St. John's Law Review

Volume 49
Number 2 *Volume 49, Winter 1975, Number 2*

Article 3

August 2012

Disclosure Under the Freedom of Information Act (Rose v. Department of the Air Force)

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ADMINISTRATIVE LAW

DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT

Rose v. Department of the Air Force

The Freedom of Information Act[1] (FOIA) represents the culmination of extensive congressional efforts[2] to foster meaningful public scrutiny of federal agency action.[3] Founded upon the premise that an informed electorate is essential to democratic self-government,[4] the Act seeks to provide meaningful access to Government documents and materials.[5] Accordingly, the FOIA creates a right in the general public

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1 5 U.S.C. § 552 *et seq.* (1970) [hereinafter cited as FOIA]. *See generally* Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967) [hereinafter cited as Davis]; Note, *The Freedom of Information Act: Shredding the Paper Curtain*, 47 ST. JOHN'S L. REV. 694 (1973) [hereinafter cited as *Shredding the Paper Curtain*].

2 According to then Congressman Donald Rumsfeld, the FOIA "was the result of a 12-year effort on the part of press, the Bar and the Congress to begin to deal with decades of unwarranted secrecy in the Executive Branch of the Federal government." Rumsfeld, *FOI Cleanup Hitters with Good Followthrough*, AM. SOC'Y OF NEWSPAPER EDITORS BULL., *reprinted in* 114 CONG. REC. 3774, 3775 (1968). *See also* Frankel v. SEC, 460 F.2d 813, 815-17 (2d Cir. 1972).

See Hearings on the Administration and Operation of the Freedom of Information Act Before the Subcomm. on Foreign Operations and Government Information of the House Comm. on Government Operations, 92d Cong., 2d Sess., pt. 4, 1367-73 (1972). The legislative deliberations prior to enactment are discussed in detail in Note, *Comments on Proposed Amendments to Section 3 of the Administrative Procedure Act: The Freedom of Information Bill*, 40 NOTRE DAME LAW. 417 (1965).

3 H.R. REP. No. 1497, 89th Cong., 2d Sess. 1 (1966) [hereinafter cited as H.R. REP.], *quoted in* Tennessean Newspapers, Inc. v. FHA, 464 F.2d 657, 658 (6th Cir. 1972). The court in *Tennessean* noted:

> One of the reasons for the First Amendment as well as the Freedom of Information Act, is to promote honesty of government by seeing to it that public business functions under the hard light of full public scrutiny.

Id. at 660.

4 In Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971), the court indicated that the FOIA was enacted to provide citizens with access to governmental papers, since

> Congress recognized that the public cannot make intelligent decisions without such information, and that governmental institutions become unresponsive to public needs if knowledge of their activities is denied to the people and their representatives.

Id. at 1080. *See* Bristol-Myers Co. v. FTC, 424 F.2d 935, 936 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

James Madison once noted that "[k]nowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives." Letter from James Madison to W.T. Barry, *reprinted in* 9 THE WRITINGS OF JAMES MADISON 103 (Hunt ed. 1910). This language was adopted by the Senate in its report of the FOIA. S. REP. No. 813, 89th Cong., 1st Sess. 2-3 (1965) [hereinafter cited as S. REP.].

5 The Second Circuit has stated:

> The ultimate purpose [of the FOIA] was to enable the public to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope, and procedure of federal government activities.

Frankel v. SEC, 460 F.2d 813 (2d Cir. 1972) (Hays, J.).

to obtain agency information and requires that identifiable agency records be promptly made available to any person upon request.[6]

This newly created public right is not, however, without limitation. Although the basic purpose of the FOIA is to increase the quantity and liberalize the scope of disclosure,[7] Congress has refused to extend the applicability of the Act to nine separate categories of information.[8] Among the matters specifically excluded from FOIA coverage are personnel or medical files, whose release would result in a "clearly unwarranted invasion of personal privacy,"[9] and documents pertaining only to the agency's personnel rules and practices.[10]

In *Rose v. Department of the Air Force*,[11] the Second Circuit was presented with an opportunity to interpret the mandates of the FOIA. Michael T. Rose, a member of the New York University Law Review and an Air Force Academy graduate, sought access to the case summaries of the Academy's honor and ethics code disciplinary proceedings.[12] He intended to utilize these summaries in connection with a

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[6] 5 U.S.C. § 552(a)(3) (1970); *see* EPA v. Mink, 410 U.S. 73, 80 (1973) (White, J.) (the Act "attempts to create a judicially enforceable public right to secure . . . information from possibly unwilling official hands"); Williams v. IRS, 345 F. Supp. 591, 594 (D. Del. 1972).

[7] *See, e.g.*, Stokes v. Brennan, 476 F.2d 699, 700-01 (5th Cir. 1973); Bristol-Myers Co. v. FTC, 424 F.2d 935, 936 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970); UNITED STATES DEP'T OF JUSTICE, ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT, at III-IV (1967). *See also* S. REP., *supra* note 4, at 3; H.R. REP., *supra* note 3, at 1.

[8] 5 U.S.C. § 552(b) (1970) provides:

This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;
(2) related solely to the internal personnel rules and practices of an agency;
(3) specifically exempted from disclosure by statute;
(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency;
(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;
(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
(9) geological and geophysical information and data, including maps, concerning wells.

[9] *Id.* § 552(b)(6).

[10] *Id.* § 552(b)(2).

[11] 495 F.2d 261 (2d Cir. 1974), *cert. granted*, 43 U.S.L.W. 3445 (U.S. Feb. 14, 1975) (No. 74-489).

[12] *Id.* at 262. The sought-after documents were to be utilized as reference material. The summaries are excerpts of the significant facts in each honor committee case and some of the important cases decided by the more informal ethics committee. *Id.* at 266. Approximately 100 to 200 summaries were involved. *Id.* at 268 n.19.

Law Review article dealing with disciplinary systems at the service academies. Upon the refusal of the Air Force to order their release,[13] Rose brought an action in the federal district court to compel disclosure of the documents with personal references and identifying information excised.[14] The district court refused Rose's requests, finding the summaries to pertain exclusively to internal personnel rules of the agency.[15] On appeal, the Second Circuit, over a vigorous dissent by Judge Moore, reversed, holding that the summaries, if properly redacted to meet the demands of the privacy exemption,[16] could be disclosed pursuant to the FOIA.[17] The court further ruled that the summaries were not within the internal personnel rules exemption[18] and that the judiciary had no general equitable power to preclude release of documents whose disclosure was mandated by the FOIA.[19]

The *Rose* court was initially confronted with the always difficult problem of evaluating conflicting substantial rights, a difficulty com-

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13 Rose's request was formally denied three times, the final denial coming from the Office of the Secretary of the Air Force. Brief for Appellants at 5-6. The case is illustrative of the difficulty and expense involved, despite the FOIA, in securing information from a reluctant Government agency. *See generally* Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEXAS L. REV. 1261 (1970); Note, *Freedom of Information: The Statute and the Regulations*, 56 GEO. L.J. 18 (1967).

For a discussion of the administrative steps a plaintiff might be required to take prior to bringing an action under the FOIA in order to avoid being defeated by the doctrine of exhaustion of remedies, see *Shredding the Paper Curtain*, *supra* note 1, at 703-06. *Accord*, Nader, *Freedom From Information: The Act and the Agencies*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1, 5 (1970). *But see* Note, *The Information Act: Judicial Enforcement of the Records Provision*, 54 VA. L. REV. 466, 468-71 (1968) (generally supporting the proposition that merely a reasonable effort is required to support an FOIA action).

14 The FOIA provides that if an improper withholding of documents occurs, a federal district court may, upon complaint, enjoin the further withholding of the papers and order the Government to produce the documents in court. The district court is to try the case de novo and the burden is on the agency to sustain its position. 5 U.S.C. § 552(a)(3) (1970).

In his FOIA action, Rose was joined by the present and former editors-in-chief of the New York University Law Review. Throughout the proceedings, the Review emphasized that it was willing to accept the case summaries with the names of the accused cadets and other identifying information deleted. By doing so, the Review relied heavily upon the principle established in Grumman Aircraft Eng'g Corp. v. Renegotiation Board, 425 F.2d 578 (D.C. Cir. 1970), wherein the court held:

> The statutory history does not indicate, however, that Congress intended to exempt an entire document merely because it contained some [exempt] . . . information. . . . [T]he interests of confidentiality can be protected by striking identifying details prior to releasing the document.

Id. at 580-81 (footnotes omitted). *See* Brief for the Appellants at 26.

15 495 F.2d at 263. This ground was raised by the trial court sua sponte.

16 *See* text accompanying note 9 *supra*.

17 495 F.2d at 268-69. Circuit Judges Feinberg and Hays constituted the majority, with Judge Feinberg authoring the court's opinion.

18 *Id.* at 266.

19 *Id.* at 269-70.

pounded in this instance by lack of adequate congressional guidance.[20] Through enactment of the FOIA, Congress attempted to strike a balance between the general public's right of access to government documents and the individual's right to privacy.[21] Since the FOIA places the burden of proof on the agency to justify nondisclosure,[22] the release of information to the public appears favored. Furthermore, courts have encouraged disclosure by repeatedly holding that the FOIA's exemptions are to be narrowly construed.[23] Additionally, in this particular instance, the Air Force allowed access to the summaries to Academy cadets and others with a "need to know."[24] The court stated that "the curtain of confidentiality appears to shield these records from the glare of external publicity but not from the eyes of present [and future] cadets."[25]

Among the considerations militating against disclosure, both the House of Representatives and the Senate recognized that many federal agencies maintained massive files containing detailed, intimate personal information.[26] Revelation of such materials could result in harm and embarrassment to individuals which could not be justified by a legitimate public interest. Accordingly, the Second Circuit realized that disclosure of a disciplined cadet's identity could result in serious damage to his livelihood and reputation.[27] The majority was particularly concerned that the rights of the affected cadets be adequately protected since neither party to the action had the interest of the cadets directly at heart.[28] In light of the internal dissemination of the

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20 A major flaw of the FOIA is the equivocal nature of its draftsmanship. *See* Davis, *supra* note 1, at 807-09; *Shredding the Paper Curtain*, *supra* note 1, at 697. *See also* Comment, *Developments Under the Freedom of Information Act—1973*, 1974 DUKE L.J. 251, 252, 275-77 nn.140-46, 281 & n.167, 283 & nn.176-80. As the *Rose* court itself noted: "As is frequently the case with such legislation, we have little to guide us in the way of precedent, and the brevity and generality of the statutory formulations leave much to be decided by the courts." 495 F.2d at 262.

21 S. REP., *supra* note 4, at 9; H.R. REP., *supra* note 3, at 11. *See* Soucie v. David, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

22 5 U.S.C. § 552(a)(3) (1970).

23 *See* Stokes v. Brennan, 476 F.2d 699, 700-01 (5th Cir. 1973); Bannercraft Clothing Co. v. Renegotiation Board, 466 F.2d 345 (D.C. Cir. 1972); Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971); Bristol-Myers Co. v. FTC, 424 F.2d 935, 936 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

24 495 F.2d at 266. Although information about disciplinary cases is to be kept strictly confidential, the case summaries are posted in the Academy's squadrons and Honor Representatives are permitted to discuss the cases with the cadets. In fact, the names of dismissed cadets are not deleted from the summaries. However, the name of a guilty cadet who is allowed to remain at the Academy will not be released. *Id.*

25 *Id.*

26 S. REP., *supra* note 4, at 9; H.R. REP., *supra* note 3, at 11.

27 495 F.2d at 267. Among the possible consequences considered by the court were loss of employment and friends. *Id.*

28 *Id.* Although the Air Force was seeking to prevent disclosure, it was acting primarily to defend its own procedures rather than to protect the interests of the cadets.

summaries by the Air Force, mere deletion of names would not preserve the privacy interests of the disciplined cadets. Since old recollections could be refreshed by reading the fact patterns,[29] such a procedure could pose a "great risk" to the cadets and effectuate an unwarranted interference with their right to privacy.[30]

Having considered the arguments for disclosure and the risks inherent therein, the majority of the Second Circuit panel resolved the conflict by remanding the case for an in camera examination of the documents by the district court.[31] In so doing, the procedures to be utilized in the lower court's review were set forth. Judge Feinberg, writing for the majority, ordered the Air Force to produce the documents and to work with the trial court in their redaction. The judge felt that a "workable compromise" could be reached and useful, albeit edited, documents handed over to the Law Review.[32] The court indicated, however, that should the removal of all personal references and identifying information prove insufficient to safeguard the privacy of the cadets, the documents should not be released.[33]

In reaching its decision, the *Rose* majority properly declined to consider the status and needs of those demanding access to the documents. The court focused instead on achieving a proper balance between the privacy rights of the disciplined cadets and the rights of the *general public* to information as guaranteed by the FOIA.[34] This approach appears consonant with the Act's language and legislative history. The Act authorizes "any person" to request documents and, upon agency failure to produce the materials, to institute suit.[35] In-

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29 By having his memory prompted through the reading of a summary or a reference thereto, an Air Force officer, graduated from the Academy, might come to realize that a man under his command had been subjected to Academy discipline. *Id.*

30 *Id.* at 268. The court pointed out that there is no guarantee that officers who have had access to the documents will maintain the secrecy of the material's contents, especially "when time may have eroded the fabric of cadet loyalty." *Id.* at 267.

There is a more compelling reason, however, why the interests of the disciplined cadets must be adequately protected. Neither the statute nor the legislative history places any limits on the possible uses of information obtained through the FOIA. Similarly, there is no prohibition against, or limitation on, the further dissemination of the documents. City of Concord v. Ambrose, 333 F. Supp. 958, 959 (N.D. Cal. 1971). Thus, once the Review had obtained the case summaries, it could treat them as the editors pleased, including publishing the summaries in whole or in part.

31 495 F.2d at 268. The court noted that since the agency had failed to meet its burden under the FOIA, *see* note 14 *supra*, the Air Force must now produce the documents in court.

32 495 F.2d at 268.

33 *Id.* In light of the court's stress on the production of "documents sufficient for the purpose sought," *id.*, and of the concern expressed for the privacy of the disciplined cadets, it may be hypothesized that should the documents require such heavy editing as to render them valueless, these papers likewise should not be released.

34 *Id.* at 268-69.

35 5 U.S.C. § 552(a)(3) (1970).

deed, one of the principal reforms effected by the FOIA was elimination of the "properly and directly concerned" test of the former statute.[36] The new Act does not create rights running to particular individuals or groups but rather, entitles the general public to obtain more information about its Government.[37] In the words of Justice White:

> [The Act] seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.[38]

Consequently, disclosure is to be promoted, in part, by discouraging agencies from resisting requests based upon the demandant's purported lack of status or absence of need to know.[39]

In his dissent, Judge Moore took issue with the majority's resolution of the privacy issue as well as their failure to consider the status of the demandant. He contended that even the disclosure of redacted summaries would result in an "egregious" intrusion into the cadets' privacy rights.[40] Furthermore, a breach of secrecy enveloping cadet disciplinary hearings could not be justified by "the curiosity satisfying efforts of three law school students, who merely to write a Law Review Note would pry into and seek to disclose the former transgressions of Air Force cadets."[41] Additionally, Judge Moore stated that elimination of the identifiable factual elements would only create hypotheticals, thus failing to provide the raw factual data sought by the Review.[42] In any event, the dissent argued, the entire in camera process would constitute an extreme and unjustifiable misuse of judicial time and expense.[43] Notwithstanding the arguments of Judge Moore, the *Rose*

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36 *See* EPA v. Mink, 410 U.S. 73, 79 (1973), *quoting* 5 U.S.C. § 1002 (1964); Robles v. EPA, 484 F.2d 843, 846-47 (4th Cir. 1973).

37 *See* S. REP., *supra* note 4, at 3; H.R. REP., *supra* note 3, at 1.

38 EPA v. Mink, 410 U.S. 73, 80 (1973).

39 Despite the intent to promote disclosure, litigants seeking such relief may be discouraged by the lengthy delays in the adjudication of FOIA claims. In spite of the fact that the FOIA specifically provides that actions under the Act are to take precedence over other actions and are to be expedited, 5 U.S.C. § 552(a)(3) (1970), extensive delays between the demandant's original request and final adjudication are common. In Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971), for example, almost two years elapsed between the original request and the ultimate decision. *Rose*, without considering the time that will be required in the editing and in camera review process, has involved a time span of almost three years.

40 495 F.2d at 265.

41 *Id.*

42 *Id.* at 272.

43 *Id.* In expressing his view, Judge Moore stated:

> In these days when there is so much clamor about the desirability of speedy trials, I am unwilling to subscribe to, or acquiesce in, any opinion which saddles

majority, in requiring the in camera examination, has remained faithful to the congressional goal of achieving the maximum degree of disclosure possible without doing violence to other important societal values. The examination and redaction would adequately protect the rights of disciplined cadets to have their privacy respected.[44] Moreover, the Air Force would not be permitted to cast an opaque cloak of secrecy over its honor code proceedings. Although the use of an in camera examination would not be appropriate in all FOIA cases, the propriety of its use in a *Rose* situation appears clear.[45] Use of such

> such a needless burden upon an important branch of our military forces and, in my opinion, an equally important judicial branch.

Id. Judge Moore estimated that it would take about 25 hours to delete the names from 150 case summaries and at least 75 hours to do a more careful editing. *Id.*; *see* note 12 *supra*.

[44] The majority did not share the dissenter's prediction that the editing process would involve a substantial amount of judicial time. *See* note 43 and accompanying text *supra*. The court indicated that once agreement was reached on the basic principles to be applied, the actual editing would not take an "undue amount of time." 495 F.2d at 269 n.21.

Assuming that a large amount of judicial time is involved, the problem can be alleviated by permitting the district court to appoint a special master. This approach has been adopted by the District of Columbia Circuit. Cuneo v. Schlesinger, 484 F.2d 1086, 1092 (D.C. Cir. 1973) (wherein the court noted that appointing a master may "relieve much of the burden of evaluating documents that currently falls on the trial judge"); *accord*, Tax Analysts & Advocates v. IRS, 362 F. Supp. 1298, 1309 (D.D.C. 1973).

The District of Columbia has been the forum for many FOIA cases since the statute grants jurisdiction to the court in the district wherein the plaintiff resides or has his principal place of business or where the agency records are situated. 5 U.S.C. § 552(a)(3) (1970).

[45] Whether the use of an in camera examination is proper may depend upon which statutory exemption is at issue in a given case. In EPA v. Mink, 410 U.S. 73 (1973), the Supreme Court ruled that an in camera examination is not permitted pursuant to exemption one (military or diplomatic secrets), but may be appropriate in an exemption five case (interagency memoranda not available to nonagency parties in litigation with the agency). *Id.* at 84, 93. *But see* note 80 *infra*. Where exemption five is at issue, the Court ruled that the agency should be given an opportunity to establish, by detailed affidavits or oral testimony, that the exemption clearly applies. Alternatively, the agency may produce a representative document for the court's consideration in camera. *Id.* at 93.

Both exemptions one and five encompass material that may be covered by executive privilege. Thus, the limitation on in camera examination of documents within the scope of the coverage of these two exemptions may be justified by considerations which would be inapplicable to other exemptions. For example, the Court in *Mink* stated:

> [T]he very purpose of the privilege, the encouragement of open expression of opinion as to governmental policy is somewhat impaired by a requirement to submit the evidence even [in camera].

Id. at 92-93, *quoting* Kaiser Aluminum & Chemical Corp. v. United States, 157 F. Supp. 939, 947 (Ct. Cl. 1958) (opinion of retired Supreme Court Justice Reed). *Cf.* Epstein v. Resor, 421 F.2d 930, 933 (9th Cir. 1970). *See also* Nixon v. Sirica, 487 F.2d 700, 712-17 (D.C. Cir. 1973).

Since an in camera examination can violate the right to privacy, it may be argued that some of the same principles which limit the use of in camera examinations under exemptions one and five may extend to exemption six (personnel and medical files). However, it has been held that exemption six imposes upon the courts a duty to balance the right of privacy against the right of public access in specific cases. *See* text accompanying note 71 *infra*. The act of balancing requires an examination of the object to be

an inspection is the sole means of achieving compliance with the statutory mandate that disclosure of files should be denied where it "would constitute a clearly unwarranted invasion of personal privacy."[46] Furthermore, the majority's position regarding the status of a plaintiff is consistent with substantial precedent. Although Judge Moore's opinion is supported by a District of Columbia Circuit case,[47] inquiry into a plaintiff's status has been precluded by the Fourth[48] and Sixth[49] Cir-

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studied. Thus, in Boeing Airplane Co. v. Coggeshell, 280 F.2d 654, 662 (D.C. Cir. 1960), a pre-FOIA subpoena case, the court stated that

> where no military or state secrets are involved, and where the generally meritorious basis of the subpoena — including necessity — has been established, we think it proper for the District Judge to examine *in camera* the individual papers which are alleged to be privileged and direct exclusions or excisions in a manner deemed lawful and appropriate . . . .

In any event, *Rose* satisfies the *Mink* requirement in that the Air Force had been given an opportunity to prove the applicability of exemptions without being immediately compelled to produce the documents. *See* note 31 *supra*.

[46] 5 U.S.C. § 522(b)(6) (1970). In order to balance the conflicting rights of the parties to the litigation to determine the applicability of exemption six, the district court should be permitted to examine the documents privately. The court cannot in the majority of cases rule on the exempt nature of unseen documents. Furthermore, it would defeat the purpose of the exemption to permit the court to examine the papers publicly. *See* Tax Analysts & Advocates v. IRS, 362 F. Supp. 1298, 1309 (D.D.C. 1973).

[47] Getman v. NLRB, 450 F.2d 670, 674-77 (D.C. Cir. 1971) (Wright, J.). In balancing the interests protected by exemption six, the *Getman* court examined into the nature and extent of the invasion, the "public interest purpose" of the demandants, the quality of any study to be performed, and the possibility that the study could be made without use of the sought-after documents. *Id.*

In *Getman*, the demandants, labor law professors, requested the NLRB to provide them with the names and addresses of employees eligible to vote in approximately 35 union representation elections. *Id.* at 671. The plaintiffs were conducting a study into the NLRB's conduct of such elections and sought to interview consenting employees about their attitudes toward the election. *Id.* at 671-72. The court noted that the intrusion involved was minor, that the employees had a right to refuse to participate, and that there was a definite need for the study. *Id.* at 675-76. In reaching its conclusion, the court stated:

> [T]he invasion of employee privacy strikes us as very minimal, and the possible detrimental effects of the study in terms of delaying the election process as highly speculative. On the other hand, the study holds out an unusual promise.

Id. at 677. *See also* Wu v. National Endowment for the Humanities, 460 F.2d 1030 (5th Cir. 1972), *cert. denied*, 410 U.S. 926 (1973). In addition to finding out that the documents at issue were covered by exemption five, the court in *Wu* stated that "the services of these [the Endowment's] outside experts clearly outweighs the public's interest in whatever factual excerpts there may be in the memoranda appellant seeks." *Id.* at 1034.

On the issue of consideration of a demandant's status, *Getman* does not represent the unquestioned authority within its own circuit. In dicta, Chief Judge Bazelon in Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971), said that "by directing disclosure to any person, the Act precludes consideration of the interest of the party seeking relief." *Id.* at 1077.

[48] Robles v. EPA, 484 F.2d 843, 846-47 (4th Cir. 1973). The *Robles* court emphasized that disclosure was never to "depend upon the interest or lack of interest of the party seeking disclosure." *Id.* at 847, *quoting* F. DAVIS, ADMINISTRATIVE LAW TREATISE, § 3A.4, at 120 (Supp. 1970).

[49] Hawkes v. IRS, 467 F.2d 787 (6th Cir. 1972). *Hawkes* involved a defendant who

cuits, and three federal district court decisions.[50]

The *Rose* court also reversed the district court's determination that the case summaries were covered by the exemption for documents "solely related to the internal personnel rules and practices of the agency."[51] In reaching its determination, the court was confronted with a conflict in the legislative history as to the scope of the statutory exemption. The Senate report of the Act construed the exemption narrowly to exclude only routine ministerial rules from FOIA coverage.[52] The House report, however, adopted a more expansive approach to the exemption, believing that it encompassed documents of a more substantive nature.[53] The House construction would exempt operating rules and guidelines but would allow disclosure of routine administrative matters.[54] In *Rose*, the Second Circuit failed, for the third

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pleaded nolo contendere to criminal tax fraud and sought IRS documents relevant to his case. The court therein stated:

> Access to material under the Freedom of Information Act is not limited to those with a particular reason seeking disclosure. Instead the material is available "to any person."

Id. at 790 n.3 (citation omitted). The court further noted that "[s]uch exemptions as are allowed in the Act are based on the nature of the material sought—not the identity of the seeker." *Id.* at 792 n.6.

[50] Wine Hobby USA, Inc. v. United States Bureau of Alcohol, Tobacco & Firearms, 363 F. Supp. 231, 234, 236 (E.D. Pa. 1973); Williams v. IRS, 345 F. Supp. 591, 594 (D. Del. 1972); City of Concord v. Ambrose, 333 F. Supp. 958, 959 (N.D. Cal. 1971); *cf.* Consumers Union of the United States, Inc. v. Veterans Administration, 301 F. Supp. 796, 806 (S.D.N.Y. 1969), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971).

In *Wine Hobby*, the court, citing Hawkes v. IRS, 467 F.2d 787 (6th Cir. 1972), permitted access to a list of names and addresses of registered private wine producers even though the defendant was going to use the list to solicit business. 363 F. Supp. at 232, 234, 236. The court agreed with Judge MacKinnon's concurring opinion in Getman v. NLRB, 450 F.2d 670, 680-81 (D.C. Cir. 1971), that although Congress did not intend such lists to be so freely available, it would take a congressional amendment to the FOIA to prevent their release. 363 F. Supp. at 236-37.

The district judge in *Williams* stated that the FOIA

> is a public disclosure statute giving "any person" a general right of access to governmental records without references to his particular circumstances, his motive or his need.

345 F. Supp. at 594.

In *City of Concord*, the court indicated that

> [t]he statute is so drafted that no "need to know" test is imposed upon the party seeking information. Instead, information is to be made available to "the public" or to "any person" requesting it. . . . [I]f plaintiffs are entitled to the documents in question, then so is every member of the public.

333 F. Supp. at 959.

[51] 495 F.2d at 266; 5 U.S.C. § 552(b)(2) (1970).

[52] [The exemption] relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like.

S. REP., *supra* note 4, at 8.

[53] The House report states that "[o]perating rules, guidelines, and manuals of procedure for Government investigators or examiners would be exempt from disclosure. . . ." H.R. REP., *supra* note 3, at 10.

[54] *See id.*

time,[55] to select between these conflicting interpretations. Rather, the court ruled that the case summaries were not exempt under either interpretation.[56]

The summaries were clearly nonexempt under the Senate construction since they concerned more than mere ministerial matters. The court noted that the summaries "have a substantial potential for public interest outside the Government."[57] Measuring the applicability of the exemption, as construed by the Senate, by the amount of public interest which the documents engender is a novel approach. Presumably, the public interest would not be aroused by internal housekeeping details, the type of material the Senate meant to exclude from the FOIA.[58] Moreover, the case summaries involved in *Rose* will substan-

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[55] *See* Frankel v. SEC, 460 F.2d 813, 816 & n.5 (2d Cir. 1972) (Hays, J.); Polymers, Inc. v. NLRB, 414 F.2d 999, 1006 (2d Cir. 1969) (Timbers, J.), *cert. denied*, 396 U.S. 1010 (1970). In both of these earlier cases, the court indicated the existence of a conflict but did not attempt to resolve it.

[56] 495 F.2d at 265. The Sixth Circuit has stated that the Senate report is to be preferred because it more clearly follows the "plain import" of the statute and because using the House report could lead to conflicts with other sections of the Act. Hawkes v. IRS, 467 F.2d 787, 796-97 (6th Cir. 1972). An additional reason for this preference is that the Senate's report was available to both houses when they considered the bill, whereas the House report was not issued until after the Senate had voted. *Id.* at 797.

Based on the same line of reasoning as the Sixth Circuit, two district courts have placed their reliance on the Senate rather than the House report. Consumers Union of the United States, Inc. v. Veterans Administration, 301 F. Supp. 796, 801 (S.D.N.Y. 1969), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971); Benson v. General Services Administration, 289 F. Supp. 590, 594-95 (W.D. Wash. 1968). Professor Davis also adopts this rationale. *See* Davis, *supra* note 1, at 762-63. *See also Project, Federal Administrative Law Developments—1969*, 1970 DUKE L.J. 67, 81; *Shredding the Paper Curtain*, *supra* note 1, at 716-17. However, the Second Circuit has refused to fully accept the argument that the Senate report should be preferred merely because it alone was before both houses of Congress. According to the court, this approach may have merit in "isolated instances dealing with specific provisions," but both reports reflect the purpose of the Act. Frankel v. SEC, 460 F.2d 813, 816 n.5 (2d Cir. 1972) (Hays, J.).

[57] 495 F.2d at 265.

While never mentioned in the case, it is interesting to consider whether the widespread and generally adverse public reaction to a related incident had any impact on the court's decision. A West Point cadet had been found guilty of an honor code violation and the Honor Committee asked for his resignation. Rather than resign, the cadet successfully appealed to a Board of Officers on what his peers felt were technical grounds. He spent his next nineteen months at West Point "silenced," *i.e.*, no member of the Corps of Cadets would speak to him except in an official capacity. Since this punishment is an unofficial part of the operation of the honor code disciplinary system, there was strong public reaction in favor of the cadet and against the disciplinary system. *See, e.g.*, N.Y. Times, July 13, 1973, § 1, at 41, col. 1.

[58] The fact that a substantial public interest has been aroused should not, in itself, serve to strip an otherwise exempted document of its protection. *See* Polymers, Inc. v. NLRB, 414 F.2d 999 (2d Cir. 1969), wherein the Second Circuit held that an NLRB document entitled *A Guide to the Conduct of Elections*, while of substantial public interest, was exempt from disclosure under the internal personnel rules exemption of the FOIA. *Accord*, Hicks v. Freeman, 397 F.2d 193 (4th Cir. 1968), *cert. denied*, 393 U.S. 1064 (1969) (Dep't of Agriculture reduction-in-force procedure); City of Concord v. Ambrose, 333 F. Supp. 958 (N.D. Cal. 1971) (Treasury Dep't instructions for proper conduct

tially affect the careers and lives of the disciplined cadets.[59] Such an important impact further serves to distinguish the documents from minor administrative matters.

The court interpreted the House report as requiring disclosure unless the sanctity of the administrative processes would be threatened by release.[60] The Air Force argued that publication of the summaries would weaken the confidentiality of the disciplinary process and thereby shatter the foundation of the honor code. The agency further contended that the editing process could not "totally succeed" and that an inadvertent disclosure might occur.[61] The court rejected these arguments, stating that the editing process would adequately protect the confidentiality of the honor code proceedings.[62] The court also noted that total success was "an impossible standard and surely not one imposed by a statute based upon a general philosophy of full agency disclosure to the public."[63]

The court's ruling on the internal personnel rules exemption is consistent with the remedial intent of the legislation. As previously noted, it is well established that the exemptions from the FOIA are to be narrowly construed and that disclosure is to be favored.[64] It is unfortunate, however, that the panel refused to indicate a preference for either of the contradictory congressional interpretations. Al-

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of a stakeout) (dictum); Pifer v. Laird, 328 F. Supp. 649 (N.D. Cal. 1971) (procedures involving conscientious objector discharges). *See also* H.R. REP., *supra* note 3, at 10; *Hearings on H.R. 5012 et al., before a Subcomm. of the House Comm. on Government Operations*, 89th Cong., 1st Sess. 29 (1969).

Rose involved more than mere public interest; at stake were substantial rights of the disciplined cadets. This additional circumstance removes *Rose* from the *Polymers* line of cases.

59 495 F.2d at 265.

60 *Id.* In reaching this interpretation of the House report, the court cited Tietze v. Richardson, 342 F. Supp. 610 (S.D. Tex. 1972), Cuneo v. Laird, 338 F. Supp. 504 (D.D.C. 1972), *remanded sub nom.* Cuneo v. Schlesinger, 484 F.2d 1086 (D.C. Cir. 1973), and City of Concord v. Ambrose, 333 F. Supp. 958 (N.D. Cal. 1971). 495 F.2d at 265 n.12. Although both *Tietze* and *Cuneo* involved material exempt under the internal personnel rules provision, neither case mentioned or cited the House report. In *City of Concord*, the court stated in dicta that the House report might be viewed as authorizing the withholding of instructions relating to the operation of a stakeout. However, the court declined to base its holding on that ground. 333 F. Supp. 460-61. Thus, the *Rose* interpretation of the House report must be viewed as tenuous at best.

The court's refusal to exempt the case summaries on the basis of the House report can be substantiated on another ground. The report would exempt operating rules and manuals of procedure, but not matters relating to internal management, such as employee relations. H.R. REP., *supra* note 3, at 10, *quoted by the court* at 495 F.2d at 264-65. Summaries of disciplinary cases would fall into the internal management category and thus would not be exempt from FOIA coverage.

61 495 F.2d at 266.

62 *Id.*

63 *Id.*

64 *See* notes 7 & 23 and accompanying text *supra*.

though the court was able to conclude that the materials involved were not covered by either interpretation, *Rose* will offer little guidance to future litigants confronted with a direct conflict in the legislative history.

In resolving the final issue raised, *Rose* held that courts do not have the equitable power to refrain from ordering disclosure of materials where such documents are not covered by one of the statutory exemptions.[65] The court rejected the Air Force's argument that the courts could withhold documents whose release would damage the public interest. In his opinion, Judge Feinberg indicated that exercise of equitable discretion would only be proper in a "truly exceptional case."[66]

This holding finds justification in the Act itself, which provides that the withholding of information is not authorized "except as specifically stated in this section."[67] Furthermore, the Second Circuit's position is supported by persuasive case law. In *Soucie v. David*,[68] the District of Columbia Circuit took cognizance of the legislative balancing of interests inherent in the statutory exemptions and stated in dicta:

> Since judicial use of traditional equitable principles to prevent disclosure would upset this legislative resolution of conflicting interests, we are persuaded that Congress did not intend to confer on district courts a general power to deny relief on equitable grounds apart from the exemptions in the Act itself.[69]

This reasoning was accepted by the same circuit in *Getman v. NLRB*.[70] The *Getman* court ruled that while the personal privacy exemption required the exercise of judicial discretion, "equitable discretion should not be imported into any of the other exemptions."[71] The Second Circuit in *Rose* allied itself with the position established by *Soucie* and *Getman*.[72]

In accord with the Second Circuit's view, both the Fourth[73] and

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65 495 F.2d at 269-70.

66 *Id.* at 269.

67 5 U.S.C. § 552(c) (1970).

68 448 F.2d 1067 (D.C. Cir. 1971) (Bazelon, C.J.).

69 *Id.* at 1077.

70 450 F.2d 670, 678, 680 (D.C. Cir. 1971); *accord*, Bannercraft Clothing Co. v. Renegotiation Board, 466 F.2d 345, 353 (D.C. Cir. 1972).

71 450 F.2d at 674 n.10. This language was quoted by the *Rose* court. 495 F.2d at 269-70.

72 495 F.2d at 269-70.

73 Robles v. EPA, 484 F.2d 843, 847 (4th Cir. 1973), wherein the court rejected an argument that disclosure should be refused because release "would do more harm than good." *Cf.* Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971). In *Wellford*, the court stated:

Sixth[74] Circuits have concluded that the FOIA conveyed no equitable discretion to the courts to refuse disclosure. To the contrary, the Ninth Circuit[75] and two district courts[76] have interpreted the FOIA as permitting the use of judicial discretion.[77] As the Sixth Circuit has pointed out, however, the use of such equitable power would result in a district court being able to rule on disclosure without being bound by the statutory scheme established in the FOIA.[78] Such a result would be clearly contrary to congressional intent.

> After considering voluminous testimony on both sides and balancing the public, private and administrative interests, Congress decided that the best course was open access to the governmental process with a very few exceptions. It is not the province of the courts to restrict that legislative judgment under the guise of judicially balancing the same interests that Congress considered.

Id. at 24-25.

[74] Hawkes v. IRS, 467 F.2d 787, 792 n.6 (6th Cir. 1972); Tennessean Newspapers, Inc. v. FHA, 464 F.2d 657, 661-62 (6th Cir. 1972).

[75] GSA v. Benson, 415 F.2d 878 (9th Cir. 1969). In *Benson*, the court noted that in exercising the equity powers "conferred" by the FOIA, it must weigh the effects of disclosure by use of traditional equitable principles. *Id.* at 880. However, as the District of Columbia Circuit pointed out in Getman v. NLRB, 450 F.2d 670, 678 n.25 (D.C. Cir. 1971), *Benson* can be distinguished since it involved the applicability of exemption five. This exemption covers material which is unavailable to a nonagency party in litigation with an agency. Thus, the issue may permissibly turn on the equitable considerations underlining a potential ruling on discovery. Secondly, in *Benson* the agency had, by regulation, bound itself not to use the exemption unless there was a "compelling need." *Id.* This concept also imports equitable considerations.

Benson is supported by the decision of the Fifth Circuit in Wu v. National Endowment for the Humanities, 460 F.2d 1030 (5th Cir. 1972), *cert. denied*, 410 U.S. 926 (1973). In that case, the court found not only that exemption five applied, but that equities running in favor of the agency would serve to prevent disclosure of the contested documents. *Id.* at 1034; *see* note 47 *supra*.

[76] Cuneo v. Laird, 338 F. Supp. 504 (D.D.C. 1972) (Hart, J.), *remanded sub nom.* Cuneo v. Schlesinger, 484 F.2d 1086 (D.C. Cir. 1973); Consumers Union, Inc. v. Veterans Administration, 301 F. Supp. 796 (S.D.N.Y.), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971).

In *Cuneo*, the district court ruled that requiring the Government to publicly disclose its defense procurement auditing manual would be comparable to forcing a football team to reveal its "playbook." *Cuneo* has little precedential value in view of strong District of Columbia Circuit authority to the contrary. *See* text accompanying note 72 *supra*.

In *Consumers Union*, the court stated that if agency records are not exempted under the statutory formulations, "a court must order their disclosure unless the agency proves that disclosure will result in significantly greater harm than good." 310 F. Supp. at 806. *But see* note 73 *supra*. *Consumers Union* was one of the earlier FOIA cases and, like *Cuneo*, has been vitiated by subsequent judicial interpretations.

[77] The House report provides some support for this proposition. It states:

> The court will have authority *whenever it considers such action equitable and appropriate* to enjoin the agency from withholding its records and to order the production of agency records improperly withheld.

H.R. REP., *supra* note 3, at 9 (emphasis added). Professor Davis also believes that the FOIA conveys discretion to the courts in ruling on disclosure. *See* Davis, *supra* note 1, at 767.

[78] Tennessean Newspapers, Inc. v. Federal Housing Administration, 464 F.2d 657 (6th Cir. 1972). In *Tennessean*, the court rejected the idea that

> the District Court had the right to disregard the purposes and limitations of

In *Rose*, the Second Circuit kept faith with the tenor of the FOIA. By directing the district court to employ an in camera examination, the court was able to authorize the release of the case summaries, while simultaneously guarding against unwarranted invasions of privacy. The panel's rejection of the applicability of the internal personnel rules exemption prevented the use of that exemption to cover the case summaries, which clearly are matters of substantive policy. However, the court's failure to explicitly endorse the Senate report's interpretation of the scope of the exemption over that of the House leaves the door open to future litigation.[79] Finally, by its holding that the FOIA generally does not import any equitable discretion to the courts, the Second Circuit properly refused to judicially engraft another "exemption" onto the framework supplied by Congress.[80]

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> [the FOIA] any more than did the agency. . . . Such a view, [that the courts have such equity power] carried to its logical conclusion, would allow the District Court to review a petition for disclosure totally independent of the Freedom of Information Act and its purposes and standards.

Id. at 661.

[79] Agencies desiring to withhold information either permanently or temporarily may well be encouraged to litigate based upon real or imagined differences in the legislative history of the FOIA. It is submitted, however, that *Rose* serves to provide the Second Circuit's definition of the Act's thrust. Implicit in the court's holding is the notion that it will give little weight to arguments based upon a portion of the legislative history where these arguments fail to conform to the court's definition of the rights and presumptions created by the FOIA.

[80] Subsequent to *Rose*, Congress, over a presidential veto, enacted broad and sweeping amendments to the FOIA. Act of Nov. 21, 1974, Pub. L. No. 93-502. In further emphasizing and strengthening the FOIA's mandate of disclosure, the recent legislation adds credence to the majority opinion in *Rose*. In particular, specific authorization is provided for in camera inspection by the court to determine the applicability of any of the exemptions. *Id.* § 1(b)(2), *codified at* 5 U.S.C. § 552(a)(4)(B). This portion of the amendment, by providing for in camera review under *any* subsection (b) exemption, overrules the Supreme Court's decision in *Mink*. Thus, even where the agency contends that either the military or diplomatic secrets exemption or the interagency memorandum exemption applies, *see* note 8 *supra*, the court may require production of the documents for in camera examination. *See* note 45 *supra*.

The FOIA amendments also attempt to curb the use of unwarranted "stalling" tactics by an agency once an appropriate request has been made. *See* notes 13, 39, 79 and accompanying text *supra*. Towards this end, the new provisions establish specific time limits for agency determinations, Act of Nov. 21, 1974, Pub. L. No. 93-502, § 1(c), *codified as* 5 U.S.C. § 552(a)(6)(A), (B), empower the court to award attorney fees to successful complainants, *id.* § 1(b)(2), *codified at* 5 U.S.C. § 552(a)(4)(E), and create a procedure for disciplining culpable agency personnel, *id.*, *codified at* 5 U.S.C. § 552(a)(4)(F).

As Senator Mondale stated during the Senate debate which resulted in enactment of the amendments: "The Freedom of Information Act amendments of 1974 are an attempt to improve compliance with the act, which is needed to make it a better vehicle for learning the truth." 120 CONG. REC. 19,820 (daily ed. Nov. 21, 1974). Judicial decisions such as the Second Circuit's in *Rose* serve to accomplish this same aim. Hopefully, the Supreme Court, which has recently indicated that it will review *Rose*, will adopt an equally enlightened approach. *See* 43 U.S.L.W. 3445 (U.S. Feb. 14, 1975) (No. 74-489) (writ of certiorari granted).