

St. John's Law Review

Volume 51
Number 4 *Volume 51, Summer 1977, Number 4*

Article 3

July 2012

"Reversing" the Freedom of Information Act: Congressional Intention or Judicial Intervention?

Stephen J. Kaczynski

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

Kaczynski, Stephen J. (1977) ""Reversing" the Freedom of Information Act: Congressional Intention or Judicial Intervention?," *St. John's Law Review*. Vol. 51 : No. 4 , Article 3.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol51/iss4/3>

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

NOTES AND COMMENTS

“REVERSING” THE FREEDOM OF INFORMATION ACT: CONGRESSIONAL INTENTION OR JUDICIAL INVENTION?

INTRODUCTION

A truly democratic government requires as its foundation an informed electorate.¹ The continuous growth and increasing complexity of our government and its myriad agencies, however, have posed many problems for citizens in acquiring information from the governing bodies. In an effort to alleviate these difficulties, Congress enacted the Freedom of Information Act (FOIA)² which grants the public an enforceable right of access to public records.³ Under the

¹ James Madison discussed the need for a knowledgeable people in a true democracy: 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 a people who mean to be their own governors must arm themselves with the power that knowledge gives.

Letter from James Madison to W.T. Barry (Aug. 4, 1822), reprinted in 9 THE WRITINGS OF JAMES MADISON 103 (Hunt ed. 1910). See also Note, *The Freedom of Information Act: Shredding the Paper Curtain*, 47 ST. JOHN'S L. REV. 694, 694-95 (1973).

² 5 U.S.C. § 552 (1970 & Supp. V 1975), as amended by Pub. L. No. 94-409, 90 Stat. 1247 (1976). The House Report accompanying the original act stressed the need for such a law in a representative government:

A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of the information varies.

. . . .

. . . [FOIA] provides the necessary machinery to assure the availability of Government information necessary to an informed electorate.

H.R. REP. NO. 1497, 89th Cong., 2d Sess. 12, reprinted in [1966] U.S. CODE CONG. & AD. NEWS 2429 [hereinafter cited as HOUSE REP., U.S. CODE CONG.]. The Senate Report acknowledged the practical difficulty in obtaining such information due to the “very vastness of our Government and its myriad of agencies.” The FOIA policy of full disclosure was intended to alleviate this problem. S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965) [hereinafter cited as S. REP.].

³ Under the FOIA, the requester who is denied access to public records may bring an action in federal district court to obtain release of the information. This proceeding is to be given precedence by the court over all other docketed cases. The matter will be determined *de novo*, and the withholding agency has the burden of demonstrating the lawfulness of its action. 5 U.S.C. § 552(a)(3) (1970 & Supp. V 1975). See S. REP., *supra* note 2, at 8.

The FOIA supplanted § 3 of the Administrative Procedure Act, ch. 324, § 3, 60 Stat. 238 (1946). Although this prior statute was intended to be disclosure oriented, see S. REP. NO. 752, 79th Cong., 1st Sess. 12 (1945); ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 5-9 (1947), the various exceptions to the rule of disclosure gave the government broad power to withhold information. Any information involving “any function of the

FOIA, the government may refuse to divulge requested information only if the material falls within one of the Act's nine strictly construed exemptions.⁴ The passage of the Act and its subsequent amendments clearly demonstrate congressional aversion to the liberal use of the secrecy stamp in the executive branch of government.⁵

Since the FOIA's original enactment in 1966, several incidents have prompted theretofore overly-secretive governmental agencies to release, rather than withhold, requested information, even when the information arguably fits within an FOIA exemption. The government, through numerous court defeats, has learned that the judiciary does not consider a number of oft-requested documents and reports to be covered by the exemptions.⁶ In addition, the agencies

United States requiring secrecy in the public interest" or "relating solely to the internal management of an agency" was exempt from disclosure. Further, any final opinion or order of an agency could be suppressed if a determination was made that it was "for good cause to be held confidential." Finally, matters of official record were only to be released to "persons properly and directly concerned" and then only if there was no "good cause found" for confidentiality. Requesters wrongfully denied access to such information had no remedy in court to compel its disclosure. Some rather unusual invocations of the APA exceptions were documented in the House Report accompanying the FOIA. In 1961, for example, the Secretary of the Navy used the "internal management" exception to withhold Navy telephone directories. The "good cause for confidentiality" exception was utilized to conceal agency mistakes or maladministration, such as the awarding of a government contract to one other than the lowest bidder. HOUSE REP., *supra* note 2, at 5, reprinted in U.S. CODE CONG. at 2422-23. See also S. REP., *supra* note 2, at 5. See generally Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967).

⁴ The exemptions remove such matters as national security information, personnel records, trade secrets, confidential commercial or financial information, interagency memoranda, and investigative files from the mandatory disclosure rule of the FOIA. See 5 U.S.C. § 552(b)(1)-(9) (1970 & Supp. V 1975), as amended by Pub. L. No. 94-409, 90 Stat. 1247 (1976). The Senate Report announced that information is to be disclosed under the FOIA "unless explicitly allowed to be kept secret by one of the exemptions." S. REP., *supra* note 2, at 10 (emphasis added). The courts have interpreted this as a directive to construe narrowly the exemptions. See, e.g., *Ethyl Corp. v. EPA*, 478 F.2d 47, 49 (4th Cir. 1973); *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971). See also Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 783-84 (1967).

⁵ The House Report noted the existence of 24 security classifications in addition to "Top Secret," "Secret," and "Confidential" which could be used to restrict public access to government files. HOUSE REP., *supra* note 2, at 6, reprinted in U.S. CODE CONG. at 2423. In response to *EPA v. Mink*, 410 U.S. 73 (1973), wherein it was held that the Executive's security classification of information may not be judicially reviewed under the FOIA, Congress amended the Act to provide for *in camera* inspection of the documents in question to determine the applicability of the national security exemption. 5 U.S.C. § 552(a)(4)(B) (Supp. V 1975). See H.R. REP. No. 876, 93d Cong., 2d Sess. 7, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6272-73; 120 CONG. REC. 17,017 (1974) (remarks of Sen. Kennedy).

⁶ The government has encountered particular difficulty in attempting to withhold Affirmative Action Program and Equal Employment Opportunity Reports. The agencies, in attempting to avoid disclosure, had routinely asserted several exemptions, *i.e.*, trade secret,

have proven ill-equipped to handle the complex evidentiary requirements necessary to justify the withholding of information, particularly in connection with the mushrooming number of corporate requests for information supplied by and pertaining to the business of other corporations.⁷ Finally, Congress, in the 1974 FOIA amendments,⁸ added administrative penalties for wrongful withholding of information by agency officials and employees.⁹ The Senate and House Reports accompanying these amendments clarified the original congressional intent behind the exemptions and stressed that they are "permissive, not mandatory,"¹⁰ thereby further encouraging compliance with FOIA requests.

This new-found candor and willingness to produce requested information has, in turn, given rise to a number of "reverse-FOIA" suits¹¹ in which the suppliers of information attempt to prevent its dissemination to the parties seeking its release under the FOIA.¹²

personnel files, other statute, and investigatory files, all to no avail. See *Robertson v. Department of Defense*, 402 F. Supp. 1342 (D.D.C. 1975); *Legal Aid Soc'y of Alameda County v. Shultz*, 349 F. Supp. 771 (N.D. Cal. 1972). In addition, it is now clear that the government's promise of confidentiality to the supplier of the information would not, *per se*, defeat disclosure under the FOIA. See, e.g., *Robles v. EPA*, 484 F.2d 843 (4th Cir. 1973); *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971); *Save the Dolphins v. Department of Commerce*, 404 F. Supp. 407 (N.D. Cal. 1975).

⁷ In 1975, for example, the Food and Drug Administration had received 12,300 FOIA requests. Only eight percent came from public interest groups, while 86 percent originated from industry. Arnold, *Who's Going Fishing in Government Files?*, 6 JURIS DOCTOR, April 1976, at 17, 22. To establish the applicability of an exemption, an agency must furnish the court with the material requested under the FOIA, together with a detailed index correlating the claim exemption to the specific items sought. Note, *Would Macy's Tell Gimbel's: Government-Controlled Business Information and the Freedom of Information Act, Forwards & Backwards*, 6 LOY. CHI. L.J. 594, 606 (1975). At the hearing, the agency also must illustrate, often by means of expert testimony, the damage likely to be suffered by the supplier in the event that the requested data is released. Thus, the inquiry is a highly specialized one. See P. AREEDA, *ANTITRUST ANALYSIS* ¶ 170 (2d ed. 1974).

* 5 U.S.C. § 552 (Supp. V 1975).

⁹ If a court determines that records were improperly withheld, awards attorney's fees to the requester, and issues a written finding that agency personnel might have acted arbitrarily in withholding requested information, the Civil Service Commission is required to conduct an inquiry into the matter and may, in its discretion, direct appropriate disciplinary action. 5 U.S.C. § 552 (a)(4)(F) (Supp. V 1975). In addition, the names and titles of persons responsible for the withholding of information, wrongful or otherwise, must be supplied to Congress. *Id.* at (d)(3).

¹⁰ S. REP. NO. 93-854, 93d Cong., 2d Sess. 6 (1974); H.R. REP. NO. 876, 93d Cong., 2d Sess. 3 (1973), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6269. See also H.R. REP. NO. 1419, 92d Cong., 2d Sess. 3 (1972).

¹¹ See *Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769, 775 (D.D.C. 1974).

¹² Only three appellate courts have considered the reverse-FOIA suit: the District of Columbia, the Fourth, and the Fifth Circuits. See *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), cert. denied, 97 S. Ct. 2199 (1977); *Pennzoil Co. v. FPC*, 534 F.2d 627 (5th Cir. 1976); *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935 (D.C. Cir. 1975).

Although these actions may be brought under the Administrative Procedure Act (APA),¹³ this route is disfavored by information suppliers since the court may grant relief only when the agency's decision to release the information was "clearly arbitrary" or an "abuse of discretion."¹⁴ Seeking alternative avenues affording broader bases of relief, reverse-FOIA plaintiffs have alleged the existence of an implied right of action under either the FOIA exemptions¹⁵ or a federal penal statute which outlaws the disclosure of confidential information.¹⁶ Under either implied cause of action, the court is empowered to exercise *de novo* review of the matter;¹⁷ the very existence of the implied causes of action, however, is still subject to controversy. The purpose of this Note is to analyze the various bases asserted for relief in reverse-FOIA suits and the attendant standards of review. After a discussion of the availability and limitations of the APA as the basis of a reverse-FOIA action, the theories underlying implied causes of action will be examined. Some suggestions will then be offered concerning the future of reverse-FOIA suits.

THE ADMINISTRATIVE PROCEDURE ACT

Reviewability of Agency Decisions

Section 702 of the Administrative Procedure Act provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."¹⁸ The federal circuit courts of appeal had long been divided on the issue of whether this statute is an independent grant of subject matter jurisdiction to review agency action¹⁹ and this confusion was re-

¹³ See 5 U.S.C. §§ 702, 703, 706(2)(A) (1970).

¹⁴ *Id.* at § 706(2)(A).

¹⁵ The implied causes of action are based upon two different theories. One theory holds that the FOIA exemptions *bar* disclosure. See, e.g., *Pennzoil Co. v. FPC*, 534 F.2d 627 (5th Cir. 1976); *United States Steel Corp. v. Schlesinger*, 8 F.E.P. Cas. 923 (E.D. Va. 1974). The other theory rejects this view, but grants the supplier a cause of action to enjoin disclosure based upon judicial interpretation of the congressional intent underlying the FOIA. See *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 97 S. Ct. 2199 (1977).

¹⁶ 18 U.S.C. § 1905 (1970), *discussed in notes 112-147 infra*.

¹⁷ For a discussion of *de novo* review, see text accompanying notes 53 & 54 *infra*.

¹⁸ 5 U.S.C. § 702 (1970).

¹⁹ A majority of the circuits had held that § 10 of the APA, 5 U.S.C. §§ 701-04 (1970), conferred subject matter jurisdiction upon the federal courts to review agency action. See, e.g., *Sanders v. Weinberger*, 522 F.2d 1167 (7th Cir. 1975), *rev'd sub. nom. Califano v. Sanders*, 430 U.S. 99 (1977); *Ortego v. Weinberger*, 516 F.2d 1005 (5th Cir. 1975); *Pickus v.*

flected in reverse-FOIA actions as well. Those circuits which had recognized the APA as a grant of jurisdiction utilized it as such in reverse-FOIA actions.²⁰ This position appeared consistent with a series of Supreme Court decisions.²¹

In 1976, however, Congress amended the federal question jurisdiction statute to eliminate the amount-in-controversy requirement in actions against the United States or any agency or officer thereof.²² Recognizing that this action largely undercut the rationale for maintaining APA jurisdiction, the Supreme Court, in *Califano v. Sanders*,²³ held that the APA should not "be interpreted as an implied grant of subject matter jurisdiction to review agency actions."²⁴ Despite this judicial action, there will be no difficulty in finding a jurisdictional predicate for future reverse-FOIA cases. Justice Brennan, writing for the majority in *Sanders*, observed that "[t]he obvious effect of [the amendment of the federal question statute] . . . is to confer jurisdiction on federal courts to review agency action"²⁵ As there are no restrictions on judicial review in the FOIA itself, federal question jurisdiction appears to be broadly available to the reverse-FOIA plaintiff.²⁶ Although no longer serving as the jurisdictional predicate in these suits, the APA none-

United States Bd. of Parole, 507 F.2d 1107 (D.C. Cir. 1974); *Bradley v. Weinberger*, 483 F.2d 410 (1st Cir. 1973); *Brandt v. Hickel*, 427 F.2d 53 (9th Cir. 1970); *Brennan v. Udall*, 379 F.2d 803 (10th Cir. 1967); *Deering-Milliken, Inc. v. Johnston*, 295 F.2d 856 (4th Cir. 1961). The remaining circuits adopted a contrary position. See, e.g., *Bramblett v. Desobry*, 490 F.2d 405 (6th Cir.) (per curiam), cert. denied, 419 U.S. 872 (1974); *Zimmerman v. United States*, 422 F.2d 326 (3d Cir.), cert. denied, 399 U.S. 911 (1970); *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529 (8th Cir. 1967).

²⁰ APA jurisdiction was found by the District of Columbia Circuit in *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935 (D.C. Cir. 1975), was acknowledged as permissible in *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1208-09 (4th Cir. 1976), cert. denied, 97 S. Ct. 2199 (1977), and was assumed by the Fifth Circuit in *Pennzoil Co. v. FPC*, 534 F.2d 627 (5th Cir. 1976).

²¹ In three major decisions, *Rusk v. Cort*, 369 U.S. 367 (1962), *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), and *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), the Supreme Court seemed to accept the view that the APA confers subject matter jurisdiction, permitting the courts to review a wide range of agency action. In *Rusk*, the Court stated that it would "not hold that the broadly remedial provisions of the Administrative Procedure Act are unavailable to review administrative decisions . . . in the absence of clear and convincing evidence that Congress so intended." 369 U.S. at 379-80.

²² Pub. L. No. 94-574, 90 Stat. 2721 (1976) (amending 28 U.S.C. § 1331(a) (1970)).

²³ 430 U.S. 99 (1977).

²⁴ *Id.* at 105.

²⁵ *Id.* The Court rejected the contention that the amendment to the jurisdictional statute was intended merely to supplement the APA, and, instead, found that Congress sought to "restructure afresh" the jurisdictional predicates. *Id.* at 107 & n.7 (quoting S. REP. No. 996, 94th Cong., 2d Sess. 12 (1976)).

²⁶ See *Planning Research Corp. v. FPC*, 555 F.2d 970, 977-78 & n.15 (D.C. Cir. 1977).

theless continues to provide the procedures and standards of review of agency decisions.

Standard of Review

The reviewability of administrative decisions under the APA is broad; the standard of review, however, is particularly narrow. An agency decision may be upset only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²⁷ In utilizing this standard, courts are limited to a review of the administrative record²⁸ and may reverse only when the agency's decision was not rationally based upon a careful deliberation of all relevant factors.²⁹

An examination of several reverse-FOIA cases reveals the development of a set of relevant factors to be considered by a court in an APA review. Guidelines for APA-based review were first established by the Court of Appeals for the District of Columbia Circuit in *Charles River Park "A," Inc. v. HUD*,³⁰ the first reverse-FOIA case to reach the appellate level. In *Charles River*, the Boston tax assessor sought to obtain information submitted to the Federal Housing Authority by certain multi-family housing projects in the Boston area.³¹ The authority agreed to release the information even though

²⁷ 5 U.S.C. § 706(2)(A) (1970). The court in *McCoy v. Weinberger*, 386 F. Supp. 504 (W.D. Ky. 1974), utilized the alternative "in excess of statutory authority" test embodied in the APA. 5 U.S.C. § 706(2)(C) (1970). See 386 F. Supp. at 507-08. It has been noted that this test is based on the premise that the FOIA exemptions *mandate* that information not be disclosed. Hence, release of exempted information would be "in excess of statutory authority." Comment, *Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection*, 70 Nw. U.L. Rev. 995, 1013 (1976).

²⁸ See 5 U.S.C. § 706 (1970). An administrative record must meet certain standards of completeness before the decision based upon it will be sustained. See *Pennzoil Co. v. FPC*, 534 F.2d 627, 632 (5th Cir. 1976), *discussed in* notes 41-49 and accompanying text *infra*.

²⁹ See *Camp v. Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). Chief Justice Hughes, in *Morgan v. United States*, 298 U.S. 468 (1936), outlined the procedures essential to a proper agency decision:

There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. . . . Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order.

Id. at 480 (citations omitted).

³⁰ 519 F.2d 935 (D.C. Cir. 1975), *rev'g* 360 F. Supp. 212 (D.D.C. 1973).

³¹ 519 F.2d at 938-39. The Commissioner of Assessing sought to obtain verification of the gross income of the projects for the purpose of real estate tax assessment. *Id.* at 939. He requested information which the project had been required to provide pursuant to the regulatory authority of the FHA under 12 U.S.C. § 1715k (1970).

it was apparently covered by an exemption,³² and thus was not subject to mandatory disclosure. Charles River Park, operator of the housing projects, objected to disclosure and brought a reverse-FOIA suit, asserting various implied rights of action.³³ The district court, without hearing evidence, found the information to be confidential and barred its disclosure.³⁴

The appellate panel deemed the record inadequate to support the lower court's finding of confidentiality and remanded the case with instructions for reconsideration.³⁵ The district court was directed to hold an evidentiary hearing³⁶ and to determine whether the requested information was confidential within the meaning of Title 18, section 1905 of the United States Code,³⁷ a federal penal statute forbidding disclosure of confidential data by government employees. If the material was found confidential under section 1905, release of it by the Housing Authority would constitute an abuse of discretion.³⁸ Should the penal statute be found inapplicable, the trial court, to determine whether the agency abused its discretion in deciding to release this information, was instructed to balance the public interest in disclosure—here, the accurate assessment of taxes—against the suppliers' interest in keeping the data confidential. A method to accommodate both interests was to be sought as well.³⁹

The *Charles River* decision evidences the District of Columbia Circuit's recognition of the public interest as a weighty factor to be

³² The data was probably covered by the confidential information exemption. See 5 U.S.C. § 552(b)(4) (1970).

³³ The suppliers claimed implied causes of action under both the FOIA exemptions and 18 U.S.C. § 1905. The § 1905 action is discussed in notes 112-47 and accompanying text *infra*.

³⁴ 360 F. Supp. at 212. The district court rejected the claim of an implied action based upon the FOIA exemptions, finding that the exemptions neither prohibit nor authorize disclosure. Instead, the court upheld an implied right of action under § 1905. *Id.* at 213.

³⁵ 519 F.2d at 939.

³⁶ The evidentiary hearing required by the *Charles River* panel was not the equivalent of a *de novo* review of agency action, notwithstanding the contrary view of the Fourth Circuit expressed in *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1215 (4th Cir. 1976), *cert. denied*, 97 S. Ct. 2199 (1977). The *Charles River* court explained that "[i]n holding this hearing the district court is *not reviewing agency action*; it is making a threshold determination whether the plaintiff has any cause of action at all." 519 F.2d at 940-41 n.4 (emphasis added).

³⁷ Included in the § 1905 definition of "confidentiality" are trade secrets, styles of work, secret processes, statistical data, income sources and amounts, and expenditures of any person, partnership, corporation or association. 18 U.S.C. § 1905 (1970).

³⁸ 519 F.2d at 943.

³⁹ *Id.* The court suggested that such an accommodation could be reached by releasing to the tax assessor only those items necessary to his inquiry, with the express condition that he keep them confidential. *Id.*

considered in APA review of an agency's decision to release FOIA-exempted information. Such a recognition is consistent with the expressed congressional intent behind the FOIA that "agencies have a definite obligation to release information—even where withholding may be authorized by the language of the statute—where the public interest lies in disclosure."⁴⁰

In the year following the *Charles River* decision, the guidelines for APA review were further refined by the Fifth Circuit in *Pennzoil Co. v. FPC*.⁴¹ In *Pennzoil*, the Federal Power Commission (FPC) had been provided, pursuant to its request, with information regarding offshore natural gas reserves by certain natural gas producers.⁴² Public interest groups sought access to the data under the FOIA and the Commission decided to comply with this request. A battery of objections from the major oil companies ensued,⁴³ culminating in an appeal of the Commission's order to the Fifth Circuit. The appeal was grounded upon both the APA and an implied right of action under the FOIA. The reviewing court rejected the notion that the FOIA exemptions *barred* disclosure⁴⁴ and refused to imply a right of action on that basis. Instead, the panel found that the FPC had abused its discretion and remanded the case to the Commission.⁴⁵

In reaching this conclusion, the court noted that the Commission's decision to release the exempted information was a departure from prior agency policy and thus subject to a more exacting APA review than ordinary FPC decisions.⁴⁶ In exercising this stricter scrutiny, the panel took note of the FPC's declaration that the public interest in disclosure outweighed the potential harm to the suppliers, but found that this cursory statement alone was an insuffi-

⁴⁰ 120 CONG. REC. 17,016 (1974) (remarks of Sen. Kennedy).

⁴¹ 534 F.2d 627 (5th Cir. 1976).

⁴² The Federal Power Commission (FPC) planned to devise a rate structure which would provide for a more efficient development of the nation's natural gas supply. Discrepancies in the figures then available to the government caused the FPC to require new, more detailed information. *Id.* at 628-29.

⁴³ Among those companies protesting the order were Mobil, Chevron, Exxon, Atlantic Richfield, Texaco, Pennzoil, Union Oil, and Pacific Gas and Electric. *See id.* at 628. The Commission conceded that the information was exempt under both the trade secret and geological data exemptions. *See id.* at 630 n.2.

⁴⁴ The court stated that such an interpretation "would be at war with the basic principles embodied in the Freedom of Information Act." *Id.* at 630. *See* note 10.*supra*.

⁴⁵ 534 F.2d at 632.

⁴⁶ *See id.* at 630. If other courts adopt this approach, it seems likely that, in the majority of reverse-FOIA suits brought under the APA, agency action will be subject to this stricter scrutiny since administrative decisions to release exempted information often involve departures from the prior agency norms of maximum secrecy. *Id.*

cient basis to support disclosure.⁴⁷ The Fifth Circuit directed that three additional factors be considered by the FPC in exercising its discretion. First, the Commission should consider whether the disclosure of this type of data would aid it in its functions, *i.e.*, whether the consumers requesting the information could properly utilize it in their appearances before the Commission. Second, the harm done to the public generally by release ought to be weighed; if the information oil companies discover through exploration would no longer be guaranteed exclusivity, exploration might be curtailed to the detriment of the public at large. Finally, the FPC should seek and consider alternatives to full disclosure which would simultaneously benefit the consumers and protect the suppliers.⁴⁸ Only after these three factors have received careful consideration and disposition by the FPC will a final decision of that agency to release exempted information pass judicial muster in the Fifth Circuit.⁴⁹

A comparison of *Charles River* and *Pennzoil* demonstrates a trend towards establishing specific factors which must be rationally considered by the agency before its decision will be found to constitute a proper exercise of discretion.⁵⁰ In fact, the *Charles River* requirements of a balancing of public and private interests⁵¹ and a search for an accommodation of these conflicting interests were found inadequate in *Pennzoil*, and additional factors were deemed necessary.⁵² Thus, it is submitted that any concern regarding the inadequacy of relief under the abuse of discretion standard is unwarranted, and the use of legal ingenuity to discover implied rights of action is unnecessary. The courts appear to be fashioning specific criteria which have the effect of strengthening APA review in reverse-FOIA suits.

⁴⁷ *Id.* at 632.

⁴⁸ *Id.*

⁴⁹ The panel stated: "The Commission, however, in making an informed decision and before taking action that has such clear and Congressionally recognized adverse consequences must consider all relevant factors." *Id.* The legislative policies behind the FOIA exemptions could thereby be evaluated in an APA action, alleviating the need for an implied cause of action.

⁵⁰ One commentator on the subject of reverse-FOIA suits has noted the regrettable absence of statutory guidance for APA review in such actions. Comment, *Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection*, 70 *Nw. U.L. Rev.* 995, 1016-17 (1976). The *Charles River* decision and the *Pennzoil* decision may fill this void and help adequately define the abuse of discretion standard.

⁵¹ See discussion in notes 39-40 and accompanying text *supra*.

⁵² See notes 47-49 and accompanying text *supra*.

IMPLIED CAUSES OF ACTION

In seeking to obtain broader judicial review of an agency's decision to disclose information, suppliers have resorted to claims of implied causes of action under either FOIA exemptions or other federal statutes. Where an implied cause of action is found to exist, the courts will conduct a *de novo* review of the matter in question, attempting to determine whether in fact the material is so confidential as to warrant its withholding in the public interest.⁵³ This review, not subject to the strictures of APA procedures,⁵⁴ reaches beyond the administrative record, inviting the submission of other relevant information to the court. The implied causes of action asserted in reverse-FOIA suits will be analyzed within the framework of the factors the Supreme Court has deemed relevant to the recognition of an implied right of suit.

Legislative Intent & Implied Actions: Cort v. Ash

Recently, the Supreme Court, in *Cort v. Ash*,⁵⁵ delineated the factors relevant in determining whether a private cause of action will be found to exist under a federal criminal statute not expressly providing for one.⁵⁶ In *Cort*, a corporate stockholder sought to enjoin the board of directors of Bethlehem Steel Corporation from making illegal political campaign contributions. The stockholder based his suit upon an implied right of action under a federal criminal statute prohibiting corporations from making contributions to presidential campaigns but affording no express private remedy for the corporate shareholder.⁵⁷

After reviewing prior case law, the Supreme Court identified four criteria which it deemed relevant to "whether a private remedy

⁵³ *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1215 (4th Cir. 1976), cert. denied, 97 S. Ct. 2199 (1977) (citing Note, *Protection from Government Disclosure—The Reverse-FOIA Suit*, 1976 DUKE L.J. 330, 334 n.18).

⁵⁴ Note, *Protection from Government Disclosure—The Reverse-FOIA Suit*, 1976 DUKE L.J. 330, 334 n.18.

⁵⁵ 422 U.S. 66 (1975).

⁵⁶ For a detailed pre-*Cort* discussion of implied causes of action, see Note, *The Phenomenon of Implied Private Actions Under Federal Statutes: Judicial Insight, Legislative Oversight or Legislation by the Judiciary?*, 43 FORDHAM L. REV. 441 (1974). The author criticized the Third Circuit's *Cort* decision in terms similar to those used by the Supreme Court a year later. *Id.* at 456-57.

⁵⁷ 422 U.S. at 71. The criminal statute relied upon is codified at 18 U.S.C. § 610 (Supp. V 1975). At the time of the *Cort* litigation, there was no statute providing a private remedy for the corporate shareholder. There is now such a cause of action available under 2 U.S.C. § 437g (Supp. V 1975).

is implicit in a statute not expressly providing one."⁵⁸ First, a court should consider whether the plaintiff is "one of the class for whose *especial* benefit the statute was enacted."⁵⁹ Second, there should be an assessment of the applicable legislative intent.⁶⁰ Third, it should be determined whether the implied cause of action is "consistent with the underlying purposes of the legislative scheme."⁶¹ Finally, the cause of action should not be one traditionally relegated to state law.⁶² In *Cort*, protection of corporate shareholders was deemed a subsidiary legislative purpose at best, and the implied cause of action was denied.⁶³ Thus, the Court determined that legislative intent is the overriding factor on the issue of whether an implied cause of action exists under a particular statute.⁶⁴

Implied Cause of Action Under the "Trade Secret" Exemption: Westinghouse Electric Corp. v. Schlesinger

Exempted from the general rule of mandatory disclosure under the FOIA are trade secrets and commercial or financial information which are privileged or confidential.⁶⁵ By far, the most controversial claim of a right of action in reverse-FOIA suits to date is that of an implied action in favor of a supplier based upon this exemption. This theory, often advanced by corporate suppliers of information,⁶⁶

⁵⁸ 422 U.S. at 78.

⁵⁹ *Id.* (quoting *Texas & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916)).

⁶⁰ 422 U.S. at 78 (citing *National R.R. Passenger Corp. v. National Assoc. of R.R. Passengers*, 414 U.S. 453, 458, 460 (1974)).

⁶¹ 422 U.S. at 78 (citing *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 423 (1975)). An alternate third criterion is "whether the statutory remedies have been adequately enforced." Note, *The Phenomenon of Implied Private Actions Under Federal Statutes: Judicial Insight, Legislative Oversight or Legislation by the Judiciary?*, 43 *FORDHAM L. REV.* 441, 441 (1974).

⁶² 422 U.S. at 78 (citing *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963)).

⁶³ 422 U.S. at 80. The Court traced the legislative history of the statute and found that the main thrust of the original Act of January 26, 1907, 34 Stat. 864, was a desire to purge federal elections of undue corporate influence; the protection of the shareholder was, at best, a secondary concern. 422 U.S. at 80-82.

⁶⁴ For a subsequent judicial application of the standards established in *Cort*, see *People's Hous. Dev. Corp. v. City of Poughkeepsie*, 425 F. Supp. 482, 488-94 (S.D.N.Y. 1976). The implications of *Cort* are explored in Comment, *Private Rights of Action Under Amtrak and Ash: Some Implications for Implication*, 123 *U. PA. L. REV.* 1392 (1975).

⁶⁵ 5 U.S.C. § 552(b)(4) (1970).

⁶⁶ For a sampling of the number of corporate suppliers in a *single* case, see note 43 *supra*. Other giants of industry involved in reverse-FOIA suits have been United States Steel Corp., Westinghouse Electric Corp., General Motors Corp., Chrysler Corp., and Hughes Aircraft Co. See, e.g., *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 97 S. Ct. 2199 (1977); *Chrysler Corp. v. Schlesinger*, 412 F. Supp. 171 (D. Del. 1976); *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292 (C.D. Cal. 1974).

has been litigated frequently and ultimately has been accepted by the Fourth Circuit in *Westinghouse Electric Corp. v. Schlesinger*.⁶⁷ In *Westinghouse*, certain government contractors sought to prevent disclosure of Affirmative Action Program and Equal Employment Opportunity Reports which they had submitted to the government in compliance with an Executive Order.⁶⁸ The plaintiffs contended that their position as suppliers gave rise to an implied cause of action under the trade secret exemption to enjoin the release of information. The district court reasoned that the exemption prohibited disclosure and, accordingly, granted the relief sought.⁶⁹

The Fourth Circuit, in deference to the plain language of the statute,⁷⁰ ruled that the FOIA "does not apply" to exempted information, and that the exemptions, therefore, cannot prohibit disclosure.⁷¹ Rather, the court found that a decision to disclose is permissible within the discretion of the agency. The exercise of this discretion, however, is subject to "any clear declarations of a legislative policy against disclosure as reflected in an exemption of the Act itself."⁷² Thus, the court held, in effect, that while the exemptions do not forbid disclosure, the policy behind an exemption might do so. The panel found that Congress, in providing the nine exemptions to the general rule of disclosure,⁷³ had intended to balance the pub-

⁶⁷ 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 97 S. Ct. 2199 (1977). The suppliers also asserted the other statute exemption as a basis for relief. 542 F.2d at 1199-1203. This theory of action in reverse-FOIA suits is discussed in notes 131-47 and accompanying text *infra*.

⁶⁸ Affirmative Action Program and Equal Employment Opportunity reports are filed pursuant to Executive Orders 11,246 and 11,375, 3 C.F.R. 169-77 (1977). The reports must be submitted to insure compliance with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1970 & Supp. V 1975), which forbids discrimination in employment on government contracts.

⁶⁹ 392 F. Supp. 1246, 1250-51 (E.D. Va. 1974), *aff'd*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 97 S. Ct. 2199 (1977).

⁷⁰ The FOIA expressly states that the broad mandatory disclosure rule "does not apply" to matters that are exempted. 5 U.S.C. § 552(b) (1970).

⁷¹ 542 F.2d at 1197 (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 145-48 (1975); *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 942 (D.C. Cir. 1975)).

⁷² 542 F.2d at 1197. The panel noted that APA review is available if the decision to release runs afoul of one of the congressional policies. *Id.* at 1198. Later, in the opinion, however, the court rejected APA review as too limited. *See id.* at 1213, 1215.

⁷³ *Id.* at 1210. It is manifest that the FOIA was intended to protect the individual's right to privacy. The Senate Report stated that "it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records." S. REP., *supra* note 2, at 3. This broad protection was appropriately incorporated into the personnel records exemption. 5 U.S.C. § 552(b)(6) (1970). The *Westinghouse* court seems to have applied the personnel records exemption's protection of individual privacy to the trade secret exemption's limited protection of narrowly defined corporate data. 542 F.2d at 1211. *See* S. REP., *supra* note 2, at 9. Supplementing this erroneous

lic's need to know against the individual's right of privacy. The court quoted the Senate hearings on the FOIA, wherein it was stated that the trade secret exemption was designed to protect confidential information "not only as a matter of fairness but as a matter of right."⁷⁴ In addition, the court reasoned that "when a statute, whether phrased in the form of an exemption or not, grants a private party protection from disclosure, it carries with it an implied right in the private party to invoke the equity powers of a court to assure him that protection."⁷⁵ Moreover, since the "envious competitor or the curious busybody" seeking the information is granted *de novo* review of a government denial, the court continued, the aggrieved supplier should be accorded a similarly broad review.⁷⁶ Finally, the

interpretation with an isolated quotation from a subcommittee hearing, *see id.* at 1211, and dicta from other cases, *see id.*, the Fourth Circuit compiled a deceptively strong rationale for permitting the implied cause of action. *See id.* at 1210-11.

⁷⁴ 542 F.2d at 1211 (emphasis added by the court) (quoting National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 769 (D.C. Cir. 1974) (quoting *Hearings on S. 1666 before Subcomm. on Admin. Prac. & Proc. of Sen. Comm. on Judiciary*, 88th Cong., 1st Sess. 199 (1964))). This testimony, however, was offered not by a member of Congress, but by a spokesman of the Justice Department. Further, it was offered in hearings held in 1963, a full two years before the final Senate Report on the FOIA. It is submitted that this single statement, standing alone as it does and unsupported by subsequent legislative reports, is insufficient evidence of legislative intent upon which to base an implied cause of action granting *de novo* review. *See* 542 F.2d at 1211, 1213.

⁷⁵ 542 F.2d at 1211. The court took a broad view of its equity power under the FOIA, relying upon the Supreme Court decision in *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1 (1974). In *Bannerkraft*, the plaintiff, in the process of renegotiating his contract with the government, sought to enjoin further proceedings pending his receipt of information requested under the FOIA. The Supreme Court refused to allow the assertion of jurisdiction for such an injunctive suit, but declared, in dicta:

The broad language of FOIA, with its obvious emphasis on disclosure and with its exemptions carefully delineated as exceptions; the truism that Congress knows how to deprive a court of broad equitable power when it chooses so to do . . . and the fact that the Act, to a definite degree, makes the district courts the enforcement arm of the statute, . . . persuade us that the . . . principle of a statutorily prescribed special and exclusive remedy is not applicable to FOIA cases. . . . [T]here is little to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court.

Id. at 19-20 (dicta) (citations omitted). A subsequent interpretation of *Bannerkraft*, however, stated that the broad equity power discussed by the Supreme Court was intended only to carry out the purposes of disclosure. *Seafarers Int'l Union v. Baldwin*, 508 F.2d 125, 128 (5th Cir. 1975).

⁷⁶ 542 F.2d at 1213. The court reasoned that *de novo* review could be obtained by a more circuitous route if the agency were to honor a claim of confidentiality and withhold the information, prompting the requester to bring suit for its release. At this point, the suppliers could enter the *de novo* hearing as intervening parties. *Id.* The court found that the agency's "delinquency" in failing to assert the supplier's "right" to confidentiality short circuited this process and was sufficient justification for recognizing an implied right of action whereby the supplier might assert the "right" himself. *Id.* It is suggested, however, that where the decision

Fourth Circuit noted that if the review was limited to a check on administrative arbitrariness, the result would be to make the executive's "*ipse dixit final*."⁷⁷

It is submitted, however, that the analysis of the *Westinghouse* court does not comport with the congressional intent behind the FOIA as well as judicial interpretations of that intent. The overall thrust of the FOIA is directed towards disclosure of information in the hands of the government.⁷⁸ The Senate Report declared that the purpose of the Act was "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language."⁷⁹ Subsequent legislative reports have explained that the exemptions are permissive, not mandatory, and that agencies may make disclosures of exempted information if consistent with the proper exercise of discretion.⁸⁰ In particular, the trade secret exemption was deemed "necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries but would customarily not be released to the public by the person from whom it was obtained."⁸¹ The scope of this exemption was judicially interpreted in

to release may be characterized as a reasoned act of discretion, rather than as a failure to perform a duty, this analysis will not stand.

A second means of acquiring a *de novo* hearing was recognized in *Sears, Roebuck & Co. v. GSA*, 553 F.2d 1378 (D.C. Cir. 1977). In *Sears*, prior to the Department of Labor's final decision concerning whether to release information sought under the FOIA, the suppliers brought an action for a declaratory judgment in an effort to establish the non-disclosable nature of the documents. 553 F.2d at 1384-85. The court found that, since APA review only applies to "final agency action," 5 U.S.C. § 703 (1970), the action was properly brought and a *de novo* review of whether the FOIA exemptions mandate non-disclosure was therefore accorded the plaintiff. 553 F.2d at 1384-85.

⁷⁷ 542 F.2d at 1215. The panel suggested that a *de novo* hearing is "substantially the same" as the *Charles River* evidentiary hearing. *Id.* The hearing ordered in *Charles River*, however, was designed only to obtain additional evidence from the agency in order to determine whether the plaintiff had a valid claim of administrative arbitrariness. See *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 940-41 & n.4 (D.C. Cir. 1975); note 36 *supra*.

⁷⁸ The Act was intended to open up the complex administrative structure and procedure to public scrutiny. S. REP., *supra* note 2, at 3.

⁷⁹ *Id.* The Senate Report was available for consideration by both houses, while the House Report was issued only after the FOIA had passed the Senate. The Senate Report, therefore, has been considered "the surer indication of congressional intent. . . ." *Benson v. GSA*, 289 F. Supp. 590, 595 (W.D. Wash. 1968), *aff'd*, 415 F.2d 878 (9th Cir. 1969). See also Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 762-63 (1967); Note, *The Freedom of Information Act: Shredding the Paper Curtain*, 47 ST. JOHN'S L. REV. 694, 697 (1973).

⁸⁰ See note 10 *supra*.

⁸¹ S. REP., *supra* note 2, at 9. Based on the Senate's explanation of the materials covered by the trade secret exemption, the subjects of the litigation in *Westinghouse*, Affirmative Action Program and Equal Employment Opportunity Reports required as a condition of

National Parks & Conservation Association v. Morton.⁸² The District of Columbia Circuit ruled that information would be presumed confidential if its release would tend either to "impair the Government's ability to obtain necessary information in the future" or "cause substantial harm to the competitive position of the person from whom the information was obtained."⁸³ The *National Parks* court further stated that the trade secret exemption was "intended for the benefit of persons who supply information as well as the agencies which gather it."⁸⁴

The *Westinghouse* panel relied upon this and other excerpts from the *National Parks* opinion to support its conclusion that the FOIA exemption confers upon the supplier an implied right of action to enjoin disclosure.⁸⁵ *National Parks*, however, was not a reverse-FOIA suit. In that case, it was the government which sought to utilize the trade secret exemption to deny access to certain records sought under the FOIA.⁸⁶ Thus, any statements by the *National Parks* court which might be interpreted as supporting an implied cause of action clearly were not essential to the holding of the case.⁸⁷ In fact, the appellate panel which decided *National Parks* noted in a later decision that

National Parks never stated that an individual had a right under the FOIA to block disclosure when the government wished to disclose the information that it was not required to disclose. It simply stated a test to be used to determine whether the information is confidential.⁸⁸

government contracts, appear to be excluded altogether from the scope of the exemption. *Id.* But see *General Dynamics Corp. v. Dunlop*, 427 F. Supp. 578 (E.D. Mo. 1976) (finding AAP reports within trade secret exemption).

⁸² 498 F.2d 765 (D.C. Cir. 1974).

⁸³ *Id.* at 770. Prior to *National Parks*, information was considered confidential if it was not ordinarily released by the supplier to the public. This was the subjective test of confidentiality. See *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591 (D.P.R. 1967). *National Parks*, however, established a two-pronged objective test. See 498 F.2d at 770. A detailed analysis of this area of the law is undertaken in Note, *Public Disclosure of Confidential Business Information Under the Freedom of Information Act: Towards a More Objective Standard*, 60 CORNELL L. REV. 109 (1974).

⁸⁴ 498 F.2d at 770. See note 87 *infra*.

⁸⁵ See notes 58-64 and accompanying text *supra*.

⁸⁶ 498 F.2d at 770.

⁸⁷ See note 84 *supra*. The panel merely wished to demonstrate that an exemption "may be applicable even though the Government itself has no interest in keeping the information secret." *Id.* at 770. In so doing, it appears that the court never envisioned that any party other than the government could invoke the exemption. See text accompanying note 88 *infra*.

⁸⁸ *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 941 n.5 (D.C. Cir. 1975).

It is also noteworthy that the strong language of the Senate hearings, an integral part of both the *Westinghouse* rationale⁸⁹ and the *National Parks* case,⁹⁰ never appeared in the final Senate report on the FOIA. Instead, the report's clarification of the trade secret exemption was neutral, at best, with respect to the intended primary beneficiaries of the exemption.⁹¹ Indeed, Senator Kennedy, in introducing the 1974 FOIA amendments,⁹² told the Senate that "Congress certainly did not intend the exemptions of the Freedom of Information Act to be used to prohibit disclosure of information to justify automatic withholding."⁹³ Although denying that the exemptions forbade disclosure, the *Westinghouse* decision, in effect, promotes the use of the trade secret exemption to prohibit disclosure, contrary to congressional intent, by sanctioning the implication of a private action based upon it.⁹⁴

A commentator on implied causes of action has noted that "[f]or a federal statute to create a class of plaintiffs who may be potential beneficiaries under the statute it must directly by clear inference grant to the prospective plaintiffs a federal right to be free from conduct which violates the statute."⁹⁵ In light of both this comment and the fact that the *Westinghouse* panel conceded that the FOIA "does not apply" to exempted information,⁹⁶ release of that information apparently cannot violate the FOIA and thereby make the suppliers a class of beneficiaries under it. Rather, the release of such information may violate the APA, if disclosed in abuse of discretion,⁹⁷ thus making the APA the proper route for judicial review. Assuming *arguendo* that Congress did intend the exemption to especially benefit the suppliers, the absence of an

⁸⁹ 542 F.2d at 1211, 1213.

⁹⁰ 498 F.2d at 767.

⁹¹ See notes 74, 81 and accompanying text *supra*.

⁹² Senator Kennedy was chairman of the Senate Subcommittee on Administrative Practice and Procedure. In this capacity, he introduced S. 2543, 93d Cong., 2d Sess. (1974) which, as amended, became the 1974 FOIA amendments, Pub. L. No. 93-502, 88 Stat. 1897 (1974). See 120 CONG. REC. 17,016-17 (1974) (remarks of Sen. Kennedy concerning S. 2543).

⁹³ *Id.* at 17,016 (remarks of Sen. Kennedy concerning S. 2543, 93d Cong., 2d Sess. (1974)).

⁹⁴ See Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Information: The Reverse Freedom of Information Act Lawsuit*, 55 TEX. L. REV. 587, 630 n.200 (1977).

⁹⁵ Note, *The Phenomenon of Implied Private Actions Under Federal Statutes: Judicial Insight, Legislative Oversight or Legislation by the Judiciary?*, 43 FORDHAM L. REV. 441, 446-47 (1974).

⁹⁶ 542 F.2d at 1197 (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 147-48 (1975); *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 942 (D.C. Cir. 1975)).

⁹⁷ See notes 27-29 and accompanying text *supra*.

explicit or implicit remedy in the language of FOIA itself perhaps indicates that Congress considered the APA an adequate basis of review.⁹⁸

In viewing the entire legislative scheme of the APA, of which the FOIA is the public information section,⁹⁹ it appears highly unlikely that any right of action with concomitant *de novo* review of agency action was intended to be created. A compartmentalized administrative scheme was devised to serve the needs of an increasingly complex society.¹⁰⁰ Each specialized economic, social, and technological field of endeavor was provided with an expert forum in which its interests could be understood clearly and its differences heard and adjudicated, with due consideration given to the needs of the public at large.¹⁰¹ Properly exercised, judicial review of these decisions would respect the expertise of the agencies and only scrutinize the administrative record to ensure that all relevant evidence was evaluated.¹⁰² The *de novo* review accorded a party aggrieved by a wrongful withholding of information sought under the FOIA is a very limited exception to this general legislative policy, created to advance the FOIA objective of full agency disclosure.¹⁰³ The exemptions to this rule of disclosure, therefore, were to be narrowly construed.¹⁰⁴ Therefore, it seems that any implied right of action under the FOIA exemptions giving rise to a *de novo* review runs counter to three clearly defined congressional objectives: limited judicial review of agency decisions, encouragement of disclosure under the FOIA, and narrow construction of the exemptions. It is suggested

⁹⁸ Given the broad range of decisions subject to APA review, the rule of statutory construction *expressio unius est exclusio alterius* would seem to apply to the *de novo* review accorded the aggrieved requester under the FOIA. Thus, since Congress specifically carved out a narrow exception from APA review for the requester, the supplier's cause of action should be governed the APA standard of review.

⁹⁹ The FOIA supplanted § 3 of the APA, 60 Stat. 238 (1946), which was the Public Information Section of the APA. See generally Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967).

¹⁰⁰ The Supreme Court, in *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956), explained: "The growing complexity of our economy induced the Congress to place regulation of businesses . . . in specialized agencies with broad powers."

¹⁰¹ See generally *International Union of Elec., Radio & Mach. Workers v. NLRB*, 366 U.S. 667, 674 (1961); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 800 (1945); W. GELLHORN, *FEDERAL ADMINISTRATIVE PROCEEDINGS* 1-14 (1941).

¹⁰² See Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55, 80 (1965) (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 226 (1821)). See also note 29 *supra*.

¹⁰³ See S. REP., *supra* note 2, at 8; HOUSE REP., *supra* note 2, at 2, 9, reprinted in U.S. CODE CONG. at 2426.

¹⁰⁴ See note 4 and accompanying text *supra*.

that the congressional desire to protect genuinely confidential information, the very policy upon which reverse-FOIA plaintiffs rely when asserting an implied cause of action under the Act, can be satisfied fully by the existing system of APA review without, as feared by the *Westinghouse* court,¹⁰⁵ making the agency's *ipse dixit* final. The criteria upon which the agency's decision to disclose are evaluated¹⁰⁶ sufficiently protect the supplier against unreasonable or ill-considered action by the government. Under recent decisions, agencies are required to consider various factors in determining whether to release information, including the public and private interests and the confidential nature of the data.¹⁰⁷ The completeness of this evaluation and the rationality of the ultimate decision is then subject to court review. Upon review, the policies underlying the FOIA as well as the interests of the supplier and the public are taken into account by the court.¹⁰⁸ It is submitted, therefore, that the legislative history behind the FOIA is devoid of any intention

¹⁰⁵ See 542 F.2d at 1215.

¹⁰⁶ See *Pennzoil Co. v. FPC*, 534 F.2d 627 (5th Cir. 1976); *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935 (D.C. Cir. 1975); notes 30-52 and accompanying text *supra*.

¹⁰⁷ A determination of the confidential nature of the data is but one element of the overall inquiry. Under this view, the mere fact that release of the information might cause the supplier substantial competitive harm would not automatically require withholding. The *Pennzoil* court noted that

FOIA is not irrelevant in determining whether information encompassed in its exclusions should be disclosed. In reviewing the agency's exercise of discretion concerning the release of such information, this court must be cognizant of the fact that Congress in drafting a broad disclosure statute found sufficient justification for withholding this type of information from public perusal.

534 F.2d at 630.

¹⁰⁸ In *Sears, Roebuck & Co. v. GSA*, 384 F. Supp. 996 (D.D.C. 1974), the district court applied an APA standard of review and considered the policies behind the FOIA in determining whether agency discretion had been abused. *Id.* at 1001. Thus, if disclosure were to run afoul of a policy underlying the trade secret exemption, it could be enjoined absent an overriding public interest. The public interest will not invariably require disclosure. In *Metropolitan Life Ins. Co. v. Usery*, 426 F. Supp. 150 (D.D.C. 1976), *cert denied*, 45 U.S.L.W. 3748 (May 17, 1977), the National Organization of Women sought to obtain Affirmative Action Program and Equal Employment Opportunity reports, as well as other information submitted by various insurance companies to the Department of Labor. *Id.* at 154. The insurance companies brought a reverse-FOIA suit to prevent the agency from complying with the request. The court found that the public interest in disclosure did not outweigh the individual interests at stake:

Balanced against the public interest is the insurance companies' interest in protecting their competitive position and the employees' interest in their privacy. Disclosure of the exempt information would seriously impair these interests. On the balance, the slight harm to the public interest from non-disclosure of these documents is outweighed by the serious harm to the employees and the companies which would result from the disclosure of these documents.

Id. at 171.

to imply a cause of action based upon the trade secret exemption. Instead, there appears to be a positive legislative scheme, of which the FOIA is only a part, opposing such an action and limiting review to the abuse of discretion standard.¹⁰⁹ Implication of a new and conceivably unnecessary cause of action permitting broad review of agency action thus would not only frustrate congressional purpose but would give rise to additional court congestion¹¹⁰ without affording a significantly greater degree of protection to reverse-FOIA plaintiffs than that already provided through the existing method and scope of review.¹¹¹ The courts should not embark upon such a course absent the clear congressional authorization which seems lacking in this instance.

Implied Causes of Action Based Upon Section 1905

Section 1905 of Title 18 provides that any employee of the United States government who discloses "to any extent not authorized by law any information [involving] trade secrets" shall be fined or imprisoned or both.¹¹² Reverse-FOIA plaintiffs have endeavored to premise implied causes of action both upon section 1905,¹¹³ and upon section 1905 in conjunction with the FOIA "other statute" exemption.¹¹⁴

¹⁰⁹ See S. REP. No. 854, 93d Cong., 2d Sess. 6 (1974); H.R. REP. No. 876, 93d Cong., 2d Sess. 3 (1973), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6269; 120 CONG. REC. 17,016 (1974) (remarks of Sen. Kennedy).

¹¹⁰ Almost all corporate giants submit data relating to their profits and expenditures to the government. See Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit*, 55 TEX. L. REV. 587, 588 (1977). These entities can afford the expense involved in challenging the agencies in a lengthy and complex *de novo* review. Such a potential wave of protracted litigation might reverse the post-1974 trend toward disclosure; it would almost certainly clog the court dockets to such an extent as to impair the congressional purpose in devising the administrative scheme, *i.e.*, elimination of the bulk of essentially administrative controversies from the court calendars. See W. GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 13-14 (1941).

¹¹¹ See notes 18-52 and accompanying text *supra*.

¹¹² 18 U.S.C. § 1905 (1970) provides in pertinent part:

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties . . . which information concerns or relates to . . . trade secrets, . . . [or] confidential statistical data, . . . shall be fined not more than \$1000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

¹¹³ See *Burroughs Corp. v. Schlesinger*, 403 F. Supp. 633 (E.D. Va. 1975); *Charles River Park "A", Inc. v. HUD*, 360 F. Supp. 212 (D.D.C. 1973), *rev'd and remanded for further proceedings*, 519 F.2d 935 (D.C. Cir. 1975).

¹¹⁴ 5 U.S.C. § 552(b)(3) (1970) (amended 1976). See *Westinghouse Elec. Corp. v. Schles-*

The oft-litigated question of whether a private cause of action can be implied under a criminal statute¹¹⁵ was once again considered by the Supreme Court in *Cort v. Ash*.¹¹⁶ Therein, the Court declared that the mere fact that a statute is criminal in nature will not necessarily preclude an implied civil action based upon it.¹¹⁷ Rather, an evaluation must be made of the legislative history of the statute in question to determine whether the legislative purpose will be furthered by private civil suits.¹¹⁸ In *Cort*, the Court refused to imply an action in favor of a corporate stockholder based upon a criminal statute because protection of that party was found to be only a subsidiary purpose of the law.¹¹⁹ The Supreme Court characterized the law in question as "nothing more than a bare criminal statute, with absolutely no indication that civil enforcement of any kind was available to anyone."¹²⁰

A comparable situation is encountered with respect to section 1905. Enacted to synthesize a number of similar statutes then ex-

inger, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 47 S. Ct. 2199 (1977).

¹¹⁵ The leading case in favor of implying a civil action based upon a criminal statute is *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967). In *Wyandotte*, the Court faced the issue whether a cause of action for damages lay in favor of the government against a party voluntarily sinking a vessel in a navigable waterway. Such conduct was outlawed by section 15 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 409 (1970). If a ship were sunk, however, the government would have to remove it at the taxpayer's expense, the only expressed remedy being an in rem action against the ship. *Id.* at § 414. The Court found no indication that Congress had intended this to be the exclusive remedy and implied an action for damages against the violator, finding such an action to be in furtherance of the congressional purpose. 389 U.S. at 206-07. *See also* *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

The contrary view—that the very nature of a criminal statute forecloses the possibility of an implied action—was ably advanced by Judge Aldisert, dissenting from the Third Circuit decision in *Cort v. Ash*, 496 F.2d 416 (3d Cir. 1974), *rev'd*, 422 U.S. 66 (1975). Judge Aldisert noted that

[e]very criminal statute is designed to protect some individual, public, or social interest

. . . To find an implied civil cause of action for the plaintiff in this case is to find an implied civil right of action for every individual, social, or public interest which might be invaded by violation of any criminal statute. To do this is to conclude that Congress intended to enact a civil code companion to the criminal code.

496 F.2d at 428-29.

¹¹⁶ 422 U.S. 66 (1975), *discussed in* notes 55-63 and accompanying text *supra*.

¹¹⁷ 422 U.S. at 79 (citing *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 201-02 (1967)).

¹¹⁸ 422 U.S. at 78.

¹¹⁹ 422 U.S. at 81-82. *See* note 63 *supra*.

¹²⁰ 422 U.S. at 79-80. The Court distinguished cases in which implied civil actions were found to exist, finding that the statutes in question in those cases expressly provided some remedies and the only issue was the existence of additional ones. The pertinent statute in *Cort*, however, provided no explicit remedies, and the legislative history hinted that no implied actions were intended. *Id.* n.11.

tant,¹²¹ 1905 is devoid of any definitive indication of congressional intent.¹²² Its predecessors also suffer from the same infirmity. Given the tenor of the Congress which enacted the present version of the statute in 1948,¹²³ however, it is suggested that the primary purpose of the law was to prohibit quasi-treasonous disclosures of governmental data;¹²⁴ protection of the supplier of information was perhaps a secondary purpose. Thus, section 1905 appears to be squarely within the ambit of the *Cort* denial of an implied right of action.

Nonetheless, two district courts have concluded that section 1905 provides reverse-FOIA plaintiffs with an implied private right of action, although neither did so with extensive discussion. In the lower court decision in *Charles River Park "A", Inc. v. HUD*,¹²⁵ it merely was noted that "[p]laintiffs have standing to invoke a criminal statute to effectuate the Congressional purpose."¹²⁶ The District of Columbia Circuit, however, in remanding *Charles River*, stated that "we do not think we should imply such a right [of action under section 1905] unnecessarily."¹²⁷ In *Burroughs Corp. v. Schlesinger*,¹²⁸ the District Court for the Eastern District of Virginia impliedly accepted section 1905 as a predicate for a reverse-FOIA suit,¹²⁹ but did not ultimately determine whether relief should be granted under it.¹³⁰

¹²¹ Act of Feb. 26, 1926, ch. 27, § 1115, 44 Stat. 117; Act of June 17, 1930, ch. 497, § 335, 46 Stat. 701; Act of Jan. 27, 1938, ch. 11, § 2, 52 Stat. 8.

¹²² Expressions of legislative intent concerning either § 1905 or its predecessors seem not to exist. The statute from which § 1905 developed was enacted as part of the Wilson Tariff of 1894, ch. 349, § 34, 28 Stat. 557, which created penalties for the release of information acquired by revenue collectors in the performance of their duties. Section 1905 extended similar penal provisions to all government employees. 18 U.S.C. § 1905 (1970).

¹²³ See E. GOLDMAN, *THE CRUCIAL DECADE—AND AFTER*, 99-102 (1960).

¹²⁴ One commentator has viewed § 1905 as "a relic of an earlier age." Comment, *Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection*, 70 Nw. U.L. REV. 995, 1016 (1976).

¹²⁵ 360 F. Supp. 212 (D.D.C. 1973), *rev'd and remanded for further proceedings*, 519 F.2d 935 (D.C. Cir. 1975).

¹²⁶ 360 F. Supp. at 213 n.2 (citing *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 202 (1967)).

¹²⁷ 519 F.2d at 941 n.6.

¹²⁸ 403 F. Supp. 633 (E.D. Va. 1975). *Burroughs* is illustrative of instances in which the FOIA is used as a weapon to discover information pertaining to the business of a competitor. Sperry Rand-Univac, a competitor of Burroughs, sought information submitted by Burroughs in connection with an unsuccessful bid on a Navy project. From this data, Sperry Rand could estimate future Burroughs bids on similar projects and calculate their own bids accordingly. *Id.* at 634.

¹²⁹ The court found federal question jurisdiction under 28 U.S.C. § 1331 (1970), since the plaintiff sought to enjoin an alleged violation of § 1905 and claimed injury in excess of \$10,000. 403 F. Supp. at 636.

¹³⁰ *Id.* at 637 n.7. The court decided that the case was not ripe for disposition and directed

Section 1905 as Within the "Other Statute" Exemption

The broad disclosure mandate of the FOIA is not applicable to matters "specially exempted from disclosure by statute."¹³¹ Section 1905 often has been asserted by reverse-FOIA plaintiffs to be within the scope of this particular exemption.¹³² Under this view, any information which cannot be disclosed under section 1905 falls within the FOIA exemption and may be the subject of an implied cause of action. Until recently, the courts uniformly had rejected the contention that section 1905 was embraced by the other statute exemption in both direct¹³³ and reverse-FOIA¹³⁴ suits. The terms of section 1905 were considered too indistinct to be compatible with the wording of the exemption. The leading case to the effect is *M.A. Schapiro & Co. v. SEC*,¹³⁵ wherein the court stated: "Moreover, the provision for documents specifically exempted from disclosure by statute . . . relates to those other laws that restrict public access to *specific* government records. It does not, as defendants allege, relate to a statute that *generally* prohibits *all* disclosures of confidential information."¹³⁶

The Supreme Court raised doubts concerning the viability of these decisions, however, in *FAA Administrator v. Robertson*.¹³⁷ In *Robertson*, a public interest group requested certain documents from the Federal Aviation Administration (FAA) under the FOIA. Prompted by the airlines' objections, the FAA refused to honor the disclosure request, pointing to section 1504 of Title 49, United States Code, a statute giving the agency discretion in decisions to release information,¹³⁸ as the other statute. The District of Columbia

a *Charles River* evidentiary hearing to determine the degree of confidentiality of the information. *Id.* at 637.

¹³¹ 5 U.S.C. § 552(b)(3) (1970) (amended 1976).

¹³² *See, e.g., Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1203 (4th Cir. 1976), *cert. denied*, 97 S. Ct. 2199 (1977); *Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769, 772 (D.D.C. 1974).

¹³³ *See, e.g., Ditlow v. Volpe*, 362 F. Supp. 1321, 1323-24 (D.D.C. 1973), *rev'd on other grounds*, 494 F.2d 1073 (D.C. Cir. 1974); *M.A. Schapiro v. SEC*, 339 F. Supp. 467, 469-70 (D.D.C. 1972); *Frankel v. SEC*, 336 F. Supp. 675, 678-79 (S.D.N.Y. 1971), *rev'd on other grounds*, 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972).

¹³⁴ *See Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769 (D.D.C. 1974).

¹³⁵ 339 F. Supp. 467 (D.D.C. 1972). In *Schapiro*, the government unsuccessfully attempted to withhold Securities and Exchange Commission staff studies, basing their refusal to release the information upon § 1905 and the other statute exemption. *Id.*

¹³⁶ *Id.* at 470 (citation omitted) (emphasis added).

¹³⁷ 422 U.S. 255 (1975), *rev'g* 498 F.2d 1031 (D.C. Cir. 1974).

¹³⁸ 49 U.S.C. § 1504 (1970) provides in pertinent part:

Any person may make written objection to the public disclosure of information contained in any application, report, or document . . . Whenever such objection

district and circuit courts found section 1504 not sufficiently specific and rejected the FAA's claim.¹³⁹ The Supreme Court reversed, deciding that this statute was one of many laws in existence at the time of the passage of the FOIA which was not repealed by implication.¹⁴⁰ Disclosure was thus within the discretion of the Administrator and not required under the FOIA. The Fourth Circuit, in *Westinghouse Electric Corp. v. Schlesinger*,¹⁴¹ applied the *Robertson* rationale to section 1905. The court determined that section 1905 fit "the description of an 'extant' statute as defined by the Supreme Court in *Robertson* and it represented the type of 'general' prohibition of disclosure discussed therein."¹⁴² The panel went on to observe that *Robertson* probably overruled *Schapiro*.¹⁴³

Other courts have not agreed with the *Westinghouse* analysis. The District of Columbia Circuit has found qualitative differences between the statute considered in *Robertson* and section 1905:

Section [1504] specifically authorizes nondisclosure of information filed with or obtained by a specific agency, the FAA, whereas section 1905 is merely a general prohibition against *unauthorized* disclosures of confidential commercial or financial information. Any other interpretation would require departure from the established policy of construing FOIA exemptions narrowly . . . and the general rule that a criminal statute is to be narrowly construed.¹⁴⁴

Furthermore, in 1976, the other statute exemption was amended:¹⁴⁵

is made, the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public.

¹³⁹ 493 F.2d at 1031.

¹⁴⁰ 422 U.S. at 265-66. The Court found support for this proposition in the House Report accompanying the FOIA, which stated: "There are nearly 100 statutes or parts of statutes which restrict public access to specific Government records. These would not be modified by the public records provisions of [the FOIA]." HOUSE REP., *supra* note 2, at 10, reprinted in U.S. CODE CONG. at 2427.

¹⁴¹ 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 97 S. Ct. 2199 (1977).

¹⁴² 542 F.2d at 1202. The panel found additional support for its holding that § 1905 is encompassed within the other statute exemption in certain departmental regulations. *Id.* at 1202-03 & nn.33, 34.

¹⁴³*Id.* at 1202 n.30 (citing Note, *Developments Under the Freedom of Information Act—1975*, 1976 DUKE L.J. 366, 395-98).

¹⁴⁴ *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 687 n.50 (D.C. Cir. 1976) (citations omitted) (emphasis added). The court, however, expressly noted that its consideration of this issue was "dictum." *Id.* at 686 n.46. A subsequent court declined to overrule the *National Parks* decision, noting that the Supreme Court might grant review in *Westinghouse*. *Sears, Roebuck & Co. v. GSA*, 553 F.2d 1378, 1385 (D.C. Cir. 1977).

¹⁴⁵ Government in the Sunshine Act of 1976, § 5(b), Pub. L. No. 94-409, 90 Stat. 1247 (amending 5 U.S.C. § 552(b)(3) (1970)).

it now only applies to a statute requiring "that the matters be withheld from the public in such a manner as to leave no discretion on the issue" or "establishes particular criteria for withholding or refers to particular types of matters to be withheld."¹⁴⁶ The Conference Report stated that "[t]he conferees intend this language to overrule the decision of the Supreme Court in [*Robertson*]."¹⁴⁷ Thus, even assuming that the Fourth Circuit was correct in its interpretation of the law in effect at the time of its deliberations, it now seems clear that section 1905 is not within the scope of the other statute exemption.

CONCLUSION

Implied rights of action preventing disclosure of information do not comport with the general philosophy behind the FOIA. Since the release of exempted matter was left to agency discretion, APA review is the proper remedy for the allegedly aggrieved information supplier. Nonetheless, a judicial or legislative resolution of the uncertainty existing with regard to implied actions would be most welcome. Regrettably, the Supreme Court recently denied review in the *Westinghouse* case,¹⁴⁸ thereby precluding, for the present, a definitive judicial determination. Congress, however, could act along either of two paths: the implied right of action recognized under the trade secret exception by the Fourth Circuit in *Westinghouse* could be codified, or *Westinghouse* could be statutorily rejected. Given the legislative trend since the enactment of the FOIA,¹⁴⁹ the latter course is the one more likely to be adopted. It would be advisable, however, for Congress to include in any amendment a proviso that requires agencies to give the supplier notice of an intent to release exempted information before a final determination is made to do so.¹⁵⁰ Such notice would enable the supplier to fully present its case

¹⁴⁶ *Id.*

¹⁴⁷ HOUSE CONF. REP. NO. 1441, 94th Cong., 2d Sess. 25, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 3743. The original House Report specifically cited § 1905 as one of the statutes which might be affected by the *Robertson* holding and suggesting that the decision should be overruled by statute. H.R. REP. NO. 880, 94th Cong., 2d Sess. 23, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 3687. For a discussion of the general effect of the amendment of the other statute exemption, see Note, *The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act*, 76 COLUM. L. REV. 1029 (1976).

¹⁴⁸ 97 S. Ct. 2199 (1977).

¹⁴⁹ Both the 1974 and 1976 FOIA amendments have sought to further promote disclosure. See 5 U.S.C. § 552 (Supp. V 1975), as amended by Pub. L. No. 94-409, 90 Stat. 1247 (1976).

¹⁵⁰ To ensure that a supplier receives notice of a pending FOIA request, a statutory amendment apparently is necessary. In *Pharmaceutical Mfrs. Ass'n v. Weinberger*, 401 F.

early enough in the agency's deliberations so as to obtain effective consideration of its position. The interests of all parties involved would thereby be fully and equitably adjudicated at the agency level, as desired by Congress, while reserving limited judicial review in cases of alleged administrative caprice.

Stephen J. Kaczynski

Supp. 444 (D.D.C. 1975), the court reasoned that since there is no right to enjoin disclosure there can be no right to notice from the agency before a decision to disclose is made. *Id.* at 448.