Fordham Law Review

Volume 36 | Issue 4 Article 8

1968

The Freedom of Information Act: Access to Law

THE FREEDOM OF INFORMATION ACT: ACCESS TO LAW

The Administrative Procedure Act of 1946 (the "APA"),[1] which sought the standardization and simplification[2] of administrative procedure among United States government agencies,[3] was enacted with the dominant purpose of insuring that "[t]he governors shall be governed and the regulators shall be regulated."[4] Section three[5] of the APA, commonly known as the Public Information section, was a cornerstone in this design, as it attempted to bring the workings of the agencies into public view.

Section three provided that agencies were to publish in the Federal Register or make available for public inspection certain information.[6] Yet, simultaneously, section three excepted from these disclosure requirements functions "requiring secrecy in the public interest,"[7] matters relating "solely to the internal management of an agency,"[8] final opinions and orders required "for good cause to be held confidential,"[9] and official records sought by persons not "properly and directly concerned."[10] In the face of these exceptions, it is not difficult to imagine how the broad mandates for information could be frustrated by the equally broad justifications for secrecy. The subsequent history of section three proved, at least, that the administrative agencies, in shrouding their operations with the cloak of secrecy, were not lacking in imagination.[11]

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1. 60 Stat. 237 (1946).

2. S. Doc. No. 248, 79th Cong., 2d Sess. 243 (1946).

3. The APA, 5 U.S.C.A. § 551(1) (1967), broadly defines "agency" as:

"[E]ach authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia; or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts-martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory. . . ."

4. S. Doc. No. 248, supra note 2, at 244. Senator McCarran, the chief proponent of the Act, called it a "bill of rights for . . . Americans whose affairs are controlled or regulated . . . by agencies . . . ." Id. at 307. Probably the most sensitive comment on the diverse motives at work in this complex legislation, was that of Justice Frankfurter in Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951), where he observed that "Congress expressed a mood."

5. 60 Stat. 238 (1946).

6. This information includes rules, procedure, opinions, orders, interpretations, policy statements and records. 60 Stat. 238 (1946).

7. 60 Stat. 238 (1946).

8. 60 Stat. 238 (1946).

9. 60 Stat. 238 (1946).

10. 60 Stat. 238 (1946).

11. Senator Ervin remarked that through section three of the APA "Congress meant to

It is against this background that the Freedom of Information Act,[12] which amends the original section three, should be studied. It should be kept in mind when interpreting this brief yet comprehensive statute that Congress sought to expand the *public* right to government information[13] and, at the same time, to eliminate the vague standards which allowed agencies, in effect, "discretion to withhold any information they wish[ed] to withhold."[14] Beyond these preliminary observations on legislative purpose, little can be gained by looking to legislative intent. Quite often legislative intent is an elusive, if not imaginary demon,[15] as the ten year legislative background of the Information Act illustrates.[16] The final report of the Senate committee[17] does little more than paraphrase the Act. The House committee report[18] seems even to contradict the clear words of the statute in favor of agency discretion, and the Attorney General's Memorandum,[19] as might be expected,[20] agrees with the pro-agency interpretation[21] of the House committee.[22]

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guarantee that the public's right to information would be respected. Instead, this section has been cited frequently by Government officials as authority for withholding information from the Congress, the press and the public." Hearing on S. 1160, S. 1136, S. 1758, and S. 1879 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. 4 (1965) [hereinafter cited as 1965 Hearings].

12. 5 U.S.C.A. § 552 (1967).

13. There is little doubt that the main thrust of the new Information Act is the right of the public ("any person," 5 U.S.C.A. § 552(a)(3) (1967)) to information rather than the right of only some persons ("persons properly and directly concerned," 60 Stat. 238 (1946)), as the 1946 version provided.

14. Statement of Senator Long, 1965 Hearings at 2.

15. "[W]hen counsel talked of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. I only want to know what words mean. . . . [Y]ou construe a particular clause or expression by considering the whole instrument and any dominant purposes that it may express." Letter by Justice Holmes, in Frankfurter, Some Reflections on the Reading of Statutes, in Landmarks of Law 221 (R. Henson ed. 1960).

16. See Note, 40 Notre Dame Law. 417 (1965), for an analysis of the legislative background of the new Information Act.

17. S. Rep. No. 813, 89th Cong., 1st Sess. 1 (1965).

18. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 1 (1966).

19. U.S. Dep't of Justice, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (1967) [hereinafter cited as Att'y Gen. Memo.].

20. Since the Attorney General is the Government's lawyer, and he will be representing the agencies in much of the litigation involving the Information Act, it is to be expected that his preliminary interpretation of the Act will be partisan, i.e., pro-agency.

21. The pro-agency view can be simply phrased as the belief that the agencies themselves should have discretion as to what information they should disclose. See statement of Senator Long, 1965 Hearings at 2.

22. Professor Davis, in his analysis of the Information Act, said that "Problems of interpretation are aggravated . . . by the differences between what the Act says on its face and what the committee reports say, and they are further complicated by differences between the two committee reports . . . . The main thrust of the House committee remarks that seem to pull away from the literal statutory words is almost always in the direction of nondis-

It is abundantly clear, then, that those ambiguities inherent in the wording of the Information Act cannot be satisfactorily resolved by a legislative history that is even more confusing than the Act itself.[23] Ultimately, interpretation must fall back on the words of the statute itself. The original section three was rejected because it allowed the agencies to withhold what was deemed public information. "Congress expressed a mood";[24] the public has a right to know.

The Information Act can be logically divided into three parts. There are provisions which affirmatively require disclosure of information amounting to law.[25] Other provisions provide for disclosure of all other information which agencies have at their disposal, i.e., factual material.[26] Finally, there are specific provisions upon which a refusal to disclose information can be justified.[27] The following analysis will focus on those provisions which provide access to law. This feature of the Act should have immediate importance to the administrative bar.

I. Publication in the Federal Register

Subsection (a)(1) of the new section 552[28] prescribes, as did the former section three, various categories of information which must be published in the

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closure. The Attorney General's Memorandum consistently relies on such remarks by the House committee." Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 762-63 (1967). If the House report is pro-agency, it is natural that the agencies would favor it. The Chief Counsel of the Internal Revenue Service, in voicing his misgivings over the Act's requirement that agencies make their staff manuals available to the public, remarked: "Happily, the answer is in the House Committee report." Uretz, Freedom of Information and the IRS, 20 Ark. L. Rev. 283, 287 (1967).

23. Cf. Wong Yang Sung v. McGrath, 339 U.S. 33, 49 (1950), where the Supreme Court, in the first in-depth judicial interpretation of the 1946 APA, noted that its "legislative history is more conflicting than the text is ambiguous."

24. Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951).

25. 5 U.S.C.A. § 552(a)(1)-(2) (1967).

26. 5 U.S.C.A. § 552(a)(3) (1967).

27. 5 U.S.C.A. § 552(b) (1967).

28. 5 U.S.C.A. § 552(a)(1) (1967) reads as follows:

"(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Federal Register. Publication being the most potent disclosure device, the materials required to be published are evidently deemed the most important.[29] By and large, these materials represent law, or at least effective law.

A. *Organization and Procedure*

Parts (A), (B) and (C) of subsection (a)(1) require Federal Register publication of the details of administration. The changes from the original section three, which are few, are primarily in the direction of clarity, occasionally to the point of redundancy, and they make it perfectly clear that all agency procedure must be published.[30]

B. *Substantive Rules and Statements of General Applicability*

Part (D) of subsection (a)(1) calls for publication of "substantive rules of general applicability . . . and statements of general policy or interpretations of general applicability formulated and adopted by the agency . . . ."[31] Similar language is found in the former section three, but with the qualification "for the guidance of the public,"[32] which was conveniently seized upon to negate the affirmative commands for disclosure.[33] The revision could go far in implementing congressional design to unveil secret law; yet like all statutory language its scope is a matter of interpretation, and in administrative law the usual perplexities of interpretation are magnified.

The subdivision begins with the requirement that substantive rules of general applicability be published. The term "rules," in this context, is not used in the loose sense so as to connote both legislative and interpretative rules.[34] As used throughout the APA, "rules" refer only to legislative rules, i.e., rules adopted pursuant to statutory authority to legislate (rule making).[35] The "general ap-

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Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register."

29. For an analysis of Federal Register publication in general, see Newman, Government and Ignorance—A Progress Report on Publication of Federal Regulations, 63 Harv. L. Rev. 929 (1950); Note, 80 Harv. L. Rev. 439 (1966).

30. Att'y Gen. Memo. 7-10. As to procedural disclosure under the original section three of the APA, see R. Parker, Administrative Law 147 (1952); Reich, Rule Making Under the Administrative Procedure Act, in The Federal Administrative Procedure Act and The Administrative Agencies 492, 496 (G. Warren ed. 1947).

31. 5 U.S.C.A. § 552(a)(1)(D) (1967).

32. 60 Stat. 238 (1946).

33. Davis, supra note 22, at 768.

34. 1 K. Davis, Administrative Law Treatise §§ 5.03-.05 (1958).

35. For a convincing argument that this was the proper interpretation of similar language in the original section 3(a) of the APA, see Dwan, The Federal Administrative Procedure Act and the Bureau of Internal Revenue, in the Federal Administrative Procedure Act and The Administrative Agencies 142, 152-53 (G. Warren ed. 1947).

plicability" qualification of substantive rules is apparently meant to exclude from publication private rules[36] of a non-adversarial nature. Knowledge of such rules is of little value to the public, so publication would be superfluous.[37]

It is when the Act, in this same subdivision, requires publication of "statements of general policy or interpretations of general applicability formulated and adopted by the agency . . ."[38] that extreme conceptual and practical problems are encountered. "General applicability" is a difficult standard to apply in the field of administrative law.

One commentator equates "general applicability" with "precedental" value.[39] Though plausible at first sight, when viewed against the realities of the administrative process and in the context of the juridical norms of administrative law, this equation is quite incongruous. For example, agencies in their adjudicatory opinions often announce "policy" and "interpretations." Although in a particular adjudication the factual situation may be so unique that the principle declared will probably never be applied again, it must at least be afforded the position of a potential precedent.[40] It may fairly be concluded then, that under the precedental test all adjudicatory opinions are "precedents" and thus all are "generally applicable."

There are indeed other sources of policy statements and interpretations, such as advisory letters, press releases and instructions to staff personnel,[41] which lead to an even greater dilemma when evaluated under the precedental value test. Since the administrative process is committed to the enforcement of thousands of laws involving many millions of people yearly[42] and must necessarily operate through many subordinate employees in order to function properly, these other statements of policy and interpretation are in most cases the effective standards which will be applied to the public—at least at the threshold.[43] Clearly, it is desirable that such interpretations which "often set the pattern for

36. Att'y Gen. Memo. 10.

37. But unless exempted from disclosure by section 555(b) of the Act, such rules might have to be made available under section 552(a)(2)(B), although an argument can be made that private rules are "law" and not "interpretations." They are, however, at least "records," which section 552(a)(3) makes available on request.

38. 5 U.S.C.A. § 552(a)(1)(D) (1967).

39. Davis, supra note 22, at 770, 773.

40. This is not to admit that administrative adjudication is rigidly committed to stare decisis, though administrative tribunals do generally adhere to this judicial doctrine. See Davis, Administrative Findings, Reasons, and Stare Decisis, 38 Calif. L. Rev. 218 (1950).

41. Other examples are letters, opinions, explanatory statements and annual reports. Their variety is limited only by administrative imagination. See Newman, supra note 29, at 934-44.

42. It has been estimated that legislative output of the federal agencies exceeds the legislative output of Congress, and that the quantity of agency adjudication is many times that of all federal courts. 1 K. Davis, Administrative Law Treatise § 1.02 (1958). The NLRB alone, for the year 1965, reported 36,110 cases on the docket. 30 NLRB Ann. Rep. 177 (1965).

43. "The effect of interpretations upon the day-to-day administration of federal laws is tremendous." Newman, supra note 29, at 934.

relations between agency and citizen"[44] be publicized as much as the more formal rules and opinions. But are *all* such statements of policy and interpretation, which with a practical eye involve millions of documents, to be published in the Federal Register?

Statements of policy and interpretations in the form of these other materials are not, however, binding norms.[45] Since these statements are not binding, they have no precedental value in the literal sense, and thus cannot be generally applicable under the precedental value test. Yet the wording of the Act indicates that Congress believed at least some statements of policy and interpretations to be generally applicable.[46] At least on this level, therefore, the test fails.

However, a more than plausible argument can be made that, translated into the administrative process, these "other" statements of policy and interpretations bear striking resemblance to traditional binding norms in terms of effective law. It is an ancient axiom that legal norms be publicized since they reflect what has been done in the past, and given the relative stability and continuity in all human activity, they will under similar circumstances probably be applied in the same way in the future. People ought to know these "precedents" so that they may predict the acceptability of their conduct—even though pure legalism recognizes no rigid stare decisis.[47] Hence these other statements of policy and interpretation, being as effective as traditional legal norms, ought to have this same precedental value vis-à-vis public knowledge,[48] albeit they are not true precedents:

> After all, administrative law is not a field of law like contracts or real property; it is a system of justice.
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> . . . .
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> [A]dministrative agencies are supposed to be flexible and they certainly change in their organizational patterns rapidly. . . . We must know a lot of things in the administrative field that we do not have to know about in the judicial field. And yet, *whoever drew the first set of administrative rules undoubtedly had in mind the rule book he grew up with in the county courthouse.*[49]

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44. Id. at 941.

45. See R. Parker, Administrative Law 76-79 (1952). "A mere policy statement . . . is as such neither binding, nor does it need authorization. It merely announces how the agency intends to interpret the law. Such an announcement . . . may follow from the agency's conduct, or it may be ascertainable from press releases or newspaper interviews." Id. at 79.

46. 5 U.S.C.A. § 552(a)(1)(D). The only other possible interpretation is that the language refers only to "policy" and "interpretations" announced in adjudicatory opinions. But in the following subsection the Act explicitly refers to adjudicatory opinions as "final opinions . . . made in the adjudication of cases . . . ." 5 U.S.C.A. § 552(a)(2)(A). It is unlikely that the Act would in one section use generic terms, and in another section be specific, intending both to mean precisely the same thing.

47. See 2 W. Holdsworth, A History of English Law 224-25 (1927).

48. "Precedental" value for publication purposes would use "precedent" in the sense that these statements reflect how the agency is thinking, i.e., "agency personality."

49. McFarland, Analysis of the Federal Administrative Procedure Act, in the Federal Administrative Procedure Act and The Administrative Agencies 16, 18, 25 (G. Warren ed. 1947) (emphasis added).

Nevertheless, as in the case of adjudicatory opinions, the practical expansion of the above argument, if we conclude that "general applicability" is a question of "precedental" value, is that *all* these other materials which express agency policy and interpretation must be published in the Federal Register. Aside from the impracticalities of this result, and aside from the strained construction required to place "precedental" and "policy and interpretations" in the same administrative vocabulary, by the language of the Information Act, this cannot be what was intended. While subsection 552(a)(1)(D) requires publication of statements of general policy or interpretations of general applicability, subsection 552(a)(2)(A) & (B) require availability for copying of "final opinions" and "statements of policy and interpretations." Obviously, the only distinction rests on "general applicability." Congress must have supposed that some statements of policy, interpretations and final opinions are not generally applicable.

Perhaps a more rewarding approach, and certainly one that is more attentive to the complexities of administrative law, is to measure "general applicability" in terms of the rule making-adjudication distinction made by the APA,[50] as that distinction has been judicially interpreted. The APA defines rule as "an agency statement of general . . . applicability and future effect designed to implement . . . law . . . ."[51] The APA defines adjudication in a residuary way—a final disposition which is not rule making is adjudication.[52] Under the APA the distinction is important since if an agency intends to prescribe law by rule making it must give notice in the Federal Register and afford interested persons an opportunity to participate by submission of data, views or arguments,[53] while if an agency decides to adjudicate it must afford an evidentiary type hearing to the parties involved in an actual controversy.[54]

It has been consistently pointed out[55] that the somewhat nebulous definitions[56] drawn by the APA were functional definitions, which merely recognized that an agency makes rules when it acts legislatively and adjudicates when it acts judicially.[57] The courts, in their early interpretations of the APA, accepted this functional approach, realizing that the APA definitions, when read literally, had little practical meaning.[58] This is not to say, however, that the judicial

50. 5 U.S.C.A. §§ 551(4)-(7) (1967).

51. 5 U.S.C.A. § 551(4) (1967).

52. 5 U.S.C.A. § 551(6) & (7) (1967).

53. 5 U.S.C.A. § 553 (1967).

54. 5 U.S.C.A. § 554 (1967).

55. See R. Parker, Administrative Law 70-80 (1952); Nathanson, Some Comments on the Administrative Procedure Act, 41 Ill. L. Rev. 368, 372 (1946); Schwartz, Administrative Terminology and the Administrative Procedure Act, 48 Mich. L. Rev. 57, 65-70 (1949).

56. A reader of the Act is confronted with phrases like "general applicability," "future effect," and "implement law," which necessarily involve the most theoretical of judgments.

57. 1 K. Davis, Administrative Law Treatise § 5.02 (1958). Compare Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908), with J. Dickinson, Administrative Justice and the Supremacy of Law 21 (1927), and Fuchs, Procedure in Administrative Rule-Making, 52 Harv. L. Rev. 259, 265 (1938).

58. Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676 (9th Cir.), cert. denied, 338 U.S. 860 (1949). The court focused instead on a more practical theory: "The Administrative Proce-

mind was able in one stroke to dissolve the uncertainties of the rule making-adjudication dichotomy. But by turning away from conceptualism, the courts were able to put the problem in a practical focus. And the distinction is seen to turn, in part, on what is "generally applicable."

In *SEC v. Chenery Corp.*,[59] the United States Supreme Court decided that the SEC, in a matter involving a corporate reorganization, could adjudicate the issues at hand in light of the relevant congressional statute, even though the Commission had not promulgated a general rule. With a broad sweep, the Court declared that an administrative agency may formulate a new standard of conduct, either by rule making or by ad hoc adjudication:

> [T]he agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evaluation of statutory standards. And the choice made between proceeding by general rule or by individual, *ad hoc* [*sic*] litigation is one that lies primarily in the informed discretion of the administrative agency.[60]

Cases after *Chenery* have consistently held that an agency may develop the most general of legal principles on a case by case basis.[61] The NLRB, for example, has rarely exercised its substantive rule making powers but has preferred to establish its general standards by adjudication.[62] In one example of the formulation of a general standard by adjudication, the NLRB, in the *General Cable*[63] case, decided that their existing case law principle which barred representation elections for a maximum period of two years under an existing collective bargaining contract was no longer appropriate and that they were then and there increasing the period to three years.[64] This case exemplifies how a newly adjudicated standard will not only effect the immediate parties, or merely a small number of future parties, but will inevitably apply to a great number of persons within the Board's jurisdiction.

On the other hand, when agencies have elected to establish policy by rule making, the courts have held them to a stricter compliance with the APA requirement of "general applicability." In *Philadelphia Co. v. SEC*,[65] the SEC had

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dure Act is based upon a broad and logical dichotomy between 'rule-making and adjudication,' i.e., legislative and judicial functions." Id. at 692.

59. 332 U.S. 194 (1947).

60. Id. at 203.

61. E.g., Optical Workers' Union, Local 24859 v. NLRB, 227 F.2d 687 (5th Cir. 1955), cert. denied, 351 U.S. 963 (1956); Yellow Transit Freight Lines, Inc. v. United States, 221 F. Supp. 465, 471 (N.D. Tex. 1963) (dissent).

62. See, e.g., Leedom v. Local 108, International Bhd. of Elec. Workers, 278 F.2d 237 (D.C. Cir. 1960); NLRB v. Shirlington Supermarket Inc., 224 F.2d 649 (4th Cir.) cert. denied, 350 U.S. 914 (1955); NLRB v. National Container Corp., 211 F.2d 525 (2d Cir. 1954); NLRB v. Guy F. Atkinson Co., 195 F.2d 141 (9th Cir. 1952) (adjudicative standard held improper because of harshness of retroactivity).

63. General Cable Corp., 139 NLRB 1123 (1962).

64. Id. at 1125.

65. 175 F.2d 808 (D.C. Cir.), vacated as moot, 337 U.S. 901 (1948).

issued a rule which denied exemption under the Public Utility Holding Company Act to a subsidiary in reorganization. In point of fact, the rule was applicable only to a subsidiary of the petitioner and was obviously aimed at the petitioner. The court held that the SEC could not deny a hearing:

> We think the order of the Commission revoking the exemption . . . was invalid for lack of an adequate hearing . . . . It is elementary that the action of an administrative tribunal is adjudicatory in character if it is particular and immediate, rather than, as in the case of legislative or rule-making action, general . . . in effect . . . . Within this definition the Commission's order . . . is adjudicatory . . . . It is particular, *i.e.*, it applies to the Pittsburgh reorganization alone. . . .[66]

The implication of the court's decision was that the rule was improper because it rested on individual grounds, rather than on general considerations. This doctrine has constitutional foundations[67] and has been articulated in later cases.[68]

In another case,[69] the CAB had promulgated a rule whose effect on petitioners was to modify their existing rights to provide certain types of freight service. Petitioners applied to the federal court for review, claiming a right to an adjudication. The court, determining that the CAB had validly exercised its rule making power, denied the right to an adjudication and indicated when an adjudication would be necessary:

> We are not here concerned with a proceeding that in form is couched as rule making . . . but in substance and effect is individual in impact and condemnatory in purpose . . . . There is no individual action here masquerading as a general rule.
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> . . . .
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> Where the agency is considering a general regulation, *applicable to all carriers*, or *to all carriers within an appropriate class*, then each carrier is protected by the fact that it cannot be disadvantaged except as the Board takes action against an entire class.[70]

The principle that can be extracted from the preceeding analysis is that an administrative agency *can* validly develop a legal standard of general applicability by individual adjudication, whereas if the agency chooses to proceed by rule,

66. Id. at 816. This case is criticized in 1 K. Davis, Administrative Law Treatise § 7.01 (1958).

67. Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915); Londoner v. Denver, 210 U.S. 373 (1908); cf. Bowles v. Willingham, 321 U.S. 503 (1944).

68. CAB v. Delta Air Lines, Inc., 367 U.S. 316 (1961); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); Air Line Pilots Ass'n v. Quesada, 276 F.2d 892 (2d Cir. 1960); In re Carter, 192 F.2d 15 (D.C. Cir.), cert. denied, 342 U.S. 862 (1951); Standard Airlines v. CAB, 177 F.2d 18 (D.C. Cir. 1949); American Air Transport, Inc. v. CAB, 98 F. Supp. 660 (D.D.C. 1951), aff'd, 201 F.2d 189 (D.C. Cir. 1952).

69. American Airlines, Inc. v. CAB, 359 F.2d 624 (D.C. Cir.), cert. denied, 385 U.S. 843 (1966).

70. Id. at 631 (emphasis added). See also Capital Airways, Inc. v. CAB, 292 F.2d 755 (D.C. Cir. 1961). "The inference to be drawn is that if the Board proposed to discriminate between carriers in the same group, characterizing some as law abiders and some as law breakers, it would be required to afford an evidentiary hearing . . . ." Id. at 758.

it *must* do so by generally applicable standards. And what is meant by "generally applicable" rests on purely pragmatic considerations.[71] If a standard will in fact be applicable to a large number of persons, in the public at large or within an identifiable class, then it is general. If it has an adversarial flavor and is directed, either expressly or in fact, at a small number within a class, then it is not general.[72]

While it is true that the test for "general applicability" discussed above flows from the rule making-adjudication distinction of substantive administrative law, it seems it should apply to a publication statute, if for no other reason than because the materials which the publication statute encompasses are those upon which this substantive doctrine is based. An additional reason for this result can be offered. The *Chenery*[73] case authorizes agencies to establish general standards by adjudication, and the *General Cable*[74] case is an illustration of this process at work. Yet the same result could have been reached by rule making.[75] The choice is essentially a matter of policy.[76] But if Congress has directed that "substantive rules" be published, why should resort to another method of operation—adjudication, which is also binding law, or press releases, staff manuals and other informal sources which have the same force and effect[77]—escape the scrutiny of public exposure? Or put another way, if an agency could validly procure the same result by rule making, but they choose to proceed differently,[78] there is no less reason why these statements should not be published. To be sure, assuming the soundness of the congressional conclusion[79] that agencies have exhibited the tendency to secret their law, a contrary requirement would only encourage the agencies to act by "informal" methods, rather

71. Nathanson, Some Comments on the Administrative Procedure Act, 41 Ill. L. Rev. 368 (1946). "One need not study these definitions [rule making and adjudication] long before coming to the conclusion that they must find their justification in extremely pragmatic, not philosophical, considerations." Id. at 372.

72. See Comment, The Federal Administrative Procedure Act: Codification or Reform?, 56 Yale L.J. 670, 681 (1947).

73. SEC v. Chenery Corp., 332 U.S. 194 (1947).

74. General Cable Corp., 139 NLRB 1123 (1962).

75. Professor Davis is not only critical of the General Cable case vis-à-vis the choice of adjudication, but believes the choice violates § 4 of the APA (now 5 U.S.C.A. § 553 (1967)). 1 K. Davis, Administrative Law Treatise § 6.13 (Supp. 1965). See also Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 Yale L.J. 729 (1961).

76. SEC v. Chenery Corp., 332 U.S. 194 (1948). See Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921 (1965).

77. See notes 41-44 supra and accompanying text.

78. Many writers assail the agencies for not resorting to rule making more often. See, e.g., Baker, Policy By Rule or Ad Hoc Approach—Which Should it Be?, 22 Law & Contemp. Prob. 658 (1957); H. Friendly, The Federal Administrative Agencies; The Need for Better Definitions of Standards (1962); Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 Yale L.J. 729 (1961); Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921 (1965).

79. See note 11 supra.

than by rule. In fact, in the last decade the most serious scholarship in the field has been highly critical of the agencies for failing to make maximum use of their rule making powers.[80]

The language of the Information Act must be placed in a practical focus.[81] If an agency makes statements expressing policy or interpretation of law, which *could* have been validly accomplished by a rule (which is then necessarily of general applicability within the principles of the preceding analysis), then these must be published in the Federal Register as "statements of general policy or interpretations of general applicability."[82] This seems to be the intent of Congress, especially since "substantive rules" and "statements of general policy or interpretations of general applicability" are grouped in the same sentence of the Act.[83]

C. *Failure to Publish—No Adverse Effect*

Subsection 552 (a)(1) concludes with the proviso that "[e]xcept to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published."[84] Although the express provision that actual and timely knowledge will suffice for publication is new, the same effect was attributed by interpretation to the old section three of the APA.[85] What is unique is that "a matter" which is re-

80. See note 78 supra.

81. See notes 58-62 supra and accompanying text.

82. 5 U.S.C.A. § 552(a)(1)(D) (1967). An interesting question on this subsection's scope arises in connection with the Internal Revenue Service's "revenue rulings" and "letter rulings." The "letter rulings" are essentially interpretations of the Internal Revenue Code on a particular state of facts made by the Service in response to written request. The Service publishes in its Cumulative Bulletin only a small number of these, those that it deems to have substantial value, as "revenue rulings." Professor Davis concludes that "revenue rulings" must be published in the Federal Register under section 552(a)(1)(D), but that "letter rulings" do not have to be. Professor Davis' distinction rests on the "revenue rulings" being "designed" to serve as "precedents," while "letter rulings" are not. Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 770 (1967). The Attorney General's Memorandum does not allude to this problem in regard to section 552(a)(1)(D), but in reference to section 552(a)(2)(B) says: "'[A]n agency may not be required to make available for public inspection . . . any advisory interpretation on a specific set of facts . . . requested by and addressed to a particular person . . . .'" Att'y Gen. Memo. 16. Apparently, then, the Attorney General would not recognize a duty to publish such "interpretations" in the Federal Register. Under the test proposed in this comment, however, "revenue rulings" are in most cases of "general applicability" within section 552(a)(1)(D), and some "letter rulings" if they are general enough, must also be published in the Federal Register under this section.

83. 5 U.S.C.A. § 552(a)(1)(D) (1967). The Attorney General's Memorandum has taken the position that "an agency is not required under subsection (a) to publish in the Federal Register the rules, policies and interpretations formulated and adopted in its published decisions." Att'y Gen. Memo. 10.

84. 5 U.S.C.A. § 552(a)(1)(E) (1967).

85. United States v. Aarons, 310 F.2d 341 (2d Cir. 1962) (actual notice sufficient). But

quired to be published and is not, cannot be invoked to prejudice a person's rights. "A matter" would encompass substantive rules and statements of general policy and interpretations of general applicability,[86] whereas the former section three provided this sanction only for non-publication of procedure.[87]

If an unpublished policy statement or interpretation is known to an "affected" person, the Act's protection is meaningless. In the case of "substantive rules," the no publication–no adverse affect clause has some significance, since "rules" are binding norms. However, this section does not grant general immunity, but rather only limited protection against the "matter required to be published. . . ."[88] And as the *Chenery* case[89] demonstrates, an agency can formulate a binding principle by adjudication, without reference to a rule. So even if a rule is rendered ineffective by this section, the agency can reach the same result against the same "affected" person, by adjudication under the statute.[90] With regard to policy statements and interpretations, the sanction is even less effective. These materials are not binding.[91] When an agency adjudicates, it either applies a rule, or the congressional statute as in *Chenery*;[92] a policy or interpretation, however, is merely persuasive.[93] Even if a statement of policy or interpretation *is published,* a person cannot be adversely affected by *it*. In event of its nonpublication, an agency would have even fewer qualms about establishing the same principle by adjudication than they would in the case of an unpublished rule.

Another observation, here relevant, is that this provision does not require an agency to publish its law first in order for it to be effective. In other words, substantive rules and adjudicative principles may still be retroactive in effect,[94] even though once they have been crystallized, they must be published.[95]

II. Materials To Be Made Available for Inspection and Copying

Subsection 552(a)(2)[96] provides that agencies must make final opinions, orders, statements of policy and interpretations, administrative staff manuals

see Hotch v. United States, 212 F.2d 280 (9th Cir. 1954). See also Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947).

86. See notes 76-81 supra and accompanying text.

87. 60 Stat. 238, § 3(a) (1946).

88. 5 U.S.C.A. 552(a)(1)(E) (1967).

89. See notes 59-60 supra and accompanying text.

90. Id. The problem, fortunately, is more theoretical than real, since the agencies have been diligent in publishing "rules." 1 K. Davis, Administrative Law Treatise § 6.09 (1958).

91. See note 45 supra.

92. See notes 59-63 supra and accompanying text.

93. Southwestern Elec. Power Co. v. Federal Power Comm'n, 304 F.2d 29, 39 (5th Cir.), cert. denied, 371 U.S. 924 (1962).

94. See NLRB v. Guy F. Atkinson Co., 195 F.2d 141, 149 (9th Cir. 1952); 1 & 3 K. Davis, supra note 90, §§ 5.08 at 17.07-08 (1958); Davis, Administrative Rules—Interpretative, Legislative, and Retroactive, 57 Yale L.J. 919 (1948).

95. Gras v. Beechie, 221 F. Supp. 422, 425 (S.D. Tex. 1963).

96. 5 U.S.C.A. § 552(a)(2) (1967) reads:

and instructions to staff members available to the public for inspection and copying. Moreover, all matter required to be made available must be indexed. Like subsection 552(a)(1), the materials to be made available represent law, either in the traditional sense or in the sense of the effective law peculiar to the administrative process. Having only to be made available,[97] this information is evidently deemed less essential for public knowledge than the published matter.

A. *Final Opinions and Orders*

Part (A) covers the availability of final opinions (including dissenting opinions) and orders, "made in the adjudication of cases."[98] The APA defines "order" as the "final disposition . . . in a matter other than rule making . . . ."[99] and "adjudication" as "agency process for the formulation of an order."[100] Thus, whenever a matter before an agency is finally disposed of, and rule making is not involved, then the process is an "adjudication," and the disposition itself is an "order."[101] The key phrase is "final disposition," and here the APA clearly has in mind situations where agency action is intended to be final rather than provisional or preliminary. Threshold and intermediate administrative determinations, such as tax audits, no-action letters and application processing, are not final dispositions, and so are not "orders."[102] In short, "adjudication" com-

"(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof."

97. The agencies have an alternative to making the materials "available." They may "promptly" publish them and offer copies for sale. 5 U.S.C.A. § 552(a)(2) (1967).

98. 5 U.S.C.A. § 552(a)(2)(A) (1967).

99. 5 U.S.C.A. § 551(6) (1967).

100. 5 U.S.C.A. § 551(7) (1967).

101. See Schwartz, Administrative Terminology and The Administrative Procedure Act, 48 Mich. L. Rev. 57, 69-70 (1949).

102. But see Davis, The Information Act: A Preliminary Analysis, 34 U. Chic. L. Rev. 761, 782 (1967). Professor Davis does not think that determinations which are not final

ports with the judicial function,[103] and an "order" is equivalent to a judgment. The "orders" contemplated by this subdivision of the Act are no more than the decrees issued as a result of a judicial proceeding on the administrative level.[104]

Presumably an "opinion" is every reasoned determination, but like "orders", the Act limits its application to those "made in the adjudication of cases",[105] i.e., opinions rendered in connection with a judicial proceeding on the administrative level. With reference to opinions, the Act creates a slight ambiguity. Since subsection 522(a)(1)(D) requires interpretations of general applicability to be published in the Federal Register, and, as discussed above,[106] some adjudicatory opinions would be included, this subsection would either require those opinions not published to be made available or be made cumulative, and require all opinions, including those published, to be made available. The latter would be preferable.

B. *Policy Statements and Interpretations*

Part (B) of subsection 552(a)(2) says that "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register,"[107] must be made available. The reference to publication of policy statements and interpretations is to the "general applicability" standard found in subsection 552(a)(1)(D).[108] It is then such statements which do *not* have general applicability that must be made available. This sentence completes the all-inclusive reach of the Act—every statement of policy or interpretation must either be published in the Federal Register or made available for copying.

C. *Staff Manuals*

Subsection 552(a)(2)(C) makes "administrative staff manuals and instructions to staff that affect a member of the public" open to public inspection. If what is in a staff manual "affects" the "public", in most cases it will be a statement of policy or interpretation, which subdivision (B) of this subsection makes available, and more often than not will be of "general applicability" within the

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should have to be made available and indexed, but believes that there is no "analytical" way out of it. The Attorney General's position is: " 'orders made in the adjudication of cases' is intended to limit the requirement to orders which are issued as part of the final disposition of an adjudicative proceeding." Att'y Gen. Memo. 15. The Attorney General's conclusion is correct, but his reasoning seems analytically inaccurate, since by APA definition the only orders are those issued in an adjudication, i.e., final disposition. See Schwartz, supra note 101, at 69-70.

103. Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676, 693 (9th Cir. 1949).

104. Att'y Gen. Memo. 15.

105. 5 U.S.C.A. § 552(a)(2)(A) (1967).

106. See notes 73-83 supra and accompanying text.

107. 5 U.S.C.A. § 552(a)(2)(B) (1967).

108. See notes 82-83 supra and accompanying text.

Federal Register publication obligation of section 552(a)(1)(D).[109] The apparent redundancy, however, is justifiable because staff manuals contain the standards which are used daily by agency personnel to dispense the law, and there is no question that the public has the right to know the effective standards being applied.

D. *Deleting Identifying Details*

From the various materials made available for inspection under subsection 552(a)(2), "[t]o the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details. . . ."[110] That the agency may delete identifications will undoubtedly permit initial agency discretion. However, this expurgation power is confined to identifications, and since the Act also provides that the justifications for the "unwarranted invasion" shall be explained fully in writing,[111] the provision does not seem to promise a loophole for secrecy.

Surprisingly, what has caused most controversy is the criterion of "personal" privacy. Professor Davis notes that "personal" does not allow for protection of a corporation.[112] Be that as it may, the Act nevertheless is consonant with the traditional doctrine that a corporation does not have a right to privacy.[113] In any event, the Act does give protection to certain commercial and financial information of a corporation against *all* disclosure, under the Act's fourth exemption.[114]

E. *Indexing*

Finally, subsection 552(a)(2) makes the duty of public availability workable, by providing that agencies must maintain a "current index" for this information. Without such a device, the affirmative mandates for information would be of little value. Curiously, however, though an index is a sine qua non, the Attorney General advises that agencies do not have to comply with indexing, as long as the information is not "cited" by the agency as "precedent."[115] Not only is the Attorney General's advice disloyal to the Act's spirit, but it is analytically unsound. Most of the materials made available by subsection 552(a)(2),

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109. 5 U.S.C.A. § 552(a)(1)(D) (1967).

110. 5 U.S.C.A. § 552(a)(2) (1967).

111. 5 U.S.C.A. § 552(a)(2) (1967). See Att'y Gen. Memo. 19.

112. Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 781 (1967). But see Att'y Gen. Memo. 19.

113. W. Prosser, Torts § 112, at 843 (3d. ed. 1964).

114. "This section does not apply to matters that are . . . (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C.A. § 552(b)(4) (1967).

115. Att'y Gen. Memo. 16, 21. "Careful and continuing attention will be required to distinguish 'documents having precedential significance' (H. Rept., 8)—the only ones required to be included in the index . . . ." Id. at 21.

namely, policy statements, interpretations and staff manuals, are not precedents.[116] They are *never* "cited" as precedents—if these materials are adverted to at all, it is only out of respect for their persuasive voice, like a textbook, handbook or law review. The last sentence of section 552(a)(2) provides that the materials to be made available cannot be relied on, used or cited, unless they are made available and indexed. Although the sanction may be without teeth, it is quite different to say that because the sanction is unenforceable, the imperatives of disclosure can be ignored.[117] Administrative agencies are not self-governing galaxies; they are agents of our government and owe obedience to congressional command. The sanction is not an alternative. The Act exacts an index.

III. Conclusion

The new Information Act represents a significant accomplishment in terms of the public's fundamental right to know the law. Firstly, it reaffirms the public's right to know agency rules and case law, materials which can be called the "binding" law. Secondly, the Act makes a bold departure in exposing for public perusal the "informal" law, the staff manuals, advisory and explanatory letters, press releases, and all the other modes through which agencies express policy and interpretations of law—something which is not normally considered the "law." Congress has thus manifested its sensitivity to the administrative process, its realization that the process is vigorous and creative in its methods of operation, and its awareness that within the process these informal materials have all the force and effect of "law."

Since the Act mechanically requires disclosure, but then lists nine specific categories of exemptions,[118] no precise conclusion as to the Act's effect on a concrete situation can be reached without considering the exemptions. No attempt has been made here to analyze them, but it is believed that the exemptions will have limited application to disclosure of law.[119]

The Attorney General's Memorandum, in reference to many important types of materials, reads the Act rather restrictively,[120] and sometimes with funda-

116. Compare this with the "adversely affected" provision in section 552(a)(1), notes 84-93 supra and accompanying text.

117. Davis, supra note 112, at 774.

118. 5 U.S.C.A. § 552(b)(1)-(9) (1967).

119. The obvious exemption is for any matter "specifically exempted from disclosure by statute." 5 U.S.C.A. § 552(b)(3) (1967). Other pertinent exemptions are for matters "(2) related solely to the internal personnel rules and practices of an agency" and "(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C.A. § 552(b)(2) & (5). The Attorney General's Memorandum would interpret these two exemptions, especially the fifth, so as to substantially negate the affirmation provisions which expose the "informal law." Att'y Gen. Memo. 30-31, 35. For a more perceptive analysis and a rather truculent answer to the Attorney General, see Davis, supra note 112, at 761, 785-86, 794-97 (1967).

120. See note 83 supra.

mental unsoundness, consistently drawing support from the House committee report, rather than from the Act itself.[121] For instance, although section 552 (a)(2) explicitly requires an index, the Memorandum, quoting the House report, concludes that sometimes an index is not required.[122] Since the Memorandum was written for the guidance of the agencies, it should at least initially, dictate how the agencies will carry out the Act. As pointed out above[123] the Act's built-in sanctions are essentially meaningless, and the agencies can comply with the Act diligently or ignore it without in any way being coerced into compliance with the affirmative provisions for disclosure. Further, the likelihood of court construction via judicial review on the basis of these unenforceable sanctions is slim.[124] In all probability, then, the Memorandum will be the law.

It is thus a safe prophecy that the Act's actual accomplishments will be far less impressive than what its creators envisioned. This is not to say the attempt was futile. As with any legislation which seeks to modify basic concepts of government, success depends ultimately on the cooperation and dedication of those who are asked to conform: "Law is not wholly self-explantory of self-executing.

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121. The act itself would have provided a better source. "Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy . . . to formulate a plan of government. That aim . . . is evinced in the language of the statute, as read in the light of other external manifestations of purpose . . . . We are not concerned with anything subjective. We do not delve into the mind of legislators or their draftsmen, or committee members." Frankfurter, Some Reflections on the Reading of Statutes, in Landmarks of Law 210, 221 (Henson ed. 1960).

122. Att'y Gen. Memo. 21. See notes 115-17 supra and accompanying text.

123. See notes 86-103, 115-17 supra and accompanying text.

124. See notes 85-87, 111-12 supra and accompanying text. See Southwestern Elec. Power Co. v. Federal Power Comm'n, 304 F.2d 29, 39 (5th Cir.), cert. denied, 371 U.S. 924 (1962). Professor Davis argues that section 552(a)(2) is judicially enforceable under section 552(a)(3) of the Act which specifically provides that upon complaint the United States District Court may order the production of improperly withheld "agency records". The approach is imaginative, but requires a rather strained construction to evade the opening phrase of section 552(a)(3): "Except with respect to the records made available under paragraphs (1) and (2) of this subsection . . . ." Davis, supra note 112 at 775-76. Professor Davis further argues that section 552(a)(2) is enforceable apart from the Act on general equity jurisdiction of Federal courts. Id. at 776. Apparently, Professor Davis has in mind a mandatory injunction, similar in purpose to mandamus, to compel a public official to perform a ministerial duty. While such a suit might be possible, complex problems of sovereign immunity and discretionary-ministerial duties are involved, as well as judicial reluctance to "use mandamus to resolve problems of statutory interpretation . . ." since "the writ was developed to enforce clear duties and should not be used as a substitute for appellate proceedings to review administrative determinations." Development in the Law—Remedies Against the United States and its Officials, 70 Harv. L. Rev. 827, 849 (1957). Furthermore, aside from the specific materials included in the Act, such as adjudicatory opinions and staff manuals, the great bulk of the materials encompassed are classified generically: "Statement of policy and interpretations." Thus suits to enforce this provision could well become "fishing expeditions."

Its efficacy is heavily dependent on the sound judgment and faithful execution of those who direct and administer our agencies of Government."[125] Hopefully, the administrative agencies will be faithful.

125. Att'y Gen. Memo. III.