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# Applying the Freedom of Information Act in the Area of Federal Grant Law: Exploring an Unknown Entity

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# APPLYING THE FREEDOM OF INFORMATION ACT IN THE AREA OF FEDERAL GRANT LAW: EXPLORING AN UNKNOWN ENTITY

## I. INTRODUCTION

**G**REATER ACCESS TO GOVERNMENT INFORMATION IN THE UNITED STATES has long been sought under the rationale of the people's right to know what their government is doing.<sup>1</sup> An often-cited letter written by James Madison in 1822 eloquently expresses the public's need to have access to information concerning the operations of the government:

A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance; and the people who mean to be their own Governors, must arm themselves with the power, which knowledge gives.<sup>2</sup>

Congress first attempted to formulate a general statutory plan to insure public access to such information in 1946, with the enactment of section three of the Administrative Procedure Act.<sup>3</sup> Because this Act did not sufficiently afford the public at large access to government records, the Congress revised it by enacting the Freedom of Information Act (FOIA).<sup>4</sup> The purpose of the FOIA was to clarify and protect the public's right of access to information concerning government operations.<sup>5</sup>

The FOIA struck a balance, in favor of disclosure, between the right of an individual to find out how his government is operating and the need of the government to keep some information in confidence. The general philosophy of this Act requires full federal agency disclosure of agency records, either by

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<sup>1</sup>SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE, SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES 6 (Comm. Print 1974) [hereinafter cited as FOIA SOURCE BOOK].

<sup>2</sup>Letter from James Madison to W.T. Barry (Aug. 4, 1822), reprinted in THE COMPLETE MADISON 337 (Padover ed. 1953).

<sup>3</sup>Administrative Procedure Act, Ch. 324, § 3, 60 Stat. 238 (1946) (current version at 5 U.S.C. § 552 (1976)). The Act, however, failed to successfully promote a congressional policy of fair disclosure. Agencies quickly discovered four major loopholes in the statute which provided bases for withholding information:

Acting under "color of law" an administrator was empowered to withhold information "requiring secrecy in the public interest"; when the person seeking disclosure was not "properly and directly concerned," or where the information was "held confidential for good cause found"; and "when the information sought was related to the internal management" of a government agency or department.

FOIA SOURCE BOOK, *supra* note 1, at 7 (quoting Comment, *The Freedom of Information Act: A Critical Review*, 38 GEO. WASH. L. REV. 150, 151-52 (1969)).

<sup>4</sup>Freedom of Information Act, 5 U.S.C. § 552 (1976).

<sup>5</sup>*Id.* The Freedom of Information Act closed many of the loopholes in the Administrative Procedure Act. It eliminated the "properly and directly concerned" test by making agency records available to any member of the public; it replaced the nebulous phrases "good cause found," "in the public interest," and "internal management" with nine specifically delineated exemptions defining what information may be withheld; and it gave aggrieved citizens a judicial remedy for wrongfully withheld information. H.R. REP. NO. 1497, 89TH CONG., 2D SESS. 1, 2, reprinted in [1966] U.S. CODE CONG. & AD. NEWS 2418, 2418-19.

publication or upon request, unless the information is exempted under one of the nine expressly defined exceptions.<sup>6</sup> However, to determine what information is available to the public under the FOIA it is necessary to determine both what constitutes an "agency" of the government and what is an "agency record."

The FOIA defines "agency,"<sup>7</sup> but gives no express guidance as to what is an "agency record." However, in the recent District of Columbia Court of Appeals case of *Forsham v. Califano*,<sup>8</sup> the definition of "agency records" was equated with the definition of "agency" under the FOIA. The purpose of this Comment is to examine the propriety and impact of such a definition of "agency records" in light of the people's right to know what their government is doing, using as a focal point the controversy that arose in *Forsham v. Califano*.

## II. FORSHAM V. CALIFANO

### A. Statement Of The Facts

Public availability of federal agency documents is generally governed by the Freedom of Information Act. The FOIA is silent, however, on its applicability to records *maintained* by anyone other than federal agencies. This silent area under the FOIA is the issue litigated in the case of *Forsham v. Califano*.

*Forsham* involved an action brought by physicians<sup>9</sup> to obtain the raw research data of the University Group Diabetes Program (UGDP). "The UGDP [was] a study funded by 13 federal grants administered by the National Institutes of Arthritis, Metabolism and Digestive Diseases . . . ."<sup>10</sup> The results of the UGDP study indicated that the administration of tolbutamide, an oral hypoglycemic drug, to mild adult-onset diabetics led to a death rate from cardiovascular disease higher than that of groups treated with diet and a fixed or variable dosage of insulin.

Because of controversy over the quality of the UGDP study, the National Institutes of Arthritis, Metabolism and Digestive Diseases contracted with a

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<sup>6</sup>FOIA SOURCE BOOK, *supra* note 1, at 38; Freedom of Information Act, 5 U.S.C. § 552(b) (1976).

<sup>7</sup>Freedom of Information Act, 5 U.S.C. § 552 (1976); *see* text accompanying note 27 *infra*.

<sup>8</sup>No. 76-1308 (D.C. Cir. July 11, 1978). *Forsham* involved the applicability of the FOIA to records of the recipient of a federal grant. The National Institute of Arthritis, Metabolism and Digestive Diseases, one of the National Institutes of Health (a government agency), funded a clinical study by twelve university medical centers and one coordinating center concerning treatment of diabetes. On the basis of this study, the Food and Drug Administration recommended changes in the use and labeling of certain drugs used to treat diabetics. A group of physicians involved in the treatment of diabetes made an FOIA request for the raw data used in the study and held by the coordinating center grantee. The District of Columbia Court of Appeals found that this grantee was not an agency and therefore that its raw data was not an agency record, and denied the physicians' request.

<sup>9</sup>Three physicians sued on their own behalf and on behalf of an unincorporated association of 178 physicians involved in the daily treatment and management of diabetes. *Forsham v. Califano*, No. 76-1308 (D.C. Cir. July 11, 1978).

<sup>10</sup>*Id.* at 3. The grants were made under the statutory grant-in-aid authority. Public Health Service Act, 42 U.S.C. § 241(c) (1976). Twelve grants were made to participating university medical centers and one to the UGDP Coordinating Center.

private international society of biostatisticians, The Biometric Society, for evaluation of the study. The findings of the report by the Biometric Society were "mixed," but "moderately strong" evidence of harmfulness was found.

On the basis of the UGDP study, the Food and Drug Administration (FDA) of the Health, Education and Welfare Department (HEW) issued a bulletin in October, 1970, recommending to the medical community that tolbutamide be used only in cases of adult-onset stable diabetes which could not be controlled by diet and could not be treated with insulin. In June, 1971, an FDA bulletin proposed changes in the labeling of oral hypoglycemic drugs to warn of cardiovascular hazards.<sup>11</sup> In 1975, the FDA, relying heavily upon the UGDP study, proposed new labeling requirements for oral hypoglycemic drugs used in the treatment of diabetes.<sup>12</sup> In 1977, Secretary Califano of HEW declared phenformin, an oral hypoglycemic drug, to be an imminent hazard to public health, and suspended approval of all new drug applications for this drug. Final labeling regulations, however, had not been issued by the FDA at the date of the *Forsham* decision.

Plaintiffs began a series of FOIA requests in 1974 and 1975 for access to the raw data of the UGDP study and to a draft report of the Biometric Society. The Biometric Society report was given to the plaintiffs, but they were notified that the raw data was the property of those engaged in the UGDP study and not available under the FOIA. On September 30, 1975, the FOIA action was commenced, and on February 5, 1976 the District Court granted HEW officials' motion to dismiss on the grounds that the FOIA was not applicable to records maintained by the investigators and coordinating center grantees.<sup>13</sup> The District of Columbia Court of Appeals affirmed.

### B. *The Majority Opinion*

Judge Leventhal framed the issue as "whether and under what conditions data compiled by a private group that is receiving money under a federal grant-in-aid program are or become 'agency records' by virtue of the fact that the agency has funded the program and has the authority to demand those records."<sup>14</sup> The court stated that disclosure under the FOIA is not required unless the records are agency records.<sup>15</sup> Recognizing that in any program funded by the federal government, the government has the opportunity to

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<sup>11</sup>In 1972 the plaintiffs sued to enjoin the FDA from enforcing final labeling proposals published in the May 1972, *FDA Drug Bulletin*, due to deficiencies in the UGDP study. Although the trial court granted a temporary injunction, the court of appeals vacated the order and remanded the case to the FDA for exhaustion of administrative remedies. *Bradley v. Weinberger*, 483 F.2d 410 (1st Cir. 1973).

<sup>12</sup>40 Fed. Reg. 28, 587-95 (1975). The statutory authority for FDA labeling regulations is contained primarily in 21 U.S.C. § 371(a) (1976).

<sup>13</sup>*Forsham v. Califano*, No. 75-1608 (D.D.C. Feb. 5, 1976). Several reasons for the trial court's decision were listed by the court of appeals. In addition to finding that the UGDP raw data was not an "agency record" within the scope of the FOIA, the court also concluded that the UGDP Coordinating Center was not an "agency" as contemplated by the Act. *Forsham v. Califano*, No. 76-1308 at 8 (D.C. Cir. July 11, 1978).

<sup>14</sup>*Forsham v. Califano*, No. 76-1308 at 2 (D.C. Cir. July 11, 1978). The current authority under which HEW may obtain records of a federal grantee which are pertinent to a specific HEW grant may be found at 43 Fed. Reg. 34,084 (1978) (to be codified in 45 C.F.R. § 74.24).

<sup>15</sup>*Forsham v. Califano*, No. 76-1308 at 17 (D.C. Cir. July 11, 1978).

assess results of the performance during the life of the grant, and also that the federal government may give directions concerning certain "matters of public policy that are essentially peripheral to the core of the work done,"<sup>16</sup> Judge Leventhal found that, without more, these records were not agency records.<sup>17</sup>

The "more" that would be required to convert the private grantees' records into agency records was a "core involvement by the government." Without significant government control of the day-to-day operations, or detailed involvement in the planning or execution of the program, the raw data records kept by the private grantee remained the property of the grantee, as to which the government had no ownership rights.<sup>18</sup>

Paying little attention to the fact that HEW was determining policy based on the UGDP study, the court of appeals relied heavily on two factors. First, in defining what an agency was, the court adopted the rationale of the Supreme Court in *United States v. Orleans*.<sup>19</sup> This was a Federal Tort Claims action in which the Court found that the critical element distinguishing a federal agency from either a government contractor or grantee was whether the federal government was in control of "the detailed physical performance" of all the programs or projects it financed.<sup>20</sup> The elements which the court of appeals emphasized in *Forsham*, namely government funding and the implementation of federal objectives, were also emphasized by the Supreme Court when they applied the same "core control by government" test in determining that the Warren-Trumbull Council, a non-profit, federally funded community action agency, was not a federal agency. However, the element missing in *United States v. Orleans* and de-emphasized in *Forsham v. Califano* was reliance by the federal government on the results of the government funded project.<sup>21</sup>

Second, the court of appeals emphasized the need to keep the federal grantee free from the demands of the FOIA in order to prevent a "chilling effect" upon the federal grant-in-aid program.<sup>22</sup> Consequently, the court

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<sup>16</sup>Judge Leventhal stated that the federal government may require a federal grantee to avoid discrimination on the basis of race, religion, creed, or sex. *Id.* at 20. See note 100 *infra*.

<sup>17</sup>*Id.* at 21.

<sup>18</sup>*Id.* Judge Leventhal stated that "the governing principle is that only if a federal agency has created or obtained a record (or has a duty to obtain the record) in the course of doing its work, is there an agency record that can be demanded under FOIA." *Id.* at 16 (footnotes omitted). He further observed that his classifying of those records which the government has a duty to obtain as disclosable agency records was technically dictum.

<sup>19</sup> 425 U.S. 807 (1976). This case presented the issue of whether the Warren-Trumbull Council, a federally funded community action agency operating as a non-profit corporation under Ohio law, was a federal agency. The Warren-Trumbull Council had sponsored a recreational outing for a group of children. While returning in one of the private cars, Joseph V. Orleans was injured in a collision with a parked truck. The injured boy and his father sued the federal government under the Federal Tort Claims Act, alleging that the federal agents in charge of the outing were negligent in their organization and supervision. *Id.* at 809-10.

<sup>20</sup> *Id.* at 816.

<sup>21</sup> This distinction is crucial in view of the fact that the court of appeals adopted the *Orleans* test without recognizing any distinguishing factors between the two cases. *Forsham v. Califano*, No. 76-1308 at 12, 13, 18 (D.C. Cir. July 11, 1978).

<sup>22</sup> The court refused to accept the appellant's contention that subsection of these documents to the FOIA would not curb scientific research under federal grants. Rather, the court asserted that such speculation involved matters beyond the scope of judicial notice. *Id.* at 18.

found that because the federal grantee was not an agency of the federal government, its raw data was not an agency record unless the government exercised “core control” over the grantee’s operation. The result of this approach is to require the conversion of the grantee into a mini-department of a federal agency before the grantee’s records become agency records.

### C. *The Dissent*

Judge Bazelon, in a strong dissent, indicated that factors other than whether the records have been created or obtained by a government agency are relevant in determining whether a grantee’s records are agency records under the FOIA. To discover what factors were relevant in such a determination, it was necessary to examine the policies behind the passage of the FOIA.<sup>23</sup>

Citing the policy of the FOIA that the “public has a right to know what its Government is doing,” the dissent suggested the need for a broad definition of “agency records” so as to be consistent with the legislative purpose of the FOIA. The test applied by Judge Bazelon was whether the circumstances of the case “cumulatively establish a significant degree of federal involvement” so as to draw the UGDP raw data into the definition of agency records.<sup>24</sup>

In finding a “significant degree of federal involvement,” the relevant factors considered by the dissent were three: federal funding of the study, federal access to the raw data, and federal reliance upon the results of the study. Judge Bazelon stated that where all three factors are present, the grantee records clearly become agency records.<sup>25</sup>

Finally, the dissent contended that the “chilling effect” upon an autonomous grantee which the majority was so concerned about would be minimized where a required factor was reliance by the government on the scientific records in the course of its decision-making.<sup>26</sup> This is so because government reliance would likely be limited to cases where the study was completed and the results previously published.

Judge Bazelon’s dissent seriously challenged the *Forsham* majority’s failure to distinguish between the definition of agency and that of agency records, and its concomitant fear of a “chilling effect” upon the federal grant-in-aid program. This raises the question whether the definition of agency was properly applied in finding that the UGDP raw data was not a disclosable agency record. For an answer, a close examination of pertinent case law is necessary.

## III. THE EVOLUTION OF TESTS APPLICABLE TO FEDERAL GRANTEE PROGRAMS

### A. *Defining “Agency” Under the FOIA*

Under the Administrative Procedure Act, “agency” means “each authority

<sup>23</sup> *Id.* at 4 (Bazelon, J., dissenting).

<sup>24</sup> *Id.* at 1 (Bazelon, J., dissenting). This test is similar to the majority’s “core control by government” test, but the emphasis is in a different direction. The majority concentrated on the definition of an “agency” in determining what constitutes an agency record. Judge Bazelon, however, considered the character of the data and the degree of government involvement therewith separate from any definition of agency.

<sup>25</sup> *Id.* at 1, 6-7 (Bazelon, J., dissenting).

<sup>26</sup> *Id.* at 17 (Bazelon, J., dissenting).

of the Government of the United States, whether or not it is within or subject to review by another agency.”<sup>27</sup> The courts have found this statutory language entirely clear, construing it to mean that when any administrative authority has substantial independent authority in the exercise of specific functions, the Administrative Procedure Act confers upon it agency status.<sup>28</sup> Since the Administrative Procedure Act is primarily concerned with rule making and adjudicative powers, administrative units with such powers are clearly agencies thereunder.<sup>29</sup> This definition was expanded in *Soucie v. David*,<sup>30</sup> the court finding that where an entity is delegated some of Congress’ power of inquiry and where it has the independent function of evaluating federal programs, such an entity is an agency subject to the FOIA even though it exercises no rule making or adjudicative authority.<sup>31</sup>

In 1974 Congress amended the FOIA, expanding the definition of agency.<sup>32</sup> The legislative history of this amendment indicates that Congress intended to expand the definition of “agency” to entities that are neither chartered by the federal government or controlled by it.<sup>33</sup> This expansion required an expansion by the courts of the test used in determining agency status for purposes of the FOIA.

The District of Columbia Court of Appeals, interpreting the expanded definition of agency under the 1974 FOIA Amendment, found in *Lombardo v. Handler*<sup>34</sup> that the National Academy of Sciences and its committee on motor vehicle emissions was not an agency of the government for purposes of the

<sup>27</sup> Administrative Procedure Act, 5 U.S.C. § 551(1) (1976).

<sup>28</sup> See generally *Soucie v. David*, 448 F.2d 1067, 1073 & n.14 (D.C. Cir. 1971).

<sup>29</sup> See *Soucie v. David*, 448 F.2d 1067, 1073 & nn.14 & 15 (D.C. Cir. 1971). The *Soucie* court cited various sources for this interpretation, including the legislative history of the Administrative Procedure Act. One cited authority succinctly states

[t]he theme that runs through the legislative history of section 2 is that an administrative agency is a part of government which is “generally independent in the exercise of [its] functions” and which “by law has authority to take final and binding action” affecting the rights and obligations of individuals, particularly by the characteristic procedures of rulemaking and adjudication.

Freedman, *Administrative Procedure and the Control of Foreign Direct Investment*, 119 U. PA. L. REV. 1, 9 (1970).

<sup>30</sup> 448 F.2d 1067 (D.C. Cir. 1971). *Soucie* involved an FOIA action to compel the Office of Science and Technology to release a report evaluating the federal government’s program for development of a supersonic transport aircraft.

<sup>31</sup> *Id.* at 1075. The court emphasized the fact that Congress retained control over information on federal programs accumulated by the Office of Science and Technology. *Id.*

<sup>32</sup> Privacy Act of 1974, Pub. L. No. 93-502, § 3 (current version at 4 U.S.C. § 552(e) (1976)). This section provides that “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 Government (including the Executive Office of the President), or any independent regulatory agency.”

<sup>33</sup> S. REP. NO. 93-1200, 93d Cong., 2d Sess. 14, 15, reprinted in, [1974] U.S. CODE CONG. & AD. NEWS 6285, 6293. Also the House Report to the Conference Committee stated that the definition of “agency” was expanded to include not only those entities under 5 U.S.C. § 551(1) but also entities which perform government functions and control information of interest to the public. H.R. REP. NO. 93-876, 93d Cong., 2d Sess. 8, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6267, 6274. The expansion of the agency definition, however, was not intended to affect “subdivision, offices or units within an agency.” S. REP. NO. 93-1200, 93d Cong., 2d Sess. 15, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6285, 6293.

<sup>34</sup> 397 F.Supp. 792, 794 (D.D.C. 1975). The National Academy of Sciences had a contract with the Environmental Protection Agency (EPA) to study the feasibility of certain auto emission standards. Approximately 75% of the Academy’s revenues result from government contracts. *Id.*

FOIA.<sup>35</sup> The court held that this Academy of Sciences committee was not a "government controlled corporation" because there was no significant government control shown.<sup>36</sup> Also, it neither acted as an authority of the government nor performed government functions.<sup>37</sup> The *Lombardo* court stated that the FOIA "was not intended to be applied directly to entities which merely contract with the government to conduct studies."<sup>38</sup>

The next significant case defining "agency" under the FOIA also came out of the Court of Appeals in the District of Columbia. The court, in *Rocap v. Indiek*,<sup>39</sup> held that the Federal Home Loan Mortgage Corporation (FHLMC) was a "government controlled corporation" within the definition of agency under the FOIA.<sup>40</sup> The dividing line for FOIA purposes was that the government had substantial control over the day-to-day operations of the FHLMC.<sup>41</sup>

It has become evident that in defining what an agency is under the FOIA, the courts have applied two tests. The original test developed under the Administrative Procedure Act determined whether the entity exercised any government rule making or adjudicatory functions.<sup>42</sup> A second test applied under the 1974 amendment to the FOIA, is whether the entity is significantly controlled by the federal government in its day-to-day operations.<sup>43</sup> No case, however, has applied the tests defining agency to determine what constitutes an agency record, except *Forsham v. Califano*. The *Forsham* court thus extended the test for "agency" into the realm of what constitutes an "agency record."

The test applied by the majority in *Forsham* is the traditional common law test of agency, differentiating between an agent and an independent contractor.<sup>44</sup> The majority opinion cited *United States v. Orleans*<sup>45</sup> as "lighting the path" to finding the test applicable to agency records.<sup>46</sup> The Court in *Orleans* determined the test applicable to define "agency" by relying on

<sup>35</sup> The court also held that the Academy was not an "agency" under the Federal Advisory Committee Act, and that its *Committee on Motor Vehicle Emissions* was not an "advisory committee" under that Act. *Id.* at 796, 800 (construing Federal Advisory Committee Act, 5 U.S.C. App. § 3(2)-(3) (1976)). See note 68 *infra*.

<sup>36</sup> *Id.* at 802. Counsel for the Academy offered an extensive list of the Academy's non-agency characteristics. Among these were the lack of direct federal funding, performance by the Academy of many activities for non-federal bodies, lack of "Civil Service employment controls, O.M.B. management controls, or G.A.O. accounting controls." *Id.* at 794-95.

<sup>37</sup> *Id.* at 802. The court noted that the legislative history of the amendment defining "agency" indicated that the broadened definition was not intended to include corporations neither chartered nor controlled by the federal government. *Id.*

<sup>38</sup> *Id.* A major difficulty with the opinion in *Lombardo* was the failure to provide guidelines to aid in determining when an agency is controlled by the government.

<sup>39</sup> 539 F.2d 174 (D.C. Cir. 1976).

<sup>40</sup> *Id.* at 180-81.

<sup>41</sup> *Id.* at 177. The court noted that the FHLMC was chartered under federal law, its board of directors consisted of federal officers; its operations were tightly controlled by statute, Congress treated it as an agency, and its employees as employees of the United States. *Id.* at 176 (citing Brief for Appellee at 6.).

<sup>42</sup> See note 29 *supra*.

<sup>43</sup> See notes 32-41 *supra* and accompanying text.

<sup>44</sup> See, e.g., W. EDWARD SELL, *SELL ON AGENCY* § 19 at 16 (1975).

<sup>45</sup> 425 U.S. 807 (1976). See notes 19-21 *supra* and accompanying text.

<sup>46</sup> *Forsham v. Califano*, No. 76-1308 at 12 (D.C. Cir. July 11, 1978).



*Logue v. United States* and *Maryland v. United States*.<sup>47</sup> The Supreme Court, in *Logue v. United States*<sup>48</sup>, deciding whether prison guards at a federal prison were employees of the state or federal government, adopted the “traditional distinction between employees of the principal and employees of an independent contractor,” and held that “the critical factor in making this determination is the authority of the principal to control the detailed physical performance of the contractor.”<sup>49</sup> *Maryland v. United States*<sup>50</sup> held that state supervision of federal military and civil personnel took such personnel out of the control of the federal government and that therefore the Federal Tort Claims Act was not applicable.<sup>51</sup>

It is clear from these cases that the court in *Forsham* applied an agency test in order to determine what are agency records. The test applied was certainly applicable if the issue was whether the grantee was an agency of the federal government, but the issue was whether the grantee’s raw data were agency records. Therefore, the question must be asked whether the court applied the proper test.

### B. Defining Agency Records Under the FOIA

Under the FOIA, agencies must publish in the Federal Register specified information including substantive rules and statements of policies, and must make available to the public for inspection and copying all final opinions and statements of policy.<sup>52</sup> Additionally, each agency must make available to the public, upon request, reasonably describable agency records.<sup>53</sup> The major difficulty with the FOIA is that nowhere in the legislative history of the Act is there information relevant to the definition of agency records.<sup>54</sup> However, the courts have construed the meaning of describable agency records even without the help of legislative history.

In *American Mail Line, Ltd. v. Gulick*,<sup>55</sup> the Court of Appeals of the District of Columbia held that where an agency bases a final opinion upon a staff memorandum and incorporates part of this memorandum into its final opinion, the whole memorandum becomes part of the final opinion of the agency and is required to be disclosed under the FOIA.<sup>56</sup> The *Gulick* court stated that Congress intended to identify two different types of agency records, *i.e.* those records which are final opinions or declarations of general policy, and identifiable or reasonably describable records.<sup>57</sup> The staff memorandum in question was an identifiable record because the agency had

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<sup>47</sup> 425 U.S. at 814, 815 (citing *Logue v. United States*, 412 U.S. 521 (1973) and *Maryland v. United States*, 381 U.S. 41 (1965)).

<sup>48</sup> 412 U.S. 521 (1973).

<sup>49</sup> *Id.* at 527-28.

<sup>50</sup> 381 U.S. 41 (1965).

<sup>51</sup> *Id.* at 53.

<sup>52</sup> Freedom of Information Act, 5 U.S.C. § 552(a)(1)-(2) (1976).

<sup>53</sup> *Id.* § 552(a) (3).

<sup>54</sup> See generally *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696, 699-700 (D.C. Cir. 1969).

<sup>55</sup> 411 F.2d 696 (D.C. Cir. 1969).

<sup>56</sup> *Id.* at 702.

<sup>57</sup> *Id.* at 704.

stated that its decision was based substantially thereon.<sup>58</sup> Agency records, then, are identifiable records if the record forms a basis for a policy decision by an agency and if the agency recognizes it as forming that basis.<sup>59</sup>

In a case following *Gulick, Sterling Drug Inc. v. FTC*,<sup>60</sup> the Court of Appeals for the District of Columbia dealt with the issue of when agency memoranda become part of a final decision by an agency.<sup>61</sup> The court divided agency memoranda into three categories: those prepared by the staff of the Federal Trade Commission (FTC), those prepared by individual members of the commission, and those prepared by the commission itself as the final opinion or policy decision.<sup>62</sup> The *Sterling* court stated that the underlying philosophy of *Gulick* is applicable to memoranda issued by the commission itself only because these memoranda would not be argumentative within the agency, but rather would be explanatory of the commission's decision.<sup>63</sup> An agency record that is created by an agency must be disclosed under section 3 of the FOIA as an identifiable record if it forms the basis of an agency final opinion or general policy declaration. However, memoranda prepared by an agency staff or its members are intra-agency memoranda exempted by section 552(b)(5) of the FOIA in order to encourage the exchange of ideas and arguments within an agency.<sup>64</sup>

Following this decision, it was held that an agency is required to identify all documents it has used to support a policy decision, and at that point the agency has the burden of establishing that the documents are exempted from disclosure.<sup>65</sup> The reason for requiring the agency to identify all documents used in support of policy decisions is to prevent the creation of secret agency law in which the agency insulates "itself from external criticism of its method and its rationale, leaving nothing open to challenge except the legality of its result."<sup>66</sup>

Consistent with this rationale is dictum in *Washington Research Project, Inc. v. HEW*,<sup>67</sup> where the court held that a group of outside private

<sup>58</sup> *Id.* at 701.

<sup>59</sup> See *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 706 & n.7 (D.C. Cir. 1971). See also 450 F.2d at 713 & n.8 (Bazelon, J., concurring in part and dissenting in part).

<sup>60</sup> 450 F.2d 698 (D.C. Cir. 1971).

<sup>61</sup> One of the issues on appeal was whether certain internal agency memoranda constituted intra-agency records under § 552(b)(5) of the FOIA, which exempts such information from public disclosure unless it would be available by law to a party litigating with the agency. *Id.* at 704. *Sterling* was charged with violating § 7 of the Clayton Act, 5 U.S.C. § 18 (1976), in connection with its acquisition of another company. *Sterling* requested the FTC file regarding its approval of a merger between Miles Laboratories and the S.O.S. Company. *Sterling* felt that this approval was dispositive of its case, and that because the FTC gave no ascertainable reasons for approving the Miles-S.O.S. merger, the FTC file would contain the basis for that decision. *Id.* at 701-02.

<sup>62</sup> *Id.* at 706.

<sup>63</sup> *Id.* at 708. The court stated that binding agency opinions and interpretations are law and must therefore be made available to the public in order to prevent the development of secret agency law. The dissenting opinion in *Sterling* felt that the majority's distinction between the three types of agency memoranda was artificial, and that all memoranda adopted by an agency in the formulation of its policies should be disclosed. *Id.* at 714 (Bazelon, J., concurring in part and dissenting in part).

<sup>64</sup> *Id.* at 708; Freedom of Information Act, 5 U.S.C. § 552(b)(5) (1976).

<sup>65</sup> National Cable Television Ass'n v. FCC, 479 F.2d 183, 193 (D.C. Cir. 1973).

<sup>66</sup> *Id.* at 187.

<sup>67</sup> 504 F.2d 238 (D.C. Cir. 1974), cert. denied, 421 U.S. 963 (1975).

consultants appointed by the National Institute of Mental Health, a subdivision of HEW, to independently review applications for grants, was not an agency within the meaning of the FOIA.<sup>68</sup> The court implicitly recognized the difference between an agency and an agency record by stating that, "this is not to say that a staff recommendation may never achieve the dignity of an agency's final decision; it may do so when the agency adopts it as its own, and at that point its disclosure can be required."<sup>69</sup> This distinction is crucial because it recognizes that even though a private entity consulting the federal government is not an agency of the government, a report submitted to the government may become a disclosable agency record if the agency adopts or relies upon it as part of its rationale for a final policy decision. It is important to note, however, that the *Washington Research Project* reports submitted to the government, which become subject to disclosure by incorporation into the agency's final opinion, were all in the possession of the federal government. This differs from the case in *Forsham*, in which the raw data remained in the possession of the private grantee and was incorporated into the federal government policy decisions indirectly, through reliance upon the grantee's summary report.

One further observation must be made in regard to identifiable agency records used by an agency in making a policy decision. In *NLRB v. Sears Roebuck & Co.*,<sup>70</sup> the Supreme Court held that inter-agency or intra-agency memoranda which explain "final opinions" of an agency must be disclosed.<sup>71</sup> The reason for distinguishing between agency memoranda which are adopted in an agency's final opinion and those which are not is that the public

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<sup>68</sup> Under the facts involved, the court determined that the group of consultants was an advisory committee "performing staff functions through the medium of outside consultants. . . ." *Id.* at 246. This view had not been anticipated by counsel for the plaintiff-appellee:

Whether the IRC is subject to the disclosure requirements of the Federal Advisory Committee Act, 5 U.S.C. App. I, § 10, is not a question before this court. We note, however, that that Act makes the FOIA standards applicable to advisory committees' reports and other papers only insofar as the head of the agency to which the committee reports fails to determine in writing that the reports or documents contain information within an exemption to the FOIA. *Id.* § 10(d).

504 F.2d at 248 n. 15.

Note that this case was cited in *Forsham* as being congruent therewith. *Forsham v. Califano*, No. 76-1308 at 13 (D.C. Cir. July 11, 1978). Thus, the Federal Advisory Committee Act disclosure requirements represents a *potential* method for evading *Forsham*-type definitional difficulties. However, see *Lombardo v. Handler*, 347 F.Supp. 792 (D.D.C. 1975) for a strict construction of the terms "agency" and "advisory committee" under this Act. There the National Academy of Sciences was found not to be an "agency" despite the facts that it was established by a congressional act, it was required to make reports to Congress and investigations when requested to do so by a department of the federal government, its reports are given some legal significance by other congressional acts, and so on. 397 F.Supp. at 793-94. The court in *Lombardo* also found that the Academy's Committee on Motor Vehicle Emissions was not an "advisory committee" by strictly construing the Federal Advisory Committee Act's definition of that term. 397 F.Supp. at 796-800 (construing 5 U.S.C. App. § 3(2) (1976)). Once it is recognized that the Academy has much greater ties with the federal government than the average grantee, and that its Committee on Motor Vehicle Emissions likewise had a much closer relationship to the Environmental Protection Agency than most grantees would have to a federal agency, it becomes clear that in nearly all cases grantee records remain unavailable under the Federal Advisory Committee Act.

<sup>69</sup> 504 F.2d at 248.

<sup>70</sup> 421 U.S. 132 (1975).

<sup>71</sup> *Id.* at 153-54. This case involved an FOIA request for disclosure of NLRB Advice Memoranda developed by the Advice Branch of the General Counsel's Office and communicated

is intimately concerned with the reasons supplying a basis for an agency policy actually adopted, whereas the public is only marginally concerned with reasoning relative to a policy rejected by an agency or reasoning which did not form the basis of a policy.<sup>72</sup> This rationale is equally applicable to cases in which reports of private entities are adopted by an agency as part of the basis for a policy decision. Indeed, it could be said that the whole purpose of requiring disclosure of identifiable agency records under section 552(a)(3) of the FOIA is to supply the public with the reasons upon which an agency policy decision is based.

In the above cases, however, where the courts have found non-agency or otherwise exempt records to be disclosable agency records, the non-agency or staff entities were performing works for the government and the government agency had possession of the reports when they were requested under the FOIA.<sup>73</sup> Thus, if the rationale of these cases is to be applied to records of private grantees, two questions must be answered: are federal grantees performing work for the government; and if so, must the grantees' records be in the possession of a government agency before disclosure is required under the FOIA. Before discussing these questions, however, it must be determined whether the tests used in defining government agencies and agency records may be adequately and justifiably applied to federal grantees.

### C. *Applicability of Agency and Agency Record Tests to Federal Grantees*

For obvious reasons the tests defining "agency" under the FOIA are appropriate for determining whether a federal grantee is an agency of the government. Where a federal grantee does not have substantial independent authority in the exercise of specific functions<sup>74</sup> and where it is not subject to significant control of its day-to-day operations,<sup>75</sup> then the federal grantee does not constitute an agency of the government. The UGDP study group in the *Forsham* case obviously did not constitute a federal agency because it was not authorized to make agency decisions and the government did not exercise control over its day-to-day operations.<sup>76</sup>

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from the General Counsel to the NLRB Regional Director in the form of a "final determination." The Memorandum determined whether the NLRB Regional Director would file a complaint or refuse to proceed on the complaining party's request. *Id.* at 132.

Of course, unless the intra-agency memoranda "explain agency action already taken or an agency decision already made . . . [or] constitute 'final dispositions' of matters by an agency. . . ," § 552(b)(5) will exempt them from public disclosure, Freedom of Information Act, 5 U.S.C. § 552(b)(5). *Id.* at 153-54.

<sup>72</sup> NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 152 (1975).

<sup>73</sup> See NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975); Washington Research Project, Inc. v. HEW, 504 F.2d 238 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); American Mail Line, Ltd. v. Gulick, 411 F.2d 696 (D.C. Cir. 1969).

<sup>74</sup> See *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971) and text accompanying notes 28 & 29 *supra*.

<sup>75</sup> See *Rocap v. Indiek*, 539 F.2d 174, 177 (D.C. Cir. 1976); *Lombardo v. Handler*, 397 F.2d 792, 802 (D.D.C. 1975); notes 32-41 *supra* and accompanying text.

<sup>76</sup> The status of the UGDP study group was litigated in *Ciba-Geigy Corp. v. Mathews*, 428 F.Supp. 523 (S.D.N.Y. 1977), wherein it was determined that the group lacked agency status and the data produced by the group were not agency records. *Id.* at 526-28. *Ciba-Geigy* involved an FOIA request for the same raw data as in *Forsham*, filed by the pharmaceutical manufacturer of the drugs under study by the UGDP.

However, recognizing that the courts have distinguished between an agency and agency records for purposes of the FOIA,<sup>77</sup> the tests defining a government agency are inappropriate for determining whether a federal grantee's records are agency records. Applying the agency tests to a dispute over what are agency records is a roundabout way of determining whether a federal agency is present. Such an approach fails to recognize the distinction between an agency and an agency record. The two are not co-extensive under the FOIA.<sup>78</sup> Applying the agency tests to grantee records, as was done in *Forsham*, necessitates the finding in all cases that federal grantee records are not agency records, unless a federal agency actually possesses them.<sup>79</sup> Such a result would be contrary to the policies of the FOIA because an agency could adopt a federal grantee report as the basis for a policy decision, and the potential basis for challenge by a member of the public would be severely limited.<sup>80</sup> The agency could thereby insulate itself from external criticism of its methods and rationales concerning policy decisions.<sup>81</sup> In light of the people's right to know why government decisions are made, limiting required disclosure under the FOIA to situations where an agency physically possesses grantee data and records is contra to the spirit and intent of the FOIA when an agency bases a policy decision upon federal grantee results.

The test developed by the courts for defining agency records is equally inadequate. The FOIA is not so broad as to apply to every document or report that a government agency adopts as a basis for a policy decision. Cases finding that the records of non-agency entities constituted agency records because they were adopted by the agency as part of the agency's policy decision all dealt with entities that had a nexus with the government agency. Specifically, the non-agency entities created the records in performance of government functions.<sup>82</sup> Thus, if grantee records are ever to be disclosed as agency records, a nexus sufficient to show that the federal government has some right to the records is apparently required. One obvious connection is the *possession* of the grantee's records by a government agency. However, possession of the grantee's records does not appear to be the only possible

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<sup>77</sup> See notes 52-72 *supra* and accompanying text.

<sup>78</sup> *Id.*

<sup>79</sup> See, e.g., *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Washington Research Project, Inc. v. HEW*, 504 F.2d 238 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). Federal grantees, by their very nature, are not armed with the power to make government decisions. Furthermore, grantees are given control of the day-to-day operations of their projects, while the government merely monitors and evaluates the program's progress. See 43 Fed. Reg. 34089 (to be codified in 45 C.F.R. § 74.80-85).

<sup>80</sup> Agency action may be set aside by a reviewing court on six different grounds: when the action is arbitrary, capricious, or an abuse of discretion; when it is unconstitutional; when it is beyond the agency's statutory mandate; when it is not in accordance with due process guarantees; when, in cases involving statutorily required hearings, it is unsupported by substantial evidence; or when it is unwarranted by the facts, to the extent they may be reviewed by a court. Freedom of Information Act, 5 U.S.C. § 706 (1976).

When access to raw data such as the UGDP study results is denied to persons opposing agency action it seems that challenges on the facts and evidence are effectively precluded. An additional burden on plaintiffs is the presumption of validity attached to agency action. See *Certified Color Manufacturers Ass'n v. Mathews*, 543 F.2d 284, 293-94 (D.C. Cir. 1976).

<sup>81</sup> See notes 65 & 66 *supra* and accompanying text.

<sup>82</sup> See note 73 *supra* and accompanying text.

connection between a government agency and a federal grantee which would provide a sufficient nexus for purposes of applying the FOIA.

#### IV. THE RELATIONSHIP BETWEEN THE GRANTEE AND THE GOVERNMENT — LOOKING FOR A SUFFICIENT NEXUS

##### A. *The Autonomous Grantee*

The majority opinion in *Forsham* stressed the fact that the relationship between the grantee and the government is one based on the autonomy of a grantee "doing his own thing."<sup>83</sup> "A grant is assistance. It does not fill a specifiable requirement of the [federal] government."<sup>84</sup> The assistance is given because the government thinks "maybe something usefull will turn up" that could be utilized by society.<sup>85</sup>

The *Forsham* court referred to the concept of the autonomous grantee to show that the imposition of FOIA upon grantees would infringe upon the philosophy and purpose of federal grant programs. In light of the fact that there is a growing trend in the area of grant law towards an increase in the degree and variety of specific federal controls over the grantee,<sup>86</sup> this desire to limit further federal infringement is praiseworthy. Concern over growing federal involvement in the grant area relates primarily to the increasing number of application requirements, auditing procedures and government management controls *during* the grant period.<sup>87</sup> The FOIA, however, if applied to a grantee only where a sufficient nexus with the federal government exists, would not overly increase federal involvement in the grant area. The FOIA would be applied to a grantee when its records and data are filed with a federal agency, or when some relationship between the government and the grantee comes into existence, converting the grantee's private records into agency records. Under the first situation, the grantee's records become

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<sup>83</sup> No. 76-1308 at 19. Judge Leventhal stated that the concept of an autonomous grantee "is a core concept, not an incidental observation. In a grant program the federal government gets the advantage of services rendered by someone who is doing his own thing, his own autonomous thing. It is not the same as a government operation in disguise." *Id.*

<sup>84</sup> Mason, *Current Trends in Federal Grant Law — Fiscal Year 1976*, 35 FED. B.J. 163, 166 (1976).

<sup>85</sup> *Id.* at 167. The *Forsham* majority quoted from Mason, who states that "[t]he grant is assistance to an autonomous grantee. The grantee is not an arm, agent or instrumentality of the grantor. The employees of the grantee are not federal employees. The torts of the grantee are not federal torts. The property of the grantee is not federal property." *Id.* at 167-68, quoted in *Forsham v. Califano*, No. 76-1308 at 19 (D.C. Cir. July 11, 1978).

<sup>86</sup> See Montalto & Wallick, *Symbiosis or Domination: Rights and Remedies Under Grant-Type Assistance Programs*, 46 GEO. WASH. L. REV. 159, 170 (1976).

It is notable that as such government controls increase, it becomes more likely that a grantee could be found to be a government controlled corporation subject to FOIA disclosure requirements under the substantial control test. See text accompanying notes 37-45 *supra*. However, this difficult factual question goes to whether the grantee is an *agency*, not to whether grantee records are agency records. See notes 55-72 *supra* and accompanying text.

<sup>87</sup> See generally Newton, *Contracting Under Grants: The Need to Define the Federal Role*, 9 PUB. CONT. L.J. 35, 36-37 (1977); Mason, *Current Trends in Federal Grant Law — Fiscal Year 1976*, 35 FED. B.J. 163, 176 (1976); Montalto & Wallick, *Symbiosis or Domination: Rights and Remedies Under Grant-Type Assistance Programs*, 46 GEO. WASH. L. REV. 159, 170 (1976).

agency records by mere agency possession.<sup>88</sup> Under the second situation, it is difficult to imagine a sufficient nexus between the grantee's records and the federal government without some sort of reliance thereon by the government. Reliance will not ordinarily occur until the grantee has completed its grant project and the results have been published. Little infringement upon the grantee's autonomy will occur, as to control or operation of the grantee's project, by application of the FOIA after the project is complete.<sup>89</sup>

### B. *Funding and Access*

There is little reason why federal funding of a grantee or government access to a grantee's records should provide the necessary nexus between grantee records and the government to require disclosure of the records under the FOIA. For example, the legislative history of the 1974 Amendments to the FOIA indicates that the amendments "do not intend to include corporations which receive appropriated funds but are neither chartered by the federal government nor controlled by it."<sup>90</sup> In *Ciba-Geigy Corp. v. Mathews*,<sup>91</sup> a case involving the same raw data sought in *Forsham*, the court relied in part upon this statement in finding

that federal funding, regardless of amount is not sufficient to vest the underlying raw data of the UGDP research with a public character. To hold otherwise at a time when public monies flow to numerous private endeavors would surely have a chilling effect on independent efforts at research and development by all but those institutions able to survive without Governmental support.<sup>92</sup>

Thus, the reasoning behind such policy is not only that funding does not

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<sup>88</sup> This situation reflects current treatment. As the *Forsham* majority states, "[s]cientists engaged in research on federal grants must accept the fact that any documents filed with the federal government, whether on the scientists' own initiative or an audit or other lawful demand, are subject to FOIA." *Forsham v. Califano*, No. 76-1308 at 18 (D.C. Cir. July 11, 1978).

<sup>89</sup> Inconvenience to the grantee would perhaps be greatest in the *Forsham*-type situation where raw data is summarized and the summarization is relied upon by the government in making a policy decision which affects large numbers of the general public. In such a situation, the grant and project having ended, the ex-grantee would merely be required, under the FOIA, to allow inspection and copying of its raw data. Ownership of the raw data need not be relinquished. Such a minor inconvenience is hardly justification for the prevention of proper evaluation of a final report which will have important repercussions for the general public. Indeed, thorough and proper evaluation should be sought by the grantee as consistent with the commitment of the scientific community to advance "scientific truth by subjecting findings and conclusions to the 'exacting scrutiny of fellow experts.'" *Forsham v. Califano*, No. 76-1308 at 18 (D.C. Cir. July 11, 1978) (Bazelon, J., dissenting) (quoting R. MERTON, *THE SOCIOLOGY OF SCIENCE* 275 (1973)).

<sup>90</sup> S. REP. NO. 93-1200, 93d Cong., 2d Sess. 15, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6285, 6293.

<sup>91</sup> 428 F.Supp. 523 (S.D.N.Y. 1977).

<sup>92</sup> *Id.* at 530 (footnote omitted). In reaching this result as to federal funding, the court also relied in part on *Lombardo v. Handler*, 397 F.2d 792 (D.D.C. 1975), discussed at notes 34-38 *supra* and accompanying text. Reliance upon *Lombardo* as to the insignificance of federal funding under the FOIA is misplaced, as the National Academy of Sciences involved therein was prohibited from receiving any government appropriations. 397 F.2d at 794. Nevertheless, *Lombardo* is persuasive on this issue, as the Academy did derive approximately 75% of its revenues from *contracts* with the federal government. 397 F.2d at 794 n. 10; see note 34 *supra*.

convert a non-agency entity into a federal agency, and is not tantamount to government control, but also that funding alone does not provide a sufficient reason to require disclosure of grantee records in light of the ramifications of requiring disclosure on the basis of funding alone.

Similarly, a government right of access to grantee records cannot and should not prompt the imposition of the disclosure requirements of the FOIA. Access requirements are nearly as common as federal funding itself, so that the impact of requiring disclosure on this basis alone would be tremendous. Also, a right of access provides even less justification for required disclosure than does federal funding, since access and retention requirements are used primarily only to audit and evaluate government grants.<sup>93</sup> A right of access does not constitute a government right to the records themselves, nor does it, standing alone, constitute sufficient government control to allow a proper application of the FOIA.<sup>94</sup>

The same reasoning applies where both funding and access coincide, primarily because there is no sufficient justification for requiring disclosure where the public's interest is so slight when compared with the all-inclusive impact of required disclosure under such circumstances.

### C. *Reliance by the Government*

If the FOIA is to apply to records in possession of a private grantee, it thus appears that the only sufficient nexus between the grantee's records and a government agency is reliance on the grantee's records in the formulation of government policies.<sup>95</sup> Certainly the government expects that the findings of a grant-in-aid project could be used by it in formulating policy. This is not disputed in the *Forsham* case. The essential question, then, is whether the public should have the right to look to a grantee's records for a complete explanation of the methods and rationale relied upon by the government in making a particular policy decision.<sup>96</sup>

The relationship of grantor to grantee is not one of pure gift, unburdened with enforceable obligations.<sup>97</sup> Although the relationship is not purely

<sup>93</sup> See, e.g., 43 Fed. Reg. 34083 (Subpart D — Retention and Access Requirements for Records) (1978) (to be codified in 45 C.F.R. § 74.20-.25). In *Ciba-Geigy Corp. v. Mathews*, 428 F. Supp. 523 (S.D.N.Y. 1977), it was said that

[a]lthough the federal defendants have access to the underlying data, there is no evidence that they have used it to exercise regular dominion and control over the raw data. . . . [A]lthough it was transmitted temporarily to the Government for limited auditing purposes, ownership and control were not conveyed along with it.

428 F.Supp. at 530-31.

<sup>94</sup> *Ciba-Geigy Corp. v. Mathews*, 428 F.Supp. 523, 530-31 (S.D.N.Y. 1977).

<sup>95</sup> Judge Bazelon, dissenting in *Forsham*, stated that reliance on the UGDP raw data in the course of formulating official government policy makes such data "precisely the sort of document Congress intended to be disclosed under FOIA." *Forsham v. Califano*, No. 76-1308 at 17 (D.C. Cir. July 11, 1978) (Bazelon, J., dissenting).

<sup>96</sup> The policies of the FOIA are definitely in favor of disclosure. The people, indeed, have a right to know what their government is doing, and why. See notes 1 & 2 *supra* and accompanying text. Under the FOIA, records used in support of agency policy decisions should be subject to disclosure in order to prevent the formulation of secret agency law through which the agency insulates itself from external criticism of its methods and rationale. *National Cable Television Assoc. v. F.C.C.*, 479 F.2d 183, 187 (D.C. Cir. 1973).

<sup>97</sup> *Montalto & Wallick, Symbiosis or Domination: Rights and Remedies Under Grant-Type Assistance Programs*, 46 *GEORGE WASHINGTON LAW REVIEW* 159, 165 & n. 33, 166 (1976).



contractual, certain contractual obligations nevertheless exist.<sup>98</sup> While the law is unclear as to what obligations are enforceable against either the grantee or grantor,<sup>99</sup> the law is clear that the government can impose obligations concerning overriding federal policies.<sup>100</sup> Federal funding of a grant project, the government's right to access of the grantee's records, and governmental reliance upon the grantee's records by basing policy decisions thereon, provides the basis upon which the FOIA policy could be enforced. The overriding federal policy is the public's right to know what its government is doing, and the grantee should expect that this policy will be enforced when the government chooses to rely upon the grantee's records.<sup>101</sup>

The majority in *Forsham* indicates that one reason for not extending the FOIA to grantee records possessed by the grantee is that such an extension in the public interest is not properly addressed by the courts, but rather is a task for the legislature.<sup>102</sup> However, in a recent committee report concerning the lack of guidelines for federal contract and grant data, the House Committee on Government Operations recommended that the application of the FOIA to contractor and grantee records be left to the courts.<sup>103</sup> The report stated: "Availability of contractor or grantee records under FOIA is still a developing area of case law, and the committee thinks that it is premature to comment. It will take more time and more cases to see whether the majority decision in *Forsham* is generally accepted."<sup>104</sup>

V. THE DEGREE OF RELIANCE REQUIRED —  
ANALYSIS OF *Ciba-Geigy Corporation*  
*v. Mathews*<sup>105</sup>

In *Ciba-Geigy Corporation v. Mathews*, the court applied a "significant involvement with the records" test to the same UGDP raw data later involved in *Forsham*.<sup>106</sup> The court held that the data was not subject to disclosure under the FOIA because "mere access without ownership and mere reliance without control will not suffice to convert the UGDP raw data into agency data."<sup>107</sup>

In applying the "significant involvement with the records" test, the court analyzed when government reliance amounted to "significant involvement."

<sup>98</sup> *Id.* at 166.

<sup>99</sup> *Id.* at 167.

<sup>100</sup> See *United States v. Frazier*, 297 F.Supp. 319, 322-23 (M.D. Ala. 1968). The court held that the United States had standing to bring an action to force the State of Alabama to conform its employment policies under a federal grant to meet federal laws and regulations.

<sup>101</sup> Where a grantee's records come into the possession of a government agency they become subject to the FOIA. See note 88 *supra*. There is little reason for not enforcing the FOIA merely because the agency does not *possess* the records where there is a strong public interest in allowing examination of the records.

<sup>102</sup> Judge Leventhal recognized that a balance must be struck considering the advantages of an autonomous grantee "and the possibly conflicting policy that cherishes full and free public access to government agencies. . . ." *Forsham v. Califano*, No. 76-1308 at 21 (D.C. Cir. July 11, 1978).

<sup>103</sup> H.R. REP. No. 95-1663, 95th Cong., 2d Sess. (1978).

<sup>104</sup> *Id.* at 24.

<sup>105</sup> 428 F. Supp. 523 (S.D.N.Y. 1977).

<sup>106</sup> *Id.* at 529.

<sup>107</sup> *Id.* at 531.

The raw data was not subject to disclosure because the government did not directly rely on the raw data so as to give the government a basis for obtaining and disclosing it.<sup>108</sup> However, by distinguishing between direct reliance, as where the government directly controlled or substantially utilized the underlying data, and indirect reliance via the summary report, the court rendered the reliance test a nullity. The summary report is, of course, nothing more than an analysis and summation of the raw data. In relying on the summary report, the government necessarily relied on the underlying raw data.

Recognizing the tenuousness of its distinction, the court attempted to lend substance to it, saying:

The difference between the FDA's control and use of final reports and its alleged dependence upon underlying documentation may seem slight, but it is a valid distinction in this Court's opinion. First, the Government neither obtained nor needed significant authority over the underlying raw data since it had no plans to conduct its own independent scientific assessment.<sup>109</sup>

This latter statement begs the question, as the FDA would have no need to conduct its own scientific assessment where it granted the necessary funds for the UGDP study and subsequently chose to rely upon its findings. Clearly the distinction between reliance upon the summary report and reliance upon the underlying documentation is one without substance, and fails to give sufficient emphasis to the public's right to know and to the FOIA's aim of preventing the creation of secret agency law.

## VI. A SUGGESTED APPROACH

Applying the FOIA to a grantee's records is a new and developing area in which there are few guidelines.<sup>110</sup> The approach suggested here consists of an actual balancing of public and private interests, considering ownership and control as relevant considerations rather than as determining factors.

Beginning with the realization that the interests of the grantee, the govern-

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<sup>108</sup> *Id.* at 532. The New York Court distinguished between direct reliance upon the summary report of UGDP study and direct reliance upon supporting documentation. Finding that the government did not directly rely on the supporting documentation, the court found a lack of significant government involvement with the raw data records. The court based its distinction on the need "to preserve a salutary balance between the public's right to be informed of the grounds for government decisionmaking and the protection of private interest." *Id.* at 532.

<sup>109</sup> *Id.* at 531. The court also stressed that the summary report had been independently evaluated by the Biometrics Society, and that the FDA had allowed the public to participate in the proposed policy decision through public hearing thereon. *Id.* at 531-32 n. 8. However, the findings of the Biometrics Society report were far from conclusive, *Id.* at 526 n. 1, and the very fact that independent evaluation of the report was deemed necessary suggests that the FDA knew that the findings of the UGDP report were open to serious question. Furthermore, the opportunity for participation by the public in the proposed policy determination means little where the public is not an informed participant, knowledgeable as to the methodology and precise findings which formed the basis for the UGDP summary report.

<sup>110</sup> See H.R. REP. No. 95-1663, 95th Cong., 2d Sess. (1978). *Forsham* certainly does not foreclose the question of FOIA's application to grantee records. In utilizing property rights and agency law in an area not readily suited therefor, both *Forsham* and *Ciba-Geigy* failed to consider the *spectrum* of relevant considerations, and lost sight of the all-important policies behind enactment of the FOIA.

ment and the public must all be accounted for, the relevant considerations in such a balancing approach may be stated as follows: (1) the control of the grant program rests essentially with the grantee, and the work product of that grant program is the property of the grantee; (2) the government has funded the grant program, which probably would not have been conducted without federal monies, has the right of access to the records for purposes of monitoring and evaluation of the grant project, and the government has the right to use results of the grant project based implicitly on the nature of grant-in-aid assistance; and (3) the public has the interest of evaluating the rationale and methodology which form the basis of an agency's policy decisions which affects the public.

As with any balancing approach, the circumstances determine the dominant interests, but where the government has substantially relied upon a grantee's findings, it has essentially relied upon the underlying documentation. This, in conjunction with the public's interest, triggered by the government's choice to rely on the findings, should take precedence over the grantee's ownership rights as to the raw data.<sup>111</sup> The grantee cannot be said to have pure ownership rights in its work product, having accepted federal funding which brings with it an implied right of the government to rely on the results, and other governmental rights.<sup>112</sup> Once the government exercises its implicit right to rely upon the grantee's findings, the public's vital interest in evaluating the government's decision is invoked, and when the only practicable way to provide meaningful evaluation is through examination of the grantee's underlying documentation, the balance should be struck in favor of the public's interests in disclosure.<sup>113</sup> The grantee presumably would not be wholly adverse to such disclosure, as it is consistent with the commitment of the scientific community to advance "scientific truth by subjecting findings and conclusions to the 'exacting scrutiny of fellow experts.'"<sup>114</sup> Of course, absent government reliance, or where there exist other practicable and meaningful ways to thoroughly evaluate government policy decisions, the grantee's property rights would outweigh the public's need to obtain disclosure of the grantee's records.

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<sup>111</sup> See notes 95-103 *supra* and accompanying text.

<sup>112</sup> See notes 97-100 *supra* and accompanying text.

<sup>113</sup> There are, of course, specific categories of records which are exempt from disclosure. Freedom of Information Act, 5 U.S.C. § 552(b) (1976). These exemptions and their applicability are beyond the scope of this comment.

<sup>114</sup> *Forsham v. Califano*, No. 76-1308 at 18 (D.C. Cir. July 11, 1978) (Bazelon, J. dissenting) (quoting R. MERTON, *THE SOCIOLOGY OF SCIENCE* 275 (1973)).

