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ADMINISTRATIVE LAW

FREEDOM OF INFORMATION ACT — EXEMPTION 7(A) REJECTED AS DISCOVERY TOOL IN NLRB ENFORCEMENT PROCEEDINGS

Title Guarantee Co. v. NLRB

The Freedom of Information Act (FOIA)¹ is intended to ensure the public an enforceable right to inspect government records.² A departure from this broad policy of disclosure is permitted only if requested information falls under any of the Act's nine exemptions.³ Exemption 7,⁴ as originally interpreted by the courts, excepted from this disclosure scheme current investigatory files compiled for prospective law enforcement proceedings.⁵ Subsequently, however, a series of cases interpreted exemption 7 as a blanket exception for both open and closed investigatory files.⁶ Congressional reaction to these latter decisions⁷ led to the inclusion in the 1974 FOIA amend-

¹ 5 U.S.C. § 552 (1970 & Supp. V 1975), as amended by Pub. L. No. 94-409, § 5(b)(3), 90 Stat. 1241 (1976).

² For the legislative history of the FOIA, see S. REP. NO. 813, 89th Cong., 1st Sess. (1965); H.R. REP. NO. 1497, 89th Cong., 2d Sess. (1966), reprinted in [1966] U.S. CODE CONG. & AD. NEWS 2418. For a discussion of the FOIA and its background, see Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967); Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 COLUM. L. REV. 895 (1974); Note, *Freedom of Information: The Statute and the Regulations*, 56 GEO. L.J. 18 (1967); Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971 (1975).

³ 5 U.S.C. § 552(c) (1970) provides that the FOIA "does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section." The specific exemptions are listed at 5 U.S.C. § 552(b) (1970 & Supp. V 1975).

⁴ 5 U.S.C. § 552(b)(7) (1970) (amended 1974). The original exemption 7 applied to "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." *Id.*

⁵ See, e.g., *Wellford v. Hardin*, 444 F.2d 21, 23 (4th Cir. 1971); *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970).

⁶ See *Center for Nat'l Policy Review on Race & Urban Issues v. Weinberger*, 502 F.2d 370 (D.C. Cir. 1974) (open or closed nature of investigation irrelevant in decision to protect records of HEW school discrimination investigations); *Ditlow v. Brinegar*, 494 F.2d 1073 (D.C. Cir.) (per curiam), cert. denied, 419 U.S. 974 (1974) (correspondence between National Highway Traffic Safety Administration and auto manufacturers regarding safety defect investigations exempt despite uncertain prospect of enforcement proceedings); *Aspin v. Department of Defense*, 491 F.2d 24 (D.C. Cir. 1973) (release of *Peers Commission Report* on My Lai incident denied, although all court martial activity completed); *Weisberg v. United States Dep't of Justice*, 489 F.2d 1195 (D.C. Cir. 1973) (en banc), cert. denied, 416 U.S. 993 (1974) (findings from spectrographic analysis of bullets in Kennedy assassination need not be disclosed long after termination of Warren Commission); *Frankel v. SEC*, 460 F.2d 813 (2d Cir.), cert. denied, 409 U.S. 889 (1972) (shareholders denied access to investigatory file of 10b-5 action previously settled by consent decree).

⁷ The cases applying a blanket exemption, see note 6 *supra*, were specifically designated as the source of dissatisfaction with the original exemption 7. See 120 CONG. REC. 17,033, 17,034-35, 17,039-40 (1974) (remarks of Sens. Hart and Kennedy).

ments of a more specific exemption 7, which authorizes nondisclosure only in those situations where disclosure would result in certain enumerated harms.⁸ Recently, in *Title Guarantee Co. v. NLRB*,⁹ the Second Circuit considered the application of amended exemption 7 in the context of National Labor Relations Board (NLRB) enforcement proceedings. The court held that the 7(A) exemption of those investigatory records which, if disclosed, would "interfere with enforcement proceedings,"¹⁰ permits nondisclosure of statements of employees and their union representatives taken in preparation for current unfair labor practice enforcement proceedings.¹¹

In May 1975, District 65 of the Wholesale, Retail, Office and Processing Union, Distributive Workers of America, filed an unfair labor practice charge with the New York regional office of the NLRB, alleging that Title Guarantee refused to execute a collective bargaining agreement with the union in violation of the National Labor Relations Act (NLRA).¹² Following an investigation by the regional director, during which written statements and affidavits were taken from Title Guarantee employees and union representatives, a complaint was issued and a hearing set for October 1975. Prior to the hearing, Title Guarantee requested copies of all written statements elicited during the investigation.

The Board refused the request, invoking exemptions 5, 7(A), 7(C), and 7(D) of the FOIA.¹³ Following an unsuccessful appeal to

* The current version of exemption 7 excepts from disclosure investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

5 U.S.C. § 552(b)(7) (Supp. V. 1975). For a discussion of the 1974 amendments, see Clark, *Holding Government Accountable: The Amended Freedom of Information Act*, 84 YALE L.J. 741, 759-63 (1975); Ellsworth, *Amended Exemption 7 of the Freedom of Information Act*, 25 AM. U.L. REV. 37 (1975); Murphy, *Administrative Law: Amendments to the Freedom of Information Act, 1974/1975 ANN. SURVEY OF AM. L. 607*; Note, *The Freedom of Information Act Amendments of 1974: An Analysis*, 26 SYRACUSE L. REV. 951, 967-69 (1975).

⁹ 534 F.2d 484 (2d Cir.), cert. denied, 97 S. Ct. 98 (1976), rev'g 407 F. Supp. 498 (S.D.N.Y. 1976).

¹⁰ 5 U.S.C. § 552(b)(7)(A) (Supp. V 1975).

¹¹ 534 F.2d at 492.

¹² *Id.* at 485-86. The complaint as finally amended alleged violations of § 8(a)(1) and § 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(1), (5) (1970).

¹³ 5 U.S.C. § 552(b)(5), (7)(A), (C), (D) (1970 & Supp. V 1975). Pursuant to 29 C.F.R. §

the Board's General Counsel, suit was instituted in federal district court.¹⁴ On the basis of an in camera inspection of the disputed material,¹⁵ District Judge Gagliardi found all claimed exemptions to be inapplicable and granted Title Guarantee's motion for summary judgment.¹⁶ Accordingly, the district court ordered the information

102.117(d) (1976), if requested material falls under any of the FOIA exemptions, denial is mandatory unless release is "specifically permitted by the Board, its chairman, or its general counsel."

¹⁴ If the Board's determination results in full or partial nondisclosure, the party requesting the information has 20 days in which to file an appeal with the Board's General Counsel or Chairman. The Counsel or Chairman then has 20 days to reach a decision. 29 C.F.R. § 102.117(b)(2)(ii). Should the agency again find for nondisclosure, a complaint may be filed with a federal district court under 5 U.S.C. § 552(4)(B) (1970 & Supp. V 1975).

¹⁵ The 1974 amendments specifically authorize district courts to use in camera inspections in determining the applicability of any exemption: "[T]he court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions" 5 U.S.C. § 552(a)(4)(B) (Supp. V 1975).

¹⁶ 407 F. Supp. at 501-06. The district court first considered the applicability of exemption 5, which permits withholding of "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5) (1970). The NLRB claimed that the requested material was protected under this exemption by the government's executive privilege, *see* EPA v. Mink, 410 U.S. 73, 86-87 (1973), and by the attorney work-product privilege, *see* Hickman v. Taylor, 329 U.S. 495 (1947); Kent Corp. v. NLRB, 530 F.2d 612 (5th Cir.), *cert. denied*, 97 S. Ct. 316 (1976). 407 F. Supp. at 501-02. For an excellent discussion on executive privilege and the attorney work-product privilege under exemption 5, *see* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-55 (1975). Judge Gagliardi ruled that the requested witnesses' statements were purely factual in nature and were not "memorandums or letters" included under exemption 5. 407 F. Supp. at 502-03. *Accord*, Goodfriend W. Corp. v. Fuchs, 411 F. Supp. 454, 456-57 (D. Mass.), *rev'd per curiam on other grounds*, 535 F.2d 145 (1st Cir.), *cert. denied*, 97 S. Ct. 257 (1976); Cessna Aircraft Co. v. NLRB, 405 F. Supp. 1042, 1052 (D. Kan. 1975), *rev'd per curiam on other grounds*, 542 F.2d 834 (10th Cir. 1976). *But see* Jamco Int'l v. NLRB, 91 L.R.R.M. 2446, 2449 (N.D. Okla. 1976). This distinction between purely factual material and memoranda representing an agency's deliberative processes generally has been accepted by the courts. *See, e.g.*, EPA v. Mink, 410 U.S. 73, 89 (1973); Schwartz v. IRS, 511 F.2d 1303, 1305 (D.C. Cir. 1975); Bristol-Myers Co. v. FTC, 424 F.2d 935, 939 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

Exemption 7(C) protects investigatory records which, if disclosed, "constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C) (Supp. V 1975). The *Title Guarantee* district court interpreted exemption 7(C) as referring only to items which are commonly considered private, and found that 7(C) did not apply to the records in the case at hand. 407 F. Supp. at 505, *citing, inter alia*, Wine Hobby U.S.A., Inc. v. IRS, 502 F.2d 133 (3d Cir. 1974); Rural Housing Alliance v. United States Dep't of Agriculture, 498 F.2d 73 (D.C. Cir. 1974). *Accord*, Amerace Corp. v. NLRB, [1976] 4 LAB. L. REP. (CCH) (79 Lab. Cas.) ¶ 11,576, at 21,513-14 (W.D. Tenn. June 10, 1976); Maremont Corp. v. NLRB, 91 L.R.R.M. 2645, 2646 (W.D. Okla. 1976), *rev'd per curiam on other grounds*, 93 L.R.R.M. 2799 (10th Cir. Oct. 5, 1976); Deering Milliken, Inc. v. Nash, 90 L.R.R.M. 3138, 3147-48 (D.S.C. 1975), *aff'd in part and rev'd in part sub nom.* Deering Milliken, Inc. v. Irving, 94 L.R.R.M. 2358 (4th Cir. Jan. 25, 1977).

Exemption 7(D) protects material that would "disclose the identity of a confidential source." 5 U.S.C. § 552(b)(7)(D) (1970). The district court noted that such confidentiality

disclosed and enjoined the unfair labor practice hearing pending NLRB compliance.¹⁷

Although Judge Gagliardi's opinion addressed each of the four claimed exemptions in depth, his treatment of exemption 7(A) is of particular significance since that exemption proved to be the focal point of the Second Circuit's decision. Judge Gagliardi determined that the legislative history of the FOIA as well as the statutory language of the 1974 amendments demands that the courts adopt a case-by-case approach to resolution of disputed exemption claims.¹⁸ He stated, moreover, that in each case it is incumbent upon the

must be based upon either an express assurance or a reasonable inference. 407 F. Supp. at 505. See S. REP. No. 1200, 93d Cong., 2d Sess. 13 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6291; H.R. REP. No. 1380, 93d Cong., 2d Sess. 13 (1974). The court found that the Board had produced no evidence of an express assurance. Moreover, after reviewing the material in camera, the court concluded that both the nature of the material and the identity of the informants precluded an inference of confidentiality. 407 F. Supp. at 505. Observing that a witness's identity will ultimately be disclosed at the NLRB hearing, other courts have subsequently reached similar decisions. See, e.g., Mylan Pharmaceuticals, Inc. v. NLRB, 407 F. Supp. 1124, 1127 (W.D. Pa. 1976); Climax Molybdenum Co. v. NLRB, 407 F. Supp. 208, 209 (D. Colo. 1975), *aff'd mem.*, 539 F.2d 63 (10th Cir. 1976). But see Kaminer v. NLRB, 90 L.R.R.M. 2269, 2271-72 (S.D. Miss. 1975).

¹⁷ 407 F. Supp. at 505-06. The preliminary issue of whether the courts have jurisdiction to enjoin NLRB proceedings has been vigorously contested. The FOIA explicitly confers jurisdiction upon the district courts "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B) (Supp. V 1975). In *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1 (1974), the Supreme Court held that because of the unique nature of renegotiation cases this injunctive jurisdiction does not include the power to enjoin the proceedings of the Renegotiations Board. Although the Court found it unnecessary to decide whether a district court could enjoin proceedings before other federal agencies, it did indicate that such injunctive jurisdiction need not contradict congressional intent. In dictum the Court stated: "With the express vesting of equitable jurisdiction in the district court by § 552(a), there is little to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court." *Id.* at 20. Judge Gagliardi employed the *Bannerkraft* dictum in holding that the express grant of equity jurisdiction to the district courts included the power to enjoin NLRB proceedings. 407 F. Supp. at 501. Since the Second Circuit found the contested information in *Title Guarantee* to be exempt, it refrained from deciding this issue. Most courts have held that such injunctive jurisdiction is properly within their equity powers. See, e.g., *Electri-Flex Co. v. NLRB*, 412 F. Supp. 698, 700-01 (N.D. Ill. 1976); *Capital Cities Communications, Inc. v. NLRB*, 409 F. Supp. 971, 973-74 (N.D. Cal. 1976). But see *Atlas Indus., Inc. v. NLRB*, 91 L.R.R.M. 2676, 2677 (N.D. Ohio 1976); *NLRB v. Hardeman Garment Corp.*, 91 L.R.R.M. 2425, 2425-26 (W.D. Tenn. 1975); *Amerace Corp. v. NLRB*, 91 L.R.R.M. 2344, 2345 (W.D. Tenn. 1975). These latter three district courts declared that a ruling against jurisdiction was mandated by the Sixth Circuit's decision in *Sears, Roebuck & Co. v. NLRB*, 433 F.2d 210 (6th Cir. 1970) (*per curiam*). There the court held that district courts do "not have the power to enjoin or to review decisions of the National Labor Relations Board." *Id.* at 211. Although *Sears* did not directly involve an FOIA claim, the Sixth Circuit labeled as a "dubious proposition" the theory that the FOIA granted jurisdiction to enjoin agency proceedings. *Id.*

¹⁸ 407 F. Supp. at 504.

withholding agency to prove with particularity the existence of any of the enumerated harms.¹⁹ The Board sought to sustain its burden of proof by asserting generally that disclosure would injure its case and deter potential informants.²⁰ Judge Gagliardi, however, rejected the NLRB's contention, ruling that such general allegations of harm were insufficient. Indeed, upon in camera inspection of the controverted material, he concluded that no actual harm would result from releasing the material.²¹

In reversing the district court, the Second Circuit ruled that exemption 7(A) permitted nondisclosure of the requested information.²² Consequently, the court did not determine the applicability of the other exemptions.²³ Judge Oakes, writing for a unanimous panel, first found that congressional intent was not sufficiently clear to mandate more liberal NLRB discovery procedures.²⁴ Prefacing its analysis of legislative intent with a survey of the Board's discovery rules, the court noted that the extent of discovery lay within the NLRB's rule-making discretion.²⁵ In exercising this discretion, the court stated, the Board has restricted the use of depositions to the preservation of evidence and has permitted a litigant access to witnesses' statements only for cross-examination purposes after testimony has been given.²⁶ Since the Board does not provide for pretrial discovery as of right,²⁷ the Second Circuit concluded that the substantive effect of FOIA mandated disclosure would be "tantamount to the issuance of new, broader discovery rules for NLRB proceedings."²⁸ Judge Oakes did not believe that the legislative history of the amendments warranted such a substantial change.²⁹ He noted that the 1974 amendments were enacted in reaction to a series of

¹⁹ *Id.*

²⁰ *Id.* The Board also claimed an attorney work-product privilege under exemption 7(A). This privilege is generally associated with exemption 5. See note 16 *supra*. Accordingly, the claim was dismissed out of hand by both the district court, 407 F. Supp. at 504-05, and the Second Circuit, 534 F.2d at 491.

²¹ 407 F. Supp. at 504-05.

²² 534 F.2d at 492. The FOIA exemptions do not prohibit disclosure. Rather, as specifically noted in the 1974 congressional debates and quoted by Judge Oakes, *id.* at 489, the exemptions are "only permissive and mark the outer limits of information that may be withheld." 120 CONG. REC. 17,016 (1974) (remarks of Sen. Kennedy).

²³ 534 F.2d at 489 nn.10 & 11, 492 n.15.

²⁴ *Id.* at 491.

²⁵ *Id.* at 487.

²⁶ 29 C.F.R. § 102.118 (1976) (incorporating in substance the Jencks Act, which provides minimal disclosure in federal criminal litigation).

²⁷ See note 55 *infra*.

²⁸ 534 F.2d at 487.

²⁹ *Id.* at 491.

cases³⁰ which had applied a broad prohibition against disclosure of all investigatory files in both open and closed law enforcement proceedings.³¹ The *Title Guarantee* panel did not, however, view the amendments as a rejection of the case law that had applied exemption 7 only to open enforcement proceedings. Although recognizing the overriding purpose of the FOIA as the general disclosure of governmental information,³² the court implied that a reaffirmation of the latter cases would be consonant with congressional intent. Therefore, it ruled that the legislative history is not clear enough to authorize utilization of the FOIA as a vehicle for requiring more extensive NLRB discovery procedures.³³

The Second Circuit then acknowledged *Title Guarantee's* argument that the NLRB must establish the harm of releasing requested material in order to utilize an exemption.³⁴ Considering the special circumstances of an unfair labor practice proceeding, however, the court found this burden of proof to be met by the inherence of two types of interference with such proceedings. First, the panel agreed with the Board's contention that early discovery could allow an opposing litigant to frustrate enforcement proceedings.³⁵ Second, the court articulated its belief that the delicate labor-management relationship could easily lead to employer reprisals and coercion directed at employee witnesses.³⁶ Consequently, Judge Oakes concluded that in an unfair labor practice proceeding nondisclosure of employee statements is permitted under exemption 7(A) as a matter of law.³⁷ As a result, neither in camera inspection of requested records nor a case-by-case determination of the applicability of any exemption was deemed to be within the prerogative of the district court.³⁸

³⁰ See cases cited in note 6 *supra*. For a discussion of these cases, see Note, *The Investigatory Files Exemption to the FOIA: The D.C. Circuit Abandons Bristol-Myers*, 42 GEO. WASH. L. REV. 869 (1974).

³¹ 534 F.2d at 488-89.

³² *Id.* at 488.

³³ *Id.* at 490.

³⁴ *Id.* at 491. 5 U.S.C. § 552(a)(4)(B) (Supp. V 1975) specifically provides that upon initiation of an FOIA complaint in a district court, "the court shall determine the matter de novo . . . and the burden is on the agency to sustain its action [of withholding the records]."

³⁵ 534 F.2d at 491-92.

³⁶ *Id.* at 491.

³⁷ *Id.* at 492.

³⁸ See *id.* at 491. *Title Guarantee* argued that exemption 7(A) must be "read complementarily to the in camera inspection amendment," and that the Board must prove, with particularity, interference with an individual proceeding. Judge Oakes did not accept these assertions, adopting instead an approach of automatic nondisclosure. *Id.*

Although Judge Oakes correctly observed that the amendments were intended to remove closed investigatory files from the automatic protection of exemption 7,³⁹ courts have not agreed consistently with the Oakes position that, absent a clear congressional intent to liberalize NLRB discovery procedures, ongoing Board proceedings should be protected by the automatic application of exemption 7(A).⁴⁰ A minority of the district courts has followed Judge Gagliardi's approach, interpreting the FOIA as requiring a case-by-case determination.⁴¹ The reasons for supporting this approach are

³⁹ *Id.* at 492.

⁴⁰ There is general agreement that the original exemptions of the FOIA were meant to cover ongoing NLRB proceedings. *See, e.g.,* NLRB v. Hardeman Garment Corp., 406 F. Supp. 510, 512 (W.D. Tenn. 1976); *Harvey's Wagon Wheel, Inc. v. NLRB*, 91 L.R.R.M. 2410, 2413 (N.D. Cal. 1976), *aff'd*, 93 L.R.R.M. 3068 (9th Cir. Dec. 8, 1976). *See also* H.R. REP. No. 1497, 89th Cong., 2d Sess. 11 (1966), *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 2428; 110 CONG. REC. 17,667 (1964) (remarks of Sen. Humphrey). No such uniformity exists, however, concerning the effect of the 1974 amendments. Some courts have assigned great weight to congressional expressions indicating support for individualized determinations, and therefore adopt a case-by-case approach. *See, e.g.,* NLRB v. Hardeman Garment Corp., 406 F. Supp. 510, 512-13 (W.D. Tenn. 1976); *McDonnell Douglas Corp. v. NLRB*, 92 L.R.R.M. 2072, 2073-75 (C.D. Cal. 1976). In contrast, other courts have placed more emphasis on the congressional desire to protect ongoing law enforcement proceedings, and have held for *se* nondisclosure in the labor context. *See, e.g.,* *Climax Molybdenum Co. v. NLRB*, 539 F.2d 63, 64-65 (10th Cir. 1976); *Goodfriend W. Corp. v. Fuchs*, 535 F.2d 145 (1st Cir.) (*per curiam*), *cert. denied*, 97 S. Ct. 257 (1976).

⁴¹ Judge Gagliardi's district court opinion and Judge Oakes' court of appeals opinion in *Title Guarantee* are the preeminent decisions interpreting amendment 7(A). Those district court cases that relied on Judge Gagliardi's opinion in following a case-by-case determination are: *Baptist Memorial Hosp. v. NLRB*, 92 L.R.R.M. 2645, 2647 (W.D. Tenn. 1976); *McDonnell Douglas Corp. v. NLRB*, 92 L.R.R.M. 2072, 2073-74 (C.D. Cal. 1976); *Bellingham Frozen Foods, Inc. v. Henderson*, 91 L.R.R.M. 2761, 2763 (W.D. Wash. 1976); *Goodfriend W. Corp. v. Fuchs*, 411 F. Supp. 454, 458 (D. Mass.), *rev'd per curiam*, 535 F.2d 145 (1st Cir.), *cert. denied*, 97 S. Ct. 257 (1976); *Local 32, United Ass'n of Journeymen v. NLRB*, 91 L.R.R.M. 2513, 2514 (W.D. Wash. 1976); *NLRB v. Hardeman Garment Corp.*, 406 F. Supp. 510, 512-13 (W.D. Tenn. 1976). Cases reaching a similar determination without express reliance on the *Title Guarantee* district court decision include: *Maremont Corp. v. NLRB*, 91 L.R.R.M. 2645 (W.D. Okla. 1976), *rev'd per curiam*, 93 L.R.R.M. 2799 (10th Cir. Oct. 5, 1976); *Local 30, United Slate, Tile & Composition Roofers v. NLRB*, 408 F. Supp. 520 (E.D. Pa. 1976); *Deering Milliken, Inc. v. Nash*, 90 L.R.R.M. 3138 (D.S.C. 1975), *rev'd in part and aff'd in part sub nom. Deering Milliken, Inc. v. Irving*, 94 L.R.R.M. 2358 (4th Cir. Jan. 25, 1977); *Cessna Aircraft Co. v. NLRB*, 405 F. Supp. 1042 (D. Kan. 1975), *rev'd per curiam*, 542 F.2d 834 (10th Cir. 1976).

While Judge Gagliardi's decision originally enjoyed substantial support, the Second Circuit's interpretation is now clearly predominant. The five other circuits that have thus far considered the issue have all been in accord with the Second Circuit's holding. *See* *New England Medical Center Hosp. v. NLRB*, 94 L.R.R.M. 2322 (1st Cir. Dec. 28, 1976); *Goodfriend W. Corp. v. Fuchs*, 535 F.2d 145 (1st Cir.) (*per curiam*), *cert. denied*, 97 S. Ct. 257 (1976); *Roger J. Au & Son, Inc. v. NLRB*, 538 F.2d 80 (3d Cir. 1976); *Deering Milliken, Inc. v. Irving*, 94 L.R.R.M. 2358 (4th Cir. Jan. 25, 1977) (*dictum*); *Harvey's Wagon Wheel, Inc. v. NLRB*, 93 L.R.R.M. 3068 (9th Cir. Dec. 8, 1976); *Cessna Aircraft Co. v. NLRB*, 542 F.2d

forceful. Foremost in manifesting congressional intent to authorize case-by-case determinations is the statutory language itself. The requirement that the agency prove the applicability of a specific exemption,⁴² the provisions for de novo review⁴³ and severability of records,⁴⁴ and the authorization of in camera inspection by the court,⁴⁵ all tend to indicate that an individualized approach should be followed.⁴⁶ Any doubt as to the proper intentment of the statutory language may be resolved by an examination of the legislative history.

Prior to the 1974 amendments, an agency's burden of proving the applicability of an exemption was often satisfied by merely demonstrating that the withheld information was part of a broad classification of material excepted by an automatic blanket exemption.⁴⁷ The congressional debate over the 1974 amendments, however, is permeated with expressions of support for a case-by-case approach.⁴⁸ Much of this debate was prompted by an amendment

834 (10th Cir. 1976) (per curiam); *Maremont Corp. v. NLRB*, 93 L.R.R.M. 2799 (10th Cir. Oct. 5, 1976) (per curiam); *Climax Molybdenum Co. v. NLRB*, 539 F.2d 63 (10th Cir. 1976). These circuits have relied substantially on Judge Oakes' rationale in *Title Guarantee* in holding in favor of nondisclosure.

⁴² 5 U.S.C. § 552(4)(B) (Supp. V 1975).

⁴³ *Id.*

⁴⁴ *Id.* § 552(b).

⁴⁵ *Id.* § 552(4)(B).

⁴⁶ Professor Davis has asserted that in interpreting the FOIA, particular import should be given to the statutory language. In referring to the provision which permits nondisclosure only as "specifically stated," Pub. L. No. 90-23, § 552(c), 81 Stat. 55 (1967) (current version at 5 U.S.C. § 552(c) (Supp. V 1975)), he remarked: "The pull of the word 'specifically' is toward emphasis on statutory language and away from all else—away from implied meanings, away from reliance on legislative history, away from needed judicial legislation." Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 783 (1967). In view of the increased specificity of the 1974 amendments, Professor Davis's maxim is even more applicable today. For a discussion of the significance of the statutory language, see Fuselier & Moeller, *NLRB Investigatory Records: Disclosure Under the Freedom of Information Act*, 10 U. RICH. L. REV. 541, 545-46 (1976).

⁴⁷ See, e.g., *EPA v. Mink*, 410 U.S. 73, 84 (1973). Perhaps the furthest extension of the blanket exemption doctrine can be found in *Center for Nat'l Policy Review on Race & Urban Issues v. Weinberger*, 502 F.2d 370, 372 (D.C. Cir. 1974), wherein the court remarked that "[t]he sole question before us is whether the materials in question are 'investigatory files compiled for law enforcement purposes.' Should we answer that question in the affirmative, our role is 'at an end.'"

⁴⁸ See, e.g., 120 CONG. REC. 17,019 (1974), wherein Senator Kennedy, an author of the 1974 amendments, remarked:

With the new provisions it should be clear that there can be no blanket claim of confidentiality under any of the exemptions. In connection with this objective, [the FOIA] proposes specifically to reaffirm the discretion of the courts through in camera inspection to examine each and every element of requested files or records. Senator Hart, the author of amended exemption 7, stated specifically in reference to exemp-

clarifying the district courts' discretionary power to order in camera examination of disputed material.⁴⁹ Although the in camera amendment was a response to a Supreme Court decision involving the scope of the classified materials exemption,⁵⁰ it is clear that the in camera provision was meant to apply to all exemptions.⁵¹ Moreover, in the debate over exemption 7(A), the agency's burden of justifying nondisclosure was explicitly reemphasized.⁵² This burden was interpreted as requiring a showing that disclosure actually would harm, rather than could harm, an enforcement proceeding, thereby eliminating mere probability of harm as an acceptable quantum of proof.⁵³ The overall congressional philosophy that emerges is one of general disclosure, with nondisclosure authorized only when affirmatively justified "in the context of [a] particular enforcement proceeding."⁵⁴

In contradistinction to the determinative weight District Judge Gagliardi accorded the broad congressional design for an individualized application of FOIA exemptions, Judge Oakes subordinated this congressional policy to the practical demands of the delicate

tion 7(A) that, "[i]n determining whether or not the information to be released will interfere with a law enforcement proceeding it is only relevant to make such determination in the context of the particular enforcement proceeding." *Id.* at 17,033.

⁴⁹ *Id.* at 17,018-31.

⁵⁰ The in camera amendment, 5 U.S.C. § 552(a)(4)(B) (Supp. V 1975), was a direct response to *EPA v. Mink*, 410 U.S. 73 (1973), wherein the Supreme Court rejected the idea that the district courts have the discretionary power to inspect classified documents in camera. See S. REP. NO. 1200, 93d Cong., 2d Sess. 9 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6287; H.R. REP. NO. 1380, 93d Cong., 2d Sess. 9 (1974).

⁵¹ See 120 CONG. REC. 17,019 (1974) (remarks of Sen. Kennedy). The Conference Report explicitly states that the 1974 amendments authorize a court to "examine records *in camera* in making its determination under any of the nine categories of exemptions." S. REP. NO. 1200, 93d Cong., 2d Sess. 9 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6287; H.R. REP. NO. 1380, 93d Cong., 2d Sess. 9 (1974).

⁵² See 120 CONG. REC. 17,033 (1974) (remarks of Sen. Hart).

⁵³ The 1965 Senate Report stated that "Exemption No. 7 deals with 'investigatory files compiled for law enforcement purposes,' . . . [whose disclosure], except to the extent they are available by law to a private party, *could* harm the government's case in court." S. REP. NO. 813, 89th Cong., 1st Sess. 9 (1965) (emphasis added). On the other hand, the 1974 Conference Report stated that amended exemption 7 "would permit an agency to withhold investigatory records compiled for law enforcement purposes only to the extent that the production of such records *would* interfere with enforcement proceedings." S. REP. NO. 1200, 93d Cong., 2d Sess. 12 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6290 (emphasis added); H.R. REP. NO. 1380, 93d Cong., 2d Sess. 12 (1974) (emphasis added). Additionally, Senator Hart remarked that the amended exemption 7 "explicitly places the burden of justifying nondisclosure on the Government, which would have to show that disclosure *would* interfere with enforcement proceedings." 120 CONG. REC. 17,033 (1974) (emphasis added).

⁵⁴ 120 CONG. REC. 17,033 (1974) (remarks of Sen. Hart).

employee-employer relationship. The Second Circuit's analysis of the legislative history is inextricably linked to the minimal discovery that characterizes the NLRB's investigative procedures.⁵⁵ Although the Board's virtually nonexistent discovery provisions have been criticized by elements of both bench and bar,⁵⁶ courts have generally accepted its policy of nondisclosure.⁵⁷ Perceiving the Board's restrictive discovery procedures as a rationally arrived at status quo, Judge Oakes found the legislative history of the FOIA amendments too equivocal to mandate liberalization of the NLRB discovery procedures.⁵⁸

Several aspects of the legislative history do lend themselves to equivocal interpretation. Since none of the decisions specifically repudiated by Congress involved NLRB issues,⁵⁹ in enacting the amendments Congress did not explicitly demand the abandonment of the Board's prehearing procedures.⁶⁰ Furthermore, the legislature

⁵⁵ There is no inherent constitutional right to pretrial discovery, *see* *Miner v. Atlass*, 363 U.S. 641, 643-44 (1960), nor is there a provision in the NLRA that specifically requires the NLRB to use discovery procedures, *see* *NLRB v. Interboro Contractors, Inc.*, 432 F.2d 854, 858 (2d Cir. 1970), *cert. denied*, 402 U.S. 915 (1971); *NLRB v. Globe Wireless, Ltd.*, 193 F.2d 748, 751 (9th Cir. 1951). Consequently, the Board is empowered to formulate its own discovery rules. *See* *Electromec Design & Dev. Co. v. NLRB*, 409 F.2d 631, 635 (9th Cir. 1969); *NLRB v. Vapor Blast Mfg. Co.* 287 F.2d 402, 407 (7th Cir. 1961). As a result, the Board permits only minimal discovery. Under 29 C.F.R. § 102.30 (1976), depositions are allowed at the discretion of the regional director or administrative law judge for "good cause shown." The NLRB's interpretation of this rule, however, has been so restrictive as to essentially negate the rule's use as a discovery tool. *See, e.g.,* *NLRB v. Interboro Contractors, Inc.*, 432 F.2d 854, 858 (2d Cir. 1970), *cert. denied*, 402 U.S. 915 (1971). *But see* *NLRB v. Safway Steel Scaffolds Co.*, 383 F.2d 273, 276-77 (5th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968). Hence, the only materials to which a litigant in a Board proceeding may gain access as of right are witness statements released for the purpose of cross-examination after the witness has already testified. 29 C.F.R. § 102.118(b)(1) (1976).

⁵⁶ *See, e.g.,* *New England Medical Center Hosp. v. NLRB*, 94 L.R.R.M. 2322, 2326 (1st Cir. Dec. 28, 1976) (NLRB's discovery procedures labeled "trial by ambush"); 175 N.Y.L.J. 97, Nov. 19, 1975, at 1, col. 2 (New York County Lawyers' Association call for more liberal pretrial discovery system). On January 6, 1976, dissatisfaction with the Board's disclosure practices resulted in the formation of a blue ribbon task force to study, among other problems, the NLRB's prehearing discovery procedures. 1 *LAB. REL. REP. (BNA)* 375 (Jan. 13, 1976). A concise summary of the arguments for and against NLRB discovery is contained in the task force's 1976 interim report. *Id.* at 243-45 (July 26, 1976). For a discussion of the relationship between *Title Guarantee* and the failure of the task force to recommend significant modification of Board discovery procedures, see note 92 and accompanying text *infra*.

⁵⁷ *See, e.g.,* *Capital Cities Communications, Inc. v. NLRB*, 409 F. Supp. 971, 977 (N.D. Cal. 1976). *Capital Cities* represents a rather extreme case of judicially expressed disdain for Board procedures. Even in this instance, however, the district judge recognized that it was not within the province of the court to mandate new discovery procedures.

⁵⁸ 534 F.2d at 492.

⁵⁹ *See* cases cited in note 6 *supra*.

⁶⁰ 534 F.2d at 492. *See* *Harvey's Wagon Wheel, Inc. v. NLRB*, 91 L.R.R.M. 2410, 2413

did not clearly express dissatisfaction with the significant body of case law applying automatic nondisclosure to open enforcement proceedings.⁶¹ In fact, language may be found in the 1974 debates that supports the continued general inclusion of open investigatory files under exemption 7(A).⁶² Even when viewed in light of the special NLRB discovery procedures, however, these arguments do not appear to override the pervasive congressional intent for particularized determinations. Rather, at best, they would seem only to raise a point on which "reasonable judges may readily differ."⁶³ Notwithstanding the apparently equivocal legislative history, Judge Oakes' approach fails to take cognizance of the seemingly clear import of the statutory language.⁶⁴ The provision requiring a showing of harm in each case appears to eliminate the possibility of an automatic application of exemption 7(A).⁶⁵ The Second Circuit attempted to

(N.D. Cal. 1976), *aff'd*, 93 L.R.R.M. 3068 (9th Cir. Dec. 8, 1976); Fuselier & Moeller, *NLRB Investigatory Records: Disclosure Under the Freedom of Information Act*, 10 U. RICH. L. REV. 541, 546-47 (1976).

⁶¹ 534 F.2d at 490, 492. The NLRB cases most often referred to as precedent for nondisclosure in open proceedings are: *Wellman Indus., Inc. v. NLRB*, 490 F.2d 427 (4th Cir.), *cert. denied*, 419 U.S. 834 (1974); *NLRB v. Clement Bros.*, 282 F. Supp. 543 (N.D. Ga. 1968); *Barcelonetta Shoe Corp. v. Compton*, 271 F. Supp. 591 (D.P.R. 1967). The most influential of the non-NLRB cases include: *Wellford v. Hardin*, 444 F.2d 11 (4th Cir. 1971); *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970). A number of courts have seized upon the absence of any mention of the above cases in the legislative history as indicative of congressional intent to reaffirm the open-closed distinction exemplified by these cases. *See, e.g.*, *Climax Molybdenum Co. v. NLRB*, 539 F.2d 63, 64 (10th Cir. 1976); *Vegas Village Shopping Corp. v. NLRB*, 92 L.R.R.M. 2683, 2686 (C.D. Cal. 1976); *Capital Cities Communications, Inc. v. NLRB*, 409 F. Supp. 971, 976 (N.D. Cal. 1976). *Contra*, *NLRB v. Hardeman Garment Corp.*, 406 F. Supp. 510, 512 (W.D. Tenn. 1976).

⁶² *See* 120 CONG. REC. 17,033 (1974), wherein Senator Hart remarked that Congress intended exemption 7 "to prevent harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to investigative files than he would otherwise have." Later in the same discussion the Senator reiterated this sentiment by stating that the exemption applied "whenever the Government's case in court . . . would be harmed by the premature release of evidence of information not in the possession of known or potential defendants." *Id.* These statements, however, do not necessarily support the argument that records from open proceedings should be automatically exempted. A close reading of Senator Hart's comments indicates that the exemption was intended to prevent "harm," not "earlier or greater access," or "premature release." Consequently, the remarks are consistent with Judge Gagliardi's position that an agency must prove *harm* to justify nondisclosure.

⁶³ *Frankel v. SEC*, 460 F.2d 813, 819 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972) (Oakes, J., dissenting). It is ironic that, at least in the area of NLRB proceedings, the legislative history of the 1974 amendments, rather than achieving the intended result of "clarifying what the law presently requires," 120 CONG. REC. 17,035 (1974) (remarks of Sen. Kennedy), has had the effect of providing ample support for contradictory interpretations of what the law actually is.

⁶⁴ *See* notes 42-46 and accompanying text *supra*.

⁶⁵ *See, e.g.*, *McDonnell Douglas Corp. v. NLRB*, 92 L.R.R.M. 2072, 2073-74 (C.D. Cal. 1976); *Deering Millikin, Inc. v. Nash*, 90 L.R.R.M. 3138, 3144 (D.S.C. 1975), *rev'd in part*

surmount this obstacle by ruling, in effect, that statements made in the context of an unfair labor practice proceeding present a sufficiently particularized case in which harm necessarily results from disclosure.⁶⁶

The initial harm envisioned in Judge Oakes' two-pronged inherent harm argument is that premature disclosure will allow a defendant to "frustrate the proceedings or construct defenses,"⁶⁷ thereby minimizing the Board's effectiveness in presenting its "strongest case."⁶⁸ Although the Second Circuit did not fully develop this aspect of inherent harm, other courts have placed increased emphasis on the "strongest case" argument in justifying nondisclosure.⁶⁹ Proponents of the "strongest case" theory, however, have merely couched their assertions in generalized terms.⁷⁰ Positing that pretrial discovery will necessarily result in interference, these courts have not deemed it necessary to determine whether there is any *actual* interference in an individual proceeding.⁷¹ That actual

and aff'd in part sub nom. Deering Milliken, Inc. v. Irving, 94 L.R.R.M. 2358 (4th Cir. Jan. 25, 1977).

⁶⁶ See 534 F.2d at 491.

⁶⁷ *Id.*

⁶⁸ The "strongest case" argument, most notably advocated in *Wellman Indus., Inc. v. NLRB*, 490 F.2d 427 (4th Cir.), *cert. denied*, 419 U.S. 834 (1974), perceives any "premature discovery" as weakening the Board's ability to present its strongest case in court. See, e.g., *Capital Cities Communications, Inc. v. NLRB*, 409 F. Supp. 971, 977 (N.D. Cal. 1976).

⁶⁹ See, e.g., *New England Medical Center Hosp. v. NLRB*, 94 L.R.R.M. 2322, 2325-27 (1st Cir. Dec. 28, 1976); *Marathon Le Tourneau Co. v. NLRB*, 414 F. Supp. 1074, 1081-84 (S.D. Miss. 1976); *Vegas Village Shopping Corp. v. NLRB*, 92 L.R.R.M. 2683, 2687 (C.D. Cal. 1976).

⁷⁰ See, e.g., *New England Medical Center Hosp. v. NLRB*, 94 L.R.R.M. 2322, 2326 (1st Cir. Dec. 28, 1976) (release "cannot be said to lack any adverse impact on the Board's ability to prosecute its enforcement proceeding to a successful conclusion"); *Goodfriend W. Corp. v. Fuchs*, 535 F.2d 145, 147 (1st Cir.), *cert. denied*, 97 S. Ct. 257 (1976) ("cannot rule out all possibility that the company may 'be able to use disclosure to . . . frustrate the proceedings'"). Of particular interest is *Harvey's Wagon Wheel, Inc. v. NLRB*, 93 L.R.R.M. 3068 (9th Cir. Dec. 8, 1976), wherein the Ninth Circuit declared that "[c]onclusory or generalized allegations" would not sustain a claim of exemption. *Id.* at 3069. In holding that disclosure of employees' statement should not be allowed, however, the court admitted a former NLRB attorney's affidavit, which stated "his opinion that if the Board were ordered to produce all statements given it during its investigations of such charges, the Board's ability to remedy unfair labor practices would be gravely impaired." *Id.* at 3069-70. The court found this conclusory affidavit to contain "sufficient detailed facts to provide a bases that disclosure of employee statements, at least, 'would interfere with enforcement proceedings.'" *Id.* at 3070.

⁷¹ Recently, the "strongest case" argument has been advocated most vigorously by the First Circuit in *New England Medical Center Hosp. v. NLRB*, 94 L.R.R.M. 2322 (1st Cir. Dec. 28, 1976). There, the hospital sought disclosure of statements of various individuals, including nine supervisory employees expected to testify at a pending unfair labor practice hearing. Unlike other NLRB related exemption 7(A) cases, in this instance the hospital-employer had a representative present at the Board's interviews of these employees. Since

interference does not necessarily result from discovery is forcefully indicated by the conclusions of several district courts which, after in camera inspection, found that disclosure of the examined statements would not materially harm the Board's case.⁷² Indeed, in *Title Guarantee*, Judge Gagliardi, upon in camera inspection, found that no harm would result from disclosure.⁷³ Thus, the "strongest case" argument appears to be unnecessarily broad and, when analyzed in the context of a specific enforcement proceeding, often pales into an unsupportably vague assertion.⁷⁴ It is difficult, in the absence of some more explicit evidence of interference to justify the total prohibition of a case-by-case review.

Judge Oakes believed that an additional source of interference was inherent in the delicate employee-employer relationship. The Second Circuit feared that the ever-present threat of reprisals and

both the identities of the cooperating employees and the substance of their statements were known to the employer, fear of coercion and reprisal was not a valid consideration in the First Circuit's decision denying disclosure. Accordingly, the court's ruling as to the nine employees' statements relied almost exclusively on the "strongest case" argument. Speaking in broad terms and without the benefit of in camera review, the First Circuit listed several sources of possible interference. First, the court argued that disclosure of the Board's interview notes "might give some insight into what parts of the interview the agent deemed important." *Id.* at 2326. This is, in essence, a contention that disclosure would reveal the product of the Board's deliberative processes, and as such, properly should have been treated as an exemption 5 problem. See note 16 *supra*. The court next generally asserted that disclosure, "whatever its benefits, would interfere, from the enforcement agency's standpoint, with the pending enforcement proceeding." 94 L.R.R.M. 2326. It is submitted that such a broad allegation of harm is not adequate to satisfy the agency's burden of proof under the 1974 amendments. See notes 48-54 and accompanying text *supra*.

Perceiving judicial involvement in an agency's discovery procedures as detrimental interference, the First Circuit stated that "it is difficult to conceive of a greater interference than one which would involve the courts in arbitrating the Board's control of what documents to retain and what to surrender." 94 L.R.R.M. at 2326. The court concluded that "[t]he specter of involvement of the district court in discovery matters during an ongoing unfair labor practice proceeding . . . is a compelling reason to construe Exemption 7(A) to shelter investigatory records in the Board's case file . . ." *Id.* at 2327. This rationale for judicial exclusion seems to be inconsistent with the express legislative intent that the accessibility of government records remain subject to judicial scrutiny. See 120 CONG. REC. 17,019 (1974) (remarks of Sen. Kennedy).

⁷² See, e.g., *McDonnell Douglas Corp. v. NLRB*, 92 L.R.R.M. 2072, 2075 (C.D. Cal. 1976); *Baptist Memorial Hosp. v. NLRB*, 92 L.R.R.M. 2645, 2647 (W.D. Tenn. 1976).

⁷³ 407 F. Supp. at 504-05.

⁷⁴ See *McDonnell Douglas Corp. v. NLRB*, 92 L.R.R.M. 2072, (C.D. Cal. 1976), where, in referring to the agency's burden of proof, the court stated:

Generalized statements of harm of the type asserted by the defendants are not adequate. The acceptance of the defendants' contention that disclosure of any witness statement in any case is exempted because any such disclosure would make it more difficult for the Board to prevail in its enforcement proceeding would result in no witness statement ever being disclosed . . .

Id. at 2074.

employee coercion would deter potential witnesses from testifying, thereby resulting in harm to the particular proceeding.⁷⁵ This specter appears to be illusory, however, for several reasons. Employees who provide statements to Board agents are specifically protected from employer reprisals and coercion by the NLRA.⁷⁶ Additionally, if a FOIA request is granted at the district court level, the court can fashion relief to further protect the employee's interests.⁷⁷ The opportunity for obstruction and coercion is also minimized by the general proximity of disclosure orders to the date of the scheduled unfair labor practice hearings.⁷⁸ Finally, the Board's own rules provide for disclosure of a witness' statements for cross-examination purposes after he has testified.⁷⁹ Since any employee who reasonably may be expected to testify already enjoys little expectation of confidentiality, the increased deterrent effect of FOIA mandated disclosure is questionable.⁸⁰

Although the case-by-case approach may not increase the possibility of employer coercion in a particular case, it has been argued that pretrial disclosure may have a "chilling effect" on future employee cooperation with Board investigations.⁸¹ As a practical mat-

⁷⁵ 534 F.2d at 491. *See, e.g., Atlas Indus., Inc. v. NLRB*, 91 L.R.R.M. 2676, 2679 (N.D. Ohio 1976).

⁷⁶ *See* 29 U.S.C. § 158(a)(4) (1970), which provides: "(a) It shall be an unfair labor practice for an employer . . . (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter." In *NLRB v. Scrivener*, 405 U.S. 117, 121-25 (1972), this provision was interpreted as protecting not only those employees who actually testify, but also employees who give statements at any point during an investigation.

⁷⁷ *See, e.g., Furr's Cafeterias, Inc. v. NLRB*, 416 F. Supp. 629 (N.D. Tex. 1976). In ordering disclosure of witness' affidavits, the district court prohibited the plaintiff "from approaching, contracting, calling, or otherwise seeking out and confronting the affiants prior to the presentation of each affiant's testimony at the National Labor Relations Board hearing in question." *Id.* at 631. If the plaintiff in this situation attempted to exert any leverage on its employees it would not only be subject to contempt charges but also to suit under the NLRA. *See* note 76 *supra*.

⁷⁸ *See, e.g., Robbins Tire & Rubber Co. v. NLRB*, 92 L.R.R.M. 2586, 2587 (N.D. Ala. 1976) (11 days); *Read's Inc. v. NLRB*, 91 L.R.R.M. 2722 (D. Md. 1976) (1 day); *Bellingham Frozen Food, Inc. v. Henderson*, 91 L.R.R.M. 2761, 2764 (W.D. Wash. 1976) (7 days).

⁷⁹ *See* 29 C.F.R. § 102.118(b)(1) (1976).

⁸⁰ *See, e.g., NLRB v. Schill Steel Prods., Inc.*, 408 F.2d 803, 805 (5th Cir. 1969); *McDonnell Douglas Corp. v. NLRB*, 92 L.R.R.M. 2072, 2075 n.2 (C.D. Cal. 1976). The only instance in which an informant might enjoy a reasonable expectation of confidentiality is one in which there is a slight possibility that he will be called to testify. *See, e.g., Poss v. NLRB*, 91 L.R.R.M. 2232, 2234 (D.D.C. 1975). The usual reason for not being called to testify would be the insubstantial value of the testimony. Thus, it is submitted that the deterrent effect of pretrial discovery on those who reasonably expect anonymity would produce only a minimal reduction in the Board's enforcement capacity.

⁸¹ One court has interpreted the legislative intent behind the exemption as "clearly

ter, if the NLRB is required to prove a specific harm in order to substantiate every claim to an exemption, discovery will be forced at the agency level.⁸² Consequently, as employees become increasingly aware that their employers may have early access to their statements, they may be more reluctant to cooperate with the Board and expose themselves to possible reprisals.⁸³ Moreover, with disclosure effectively compelled at the agency level, there will be little opportunity to implement the mitigating factors of court-ordered disclosure. Therefore, this argument concludes, if pretrial discovery is accepted as the norm, a cooperative employee faces the prospect of fewer safeguards over a longer period of time, and a corresponding increase in reluctance to provide information may be expected.

It is submitted, however, that a "chilling effect" on employee cooperation can be avoided without foreclosing discovery of all material protected by the *Title Guarantee* holding.⁸⁴ Several recent district court decisions have held that measurable segments of such material can be disclosed without undue interference with Board proceedings.⁸⁵ Assuming, *arguendo*, that the release of the remain-

contemplating that information should be protected from disclosure if its release in a particular enforcement proceeding would interfere with subsequent enforcement proceedings of the same type." *Harvey's Wagon Wheel, Inc. v. NLRB*, 91 L.R.R.M. 2410, 2414 (N.D. Cal. 1976), *aff'd*, 93 L.R.R.M. 3068 (9th Cir. Dec. 8, 1976). The deterrent effect of disclosure on future investigations and proceedings is a repeated theme in cases advocating a blanket 7(A) exemption. *See, e.g., Capital Cities Communications, Inc. v. NLRB*, 409 F. Supp. 971 (N.D. Cal. 1976).

⁸² As a matter of administrative efficiency, the NLRB would be reluctant to contest cases where withholding might be justified but the agency's burden of proof not easily sustained. Other factors which would deter the NLRB from defending claims at the district court level are the assessments and sanctions which may be imposed on the Board or its employees for arbitrary or capricious withholding. *See* 5 U.S.C. § 552(a)(E), (F) (Supp. V 1975).

⁸³ Five hundred and fourteen unfair labor practice charges alleging employer coercion or reprisals against employees for testifying were filed in the fiscal year ending June 1974. *See* Letter from Peter G. Nash, former NLRB General Counsel, to Clunet R. Lewis (Aug. 8, 1975), *reprinted in Labor Relations Yearbook—1975* at 337 (BNA 1976). It is interesting to note that in *Title Guarantee*, although the NLRB argued that there "would necessarily be interference," Judge Oakes ruled only that interference "could well result." 534 F.2d at 491 (emphasis added). This language admits a degree of uncertainty which apparently does not satisfy the statutory provision compelling an agency to prove that disclosure "would . . . interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A) (Supp. V. 1975). *See generally* note 53 *supra*.

⁸⁴ Several courts have rebutted the "chilling effect" argument. *See, e.g., McDonnell Douglas Corp. v. NLRB*, 92 L.R.R.M. 2072, 2074 (C.D. Cal. 1976); *Local 32, United Ass'n of Journeymen v. NLRB*, 91 L.R.R.M. 2513, 2515 (W.D. Wash. 1976).

⁸⁵ The logic of *Temple-Eastex, Inc. v. NLRB*, 410 F. Supp. 183 (E.D. Tex. 1976) is particularly appealing. In *Temple-Eastex* the court drew a firm distinction between statements favorable to an employer and those unfavorable. In ordering disclosure of favorable affidavits, Chief Judge Fisher remarked that "[t]he constantly reiterated justification for protecting an NLRB affidavit from disclosure is the fear of reprisal by the company against

ing material might result in reprisals and employee coercion, it is submitted that the utilization of an automatic 7(A) exemption is too broad a solution to this problem. Since the core of the "chilling effect" argument is that the possibility of coercion and reprisals will deter employees from cooperating with the Board, the focus of any remedy should be on protecting an employee's identity. Exemption 7(D) was designed to provide this type of protection. The more appropriate response, therefore, would be for the Board to grant cooperating employees an "express assurance of confidentiality,"⁸⁶ thereby bringing employee identities within the protection of exemption 7(D).⁸⁷ Under this exemption, only those segments of an

the employee . . . We cannot, however, envision any reprisal by a company against affiants who have made statements favorable to its position at the NLRB hearing." *Id.* at 186 (citations omitted). One commentator has referred to *Temple-Eastex* as the "proper approach" to follow in reconciling the FOIA with the special demands of the employee-employer situation. See Note, *Backdooring the NLRB: Use and Abuse of the Amended FOIA for Administrative Discovery*, 8 *Loy. U.L.J.* 145, 182 (1976).

A further inroad into *Title Guarantee's* blanket exemption was advocated in *Robbins Tire & Rubber Co. v. NLRB*, 92 L.R.R.M. 2586 (N.D. Ala. 1976). The *Robbins* court distinguished *Title Guarantee*, finding that in *Title Guarantee* all written statements were requested, whereas in *Robbins* only the statements of people scheduled to testify were requested. Focusing on the time element of discovery rather than on the mere fact of disclosure, the court ordered the statements released. *Id.* at 2588. The *Robbins* court convincingly reasoned that it would be difficult for the Board to sustain its burden of proving harm, since the witnesses already knew that their statements would be revealed shortly. If the holdings of the *Robbins* and *Temple-Eastex* courts are followed and combined, the only employee statements that would remain under the ambit of Judge Oakes' automatic exemption would be unfavorable statements made by persons who would not be called to testify in the near future.

⁸⁶ S. REP. No. 93-1200, 93d Cong., 2d Sess. 13 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6291.

⁸⁷ Exemption 7(D) protects investigatory records, the release of which would "disclose the identity of a confidential source." 5 U.S.C. § 552(b)(7)(D) (Supp. V 1975). The intent of the provision was made clear by its author, Senator Hart, when he remarked:

[T]he amendment protects without exception and without limitation the identity of informers. It protects both the identity of informers and information which might reasonably be found to lead to such disclosure. These may be paid informers or simply concerned citizens who give information to enforcement agencies and desire their identity to be kept confidential.

120 CONG. REC. 17,034 (1974).

That exemption 7(D) is a viable provision for protecting employee statements, is indicated by several decisions which have utilized the exemption to protect NLRB records. See, e.g., *Baptist Memorial Hosp. v. NLRB*, 92 L.R.R.M. 2645, 2647-48 (W.D. Tenn. 1976); *Kaminer v. NLRB*, 90 L.R.R.M. 2269, 2271 (S.D. Miss. 1975). *Contra*, *Poss v. NLRB*, 91 L.R.R.M. 2232, 2234 (D.D.C. 1975). Since several limitations have been imposed on exemption 7(D), the Board has not found it as attractive as exemption 7(A). See *Marathon LeTourneau Co. v. NLRB*, 414 F. Supp. 1074, 1084 (S.D. Miss. 1976) (prospective witnesses not considered confidential sources since "identity will ultimately be disclosed" notwithstanding fact that express assurance of confidentiality was given); *Furr's Cafeterias, Inc. v. NLRB*, 416 F. Supp.

employee's statements which do not reveal the employee's identity will be disclosed. Thus, while portions of his statements will be released, the employee will not be faced with the possibility of coercion and reprisal. If such a procedure is used, the "chilling effect" argument becomes meaningless.⁸⁸

Confined to its facts, the adverse effect of *Title Guarantee's* holding on the general policy of disclosure would be minimal. By relying on the "strongest case" argument, however, Judge Oakes laid the precedential groundwork for a greater departure from the case-by-case approach intended by Congress.⁸⁹ Several cases have already construed *Title Guarantee* up to, and possibly beyond, its narrow limits,⁹⁰ and it is likely that the case will eventually be cited to sanction the broad exemption of other types of open investigatory records. *Title Guarantee* has also had a stifling effect on NLRB initiated reform. Conflicting district court interpretations of the 1974 amendments had prompted the Board to establish a task force

629, 631 (N.D. Tex. 1976) (severable part of records that will not disclose identity must be made available).

⁸⁸ Under the "chilling effect" argument, the primary means for averting potential coercion and reprisals is the preservation of an employee-informant's identity. See, e.g., *Vegas Village Shopping Corp. v. NLRB*, 92 L.R.R.M. 2683, 2687-88 (C.D. Cal. 1976).

⁸⁹ The Board argued for an open-closed distinction in determining the applicability of exemption 7(A). 534 F.2d at 490. Although Judge Oakes did not expressly accept such an expansive interpretation, stating that it was "unnecessary to make the broad determination that any investigative information obtained in connection with a pending enforcement proceeding is per se nondiscloseable," *id.* at 491, he did lend indirect support to the NLRB's position by observing that in passing the 1974 amendments Congress was concerned with and meant to overrule "closed investigative file cases." *Id.* at 492 (emphasis in original).

⁹⁰ One expansive interpretation of *Title Guarantee* is *Goodfriend W. Corp. v. Fuchs*, 535 F.2d 145 (1st Cir.) (per curiam), *cert. denied*, 97 S. Ct. 257 (1976). There, the First Circuit reversed a district court judgment ordering disclosure of statements of witnesses who were to testify at a hearing scheduled the next day. The court held that "[e]ven in this case we cannot rule out all possibility that the company may 'be able to use disclosure to learn the Board's case in advance and frustrate the proceedings . . .'" *Id.* at 147, quoting *Title Guar. Co. v. NLRB*, 534 F.2d 484, 491 (2d Cir.), *cert. denied*, 97 S. Ct. 98 (1976). Thus, the test propounded in *Title Guarantee* for applying exemption 7(A) has already been extended from whether the NLRB has sustained its burden of proving harm to the proceeding, to whether the court can rule out all possibility of interference.

More recently, in *New England Medical Center Hosp. v. NLRB*, 94 L.R.R.M. 2322 (1st Cir. Dec. 28, 1976), the First Circuit abandoned any pretext of reliance on the special employer-employee relationship, basing its decision solely on the "strongest case" argument. Although the court refrained from granting automatic protection for all records relating to closed NLRB proceedings, its decision clearly supports a blanket exemption for records pertaining to ongoing enforcement proceedings. *Id.* at 2325-29. In order to qualify for such comprehensive protection, the *New England* court required only that the Board "verify by affidavit or otherwise that the exempt open file contains nothing but statements, evidence or other material relevant to the unfair labor practice complaint then being prosecuted." *Id.* at 2327.

to reevaluate its discovery procedures.⁹¹ The broad protection accorded NLRB proceedings by the Second Circuit, however, revived the recalcitrant Board attitude toward reform, thus rendering the task force's study perfunctory.⁹²

In amending the FOIA Congress presented the courts with a legislative history that lends itself to conflicting interpretations. Both Judge Oakes' blanket exemption approach and Judge Gagliardi's case-by-case approach have shortcomings. The case-by-case approach has the undesirable consequence of producing an indirect and probably unintended reformation of NLRB discovery.⁹³ This could be mitigated, however, by utilizing other exemptions and amending the NLRB's internal procedures.⁹⁴ On the other hand, the Second Circuit's approach may have the more pervasive effect of inhibiting the liberal implementation of the FOIA by setting a precedent for an overbroad interpretation of exemption 7(A).⁹⁵ On bal-

⁹¹ See note 56 *supra*.

⁹² The hope for any meaningful reform was largely dissipated by the apparent endorsement of the NLRB's position given by *Title Guarantee* and similar decisions in other circuits. See note 41 *supra*. In fact, within two months of the *Title Guarantee* decision, NLRB General Counsel John S. Irving felt confident enough to impose four "essential prerequisites" upon any potential proposals promulgated by the task force. Briefly stated, the criteria are that: (1) disclosure speed rather than delay Board proceedings; (2) disclosure result in more settlements; (3) procedures ensure against intimidation and deterrence of employees; and, (4) the General Counsel gain reciprocal access to management material. 1 LAB. REL. REP. (BNA) 85 (May 31, 1976). By mid-July, the committee chairman was forced to report that the committee was deadlocked and any forthcoming recommendations would "fall short of anything resembling a wholesale opening up of NLRB proceedings." *Id.* at 242. The committee's interim report, issued Nov. 5, 1976, embodied five recommendations, the most notable of which provides for the exchange of documentary evidence at a pretrial conference held 30 to 60 minutes prior to a hearing. Even this limited concession is conditioned by nonidentification of employees. The inability of the committee to reach more substantial agreement was attributed to a division "epitomized by the strongly held and widely disparate opinions on the reality of employee fear as an inhibiting factor in securing statements from witnesses." *Id.* at 247.

⁹³ Even the most ardent advocates of the case-by-case method admit that the FOIA was not intended to be a discovery tool. See, e.g., *Local 30, United Slate, Tile & Composition Roofers v. NLRB*, 408 F. Supp. 520, 524 (E.D. Pa. 1976); *Deering Milliken, Inc. v. Nash*, 90 L.R.R.M. 3138, 3141 (D.S.C. 1975), *aff'd in part and rev'd in part sub nom.* *Deering Milliken, Inc. v. Irving*, 94 L.R.R.M. 2358 (4th Cir. Jan. 25, 1977).

⁹⁴ See, e.g., Garvey, *Prehearing Discovery in NLRB Proceedings*, 26 LAB. L.J. 710, 718 (1975), wherein the author remarks that employees should be protected through the use of a rebuttable presumption. In essence, the presumption would be that any adverse change in an employee-witness' employment arrangements following discovery was a reprisal.

⁹⁵ Emboldened by its recent successes in the circuit courts, the NLRB appears prepared to seek restoration of the across-the-board protection apparently rejected by Congress in 1974. Particularly significant is the First Circuit's passing reference to the Board's argument, that "closed files are exempt (perhaps permanently) quite apart from their effect on [the] pending case." *New England Medical Center Hosp. v. NLRB*, 94 L.R.R.M. 2322, 2329 (1st Cir. Dec. 28, 1976).

ance, it appears that the judiciary has not been provided with a satisfactory statutory tool for harmonizing NLRB procedures and the FOIA. The present legislative scheme fails to reconcile the needs of the NLRB in its prosecutorial capacity with the general policy of governmental disclosure underlying the FOIA. Ultimately, resolution of the exemption 7(A) imbroglio lies with the legislature. It is hoped that *Title Guarantee* and its progeny will impress upon Congress the need for clarification of the scope of exemption 7.

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A RETREAT FROM ABSOLUTE IMMUNITY FOR FEDERAL OFFICIALS

Economou v. United States Department of Agriculture

For many years, the courts have sought to achieve a delicate equilibrium between the protection of individual rights and the insulation of government officials from liability for the infringement of those rights.¹ The judicial attitude favoring absolute immunity for federal officials² culminated in *Barr v. Mateo*,³ a defamation

¹ The debate concerning the appropriate balance between individual protection and governmental immunity has been raging since the early days of the common law. See, e.g., Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1-2 (1963). The problem is perplexing because of the strong countervailing policies that underlie each argument. Opponents of governmental immunity have argued that since it is a fundamental principle of Anglo-American jurisprudence that no man stands above the law, public office should not shield its occupant from liability for his acts. Proponents of governmental immunity, however, point to the ancient maxim that the sovereign cannot be sued in his own court. See, e.g., Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 263 (1937). As the individual sovereign was replaced by modern bureaucratic government, the concept of sovereign immunity was extended to the state and to public officials acting as agents of the state. See W. PROSSER, *THE LAW OF TORTS* § 131, at 970-71 (4th ed. 1971). This idea had as its fundamental support

two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability [a governmental] officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of liability would deter his willingness to execute his office with the decisiveness and judgment required by the public good.

Scheuer v. Rhodes, 416 U.S. 232, 240 (1974) (footnote omitted), citing Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 223 (1963).

² The federal penchant for granting absolute immunity originally was evidenced by the constitutional grant of immunity to legislators. U.S. CONST. art. I, § 6. Absolute immunity subsequently was extended to judges by the federal courts. See *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871). Similarly, the federal courts have afforded the chief officials of the executive branch absolute immunity. See, e.g., *Spalding v. Vilas*, 161 U.S. 483 (1896) (Postmaster General); *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949