deposit Insurance Corporation that disclosure was problematic, the court rejected the Federal Deposit Insurance Corporation’s claim of exemption.

VII. Conclusion

Litigation under the FOIA in 1979 resolved fewer issues than it left open. The Supreme Court’s pronouncements in Chrysler and Merrill failed to settle even the particular disputes under consideration. Furthermore, the Court’s reasoning was inconclusive (Chrysler) and unsatisfying (Merrill). The circuit and district courts made progress in certain areas, most notably with regard to applying the Supreme Court’s 1978 decision in Robbins Tire and Robbins Tire and Rubber Co., 437 U.S. 214 (1978). The circuit and district courts made progress in certain areas, most notably with regard to applying the Supreme Court’s 1978 decision in Robbins Tire and Rubber Co., 437 U.S. 214 (1978). The circuit and district courts made progress in certain areas, most notably with regard to applying the Supreme Court’s 1978 decision in Robbins Tire and Rubber Co., 437 U.S. 214 (1978). Again, however, the disturbing developments overshadowed the positive accomplishments. Conflicts erupted between courts over the exempt status of consumer product information and records of unlawful criminal investigations. Moreover, rumblings in the Congress concerning request delays and records of national intelligence agencies forbode the injection of new uncertainties into the law. In sum, the year’s FOIA developments demonstrated that the area of federal information disclosure is one of constant and unpredictable change.

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196. Id. at 1333.
198. See notes 87 & 107 supra.