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Freedom of Information Act: The Expansion of Exemption Six

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residency barrier is actual and immediate. Because the judicial process is an exclusive precondition to dissolution of marriage, the state should not be able to monopolize the right to dissolve the marriage without affording all citizens equal access to the divorce courts.[72]

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FREEDOM OF INFORMATION ACT: THE EXPANSION OF EXEMPTION SIX

Wine Hobby USA, Inc. v. United States, 502 F.2d 133 (3d Cir. 1974)

Wine Hobby USA, a Pennsylvania corporation engaged in the mail order sale of homemade winemaking equipment, requested the United States Bureau of Alcohol, Tobacco, and Firearms[1] to disclose the names and addresses of persons registered with the Bureau to produce homemade wine.[2] Upon the Bureau's denial of the request, Wine Hobby sued in federal district court for a disclosure order.[3] The court granted the order requiring the Bureau to release the desired names and addresses.[4] On appeal,[5] the United States Court of Appeals for the Third Circuit reversed and HELD, unless some public interest is advanced, any disclosure of personal information that will result in an invasion of privacy is not compelled under the Freedom of Information Act.[6]

The Freedom of Information Act of 1966 (FOIA),[7] replaced the Public

72. *See* Boddie v. Connecticut, 401 U.S. 371, 383 (1971).

1. The Bureau was established by Treasury Order No. 221 on July 1, 1972. 37 Fed. Reg. 11696 (1972).

2. Persons who produce wine are subject to certain permit, tax, and bonding requirements under 26 U.S.C. §§5041(a), (d), 5043(a), (b) 1970, and 27 U.S.C. 203(b)(1) (1970). An exception to these requirements is provided by statute for any registered head of a family that produces for family use and not for sale an amount of wine not exceeding 200 gallons per year. 26 U.S.C. §5042(a)(2) (1970). Wine Hobby stipulated in the district court that its purpose in obtaining the names and addresses of the wine permit registrants was to enable it to forward catalogs and announcements to these people regarding equipment it offered for sale. Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 134 (3d Cir. 1974).

3. 5 U.S.C. §552(a)(3) (1970) gives those whose requests for government information have been denied the right to appeal to federal district courts for orders forcing disclosure of the desired information.

4. Wine Hobby USA, Inc. v. United States Bureau of Alcohol, Tobacco & Firearms, 363 F. Supp. 231 (E.D. Pa. 1973).

5. Appellee neither submitted briefs nor participated in oral argument. 502 F.2d at 134.

6. 502 F.2d 133.

7. 5 U.S.C. §552 (1970). Commentary on the Act, which became effective on July 4, 1967, has been extensive. The most comprehensive bibliography is in SUBCOMM. ON ADMINISTRATIVE

Information section of the Administrative Procedure Act of 1946 (APA).[8] This section of the APA had been intended to provide a statutory framework that would permit broad public access to government information.[9] Through a course of restrictive agency interpretation of the law's provisions,[10] however, the Public Information section "came to be looked upon more as a withholding statute than a disclousre statute."[11] The FOIA was enacted to remedy the deficiencies of the previous law. In order to accomplish this goal, the FOIA (1) eliminated the APA's requirement that those seeking information held by the Government be "properly and directly concerned," (2) exempted nine specifically defined categories of information from disclosure, and (3) provided those who had been denied access to nonexempt information the right to appeal to federal district courts for disclosure orders.[12] The instant case turned on an interpretation of one of the nine exemptions, Exemption Six, which allows agencies to withhold "personnel, medical, or similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[13]

Congressional testimony indicates that, prior to its adoption,[14] Exemption Six[15] was interpreted by federal agencies to protect only the privacy of government employees.[16] This interpretation was changed, however, by a report of the

PRACTICE AND PROCEDURE OF THE COMM. ON THE JUDICIARY, UNITED STATES SENATE, 93D CONG., 2D SESS., FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES (Comm. Print 1974). Much of the response has been critical. *See, e.g.*, Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 807 (1967): "That the Congress of the United States after more than ten years of hearings, questionnaires, studies, reports, drafts, and pulling and hauling, should wind up with such a shabby product seems discouraging." Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEXAS L. REV. 1261, 1262 (1970): "After three years of operation, the Freedom of Information Act has not fulfilled its advocates' most modest aspirations."

8. 5 U.S.C. §1002 (1946).

9. H.R. REP. No. 1497, 89th Cong., 2d Sess. 3 (1966).

10. The National Science Foundation, for example, cited the Public Information section in refusing to divulge cost estimates of unsuccessful contractors in connection wth a deep sea study. In addition, the Navy found support in the law to withhold telephone directories and the Board of Engineers for Rivers and Harbors used the section to refuse to disclose their votes on issues involving controversial expenditures. *Id.* at 5, 6.

11. EPA v. Mink, 410 U.S. 73, 79 (1973).

12. H.R. REP. No. 1497, *supra* note 9, at 1, 2.

13. 5 U.S.C. §552(b)(6) (1970).

14. Exemption Six was not included in the draft of the FOIA considered in 1963. *Hearings on S. 166, S. 1663 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. at 1, 2 (1964). The drafters evidently believed that personnel, medical, and similar files were already barred from disclosure by statute. S. REP. No. 1219, 88th Cong., 2d Sess. 14 (1964). In 1964 the exemption was added. *Hearings on S. 1663 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. at 3 (1966). In 1965 the wording was changed from "similar matters" to the present "similar files." *Hearings on S. 1160 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. at 7 (1965).

15. The exemption refers to an invasion of privacy, a familiar concept in tort law. An actionable invasion of privacy in tort requires a public disclosure of private facts concerning a matter "offensive and objectionable to a reasonable man of ordinary sensibilities." W. PROSSER, HANDBOOK OF THE LAW OF TORTS 811 (4th ed. 1971).

16. Mr. John A. McCart of the Government Employees' Council, AFL-CIO, indicated

Senate Judiciary Committee.[17] The report acknowledged that many government agencies, in the course of performing their functions, were required to maintain files containing detailed information about citizens.[18] The report made clear that the statutory language of Exemption Six was broad enough to permit these agencies to withhold the personnel, medical, and similar files of all citizens and not just the files of those employed by the Government.[19]

The significance of the holding in the instant case lies in the additional breadth it gives to Exemption Six. The court utilized two tests to arrive at its decision. The first test was used to determine whether the names and addresses sought by Wine Hobby constituted "personnel, medical, or similar files" within the meaning of Exemption Six.[20] The court reasoned that because the element shared by personnel and medical files was the personal quality of the information contained, the test for determining whether information was a "similar file" should turn on whether the information is personal.[21] The court then, without elaborating, found that names and addresses were personal information and therefore within the language of Exemption Six.[22]

This personal information test allows Exemption Six to prohibit the disclosure of a broader range of information than that which had been prohibited by the tests articulated in previous cases. In *Washington Research Project v. HEW*,[23] the court held that the test for determining whether competency ratings were "personnel, medical, or similar files" turned on whether the ratings were detailed government records.[24] This test had its roots in a House committee report, which stated that Exemption Six was designed to "cover detailed Government records on an individual."[25] The court found that because the competency ratings were brief and nonspecific, they did not constitute "similar files" under the exemption.[26]

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that Exemption Six was a needed exemption but thought employees themselves should have access to their files. Mr. Robert Giles of the Commerce Department submitted a letter interpreting the exemption to permit release of the files of nonemployee Patent Office attorneys. In defining some of the personnel records the disclosure of which would be effected by the FOIA, the House Subcommittee on Foreign Operations and Government Information listed efficiency ratings, physical examinations, aptitude test results, character evaluations, et cetera. No mention was made of personal information held by the Government concerning nongovernment employees. *Hearings on H.R. 5012 Before the Subcomm. on Foreign Operations and Government Information of the House Comm. on Government Operations,* 89th Cong., 1st Sess. at 162, 212, 265 (1965).

17. S. REP. No. 813, 89th Cong., 1st Sess. 9 (1965).

18. *Id.* The Veterans Administration and the Department of Health, Education, and Welfare were cited as examples of agencies likely to have large amounts of personal data on file.

19. *Id.* The report stated Exemption Six "should lend itself particularly to those Government agencies where persons are required to submit vast amounts of personal data usually for limited purposes." *Id.*

20. 502 F.2d at 135.

21. *Id.*

22. *Id.*

23. 366 F. Supp. 929 (D.D.C. 1973).

24. *Id.* at 937.

25. H.R. REP. No. 1497, *supra* note 9, at 11.

26. 366 F. Supp. at 937.

In *Robles v. EPA*[27] and *Rural Housing Alliance v. USDA*[28] the courts focused on the question of whether the desired information contained intimate details about an individual's personal life. This "intimate details" test also had its origin in the committee report, which indicated that Exemption Six was intended to prevent disclosure of files containing intimate details of the sort that "might harm an individual."[29] This test was found not to have been met in *Robles* where the court determined that because radiation levels of buildings pertained to physical things and not to human beings, the information was not the sort of personally intimate detail designed to fall within Exemption Six.[30] In *Rural Housing*, however, the court found that because disclosure of facts pertaining to family fights, alcohol consumption, and the legitimacy of children would be embarrassing, such information was sufficiently intimate to fall within the similar files provision of Exemption Six.[31]

The instant court did not attempt to distinguish the personal information test from either the detailed records test or intimate details test. Rather, the court reasoned that because the purpose of the exemption was to prevent invasions of privacy, the phrase "personnel, medical, or similar files" should be expanded to include information the release of which would frustrate this purpose, regardless of whether the information could be strictly construed as being similar to that contained in personnel or medical files.[32] Such a view of Exemption Six suggests that in determining whether information falls within the exemption, emphasis should be placed not on the phrase "personnel, medical, or similar files," but on the phrase "clearly unwarranted invasion of personal privacy."

The second test applied by the instant court dealt with the meaning of the words "clearly unwarranted."[33] The court held that the test for determining when a disclosure was clearly unwarranted centered on the question of whether the information would be used to advance a public interest that outweighs the affected individual's interest in privacy.[34] Although the term "public interest" was never defined, the court asserted three reasons for balancing it against personal privacy. The first reason was that the word "unwarranted," in itself, connoted a balancing of factors.[35] Second, the idea of interest balancing by the judiciary was supported by Exemption Six's legislative history.[36] The court cited a Senate report, which stated that the exemption

27. 484 F.2d 843 (4th Cir. 1973).
28. 498 F.2d 73 (D.C. Cir. 1974).
29. H.R. REP. No. 1497, *supra* note 9, at 11.
30. 484 F.2d at 845.
31. 498 F.2d at 77.
32. 502 F.2d at 135. This justification was also used to permit lists of names and addresses to fall under the statutory term "files." The court noted: "Were purchasers of contraceptives required to register with the Government, and were a plaintiff to request disclosure of the names and addresses of such registrants, a narrow construction of 'files' would require disclosure by preventing inquiry into the invasion of privacy which would result from disclosure." *Id.* n.9.
33. *Id.* at 135, 136.
34. *Id.*
35. *Id.*
36. *Id.*

"enunciates a policy that will involve balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny and the preservation of the public's right to government information."[37] The third justification was that nothing in the FOIA precluded the selective disclosure of information that could result from the application of a balancing test.[38]

Seeking to follow the intent of Congress, the court applied the test to the facts of the instant case by balancing the public interest that would be served by the disclosure of the list against the invasion of personal privacy that such disclosure would entail. The court noted that Wine Hobby intended to use the names and addresses in an advertising mailing list. This use "advanced no direct or indirect public interest" and its commercial nature was "wholly unrelated to the purpose behind the Freedom of Information Act."[39] In addition, the court noted that by releasing the names and addresses the Bureau would also divulge the facts that those on the lists were winemakers and heads of households and would potentially subject them to the receipt of unrequested mail.[40] Thus, no public purpose would be served by disclosure, and the privacy of individuals would be invaded to some extent. Balancing the admittedly minor invasion of privacy against the complete absence of public interest, the court held in favor of privacy and concluded that disclosure was clearly unwarranted.[41]

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37. *Id.* at 136, n.9 *quoting* S. REP. No. 813, *supra* note 17. However, H.R. REP. No. 1497, *supra* note 9, at 11, states that Exemption Six "provides a proper balance" between the various rights involved. This language implies that Congress has already balanced the public interest in disclosure against personal privacy and decided to permit all disclosure except that which would be clearly unwarranted. Such an interpretation of Exemption Six does not support further judicial balancing of the interests previously balanced by Congress.

38. 502 F.2d at 136. This reading of the FOIA was made possible by subsection (b), which indicates that nothing said in subsection (a), including the requirement that information be made available to "any person," is applicable to information exempted from disclosure. From this logical proposition, however, the court apparently assumed that because all seekers could not have access to exempt information, by implication some seekers could have access. This interpretation, which sanctions selective disclosure of exempt information, does violence to the concept of exemption. Additionally, the Senate Judiciary Committee states that "all materials are to be made available to the public unless explicitly allowed to be kept secret by one of the exemptions." S. REP. No. 813, *supra* note 17, at 10. This statement implies that Congress intended government information to be either absolutely exempt or public — not selectively nonexempt for those who satisfy a judicially approved balancing test.

39. 502 F.2d at 137. The purposes of the FOIA have been variously stated. *See, e.g.*, H.R. REP. No. 1497, *supra* note 4, at 12: "A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. [The FOIA] provides the necessary machinery to assure the availability of Government information necessary to an informed electorate." S. REP. No. 813, *supra* note 17, at 3. The FOIA prevents the continued secrecy of "embarrassing mistakes or irregularities." 112 CONG. REC. 13016 (1966) (remarks of Congressman Reid): "The right of the public to information is paramount and each generation must uphold anew that which sustains a free press." 110 CONG. REC. 170 (1964) (remarks of Senator Humphrey): "[E]very Senator knows that certain agencies through the years have abused in a most flagrant manner the legitimate right to withhold certain privileged or confidential information. The time for a thorough revision . . . is long overdue."

40. 502 F.2d at 137.

41. *Id.* The court said: "[W]e conclude that the invasion of privacy caused by disclosure

In support of its use of the balancing test[42] the instant court cited *Getman v. NLRB*.[43] In *Getman* the court disclosed the names and addresses of those eligible to vote in certain union elections to labor law professors who were preparing a study on election practices. The court, citing the legislative history referred to in the instant case, concluded that disclosure would be warranted where the public interest purpose of the researchers and the public need for the study outweighed the slight invasion of privacy that would be suffered by the union members.[44] Thus, in *Getman* the public interest purpose of the researchers was a positive factor influencing the court in ordering disclosure. In the instant case, however, lack of public interest purpose was a negative factor that influenced the court in denying disclosure.

Prior to the holding in the instant case, the *Getman* balancing test had not been accepted by other courts. The Fourth Circuit, in *Robles*,[45] repudiated the test and held "that disclosure was never to 'depend upon the interest or lack of interest of the party seeking disclosure.' "[46] The *Robles* court believed that the FOIA's general requirement that disclosure be made to "any person" evidenced an intent to prohibit inquiry into the purposes behind disclosure requests.[47] Thus, in *Robles* the court focused on the extent of the privacy invasion, not the public interest served by disclosure, in order to determine whether disclosure was clearly unwarranted.

The Second Circuit, in *Rose v. Department of the Air Force*,[48] also rejected the *Getman* balancing approach and held that in determining whether disclosure was clearly unwarranted, it was necessary to look "into the nature of the privacy interest invaded and the extent of the proposed invasion."[49] The

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would be 'clearly unwarranted' even though the invasion of privacy in this case is not as serious as that considered by the court in other cases . . . ."

42. This balancing test was criticized in Note, *Invasion of Privacy and the Freedom of Information Act:* Getman v. NLRB, 40 GEO. WASH. L. REV. 527 (1972). "The benignly discriminate approach of the *Getman* court may, in future cases, yield invidiously discriminate withholding of records reminiscent of the approach under the predecessor statute." *Id.* at 536.

43. 450 F.2d 670 (D.C. Cir. 1971).

44. *Id.* at 677. The court acknowledged that the study had been in operation for two years and was being financed by the largest grant ever made available, for law-related research, by the National Science Foundation. *Id.* at 676. A successful study, according to the court, would serve as a model to encourage further empirical work to test the behavioral assumptions underlying law. *Id.* at 677. The court noted "the public interest need for such an empirical investigation . . . has for some time been recognized by labor law scholars . . . ." *Id.* at 675-76. The court did not specifically define the term "public interest" but appears to have equated it with scholarly research. This interest was contrasted with the "relatively minor" loss of privacy that would result from an employee's being asked over the telephone if he would be willing to be interviewed. *Id.* at 675.

45. 484 F.2d 843 (4th Cir. 1973).

46. *Id.* at 847. The court quoted from Davis, *supra* note 7, at 766, who reads the exemption to require disclosure without regard to use but advocates amending the FOIA to provide for disclosure on a selective basis.

47. *Id.* The court was referring to 5 U.S.C. §552(a)(3). This section requires that "on request for identifiable records" the agency "shall make the records promptly available to any person."

48. 495 F.2d 261 (2d Cir. 1974).

49. *Id.* at 266.

court emphasized that its test centered on the potential for serious harm that might result from disclosure.[50] Thus, both the Fourth and Second Circuit Courts of Appeals have interpreted "clearly unwarranted" to require investigation into the invasion of privacy itself and not into the reason for invasion.

In contrast, the court in the instant case examined not only the invasion of privacy, but also the use to which the information would be put. By requiring that this use advance a public interest, this approach can permit nondisclosure in cases where the invasion of privacy itself is insignificant. In addition, the court's approach requires at least an implicit judicial determination of what constitutes "public interest." Most importantly, however, by insisting on a showing of public interest, the instant decision makes it possible for an agency to prohibit disclosure of information to commercial organizations while simultaneously allowing disclosure to public interest concerns, even where the invasion of privacy is exactly the same. Because no agency can ever know whether desired information will be used strictly in the public interest, information would appear to be rightfully withheld whenever disclosure will result in any invasion of privacy.[51]

Both of the tests applied by the instant court, the personal information test and the public interest balancing test, broaden the scope that Exemption Six had acquired through prior judicial interpretation, and may permit agencies to withhold greater amounts of information. The personal information test broadens the statutory phrase "personnel, medical, and similar files" to encompass all personal information. The public interest balancing test broadens the statutory phrase "clearly unwarranted invasion of personal privacy" to encompass any invasion of privacy not serving a public interest. The joint application of these tests produces an exemption that bars disclosure of all personal information that will result in invasion of privacy unless disclosure advances a public interest.

An exemption of this sort may be necessary in order to keep the FOIA from being exploited as a source of business information for private commercial interests.[52] To allow Exemption Six to be read this broadly, however, threatens the FOIA's ultimate goal of public access to government information. The prior disclosure law lost its effectiveness through precisely this sort of broad interpretation.[53] The courts should look to past experience for guidance and construe Exemption Six narrowly so as to effectuate, rather than thwart,

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50. *Id.* at 267.

51. *See* Note, *supra* note 42, at 539.

52. Such an exemption might also be needed to curtail collection agency requests. Using Exemption Six, the Immigration and Naturalization Service denies requests of collection agencies for names and addresses of aliens in the United States. *Hearings on United States Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act (Part 4) Before the Subcomm. on Foreign Operations and Government Information of the House Comm. on Government Operations,* 92d Cong., 2d Sess. 1176 (1972).

53. See note 10 *supra.*