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NOTES

THE PLAIN MEANING OF THE FREEDOM OF INFORMATION ACT: NLRB V. GETMAN

In *NLRB v. Getman*,¹ the Court of Appeals for the District of Columbia Circuit narrowed the scope of information which administrative agencies may withhold under the Freedom of Information Act.² Compelling the National Labor Relations Board to disclose 35 *Excelsior* lists,³ the court found that nondisclosure was not warranted by any of the Act's exemptions. Moreover, courts were found powerless to withhold information not within one of the Act's specific exemptions.⁴

Plaintiffs, both labor law professors and former NLRB attorneys, had sought the lists in order to conduct a study funded by the National Science Foundation. The study was designed to test empirically the behavioral assumptions underlying Board rules governing union representation elections. The Board had sought to withhold the lists under exemptions (4), (7) and (6) of the Act. The court dealt with the applicability of each of these exemptions before turning to the issue of judicial discretion.⁵

EXEMPTION (4): TRADE SECRETS AND COMMERCIAL OR FINANCIAL INFORMATION OBTAINED FROM A PERSON AND PRIVILEGED OR CONFIDENTIAL

Initially, the Board argued that exemption (4) allowed the withholding of any information given the government in confidence. The

1. 450 F.2d 670 (D.C. Cir. 1971).

2. 5 U.S.C. § 552 (1970) [hereinafter referred to as the Act]. The Act provides that, subject to nine categorical exemptions, identifiable records of government agencies shall be made available to any person upon request. The Act is part of the Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (1970).

3. Within seven days after a union representation election is directed, an employer must furnish the NLRB Regional Director with the names and addresses of all employees eligible to vote in the election. The Board transmits this list to the union to give it an opportunity to contact the employees. *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966). The Supreme Court accepted the principle of *Excelsior* in *NLRB v. Wyman-Gordan Co.*, 394 U.S. 759 (1969).

4. The district court had found the lists were not within the Act's exemptions and that, assuming courts had equitable discretion to deny disclosure of information not specifically exempted, the Board had not satisfied its burden of justifying nondisclosure. The Act places the burden of justifying nondisclosure on the agency from which information is sought. 5 U.S.C. § 552(a) (3) (1970).

5. This note is limited to a discussion of the particular issues raised by the decision in *Getman*. The most comprehensive treatment of the Act and the early decisions under it can be found in Note, *The 1966 Freedom of Information Act: Early Judicial Interpretations*, 44 WASH. L. REV. 641 (1969) [hereinafter cited as *1966 Act*].

court, however, regarded such a construction as contrary to the "plain meaning"⁶ of the exemption, thereby adopting the view of *Consumers Union of United States, Inc. v. Veterans Administration*⁷ that exemption (4) applied only to: "(1) trade secrets and (2) information which is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential."⁸ Therefore, according to the *Getman* court, exemption (4) afforded no justification for the Board's withholding of the noncommercial, nonfinancial *Excelsior* lists.

Following its quotation from *Consumers Union*, the court characterized an *Excelsior* list as:

A bare list of names and addresses of employees *which employers are required to give the Board, without any express promise of confidentiality*, and which cannot be fairly characterized as "trade secrets" or "financial" or "commercial" information.⁹

When this characterization of *Excelsior* lists is compared with the earlier breakdown of exemption (4), the relevance of the emphasized phrase is unclear. As "confidential" is apparently the only requisite element of exemption (4) whose legal meaning is not relatively certain,¹⁰ any significance the court's observations may have must relate to that term. Read with the other D.C. Circuit cases which have dealt with the meaning of "confidential," *Getman* indicates that an unintentional definition of that term may be emerging. The result could be confusing in that the "express promise" and "compulsion of law" requirements of the definition are, despite the *Getman* dicta, inapplicable to exemption (4).

In *Ackerley v. Ley*,¹¹ the D.C. court stated in dictum that receipt of medical records under an express promise of confidentiality would not in itself justify nondisclosure under exemption (6), despite the fact that such records are explicitly mentioned in (6) as the type which the exemption was designed to protect from disclosure.¹² It thus seems unlikely that exemption (4), which does not expressly mention any kind of record as protected and involves less delicate interests than medical

6. 450 F.2d at 673.

7. 301 F. Supp. 796 (S.D.N.Y. 1969).

8. *Id.* at 802.

9. 450 F.2d at 673 (emphasis added).

10. Note, *Freedom of Information: The Statute and the Regulations*, 56 GEO. L.J. 18, 35-37 & n.126 (1967).

11. 420 F.2d 1336 (D.C. Cir. 1969).

12. *Id.* at 1339-40 n.3.

privacy, could serve to prevent disclosure on the basis of an express promise of confidentiality.¹³ The observation of the *Getman* court must, therefore, imply that although an express promise alone will not defeat disclosure, it is nonetheless somehow relevant to a court's inquiry into whether the information is confidential. In *Grumman Aircraft Engineering Co. v. Renegotiation Board*,¹⁴ the D.C. court described the inquiry as a process of determining whether documents "contain financial or commercial information which the informant would not reveal to the public and therefore are exempt from disclosure."¹⁵ To meet this test, an informant's extraction of an express promise of confidentiality could be used in the process as evidence that an informant would not reveal the information to the public.

The court's observation that the lists were given under compulsion of law also adds an unwarranted judicial gloss to the meaning of "confidential." In *Bristol-Myers Co. v. Federal Trade Commission*,¹⁶ the D.C. court stated that exemption (4) functioned to protect the privacy of one who "offers information to assist government policy-makers."¹⁷ *Getman's* observation that the *Excelsior* lists were required to be given to the Board may be read with *Bristol-Myers* as indicating

13. Professor Kenneth Culp Davis believes *Ackerley's* comment "has applications far beyond the sixth exemption." K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3A.22 (1970 Supp.) [hereinafter cited as DAVIS TREATISE]. While Davis did not specify these applications, he would probably agree with the one made here. However, exemption (6)'s unique balancing requirement [see note 37 *infra* & text accompanying] may so distinguish it from other exemptions that such analogies cannot be drawn with certainty. While an express promise may be accorded varying weights when the interest of personal privacy is being balanced, the intellectual process involved in according weights in a balancing situation is not necessarily the same as that involved in determining whether a document fits a definition of "confidential."

14. 425 F.2d 578 (D.C. Cir. 1970).

15. *Id.* at 582. Such an approach was criticized before *Grumman* as holding the government to standards established by private parties even though the information might affect the public interest. Comment, *Freedom of Information—Court May Permit Withholding of Information not Exempted from Disclosure under the Freedom of Information Act*, 5 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 121, 124 (1970).

A more telling criticism is that the *Grumman* test may be used to justify withholding information in just such a case as the House Report accompanying the Act says it was designed to prevent: In 1962, the National Science Foundation refused to disclose cost estimates submitted by unsuccessful bidders for an NSF contract. Withholding was based upon the NSF's view of "the public interest." The successful contractor had not submitted the lowest bid. H.R. REP. No. 1497, 89th Cong., 2d Sess. 5 (1966) [hereinafter cited as H.R. REP.]. Under the *Grumman* method of determining whether information should be exempted under (4), the successful contractor's quite reasonable unwillingness to disclose his bid would have justified the NSF in refusing to disclose. If the *Grumman* test not only fails to correct the abuses the Act was designed to correct, but actually serves as a basis for their continuance, the test cannot be correct.

16. 424 F.2d 935 (D.C. Cir. 1970).

17. *Id.* at 938.

that information not voluntarily given cannot be exempt from disclosure as confidential under (4). However, nothing in the exemption's plain language, upon which the court so assiduously relied, requires such a restriction.¹⁸

EXEMPTION (7): INVESTIGATORY FILES COMPILED FOR LAW
ENFORCEMENT PURPOSES EXCEPT TO THE EXTENT AVAILABLE
TO A PARTY OTHER THAN AN AGENCY

In holding exemption (7) inapplicable, the court again adopted a "plain language" view of the statute's meaning. The court rejected both the Attorney General's Memorandum interpreting the Act¹⁹ and the House report²⁰ upon which the Memorandum was based. Instead, the court interpreted exemption (7) in accord with the Senate report²¹ which equated "law enforcement purposes" with the prosecution of law violators. The court required that disclosure be capable of harming the Government's case "in court"²² before the exemption could apply.²³

18. When the D.C. court does attempt to clarify the meaning of "confidential," it may seek to derive a standard from the exemption's purpose. Unfortunately, past opinions have read into exemption (4) a purpose to protect privacy without assessing the implications of this approach. Thus, *Bristol-Myers* viewed the function of exemption (4) in terms of privacy, and *Grunman* described the exemption's purpose as avoidance of "unwarranted invasions of personal privacy." 425 F.2d at 580. However, another exemption in the Act, exemption (6), expressly provides for withholding information if disclosure would result in a "clearly unwarranted invasion of personal privacy." Finding a similar purpose in exemption (4) is at best redundant. At worst, it injects an interest-balancing process into the exemption through use of the term "unwarranted." Such a process is not justified by the plain language of the exemption. Moreover, the court in *Getman* described balancing as inappropriate under any exemption other than (6). Ambiguities in the term "confidential" will, therefore, not be cured by resorting to case descriptions of exemption (4)'s purpose. The next step must be toward a definition of "confidential" which effectively separates exemptions (4) and (6). As long as anomalies in judicial interpretations remain, agencies may be expected to take advantage of them in order to avoid disclosure.

19. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT (1967) [hereinafter cited as ATTORNEY GENERAL'S MEMORANDUM].

20. H.R. REP., *supra* note 15.

21. S. REP. No. 813, 89th Cong., 1st Sess. (1965) [hereinafter cited as S. REP.]. The Court regarded the Senate report as a more reliable indicator of legislative intent than the House report because the latter was not published until after the Senate had passed its bill. The Senate report, on the other hand, had been considered by both houses. 450 F.2d at 673 n.8. In addition, the bill originated in and was drafted in the Senate. Brief for Consumers Union of United States, Inc., as Amicus Curiae at 12.

22. The phrase "in court" should not be construed as exclusive. *Bristol-Myers* indicated the exemption may apply to investigatory files compiled for adjudicatory proceedings which are not, strictly speaking, "in court." 424 F.2d at 939. *Bristol-Myers* was cited in support of the *Getman* holding.

23. 450 F.2d at 673. Compare the court's narrow reading of the exemption with those in *Evans v. Transportation Dep't*, 446 F.2d 821 (5th Cir. 1971), and *Cowles Communications, Inc. v. Department of Justice*, 325 F. Supp. 726 (N.D. Cal. 1971). Both held that exemption (7) applied to investigatory files although

Excelsior lists lack both characteristics and, thus, could not be exempt from disclosure under (7). Prior to *Getman*, however, agency regulations drew heavily upon the Attorney General's Memorandum. Therefore, it is important to delineate that part of the House report which goes beyond the scope of the document the D.C. court regards as controlling.

Professor Kenneth Culp Davis, who was cited by the court to support its reliance on the Senate report, believes the Senate's term "law violators"²⁴ is compatible with the House's view that the exemption covers investigatory files related not only to the enforcement of criminal laws but also to all other types of laws. However, Professor Davis believes the House report enlarges the terms of the statute by allowing inclusion of noninvestigative files within the exemption merely because they are "commingled"²⁵ with a larger investigative file.²⁶ Under *Getman*, therefore, agencies may not suppress noninvestigative files by the commingling technique tacitly allowed by the House report and the Attorney General's Memorandum.²⁷ However, whether particular information bears such a direct relationship to impending proceedings that the Government's case would be harmed in court by premature discovery must still be determined on a case-by-case basis.²⁸

EXEMPTION (6): PERSONNEL AND MEDICAL FILES AND SIMILAR
FILES, THE DISCLOSURE OF WHICH WOULD CONSTITUTE A CLEARLY
UNWARRANTED INVASION OF PERSONAL PRIVACY

The *Getman* court held that, even assuming *Excelsior* lists are among the types of information which exemption (6) was designed to protect from forced disclosure, the Board had not sufficiently justified nondisclosure under the exemption. The court regarded exemption (6) as requiring

a court reviewing the matter de novo to balance the right of

there was no possibility of the files' being used in court. Neither case was mentioned by the court in *Getman*.

24. S. REP., *supra* note 21, at 9.

25. The term "commingle" was first used in this sense in Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1, 9 (1970) [hereinafter cited as Nader].

26. DAVIS TREATISE, *supra* note 13, at § 3A.23; Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 799-800 (1967) [hereinafter cited as Davis].

27. Some agencies have been accused of exploiting the exemption by deliberately opening investigative files in order to insert, and thus exempt, a requested record. Nader, *supra* note 25, at 7, 10.

28. Since determinative rules governing all situations are difficult to construct, avoidance practices under the exemption may continue to be checked only by threat of suit. If a recalcitrant agency doubts that the threat will be carried out, investigative files could continue as catchalls of information which the agency is determined to conceal.

privacy of affected individuals against the right of the public to be informed; and the statutory language "clearly unwarranted" instructs the court to tilt the balance in favor of disclosure.²⁹

Getman's balancing was a multistep process. The court first inquired whether disclosure to the plaintiffs would invade the privacy of the individuals whose names and addresses were disclosed. The court found that it would. Secondly, the court evaluated the seriousness of the invasion and found it to be "relatively minor," since an employee contacted for an interview during plaintiffs' study could refuse to disclose any information more personal than a name and address.³⁰

Against this invasion of individual privacy the court balanced the study's public interest purpose. Labor law scholars have long called for empirical inquiry into the relevance of the elaborate regulations which govern the conduct of parties to a union representation election.³¹ If

29. 450 F.2d at 674.

30. The court noted that the employee is first contacted by telephone and asked if he is willing to be interviewed. *Id.* at 675 & n.12. He is forewarned by a letter describing the study and giving assurances of confidentiality and of the independence of the study from the parties to the election. Brief for Appellees at 8. The court did not, however, note that the initial contact is in person if the employee does not have a phone. *Id.* at 8 n.19.

The court found that the exemption was directed toward the protection of "intimate" and "highly personal" records, such as those kept by the Veterans Administration, the Department of Health, Education and Welfare, the Selective Service System or the Bureau of Prisons. A bare name and address, on the other hand, can betray nothing embarrassing. 450 F.2d at 675, citing H.R. REP., *supra* note 15, at 11; S. REP., *supra* note 21, at 9. However, a list of names and addresses is seldom "bare." Lists are usually compiled for reasons. The reasons may be personal or embarrassing to the persons listed. The Department of Defense, for example, has a list of names of contractors from whom the Department will not accept bids. Many of those on the list have been convicted of fraud in connection with defense contracting. Disclosure of such a list might be highly embarrassing, although the list contains nothing more than names and addresses. See 1966 Act, *supra* note 5, at 675 n.170.

31. The court cited Bernstein, *The N.L.R.B.'s Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 582 (1970); Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 46-53, 88-90 (1964); Samoff, *N.L.R.B. Elections: Certainty and Uncertainty*, 117 U. PA. L. REV. 228, 253 (1968) [hereinafter cited as Samoff]; and Note, *Behavioral and Non-Behavioral Approaches to NLRB Representation Cases*, 45 IND. L.J. 276 (1970).

Samoff says one of the Board's behavioral assumptions is that employees are generally "unthinking, unfeeling, passive and reactive—easily swayed, unable to evaluate, and susceptible to propaganda, promises and blandishments." Samoff, *supra* at 235, quoted in Note, *supra* at 277 n.3. Bernstein suspects most Board doctrine is based upon "untested suppositions," and that, if they are unfounded, "the whole Board election process is askew." Bernstein, *supra* at 582, quoted in Brief for Appellees at 5. The Board admits it does not evaluate the actual effect on employees of specific party conduct. Rather, the Board determines "whether it is reasonable to conclude that the conduct tended to prevent the free formation and expression of the employee's

the Board's regulations are founded upon invalid behavioral assumptions, the tremendous costs of Board regulation could be reduced.³²

The Board argued, however, that the interviews could influence employee votes, result in challenges to election results and thereby necessitate Board hearings to determine the validity of election results. The resultant delay in resolving representation issues was alleged to be contrary to the public interest. In effect, the Board asserted that the study's potential interference with the "laboratory conditions" of elections detracted from the weight to be accorded the public interest in the study's successful completion. The Board alleged, therefore, that the public interest in the study did not justify an invasion of personal privacy.³³

The Board's objection to the possibility of additional hearings and delays was dismissed as speculative and a "shortsighted view" of what was ultimately in the Board's self-interest.³⁴ The court noted that the purpose of the study was to determine the necessity of the very regulations which give rise to the hearings and delays the Board feared. The court further examined the quality of the study and the directors' qualifications, found both to be excellent, and determined that the study was thus likely to achieve its public interest purpose.³⁵ In effect, the court required

choice." 450 F.2d at 676 n.16, quoting 33 N.L.R.B. ANN. REP. 60 (1969). Cf. *The Liberal Market, Inc.*, 108 N.L.R.B. 1481 (1954), where the Board said, "We seek to establish ideal conditions insofar as possible, but we appraise the actual facts in the light of realistic standards of human conduct." *Id.* at 1482, quoted in Note, *supra* at 276 n.2.

32. The results of approximately one in seven representation elections are challenged for violation of NLRB rules. 450 F.2d at 675.

33. The Board argued that the persons interviewed might defer to the view they believe the interviewer would prefer. Brief for Appellants at 7-9 & n.6. The authorities cited by the Board, however, were addressed to the problem of the validity and accuracy of responses rather than to the influence of interviews on subsequent behavior patterns. The Board could more directly have argued that the interviews would produce an inaccurate picture of behavioral patterns and that the inaccuracies would defeat the validity of the study's conclusions, and, hence, vitiate the public interest in its successful completion. However, it is doubtful such an approach would have been successful. The court found that interviewers were trained to avoid influencing employees and that no evidence to justify the Board's fears had manifested itself in the three pilot studies conducted by the plaintiffs. 450 F.2d at 675-76.

34. *Id.* at 675.

35. Plaintiffs were described as "highly qualified specialists in labor law." Both taught labor law, were former attorneys for the Board and had authored law review articles in the field. The court examined the quality of the study by noting the approval of the "prestigious National Science Foundation," the size of the grant (the largest ever given for a law-related study), the support of "virtually every major scholar in the labor law field" and the fact that the study was designed in collaboration with survey research experts. *Id.* at 676-77.

The court further noted that the study would involve only 35 out of 15,000 elections to be conducted by the Board over its two-year course. However, the court did not indicate whether it attached significance to the small number of Board-

a reasonable likelihood that the study would be successfully completed. Balancing the public interest in the successful completion of the study against the minimal invasion of employee privacy and the speculative delays in election resolution, the court held that exemption (6) did not apply.³⁶

The court's balancing approach under exemption (6) is a sound one. Despite the broad disclosure mandate of the Act, the phrase "clearly unwarranted" necessitates a weighing of interests to distinguish those invasions of privacy which are warranted by the public interest from those which would be offensive. As the court said:

Although one of the purposes of the . . . Act was to limit agency discretion not to disclose by abandoning the former ground rule that a person requesting information show he was "properly and directly concerned," . . . we find that this purpose is in unavoidable conflict with the explicit balancing requirement of Exemption(6).³⁷

Nevertheless, Professor Davis asserts that balancing is precluded by the Act. He regards the requirement to disclose to "any person" as preventing distinctions among the interests of persons seeking disclosure. Instead, Davis believes that the rights of all information seekers are equal. In his view, the rights of the "officious" are as great as the rights of one with a legitimate interest in obtaining information.³⁸

conducted elections the study might disrupt or to the small number of persons whose privacy would be invaded. The court observed that the only other means of obtaining the lists entailed a risk of prejudicing the study's results. For their pilot studies, plaintiffs had obtained employee lists from the unions which were parties to the elections. Such a procedure entailed the risk that the employees would believe the interviews were union-sponsored and hence give slanted replies. Brief for Appellees at 11-12. The slanted replies would mar the validity of the study.

Cf. Ackerley v. Ley, 420 F.2d 1336 (D.C. Cir. 1969):

[T]he fact that appellant might, presumably by a combination of intuition and diligent research, ferret out some of the materials relied upon is surely no reason to suppose that Congress made revelation under the Freedom of Information Act contingent upon a showing of exhaustion of one's own ingenuity.

Id., at 1342.

36. The court added the following caveat:

[A] court's discretion to grant disclosure under Exemption (6) carries with it an implicit limitation that the information, once disclosed, be used only by the requesting party and for the public interest purpose upon which the balancing was based.

450 F.2d at 67 n.24.

37. *Id.*

38. DAVIS TREATISE, *supra* note 13, at § 3A.4; Davis, *supra* note 26, at 765-66. Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971), adopted this interpretation of "any person."

The contrasting views of Davis and the court can, however, be reconciled. Moreover, the same reasoning which reconciles their interpretations can also explain the court's weighing the public interest—as opposed to the plaintiffs' private interests—in having the information disclosed. The court correctly believes the term “unwarranted” in exemption (6) necessarily requires a balancing to determine whether private information should be disclosed. If, however, as Davis notes, Congress foreclosed weighing individual interests by the phrase “any person,” then it must have intended that the explicit balancing requirement of the term “unwarranted” be satisfied by weighing some other interest, namely, the public interest. Thus, it was unnecessary for the court to adopt the suspect position that a specific provision of the Act overrides a known legislative purpose.

The Burden of Proof

Subsection (a)(3) of the Act provides that in any de novo proceeding under the Act, the agency has the burden of sustaining its decision to withhold.³⁹ The effect of balancing under exemption (6), however, is to shift the burden of proof to the person seeking disclosure. The agency need only demonstrate that revealing the requested information would entail an invasion of privacy. The person seeking the information must then demonstrate a public interest in disclosure sufficient to overcome the privacy interests. In *Getman*, two interests weighed in favor of nondisclosure: privacy and possible interference with the Board's statutory function of expediting elections. The latter interest was dismissed by the court summarily.⁴⁰ More likely to have weighed heavily against disclosure was a judgment that the right of privacy is of a higher value, in the abstract, than the right to information. Privacy is an interest protected by the Constitution from governmental intrusions⁴¹ and by tort law from invasions by individuals.⁴² The right to information is served only by the Freedom of Information Act. Any balancing of the right of privacy and the right to information under exemption (6) will be within the framework of these relative values. Although the invasion of privacy was relatively minor, the court's sensitivity to privacy rights required a strong public interest in the study to justify the invasion. Thus, an invasion of privacy will be

39. 5 U.S.C. § 552(a)(3) (1970).

40. See note 34 *supra* & text accompanying.

41. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Katz v. United States*, 389 U.S. 347 (1967).

42. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 112 (3d ed. 1964).

relatively easy to demonstrate while an overriding public interest in that invasion will not.

Agency Decisions to Disclose

While the Act provides for a de novo judicial proceeding when an agency withholds information, there is no provision for evaluation of an agency's decision to disclose. At some point, the agency itself will balance the competing interests under exemption (6). While the *Getman* court apparently approves such an exercise of agency discretion, problems may arise which the court apparently did not consider. In theory, the function of government is to serve the public interest, but because particular government agencies operate only within narrow areas of this public interest it is not surprising that they may occasionally view the public interest in terms of their own narrow activities. The absence of specialization in the judiciary aids courts in formulating broader conceptions of the public good. In *Getman*, the Board's parochial short-sightedness⁴³ led it to object that plaintiffs' study might violate the very Board rules whose premises the study sought to test. The Board's objection took the form of withholding information requested under the Act.

However, there is also the risk that an agency's narrow view may lead it to disclose information which a court would not disclose. This risk is compounded by the ineffectiveness of the remedies available to the person injured by such administrative disclosure. Although the person whose privacy is threatened could seek an injunction against the agency prior to disclosure, thus providing a judicial opportunity to balance the competing interests, it is doubtful whether the individual affected will know of the potential invasion until it takes place.⁴⁴ The person affected could sue the agency for abuse of discretion once the decision to disclose was discovered, but such a suit would not eliminate the ill effects of the disclosure.

The *Getman* opinion left other potential problems unresolved. The court stated that a judicial grant of disclosure implies that the information may be used only by the person to whom disclosed and only for

43. See note 34 *supra* & text accompanying.

44. The person affected could request notification of pending disclosure so he could seek an injunction against disclosure. The Act, however, only gives jurisdiction to issue injunctions against withholding, not against disclosure. 5 U.S.C. § 552(a)(3) (1970). Resolution of the disclosure question outside the Act would not seem to accord with the congressional intent that the Act govern disclosure policies. Nor would extraction of an express promise not to disclose be sufficient protection. See notes 11-13 *supra* & text accompanying.

the purpose weighed in the balancing process.⁴⁵ Noncoerced administrative disclosures would seem to carry with them the same limitations as a judicial grant of disclosure, but it is not clear how such administrative limitations would be enforced. A court could use its contempt power or find a tort remedy for the person whose privacy was violated in disregard of the conditions of judicial disclosure. An agency, however, lacks contempt power, and a court cannot cite for contempt of an agency order. Furthermore, while a tort remedy might be available for such clearly unwarranted invasions of personal privacy, the preferable approach is to avoid commission of the tort in the first instance. Any genuine agency doubt as to the applicability of exemption (6), therefore, should be resolved by nondisclosure so that the ultimate responsibility for determining whether the public interest warrants an invasion of personal privacy will remain with the courts. Although this approach may be cumbersome, expensive and time-consuming, it is nonetheless preferable to disclosure of personal information without controls.

Balancing and Agency Expertise

When a disclosure question does reach a court, it must be recognized that an agency's narrow view of the public interest may still control the outcome. Courts often defer to the expertise of executive agencies, particularly such regulatory agencies as the NLRB.⁴⁶ *Getman* was not a fundamental departure from this practice. While the court summarily rejected the Board's argument that the possible interference with "laboratory conditions" overcame the public interest in the study's successful completion, that fact alone is deceptive. It must be noted that the plaintiffs were former NLRB attorneys, recognized labor law authorities, and were engaged in a project designed in collaboration with experts in survey research. The court stated that requests

by less well qualified applicants or applicants with a less carefully designed or more disruptive study would require a new

45. See note 36 *supra*.

46. See, e.g., *SEC v. New England Elec. Sys.*, 384 U.S. 176, 185 (1966).
Cf. American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965):

There is of course no question that the Board is entitled to the greatest deference in recognition of its special competence in dealing with labor problems.

Id. at 316. But the Court went on to state:

The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in an unauthorized assumption by an agency of major policy decisions properly made by Congress.

Id. at 318.

balancing and might be found to involve a "clearly unwarranted invasion of privacy" which would justify nondisclosure.⁴⁷

In analyzing the interests involved, the court, rather than evaluating the study's elaborate structure, relied upon labor law experts who approved the study's purpose and upon survey research experts who approved the study's design. The case may fairly be characterized as one of experts versus experts, with the court persuaded by the weight of authority as much as by the merits. If the person seeking disclosure is unable to marshal such an impressive array of specialized authority to support his definition of the public interest, the court must strive for a truly de novo proceeding and guard against the tendency to ratify bureaucratic definitions.

While the court must engage in a balancing process, it should recognize that the quality of a study's design and the qualifications of its directors are largely functions of the amount of money supporting the project.⁴⁸ According weight to applicants' specialized qualifications and to the quality of their study's design will probably result in organizations such as "Nader's Raiders" experiencing difficulty in dislodging information which could come within exemption (6). Such organizations are staffed largely by amateurs, including college students working during the summer months. Their projects will not approach the sophistication of the model in *Getman*, although their purposes may be no less ambitious and public-spirited. Because projects such as that in *Getman* are rare, denying information to less sophisticated groups will result in a severe limitation on the number and scope of public interest investigations which require personal information.⁴⁹ A court should weigh the desirability of this result among the factors it balances in determining whether to require disclosure.

Courts must also recognize that administrative agencies may seek to avoid the impact of the *Getman* decision by using exemption (6) to withhold noncommercial and nonfinancial information which exemp-

47. 450 F.2d at 677 n.24.

48. The plaintiff's project has been funded by a 204,300 dollar grant from the National Science Foundation, the largest ever given for a law-related study. Part of the grant maintains the plaintiffs as directors, while the remainder pays for the well-trained interviewers and the specialists who trained them, the data reduction workers and facilities and so forth. A project which lacks funds to maintain such highly qualified specialists will almost certainly have less well-qualified personnel.

49. The Civil Aeronautics Board has denied to associates of Mr. Nader the names of complainants before that agency on the ground that airlines might take retaliatory action against the complainants. The denial made it impossible to contact the complainants in order to assess the effectiveness of the CAB's response to complaints. Nader, *supra* note 25, at 11-12.

tion (4) will no longer serve to protect. The success of such an attempt will hinge on the meaning of "personal," for exemption (6) permits withholding only when "personal privacy" is threatened by disclosure.⁵⁰ As a policy matter, however, the courts should avoid importing the confusing goals of exemption (4) into exemption (6). Here, as in other sections of the Act, a primary value is certainty of result, for without certainty the Act cannot fulfill its promise.⁵¹

EQUITABLE DISCRETION

Having determined that the *Excelsior* lists did not fall within any of the exemptions, the court further held that "a District Court has no equitable jurisdiction to deny disclosure on grounds other than those laid out under one of the Act's enumerated exemptions."⁵² This holding was not unheralded. In *Bristol-Meyers*, the D.C. court had described the structure of the Act as "a liberal disclosure requirement, limited only by specific exemptions which are to be narrowly construed."⁵³ In *Soucie v. David*,⁵⁴ the same court stated in dictum that the Act reflected a congressional balancing and resolution of interests which would be upset by judicial exercise of equitable discretion.

Having previously stated that balancing under any exemption other than (6) is inappropriate, the holding that courts lack equitable powers foreclosed future general consideration of agency arguments that disclosure would overburden or disrupt their activities.⁵⁵ Such a sweeping restriction was necessary in order to influence agency disclosure policies. Had the court used language limited to the *Getman* case, agencies not immediately affected by the opinion might have felt free to continue their present withholding policies.⁵⁶ Prior to *Getman*, the agencies'

50. The Attorney General's memorandum states that although the exemption normally involves individual privacy, corporations and other organizations are also within its protection because of the Administrative Procedure Act's definition of "person." ATTORNEY GENERAL'S MEMORANDUM, *supra* note 19, at 36-37. Davis believes that "personal privacy" always relates to individuals and that the Administrative Procedure Act's definition of "person" has no relevance because that word is not used in exemption (6). DAVIS TREATISE, *supra* note 13, at § 3A.22; Davis, *supra* note 26, at 799. The phrase "clearly unwarranted" probably indicates a congressional intent that traditional notions of privacy not be stretched to defeat disclosure.

51. See notes 56-57 *infra* & text accompanying.

52. 450 F.2d at 678.

53. 424 F.2d at 938.

54. 448 F.2d 1067 (D.C. Cir. 1971).

55. The premise of such agency arguments is that government activities are, by definition, always in the public interest. It was the validity of this premise which the study in *Getman* was designed to test. See also *Wellford v. Hardin*, 444 F.2d 21, (4th Cir. 1971). Disruption of agency activities will still be relevant to the courts definition of the public interest under exemption (6).

56. The NLRB's attempt to characterize *Excelsior* lists as investigatory files

policies of withholding information on specious grounds had prevailed due to the hazards of an expensive and time-consuming suit for relief. Many individuals were simply unwilling to run these risks, no matter how transparently invalid the agency's basis for withholding.⁵⁷

While *Getman* refused to recognize discretion, other courts have done so under the guise of balancing competing interests under specific exemptions.⁵⁸ Despite contending that they were merely "balancing," these courts actually considered factors relevant to an equitable discretion inquiry. Nothing in the language of the exemptions (other than exemption (6)) can reasonably be interpreted as requiring balancing, and subsection (c) limits nondisclosure to conditions provided for in the Act. Therefore, such balancing is merely the exercise of equitable discretion under another name.

Although the factors considered in these pre-*Getman* cases are persuasive, use of the balancing process in this manner is nonetheless inappropriate. As the *Getman* court noted when it characterized exemption (6)'s balancing requirement as unique, the purpose of the Act is "to limit discretion and encourage disclosure."⁵⁹The objection to balanc-

for law enforcement purposes is an example. Refusal by the CAB to disclose the names of complainants [note 49 *supra*] is another example. A recent survey of federal agencies indicates that refusals to disclose information sought under the Act remain common. Giannella, *Agency Procedures Implementing the Freedom of Information Act: A Proposal for Uniform Regulations*, 23 AD. L. REV. 217, 221 (1971).

57. See cases collected in *id.* at 225 n.27. "[T]he absence of persistence may reflect a lack of sophistication and money rather than a want of interest." *Id.* at 225. Plaintiffs in *Getman* were both attorneys; they handled the litigation themselves.

58. *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591 (D.P.R. 1967), balanced an employer's interest in disclosure of employee witness statements against the agency's interest in nondisclosure. *General Serv. Administration v. Benson*, 415 F.2d 878 (9th Cir. 1969), weighed the "effect of disclosure and nondisclosure, according to traditional equity principles," in determining whether exemption (5) was to apply. *Id.* at 880. *American Mail Line v. Gulick*, 411 F.2d 696 (D.C. Cir. 1969), similarly regarded exemption (5) as involving a balancing of competing interests. *Tuchinsky v. Selective Serv. Sys.*, 418 F.2d 155 (7th Cir. 1969), allowed the withholding of information where disclosure would impose "an unreasonable burden" upon the agency and the information was available elsewhere. *Id.* at 157. *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), whose dicta the *Getman* court quoted selectively to support its holding that it lacked discretionary power, stated that "exceptional circumstances" could give rise to the exercise of "limited equitable discretion" without violating the Act's legislative intent. *Id.* at 1077. *Cowles Communications, Inc. v. Department of Justice*, 325 F. Supp. 726 (N.D. Cal. 1971), allowed exempting investigatory files under (7), although there was no possibility of their being used in court, to protect informers' anonymity and citizens' rights of privacy. *Evans v. Transportation Dep't*, 446 F.2d 821 (5th Cir. 1971), held that plaintiff's desire for letters in a closed investigatory life was "totally submerged by the public interest" in the agency's remaining safely accessible to informants who wished to remain anonymous. *Id.* at 824.

59. 450 F.2d at 674 n. 10.

ing under specific exemptions is the same as the argument against exercising equitable discretion: it creates uncertainty, thereby making suits more hazardous and disappointed information seekers less likely to sue. The less probable it is that a person seeking disclosure will call into judicial question an agency's nondisclosure, the greater the likelihood there is that the agency will refuse to disclose.⁶⁰

Balancing under specific exemptions could create even greater unpredictability than the exercise of equitable discretion, for the former may invite the injection of factors not generally present in the exercise of the latter. Specifically, agency definitions of "the public interest" will be more likely to govern the decision under listed exemptions than under a discretionary balancing approach since the agency will be better equipped than the plaintiff or the court to explain how a particular exemption relates to an agency's specialized activities. The result of such a balancing process may ultimately be judicial deference to agency expertise, a result approaching resurrection of the old Administrative Procedure Act's abuses. General equity decisions, however, would derive from arguments couched in less heavily specialized terms, thereby removing many of the handicaps facing a potential plaintiff.

The exemptions of the Freedom of Information Act are not so precise that courts may be expected to apply them without a preliminary period of definition. During this period, however, the courts must not resort to such methodological devices as balancing, which could ultimately defeat the purpose of the Act.⁶¹ The lead of *Getman* in renouncing both discretion and balancing under specific exemptions, and instead emphasizing the Act's plain language, must be followed if the Act is to

60. The House report indicates that a purpose of providing for de novo judicial proceedings in subsection (3) was to "serve as an influence against the initial wrongful withholding." H.R. REP., *supra* note 15, at 9. If uncertainty renders suit so risky that information seekers seldom litigate, the existence of a judicial remedy will have little impact on agency disclosure practices.

61. Davis suggests the use of discretion to modify the poorly drawn exemptions. Davis, *supra* note 26, at 803-04. It has also been suggested that equitable discretion be employed for a limited period while the various exemptions are clarified. Note, *Judicial Discretion and the Freedom of Information Act: Disclosure Denied: Consumers Union v. Veterans Administration*, 45 IND. L.J. 421, 433 n.89 (1970). Both suggestions would result in uncertainty. The Note's solution, moreover, does not resolve the problem of when the various periods would begin and end, so that unpredictability of suit would remain.

62. In the meantime, information seekers can take advantage of the Act's liberal venue provisions to file suit in the District of Columbia. Suit may be brought where the plaintiff resides, where he has his place of business or where the records are situated. 5 U.S.C. § 522(a)(3) (1970). Even records used exclusively by an agency's field offices may be duplicated at the Washington home office, thus providing a basis for venue there.

fulfill its promise. The preeminence of the Court of Appeals for the District of Columbia Circuit in the field of administrative law will hopefully influence other circuits to follow its lead.⁶²

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