

PROTECTION FROM GOVERNMENT DISCLOSURE— THE REVERSE-FOIA SUIT

The Freedom of Information Act (FOIA)¹ is designed to establish “a general philosophy of full agency disclosure . . . and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld.”² At the same time, however, the drafters of the FOIA did not wholly ignore the privacy interests of persons who submit information to government agencies. Congressional committee reports regarding the FOIA recognize the necessity of “protect[ing] certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records” and the propriety of allowing such confidentiality as is necessary for operation of the Government.³

Congress’s weighing of a “philosophy of full agency disclosure” against citizens’ privacy interests resulted in an act which requires a sweepingly broad disclosure of identifiable agency records on request of extra-governmental parties,⁴ but which exempts certain categories of agency materials from the provisions of the Act generally.⁵ Hence,

THE FOLLOWING CITATIONS WILL BE USED IN THIS NOTE:

K. DAVIS, *ADMINISTRATIVE LAW TEXT* (3d ed. 1972) [hereinafter cited as K. DAVIS, *TEXT*];

Cramton, *Nonstatutory Review of Federal Administrative Actions: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction and Parties Defendant*, 68 MICH. L. REV. 387 (1970) [hereinafter cited as Cramton].

1. 5 U.S.C.A. § 552 (Supp. 1976).

2. S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965) (emphasis added); *accord*, H.R. REP. NO. 1497, 89th Cong., 2d Sess. 1 (1966) (“[The Act is to] provide a true Federal public records statute by requiring the availability, to any member of the public, of all of the executive branch records described in its requirements, except those involving matters which are within nine stated exemptions.”).

3. S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965); *accord*, H.R. REP. NO. 1497, 89th Cong., 2d Sess. (1966):

It is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy. The right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his Government. This bill strikes a balance considering all these interests. *Id.* at 6.

4. 5 U.S.C.A. § 552(a) (Supp. 1976), *amending* 5 U.S.C. § 552(a) (1970). The broadest disclosure requirement of the FOIA provides: “[E]ach agency, upon any request for records . . . made in accordance with published rules . . . shall make the records promptly available to any person.” *Id.* § 552(a)(3).

5. This section does not apply to matters that are—

(1) (A) specifically authorized under criteria established by an Executive

while the FOIA provides an enforcement mechanism through which the federal courts may order an agency to produce records improperly withheld from a complaining party,⁶ the courts have consistently held that the agency is not required to release information falling within one of the Act's exemptions.⁷

Recently, private parties who have submitted allegedly confidential

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- 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;
- (2) related solely to the internal personnel rules and practices of an agency;
 - (3) specifically exempted from disclosure by statute;
 - (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
 - (5) 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;
 - (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
 - (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;
 - (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
 - (9) geological and geophysical information and data, including maps, concerning wells. 5 U.S.C.A. § 552(b) (Supp. 1976), amending 5 U.S.C. § 552(b) (1970).

Among other provisions of the FOIA are requirements that agencies publish descriptions of their organization and methods of operation, 5 U.S.C. § 552(a)(1) (1970), and make available a public index of documents related to specified agency actions. 5 U.S.C.A. § 552(a)(2) (Supp. 1976).

6. 5 U.S.C.A. § 552(a)(4)(B) (Supp. 1976).

7. See, e.g., *FAA Administrator v. Robertson*, 422 U.S. 255 (1975) (nondisclosure permitted by statutory exemption); *Center for Nat'l Policy Review v. Weinberger*, 502 F.2d 370 (D.C. Cir. 1974) (nondisclosure justified by investigatory files exemption); *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133 (3d Cir. 1974) (nondisclosure under personnel and medical files exemption).

More accurately, release of exempt information is not required by the FOIA itself. Plaintiffs seeking to obtain agency records still have available such means as the Federal Rules of Civil Procedure, which may require disclosure of information deemed FOIA-exempt. *Frankel v. SEC*, 460 F.2d 813, 818 (2d Cir.), cert. denied, 409 U.S. 889 (1972) (court's decision to deny disclosure under FOIA does not mean plaintiffs may not obtain information through discovery under Federal Rules). Moreover, courts may order certain portions of an exempt document deleted so as to render the remainder subject to disclosure. *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938-39 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970) (identifying details or secret matters may be deleted from document to render it subject to disclosure); *M.A. Schapiro & Co. v. SEC*, 339 F. Supp. 467, 471 (D.D.C. 1972) (court may order identifying material deleted from document and then order disclosure).

information to the government have attempted to advance their recognized right of privacy under the FOIA one step further to prevent the release of such information by the government.⁸ These attempts have arisen in the context of a suit brought by a private party to enjoin an agency from voluntarily releasing information to a third party when the material involved arguably falls within one of the Act's exemptions—the "reverse-FOIA" action. The theory of such an action is that, when information falls within an exemption and its release would harm the party which submitted that information, the agency is not merely *permitted* to withhold the data but is *prohibited* from disclosing it.

Of course, since the FOIA requires that agency records falling outside one of its exemptions must be released at the request of a party,⁹ the first step in obtaining any such relief is to show that the information involved is in fact within one of the Act's exemptions. Beyond this, however, judicial response to reverse-FOIA suits has been widely varied.

The circumstances which prompt a reverse-FOIA action and the privacy interests involved are well illustrated by the facts of a case¹⁰ brought by the owner of a nursing home. In order to comply with the Medicare program, the home had been required to submit yearly cost reports to the Department of Health, Education and Welfare. When a local competitor took advantage of the opportunity offered by the FOIA by formally requesting that HEW release to him the nursing home's 1973 cost report, the agency agreed to disclose the data.¹¹ The plaintiff nursing home owner then brought an action in federal court to enjoin release of the cost report, claiming that the report was within one of the FOIA exemptions and that its disclosure would harm the nursing home's competitive position.¹²

8. *E.g.*, *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935 (D.C. Cir. 1975); *Sears, Roebuck & Co. v. General Services Administration*, 509 F.2d 527 (D.C. Cir. 1974); *GTE Sylvania, Inc. v. Consumer Product Safety Comm'n*, Civil No. 75-104 (D. Del. Oct. 23, 1975); *Pharmaceutical Mfrs. Ass'n v. Weinberger*, 37 Ad. L.2d 447 (D.D.C. 1975); *Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1246 (E.D. Va. 1974); *McCoy v. Weinberger*, 386 F. Supp. 504 (W.D. Ky. 1974); *Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769 (D.D.C. 1974); *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292 (C.D. Cal. 1974); *United States Steel Corp. v. Schlesinger*, 34 Ad. L.2d 790 (E.D. Va. 1974).

A party may be able to prevent disclosure of information he has submitted to the government under the Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896, although the Act applies only to "individuals." See Note, *The Privacy Act of 1974: An Overview*, 1976 DUKE L.J. 301, 302-06.

9. 5 U.S.C.A. §§ 552(a)(3), (b) (Supp. 1976).

10. *McCoy v. Weinberger*, 386 F. Supp. 504 (W.D. Ky. 1974).

11. *Id.* at 505-06.

12. *Id.* at 506. The district court held that the Secretary would be acting beyond

One can imagine that the extra-judicial recourses of the owner were far from satisfactory: he could have refused to submit future cost reports, thereby losing the benefits of the Medicare program¹³ and almost certainly becoming unable to compete with Medicare-assisted homes; or he could have continued in the program and given up the confidential cost data to competitors who may have had the capacity to use that information to underprice him, forcing him from the market.¹⁴

This Note will examine the basis upon which a reverse-FOIA plaintiff may seek relief. The few cases which address the issue illustrate that the courts consistently have been required to address two recurrent issues in their analysis of the reverse-FOIA suit: (1) whether the FOIA exemptions may be construed to forbid or restrict disclosure of information, and (2) if the exemptions do not restrict disclosure, whether some other substantive and jurisdictional bases exist to prevent disclosure. As will be seen, however, the remedy itself may be inadequate to protect fully the confidentiality of information submitted to the government even if either or both of these underlying questions are resolved in favor of the reverse-FOIA plaintiff.

BASIS OF THE REVERSE-FOIA ACTION

The Exemptions—Permissive or Compulsory?

To begin with a point on which the courts are in agreement,¹⁵ it is clear that in order to qualify for relief the reverse-FOIA plaintiff must

the scope of his own regulations and in violation of the confidentiality exemption, 5 U.S.C. § 552(b)(6) (1970), and granted the injunction. 386 F. Supp. at 508.

13. See 20 C.F.R. § 405.406(b) (1975) (requirement that providers of Medicare services submit annual cost reports); *id.* § 405.406(e) (suspension of program payments to provider when it does not maintain adequate records for determination of reasonable cost).

14. Thus far it does not appear that a reverse-FOIA action has been brought by a party other than one who has himself submitted the information sought to be protected. However, a person may have legitimate interests in the confidentiality of some document which contains information about him though he himself did not surrender the document to the government. Indeed the case of one harmed by information he had no part in collecting or submitting is especially appealing, since there is no conceivable way he could have protected his own interests. While the following discussion assumes that the reverse-FOIA plaintiff has himself submitted the information he seeks to protect, the judicial remedy should be equally available to one who has not supplied the documents; the interests to be protected are those of privacy and not property.

15. Charles River Park "A", Inc. v. HUD, 519 F.2d 935, 940-41 n.4 (D.C. Cir. 1975) (if information not found within confidentiality exemption on remand, it must be disclosed); Sears, Roebuck & Co. v. General Services Administration, 509 F.2d 527, 529-30 (D.C. Cir. 1974) (denial of preliminary injunction because plaintiff unlikely to be able to show information was exempt); GTE Sylvania, Inc. v. Consumer Product Safety Comm'n, Civil No. 75-104, at 39-41 (D. Del. Oct. 23, 1975) (determination that

show that the information he seeks to protect is exempt under the Act.¹⁶ This showing is fundamental simply because the Act mandates disclosure of all non-exempt documents¹⁷ and hence release of such documents certainly may not be enjoined.¹⁸ Beyond this point there is considerable disagreement among the courts over how to proceed.¹⁹

Once a court has determined that information sought to be protected is in fact within an exemption, the first question it must address is whether the exemptions are permissive or compulsory; it must decide whether the agency has discretion to release the information or whether the agency is flatly prohibited from releasing it. The most comprehensive argument in support of the latter contention is found in *Westinghouse Electric Corp. v. Schlesinger*.²⁰ There, in rejecting the agency-

information is exempt under statutory exemption precedes discussion of whether disclosure should be enjoined); *Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1246, 1249-50 (E.D. Va. 1974) (disclosure of information prohibited on finding of confidentiality as defined in FOIA exemption); *McCoy v. Weinberger*, 386 F. Supp. 504, 507 (W.D. Ky. 1974) (court first finds that information is within confidentiality exemption); *Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769, 775 (D.D.C. 1974) (FOIA would permit disclosure unless exemption to disclosure applicable); *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292, 295 (C.D. Cal. 1974) (key factor is whether information is confidential and therefore exempt); *United States Steel Corp. v. Schlesinger*, 35 Ad. L.2d 790, 791-92 (E.D. Va. 1974) (information judged confidential under FOIA exemption and disclosure barred).

16. In the regular FOIA action the agency has the burden of proving that there is a basis for declaring information exempt. 5 U.S.C.A. § 552(a)(4)(B) (Supp. 1976). See *Tax Analysts & Advocates v. IRS*, 362 F. Supp. 1298, 1301 (D.D.C. 1973), *aff'd on this point*, 505 F.2d 350, 353 (D.C. Cir. 1974). It seems reasonable to expect the plaintiff to assume this burden in a reverse-FOIA action, since such a showing is a prerequisite to preventing an agency from disclosing the information. See note 15 *supra* and text accompanying note 9 *supra*. Moreover, congressional intent to establish a "general philosophy of full agency disclosure" suggests that documents in agency custody should be presumed subject to disclosure until proven otherwise, exemption being the exception rather than the rule. See note 2 *supra*.

17. 5 U.S.C.A. § 552(a)(3) (Supp. 1976). *But see Note, Developments Under the Freedom of Information Act—1974*, 1975 DUKE L.J. 416, 424-27 (discussion of whether federal courts have discretion to refuse to order disclosure of non-exempt information).

18. In *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935 (D.C. Cir. 1975), it was determined that the scope of the court's inquiry on the issue of whether the information is within an exemption should be that of de novo review. *Id.* at 940-41 n.4. A de novo evidentiary hearing is inappropriate in a review of informal agency action, *Camp v. Pitts*, 411 U.S. 138, 141-42 (1973); see note 73 *infra*; however, the *Charles River* court reasoned that "in holding this hearing the district court is not reviewing agency action, it is making a threshold determination whether the plaintiff has any cause of action at all." 519 F.2d at 940-41 n.4. Thus the court's consideration of whether material is exempt should be the same whether the issue is raised in an action for disclosure under subsection (a)(3) of the FOIA, 5 U.S.C.A. § 552(a)(3) (Supp. 1976), or in a reverse-FOIA suit. 519 F.2d at 940-41 n.4.

19. See notes 20-29, 84-89 *infra* and accompanying text.

20. 392 F. Supp. 1246 (E.D. Va. 1974). *Westinghouse Electric and a subsidiary*

defendant's argument that FOIA exemptions leave the release of exempt documents to agency discretion,²¹ the court first quoted excerpts of the Senate and House committee reports which emphasize that the functions to be served by the FOIA exemptions include protection of the confidentiality of information submitted by private parties and protection of the privacy of the parties themselves.²² As additional support for its position, the court quoted from *Bristol-Myers Co. v. FTC*,²³ interestingly a case in which the plaintiffs sought to compel, not enjoin, disclosure: "This provision [the confidentiality exemption] serves the important function of protecting the privacy and the competitive position of the citizen who offers information to assist government policy makers."²⁴ The *Westinghouse* court brought this dictum into the reverse-FOIA context to support a conclusion that the exemption's purpose of protecting privacy and confidentiality allows "a plaintiff which the exemption is designed to protect" to invoke the exemption "where disclosure is threatened."²⁵

brought this action to enjoin government agencies from releasing an employer information report and an affirmative action plan they had submitted. The subsidiary, Fraser & Johnston, had filed the reports with the Office of Federal Contract Compliance as required of government contractors. *Id.* at 1075. The employer information reports consist of statistics on the ethnic composition of a government contractor's work force. Affirmative action plans outline a proposed course of action by which the contractor intends to correct effects of past employment discrimination. These reports are required under penalty of contract cancellation.

The district court confirmed the decision and rationale of *Westinghouse* in *United States Steel Corp. v. Schlesinger*, 35 Ad. L.2d 790 (E.D. Va. 1974), a reverse-FOIA case which the presiding judge decided independently of any consideration of *Westinghouse*, although he wrote the opinion after reviewing the former case. *Id.* at 791.

21. The court flatly rejected the argument that FOIA exemptions are permissive only, and that the FOIA is authority only for disclosing information and cannot be used to bar disclosure. 392 F. Supp. at 1250. Such a contention, the court said, makes "the statutory exemption meaningless and flies in the face of the protective purpose of the exemption[s] . . ." *Id.*

22. *Id.* The court set forth the following portions of the legislative history:

This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes. S. REP. No. 813, 89th Cong., 1st Sess. 9 (1965).

It would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations. H.R. REP. No. 1497, 89th Cong., 2d Sess. 10 (1966).

23. 424 F.2d 935 (D.C. Cir. 1970).

24. *Id.* at 938, quoted in *Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1246, 1250 (E.D. Va. 1974).

25. *Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1246, 1250 (E.D. Va.

The leading case on the other side of the question is *Charles River Park "A", Inc. v. HUD*.²⁶ The *Charles River* court concluded that the FOIA makes no statement at all with respect to exempt information, a conclusion which necessarily follows from a single proposition adopted by the court: "If . . . this information falls within the fourth exemption, then the FOIA does not apply to it because the language of the FOIA clearly provides that the Act 'does not apply to matters' that fall within

1974); see *United States Steel Corp. v. Schlesinger*, 35 Ad. L.2d 790, 791 (E.D. Va. 1974) (rejecting as "without merit" the argument that "only the Government may use the exemptions to justify nondisclosure").

The reasoning of two other federal district courts is largely in accord with that of the *Westinghouse* court. In *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292 (C.D. Cal. 1974), the court also premised its substantive analysis on the assumption that FOIA exemptions in themselves can prevent disclosure. The case was brought by Hughes Aircraft, a government contractor, in an effort to enjoin release of the affirmative action plan it had submitted to the government. *Id.* at 294. The court considered the exemptions as "restricting" disclosure of documents and agreed with the plaintiff that nondisclosure might be required by a reading of the trade secrets exemption, 5 U.S.C. § 552(b) (4) (1970), and a regulation which requires that affirmative action plans be released unless they qualify as exempt. 41 C.F.R. §§ 60-40.2, -40.3 (1974). The court, however, found against the plaintiff on the facts. 384 F. Supp. at 296.

Likewise, the court in *McCoy v. Weinberger*, 386 F. Supp. 504 (W.D. Ky. 1974), stated definitively that all government agencies are "forbidden to release" information which falls within the confidentiality exemption. *Id.* at 507. In the alternative, the court suggested another approach: an agency may not be permitted to release information if in so doing it exceeds the scope of agency regulations which authorized such disclosure. *Id.* The governing regulations, 20 C.F.R. §§ 401.1 *et seq.* (1975), as amended, 40 Fed. Reg. 27,649-50 (1975), and more particularly, 20 C.F.R. § 401.3(u) (1975), were published pursuant to a specific disclosure statute which provides: "No disclosure . . . of any file, record, report or other paper, or any information, obtained at any time . . . by any officer or employee of the Department of Health, Education, and Welfare . . . in the course of discharging their respective duties . . . shall be made except as the Secretary . . . may by regulations prescribe." 42 U.S.C. § 1306 (1970). The regulation, 20 C.F.R. § 401.3(u) (4) (1975), in turn states that information concerning costs of operation and other information from financial reports furnished by Medicare facilities such as the plaintiff's business (providers of services under Title XVIII of the Social Security Act) may be disclosed only to certain federal or state officers or employees. Since the plaintiff's cost report was to be released to a party other than a federal or state official, such agency action was, in the *McCoy* court's opinion, unauthorized. 386 F. Supp. at 507. For the factual background of the case, see notes 10-13 *supra*. The argument that disclosure should be enjoined when it is contrary to a federal regulation was also made in *Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769, 772, 774, 777 (D.D.C. 1974).

26. 519 F.2d 935 (D.C. Cir. 1975). The plaintiffs in the case, operators of a multi-family housing project, had sought injunctive relief in the district court against HUD to halt impending release of detailed financial reports they had submitted under the Federal Housing Administration program. The court of appeals agreed with the lower court's conclusion that, once it was determined that the reports fell within the confidentiality exemption of the FOIA, the Act "simply does not apply to this case" because it "neither prohibits nor authorizes disclosure" of exempt data. 360 F. Supp. 212, 213 (D.D.C. 1973).

an exemption."²⁷ If this assertion is accepted, the FOIA cannot be interpreted as forbidding agencies from releasing exempt information.²⁸ By definition, no act makes provision for matters to which it "does not apply."²⁹

An examination of the specific language of the statute and its legislative history leads to the conclusion that the *Charles River* court

27. 519 F.2d at 942.

28. Professor Davis apparently decided quite early that the FOIA does not require an agency to withhold exempt records, Davis, *The Information Act: A Preliminary Analysis*, 34 U. CH. L. REV. 761, 766 (1967), and he continues to espouse that interpretation: "[The FOIA's] exemptions protect against required disclosure, not against disclosure." K. DAVIS, TEXT § 3A.5.

29. Two other District of Columbia District Court cases, decided after the lower court decision in *Charles River*, have dealt with the reverse-FOIA question. While the outline of the issues in both cases roughly parallels that of *Charles River*, each suggests some variations in the analysis of reverse-FOIA suits.

In the first of these cases, *Sears, Roebuck & Co. v. General Services Administration*, 384 F. Supp. 996 (D.D.C. 1974), the plaintiff sought to prevent disclosure of affirmative action plans and employer information reports which it had been required to furnish to two government agencies by virtue of its status as a government contractor. *Id.* at 999-1000. The court denied relief, holding that the information did not qualify as exempt and was therefore required to be disclosed. 384 F. Supp. at 1004-05. The court did not decide whether Sears was entitled to have selected portions of purportedly confidential data deleted from the documents before they would be released. Since the General Service Administration/Office of Federal Contract Compliance had offered throughout the litigation to consider any specific objections to release of selected portions in the light of its agency regulations, 41 C.F.R. § 60-40.3 (1975), the court found that Sears had not yet exhausted its administrative remedies on that score. *Id.* at 1006-08.

The other case to come before the District of Columbia court was *Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769 (D.D.C. 1974). The plaintiffs in this action alleged that information they had submitted to the Customs Service was confidential and therefore could not be released by the Service to officials of the Mexican government. Criticizing the district court decision in *Charles River* as "apparently concluding that [the FOIA] had no relevance to a claim seeking to bar disclosure," *id.* at 775, the court applied the FOIA by questioning "whether disclosure is inappropriate under the Act or its implementing regulations." *Id.* at 776. The *Neal-Cooper* court's application of the test, however, was similar to that of *Charles River*: the court addressed first whether the information could qualify as exempt, *id.* at 776, and second whether disclosure "would harm innocent parties." *Id.* at 777. It determined that the information was non-exempt and therefore that disclosure was appropriate. *Id.* at 776-77.

As in *Charles River*, the court assumed that the FOIA "would permit the disclosure of this information unless an exemption to disclosure is applicable." *Id.* at 775. Further, the court expressly approved the Customs Regulations' interpretation of the FOIA exemptions, as permitting an agency to release exempt documents. *Id.* at 777 n.37, citing *Sears, Roebuck & Co. v. General Services Administration*, 384 F. Supp. 996 (D.D.C. 1974) (as representing the "general view" that the exemptions authorize non-disclosure but do not require it). The Customs Regulations allow the Service the discretion to disclose information which may lawfully be withheld if such disclosure is in the public interest. 19 C.F.R. § 103.0 (1974). The *Neal-Cooper* court found that the Service had discretion to release its own investigatory files where there was no showing that such release would harm innocent parties. 385 F. Supp. at 769-77.

was correct in its conclusion that the exemptions are permissive only. Subsection (a) of section 552 commences with the phrase: "Each agency shall make available to the public information as follows" ³⁰ After the disclosure requirements of section 552(a) are enumerated, subsection (b) provides: "This section does not apply to matters that are [within the definition of exemptions (1)-(9)]." ³¹ The clear import of the language of section 552(b) is that Congress has determined not to legislate with respect to certain categories of documents which have been legislatively designated "exempt." It would be an error of logic to read subsection (b) as stating the negative of section 552(a) so as to imply a prohibition. Regardless of what Congress meant, that simply is not what is said.

The legislative history is not contrary to this interpretation, although both the original Senate and House committee reports stress the importance of the exemptions as a means of protecting "important rights of privacy." ³² While these reports may provide some guidance in construing the Act, the mere observation that Congress was concerned with protecting privacy interests when it enacted the FOIA clearly does not answer the more important question of how Congress in fact provided for the protection of those interests.

Moreover, the provisions which Congress did enact suggest that reliance on these committee reports as authority for the proposition that the exemptions are mandatory is incorrect. The FOIA specifically grants a judicial remedy for private parties seeking to compel disclosure. ³³ There is no parallel provision giving any similar remedy to those seeking to prevent disclosure. The statute goes only so far as to say that the disclosure requirements "[do] not apply" to information to which an interest in privacy, as defined by the Act, might attach. One can only conclude that the "protection" which the FOIA was meant to provide to private parties with an interest in nondisclosure is to allow agencies the discretion to take the private parties' interests into consideration in deciding whether or not to release exempt information. ³⁴

30. 5 U.S.C. § 552(a) (1970).

31. 5 U.S.C.A. § 552(b) (Supp. 1976), *amending* 5 U.S.C. § 552(b) (1970).

32. S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965). *See also id.* at 9; H.R. REP. NO. 1497, 89th Cong., 2d Sess. 10 (1966).

33. 5 U.S.C.A. § 552(a)(4)(B) (Supp. 1976).

34. The House committee report on the 1974 FOIA amendments, Pub. L. No. 93-502, 88 Stat. 1561 (1974), recognizes that the original intent of the statute is merely to allow agencies the opportunity to withhold exempt information: "[Anyone may obtain information in the possession of agencies] subject to nine categories of exemptions, whose invocation in most cases is optional . . ." H.R. REP. NO. 876, 93d Cong., 2d Sess. 4 (1974) (emphasis added); cf. *Reliability of Elec. & Gas Service*, 34 AD. L.2D

A final rebuttal to the contention that the exemptions section might compel nondisclosure is found in the last subsection of the Act: "This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section."³⁵ The provision is a final affirmation that "disclosure is thus the guiding star . . . in construing the Act."³⁶ As the court of appeals concluded in *Charles River*, the FOIA simply makes no statement or directive with respect to whether exempt information should or must be withheld by the agency³⁷—the exemptions *permit* nondisclosure but they do not *compel* it.

Since the Act does not prescribe how an agency may handle exempt information, agencies must look to other sources for authority to disclose it. Such authorization is supplied by section 301 of title 5, which provides that heads of executive departments may issue regulations for the custody and use of agency records.³⁸ Hence in the absence of some other statute limiting its discretionary authority,³⁹ an agency is vested with responsibility for determining whether to release or withhold FOIA-exempt documents.⁴⁰

Substantive Basis of the Reverse-FOIA Action

It might at first appear that the conclusion that the FOIA does not restrict an agency's disclosure of exempt information puts an end to the inquiry into the substantive basis of a reverse-FOIA suit. But as *Charles River* itself suggests,⁴¹ there is another possible judicial path

1054, 1056 (FPC Opinion No. 687, Feb. 4, 1974) (controversy challenging right of FPC to release valuable proprietary information: "[The FOIA] exemptions are a privilege of the agency not of one seeking to protect the confidentiality of the information.").

35. 5 U.S.C. § 552(c) (1970).

36. *Consumers Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796, 800 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971).

37. *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 941-42 (D.C. Cir. 1975).

38. 5 U.S.C. § 301 (1970); *see Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 941 (D.C. Cir. 1975). Other statutes also provide independent grants of authority to disclose. *See, e.g.*, 15 U.S.C. § 46(f) (1970) (FTC).

39. *E.g.*, INT. REV. CODE OF 1954 § 6103(a) (strictly limiting public access to income tax returns). *See note 47 infra*.

40. This does not mean that an agency's decision to release or withhold exempt information may not be reviewed by the federal courts. *See notes 62-83 infra* and accompanying text.

41. *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 943 (D.C. Cir. 1974). The substantive issues which the court directed to be considered on remand in determining whether to grant relief were:

- (1) Whether the information in question was FOIA-exempt.
- (2) If so, whether it would be an abuse of discretion for the agency to release the information; that is,
 - (a) whether the information would fall under the prohibitions of section

open to the person who wishes to prevent an agency from making public the information which he has submitted. Even if the exemptions are permissive, the agency's decision to disclose exempt information is still subject to judicial review under the Administrative Procedure Act. Thus, assuming a jurisdictional basis can be found for the action (a point to be considered),⁴² such disclosure may be halted by proof that it would constitute agency action which is "an abuse of discretion, or otherwise not in accordance with law."⁴³ The cases suggest three specific approaches the reverse-FOIA plaintiff might use once he has shown that the information in question is FOIA-exempt: he can allege (1) that disclosure of the information in question would violate a statute; (2) that disclosure would be contrary to agency regulations; or (3) that disclosure would constitute an abuse of agency discretion.

(1) *Disclosure would violate a statute.* This first approach is the most straightforward. The plaintiff in this situation need show only that disclosure would violate a particular federal statute in order to prove both that the information is FOIA-exempt and also that disclosure must be enjoined. Once it is determined that a specific statute prohibits the disclosure of certain information, the information is by definition exempt from mandatory disclosure under the statutory exemption of the FOIA.⁴⁴ At the same time, disclosure which would violate a statute may be enjoined under the APA as agency action which is "not in accordance with law."⁴⁵ Thus, this form of reverse-FOIA suit appears identical to a suit brought pursuant to the nondisclosure statute itself, and simply alleges that disclosure would violate that law.⁴⁶

1905 of the criminal code, 18 U.S.C. § 1905, or

- (b) whether balancing "the interests of the [requesting party] and the public . . . against the interests of [Charles River Park] in keeping the information confidential," the agency would abuse its discretion if it released the information. *Id.*

42. See notes 84-120 *infra* and accompanying text.

43. 5 U.S.C. § 706(2)(A) (1970).

44. The statutory exemption would apply since the information would be "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3) (1970).

45. *Id.* § 706(2)(A); see *GTE Sylvania, Inc. v. Consumer Product Safety Comm'n*, Civil No. 75-104 at 39, 41, 55 (D. Del. Oct. 23, 1975) (disclosure enjoined because Consumer Product Safety Commission did not comply with Food, Drug, and Consumer Product Act, 15 U.S.C. § 2055(b)(1) (Supp. III, 1973), in releasing report on television-related accidents).

46. It should be noted, however, that an action brought under the APA to prevent disclosure is analytically different from one brought under the nondisclosure statute itself. In the latter, assuming disclosure would violate the statute, the question is whether a right of action to enjoin disclosure will be implied. A suit under the APA, on the other hand, simply addresses the question whether disclosure would violate the statute, and thus constitute agency action "not in accordance with law." In order to sustain a suit under the APA, however, an independent source of jurisdiction must be found (as-

In order to successfully invoke a statutory proscription, without more, to prevent disclosure, a plaintiff must show that the statute mandates nondisclosure in absolute terms.⁴⁷ An obvious example of such a statute is the tax code provision⁴⁸ which restricts disclosure of income tax returns except upon order of the President or under disclosure regulations approved by him.⁴⁹ If a statute merely gives an agency the discretion to release or withhold information, of course, the plaintiff cannot prove that the disclosure of the documents in question is unlawful merely by showing they are within the ambit of that statute.⁵⁰ The plaintiff must therefore ask the court to adjudicate whether agency discretion has been abused. This inquiry is similar to that involved in a reverse-FOIA action based solely on review of agency discretion,⁵¹ except that the policies underlying the discretionary statute should be considered. Typical of statutes in this category is section 1104 of the Federal Aviation Act of 1958,⁵² which grants the Federal Aviation Board discretion to withhold public disclosure of information on receipt

suming the APA does not itself provide jurisdiction), while a decision to imply a right of action under the nondisclosure statute is itself a decision on the jurisdictional question.

47. *E.g.*, 15 U.S.C. § 2055(a)(2) (Supp. III, 1973) (prohibiting public disclosure by Consumer Product Safety Commission of "trade secret[s] or other matter referred to in section 1905 of Title 18"); 42 U.S.C. § 1306 (1970) ("[N]o disclosure . . . of any file, record, report or other paper, or any information, obtained at any time . . . by any officer or employee of the Department of Health, Education and Welfare . . . in the course of discharging their respective duties . . . shall be made except as the Secretary . . . may by regulations prescribe."). The latter must, of course, be interpreted with reference to implementing regulations. See notes 63-66 *infra* and accompanying text.

48. INT. REV. CODE OF 1954, § 6103.

49. "[Income tax] returns made with respect to taxes imposed by chapters 1, 2, 3, and 6 . . . shall be open to [public] inspection only upon order of the President and under rules and regulations prescribed by the Secretary or his delegate and approved by the President." *Id.*

50. A statute which grants an agency the discretion to withhold information creates a category of exempt information through the statutory exemption. See *Administrator, FAA v. Robertson*, 422 U.S. 255, 262 (1975). The nature of a reverse-FOIA suit implies, however, that when the action is brought the agency has decided to exercise any statutory discretion it may have by releasing the data. In this situation, the agency itself does not trigger the statutory exemption, unlike the situation in *Robertson*, where a decision to withhold information was made pursuant to a discretionary statute. In a reverse-FOIA suit, the plaintiff does not necessarily lose the benefit of the statutory exemption although the agency's discretionary decision is adverse to his interests. The plaintiff asks the court to review the agency's action, see notes 51-53 *infra* and accompanying text, and if the court holds in favor of the plaintiff, thereby substituting its judgment for that of the agency, the statutory exemption is automatically satisfied by the court's determination that withholding information is proper in light of the discretionary statute.

51. See notes 72-83 *infra*.

52. 49 U.S.C. § 1504 (1970).

of a written objection to its release. The statute itself suggests criteria to guide agency judgment—the requirements of the public interest and the potential adverse effect on the party objecting to release⁵³—and these factors should be of special importance in a court's evaluation of the agency's exercise of discretion.

A frequently invoked statute in reverse-FOIA cases, undoubtedly because of its broad applicability, is section 1905 of the criminal code.⁵⁴ Although the statute does not actually forbid the disclosure of information, but instead imposes criminal sanctions on any agency employee who releases "trade secrets . . . [or] confidential statistical data . . . of any person,"⁵⁵ the substantive theory of a case brought under this provision is similar to that of any other reverse-FOIA suit grounded in a statute which precludes disclosure in absolute terms. Since section 1905 does not speak in terms of discretion,⁵⁶ disclosure of information in violation of its terms would clearly constitute agency action "not in accordance with law" and thus could be prevented under the APA. This was the theory apparently adopted by the court in *Charles River Park "A", Inc. v. HUD*,⁵⁷ when, in discussing section 1905, it stated that "if the disclosure of the information involved here would constitute a violation of a criminal statute, it would be an abuse of discretion for an agency to ignore such a statutory mandate and release the information."⁵⁸

One important difference between this provision and statutes which actually prohibit the disclosure of information is that section 1905 may not be treated as a statute which qualifies under the statutory exemption of the FOIA.⁵⁹ Thus, unless the information in question falls within

53. "Whenever [a written objection to public disclosure of FAA information] is made, the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public." *Id.*

54. 18 U.S.C. § 1905 (1970).

55. *Id.*

56. *Id.* Indeed, the criminal sanctions apparently preclude discretion with respect to the information covered by the statute.

57. 519 F.2d 935, 942 (D.C. Cir. 1975). Although the court speaks in terms of an "abuse of discretion," it is probably more accurate in terms of the APA to characterize the agency's release of material falling within section 1905 as agency action "not in accordance with law." Section 10(e) of the APA, 5 U.S.C. § 706(2)(A) (1970), provides for judicial curtailment of agency action which is either "an abuse of discretion" or "not in accordance with law."

58. 519 F.2d at 942.

59. *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 941 n.7 (D.C. Cir. 1975); *Robertson v. Butterfield*, 498 F.2d 1031, 1033 n.6 (D.C. Cir. 1974), *rev'd on other grounds sub nom. Administrator, FAA v. Robertson*, 422 U.S. 255 (1975); *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 425 F.2d 578, 580 n.5 (D.C. Cir. 1970), *rev'd*

another exemption, the Act may require that it be disclosed even if such disclosure would violate this section. However, since section 1905 applies to material which is confidential in nature, the reverse-FOIA plaintiff may be able to prove in many cases that the confidentiality exemption⁶⁰ applies to the information he seeks to protect.⁶¹

(2) *Disclosure would contravene an agency regulation.* The second tack a plaintiff may take is to argue that the disclosure he seeks to avoid would constitute a violation of an agency regulation and hence should be enjoined. Agency regulations providing for policies and procedures to govern the release of agency documents are authorized either by section 301 of title 5⁶² or by some other statute which directs federal agencies to publish guidelines for disclosure of information.⁶³ The Supreme Court has held that agency officials are bound by regulations the agency has promulgated in all matters which involve "more than mere consideration of procedural irregularities."⁶⁴ In other words,

on other grounds, 421 U.S. 168 (1975); *Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769, 774-75 (D.D.C. 1974); *Sears, Roebuck & Co. v. General Services Administration*, 384 F. Supp. 996, 1003 (D.D.C. 1974); *Ditlow v. Volpe*, 362 F. Supp. 1321, 1323-24 (D.D.C. 1973), *rev'd on other grounds sub nom. Ditlow v. Brinegar*, 494 F.2d 1073 (D.C. Cir. 1974); *M.A. Schapiro & Co. v. SEC*, 339 F. Supp. 467, 469-70 (D.D.C. 1972); *Frankel v. SEC*, 336 F. Supp. 675, 678-79 (S.D.N.Y. 1971), *rev'd on other grounds*, 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972).

60. 5 U.S.C. § 552(b)(4) (1970). See note 5 *supra*.

61. The meaning of "confidential" as used in section 1905 apparently has not been defined in the case law. As a criminal statute, it is to be narrowly construed, *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 943 (D.C. Cir. 1975), but so too are the FOIA exemptions. *Cuneo v. Schlesinger*, 484 F.2d 1086 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); *M.A. Schapiro & Co. v. SEC*, 339 F. Supp. 467 (D.D.C. 1972). There is no reason to suppose, however, that the criteria for showing "confidentiality" under section 1905 should be broader than the tests which the courts have constructed to guide their application of the confidentiality exemption of the FOIA. See *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (confidentiality exemption implies that disclosure would either (1) impair government's ability to obtain information in future, or (2) cause harm to competitive position of person from whom information was obtained). Thus, information which falls within section 1905 should also fall within the confidentiality exemption.

62. 5 U.S.C. § 301 (1970).

63. *E.g.*, 42 U.S.C. § 1306 (1970).

64. *Vitarelli v. Seaton*, 359 U.S. 535, 541 (1959); see *Service v. Dulles*, 354 U.S. 363, 372, 388-89 (1957); *Accardi v. Shaughnessy*, 347 U.S. 260, 265, 268 (1954). In *Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769 (D.D.C. 1974), the court responded to allegations that disclosure should be halted because the Customs Service had not complied with its own regulations requiring that foreign government requests for information be forwarded to Washington for a decision on disclosure (19 C.F.R. § 103.2(g) (1970)):

[The plaintiffs] assert that these regulations have the force of law and govern the activities of the Service. While this is doubtless true in regard to those

regulations have the force of law with respect to governance of the agency itself.⁶⁵ It follows, then, that if a reverse-FOIA plaintiff can show that release of the information he seeks to protect would violate an agency regulation, such release should be prevented under the APA.⁶⁶

Two cases recognize this form of the reverse-FOIA action. In *McCoy v. Weinberger*⁶⁷ the court found that "a further reason exists for applying the APA [governing judicial review of agency discretion] to defendants' action which is that an agency of the Government may not act beyond the confines of its own regulations."⁶⁸ Similarly, release of certain portions of an affirmative action plan was enjoined in *Hughes Aircraft Co. v. Schlesinger*⁶⁹ on the basis of an agency regulation which prohibited disclosure of certain parts of such plans when their release would "injure the business or financial position of the contractor, [or] would constitute a release of confidential financial information of an employee."⁷⁰ Thus, in the context of a reverse-FOIA suit, agency action is subject to attack not only by allegation that it does not conform to federal law, but also by allegation that the agency has not abided by its own published procedures and policies.

(3) *Disclosure would constitute an abuse of agency discretion.* Even if disclosure of the information in question is not prohibited by statute or agency regulation, leaving the decision to release the information completely within the discretion of the agency, the reverse-FOIA plaintiff may still be able to prevent disclosure by adopting a third approach. The APA⁷¹ provides for judicial curtailment of agency action which is "arbitrary, capricious, [or] an abuse of discretion."⁷²

regulations which govern the activities of the Service in relation to outside parties, the Court has difficulty in concluding that a regulation governing purely internal activities and processes cannot be waived. 385 F. Supp. at 777.

65. For a discussion of the situations in which an agency may violate its own regulations, see Note, *Violations by Agencies of Their Own Regulations*, 87 HARV. L. REV. 629 (1974).

66. See *McCoy v. Weinberger*, 386 F. Supp. 504, 507-08 (W.D. Ky. 1974); *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292, 298 (C.D. Cal. 1974); cf. *Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769, 777 (D.D.C. 1974).

67. 386 F. Supp. 504 (W.D. Ky. 1974).

68. *Id.* at 507. The regulations found controlling in *McCoy* had been promulgated pursuant to section 1306 of the Social Security Act. 42 U.S.C. § 1306 (1970). See note 47 *supra*.

69. 384 F. Supp. 292 (C.D. Cal. 1974).

70. 41 C.F.R. § 60-40.3(a)(2) (1974), quoted in *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292, 297 (C.D. Cal. 1974).

71. 5 U.S.C. §§ 701 *et seq.* (1970).

72. *Id.* § 706(2)(A). When judicial review is sought on this basis, an argument might be made that review is not authorized under the APA because the situation falls under the exception which applies when "agency action is committed to agency discre-

Thus, an agency may be enjoined from disclosing particular material if, on a consideration of all circumstances, such disclosure would constitute an abuse of the agency's discretion within the meaning of the APA.⁷³

tion by law." *Id.* § 701(a)(2). The *Charles River* court found that authorization for any release of agency records and information is provided by section 301 of the APA, 5 U.S.C. § 301 (1970), and that "agency action taken under section 301 is subject to review under the Administrative Procedure Act (APA) to determine whether [the agency's] disclosure of the requested information would be an abuse of its discretion." *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 941 (D.C. Cir. 1975). This conclusion seems warranted by the interpretations which have been given to the scope of section 701(a)(2). See, e.g., *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 874 (D.C. Cir. 1970); *Scars, Roebuck & Co. v. General Services Administration*, 384 F. Supp. 996, 1001 (D.C. Cir. 1974).

The *Sears* court espoused the narrow interpretation of this exemption from APA-authorized review which was adopted by the Supreme Court in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971), that the federal courts are denied jurisdiction by this exemption only when there is "no law" which the court can apply in reviewing agency action. 384 F. Supp. at 1001. The district court implied that the "law to be applied in the case before it was the FOIA." *Id.*

Thus, if agency disclosure is under section 301 of title 5, 5 U.S.C. § 301 (1970), or pursuant to some regulation which embodies an element of discretion, the agency action should still be reviewable in federal district court. See *Berger, Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965), cited in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971), for the proposition that section 701(a)(2) is a "very narrow" exception. Professor Berger argues that, "Congress regarded an 'abuse of discretion' as 'not in accordance with law,' and in consequence did not embody it within the exception for 'action . . . by law committed to agency discretion.'" *Berger, supra*, at 61.

73. Section 706(2)(A) does not authorize de novo review and, although the court's "inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 417 (1971); accord, *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974); *Camp v. Pitts*, 411 U.S. 138, 141-42 (1973); *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935 (D.C. Cir. 1975).

In applying the standard, the court may seek additional evidence from the agency: "If . . . there was such failure to explain administrative action as to frustrate effective judicial review, the remedy [is] . . . to obtain from the agency, either through affidavits or testimony, such additional explanations of the reasons for the agency decision as may prove necessary." *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973); see *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 943 (D.C. Cir. 1975). Thus, though the administrative record already in existence should be the "focal point for judicial review," 411 U.S. at 142, the court may go beyond that record when such a step is necessary to "have sufficient information to consider rationally the [agency's] actions." *GTE Sylvania, Inc. v. Consumer Product Safety Comm'n*, Civil No. 75-104 at 33-34 (D. Del. Oct. 23, 1975); see *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971); *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 943 (D.C. Cir. 1975); *Nuclear Data, Inc. v. AEC*, 364 F. Supp. 423, 425 (N.D. Ill. 1973).

The court of appeals in *Charles River*, however, directed the lower court on remand to hold an evidentiary hearing on the threshold issue of whether the information is exempt under the FOIA. *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 940 n.4 (D.C. Cir. 1975). See note 18 *supra*.

This third approach was adopted by the court in *Charles River Park "A", Inc. v. HUD*,⁷⁴ which outlined the considerations to be weighed in making the determination whether the agency has abused its discretion: (1) whether the information was submitted in confidence, (2) the interests of the party requesting the information, and (3) the interests of the public in disclosure.⁷⁵

The first consideration noted by the court suggests that the reasonable expectation of a party that information he submits to an agency will remain confidential is an important factor in deciding whether relief is justified.⁷⁶ The weight given this factor, in turn, will depend partly upon the legitimacy of the confidentiality interests asserted. In *Neal-Cooper Grain Co. v. Kissinger*,⁷⁷ for example, while questioning whether disclosure "would harm innocent parties,"⁷⁸ the district court refused to enjoin the release of the materials in question since the plaintiff had made no showing of confidentiality "beyond certain bare assertions found in the complaint."⁷⁹ As a practical matter, private parties may anticipate this consideration by seeking an agency's promise to protect data or at least by articulating a request for confidentiality.⁸⁰

However, when even a legitimate expectation of confidentiality is balanced against the third consideration suggested by the court, that of

74. 519 F.2d 935, 943 (D.C. Cir. 1975); see *Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769, 777, 779 (D.D.C. 1974); *Sears, Roebuck & Co. v. General Services Administration*, 384 F. Supp. 996, 1007 (D.D.C. 1974).

75. *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 943 (D.C. Cir. 1975). It should be noted that consideration of such circumstances calls for a determination much different from that involved in the initial decision of whether information is exempt. Far from providing for a balancing of equities in making the latter determination, the FOIA was specifically designed to preclude consideration of the identity and interests of the particular party who requests disclosure. S. REP. NO. 813, 89th Cong., 2d Sess. 5-6 (1966); see *Robles v. EPA*, 484 F.2d 843, 848 (4th Cir. 1973); *Frankel v. SEC*, 460 F.2d 813, 816 (2d Cir. 1972). But see *Getman v. NLRB*, 450 F.2d 670, 674 n.10 (D.C. Cir. 1971) (personnel and medical records exemption, section 552(b)(6), is exception to general thrust of Act, since by its terms it demands discretionary balancing of competing interests).

Thus, non-exempt documents are required to be released pursuant to the FOIA even though the agency has given a promise of confidentiality. *Petkas v. Staats*, 501 F.2d 887, 889-90 (D.C. Cir. 1974); *Robles v. EPA*, 484 F.2d 843, 846 (4th Cir. 1973); *Getman v. NLRB*, 450 F.2d 670, 673 (D.C. Cir. 1971); *Ditlow v. Volpe*, 362 F. Supp. 1321, 1324 n.4 (D.D.C. 1973), *rev'd on other grounds sub nom. Ditlow v. Brinegar*, 494 F.2d 1073 (D.C. Cir. 1974). See notes 76-80 *infra* and accompanying text.

76. *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 943 (D.C. Cir. 1975).

77. 385 F. Supp. 769 (D.D.C. 1974).

78. *Id.* at 777.

79. *Id.* The court found that the plaintiff had not even shown the information to be within the confidentiality exemption.

80. But such agreements cannot shield information from the operation of the FOIA. See note 75 *supra*.

the "public interest" in disclosure, the courts may tend to weigh the latter more heavily. The court of appeals in *Charles River* stated: "If the public interest consideration supports disclosure of this information, the fact that it was submitted in confidence would not be enough to establish that the release of the information is an abuse of discretion."⁸¹

Finally, the court's acknowledgement of the interests of the party seeking disclosure suggests that it may be appropriate in some instances to permit only limited disclosure. For example, while release of the Charles River Park financial statements to Boston's Commissioner of Assessing may be justifiable,⁸² release of the same information to a competitor may not be appropriate.⁸³ Further, even if the interests of the party requesting disclosure are persuasive, the court may consider permitting the release subject to an order that the recipient keep the documents in strict confidence.

Jurisdictional Basis of the Reverse-FOIA Action

The second major analytical obstacle with which courts have grappled in reverse-FOIA cases is that of jurisdiction. While no court has failed to find jurisdiction,⁸⁴ there has been substantial disagreement as to the proper basis for this finding. Three alternatives which the courts have discussed are (1) jurisdiction by virtue of the APA,⁸⁵ (2) an

81. *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 943 (D.C. Cir. 1975). In *Charles River* the plaintiff alleged an interest in keeping the information confidential and a reliance upon agency promises of confidentiality. See *id.* at 939. The tax assessor who sought the reports alleged that he needed them for making accurate tax assessments, *id.*, and the court considered his demand as that of "a government body which intends to use the information in performance of the legitimate and traditional governmental function" of taxation. *Id.* at 943.

82. *Id.* at 939-40 (remanding for evidentiary hearing).

83. See *McCoy v. Weinberger*, 386 F. Supp. 504, 507 (W.D. Ky. 1974) (plaintiff successfully protected financial reports by showing that disclosure to competitor "would cause substantial harm to its competitive position"); cf. *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292, 296 (C.D. Cal. 1974) (suggesting that relief is appropriate if plaintiff can show that substantial harm to his competitive position would result from release).

84. *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 939 (D.C. Cir. 1975); *Sears, Roebuck & Co. v. General Services Administration*, 509 F.2d 527 (D.C. Cir. 1974); *Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1246, 1248 (E.D. Va. 1974); *McCoy v. Weinberger*, 386 F. Supp. 504, 507-08 (W.D. Ky. 1974); *Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769 (D.D.C. 1974) (jurisdiction assumed without discussion); *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292, 294 (C.D. Cal. 1974); *United States Steel Corp. v. Schlesinger*, 35 Ad. L.2d 790 (E.D. Va. 1974) (jurisdiction assumed without discussion).

85. *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 939 (D.C. Cir. 1975); *McCoy v. Weinberger*, 386 F. Supp. 504, 507 (W.D. Ky. 1974); *Scars, Roebuck & Co.*

implied private right of action under a nondisclosure statute,⁸⁶ and (3) general federal question jurisdiction.⁸⁷ As will be seen, the first two alternatives have significant weaknesses.⁸⁸ The third possibility, on the other hand, is analytically sound and should serve as a basis for every reverse-FOIA suit whether grounded in violation of statute or agency regulation or in abuse of agency discretion.⁸⁹ An additional problem in the area of jurisdiction is whether sovereign immunity bars a reverse-FOIA suit. Although the courts have yet to discuss fully sovereign immunity in the context of a reverse-FOIA action,⁹⁰ the defense poses substantial theoretical difficulties for maintaining such an action.

(1) *Jurisdiction under the Administrative Procedure Act.* The *Charles River* court⁹¹ and several earlier district court reverse-FOIA decisions⁹² found jurisdiction under the APA.⁹³ Under this theory, the reverse-FOIA plaintiff is entitled to bring suit by virtue of his contention that he is a person "adversely affected or aggrieved"⁹⁴ by the agency's decision to release the information involved. Disclosure, it is urged, would cause some harm to his interests.

v. General Services Administration, 384 F. Supp. 996, 1000-01 (D.D.C.), *aff'd*, 509 F.2d 527 (D.C. Cir. 1974).

86. See *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 941 n.6 (D.C. Cir. 1975) (no review under section 1905); *Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1246, 1248 (E.D. Va. 1974) (federal question jurisdiction under section 1905).

87. See *Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1246, 1248 (E.D. Va. 1974) (federal question jurisdiction arising under FOIA); *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292, 294 (C.D. Cal. 1974) (federal question jurisdiction arising under FOIA).

88. See notes 91-108 *infra* and accompanying text.

89. See notes 109-20 *infra* and accompanying text.

90. Several courts have acknowledged the existence of a possible sovereign immunity defense, but none has given the issue more than a conclusory treatment. See *Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1246, 1248 (E.D. Va. 1974); *McCoy v. Weinberger*, 386 F. Supp. 504, 507 (W.D. Ky. 1974); *Sears, Roebuck & Co. v. General Services Administration*, 384 F. Supp. 996, 1001 (D.D.C. 1974); *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292, 294 (C.D. Cal. 1974). The *Westinghouse* court's approach is typical:

[T]he relief sought, if granted, would not "expend itself on the public treasury or domain, or interfere with the public administration" to the extent that the Government would be "stopped in its tracks." *Land v. Dollar*, 330 U.S. 931, 938 (1947); *Larson v. Domestic & Foreign [Commerce] Corp.*, 337 U.S. 682, 704 (1949); and . . . the actions of the federal officers are sufficiently alleged to be beyond their statutory powers so that those actions would not be the actions of the sovereign. *Dugan v. Rank*, 372 U.S. 609, 621 (1963). *Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1246, 1248 (E.D. Va. 1974).

91. *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 939 (D.C. Cir. 1974).

92. *E.g.*, *McCoy v. Weinberger*, 386 F. Supp. 504, 507 (W.D. Ky. 1974); *Sears, Roebuck & Co. v. General Services Administration*, 384 F. Supp. 996, 1000-01 (D.D.C. 1974).

93. 5 U.S.C. §§ 701 *et seq.* (1970).

94. *Id.* § 702.

It appears, however, that several circuits have refused to recognize the APA as an independent grant of jurisdiction in any context.⁹⁵ Instead, these courts have found the APA's purpose to be limited to "[defining] the procedures and manner of judicial review of agency action rather than [conferring] jurisdiction."⁹⁶ The decisions of the courts on this point are "irreconcilably conflicting"⁹⁷ and the Supreme Court has not spoken directly to the issue.⁹⁸ Thus, it cannot presently be said that all federal circuits will find jurisdiction over a reverse-FOIA suit on the basis of the APA alone.

(2) *Private right of action under a nondisclosure statute.* As previously discussed,⁹⁹ a statute which prohibits the disclosure of particular information may provide a substantive basis for preventing an agency from releasing exempt information. Such a statute may also provide a jurisdictional basis for the reverse-FOIA suit by virtue of an implied right of action under the statute itself to prevent a violation of its terms. When the interests which a particular statute is designed to protect are asserted by a party although the statute itself does not ex-

95. Second Circuit: *Ove Gustavsson Contracting Co. v. Floete*, 278 F.2d 912 (2d Cir.), *cert. denied*, 364 U.S. 894 (1960). *But see* *Cappadora v. Celebrezze*, 356 F.2d 1, 5, 7 (2d Cir. 1966) (implying that section 10 of the APA includes grant of jurisdiction). Second Circuit panels have explicitly recognized the conflict among jurisdictions on this issue. *Aguayo v. Richardson*, 473 F.2d 1090, 1101-02 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974); *Toilet Goods Ass'n v. Gardner*, 360 F.2d 677, 679 n.1 (2d Cir. 1966).

Third Circuit: *West Penn Power Co. v. Train*, 37 Ad. L.2d 183, 191 (3d Cir. 1975); *Zimmerman v. United States*, 422 F.2d 326, 330 (3d Cir.), *cert. denied*, 399 U.S. 911 (1970); *Operating Eng'rs Local 542 v. NLRB*, 328 F.2d 850, 854 (3d Cir.), *cert. denied*, 379 U.S. 826 (1964); *Schwab v. Quesada*, 284 F.2d 140, 143 (3d Cir. 1960).

Eighth Circuit: *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529, 532 (8th Cir. 1967). *But see* *State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1105 n.7 (8th Cir. 1973) (noting conflict among jurisdictions and suggesting that recent Supreme Court cases "tend to look favorably upon construing Section 10 [of the Act] as an affirmative grant of jurisdiction.").

96. *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529, 532 (8th Cir. 1967), *citing* *Ove Gustavsson Contracting Co. v. Floete*, 278 F.2d 912, 914 (2d Cir. 1960).

97. *Pickus v. United States Bd. of Parole*, 507 F.2d 1107, 1109 (D.C. Cir. 1974).

98. *Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308, 329-30 (1967); *see* *Aguayo v. Richardson*, 473 F.2d 1090, 1101 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974); *Zimmerman v. United States*, 422 F.2d 326, 330-31 (3d Cir.), *cert. denied*, 399 U.S. 911 (1970); *Pickus v. United States Bd. of Parole*, 507 F.2d 1107, 1109 (D.C. Cir. 1974); *State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1105 n.7 (8th Cir. 1973); Note, *Judicial Review Under the Clean Air Amendments, 1976 DUKE L.J.* 450, 470-72 nn.99-100. *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 23.02 (Supp. 1970).

99. *See* notes 44-61 *supra* and accompanying text.

licitly grant jurisdiction over such a controversy, courts have sometimes been willing to imply a private right of action.¹⁰⁰ The decision is based on a consideration of several factors:

(1) a Federal statutory or constitutional prohibition against the acts complained of; (2) inclusion of the defendant in the class upon which the duty of statutory compliance has been imposed; (3) legislative intent to place the party claiming injury within the ambit of the statute's protection or to confer a substantive benefit or immunity upon him; (4) injury or threatened harm proximately resulting from the defendant's breach of duty; and (5) unavailability or ineffectiveness of alternative avenues of redress.¹⁰¹

Of course, a suit based on an implied right of action under a nondisclosure statute is actually nothing more than a suit brought pursuant to the statute itself.

A nondisclosure statute which may be applicable in many reverse-FOIA cases is section 1905 of the criminal code.¹⁰² As previously noted,¹⁰³ this provision was obviously designed to protect the privacy interests of those who submit information falling within its purview. The mechanism provided to accomplish this purpose, however, is a criminal sanction directed against offending agency employees. The statute does not explicitly grant federal court jurisdiction over an action in which a private party might seek to assert those rights and interests tacitly recognized by the statute. Nevertheless, the court in *Charles River Park "A", Inc. v. HUD*¹⁰⁴ indicated that it would imply a private right of action under section 1905 in the appropriate situation. While the court refused to allow a private action to enjoin a violation of the statute in that particular case,¹⁰⁵ its rationale was that such a right should not be implied "unnecessarily"¹⁰⁶ in light of its decision that the APA afforded a jurisdictional basis.¹⁰⁷

One obvious problem with using any nondisclosure statute as a jurisdictional basis for a reverse-FOIA suit is that it can be invoked only

100. *E.g.*, *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 202 (1967) (action by United States under Rivers & Harbors Act of 1899); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (private remedy implicit in section 14(a) of Securities Exchange Act of 1934). *But see* *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973) (refusal to permit private right of action under sections 5, 12, and 14 of FTCA). *See also* *Charles River Park "A", Inc. v. HUD*, 360 F. Supp. 212, 213 (D.D.C. 1973).

101. *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 989 (D.C. Cir. 1973).

102. 18 U.S.C. § 1905 (1970).

103. *See* notes 44-61 *supra* and accompanying text.

104. 519 F.2d 935 (D.C. Cir. 1975).

105. *See id.* at 941 n.6.

106. *Id.*

107. It has also been suggested in at least one case that section 1905 might provide

as a basis for review of those actions which involve the type of information which the statute purports to protect from disclosure. For instance, even if section 1905 were held to provide jurisdiction in a reverse-FOIA action, it could be used only in situations where the information in question consisted of the type of trade secrets and confidential statistical data covered by that statute.¹⁰⁸

(3) *General federal question jurisdiction.* The most promising source of jurisdiction for a reverse-FOIA suit is the general federal question statute, which grants jurisdiction when "the matter in controversy exceeds the sum or value of \$10,000, . . . and arises under the Constitution or laws . . . of the United States."¹⁰⁹ One position which has been adopted by at least two courts is that a federal question arises under the FOIA itself.¹¹⁰ However, this position assumes that the exemptions are mandatory rather than permissive, since it proceeds on the theory that the reverse-FOIA action is one to restrain a violation of the Act itself.¹¹¹ As shown earlier, this interpretation of the Act proves to be erroneous on close scrutiny.¹¹²

Nevertheless, federal question jurisdiction should provide a basis for virtually all reverse-FOIA suits. Although the precise meaning of

a basis for federal question jurisdiction under 28 U.S.C. § 1331(a) (1970). *Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1246, 1248 (E.D. Va. 1974) (federal question arising under the FOIA itself, under the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1970), and under 18 U.S.C. § 1905 (1970)).

108. 18 U.S.C. § 1905 (1970).

109. 28 U.S.C. § 1331 (1970).

110. *Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1246, 1248 (E.D. Va. 1974); *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292, 294 (C.D. Cal. 1974).

111. "This controversy arises under 5 U.S.C. § 552, since the plaintiff is seeking to restrain the defendants from allegedly violating its terms." *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292, 294 (C.D. Cal. 1974).

112. See notes 15-40 *supra* and accompanying text. Another theory basing jurisdiction on the FOIA itself is that a private right of action (much like that discussed earlier in relation to specific nondisclosure statutes, see notes 99-106 *supra* and accompanying text) should be inferred from the Act. In other words, if the party who has submitted the information can show that it is exempt, he should be entitled to maintain an action to protect his recognized right of privacy under the Act in an effort to prevent disclosure. This theory, however, also assumes the exemptions were designed to provide affirmative protection to a party who submits information, and the two courts which have considered it have rejected it. *Sears, Roebuck & Co. v. General Services Administration*, 384 F. Supp. 996, 1000 (D.D.C. 1974); *McCoy v. Weinberger*, 386 F. Supp. 504, 506 (W.D. Ky. 1974). The *Sears* court reasoned that a reverse-FOIA plaintiff is not a party whom the FOIA was designed to benefit and thus that the statute does not imply a private right of action for his protection. 384 F. Supp. at 1000; *cf. Renegotiation Bd. v. Banner-craft Co.*, 415 U.S. 1, 16-20 (1974) (injunctive remedy explicitly provided for by confidentiality exemption of FOIA is not the *exclusive* remedy). The *Sears* court distinguished *Banner-craft* as inapplicable to a litigant seeking to enjoin disclosure, since the only right provided by the FOIA is the right to disclosure. 384 F. Supp. at 1000 n.5.

the requirement that the action must be one which "arises under" federal law remains unsettled for many cases that involve issues of federal law,¹¹³ it is clear that an action, such as the reverse-FOIA suit, which is against a federal agency to challenge federal administrative action meets this requirement. Both the substantive basis for the action, the right of a private party to be free from agency action which adversely affects him and is not authorized by federal law,¹¹⁴ and the remedy sought, a declaratory judgment and an injunction¹¹⁵ to prevent disclosure, are created by federal law.¹¹⁶

The only possible difficulty which might be encountered by the reverse-FOIA plaintiff stems from the second requirement of the statute that the amount in controversy exceed \$10,000. Usually the plaintiff will be able to allege sufficient economic damage to meet this requirement, especially if the information sought to be protected is of a financial nature. In one reverse-FOIA suit, for example, the plaintiff argued that release of an affirmative action plan would enable a competitor to estimate the company's labor costs and thereby underbid on government contracts.¹¹⁷ In other situations, however, it may not be possible to place a monetary value on the damage which would result from disclosure of the documents in question. For instance, in situa-

113. See generally C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3562 (1975).

114. This form of proceeding is the most common type of nonstatutory judicial review of agency action. See K. DAVIS, TEXT § 23.03, at 443. "The theory and operation of nonstatutory review are that the officer who has committed a wrong to a private individual is answerable for his conduct unless he can establish that federal law justified his action." Cramton 395, citing ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 80-82 (1941).

115. 28 U.S.C. §§ 2201-02 (1970).

116. "[W]hen the claim is that the administrator has gone beyond his jurisdiction and has sought to do something that [a federal] statute does not authorize, it has been held that it is the proposed application of the federal statute that alone gives rise to the action and that this makes the suit one arising under federal law." C. WRIGHT, A. MILLER & E. COOPER, *supra* note 113, § 3568, at 465. Specifically, the claim in any reverse-FOIA suit is that the agency's decision to release the information in question is an abuse of its discretionary authority or not in accordance with law. See text accompanying notes 42-43 *supra*.

117. Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292 (C.D. Cal. 1974). In that case, the court concluded that the affirmative action plan would be of "marginal utility" to a competitor, *id.* at 298, but this conclusion was reached after a detailed consideration of the plaintiff's expert testimony. *Id.*, at 296-98. Nevertheless, "the injury sought to be prevented [had] been sufficiently alleged to exceed the required jurisdictional amount." *Id.* at 294. See also Westinghouse Elec. Corp. v. Schlesinger, 392 F. Supp. 1246, 1248 (E.D. Va. 1974) (requisite jurisdictional amount met—allegations of competitive damage).

tions where the plaintiff attempts to prevent disclosure because of possible damage to his reputation, the interest is not readily assessable in terms of money. It appears, however, that as a practical matter jurisdiction will seldom be denied on this basis. The requirement of jurisdictional amount in the area of nonstatutory review of administrative action has been severely criticized by the commentators in recent years,¹¹⁸ and the courts appear willing to construe the requirement broadly.¹¹⁹

In sum, the jurisdictional issue is no bar to any variety of reverse-FOIA suit. An allegation that jurisdiction is provided by the APA or a specific nondisclosure statute may be sufficient in many instances. Where neither of these statutes is viewed as jurisdictional, it seems clear that the reverse-FOIA action may still proceed in most cases as a form of nonstatutory review under general federal question jurisdiction.¹²⁰

(4) *The sovereign immunity defense.* The relief requested in a reverse-FOIA action is, of course, an injunction against a government official to restrain him from making public certain information which has been submitted to the government by a private party. When a suit is deemed to be directed against the United States as sovereign, even though the suit is technically against a government officer in his own name, sovereign immunity may bar not only an action at law, but also an equitable proceeding such as a reverse-FOIA suit.¹²¹

The general rule of sovereign immunity is that the government may not be sued without its consent.¹²² The Supreme Court has delineated those situations in which the defense generally is available in the follow-

118. See, e.g., K. DAVIS, TEXT § 23.03, at 443-44; C. WRIGHT, A. MILLER & E. COOPER, *supra* note 113, § 3568, at 465-67; Cramton 437-46.

119. Professor Davis states that "the books are full of cases *assuming* that the \$10,000 requirement does not apply to nonstatutory review of federal administrative action." K. DAVIS, TEXT § 23.03, at 443-44.

120. Once jurisdiction has attached, the APA serves the purpose of defining "the procedures and manner of judicial review of agency action . . ." *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529, 532 (8th Cir. 1967) (court does not view APA as making independent grant of jurisdiction). See note 96 *supra* and accompanying text.

121. K. DAVIS, TEXT § 27.03, at 499-500. The technique of circumventing sovereign immunity by seeking injunctive relief against a government officer originated in *Ex parte Young*, 209 U.S. 123 (1908), but the courts have moved away from a consistent willingness to accept this legal fiction. K. DAVIS, TEXT § 27.03, at 499.

122. *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *Minnesota v. United States*, 305 U.S. 382, 387 (1939). There are several possible conceptual origins of the sovereign immunity doctrine: (1) the traditional immunity of the English sovereign deemed to have survived the American revolution; (2) the inability of the courts to enforce a judgment against the executive without its aid; (3) the theoretical ground that there can be no legal right against the authority which makes the law on which that right depends. Cramton 396-97.

ing terms: "[A] suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' . . . or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" ¹²³ There are, however, two exceptions to this general rule. First, a suit for specific relief against an officer of the sovereign is not considered a suit against the sovereign itself if the officer was acting *ultra vires*. ¹²⁴ Second, the defense is not available if "the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional." ¹²⁵

There seems little doubt that the relief requested by a reverse-FOIA plaintiff will "restrain the Government from acting" ¹²⁶ and thus operate against the United States as sovereign. ¹²⁷ Hence, the suit will be barred unless sovereign immunity has been waived by some federal statute or the action falls within one of the two exceptions to the doctrine. In most cases, a reverse-FOIA plaintiff will not be in a position to allege that the statute or regulation pursuant to which an officer is acting in releasing information is unconstitutional. However, the action in many cases will be one which falls within the *ultra vires* exception to the rule. These are the situations wherein the plaintiff

123. *Dugan v. Rank*, 372 U.S. 609, 620 (1963), quoting *Land v. Dollar*, 330 U.S. 731, 738 (1947), and *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949).

124. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949).

125. *Id.* at 690; see *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963). However, there is some indication that even though the officer's disputed action is allegedly *ultra vires* or pursuant to an unconstitutional authority, the suit may be barred in certain circumstances. In *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), the leading case on the current interpretation of the sovereign immunity doctrine, the Supreme Court stated that despite the two categories of exceptions, sovereign immunity may bar a suit "if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." *Id.* at 691 n.11, citing *North Carolina v. Temple*, 134 U.S. 22 (1890). Obviously this limitation does not apply to the reverse-FOIA situation, since the injunctive relief requested requires only "cessation of the conduct" of releasing information, not "affirmative action."

The cases and commentators have disputed the construction and correctness of *Larson's* footnote 11. See, e.g., *Schlafly v. Volpe*, 495 F.2d 273, 279-80 (7th Cir. 1974) (construing footnote 11 as recognizing that sovereign immunity may bar suit in exceptional cases, for example, where to do otherwise would impose "an intolerable burden on governmental functions"); *Washington v. Udall*, 417 F.2d 1310, 1318 (9th Cir. 1969) (taking position that footnote 11 was not intended to preclude *all* suits for affirmative relief); K. DAVIS, *TEXT* 501; Cramton 414.

126. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949).

127. See, e.g., *Doehla Greeting Cards, Inc. v. Summerfield*, 227 F.2d 44 (D.C. Cir. 1955) (action to join enforcement of increased parcel post zone rates).

alleges that disclosure is contrary to a federal statute or regulation. It should be noted, however, that not all statutes or regulations of this type will be sufficient to satisfy the exception. The Supreme Court in *Larson v. Domestic & Foreign Commerce Corp.*¹²⁸ made it clear that the ultra vires exception is not satisfied by a mere "claim of error in the exercise" of power granted to a government official.¹²⁹ Rather, it is necessary that the complaint set forth a particular statutory (or regulatory¹³⁰) limitation since "the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power."¹³¹ The applicability of the ultra vires exception is most clear in a case where statutory authority is limited in absolute terms,¹³² but the courts have also been willing to grant relief when the statutory mandate merely sets forth standards with which the officer must comply.¹³³ Thus, an allegation should be sufficient to satisfy the ultra vires exception if it states

128. 337 U.S. 682 (1949).

129. *Id.* at 690.

130. Regulatory limitations have the force of law as against the agencies which promulgated them. See notes 64-65 *supra* and accompanying text.

131. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 (1949); see *Dugan v. Rank*, 372 U.S. 609, 622-23 (1963) (since statutory power involved "had no limitation placed upon it by the Congress," ultra vires exception not satisfied). The commentators have severely criticized the distinction between "error" and "general authority" posed in *Larson's* definition of the ultra vires exception. See, e.g., Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1490-91 (1962) ("The vice of *Larson* . . . is that [it permits] . . . courts to shirk the hard task of determining the limits of official power."); Cramton 407 (the distinction "has been applied to deprive litigants of judicial consideration of their claim that an officer's conduct is unlawful").

132. See *Schlafly v. Volpe*, 495 F.2d 273, 279 (7th Cir. 1974) (sufficient allegation that action was ultra vires where complaint stated that conditions precedent to termination of federal assistance as set forth in statute had not been satisfied); *Washington v. Udall*, 417 F.2d 1310, 1316-17 (9th Cir. 1969) (court emphasized that statute stated absolutely that a certain 160-acre limitation was to be included in particular contracts).

133. *Eastern Ky. Welfare Rights Organization v. Simon*, 506 F.2d 1278, 1283 (D.C. Cir. 1974) (challenge of authority of officer to interpret revenue statute in manner contrary to long-established congressional policy was within ultra vires exception); *State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1123 (8th Cir. 1973) (court construed Federal-Aid Highway Act to determine that officer had no express or implied authority to impound funds for purposes not related to Act itself). *But see Doehla Greeting Cards, Inc. v. Summerfield*, 227 F.2d 44 (D.C. Cir. 1955) (court held ultra vires exception inapplicable even though postal law in question set forth standards to be observed by Postmaster General in taking action at issue). The result in *Summerfield* has been criticized in Byse, *supra* note 131, at 1489-90; Cramton 407-08; Comment, *Immunity of Government Officers: Effects of the Larson Case*, 8 STAN. L. REV. 683 (1956). "[T]he merits as so defined will never be litigated at all if the court construes the statute to give the defendant 'prima facie' authority for his acts." *Id.* at 690. See generally *Social Security Bd. v. Nierotko*, 327 U.S. 358, 369 (1946) ("An agency may not finally decide the limits of its statutory power."); *Stark v. Wickard*, 321 U.S. 288, 309-10 (1944).

that by disclosing information an officer will exceed the bounds of his authority as delineated by a statute or regulation which sets forth criteria for determining when particular information is to be withheld.

In a reverse-FOIA action based solely on review of agency discretion,¹³⁴ on the other hand, the ultra vires exception is of no help in circumventing sovereign immunity. Nor do the statutes granting subject matter jurisdiction¹³⁵ and mandamus relief¹³⁶ waive sovereign immunity in actions to which they apply.¹³⁷ Nevertheless, it can be argued that the courts should not invoke sovereign immunity to bar a reverse-FOIA action which alleges abuse of agency discretion. As previously noted, the reverse-FOIA action is based on the APA.¹³⁸ In other cases where the Act has provided the basis of an action which seeks injunctive relief against a government official, several circuit courts have explicitly held that the sovereign immunity doctrine is avoided or restricted, and the Supreme Court has pointedly avoided the question.

The Supreme Court's approach to the issue of sovereign immunity has developed in two independent lines of cases. One line, headed by *Larson v. Domestic & Foreign Commerce Corp.*,¹³⁹ relies on a detailed and technical discussion of the sovereign immunity doctrine with no mention of the effect, if any, of the APA and its underlying policies on an action against a government officer.¹⁴⁰ The prevailing viewpoint expressed in these cases is that "[t]here are the strongest reasons of public policy for the rule that [injunctive] relief cannot be had against

134. Agencies are granted authority to release documents by section 301, 5 U.S.C. § 301 (1970), or by specific enabling legislation. See notes 62-63 *supra* and accompanying text.

135. 28 U.S.C. § 1331 (1970).

136. "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." *Id.* § 1361.

137. *Beale v. Blount*, 461 F.2d 1133, 1138 (5th Cir. 1972) (section 1331); *McQueary v. Laird*, 449 F.2d 608, 611 (10th Cir. 1971) (section 1361); *Professional & Technical Eng'rs Local 1 v. Williams*, 389 F. Supp. 287, 290 (E.D. Va. 1974), *aff'd*, 510 F.2d 966 (4th Cir. 1975) (section 1361); *Kentucky ex rel. Hancock v. Ruckelshaus*, 362 F. Supp. 360, 367-68 (W.D. Ky. 1973), *aff'd*, 497 F.2d 1172 (6th Cir. 1974), *cert. granted*, 95 S. Ct. 1390 (1975) (sections 1331, 1361); *Massachusetts v. Connor*, 248 F. Supp. 656, 660 (D. Mass.), *aff'd*, 366 F.2d 778 (1st Cir. 1966) (section 1361); *Smith v. United States*, 224 F. Supp. 402, 404 (D. Wyo. 1963), *aff'd*, 333 F.2d 70 (10th Cir. 1964) (section 1361).

138. See text accompanying notes 41-43 *supra*.

139. 337 U.S. 682 (1949).

140. See *Hawaii v. Gordon*, 373 U.S. 57 (1963); *Dugan v. Rank*, 372 U.S. 609 (1963); *Malone v. Bowdoin*, 369 U.S. 643 (1962); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). Each of these cases was decided after enactment of the APA in 1946.

the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right."¹⁴¹ The second line of cases, of which *Citizens to Preserve Overton Park v. Volpe*¹⁴² is representative, explores the technicalities and restrictions of the APA without any discussion of the role of sovereign immunity in actions for review of agency discretion.¹⁴³ Furthermore, the latter cases take the expansive view that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."¹⁴⁴ These two trends could perhaps be reconciled by assuming that the APA constitutes a legislative waiver of sovereign immunity but that the Act was inapplicable in the first line of cases.¹⁴⁵ However, dictum in one Supreme Court decision states that the APA is not to be "deemed an implied waiver of all governmental immunity from suit."¹⁴⁶

Not surprisingly the circuit courts are in conflict as to the applicability of the sovereign immunity doctrine in cases governed by the APA. Several courts have held that the Act constitutes a waiver of sovereign immunity in any action to which it applies.¹⁴⁷ In these jurisdictions, of course, *no* reverse-FOIA suit will be dismissed on the ground of sovereign immunity, since the sovereign is deemed to have consented to any such suit.

141. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949). Indeed, the case of *United States v. Sherwood*, 312 U.S. 584 (1941), is still being cited by the lower courts for the proposition that "[e]very declaration of a waiver of sovereign immunity must be strictly construed." *Kentucky ex rel. Hancock v. Ruckelshaus*, 497 F.2d 1172, 1176 (6th Cir. 1974).

142. 401 U.S. 402 (1971).

143. *See id.*; *Barlow v. Collins*, 397 U.S. 159 (1970); *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150 (1970); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

144. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967), *citing* *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962). Of course, even though the Court in the quoted passage was referring to the issue of statutory preclusion of review, rather than sovereign immunity, the statement evidences a strong presumption in favor of judicial review.

145. The court in *Littell v. Morton*, 445 F.2d 1207, 1212-13 (4th Cir. 1971), noted this possible path of reconciliation.

146. *Blackmar v. Guerre*, 342 U.S. 512, 516 (1952). It is possible that the Supreme Court may supply further guidance on the sovereign immunity issue in an APA case when it decides *Kentucky ex rel. Hancock v. Ruckelshaus*, 497 F.2d 1172 (6th Cir. 1974), *cert. granted*, 95 S. Ct. 1390 (1975). The question which has been certified is whether sovereign immunity bars an action to enforce a Clean Air Act implementation program against government officials. 44 U.S.L.W. 3031 (July 22, 1975).

147. The Second and District of Columbia Circuits presently take this view. *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 873-74 (D.C. Cir. 1970); *Kletschka v. Driver*, 411 F.2d 436, 445 (2d Cir. 1969). The Ninth Circuit at one time espoused the waiver theory, *Adams v. Witmer*, 271 F.2d 29, 34-35 (9th Cir. 1958), but has since abandoned that position. *Washington v. Udall*, 417 F.2d 1310, 1320 (9th Cir. 1969).

Even in the circuits which hold that the APA does not imply such a waiver,¹⁴⁸ however, an action governed by the Act may not be barred by the sovereign immunity doctrine. Two courts from this group have taken the position that in an action where both the APA and the sovereign immunity defense are applicable, sovereign immunity will not bar the action unless "the reasons for its application [are] so compelling as to require dismissal of the case despite the APA."¹⁴⁹ This view is illustrated by the decision of the Fourth Circuit in *Littell v. Morton*.¹⁵⁰ In this case, review was granted even though sovereign immunity was applicable and the case was not within an exception, since the relief requested¹⁵¹ posed no danger that the government would be "stopped in its tracks" or that an "important government project [would be] halted pending litigation."¹⁵² After specifically noting the line of Supreme Court cases in which review was granted under the APA without discussion of sovereign immunity,¹⁵³ and with reference to the vehement criticism which the commentators have leveled against the sovereign immunity doctrine,¹⁵⁴ the court observed:

The Fifth Circuit is in a state of confusion, having adopted the waiver theory in *Estrada v. Ahrens*, 296 F.2d 690, 698 (5th Cir. 1961), retreated from that position without expressly overruling it in *Colson v. Hickel*, 428 F.2d 1046 (5th Cir. 1970), *cert. denied*, 401 U.S. 911 (1971), and declined to reconcile the two in *Warner v. Cox*, 487 F.2d 1301, 1305 (5th Cir. 1974). However, the court in *Cox* did hold that any waiver which the Act *might* provide "does not extend so far as an action . . . for money." *Id.*

148. *Sierra Club v. Hickel*, 467 F.2d 1048, 1054 (6th Cir. 1972); *Littell v. Morton*, 445 F.2d 1207, 1212-13 (4th Cir. 1971); *Washington v. Udall*, 417 F.2d 1310, 1320 (9th Cir. 1969); *Motah v. United States*, 402 F.2d 1, 2 (10th Cir. 1968); *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529, 552 (8th Cir. 1967); *Cyrus v. United States*, 226 F.2d 416, 417 (1st Cir. 1955).

149. *Littell v. Morton*, 445 F.2d 1207, 1213 (4th Cir. 1971); *see Washington v. Udall*, 417 F.2d 1310, 1320 (9th Cir. 1969) ("In any case wherein the immunity doctrine is so transcending as to require dismissal of the suit, the Act does not provide for Administrative Review."). *Littell* purports to adopt the formulation of the *Udall* court for reconciling the APA and the sovereign immunity doctrine. 445 F.2d at 1213. However, it is not clear that the Ninth Circuit would go so far as the Fourth in striking a balance which favors review. The Ninth Circuit in *Udall* had found the ultra vires exception applicable and resolved the sovereign immunity question on that basis. Thus it is impossible to tell when the court would find a sovereign immunity consideration "so transcending as to require dismissal." 417 F.2d at 1320.

150. 445 F.2d 1207 (4th Cir. 1971).

151. The plaintiff demanded payment for professional services rendered to the Navajo Tribe, to which he was allegedly entitled under a contract with the Department of the Interior. *Id.* at 1209-10.

152. *Id.* at 1214.

153. *Id.* at 1212.

154. *See, e.g., K. DAVIS, TEXT §§ 27.01-07; Byse, supra note 131, at 1484-93; Crampton 389-436; Comment, supra note 133.* In October, 1969, a proposed amendment of the APA, which would in essence have abolished sovereign immunity in suits for specific relief, was adopted by the Administrative Conference of the United States and the Ad-

The rationale for sovereign immunity essentially boils down to substantial bothersome interference with the operation of government. It can be said with some justification that both Congress, through the enactment of the APA, and the courts, through liberal application of the APA and silence as to sovereign immunity, have largely rejected this rationale.¹⁵⁵

The commentators are in agreement¹⁵⁶ that the only remaining substantial rationale for the sovereign immunity doctrine is the fear of interference with government operations by litigious plaintiffs. The *Littell* formulation succeeds in preserving this essential protective characteristic of sovereign immunity while avoiding a formalistic application of the doctrine which would thwart the favorable attitude toward allowing judicial review of agency action evidenced by the line of cases giving an expansive construction to the APA. If, in line with the Supreme Court's dictum, the APA is deemed not to waive sovereign immunity in all cases to which the Act applies, the solution presented by *Littell* seems the most reasonable.

A reverse-FOIA case is an ideal example of a situation in which judicial review is appropriate. The interests of a private party in preserving confidentiality of information are to be balanced against the interests of the public (or more narrowly, the requesting party) in disclosure.¹⁵⁷ The agency's interest is minimal,¹⁵⁸ since its role is only that of primary intermediary, with the delegated task of initially balancing the interests of extra-governmental parties. Accordingly, since a court order to withhold certain documents will hardly "stop the government in its tracks,"¹⁵⁹ sovereign immunity should not bar even a reverse-FOIA action based solely on review of agency discretion.¹⁶⁰

INADEQUACY OF THE REVERSE-FOIA SUIT

In spite of the apparent availability of theoretical bases for the reverse-FOIA suit, such an action may not in fact be adequate in a

ministrative Law Section of the American Bar Association. The proposal was adopted in principle by the House of Delegates of the American Bar Association in February, 1970. K. DAVIS, SUPPLEMENT, *supra* note 98, § 27.00-8, at 216.

155. 445 F.2d at 1214.

156. K. DAVIS, TEXT § 27.02, at 498; Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060, 1061 (1946); Byse, *supra* note 131, at 1484; Cramton 397.

157. See note 81 *supra* and accompanying text.

158. In any situation giving rise to a reverse-FOIA suit, the agency has already determined that the government itself has no interest in retention of the information.

159. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949).

160. The strongest argument the government could make for application of the sovereign immunity doctrine would be the claim that each reverse-FOIA suit interferes with the agency's execution of the policy of total disclosure mandated by the FOIA itself.

substantial number of cases to protect the interests of a party who has submitted information to the government and retains some right of confidentiality. Under the FOIA as amended in 1974, the government is required to respond to a request for information within ten days for original requests and twenty days for administrative appeals of denials.¹⁶¹ The Act neither makes provision, nor allows sufficient time, for notification of the party who has submitted the information to the agency of a decision to release the documents.¹⁶² Thus, information may be made public and damage done without an interested party's knowledge of the release.

There are two possible remedies for this situation. In order to prevent such a release, an interested party might consider bringing an action shortly after submitting documents to an agency for an injunction against any release of the papers or a declaratory judgment that such release would constitute an abuse of agency discretion. However, if the information has already been released, one might sue for damages caused by the negligent or wrongful release of the documents.

Declaratory or Injunctive Relief

The courts traditionally evaluate two factors in determining whether to grant injunctive or declaratory relief: the fitness of the issues for judicial decision, and the hardship to the parties of withholding court consideration.¹⁶³ The main obstacle to the plaintiff who seeks these remedies to protect information submitted to an agency is that the controversy may not yet be ripe for judicial resolution.¹⁶⁴ If no request

161. 5 U.S.C.A. § 552(a)(6)(A) (Supp. 1976).

162. Cf. DEPT OF JUSTICE, ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT 34 (1967) ("there may be instances when agencies will find it *appropriate* to consult with the person who provided the information before deciding whether the exemption applies" (emphasis added)).

Some agencies, however, have developed a formal policy of consulting the party who submitted the information when the applicability of an FOIA exemption is a possibility. The regulations of the Food and Drug Administration provide:

In situations where the confidentiality of data or information is uncertain and there is a request for public disclosure, the Food and Drug Administration will consult with the person who has submitted or divulged the data or information or who would be affected by disclosure before determining whether or not such data or information is available for public disclosure. 21 C.F.R. § 4.45 (1975).

Still, the submitting party is dependent on the agency to determine when confidentiality is "uncertain."

163. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967).

164. *See id.*

[The] basic rationale [of ripeness] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagree-

has yet been made for release of the information, the agency obviously will not have decided, formally or informally, whether or not disclosure of the particular document is proper—in a sense there is not yet a real controversy. The APA¹⁶⁵ imposes a “ripeness” requirement which is operationally equivalent to the courts’ generalized criteria of justiciability.¹⁶⁶ Section 10(c) of the APA states that judicial review may only be exercised over “final agency action.”¹⁶⁷

Considerations of ripeness led the court in *McCoy v. Weinberger*¹⁶⁸ to preclude the plaintiff from certifying a class action for injunction against release of yearly cost reports furnished by hospitals and skilled nursing homes pursuant to the Medicare program.¹⁶⁹ Since the prospective members of the class were institutions which were not “in immediate danger of having their cost reports released to competitive nursing homes or other members of the general public,” the court determined that ordering a generally applicable injunction would be “inappropriate.”¹⁷⁰

Thus, if the plaintiff merely fears that an agency in its own discretion may release FOIA-exempt information in the future, his action for declaratory¹⁷¹ or injunctive¹⁷² relief will probably be barred both by the APA,¹⁷³ and by the courts’ reluctance to review issues not

ments over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

165. 5 U.S.C. § 704 (1970).

166. *Sinclair Oil Corp. v. Smith*, 293 F. Supp. 1111, 1115 (S.D.N.Y. 1968) (familiar principle that courts are reluctant to intervene when agency proceedings are at intermediate stage embodied in section 10(c) of APA, 5 U.S.C. § 704 (1970)).

167. Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. 5 U.S.C. § 704 (1970).

168. 386 F. Supp. 504 (W.D. Ky. 1974).

169. *Id.* at 508.

170. *Id.* Similarly, in *Westinghouse* the court refused the plaintiffs’ request for a declaratory judgment that disclosure of any employment information report or affirmative action plan is prohibited. Such relief, reasoned the court, would necessarily cover information yet to be prepared which might not be truly confidential. *Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1246, 1251 (E.D. Va. 1974).

171. *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 940 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970) (claim for declaratory relief not ripe for adjudication when challenge is of rule merely proposed by agency).

172. *Sinclair Oil Corp. v. Smith*, 293 F. Supp. 1111, 1113-14, 1115-16 (S.D.N.Y. 1968) (court refused injunction against further action on applications for licenses from Foreign Trade Zones Board since no final or intermediate orders or regulations had been announced).

173. 5 U.S.C. § 704 (1970).

yet ripe.¹⁷⁴ However, if the agency has issued a regulation which specifies that a particular type of document will be released on request,¹⁷⁵ the issue of whether such disclosure is contrary to law or an abuse of discretion may well be fit for judicial decision.¹⁷⁶ In such a case the issues are concrete and the controversy is fixed by the agency's formal willingness to disclose particular data.

The second factor the courts evaluate in determining whether declaratory or injunctive relief is appropriate is the hardship to the parties of withholding court consideration.¹⁷⁷ Irreparable harm and inadequacy of legal remedies are additional prerequisites to injunctive relief.¹⁷⁸ It seems that the "hardship" standard, at least, should be met. The plaintiff is faced with the dilemma of either withholding confidential information and suffering whatever sanctions result, or submitting the data and risking that it may be released without sufficient notice to allow him to challenge the agency action before harm is done.¹⁷⁹ Whether or not a plaintiff can meet the irreparable harm standard depends, of

174. See *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 940 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970); *Sinclair Oil Corp. v. Smith*, 293 F. Supp. 1111, 1113-14, 1115-16 (S.D.N.Y. 1968).

175. In *McCoy* the court noted that although the Secretary of Health, Education and Welfare had stated he planned to adopt new regulations to allow disclosure of reports such as that the plaintiff had furnished, he had not yet taken that step. *McCoy v. Weinberger*, 386 F. Supp. 504, 508 (W.D. Ky. 1974).

176. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 151 (1967) (regulation issued by FDA as to particular drug labeling and advertising challenged as beyond authority given by Food, Drug, and Cosmetic Act—issue deemed appropriate for judicial review); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 198 (1956) (challenge of FCC regulation stating policy that license applicant already owning five licenses would not be issued another—reviewable as "final agency action").

177. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967).

178. *Sampson v. Murray*, 415 U.S. 61, 88 (1974).

179. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967) (sufficient "hardship" that plaintiffs had either to incur cost of changing promotional material and labeling or risk prosecution). But see *Pharmaceutical Mfrs. Ass'n v. Weinberger*, 37 Ad. L.2d 447 (D.D.C. 1975), in which the plaintiff sought an injunction to compel the FDA to provide some notice to affected drug companies before releasing material from "new drug application" files to the public. *Id.* at 450. The court denied an injunction pendente lite, concluding that:

The plaintiff here is not seeking to prevent the disclosure of specific information which has been requested under FOIA provisions. Rather, what it seeks to prevent is some type of speculative future harm—the possibility of accidental disclosure in the future of unidentified confidential information. *Id.* at 453.

The record in the case, however, showed that the applicable FDA regulations, 21 C.F.R. § 4.45 (1975), which required notice to be given to drug manufacturers before information from new drug files was released, had been interpreted by the Commissioner to require notice in all cases except when the material was "clearly disclosable under law." 37 Ad. L.2d at 453, quoting 39 Fed. Reg. 44,609, ¶ 62 (1974) (emphasis by the court).

course, upon the type of injury he expects to result from disclosure of the confidential materials.¹⁸⁰

Action for Damages

In an action for damages against an agency which has already released exempt information, the plaintiff is squarely confronted by the obstacle of sovereign immunity. A waiver of sovereign immunity is not available through the APA¹⁸¹ since that statute does not apply to actions for damages.¹⁸² Moreover, if the plaintiff's complaint sounds in the tort of interference with contract or that of interference with prospective business advantage, the action is precluded by the Federal Tort Claims Act.¹⁸³

However, at least two situations exist in which an action for damages may be successful. First, if the party who submitted the information had entered into an express or implied agreement with the government agency that the data were not to be released to the public,¹⁸⁴ he could maintain an action for damages on that contract.¹⁸⁵

Second, the party may be able to recover if he can show that an agency employee was negligent in releasing the information in question. Suppose a party claims he was injured by an agency employee's negligence in executing a statute or regulation¹⁸⁶ (subject to the restriction as to interference with contract or interference with prospective business advantage actions mentioned above). The Federal Tort Claims Act would preclude such an action if the employee were performing a "discretionary function or duty . . . whether or not the discretion

180. See, e.g., *Pharmaceutical Mfrs. Ass'n v. Weinberger*, 37 AD. L.2d 447, 453 (not certain that injury, if it did occur, would be irreparable). See note 179 *supra*.

181. See notes 146 & 148 *supra* and accompanying text.

182. 5 U.S.C. § 706 (1970).

183. 28 U.S.C.A. § 2680(h) (Supp. 1976); see, e.g., *Taxay v. United States*, 345 F. Supp. 1284, 1286 (D.D.C. 1972), *aff'd*, 487 F.2d 1214 (D.C. Cir. 1973) (interference with prospective business advantage); *Pargament v. Fitzgerald*, 272 F. Supp. 553, 556 (S.D.N.Y. 1967), *aff'd*, 391 F.2d 934 (2d Cir. 1968) (interference with contract).

184. For a discussion of such agreements, see note 80 *supra* and accompanying text.

185. *Knight Newspapers, Inc. v. United States*, 395 F.2d 353 (6th Cir. 1968) (waiver of sovereign immunity with respect to express contracts and contracts implied in fact but not as to contracts implied or founded on equitable principles); *Aktiebolaget Bofors v. United States*, 194 F.2d 145, 149 (D.C. Cir. 1951) (court would allow contract action against United States for unauthorized use of trade secrets); *Padbloc Co. v. United States*, 161 Ct. Cl. 369, 388-89, 412-13 (1963) (recovery for breach of confidentiality clause of contract with Army Chemical Corps); 28 U.S.C. § 1346(a)(2) (1970).

186. See 28 U.S.C. §§ 1346, 2680(a) (1970).

involved [was] abused."¹⁸⁷ Clearly, if the plaintiff is alleging only that disclosure constituted an "abuse of discretion," the third type of reverse-FOIA suit, this discretionary duty exception will apply and sovereign immunity will bar the suit for damages. If, however, the plaintiff is able to claim that disclosure violates a statute or regulation, the action will be barred only if the statute or regulation delegates a "discretionary function" to the employee.¹⁸⁸ The test for distinguishing a discretionary function is to analyze "not merely whether judgment was exercised but also whether the nature of the judgment called for policy considerations."¹⁸⁹ This test is obviously inexact, and "each case . . . must stand on its own record."¹⁹⁰ Yet at least in one situation, recovery clearly should be permitted: if a statute or regulation specifically forbids disclosure of a specifically identified type of document, for example, the tax code section restricting release of tax returns,¹⁹¹ agency employees need make no "policy judgments as to the public interest"¹⁹² and their actions should be reviewable in an action at law.¹⁹³

CONCLUSION

Without a judicial remedy, those who furnish information pursuant to a government regulatory scheme or as a requisite to obtaining agency-administered benefits seemingly lose all control over the disposition of that data. As federal programs proliferate, such parties may increasingly abandon privacy interests and fall prey to individuals and corporations that are learning to use the FOIA for ferreting out data not about government operations but about private individuals.¹⁹⁴

The reverse-FOIA action, in its several forms, provides a means for a private party to minimize the privacy rights he inevitably relinquishes

187. *Id.* § 2680(a).

188. *Dalehite v. United States*, 346 U.S. 15, 27 (1953).

189. *Griffin v. United States*, 500 F.2d 1059, 1064 (3d Cir. 1974); *see Dalehite v. United States*, 346 U.S. 15, 34 (1953).

190. *Blitz v. Boog*, 328 F.2d 596, 599 (2d Cir.), *cert. denied*, 379 U.S. 855 (1964).

191. INT. REV. CODE OF 1954 § 6103. *See notes 48-49 supra* and accompanying text.

192. *Griffin v. United States*, 500 F.2d 1059, 1064 (3d Cir. 1974).

193. *See id.* (regulation calling for comparative analysis of polio vaccine based on specific criteria does not require exercise of "discretion"); *cf. Hendry v. United States*, 418 F.2d 774, 783 (2d Cir. 1969) (malpractice claim not barred by Federal Tort Claims Act); *Eastern Air Lines v. Union Trust Co.*, 221 F.2d 62 (D.C. Cir.), *aff'd in part and rev'd in part*, 350 U.S. 907, *modified*, 350 U.S. 962 (1955) (air traffic tower operators not performing discretionary acts).

194. *See Arnold, Who's Going Fishing in Government Files*, 6 JURIS DOCTOR 17 (Apr. 1976).

in surrendering information to the government, within the statutory constraints requiring full disclosure of non-exempt documents. The adequacy of this remedy, however, is substantially reduced to the extent that the private party does not receive notice of impending release of information he has submitted, and consequently loses any reliable opportunity to challenge agency action.