DEVELOPMENTS UNDER THE FREEDOM OF INFORMATION ACT—1986

The twentieth year of the Freedom of Information Act[1] (FOIA) produced few victories for advocates of increased disclosure of government information. The first changes to the FOIA in a decade[2] broadened the definition of what records are covered by the law enforcement exemption and lowered the standard agencies must meet in order to withhold information.[3] The amendment also recognized that an agency can refuse to confirm or deny the existence of records.[4]

As part of the same legislation, Congress enacted a new fee structure and waiver provisions for FOIA requests.[5] The news media and educational and scientific institutions will pay less for information requests, while commercial requesters will pay more.[6]

In other activity, the House passed a bill[7] that would have required agencies to involve submitters of business information in decisions to release information claimed to be confidential.[8] The bill also would have provided both submitters and requesters explicit causes of action to contest agency decisions.[9] This bill did not reach the Senate floor.[10]

One of the few victories for advocates of increased disclosure came in a House Report addressing the electronic collection and dissemination of information by federal agencies.[11] The report broadly defines agency records and strictly limits user fees, stating that all public information in agency data bases is subject to the FOIA and must be provided to FOIA requesters at no more than a nominal fee or the actual copying costs.[12]

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1. 5 U.S.C. § 552 (1982).

2. *See FOIA Amendments Part of New Drug Legislation,* 12 ACCESS REP. No. 21, Oct. 22, 1986, at 1 (first amendment to FOIA in decade).

3. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1801, 100 Stat. 3207, 3207-48 to 3207-49. *See infra* notes 40-49 and accompanying text.

4. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-49. *See infra* notes 50-56 and accompanying text.

5. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1803, 100 Stat. 3207, 3207-49 to 3207-50. *See infra* notes 57-94 and accompanying text.

6. *See infra* notes 57-59 and accompanying text.

7. H.R. 4862, 99th Cong., 2d Sess., 132 CONG. REC. H7876 (daily ed. Sept. 22, 1986).

8. *See infra* notes 95-99 and accompanying text.

9. *See infra* notes 103-107 and accompanying text.

10. [1985-1986] 2 Cong. Index (CCH) 35,089 (Dec. 10, 1986).

11. HOUSE COMM. ON GOV'T OPERATIONS, ELECTRONIC COLLECTION AND DISSEMINATION OF INFORMATION BY FEDERAL AGENCIES: A POLICY OVERVIEW, H.R. REP. No. 560, 99th Cong., 2d Sess. (1986).

12. *See infra* notes 116-139 and accompanying text.

Administrative agencies also considered public access to information. The National Archives and Records Administration issued regulations providing FOIA access to certain Nixon presidential materials,[13] which are the subject of a dispute regarding executive privilege.[14] The Committee on Judicial Review of the Administrative Conference of the United States considered the creation of an administrative tribunal or ombudsman to review FOIA disputes between information requesters and the government.[15]

The federal courts continued the trend toward restricting access to information.[16] District courts ruled that the FOIA does not provide access to records that the government obtains without legal authority,[17] that a stock exchange is a financial institution covered by exemption 8,[18] and that law enforcement records need only a "rational nexus" to the purpose of the agency to qualify as "investigatory records" under exemption 7.[19] A district court also ruled that the six-year statute of limitations for actions against the federal government applies to FOIA actions, with the limitations period beginning automatically upon an agency's failure to meet a FOIA deadline—even if the requester has continued to pursue administrative review.[20]

The United States Court of Appeals for the Eleventh Circuit, on the other hand, did provide for more disclosure. The court ruled that an agency must provide a trial court with more than a bald assertion of privilege when it refuses to confirm or deny the existence of law enforcement records. The holding stated that agencies must provide enough information—through a *Vaughn* index, *in camera* review, a hearing or affidavits—for a court to determine if the public interest would justify

13. Preservation and Protection of and Access to Historical Materials of the Nixon Administration; Repromulgation of Public Access Regulations, 51 Fed. Reg. 7228 (1986) (to be codified at 36 C.F.R. § 1275).

14. *See infra* notes 158-162 and accompanying text.

15. *See infra* notes 140-157 and accompanying text.

16. The recent trend towards restricting public access to government information is discussed in Note, *Developments Under the Freedom of Information Act—1985*, 1986 DUKE L.J. 384 [hereinafter Note, *Developments—1985*]. For a discussion of developments under the FOIA in prior years, see the annual FOIA note in the *Duke Law Journal* from 1970 to 1984.

17. Marzen v. United States Dep't of Health and Human Servs., 632 F. Supp. 785 (N.D. Ill. 1986), *aff'd*, 825 F.2d 1148 (7th Cir. 1987). *See infra* notes 163-179 and accompanying text.

18. Mermelstein v. SEC, 629 F. Supp. 672 (D.D.C. 1986). *See infra* notes 297-313 and accompanying text.

19. Wilkinson v. FBI, 633 F. Supp. 336 (C.D. Cal. 1986). *See infra* notes 257-273 and accompanying text.

20. Spannaus v. United States Dep't of Justice, 643 F. Supp. 698 (D.D.C. 1986), *aff'd*, 824 F.2d 52 (D.C. Cir. 1987). *See infra* notes 184-202 and accompanying text.

disclosure.[21]

The United States Courts of Appeals for both the Third and District of Columbia Circuits held that section 6103 of the 1976 Tax Reform Act did not supersede the FOIA, but was included under exemption 3 of the FOIA.[22] Thus, disclosure of tax return information is governed by the FOIA and not the more restrictive Tax Reform Act. In a simultaneous en banc opinion, the District of Columbia Circuit held that section 6103's Haskell Amendment—which allows disclosure of tax return information data "in a form which cannot be associated with . . . a particular taxpayer"[23]—requires more than the mere fact of nonidentification; it also requires "agency *reformulation* of the return information into a statistical study or some other composite product."[24]

I. LEGISLATIVE DEVELOPMENTS

A. *Overview.*

Efforts for an extensive overhaul of the FOIA failed again in 1986.[25] In late 1985, a Justice Department official expressed willingness to negotiate reforms,[26] and Representatives English and Kindness led a reform effort in the House.[27] The House Subcommittee on Government Information, Justice and Agriculture circulated an extensive list of potential amendments during March and April of 1986.[28]

Parts of the proposed legislation met different fates. Fee and law enforcement provisions were incorporated into the Anti-Drug Abuse Act.[29] Business information provisions and expedited access procedures, however, were passed only by the House.[30] Provisions concerning use of the FOIA in discovery, sanctions against agencies, limits on the banking

21. Ely v. FBI, 781 F.2d 1487 (11th Cir. 1986). *See infra* notes 203-221 and accompanying text.

22. Grasso v. IRS, 785 F.2d 70 (3d Cir. 1986); Church of Scientology v. IRS, 792 F.2d 146 (D.C. Cir. 1986). *See infra* notes 224-244 and accompanying text.

23. I.R.C. § 6103(b)(2) (1982).

24. Church of Scientology v. IRS, 792 F.2d 153, 160 (D.C. Cir. 1986) (en banc), *cert. granted,* 107 S. Ct. 947 (1987). *See infra* notes 245-253 and accompanying text.

25. *See* Note, *Developments—1985, supra* note 16, at 390-94.

26. *See Markman Expresses Hope for FOIA Legislation,* 12 ACCESS REP. No. 1, Jan. 1, 1986, at 1-2.

27. 132 CONG. REC. H3139-40 (daily ed. May 21, 1986).

28. *See Subcommittee Staff, Justice Near Agreement on FOIA Legislation,* 12 ACCESS REP. No. 4, Feb. 12, 1986, at 1; *FOIA Draft Legislation: Why and How It Failed,* 12 ACCESS REP. No. 14, July 2, 1986, at 1-3; *House Advances Limited FOIA Bill,* VII FOIA UPDATE No. 2, Spring 1986, at 1.

29. *See Draft FOIA Legislation Now Being Circulated,* 12 ACCESS REP. No. 5, Feb. 26, 1986, at 2-3.

30. H.R. 4862, 99th Cong., 2d Sess., 132 CONG. REC. H7876 (daily ed. Sept. 22, 1986). The Senate failed to pass the measure. *See infra* notes 95-102 and accompanying text.

exemption and agency record keeping were discussed, but never actually introduced as legislation.[31] Had these provisions been enacted, agencies would have been required to publish lists of exemption 3 statutes[32] and any separate FOIA request queues in the agency, to maintain logs of records received and requests processed, and to provide more comprehensive annual reporting.[33]

Various FOIA interest groups[34] and the federal administrative agencies refused to support extensive change to the FOIA.[35] Agencies objected to the administrative burdens involved in the record keeping, expedited access and business procedures proposals.[36] Information requesters, while of course favoring a more liberal fee policy, objected to the additional withholding of information under the law enforcement[37] and business procedures provisions.[38]

When the business procedures bill was introduced, it was considered the only measure likely to pass.[39] The Senate, however, took no action on the House bill. Instead, law enforcement and fee provisions—last-minute additions by the Senate to the Anti-Drug Abuse Act—were enacted.

B. *Law Enforcement Amendments.*

The Senate incorporated provisions into the Anti-Drug Abuse Act that broadened the FOIA's law enforcement exemption and added a new section for exclusion of law enforcement information.[40] Senator Dole introduced the proposal to "prohibit public disclosure of law enforcement investigative information that could reasonably be expected to alert drug

31. *See Draft FOIA Legislation Now Being Circulated, supra* note 29, at 2.

32. Exemption 3 exempts from the FOIA matters "specifically exempted from disclosure by statute" other than the FOIA itself. 5 U.S.C. § 552(b)(3) (1982).

33. *See Draft FOIA Legislation Now Being Circulated, supra* note 29, at 2.

34. Representative English mentioned as interested parties "the FOIA requester community, the business coalition on FOIA . . . and others." 132 CONG. REC. H3139 (daily ed. May 21, 1986).

35. 132 CONG. REC. H3139 (daily ed. May 21, 1986) (statement of Rep. English) (describing "considerable disagreement" among agencies over possible FOIA amendments).

36. *House Advances Limited FOIA Bill, supra* note 28, at 1; *FOIA Draft Legislation: Why and How It Failed, supra* note 28, at 3.

37. *FOIA Draft Legislation: Why and How It Failed, supra* note 28, at 3.

38. *Subcommittee Hearing Covers Business Bill,* 12 ACCESS REP. No. 13, June 18, 1986, at 2.

39. *Id.* at 1-2.

40. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §§ 1801-1802, 100 Stat. 3207, 3207-48 to 3207-49 (codified at 5 U.S.C.A. § 552 (West Supp. 1987)). The Anti-Drug Abuse Act was introduced as H.R. 5484, 99th Cong., 2d Sess., 132 CONG. REC. H6459 (daily ed. Sept. 8, 1986). The original version of section 1801, regarding withholding law enforcement records, is reproduced at 132 CONG. REC. S13660 (daily ed. Sept. 25, 1986). An amendment inserting a new section 1802, regarding the refusal to confirm or deny the existence of records and fee waiver provisions, is reproduced at 132 CONG. REC. S14,033 (daily ed. Sept. 27, 1986). The final version is printed at 132 CONG. REC. H9497 (daily ed. Oct. 8, 1986).

dealers . . . [to] law enforcement activity related to them."[41] The legislation also sought to protect national security interests.[42]

The intended impact of these changes is not clear. Representative English claimed that the amendments would "make only modest changes" and that "[t]he small scope of the reforms confirm[ed his] previously stated views that the broad complaints from the law enforcement community about the negative effects of the FOIA were greatly exaggerated."[43] Senator Hatch insisted that the changes were "intended to broaden the reach of [exemption 7] and to ease considerably a Federal law enforcement agency's burden in invoking it."[44] President Reagan, upon signing the law, remarked that the amendment "substantially broaden[ed]" the law enforcement exemption.[45]

The amendments perform two functions. First, exemption 7 now defines more broadly which records an agency can withhold from FOIA requesters for law enforcement reasons. Second, new provisions completely exclude certain records from the reach of the FOIA and allow

41. 132 CONG. REC. S13,780 (daily ed. Sept. 26, 1986). The Senator noted that a recent Drug Enforcement Agency study determined that 14% of all drug investigations were "significantly compromised or cancelled" due to public disclosure of information related to the investigations. *Id.* A report published by a FOIA interest group, however, claimed that several allegations of FOIA abuse made by government officials in the past were unfounded. PEOPLE FOR THE AMERICAN WAY, THE FREEDOM OF INFORMATION ACT AFTER TWENTY YEARS (1986), *reprinted in* 132 CONG. REC. S8773, S8775 (daily ed. June 26, 1986).

As originally proposed by Senator Dole, section 1802 of the Anti-Drug Abuse bill contained a provision identical to the House version, which would have allowed agencies to withhold documents compiled in investigations of organized crime for five years, subject to a determination by the agency "that there is an overriding public interest in earlier disclosure or in longer exclusion not to exceed three years." S. 774, 98th Cong., 2d Sess. § 14, 130 CONG. REC. S1794, S1796 (daily ed. Feb 27, 1984). Senators Leahy, Hatch and Denton offered an alternative amendment to section 1802 that would have permitted agencies to treat records as not subject to disclosure only so long as the records were part of an ongoing criminal investigation, the subject of which was believed to be unaware of the investigation, to the extent that disclosure could interfere with the investigation. 132 CONG. REC. S14,033 (daily ed. Sept. 27, 1986).

42. 132 CONG. REC. S14,252 (daily ed. Sept. 30, 1986) (statement of Sen. Denton). *See* PUBLIC REPORT OF THE VICE PRESIDENT'S TASK FORCE ON COMBATTING TERRORISM 26 (1986) (recommending a Justice Department investigation and possible legislation to stop potential terrorist use of the FOIA to identify informants, delay investigations and tie up government resources).

43. 132 CONG. REC. H9462-63 (daily ed. Oct. 8, 1986).

44. 132 CONG. REC. S16,504 (daily ed. Oct. 15, 1986).

45. *Washington Focus,* 12 ACCESS REP. No. 23, Nov. 19, 1986, at 1.

On October 29, 1986, the National Security Advisor signed a memorandum directing federal agencies to safeguard "sensitive, but unclassified" information stored electronically. The "sensitive" category was defined to include any information whose loss or disclosure could adversely affect government interests. Although classification as "sensitive" is not intended to prevent release of information under the FOIA, the classification might provoke increased scrutiny and cause delay before release. *"Sensitive" Information Memo Likely To Have Impact on FOIA,* 12 ACCESS REP. No. 23, Nov. 19, 1986, at 1-2. *See* Note, *Developments—1985, supra* note 16, at 389-90 (discussing congressional concern that the Computer Crime Law, 18 U.S.C. § 1030 (Supp. III 1985), might also discourage government employees from disclosing information subject to the FOIA).

agencies to neither confirm nor deny the existence of these records to FOIA requesters.

The FOIA's law enforcement exemption now includes law enforcement records when disclosure "could reasonably be expected to" have adverse effects, as opposed to the pre-amendment requirement that the adverse effects "would" result.[46] The exemption for investigatory techniques and procedures has also been broadened to include prosecution techniques and to protect investigation and prosecution guidelines where disclosure "could reasonably be expected to risk circumvention of the law."[47] Most legislators agreed that the new language codified current judicial interpretations of the agencies' burden of proof.[48] One court,

46. The "could reasonably be expected to" language applies to the following subsections of exemption 7:

> (A) . . . interfere with enforcement proceedings,
> (C) . . . constitute an unwarranted invasion of personal privacy,
> (D) . . . disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,
> (F) . . . endanger the life or physical safety of any individual.

5 U.S.C.A. § 552(b)(7) (West Supp. 1987). Furthermore, exemption 7 now applies to the broader group of "records or information" compiled for law enforcement purposes, instead of only the former "investigatory records" compiled for law enforcement purposes. Subsection (D) has been changed to include governmental units and private institutions as confidential sources to be protected by the exemption. Senator Leahy inserted a Congressional Research Service report into the Congressional Record in support of the conclusion that the changes thus far mentioned would "substantially reflect current judicial interpretations." 132 CONG. REC. S14,296, S14,297 (daily ed. Sept. 30, 1986). The word "only" was removed from the last clause of subsection (D) to make it clear that information obtained from a confidential source, but also available elsewhere, is to be exempted from the FOIA. Subsection (F) was also changed to apply to "any natural person" instead of "law enforcement personnel." The new language is the same as that of a bill passed by the Senate in the 98th Congress. S. 774, 98th Cong., 2d Sess., 130 CONG. REC. S1794, S1822 (daily ed. Feb. 27, 1984). The House referred the Senate bill to the Committee on Government Operations, 130 CONG. REC. H1040 (daily ed. Feb. 29, 1984), from which it never emerged.

47. Exemption 7(E) prevents disclosure that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure *could reasonably be expected* to risk circumvention of the law . . . ." 5 U.S.C.A. § 552(b)(7)(E) (West Supp. 1987) (emphasis added). The previous version of the statute prevented disclosure that "*would* . . . disclose investigative techniques and procedures." 5 U.S.C. § 552(b)(7)(E) (1982) (emphasis added).

Legislators disagreed whether information available to some parties, such as prosecution procedures known to former prosecutors, could be withheld under this exemption. Representatives Kindness and English noted that it would be "difficult to make the case that disclosure will risk circumvention of the law" in this situation. 132 CONG. REC. H9467 (daily ed. Oct. 8, 1986). Senator Hatch, however, argued that the exemption should be applied "regardless of the extent of [the information's] availability within the law enforcement community." 132 CONG. REC. S16,505 (daily ed. Oct. 15, 1986).

48. *E.g.*, 132 CONG. REC. S14,296-97 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy); 132 CONG. REC. H9465-66 (daily ed. Oct. 8, 1986) (report by Reps. English & Kindness); 132 CONG. REC. H9462-63 (daily ed. Oct. 8, 1986) (statement of Rep. English).

however, has already ruled that the change—at least as applied to exemption 7(C)—"creates a broader protection."[49]

The amendments also exclude certain records from the FOIA by allowing agencies to refuse to confirm or deny the existence of three categories of records: (1) records concerning a criminal investigation, if disclosure could reasonably be expected to interfere with enforcement proceedings; (2) third-party requests for informant records, if the informant's status as an informant has not been officially confirmed; and (3) classified records of the FBI pertaining to foreign intelligence, counterintelligence and international terrorism investigations.[50]

According to Senator Hatch, the law enforcement exemption needed to be supplemented by the exclusions because invoking the exemption itself informs criminal elements of investigations being conducted against them.[51] Other legislators viewed the change differently.

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49. Allen v. Department of Defense, 658 F. Supp. 15, 23 (D.D.C. 1986). Exemption 7(C) protects against disclosure that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C.A. § 552(b)(7)(C) (West Supp. 1987).

50. The amendment states:

> Section 552 of title 5, United States Code, is amended by redesignating subsections (c), (d), and (e) as subsections (d), (e), and (f) respectively, and by inserting after subsection (b) the following new subsection:
>
> (c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—
>
> (A) the investigation or proceeding involves a possible violation of criminal law; and
>
> (B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) dislosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.
>
> (2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.
>
> (3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-49 (codified at 5 U.S.C.A. § 552(b)(7) (West Supp. 1987)).

Disclosure not only endangers ongoing investigations, it can also create an "unwarranted invasion of personal privacy," in violation of exemption 7(C), by stigmatizing a target without the benefit of a public trial. *Privacy "Glomarization,"* VII FOIA UPDATE No. 1, Winter 1986, at 3 (quoting Baez v. Department of Justice, 647 F.2d 1328, 1338 (D.C. Cir. 1980)).

Specific reference to the FBI was unsuccessfully objected to by other agencies that wished to be included in the provision during negotiations on draft legislation in the spring of 1986. *FOIA Draft Legislation: Why and How It Failed, supra* note 28, at 3.

51. Senator Hatch warned that "[t]o invoke (b)(7)(D), for example, is to tell the requester, potentially a criminal seeking information in his illicit organization, exactly what he may want to know—that his organization has an internal informant." 132 CONG. REC. S14,040 (daily ed. Sept.

The courts have already recognized an agency's right to exclude records from the FOIA by refusing to acknowledge their existence.[52] Senator Leahy stressed that this FOIA exclusion was "a narrow and specific statutory authority for criminal law enforcement agencies to act on the principle that 'an agency may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under a FOIA exemption.' "[53] Exclusion would create "no new substantive withholding authority" in the areas of ongoing investigations and national security, because only records qualifying for exemption could qualify for the exclusion.[54]

The parameters of litigation in such an exclusion case are unclear. Representative Kindness stressed the courts' duty to develop as much of a public record as possible in exclusion proceedings. He noted that agencies should be required to file public affidavits and requesters should be allowed to conduct discovery, so that a requester can understand the agency position in an exclusion dispute.[55] Senator Hatch, however, stressed that requesters can expect the "automatic" filing of *in camera* affidavits to explain a refusal to confirm the existence of a record, "regardless of whether the exclusion was in fact employed in that case."[56] Logically, it would defeat the purpose of the exclusion if agencies were required to confirm the existence of an investigatory record in litigation, yet, the somewhat absurd phenomenon of litigation over nonexistent

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27, 1986). According to the "mosaic" theory, invoking an exemption or the disclosure of some nonexempt information can, in the aggregate, inform criminal, foreign intelligence or terrorist parties of the existence or contents of records that should be kept secret. *Id.*

52. *See infra* note 209.

53. 132 CONG. REC. S14,297 (daily ed. Sept. 30, 1986) (quoting Gardels v. CIA, 689 F.2d 1100, 1103 (D.C. Cir. 1982) (citing Phillippi v. CIA, 546 F.2d 1009, 1012 (D.C. Cir. 1976))). Senator Leahy noted that the ability to refuse to confirm the existence of records has been recognized by the courts, and that this language would only codify cases such as *Gardels* and *Phillippi.*

"Glomarization," the refusal to confirm or deny the existence of records, is discussed *infra* at note 209. Courts have been most willing to recognize the "Glomar" response in cases involving national security (exemption 1) and personal privacy (exemption 7). J. FRANKLIN & R. BOUCHARD, GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS § 1.04, at 1-31 to 1-32, § 1.10[3], at 1-130 to 1-132 (1987). Exemption 7(C) would apply to cases involving invasion of the privacy interests of suspected criminals and the release of the identities of confidential sources. *See* B. BRAVERMAN & F. CHETWYND, INFORMATION LAW § 11-7, at 458-59, 461-62 (1985). The Justice Department has argued that under the personal privacy exemption, concern for privacy may require an agency to refuse to confirm or deny the existence of criminal investigatory records maintained on an individual. *Privacy "Glomarization," supra* note 50, at 3-4.

54. 132 CONG. REC. S14,297 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy). Senator Leahy also noted the agencies' agreement to notify FOIA requesters in writing of the exclusion's existence. *Id. See* 5 U.S.C.A. § 552(b)(1), (7)(A) (West Supp. 1987) (exempting classified information and information that "could reasonably be expected to interfere with enforcement proceedings" from the FOIA).

55. 132 CONG. REC. H9467 (daily ed. Oct. 8, 1986).

56. 132 CONG. REC. S16,505 (daily ed. Oct. 15, 1986).

records could occur, because any requester who is informed that the records do not exist may think the agency has improperly applied the exclusion.

C. *Fee Amendments.*

The Anti-Drug Abuse Act contains a new three-tiered fee structure and new fee waiver provisions.[57] Fees are reduced for the news media and increased for commercial users, while waivers are now to be granted based on slightly different statutory criteria. The changes were made "so that more of the costs of FOIA will be recouped, and at the same time [to] relieve the news media of the need to pay a high cost for access to Government records."[58] Senator Hatch estimated that charging commercial requesters for review time "could generate as much as $60 million in additional fees."[59]

The new fee structure is similar to earlier proposals.[60] In the previ-

57. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1803, 100 Stat. 3207, 3207-49 to 3207-50 (codified at 5 U.S.C.A. § 552(a)(4)(A)) (West Supp. 1987).

58. 132 CONG. REC. S14,033 (daily ed. Sept. 27, 1986) (statement of Sen. Leahy).

59. 132 CONG. REC. S14,040 (daily ed. Sept. 27, 1986).

60. Section 1803 states:

> Paragraph (4)(A) of section 552(a) of title 5, United States Code, is amended to read as follows:
>
> (4)(A)(i) . . . each agency shall promulgate regulations . . .
>
> (ii) Such agency regulations shall provide that—
>
> (I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;
>
> (II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or non-commercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and
>
> (III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.
>
> (iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.
>
> (iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section.

Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1803, 100 Stat. 3207, 3207-49 to 3207-50 (codified at 5 U.S.C.A. § 552(a)(4)(A) (West Supp. 1987)).

Earlier proposed legislation containing this three-tiered fee structure includes H.R. 1882, 99th Cong., 1st Sess. (1985), *introduced,* 131 CONG. REC. H1836 (daily ed. Apr. 2, 1985), and H.R. 6414, 98th Cong., 2d Sess., *introduced,* 130 CONG. REC. H11363 (daily ed. Oct. 5, 1984). *See* Note, *Developments—1985, supra* note 16, at 392; Note, *Developments Under the Freedom of Information Act—1984,* 1984 DUKE L.J. 742, 753 n.98 [hereinafter Note, *Developments—1984*]. The amendments enacted in 1986 did not adopt earlier proposals for charging "all costs reasonably and directly attrib-

ous version of the statute, all requesters paid search and duplication costs.[61] Under the new law, the news media and educational and scientific institutions seeking information for scholarly or scientific research will pay only duplication costs.[62] Commercial requesters will pay for review time, while those not falling within either of these categories will continue to pay the previous fees for search and duplication.[63] The first two hours of search time and the first hundred pages of duplication in each noncommercial request will be furnished without charge.[64] Agencies cannot demand prepayment unless the requester has previously failed to pay FOIA fees or the total bill will be more than $250.[65] Fees will not be charged when billing and collection costs exceed the amount of the fee.[66]

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utable" to a search. *See* 131 CONG. REC. S266 (daily ed. Jan. 3, 1985) (statement of Sen. Hatch) (discussing S. 150, 99th Cong., 1st Sess. § 2, (1985)); Note, *Developments—1985, supra* note 16, at 390-91 (congressional debate over need for "overhaul" of FOIA). The 1986 amendments also did not follow an earlier proposal to charge the fair value of commercially useful information to commercial requesters, S. 774, 98th Cong., 2d Sess. § 2, 130 CONG. REC. S1794, S1794-95 (daily ed. Feb. 27, 1984), or to include nonprofit groups intending to disseminate information in the category paying only duplication costs, H.R. 6414, 98th Cong., 2d Sess. (1984). *See* Note, *Developments—1984, supra,* at 745-46.

61. 5 U.S.C. § 552(a)(4)(A) (1982) provided that:

> fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction is in the public interest because furnishing the information can be considered as primarily benefitting the general public.

62. 5 U.S.C.A. § 552(a)(4)(A)(ii)(II) (West Supp. 1987).

63. 5 U.S.C.A. § 552(a)(4)(A)(ii)(I), (III) (West Supp. 1987). Review costs are defined in 5 U.S.C.A. § 552(a)(4)(A)(iv) (West Supp. 1987).

FOIA requesters of Defense Department information, however, will pay only search and duplication costs. A provision in the 1987 Defense Authorization Act states that such requesters will pay "all reasonable costs attributable to search and duplication." 10 U.S.C.A. § 2328 (West Supp. 1987). This provision originally was intended to increase fees for technical data over the previous FOIA limitation to "the direct costs of such search and duplication." 5 U.S.C. § 552(a)(4)(A) (1982). The Defense Department technical data fees, however, will now be lower than those charged to other commercial requesters under the new FOIA provisions.

"Technical data" is information "of a scientific or technical nature . . . relating to supplies procured by an agency . . . [but] does not include . . . information incidental to contract administration." 10 U.S.C § 2302(4) (Supp. III 1985). Under the terms of the National Defense Authorization Act, the Defense Department will retain fees received for technical data. 10 U.S.C.A. § 2328(b) (West Supp. 1987). Fees may be waived for requesters using the information to formulate government bids, for use required to comply with international agreements, and when the Department determines that a waiver "is in the interests of the United States." 10 U.S.C.A. § 2328(c)(3) (West Supp. 1987).

64. 5 U.S.C.A. § 552(a)(4)(A)(iv)(II) (West Supp. 1987).

65. 5 U.S.C.A. § 552(a)(4)(A)(v) (West Supp. 1987). For an example of more restrictive prepayment policies in effect before the amendment, see 5 C.F.R. § 294.107(e) (1987) (Office of Personnel Management); Freedom of Information Act Program, 51 Fed. Reg. 35,634, 35,637 (1986) (to be codified at 32 C.F.R. § 1285.3(d)(2)(iv)) (Defense Logistics Agency).

66. 5 U.S.C.A. § 552(a)(4)(A)(iv)(I) (West Supp. 1987).

The law requires a fee reduction or waiver "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."[67] It is unclear who Congress intended to include in the reduced-fee category and what requests would qualify for fee waivers; for example, public interest groups and government information clearinghouses may or may not qualify for reduced fee treatment as news media.

Earlier legislative proposals specifically included in the media category those nonprofit groups that intended to make the information available to the media,[68] but these groups were not mentioned in the 1986 legislation. While Senator Hatch stated that this change indicated an intent to restrict the scope of those who could qualify for fee reductions,[69] several legislators stressed that the news media category should be construed broadly. Representative English said that dissemination of government information by private concerns is desirable and in the public interest because it saves the government the expense of publishing the information itself.[70] Senator Leahy added that any organization or individual would qualify as a member of the news media if it "regularly publishes or disseminates information to the public," for example, by publishing a magazine.[71] Representative English argued that a public interest group's request for information "sought for possible publication is still a request from the news media even though the public interest group might also want the information for other purposes."[72] Senator Hatch, however, stressed the need for a "traditional and common sense" interpretation of the term "media," apparently advocating a narrow definition of the category to include only media directed at the general public.[73]

The status of private libraries and government information clearing-

67. 5 U.S.C.A. § 552(a)(4)(A)(iii) (West Supp. 1987). Senator Hatch noted that, in a departure from the model of H.R. 6414, 98th Cong., 2d Sess. (1984), indigency and compelling need would not justify a fee waiver under the 1986 amendments. 132 CONG. REC. S14,040 (daily ed. Sept. 27, 1986). A 1985 proposal would also have granted fee waivers to indigent requesters who could demonstrate a "compelling need" for the documents. H.R. 1882, 99th Cong., 1st Sess. § 4 (1985). *See* Note, *Developments—1985, supra* note 16, at 392.

68. H.R. 6414, 98th Cong., 2d Sess. § 4 (1984).

69. 132 CONG. REC. S14,040 (daily ed. Sept. 27, 1986).

70. 132 CONG. REC. H9464 (daily ed. Oct. 8, 1986).

71. 132 CONG. REC. S14,298 (daily ed. Sept. 30, 1986).

72. 132 CONG. REC. H9464 (daily ed. Oct. 8, 1986).

73. 132 CONG. REC. S16,505 (daily ed. Oct. 15, 1986) (Free-lance writers should not benefit from "the speculative possibility" that they might be able to disseminate information.). *See* 132 CONG. REC. H9464 (daily ed. Oct. 8, 1986) (statement of Rep. English) (Free-lance writers must "demonstrate that their work is likely to be published" in order to qualify for the news media category.).

houses is unclear;[74] the law does not state whether they qualify as media for the reduced-fee treatment or automatic fee waivers. A complete fee waiver would be more desirable to the requester than a reduced fee; either option, however, would be preferable to paying a standard fee. References to "libraries" do not distinguish general-purpose libraries and institutions specializing in providing government information, and congressional debate is unilluminating. Senator Hatch flatly stated that private libraries of government documents, whether or not operated for profit, would not qualify for reduced fees as media.[75] This led Senator Kerry to express concern about whether university libraries would qualify for fee waivers; Senator Leahy reassured him that any library or clearinghouse would warrant reduced fee treatment if it regularly disseminated information.[76] Shortly after the amendments were passed, however, a Justice Department official issued a memo adopting Senator Hatch's more restrictive view, stating that agencies are not required to grant fee waivers to libraries without evidence of a planned use by someone who would qualify for a fee waiver.[77]

FOIA requesters may seek complete fee waivers regardless of their characterization as media, commercial or general requesters.[78] The new statutory standard for fee waivers is that the information must be "in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government."[79] The breadth of this standard is disputed. While Senator Hatch prescribed a narrow application, other legislators advocated granting a waiver whenever any information about government activities is divulged and the requester does not have a primarily commercial interest in the information. Senator Leahy argued that waivers would be appropriate even if a requester sought only a limited amount of information and did not intend

74. *See Leahy-Hatch-Denton: A Difference of Interpretation,* 12 ACCESS REP. No. 20, Oct. 8, 1986, at 7-8 (discussing the position of the National Security Archives); *Surrogate FOIA Requests Increasing,* VII FOIA UPDATE No. 1, Winter 1986, at 1-2 (same).

75. 132 CONG. REC. S14,040 (daily ed. Sept. 27, 1986). The Senator noted and distinguished an earlier proposal, H.R. 6414, 98th Cong., 2d Sess., that included a "nonprofit group that intends to make the information available" in the reduced-fee category.

76. 132 CONG. REC. S16,496 (daily ed. Oct. 15, 1986). *See* 132 CONG. REC. H9464 (daily ed. Oct. 8, 1986) (statement of Rep. English) (referring to policy concerns raised by a 1986 House report discussed *infra* notes 116-139 and accompanying text); *supra* note 71 and accompanying text.

77. *Supplemental Fee Waiver Guidance,* VII FOIA UPDATE No. 3, Summer 1986, at 3. *See Fight Continues on Fee Waiver Front,* 12 ACCESS REP. No. 25, Dec. 17, 1986, at 4-5.

78. 5 U.S.C. § 552(a)(1)-(2) (1982).

79. 5 U.S.C.A. § 552(a)(4)(A)(iii) (West Supp. 1987). Previously, fees were waived if a waiver was "in the public interest because furnishing the information [could] be considered as primarily benefitting the general public." 5 U.S.C. § 552(a)(4)(A) (1982). Congressional intent concerning the new provisions is unclear. *See Fight Continues on Fee Waiver Front, supra* note 77, at 4 (discussing varying congressional views regarding fee waiver provisions).

public dissemination.[80] Senator Hatch, on the other hand, believed that the word "significantly" should be "given its common force" to require a real contribution to public understanding of government, and that "public" should be "applied so as to require a breadth of benefit beyond any particularly narrow interests that might be presented."[81]

Another area of disagreement concerns statutory language stating that the FOIA fee structure will not override other statutes which govern fees.[82] Senator Hatch thought this language was "plainly intended to preserve" all other fee-setting statutes,[83] while Representative English said statutes which did not prescribe *specific* levels of fees would be controlled by the FOIA's fee waiver provisions.[84]

Finally, it is disputed whether the statute was intended to depart from the Justice Department's guidelines[85] for agency fee waiver decisions. Senator Leahy stated that the amendment effects "a change in the current fee waiver language and is specifically intended to overturn the January 1983 Justice Department fee waiver guidelines."[86] Representative English concurred with Senator Leahy's statement and described the Justice Department's interpretation of the previous statutory language as "erroneous" and "too restrictive."[87] Senator Hatch, on the other hand,

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80. 132 CONG. REC. S14,298 (daily ed. Sept. 30, 1986). Representative English agreed: "Public understanding is enhanced when information is disclosed to the subset of the public most interested, concerned, or affected by a particular action or matter." 132 CONG. REC. H9464 (daily ed. Oct. 8, 1986).

81. 132 CONG. REC. S16,505 (daily ed. Oct. 15, 1986).

82. 5 U.S.C.A. § 552(a)(4)(vi) (West Supp. 1987) ("Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.").

83. 132 CONG. REC. S16,505 (daily ed. Oct. 15, 1986).

84. 132 CONG. REC. H9465 (daily ed. Oct. 8, 1986). *See, e.g.*, 42 U.S.C.A. § 286(d)(2) (West Supp. 1987) (National Library of Medicine may provide access either "without charge as a public service" or for a fee.); 31 U.S.C. § 9701 (1982) (agencies to charge recipients of services a "self-sustaining" fee).

85. Memo from Assistant Attorney General Johnathan C. Rose to Heads of All Federal Departments and Agencies (Jan. 7, 1983), *reprinted in* 1 Gov't Disclosure Rep. (P-H) ¶ 300,815 (Feb. 8, 1983). Citing dual goals of benefit to the general public and the "preservation of public funds," Rose listed five factors to be considered in evaluating fee waiver requests:

1. "[A]n agency must determine whether there is a genuine public interest in the subject matter of the documents for which fee waiver is sought . . . ."
2. "[A]gencies must examine . . . the value to the public of the records themselves."
3. "[Agencies must] consider[ ] whether the requested information is already available in the public domain."
4. "A requester's identity and qualifications—*e.g.* expertise in the subject area and ability and intention to disseminate the information to the public—should be evaluated."
5. "[Agencies must make] an assessment . . . of any personal interest of the requester . . . [compared with] any discernable public benefit . . . ."

Id. The memo urged that fees not be waived simply as the "course of least resistance," but that "thorough reviews" be conducted "on a case-by-case basis." *Id.*

86. 132 CONG. REC. S14,298 (daily ed. Sept. 30, 1986).

87. 132 CONG. REC. H9464 (daily ed. Oct. 8, 1986).

said that the Justice Department guidelines were not being repudiated.[88]

The Justice Department guidelines, which purport merely to elucidate the statute's fee waiver clause, have been controversial since publication.[89] Five factors named in the guidelines require an agency to evaluate both the requested information's value to the public and the requester's ability to disseminate it.[90] While some agency regulations specifically state that fee waiver decisions will be based on the five Justice Department criteria,[91] others merely restate the prior FOIA statutory language.[92] This tension was demonstrated in 1986 when one agency proposed regulations which incorporated the Department of Justice guidelines[93] and then—in response to public comment—published final regulations that instead used the then-current statutory language.[94]

D. *The House Bill: Business Confidentiality Procedures.*

Although submitters of confidential business information continued to press for procedures to protect their information from disclosure pursuant to FOIA requests by competitors,[95] Congress failed to so amend

88. 132 CONG. REC. S16,505 (daily ed. Oct. 15, 1986).

89. *See Markman Expresses Hope for FOIA Legislation, supra* note 7, at 2 (guidelines objectionable to press and public interest groups because they give agencies wide discretion in determining what information is in public interest); *see also* Note, *Developments Under the Freedom of Information Act—1983,* 1984 DUKE L.J. 377, 392-93 [hereinafter Note, *Developments—1983*].

90. *See supra* note 85.

91. *E.g.,* Freedom of Information Act Implementing Regulations, 7 C.F.R. § 1.13 (1987) (Dep't of Agric.); Freedom of Information Act Regulations, 51 Fed. Reg. 13,250, 13,255-56 (1986) (to be codified at 45 C.F.R. § 5.44(b)) (proposed Apr. 8, 1986) (Dep't of Health and Human Servs.).

92. *E.g.,* Freedom of Information Act Regulations for the National Endowment for Democracy, 51 Fed. Reg. 40,161, 40,164 (1986) (to be codified at 22 C.F.R. § 526.5(c)(10)) (U.S. Information Agency); Availability of Official Information, Service Charges for Information, 5 C.F.R. § 294.107(h) (1987) (Office of Personnel Management). The statutory language, prior to the 1986 amendments, held that fees should be waived when waiver or reduction was "in the public interest because furnishing the information can be considered as primarily benefitting the general public." 5 U.S.C. § 552(a)(4)(A) (1982).

93. Freedom of Information Act Procedures, 51 Fed. Reg. 17,206, 17,206-07 (1986) (proposed May 9, 1986) (National Archives and Records Administration).

94. Freedom of Information Act Procedures, 51 Fed. Reg. 23,416 (1986) (to be codified at 36 C.F.R. § 1250.38(b)) (National Archives and Records Administration).

In 1986, requester groups finally succeeded in efforts to have the Justice Department guidelines reviewed by a court, which found that the guidelines were not facially invalid. Better Gov't Ass'n v. Department of State, No. 83-2998, slip op. at 6 (D.D.C. July 31, 1986) (Memorandum supporting Judgment and Order). *See* Better Gov't Ass'n v. Department of State, No. 83-2998 (D.D.C. Mar. 9, 1987) (clarifying earlier decision and noting that new guidelines will have to be issued to accomodate FOIA). The court found the guidelines "reasonably relevant" to a determination on fee waivers. No. 83-2998, memorandum op. at 6 (July 31, 1986). It noted, however, that the guidelines should be subjected to notice and comment rulemaking by the agency which relied on them. *Id.* at 7. *See generally Fee Waiver Guidance Not "Facially Invalid,"* 12 ACCESS REP. No. 17, Aug. 13, 1986, at 4-5.

95. *House Advances Limited FOIA Bill,* VII FOIA UPDATE No. 2, Spring 1986, at 1.

the FOIA in 1986. The House did pass a bill sponsored by Representatives English and Kindness that would have required agencies to involve submitters of business information claimed to be confidential in any decision to release that information;[96] however, the Senate failed to act on the bill.

The proposal contained features of earlier unsuccessful legislation.[97] Submitters would have been required to designate information they considered exempt from disclosure under exemption 4.[98] Agencies would have been required to notify the submitter of requests and allow an opportunity to object to disclosure.[99] While most agencies currently do provide notification to business information submitters, procedures vary widely and submitters are not gnaranteed the right to be consulted.

In 1986, the Department of Health and Human Services—in the absence of statutory guidance—proposed regulations which would require submitters to intervene in any suit brought by requesters against the agency.[100] The Food and Drug Administration considered a test proposal that would permit business submitters to mark any confidential material; this proposal, however, would also require the business submitters to defend any suit against the agency.[101] The Department of Agriculture issued less stringent regulations, stating that while its general policy was to consult with submitters, it would not if it could "readily determine" whether disclosure was appropriate.[102]

The FOIA provides no explicit cause of action for "reverse-FOIA" suits where an information submitter seeks to enjoin the government from disclosing the information to requesters.[103] Under the legislation

96. H.R. 4862, 99th Cong., 2d Sess., 132 CONG. REC. H7876 (daily ed. Sept. 22, 1986), *passed,* 132 CONG. REC. H7880 (daily ed. Sept. 22, 1986).

97. *See* S. 150, 99th Cong., 1st Sess., *introduced,* 131 CONG. REC. S72 (daily ed. Jan. 3, 1985); H.R. 1882, 99th Cong., 1st Sess., *introduced,* 131 CONG. REC. H1836 (daily ed. Apr. 2, 1985).

98. H.R. 4862, 99th Cong., 2d Sess. § 2, 132 CONG. REC. H7876, H7876 (daily ed. Sept. 22, 1986). Exemption 4 of the FOIA exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4) (1982).

99. H.R. 4862, 99th Cong., 2d Sess. § 2, 132 CONG. REC. H7876, H7876 (daily ed. Sept. 22, 1986). Notification would not have been required if the agency decided to deny the request, disclosure was required by law, the information had been published or otherwise made public, or the designation was "obviously frivolous." *Id.*

100. Freedom of Information Act Regulations, 51 Fed. Reg. 13,250, 13,257 (1986) (to be codified at 45 C.F.R. § 5.65) (proposed Apr. 18, 1986). The Commodities Futures Trading Commission issued similar regulations. 17 C.F.R. § 145.9(i) (1987).

101. *FDA May Try Out New Business Data Proposal,* 12 ACCESS REP. No. 11, May 21, 1986, at 2-4. The article noted that delegation of authority over disclosure to the information submitters may not be legal. *Id.* at 3.

102. 7 C.F.R. § 1.8(a) (1987).

103. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 316 (1979) (refusing to imply a private right of action to enjoin disclosure in violation of the Trade Securities Act). *See also* Note, *Developments—1983, supra* note 89, at 442 & n.255 (discussing *Chrysler*). A submitter opposing disclosure may

proposed by Representatives English and Kindness, both submitters and requesters would have had an explicit cause of action to contest agency decisions,[104] and claims by requesters as well as reverse-FOIA suits would be subject to de novo review.[105] The information requester would have benefitted from provisions compelling transfer of venue in most cases to the forum of its preference,[106] and requiring the imposition of sanctions against submitters who participate in lawsuits when their position is not "substantially justified."[107] Additionally, the House bill would have provided expedited access deadlines when requesters demonstrated "a substantial public interest in expeditious consideration."[108]

Representative Kindness argued that these actions were necessary to protect confidential information; he further indicated that the legislation was intended to discourage FOIA use by requesters who unduly burden the agencies with requests for competitors' data.[109] Representative English stressed that the bill would make only procedural changes; it was needed to ensure fair decisions on the disclosure of confidential information because time limits currently restrict agencies' ability to consult with submitters.[110]

The proposed amendments generated much debate in the House. Opponents objected that the bill's provisions, especially de novo review of reverse-FOIA suits, could be manipulated to create delay and expense for both the government and FOIA requesters.[111] The expedited access provisions also represented a potential cause of additional expense to agencies.[112] While notification of FOIA requests to submitters might be justified in the interest of fairness, providing de novo review of reverse-

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bring suit under the Administrative Procedures Act, which provides judicial review for a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." 5 U.S.C. § 702 (Supp. III 1985). This remedy, however, is available only after an injury has occurred.

104. H.R. 4862, 99th Cong., 2d Sess. § 3(1) (1986).

105. *Id.* at § 3(2).

106. *Id.* at § 3(1).

107. *Id.* at § 3(3). Reasonable attorney fees and costs would be awarded.

108. *Id.* at § 2. *See* 132 CONG. REC. H7880 (daily ed. Sept. 22, 1986) (statement of Rep. Kleczka) ("reporters with short deadlines and public interest groups and others who have a special need for information on short notice" would qualify under this provision); *House Advances Limited FOIA Bill,* VII FOIA UPDATE No. 2, Spring 1986, at 1 (identifying Kleckza's interpretation as a proposal presenting "totally unacceptable difficulties to agencies").

109. 132 CONG. REC. H3139 (daily ed. May 21, 1986).

110. 132 CONG. REC. H7877 (daily ed. Sept. 22, 1986). Representative English also noted that the bill would provide uniformity in agency procedures. *Id.*

111. 132 CONG. REC. H7878 (daily ed. Sept. 22, 1986) (statement of Rep. Weiss). *See also* HOUSE COMM. ON GOV'T OPERATIONS, FREEDOM OF INFORMATION ACT AMENDMENTS OF 1986, H.R. REP. No. 832, 99th Cong., 2d Sess. 57-58 (1986) (dissenting views of Reps. Weiss, Levin, Owens, Conyers & Martinez) [hereinafter Committee Dissent].

112. 132 CONG. REC. H7879 (daily ed. Sept. 22, 1986) (statement of Rep. Weiss).

FOIA suits was thought to be unnecessary and unduly restrictive of disclosure under the FOIA.[113] In spite of these criticisms, the House passed the bill.[114] The Senate, however, did not debate or vote on the bill, and it died at the end of the Ninety-ninth Congress.[115]

II. ADMINISTRATIVE DEVELOPMENTS

A. *House Report on the Electronic Collection and Dissemination of Information by Federal Agencies.*

The House Committee on Government Operations issued a report that has implications for the pricing of government information and procedures used to process FOIA requests.[116] The report articulates policy goals arising from the first amendment, the Copyright Act,[117] the Privacy Act,[118] and the Paperwork Reduction Act,[119] and addresses agency use of data bases to collect, store and disseminate public information.[120] It stresses that information must remain as "freely accessible and easily reproducible" when agencies use computer systems as it is with paper systems.[121] Although the report primarily advocates good planning, cooperation and efficiency in government information systems, it also addresses several FOIA-related issues.

First, the report provides a broad definition of agency records which includes collections of commercially valuable information gathered for resale to the public. In response to a decision by the United States Court of Appeals for the Ninth Circuit,[122] the report states that all public information in agency data bases is subject to the FOIA and therefore must be provided to requesters at no more than a nominal fee or the actual copy-

113. Committee Dissent, *supra* note 111, at 57-58. The Working Group on Intellectual Property issued a memorandum in 1986, which recommended that the President issue an executive order mandating agency notification to business information submitters of FOIA requests. The group also recommended certain changes to exemptions 4 and 5 to foster commercial competitiveness. *Working Group Memo Suggests Exemption 4 Changes,* 12 ACCESS REP. No. 25, Dec. 17, 1986, at 5-6.

114. 132 CONG. REC. H7880 (daily ed. Sept. 22, 1986).

115. [1985-1986] 2 Cong. Index (CCH) 35,089 (Dec. 10, 1986).

116. HOUSE COMM. ON GOV'T OPERATIONS, ELECTRONIC COLLECTION AND DISSEMINATION OF INFORMATION BY FEDERAL AGENCIES: A POLICY OVERVIEW, H.R. REP. No. 560, 99th Cong., 2d Sess. (1986) [hereinafter POLICY OVERVIEW].

117. 17 U.S.C. § 105 (1982).

118. 5 U.S.C. § 552a (1982).

119. 44 U.S.C. §§ 3501-3520 (1982).

120. An Office of Management and Budget circular distinguished between "dissemination" as "active outreach by a government agency" and "access" as "providing to members of the public, upon their request, the government information to which they are entitled under law." Management of Federal Information Resources, 50 Fed. Reg. 52,730, 52,745 (1985). The House report does not make this distinction. *See* POLICY OVERVIEW, *supra* note 116, at 1-2.

121. POLICY OVERVIEW, *supra* note 116, at 9.

122. SDC Dev. Corp. v. Mathews, 542 F.2d 1116 (9th Cir. 1976).

ing costs.[123] The Ninth Circuit had determined that information on medical publications contained in the National Library of Medicine's MEDLARS data base, which in 1976 was being supplied on tape to subscribers for a fee of $50,000 per year,[124] did not fall within the definition of "agency records."[125] The House report disagrees, stating that these records *were* agency records because they were compiled under statutory authority with public funds and did not fall within any of the nine FOIA exemptions.[126] Because agencies providing information under FOIA can charge only search, duplication and review costs,[127] the MEDLARS data base—according to the report's reasoning—should be available upon payment of those fees.[128]

Second, the report states that user fees should be limited to nominal charges and that any proposal to surcharge for commercially valuable information would be inadvisable. The report notes that in a situation such as that of MEDLARS, where the agency's purpose was to gather and disseminate information, "a lower price would permit more people to use the information . . . [thus enabling] the agency to do a better job of carrying out its statutory responsibility to 'aid the dissemination of . . . information.' "[129] Furthermore, high fees for information might be illegal and licensing arrangements limiting copying and redissemination privileges could violate the prohibition on copyrighting government information.[130] This prohibition is based on recognition that information created with public funds should be available to the public and that excessive government control over information might lead to its monopolistic or overtly political use.[131] Additionally, agencies should not derive real economic support from user fees, because most system costs are incurred for internal agency purposes.[132] Fees cannot be justified as a

123. POLICY OVERVIEW, *supra* note 116, at 33.

124. 542 F.2d at 1118 & n.3.

125. *Id.* at 1120.

126. POLICY OVERVIEW, *supra* note 116, at 33. The MEDLARS library is authorized by 42 U.S.C.A. § 286 (West Supp. 1986).

127. 5 U.S.C.A. § 552(a)(4)(A) (West Supp. 1987).

128. POLICY OVERVIEW, *supra* note 116, at 32-33, 35.

129. *Id.* at 34 (quoting 42 U.S.C. § 275 (1982)).

130. *Id.* at 26-27 (quoting letter from David Ladd, Register of Copyrights, to Sen. Mathias (Oct. 11, 1983)). *See* The Copyright Act, 17 U.S.C. § 105 (1982) ("Copyright protection . . . is not available for any work of the United States Government . . . ."). *See also* 132 CONG. REC. H9464 (daily ed. Oct. 8, 1986) (referring to this section of the report's reasoning while arguing for an expansive interpretation of the 1986 amendments to the FOIA's fee provisions).

131. POLICY OVERVIEW, *supra* note 116, at 4-6.

132. *Id.* at 40.

source of revenue to the government under current policy.[133] Therefore, legislation to charge requesters the commercial value of information supplied under the FOIA[134] would be a mistake, because it would allow the government to exercise "copyright-like controls" over information.[135]

Third, the report discusses agencies' duty to use electronic information systems in the fashion most useful to information requesters. The report notes:

> Public access is a dynamic concept. If an agency has developed the ability to manipulate data electronically, it is unfair to restrict the public to paper documents. An agency cannot justify denying the public the benefits of new technology by preserving, without improvement, the same type of access that was provided in the past.[136]

The House report thus dictates that, if possible, agencies offer information in a variety of media and formats. In *Dismukes v. United States Department of Interior,*[137] for example, an agency was allowed to give a FOIA requester a microfiche record instead of the computer tape requested. The House report stated that "[i]t is not clear that the *Dismukes* court's reading of the Freedom of Information Act is entirely correct" and that an extension of the court's reasoning could lead to over-control of information by government.[138]

The report's insistence that government share the benefits of technology with information requesters also supports an argument that agencies must create any new computer retrieval programs necessary to satisfy FOIA requests. The traditional method of processing FOIA requests—locating and photocopying a paper document—involves easily calculated search and duplication costs. On the other hand, creating a program to retrieve computerized data might involve an extensive effort. The government's duty to create such new programs is still undefined.[139]

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133. *See id.* at 43 ("Current policies requiring public access to government records and prohibiting government copyright will not support fees for information products and services that produce revenues higher than the cost of dissemination.").

134. *See* S. 774, 98th Cong., 2d Sess., 130 CONG. REC. S1794 (daily ed. Feb. 27, 1984).

135. POLICY OVERVIEW, *supra* note 116, at 11.

136. *Id.* at 10.

137. 603 F. Supp. 760, 762-63 (D.D.C. 1984).

138. POLICY OVERVIEW, *supra* note 116, at 36 n.151.

139. *Computerized Records: Information Access and the FOIA,* 12 ACCESS REP. No. 19, Sept. 24, 1986, at 2-3, 5. In 1986, the Justice Department litigated two cases involving programming requests, arguing that a duty to write new programs would "transform the government into a giant computer research firm" and "constitute a wholesale departure from both existing law and the purposes of the FOIA." Public Citizen v. OSHA, No. 86-0705 (D.D.C.) (motion for summary judgment denied Aug. 5, 1987); Kele v. Parole Comm'n, No. 85-4058 (D.D.C. dismissed Oct. 31, 1986, for failure to exhaust administrative remedies). *See Computerized Records: Information Access and the FOIA, supra* at 3 (discussing Justice Department's arguments). The Department of Health and Human Services published a proposed rule stating that it was not required to write a new program to print information in a requested format, but that it would write a new program if a minimal effort

B. *Proposal for FOIA Tribunal or Ombudsman.*

The Committee on Judicial Review of the Administrative Conference of the United States considered the creation of an administrative tribunal or ombudsman to review FOIA disputes between information requesters and the government. Professor Mark Grunewald prepared two draft reports for the committee during 1986.

The first draft of the report[140] reviewed statistics on FOIA dispute resolution and proposed the creation of an administrative tribunal.[141] The tribunal would attempt to provide greater speed, cost efficiency and specialized expertise in the resolution of FOIA disputes. It would be managed by a presidential appointee who would be removable only for cause and would be staffed by administrative law judges and conciliators. Disputes would be referred to the tribunal by the parties themselves or by court certification on motion of either party, and tribunal decisions would be appealed to the federal courts of appeals, subject to the same standard of review as decisions by the district courts.[142]

In a request for public comment published in March, however, the committee expressed doubt over the necessity for a tribunal.[143] The committee sought comments on alternative methods for speeding the resolution of FOIA disputes.[144] Identified as possibilities were: increased use of magistrates in court proceedings, more use of the Office of Special Counsel of the Merit Systems Protection Board to investigate charges of arbitrary or capricious government withholding of information, establishment of an ombudsman or conciliator function, creation of statutory incentives to promote early settlement by the government in appropriate cases, and development of guidelines for efficient review by the courts.[145]

Professor Grunewald prepared a second draft of his report proposing the creation of an ombudsman as an alternative to an administrative

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was involved and it was the only way to respond to a request. Freedom of Information Act Regulations, 51 Fed. Reg. 13,250, 13,253 (1986) (to be codified at 45 C.F.R. § 5.21(e)) (proposed Apr. 18, 1986).

140. M. Grunewald, A Study of the Desirability and Feasibility of Establishing an Administrative Tribunal to Resolve Freedom of Information and Other Public Access Disputes (draft of Feb. 25, 1986) (Report to the Administrative Conference of the United States).

141. *Id.* at 7-22, 61-63. *See* Request for Public Comments, 51 Fed. Reg. 10,213 (1986); *Draft on FOIA Tribunal Submitted to Conference,* 12 ACCESS REP. No. 6, Mar. 12, 1986, at 1-2.

142. Request for Public Comments, 51 Fed. Reg. 10,213 (1986).

143. *Id.* The report's statistics showed that only 500 court actions result each year from the 5000 FOIA disputes resolved against the requester at the agency level.

144. *Id.* at 10,214.

145. *Id.*

tribunal.[146] "Ombudsman" is defined for the report's purposes as "an independent officer with authority, on the basis of citizen complaints, to investigate specific administrative action and to criticize but not compel a change in the result."[147] Although possibly situated in the Justice Department,[148] the FOIA ombudsman should play the role of a neutral advocate of the FOIA's policies,[149] facilitating communication[150] and proposing dispute resolution.[151] He would not compel agency actions or influence later court findings, his authority being limited to the preparation of a report to the requester and the agency.[152] The goals of the system would be to facilitate the evaluation and resolution of disputes and to identify systematic access problems.[153]

The committee was uncertain of the usefulness of an ombudsman, the amount of power he should hold, and the types of disputes he should review.[154] The committee agreed that any ombudsman authority should be limited to procedural disputes such as the adequacy of a record search, compliance with time limits, and fee collections and waivers.[155] The substantive applicability of national security, law enforcement and confidential business information exemptions would be beyond the scope of the ombudsman's authority.[156] Thus, any ombudsman function established in the future will probably be limited to procedural matters.[157]

C. *Nixon Presidential Materials.*

The National Archives and Records Administration published regulations providing for FOIA access to some Nixon presidential materi-

146. M. Grunewald, A Study of the Desirability and Feasibility of Establishing an Administrative Tribunal to Resolve Freedom of Information and Other Public Access Disputes 85-127 (draft of Sept. 25, 1986) (Report to the Administrative Conference of the United States).

147. *Id.* at 98.

148. *Id.* at 121.

149. *Id.* at 119.

150. *See id.* ("[T]he ombudsman might even bring together the requester and an agency official to exchange views on how to bring the matter to a fair and expeditious conclusion.").

151. *Id.* at 118.

152. *Id.*

153. *Id.* at 116.

154. *ACUS Discusses Proposal for FOIA Ombudsman Project,* 12 ACCESS REP. No. 22, Nov. 5, 1986, at 1-3.

155. *ACUS Continues Debate on FOIA Ombudsman Project,* 12 ACCESS REP. No. 23, Nov. 19, 1986, at 2-3.

156. *Id.* at 3.

157. On December 4, 1986, the committee agreed to reserve consideration of the ombudsman project and to urge the Justice Department's Office of Information and Privacy to expand its role as a FOIA dispute resolution center. *In Brief,* 12 ACCESS REP. No. 25, Dec. 17, 1986, at 12-13. A Justice Department official informed the committee that his department would not support the placement of an experimental ombudsman project in the Justice Department. *Id.* at 13. No consensus materialized by the end of the year.

als.[158] FOIA access is provided to records of an "agency"—defined in the regulations to include the Executive Office of the President[159]—if the records are not available from the agency which generated them.[160] Several members of the House reacted critically to a Justice Department memorandum which seemed to give more weight to claims of executive privilege than the regulations themselves would provide.[161] While claims of executive privilege may be litigated in the future, some of the materials already have been released to the public.[162]

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158. Preservation and Protection of and Access to Historical Materials of the Nixon Administration; Repromulgation of Public Access Regulations, 51 Fed. Reg. 7228 (1986) (to be codified at 36 C.F.R. § 1275). The Archive must review the material before releasing that portion not subject to restrictions. *Id.* at 7231 (to be codified at 36 C.F.R. § 1275.16(g)).

In 1985, the United States Court of Appeals for the District of Columbia Circuit held that the procedures promulgated pursuant to the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2111 (Supp. III 1985), provide the only means of disclosure of Nixon materials and that the FOIA does not provide separate access. Ricchio v. Kline, 773 F.2d 1389, 1395 (D.C. Cir. 1985).

159. "Agency" is defined as:

> an executive department, military department, independent regulatory or nonregulatory agency, Government corporation, Government-controlled corporation, or other establishment in the executive branch of the Government including the Executive Office of the President. For purposes of [the section on access by agencies] only, the term "agency" shall also include the White House Office.

51 Fed. Reg. 7231 (1986) (to be codified at 36 C.F.R. § 1275.16(f)).

160. The National Archives and Records Administration stated that "[t]he Archivist will process Freedom of Information Act requests for access to only those materials . . . which are identifiable by an Archivist as records of an agency as defined [in this rule]." 51 Fed. Reg. 7235 (1986) (to be codified at 36 C.F.R. § 1275.70(a)). The Administration also stated:

> In order to allow NARA Archivists to devote as much time and effort as possible to the processing of materials for general public access, the Archivist will not process those Freedom of Information requests where the requester can reasonably obtain the same materials through a request directed to an agency.

51 Fed. Reg. 7236 (1986) (to be codified at 36 C.F.R. § 1275.70(b)).

161. *See* HOUSE COMM. ON GOV'T OPERATIONS, ACCESS TO THE NIXON PRESIDENTIAL MATERIALS SHOULD BE GOVERNED BY NARA REGULATIONS, NOT OMB OR DOJ ACTIONS, H.R. REP. NO. 961, 99th Cong., 2d Sess. 17-32 (1986); *Review of Nixon Presidential Materials Access Regulations: Hearing Before a Subcomm. of the House Comm'n on Gov't Operations,* 99th Cong., 2d Sess. 2 (1986). The regulations state that the Archivist will make the decision as to any claim of privilege. 51 Fed. Reg. 7233 (1986) (to be codified at 36 C.F.R. § 1275.44(a)). A Justice Department memo stated that the Archivist would be legally bound to respect any claim of privilege made by either a sitting President or a former President, and that an incumbent President should respect a former President's claims unless constitutionally compelled to do otherwise. *Justice Memo Accompanies Nixon Papers Regulations,* 12 ACCESS REP. NO. 6, Mar. 12, 1986, at 4. Representatives Kindness and English objected to the Justice Department's involvement in the issue. *Justice, OMB Questioned on Access to Nixon Papers,* 12 ACCESS REP. NO. 10, May 7, 1986, at 5. The General Counsel to the Clerk of the House stated that Congress did have the authority to give the Archivist power to determine claims of executive privilege. *Id.* at 6. The regulations noted that, in any event, the Presidential Records Act, 44 U.S.C. § 2204 (1982), places a time limit of twelve years on executive privilege claims. 51 Fed. Reg. 7230 (1986) (supplementary information to regulations).

162. *Archives Opens Up Part of Nixon Files,* 12 ACCESS REP. NO. 24, Dec. 3, 1986, at 4-5. On December 1, 1986, 1.5 million pages of documents were made public. *Id.* at 4.

III. JUDICIAL DEVELOPMENTS

A. *Jurisdiction: The Definition of Agency Records.*

The lack of a comprehensive definition of the term "agency records" continued to fuel litigation in 1986.[163] The FOIA empowers federal courts to enjoin federal agencies from wrongfully withholding agency records;[164] however, neither the FOIA nor its legislative history clarifies what falls within that category. In *Marzen v. United States Department of Health and Human Services,*[165] a case of first impression, the Federal District Court for the Northern District of Illinois held that " 'agency records' do not include records obtained by a governmental agency without legal authority, express or implied, to do so."[166]

In *Marzen,* the National League Center for the Medically Dependent and Disabled in Indianapolis brought a FOIA action against the Department of Health and Human Services (HHS), seeking records compiled during an investigation by the HHS's Office for Civil Rights (OCR). Pursuant to its purported authority under the Rehabilitation Act of 1973,[167] the OCR had initiated an investigation into possible discrimination against a handicapped newborn.[168]

Although both the plaintiff and the government argued that only the FOIA's nine statutory exemptions could support nondisclosure, the district court addressed the threshold question of whether the requested records were agency records within the scope of the FOIA.[169] The court reasoned that if the Supreme Court affirmed a Second Circuit decision that held that the HHS lacked statutory authority to conduct such inves-

163. *See* Note, *Developments—1984, supra* note 60, at 774-82 (comprehensive discussion of litigation occurring in 1984 concerning definition of "agency records"); Note, *Developments—1983, supra* note 89, at 393-402 (comprehensive discussion of litigation occurring in 1983 concerning definition of "agency records").

164. 5 U.S.C. § 552(a)(4)(B) (1982).

165. 632 F. Supp. 785 (N.D. Ill. 1986), *aff'd,* 825 F.2d 1148 (7th Cir. 1987).

166. *Id.* at 802. Under the court's analysis, most of the requested records were not agency records and were, therefore, nondisclosable. Nonetheless, the court conducted an alternative analysis because (1) the case was one of first impression, (2) the pertinent legislative history did not adequately resolve the issue, (3) the issue was inadequately addressed by the parties, and (4) the case involved the unresolved question of whether an agency's good faith belief that it had statutory authority to conduct such investigations altered the outcome. *Id.* at 802. The Supreme Court subsequently ruled that HHS lacked statutory authority. *See infra* note 170.

167. 29 U.S.C. § 794 (1982). Section 504 of the Rehabilitation Act purportedly gave the HHS authority to conduct investigations into possible violations of the Rehabilitation Act by recipients of federal funds. 632 F. Supp. at 790.

168. 632 F. Supp. at 787. The investigation concerned a "Baby Doe" incident in which corrective medical treatment was withheld by parental request from a Down's Syndrome newborn with a blocked esophagus. *Id.* at 788-89.

169. *Id.* at 794-802.

tigations,[170] the determinative issue would be whether records obtained without statutory authority are nevertheless agency records within the scope of the FOIA.[171]

The court rejected the plaintiff's contention that because the requested records were in the possession, custody and control of the OCR, they were agency records.[172] It reasoned that the FOIA implicitly assumes an agency is legally authorized to obtain the requested records "because Congress could not have intended to expose to public scrutiny documents that the agency itself had no legal authority to examine."[173] The court further reasoned that the Privacy Act—which requires statutory authorization or an executive order for agency record collection[174]—prompted a strict construction of the term agency records, restricting the FOIA's application to those records obtained under specific authority.[175]

Under *Marzen,* a determination that the records are not agency records makes unnecessary any investigation into whether the records are nondisclosable under one of the FOIA's nine statutory exemptions.[176] The court observed that the public's interest in knowing how its government works would be satisfied by the government's admission in a *Vaughn* index[177] that "the documents are not disclosable because they

170. The Supreme Court subsequently held that the HHS's investigations were not authorized by statute and that the HHS regulations established to continue the investigations were invalid. Bowen v. American Hosp. Ass'n, 106 S. Ct. 2101, 2123 (1986).

171. 632 F. Supp. at 795.

172. *Id.* at 797. The court acknowledged that, in determining whether documents are agency records, courts generally had focused on whether the documents are in the possession, custody or control of the agency. The court, however, deduced from two Supreme Court decisions, Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980) and Forsham v. Harris, 445 U.S. 169 (1980), that "neither an agency's access to documents (that is, its unexercised power to obtain them) nor even the agency's physical custody of documents (not created by the agency) is enough, in and of itself, to turn documents into agency records." 632 F. Supp. at 798 (quoting General Elec. Co. v. Nuclear Regulatory Comm'n, 750 F.2d 1394, 1400 (7th Cir. 1984)).

Both *Forsham* and *Kissinger* focused on the possessory nature of agency records under the FOIA. *See* Note, *The Definition of "Agency" Under the Freedom of Information Act As Applied to Federal Consultants and Grantees,* 69 GEO. L.J. 1223, 1242-47 (1981) (*Forsham* and *Kissinger* "indicate that public access turns on whether the agency has taken physical custody of the records produced by nongovernment sources.").

173. 632 F. Supp. at 798.

174. Privacy Act of 1974, 5 U.S.C. § 552a(e)(1) (1982).

175. 632 F. Supp. at 800. The court earlier noted its hesitancy to "vest great weight on the Privacy Act both because it was passed subsequent to FOIA and because those statutes were informed by different congressional concerns." *Id.* at 799. The court admitted it was influenced by the lack of a statutory definition of agency records, the absence of legislative history of the term, and the fact that Congress passed the Privacy Act only 40 days after the FOIA. *Id.*

176. *Id.* at 800.

177. The *Vaughn* index, which requires a detailed justification for each document claimed to be exempt from disclosure, was first established in Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973),

were obtained without authority or illegally."[178]

The court rejected the government's argument that a good faith belief of authority to conduct the investigations brought the documents within the scope of the FOIA. It held that a finding of good faith would affect only the reason for nondisclosure claimed in a *Vaughn* index.[179]

Marzen is unpersuasive. Although a government agency would not lightly admit that requested records were obtained illegally or without authority,[180] such an admission might warrant greater disclosure of the collected materials. Congress enacted the FOIA to reverse a trend of increasing secrecy within governmental agencies and to facilitate an informed citizenry.[181] Indeed, the FOIA's legislative history includes numerous references to the people's right to know what their government is doing.[182] An agency's refusal to disclose requested documents because

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cert. denied, 415 U.S. 977 (1974). The *Vaughn* court rejected the government agency's claim that "all it need do to fulfill its burden [under the FOIA] is to aver that the factual nature of the information is such that it falls under one of the exemptions." *Id.* at 825-26. The court noted that allowing such blanket exemptions would render the opposing party "comparatively helpless to controvert this characterization" and required the court system to conduct its own investigation. *Id.* at 826.

178. 632 F. Supp. at 800. The plaintiff argued:

> How the agency obtains the records is immaterial. Indeed, if the CIA or any other agency notoriously *stole* records, it is inconceivable that they would not be subject to FOIA *merely* for that reason. Unless one of the nine exemptions applied, the public interest in disclosure might be even greater. Certainly, the interest of the public in "knowing what their government is doing" would be just as high. This is why withholding has been limited to the nine exemptions.

Id. at 800 (quoting plaintiff's supplemental brief) (emphasis in original). The court rejected this argument, finding that the public need only know the general nature and extent of the records obtained and that the records were obtained illegally. *Id.* Analogizing to the Watergate break-in of Daniel Ellsberg's psychiatrist's office, the court noted that the stolen records, which were "subsequently in the possession, custody, and control of the government, could not [have been] disclosed to every member of the public merely because of those circumstances." *Id.* at 801.

The *Marzen* court failed to recognize the strength of the plaintiff's argument. Once deemed agency records, the requested documents are not simply let loose to the public at large as the court suggested in its Watergate analogy. Instead, any documents which come within the FOIA's nine statutory exemptions would be protected from disclosure. Thus, as pointed out by the plaintiff in oral argument, in all likelihood Daniel Ellsberg's psychiatric files would be protected from disclosure by the FOIA's privacy or national security exemptions. *See id.* at 801 n.15.

179. *Id.* at 802.

180. *Id.* at 801. The court posited that an admission that the records were "obtained only because they were stolen" would "by its very serious nature, suggest[ ] its truth." *Id.*

181. *See generally* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) ("basic purpose . . . is to ensure an informed citizenry . . . needed to check against corruption and to hold the governors accountable to the governed"); B. BRAVERMAN & F. CHETWYND, *supra* note 39, at §§ 1-1.2 to 1-1.3 (discussing origin and purpose of the FOIA).

182. *E.g.,* 118 CONG. REC. 9949-50 (1972) (statement of Rep. Moorhead), *reprinted in* SUBCOMMITTEE ON GOV'T INFORMATION AND INDIVIDUAL RIGHTS OF THE HOUSE COMM. ON GOV'T OPERATIONS & SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 94TH CONG., 1ST SESS., FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (P.L. 93-502) SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 99 (Joint Comm. Print 1975) [hereinafter SOURCE BOOK]; 120 CONG. REC. 6814 (1974) (statement of

they were obtained illegally or without statutory authority reveals only *how* the government is conducting its business, but fails to inform the public of *what,* in fact, that business is. The claim that an agency has no authority to collect requested records should not allow the government to escape scrutiny altogether. Instead, courts should require that the government at least produce a detailed *Vaughn* index or submit selected documents to *in camera* review.[183] This would preserve the adversarial process of FOIA requests: requesters could contest the agencies' decisions to withhold, and agencies could protect those records properly exempt from disclosure under the FOIA.

B. *FOIA Actions and the Applicable Statute of Limitations.*

It is generally accepted that the FOIA requires exhaustion of administrative remedies prior to seeking judicial review of an agency's determination.[184] In *Spannaus v. United States Department of Justice,*[185] the Federal District Court for the District of Columbia ruled that the plaintiff's 1985 FOIA action was time-barred because the statute of limitations began to run when his administrative remedies were *constructively* exhausted. Exhaustion occurred when the agency failed to respond within the statutory time period—in this case ten days after the plaintiff filed his request[186]—and not when the agency had resolved all of the

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Rep. Gude), *reprinted in* SOURCE BOOK, *supra,* at 262; *id.* at 17,021 (statement of Sen. Cranston), *reprinted in* SOURCE BOOK, *supra,* at 300; *id.* at 17,025 (statement of Sen. Javits), *reprinted in* SOURCE BOOK, *supra,* at 311. *See also Marzen,* 632 F. Supp. at 801 (plaintiff's responses at oral argument to why public should have access to records normally kept confidential and why *Vaughn* index would not satisfy public's right to know).

183. It is unclear what degree of specificity the *Marzen* court would require in a *Vaughn* index declaring the FOIA inapplicable because the requested records were obtained illegally or without statutory authority. At one point, the court observed that the public's interest in knowing how its government works is satisfied by the agency's admission that the documents were obtained only because they were stolen. 632 F. Supp. at 802. Elsewhere, the court noted that the public need only know the fact of the theft and "the *general nature and extent* of the records stolen." *Id.* at 800 (emphasis added). While the first observation suggests the agency could satisfy its obligation with no more than a bald assertion, the second indicates that an agency might be required to submit a somewhat detailed *Vaughn* index.

184. *See, e.g.,* Stebbins v. Nationwide Mut. Ins. Co., 757 F.2d 364, 366 (D.C. Cir. 1985) (exhaustion of administrative remedies required under the FOIA); Hedley v. United States, 594 F.2d 1043, 1044 (5th Cir. 1979) (although exhaustion not expressly required under FOIA, the Act should be read to require party to present proof of exhaustion prior to seeking judicial review). FOIA itself deems a requester's administrative remedies exhausted whenever an agency fails to comply with the applicable time limit provisions. *See* 5 U.S.C. § 552(a)(6)(C) (1982) ("Any person making a request to any agency for records . . . shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph.").

185. 643 F. Supp. 698 (D.D.C. 1986), *aff'd,* 824 F.2d 52 (D.C. Cir. 1987).

186. *Id.* at 700-01 ("Even assuming the requests were delayed in the mails a week, the ten working-day response period had run by the time of the agency's first determination.").

tween general statutes of limitations, which are merely procedural requirements, and section 2401(a), which is a "condition attached to the sovereign's consent to be sued," and held that "strict compliance with [section 2401(a)] is a jurisdictional prerequisite to suit that can neither be waived by the government, nor relaxed by the courts for equitable considerations."[194]

The court denied the plaintiff's contention that applying section 2401(a) to FOIA actions contravened "the spirit, thrust and purpose of the Act, which is designed to insure that citizens obtain government documents to which they are entitled."[195] Conceding that some agency administrative reviewing processes exceed six years, the court noted that requesters can protect themselves against dismissal for untimeliness by seeking a stay pending resolution of their administrative appeals.[196]

The plaintiff also argued that applying section 2401(a) to the FOIA would be futile because a requester can create a new cause of action with a new accrual date simply by filing a new FOIA request.[197] Noting that the question was not directly before it, the court found it "at least arguable that res judicata would apply" where two FOIA requests are virtually identical and the earlier request was the subject of a lawsuit previously dismissed as untimely.[198]

The court found "most compelling" the argument that section 2401(a) should not begin to run until all administrative appeals have been exhausted.[199] It observed that such a view is consistent with the general policy underlying the exhaustion doctrine and that "it seems particularly unfair to allow an agency to process a request for more than six years and then hide behind section 2401(a) when that processing is subsequently challenged in court."[200] Nevertheless, the court reasoned it was unable to toll the statute of limitations because Congress had determined that a cause of action under the FOIA accrues upon constructive exhaustion of the requester's administrative remedies.[201] The court further reasoned that "FOIA plaintiffs . . . must take the bitter with the sweet. Congress opened the door to the court house [sic] earlier than it might have in order to assist those seeking documents; that the door closes

194. *Id.* at 700 (citations omitted).

195. *Id.* at 702.

196. *Id.*

197. *Id.*

198. *Id.* The court noted that the jurisdictional nature of section 2401(a) mandates its application to FOIA actions even if the court "finds it unwise or inefficient to do so." *Id.*

199. *Id.* at 704.

200. *Id.*

201. *Id.*

plaintiff's administrative appeals.[187] Noting that the FOIA lacks a statute of limitations provision, the court reasoned that because federal law purports to affix a six-year statute of limitations to "every civil action commenced against the United States," that stricture must apply to the FOIA as well.[188]

The plaintiff contended that the six-year statute of limitations does not apply to FOIA suits.[189] Alternatively, he argued that even if the statute did apply, the six-year period did not begin to run until the agency decided his final administrative appeal.[190] The court rejected both of the plaintiff's arguments.

The court rejected the argument that, although the federal statute of limitations purports to apply to "every civil action commenced against the United States," courts have refused to apply it to every action, particularly exempting habeas corpus petitions.[191] Adopting the Department of Justice's position, the court found that "the habeas exception to section 2401(a)'s otherwise allencompassing [sic] reach is an extremely narrow one, dictated by the unique constitutional values at stake in a habeas petition, and that no comparable constitutional interests support an expansion of this exception to include FOIA actions."[192]

The plaintiff also argued that section 2401(a) is merely a "statute[ ] of repose, designed to prevent the unfairness to defendants that can result from the passage of time" and, therefore, should not be applied to FOIA actions because "there is no concern that memories will have faded or that witnesses will have disappeared."[193] The court distinguished be-

187. *Id.* at 704. In September of 1977, Spannaus submitted two FOIA requests to the FBI. His requests were for the most part denied; the subsequent administrative appeals were argued several times and finally decided in August of 1979. Spannaus also tried to amend a complaint in a separate suit in New York to include his FOIA claims; that motion was dismissed without prejudice in October of 1984. *Id.* at 699-700.

188. *Id.* at 700-02. *See* 28 U.S.C. § 2401(a) (1982) ("[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues . . . .").

189. 643 F. Supp. at 701-02.

190. *Id.* at 703-05. Spannaus also argued that, if section 2401(a) does apply to the FOIA, then it was tolled by the attempted filing of his claims in the New York court. *See id.* at 703. The court held that the policies underlying the FOIA do not warrant overriding the well-settled rule of law that "a dismissal without prejudice does not operate as an adjudication upon the merits, and thus leaves the situation the same as if suit had never been brought." *Id.* at 703 (quoting Dupree v. Jefferson, 666 F.2d 606, 611 (D.C. Cir. 1981)). Thus, section 2401(a) was not tolled by the New York court's dismissal without prejudice of the FOIA claims.

191. *Id.* at 701.

192. *Id.* The court suggested that the plaintiff was attempting to elevate his FOIA action to the level of a constitutional right by characterizing the FOIA as the "embodiment of First Amendment rights," to which the court replied, "FOIA, however, was not compelled by the first amendment, and plaintiff has cited no independent, constitutional right to the information he seeks." *Id.* at 701 n.2.

193. *Id.* at 701.

sooner is neither unfair nor . . . unexpected."[202]

C. *The Threshold Burden in Claims of Exemption.*

The FOIA presumption that requested documents are subject to disclosure absent a clear showing to the contrary is consistent with the legislature's intent to provide wide-ranging citizen access to government documents.[203] Courts disagree, however, as to the showing necessary to support a government agency's claim of exemption.[204] In *Ely v. Federal Bureau of Investigation,*[205] the United States Court of Appeals for the Eleventh Circuit held that, even in the sensitive area involving third-party FOIA requests,[206] a trial court cannot rely on an agency's bald assertion of privilege to sustain an action for nondisclosure.[207]

David Ely, a federal prisoner, sought all information regarding a third party who allegedly had some connection to Ely's imprisonment.[208] The Federal Bureau of Investigation (FBI) claimed privileges under several FOIA exemptions, and neither confirmed nor denied the existence of the files.[209] The Federal District Court for the Middle District of Florida

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202. *Id.*

203. S. REP. No. 813, 89th Cong., 1st Sess. 3 (1965). ("It is the purpose of the present bill . . . to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld.").

204. *Compare, e.g.,* Abourezk v. Reagan, 785 F.2d 1043, 1060-61 (D.C. Cir.) (underlining concerns about using ex parte, *in camera* submissions to dispose of the merits of a case), *cert. granted,* 107 S. Ct. 666 (1986) *with* Knight Publishing Co. v. United States Dep't of Justice, 631 F. Supp. 1175, 1180 (W.D.N.C. 1986) (finding an ex parte, *in camera* affidavit sufficient to support agency's claim of exemption).

205. 781 F.2d 1487 (11th Cir. 1986).

206. Third-party requests under the FOIA potentially compromise significant privacy interests when directed to law enforcement agencies. For a discussion of the relevant concerns, see *Privacy "Glomarization," supra* note 50, at 3.

207. 781 F.2d at 1494. The court of appeals reversed the district court's grant of the FBI's motion for summary judgment and remanded the case for trial "during which the FBI will be required to make an adequate showing of privilege to be considered *de novo* by the trial court." *Id.*

208. *Id.* at 1488.

209. *Id.* at 1488-89. The "Glomar Denial" or "Glomarization," which is a response to a FOIA request that neither confirms nor denies the existence of the requested records, was first judicially recognized in Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976). *Phillippi* raised the issue of whether the CIA could refuse to confirm or deny its ties to Howard Hughes' submarine retrieval ship, the Glomar Explorer. The court of appeals held that before a "Glomar Denial" will satisfy the FOIA, the agency must submit a detailed public justification for refusing to confirm or deny the existence of the requested records. 546 F.2d at 1013, 1014 n.12. "The Agency's arguments should then be subject to testing by appellant, who should be allowed to seek appropriate discovery when necessary to clarify the Agency's position or to identify the procedures by which that position was established." *Id.* at 1013.

Since *Phillipi,* "Glomarization" has been recognized outside the national security context. *See, e.g.,* Miller v. Bell, 661 F.2d 623, 631-32 (7th Cir. 1981) (identities of those *merely mentioned* in investigatory records protected from disclosure), *cert. denied,* 456 U.S. 960 (1982); Baez v. United

granted the FBI's motion for summary judgment, reasoning that the incorporation of the Privacy Act[210] into exemption 3 precludes disclosure of the requested information without the third party's permission.[211] Alternatively, the court held that the files were exempt because "they contained personnel and medical information as well as investigatory records."[212] The district court reached its determination without knowing if the requested documents even existed.[213]

The court of appeals reversed, refusing to follow a Seventh Circuit decision that the *Vaughn* requirement should not apply to "nonconsensual third party requests where the requesting party has identified no public interest in disclosure."[214] The court found that following the Seventh Circuit would "effectively place[ ] on [the requester] the burden of proving that the documents in question were not privileged."[215] The Seventh Circuit approach would give "the government an absolute, unchecked veto over what it would or would not divulge, in clear violation of the provisions of the statute."[216]

States Dep't of Justice, 647 F.2d 1328, 1338 (D.C. Cir. 1980) (release to public that individual was subject of FBI investigation clearly an "unwarranted invasion of . . . privacy"). *See also Privacy "Glomarization," supra* note 50 (application of Glomarization appropriate in third party request context due to individual privacy concerns).

Recent legislation makes it easier for law enforcement agencies to withhold information in certain circumstances with a "Glomar"-like response. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48 to 3207-49 (codified at 5 U.S.C.A. § 552(b)(7) (West Supp. 1987)). For a discussion of the specific provisions of the legislation, see *supra* notes 50-51 and accompanying text.

210. 5 U.S.C. § 552a (1982).

211. 781 F.2d at 1489. Exemption 3 of the FOIA protects from mandatory disclosure any information "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3) (1982). The district court reasoned that the information Ely requested was protected by the Privacy Act and thus protected from disclosure under exemption 3 of the FOIA. The court of appeals noted that the precedent for such a view, Painter v. FBI, 615 F.2d 689, 690-91 (5th Cir. 1980), "has been implicitly overruled by statute, and explicitly rejected in the legislative history." 781 F.2d at 1489 n.1 (citing CIA Information Act, 5 U.S.C. § 552a(q) (Supp. III 1985)). *See* H.R. REP. NO. 726, 98th Cong., 2d Sess., pt. II, 13-14, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3741, 3787-88 ("The Committee specifically rejects the interpretation set forth in the decisions of the Fifth and Seventh Circuits . . . .").

212. 781 F.2d at 1489.

213. *Id.*

214. *Id.* at 1491-92 n.4 (discussing Antonelli v. FBI, 721 F.2d 615, 617 (7th Cir. 1983), *cert. denied,* 467 U.S. 1210 (1984), and finding invalid in Eleventh Circuit). For a discussion of the *Vaughn* requirement, see *supra* note 77.

215. 781 F.2d at 1490.

216. *Id.* at 1494. The court of appeals noted that "[b]y its clear terms, FOIA places on the courts the obligation to consider and resolve competing claims of privilege and access, relegating the government to the role of furnishing evidence to rebut the presumption of disclosure. . . . By so crafting the statute, Congress made clear that the court, not the agency, is to be the ultimate arbiter of privilege." *Id.* at 1490. When the district court required "no *Vaughn* Index, no *in camera* inspection, no hearing, not even the filing of an affidavit to support the government's claim, . . . [i]t diverted to the agency the court's obligation to decide [such] questions according to law." *Id.* at 1494.

The FBI argued that unless Ely made some initial showing of public interest in disclosure, it would be a needless formality to require the government either to inform the trial court whether the documents in question exist or to suffer *in camera* review.[217] The court rejected the FBI's argument, noting that "the government must first establish to the court's satisfaction that its claim of privilege is *bona fide*—that it properly comes within the ambit of one of the statutory exemptions. Only *after* that showing is made will the court move on to the second step . . .—the balancing of privacy interests against the presumption of disclosure" to determine if disclosure would constitute a "clearly unwarranted invasion of privacy."[218]

The FOIA requires the district court to develop an "adequate factual basis" to support its decision under de novo review.[219] The *Ely* court noted that while the trial court has discretion in conducting an *in camera* review of the requested documents or requiring the filing of a *Vaughn* index,[220] its "obligation to find . . . an adequate factual basis to support the claim of privilege is *not* discretionary; it is a *sine qua non.*"[221]

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217. *Id.* at 1490-91 n.3.

218. *Id.* at 1491 n.3.

219. Stephenson v. IRS, 629 F.2d 1140, 1144 (5th Cir. 1980). *See* 5 U.S.C. § 552(a)(4)(B) (1982) ("[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 set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.").

220. 781 F.2d at 1491.

221. *Id.* (emphasis supplied by the court). If the trial court chooses to satisfy its obligation by conducting *in camera* review, "then *a priori* the government must, at a minimum, tell the court whether the documents in dispute exist." *Id.* at 1492. Once that minimal requirement is met, the *Ely* court suggested that only affidavits be required in situations where the records do *not* exist. But where the records are in the possession of the government agency, more should be required, such as indexing, random or representative sampling, or oral testimony. *Id.* (citing Stephenson v. IRS, 629 F.2d 1140, 1145-46 (5th Cir. 1980)). *See also* Currie v. IRS, 704 F.2d 523, 530-31 (11th Cir. 1983) (discussing procedure for review when district court knows documents in dispute exist).

The *Ely* court noted, however, that *in camera* review is usually unsatisfactory for two reasons. First, if the requested documents are numerous, such review seriously overburdens the trial courts. Second, *in camera* review tends to erode the effectiveness of the adversarial system. 781 F.2d at 1492. "Accordingly, *in camera* review 'is to be utilized in only the rare case such as . . . [when] the disputed documents are relatively brief, few in number, and where there are few claimed exemptions.' " *Id.* at 1493 (quoting *Currie,* 704 F.2d at 531).

The *Ely* court recognized that the more satisfactory *Vaughn* index might be impracticable in "Glomar" denial situations, where even the acknowledgement that certain information exists might be a violation of the privacy provisions of the FOIA. In such cases the method established by Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976), should be employed. To require a detailed public affidavit that explains the reasons for refusing to confirm or deny the existence of the records, and then allow adversarial testing of the government's arguments might achieve "the best balance between the legitimate public or private considerations suggesting privilege and the public interest in full and open access to government records so strongly endorsed by Congress. Further, the integrity of the adversary system may be, for the most part, preserved by this means." 781 F.2d at 1493.

A high threshold burden on the government to sustain its action for nondisclosure is consistent with both the language of the FOIA and its legislative history. Relying on bald assertions of privilege or affidavits that are "little more than . . . *ipse dixit* assertion[s] of privilege"[222] threatens to subvert one of the basic purposes of the FOIA: "to ensure an informed citizenry . . . needed to check against corruption and to hold the governors accountable to the governed."[223]

D. *Exemption 3 and Nondisclosure of Tax Return Information Under Internal Revenue Code Section 6103.*

In 1976, Congress enacted the Tax Reform Act (TRA) less than a month after it amended exemption 3 of the FOIA.[224] The TRA amended section 6103 of the Internal Revenue Code[225] to check against perceived abuses of the tax information disclosure system.[226] The amended version of exemption 3 of the FOIA allows nondisclosure of records that have been "specifically exempted from disclosure by statute," provided that the statute either leaves no administrative discretion on the issue or "establishes particular criteria for withholding or refers to particular types of matters to be withheld."[227] Whether Congress in-

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222. 781 F.2d at 1492 n.4.

223. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (exemption 7(A) protects statements of witnesses prior to testifying at NLRB hearing).

224. Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (1976) (codified in scattered sections of 26 U.S.C.).

225. I.R.C. § 6103 (1982). Section 6103(a) provides that "[r]eturns and return information shall be confidential . . . ." Section 6103(b)(2) provides that:

> "return information" means:
>
> (A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, over-assessments, or tax payments, . . . and
>
> (B) any part of any written determination or any background file document relating to such written determination . . .
>
> *but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.*

I.R.C. § 6103(b)(2) (1982) (emphasis added to indicate Haskell Amendment).

Section 6103 also provides that "[r]eturn information with respect to any taxpayer may be open to inspection by or disclosure to any person authorized by this subsection to inspect any return of such taxpayer if the Secretary determines that such disclosure would not seriously impair Federal tax administration." I.R.C. § 6103(e)(7) (1982).

226. *See* S. REP. NO. 938, 94th Cong., 2d Sess. 306, 316-17, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 3439, 3746-47 (discussing various abuses of tax information disclosure). Among Congress's concerns were that tax return information had been released for improper political purposes and that such disclosure compromised the personal privacy of taxpayers. *Id.*

227. 5 U.S.C. § 552(b)(3) (1982). As originally enacted, the FOIA did not apply to matters "specifically exempted from disclosure by statute" with no further qualifications. *See* Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250, 251.

Congress amended exemption 3 of the FOIA to overrule the Supreme Court's decision in FAA v. Robertson, 422 U.S. 255 (1975). In *Robertson*, the Court held that a section of the Federal Aviation Act of 1958 was an exemption 3 statute even though it allowed an agency administrator "a

tended section 6103 to displace the FOIA and serve as the sole vehicle for the disclosure of tax return information is a question that frequently has generated litigation.[228]

A finding that section 6103, rather than the FOIA, is the provision controlling disclosure of tax return information would have significant consequences; under section 6103, an Internal Revenue Service (IRS) decision is accorded significantly greater deference than under the FOIA. The Administrative Procedure Act limits judicial review to a determination of whether an agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[229] If the FOIA governs disclosure, however, the court must conduct de novo review of the agency's decision, and the agency must bear the burden of justifying nondisclosure under one of the FOIA's statutory exemptions.[230]

This issue has divided the courts of appeals in the federal circuits. The Seventh Circuit has followed *Zale Corp. v. Internal Revenue Service,*[231] the first case to advance the view that section 6103 displaces the more stringent FOIA standard.[232] The Sixth Circuit also has indicated approval of the *Zale* approach.[233] The rule in the Fifth, Ninth and Eleventh Circuits, however, is contrary: section 6103 does not supersede the FOIA but rather falls within the ambit of exemption 3.[234] In 1986, the Third and District of Columbia Circuits followed the latter view.

In *Grasso v. Internal Revenue Service,*[235] the United States Court of

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broad degree of discretion on what information [was] to be protected [from FOIA disclosure] . . . to insure continuing access to the sources of sensitive information necessary to the regulation [by the agency]." *Id.* at 266. Congress was concerned that qualifying the statute under exemption 3 would give agencies unfettered discretion in withholding information. *See* H.R. REP. No. 880, 94th Cong., 2d Sess., pt. 1, 22-23, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 2183, 2204-05.

228. *See generally* Note, *Developments—1984, supra* note 60, at 783-87 (Fifth and Ninth Circuits applied the FOIA's de novo review standard in disclosure of tax return information); Case Comment, *Applying the Freedom of Information Act to Tax Return Information,* 69 GEO. L.J. 1283, 1292-1303 (1981) (discussing deferential standard of review adopted in Zale Corp. v. IRS, 481 F. Supp. 486 (D.D.C. 1979).

229. 5 U.S.C. § 706(2)(A) (1982). Finding that section 6103 displaces the FOIA would also relieve an agency of certain FOIA procedural requirements, such as adhering to time limitations and segregating for release nonexempt portions of the requested information. *See* 5 U.S.C. § 552(a)(6)(A), (b) (1982).

230. 5 U.S.C. § 552(a)(4)(B) (1982).

231. 481 F. Supp. 486 (D.D.C. 1979).

232. *See* King v. IRS, 688 F.2d 488, 495-96 (7th Cir. 1982).

233. White v. IRS, 707 F.2d 897, 900 (6th Cir. 1983).

234. Linsteadt v. IRS, 729 F.2d 998, 1001-03 (5th Cir. 1984); Long v. IRS, 742 F.2d 1173, 1178 (9th Cir. 1984); Currie v. IRS, 704 F.2d 523, 526-28 (11th Cir. 1983).

235. 785 F.2d 70 (3d Cir. 1986). Paul Grasso filed a FOIA request with the IRS, seeking a report of an interview the IRS held with Grasso in the course of an investigation into his civil and criminal tax liability. The district court ordered disclosure of portions of the record, and the IRS appealed. Grasso chose not to participate in the appeal. *Id.* at 72 & n.1.

Appeals for the Third Circuit agreed with the Ninth Circuit's reasoning in *Long v. Internal Revenue Service,*[236] that if section 6103 were not subject to the FOIA, it would render exemption 3 meaningless. "If an exemption statute's purpose were determinative, then we would have to treat all exemption statutes as independent of FOIA, a result clearly not consonant with FOIA."[237] The *Grasso* court rejected the government's argument that, under principles of statutory construction, section 6103 and its specific provisions for disclosure of return information take precedence over the more generally applicable FOIA.[238]

In *Church of Scientology v. Internal Revenue Service,*[239] the United States Court of Appeals for the District of Columbia Circuit also rejected the government's argument that section 6103 displaces the FOIA and provides the exclusive criteria for release of covered tax return information. The court of appeals found that the FOIA

> appl[ies] across-the-board to many substantive programs; it explicitly accommodates other laws by excluding from its disclosure requirement documents "specifically exempted from disclosure" by other statutes . . . and it is subject to the provision, governing all of the Administrative Procedure Act . . . that a "[s]ubsequent statute may not be held to

236. 742 F.2d 1173 (9th Cir. 1984).

237. 785 F.2d at 74 (quoting *Long,* 742 F.2d at 1178). In *Long,* the government argued that the statutes were irreconcilable because section 6103 was a "specific nondisclosure statute" but the FOIA was a "specific disclosure" statute. The *Long* court "held that the policies expressed in section 6103 could be reconciled with FOIA through Exemption 3 which incorporates criteria contained in specific nondisclosure statutes." *Grasso,* 785 F.2d at 74 (citing and discussing *Long,* 742 F.2d at 1178).

238. The converse of this argument had been confronted by the district court in Zale Corp. v. IRS, 481 F. Supp. 486, 489-90 (D.D.C. 1979). "The *Zale* court described section 6103 as representing a 'legislative proclamation of a rule of confidentiality with limited statutory exemptions,' a policy that the court considered incompatible with the policy of FOIA, which allows disclosure without a showing of need." *Grasso,* 785 F.2d at 74 (quoting *Zale,* 481 F. Supp. at 489).

The *Zale* court noted that Congress was amply aware of the more general provisions of the FOIA while it debated the passage of the Tax Reform Act containing this amendment to section 6103. It found, however, no indication that Congress intended "to allow [the FOIA] to negate, supersede, or otherwise frustrate the clear purpose and structure of § 6103." 481 F. Supp. at 489.

Section 6103 provides only that "[r]equests for the inspection or disclosure of a return or return information and such inspection or disclosure shall be made in such manner and at such time and place as shall be prescribed by the Secretary." I.R.C. § 6103(p)(1) (1982). The FOIA, however, provides precise regulations for both the timing and method of information disclosure. *See* 5 U.S.C. § 552(a) (1982).

Failing to include such procedures in section 6103 suggests that Congress did not intend section 6103 to displace the FOIA as the sole vehicle for disclosure of tax return information. Indeed it suggests that Congress contemplated the coexistence of the statutes. *See generally* Hirschfeld, *Right of Access to Internal Revenue Service Files,* 15 U. TOL. L. REV. 659, 675-78 (1984) (supporting *Zale* holding that section 6103 is a "self-contained disclosure system"); Case Comment, *supra* note 228, at 1295-98 (discussing section 6103 and the effect of specifically drafted legislation).

239. 792 F.2d 146, 148-50 (D.C. Cir. 1986). The plaintiff church sought to compel the IRS to disclose all documents in its possession relating to the Church of Scientology of California. *Id.* at 147-48.

> supersede or modify this subchapter . . . except to the extent that it does so expressly."[240]

Both the Third and District of Columbia Circuits noted that section 6103 and the FOIA are not in conflict.[241] "Section 6103 prohibits the disclosure of certain IRS information . . . and FOIA, which requires all agencies, including the IRS, to provide nonexempt information to the public, establishes the procedures the IRS must follow in asserting the § 6103 (or any other) exemption."[242] In *Church of Scientology,* the court of appeals acknowledged that the FOIA might frustrate the purpose of section 6103 by placing upon the IRS the burden of sustaining its claimed exemption in de novo judicial review,[243] but reasoned that because all subsequently enacted disclosure statutes would be in the same position, allowing section 6103 to supersede the FOIA for that reason would render exemption 3 meaningless past the date of its enaction—"a state of affairs no one has suggested."[244]

In a simultaneous en banc opinion,[245] the United States Court of Appeals for the District of Columbia Circuit addressed the meaning of section 6103's Haskell Amendment, which limits the Internal Revenue Code's definition of *non*disclosable tax return information by excluding

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240. *Id.* at 149. The court noted that section 559 of the Administrative Procedure Act, which requires an express intent to supersede or modify the Act, can, as any other provision, be repealed by implication. But the language of the provision "assuredly increases the burden that must be sustained before an intent to depart from the Administrative Procedure Act can be found." *Id.* at 149 n.2. Thus, the court "[found] it impossible to conclude that such a statute was *sub silentio* repealed by § 6103." *Id.* at 149.

241. *Grasso,* 785 F.2d at 75; *Church of Scientology,* 792 F.2d at 149.

The *Grasso* court concluded that the "FOIA and section 6103 can be viewed harmoniously through the operation of Exemption 3." 785 F.2d at 75. It noted that, although Congress amended section 6103 and the FOIA's exemption 3 within one month of each other, there is no indication in the legislative history of either statute that Congress intended section 6103 to act independently of the FOIA. *Id.* It further noted that the 1976 Tax Reform Act contains a separate provision that does supersede the FOIA. "Section 6110, which deals with disclosure of letter rulings, expressly provides that it is the exclusive provision governing disclosure of the material covered in that section." *Id.* Such an inclusion in the 1976 Act strongly supports the court's view that if Congress intended section 6103 to operate independently of the FOIA, it would have included an express provision.

In a proceeding in which a court did find that section 6103 operated independently of the FOIA, the court still required a detailed *Vaughn* index of the withheld information. *See* Osborn v. IRS, 754 F.2d 195, 196-97 (6th Cir. 1985).

242. *Church of Scientology,* 792 F.2d at 149.

243. *Id.* at 149-50. For a discussion of the pertinent standards of review, see *supra* notes 229-30 and accompanying text.

244. 792 F.2d at 150.

245. Church of Scientology v. IRS, 792 F.2d 153 (D.C. Cir. 1986) (en banc), *cert. granted,* 107 S. Ct. 947 (1987). The central issue in the church's appeal was whether certain files could reasonably be excluded from a FOIA search as including only "return information" (excluded from disclosure by I.R.C. § 7213(a)(1)), and, more specifically, whether redaction of identifying information from the documents would remove them from the protected category. 792 F.2d at 155.

"data *in a form* which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer."[246] An earlier panel decision, *Neufeld v. Internal Revenue Service,*[247] had followed the Ninth Circuit's reasoning that under the Haskell Amendment, redaction of names, identifying numbers and other similar information removes the data from section 6103's protection. The Seventh Circuit took a different approach, holding that the Haskell Amendment provides only for the disclosure of statistical tabulations not associated with or not identifying particular taxpayers.[248]

In its en banc opinion, the District of Columbia Circuit rejected *Neufeld*[249] and disagreed with the Ninth and Seventh Circuits' decisions. It found the Ninth Circuit's redaction method overly-broad[250] and the

246. I.R.C. § 6103(b)(2) (1982) (emphasis added). See *supra* note 225 for textual placement of the Haskell Amendment within section 6103.

247. 646 F.2d 661, 665 (D.C. Cir. 1981) (following Long v. IRS, 596 F.2d 362, 368 (9th Cir. 1979), *cert. denied,* 446 U.S. 917 (1980)). Even though the IRS had not briefed the question, the *Neufeld* panel found it necessary to decide whether simple redaction would remove the information from the protected area of "return information." *Church of Scientology,* 792 F.2d at 156 (discussing *Neufeld,* 646 F.2d at 665). Without conducting any analysis of its own, the *Neufeld* panel followed *Long,* the only court of appeals precedent at the time. *Id.*

248. King v. IRS, 688 F.2d 488, 493 (7th Cir. 1982).

249. 792 F.2d at 156-60. Although the court never expressly overruled *Neufeld,* it rejected the Ninth Circuit's reasoning in *Long,* which was adopted by the *Neufeld* panel. "It suffices to say that the mere deletion of the taxpayer's name or other identifying data is not enough, since that would render the *reformulation requirement* entirely duplicative of the nonidentification requirement." *Id.* at 163 (emphasis added). For a description of the reformulation requirement, see *infra* note 252 and accompanying text.

250. 792 F.2d at 157. The court of appeals also found that rejection of the *Long* interpretation is suggested by "clear textual indications" as well as "plausible legislative intent." *Id.* at 158. The court reasoned that:

> It would be most peculiar to catalogue in such detail, in subparagraph (A) of the body of the definition, the specific items that constitute "return information" . . . while leaving to an afterthought the major qualification that none of those items counts unless it identifies the taxpayer. Such an intent would more naturally have been expressed not in an exclusion ("but such term does not include . . .") but in the body of the definition—by stating, for example, that "the term 'return information' means the following information that can be associated with or identify a particular taxpayer . . . ."

Id. at 157.

The court agreed with the Seventh Circuit finding that "the formulation of the Haskell Provision itself suggests something other than merely the absence of identifying information." *Id.* The term "in a form," in the phrase "data *in a form* which cannot be associated with . . . a particular taxpayer," I.R.C. § 6103(b)(2) (1982) (emphasis added), would be superfluous to indicate the absence of identifying information. 792 F.2d at 157. "[I]t is curious usage to describe an item of return information . . . as having one 'form' when made public in a document that includes the taxpayer's name, and taking a different 'form' when made public in the very same document with only the name deleted." *Id.*

In assessing the "plausible legislative intent," the *Church of Scientology* court acknowledged that "there is no reason 'why Congress would have wanted to forbid the disclosure of information which would not threaten the privacy of individual taxpayers.' " *Id.* at 158 (citations omitted). The court found it also true, however, that mere deletion of identifying material will not always protect a

Seventh Circuit's limitation to statistical tabulations overly-restrictive.[251] The court held that the language of the amendment—specifically the use of the words "in a form"—requires not merely the fact of nonidentification but also "agency *reformulation* of the return information into a statistical study or some other composite product—presumably on the theory that such reformulation gives added assurance that a taxpayer's identity will in fact not be disclosed."[252]

While the District of Columbia Circuit's "reformulation requirement" does provide additional protection against disclosure of a taxpayer's identity, the additional costs to provide that protection might prove excessive. As suggested in the dissent, the FOIA recognizes the danger of "unwarranted invasion of personal privacy" but adequately guards against such invasion by allowing segregability of the requested information.[253] The FOIA's method of segregating exempt information balances the public's interest in government information, the individual's right to privacy, and the cost to the agency.

E. *Exemption 7: Law Enforcement Information.*

In 1986, Congress amended exemption 7 of the FOIA to further limit disclosure of law enforcement information.[254] Prior to the change, invocation of exemption 7's protection prompted a two-part analysis: first, the records had to qualify as "investigatory records compiled for law enforcement purposes"; and second, the agency had to show that disclosure of the requested records "would" cause one of the six specific

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person's identity. Human error and/or other information held by the document requester might effectively serve to reveal the taxpayer's identity. *Id.*

251. 792 F.2d at 161-63.

252. *Id.* at 160. In essence, the court ruled that the "IRS may never disclose data listed in the section even if there is no risk of identification, unless it has been 'reformulated.' " *Id.* at 172 (Wald, J., dissenting). The dissent claimed that the majority "elevated 'form' over substance," *id.* at 178, by misreading "in a form" to require reformulation, when mere redaction of identifying information satisfies the requirement, *id.* at 175. "In its original, it is in a form that identifies; once the necessary deletions are made, it is in a form that does not identify." *Id.*

The *Church of Scientology* approach differs from the Seventh Circuit's interpretation in that the *Church of Scientology* court found statistical tabulations only *one* type of acceptable reformulation. The court refrained from defining all other acceptable methods of reformulation, but noted that simple deletion of identifying data would not be sufficient. *Id.* at 161-63.

253. *See supra* note 250. In any event, it would prove virtually impossible to guard against the "informed requester" in every case even with reformulation of the requested data. How much an informed requester can deduce depends upon how much information he already has, something the government agency cannot know.

254. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1802(a), 100 Stat. 3207, 3207-48 to 3207-49 (codified at 5 U.S.C.A. § 552(b)(7) (West Supp. 1987)). *See supra* notes 40-56 and accompanying text.

harms enumerated in exemption 7.[255] As amended, the exemption provides protection for "records or information compiled for law enforcement purposes," eliminating the requirement that the records must be investigatory in nature, and requires only that disclosure "could reasonably be expected" to cause one of the enumerated harms.[256]

1. *The Exemption 7 Threshold.* Even prior to the amendment to exemption 7, courts accorded law enforcement agencies varying degrees of deference in determining whether or not the requested records were "investigatory records compiled for law enforcement purposes."[257] Some courts adopted a per se rule that protected all records of law enforcement agencies from disclosure,[258] while others required some showing of a

255. FBI v. Abramson, 456 U.S. 615, 622, 631-32 (1982) (citing 5 U.S.C. § 552(b)(7) (1982)). As originally enacted, exemption 7 allowed agencies to withhold "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 5 U.S.C. § 552(b)(7) (1970). This language prompted broad judicial interpretation, exempting all information in investigatory files regardless of the nature of the information or the status of the underlying investigation. *See, e.g.,* Center for Nat'l Policy Review on Race & Urban Issues v. Weinberger, 502 F.2d 370, 374 (D.C. Cir. 1974) (if records are "investigatory files compiled for law enforcement purposes," then court's "duty is 'at an end' "); Weisberg v. United States Dep't of Justice, 489 F.2d 1195, 1198-1202 (D.C. Cir. 1973) (en banc) (holding ten-year-old investigatory files on Kennedy assassination exempt although enforcement proceedings apparently not expected), *cert. denied,* 416 U.S. 993 (1974). In 1974, Congress rejected such a broad interpretation and required that the exemption 7 privilege be limited to information that, if released, would cause one of six enumerated harms. *See* 5 U.S.C. § 552b(c)(7) (1977). The main purpose of the 1974 amendment was to halt the court's expansive treatment of exemption 7, and to avoid the "wooden[ ] and mechanical[ ]" application of exemption 7 which was "in direct contravention of congressional intent." 120 CONG. REC. 17,034 (1974) (statement of Sen. Kennedy), *reprinted in* SOURCE BOOK, *supra* note 82, at 335. *See generally* Comment, *Amendment of the Seventh Exemption Under the Freedom of Information Act,* 16 WM. & MARY L. REV. 697, 711-15 (1975) (suggesting that expansion of exemption may be curtailed, but that mechanical interpretation may be encouraged).

Legislation in 1986, however, has changed exemption 7 again, making it considerably easier for agencies to claim privilege under exemption 7. *See supra* notes 40-56 and accompanying text.

256. 5 U.S.C.A. § 552(b)(7) (West Supp. 1987).

257. 5 U.S.C. § 552(b)(7) (1982). In determining whether a document was compiled for law enforcement purposes, courts generally distinguish between agencies whose principal function is criminal law enforcement, such as the FBI or the DEA, and those with both law enforcement and administrative functions, such as the NLRB or the FTC. A mixed-function agency usually must show that its investigation involved the enforcement of a statute or regulation within its authority, *see, e.g.,* Church of Scientology v. United States Dep't of the Army, 611 F.2d 738, 748-49 (9th Cir. 1979), and that the records were compiled for specific enforcement purposes, *see, e.g.,* Rural Housing Alliance v. United States Dep't of Agric., 498 F.2d 73, 80 (D.C. Cir. 1974). Agencies with pure law enforcement functions, however, generally do not need to establish a definite law enforcement purpose for compiling the particular records in question. *See, e.g.,* Pratt v. Webster, 673 F.2d 408, 418-21 (D.C. Cir. 1982) ("A court . . . should be hesitant to second-guess a law enforcement agency's decision to investigate if there is a *plausible basis* for its decision.") (emphasis added).

258. The Courts of Appeals for the First, Second and Eighth Circuits treat all records compiled by pure law enforcement agencies as per se "compiled for law enforcement purposes," qualifying the records for exemption under the FOIA's exemption 7. *See, e.g.,* Williams v. FBI, 730 F.2d 882, 884-85 (2d Cir. 1984) (records given absolute protection even if compiled in course of unwise, meritless,

rational nexus between the records and a proper law enforcement purpose.[259]

In *Wilkinson v. Federal Bureau of Investigation,*[260] the Federal District Court for the Central District of California reminded potential FOIA litigants of the significant deference accorded law enforcement agencies even under the somewhat more stringent rational nexus standard. In *Wilkinson,* the plaintiffs alleged that the FBI improperly deleted extensive portions of documents requested under the FOIA; the documents pertained to both an early 1960s investigation of the National Committee Against Repressive Legislation (NCARL) and an independent investigation of NCARL's executive director, Frank Wilkinson, begun in the mid-1940s.[261] Recognizing that the threshold question under exemption 7 was whether the documents in issue were "investigatory records compiled for law enforcement purposes,"[262] the district court

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or illegal investigation); Kuehnert v. FBI, 620 F.2d 662, 666-67 (8th Cir. 1980) (exemption 7's threshold requirement of having been "compiled for law enforcement purposes" met where requested documents "comprise[d] investigatory records of a criminal law enforcement agency"); Irons v. Bell, 596 F.2d 468, 474-76 (1st Cir. 1979) ("[I]nvestigatory records of law enforcement agencies are inherently records compiled for 'law enforcement purposes' within the meaning of Exemption 7.").

The Court of Appeals for the District of Columbia Circuit may also follow a modified per se rule. In Pratt v. Webster, 673 F.2d 408 (D.C. Cir. 1982), the court of appeals held that records generated as part of a counterintelligence program of questionable legality, which was part of an otherwise authorized law enforcement investigation, qualified as records compiled for law enforcement purposes. *Id.* at 416-18. At the same time, the court of appeals rejected the per se approaches taken in *Williams, Kuehnert* and *Irons. Id.* at 416 n.17. Instead, the *Pratt* court adopted a two-part test for determining whether the threshold burden had been met for exemption 7: (1) whether the agency's investigative activities are related to the enforcement of federal laws or the maintenance of national security, and (2) whether the nexus between the investigation and one of the agency's law enforcement duties is based on information sufficient to support at least a colorable claim of rationality. *Id.* at 420-21.

Although no subsequent case has produced documents that failed to meet the threshold burden under the *Pratt* test, the court of appeals refuses to adopt the per se rule and continues to assert that the *Pratt* standard is the appropriate test in the District of Columbia Circuit. *See* Founding Church of Scientology v. Smith, 721 F.2d 828, 829 n.1 (D.C. Cir. 1983).

259. *See* Binion v. United States Dep't of Justice, 695 F.2d 1189, 1193-94 (9th Cir. 1983) (*a fortiori* approach appropriate where FBI investigation clearly legitimate); Friedman v. FBI, 605 F. Supp. 306, 321 (N.D. Ga. 1981) (threshold satisfied where "FBI was gathering information with the good faith belief that the subject may violate or has violated federal law and was not merely monitoring subject for purposes unrelated to federal law"); Malizia v. United States Dep't of Justice, 519 F. Supp. 338, 347 (S.D.N.Y. 1981) (requiring at least a "colorable claim of a rational nexus" between activities being investigated and violations of federal law). *See also* Powell v. United States Dep't of Justice, 584 F. Supp. 1508, 1522 (N.D. Cal. 1984) (requiring *in camera* inspection to determine whether FBI investigation was "realistically based on a legitimate concern that federal laws have been or may be violated" (quoting *Pratt,* 673 F.2d at 420-21)).

260. 633 F. Supp. 336, 343 (C.D. Cal. 1986).

261. *Id.* at 338-39.

262. *Id.* at 342. Under the new language of the amendment to exemption 7, *see supra* note 46, there is no requirement to show that the records are "investigatory" in nature.

found that to satisfy this threshold burden "an agency with a clear law enforcement mandate such as the FBI need only establish a 'rational nexus' between its law enforcement duties and the document for which Exemption 7 is claimed."[263] The court noted the "paucity of hard documentary evidence on the issue of the purpose of the investigation"[264] but held that the FBI "satisfied (albeit barely) [its] burden of showing . . . that the Exemption 7 threshold ha[d] been met."[265]

The plaintiffs argued that the length of the investigations (the Wilkinson investigation had gone on for more than forty years) and the fact that they never culminated in any charges nullified any legitimate purpose the investigations initially may have had.[266] In addition, the plaintiffs claimed that the FBI employed illegal techniques during its investigations, violating the plaintiffs' first amendment rights and indicating that the investigations had not been conducted for "law enforcement purposes."[267] The court rejected both arguments, finding that investigations do not need to culminate in prosecution to be legitimate[268] and "that Exemption 7 applies even to investigations of questionable legality."[269]

The *Wilkinson* court's finding that exemption 7 refers to "purposes rather than methods"[270] suggests that a full litany of illegal techniques would not remove the records from exemption 7 protection if the government could show a colorable purpose for the investigation.[271] This ap-

263. 633 F. Supp. at 342 (quoting Binion v. United States Dep't of Justice, 695 F.2d 1189, 1194 (9th Cir. 1983)).

264. *Id.* at 343. The evidence submitted by the FBI consisted of several affidavits stating that the requested documents were compiled in connection with an internal security investigation to determine whether Wilkinson and NCARL were acting in violation of various federal statutes. *Id.* at 342-43. The FBI also asserted that the investigation was an adjunct to its general investigation of the Communist Party and cited a Supreme Court case, Wilkinson v. United States, 365 U.S. 399, 412 (1961), in which the Court noted that Wilkinson was suspected by a House Subcommittee to be a Communist leader engaged in propaganda activities. 633 F. Supp. at 343 n.14.

265. 633 F. Supp. at 343. The district court noted that "courts have held that an agency like the FBI 'need only be held to a minimal showing that the activity which generated the documents was related to the agency's function.' " *Id.* (quoting Dunaway v. Webster, 519 F. Supp. 1059, 1076 (N.D. Cal. 1981)).

266. *Id.* at 343.

267. *Id.* The alleged illegal investigatory techniques included "warrantless electronic surveillance and the infiltration and disruption of groups with which Wilkinson was involved." *Id.*

268. *Id.* at 343-44. The court found that the FBI's ultimate decision that Wilkinson was not a national security threat did not indicate that the FBI never had reason to investigate him.

269. *Id.* at 344. To support its finding, the court cited a case in which questionable actions by the FBI to foment distrust and create dissention among the members of the Black Panther Party did not negate the law enforcement purpose of the investigation. *Id.* (citing Pratt v. Webster, 673 F.2d 408, 422-23 (D.C. Cir. 1982)).

270. *Id.*

271. Of course, as the court noted, finding enough of a law enforcement purpose to meet the liberal exemption 7 threshold "does *not* automatically entitle the [agency] to wholesale redactions on

proach is at odds with the recent decision in *Marzen v. United States Department of Health and Human Services,*[272] in which the Federal District Court for the Northern District of Illinois held that, even if the collecting agency acts in good faith, records obtained illegally are not "agency records" and thus their disclosure is not dictated by the FOIA.[273]

It is unlikely that courts will follow *Marzen* as long as *Wilkinson* and the language of the recent amendment protect even illegally obtained investigatory records.[274] While both approaches tend to protect the information from disclosure, the burden imposed on the government agency under each approach differs significantly. Under *Wilkinson,* the government must show that disclosure would cause one of exemption 7's enumerated harms;[275] under *Marzen,* however, the determination that the records are not "agency records" forecloses any investigation into specific grounds for nondisclosure.[276] Thus, even though exemption 7 now mandates greater deference to law enforcement agencies, the burden on the government is greater under *Wilkinson* than it would be under *Marzen.*

2. *Interference with Enforcement Proceedings.* The new language of exemption 7(A) authorizes the withholding of "records or information compiled for law enforcement purposes" if disclosure "could reasonably be expected to interfere with enforcement proceedings."[277] Formerly, agencies were required to show that release of the "investigatory records compiled for law enforcement purposes . . . *would* . . . interfere with enforcement proceedings."[278] Although it is clear that the new language lessens the agency's burden and broadens the scope of qualifying records,[279] it is unsettled whether courts will use the amendment to extend the protection of exemption 7(A) to "enforcement proceedings" that are not directly related to the requested records.

Prior to the amendment, exemption 7(A) generally had been in-

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the basis of [the] exemption." *Id.* at 344 n.17. The agency still must meet the independent burden of showing the applicability of the specific exemptions claimed. Establishing a rational nexus between the investigation and a legitimate law enforcement purpose meets only the threshold burden of exemption 7. *Id.*

272. 632 F. Supp. 785 (N.D. Ill. 1986), *aff'd,* 825 F.2d 1148 (7th Cir. 1987). *See supra* notes 165-183 and accompanying text.

273. 632 F. Supp. at 802. *See supra* note 36 and accompanying text.

274. *See supra* notes 46-48 and accompanying text.

275. 633 F. Supp. at 344.

276. 632 F. Supp. at 800.

277. 5 U.S.C.A. § 552(b)(7) (West Supp. 1987).

278. 5 U.S.C. § 552(b)(7)(A) (1982) (emphasis added).

279. *See supra* notes 254-256 and accompanying text.

voked to protect discrete pending proceedings.[280] Occasionally, however, courts had extended exemption 7(A) protection to *related* pending proceedings[281] and to situations in which disclosure would hinder an agency's ability to shape or control investigations.[282] Most courts, however, had refused to extend exemption 7(A)'s protection to cases in which the withholding agencies argued that disclosure would chill cooperation with other parties in future, unrelated investigations.[283]

In an alternative holding in *Marzen v. United States Department of Health and Human Services,*[284] the district court accepted the government's argument that exemption 7(A) should apply when the agency can prove disclosure would substantially harm future proceedings.[285] The court noted that exemption 7(A) prohibits disclosure where the government can demonstrate that release would cause "concrete, cognizable, and substantial interference" with pending, contemplated or future enforcement proceedings.[286]

In *Marzen,* the requested records were obtained during an investigation into a federally funded hospital's possible discrimination against a handicapped newborn—colloquially referred to as a "Baby Doe" investigation.[287] The *Marzen* court adopted the government's argument that disclosure "would interfere with enforcement proceedings by discouraging the prompt cooperation of institutions" in the future, and that

280. *See, e.g.,* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 232 (1978) (statutory language "suggests" exemption 7(A) applies whenever government's case in court would be harmed by premature release of information); Seegull Mfg. Co. v. NLRB, 741 F.2d 882, 886-87 (6th Cir. 1984) (exemption 7(A) is temporal and, as a general rule, may be invoked only as the relevant proceeding remains pending).

281. *See, e.g.,* New England Medical Center Hosp. v. NLRB, 548 F.2d 377, 386 (1st Cir. 1976) (information in closed file "essentially contemporary with, and closely related to," a pending proceeding provided exemption 7(A) protection); Freedberg v. Department of the Navy, 581 F. Supp. 3, 4 (D.D.C. 1982) (exemption 7(A) applicable to request for information compiled by Navy during murder investigation).

282. *See, e.g.,* J.P. Stevens & Co. v. Perry, 710 F.2d 136, 137, 143 (4th Cir. 1983) (disclosure would hinder agency's ability to shape and control investigations, as well as create a "chilling effect" on potential witnesses, hamper the free flow of ideas within the agency, and make future investigations more difficult).

283. *See, e.g.,* Nemacolin Mines Corp. v. NLRB, 467 F. Supp. 521, 524 (W.D. Pa. 1979) (When "the administrative agency has no intention to use statements in later enforcement proceedings, there are no 'enforcement proceedings' which disclosure could disrupt."); Associated Dry Goods Corp. v. NLRB, 455 F. Supp. 802, 813 (S.D.N.Y. 1978) ("proper focus of Exemption 7(A) is on the effect of disclosure on specific, concrete proceedings").

284. 632 F. Supp. 785 (N.D. Ill. 1986), *aff'd,* 825 F.2d 1148 (7th Cir. 1987). For a discussion of the *Marzen* holding that for the purposes of the FOIA "agency records" do not include information obtained by an agency without legal authority to do so, see *supra* notes 165-183 and accompanying text. *See also* 632 F. Supp. at 802 (discussing why alternative holdings were desirable).

285. 632 F. Supp. at 804.

286. *Id.* at 805.

287. *Id.* at 787-88.

"ordering release of the[ ] records would undermine [the agency's] ability to obtain necessary records in such investigations in the future, especially where a threat to life mandates rapid investigation."[288]

The plaintiff accepted the unusually pressing nature of such investigations but argued that exemption 7(A) protection is "limited to records whose disclosure would interfere with a pending enforcement proceeding involving those records and not to its effect on future proceedings."[289] The court rejected this argument, relying heavily on inferences drawn from *National Labor Relations Board v. Robbins Tire & Rubber Co.*[290] The *Robbins Tire* Court held that "prehearing disclosure of witnesses' statements would involve the kind of harm that Congress believed would constitute an 'interference' with NLRB enforcement proceedings."[291] The *Marzen* court noted that "[n]ot only does *Robbins Tire* lack any holding restricting Exemption 7(A) to interference with pending proceedings but the logic of the decision actually *supports* applying the exemption to future interference."[292] The court found particularly pertinent the Supreme Court's finding that the NLRB must give a limited assurance of confidentiality to induce witnesses to cooperate.[293] It also found the language of exemption 7(A) instructive: "Indeed, the language of the Exemption refers to interference with 'enforcement proceedings' in the plural, not to interference with the particular 'enforcement proceeding' (in the singular) in question."[294]

Perhaps the unusual nature of the "Baby Doe" investigations prompted this protective response from the court. Nonetheless, allowing exemption 7(A) protection on a case-by-case showing of "concrete, cognizable, and substantial interference" with *future* enforcement proceedings[295] could seriously compromise public access to investigatory

288. *Id.* at 803. At the time of the decision, the OCR was not conducting any investigations, pending the Supreme Court's decision in Bowen v. American Hosp. Ass'n, 476 U.S. 610 (1986). *Marzen,* 632 F. Supp. at 803 n.17.

289. 632 F. Supp. at 803.

290. 437 U.S. 214 (1978).

291. *Id.* at 241.

292. 632 F. Supp. at 804 (emphasis supplied by court). It is true that *Robbins Tire* lacks a specific holding restricting exemption 7(A) protection to interference with *pending proceedings.* The Supreme Court, however, noted that it was dealing only "with the narrow question whether witnesses' statements must be released five days prior to an unfair labor practice hearing" and concluded that it could not "see how FOIA's purposes would be defeated by deferring disclosure until after the Government has 'presented its ease in court.' " *Robbins Tire,* 437 U.S. at 242. This language certainly suggests that the Court was concerned with the "chilling effect," on potential witnesses in a specific, pending proceeding.

293. 437 U.S. at 240-41.

294. 632 F. Supp. at 805.

295. *Id.* The *Marzen* court found that the government "amply demonstrated such a concrete, cognizable, and substantial interference with future OCR enforcement proceedings." *Id.* at 806.

records. This is especially true if courts require no more than the "government's assertions of such interference with future . . . investigations."[296]

F. *Exemption 8: Securities Exchange Deemed Financial Institution.*

Exemption 8 protects from disclosure matters that are "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of *financial institutions.*"[297] Exemption 8 protects the security of financial institutions by withholding reports from the public that contain evaluations of a bank's stability and promotes cooperation between banks and their supervising federal agencies.[298] In *Mermelstein v. Securities Exchange Commission,*[299] the Federal District Court for the District of Columbia questioned an earlier decision and ruled that stock exchanges are "financial institutions" for purposes of exemption 8 of the FOIA.[300]

Finding no definition of "financial institution" in the FOIA itself,

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The government's "ample demonstration" included affidavits showing: (1) that OCR acquired patient medical records only by assuring hospitals the records would be kept confidential; (2) that OCR's enforcement abilities would be diminished seriously if assurances of confidentiality could not be given because of FOIA requests; and (3) that the hospitals' voluntary and rapid cooperation for release of records gained through commitments of confidentiality was essential to the investigations' success. *Id.*

296. 632 F. Supp. at 806. The court held that because the plaintiff produced no evidence to contest the government's assertions, disclosure was properly withheld. *Id.*

297. 5 U.S.C. § 552(b)(8) (1982) (emphasis added). *See generally* B. BRAVERMAN & F. CHETWYND, *supra* note 53, at §§ 12-1 to 12-2.2.3 (1985).

298. *See* S. REP. No. 813, 89th Cong., 1st Sess. 10 (1965); *see also* Consumer Union, Inc. v. Heimann, 589 F.2d 531, 536-41 (D.C. Cir. 1978) (discussing legislative history of exemption 8).

Exemption 8 also has been found to protect, indirectly, bank customers' privacy interests. *See, e.g., In re* Verrazzano Towers, Inc., 7 Bankr. 648, 652 (Bankr. E.D.N.Y. 1980) (limiting access to bank records preserves customer confidentiality).

299. 629 F. Supp. 672 (D.D.C. 1986). Mermelstein, a member of the Boston Stock Exchange and a partner of a brokerage firm involved in a disciplinary proceeding, sought from the SEC a report of an investigation of the Boston Stock Exchange that Mermelstein believed implicated his firm. *Id.* at 673.

300. *Id.* at 674-75 (rejecting interpretation of "financial institution" in M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467 (D.D.C. 1972)). The court further ruled that the Boston Stock Exchange is also a financial institution for the purposes of the Sunshine Act, 5 U.S.C. § 552b(c)(8) (1982). 629 F. Supp. at 674-75.

After *Schapiro,* courts refused to restrict the scope of exemption 8. *See, e.g.,* Gregory v. FDIC, 631 F.2d 896, 898 (D.C. Cir. 1980) (Exemption 8 provides "absolute protection regardless of the circumstances underlying the regulatory agency's receipt or preparation of examination, operating or condition reports."); Consumers Union, Inc. v. Heimann, 589 F.2d 531, 533 (D.C. Cir. 1978) (not the court's function "to subvert . . . [Congress's] particularly broad, all-inclusive definition" of exemption 8).

the court instead relied on the subsequently-enacted Sunshine Act.[301] Although the text of the Sunshine Act also fails to define the term,[302] a Senate report accompanying the Sunshine Act states that the term financial institution as used in the act was "intended to include . . . exchanges dealing in securities or commodities, such as the New York Stock Exchange."[303] The court also relied on a guide to the FOIA, released by the House Committee on Government Operations one year after the enactment of the Sunshine Act,[304] which noted that exemption 8 of the FOIA extends protection to bank reports and "documents prepared by the Securities Exchange Commission regarding the New York Stock Exchange, and other similar information."[305]

Relying primarily on the court's earlier dictum in *M.A. Schapiro & Co. v. Securities Exchange Commission* that the term financial institution does not include "national securities exchanges or broker-dealers,"[306] the plaintiff argued that exchange commissions are not financial institutions under the FOIA.[307] The court rejected this argument, concluding that Congress "never acceded to the *Schapiro* court's restrictive census of 'financial institutions' for purposes of FOIA's Exemption 8," and "has since given sufficient indication that it expects securities exchanges to be numbered among them when it comes to ordering public disclosure of matters relating to their regulation."[308]

In addition, the plaintiff argued that since Congress expressly declared its intention to overrule a Supreme Court decision when it enacted the Sunshine Act, it would have nullified the *Schapiro* decision if it wanted to change current judicial interpretation of exemption 8.[309] The court strongly disagreed, finding it "presumptuous in the extreme to

301. *See* 629 F. Supp. at 674 ("[B]ecause FOIA and the Sunshine Act are *in pari materia,* 'they should be read together.' ").

302. The Sunshine Act does, however, use the term twice. First, it adopts the FOIA's exemption 8 as its own exemption 8. 5 U.S.C. § 552b(c)(8) (1982); *see* H.R. REP. NO. 880, 94th Cong., 2d Sess., pt. 1, at 12 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 2183, 2193. Second, it includes information concerning "financial institutions" as among the various types of information which may be withheld under exemption 9(A). 5 U.S.C. § 552b(c)(9)(A) (1982). *See* 629 F. Supp. at 674 ("Sunshine Act uses the term 'financial institution' twice, . . . unfortunately, without definition.").

303. S. REP. NO. 354, 94th Cong., 1st Sess. 24 (1975).

304. A CITIZEN'S GUIDE ON HOW TO USE THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT IN REQUESTING GOVERNMENT DOCUMENTS, H.R. REP. NO. 793, 95th Cong., 1st Sess. 13 (1977).

305. *Id.*

306. 339 F. Supp. 467, 470 (D.D.C. 1972).

307. 629 F. Supp. at 673.

308. *Id.* at 674. The court also noted that the definition of "financial institution" found in *Schapiro* was borrowed from an SEC rule that was promulgated in 1941 "for an altogether different purpose." *Id.* at 673.

309. *Id.* at 674.

think that [Congress] is aware of, and consciously adverts to, isolated decisions of a single federal district court when it passes comprehensive legislation some years later."[310]

Finally, the *Mermelstein* court rejected the plaintiff's alternative argument that the SEC should have released any nonexempt portion of the report that was segregable from the exempt portions.[311] It also rejected the argument that the court should make an *in camera* inspection to determine what may be subject to production.[312] Without any independent investigation, the court accepted the SEC's response that the requested portions were not segregable and held that the SEC properly withheld the requested records.[313]

CONCLUSION

In its twentieth year, the FOIA remains a much debated law. Although 1986 saw changes to the structure of the FOIA for the first time in a decade, the extent of those changes is unclear. The amendments undoubtedly will make it easier for law enforcement agencies to withhold documents from FOIA request. They also legitimate the practice of neither acknowledging nor denying the existence of records. Nonetheless, the parameters of these exceptions to the public's right to its government's records will probably have to be determined in the courts.

Congress did give some guidance to interpretation in a House report on electronic collection and dissemination of data by federal agencies. The report used a *broad* definition of agency records, and stated that

310. *Id.* The court added that appellate courts frequently warn against drawing inferences of congressional approval or disapproval of judicial determinations solely from Congress's failure to mention them when it enacts a new law. *Id.*

311. *Id.* at 675; *see also* 5 U.S.C. § 552(b) (1982) (requiring segregation of "reasonably segregable" portion of a record).

312. 629 F. Supp. at 675. *In camera* inspections are discretionary under the FOIA, *see* 5 U.S.C. § 552(a)(4)(B) (1982), but building an adequate factual basis for de novo review under the FOIA is not. *See supra* notes 219-221 and accompanying text.

313. 629 F. Supp. at 675. The SEC claimed the requested portion was not segregable because "it [was] an integral part of the Commission's evaluation of the sufficiency of BSE's own self-policing efforts, and is not addressed to the merits of any individual case." *Id.* The court noted that even information pertaining to specific disciplinary proceedings involving exchange members is protected from disclosure by exemption 8 *to the extent the information may be of value to the SEC in its supervision of the Boston Stock Exchange. Id.*

The *Mermelstein* court failed to go beyond the SEC's assessment of the nature of the withheld record and found "no reason . . . to doubt the SEC's description . . . [and] consequently no reason . . . to review it *in camera.*" *Id.* Other courts have held that the FOIA obligation of de novo review, 5 U.S.C. § 552(a)(4)(B) (1982), requires the trial court to develop an adequate factual basis to support its decision. *See supra* notes 219-221 and accompanying text. This factual basis should not be supported solely by the SEC's assertion of total exemption. To do so, makes the agency, and not the court, the "ultimate arbiter of privilege." Ely v. FBI, 781 F.2d 1487, 1490 (11th Cir. 1986).

only nominal fees should be charged for access to those records. The report stressed that the government should utilize improved technology to make information available to the public.

Courts continued to explore the parameters of the FOIA in 1986. A number of district court decisions expanded the ability of agencies to withhold information or escape judicial review. Appellate courts, however, did hold that agencies cannot peremptorily withhold information, and did not allow the FOIA to be superseded by subsequent legislation.

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