COMMENT

DEVELOPMENTS UNDER THE FREEDOM OF INFORMATION ACT—1981

During 1981, the fifteenth year of the Freedom of Information Act (FOIA),[1] decisions from the courts of appeals dominated the Act's interpretative landscape[2] in a continuing attempt to reconcile the FOIA's "general philosophy of full agency disclosure"[3] with the competing desire for secrecy and confidentiality in government. The Court of Appeals for the District of Columbia Circuit retained its preeminence as a FOIA tribunal,[4] issuing significant decisions on six of the Act's nine exemptions.[5] The Courts of Appeals for the First and Third Circuits joined the District of Columbia judges in refining the FOIA's "personal privacy" exemptions.[6] In the Court of Appeals for the Ninth Circuit, the central dispute in a long-running Exemption 3

1. 5 U.S.C. § 552 (1976). The scheme of the Act is fairly simple: government agencies must disclose all records held by them through publication, open files, or individual responses to specific requests, unless the records fall within one of nine specific exemptions.

2. The Supreme Court issued one decision in 1981 concerning the FOIA, Weinberger v. Catholic Action of Hawaii/Peace Educ. Project, 102 S. Ct. 197 (1981), but did not significantly reinterpret any provision of the Act. See text accompanying notes 75-85 *infra*.

3. S. REP. No. 813, 89th Cong., 1st Sess. 3 (1965), *reprinted in* SUBCOMM. ON ADMINISTRATIVE PRACTICE & PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES, 93d Cong., 2d Sess. 38 (1974) [hereinafter cited as SOURCE BOOK].

4. The Court of Appeals for the District of Columbia Circuit decides a large number of FOIA cases because the Act provides that venue properly lies "in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated [most likely the District of Columbia], or in the District of Columbia." 5 U.S.C. § 552(a)(3)(B) (1976).

5. The court addressed Exemption 1, which permits agencies to withhold certain records to protect national security, 5 U.S.C. § 552(b)(1) (1976), see text accompanying notes 37-87 *infra*; Exemption 2, which applies to internal personnel rules and practices of an agency, 5 U.S.C. § 552(b)(2) (1976), see text accompanying notes 88-110 *infra*; Exemption 4, which concerns trade secrets and confidential or privileged business data, 5 U.S.C. § 552(b)(4) (1976), see text accompanying notes 124-25 *infra*; Exemption 5, which covers intra-agency memoranda, 5 U.S.C. § 552(b)(5) (1976), see text accompanying notes 161-85 *infra*; Exemption 6, which concerns invasions of personal privacy, 5 U.S.C. § 552(b)(6) (1976), see text accompanying notes 196-201 *infra*; and Exemption 7, subpart (C) of which concerns invasions of personal privacy in law enforcement and national security investigatory records, 5 U.S.C. § 552 (b)(7)(C) (1976), see text accompanying notes 216-25 *infra*.

6. Exemptions 6 and 7(C). See text accompanying notes 192-95, 205-15 *infra*.

suit[7] ended when the Reagan administration's Economic Tax Recovery Act of 1981[8] amended the Internal Revenue Code provision in question.[9]

The nonjudicial branches of the federal government were active as well. The Attorney General issued an important policy letter on the FOIA.[10] The Securities and Exchange Commission considered (but failed to pursue) a clever redefinition of "agency records" which would have prevented certain disclosures from its files.[11] Legislative initiatives supported by President Reagan threatened drastic changes in the FOIA,[12] but by the end of 1981 the only real changes had come through continuing judicial refinement of the Act's scope.[13]

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7. Long v. Bureau of Economic Analysis, 646 F.2d 1310 (9th Cir. 1981), *vacated and remanded*, 102 S.Ct. 468 (1981). Exemption 3 permits withholdings authorized by other federal statutes. 5 U.S.C. § 552 (b)(3) (1976).

8. Pub. L. No. 97-34, § 701, 95 Stat. 340 (1981) (codified at I.R.C. § 6103(b)).

9. I.R.C. § 6103 (1976).

10. See text accompanying notes 17-19 *infra*.

11. See text accompanying notes 29-36 *infra* discussing proposed regulation § 240.24a-1.

12. See notes 20, 24-27 and text accompanying notes 20-27 *infra*. The Supreme Court may also play a greater role in 1982 developments, having granted review in five FOIA cases during 1981: Shapiro v. Klutznick, 636 F.2d 1210 (3d Cir. 1980), *cert. granted sub nom.* Baldridge v. Shapiro, 451 U.S. 936 (1981) (disclosure of census information—Exemption 3); McNichols v. Klutznick, 644 F.2d 844 (10th Cir. 1981), *cert. granted sub nom.* McNichols v. Baldridge, 452 U.S. 937 (1981) (disclosure of census information—Exemption 3); Abramson v. FBI, 658 F.2d 806 (D.C. Cir. 1980), *cert. granted*, 452 U.S. 937 (1981) (withholding of FBI records under Exemption 7(c) when such records were not compiled for investigatory purposes); Washington Post Co. v. United States Dep't of State, 647 F.2d 197 (D.C. Cir.), *cert. granted*, 102 S.Ct. 565 (1981) (Exemption 6) (see text accompanying notes 196-201 *infra*); Bureau of Economic Analysis v. Long, 646 F.2d 1310 (9th Cir. 1981), *vacated and remanded*, 102 S.Ct. 468 (1981) (I.R.C. § 6103 and Exemption 3) (see text accompanying notes 143-59 *infra*). Early in 1982, the court decided *McNichols* and *Shapiro*, holding that census information was exempt under the FOIA, *see* 102 S. Ct. 1103 (1982), and agreed to hear a sixth case, Holy Spirit Ass'n for Unification of World Christianity v. CIA, 636 F.2d 838 (D.C. Cir. 1980), *cert. granted*, 102 S. Ct. 1249 (1982) (Exemptions 1 and 3).

Somewhat later, as this comment went to press, the Court decided the *Washington Post* case. *See* 50 U.S.L.W. 4522 (U.S. May 17, 1982). The case is discussed in note 201 *infra*. The Court also reversed *Abramson*. *See* 50 U.S.L.W. 4530 (U.S. May 24, 1982).

13. For a discussion of developments under the FOIA in prior years, see Comment, *Developments Under the Freedom of Information Act—1980*, 1981 DUKE L.J. 338; Comment, *Developments Under the Freedom of Information Act—1979*, 1980 DUKE L.J. 139; Note, *Developments Under the Freedom of Information Act—1978*, 1979 DUKE L.J. 327; Note, *Developments Under the Freedom of Information Act—1977*, 1978 DUKE L.J. 189; Note, *Developments Under the Freedom of Information Act—1976*, 1977 DUKE L.J. 532; Note, *Developments Under the Freedom of Information Act—1975*, 1976 DUKE L.J. 366; Note, *Developments Under the Freedom of Information Act—1974*, 1975 DUKE L.J. 416; Comment, *Developments Under the Freedom of Information Act—1973*, 1974 DUKE L.J. 251; Note, *Developments Under the Freedom of Information Act—1972*, 1973 DUKE L.J. 178; Project, *Federal Administrative Law Developments—1971*, 1972 DUKE L.J. 115, 136; Project, *Federal Administrative Law Developments—1970*, 1971 DUKE L.J. 149, 164; Project, *Federal Administrative Law Developments—1969*, 1970 DUKE L.J. 67, 72.

I. DEVELOPMENTS OUTSIDE THE COURTS

Because the Department of Justice exercises primary responsibility for the defense of any FOIA suit against an agency, its policy guides agencies in their decisions to withhold or release information requested under the Act. In the first year of the Carter administration, Attorney General Griffin Bell issued to all federal departments and agencies a letter favoring "the spirit, appearance, and reality of open government."[14] The Bell letter set out four criteria the Department of Justice would consider in determining whether to defend a suit:

> (a) Whether the agency's denial seems to have a substantial legal basis,
> (b) Whether defense of the agency's denial involves an acceptable risk of adverse impact on other agencies,
> (c) Whether there is a sufficient prospect of actual harm to legitimate public or private interests if access to the requested records were to be granted to justify the defense of the suit, and
> (d) Whether there is sufficient information about the controversy to support a reasonable judgment that the agency's denial merits defense under the three preceeding critiera.[15]

Criterion (c) encouraged disclosure for borderline requests[16] because absent some showing of prospective harm, the Department of Justice would not undertake a defense of an agency's withholding.

Four years later, under President Reagan, Attorney General William French Smith abolished criterion (c).[17] The Department of Justice will now defend all FOIA suits having a substantial legal basis "without requiring the agency to show that demonstrable harm could result"[18] from disclosure. This new stance permits the agencies to formulate more restrictive internal policies toward disclosure requests without forfeiting their practical opportunity for representation in the courts.[19]

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14. Letter from Attorney General Griffin B. Bell to Heads of All Federal Departments and Agencies (May 5, 1977) (released by the Department of Justice May 11, 1977), *reprinted in* THE 1981 EDITION OF LITIGATION UNDER THE FEDERAL FREEDOM OF INFORMATION ACT AND PRIVACY ACT, app. 56-57 (6th ed. C. Marwick 1980).

15. *Id.* at 57.

16. For a contrary view, see note 19 *infra* (guidelines were, perhaps, never heeded).

17. *See* Letter of Attorney General William French Smith to All Federal Departments and Agencies (May 5, 1981).

18. Remarks of Deputy Attorney General Edward C. Schmults before the Second Circuit Judicial Conference, "The Freedom of Information Act—Is it Working Correctly?" (May 9, 1981) (published as Department of Justice No. DOJ-1981-05).

19. Mark Lynch, an attorney for the American Civil Liberties Union, claims that the new policy suggests the Department of Justice will simply cater to the whims of its clientele (the agencies). Coles and Picard, *Freedom of Information Act Comes Under Fire as Misused Law; Officials Call For Legislative Revision*, FOI DIGEST, May-June 1981 at 4. Jack Landau, Executive Director

Attorney General Smith's letter accurately represents the Reagan administration's 1981 attitude toward the FOIA. The administration's legislative initiatives, such as a comprehensive amendments proposal, S. 1751,[20] also indicate a desire to restrict disclosures. The version of this bill incorporated in S. 1730[21] and approved by the Senate Judiciary Subcommittee on the Constitution would create two new exemptions: one for government-generated legal settlement records[22] and another for technical data restricted from export.[23] More importantly, S. 1730 would also expand the coverage of Exemption 2,[24] Exemption 4,[25] and

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of the Reporters Committee for Freedom of the Press, contends that the new guidelines "will send a clear message to all government agencies—'When in doubt, keep it secret,' 'Use every technicality to suppress information' and 'Lean over backward against the free flow of news.'" *Id.* But some evidence indicates that the old Bell guidelines were not successful in encouraging more disclosures: within seven months of their issuance, the FOIA caseload for the Department of Justice increased from 600 to 1,100 cases. *Id.*

The same day Smith's memorandum appeared, Representative Fortney Stark introduced legislation that would, in effect, block the new policy by enacting the Bell standards as positive law. *See* H.R. 3412, 97th Cong., 1st Sess. (1981).

20. 97th Cong., 1st Sess. (1981). The Reagan administration also planned to introduce proposals to exempt the CIA from the FOIA, a step urged by the Director of the CIA, William J. Casey. Casey alleged that the CIA has unintentionally released "sensitive intelligence information" when complying with FOIA requests, and that the CIA data provided to other agencies has caused FOIA disclosures constituting "serious compromises of classified information." 1981 N.Y. Times News Service. For a summary of other legislative proposals on the FOIA not initiated by the President's staff, see Weiss, *Security, Police Work Cited By Critics Seeking to Limit Freedom of Information Act*, 39 CONG. Q. WEEKLY REP. 1243, 1246 (1981) (summarizing S. 587, S. 1235, S. 1247, S. 1273, H.R. 2021). Two of these bills, S. 1235, 97th Cong., 1st Sess. (1981), and S. 1273, 97th Cong., 1st Sess. (1981), substantially exempt the CIA from the FOIA by greatly expanding the types of CIA files that may be withheld under the Act.

21. Senator Orrin Hatch chairs the Subcommittee. His own FOIA amendments bill, S. 1730, 97th Cong., 1st Sess., 127 CONG. REC. 511, 296 (1981) constituted the other major working proposal for changing the Act and influenced the final form of S. 1751. Hatch made it known he intended to "combine the best of both bills" during their mark-up in committee. *See* Weiss, *Questions Posed Concerning Reagan Proposal to Restrict Freedom of Information Act*, 39 CONG. Q. WEEKLY REP. 2077, 2077 (1981).

22. S. 1730, 97th Cong., 1st Sess. § 12 (1981). *Cf.* County of Madison v. Department of Justice, 641 F.2d 1036, 1041 (1st Cir. 1981) (no equitable "settlement exemption" implied in the FOIA).

23. S. 1730, 97th Cong., 1st Sess. § 12 (1981).

24. *See id.* § 8. Exemption 2, 5 U.S.C. § 552(b)(2) (1976), currently permits withholding of matters "related solely to the internal personnel rules and practices of an agency." Some courts interpret this exemption to extend beyond mere "housekeeping" information to investigatory and training manuals. *See, e.g.*, Crooker v. Bureau of Alcohol, Tobacco, & Firearms, 670 F.2d 1051 (D.C. Cir. 1981) (en banc) discussed at text accompanying notes 90-110 *infra*. The Reagan-Hatch bill would codify this judicial interpretation for "such materials as (A) manuals and instructions to investigators, inspectors, auditors and negotiators" and would also extend protection to materials used for determining qualifications of employment, promotion, or licensing of individuals.

25. *See* S. 1730, 97th Cong., 1st Sess. §§ 4, 5, 9 (1981). Exemption 4, 5 U.S.C. § 552(b)(4) (1976), currently protects confidential "trade secrets and commercial or financial information" from mandatory disclosure. Courts have interpreted this provision to require a showing that disclosure is likely to cause substantial harm to the competitive position of the submitter. See text

Exemption 7,[26] but restrict judicial review under Exemption 1 to an "arbitrary and capricious" standard.[27]

The Securities and Exchange Commission (SEC) took a subtler approach toward proscribing unwanted disclosures by proposing regulation 240.24a-1.[28] The proposed regulation would have excluded certain documents from disclosure through a narrow interpretation of the phrase "agency records." The FOIA contemplates remedies only for the withholding of "agency records."[29] Section 24a of the Securities Exchange Act of 1934[30] defines "agency records" for the SEC as "all applications, statements, reports, contracts, correspondence, notices, and other documents filed with or otherwise obtained by the Commis-

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accompanying notes 128-42 *infra*. The Reagan-Hatch bill expands this concept by permitting the withholding of information "the disclosure of which *could* impair the legitimate private competitive *research, financial, or business* interests of *any* person." S. 1730, 97th Cong., 1st Sess. § 9 (1981) (emphasis added). The bill also provides for regulations requiring a submitter of information to specify any data exempt under section 552(b)(4), requiring the agency to notify the submitter when any request is made for such designated material, and allowing the submitter to object to any disclosure of the data. S. 1730, 97th Cong., 1st Sess. § 4 (1981). Section 5 of the bill allows a requester or submitter to intervene as of right in a suit for disclosure or nondisclosure by the other party generally. *Id.* § 5. The Administrative Conference of the United States had considered a comprehensive modification of Exemption 4, but in deference to the Reagan administration, returned its proposals to committee without action. *See* 50 U.S.L.W. 2371 (Dec. 22, 1981).

26. *See* S. 1730, 97th Cong., 1st Sess. § 11 (1981). Exemption 7, 5 U.S.C. § 552(b)(7) (1976), permits withholding of "investigatory records compiled for law enforcement purposes" under six carefully limited circumstances. The Reagan-Hatch bill would extend Exemption 7 beyond "investigatory records" to any documents "compiled for law enforcement purposes" in circumstances which are essentially expansions of the six current instances. Exclusions are specifically implied for all terrorism, foreign intelligence, and organized-crime information. Confidential sources would also receive greater protection. *See* S. 1730, 97th Cong., 1st Sess. § 11(b) (1981). For a discussion of Exemption 7(D), see note 217 *infra*.

27. *See* S. 1751, 97th Cong., 1st Sess. § 5(2) (1981). Exemption 1, 5 U.S.C. § 552(b)(1) (1976), covers "matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." The need for a legislative change of Exemption 1 is not obvious, given the extent to which courts already refuse to allow a full de novo review of national security matters under the FOIA. *See* note 57 and text accompanying notes 53-56, *infra*.

The Reagan-Hatch bill also allows agencies to charge requesters for the services of agency personnel in searching their files for information, S. 1730, 97th Cong., 1st Sess. § 2 (1981); gives agencies more flexible time limits in responding to requests, *id.* § 3; and prevents any requests for information under the FOIA by or on behalf of a party in an ongoing lawsuit, *id.* § 14. As this comment went to press, defenders of the FOIA in its present form had secured a major compromise in the Senate Judiciary Committee. The compromise protected much of Exemption 1 and current access to foreign intelligence information, but still allowed additional restrictions on investigatory records. *See* The Washington Post, May 22, 1982, at A2, Col. 4.

28. SEC Proposed Rulemaking, Records Not Obtained by the Commission, 46 Fed. Reg. 15,178 (1981).

29. *See* 5 U.S.C. § 552(a)(4)(B) (1976) ("the district court . . . has jurisdiction to enjoin the agency from withholding agency records").

30. 15 U.S.C. § 78x(a) (1976).

sion . . . ."[31] Documents not filed with the SEC under requirement of law or "otherwise obtained" by the SEC are not agency records and are thus not within the FOIA.

To encourage voluntary submissions of data for its law enforcement activities,[32] the Commission proposed regulation 240.24a-1, reasoning as follows:

> A "record" received by the Commission, other than in connection with a filing with the Commission, shall not be considered to have been "otherwise obtained" by the Commission, within the meaning of section 24a of the [Securities Exchange] Aet, 15 U.S.C. 78x(a), unless such record is used as an exhibit by the Commission or its staff in the law enforcement activities of the Commmission . . . .[33]

Thus, on receipt of documents not filed with the Commission, the SEC could elect under proposed section 240.24a-1 to treat the information as not "otherwise obtained" and thereby prevent its release under the FOIA.[34] Because nothing prevents other agencies from promulgating similar regulations,[35] the fate of the SEC's proposed section 240.24a-1 could have had potential significance throughout the federal government.[36]

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31. *Id.* The Supreme Court, in Forsham v. Harris, 445 U.S. 169, 185 (1980), cited section 24(a) with approval as the standard for "agency records" in the SEC.

32. The SEC began this effort by promulgating a rule establishing procedures for treating information as "confidential." *See* 17 C.F.R. § 200.83 (1981). But comments received by the Commission prompted consideration of additioual regulations because "confidcntiality" alone does not ensure nondisclosure under Exemptions 4 and 7(D) of the FOIA. *See* SEC Proposed Rulemaking, Records Not Obtained by the Commission, 46 Fed. Reg. 15,178, 15,179 (1981).

33. SEC Proposed Rulemaking, Records Not Obtained by the Commission, 46 Fed. Reg. 15,178, 15,180 (1981). For discussions of other approaches to defining "agency records," see Comment, *What Is A Record? Two Approaches to the Freedom of Information Act's Threshold Requirement*, 1978 B.Y.U.L. REV. 408; Note, *The Definition of "Agency Records" Under the Freedom of Information Act*, 31 STAN. L. REV. 1093 (1979).

34. The rule may have evolved from language in Forsham v. Harris, 445 U.S. 169 (1980): "FOIA applies to records, which have been *in fact* obtained, and not to records which merely *could have* been obtained." *Id.* at 186 (emphasis in original).

35. Such promulgation would become especially likely if agencies take to heart Justice Brennan's complaint in *Forsham* that the Court has produced "no manageable standards of any kind" for defining agency records. 445 U.S. at 189 n.5 (Brennan, J., dissenting). A similar kind of control over disclosure is exercised by Congress. Congressional documents are not "agency records" because Congress is not an agency, *see* 5 U.S.C. § 552(e) (1976), but Congress can cause documents to become available under the FOIA through a failure to designate them "congressional" when such documents have passed from exclusive congressional possession. *See* Holy Spirit Ass'n v. CIA, 636 F.2d 838, 841 (D.C. Cir. 1980), *cert. granted*, 102 S. Ct. 1249 (1982). Under the SEC's proposal, a failure to have a submitter hand over information voluntarily (instead of including it in a filing, for instance) would subject the information to FOIA requests.

36. The SEC has not actively pursued this rulemaking because of pending legislative activity aimed at amending the FOIA. Courts have also shown some deference to Exemption 7 claims, deference which seems to go against the requirements of the Act.

II. THE NATIONAL SECURITY EXEMPTION

Even though section 552(a)(4)(B) of the FOIA prescribes that "the court *shall* determine the matter de novo . . . and the burden is on the agency to sustain its actions"[37] when the agency's withholding of information is challenged, the statute's command sometimes goes unheeded in Exemption 1[38] litigation. Three recent national security cases illustrate this assertion: *Phillippi v. CIA*,[39] *Military Audit Project v. Casey*,[40] and *Stein v. Department of Justice*.[41] A fourth case, the only 1981 Supreme Court decision that sheds any light on the FOIA,[42] indicates the Court may have little patience with the delicate maneuvering judges must undertake to comply fully with the spirit of the Act in Exemption 1 situations.

A. *The Courts of Appeals Permit a Lowered Standard of Review.*

Phillippi and *Military Audit Project*, closely related suits in the Court of Appeals for the District of Columbia Circuit, involved requests for information about the *Hughes Glomar Explorer* incident of the mid-1970s.[43] In both cases the court sustained CIA withholdings based on combined Exemption 1 and 3 grounds[44] and granted sum-

37. 5 U.S.C. § 552 (a)(4)(B) (1976).

38. See note 27 *supra* for the text of Exemption 1.

39. 655 F.2d 1325 (D.C. Cir. 1981).

40. 656 F.2d 724 (D.C. Cir. 1981).

41. 662 F.2d 1245 (D.C. Cir. 1981).

42. Weinberger v. Catholic Action of Hawaii/Peace Educ. Project, 102 S. Ct. 197 (1981).

43. Military Audit Project v. Casey, 656 F.2d 724, 727-29 (D.C. Cir. 1981), describes the background of the *Hughes Glomar Explorer* controversy. According to reports widely circulated during 1975, the CIA had arranged with Howard Hughes for the construction of a huge floating platform and submersible barge in order to raise a sunken Russian submarine from the sea floor. The "cover story" for the *Glomar Explorer* protrayed the project as a daring engineering venture into deep-sea manganese mining. After the *Glomar Explorer* recovered one-third of the submarine, a Hughes office in Los Angeles was mysteriously burglarized. Shortly thereafter the *Los Angeles Times* published an incomplete, garbled account of the *Glomar Explorer's* efforts. The CIA tried to suppress the story, with temporary success among the news media, but columnist Jack Anderson breached the informal silence and circulated the story widely. *Id.*

44. Exemption 3 allows an agency to withhold information whenever such information is "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matter be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. 552(b)(3) (1976). (The *Phillippi* and *Military Audit Project* withholdings relied on the National Security Act, 50 U.S.C. 403(d)(3) (1976).) Exemption 1, in similar fashion, requires an Executive Order as a prerequisite to withholding. (The *Phillippi* and *Military Audit Project* courts relied on Exec. Order No. 11,652, 3 C.F.R. 678 (1971-1975 compilation) (superseded by Exec. Order No. 12,065, 3 C.F.R. 190 (1979)).)

mary judgment for the government[45] on the basis of affidavits.

The *Military Audit Project* court began its examination of agency affidavits by reference to the legislative history of Exemption 1 (chiefly a House-Senate conference report[46]) noting that:

> The legislative history of the 1974 amendments to the Act . . . makes it clear that we "must recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [sic] might occur as a result of public disclosures of a particular classified record." We are therefore required to "accord *substantial weight* to an agency's affidavit."[47]

Reasoning from prior case law,[48] the court then determined that agency affidavits warrant summary judgment if they: 1) describe in reasonable detail the documents and justification for their withholding; 2) demonstrate that the withholding logically falls within the claimed exemption; and 3) are not controverted, either by other evidence or by indications of bad faith.[49] Since the court decided that the affidavits in both cases met these conditions, it affirmed the CIA withholdings.

The application of this general formula to the facts of cases like *Phillippi* and *Military Audit Project* reveals the difficulty of accomplishing effective de novo review at trial without the active intervention of the judge. Discovery may be limited or prevented altogether because "[i]n national security cases, some sacrifice to the ideals of the full adversary process are inevitable."[50] Furthermore, a denial of discovery cannot constitute an abuse of trial court discretion when the movants fail to raise "substantial . . . questions concerning the substantive content of the affidavits."[51] Thus if the public information to which the information-seeker has access is insufficient to raise such "substantial

45. Military Audit Project v. Casey, No. 75-2103 (D.D.C. June 10, 1980), *aff'd*, 656 F.2d 724 (D.C. Cir. 1981); Phillippi v. CIA, No. 75-1265 (D.D.C. June 9, 1980), *aff'd*, 655 F.2d 1325 (D.C. Cir. 1981).

46. *See* CONFERENCE REPORT ON THE FREEDOM OF INFORMATION ACT AMENDMENTS, H. R. REP. No. 93-1380 (S. REP. No. 93-1200 identical), 93d Cong., 2d. Sess. 123 (1974), *reprinted in* SOURCE BOOK, *supra* note 3, at 217.

47. Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981) (footnotes omitted).

48. *Id.* at 738 n. 49, *citing* Baez v. United States Dep't of Justice, 641 F.2d 1328, 1335 (D.C. Cir. 1981); Lesar v. United States Dep't of Justice, 636 F.2d 472, 481 (D.C. Cir. 1980); Hayden v. National Security Agency/Central Security Serv., 608 F.2d 1381, 1386-87 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980); Ray v. Turner, 587 F.2d 1187, 1194-95 (D.C. Cir. 1978); Weissman v. CIA, 565 F.2d 692, 696-98 (D.C. Cir. 1977).

49. Military Audit Project v. Casey, 656 F.2d at 738.

50. *Id.* at 751, *citing* Hayden v. National Security Agency/Central Security Serv., 608 F.2d 1381, 1385 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980). *Cf.* Shaffer v. Kissinger, 505 F.2d 389, 391 (D.C. Cir. 1974), (pre-amendments case granting discovery of classified information in an Exemption 1 suit).

51. Military Audit Project v. Casey, 656 F.2d at 751.

questions," he is in a "Catch-22" position.[52] Unless the court also assumes the burden of ensuring de novo review, the agency need merely recite a reasonable basis for exemption to justify its withholding decision under section 552(a)(4)(B) of the FOIA.[53]

The *Military Audit Project* panel refused to take such an active role. Instead, Judge Malcolm Wilkey's opinion simply affirmed the plausibility of each critical statement in the CIA affidavits.[54] Although Judge Wilkey claimed that it "is simply not so" that summary judgment on this basis represents a de facto substitution of a deferential "reasonable basis" standard of review,[55] an inquiry restricted to the plausibility of unchallengable agency affidavits seems indistinguishable from a nonadversarial inquiry into the apparent reasonableness of a secrecy classification. The court could at least have compared the affidavits' claims to the contents of the documents themselves. Yet the *Military Audit Project* and *Phillippi* panels stated that no in camera inspection is required when the affidavits seem sufficient.[56]

The holdings in *Military Audit Project* and *Phillippi*, and in a similar case, *Stein v. Department of Justice*,[57] defeat the spirit of the 1974

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52. As Judge Mikva notes in his concurring opinion in *Phillippi*, "appellant is caught in a Catch-22 inherent in the equivocal publicizing of legitimate intelligence operations." 655 F.2d at 1333 The problem is that:

> if the purpose of the Glomar expedition was as described, official confirmation is unwarranted; if the reports are merely a fallback cover story, disclosure is even more unwarranted. This reasoning would not, of course, permit the CIA to withhold documents concerning activities with no legitimate purpose merely by making a boilerplate allegation that they "might possibly involve a fallback story."

Id. The majority opinion implicitly recognized that these possible "fallback cover stories" are unreliable sources for the requester in uncovering information to press his claims. Judge Wilkey referred to such fabrications as "dis-information": "[w]ithout the ability to engineer controlled leaks of dis-information, the CIA would be deprived of the ability to disseminate a fallback cover while simultaneously protecting it." *Id.* at 1330.

53. 5 U.S.C. § 552(a)(4)(B) (1976).

54. The language of the opinion reveals this, for example:

> What should be obvious is that if it is both plausible that the *Glomar Explorer* was designed to mine the seabed and at the same time also plausible that the *Glomer Explorer* was designed to raise a Russian submarine, it is plausible that the *Glomar Explorer* was in fact designed to perform yet some still-secret third function . . . . The affidavits supplied by the government provide an understandable and plausible basis for the government's Exemption 1 claims.

Military Audit Project v. Casey, 656 F.2d 724 at 744-45. References to plausibility appear several other times, *id* at 737-38.

55. *Id.* at 751. See the discussion of the 1974 FOIA amendments' legislative history, text accompanying notes 60-69 *infra*, for background on Congress's rejection of the reasonable-basis standard.

56. Military Audit Project v. Casey, 656 F.2d 724, 752 (D.C. Cir. 1981).

57. 662 F.2d 1245 (7th Cir. 1981). *Stein* explicitly stated what the District of Columbia Circuit's decisions only implied:

> Congress did not intend that the courts would make a true *de novo* review of classified documents . . . . Rather, Congress intended that the courts would review the sufficiency

FOIA amendments. Those changes extended de novo review to Exemption 1 claims precisely because the Supreme Court's narrow decision in its first FOIA case, *EPA v. Mink*,[58] prohibited in camera review of classified documents.[59] The Senate version of the 1974 amendments originally included a general de novo review provision, but limited Exemption 1 review to a "reasonable basis" standard.[60] During floor debate, an amendment by Senator Muskie deleted all reference to a reasonable-basis standard in the Senate bill.[61] The House version, H.R. 12471,[62] retaining de novo review for all FOIA exemptions, added only a clause specifically allowing in camera examinations to counter the restrictions imposed in *Mink*.[63] Thus the House-Senate conference committee received two bills specifying de novo review for all withholdings.[64] Given this overwhelming rejection of a reasonable-basis standard by both houses, collectively and individually, the language of the bill as passed cannot support a reading of less than de novo review. Furthermore, in his veto of the 1974 amendments,[65] President Ford proposed a return to the original Senate version: "where classified documents are requested the courts could review the classification, but would have to uphold the classification if there is a reasonable basis to

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of the agency's affidavits and would require the agency to come forward with more information or with the documents themselves if the affidavits proved insufficient.

Id. at 1253. This conclusion was derived from the same short conference committee report passage relied on by the *Military Audit Project* court. *See* CONFERENCE REPORT, FREEDOM OF INFORMATION ACT AMENDMENTS, H.R. REP. NO. 93-1380 (identical to S. REP. NO. 93-1200), 93d Cong. 2d Sess. 12 (1974) [hereinafter cited as CONFERENCE REPORT] *reprinted in* SOURCE BOOK, *supra* note 3, at 229, *cited in* Stein v. Department of Justice, 662 F.2d at 1252. In *Stein* a lawyer who represents Polish clients requested all documents concerning himself in FBI files. The FBI withheld certain documents, relying in part on Exemption 1. The district court initially upheld the agency's decision after an in camera examination, but reversed itself on a remand that had been voluntarily sought by the agency and granted by the court of appeals following the disclosure of much of the material sought. After its own in camera examination of the documents, the court of appeals reversed the second decision of the district court and upheld the nondisclosure of the remaining documents at issue. 662 F.2d at 1256 nn.5 & 6.

58. 410 U.S. 73 (1973).

59. *Id.* at 84.

60. *See* S. REP. NO. 93-854, 93d Cong., 2d Sess. 37 (1974) (proposed section (4)(B)(ii)), *reprinted in* SOURCE BOOK, *supra* note 3, at 189.

61. Senate Debate and Votes on S. 2543, 120 CONG. REC. 17,022, 17,022-33 (1974) (amendment (No. 1356) of Sen. Muskie and debate), *reprinted in* SOURCE BOOK, *supra* note 3, at 302-28.

62. H.R. REP. NO. 93-876, 93d Cong., 2d Sess. (1974) *reprinted in* SOURCE BOOK, *supra* note 3, at 145.

63. H.R. 12471 § (d), H.R. REP. NO. 93-876, 93d Cong., 2d Sess. (1974) *reprinted in* SOURCE BOOK, *supra* note 3, at 147.

64. *See* CONFERENCE REPORT, *supra* note 64, *reprinted in* SOURCE BOOK, *supra* note 3, at 225, which states that "[t]he conference substitute follows the Senate amendment . . . ." *Id.* The substitute, however, clearly incorporates language from both proposals.

65. Veto of Freedom of Information Act Amendments, 10 WEEKLY COMP. OF PRES. DOC. 1318 (Oct. 17, 1974), *reprinted in* SOURCE BOOK, *supra* note 3, at 481.

support it."[66] But again Congress passed the conference substitute specifying de novo review.[67]

The passage from the conference report relied on by *Military Audit Project* and *Stein*—that courts should give "substantial weight" to an agency's affidavit[68]—should be read in the context of Congress's continuing adherence to the requirement of de novo review. So read, the passage does not restrict de novo review, but merely validates the government's expert status in testifying during such review about possible adverse effects of public disclosure.[69]

When a FOIA requester can obtain knowledge adequate to attack these expert affidavits, in camera reviews seem unnecessary. But when a court restricts a requester's ability to test the validity of government affidavits, as in *Military Audit Project*, *Phillippi*, and *Stein*, the court still bears the burden of de novo review. Consistent with that standard, the court should perform an in camera inspection of the documents referred to by the affidavits as provided for by Congress.[70]

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66. *Id.*, *reprinted in* SOURCE BOOK, *supra* note 3, at 484.

67. Freedom of Information Act 1974 Amendments, Pub. L. No. 93-502, 88 Stat. 1561 (codified at 5 U.S.C. § 552 (1976)). Naturally, individual congressmen differed in their interpretations of the provision for de novo review. *Compare* House Action and Vote on Presidential Veto, 120 CONG. REC. 36,622-24 (1974) (remarks of Rep. Moorhead), *reprinted in* SOURCE BOOK, *supra* note 3, at 403, 405-06 (provision not at odds with President Ford's conception of reasonable basis review) *with* Senate Action and Vote on Presidential Veto, 120 CONG. REC. 36,865-69, 36,874-76 (1974) (remarks of Sen. Kennedy, Sen. Baker, and Sen. Ervin), *reprinted in* SOURCE BOOK, *supra* note 3, at 435-65 (provision completely different from President Ford's reasonable basis review). As Senator Ervin wrote of the reasonable basis standard, repeating a previous speech in the debates: "is it not ridiculous to say that to find out what the truth is, one has to show whether the agency reached the truth in a reasonable manner?" *Id.* at 36,876, *reprinted in* SOURCE BOOK, *supra* note 3, at 464.

68. *See* note 57 *supra*.

69. CONFERENCE REPORT, *supra* note 57, at 32,601, *reprinted in* SOURCE BOOK, *supra* note 3, at 229 *and in* 120 CONG. REC. 32601 (1974). Once the government's submissions are properly viewed as expert testimony, rather than as a mandate to reduce the standard of review, the 1974 amendment's explicit addition of in camera inspection to Exemption 1 procedure cannot be ignored. *See also* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 383 (2d ed. 1978) (addition of section 552(b) segregability requirement emphasizes the importance of in camera inspections).

70. The burden need not overwhelm the court. A judge can spot-check documents in camera rather than read them in their entirety, though all the documents must be made available to him on order. *See* Ferri v. Bell, 645 F.2d 1213, 1224 (3d Cir. 1981). Alternatively, the trial court can appoint a special master to examine the documents. *See* Vaughn v. Rosen, 484 F.2d 820, 828 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). The *Vaughn* decision established the standard practice of requiring a detailed affidavit index of documents to help relieve the burden on the court of reading every document in FOIA litigation. As Judge Wilkey noted in *Vaughn*, the absence of such a procedure would "create a situation in which the Government need only carry its burden of proof against a party that is effectively helpless and a court system that is never designed to act in an adversary capacity." *Id.* at 826. The *Vaughn* court was trying to ensure the integrity of de novo review when a court is overwhelmed by the number of possible documents at issue. *See id.* at 828. Judge Wilkey's observations in *Vaughn* are equally applicable as an argu-

At least one court agrees that inadequate knowledge of the contents of government documents may trigger in camera reviews in national security cases. In *Coastal States Gas Corp. v. Department of Energy*,[71] the Court of Appeals for the Third Circuit drew the following distinction:

> Courts in the future may find that exactly how they choose to exercise their *de novo* review role, and the desirability of *in camera* review, may turn on whether the agency's own interests, or third party or important public interests, are at stake. Thus, a court faced with . . . Exemption 5 claims for internal agency memoranda might order disclosure despite incomplete knowledge of the records involved, since only the agency's vested interests are in issue . . . . But if [there are potential] . . . adverse effects on third parties or national security interests, then a court might resort to *in camera* review to assure that the documents were factually non-exempt before ordering disclosure.[72]

The *Coastal States Gas* argument supported the government's defense to summary judgment. It should apply equally to a plaintiff's request, however; otherwise the government receives a procedural advantage not provided under the FOIA. Thus, when a good-faith plaintiff has no chance to obtain the knowledge of the records needed to debate the agency's exemption claims, the court should undertake an in camera examination.[73] This minimal burden ensures a thorough de novo review, avoiding the shortcomings of *Military Audit Project*, *Phillippi*, and *Stein*.[74]

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ment for in camera review in the narrow situations presented him some eight years later when he authored the *Military Audit Project* and *Phillippi* opinions.

There is yet another reason for the use of in camera inspections after the 1974 amendments: before 1974, yet after *Mink*, courts had granted discovery requests for the classified contents of withheld documents in FOIA cases. *See* Schaffer v. Kissinger, 505 F.2d 389, 391 (D.C. Cir. 1974): "Facts respecting the classification of the reports in question are solely in the control of the State Department. Appellant should be allowed to undertake discovery for the purpose of uncovering facts which might prove his right of access to the documents . . . ." After the 1974 amendments, courts became reluctant to grant discovery on this point. See text accompanying notes 50-51 *supra*. In camera inspection is the logical substitute.

71. 644 F.2d 969 (3d Cir. 1981).

72. *Id.* at 985 n.80 (emphasis in original).

73. The judiciary's aversion to in camera review may be more verbal than actual. In *Stein*, for instance, although denying that a full de novo review was required, the appellate court nevertheless conducted its own in camera inspections of the documents sought. See note 57 *supra*. Other recent examples of in camera review in national security cases include Founding Church of Scientology of Washington, D.C., Inc. v. National Security Administration, No. 80-1848 (D.C. Cir. March 24, 1981) (in camera affidavits summarizing and excerpting documents), and Church of Scientology of California, Inc. v. Turner, 662 F.2d 784 (D.C. Cir. 1980) (full documents).

74. In particular, the courts could use a special master, as adverted to by Judge Wilkey in *Vaughn*. *See* Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973). Some courts have expressed a fear of handling sensitive documents themselves: "[O]ur own sense of inadequacy to provide the kind of security such sensitive information requires strongly suggests that no one should be given access

B. *Indications that the Supreme Court May Support A Lowered Standard of Review.*

In *Weinberger v. Catholic Action of Hawaii/Peace Education Project*[75] the Supreme Court reversed a decision of the Court of Appeals for the Ninth Circuit[76] requiring the Navy to prepare for public release a "Hypothetical Environmental Impact Statement" concerning the possible impact of the storage of nuclear weapons at ammunition magazines built in Hawaii. Justice Rehnquist's majority opinion held that "[v]irtually all information relating to the storage of nuclear weapons is classified . . . exempt from disclosure under Exemption 1, and therefore is exempt from the public disclosure requirements of NEPA."[77] Justice Rehnquist noted that if the Navy decided to store nuclear material at the new magazines, Department of Defense regulations would require preparation of an impact statement solely for internal agency use.[78]

Justice Rehnquist went further, however, and noted that the Navy's compliance with the National Environmental Policy Act (NEPA), when the Navy can neither admit nor deny storage for national security reasons, "is beyond judicial scrutiny in this case."[79] To support this conclusion, Justice Rehnquist cited not FOIA review procedures, but an 1875 case, *Totten v. United States*.[80] The *Totten* Court

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to such information who does not have a strong, demonstrated need for it." Colby v. Halperin, 656 F.2d 70, 72 (4th Cir. 1981). If this is a valid concern, a special master with a security clearance can no doubt be found. This method represeuts a compromise and should occur only infrequently. Yet in that narrow range of cases like *Military Audit Project*, such a compromise is preferable to a complete abrogation of de novo review. Interestingly, as this note went to press the District of Columbia Circuit, in an Exemption 1 case, reversed a lower court, remanding with instructions to conduct an in camera examination of a classified affidavit and to compel the CIA to answer interrogatories. *See* Andres v. CIA, 2 G.D.S. ¶ 82,184 (D.C. Cir. 1982) (the case will not be published).

75. 102 S. Ct. 197 (1981).

76. Catholic Action of Hawaii/Peace Education Project v. Brown, 643 F.2d 569 (9th Cir. 1980), *rev'd sub nom.* Weinberger v. Catholic Action of Hawaii/Peace Educ. Project, 102 S.Ct. 197 (1981).

77. 102 S. Ct. at 202. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (1976), requires release of Environmental Impact Statements to the President, the Council on Environmental Quality, and the public, subject to the provisions of the FOIA. As the Court noted, section 102(2)(C) of NEPA "contemplates that in a given situation a federal agency might have to include environmental considerations in the decisionmaking process, yet withhold public disclosure . . . under the authority of a FOIA exemption." 102 S. Ct. at 201.

78. 102 S. Ct. at 203.

79. *Id.*

80. 92 U.S. 105, 107 (1875). *Totten* was an action to recover compensation under a secret contract to perform spy services for the Union forces during the Civil War. The Court denied that such actions could ever be maintained in the courts because "[t]he publicity produced . . . would itself be a breach . . . and thus defeat a recovery." *Id.* at 107.

stated that "public policy forbids the maintenance of any suit . . . the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated."[81]

A suit to determine whether or not the Navy complied with NEPA in transferring weapons to the new magazines does not, however, "inevitably lead to disclosure" of confidential matters even if the Navy cannot admit or deny the fact of weapons storage. As the concurring opinion of Justice Blackmun notes, the primary purpose of NEPA is to ensure that environmental concerns are given consideration in agency planning activities.[82] To this end, the FOIA review procedures, specifically the option of in camera review, permit a court to determine initially whether an agency has complied with NEPA and to consider whether any of the nonclassified information can be segregated from the classified information. Justice Blackmun identified the *Totten* reference as unnecessary dicta[83] and focused on segregability[84] but did not directly attack Justice Rehnquist's approach.[85] Thus the entire Court appears to favor avoiding the conflict between statutorily mandated de novo review and the practical difficulties of military secrecy by leaving such decisions to the agencies.[86]

Though *Catholic Action* is not a FOIA case, and does not squarely present the question of de novo review in national security cases, the opinion indicates a potential unwillingness of the Court to pursue strict compliance with the spirit of the 1974 amendments[87] of the FOIA. In

81. *Id., cited in* Weinberger v. Catholic Action, 102 S. Ct. at 203.

82. Weinberger v. Catholic Action, 102 S.Ct. 197, 204 (1981) (Blackmun, J., concurring).

83. *Id.*

84. *Id.* Interestingly, Justice Blackmun never cited the FOIA's own provision on segregability, 5 U.S.C. § 552(b) (1976).

85. The passage quoted by Justice Rehnquist is not clearly the holding of *Totten*. The *Totten* opinion cited the privileges of the confessional, the marriage, the lawyer-client relationship, and the doctor-patient relationship as confidences that lawsuits cannot impair. It then noted: "Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed." 92 U.S. at 107 (1875). The emphasis is upon voluntary or contractual relationships. Because of this emphasis, *Totten* is weak support for governmental nondisclosure in the face of a general statute specifying disclosures (in this case, NEPA).

86. Although the FOIA provides for in camera inspection and commands de novo judicial review, even Justice Blackmun seems to ignore a possible judicial role when he states: "[T]he military must determine whether the information at issue, consistent with the dictates of the relevant executive orders, can be released." 102 S. Ct. at 204 (Blackmun, J., concurring). The negative implication is that only the military can determine segregability.

87. The case of CIA v. Holy Spirit Ass'n for Unification of World Christianity, 636 F.2d 838 (D.C. Cir. 1980), *cert. granted*, 50 U.S.L.W. 3641 (U.S. Feb. 16, 1982) may soon provide a definitive statement from the Court regarding the 1974 amendments. In the meanwhile, Justice Rehnquist's opinion for the Court in United States Department of State v. Washington Post Co., 50

this respect, the Supreme Court's views comport with the 1981 Exemption 1 decisions from the courts of appeals.

III. The Internal Personnel Rules and Practices Exemption

Until recently, a narrow interpretation of Exemption 2[88] prevailed among the circuits. The Courts of Appeals for the Fifth, Sixth, Eighth, and District of Columbia Circuits limited the exemption's application to minor "housekeeping" records, which did not include such materials as law enforcement manuals.[89] Only the Second and Ninth Circuits interpreted the provision broadly.[90] But the Court of Appeals for the District of Columbia Circuit, sitting en banc, recently reversed its views and expanded the scope of Exemption 2 in *Crooker v. Bureau of Alcohol, Tobacco & Firearms*.[91]

In 1978, Michael Crooker, a federal prisoner,[92] made a FOIA request for a Bureau of Alcohol, Tobacco, and Firearms (BATF) training manual on surveillance techniques.[93] The Bureau granted his request in part, but claimed certain withholdings based *inter alia* on Exemption 2. A district court, after inspecting the manual in camera, upheld the Bureau's claim,[94] but was reversed by the court of appeals.[95] On re-

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U.S.L.W. 4522 (U.S. May 17, 1982), *rev'g*, 647 F.2d 197 (D.C. Cir. 1981) provides another example of the Court's trend toward less-than-rigorous readings of the Act's language. See note 201 *infra*.

88. 5 U.S.C. § 552(b)(2)(1976). *See* note 24 *supra* for the language of Exemption 2.

89. *See e.g.*, Cox v. Levi, 592 F.2d 460, 462 (8th Cir. 1979); Jordan v. United States Dep't of Justice, 591 F.2d 753, 763 (D.C. Cir. 1978) (en banc); Cox v. United States Dep't of Justice, 576 F.2d 1302, 1309-10 (8th Cir. 1978); Stokes v. Brennan, 476 F.2d 699, 703 (5th Cir. 1973); Hawkes v. IRS, 467 F.2d 787, 796-97 (6th Cir. 1972).

90. *See* Hardy v. Bureau of Alcohol, Tobacco & Firearms, 631 F.2d 653, 657 (9th Cir. 1980); Caplan v. Bureau of Alcohol, Tobacco & Firearms, 587 F.2d 544, 548 (2d Cir. 1978). The Fifth Circuit's position remains somewhat equivocal. It has not yet faced a case in which disclosure of a government manual would risk circumvention of the law. Therefore, it has declined to choose between its own position in Stokes v. Brennan, 476 F.2d 699 (5th Cir. 1973), and the position taken in *Caplan* and *Hardy*. *See* Sladek v. Bensinger, 605 F.2d 899, 902 (5th Cir. 1979), *cited in* Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1070 n.50 (majority opinion), 1113 n.96 (Wilkey, J., dissenting) (D.C. Cir. 1981) (en banc).

91. 670 F.2d 1051 (D.C. Cir. 1981) (en banc).

92. Michael Crooker is also an experienced FOIA plaintiff. In Crooker v. United States Dep't. of Justice, 632 F.2d 916 (1st Cir. 1980), Crooker, after receiving materials describing the role of federal prosecutors pursuant to a FOIA request, sought attorney fees for his pro se efforts. The Court of Appeals for the First Circuit affirmed a denial of this request, holding that such awards are not authorized to pro se litigants under the FOIA. 632 F.2d at 920. The issues of both pro se attorney's fees and attorney's fees generally under the FOIA are unresolved among the circuits. *See* Comment, *Pro Se Litigant's Eligibility for Attorney Fees Under FOIA: Crooker v. United States Department of Justice*, 55 St. Johns L. Rev. 520 (1981).

93. *See* Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d at 1053.

94. *See id.* at 1055 (unreported order).

95. Crooker v. Bureau of Alcohol, Tobacco & Firearms, 635 F.2d 887 (D.C. Cir. 1981).

hearing en banc, however, a majority of the court held that, since the manual "meets the test of 'predominant internality,' and since its disclosure significantly risks circumvention of federal statutes or regulations, the document is exempt from disclosure under Exemption 2."[96] This holding departed from the court's decision in *Jordan v. United States Department of Justice*,[97] an Exemption 2 case involving guidelines for the exercise of prosecutorial discretion, in which the court had held that "[e]xemption 2 was not designed to protect documents whose disclosure might risk circumvention of agency regulation, whatever would be the merits of such a provision."[98]

Unfortunately, for an opinion drastically altering the law of the circuit, *Crooker* "muddles where it should illuminate."[99] The majority opinion reviews the legislative history of Exemption 2 because "the outcome of the case turns on congressional intent as expressed in the legislative history."[100] But, implicitly concluding that the sparse legislative history alone is insufficient to interpret the exemption,[101] the opinion also recites arguments concerning the language of the provision,[102] the results of similar cases in other circuits,[103] and the factual distinctions between *Crooker* and *Jordan*.[104] More directly, though *Crooker* is plausible,[105] the legislative history better supports a contrary position,[106] thus forcing the majority to recite other support for its holding.

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96. Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d at 1053.

97. 591 F.2d 753 (D.C. Cir. 1978) (en banc).

98. *Id.* at 771.

99. 670 F.2d at 1092 (Ginsburg, J, concurring). Judge Ginsburg discussed the majority's failure to reconcile *Jordan* with the new *Crooker* test.

100. *Id.* at 1058 n.15.

101. By the end of his opinion, Judge Edwards could only say "[t]o the extent that the legislative history underlying FOIA is helpful, it also supports our conclusion." *Id.* at 1073. Note that the legislative history referred to is that of the FOIA in general, not of Exemption 2 specifically. See note 105 *infra*.

102. *Id.* at 1066-68. See note 24 *supra* for the language of Exemption 2.

103. *Id.* at 1070-72.

104. *Id.* at 1074-75.

105. For example, the more important source for the legislative history of the exemption, S. Rep. No. 813, 89th Cong., 2d Sess. (1965), gives only a very brief and nonexclusive list of suggestions on its subject matter coverage, see note 106 *infra*, thus potentially allowing room for the exemption to cover training manuals.

106. The chief sources of Exemption 2 history are the House and Senate reports, which state that the provision applies "to the internal personnel rules and practices of any agency: Operating rules, guidelines, and manuals of procedure for Government investigators . . . would be exempt . . . but this exemption would not cover all 'matters of internal management such as employee relations and working conditions and routine administrative procedures.' " H.R. REP. No. 1497, 89th Cong., 2d Sess. 10 (1966); and "to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like." S. REP. No. 813, 89th Cong., 1st Sess. 8 (1965). These passages appear contradictory. Furthermore, the House Report does not have the

These other factors—reasonable inferences of Exemption 2's scope derived from other decisions, the language of the exemption and the FOIA as a whole—give the majority's position credence.[107] The inference that the BATF manual falls within Exemption 2 is not clearly unreasonable, and the skeletal legislative history cannot by itself determine the meaning of the exemption.[108] But the court's failure to define its new test of "predominant internality" casts doubt on the internal consistency of its conclusion.[109]

Judge Ginsburg's concurring opinion provides some guidance concerning the court's possible future analysis. She distinguishes "secret law," characteristic of the prosecutorial guidelines of *Jordan*, from the absence of "secret law," characteristic of "predominantly internal" records such as the BATF manual in *Crooker*.[110] But this explanation does not go far enough; "secret law" is not yet well-defined. To fill that gap, courts should, perhaps, use an outcome-determinative test to dis-

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weight of the Senate Report because of the House Report's tarnished history: it was inserted only after the Senate had passed the FOIA (although the House committee hearings had preceeded the Senate's) and just as the House was prepared to report the bill favorably. *See, e.g.*, K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3A.31 at 175-76 (1970 Supp.), *cited in* Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d at 1098 n.8 (Wilkey, J., dissenting). Both Judge Wilkey's *Crooker* dissent and his majority opinion in *Jordan* recount the legislative history. Each opinion favors a narrow view of the exemption. *See Id.* at 1096-1106; Jordan v. United States Dep't of Justice, 591 F.2d 753, 766-69 (D.C. Cir. 1978) (en banc).

107. The strongest of these factors are (1) the factual distinctions between *Crooker* and *Jordan* (the records sought in the latter were guidelines for prosecutorial discretion) *see* Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1068 (D.C. Cir. 1981) (en banc); (2) the results in other circuits specifically addressing disclosure of BATF manuals, *see id.* at 1070-72; and (3) the failure of the Supreme Court to foreclose a broad interpretation of Exemption 2 in relation to law enforcement manuals in Department of the Air Force v. Rose, 425 U.S. 352, 369 (1976), *cited in* Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d at 1066. In *Rose* the Supreme Court approved of a narrow reading of Exemption 2 "at least where the situation is not one where disclosure may risk circumvention of agency regulation." 425 U.S. at 369. This qualification seems to leave open the question faced in *Crooker*.

108. Judge Leventhal, whose theories are heavily relied on in *Crooker*, once observed that the history of Exemption 2 is, at best, "confused" and "obscure." *See* Vaughn v. Rosen, 523 F.2d 1136, 1147 (D.C. Cir. 1975) (Leventhal, J., concurring). Thus, though Judge Wilkey's dissenting opinion is appealing in calling for consistency in the law of the circuit instead of an entirely new Exemption 2 test, it is less persuasive in its argument against the majority's interpretation of reasonableness because it, too, relies on the legislative history for much of its logic.

109. In discussing "predominant internality" the majority opinion simply states that "guidelines on prosecutorial discretion are instructions to agency personnel . . . on how to regulate members of the public." On the other hand, the BATF manual "consists *solely* of instructions to agency personnel. There is no attempt to modify or regulate public behavior only to observe it for illegal activity." 670 F.2d at 1075 (emphasis in original). This distinction is inadequate because it looks only at the agency's inteut, and not at the effects of that intent. *Cf.* text accompanying note 110 *infra* (outcome-determinative test).

110. 670 F.2d at 1091-92 (Ginsburg, J., concurring). *See also id.* at 1076-77 (MacKinnon, J., concurring); *id.* at 1086-87 (Mikva, J., concurring).

tinguish between "secret law" and "predominantly internal" matters. Outcome-determinative tests have long been used in choice-of-law situations to distinguish substance from procedure,[111] a distinction that may parallel that of "secret law" and "internality."

Applied to *Crooker* and *Jordan*, an outcome-determinative test would support the *Crooker* majority's conclusions. The decision not to prosecute a case obviously determines its outcome; thus the written guidelines commanding such decisions serve as "secret law." The choice of a particular method of surveillance, on the other hand, does not significantly determine the outcome of a case, because other law enforcement tactics may produce the evidence on which any particular result turns. Thus, a surveillance training manual is "predominantly internal."

The majority opinion in *Crooker* itself, however, provides only "a fuzzy standard"[112] according to Judge Wilkey's dissent. The District of Columbia Circuit should heed this criticism and provide a clearer test for Exemption 2 soon.

IV. REVERSE FOIA AND EXEMPTION 4

In *Chrysler Corp. v. Brown*[113] the Supreme Court held that the Administrative Procedure Act (APA), not the FOIA, authorizes reverse FOIA litigation[114] under Exemption 4.[115] But "the Supreme Court did not decide . . . whether the judicial review under the Administrative Procedure Act should be on the administrative record or *de novo*."[116] Prior to *Chrysler*, most courts holding that the APA provided the proper vehicle for review in reverse FOIA cases reviewed only the

111. *See, e.g.*, Hanna v. Plummer, 380 U.S. 460 (1965); Byrd v. Blue Ridge Rural Electrical Coop., Inc., 356 U.S. 525 (1958); Guaranty Trust Co. v. York, 326 U.S. 99 (1945). *York* provides the pure statement of the test: "The question is whether . . . a statute concerns merely the manner and the means by which a right . . . is enforced, or whether such statutory limitation is a matter of substance . . ., namely, does it significantly affect the result of a litigation . . .?" 326 U.S. at 109.

112. 670 F.2d 1051, 1115 (D.C. Cir. 1981) (en banc) (Wilkey, J., dissenting). Some of the fuzziness in *Crooker* stems from acrimony between the judges, acrimony surfacing in the various opinions. The District of Columbia Circuit has had a history of intermittent bickering, *see The D.C. Supercircuit*, NATIONAL L. J. at 110 (March 30, 1981), and *Crooker* illustrates that this bickering may continue.

113. 441 U.S. 281 (1979). For a discussion of the case, see Comment, *Developments Under the FOIA—1979*, *supra* note 13, at 141-46; Note, Chrysler Corp. v. Brown: *Seeking A Formula for Responsible Disclosure Under the FOIA*, 29 CATH. U. L. REV. 159 (1979).

114. A reverse FOIA suit is an action by a submitter of information to prevent subsequent disclosure of the information to a requester under the FOIA.

115. 441 U.S. 281, 317 (1979). Exemption 4, 5 U.S.C. § 552(b)(4) (1976), states that "trade secrets and commercial or financial information obtained from a person and privileged or confidential may be withheld."

116. General Motors Corp. v. Marshall, 654 F.2d 294, 298 (4th Cir. 1981).

agency record.[117] Dicta in *Chrysler*, however, left open the possibility of de novo review by referring to section 706(2)(F) of the APA, which allows a court to set aside agency findings which are "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."[118]

Although no court has yet authoritatively determined when section 706 should come into play,[119] the Court of Appeals for the District of Columbia Circuit in the case of *Worthington Compressors v. Costle*,[120] and its continuation on a petition for modification, *Worthington Compressors v. Gorsuch*,[121] implied that the choice between record and de novo review may lie within trial court discretion in at least some narrow situations. Under the pre-*Chrysler* law of the District of Columbia Circuit the reverse-FOIA disclosure of exempt material (a discretionary decision under the Act[122]) required only record review.[123] The question of exempt status, however, was judged de novo.[124] In *Worthington Compressors* the Environmental Protection Agency (EPA) adopted Exemption 4 as its standard for discretionary disclosures. This eliminated any distinction in the standard of review to be applied, leaving exempt status as a legal question that could properly be decided by the district court,[125] and thus allowing either the court or the EPA to decide the disposition of the records de novo. The court of appeals

117. *See, e.g.*, cases cited in Campbell, *Reverse Freedom of Information Act Litigation*, in THE 1981 EDITION OF LITIGATION UNDER THE FEDERAL FREEDOM OF INFORMATION ACT 57, 63-64 (6th ed. C. Marwick 1980).

118. 5 U.S.C. § 706(2)(F) (1976), *cited in* Chrysler Corp. v. Brown, 441 U.S. 281, 318 (1981). *See* Braverman, Chrysler Corporation v. Brown: *Protecting Business Secrets in the '80s*, 4 CORP. L. REV. 23, 36 n.47 (1981); Note, *Protecting Confidential Business Information From Federal Agency Disclosure After* Chrysler Corp. v. Brown, 80 COLUM. L. REV. 109, 122 (1980).

119. In General Motors Corp. v. Marshall, 654 F.2d 294 (4th Cir. 1981), the Court of Appeals for the Fourth Circuit did not reach the question directly. The court did note that the APA "contemplates a right of judicial review only after the plaintiff has exhausted his administrative appeals." If the "controlling rules" have changed before judicial review occurs, administrative appeals have not been exhausted and the agency should request a remand for redetermination. *Id.* at 299. This theory establishes one threshhold requirement—exhaustion of remedies—before de novo review may be contemplated, even under section 706(2)(F), and is supported by the opinions of several other circuits. *See* Chrysler Corp. v. Schlesinger, 611 F.2d 439 (3d Cir. 1979); General Dynamics Corp. v. Marshall, 607 F.2d 234 (8th Cir. 1979); Sears, Roebuck & Co. v. Eckerd, 600 F.2d 1237 (7th Cir. 1979).

120. 662 F.2d 45 (D.C. Cir. 1981).

121. 668 F.2d 1371 (D.C. Cir. 1981) (petition for modification).

122. The exemptions of the FOIA authorize withholding; they do not require it: "Subsection (b) . . . represents the congressional determination of the types of information that the Executive Branch must have the *option* to keep confidential, *if it so chooses*." EPA v. Mink, 410 U.S. 73, 80 (1973) (emphasis added).

123. *See* Sears, Roebuck & Co. v. GSA, 553 F.2d 1378, 1381 (D.C. Cir. 1977).

124. *See* Charles River Park "A," Inc. v. HUD, 519 F.2d 935, 940 n.4 (D.C. Cir. 1975).

125. Worthington Compressors v. Costle, 662 F.2d at 51.

therefore left the district court "free to proceed in whatever manner it finds appropriate"[126] on remand and refused, when asked to modify its position, to "prohibit the district court from determining that de novo review is appropriate."[127]

The *Worthington Compressors* court also refined the legal test of confidentiality under Exemption 4. The dispute, as outlined in *Worthington Compressors v. Costle*, concerned test results and designs of portable air compressors, information submitted to the EPA as required by law.[128] The manufacturers claimed the data was confidential and could be withheld under Exemption 4.[129] Under *National Parks and Conservation Association v. Morton*,[130] information has confidential status if its disclosure would "impair the Government's ability to obtain necessary information in the future" or "cause substantial harm to the competitive position of the person from whom the information was obtained."[131] The EPA determined, however, that the potential for duplicative private testing through "reverse engineering" precluded confidential status for the compressor data. The district court also found this possibility dispositive and upheld the agency's right to disclose the information.[132]

The court of appeals disagreed. Judge Wilkey, for the majority, concluded that both the EPA and the district court failed to consider

126. *Id.*

127. 668 F.2d at 1374 (petition for modification).

128. The materials were submitted pursuant to the Noise Control Act, Pub. L. No. 92-574, 86 Stat. 1234 (codified at 42 U.S.C. § 4912(a) (1976)).

129. The plaintiffs in *Worthington* also alleged that section 4912(b)(1) of the Noise Control Act precluded disclosure. That provision states: "[a]ll information obtained . . . pursuant to subsection (a) . . . which information contains or relates to a trade secret or other matter referred to in section 1905 of title 18, shall be considered confidential for the purposes of that section." Pub. L. No. 92-574, 86 Stat. 1234 (codified at 42 U.S.C. § 4912 (1976)). Section 1905 refers to the Trade Secrets Act, 18 U.S.C. § 1905 (1976), which provides a criminal penalty for a government official's unlawful disclosure of information that "concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association." The *Worthington Compressors* court did not decide whether the Noise Control Act and the Trade Secrets Act are identical in their prohibitions on disclosure, *see* 662 F.2d at 50 n.28; whether the statute qualifies as an Exemption 3 statute, *id.* at 55-56 nn.61 & 63; or whether the Trade Secrets Act and Exemption 4 are coextensive, *id.* at 55 n.59.

130. 498 F.2d 765 (D.C. Cir. 1974). *National Parks and Conservation* (an Exemption 4 case) involved a request for records of concession operations at national parks. The court remanded with instructions to develop the record further so the concessionaires could have an opportunity to show that disclosure would prejudice their competitive position.

131. *Id.* at 770.

132. "The compressors are sold in commerce; anyone can buy or rent them; and by means of reverse engineering anyone can duplicate the tests and therefore the product verification reports" required by the EPA. Worthington Compressors v. Costle, 662 F.2d at 49 (footnotes omitted) (quoting Mem. Order at 3, *reprinted in* Joint App. at 290).

adequately the competitive harm to the plaintiff as required by *National Parks*.[133] The court conceded that the *National Parks* test addressed the typical reverse FOIA lawsuit in which government disclosure is the sole means by which a competitor can obtain the information.[134] In order to encompass the slightly more difficult problem of reverse engineering, therefore, the court expanded the *National Parks* test. Two new sub-factors were added to the determination of competitive harm: "(1) the *commercial value* of the requested information, and (2) the *cost of acquiring* the information through other means."[135] The district court had deemed the information disclosable simply because, as the agency record indicated, reverse engineering was technically possible and disclosure thus "would not create new access to otherwise unavailable information."[136] The appellate court replaced technical possibility with commercial practicability in its two-part analysis of commercial harm.[137]

The appellate decision also left to the lower court the choice of applying the test itself or allowing the EPA to do so by way of further remand. The agency objected to giving the lower court discretion,[138] but did not object to the new factors in the competitive-harm test itself. There was little reason to challenge them. The *Worthington Compressors* expansion of the confidential-information standard under Exemption 4 does not violate the Supreme Court's mandate that FOIA exemptions merit narrow construction.[139] To the contrary, adherence to a test of technical possibility could vitiate even the "trade secrets" portion of Exemption 4.[140] The commercial-practicability standard,

133. Because the law required product verification reports, no question arose whether their disclosure would hamper the government's ability to secure such information in the future.

134. *See, e.g.*, Arthur J. Doherty v. FTC, 1981-1 Trade Cas. ¶ 64,117 (D.D.C. 1981). In *Doherty* the requester sought access to a mailing list of Fedders Heat Pump owners compiled pursuant to a consent order between Fedders and the FTC on recall remedies. The court granted summary judgment on the weight of testimony by a Fedders representative that: 1) industry practice kept customer lists confidential, 2) such lists have commercial value to competitors, and 3) the present heat-pump market was highly competitive. Note how the FTC, having commanded the compilation of the list, was the sole source for the requester to search in this situation.

135. 662 F.2d at 51 (emphasis in original).

136. *Id.* at 52. *See generally* Continental Oil Co. v. FPC, 519 F.2d 31 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976) (information publicly disseminated or available from other sources not within Exemption 4).

137. 662 F.2d at 51 (D.C. Cir. 1981).

138. *Id.* at 52-53. See text accompanying notes 125-26 *supra*.

139. *See* Department of the Air Force v. Rose, 425 U.S. 352, 360-62 (1976).

140. The definition of "trade secret" in FOIA litigation is slightly more exact than the definition of "confidential commercial information." One explanation of the term is "[a]n unpatented, secret, commercially valuable, plan, appliance, formula, or process, which is used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities." Consumers Union v. Veterans Administration, 301 F. Supp. 796, 801 (S.D.N.Y. 1969), *ap-*

which places the burden of proving impracticability on the reverse-FOIA plaintiff seeking nondisclosure, sensibly explains the vague term "confidential"[141] and may reduce unnecessary reverse-FOIA suits.[142]

V. THE FEDERAL STATUTES EXEMPTION

Exemption 3 allows nondisclosure of information "specifically exempted from disclosure by statute."[143] In 1981, the *Long v. Bureau of Economic Analysis*[144] decision from the Court of Appeals for the Ninth Circuit appeared to resolve one of the most complex Exemption 3 disputes to date. But part of the Economic Recovery Tax Act of 1981

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peal dismissed, 436 F.2d 1363 (2d Cir. 1971), *quoting* United States *ex rel.* Norwegian Nitrogen Prods. v. United States Tarriff Comm., 6 F.2d 491, 495 (D.C. Cir. 1925), *rev'd on other grounds*, 274 U.S. 106 (1927).

The *Worthington* test may be necessary to counter an argument that, for instance, a chemical formula is capable of reproduction given sufficient testing of a product and cannot, therefore, be "secret" for purposes of the "trade secrets" definition.

141. The commercial-practicability standard is appropriate for confidential commercial information because the privacy interest in such information is less than the privacy interest in confidential information about individuals. Compare, for example, the effects of confidentiality as defined in *Worthington Compressors* for commercial privacy with the effects of confidentiality under Exemption 7(D). The availability of information from an outside source can destroy confidential FOIA protection for information submitted in the Exemption 4 situation. It cannot do so, however, for confidential information submitted in the Exemption 7(D) (cl. 2) situation by a confidential source. *See* Radowich v. United States Attorney, 658 F.2d 957 (4th Cir. 1981), discussed at note 216 *infra*. *See also* Lesar v. United States Dep't of Justice, 636 F.2d 472, 491-92 (D.C. Cir. 1980); Pratt v. Webster, 508 F. Supp. 751, 760 (D.D.C. 1981). This differentiation between confidential commercial information and confidential private information is analagous to the distinction between commercial speech and private first amendment speech. *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455 (1978) ("we have not discarded the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech").

142. Because the reverse-FOIA plaintiff's burden of proof on the issue of commercial impracticability will usually require more thorough evidentiary development than that needed for the question of whether a duplication of data is technically possible, such a plaintiff is more likely to reexamine his reasons for seeking nondisclosure, and in so doing, is likely to weigh the costs of litigation against the costs of disclosure. Furthermore, the plaintiff's increased chances of prevailing in such suits should be partially balanced by the deterrent effect of requesters not pursuing such claims into the courts.

143. 5 U.S.C. § 552(b)(3) (1976). *See* note 44 *supra* for a text of the statute. Sometimes Exemption 3 suits do not, at first, seem to involve statutes. For instance, the District of Columbia Circuit recently held that FED. R. CRIM. P. 6(e) qualifies as a withholding statute for FOIA purposes. *See* Fund for Constitutional Gov't v. National Archives and Records Serv., 656 F.2d 856 (D.C. Cir. 1981). Rule 6(e)(2)(a), providing a limited prohibition on disclosure of "matters occurring before the grand jury," was positively enacted by Congress, Pub. L. No. 95-78, § 2(a), 91 Stat. 319 (1977); thus, Congress did not use the usual "layover" provisions of 18 U.S.C. § 3771 (1976). Because of this method of enactment, rule 6(e), unlike most rules of procedure, is eligible as a "statute." 656 F.2d at 867-68. *Cf.* Founding Church of Scientology v. Bell, 603 F.2d 945, 952 (D.C. Cir. 1979) (per curiam) (FED. R. CIV. P. 26(c) is not an appropriate basis for invocation of Exemption 3 because it is not a statute).

144. 646 F.2d 1310 (9th Cir. 1981), *vacated and remanded*, 102 S.Ct. 468 (1981).

(ERTA),[145] immediately overruled the result.

Long involved section 6103 of the Internal Revenue Code, which provides that certain tax return information must remain confidential.[146] The 1976 amendment to section 6103, the "Haskell Amendment," adds that such return information does not, however, "include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer."[147]

Relying on the Haskell Amendment, the Court of Appeals for the Ninth Circuit held that certain Internal Revenue Service Taxpayer Compliance Measurement Program (TCMP) data in the hands of the Bureau of Economic Analysis (BEA) could not be withheld under the FOIA. (TCMP data forms the statistical basis of the IRS's Discriminant Function scoring system for selecting returns for auditing.[148]) The BEA had edited its set of TCMP documents to delete taxpayers' names and identification numbers.[149] This left no material issue of fact as to whether the TCMP records might still have had "possible indirect identifiers"; thus the court granted summary judgment for the Longs and ordered disclosure.[150]

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145. Pub. L. No. 97-34, § 701(a), 95 Stat. 340 (1981) (codified at I.R.C. § 6103(b)).

146. Tax "return information" is defined in section 6103 as:

> (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, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and
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> (B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110.

I.R.C. § 6103(b)(2)(A) & (B). This helps make § 6103 specific enough to qualify as a § (b)(3) withholding statute under the FOIA.

147. I.R.C. § 6103(b)(2)(B)(cl. 2).

148. TCMP data consist of a random selection of taxpayers from whom the IRS then obtains comprehensive audits. The IRS stores the audit information, including the amounts it considers the taxpayer should have reported, in the form of checksheets and computer tapes. This data is sorted by a weighting process under the DIF system, which attempts to identify returns with a high poteutial for tax changes. Such returns are more likely to receive audits. Long v. Bureau of Economic Analysis, 646 F.2d at 1314 n.1.

149. The Longs discovered the existence of the edited BEA tapes while pursuing the same—unedited—information in a suit against the IRS. *See* Long v. IRS, 596 F.2d 362 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980).

150. Long v. Bureau of Economic Analysis, 646 F.2d at 1320. The "indirect identifier" question arises from Haskell Amendment's standard for return information that may not be disclosed: the standard does not include information that would not "directly or indirectly" identify a taxpayer. *See* I.R.C. § 6103(b)(2)(B). The formulation of the question in terms of indirect identification results from the tangled procedural history of the Long's TCMP litigation.

At the BEA's request, the Supreme Court stayed disclosure to allow the Bureau time to petition for certiorari. During the delay, President Reagan secured passage of the ERTA. Section 701 of that Act sought to moot the litigation over the TCMP data by changing the Haskell Amendment to Code section 6103 to read:

> Nothing . . . in any . . . provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.[151]

This statutory change is intended to qualify as an exempting law within section (b)(3)(B) of the FOIA by establishing "particular criteria for withholding" and by referring to "particular types of matters to be withheld."[152] The new amendment should easily meet the section

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In an earlier Ninth Circuit case, Long v. IRS, 596 F.2d 362 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980), the court held, on the basis of the Haskell Amendment, that section 6103 does not categorically exempt all return information from disclosure: "[i]t is the clear purpose of section 6103 to protect the privacy of taxpayers. At the same time the amendment demonstrates a purpose to permit the disclosure of compilations of useful data in circumstances which do not pose serious risks of a privacy breach." *Id.* at 368. The court also ordered a remand to determine whether, once direct identifying data was deleted, "disclosure of TCMP source data [would entail] a significant risk of indirect identification [of taxpayers]." *Id.* at 367.

Following the denial of certiorari in *Long v. IRS*, the district court allowed the IRS to amend its complaint to raise additional defenses. The Longs then moved for summary judgment in *Long v. Bureau of Economic Analysis*, in which, because of a failure by the government to either amend or consolidate the case with *Long v. IRS* and thereby gain additional defenses, the issue was limited to the question of "indirect identifiers" raised in the prior holding of *Long v. IRS*.

The Court of Appeals for the Ninth Circuit upheld the grant of summary judgment for the Longs on this issue. The BEA had offered only conclusory allegations to rebut evidence that the Bureau's TCMP tapes, which contained "no name or taxpayer identification number," Long v. Bureau of Economic Analysis, 646 F.2d at 1321, did not contain any data that might identify a taxpayer. During oral argument, the agency's counsel even stated that the Bureau "had not yet determined whether any such indirect identifier problem was present." *Id.*

The *Long* decisions have had an impact on other circuits. In Neufeld v. IRS, 646 F.2d 661 (D.C. Cir. 1981), the Court of Appeals for the District of Columbia Circuit accepted the holding of *Long v. IRS* in determining that correspondence between third parties and federal officials which prompts the officials' later contacts with the IRS concerning the tax matters of the private third parties may not be exempt under section 6103. The court stated:

> It is conceivable that a taxpayer letter might contain some . . . [return] information . . . for example, the "amount of his income," such that the disclosure of the letter would pose no risk of identifying the taxpayer *if his name and address were deleted*. We do not hold, however, that mere deletion of names and addresses removes all return information from the taxpayer letters. The District Court has discretion to determine what information, other than name and address, poses a risk of identifying a taxpayer and how great that risk is.

Id. at 665 (emphasis in original). *Accord*, Moody v. IRS, 645 F.2d 795, 797-98 (D.C. Cir. 1981).

151. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 701(a), 95 Stat. 340 (1981) (to be codified at I.R.C. § 6103(b)(2)(B)).

152. 5 U.S.C. § 552(b)(3)(B) (1976).

(b)(3)(B) standards. The general proposition, present elsewhere in section 6103, allowing withholding of return information whenever the Secretary determines disclosure would "seriously impair Federal tax administration,"[153] has withstood judicial review.[154] Furthermore, ERTA section 701 clearly represents a valid congressional "delegation of authority to withhold information."[155]

Alternatively, ERTA section 701 could preempt the FOIA under the rationale of *Zale Corp. v. IRS*,[156] a 1979 district court case affirming an agency withholding of IRS materials. *Zale* held that I.R.C. section 6103 (e)(6)'s highly particularized criteria, enacted shortly after the 1976 FOIA amendments and similar to those of ERTA section 701,[157] superseded the FOIA's disclosure criteria.[158] Either rationale substantially frustrates the *Long* litigation[159] and restricts access to IRS information.[160]

VI. THE INTRA-AGENCY MEMORANDUM EXEMPTION

Although the IRS achieved an eventual victory in its Exemption 3 litigation through a congressional preemption of the controversy,[161] its 1981 Exemption 5[162] experiences were less pleasant. Section (b)(5) of the FOIA operates to "exempt those documents . . . normally privi-

153. I.R.C. § 6103(e)(6).

154. *See* Chamberlain v. Kurtz, 589 F.2d 827, 839-40 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979). *See also* Freuhauf Corp. v. IRS, 566 F.2d 574 (6th Cir. 1977); Anheuser-Busch, Inc. v. IRS, 493 F. Supp. 549 (D.D.C. 1980).

155. FAA Adm'r v. Robertson, 422 U.S. 255, 265 (1975). Such delegation of authority is probative of proper Exemption 3 status.

156. 481 F. Supp. 486 (D.D.C. 1979).

157. See text accompanying note 151 *supra* for the text of the ERTA provision. The current I.R.C. § 6103(e)(6), governing interested-party, internal and inter-agency disclosures of tax return information, states: "Return information . . . may be open to . . . 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."

158. 481 F. Supp. at 488-90. *See* Note, *Developments Under the FOIA—1980*, *supra* note 13 at 365-67, for a discussion of *Zale Corp.* Several commentators have concluded the case was wrongly decided. *See, e.g.*, Note, Zale Corporation v. Internal Revenue Service: *Turmoil in the Disclosure Scheme for Tax Return Information*, 30 CATH. U. L. REV. 675 (1981); Comment, 69 GEO. L.J. 1283 (1981).

159. The Longs have the additional, non-legal problem of rapidly expiring research funding.

160. This highly specific success by the Reagan administration, chief sponsor of the ERTA legislation, may foreshadow the eventual passage of more generally restrictive FOIA amendments. See text accompanying notes 20-27 *supra* on S. 1730, the Reagan-Hatch FOIA amendments bill.

161. See text accompanying notes 151-60 *supra*.

162. 5 U.S.C. § 552(b)(5) (1976) permits withholding of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

leged in the civil discovery context,"[163] including those covered by a "governmental" or "deliberative process" privilege. Through these privileges, Exemption 5 protects subjective, as opposed to factual, information and items that are predecisional, rather than incorporated into or in explanation of a final agency decision.[164] In the first of 1981's most noteworthy Exemption 5 cases (all three of which involved the IRS and were decided in the Court of Appeals for the District of Columbia Circuit) the court applied this formula in favor of the IRS.

In *Common Cause v. IRS*[165] the court reviewed a request for IRS documents that discussed the agency's decision not to implement a plan for public disclosure of contacts between high-ranking federal officials and the IRS concerning tax problems of third parties. The plaintiffs sought the text of the defunct disclosure plan, IRS memoranda discussing the plan, and logbooks of congressional contacts with the IRS. The district court held the first two types of information exempt under FOIA section (b)(5).[166]

163. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). The word "normally" may be emphasized. *See, e.g.*, Sterling Drug Inc. v. FTC, 450 F.2d 698, 704 (D.C. Cir. 1971) (correct standard is whether information would "routinely be disclosed" in private litigation). This emphasis prevailed in the 1981 case of Swisher v. Department of the Air Force, 660 F.2d 369 (8th Cir. 1981), denying the plaintiff's claim that a showing of exceptional need can overcome exemption under FOIA § 552 (b)(5).

164. *See* EPA v. Mink, 410 U.S. 73, 89 (1973). *See generally* 2 J. O'REILLY, FEDERAL INFORMATION DISCLOSURE: PROCEDURES, FORMS AND THE LAW § 15.07 (1980). For an example of a decision predicated on the factual versus subjective distinction, *see* Government Land Bank v. GSA, No. CA 80-1203-T (D. Mass. June 26, 1981) (holding that an appraisal report of property held by the GSA is more like factual data than not).

Other privileges incorporated by Exemption 5 include the attorney-client privilege and the attorney work-product privilege. Concerning the latter, see Moody v. IRS, 654 F.2d 795 (D.C. Cir. June 8, 1981). The requester of information objected to the application of Exemption 5 to a document detailing a meeting between an IRS lawyer and a federal judge presiding over a receivership. Opposing counsel had been excluded, allegedly in violation of the district court's rules (Rule 4 of the RULES OF THE UNITED STATES DIST. CT. FOR THE S.D. OF TEXAS) and A.B.A. ethical standards (MODEL CODE OF PROFESSIONAL RESPONSIBILITY Ethical Consideration 7-35 (1979)). *Id.* at 799. Appellee IRS admitted the conduct, and the court ordered a remand for reconsideration of the document in question. The court cautioned, however, that "[n]o court should order disclosure under the FOIA or in discovery if the disclosure would traumatize the adversary process more than the underlying legal misbehavior." *Id.* at 801.

Exemption 5 does not, however, incorporate an equitable "settlement privilege" protecting correspondence between the government and a private party concerning details of an unsuccessful settlement effort. County of Madison v. Department of Justice, 641 F.2d 1036 (1st Cir. 1981). See note 22 *supra* and accompanying text (settlement privilege may be legislated under new Reagan-Hatch bill).

165. 646 F.2d 656 (D.C. Cir. 1981).

166. Common Cause v. IRS, 1980-1 U.S. Tax Cas. § 9208 at 83,325 (D.D.C. 1979), *aff'd* 646 F.2d 656 (D.C. Cir. 1981) The court ordered disclosure of the logbooks, holding that they were not within Exemption 5. *Id.*

Common Cause's argument that the IRS memoranda were not privileged because they explained a final IRS policy decision—the decision not to implement the disclosure plan—failed to convince the court of appeals. Instead, the court held that the plan had remained merely a proposal; its non-adoption did not make law or policy.[167] Citing *NLRB v. Sears, Roebuck & Co.*,[168] the court noted: "The public is only marginally concerned with reasons supporting a policy which an agency has rejected."[169]

> A "floodgates" rationale also surfaced in explanatory dicta:
>
> The position urged by Common Cause, if pushed to its logical limits, could virtually eliminate the governmental privilege. Every rejection of a proposal, no matter how infeasible or insignificant, would become a "final decision" of an agency. True, the rejection of a policy does embody a decision; but neither the language of Exemption 5 nor the holding in *Sears* demands that such a narrow interpretation of the governmental privilege be adopted in order to protect the public interest in disclosure.[170]

The floodgates analysis itself should not be pushed to its logical limits. The *Sears* case involved an "agency's final, unappealable decision not to pursue a judicial remedy in an adversarial dispute,"[171] and the Court forbade any withholding of memoranda explaining that decision.[172] In contrast, *Common Cause* involved a "voluntary suggestion, evaluation, and rejection of a proposed policy by an agency,"[173] and the court ruled that memoranda of that decision could be withheld. Various fact situations between *Sears* and *Common Cause* may warrant more favorable consideration of disclosure. For instance, indications that the evaluation and rejection of a proposed policy proceeded under undue outside influence or under ethically questionable circumstances[174] should forestall a blind application of the *Common Cause* rationale.

Shortly after the *Common Cause* decision, a different panel of the Court of Appeals for the District of Columbia Circuit decided *Taxation with Representation Fund v. IRS*[175] and ordered disclosure of numerous

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167. 646 F.2d at 659. On the basis of the decision in *Common Cause*, the Court of Appeals for the District of Columbia Circuit also denied the release of the memoranda to an economics professor at the University of North Carolina at Greensboro. Neufeld v. IRS, 646 F.2d 661, 663 (D.C. Cir. 1981).

168. 421 U.S. 132 (1975).

169. *Id.* at 152, *cited in* Common Cause v. IRS, 646 F.2d at 659.

170. 646 F.2d at 660.

171. *Id.* at 659. *See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153-54 (1975).

172. 421 U.S. at 155.

173. Common Cause v. IRS, 646 F.2d at 659.

174. *See* Moody v. IRS, 654 F.2d 795 (D.C. Cir. 1981) (work-product privilege possibly vitiated by attorney misconduct), discussed at note 164 *supra*.

175. 646 F.2d 666 (D.C. Cir. 1981).

IRS General Counsel's Memoranda (GCMs), Technical Memoranda (TMs), and Actions on Decisions (AODs). In support of disclosure the court theorized that these documents constituted part of the "working law" of the IRS and thus did not qualify for the "deliberative process" privilege of Exemption 5.[176] Three factors determined "working law" status. First, if documents either reflect a final decision or are post-decisional, they constitute "working law."[177] Second, if they have a significant function in the agency's decision process, for example, as precedent or legislative history applied in dealings with the public, they are "working law."[178] Finally, if they flow from a superior official with policy-making authority to a subordinate, they are more likely to be "working law."[179]

Most of the GCMs, TMs, and AODs fit within one or more of these categories.[180] Consequently, the *Taxation Fund* court ordered disclosure, but the court limited its order to those GCMs and TMs adopted and distributed within the IRS and to those AODs that recommended no appeal.[181] The circuit court remanded the case to allow the district court to determine whether AODs recommending appeal are

176. *Id.* at 678. The court cites NLRB v. Sears, Roebuck & Co., 421 U.S. at 152-54 (citations and footnotes omitted):

> [T]he public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted. These reasons, if expressed within the agency, constitute the 'working law' of the agency . . . . This conclusion is powerfully supported by the other provisions of the Act. The affirmative portion of the Act, expressly requiring indexing of "final opinions," "statements of policy and interpretations which have been adopted by the agency," and "instructions to staff that affect a member of the public," 5 U.S.C. § 522(a)(2), represents a strong congressional aversion to "secret [agency] law" . . . and represents an affirmative congressional purpose to require disclosure of documents which have "the force and effect of law." . . . We should be reluctant, therefore, to construe Exemption 5 to apply to the documents described in 5 U.S.C. § 552(a)(2); and with respect at least to "final opinions" . . . we hold that Exemption 5 can never apply.

177. 646 F.2d at 677.

178. *Id.* at 678-79.

179. *Id.* at 681.

180. GCMs, written originally to guide the Assistant Commissioner (Technical) on substantive issues in various rulings, receive constant updating to reflect the General Counsel's position on these issues. This makes them both post-decisional and representative of a superior's policy commands. *See id.* at 682-83. GCMs are an integral part of IRS decisionmaking. The IRS indexes and widely distributes the GCMs to its staff, which uses them as interpretative guides, as case precedents for future GCMs, and as legal research tools. *See id.* at 682-83. TMs "may be fairly equated with 'legislative history' accompanying a new statute," *id.* at 683, because they explain proposed Treasury decisions or regulations. When a regulation or decision is adopted, TMs are usually filed and are then used in much the same way as GCMs. *Id.* AODs recommending no appeal from court decisions against the IRS are treated by the agency as final legal determinations and include the rationale for the agency's position. *Id.* at 684. Such AODs present precisely the same situation as in *Sears*, in which the Court ordered disclosure of NLRB documents linked with that agency's decision not to appeal. *See* 421 U.S. at 152.

181. Taxation with Representation Fund v. IRS, 646 F.2d at 682-84.

either final decisions or decisions on which the IRS staff would rely in decisionmaking. Either of these characteristics would tend to classify AODS as "working law."[182] On the other hand, GCMs and TMs never adopted or distributed within the IRS are like the proposed, but never adopted, IRS policy in *Common Cause*, and for similar reasons those GCMs and TMs remain privileged.

Some eight months later, the *Taxation Fund* panel reemphasized this last point in *Pies v. IRS*.[183] Pies claimed that while drafting regulations as an attorney for the IRS he incorporated "significant portions" of certain proposed regulations into another regulation which was eventually adopted.[184] Later, in private practice, he sought copies of the proposed regulations under the FOIA. The court held, however, that Pies' incorporation of the proposed regulations into another regulation was insufficient reason to treat the proposed regulations as reflecting agency law.[185] The *Pies* court emphasized that the proposals "were never subjected to final review, never approved by the officials having authority to do so, and never approved within the Legislation and Regulations Division."[186]

Bounded by the principles of *Common Cause* and *Pies*, the *Taxation Fund* decision nevertheless represents greatly enhanced access to certain agency records. Lawyers and the general public highly value such agency documents as GCMs, TMs, and AODs because these documents may suggest how best to conform with the law or how best to attack it.[187]

VII. The Personal Privacy Exemptions

Congressional concern for personal privacy underlies both Exemption 6 and Exemption 7(C). The former permits withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[188] The

182. *Id.* at 681.

183. 1981-2 U.S. Tax Cas. (CCH) § 9758 at 88,528 (D.C. Cir. Nov. 6, 1981).

184. *Id.*

185. *Id.*

186. *Id. See also* Common Cause v. IRS, 646 F.2d 656, 660 (D.C. Cir. 1981): "casual allusion in a post-decisional document to subject matter discussed in same pre-decisional, intra-agency memoranda is not the express adoption or incorporation by reference which . . . would remove the protection of Exemption 5 if the memorandum were the agency's 'final opinion.' "

187. Prentice-Hall will soon begin publishing a service containing GCMs, TMs, and AODs released by the IRS pursuant to the cousent order approved by the district court handling the remand of *Taxation with Representation Fund*. The order itself is in Tax Analysts v. IRS, 48 A.F.T.R. 2d (P-H) § 6175, *vacated and new order to similar effect substituted* 49 A.F.T.R. 2d (P-H) § 421 (D.D.C. 1981).

188. 5 U.S.C. § 552(b)(6) (1976).

latter exempts "investigatory records compiled for law enforcement purposes . . . to the extent that the production of such records would . . . constitute an unwarranted invasion of personal privacy."[189] Once the threshold requirements of "similar file" status for Exemption 6 and "investigatory record" status for Exemption 7(C) have been met, both exemptions require a test balancing personal privacy with the public interest in disclosure.[190]

The preliminary determination that records constitute "similar files" also involves a comparative analysis. This process compares the privacy interest in records of the type sought to be withheld to the privacy interest in personnel and medical records. A recent and widely cited definition restates this process: the information in "similar files" must be "of the same magnitude—as highly personal or as intimate in nature—as that at stake in personnel and medical records."[191]

In *Kurzon v. Department of Health and Human Services*[192] the Court of Appeals for the First Circuit held this test applicable whenever a case seems to favor nondisclosure.[193] This requirement aids a judge in focusing on "the *type* of privacy interest Congress had in mind" (the point of the "similar files" comparison) "before weighing that interest against the public interest in disclosure" (the point of the "unwarranted invasion of privacy" comparison).[194] The *Kurzon* court found the privacy interest in names and addresses of unsuccessful applicants for National Cancer Institute research grants unlike the privacy interest in personnel and medical files. Thus, because the applicant information did not constitute "similar files," the court did not need to apply the balancing test of a "clearly unwarranted invasion" of privacy.[195]

The "similar files" comparison, because it focuses on types of privacy interests, appears outwardly less rigorous and thus more flexible

189. 5 U.S.C. § 552(b)(7)(C) (1976).

190. Concerning Exemption 6, Congress noted in legislative history that "[t]he phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to government information." S. REP. No. 813, 89th Cong., 1st Sess. 9 (1965). *See also* H.R. REP. No. 1497, 89th Cong., 2d Sess. 11, *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 2418, 2428.

191. Board of Trade v. Commodity Futures Trading Comm., 627 F.2d 392, 398 (D.C. Cir. 1980).

192. 649 F.2d 65 (1st Cir. 1981).

193. *Id.* at 67.

194. *Id.*

195. The court expressed some relief at avoiding that second step: "in cases where the lack of similarity proves dispositive, addressing that issue first avoids the difficulties inherent in attempting to balance meaningfully widely disparate interests." *Id.*

than the specific balancing test of a "clearly unwarranted invasion of privacy." This perception of flexibility may lead some courts to make indirect comparisons when applying the former test. Rather than comparing the files at issue to personnel and medical files specifically, such courts may compare the files at issue to records previously found to be similar or dissimilar to personnel and medical files. For example, in *Washington Post Co. v. United States Department of State* the Court of Appeals for the District of Columbia Circuit did not compare the privacy interest of Iranian residents in records of United States citizenship and passport status to the privacy interest in medical and personnel files directly, but to the privacy interest in records including dates of naturalization.[196] In an earlier case, *Simpson v. Vance*,[197] the court had denied "similar files" status to records including naturalization dates. Thus, because "the facts of current citizenship or possession of a United States passport are no more personal than dates of naturalization held nonexempt in *Simpson* . . . the files in question do not qualify under the first facet of the Exemption 6 test."[198]

This analysis potentially alters the protection of personal privacy afforded by Exemption 6.[199] It requires a requester merely to show that the information sought under the FOIA is like some other records once found dissimilar to personnel or medical records. Once this is established, the information sought would also be regarded as dissimilar and unprotected by Exemption 6. The specific language of the FOIA, how-

196. *See* 647 F.2d 197 (D.C. Cir. 1981), *cert. granted*, 102 S.Ct. 565 (1981), *rev'd*, 50 U.S.L.W. 4522 (U.S. May 17, 1982). See note 201 *infra*.

197. 648 F.2d 10, 12 (D.C. Cir. 1980).

198. 647 F.2d at 199. Judge Lumbard's concurring opinion relies on *Simpson* completely: "I recognize . . . that *Simpson* states the law of this circuit on the issue. Because of this, and only because of this, I now concur." *Id.* at 200 (Lumbard, J., concurring).

199. It is incorrect to conceive of either the generic "similar files" measure of privacy or the specific "clearly unwarranted invasion" measure of privacy as wholly encompassing the other. *Cf.* United States Department of State v. Washington Post Co., 50 U.S.L.W. 4522, 4524 n.4 (U.S. May 17, 1982) (Justice Rehnquist maintains a similar position on the basis that "similar files" could not include information files not related to any particular person even though release of such files might cause embarassment to some persons generally.). An admittedly technical example illustrates this point: an employee of the General Accounting Office is suspected of embezzlement, a suspicion formally recorded by his superior in daily personnel records. The superior's formal acknowledgement triggers an FBI investigation. The investigation concludes without either clearing or condemning the employee. Now, the same privacy-threatening information, the suspicion of embezzlement, appears in two files. The potential invasion of privacy from the disclosure of either file may be the same. But the investigatory files, in contrast to the personnel files, should not be withheld under Exemption 6 because they are not "similar files." Whether they could be withheld under Exemption 7 is another question. See generally text accompanying notes 202-24 *infra*. This example shows only that the "similar files" test has some independent conceptual identity and should not be treated as if its terms are unimportant; the test may determine disclosure. See also note 201 *infra* (Court's reversal of *Washington Post*).

ever, implies that the privacy interest in the information sought must be measured against the privacy interest in personnel and medical files, not against the privacy interest in other similar or dissimilar files.[200] The Supreme Court has granted certiorari in the *Washington Post* case, and thus has an opportunity to implement the FOIA's statutory language by determining the status of the citizenship and passport information at issue through a direct comparison to the privacy interest in the medical and personnel files the Act specifies.[201]

200. This is important because the privacy interest in personnel and medical files may change much more slowly than, for instance, the privacy interest in some other kind of file that was once found similar to personnel and medical files. Measuring privacy against the information in a once-similar file which may now be viewed as public data could result in disclosure of information that is still similar to that contained in medical files.

The *Simpson* decision on which the *Washington Post* opinion is based also fails to recognize the potential for differences in privacy values, differences which may be geographic as well as temporal. The *Simpson* court stated that one reason for denying Exemption 6 treatment to the State Department information contained in the *Biographic Register* is "the fact that similar information, until 1975, had been placed in the public domain by the Department. That practice was allegedly stopped not to prevent further disgrace or embarrassment to the individuals, but on the ground that it might deter threats of physical harm from terrorists . . . ." 648 F.2d at 14. Threats of physical harm may be as good an indication of an unwarranted invasion of privacy as embarrassment in some situations. *Simpson* fails to measure invasions of privacy in terms of time and geography. Invasion of privacy should be measured at the time of the proposed disclosure as compared to the contemporaneous privacy interest in medical or personnel records. The place in relation to which the invasion of privacy should be measured is the situs of the records rather than the litigant's domicile. In most instances, the situs of the records will be the United States. If privacy were measured by the location of the person referred to in the records, that person could defeat FOIA requests by moving. The reasonable limits of the Exemption should not require extensive hypothetical analysis of future privacy conditions, or of privacy conditions in remote locales. The *Simpson* court could have explained why terrorist threats were not necessarily any indication that the information revealed was highly private. The implicit answer is that the breach of a current privacy interest in personnel and medical files in the United States does not usually give rise to such threats, even though such threats might arise in another country.

201. As this comment went to press, however, the Supreme Court reversed the Court of Appeals for the District of Columbia Circuit in an opinion authored by Justice Rehnquist that paid little heed to the concept of "similar files" as distinguished from the concept of a "clearly unwarranted invasion of personal privacy." *See* 50 U.S.L.W. 4522 (U.S. May 17, 1982). The Court could have measured the current privacy interest in citizenship information in the United States against the current privacy interest in medical and personnel file information in the United States, rather than comparing the possible interests in United States citizenship information in Iran with such possible interests in personnel and medical files in Iran. The Court could thereby find the information disclosable under the FOIA. *Cf.* note 200 *supra*.

As Judge Lumbard noted in his *Washington Post* concurrence, naturalization and citizenship information already "is a matter of public record on file in various federal district courts across the country." 647 F.2d at 199 (Lumbard, J., concurring). In the United States, medical and personnel files, unlike citizenship and naturalization data, do not usually comprise matters of public record. Thus the citizenship files do not seem to meet the "similar files" requirement.

But the Court chose instead to construe Exemption 6 very broadly, supporting its decision with references in the legislative history of the FOIA to a "general exemption" for the "kind of files the disclosure of which might harm the individual." 50 U.S.L.W. at 4523, *quoting* H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966). Unfortunately, this again occludes the distinction be-

The "file" question in Exemption 7 raises similar difficulties. Courts must decide both whether records are "investigatory" and whether they are "compiled for law enforcement purposes."[202] Exemption 7(C) also parallels Exemption 6 in its second step, the determination of "unwarranted invasion of personal privacy."[203] The omission of the word "clearly" in the 7(C) requirement, however, "provide[s] somewhat broader protection for privacy interest . . . than normally afforded under Exemption 6."[204] Courts have made use of this distinction as a tool for deciding Exemption 7(C) suits during 1981.

In *Ferri v. Bell*[205] the plaintiff sought information including the arrest records of witnesses at his previous trial on federal criminal charges. The Court of Appeals for the Third Circuit, while holding that such "rap sheets" are not "similar files" for Exemption 6 purposes,[206] held them to be "investigatory records" within Exemption 7.[207] Because an agency can use a lesser showing of privacy to justify a 7(C) withholding than an Exemption 6 withholding,[208] the plaintiff had to show a strong public interest in disclosure, as well as prove that the privacy interest actually was not especially strong. He succeeded in

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tween the specific and the generic made in the Act. Even the quoted legislative history refers to "kind of files," a generic requirement. Passport status files are not—generically—the kind which, if disclosed, cause a severe invasion of privacy the way medical files—generically—do. The confusion of the generic and the specific occurs throughout Rehnquist's opinion. For example, in stating the decision below, he notes that the court of appeals found the citizenship status of the persons in question less intimate than the information in personnel and medical files. *Id.* More properly, the court of appeals found all files of citizenship status generally less intimate than all medical and personnel files. *See* 642 F.2d at 199. The Court's decision does not represent any staggering blow to information disclosure. The Justices, all of whom agreed with the decision, merely simplified the application of Exemption 6. But simplification does not, perhaps, serve the purposes of an Act which invites strict construction of its terms as the best way to effect its goal of openness.

202. 5 U.S.C. § 552(b)(7) (1976).

203. *Id.* § 552(b)(7)(C). Exemption 7(C) was part of the 1974 amendments to the FOIA, Pub. L. No. 93-502, § 2(b), 88 Stat. 1563 (1974). The language of Exemption 6 has remained unaltered since the passage of the original FOIA in 1966.

204. Fund for Constitutional Gov't v. National Archives and Records Serv., 656 F.2d 856 (D.C. Cir. 1981). *See also* Department of the Air Force v. Rose, 425 U.S. 352, 378 n.16 (1976); Bast v. United States Dep't of Justice, 647 F.2d 1251, 1254 (D.C. Cir. 1981); Ferri v. Bell, 645 F.2d 1213, 1217 (3d Cir. 1981); Deering Milliken, Inc. v. Irving, 548 F.2d 1131, 1136 n.7 (4th Cir. 1977); Congressional News Syndicate v. United States Dep't of Justice, 438 F. Supp. 538, 541 (D.D.C. 1977). This distinction between Exemption 6 and Exemption 7(C) makes sense: the information in medical and personnel files is usually *voluntarily* supplied by the person whose privacy is threatened by the disclosure of the files, unlike the information contained in most investigatory records.

205. 645 F.2d 1213 (3d Cir. 1981).

206. *Id.* at 1217.

207. *Id.*

208. *Id.*

both. Reasoning that *Paul v. Davis*[209] permits deliberate mass circulation of arrest information,[210] the court decided any privacy interest in arrest records can certainly "be outweighed if Ferri demonstrates a public benefit to be served thereby."[211] To demonstrate that such a public interest existed, the court alluded to the rule of *Brady v. Maryland*[212] that a criminal defendant may seek a new trial if the prosecution fails to inform him of information that may not otherwise arise and that provides reasonable doubt of guilt.[213] Thus, "to the extent this disclosure may remedy and deter *Brady* violations, society stands to gain"[214] and withholding becomes unwarranted.[215]

The court in *Ferri* identified a narrow and specific public protection granted by the criminal justice process to support the invasion of privacy contemplated by disclosure. In contrast, without such a specific public protection, the Court of Appeals for the District of Columbia Circuit refused to invade the privacy of even public figures in *Fund for Constitutional Government v. National Archives and Records Service*.[216] The *Fund for Constitutional Government* case involved a request for documents, most of which were eventually released, generated by the Watergate Special Prosecution Force. The district court allowed a withholding under Exemption 7(C) of any information which disclosed the participants in unindicted wrongdoings or which revealed the identities of confidential sources or third parties not under investigation.[217]

209. 424 U.S. 693 (1976).

210. *Id.* at 712-13 .

211. Ferri v. Bell, 645 F.2d at 1218.

212. 373 U.S. 83 (1963).

213. *Id.* at 86-87.

214. Ferri v. Bell, 645 F.2d at 1218.

215. *Cf.* Tennessean Newspaper, Inc. v. Levi, 403 F. Supp. 1318 (M.D. Tenn. 1975) (Exemption 7(C) does not authorize withholding from the news media routine information such as age, address, marital status, and employment status of persons arrested or indicted).

216. 656 F.2d 856 (D.C. Cir. 1981).

217. *Id.* at 861 (paraphrasing Fund for Constitutional Gov't v. National Archives and Records Serv., 485 F. Supp. 1, 8-9 (D.D.C. 1978), *modified*, 656 F.2d 856 (D.C. Cir. 1981). The withholding, allowing for information that would reveal the identities of confidential sources, could also have been justified under Exemption 7(D); indeed the district court used Exemption 7(D) as an alternate ground for its decision. *See* 485 F. Supp. at 9; *cf.* Maroscia v. Levi, 569 F.2d 1000, 1002 (7th Cir. 1977); Church of Scientology v. Department of State, 493 F. Supp. 418, 421-22 (D.D.C. 1980); Kanter v. IRS, 496 F. Supp. 1004, 1006-07 (N.D. Ill. 1980) (in all three cases Exemption 7(C) was applied to protect identity of sources). Exemption 7(D) applies to those investigatory records whose disclosure would reveal "the identity of a confidential source" or, in the case of a criminal or national security investigation, would reveal "confidential information furnished only by the confidential source." 5 U.S.C. § 552(b)(7)(D) (1976). The leading Exemption 7(D) case in 1981, Radowich v. United States Attorney, 658 F.2d 957 (4th Cir. 1981), held that agency records revealing the identity of a confidential source may be withheld despite a public knowledge of the source's identity derived through means other than the FOIA. As the court noted, "the proscription of involuntary disclosure . . . does not disappear if the 'identity' of the 'confidential source'

The court of appeals began its review by a comparison of the privacy interests at issue with Exemption 6 presumptions of privacy invasion: "that an individual's name appears in [personnel, medical, or similar] files . . . will probably not engender comment and speculation, while . . . an individual whose name surfaces in connection with an investigation may, without more, become the subject of rumor and innuendo."[218] The comparison tends to support the court's critical conclusion that information concerning a criminal investigation falls within Exemption 7(C)[219] rather than Exemption 6.

Reference to Exemption 6 also illustrates why an Exemption 7(C) presumption of privacy may be difficult to overcome: though Exemption 6 "instructs the court to tilt the balance in favor of disclosure,"[220] Exemption 7(C) provides only the impetus of de novo review against unqualified withholdings.[221] Without a tilt in favor of disclosure, for example, the public-figure status of persons identified in the records sought cannot alone defeat a withholding.[222] As the *Fund for Constitutional Government* court implies, additional circumstances are needed: "We might be persuaded under appropriate circumstances that an individual's status as a 'public figure' would tip the 7(C) balance in favor of

later becomes known but continues *until* the beneficiary of the promise of confidentiality waives disclosure." *Id.* at 960. Furthermore, the court held that all information furnished by a confidential source in the course of a criminal or national-security investigation remains exempt from mandatory disclosure whether the same information which is not from a confidential source must be, or has been, disclosed. *Id.* at 959, 960, 964.

218. Fund for Constitutional Gov't v. National Archives and Records Serv., 656 F.2d at 863 (quoting Congressional News Syndicate v. United States Dep't of Justice, 438 F. Supp. 538, 541 (D.D.C. 1977)).

219. *Id.* at 863. Disclosing the mere connection of an individual with a criminal investigation does not present an *unwarranted* invasion of privacy in every circumstance. *See id.* at 866; Lame v. United States Dep't of Justice, 654 F.2d 917, 923 n.6 (3d Cir. 1981). But the presumption is a strong one: "release of this type of information represents a severe intrusion on the privacy interests of the individuals in question and should yield only where exceptional interests militate in favor of disclosure." 656 F.2d at 866. Courts tend to favor the privacy interest once it is established with sufficient clarity. *See, e.g.*, Bast v. United States Dep't of Justice, 665 F.2d 1251, 1254 (D.C. Cir. 1981); Baez v. United States Dep't of Justice, 647 F.2d 1328, 1338-39 (D.C. Cir. 1980); Common Cause v. National Archives and Records Serv., 628 F.2d 179, 184 (D.C. Cir. 1980); Librach v. FBI, 587 F.2d 372 (8th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979); Rushford v. Civiletti, 485 F. Supp. 477 (D.D.C. 1980), *aff'd mem.*, 656 F.2d 900 (D.C. Cir. 1981).

220. Getman v. NLRB, 450 F.2d 670, 674 (D.C. Cir. 1971).

221. *See* Department of the Air Force v. Rose, 425 U.S. 352, 378 n.16; Bast v. United States Dep't of Justice, 665 F.2d 1251, 1254 (D.C. Cir. 1981).

222. *See* Fund for Constitutional Gov't v. National Archives and Records Serv., 656 F.2d at 865; Common Cause v. National Archives and Records Serv., 628 F.2d at 179, 184 (D.C. Cir. 1980). As one specialized application of this principle, government officials do not, by virtue of their positions alone, forfeit their personal privacy under the FOIA. *See* Baez v. United States Dep't of Justice, 647 F.2d 1328 (D.C. Cir. 1980); Lesar v. United States Dep't of Justice, 636 F.2d 472, 487 (D.C. Cir. 1980).

disclosure. This is not, however, such a case."[223] The court speaks of public figure status as "diminish[ing] an individual's interest in privacy."[224] It is conceptually simpler, however, to regard public-figure status as increasing the public interest in disclosure. When this increased public interest coincides with, for instance, any identifiable public protection specified by law, then "appropriate circumstances" may exist for tipping the balance in favor of disclosure.[225]

The court could find no identifiable public protection in *Fund for Constitutional Government*. This, coupled with the initially higher barrier to disclosures in Exemption 7(C) cases as compared to Exemption 6 cases, led to an affirmance of the *Fund for Constitutional Government* withholdings. The relative threat of damage to individual Iranian residents from disclosure in *The Washington Post* may seem much higher than the threat of damage to individual government officials already investigated during the Watergate scandal in *Fund for Constitutional Government*. But the scheme of Exemptions 6 and 7(C) provides different levels of privacy, and these different disclosure results do not necessarily conflict.

VIII. CONCLUSION

A number of positive steps to clarify the FOIA occurred in 1981. The District of Columbia Circuit's improved test for confidentiality under Exemption 4 in *Worthington Compressors* was one such step.

223. Fund for Constitutional Gov't v. National Archives and Records Serv., 656 F.2d 856, 865 (D.C. Cir. 1981). The court also noted that "the legitimate and substantial privacy interests of individuals under these circumstances cannot be overriden by a general public curiosity." *Id.* at 866. *See also* Rushford v. Civiletti, 485 F. Supp. 477, 479-80 (D.D.C. 1980), *aff'd mem.*, 656 F.2d 900 (D.C. Cir. 1981).

224. Fund for Constitutional Government v. National Archives and Records Serv., 656 F.2d at 865.

225. *See e.g.*, Congressional News Syndicate v. United States Dep't of Justice, 438 F. Supp. 538 (D.D.C. 1977) (protection from campaign contribution abuses under what was then the Federal Corrupt Practices Act plus public-figure status of recipient warrants disclosure of information regarding contribution). An identifiable public protection alone may tip the balance in favor of disclosure. *See* Ferri v. Bell, 645 F.2d 1213 (protection from *Brady* violations) (for a discussion of *Ferri*, see text accompanying notes 204-14 *supra*); Bast v. Department of Justice, 665 F.2d 1251 (D.C. Cir. 1981) (protection of public from judicial partiality when an identifiable instance of judicial partiality exists).

In *Bast*, the requester of information alleged that a judge had unproperly deleted part of an open-court record during a previous FOIA trial in which Bast had been a party. The Department of Justice and the FBI investigated on charges of obstruction of justice. Bast was denied access to the records of that investigation under Exemption 7(C), except for a three-sentence passage segregated by the appellate court on in camera review. In the passage, an FBI agent attributes remarks to the judge that can be read to indicate the judge had a bias toward the government in the trial that sparked Bast's complaint. The court ordered disclosure of the passage holding that the "public importance of judicial impartiality" outweighed the judge's privacy interest. *Id.* at 1256.

That circuit's decision on IRS memoranda in *Taxation with Representation Fund* improved understanding of Exemption 5. And the legislative action of the Reagan administration and Congress, in response to the Ninth Circuit's holding in *Long v. Bureau of Economic Analysis*, foreclosed another area of uncertainty, that concerning Exemption 3's application to section 6103 of the Internal Revenue Code.

The standards of review and the uses of in camera examinations for Exemption 1 litigation were not, however, conclusively determined. Judge Wilkey's approach in *Military Audit Project* and *Phillippi* deserves critical inquiry. Worse, the District of Columbia Circuit's reversal of Exemption 2 theories in *Crooker v. Bureau of Alcohol, Tobacco, & Firearms* sheds no light on the continuing split among the circuits on the question of that exemption's scope.

Beneath these uncertainties in the current law of the FOIA, the new legislative initiatives to amend the Act created increasing pressures to alter the Act's effects. Though FOIA supporters may prevent the most drastic changes proposed in Congress during 1981,[226] the changes in the field of federal information disclosure that will occur in 1982 should prove as unpredictable as were the changes in 1981.

Christopher M. Mason

226. See note 27 *supra*.