

DEVELOPMENTS UNDER THE FREEDOM OF INFORMATION ACT—1974

INTRODUCTION

The Freedom of Information Act¹ (FOIA) was passed by Congress in 1966 as a reaction to the Public Information section of the Administrative Procedure Act,² which had become more of an agency withholding statute than a disclosure statute.³ The purpose of the FOIA is to make available to *any person* upon request substantially all the information in the hands of government agencies.⁴ Agency officials can refuse disclosure only when the information requested is specifically exempt under one or more of the nine statutory exemptions,⁵ and the burden is on the agency to justify its withholding in a *de novo* judicial review of the agency decision.⁶ Vague statutory language⁷ and

THE FOLLOWING CITATIONS WILL BE USED IN THIS NOTE:

H.R. REP. NO. 1497, 89th Cong., 2d Sess. (1966) [hereinafter cited as H.R. REP. NO. 1497];

S. REP. NO. 813, 89th Cong., 1st Sess. (1965) [hereinafter cited as S. REP. NO. 813];

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

Comment, *Developments Under the Freedom of Information Act—1973*, 1974 DUKE L.J. 251 [hereinafter cited as FOIA Comment].

1. 5 U.S.C. § 552 (1970), *as amended*, Pub. L. No. 93-502 (Nov. 21, 1974). Several important amendments enacted on November 21, 1974, became effective on February 19, 1975. Most of the changes made thereby are procedural and thus will have little effect on the substantive case law developed during 1974 and prior years. Those amendments that do make substantive changes are discussed in appropriate footnotes. References to the procedural changes are also made whenever they can be profitably included in the discussion of a 1974 development. For a discussion of the action governmental agencies must take in order to comply with the 1975 amendments, see Office of the Attorney General, Memorandum: Preliminary Guidance Concerning the 1974 Freedom of Information Act Amendments, Dec. 11, 1974.

2. Ch. 324, § 3, 60 Stat. 237, 238 (1946).

3. HOUSE COMM. ON GOVERNMENT OPERATIONS, ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT, H.R. REP. NO. 1419, 92d Cong., 2d Sess. 2 (1972); H.R. REP. NO. 1497, at 6; S. REP. NO. 813, at 5.

4. See H.R. REP. NO. 1497, at 1; S. REP. NO. 813, at 3.

5. See 5 U.S.C. §§ 552(b)(1)-(9) (1970), *as amended*, Pub. L. No. 93-502, §§ 2 (a), (b) (Nov. 21, 1974).

6. *Id.* § 552(a)(3) (Supp. II, 1972), *as amended*, Pub. L. No. 93-502, § (1)(b) (1) (Nov. 21, 1974); see *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977, *on remand*, 383 F. Supp. 1049 (D.D.C. 1974).

7. Many of the interpretation problems encountered under the FOIA were anticipated by Professor Davis. See Davis, *The Information Act: A Pre-Analysis*, 34 U.

sometimes conflicting legislative history,⁸ combined with agency reluctance to release information, have thrust the burden of interpreting the Act upon the courts.

The public's increasing awareness of the FOIA, combined with steadfast recalcitrance on the part of federal agencies to release requested information, sustained the heavy volume of FOIA litigation in 1974. Four of the Act's nine exemptions received judicial scrutiny during 1974 as the courts struggled to define the terms "specifically exempt" for purposes of the statutory exemption; "confidential" under the financial and commercial information exemption, "unwarranted invasion" under the personnel and medical files exemption, and "law enforcement purposes" under the investigatory files exemption. Also of significance were the Supreme Court's consideration of the equitable powers available to an FOIA court and the possible emergence of a right in third parties to assert the Act's exemptions to prevent agencies from *disclosing* information. Probably the most far-reaching recent development was the enactment of amendments to the FOIA which will insure greater cooperation and speed in the agencies' response to requests for information. This Note critically describes these developments in the context of the Act's judicial and legislative history and attempts to assess their impact on the FOIA's underlying policy favoring the disclosure of information in the hands of federal agencies.

POWER OF THE COURTS UNDER THE FOIA

Although the majority of the 1974 FOIA litigation again dealt with the delineation of one or more of the nine exemptions of the Act, the issue of the availability of traditional equity powers to courts enforcing the Act also received attention and was the subject of the second United States Supreme Court decision construing the FOIA.⁹ Litigation in this area has primarily involved two separate issues. A major controversy involving the power of the courts under the FOIA has been

CHI. L. REV. 761, 762, 802-12 (1967). See also Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEXAS L. REV. 1261, 1262 (1970).

8. Compare H.R. REP. NO. 1497, at 9, with S. REP. NO. 813, at 3.

9. *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1 (1974). See notes 12-32 *infra* and accompanying text. The Supreme Court first considered the FOIA in 1973 in *EPA v. Mink*, 410 U.S. 73 (1973), when it construed the national security exemption, 5 U.S.C. § 552(b)(1) (1970), as amended, Pub. L. No. 93-502, § 2(a) (Nov. 21, 1974), and the inter-agency memoranda exemption, *id.* § 552(b)(5). The Court's ruling as to the first exemption was overruled by amendments to the FOIA recently passed by Congress. Pub. L. No. 93-502, § 2(a) (Nov. 21, 1974), amending 5 U.S.C. § 552(b)(1) (1970).

whether the courts possess the equitable discretion to refuse to order disclosure of non-exempt information.¹⁰ A second issue has been whether the FOIA permits the judicial exercise of equitable jurisdiction to enjoin an ongoing administrative proceeding pending disposition of an FOIA claim for records relevant to that proceeding.¹¹ The Supreme Court in 1974 did not clearly resolve either issue, but it did suggest that in applying the Act courts have not been stripped by the FOIA of their traditional equity powers.

Equitable Jurisdiction to Enjoin Ongoing Administrative Proceedings

In *Renegotiation Board v. Bannerkraft Clothing Co.*,¹² the Supreme Court reversed the granting of temporary injunctions enjoining proceedings of the Renegotiation Board¹³ pending resolution of FOIA claims by government contractors for the disclosure of information to be used during these proceedings.¹⁴ However, the Court explicitly re-

10. The existence of equitable discretion to deny disclosure of non-exempt material has been affirmed by the Fifth and Ninth Circuits, while the Fourth, Sixth, and District of Columbia Circuits have rejected it. *Compare* *Wu v. National Endowment for Humanities*, 460 F.2d 1030, 1034 (5th Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); *General Servs. Administration v. Benson*, 415 F.2d 878, 880 (9th Cir. 1969); *Long v. IRS*, 349 F. Supp. 871 (W.D. Wash. 1972); *and* *Consumers Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969), *dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971), *with* *Robles v. EPA*, 484 F.2d 843, 847 (4th Cir. 1973); *Hawkes v. IRS*, 467 F.2d 787, 792 n.6 (6th Cir. 1972); *Tennessean Newspapers, Inc. v. Federal Housing Administration*, 464 F.2d 657, 661-62 (6th Cir. 1972); *Getman v. NLRB*, 450 F.2d 670, 677-80 (D.C. Cir. 1971); *Soucie v. David*, 448 F.2d 1067, 1076-77 (D.C. Cir. 1971); *and* *Wellford v. Hardin*, 444 F.2d 21, 24-25 (4th Cir. 1971).

11. *Compare* *Sears, Roebuck & Co. v. NLRB*, 473 F.2d 91, 93 (D.C. Cir. 1972) (*per curiam*), *cert. denied*, 94 S. Ct. 1474 (1974); *Bannerkraft Clothing Co. v. Renegotiation Bd.*, 466 F.2d 345 (D.C. Cir. 1972), *rev'd on other grounds*, 415 U.S. 1 (1974); *and* *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 940 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970) (each indicating that a district court does have jurisdiction to stay an administrative action pending the outcome of an FOIA claim in court), *with* *Sterling Drug Inc. v. FTC*, 450 F.2d 698, 710-12 (D.C. Cir. 1971), *and* *Sears, Roebuck & Co. v. NLRB*, 433 F.2d 210, 211 (6th Cir. 1970) (*per curiam*) (both concluding that the district court lacks jurisdiction to stay administrative action).

12. 415 U.S. 1 (1974).

13. Under the Renegotiation Act, 50 U.S.C. App. §§ 1211 *et seq.* (1970), the Renegotiation Board has broad powers to eliminate excessive profits made by defense contractors and subcontractors. *Id.* § 1191(c). There are several levels of renegotiation with nonbinding recommendations from each level being forwarded to the next, but a *de novo* determination of excess profits will be made at each level. 32 C.F.R. §§ 1472.3 (d)(f), (h)-(i), .4(b) (1974). From the final order of the Board, the contractor has an appeal of right to the Court of Claims, which also makes a *de novo* determination of excess profits. 50 U.S.C. App. § 1218 (Supp. II, 1972).

14. The *Bannerkraft* decision involved three cases consolidated by the circuit court—*Bannerkraft Clothing Co. v. Renegotiation Bd.*, *Astro Communication Laboratory v. Renegotiation Bd.*, and *David B. Lilly Co. v. Renegotiation Bd.*—in which the Renego-

frained from announcing a general rule concerning the enjoining of other administrative proceedings because of the *sui generis* nature of the Renegotiation Act process.¹⁵

Before the Supreme Court, the Board argued that since the FOIA (1) expressly authorizes a district court to compel disclosure of information improperly withheld, (2) places the burden on the agency to sustain its withholding, and (3) directs that FOIA suits shall take precedence over others,¹⁶ Congress intended these provisions to "constitute the *exclusive* method for enforcing the disclosure requirements . . . and that any implication of other injunctive power, . . . would be inconsistent with the statutory language."¹⁷ The contractors, on the other hand, argued that although the FOIA does not expressly grant district courts the power to enjoin administrative proceedings, such power is implied in the court's inherent capacity to provide appropriate equitable relief.¹⁸ Justice Blackmun, writing for the majority,¹⁹ seem-

tiation Board had refused to disclose information requested by contractors during the renegotiation of their contracts. *Bannercraft Clothing Co. v. Renegotiation Bd.*, 466 F.2d 345, 348 (D.C. Cir. 1972), *rev'd on other grounds*, 415 U.S. 1 (1974). Basically, the documents requested would reveal "the strength or weakness of the Board's case against the contractors and the facts or assumptions on which the Board relie[d] in assessing liability." 415 U.S. at 29 (Douglas, J., dissenting). Upon refusal by the Board to disclose the information, each contractor filed an FOIA suit in which the district courts enjoined further renegotiation pending a decision on the merits of the FOIA claim. The court of appeals affirmed, holding both that the district courts possessed jurisdiction under the FOIA to enjoin currently ongoing administrative proceedings before the Board as well as to order production of the appropriate documents and that in renegotiation proceedings the doctrine of exhaustion of administrative remedies did not bar such relief. 466 F.2d at 354-55.

The circuit court reasoned that since exclusive jurisdiction to enforce the FOIA was granted to federal district courts, there could be no proper grounds for asserting that the availability of a legal remedy or the need to respect administrative jurisdiction required such exhaustion. *Id.* at 360. The Supreme Court did not expressly disagree with the circuit court's general discussion of the exhaustion doctrine, but did determine that exhaustion was inapplicable under the Renegotiation Act. 415 U.S. at 20. See note 23 *infra*.

Bannercraft was cited in another 1974 FOIA case for the proposition "that as a general matter persons requesting information should exhaust administrative remedies prior to seeking judicial review." *Diapulse Corp. of America v. FDA*, 500 F.2d 75, 77 (2d Cir. 1974). *But see* Pub. L. No. 93-502, § 1(c) (Nov. 21, 1974), *amending* 5 U.S.C. § 552(a) (1970). For a discussion of section 1(c), see note 23 *infra*.

15. 415 U.S. at 20. See note 23 *infra*.

16. 5 U.S.C. § 552(a)(3) (Supp. II, 1972), *as amended*, Pub. L. No. 93-502, § (1)(a) (Nov. 21, 1974).

17. 415 U.S. at 17 (emphasis in original).

18. *Id.*

19. Joining Justice Blackmun in the majority opinion were Chief Justice Burger and Justices Brennan, White, and Rehnquist. Justice Douglas filed a dissenting opinion in which Justices Stewart, Marshall, and Powell joined.

ingly agreed with the argument advanced by the contractors since he concluded that "[w]ith the express vesting of equitable jurisdiction in the district court by § 552(a), there is little to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court."²⁰

Despite its recognition of a district court's equitable jurisdiction under the FOIA, the Supreme Court reversed the granting of the injunctions, holding that the special nature of the renegotiation process²¹

20. 415 U.S. at 20 (dictum). In an earlier passage of the opinion, the Court referred to the "Act's primary purpose" as being "to enable the public to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities." *Id.* at 17, quoting *Frankel v. SEC*, 460 F.2d 813, 816 (2d Cir.), cert. denied, 409 U.S. 889 (1972).

The Court's conclusion that the FOIA did not limit the inherent powers of an equity court immediately followed the Court's justification:

The broad language of the FOIA, with its obvious emphasis on disclosure and with its exemptions carefully delineated as exceptions; the truism that Congress knows how to deprive a court of broad equitable power when it chooses so to do . . . ; and the fact that the Act, to a definite degree, makes the district courts the enforcement arm of the statute, 5 U.S.C. § 552(a)(3), persuade us that . . . [the] principle of a statutorily prescribed special and exclusive remedy is not applicable to FOIA cases. *Id.* at 19-20 (citations omitted).

The *Bannerkraft* dictum that the FOIA does not in most circumstances limit the equitable powers of a court lends support to the unusual remedy decreed by the court in *Levine v. United States*, 34 Ad. L.2d 633 (S.D. Fla., Mar. 2, 1974), where documents ultimately found by the court to be non-exempt were destroyed by the government while the FOIA suit was in progress. The court rejected the District Director's argument that destruction of the documents had mooted the FOIA disclosure issue and, after finding the material non-exempt under the FOIA, ordered that the declaration forms be reconstructed as far as possible from the case reports filed by the agents themselves which would otherwise be exempt as investigatory files compiled for law enforcement purposes. *Id.* at 642. To do otherwise would "set a precedent for allowing the destruction of documents sought under the Act without taking the steps necessary to correct the ultimate effect of such destruction [which] would have a devastating effect on the viability of the Act." *Id.*

In *Washington Research Project, Inc. v. HEW*, 504 F.2d 238 (D.C. Cir. 1974), the circuit court interpreted *Bannerkraft* as supporting broad equitable powers under the FOIA but ruled that the district court had inappropriately exercised these powers in ordering HEW to amend its regulations to comply with the court's decision that research protocols and proposed grant applications be made available to the public. *Id.* at 252-53. There was no warrant in the record for anticipating that HEW "would not proceed in good faith to incorporate the substance of a final court decision into its rules and practices." *Id.* at 253.

21. Before adoption of the FOIA, the Court had consistently held that the design of the Renegotiation Act required expeditious proceedings free from interruption for judicial review by injunction prior to the exhaustion of the administrative process. 415 U.S. at 20; see *Lichter v. United States*, 334 U.S. 742, 789-93 (1948) (statutory and procedural grounds); *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752 (1947) (constitutional grounds); *Macauley v. Waterman S.S. Corp.*, 327 U.S. 540 (1946) (statutory grounds). The Court characterized renegotiation as a "bargaining process" in which each party attempts to assert his own strength and exploit the weaknesses of his

precluded a court from the exercise of this traditional equity power.²² By restricting its prohibition on stays of the administrative process under the FOIA to renegotiation cases and by indicating by way of dictum that the FOIA did not restrict the range of powers available to an equity court, *Bannercraft* suggests that, in a proper case, an FOIA court may enjoin other ongoing administrative proceedings.²³

opponent's position. 415 U.S. at 21-22. The uncertainty inherent in any type of bargaining (the Court compared it to playing a hand of poker, 415 U.S. at 25) was intentionally made a part of the renegotiation process by Congress. The calculated risk taken by a contractor who does not settle early in the negotiations is that he may eventually have to pay more. The Court, however, did not think the risk was overbearing, "for it is counterbalanced by the profound interest of the public in the recapture of excessive profits that may flow to the contractor under its government contracts." *Id.* The Court could find nothing in the adoption of the FOIA indicating "that Congress wished to change the Renegotiation Act's purposeful design of negotiation without interruption for judicial review." *Id.* at 22.

22. We find it unnecessary, however, to decide in these cases, whether, or under what circumstances, it would be proper for the District Court to exercise jurisdiction to enjoin agency action pending the resolution of an asserted FOIA claim. We hold only that in a renegotiation case the contractor is obliged to pursue its administrative remedy and, when it fails to do so, may not attain its ends through the route of judicial interference. The nature of the renegotiation process mandates this result, and, were it otherwise, the effect would be that renegotiation, and its aims, would be supplanted and defeated by an FOIA suit. 415 U.S. at 20.

23. The circumstances in which a district court could enjoin an ongoing administrative proceeding would presumably be those outlined in the circuit court's opinion: (1) where there is a threat of irreparable injury to substantive rights; (2) where no adequate remedy at law is available through statutory modes of relief; and (3) where the intervention would not be in derogation of the agency's jurisdiction. *Bannercraft Clothing Co. v. Renegotiation Bd.*, 466 F.2d 345, 355-60 (D.C. Cir. 1972), *rev'd on other grounds*, 415 U.S. 1 (1974).

These requirements set down by the circuit court for the exercise of equitable jurisdiction to enjoin ongoing administrative proceedings were relied upon by a district court in 1974 to deny plaintiff's request that FTC proceedings against it be enjoined pending release of certain records requested from the agency under the FOIA. In *Control Data Corp. v. FTC*, No. 4-74-Civil 25 (D. Minn., Mar. 4, 1974), the court held that even reading the Supreme Court's *Bannercraft* opinion so as to permit federal courts to enjoin ongoing administrative proceedings other than renegotiations, Control Data had not alleged facts showing a sufficient threat of "irreparable injury" to bring it within the guidelines established by the circuit court's *Bannercraft* opinion for the exercise of that equitable power. *Id.* at 7. The burdens alleged by Control Data included: inability to locate key witnesses to rebut the FTC charges; fading memories of those witnesses they did locate; costs of their defense in the agency proceedings; and unfavorable publicity generated by the FTC charges. *Id.* The court found these burdens to be no more than those normally incident to any vindication of a right through legal channels, not "extraordinary circumstances" justifying a stay of the administrative proceedings. *Id.* at 8. See also *Lennon v. Richardson*, 378 F. Supp. 39 (S.D.N.Y. 1974) (agency proceeding not enjoined since no irreparable injury likely).

The *Control Data* court did, however, retain jurisdiction over the FOIA claim and ordered the FTC to submit the requested documents to the court within ten days for an *in camera* examination so it could determine whether the information was exempt. No. 4-74-Civil 25, at 9. Since further action in the administrative proceedings was not

That dictum in *Bannercraft* has been adopted by two subsequent 1974 cases to overcome the government's argument that a district court has limited jurisdiction in an FOIA case and may only grant injunctive relief. In *Consumers Union of United States, Inc. v. Saxbe*,²⁴ the district court ruled that the FOIA did not limit it to granting injunctive relief²⁵ and that it had jurisdiction to grant declaratory relief that Consumers Union was entitled as a matter of right to disclosure of certain documents²⁶ in the possession of the Antitrust Division of the Justice Department even though the Attorney General had, as a matter of discretion, released the documents after commencement of the FOIA

scheduled until later in the year, Control Data, assuming the court found the records not exempt from disclosure, essentially gained its objective of acquiring the records for its defense of the FTC charges. Control Data's FOIA request had been rejected by the FTC and there was no provision for an agency review of that decision, thus freeing Control Data to seek relief in the district court. Once an FOIA suit is filed in a district court, it is given precedence over all but the most important matters, 5 U.S.C. § 552(a) (3) (Supp. II, 1972), as amended, Pub. L. No. 93-502, § (1)(b)(1) (Nov. 21, 1974), and relief is usually rapid, as *Control Data* illustrates. In many instances, however, an elaborate or slow-working appeal process within an agency and the requirement that administrative remedies be exhausted before resort to the courts is permitted combine to prevent a party from qualifying for the expedited procedure of the federal courts. In part to solve this problem, Congress included in the 1975 FOIA amendments a ten-day limit within which an agency must respond to a request for records and a twenty-day limit for a response to an appeal from the agency's initial decision. A person shall be deemed to have exhausted his administrative remedies on his FOIA request if these time limits are not met. Pub. L. No. 93-502, § 1(c) (Nov. 21, 1974), amending 5 U.S.C. § 552(a) (1970). Permitting a party earlier access to the federal courts for a determination of his FOIA claim will both reduce the pressure on courts to enjoin ongoing administrative proceedings and reduce the incentive for agency recalcitrance in responding to an FOIA claim. See note 11 *supra* and cases cited therein.

Unlike the circuit court, the Supreme Court in *Bannercraft* considered the entire multi-tier structure of the renegotiation process, see note 13 *supra*, as constituting the administrative remedy requiring exhaustion before judicial intervention would be sanctioned. It stated that the *de novo* proceeding in the Court of Claims, where the usual rights of discovery are available, "is the judicial remedy at law provided by the Renegotiation Act and is adequate protection against injury." 415 U.S. at 23. *But see id.* at 30-33 (Douglas, J., dissenting). Presumably resort to the FOIA would be permissible in a collateral proceeding during the renegotiation stages and would also be available in conjunction with discovery at the Court of Claims level. *Bannercraft Clothing Co. v. Renegotiation Bd.*, 466 F.2d 345, 355-60 (D.C. Cir. 1972), *rev'd on other grounds*, 415 U.S. 1 (1974).

24. 34 Ad. L.2d 992 (D.D.C. May 9, 1974). The court read *Bannercraft* as "granting the district court latitude to enter relief appropriate to carry out the Congressional intent of the Act." *Id.* at 994.

25. *Id.* at 995.

26. Consumers Union is a nonprofit membership corporation which publishes Consumer Reports Magazine. It sought disclosure of documents pertaining to a proposed merger of two companies to discover if such a merger would have an anti-competitive effect resulting in increases in the cost of goods and services to consumers. *Id.* at 993.

suit.²⁷ The court found the requisite case or controversy in the declaratory action since Consumers Union would undoubtedly continue to seek public disclosure of similar documents, and, if the Justice Department continued "its policy of trickling out documents" at its own discretion, Consumers Union would otherwise have "no way to gain meaningful review of the scope of [the Department's] discretion."²⁸ In another application of the FOIA, the District of Columbia Circuit Court of Appeals, in summarily remanding *Packer v. Kleindienst*²⁹ for further proceedings not inconsistent with *Bannercraft*, must have applied similar reasoning. *Packer* involved a request for audits of states seeking grants from the Law Enforcement Assistance Administration, which at the time had a policy of releasing such information no sooner than 150 days after submission to it by the receiving states. While the FOIA suit was in progress, plaintiff was given all the material she sought, and the government's subsequent motion for summary judgment was granted.³⁰ Although the district court found that the case was not moot—there existed a case or controversy on the issue of *prompt* disclosure³¹—it ruled its jurisdiction was limited to granting injunctive relief to compel disclosure which, since the documents were already released, it could no longer grant. However, the remand order by the circuit

27. *Id.* at 995. The Attorney General argued that the court had only limited jurisdiction under section 552(a)(3) of the FOIA and was restricted to granting injunctive relief. *Id.* at 994. See also *Consumers Union of United States, Inc. v. ICC*, 35 Ad. L.2d 578 (D.D.C., Aug. 13, 1974), where, although recognizing its power to do so, the court refused to grant a declaratory judgment that certain records were not exempt under the FOIA after the agency had released them during the FOIA action. The court could find no reason to suspect that the agency would refuse to release similar records upon request in the future, nor did the agency have a history of refusing FOIA requests and then "mooting-out" the issue by releasing the information before a court could rule on its exempt status. *Id.* at 581. Under these circumstances, the court concluded no useful purpose could be served by granting the declaratory relief and declined to exercise its discretion. *Id.*

28. 34 Ad. L.2d at 995. The court applied the "capable of repetition, yet evading review" exception to the mootness doctrine. See *Defunis v. Odegaard*, 416 U.S. 312 (1974); *Roe v. Wade*, 410 U.S. 113, 125 (1973); *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). Consumers Union was faced with the problem of prompt disclosure to make effective use of the information to alert the consuming public to the possible anti-competitive effects of proposed mergers so they could exert political or economic pressure to defeat the merger. Warning the public of possible anti-competitive effects of a *completed* merger would not permit the public to influence the merger decision itself.

29. No. 73-2055 (D.C. Cir., Apr. 5, 1974) (remand order). The case is not otherwise reported, but it is cited and discussed in *Consumers Union of United States, Inc. v. Saxbe*, 34 Ad. L.2d 992, 995 (D.D.C., May 9, 1974).

30. For a discussion of these facts, see *Consumers Union of United States, Inc. v. Saxbe*, 34 Ad. L.2d 992, 995 (D.D.C., May 9, 1974).

31. *Id.*

court suggests that an FOIA court's jurisdiction is not so limited.³²

Equitable Discretion to Refuse to Order Disclosure of Non-exempt Information

However broadly one wishes to read the *Bannercraft* suggestion that a court is not restricted in the use of its traditional equity powers so as to support the acquisition of jurisdiction to hear an FOIA suit, the dictum should not be stretched to imply that once jurisdiction is established a court has equitable *discretion* to refuse to compel disclosure of non-exempt information. *Bannercraft* itself was only concerned with whether a court could enjoin an administrative proceeding *pending a determination of the merits of an FOIA suit*—the merits were not before the Court,³³ and it drew no inference concerning the power of a court with respect to discretionary nondisclosure.³⁴

Those courts that indicate equitable discretion to refuse to compel disclosure of non-exempt information does exist³⁵ rely primarily upon that part of the FOIA which provides: "On complaint, the district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant."³⁶ Further support for this position

32. *Id.*

33. 415 U.S. at 26.

34. However, the Court did recognize that the "broad language of the FOIA" had an "obvious emphasis on disclosure" with "its exemptions carefully delineated as exceptions," *id.* at 19, and that the disclosure provision in section 552(a) "covers virtually all information not specifically exempted by § 552(b)," *id.* at 12. See also *Sears v. Gottschalk*, 502 F.2d 122, 128 & n.13 (4th Cir.), *petition for cert. filed*, 43 U.S.L.W. 3297 (U.S. Nov. 19, 1974) (No. 74-584) (reiterating the Fourth Circuit's view that an agency could resist disclosure only on the basis of one or more of the exemptions).

35. See, e.g., *Wu v. National Endowment for Humanities*, 460 F.2d 1030, 1034 (5th Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); *General Servs. Administration v. Benson*, 415 F.2d 878, 880 (9th Cir. 1969); *Long v. IRS*, 349 F. Supp. 871 (W.D. Wash. 1972); *Consumers Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969), *dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971). *But cf.* *Epstein v. Resor*, 421 F.2d 930, 933 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970) (limited role of courts under the first and third exemptions). See also *Montrose Chem. Corp. v. Train*, 491 F.2d 63, 66 n.15 (D.C. Cir. 1974) (district court arguably may exercise such equitable discretion).

36. 5 U.S.C. § 552(a)(3) (Supp. II, 1972), *as amended*, Pub. L. No. 93-503 § (1)(b)(1) (Nov. 21, 1974) (emphasis added). Professor Davis is the harbinger to those courts which interpret this language as authorizing the use of equitable discretion to limit the reach of the Act's mandatory disclosure provisions. K. DAVIS § 3A.6 (Supp. 1970). Professor Davis thinks the word "enjoin" is enough to invoke the traditions of equity since "an equity court by its intrinsic nature has a discretionary power to refuse to participate in bringing about results that are inconsistent with sound equitable practice." *Id.* at 123. He suggests that any court that has jurisdiction to enforce the FOIA also has jurisdiction to refuse to enforce it whenever equity traditions so require. *Id.* at 124.

is found in the House Report accompanying the FOIA.³⁷ On the other hand, courts refusing to find such equitable discretion³⁸ also rely upon the express language of the statute³⁹ as well as its legislative history.⁴⁰ They conclude that in enacting the FOIA Congress itself has already weighed the merits of disclosure and has found secrecy appropriate only in the nine specifically exempt categories. According to this view, a court's equity powers should not be used to create new exemptions for otherwise non-exempt material.⁴¹

The failure of the Supreme Court in *Bannerkraft* to address the issue of equitable discretion to withhold non-exempt information appears to have created additional uncertainty among the lower courts. Although the issue was not directly presented for decision in 1974, there are indications of a greater hesitancy to support one position over the other.⁴² Both the Third Circuit, in *Wine Hobby USA, Inc. v. In-*

37. "The Court will have authority whenever it considers such action *equitable and appropriate* to enjoin the agency from withholding its records and to order production of agency records improperly withheld." H.R. REP. No. 1497, at 9 (emphasis added). *But see* S. REP. No. 813, at 3, quoted at note 40 *infra*.

38. *See, e.g.*, *Robles v. EPA*, 484 F.2d 843, 847 (4th Cir. 1973); *Hawkes v. IRS*, 467 F.2d 787, 792 n.6 (6th Cir. 1972); *Tennessean Newspapers, Inc. v. Federal Housing Administration*, 464 F.2d 657, 661-62 (6th Cir. 1972); *Getman v. NLRB*, 450 F.2d 670, 677-80 (D.C. Cir. 1971); *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971); *Wellford v. Hardin*, 444 F.2d 21, 24-25 (4th Cir. 1971).

39. Such courts generally rely upon that part of the FOIA which provides: "This section does not authorize withholding of information or limit the availability of records to the public, *except as specifically stated in this section.*" 5 U.S.C. § 552(c) (1970) (emphasis added). Congress probably intended the words "except as specifically stated" to prevent courts from creating new exemptions rather than to restrict the breadth of the exemptions listed in section 552(b). *See EPA v. Mink*, 410 U.S. 73, 79 (1973) (exemptions are made "exclusive" by subsection (c)); *accord*, *Wellman Indus., Inc. v. NLRB*, 490 F.2d 427 (4th Cir.), *cert. denied*, 95 S. Ct. 61 (1974).

40. Senate Report 813 provides in part:

It is the purpose of the present bill to eliminate such phrases [as "requiring secrecy," "in the public interest," or "required for good cause to be held confidential," and] to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language It is essential that agency personnel, and the courts as well, be given definitive guidelines in setting information policies. Standards such as "for good cause" are certainly not sufficient. SEN. REP. No. 813, at 3.

One commentator concluded that the conflict in the language of the Act and in the legislative history, *compare* note 37 and text accompanying note 36 *with* notes 39 and 40, must be resolved in favor of preserving the equitable discretion of the district courts. Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 COLUM. L. REV. 897, 914 (1974). This approach, however, fails to adequately consider the consequences that may result from the general recognition of judicial equitable discretion. *See* notes 51-54 *infra* and accompanying text.

41. For a general discussion of non-FOIA cases interpreting injunctive provisions similar to section 552(a)(3) in the context of equitable discretion and arriving at conflicting conclusions, *see* Note, *supra* note 40, at 915-18.

42. The Fourth Circuit reaffirmed its opposition to equitable discretion in *Wellman*

ternal Revenue Service,⁴³ and the Second Circuit, in *Rose v. Department of the Air Force*,⁴⁴ abstained from expressly declaring themselves on the point, although *Rose* appears to have cited *Bannercraft* properly in stating that "[the Court is] clear that generally the Act constrains the use of broad judicial discretion to *block* disclosure."⁴⁵ *Rose* also suggests, however, that the true controversy may be over the definition of an exceptional case, "since even the courts that are cited as opposing the notion of general equity power to refuse disclosure recognize that a truly exceptional case might require it."⁴⁶ The District of Columbia Circuit lends support to that suggestion in its opinion in *Tax Analysts & Advocates v. Internal Revenue Service*,⁴⁷ where it held that Internal Revenue Service (IRS) letter rulings were not specifically exempt from disclosure by statutes protecting income tax returns.⁴⁸ Then, in response to the IRS request to deny disclosure on equitable grounds, the court stated that there was nothing in the factors present in the case which were absent in the other FOIA cases⁴⁹ to compel it to change its previous holdings "that a District Court has no jurisdiction under the Act to deny disclosure, apart from the exemptions contained in the Act, on equitable grounds."⁵⁰ The implication remains that where the proper factors heretofore not present in the cases are found to exist, equitable discretion to deny disclosure might be invoked.

Absent definitive guidance from the Supreme Court, and especially in view of the conflicting legislative history of the FOIA,⁵¹ courts considering the issue of equitable discretion to refuse to compel disclosure of non-exempt information should place considerable emphasis on

Indus., Inc. v. NLRB, 490 F.2d 427, 429 (4th Cir.), *cert. denied*, 95 S. Ct. 61 (1974), but the case was decided before the *Bannercraft* decision was handed down.

43. 502 F.2d 133 (3d Cir. 1974).

Because we believe that the information requested by Wine Hobby is exempt from disclosure under a specific statutory exemption, we need not reach the question of whether, were the material not specifically exempted, the district court possesses equitable jurisdiction to decline to order disclosure. *Id.* at 137-38.

44. 495 F.2d 261 (2d Cir. 1974). The court thought the issue of equitable discretion in the context of the personal privacy exemption was not substantial "since the language of the exemption requires a court to exercise a large measure of discretion." *Id.* at 269. See notes 126-148 *infra* and accompanying text.

45. *Id.* (emphasis in original).

46. *Id.*, citing *Tennessean Newspapers, Inc. v. Federal Housing Administration*, 464 F.2d 657, 662 (6th Cir. 1972); *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

47. 505 F.2d 350 (D.C. Cir. 1974).

48. 26 U.S.C. §§ 6103(a)(1), 7213(a)(1) (1970). These provisions are discussed in the statutory exemption section of this Note, text accompanying notes 99-102 *infra*.

49. The District of Columbia Circuit cases cited were *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971), and *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971).

50. 505 F.2d at 355.

51. Compare H.R. REP. NO. 1497, at 9, with S. REP. NO. 813, at 3.

the policy of the Act. The FOIA was enacted to correct the deficiencies of its predecessor statute⁵² whose vague wording was interpreted to permit agencies discretion in the initial determination of what information to disclose.⁵³ Permitting courts to exercise discretion in the disclosure process would defeat the attempt by Congress to provide clear standards for making information available to the public. Even though the discretion would no longer be in the agencies but rather in the courts, the agencies would be encouraged to refuse disclosure and argue the equitable merits of their position before the courts. The result would be frequent litigation over those concepts which the FOIA was enacted to eliminate from the disclosure decision: whether disclosure is "in the public interest", whether the requesting party is "properly and directly concerned", and whether "good cause" exists for denying disclosure.⁵⁴ Rejecting equitable discretion in the courts to deny disclosure of non-exempt information, on the other hand, would foster the attempt by Congress to bring clarity to the disclosure process. Rather than resulting in perennial uncertainty as to the result in any particular case and thus fostering even more unnecessary litigation, the courts' recognition of the exclusivity of the statutory exemptions will, after a period of definition, provide clear guidelines for the agencies' use in all cases.

THE EXEMPTIONS: COMPULSORY OR PERMISSIVE?

Must an agency refuse to disclose information that is within one or more of the exemptions of the FOIA? May a party which an exemption is designed to protect properly invoke that exemption when disclosure is threatened? Most FOIA litigation has involved a determination of whether information being sought by a private person and withheld by a government agency was legitimately exempted from compulsory disclosure by one of the Act's nine exemptions.⁵⁵ The issue of whether an agency could release exempt information has been raised infrequently because agencies have tended to withhold information unless compelled by a court to release it.⁵⁶ In 1974, how-

52. Act of June 11, 1946, ch. 324, § 3, 60 Stat. 238.

53. S. REP. NO. 813, at 5.

54. This was the language contained in the Public Information section of the Administrative Procedure Act, Act of June 11, 1946, ch. 324, § 3, 60 Stat. 238. One purpose of the FOIA was to eliminate these concepts from the disclosure decision. H.R. REP. NO. 1497, at 5; S. REP. NO. 813, at 5.

55. 5 U.S.C. §§ 552(b)(1)-(9) (1970), *as amended*, Pub. L. No. 93-502, §§ 2(a), (b) (Nov. 21, 1974).

56. See HOUSE COMM. ON GOVERNMENT OPERATIONS, *supra* note 3, at 2; H.R. REP. NO. 1497, at 6; S. REP. NO. 813, at 3.

ever, the issue of whether the exemptions may be used to prevent disclosure was considered by several courts.

Two courts in the same district, *Westinghouse Electric Corp. v. Schlesinger*⁵⁷ and *United States Steel Corp. v. Schlesinger*,⁵⁸ upheld the right of a person who has submitted exempt information to the government to use the FOIA to prevent an agency from disclosing that information to a third party. In both cases, the government notified the complaining corporations that it had decided to release to a requesting party the corporations' latest Employer Information Reports and Affirmative Action Program filed with the Defense Supply Agency of the Office of Federal Contract Compliance.⁵⁹ Both *Westinghouse* and *United States Steel* sued under the FOIA to prevent disclosure of the information, claiming it to be protected by the commercial or financial information exemption.⁶⁰ In enjoining the government from disclosing

The issue was raised in *Charles River Park "A", Inc. v. HUD*, 360 F. Supp. 212 (D.D.C. 1973), but did not become the central issue. There the court granted a permanent injunction enjoining HUD from disclosing information "confidential by its very nature," *id.* at 213, but not otherwise identified by the court, to a third party upon complaint by Charles River Park "A", Inc., which had submitted the information to the agency. The government made the argument that agencies were "free to disclose or to withhold records which are within the scope of the exemptions, unless otherwise restricted by different statutes," *id.*, while Charles River Park "A", Inc. argued that the exemptions were intended to prohibit disclosure. In a thoroughly unsatisfactory decision, the court rejected both of these arguments, saying that the FOIA simply did not apply, *id.*, and it granted the injunction on the basis of section 1905 of Title eighteen, United States Code, 18 U.S.C. § 1905 (1970), which prohibits the disclosure of confidential information not otherwise permitted by law. The finding of confidentiality was based upon an "implied understanding" between the corporation and HUD. 360 F. Supp. at 213. Without more, an implied promise of confidentiality has been rejected as creating a duty to withhold information under the FOIA in a majority of cases addressing the issue. See cases cited in FOIA Comment 265 n.84. The court also indicated that it could order the information withheld under its equity powers to prevent an abuse of agency discretion. 360 F. Supp. at 213. This view has also been rejected by the better authority under the FOIA. See notes 33-54 *supra* and accompanying text. The court's attempt to take the case out from under the FOIA is unsatisfactory. The issue in the case should have been whether section 1905 specifically exempted the information from disclosure under the statutory exemption, 5 U.S.C. § 552(b)(3) (1970)—a position uniformly rejected by other courts, see note 76 *infra*—and, if so, whether a private party can invoke the exemption.

57. 34 Ad. L.2D 1074 (E.D. Va., Apr. 4, 1974).

58. 35 Ad. L.2D 790 (E.D. Va., Sept. 20, 1974).

59. All government contractors are required to file the Employer Information Report (EEO-1), 41 C.F.R. § 60-1.7 (1974), and the Affirmative Action Program (AAP), *id.* § 60-1.40. The purpose of these reports is the "promotion and insuring of equal opportunities for all persons, without regard to race, color, religion, sex, or national origin, employed or seeking employment with Government contractors" *Id.* § 60-1.1.

60. 5 U.S.C. § 552(b)(4) (1970). See notes 110-125 *infra* and accompanying text. In *Westinghouse*, the corporation also asserted that the reports were exempt from dis-

that material which the courts found to be within the exemption,⁶¹ both courts rejected the government's arguments that the FOIA exemptions were neither mandatory nor available to private parties in opposing disclosure.⁶² The court in *Westinghouse* found support for its position in the congressional reports,⁶³ and *United States Steel* relied entirely upon the authority of the *Westinghouse* decision.

Despite the abruptness with which *Westinghouse* and *United*

closure under the investigatory files exemption, *id.* § 552(b)(7), *as amended*, Pub. L. No. 93-502, § 2(b) (Nov. 21, 1974), and the statutory exemption, *id.* § 552(b)(3), in conjunction with section 709(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-8(e) (1970). The investigatory files claim was rejected outright. 34 Ad. L.2d at 107. As for the statutory exemption, the court pointed out that section 709(e) created the EEOC and by its terms applied only to that agency, whereas the Office of Federal Contract Compliance was created under regulations promulgated by the Secretary of Labor pursuant to Executive Order 11246, and it was not clear whether that order had a basis independent of section 709(e). Rather than decide this issue, the court chose to rest its decision entirely upon the confidential information exemption. *Id.* at 1077.

That issue was decided in another 1974 case featuring a private party invoking the FOIA against agency disclosure. In *Sears, Roebuck & Co. v. General Servs. Administration*, No. 74-1946 (D.C. Cir., Dec. 9, 1974), *aff'g in part and rev'g in part*, 384 F. Supp. 996 (D.D.C. 1974), the court held that EEO-1's and AAP's were obtained by the Office of Federal Contract Compliance pursuant to Executive Order 11246 and *not* pursuant to section 709(e), indicating that Executive Order 11246 was independent of Title VII. The government, although willing to disclose the documents, had offered Sears an opportunity to review them and point out which portions were exempt from mandatory disclosure under the FOIA. *Id.* at 4. Sears claimed they were wholly exempt under the statutory, 5 U.S.C. § 552(b)(3) (1970), and investigatory files exemptions, *id.* § 552(b)(7), *as amended*, Pub. L. No. 93-502, § 2(b) (Nov. 21, 1974), and sought an injunction restraining the government from disclosing any of the information. At the hearing Sears also argued that the commercial or financial information exemption, *id.* § 552(b)(4), or the personal privacy exemption, *id.* § 552(b)(6), applied. The district court found neither the statutory nor the investigatory files exemption applicable but stayed disposition on the other claimed exemptions to allow Sears an opportunity to specify for the government which sections of the documents were protected by them. 384 F. Supp. at 1000. The circuit court dissolved the stay and ordered the release of all the information sought which Sears had not specified as exempt under exemptions four and six. No. 74-1946, at 5. Although the court did not expressly so state, it is apparent from the disposition of the case that it, too, was of the opinion that a person submitting information to the government can invoke the FOIA exemptions to enforce nondisclosure of exempt material.

61. The courts concluded that release of the information in the reports would enable a competitor to deduce labor costs, profit margin, and vulnerability to price change and to obtain a forewarning on new products and process changes. 34 Ad. L.2d at 1078; 35 Ad. L.2d at 791. One of the purposes of the commercial or financial information exemption is to protect an individual's competitive position.

62. 34 Ad. L.2d at 1079; 35 Ad. L.2d at 791. The actual holding of the court in *United States Steel* was that the exemption "bars disclosure of the confidential commercial or financial information contained in the plaintiffs' AAPs and EEO-1s . . . without the consent of the plaintiffs first had and obtained." *Id.* at 792 (emphasis added).

63. See H.R. REP. NO. 1497, at 10; S. REP. NO. 813, at 9.

States Steel treat the issue, there is authority supporting the position that the exemptions are solely permissive and only identify qualifying information which an agency *may* withhold from compelled disclosure. Professor Davis has maintained since the inception of the FOIA that it contains *no* provision forbidding disclosure,⁶⁴ and dictum in the 1974 case of *Moore-McCormack Line, Inc. v. I.T.O. Corp.*⁶⁵ indicates that at least one circuit court believes that "government officials may make public that which [the FOIA] exempts."⁶⁶ Moreover, a congressional committee undertaking a review of agency administration of the FOIA clearly summed up what it considers to have been the intent of Congress in passing the Act by saying that "[t]he exceptions . . . [are] only permissive, not mandatory."⁶⁷ A literal reading of the statute supports these statements,⁶⁸ as does the principle of full disclosure of informa-

64. K. DAVIS § 3A.5, at 122 (Supp. 1970); Davis, *supra* note 7, at 766.

65. No. 73-2165 (4th Cir., Dec. 27, 1974).

66. *Id.* at 11. In *Moore-McCormack*, the Department of Labor attempted to withhold under the intra-agency memorandum and investigatory files exemptions a portion of an accident report it claimed contained the investigating officer's conclusion about the cause of the accident. The court made its gratuitous statements concerning the permissive nature of the exemptions after finding that these exemptions were unavailable to protect the paragraph in question. *Id.* See also *Reliability of Elec. & Gas Serv.*, 4 P.U.R. 4th 141, 148 (F.P.C.), *petition for rehearing denied*, 4 P.U.R. 4th 163 (F.P.C. 1974) (exemptions are a privilege of the agency, not of one seeking to protect the confidentiality of the information); *cf.* *Exxon Corp. v. FTC*, 384 F. Supp. 755, 762 & n.16 (D.D.C. 1974) (indicating that release of selected portions of documents or release to selected persons does not waive the right of an agency to claim an exemption from release of other portions or to other persons); *Consumers Union of United States, Inc. v. Saxbe*, 34 Ad. L.2d 992, 994 (D.D.C. May 9, 1974) (government disclosing "as a matter of discretion" some of the sought documents).

67. HOUSE COMM. ON GOVERNMENT OPERATIONS, *supra* note 3, at 7. There is no provision in the recent amendments to the FOIA for agency consultation with persons submitting information before such information may be released. Indeed, the requirement that agencies make their initial determination on disclosure within ten days after receipt of a third party's request for the release of information, Pub. L. No. 93-502, § (1)(c)(6)(A)(i) (Nov. 21, 1974), *amending* 5 U.S.C. § 552(a) (1970), indicates that Congress was concerned only with whether an agency would assert an exemption and not with whether an agency would voluntarily release otherwise protected information.

68. Without the gloss of legislative history or judicial interpretation, the FOIA states simply that certain types of records shall be made available to the public by publication, 5 U.S.C. § 552(c)(1) (1970), that others shall be made available for public inspection and copying, *id.* § 552(a)(2), *as amended*, Pub. L. No. 93-502, § (1)(a) (Nov. 21 1974), that any other reasonably described records be made available upon request, Pub. L. No. 93-502 (Nov. 21, 1974), *amending* 5 U.S.C. § 552 (1970), and that none of the above applies to matters that are within the nine exemptions, 5 U.S.C. §§ 552(b) (1)-(9) (1970), *as amended*, Pub. L. No. 93-502, §§ 2(a), (b) (Nov. 21, 1974). That is, matters within the exemptions do not *have* to be published, do not *have* to be made available for inspection and copying, and do not *have* to be made available upon request. The statute does not say matters within the exemptions *must not* be published, copied, or disclosed.

tion in the hands of the government, a goal that provided the impetus for its enactment.

One cannot, however, review the hearings and committee reports accompanying the FOIA without recognizing that Congress was also deeply concerned with protecting an individual's right of privacy and thus designed some of the exemptions to accommodate what it perceived to be legitimate *private* as well as governmental interests.⁶⁹ Tests devised by courts interpreting the exemptions dealing with privately submitted material to determine whether certain information can be withheld under those exemptions have incorporated this desire to protect legitimate private interests,⁷⁰ probably with the expectation that an agency will respect such interests and assert the exemption for their protection. The fact remains, however, that Congress has not provided clear guidance for the agencies or the courts in the administration of the FOIA when an agency releases, or is willing to release, information that would otherwise be exempt. Pending a clarification of congressional intent, it would seem, absent an objection from a party submitting the information, that the language of the FOIA does not compel an agency to withhold *any* information. However, when a party who has submitted information does object to its disclosure, the court should look to the specific exemption invoked to determine whether that exemption has as one of its purposes the protection of a private party's interest.⁷¹ Where the exemption was intended to protect the asserted

69. See, e.g., ATTORNEY GENERAL'S MEMORANDUM iv; H.R. REP. No. 1497, at 10, 11; S. REP. No. 813, at 3, 7, 9. See also *Hearings on S. 1666 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 1-2 (1964).

70. The non-governmental interests sought to be protected by the commercial or financial information exemption, 5 U.S.C. § 552(b)(4) (1970), are discussed in notes 118-20 *infra* and accompanying text; those inherent in the personal privacy exemption, *id.* § 552(b)(6), appear in notes 142-48 *infra* and accompanying text. The only other exemption directly related to protecting non-governmental interests is the exemption for information concerning financial institutions. See 5 U.S.C. § 552(b)(8) (1970).

71. See, e.g., *Rural Housing Alliance v. United States Dep't of Agriculture*, 498 F.2d 73, 82 (D.C. Cir. 1974). In *Rural Housing*, the government offered to release, upon authorization of any individual, information concerning that individual contained in its report on racial and national origin discrimination by the Farmers Home Administration. *Id.* Although the requesting party did not obtain any releases, the court discussed the relationship between the exemptions and the releases. The court stated that

presumably the Government has power to waive an exemption. However, in so doing, the Government and a court, *when its authority is invoked*, must be alert to protect other interests in confidentiality besides those of the Government which are present in each of the nine exemptions, some more obviously than others. *Id.* (emphasis added).

The suggestion by the government that individual releases be obtained, according to the court, would protect the privacy interest inherent in the personal privacy exemption, 5 U.S.C. § 552(b)(6) (1970), from being indiscriminately disclosed if the terms of the

private interest, an agency should respect the desire of the person submitting the information, and a court, consistent with the overall policy of the FOIA, may order the agency to withhold that information.⁷²

STATUTORY EXEMPTION

Courts interpreting the exemption for matters that are "specifically exempted from disclosure by [another federal] statute"⁷³ have examined with care whether such statutes identify with particularity the matter sought to be withheld from compelled disclosure. In making this examination, these courts have been faced with the difficult task of reconciling the principle of full disclosure underlying the FOIA with the legislative history of the statutory exemption which indicates that the exemption would have no effect upon the validity of other statutes that curtail the availability of information to the public.⁷⁴ These conflicting forces have not prevented the courts from uniformly holding that a broad nondisclosure statute such as section 1905 of the Criminal Code, which prohibits disclosure of any trade secrets or commercial or financial information,⁷⁵ does not satisfy the "specifically exempted . . . by statute" criterion⁷⁶ but have resulted in inconsistent holdings where

release were unambiguous. This compromise has the favorable effect of fostering the fullest responsible disclosure while protecting the legitimate privacy interests of a person supplying information to his government in confidence. Strict adherence to this approach would require that the party submitting information which qualifies for an exemption be notified of its pending release by the agency in all cases so that it can make its objections known. As has been previously noted, however, see note 67 *supra*, there is no provision in the FOIA for consultation between agency and submitter when a request for information has been made.

72. See 5 U.S.C. § 552(a)(3) (Supp. II, 1972), *as amended*, Pub. L. No. 93-502, § (1)(b)(1) (Nov. 21, 1974). Disclosure could still be justified if the private interest would be protected adequately by deleting all identifying details. The weakness in the *Westinghouse* and *United States Steel* opinions is their implication that exemptions compel the withholding of all information which would qualify as exempt, regardless of a request by a private party for nondisclosure.

73. 5 U.S.C. § 552(b)(3) (1970).

74. See, e.g., *Hearings on S. 1666, supra* note 69, at 6 (statement of Senator Edward V. Long, Chairman of the Subcommittee). The House Report states that there are "nearly 100 statutes or parts of statutes which restrict" disclosure of information that are not affected by the FOIA. H.R. REP. No. 1497, at 10. It also refers to a House Committee Print which lists examples of such nondisclosure statutes—STAFF OF HOUSE COMM. ON GOVERNMENT OPERATION, 89TH CONG., 2D SESS., FEDERAL STATUTES ON THE AVAILABILITY OF INFORMATION (Comm. Print 1960).

75. 18 U.S.C. § 1905 (1970).

76. See, e.g., *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 425 F.2d 578, 580 n.5 (D.C. Cir. 1970); *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); *cf. California v. Richardson*, 351 F. Supp. 733, 735 (N.D. Cal. 1972), *aff'd sub nom. California v.*

a statute vests a degree of discretion in an agency in the disclosure decision.⁷⁷

One such discretionary nondisclosure statute that enjoyed mixed success in the courts in 1974 under the statutory exemption is section 1306 of the Social Security Act,⁷⁸ which prohibits "disclosure of . . . any file, record, report or other paper, or any information, obtained . . . by the Secretary . . . in the course of discharging [his] . . . duties under [the Social Security Act] . . . except as the Secretary . . . may by regulations prescribe."⁷⁹ The Court of Appeals for the Third

Weinberger, 505 F.2d 767 (9th Cir. 1974) (where the court concluded that since section 1905 permits disclosure when "authorized by law," and since disclosures made pursuant to the FOIA are provided for by law, the two statutes are not in conflict).

Several 1974 cases also considered section 1905. In *Westinghouse Elec. Corp. v. Schlesinger*, 34 Ad. L.2d 1074 (E.D. Va., Apr. 4, 1974), the court presented plaintiff's argument that section 1905 and section 709(e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-8(e) (1970), prohibited disclosure under the FOIA, but the court declined to discuss the merits. It chose instead to base its decision on the commercial or financial information exemption, 5 U.S.C. § 552(b)(4) (1970). 34 Ad. L.2d at 1077. See note 141 *infra*. The Federal Power Commission dismissed an asserted FOIA claim based on section 1905 in conjunction with the statutory exemption on the rationale of *California v. Richardson*: section 1905 applies only to disclosure not authorized by law. *Reliability of Elec. & Gas. Serv.*, 4 P.U.R.4th 163, 164 (FPC), *denying petition for rehearing* of 4 P.U.R. 4th 141 (F.P.C. 1974). And finally the District of Columbia Circuit followed its decision in *Grumman* by holding that section 1905 fails to qualify under the statutory exemption "because it does not itself define what information is exempt from disclosure." *Sears, Roebuck & Co. v. General Servs. Administration*, No. 74-1946, at 5 (D.C. Cir., Dec. 9, 1974), *aff'g in part and rev'g in part* 384 F. Supp. 996 (D.D.C. 1974); see *Robertson v. Butterfield*, 498 F.2d 1031, 1033 n.6 (D.C. Cir. 1974).

Statutes that protect specifically identified records are rarely litigated, but examples do show up in the reports when they are used to protect information outside the specified class. See, e.g., *Tax Analysts & Advocates v. IRS*, 505 F.2d 350 (D.C. Cir. 1974), where it was held that private letter rulings were not protected from disclosure by section 6103(a)(1) of Title twenty-eight, United States Code, 28 U.S.C. § 6103(a)(1) (1970), since section 6103 applied only to "[tax] returns." 505 F.2d at 353-54 & n.1. On the other hand, technical advice memoranda were protected from disclosure since the memoranda are prepared from the specific set of facts contained in a taxpayer's return. *Id.* at 355.

77. Compare *Evans v. Department of Transp.* 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972) (alternate holding that section 1504 of title forty-nine, United States Code, 49 U.S.C. § 1504 (1970), permitting the FAA to withhold information "when, in their judgment, a disclosure . . . is not required in the interest of the public . . ." satisfies the statutory exemption), with *Robertson v. Butterfield*, 498 F.2d 1031 (D.C. Cir. 1974) (holding that section 1504 does not satisfy the statutory exemption).

78. 42 U.S.C. § 1306 (1970).

79. *Id.* § 1306(a). Prior to 1974, three of the five district courts that considered section 1306 held that it does not prevent mandatory disclosure under the FOIA, while the remaining two district courts held that it may prevent disclosure under the statutory exemption. Ordering disclosure of information sought to be withheld under section 1306

Circuit in *Stretch v. Weinberger*⁸⁰ held that HEW extended-care facility survey reports⁸¹ were not protected from compelled disclosure by section 1306.⁸² Judge Hastie agreed with the district court that where a statute does not identify some specific class or category of information Congress considers appropriate for exemption, but instead grants discretion to an administrator to withhold information, it must also prescribe some guidelines for the exercise of that discretion before it satisfies the specificity requirement of the statutory exemption.⁸³ "Other-

were *Stretch v. Weinberger*, 359 F. Supp. 702 (D.N.J. 1973), *aff'd*, 495 F.2d 639 (3d Cir. 1974); *Serchuk v. Richardson*, Civ. No. 72-1212 (S.D. Fla., Nov. 28, 1972), *aff'd sub nom. Serchuk v. Weinberger*, 493 F.2d 663 (5th Cir. 1974), and *Schechter v. Richardson*, Civ. No. 710-72 (D.D.C., July 17, 1972). Allowing nondisclosure were *Schechter v. Weinberger*, Civ. No. 2319-72 (D.D.C., June 7, 1973), *ordered held in abeyance*, 498 F.2d 1015 (D.C. Cir. 1974), *rev'd*, 506 F.2d 1275 (D.C. Cir. 1974), and *California v. Richardson*, 351 F. Supp. 733 (N.D. Cal. 1972), *aff'd sub nom. California v. Weinberger*, 505 F.2d 767 (9th Cir. 1974). In 1974, several of these cases were decided at the circuit court level without reconciling the divergent views of the lower courts. See notes 80-97 *infra* and accompanying text.

80. 495 F.2d 639 (3d Cir. 1974).

81. Extended care facility survey reports are compiled by HEW to determine whether health care facilities in the states qualify for medicare reimbursements. *Id.* at 640.

82. *Id.*

83. *Id.*, Judge Hastie stated the rule to be that information is "specifically exempted from disclosure by statute"

only if a statute *either* identifies some class or category of items that Congress considers appropriate for exemption *or*, at least, sets out legislatively prescribed standards or guidelines that the Secretary must follow in determining what matter shall be exempted from disclosure. *Id.* (emphasis added).

He was of the opinion that section 1306 did not satisfy the first condition of specifically identifying a class of information. *Id.* *But see California v. Weinberger*, 505 F.2d 767 (9th Cir. 1974). For a view contrary to Judge Hastie's, see discussion at notes 89-96 *infra* and accompanying text.

The government argued that if a nondisclosure statute provided for "unrestricted discretion to exempt an undefined range of social security information from disclosure, then [the statutory exemption] preserve[d] that unfettered and unguided power." 495 F.2d at 640. In effect, its argument was that, as used in the statutory exemption, the word "'specifically' does not mean 'with some degree of particularity.'" *Id.* This argument is based on the Supreme Court's interpretation of the national security exemption, 5 U.S.C. § 552(b)(1) (1970), *as amended*, Pub. L. No. 93-502, § 2(a) (Nov. 21, 1974), in *EPA v. Mink*, 410 U.S. 73 (1973), and the similarity in language between that exemption and the statutory exemption. *See id.* at 95 n.* (Stewart, J., concurring); FOIA Comment 260-62. Judge Hastie distinguished *Mink*, saying that that opinion dealt with a different exemption and that the executive order used to classify the documents in that case "had been specifically identified in the legislative history of the [FOIA] as a valid exemption from disclosure that the Act would not alter." 495 F.2d at 641.

Congress has effectively overruled the Supreme Court in the *Mink* case by amending the national security exemption. Pub. L. No. 93-502, § 2(a) (Nov. 21, 1974), *amending* 5 U.S.C. § 552(b)(1) (1970).

The fact that Congress overruled *Mink* as it interpreted the national security exemp-

wise, there would be no escape from the unacceptable conclusion that the word 'specifically,' as used in [the statutory exemption], is surplusage."⁸⁴ Judge Hastie's opinion was subsequently adopted by the Court of Appeals for the Fifth Circuit in *Serchuk v. Weinberger*⁸⁵ and by the Court of Appeals for the District of Columbia Circuit in *Schechter v. Weinberger*,⁸⁶ over a strong dissent by Judge MacKinnon,⁸⁷ in opinions ordering the disclosure of other HEW survey reports. Although Judge MacKinnon could not sway his colleagues in the District of Columbia Circuit, his reasoning⁸⁸ was found more persuasive by Judge Smith of the Ninth Circuit Court of Appeals in *California v. Weinberger*.⁸⁹ Judge Smith was of the opinion that the word "specifically" as used in the statutory exemption required no more than that the exemption "be found in the words of the statute rather than the implication of it,"⁹⁰ and that "all records" of a given agency, as used in section 1306, satisfied this requirement even though the records "were not described with 'some degree of particularity.'"⁹¹

The difference between the opposing interpretations of section 1306 represented by *Stretch*, *Serchuk*, and *Schechter* on the one hand, and *California* and the dissent in *Schechter* on the other, is in the view they took of the agency discretion permitted by section 1306. *Stretch* and its progeny apparently interpreted the provision as permitting the Secretary to disclose or withhold information with unfettered discretion so as to amount to an "authorization for administrative exemption"⁹² rather than a specific statutory exemption. Conversely, Judge

tion, however, should not affect the significance of that decision for interpreting the similarly phrased statutory exemption which was left unchanged by the amendments.

84. 495 F.2d at 640. *But see* EPA v. Mink, 410 U.S. 73, 95 n.* (1973) (Stewart, J., concurring).

85. 493 F.2d 663 (5th Cir. 1974) (decision without published opinion). A copy of the action taken by the Fifth Circuit in *Serchuk* was provided the District of Columbia Circuit during its deliberations in *Schechter v. Weinberger*, 506 F.2d 1275 (D.C. Cir. 1974), and is set out in footnote four of that decision.

86. 506 F.2d 1275 (D.C. Cir. 1974).

87. Judge MacKinnon dissented in accordance with his view of the case as set forth in the District of Columbia Circuit's previous order, *Schechter v. Weinberger*, 498 F.2d 1015 (D.C. Cir. 1974) (MacKinnon, J., dissenting), which held *Schechter* in abeyance pending the Third Circuit's final disposition of *Stretch*. 506 F.2d at 1277 (MacKinnon, J., dissenting).

88. Judge MacKinnon was of the opinion that since the reports were obtained by the Secretary in the discharge of his duties under the Social Security Act, they fell within the express language of section 1306 and therefore at least within the literal language of the statutory exemption. 498 F.2d at 1015 (MacKinnon, J., dissenting).

89. 505 F.2d 767 (9th Cir. 1974).

90. *Id.* at 768.

91. *Id.*

92. *See* *Schechter v. Weinberger*, 506 F.2d 1275, 1276-77 (D.C. Cir. 1974); *Stretch*

MacKinnon and the court in *California* construed the words of section 1306—"no disclosure . . . shall be made"—as a specific congressional exemption which prohibits disclosure of *all* information received under the Social Security Act, while the words "except as the Secretary . . . may by regulation prescribe" merely allow the Secretary "to relax the absolute prohibition established by Congress."⁹³ In other words, it is the difference between a congressional authorization of an administrative exemption and a congressional exemption with power in an agency to relax it.⁹⁴

The distinction is a close one, but the result reached in *California* appears to better fit the language used in the statutory exemption. *All* the information received under the Social Security Act is capable of identification, and it is such information that Congress has "specifically" exempted from disclosure by section 1306. Moreover, nondisclosure statutes such as section 1306 which exempt *all* the information received by a specific agency or under a specific program can be analogized to the "born classified" concept recently endorsed by Congress in its consideration of the 1975 amendments⁹⁵ to the FOIA. Under this

v. Weinberger, 495 F.2d 639, 640 (3rd Cir. 1974). The quoted language appears to have been the argument put forward by the government in *Stretch*, and which *Stretch* rejected. See *id.* at 640. Judge Smith, in his *California* decision, stated that if he viewed section 1306 as an "authorization for administrative exemption" he would agree with the conclusion reached in *Stretch*. 505 F.2d at 768.

93. 505 F.2d at 768; *accord* Schechter v. Weinberger, 498 F.2d 1015-16 (D.C. Cir. 1974) (MacKinnon, J., dissenting).

94. *Id.* "[T]here is a real difference between a statute in which the congressional words themselves prohibit disclosure and a statute which authorizes an administrator to exempt from disclosure." *Id.*

95. See H.R. REP. No. 93-876, 93d Cong., 2d Sess. (1974), reprinted in U.S. CODE CONG. & AD. NEWS 6203, 6209 (1974). Congress indicates that this is one method to protect sensitive material from *in camera* inspection even under the recently passed amendments to the FOIA. *Id.* The amendments clarify the *de novo* review requirements by federal courts under section 552(a)(3) by providing that the court may make an *in camera* examination of all records withheld by agencies under *any* of the nine exempt categories of section 552(b). Pub. L. No. 93-502, § 1(b)(2) (Nov. 21, 1974), amending 5 U.S.C. § 552(a) (1970). This clarification, along with a change in the language of the national security exemption, Pub. L. No. 93-502, § 2(a) (Nov. 21, 1974), amending 5 U.S.C. § 552(b)(1) (1970), would permit a district court to examine *in camera* each requested document claimed by an agency to qualify under the national security exemption. Before the amendments, *in camera* review under the national security exemption would ordinarily be precluded. See *EPA v. Mink*, 410 U.S. 73 (1973); FOIA Comment 252-59. Even after the amendments, however, *in camera* inspection is *not* mandatory, and if an agency can establish through indexing, see *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977, *on remand*, 383 F. Supp. 1049 (D.D.C. 1974), that the requested material is in a class automatically classified pursuant to a statute employing the "born classified" concept and thus eligible for the statutory exemption, the agency's burden to justify its withholding should be met and inspection by the court unnecessary.

concept, where a statute provides that a particular type of information is classified, such information has classified status immediately upon its coming into existence.⁹⁶ "This means that there is no administrative discretion to classify, . . . but only to declassify such data."⁹⁷ Although there is merit in the *Stretch* court's argument that it would be consistent with the full disclosure policy of the FOIA to deny information gathered under the Social Security Act protection from compelled disclosure under section 1306, the construction of the *California* court is itself consistent with the FOIA policy of restricting the discretion of agency officials to withhold information. An official could not, at his discretion, *withhold* information that would otherwise be available to the public but only *disclose* information at his discretion that would otherwise *not* be available to the public. The result reached in *California* also has the advantages of furthering the congressional intent not to have the FOIA repeal other statutes by implication and of suggesting an analysis that was successfully used in other 1974 decisions.⁹⁸

96. For examples of such statutes, see 18 U.S.C. § 798 (1970) (communication information); 42 U.S.C. § 2162 (1970) (restricted data); 50 U.S.C. §§ 403(d)(3), (g) (1970) (intelligence sources and methods). See CONFERENCE REP. NO. 93-1200, 93d Cong., 2d Sess. (1974) reprinted in U.S. CODE CONG. & AD. NEWS 6221, 6226 (1974).

97. H.R. REP. NO. 93-876, *supra* note 95, at 6209.

98. The analysis of the statutory exemption in conjunction with section 1306 utilized in the *California* decision is not inconsistent with the results reached by courts construing other nondisclosure statutes in 1974. Section 1504 of the Federal Aviation Act, 49 U.S.C. § 1504 (1970), was found by the District of Columbia Circuit Court of Appeals in *Robertson v. Butterfield*, 498 F.2d 1031 (D.C. Cir. 1974), and by a district court in the same circuit in *Cutler v. Civil Aeronautics Board*, 375 F. Supp. 722 (D.D.C. 1974), not to specifically exempt from compelled disclosure under the FOIA information held by the FAA. Section 1504 provides that upon objection by any person to disclosure of information filed pursuant to the Federal Aviation Act the "Board or Administrator shall order such information withheld . . . when, in their judgment, a disclosure . . . would adversely affect the interests of such person and is not required in the interest of the public . . ." 49 U.S.C. § 1504 (1970). It is immediately obvious that this is one of the nondisclosure statutes that *California* labeled a congressional authorization of administrative exemption; as such it does not specifically exempt material from disclosure. *Cutler* recognized this distinction drawn by *California* between congressional language restricting access to *all* information received by an agency and language giving the agency unguided discretion to withhold information; *Cutler* makes the absence of the former language a part of its holding. 375 F. Supp. at 724. The circuit court in *Robertson*, on the other hand, bases its decision primarily upon the lack of specificity with which documents are identified in section 1504. 498 F.2d at 1032.

In light of the *California* opinion's demonstration that the narrowness of the class of documents identified is not determinative where Congress exempts *all* documents received under a specific act, the approach adopted by *Cutler* is preferable to the focus of *Robertson*. If the nondisclosure statute grants an agency unguided discretion to *withhold* information rather than to *disclose* it, the specificity with which the statute identifies the information should be a secondary consideration. The chief evil sought to be remedied by the FOIA is discretionary *withholding*, whether that discretion is applied to a narrow or a broad range of information.

When construing nondisclosure statutes that identify a class of documents with specificity but also provide a measure of agency discretion to withhold such information, the issue of congressional standards for the exercise of that discretion becomes important. In *B & C Tire Co. v. Internal Revenue Service*,⁹⁹ a district court found that handwritten notes compiled by a revenue agent in completing an audit were not contemplated by section 6103 of the Internal Revenue Code, which makes "[tax] returns" public records but "open to inspection only . . . under rules and regulations prescribed by" the Secretary of the Treasury.¹⁰⁰ The government was attempting to include the agent's notes within the protection of the statutory provision under the authority of a Treasury Regulation defining tax returns to include items relating to tax returns.¹⁰¹ Although recognizing that certain regulations were contemplated by the nondisclosure statute, the court ruled that a regulation which *expanded* the scope of the statute was invalid. Thus, material within the purview of the regulation but not of the statute itself was not exempted *by the statute*.¹⁰² However, the implication of *B & C*

99. 376 F. Supp. 708 (N.D. Ala. 1974).

100. 26 U.S.C. § 6103(a)(1) (1970). Section 6103(a)(1) provides in pertinent part:

Returns made with respect to taxes . . . upon which the tax has been determined by the Secretary or his delegate shall constitute public records; but, except as hereinafter provided . . . they shall be open to 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.*

See also 26 U.S.C. § 7213(a)(1) (1970), which makes it unlawful to divulge any information contained in an income return.

Properly interpreted, the nondisclosure statute construed in *B & C Tire Co.* is of the same type as section 1306 of the Social Security Act construed in *California*. Both statutes exempt an entire class of documents from disclosure and then permit a measure of agency discretion to relax the prohibition through valid regulations. The government in *B & C Tire Co.*, however, was attempting to use its authority to promulgate regulations to *withhold* documents not otherwise within the statute rather than to permit the *disclosure* of documents otherwise protected by the statute.

Section 6103(a)(1) was an issue in several other 1974 cases construing the statutory exemption. Private letter rulings were held not to qualify as "tax returns" within section 6103(a)(1) and thus were not exempt from compelled disclosure under the statutory exemption in *Tax Analysts & Advocates v. IRS*, 505 F.2d 350 (D.C. Cir. 1974) (holding that technical advice memoranda *did* qualify as information contained in a tax return); *accord*, *Fruehauf Corp. v. IRS*, 369 F. Supp. 108 (E.D. Mich. 1974); *Queen's-Way to Fashion, Inc. v. United States*, 34 Ad. L.2d 376 (Ct. Cl., Jan. 10, 1974) (discovery case). Sections 6103(a)(1) and 7213(a)(1) were held to be "a strong statutory bar to the disclosure of income tax information" in *Association of Am. R.R.s v. United States*, 371 F. Supp. 114 (D.D.C. 1974), thus preventing the ICC from publishing as part of a public document certain information contained in the returns of railroads. See notes 55-72 *supra* and accompanying text for a discussion of the compulsory nature of the exemptions.

101. Treas. Reg. § 301.6103(a)-1(3) (1974).

102. 376 F. Supp. at 711-12.

Tire Co. is that regulations restricting agency discretion within boundaries consistent with and authorized by the terms of a specific nondisclosure statute would satisfy the requirement for congressionally imposed guidelines on agency discretion for the purposes of the statutory exemption. The question of whether guidelines contained in administrative regulations are imposed *by statute* rather than by the agency was made easier in this case since the nondisclosure statute expressly provided for such regulations and the class of documents exempted from disclosure by statute was sufficiently narrow to provide the court a standard of comparison.

Incorporating external guidelines for the exercise of agency discretion to withhold information is less defensible, however, where the source of the guidelines is not mentioned in the nondisclosure statute itself. The Court of Appeals for the Fourth Circuit in *Sears v. Gottschalk*,¹⁰³ although recognizing that specificity in the class of documents exempted alone was sufficient to prevent mandatory disclosure under the FOIA,¹⁰⁴ also professed to find guidelines for the exercise of agency discretion under section 122 of the Patent Act, which exempts “[a]pplications for patents” except, *inter alia*, “in such special circumstances as may be determined by the Commissioner.”¹⁰⁵ The

103. 502 F.2d 122 (4th Cir. 1974).

104. “[A]pplications for patents” sufficiently identifies the class of items Congress deems appropriate for the exemption so that the absence of guidelines . . . for the exercise of the Commissioner’s discretion would not be determinative. *Id.* at 127.

105. 35 U.S.C. § 122 (1970). Ms. Sears requested the right to examine and copy patent applications in the abandoned application category; she conceded the confidentiality of pending applications under section 122, and she also recognized that granted applications are already open to public inspection and copying. *See id.* §§ 112, 154 (1970). Abandoned patent applications were found by the court to be included under “patent applications” for the purpose of section 122. 502 F.2d at 128.

The government’s preliminary argument, accepted by the district court, that a request for “all existing abandoned U.S. patent applications” was not a request for “identifiable records” within the meaning of section 552(a)(3) was rejected by the circuit court. *Id.* at 127. The purpose of the “identifiable records” requirement, according to the circuit court, was to generate a “reasonable description enabling the Government employee to locate the requested records.” *Id.* at 125; *see Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970); H.R. REP. No. 1497, at 9; S. REP. No. 813, at 8. The government had made no claim that it did not know what documents the plaintiff wanted nor where to locate them. *Sears* announced the rule of the Fourth Circuit to be that “if otherwise locatable, . . . equitable considerations of the costs, in time and money, of making records available for examination do not supply an excuse for non-production.” 502 F.2d at 126.

The recent amendments to the FOIA change the requirement that a request be for “identifiable records” in section 552(a)(3) to a request that “reasonably describes such records.” Pub. L. No. 93-502 § 1(b)(1) (Nov. 21, 1974), *amending* 5 U.S.C. § 552 (a)(3) (Supp. II, 1972). The purpose of the change in language is to insure that a requirement for a specific title or file number cannot be the only requirement

court found this phrase to incorporate the then existing administrative standards for disclosure of patent applications embodied in the Patent Office rule of secrecy.¹⁰⁶ Since the standards found in that rule sufficiently restricted the scope of the Commissioner's discretion to qualify under the "specifically exempted" language of the statutory exemption and since the legislative history of section 122 clearly showed that the secrecy rule was intended to be codified by section 122,¹⁰⁷ the court found "no insuperable barrier to reading the guidelines for the exercise of the Commissioner's discretion to disclose back into [section 122]."¹⁰⁸

The attempt in *Sears* to qualify section 122 for the statutory exemption by going outside the statute to discover standards restricting agency discretion is unsatisfactory. The Patent Office rule of secrecy is not mentioned in section 122, nor does the statute make clear what are the "special circumstances" that would permit disclosure. Moreover, such groping is unnecessary. The discretion permitted the Commissioner under section 122 of the Patent Act is the same as that permitted under section 1306 of the Social Security Act—discretion to *disclose* information otherwise statutorily exempt, rather than discretion to *withhold* it. The distinction drawn by the *California* decision, and apparently missed by *Sears*, would have been sufficient to qualify section 122 as a statute contemplated by the statutory exemption without resorting to an artificial discovery of standards restricting the exercise of agency discretion.

A proper interpretation of the 1974 litigation under the statutory exemption, then, would suggest the existence of at least two methods by which a nondisclosure statute may satisfy the "specifically exempted" language of the exemption. The first is where the statute exempts *all* the information received by a given agency pursuant to a specific statute or program, or identifies some class or category of exempt material

of an agency for the identification of documents. A "description" of a requested document would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort. H.R. REP. NO. 93-876, 93d Cong., 2d Sess. (1974), reprinted in U.S. CODE CONG. & AD. NEWS 6203 (1974).

The emphasis on the ability to locate the requested records supports *Sears'* construction of the original language of section 552(a)(3). The qualification that requested records must be locatable "with a reasonable amount of effort," however, should not be allowed to shield records difficult to locate solely due to an agency's disorganization or lack of adequate indexing. See FOIA Comment 290 & n.226.

106. See 37 C.F.R. §§ 1.14(a), (b) (1974). Subsection (a) establishes the secrecy of pending patent applications, while subsection (b) extends that secrecy to abandoned patent applications.

107. See H.R. REP. NO. 1923, 82d Cong., 2d Sess. 7 (1952); S. REP. NO. 1979, 82d Cong., 2d Sess. 6 (1952).

108. 502 F.2d at 127.

when there is no difficulty identifying the information.¹⁰⁹ The other category consists of nondisclosure statutes that permit an agency discretion either to disclose information that would otherwise be exempt by statute, or, if statutory guidelines are provided, to withhold otherwise non-exempt material. Only where it is not clear from the statutory language whether a particular item of information is contemplated by the statute or where the statute permits an agency unbridled discretion to *withhold* information from disclosure should inclusion under the statutory exemption be denied.

CONFIDENTIAL INFORMATION EXEMPTION

Also exempted from the FOIA's mandate of compelled disclosure are "trade secrets and commercial or financial information obtained from a person and privileged or confidential."¹¹⁰ Currently, the most troublesome problem for the courts is to determine when concededly commercial or financial information obtained from a person is "confidential" within the meaning of the exemption.¹¹¹ The legislative his-

109. *But see* 18 U.S.C. § 1905 (1970) (prohibiting disclosure of any "trade secrets or commercial or financial information"). Section 1905 has been uniformly held *not* to satisfy the statutory exemption. See notes 75-76 *supra* and accompanying text. A possible distinguishing feature of section 1905 is that it prohibits the disclosure of several *general* types of information without identifying any specific statute or program under which the information is received.

110. 5 U.S.C. § 552(b)(4) (1970). Previous courts have relied heavily on a literal interpretation of the exemption to determine whether it applies to information withheld under its authority. Thus, to qualify for protection the material must be (1) a trade secret, or (2) information which is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential. See *Getman v. NLRB*, 450 F.2d 670, 673 (D.C. Cir. 1971), quoting *Consumers Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796, 802 (S.D.N.Y. 1969), *dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971). See also *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 425 F.2d 578, 582 (D.C. Cir. 1970); *K. DAVIS* § 3A.19 (Supp. 1970). *But see* *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591 (D.P.R. 1967). However, matter within the exemption is generally released if it can "be rendered sufficiently anonymous by deletion of the filing party's name and other identifying information." *National Cable Television Ass'n v. FCC*, 479 F.2d 183, 195 (D.C. Cir. 1973); see *Fisher v. Renegotiation Bd.*, 473 F.2d 109 (D.C. Cir. 1972); *Grummond Aircraft Eng'r Corp. v. Renegotiation Bd.*, 425 F.2d 578, 580-88 (1970) (where the practice originated); *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938-39 (D.C. Cir.); *cert. denied*, 400 U.S. 824 (1970); *M.A. Schapiro & Co. v. SEC*, 339 F. Supp. 467 (D.D.C. 1972).

111. See FOIA Comment 264-66.

The 1974 case of *Petkas v. Staats*, 501 F.2d 887 (D.C. Cir. 1974), *rev'g* 364 F. Supp. 680 (D.D.C. 1973), settled a dispute among the district courts within the District of Columbia Circuit, compare *Ditlow v. Brinegar*, 494 F.2d 1073 (D.C. Cir. 1974), *cert. denied*, 95 S. Ct. 238 (1974), and *Tax Analysts & Advocates v. IRS*, 362 F. Supp. 1292 (D.D.C. 1973) (*Robinson, J.*) *modified in part and remanded*, 505 F.2d 350 (D.C. Cir. 1974), with *Petkas v. Staats*, 364 F. Supp. 680 (D.D.C. 1973) (*Parker, J.*), *rev'd*, 501

tory has been criticized for being unresponsive to the version of the exemption enacted into law¹¹² and hence has provided little guidance for courts construing the breadth of the exemption.¹¹³

In 1974, the District of Columbia Circuit Court of Appeals in *National Parks & Conservation Association v. Morton*¹¹⁴ defined the phrase "confidential" for purposes of the exemption and provided specific guidelines for its application. In *National Parks*, a nonprofit educational and scientific organization sought disclosure of audits and annual financial statements filed in accordance with a statutory mandate by companies operating concessions in the nation's parks.¹¹⁵ The district court had granted summary judgment to the government on the basis of the confidential information exemption, having found that the information was of the kind "that would not generally be made available for public perusal."¹¹⁶ The circuit court discerned no error in the district court's finding, but thought that, without more, such a finding was insufficient to support application of the exemption.¹¹⁷ The circuit court declared that nondisclosure of financial information based on the "confidential" criterion of the exemption also should be justified by the legislative purpose underlying the exemption.¹¹⁸ An exhaustive review of that provision's legislative history¹¹⁹ convinced the court that it was intended to serve a dual purpose. Phrasing the protected interests in terms of guidelines to be utilized by courts in applying the confidential information exemption, the court concluded that for information to be "confidential," its disclosure must be likely to have "either of the following effects: (1) to impair the Government's ability to ob-

F.2d 887 (D.C. Cir. 1974), by holding that an administrative promise to maintain the confidentiality of information made to a private party submitting information to the government is not, in and of itself, sufficient to qualify that material for protection under the confidential information exemption. 501 F.2d at 889.

112. See K. DAVIS § 3A.19, at 148-51 (Supp. 1970); Katz, *supra* note 7, at 1265-67.

113. The language of the exemption itself is thought by some to be capable of several constructions. See ATTORNEY GENERAL'S MEMORANDUM 32-34; K. DAVIS § 3A.19, at 147 (Supp. 1970).

114. 498 F.2d 765 (D.C. Cir. 1974).

115. *Id.* at 766. These statements are required to be filed with the Park Service. 16 U.S.C. § 20g (1970). Disclosure of the material to the Park Service is a mandatory condition of the concessioners' right to operate in national parks. 498 F.2d at 770.

116. *National Parks & Conservation Ass'n v. Morton*, 351 F. Supp. 404, 407 (D.D.C. 1972), *rev'd*, 498 F.2d 765 (D.C. Cir. 1974); see *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 709 (D.C. Cir. 1971); *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 425 F.2d 578, 582 (D.C. Cir. 1970); *M.A. Schapiro & Co. v. SEC*, 339 F. Supp. 467 (D.D.C. 1972); S. REP. No. 813, at 9.

117. 498 F.2d at 770.

118. *Id.* at 767.

119. See *id.* at 767-70.

tain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."¹²⁰

Although these guidelines were successfully applied in several other 1974 decisions,¹²¹ the first guideline arguably was misapplied

120. *Id.* at 770 (footnote omitted).

121. The guidelines set forth in the *National Parks* case have subsequently been applied approvingly by 1974 courts considering the confidentiality issue. *See, e.g.*, *Petkas v. Staats*, 501 F.2d 887, (D.C. Cir. 1974); *Rural Housing Alliance v. United States Dep't of Agriculture*, 498 F.2d 73, 78-79 (D.C. Cir. 1974); *Consumers Union of United States, Inc. v. Saxbe*, 34 Ad. L.2d 992, 997 (D.D.C. May 9, 1974). *Pacific Architects & Eng'rs, Inc. v. Renegotiation Bd.*, 505 F.2d 383 (D.C. Cir. 1974), also indicated approval of the *National Parks* guidelines. Additionally, the *Pacific Architects* court outlined the "detailed justification" required by *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), and *Cuneo v. Schlesinger*, 484 F.2d 1086 (D.C. Cir. 1973), to accompany the index of documents submitted to the court to aid it in resolving the conflicting claims as to the exempt status of the documents. 505 F.2d at 385. The index supporting the confidential status should include

- (a) the extent to which data of the sort in dispute is customarily disclosed to the public, with specific factual or evidentiary material to support the conclusion reached;
- (b) the extent to which disclosure of the information will impair the government's ability to obtain necessary information of this type in the future, with specific factual or evidentiary material to support the conclusion reached;
- (c) the extent to which disclosure of the information will cause substantial harm to the competitive position of the person from whom the information is obtained, with specific factual or evidentiary material to support the conclusion reached; and
- (d) the extent to which any harms of the type mentioned in (b) and (c) should be reduced or eliminated by nondisclosure of the identity of the person submitting the information in dispute. *Id.*

Two 1974 cases decided before *National Parks* reached conclusions consistent with its guidelines under the confidential information exemption. *Westinghouse Elec. Corp. v. Schlesinger*, 34 Ad. L.2d 1074 (E.D. Va., Apr. 4, 1974) (release of Employer Information Report and Affirmative Action Program required to be filed by all government contractors would harm individual's competitive position); *Levine v. United States*, 34 Ad. L.2d 633 (S.D. Fla., Mar. 2, 1974) (information on custom declaration forms not confidential or privileged and therefore not protected by the confidential information exemption).

Application of the *National Parks* guidelines has not been uniform, however. The district court in *Ditlow v. Schultz*, 379 F. Supp. 326 (D.D.C. 1974), purported to follow *National Parks* in stating by way of dictum that much of the information contained on United States customs declaration forms was "confidential" and therefore protected from disclosure by the confidential information exemption. *Id.* at 329. But the court made no finding that the information on the customs declaration forms was commercial or financial, and there was no finding that the "legitimate private interests" likely to be harmed included the individual's competitive position in a business context. Absent such findings, the confidential information exemption could not properly be invoked to protect the custom declaration forms.

Another district court case, decided before *National Parks*, may have reached the proper decision by finding a report by a private defense contractor relating to possible causes of the crash of an Air Force aircraft protected under the confidential information exemption, but the court's emphasis on the government's pledge of confidentiality is clearly inconsistent with the objective determination required after *National Parks*. *Brockway v. Department of the Air Force*, 370 F. Supp. 738 (N.D. Iowa 1974). See note 111 *supra*.

by the *National Parks* court.¹²² Since most, if not all, of the information in *National Parks* was supplied pursuant to statute and was a mandatory condition of the concessioners' right to operate in the parks,¹²³ the court concluded there was "presumably no danger that public disclosure [would] impair the ability of the Government to obtain this information in the future."¹²⁴ However, the government's ability to acquire information in the future could be impaired. A person who knows that business information he provides to the government will be protected from disclosure is more likely to comply more freely and fully with statutory directives, thus easing the task of the government in collecting such information. If the information cannot be protected, however, a person is more likely to resist solicitation efforts by the government and to supply information reluctantly even when compelled to do so by statute.¹²⁵

The "trade secret" part of the exemption received judicial attention by the District of Columbia Court of Appeals when it was decided that a noncommercial scientist's research design was "not literally" a trade secret or item of commercial information and therefore not eligible for protection. *Washington Research Project, Inc. v. HEW*, 504 F.2d 238 (D.C. Cir. 1974).

122. The court did not have sufficient evidence to apply the second guideline. On the record before it the court could not accept the Association's argument that there existed no threat of substantial harm to the competitive position of the concessioners, and thus remanded to the district court for additional evidence. 498 F.2d at 770.

Plaintiff Association argued that since section 20d of Title sixteen, United States Code, 16 U.S.C. § 20d (1970), established a preference in favor of the renewal of contracts of concessioners satisfactorily performing under existing contracts, the concessioners were in effect monopolists and therefore had no competitive position to be impaired. 498 F.2d at 770. The court recognized this as a compelling argument but hypothesized that disclosure of information about concession activities may result in injury to its competitive position in a non-concession enterprise and thought the government should be permitted to introduce any evidence to that effect. *Id.* at 770-71. If only part of the information was found to be confidential under the guidelines, the district court was instructed to delete such portions and disclose the rest. *Id.*

123. See note 115 *supra*.

124. 498 F.2d at 770.

125. It is not clear whether the *National Parks* court overlooked this argument or purposefully omitted it to indicate concern with the government's *complete inability* to obtain such information, rather than the *degree of difficulty* encountered in the process of collecting the information. Assuming the court was concerned only with the complete inability of the government to obtain information, application of the first part of the *National Parks* test may initially appear to have a peculiar effect by protecting information voluntarily submitted to the government while denying protection to information required to be submitted to the government by statute—presumably that which is most vital to governmental operation. This situation may not be significant, however, since most of the information required by statute to be submitted may find protection under the "competitive position" part of the confidentiality test or under other exemptions to the FOIA. Although it is also likely that much of the information found to be confidential under one or both parts of the test may also properly be brought under the "trade secrets" or "privileged" language of the exemption, the *National Parks* approach provides

PERSONNEL AND MEDICAL FILES EXEMPTION

The FOIA also exempts from mandatory disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."¹²⁶ Prior to 1974, two circuit courts of appeal endorsed conflicting approaches to the proper application of the "clearly unwarranted invasion of personal privacy" criterion. In *Getman v. NLRB*¹²⁷ the District of Columbia Circuit Court of Appeals suggested that "a court reviewing the matter *de novo* [should] balance the right of privacy of affected individuals against the right of the public to be informed," with the balance tilted in favor of disclosure.¹²⁸ The Fourth Circuit Court of Appeals implicitly rejected the balance of interest test in *Robles v. EPA*¹²⁹ by stating that the interests of the person requesting the information and the need of the public to be informed had nothing to do with personal privacy and that to consider these interests would misconceive the plain intent of the Act.¹³⁰ Thus, under the latter approach, only the degree of invasion of personal privacy need be measured.¹³¹

a standard applicable where such a treatment of requested information would not be appropriate.

126. 5 U.S.C. § 552(b)(6) (1970).

127. 450 F.2d 670 (D.C. Cir. 1971). *Getman* was the first federal appellate court decision to reach the merits of an FOIA claim under the personnel and medical files exemption. In *Getman*, law professors engaged in a study of NLRB voting practices successfully sought to compel the Board to disclose the names and addresses of employees eligible to vote in certain elections.

128. 450 F.2d at 674. In applying this balancing of interests test, the *Getman* court's initial inquiry was whether and to what extent disclosure of the information sought would constitute an invasion of privacy of any person. *Id.* If an invasion of privacy is found, the court "must also weigh the public interest purpose of [those seeking disclosure]". *Id.* at 675. Only when the public interest purpose of those seeking disclosure outweighs the invasion of personal privacy will the court order the information disclosed.

Notice the subtle shift in emphasis between the phrases "right of the public in being informed," *id.* at 674, and "public interest purpose of those seeking disclosure," *id.* at 675. In the former, the focus is on the right of the *general public* to the information versus the right to privacy of an individual, while in the latter the focus is on the *worthiness of purpose* of those seeking disclosure. As is explained more fully in the text accompanying notes 142-44 *infra*, a court's emphasis upon the former is not necessarily incompatible with an inquiry into the invasion of personal privacy. Considering the worthiness of a request for disclosure as the balancing factor leads to additional problems. *Cf. id.* at 677 n.24. See notes 145-48 *infra* and accompanying text.

129. 484 F.2d 843 (4th Cir. 1973). In *Robles*, the plaintiffs successfully sought disclosure from the EPA of the results of a survey of homes and public buildings tested for radioactive emissions, including the names and addresses of the occupants.

130. *Id.* at 846-47; see K. DAVIS § 3A.4, at 120-21 (Supp. 1970).

131. 484 F.2d at 848. *Robles* also construed the term "similar files" for purposes of the personnel and medical files exemption. Focusing on the words "personnel and medical," the court stated that such files must have the

Three 1974 decisions indicate that the *Getman* balance of interests approach is gaining support. Citing *Getman*, the court in *Rural Housing Alliance v. United States Department of Agriculture*¹³² remanded the case to the district court to balance the invasion of personal privacy which might be caused by the disclosure of a report, with the names deleted, of case studies produced in an investigation into alleged racial discrimination in a government loan program, against the public-interest purpose of the one seeking the information.¹³³ Similarly, the Third Circuit Court of Appeals in *Wine Hobby USA, Inc. v. Internal Revenue Service*¹³⁴ weighed the commercial interest of a seller-distributor of home winemaking equipment in obtaining a list of

same characteristics of confidentiality that ordinarily attach to information in medical or personnel files; that is, to such extent as they contain "intimate details" of a "highly personal" nature, they are within the umbrella of the exemption. *Id.* at 845, citing *Getman v. NLRB*, 450 F.2d 670, 675 (D.C. Cir. 1971).

The court further stated that the information must relate to a specific person or individual in records similar to a health history or employment record; the exemption would have "no relevancy to information that deals with physical things." *Id.*; cf. K. DAVIS § 3A.22, at 164 (Supp. 1970). Thus, *Robles* ordered the disclosure of an EPA survey of homes and public buildings tested for radioactive emissions.

The confusion generated by requiring records to contain "intimate details" of a "highly personal" nature in order to qualify as "similar files" is illustrated by two 1974 cases that purport to follow *Robles* and apply its standard to the same type of records with conflicting results. The court in *Ditlow v. Shultz*, 379 F. Supp. 326 (D.D.C. 1974), found United States customs declaration forms to be a "similar file," while another in *Levine v. United States*, 34 Ad. L.2d 633 (S.D. Fla., Mar. 2, 1974), rejected this contention without discussion. The *Ditlow* court seemed to have focused on the class of information generally found in personnel or medical files in holding that information concerning names, ages, citizenship, residency, relationship of family members, and acquisitions while abroad contained in the customs declaration forms satisfied the *Robles* criteria.

In *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133 (3d Cir. 1974), the Third Circuit Court of Appeals, in finding a list of names of home winemakers to be within the phrase "similar files," appears to have taken a sounder approach by interpreting that term broadly in order to prevent the release of requested information that would result in a clearly unwarranted invasion of personal privacy. A narrow interpretation which focuses on the similarity that the requested files have to personnel and medical files might preclude inquiry into the more crucial question of whether there will be an unwarranted invasion of personal privacy. *Id.* at 135. The court in *Wine Hobby* found the common denominator to be the "personal quality of information in the file" and did not "believe that the use of the term 'similar' was intended to narrow the exemption from disclosure and permit the release of files which would otherwise be exempt because of the resultant invasion of privacy." *Id.*; accord, *Rural Housing Alliance v. United States Dep't of Agriculture*, 498 F.2d 73, 77 (D.C. Cir. 1974) (the exemption was designed to protect individuals from public disclosure of intimate details of their lives).

132. 498 F.2d 73, 76 (D.C. Cir. 1974).

133. *Id.* at 77-78. The district court was also instructed to consider whether the information sought was available from other sources, such as asking the individuals independently for similar information. *Id.*

134. 502 F.2d 133 (3d Cir. 1974).

names and addresses of persons who had applied for a federal home winemaking permit against the invasion of privacy which would result from such a disclosure.¹³⁵ Additionally, the Second Circuit in *Rose v. Department of the Air Force*¹³⁶ acknowledged that the interest of cadets in preserving the secrecy of case summaries of adjudications of the Honor and Ethics Code Committee of the Air Force Academy was not the only interest to be considered in determining whether disclosure was mandated by the FOIA.¹³⁷ While recognizing that judicial balancing of competing interests does not promote the promulgation of definitive disclosure guidelines¹³⁸ and that it is rejected as prohibited by the FOIA by courts considering the other exemptions,¹³⁹ both *Wine Hobby* and *Rural Housing* interpret the "unless clearly unwarranted" language of the exemption as mandating an exception to this prohibition.¹⁴⁰ Further support for this reading is found in the legislative history of the personnel and medical files exemption.¹⁴¹

135. Wine Hobby wanted the names and addresses of the registrants in order to forward catalogues and sales announcements regarding its products. *Id.* at 134. The court found this attempt to exploit a private commercial interest to have no direct or indirect public interest purpose and could not outweigh the relatively minor invasion of personal privacy which would occur from the receipt of "unsolicited and possibly unwanted mail from Wine Hobby" *Id.* at 137. Disclosure was thus denied. *Id.*

136. 495 F.2d 261 (2d Cir. 1974).

137. *Id.* at 268. The court stated that the goal of the personnel and medical files exemption was "a workable compromise between individual rights 'and the preservation of public rights to Government information.'" *Id.* at 269, citing H.R. REP. NO. 1497, at 11. The case was remanded to the district court with instructions to view the case summaries *in camera* to determine whether, after suitable deletions, any invasion of privacy would be "clearly unwarranted." *Id.* at 268.

The case summaries were sought by a graduate of the United States Air Force Academy to document a law review article concerning the disciplinary systems at the service academies. *Id.* at 262.

138. Definitive guidelines are a goal of the FOIA. See H.R. REP. NO. 1497, at 2, S. REP. NO. 813, at 3.

139. See, e.g., *Getman v. NLRB*, 450 F.2d 670, 674 n.10 (D.C. Cir. 1971).

140. 502 F.2d at 136; 498 F.2d at 77. See also *Getman v. NLRB*, 450 F.2d 670, 674 n.10 (D.C. Cir. 1971).

141. The Senate Report states:

The phrase "clearly unwarranted invasion of personal privacy" enunciates a policy that will involve a *balancing of interests* between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information. S. REP. NO. 813, at 9 (emphasis added).

It would be consistent with the overall policy of the FOIA, however, and more in line with *Robles* to interpret the Senate Report's remarks about a balancing of competing interests to mean that Congress *itself* struck the balance with the phrase "clearly unwarranted," in which case the courts have merely to apply that standard without further balancing in particular cases. The House Report appears stronger on this point:

The limitation of a "clearly unwarranted invasion of personal privacy" *provides a proper balance* between the protection of an individual's right of privacy and the preservation of the public's right to Government information

Although some balancing is probably required in the application of this provision, there is a danger that courts will weigh the wrong interests. For instance, the *Getman*, *Wine Hobby*, and *Rural Housing* courts looked to the particular purpose of the person requesting the information to determine the interest in favor of disclosure.¹⁴² In contrast, *Rose* measured the interest of the public in obtaining the information.¹⁴³ The latter approach seems preferable, since weighing the interest of the person seeking disclosure raises the undesirable possibility that the same information would be available to one party while simultaneously refused to another.¹⁴⁴ An approach more consistent with the overall purpose of the Act—to insure disclosure of agency-held information to “any person”—would be to consider the interest of the public in having access to the information, rather than the particular individual's purpose. Moreover, balancing of the public's interest in disclosure would avoid the difficulties encountered in yet another 1974 opinion, *Ditlow v. Shultz*.¹⁴⁵ In balancing the possible invasion of privacy resulting from disclosure of the names on United States customs declaration forms¹⁴⁶ against the need of the plaintiff to acquire the information, the court noted that a corollary of releasing information only to persons having a worthy motive is that the information must be used only by that person and only for the purpose which the court found to justify its disclosure.¹⁴⁷ Such a release to selected individuals would cause an intractable enforcement problem,¹⁴⁸ and the FOIA has no provision anticipating a solution. It would seem that any after-the-fact penalty imposed by a court—for contempt, perhaps—for any violation of the terms of release would be inadequate since the privacy interest

. . . . H.R. REP. NO. 1497, at 11 (emphasis added).

See also Davis, *supra* note 7, at 766, 806.

142. 450 F.2d at 75; 502 F.2d at 137; 498 F.2d at 78.

143. 495 F.2d at 269.

144. This was a criticism of the earlier version of section three of the APA that the FOIA was intended to correct. See, e.g., *Hearings on S. 1666*, *supra* note 69, at 7, 16, 27, 35, 60, 82, 95, 109, 140, 237; H.R. REP. NO. 1497, at 4-6; S. REP. NO. 813, at 5.

145. 379 F. Supp. 326 (D.D.C. 1974).

146. The plaintiff in *Ditlow* sought disclosure of the names and addresses from customs declaration form 6059-B completed by all persons who entered the country by air during a certain period from points in Asia and Australia in order to fulfill their obligations as representatives of that class of all passengers who were charged unlawful fares in violation of law as alleged in a related class action. *Id.* at 327.

147. *Id.* at 330, quoting *Getman v. NLRB*, 450 F.2d 670, 677 n.24 (D.C. Cir. 1971). The necessity of discussing the enforcement of such restricted disclosure was sidestepped in *Ditlow*, however, when the court ruled that the availability of the names to the plaintiff through discovery in a related class action tipped the balance in favor of personal privacy in the FOIA suit. *Id.* at 331.

148. See generally Note, *Invasion of Privacy and the Freedom of Information Act: Getman v. NLRB*, 40 GEO. WASH. L. REV. 527, 539 (1972).

sought to be protected would have already suffered. That problem is avoided if the interest balanced against the invasion of personal privacy is the interest of the general public in having access to the information. Then, disclosure of the information to *any* member of the public would be in accord with the terms of release.

INVESTIGATORY FILES EXEMPTION

The investigatory files exemption to the FOIA has been extensively modified and its protection restricted by recent amendments.¹⁴⁹

149. Pub. L. No. 93-502, § 2(b) (Nov. 21, 1974), *amending* 5 U.S.C. § 552(b)(7) (1970). As amended, the exemption protects matters that are

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 . . . *Id.*

No longer is an entire *file* exempt from compelled disclosure but only such *records* in the file whose secrecy is justified by the specifically enumerated criteria. Prior to this amendment, the exemption protected "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 5 U.S.C. § 552(b)(7) (1970), *amended in* Pub. L. No. 93-502, § 2(b) (Nov. 21, 1974). The pertinent legislative history of the latter clearly indicates that one purpose of the exemption was to protect the government's "case in court" from premature discovery by a party in litigation with the government. H.R. REP. No. 1497, at 11; S. REP. No. 813, at 9; *see* Bristol-Myers Co. v. FTC, 424 F.2d 935, 939 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970); Cooney v. Sun Shipbuilding & Drydock Co., 288 F. Supp. 708, 711-12 (E.D. Pa. 1968); Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591, 593 (D.P.R. 1967); K. DAVIS § 3A.23, at 164-65 (Supp. 1970). Judicial recognition of this purpose was reinforced in the pre-amendment 1974 cases. *See, e.g.,* Wellman Indus., Inc. v. NLRB, 490 F.2d 427 (4th Cir.), *cert. denied*, 95 S. Ct. 61 (1974) (employer not entitled to disclosure of affidavits obtained by an NLRB investigator during his inquiry into union objections to a representation election); Westinghouse Elec. Corp. v. Schlesinger, 34 Ad. L.2d 1074, 1079 (E.D. Va., Apr. 4, 1974) (purpose of investigatory files exemption is only to prevent premature discovery by a defendant in an enforcement proceeding); *cf.* Black v. Sheraton Corp. of America, 371 F. Supp. 97 (D.D.C. 1974) (discovery case).

Under the original language of the exemption, the cases were in disagreement whether, once the litigation was terminated or abandoned without prospect of future enforcement proceedings being brought, the exemption continued to apply even to those files concededly "investigatory." *Compare* Wellford v. Hardin, 444 F.2d 21, 24 (4th Cir. 1971); Bristol-Myers Co. v. FTC, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970); M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467 (D.D.C. 1972); *and* Cooney v. Sun Shipbuilding & Drydock Co., 288 F. Supp. 708 (E.D. Pa. 1968) (all requiring enforcement proceedings to be "imminent" before the exemption was to apply), *with* Rural Housing Alliance v. United States Dep't of Agriculture, 498 F.2d 73 (D.C. Cir. 1974); Ditlow v. Brinegar, 494 F.2d 1073 (D.C. Cir.), *cert. denied*, 95 S. Ct. 238

However, since the amendment carries over some of the language of the original exemption to the effect that before material is found to be within its purview the material must be shown to be in an "investigatory" file that is "compiled for law enforcement purposes,"¹⁵⁰ the pre-amendment cases interpreting this language will presumably retain precedential value. Those cases¹⁵¹ generally focused on "how and under what circumstances the files were compiled,"¹⁵² exempting the information if it "relate[d] to anything that [could] fairly be characterized as an enforcement proceeding."¹⁵³

In 1974, courts experienced great difficulty in applying these standards to determine whether an agency's *internal monitoring* of its own employees to insure that they were acting in accordance with its statutory mandate and regulations was an *investigation* for law enforcement purposes. The distinction between an investigation for purposes of prosecution and routine monitoring of day-to-day agency activities is difficult to perceive. Most information gathered by the government concerning its internal operations ultimately is used to determine the legality of activities within an agency and is thus in one sense for "law

(1974); *Aspin v. Laird*, 491 F.2d 27 (D.C. Cir. 1973); *Weisberg v. United States Dep't of Justice*, 489 F.2d 1195 (D.C. Cir. 1973), *cert. denied*, 94 S. Ct. 2405 (1974); *Frankel v. SEC*, 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972); and *Evans v. Department of Transp.*, 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972) (all applying the exemption even beyond the conclusion of all relevant enforcement proceedings). The effect of the amended exemption would be to support the earlier line of cases requiring the prospect of law enforcement proceedings for the exemption to be available. See Pub. L. No. 93-502, §§ 2(b)(7)(A), (B) (Nov. 21, 1974), *amending* 5 U.S.C. § 552(b)(7) (1970). The amended exemption also supports those cases denying protection to information when disclosure would not injure the government in the particular case. Compare *Consumers Union of United States, Inc. v. Saxbe*, 34 Ad. L.2d 992 (D.D.C. May 9, 1974) (investigatory files exemption improperly invoked where there was no problem with premature disclosure or revealing of confidential sources), with *Ditlow v. Brinegar*, 494 F.2d 1073 (D.C. Cir.), *cert. denied*, 95 S. Ct. 238 (1974); and *Green v. Kleindienst*, 379 F. Supp. 326 (D.D.C. 1974) (once documents are classified as "investigatory files compiled for law enforcement purposes" the exemption attaches regardless of whether compelled disclosure would injure the government in the particular case).

150. Pub. L. No. 93-502 § 2(b) (Nov. 21, 1974), *amending* 5 U.S.C. § 552(b)(7) (1970).

151. See *Weisberg v. United States Dep't of Justice*, 489 F.2d 1195, 1197 (D.C. Cir. 1973), *cert. denied*, 94 S. Ct. 2405 (1974); *Aspin v. Department of Defense*, 491 F.2d 24, 27 (D.C. Cir. 1973). See also *Ditlow v. Brinegar*, 494 F.2d 1073, 1074 (D.C. Cir.), *cert. denied*, 95 S. Ct. 238 (1974).

152. *Weisberg v. United States Dep't of Justice*, 489 F.2d 1195, 1202 (D.C. Cir. 1973), *cert. denied*, 94 S. Ct. 2405 (1974); *accord*, *Ditlow v. Brinegar*, 494 F.2d 1073, 1074 (D.C. Cir.), *cert. denied*, 95 S. Ct. 238 (1974).

153. *Aspin v. Department of Defense*, 491 F.2d 24, 27 (D.C. Cir. 1973), *quoting* *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 939 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

enforcement purposes." Further, this information could conceivably support disciplinary or even criminal actions against individual employees, and the statutory language appears broad enough to encompass all such internal agency audits. However, such a broad reading of the exemption would defeat a primary purpose of the Act: "to provide public access to information concerning the Government's own activities."¹⁵⁴

Recognizing these difficulties, the District of Columbia Circuit Court of Appeals in *Rural Housing Alliance v. United States Department of Agriculture*¹⁵⁵ distinguished two types of files relating to government employees—those containing reports gathered through surveillance or oversight of employees' job performance, and those containing "investigations which *focus directly* on specifically alleged illegal acts . . . of particular identified officials, acts which could, if proved, result in civil or criminal sanctions."¹⁵⁶ Protection from man-

154. *Rural Housing Alliance v. United States Dep't of Agriculture*, 498 F.2d 73, 81 (D.C. Cir. 1974).

155. 498 F.2d 73 (D.C. Cir. 1974).

Rural Housing sought a report of an investigation by the Department of Agriculture into alleged discrimination in governmental housing projects in Florida. The investigation resulted from allegations that the staff of the Farmers Home Administration discriminated on the basis of race and national origin in arranging government loans. The investigation culminated in a report concluding that there was no substantial evidence of discrimination. *Id.* at 75.

156. *Id.* at 81 (emphasis added). See also *Center for Nat'l Policy Review v. Weinberger*, 502 F.2d 370 (D.C. Cir. 1974).

As *Rural Housing* indicates, the investigatory files exemption has been recognized as applying to civil as well as criminal proceedings. See, e.g., *Ditlow v. Brinegar*, 494 F.2d 1073, 1074 (D.C. Cir.), *cert. denied*, 95 S. Ct. 238 (1974); *Evans v. Department of Transp.*, 446 F.2d 821, 824 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972); *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 939 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970); *B & C Tire Co. v. IRS*, 376 F. Supp. 708, 713 n.11 (N.D. Ala. 1974) (dictum). Even though the Senate Report refers only to "law violators" in its discussion of the exemption, S. REP. No. 813, at 9, adequate support for extending the exemption to civil proceedings is found in the House Report where it says:

This exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws. This would include files prepared in connection with related government litigation and adjudicative proceedings. H.R. REP. No. 1497, at 11.

Professor Davis suggests that the House interpretation may be broader than the language of the exemption warrants. K. DAVIS § 3A.23, at 164 (Supp. 1970). *But see* FOIA Comment 276 n.143.

The 1974 case of *Center for Nat'l Policy Review v. Weinberger*, 502 F.2d 370 (D.C. Cir. 1974), cites the House Report as authority for extending the coverage of the exemption to an *administrative* determination of continued eligibility for government financial assistance. *Id.* at 373. The Attorney General also takes the position that the exemption can be invoked for materials gathered for an administrative proceeding. ATTORNEY GENERAL'S MEMORANDUM 37-38. There is no indication in the legislative history that information gathered for administrative proceedings should not qualify as in-

datory disclosure would be available only to files of the latter type. This analysis is consistent with earlier cases in that it determines whether a file is both investigatory *and* compiled for law enforcement purposes at the time the file is first established.¹⁵⁷ It is also consistent with the overall purpose of the FOIA—to ensure public access to government-held information—by narrowly restricting the types of files that satisfy the exemption to those focusing on specific illegal activities of particular officials. Otherwise, agencies could transform their monitoring activities into an overbroad category of material unavailable to the public. Moreover, in requiring a focus on specific illegal activity, the analysis suggested by *Rural Housing* provides the same treatment to law violators who are government employees as to those who are private citizens.¹⁵⁸

Two weeks before its decision in *Rural Housing*, a different panel¹⁵⁹ of the District of Columbia Circuit Court of Appeals in *Center for National Policy Review v. Weinberger*¹⁶⁰ approved what appears to be a more permissive construction of the phrase “compiled for law enforcement purposes,” while separately applying the focus test to distinguish routine internal monitoring from agency investigations.¹⁶¹ In

formation compiled for “law enforcement purposes,” and its designation as such is in harmony with the policy of protecting investigatory techniques and sources of information of investigatory bodies.

157. See, e.g., *Aspin v. Department of Defense*, 491 F.2d 24, 27 (D.C. Cir. 1973).

158. 498 F.2d at 81. The legislative history of the investigatory files exemption draws no distinction between governmental employees and private citizens. *Id.* at n.45; see H.R. REP. NO. 1497, at 11; S. REP. NO. 813, at 9. As further guidance to the trial judge on remand, the *Rural Housing* court observed:

In so determining [whether the file is compiled for law enforcement purposes], a court must of course be wary of self-serving declarations of any agency; it must be clear to the court that more than ephemeral possibilities of enforcement were anticipated by the agency in undertaking the investigation. If an investigatory file is compiled for the purpose of determining whether a law enforcement proceeding should be brought (in the same manner as against a private citizen) and against whom, then, whether the agency concludes that proceedings are necessary or not, the agency may utilize exemption 7 to protect its investigatory process and sources. 498 F.2d at 82 n.48.

On the record before it, the *Rural Housing* court could not determine whether the purpose of an investigation into alleged racial discrimination in arranging loans under the Rural Housing Program “was to consider an action equivalent to those which the Government brings against private parties,” *id.* at 82, and thus exempt, or merely the customary surveillance of government employee performance and not exempt. It thus remanded the case to the trial court for additional evidence. *Id.*

159. The panel adjudicating the *Center* case consisted of Danaher, Senior Circuit Judge, Leventhal, Circuit Judge, and Kaufman, United States Judge for the District of Maryland. The panel deciding the *Rural Housing* case consisted of Bazelon, Chief Judge, and Robb and Wilkey, Circuit Judges.

160. 502 F.2d 370 (D.C. Cir. 1974).

161. In separately analyzing the investigatory element of the exemption, the *Center* court stated that when an “inquiry departs from the routine and focuses with special in-

Center, the District of Columbia Circuit Court of Appeals reversed the district court and found the undisclosed portions of twenty-two open and active files involving an HEW review of suspected discrimination or segregation practices in public school systems receiving federal aid exempt from compelled disclosure under the investigatory files exemption.¹⁶² To carry out its statutory mandate to prevent racial discrimination in any activity or program that receives federal financial assistance,¹⁶³ the Office for Civil Rights of HEW makes factual investigations of public school systems receiving such assistance whenever there is reason to suspect a school system may be practicing racial segregation or discrimination.¹⁶⁴ After initial reliance on voluntary compliance with federal racial standards, the statute prescribes the ultimate sanction of termination of financial assistance upon an administrative determination that racial discrimination exists.¹⁶⁵ The court in *Center* found that such an administrative determination had the "salient characteristics of 'law enforcement' contemplated by the wording of [the investigatory files exemption]"¹⁶⁶ so that when an agency having both voluntary compliance and formal determination functions gathers information for either purpose, its files are "compiled for law enforcement purposes."¹⁶⁷

tensity upon a particular party, an investigation is underway." *Id.* at 373. The material on racial discrimination in public schools that HEW sought to protect from compelled disclosure was acquired from a detailed examination of every file in the subject school systems, along with a visit to every school in these systems and interviews with teachers and students. This type of activity, according to the court, was the kind of "special scrutiny" that went beyond general administrative oversight and thus qualified as "investigatory." *Id.* at 374.

162. *Id.* at 372.

163. 42 U.S.C. § 2000d (1970).

164. 502 F.2d at 372. The Center for National Policy Review sought disclosure of a large number of files compiled during such factual investigations. HEW yielded such parts of the files containing factual data submitted to the agency as a matter of routine, *id.* at 374, but claimed the remaining material, consisting of pupil and teacher interviews and records of detailed examinations of individual school files, was protected from compelled disclosure by the investigatory files exemption, *id.*

165. 42 U.S.C. § 2000d-1 (1970).

166. 502 F.2d at 373. See note 156 *supra*. Even though an administrative proceeding to determine ineligibility for federal financial assistance "is not attended by the same safeguards and procedures as a judicial determination in a criminal or civil proceeding, it is a governmental action that must be accompanied by due procedure." *Id.*, citing *Goldberg v. Kelly*, 397 U.S. 254 (1970).

167. *Id.* Even though initial reliance is placed on voluntary compliance, the effectiveness of the preliminary procedures depends largely upon the sanction held in reserve. See *Wellman Indus., Inc. v. NLRB*, 490 F.2d 427 (4th Cir.), *cert. denied*, 95 S. Ct. 61 (1974) (discussing the eventual adjudicatory power of the NLRB). The file compiled for negotiation is also compiled for use, if necessary, in a formal action. 502 F.2d at 373. The court said it need not consider the case of an agency that has only consultative authority. *Id.* n.4.

Judge Leventhal's opinion in *Center* is not helpful in supplying guidelines for the proper application of the investigatory files exemption. Its analysis of each element of the exemption leaves one with the impression that if an element can *conceivably* be satisfied independently, then the exemption applies.¹⁶⁸ The files of any government agency with whatever type of sanctioning powers, however remote and rarely implemented, would seem to be "compiled for law enforcement purposes" under the construction of the phrase offered in *Center*.¹⁶⁹ If that is established, these agencies would only have to further establish that any gathered material "focuses with special intensity upon a particular party" to resist disclosure—a burden not difficult to bear. Lacking is the recognition made in the *Rural Housing* opinion that an overbroad construction of either element of the exemption ultimately makes the exception the rule and creates protection for material that the FOIA intended to be available to the public.¹⁷⁰ *Rural*

168. Judge Leventhal recognized that the separate elements of the exemption do "fuse and interact," 502 F.2d at 374, but he failed to discuss them in that posture other than to say: "Taking the provision as a whole, we conclude that these 22 files fall within the literal meaning of the statute as 'investigatory files compiled for law enforcement purposes.'" *Id.*

169. *Cf. Wellman Indus., Inc. v. NLRB*, 490 F.2d 427 (4th Cir.), *cert. denied*, 95 S. Ct. 61 (1974).

170. See notes 155-58 *supra* and accompanying text. There are other weaknesses in Judge Leventhal's opinion. HEW had disclosed material that came to it as a matter of routine from schools receiving federal financial assistance and only resisted disclosure of the material that was collected during its inquiries into alleged cases of racial discrimination or segregation. During the course of his opinion, Judge Leventhal stated that the court thought the "plaintiffs were entitled to access to *those parts of the 'open and active' files . . . that contain the kind of factual data submitted . . . as a matter of routine*" but not "*the balance of materials in these 22 files*" since the balance was "compiled through 'investigations' rather than routine monitoring." 502 F.2d at 373-74 (emphasis added). No attempt was made to explain how the different information was arranged; whether the investigatory information was in a separate file within the general file for each school system; whether all the information, from both investigatory and routine monitoring operations, for each school system was lumped together in a general file; or whether all the investigatory information was filed separately from the routine monitoring files. It is possible to read the *Center* opinion as authorizing a court to go through an investigatory file and release some documents while suppressing others. At the time of this opinion, however, once a file was deemed covered by the investigatory files exemption such selective disclosure was not permitted. See, e.g., *Frankel v. SEC*, 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972); *Evans v. Department of Transp.*, 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972).

A final shortcoming is Judge Leventhal's confusion in certain respects of the policy behind the investigatory files exemption with that behind the personal privacy exemption. He listed some of the policy reasons supporting his decision as "the protection of persons who are being or have been investigated from unwarranted invasion of privacy and damage to reputation" and the fact that the agency's files "often contain privileged material as well as material that is potentially and needlessly damaging to the careers and reputations of local teachers and school officials." 502 F.2d at 374. At

Housing is more consistent with the Act because it focuses on the *initial* purpose of the file to determine whether a file is both investigatory and compiled for law enforcement purposes. This is preferable to constructing possible uses for such material compiled by an agency with sanctioning powers and to determining separately whether an investigation took place.¹⁷¹

CONCLUSION

The volume of FOIA litigation shows no signs of lessening. Although the gradual process of judicial construction and interpretation of the Act through 1974 has reduced the ambiguities and sharpened the protective limits of the exemptions, the reluctance of agencies to support the Act's mandate for disclosure and their ability to outlast the timid or less financially able opponent in extended litigation has permitted them to blunt the effectiveness of the FOIA and to frustrate the intentions of its drafters. This agency behavior is the direct cause of perhaps the most significant development in 1974—enactment by Congress of amendments to the FOIA¹⁷² which become effective in 1975. These amendments generally streamline the procedure through which requests for information are to be processed, and they impose

the time of this decision, these statements of policy properly belonged to the personal privacy exemption, see notes 126-148 *supra* and accompanying text, not the investigatory files exemption. However, Judge Leventhal may have only been guilty of applying the standards of the proposed amendment prematurely. See Pub. L. No. 93-502 § 2(b) (Nov. 21, 1974), amending 5 U.S.C. § 552(b)(7) (1970), quoted in pertinent part in note 149 *supra*.

171. See *Rural Housing Alliance v. United States Dep't of Agriculture*, 498 F.2d 73, 82 n.48 (D.C. Cir. 1974).

Judge Leventhal apparently recognized the confusion his opinion in *Center* could create. In a supplemental opinion denying a rehearing, filed subsequent to the decision in *Rural Housing*, he clarified his original statements in *Center*:

We rejected that contention [that the prospect of law enforcement action was too remote for the exemption to apply] in this case, but we did not mean that the exemption is established by the mere fact that one of the purposes of opening a file is investigative, or that sanctions hover as a possibility somewhere down the road, or that some material in some file may at some point be used for some law enforcement purpose. With that kind of extrapolation the exemption clause would reach so far as to swallow up the basic statutory presumption of disclosure. In considering whether a request for disclosure involves "investigatory files compiled for law enforcement purposes," the court will of course give consideration to the executive's submission, but it will be governed, not by logic pushed to extremes, but by good sense and the essential heft of the case. 502 F.2d at 375.

Judge Leventhal properly attempted to bring *Center* more into line with *Rural Housing*, but his choice of language ("good sense and the essential heft of the case") continues to provide no adequate guidelines for courts to follow in future cases and can only lead to confusion.

172. Pub. L. No. 93-502 (Nov. 21, 1974), amending 5 U.S.C. § 552 (1970), effective February 19, 1975.

maximum time limits within which an agency must respond to a request.¹⁷³ If an agency does not respond within such time, the requester of information is deemed to have exhausted his administrative remedies and may then bring a suit against the agency to compel it to disclose the requested material.¹⁷⁴ Moreover, a court may assess "reasonable attorney's fees and other litigation costs reasonably incurred" if the requesting party "substantially prevail[s]" on his request.¹⁷⁵ When the agency's refusal to voluntarily disclose the information is of doubtful validity, the award of attorney's fees and litigation expenses should encourage those with limited financial resources to make the agency comply with the FOIA. The effect of these procedural provisions along with several substantive changes¹⁷⁶ should be to reduce significantly the ability of government agencies to avoid their duty to disclose non-exempt information and ultimately to permit realization of the congressional goal of full and prompt public disclosure of government information.

173. *Id.* § 1(c), amending 5 U.S.C. § 552(a) (1970). Subsection (c) adds the following paragraph to section 552(a):

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

Other requirements aimed at easing access to public information include the quarterly publishing and distribution of an index providing identifying information for the public of agency materials, *id.* § 1(a), amending 5 U.S.C. § 552(a)(2) (1970), the establishment of a uniform schedule of fees limited to the direct costs of search and duplication, *id.* § 1(b)(2), amending 5 U.S.C. § 552(a) (1970), and the filing by each agency of a detailed annual report with Congress covering administration of the FOIA during the year, *id.* § 3, amending 5 U.S.C. § 552 (1970).

174. *Id.* § 1(c), amending 5 U.S.C. § 552(a) (1970).

175. *Id.* § 1(b), amending 5 U.S.C. § 552(a) (1970).

176. The amendments significantly change the effect and scope of the investigatory files exemption, *id.* § 2(b), amending 5 U.S.C. § 552(b)(7) (1970), see note 149 *supra*, and the national security exemption, *id.* § 2(a), amending 5 U.S.C. § 552(b)(1) (1970). The new language of the national security exemption requires not only that information be classified according to executive order, but also that it *actually meets* the criteria established by the executive order. *Id.* See note 95 *supra*. Any "reasonably segregable portion of a record" not meeting the qualifications of the exemptions can be disclosed. *Id.* § 2(c), amending 5 U.S.C. § 552(b) (1970).

The requirement that a request be for "identical records" has been changed to a request that "reasonably describes such records." *Id.* § 1(b)(1), amending 5 U.S.C. § 552(a)(3) (Supp. II, 1972). See note 105 *supra*.