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DEVELOPMENTS UNDER THE FREEDOM OF INFORMATION ACT—1984

The eighteenth year of the Freedom of Information Act (FOIA)¹ witnessed a continuation of the trend toward restricting public access to government information.² Congress amended the National Security Act of 1947,³ exempting entire systems of Central Intelligence Agency (CIA) files from search and review and declaring that the Privacy Act⁴ is not an exemption 3 statute.⁵ Congress again considered, but failed to pass, a bill to reform the FOIA; this proposal⁶ would have substantially altered fees and waivers,⁷ time limits for responding to requests,⁸ business confidentiality procedures,⁹ and law enforcement exemptions.¹⁰ In addition, bills were introduced in both houses to create an exemption 3 statute to protect information concerning corporate research and development projects reported by business entities.¹¹ But Congress also considered a bill that would have made it more difficult for the executive branch to classify documents and protect them from disclosure.¹²

In several instances, administrative agencies took actions which altered the operation of the FOIA. In order to protect valuable business information from disclosure and to make it more difficult for a requester to obtain information from an agency without bearing the cost of the search,¹³ the Department of Justice (DOJ) revised its guidelines for responding to requests made under the FOIA and the Privacy Act.¹⁴ The Consumer Product Safety Commission (CPSC) issued new

1. 5 U.S.C. § 552 (1982).

2. See Note, *Developments Under the Freedom of Information Act — 1983*, 1984 DUKE L.J. 377 [hereinafter cited as Note, *Developments—1983*]. For a discussion of developments under the FOIA in prior years, see the annual FOIA note in the *Duke Law Journal* from 1970 to 1983.

3. 50 U.S.C. § 403 (1982).

4. 5 U.S.C. § 552a (1982).

5. Central Intelligence Agency Information Act, Pub. L. No. 98-477, 98 Stat. 2209 (1984). See *infra* notes 99-119 and accompanying text.

6. S. 774, 98th Cong., 1st Sess., 130 CONG. REC. S1794-97 (daily ed. Feb. 27, 1984).

7. See *infra* notes 42-65 and accompanying text.

8. See *infra* notes 66-72 and accompanying text.

9. See *infra* notes 73-75 and accompanying text.

10. See *infra* notes 76-95 and accompanying text.

11. H.R. 5041, 98th Cong., 2d Sess., 130 CONG. REC. H1339 (daily ed. Mar. 6, 1984) and S. 1841, 98th Cong., 2d Sess. (1984). See *infra* notes 120-28 and accompanying text.

12. S. 1335, 98th Cong., 1st Sess., 129 CONG. REC. S7161-65 (daily ed. May 19, 1983). See *infra* notes 129-36 and accompanying text.

13. See *infra* notes 138-47 and accompanying text.

14. 49 Fed. Reg. 12,248 (1984) (to be codified at 28 C.F.R. pts. 0, 16, 50).

guidelines involving public disclosure of product information.¹⁵ The Office of Management and Budget (OMB), which is responsible for developing the guidelines that agencies use in implementing the Privacy Act, declared that the Privacy Act is an exemption 3 statute under the FOIA, although this action was later invalidated by Congress.¹⁶

With one exception, judicial interpretation of the FOIA came exclusively from the lower federal courts in 1984. In its single FOIA decision of the year, the Supreme Court of the United States held that exemption 5 incorporates the well-established discovery privilege that applies to confidential statements made to air crash safety investigators, and implied that the exemption applies to any civil discovery privilege that is equally well-settled; thus the FOIA may not be used in such cases as an additional discovery weapon in litigation against an agency.¹⁷ The Court refused to accept the contention that the discovery privileges specifically mentioned in the legislative history of the FOIA exhausted the scope of the exemption 5 protection, concluding that the examples given were intended merely as "rough analogies."¹⁸

Discovery was also the subject of a decision of the Court of Appeals for the District of Columbia Circuit. That court held that a defendant agency can engage in discovery against a FOIA plaintiff.¹⁹ The D.C. Circuit also considered exemption 5, concluding that Environmental Protection Agency (EPA) budget recommendations were "predecisional" and therefore subject to withholding under the exemption.²⁰

In other judicial proceedings, the Eighth,²¹ and Tenth Circuits,²² and a district court in the Ninth Circuit,²³ addressed but failed to resolve a split concerning the standard of "confidentiality" under exemption 7.²⁴ The DOJ rendered moot another circuit split, and a case pending before the Supreme Court, concerning the status of certain hybrid records—those created by an agency not subject to the FOIA but held by an

15. Information Disclosure Under Section 6(b) of the Consumer Product Safety Act, 16 C.F.R. pt. 1101 (1985). See *infra* notes 148-58 and accompanying text.

16. 49 Fed. Reg. 12,338 (1984). See *infra* notes 159-63 and accompanying text.

17. *United States v. Weber Aircraft Corp.*, 104 S. Ct. 1488, 1494 (1984). See *infra* notes 167-83 and accompanying text.

18. *United States v. Weber Aircraft Corp.*, 104 S. Ct. 1488, 1494 & n.22 (1984).

19. *Weisberg v. Webster*, 749 F.2d 864, 868 (D.C. Cir. 1984). See *infra* notes 322-35 and accompanying text.

20. *Bureau of Nat'l Affairs v. United States Dep't of Justice*, 742 F.2d 1484, 1498 (D.C. Cir. 1984). See *infra* notes 183-94 and accompanying text.

21. See *Parton v. United States Dep't of Justice*, 727 F.2d 774, 776-77 (8th Cir. 1984).

22. See *Johnson v. United States Dep't of Justice*, 739 F.2d 1514, 1518-19 (10th Cir. 1984).

23. See *Powell v. United States Dep't of Justice*, 584 F. Supp. 1508, 1528-30 (N.D. Cal. 1984).

24. See *infra* notes 195-231 and accompanying text.

agency subject to it—by conceding that presentence reports compiled by a federal district court probation officer and delivered to the United State Parole Commission were “agency records,” and thus subject to the disclosure provisions of the FOIA.²⁵ The definition of “agency records” was also litigated before the Court of Appeals for the District of Columbia Circuit, which held that personal papers such as appointment calendars, telephone logs, and daily agendas could under certain circumstances be subject to the FOIA’s disclosure provisions.²⁶

Finally, a number of circuits addressed the proper scope of judicial review of agency withholding decisions. The Fifth²⁷ and Ninth Circuits²⁸ held that standards of review in the tax code do not displace the more stringent FOIA requirement of de novo federal court review of a withholding when the material withheld concerns a taxpayer’s return,²⁹ and that the FOIA’s disclosure rules are not preempted by the ERTA amendment to the tax code. In another matter, the District of Columbia Circuit Court of Appeals³⁰ upheld Congress’s broad grant of discretion to the district court in deciding whether to conduct in camera review of materials withheld under exemption 5.

I. LEGISLATIVE DEVELOPMENTS

A. *The Freedom of Information Reform Bill.*

Nonjudicial developments in the FOIA during 1984 were overshadowed by the potential legislative developments that were proposed but not enacted; these were embodied in a controversial Senate bill that Congress failed to pass. Entitled the Freedom of Information Reform Act (the Reform Bill), the bill proposed significant amendments to the Freedom of Information Act,³¹ and marked the first time in a decade that the Senate has acted to substantially reform the FOIA.³² The Reform Bill was the product of an extended effort by Senator Orrin Hatch to alter the

25. See Brief for Respondent at 7, *Crooker v. United States Parole Comm’n*, 105 S. Ct. 317 (1984). See *infra* notes 72-136 and accompanying text.

26. *Bureau of Nat’l Affairs v. United States Dep’t of Justice*, 742 F.2d 1484, 1494-96 (D.C. Cir. 1984). See *infra* notes 255-80 and accompanying text.

27. *Linsteadt v. IRS*, 729 F.2d 998, 1003 (5th Cir. 1984).

28. *Long v. IRS*, 742 F.2d 1173, 1178 (9th Cir. 1984).

29. See *infra* notes 281-307 and accompanying text.

30. *Center for Auto Safety v. EPA*, 731 F.2d 16 (D.C. Cir. 1984). See *infra* notes 308-21 and accompanying text.

31. S. 774, 98th Cong., 1st Sess., 130 CONG. REC. S1794-97 (daily ed. Feb. 27, 1984).

32. Rothman, *Freedom of Information Act Changes Approved by Senate*, CONG. Q., Mar. 3, 1984, at 511.

FOIA.³³ The House Subcommittee on Government Information, Justice, and Agriculture, chaired by Representative Glenn English, conducted hearings on the proposed bill in the summer of 1984, after it had been approved by a voice vote in the Senate.³⁴

The hearings did not evidence overwhelming support for the Reform Bill; many groups testified against the proposed changes.³⁵ Indeed, Chairman English appeared unconvinced that such major changes were needed.³⁶ Criticism was focused on four major areas: fees and waivers,³⁷ time limits for responding to a request,³⁸ business confidentiality procedures,³⁹ and law enforcement exemptions.⁴⁰

1. *Fees and Waivers.* Subsection (a)(4)(A) of the FOIA⁴¹ regulates fees that an agency can charge requesters for information. The provision allows an agency to recover only the "direct costs" of a search plus charges for duplication. Agencies are given the discretion to waive or reduce the fee if the information furnished would primarily benefit the general public.⁴²

Section 2 of the Reform Bill would amend subsection (a)(4)(A) to charge a "fair value fee" for requests "containing commercially valuable technological information which was generated or procured by the Gov-

33. See Note, *Developments—1983*, *supra* note 2; Note, *Developments Under the Freedom of Information Act—1982*, 1983 DUKE L.J. 390; Comment, *Developments Under the Freedom of Information Act—1981*, 1982 DUKE L.J. 423.

34. *Senate Approves Comprehensive FOIA Legislation*, 10 ACCESS REP. NO. 5, Feb. 29, 1984, at 1; 130 CONG. REC. S1822 (daily ed. Feb. 27, 1984).

35. Those testifying at the hearing included various media groups, such as the Reporters Committee for Freedom of the Press, the Society of Professional Journalists (Sigma Delta Chi), the Newsletter Association, the American Newspaper Publishers Association, and the Information Industry Association; the American Civil Liberties Union (ACLU); the American Bar Association (ABA); the Department of Justice (DOJ); and concerned historians.

36. *The Freedom of Information Reform Act: Hearings on S. 774 Before the Subcomm. on Gov't Information, Justice, and Agriculture of the House Comm. on Gov't Operations*, 98th Cong., 2d Sess. 31 (1984) (opening statement of Rep. English, Chairman) [hereinafter cited as *Hearings*].

37. See *infra* notes 42-65 and accompanying text.

38. See *infra* notes 66-72 and accompanying text.

39. See *infra* notes 73-75 and accompanying text.

40. See *infra* notes 77-95 and accompanying text.

41. 5 U.S.C. § 552(a)(4)(A) (1982).

42. The subsection provides:

In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

5 U.S.C. § 552(a)(4)(A) (1982).

ernment at substantial cost to the public, is likely to be used for a commercial purpose, and will deprive the Government of its commercial value."⁴³ The qualifying phrase "benefitting . . . not the commercial or private interest of the requester" would be added to the clause of subsection (a)(4)(A) that allows fees to be waived when the information disclosed is in the public interest.⁴⁴ According to the Senate Committee report, the purpose of these proposals was to prevent "an unjustifiable windfall" to a few at the expense of the public.⁴⁵ The Committee illustrated the type of windfall the amendments were designed to prevent by referring to an instance in which a Japanese company acquired sophisticated water desalination technology for a fraction of the sum the government had spent developing it.⁴⁶

The Senate Committee maintained that the fair value fee was consistent with the Federal User Fee Statute, which requires a federal agency to generate enough revenue to pay for anything of value prepared or issued by the agency⁴⁷ by requiring a fair and equitable payment from parties requesting information with particular economic value.⁴⁸ At the hearings, the American Civil Liberties Union (ACLU) argued in opposition to the bill that Congress was fully aware of the Federal User Fee Statute when it amended the FOIA in 1974, and that it made a conscious choice not to charge a "fair value fee" for requests.⁴⁹ Other opponents charged that the Reform Bill would displace certain provisions in the Copyright Act.⁵⁰

43. S. 774, 98th Cong., 1st Sess. § 1, 130 CONG. REC. S1794-95 (daily ed. Feb. 27, 1984).

44. *Id.*

45. S. REP. NO. 221, 98th Cong., 1st Sess. 8 (1983) [hereinafter cited as S. REP. 221].

46. *Id.*

47. 31 U.S.C. § 9701 (1982). Courts have defined the limits of the statute by prescribing the factors to be considered in measuring fees. In *Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345, 349-50 (1974), the Supreme Court interpreted 31 U.S.C. § 483a, the predecessor of the current statute, to authorize a fee only if the recipient derived a specific benefit—one that did not primarily benefit the general public. In *National Cable Television Assoc. v. United States*, 415 U.S. 336, 342-43 (1974), the Court found that the same statute required that fees be based on the value received by the recipient of government services. Moreover, the fee charged must bear a reasonable relationship to the actual costs borne by the agency in rendering the service, *National Cable Television Ass'n v. FCC*, 554 F.2d 1094, 1108 (D.C. Cir. 1976), including both direct and indirect costs, *Mississippi Power & Light Co. v. Nuclear Regulatory Comm'n*, 601 F.2d 223, 229 (5th Cir. 1979).

48. S. REP. 221, *supra* note 45, at 8.

49. *Hearings, supra* note 36, at 918 (testimony of Allan R. Adler, ACLU). The ACLU also argued that when the FOIA was amended in 1974, the House and Senate conferees adopted almost verbatim the Senate fee provision that made explicit reference to the User Fee Statute and they concluded that "it is not necessary that FOIA services performed by agencies be self-sustaining." *Id.* (citing S. REP. NO. 854, 93d Cong., 2d Sess. 10-12 (1974)).

50. *Hearings, supra* note 36, at 482 (testimony of Paul G. Zurkowski, Information Industry Association); *id.* at 918 (testimony of Allan R. Adler, ACLU); *see also* Letter from David Ladd, Register of Copyrights, to Hon. Charles McC. Mathias, Jr. (Oct. 11, 1983), 130 CONG. REC. E657-58 (daily ed. Feb. 28, 1984) (expressing concern of Copyright Office over conflict between fee provi-

Media interests expressed concern about the vague language of the subsection, pointing to the ambiguity of such phrases as "technological information" and "commercially valuable."⁵¹ Such language, they argued, would be particularly susceptible to misinterpretation by agencies, a circumstance which could lead to an increase in request denials and a decrease in access to certain information.⁵²

Opponents also argued that limiting waivers of fees⁵³ to those situations in which information would not be put to "commercial use" would penalize the book and newspaper publishing industries.⁵⁴ The Senate Committee report responds directly to this concern, however, by stating that "commercial use" does not encompass the news media even though they operate for profit.⁵⁵ The report indicates, moreover, that if a commercial use is not established and the requester is a scholar, a scientist, a representative of the news media, or a member of a non-profit group intending to make the information available to the general public, the fee is to be completely waived.⁵⁶

The first section of the Reform Bill would further amend subsection (a)(4)(A) to require that fee schedules provide for the payment of "all costs reasonably and directly attributable to responding to the request, which shall include reasonable standard charges for the cost of services by agency personnel in search, duplication, and other processing of the request."⁵⁷ The FOIA currently does not allow an agency to charge for the cost of "processing" a request.⁵⁸ The cost of implementing the Free-

sions of Reform Act and copyright law). The Copyright Act, 17 U.S.C. § 105 (1976), provides: "Copyright protection . . . is not available for any work of the United States Government."

51. *Hearings, supra* note 36, at 128 (testimony of Reg Murphy, Reporters Committee for Freedom of the Press); *id.* at 937 (testimony of Allan R. Adler, ACLU).

52. Media concerns argued, for example, that it was unclear whether the exemption allowing the imposition of fees would apply to "technological" studies done by the Department of Housing and Urban Development on the best method of suburban zoning. *Id.* at 127 (testimony of Reg Murphy, Reporters Committee for Freedom of the Press).

53. According to 5 U.S.C. § 552(a)(4)(A), a fee is waived if the government determines that such a waiver is "in the public interest because furnishing the information can be considered as primarily benefitting the general public." The Reform Bill would exempt particular instances—commercial use—from the broad "public interest" fee-waiving standard. S. 774, 98th Cong., 1st Sess. § 2, 130 CONG. REC. S1794 (daily ed. Feb. 27, 1984).

54. *Hearings, supra* note 36, at 132 (testimony of Reg Murphy, Reporters Committee for Freedom of the Press).

55. S. REP. 221, *supra* note 45, at 11.

56. *Id.* at 10.

57. S. 774, 98th Cong., 1st Sess. § 2, 130 CONG. REC. S1794 (daily ed. Feb. 27, 1984). The FOIA currently allows for the "recovery of only the direct costs" of document search and duplication. 5 U.S.C. § 552(a)(4)(A) (1982).

58. The FOIA levies a charge for the direct costs incurred. 5 U.S.C. § 552(a)(4) (A)(1982). Processing costs are the "costs of reviewing responsive records to determine what material should be released to the requester and what material should be withheld . . ." S. REP. 221, *supra* note 45,

dom of Information Act has long concerned a number of governmental authorities. One study indicates that FOIA compliance cost the government \$47.8 million in 1979, while total FOIA revenues—fees paid by the requesters—covered approximately four percent of the direct costs of compliance.⁵⁹ The Senate Committee report notes that the number of FOIA requests and the attendant costs far exceed those anticipated by Congress in 1974 when it considered and rejected an amendment to permit recovery of review costs.⁶⁰

Those testifying at the hearings pointed out that the Reform Bill failed to suggest any criteria for assessing the legitimate costs of review.⁶¹ The ACLU attributed this lack of criteria to "Congress's continued failure to grapple with an administrative process which varies widely from agency to agency, [and which] has repeatedly been shown . . . to be rife with redundancy, irrelevancy and other attributes of bureaucratic inefficiency."⁶² It was noted that some agencies charge for copying, but not for search costs,⁶³ the rate charged for copying varies widely,⁶⁴ and those agencies that do charge for search time often use a flat rate regardless of the pay scale of the employee conducting the search.⁶⁵

2. *Time Limits.* The FOIA allows an agency ten working days to respond to a request for information, and twenty working days to process an appeal of a denial of a request.⁶⁶ In the event of "unusual circumstances," the agency is permitted to extend these limits ten working

at 7. The Senate Committee was careful to point out that processing does not involve the policy and legal decisions agency personnel must make in deciding whether to release information, but does include a review of the record in question to determine whether withholding or deletions are necessitated by law or by governmental policy. *Id.*

59. *Freedom of Information Act Oversight: Hearings Before the Subcomm. on Gov't Information and Individual Rights of the House Comm. on Gov't Operations*, 97th Cong., 1st Sess. 202 (1981) (testimony of Jonathan C. Rose, Assistant Attorney General).

60. S. REP. 221, *supra* note 45, at 7.

61. *Hearings, supra* note 36, at 917 (testimony of Allan R. Adler, ACLU).

62. *Id.* The ACLU suggests that Congress study the administrative process of the FOIA to develop specific criteria for assessing legitimate review costs. *Id.*

63. *Hearings, supra* note 36 (testimony of the Committee on Federal Legislation, New York City Bar Association, at 11). An example of the use of this practice is the Selective Service System, 32 C.F.R. § 1662.6 (1982).

64. *Hearings, supra* note 36 (testimony of the Committee on Federal Legislation, New York City Bar Association, at 11). Compare the rates of the Department of Defense, 32 C.F.R. § 286.61 (1984) (\$0.01) and the Occupational Safety and Health Review Commission, 29 C.F.R. § 2201.5 (1984) (\$0.10) with the Department of Transportation, 49 C.F.R. § 7.95 (1984) (\$0.25 for first page, \$0.05 thereafter) and the Federal Emergency Management Agency, 44 C.F.R. § 5.46 (1984) (\$2.00 for first six pages).

65. *Hearings, supra* note 36 (testimony of the Committee on Federal Legislation, New York City Bar Association, at 11). See, e.g., Department of Commerce, 15 C.F.R. § 4.9 (1985) (\$10.00 per hour); Department of Health and Human Services, 45 C.F.R. § 5.61(a)(1984) (\$10.00 per hour).

66. 5 U.S.C. § 552(a)(6)(A)(i)-(ii) (1982).

days.⁶⁷ If the agency fails to meet these deadlines, the requester "shall be deemed to have exhausted his administrative remedies."⁶⁸ The Reform Bill proposes an extension of up to thirty working days for an initial request or appeal if there are "unusual circumstances," and an extension of up to sixty working days if the circumstances are "exceptional."⁶⁹

In addition, section two of the Reform Bill provides three new examples of "unusual circumstances" to add to the three already described in subsection (a)(6)(B)(i)-(iii).⁷⁰ All deadline extensions would be restricted to these six specifically defined situations.⁷¹ Those testifying against the Reform Bill felt that more definitions of "unusual circumstances" would simply create more situations in which a request for information could be denied, forcing requesters to seek relief in the courts.⁷²

67. 5 U.S.C. § 552 (a)(6)(B) (1982). This section provides, in part:

As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

Id.

68. 5 U.S.C. § 552 (a)(6)(C) (1982). This subsection, however, is not absolute in this regard. *See infra* note 70 and accompanying text. "If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records." 5 U.S.C. § 552(a)(6)(C) (1982).

69. S. REP. 221, *supra* note 45, at 12-13. Those testifying noted, however, that these time limits have been rendered virtually meaningless by a judicial interpretation that allows indefinite extensions as long as the agency can demonstrate that it is processing requests with "due diligence." *Hearings, supra* note 36, at 129 (testimony of Reg Murphy, Reporters Committee for Freedom of the Press); *id.* at 100 (testimony of Michael W. Hammer, Society of Professional Journalists). The concern was best expressed by Jerry W. Friedheim of the American Newspaper Publishers Association: "If the current 10-day limit can become 18 months at the FBI and two years at the State Department, what would a 60-day limit become?" *Id.* at 86 (testimony of Jerry W. Friedheim, American Newspaper Publishers Association).

70. S. 774, 98th Cong., 1st Sess. § 2, 130 CONG. REC. S1795 (daily ed. Feb. 27, 1984). The Reform Bill would add the following to the list of "unusual circumstances" set out *supra* at note 67:

(iv) a request which the head of the agency has specifically stated in writing cannot be processed within the time limits stated in paragraph (6)(A) without significantly obstructing or impairing the timely performance of a statutory agency function;

(v) the need for notification of submitters of information and for consideration of any objections to disclosure made by such submitters; or

(vi) an unusually large volume of requests or appeals at an agency, creating a substantial backlog.

71. S. REP. 221, *supra* note 45, at 13.

72. *Hearings, supra* note 36, at 129 (testimony of Reg Murphy, Reporters Committee for Freedom of the Press).

3. *Business Confidentiality Procedure.* The third section of the Reform Bill would amend subsection 552(a) of the FOIA to "require agencies to promulgate regulations specifying procedures that would permit submitters of trade secrets or confidential commercial or financial information to present claims of confidentiality to an agency before submitted information is released in response to an FOIA request."⁷³ Developed in response to a judicial determination that the FOIA created no private right of action that a submitter of information might use against an agency to enjoin disclosure,⁷⁴ this provision is the only section of the Reform Bill that did not meet substantial opposition.⁷⁵

4. *Law Enforcement Exemptions.* In order to protect confidential sources, the eighth section of the Reform Bill would exempt from disclosure files and information concerning personal or medical matters. The Reform Bill would exempt information from disclosure when such disclosure "could reasonably be expected to constitute"⁷⁶ an unwarranted invasion of personal privacy, thus replacing the present standard of whether disclosure "would constitute" such an invasion.⁷⁷

This modification has been criticized as unnecessary in light of the existing judicial interpretation of exemption 6.⁷⁸ In *Department of State v. Washington Post Co.*,⁷⁹ the Supreme Court reversed a line of cases that had interpreted the phrase "personal, medical and similar files" in "an

73. S. REP. 221, *supra* note 45, at 14.

74. *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979); see *Note, Developments—1983, supra* note 2, at 379-80 (discussing *Chrysler*). The only recourse currently available if the submitter opposes FOIA disclosure of information is an action under section 10(a) of the Administrative Procedure Act. That section provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof." 5 U.S.C. § 702 (1982). This remedy is available, however, only after the improper disclosure has been made; often an award of damages may not compensate the submitter for the loss.

75. *Hearings, supra* note 36, at 689 (opening statement of Rep. English, Chairman).

76. S. 774, 98th Cong., 1st Sess. § 9, 130 CONG. REC. S1796 (daily ed. Feb. 27, 1984). The language of the Reform Bill is much broader than the present statute, and would allow an agency to withhold records where there is a reasonable possibility of an invasion of privacy. The FOIA employs a much stricter standard, requiring a showing that the release of the information would actually constitute an invasion of privacy. See 5 U.S.C. § 552(b)(6) (1982).

77. Exemption 6 of the current FOIA exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (1982).

78. *Hearings, supra* note 36 (testimony of the Committee on Federal Legislation, New York City Bar Association, at 23) (citing *Department of Air Force v. Rose*, 425 U.S. 352, 381 (1976) (law review editor may have access to summaries of honor and ethics hearings at a school, but identity of individuals involved must be withheld)). The Bar Association Committee felt that this case exemplified the courts' ability to strike a proper balance between the right to access and the right to privacy under the present standard.

79. 456 U.S. 595, 601-02 (1982) (protection for personal information is not lost merely because it is stored in file labeled other than "personnel" or "medical").

overly formalistic way.”⁸⁰ The Senate Committee was aware of the Supreme Court’s decision in *Washington Post*, and was attempting in the Reform Bill to codify the Court’s holding.⁸¹ Critics of the provision testified that because courts are already aware of the need to protect confidential sources,⁸² any apparent weakening of the standard would further encourage the denial of information requests.⁸³

The tenth section of the Reform Act would alter the standard for assessing the risks of disclosure of law enforcement records.⁸⁴ According to the testimony of William H. Webster, Director of the Federal Bureau of Investigation (FBI), the current provision—subsection (b)(7)—could allow “clever requesters” to use the FOIA to identify confidential sources.⁸⁵ “Seemingly innocuous details in FBI records might provide the missing clue to identify a source or at least narrow down the candidates. A criminal does not require proof positive before taking action on such information.”⁸⁶ Criticism of this change was focused on the failure of the FBI to cite any specific instance in which the old standard had

80. See S. REP. 221, *supra* note 45, at 22 (evaluating the impact of *Washington Post*).

81. *Id.*

82. See, e.g., *Agee v. CIA*, 517 F. Supp. 1335, 1341 (D.D.C. 1981) (finding that National Security Act of 1947 and Central Intelligence Agency Act of 1949 prevent release to former CIA official of all CIA files and records pertaining to him).

83. *Hearings, supra* note 36 (testimony of the Committee on Federal Legislation, New York City Bar Association, at 23-24).

84. Section 10 of the Reform Bill provides:

(a) Section 552(b)(7) of title 5, United States Code, is amended to read as follows:

“(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) *could reasonably be expected to interfere* with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) *could reasonably be expected to constitute* an unwarranted invasion of personal privacy, (D) *could reasonably be expected to disclose* the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) *could reasonably be expected to endanger* the life or physical safety of any natural person”

S. 774, 98th Cong., 1st Sess. § 10, 130 CONG. REC. S1796 (daily ed. Feb. 27, 1984) (emphasis added). At each point where the language “could reasonably be expected to” was added, the original language required a showing that harm *would actually* result.

85. *Hearings, supra* note 36, at 811 (testimony of William H. Webster, Director, Federal Bureau of Investigation).

86. *Id.* The concerns of the FBI are echoed in Executive Order 12,356, 3 C.F.R. 166 (1983), reprinted in 50 U.S.C.A. § 401 app. at 67 (West Supp. 1985) which provides that a document should be classified under exemption 1 when “its unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security.” Exec. Order No. 12,356, § 1.3(b), 3 C.F.R. 169 (1983) app. at 67, reprinted in 50 U.S.C.A. § 401 (West Supp. 1985). Under this “mosaic theory,” agencies can classify information which, by itself, poses no threat to national security, but which has a potential for causing harm if combined with more

actually proven inadequate.⁸⁷ Critics also predicted that a flood of litigation and implementation problems would accompany the change.⁸⁸

In addition, the Reform Bill proposes to add a new provision to section 552 exempting files pertaining to organized crime, as designated by the Attorney General, for not less than five years, but up to a maximum of eight years where there is an overriding public interest in providing longer exemption.⁸⁹ After this period, the information could still be subject to any of the subsection (b) exemptions and could therefore remain undisclosed.⁹⁰ The Senate committee that approved this provision noted that the FOIA is systematically exploited by organized crime; such requesters seek to ascertain whether they are the targets of an investigation.⁹¹ Although the public record fails to substantiate this claim, the committee stated that its position was supported by evidence that it had examined, *in camera*, in a special session.⁹² Those testifying in opposition to the provision, although commending the well-drafted definition of "organized crime,"⁹³ objected to the committee's use of *in camera* evi-

information from the same document or others. See Note, *Developments Under the Freedom of Information Act — 1982, 1983* DUKE L.J. 390, 395-98 (discussing Exec. Order No. 12,356).

87. *Hearings, supra* note 36, at 102 (testimony of Michael W. Hammer, Society of Professional Journalists); *id.* at 54 (testimony of Edward Cony, American Society of Newspaper Editors); *id.* (testimony of the Committee on Federal Legislation, New York City Bar Association, at 27). Critics of the Reform Bill testified that under the present standard the courts were adequately protecting the Bureau's legitimate concerns. See, e.g., *id.*

88. *Id.* at 102 (testimony of Michael W. Hammer, Society of Professional Journalists). The "could reasonably be expected to" language is more ambiguous; as a result, courts may find the new standard more difficult to apply.

89. Section 14(c) of the Reform Bill provides:

Nothing in this section shall be deemed applicable to documents compiled in any lawful investigation of organized crime, designated by the Attorney General for the purposes of this subsection and conducted by a criminal law enforcement authority for law enforcement purposes, if the requested document was first generated or acquired by such law enforcement authority within five years of the date of the request, except where the agency determines pursuant to regulations promulgated by the Attorney General that there is an overriding public interest in earlier disclosure or in longer exclusion not to exceed three years. Notwithstanding any other provision of law, no document described in the preceding sentence may be destroyed or otherwise disposed of until the document is available for disclosure in accordance with subsections (a) and (b) of this section for a period of not less than ten years.

S. 774, 98th Cong., 1st Sess. § 14(c), 130 CONG. REC. S1796 (daily ed. Feb. 27, 1984).

90. S. REP. 221, *supra* note 45, at 31.

91. *Id.* at 30.

92. See *id.*

93. *Hearings, supra* note 36 (testimony of the Committee on Federal Legislation, New York City Bar Association, at 36). The Reform Act defines "organized crime" as

those structured and disciplined associations of individuals or of groups of individuals who are associated for the purpose of obtaining monetary or commercial gains or profits, wholly or in part by illegal means, while generally seeking to protect and promote their activities through a pattern of graft or corruption, and whose associations generally exhibit the following characteristics:

(A) their illegal activities are conspiratorial,

dence,⁹⁴ and argued that a new exemption would be superfluous in light of the existing protections of exemption (b)(7).⁹⁵

The ninety-eighth session of Congress failed to reach a consensus on the Reform Bill.⁹⁶ For this reason, the bill is now technically "dead" and any new FOIA reform legislation will have to be proposed in the ninety-ninth session.⁹⁷ Groundbreaking has already begun.⁹⁸

(B) in at least part of their activities, they commit acts of violence or other acts which are likely to intimidate,

(C) they conduct their activities in a methodical or systematic and in a secret fashion,

(D) they insulate their leadership from direct involvement in illegal activities by their organizational structure,

(E) they attempt to gain influence in government, politics, and commerce through corruption, graft, and illegitimate means, and

(F) they engage in patently illegal enterprises such as dealing in drugs, gambling, loan-sharking, labor racketeering, or the investment of illegally obtained funds in legitimate businesses.

S. 774, 98th Cong., 1st Sess. § 16(f)(6), 130 CONG. REC. S1797 (daily ed. Feb. 27, 1984).

94. *Hearings, supra* note 36 (testimony of the Committee on Federal Legislation, New York City Bar Association at 36).

95. *Id.* at 943 (testimony of Allan R. Adler, ACLU); *id.* at 58 (testimony of Edward Cony, American Society of Newspaper Editors).

96. N.Y. Times, June 21, 1984, at A20, col. 5. Representative English blamed the bill's death on the failure of the Justice Department to testify in June as scheduled. English suggested that the resultant two-month delay by the Department drastically reduced the time available for negotiation on the bill. *Washington Focus*, 10 ACCESS REP. NO. 19, Sept. 26, 1984, at 1.

97. S. 774 and H.R. 6414, discussed *infra*, note 98, are the latest efforts in a long series of attempts to amend the FOIA. For example, the 97th Congress considered six bills to amend the FOIA; because no action was taken, three more bills, including S. 774, were introduced in the 98th Congress. S. REP. 221, *supra* note 45, at 3-5.

98. On October 5, 1984, H.R. 6414, 98th Cong., 2d Sess., 130 CONG. REC. 11,363 (1984) was introduced by Representative English. The bill establishes a three-tiered fee structure for (a) commercial requesters, (b) scholars, scientists, the media, non-profit groups, and (c) all others. Fee waivers are appropriate if disclosure is both likely to contribute to the public understanding of the operations or activities of government and not primarily in the commercial interest of the requester. Indigents who show a compelling need for the information may also receive a waiver, and courts are authorized to conduct de novo review of the denial of a fee waiver by an agency.

The bill further provides for expedited access to disclosure in the case of compelling need, and would require the Special Counsel of the Merit Systems Protection Board to initiate a proceeding to determine if an agency employee has acted arbitrarily and capriciously with respect to the handling of a FOIA request. A court's written finding of suspicious circumstances would trigger the process, and counsel's findings would be reported to the employee, the court, the requester, and Congress.

The English bill also requires that more detailed information be provided in the agencies' FOIA reports to Congress. Agencies must publish a complete list of statutes that the agency head or general counsel has determined are exemption 3 statutes, as well as a specific description of the scope of the information covered.

Finally, the bill exempts from disclosure records kept by the Justice Department under an informant's name or personal identifier in response to a third party request using that name or personal identifier, except where the Department has acknowledged informant status. *English Introduces FOIA Bill in Last Days of Session*, 10 ACCESS REP. NO. 20, Oct. 10, 1984, at 2-4.

Representative English describes the bill as a "starting place" for next year's discussion, admitting that it is not endorsed by any of the groups with which he spent months negotiating. *Id.* at 2.

B. *National Security Act Amendments.*

On September 28, 1984, Congress amended the National Security Act,⁹⁹ which governs public disclosure of information held by the Central Intelligence Agency (CIA). The impetus for this legislation came from the existence of a two- to three-year backlog of FOIA requests at the CIA, a backlog that had resulted from the requirement that all pertinent records be searched and reviewed in order to determine whether "any reasonably segregable portion of a record" was exempt.¹⁰⁰ In the event a withholding was challenged in court, the CIA had to provide a written explanation for every paragraph withheld.¹⁰¹ Moreover, the CIA has complained that, notwithstanding the FOIA subsection (b)(6) exemption for classified information, the risk to intelligence sources is so great that many of these sources had stopped providing intelligence to the agency out of fear that they would be exposed under the requirements of the FOIA.¹⁰²

The Senate bill, S. 1324, which was approved by the full Senate in 1983,¹⁰³ addressed these concerns by completely exempting certain files, designated by the Director of Central Intelligence, that are in the possession of one of the three branches of the CIA.¹⁰⁴ Only files dealing with the conduct of foreign intelligence or counterintelligence operations, background investigations of informants, liaison agreements with other governments, and scientific and technical means of gathering information could be exempted.¹⁰⁵ The Senate bill specifically prohibited the Director from exempting files in order to prevent search and review for information concerning a covert activity when the existence of the activity had already been acknowledged by the Executive Branch, or for information that had been reviewed and relied upon by Congress or the agency in an investigation into alleged illegal CIA activity.¹⁰⁶

The Senate bill would have limited judicial review of a CIA withholding decision. A reviewing court would have had jurisdiction to determine only whether the agency regulations implementing S. 1324

99. Central Intelligence Agency Information Act, Pub. L. No. 98-477, 98 Stat. 2209 (1984) (codified at 50 U.S.C.A. § 403 (West Supp. 1985)). The National Security Act established the Central Intelligence Agency (CIA) and detailed its operation. 50 U.S.C. § 403 (1982).

100. 5 U.S.C. § 552(b) (1982).

101. S. REP. 221, *supra* note 45, at 10.

102. N.Y. Times, Feb. 9, 1984, at A2, col. 3.

103. See *Developments—1983*, *supra* note 2, at 385-86.

104. These three branches are the Directorate of Operations, the Directorate of Science and Technology, and the Office of Security. S. 1324, 98th Cong., 1st Sess. § 3(a) (adding § 701(a) to the National Security Act of 1947), 129 CONG. REC. S16,742 (daily ed. Nov. 17, 1983).

105. *Id.*

106. *Id.*

conformed to the statutory criteria.¹⁰⁷ The same standard would have applied to a complaint alleging either improper designation of the file or improper placement of information in a properly designated file, unless the complaint (1) made a *prima facie* showing that such an error had been committed and (2) was supported by an affidavit based on personal knowledge or "otherwise admissible evidence."¹⁰⁸

The primary difference between the unenacted Senate bill and the House version¹⁰⁹ that ultimately became law was in these provisions outlining the standard for judicial review. Under the House bill as enacted, judicial review is substantially identical to that authorized by section

107. See *supra* notes 103-06 and accompanying text for statutory criteria. S. 1324, 98th Cong., 1st Sess. § 3(a) (adding § 701(e)(2) to the National Security Act of 1947), 129 CONG. REC. S16,743 (daily ed. Nov. 17, 1983) states:

On complaint under section 552(a)(4)(B) of title 5, United States Code, that the Agency has improperly withheld records because of failure to comply with the regulations adopted pursuant to subsection (d)(2), the review of the court shall be limited to determining whether the Agency considered the criteria set forth in such regulations.

108. The bill states:

(1) On the complaint under section 552(a)(4)(B) of title 5, United States Code, that the Agency has improperly withheld records because of improper designation of files or improper placement of records solely in designated files, the review of the district court, notwithstanding any other provision of law shall be limited to a determination whether the Agency regulations implementing subsection (a) conform to the statutory criteria set forth in that subsection for designating files unless the complaint is supported by an affidavit, based on personal knowledge or otherwise admissible evidence, which makes a *prima facie* showing that—

(A) a specific file containing the records requested was improperly designated; or

(B) the records requested were improperly placed solely in designated files. If the court finds a *prima facie* showing has been made under this subsection, it shall order the Agency to file a sworn response, which may be filed in camera and ex parte, and the court shall make its determination based upon these submissions and submissions by the plaintiff. If the court finds under this subsection that the regulations of the Agency implementing subsection (a) of this section do not conform to the statutory criteria set forth in that subsection for designating files, or finds that the Agency has improperly designated a file or improperly placed records solely in designated files, the court shall order the Agency to search the particular designated file for the requested records in accordance with the provisions of the Freedom of Information Act and to review such records under the exemptions pursuant to section 552(b) of title 5, United States Code. If at any time during such proceedings the Agency agrees to search designated files for the requested records, the court shall dismiss the cause of action based on this subsection.

(2) On complaint under section 552(a)(4)(B) of title 5, United States Code, that the Agency has improperly withheld records because of failure to comply with the regulations adopted pursuant to subsection (d)(2), the review of the court shall be limited to determining whether the Agency considered the criteria set forth in such regulations.

S. 1324, 98th Cong., 1st Sess. § 3(a) (adding § 701(e) to the National Security Act of 1947), 129 CONG. REC. S16742-43 (daily ed. Nov. 17, 1983).

While the Senate Report is silent on the meaning of "otherwise admissible evidence," the phrase was probably used to distinguish an affidavit, as the term is used in S. 1324, from an affidavit as commonly defined. Either personal knowledge—which is admissible in a court of law—or "information and belief"—a term of art for hearsay information which is not normally admissible—can provide the basis of an affidavit. The new law seeks to make clear that an affidavit is sufficient for judicial review of CIA withholdings only if based on admissible evidence, not inadmissible hearsay.

109. H.R. 5164, 98th Cong., 2d Sess., 130 CONG. REC. H1716 (daily ed. Mar. 15, 1984).

552(a)(4)(B) of the FOIA,¹¹⁰ except that the proceeding is conducted "ex parte, in camera" and requires, where possible, allegations by sworn submission.¹¹¹

Representative English attached two important amendments to the House bill before it was reviewed in his Government Operations subcommittee in July of 1984. The first amendment requires the director of the CIA to prepare, for the first two years of the new law, an unclassified biannual report establishing the amount of money and number of staff the CIA has allocated to process FOIA requests, the number of requests received and processed during the preceding six months, an estimate of the average amount of processing time spent, and the number of requests

110. Subsection (a)(4)(B) of the FOIA provides:

On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

5 U.S.C. § 552(a)(4)(B) (1982).

111. Whenever any person who has requested agency records under the Freedom of Information Act (5 U.S.C. 552) alleges that the Central Intelligence Agency has improperly withheld records because of failure to comply with any provision of this section, judicial review shall be available under the terms set forth in subparagraph 552(a)(4)(B) of title 5, United States Code, except that—

(1) information specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign relations which is filed with, or produced for, the court by the Agency shall be examined ex parte, in camera by the court;

(2) the court shall, to the fullest extent practicable, determine issues of fact based on sworn submissions of the parties;

(3) when a complaint alleges that requested records were improperly withheld because of improper placement solely in exempted operational files, the complainant shall support such allegation with a sworn written submission, based upon personal knowledge or otherwise admissible evidence;

(4)(A) when a complainant alleges that requested records were improperly withheld because of improper exemption of operational files, the Agency shall meet its burden under subparagraph 552(a)(4)(B) of title 5, United States Code, by demonstrating to the court by affidavit that exempted files likely to contain responsive records currently perform the functions set forth in subsection (b) of this section; and

(B) in making its determination under subparagraph (A) of this paragraph, the court may not order the Agency to review the content of any operational file or files unless the complainant disputes the Agency's showing with a sworn written submission based on personal knowledge or otherwise admissible evidence;

...

(6) if the court finds under this subsection that the Agency has improperly withheld requested records because of failure to comply with any provision of this section, the court shall order the Agency to search and review the appropriate exempted operational file or files for the requested records and make such records, or portions thereof, available in accordance with the provisions of the Freedom of Information Act (5 U.S.C. 552), and such order shall be the exclusive remedy for failure to comply with this section; and

(7) if at any time following the filing of a complaint pursuant to this subsection the Agency agrees to search the appropriate exempted operational file or files for the requested records, the court shall dismiss the claim based upon such complaint.

H.R. 5164, 98th Cong., 2d Sess. § 701(f) (1983).

currently pending.¹¹² This amendment reflects Representative English's concern over how the CIA will implement the bill, which significantly increases the discretion delegated to the agency.¹¹³

The second and more controversial amendment terminates an ongoing legal debate by declaring that the Privacy Act is not an exemption 3 statute.¹¹⁴ Representative English's amendment thus settles the long-standing controversy regarding the relation of the Privacy Act to the FOIA. The federal courts of appeals have split on the question whether the Privacy Act is an exemption 3 statute under the FOIA.¹¹⁵ The Office

112. *Id.* House Committee Clears Legislation Exempting CIA Operational Files from FOIA, 10 ACCESS REP. NO. 16, Aug. 1, 1984, at 2 [hereinafter cited as *CIA Bill*].

113. In an interview, English remarked, "The question is how much is Congress willing to trust [CIA Director] William Casey, whose acts in the last three years have not inspired confidence and trust." *Washington Focus*, 10 ACCESS REP. NO. 12, June 6, 1984, at 1. By requiring the CIA to disclose the details of its implementation of the FOIA, English hopes to prevent the agency from using its new discretion as a tool for curtailing access to government information. A decrease in resources allocated to the FOIA, or a decrease in the requests processed, could indicate an abuse of agency discretion.

114. The bill, H.R. 4696, now codified at Pub. L. No. 98-477, 98 Stat. 2211-12 (1984), provides: Subsection (q) of section 552a of title 5, United States Code, is amended . . . by adding

...
(2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title.

Exemption 3 of the FOIA provides that the statute does not apply to matters that are "specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3)(1982).

This exemption, by its nature, cross-references other federal withholding statutes. Because of the Supreme Court decision in *Federal Aviation Admin. v. Robertson*, 422 U.S. 255, 256-66 (1975), which held that the broad discretionary withholding provision of the Federal Aviation Act was referenced by exemption 3, Congress amended the Administrative Procedure Act, 5 U.S.C. 553 (1982 & Supp. I 1983), in 1976. The Amendment specifies that the exemption only applies to withhold information from the public if a law establishes specific criteria for withholding or commands the withholding of particular types of information. Examples of types of information that could be withheld under exemption 3 are patent applications, income tax returns, and records regarding nuclear testing. *GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS* 13, 99 (R. Bouchard & J. Franklin ed. 1980).

If the Privacy Act were declared an exemption 3 statute, then it would protect information within its scope from disclosure under the FOIA; entire systems of records could be withheld. For further discussion, see *infra* notes 159-63 and accompanying text.

115. *Porter v. United States Dep't of Justice*, 717 F.2d 787, 799 (3d Cir. 1983) (Privacy Act and FOIA provide separate access to information) and *Greentree v. United States Customs Serv.*, 674 F.2d 74, 88-89 (D.C. Cir. 1982) (material unavailable under Privacy Act is not per se unavailable under FOIA) are examples of cases where courts have held that the Privacy Act is not an exemption 3 statute. *Shapiro v. Drug Enforcement Admin.*, 721 F.2d 215, 222 (7th Cir. 1983) (records exempt from disclosure under Privacy Act exemption(j)(2) may not be disclosed under FOIA request), and *Painter v. FBI*, 615 F.2d 689, 690-91 (5th Cir. 1980) (Privacy Act can be used to restrict access to records that would be available under FOIA) have held that the Privacy Act is an exemption 3 statute.

of Management and Budget (OMB) had previously declared that the Privacy Act is an exemption 3 statute,¹¹⁶ and the Supreme Court had granted certiorari to decide the issue.¹¹⁷ The new amendment to the National Security Act, however, has rendered the Supreme Court case moot and invalidated the OMB pronouncement.

The House version of the amendment was deemed particularly acceptable because it had received the backing of both the ACLU and the CIA.¹¹⁸ The House bill was approved in a voice vote in the Senate in the final days of the session and became law.¹¹⁹

C. *Research and Development Disclosure.*

A third major legislative proposal involving the FOIA was approved on March 20, 1984, by the House Judiciary Committee.¹²⁰ The Joint Research and Development Act of 1984¹²¹ was proposed to encourage businesses to engage in joint corporate research and development projects by limiting the antitrust liability of companies that inform the Federal Trade Commission (FTC) and the Attorney General about proposed projects.¹²² The proposed bill would require a company to give written notification of a proposed project simultaneously to the FTC and the Attorney General.¹²³ Information contained in the notice submitted to the government through this process would be *absolutely protected*

116. See *infra* notes 159-63 and accompanying text.

117. *Provenzano v. United States Dep't of Justice*, 717 F.2d 799 (3d Cir.) (Department of Justice records on defendant not exempt from disclosure under subsection (j)(2) of Privacy Act, which allows directors of law enforcement agencies to exempt systems of records), *petition for reh'g denied*, 722 F.2d 36 (1983), *cert. granted*, 104 S. Ct. 1706, *cert. dismissed as moot*, 105 S. Ct. 413 (1984); *Shapiro v. Drug Enforcement Admin.*, 721 F.2d 215 (7th Cir. 1983) (see *supra* note 115), *cert. granted*, 104 S. Ct. 1706, *cert. dismissed as moot*, 105 S. Ct. 413 (1984). The two cases had been consolidated for appeal.

118. *Id.* The CIA has indicated that it is not opposed to the amendments. *CIA Bill*, *supra* note 112, at 3. Nevertheless, English's amendment was so politically controversial that it was thought that it could disrupt the earlier agreement made by Senator Daniel P. Moynihan, Chairman of the Senate Intelligence Committee, that the Senate would accept the House version without a conference. *N.Y. Times*, May 11, 1984, at A15, col. 4. This, however, was not the case, and the House version was accepted by the Senate without a conference.

119. *Washington Focus*, 10 ACCESS REP. NO. 20, Oct. 10, 1984, at 1. The bill, with its amendments, became the Central Intelligence Agency Information Act, Pub. L. No. 98-477, 98 Stat. 2209 (1984).

120. *House Judiciary Approves New Exemption 3 FOIA Statute*, 10 ACCESS REP. NO. 9, Apr. 25, 1984, at 7 [hereinafter cited as *New FOIA Statute*].

121. H.R. 5041, 98th Cong., 2d Sess. §§ 4, 6, 130 CONG. REC. H1339 (daily ed. Mar. 6, 1984).

122. *New FOIA Statute*, *supra* note 120, at 7. Pursuant to this provision, a private plaintiff in an antitrust suit can recover only single, not treble, damages from a company complying with the proposed law. H.R. 5041, 98th Cong., 2d Sess. § 4, 130 CONG. REC. H1339 (daily ed. Mar. 6, 1984).

123. *Id.* at § 6. The notification must disclose "the identities of the parties and the nature, objectives, and duration of the program." *Id.* Within sixty days of the receipt of this notification the attorney general will cause an abbreviated notice of the project to appear in the *Federal Register*. It

from public disclosure. Thus the House bill, if enacted, would be an exemption 3 statute under the FOIA.¹²⁴ The committee report indicates that this exemption was deemed necessary because the existing FOIA exemptions are discretionary—an agency retains the discretion to disclose information lawfully protected by exemption (b)(4).¹²⁵ The House bill removes that discretion and *bans* disclosure.¹²⁶

The Senate version,¹²⁷ although similar to the House bill, does not confer absolute protection from disclosure on submitted information. Businesses submitting information to the FTC and Attorney General may request that such information remain undisclosed, but the Commission and the Attorney General each retain the authority to disclose the information.¹²⁸

D. *National Security Exemption.*

Hearings were held in the summer of 1984 on a measure¹²⁹ that would nullify the effects of President Reagan's Executive Order 12,356¹³⁰ and restore the standard for exempting information pursuant to the (b)(1) national security exemption to that established by President Carter's Executive Order Number 12,065.¹³¹ The Senate bill amends exemption 1 to allow an agency to withhold classified information only if disclosure would cause "identifiable damage to national security" and the need to protect the information outweighs the public interest in disclo-

is this publication that triggers the damage limitation. H.R. REP. NO. 656, 98th Cong., 2d Sess. 27 (1984)[hereinafter cited as H.R. REP. 656].

Section 4 of the bill reduces the antitrust liability of a joint research and development program that complies with H.R. 5041 to actual—not treble—damages plus prejudgment interest from the date of filing an action or, in certain specified circumstances, from the date of injury. *Id.* at 5.

124. *New FOIA Statute*, *supra* note 120, at 7. See *infra* notes 281-307 and accompanying text for a discussion of exemption 3.

125. H.R. REP. 656, *supra* note 123, at 28.

126. *Id.*

127. S. 1841, 98th Cong., 2d Sess., 130 CONG. REC. S5330 (daily ed. May 3, 1984).

128. *Id.* at § 204(c).

129. S. 1335, 98th Cong., 1st Sess., 129 CONG. REC. S7161-65 (daily ed. May 19, 1983); see Note, *Developments—1983*, *supra* note 2, at 387.

130. Exec. Order No. 12,356, 3 C.F.R. 166 (1983), *reprinted in* 50 U.S.C.A. § 401 app. at 67 (West Supp. 1985).

131. Exec. Order No. 12,065, 3 C.F.R. 190, 193 (1979).

The Reagan order provides that "information . . . shall be classified when . . . its unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security." 3 C.F.R. 166, 169 (1983). This standard is much broader than that of the Carter order, which exempted information if its release "reasonably could be expected to cause at least identifiable damage to the national security." 3 C.F.R. 190, 193 (1979). The Reagan standard classifies as exempt information that is harmless in itself, but has the potential to be harmful in conjunction with other information.

sure.¹³² Senator David Durenburger, the author of the bill, told the committee the bill would send a clear signal to federal agencies that "Congress meant it [broad disclosure] when it passed FOIA."¹³³

The bill has received mixed reviews. Mary C. Lawton of the Justice Department testified that the Department considers the Senate bill unconstitutional as a usurpation of the President's power as Chief Executive to protect state secrets involving national defense and foreign policy.¹³⁴ Mark Lynch of the ACLU called the Justice Department's argument a "big bluff" and urged passage of the measure.¹³⁵ Steve Garfinkel, director of the Information Security Oversight Office (ISOO), supported the Reagan version because the term "identifiable" was ambiguous and the balancing test invited misapplication of the standard in litigation.¹³⁶

II. ADMINISTRATIVE DEVELOPMENTS

A number of administrative agencies promulgated rules in 1984 implementing various provisions of the Freedom of Information and Privacy Acts.¹³⁷ In general, these new procedures make access to agency information more difficult and more expensive for the requester.

A. *Department of Justice.*

In March of 1984, the Department of Justice (DOJ) issued new guidelines governing the administration of the FOIA and the Privacy Act.¹³⁸ Although many of the new guidelines are almost identical to ear-

132. S. 1335, 98th Cong., 1st Sess. § 3 (1983).

133. *Senate Panel Hears Testimony of FOIA Exemption 1 Amendment*, 10 ACCESS REP. No. 8, Apr. 11, 1984, at 3.

134. *Id.* at 2.

135. *Id.*

136. *Id.* at 2-3. Garfinkel noted that for 1983, the first full year following the effective date of President Reagan's order, the number of original classification decisions decreased by two hundred thousand, or 18%. *Id.* at 3. This figure was apparently used by the administration to establish that the ISOO spent less time determining whether information fell within the scope of the standard, thus demonstrating that the Reagan standard was clearer than that advanced by President Carter.

137. In addition to the administrative activity reported here, the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC) promulgated their own final rules. The FCC has changed the standard required to gain confidential status for documents submitted to the Commission. Previously, "clear and convincing" evidence was required to establish a document as confidential; now such documents need satisfy only a "preponderance of the evidence" test. 49 Fed. Reg. 21,717 (1984) (to be codified at 47 C.F.R. pt. O).

The FTC amended its Rule 4.10(a)(3) to reflect the prevailing legal standard—that exemption 5 of the FOIA protects internal agency documents not "routinely" or "normally" available in discovery from disclosure. The FTC has therefore altered its definition of non-public information from materials not "available" in civil discovery to those not "routinely available" in civil discovery. 49 Fed. Reg. 30,165 (1984) (to be codified at 16 C.F.R. pt. 4).

138. 49 Fed. Reg. 12,248 (1984) (to be codified at 28 C.F.R. pts. 0, 16, & 50).

lier versions,¹³⁹ others implement procedural modifications designed to streamline FOIA procedures.¹⁴⁰ The substantive changes in the guidelines focus on two areas: fees and disclosure of business information. Under the new rule regarding fees, the act of filing a request under the FOIA "shall be deemed to constitute an agreement by the requester to pay all applicable fees charged . . . up to \$25, unless a waiver of fees is sought."¹⁴¹ This provision, coupled with the restrictive guidelines for fee waivers issued by the DOJ in January of 1983,¹⁴² makes access to DOJ records more expensive.¹⁴³

The second substantive change adds a procedure that allows those who submit business information to the DOJ to receive a written notification if the Department receives a request for the submitted information.¹⁴⁴ The submitter is then allowed to contest the disclosure by providing a detailed written statement specifying reasons for withholding the information.¹⁴⁵ If the Department decides to disclose the information in spite of the submitter's objection, it must, prior to disclosure, furnish the submitter with written notice of its intent.¹⁴⁶ If the Department elects not to disclose and the requester brings suit, the DOJ must notify the submitter of the pending litigation.¹⁴⁷

139. Compare, for example, 28 C.F.R. § 16.41 (1984) with 49 Fed. Reg. 12,254 (1984) (to be codified at 28 C.F.R. § 16.3).

140. Requests are now sent directly to the various divisions of the DOJ, rather than to the Assistant Attorney General—the party previously responsible for forwarding them. A list of the various divisions of the DOJ appears at the end of the rule. 49 Fed. Reg. 12,263 (1984) (App. I to Pt. 16). The language of the DOJ guidelines implementing both the FOIA and the Privacy Act was standardized in order to facilitate comparison between the two.

141. 49 Fed. Reg. 12,255 (1984) (to be codified at 28 C.F.R. § 16.3(c)).

142. Memorandum from Assistant Attorney General Jonathan Rose to Heads of All Federal Departments and Agencies (Jan. 7, 1983), *reprinted in* 1 GOV'T DISCLOSURE REP. (P-H) ¶ 300,815 (Feb. 8, 1983). Courts and agencies are to evaluate fee waiver requests by applying five criteria: (1) the interest in disclosure must be a general public interest, not a private one; (2) records must meaningfully contribute to the public development or understanding of a subject; (3) denial is appropriate if the records are already available; (4) the requester must have expertise in the subject area as well as the ability and the intention to disseminate the requested data to the public; and (5) denial is appropriate if the documents are sought for commercial reasons, for use in litigation, or for ascertaining what the government knows about the requester. *Id.* See *supra* notes 41-65 and accompanying text.

143. A study done by Common Cause, a national citizens lobby whose avowed purpose is to make government more open and accountable to the public, indicates that a restrictive fee waiver policy may result in "the worst of all possible scenarios: limited public access to information offset by a marginal, at best, impact on total FOIA costs." *Hearings, supra* note 36, at 205 (testimony of Michal Freedman, Common Cause).

144. 49 Fed. Reg. 12,256 (1984) (to be codified at 28 C.F.R. § 16.7).

145. *Id.* This measure parallels the business confidentiality procedures established in the Reform Act, S. 774, 98th Cong., 1st Sess. § 3, 130 CONG. REC. S1795 (daily ed. Feb. 27, 1984). See *supra* notes 73-75 and accompanying text.

146. 49 Fed. Reg. 12,256 (1984) (to be codified at 28 C.F.R. § 16.7(e)).

147. 49 Fed. Reg. 12,256 (1984) (to be codified at 28 C.F.R. § 16.7(f)).

B. *Consumer Product Safety Commission.*

The Consumer Product Safety Commission (CPSC) issued new guidelines in December of 1983 governing the public disclosure of product information that would reveal the identity of a manufacturer or private labeler of a product.¹⁴⁸ Pursuant to the terms of subsection (b)(1) of the Consumer Product Safety Act (CPSA),¹⁴⁹ if the information disclosed to a consumer by the CPSC would allow that consumer to ascertain the identity of the submitter, the Commission must provide the submitter with a reasonable opportunity to send in comments with regard to the propriety of disclosing such information.¹⁵⁰ In addition, the Commission is required to "take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this Act."¹⁵¹

The CPSC not only issued guidelines detailing the procedure for notifying submitters and reviewing their objections to disclosure,¹⁵² but also defined the "reasonable steps" necessary to ensure the accuracy of the information and the fairness of the disclosure.¹⁵³ The Commission decided that a requester can meet this burden by providing either a "confirmation from consumers" or evidence of an objective investigation by a qualified expert into the accuracy of the consumer complaints that gave rise to the request for information.¹⁵⁴

148. 48 Fed. Reg. 57,406 (1983) (to be codified at 16 C.F.R. pt. 1101).

149. 15 U.S.C. § 2055 (1982).

150. *Id.* at § 2055(b)(1).

151. *Id.* Consumer groups use the CPSA to obtain and publish information about harmful or defective products. Therefore, firms are concerned that the information be "fair and accurate."

152. 48 Fed. Reg. 57,431-33 (1983) (to be codified at 16 C.F.R. §§ 1101.21-1101.26). If a manufacturer or private labeler wishes to prevent disclosure, the firm must make claims of confidentiality pursuant to section (a)(2) of the Act, 15 U.S.C. § 2055(a)(2) (1982), which protects trade secrets. Any claim of confidentiality must be asserted at the time comments are submitted. *Id.* at 57,432.

153. 48 Fed. Reg. 57,433-34 (1983) (to be codified at 16 C.F.R. §§ 1101.32-1101.33).

154. Any of the following actions are considered "reasonable steps to ensure accuracy": (1) the Commission staff or a qualified outsider conducts an investigation, inspection, or scientific test which corroborates the information; (2) the Commission obtains a copy of such an evaluation from a qualified person; and (3) the person who submitted the information to the Commission for review confirms that the information is correct to the best of his or her knowledge, provided that (a) the person was injured or nearly injured in an incident involving the product in question; (b) the person identifies a defect in the product on the basis of his or her own experience; (c) the person was an eyewitness to an accident or incident involving the product or the person possesses the requisite training and has conducted an investigation; or (d) the person is the parent or guardian of a child involved in an incident with the product. 48 Fed. Reg. 57,433-34 (1983) (to be codified at 16 C.F.R. § 1101.32-1101.33).

In order to ensure fairness, the CPSC will include the manufacturer's or labeler's comments—if the firm so requests—and issue an explanatory statement in conjunction with the release of product information.¹⁵⁵ In general, however, the Commission retains a wide area of discretion in limiting the circumstances under which the information will be released.¹⁵⁶

Finally, in reviewing FOIA requests, the Commission will examine the request in light of the purposes of the CPSA in order to ensure that the release of product information is reasonably related to effectuating the purposes of that act.¹⁵⁷ If faced with a "close case" on disclosure, the CPSC will then defer to the purposes of the FOIA—"establish[ing] a general right of the public to have access to information in the Commission's possession."¹⁵⁸

C. *Office of Management and Budget.*

In a controversial action that was later overruled by Congress,¹⁵⁹ the Office of Management and Budget (OMB), the agency responsible for developing guidelines implementing the Privacy Act for all other agencies, revised its Privacy Act Implementing Guidelines to clarify the relationship between the Privacy Act and the FOIA.¹⁶⁰ Under the OMB guidelines, the Privacy Act was declared an exemption 3 statute, so that an agency would have maintained the same discretion to deny access to exempt systems of records regardless of whether access was sought under the FOIA or the Privacy Act.¹⁶¹ The guidelines cautioned, however, that agencies should not rely exclusively on this rule if a matter proceeded to litigation in the Third Circuit or District of Columbia Circuit

155. 48 Fed. Reg. 57,434 (1983) (to be codified at 16 C.F.R. § 1101.33).

156. *Id.* The guidelines suggest the general steps that the CPSC take to ensure that the release of information is fair under the circumstances, subject to case-by-case determination by the agency of what constitutes "fair" under the particular circumstances. The regulation also lists examples of disclosure circumstances that are not considered fair. These include instances where a firm has a reasonable expectation of confidentiality with regard to the information; circumstances in which disclosure would expose work product of attorneys employed by the firm; and the disclosure of a firm's comments if the firm has specifically requested that they be kept confidential.

157. 48 Fed. Reg. 57,434 (1983) (to be codified at 16 C.F.R. § 1101.34).

The purposes of the Act are (1) to protect the public against unreasonable risks of injury associated with consumer products; (2) to assist consumers in evaluating the comparative safety of consumer products; (3) to develop uniform safety standards for consumer products and to minimize conflicting state and local regulations; and (4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries. 15 U.S.C. § 2051 (1982).

158. 48 Fed. Reg. 57,434 (1983) (to be codified at 16 C.F.R. § 1101.34).

159. Congress, in enacting amendments to the National Security Act, invalidated the OMB guidelines. *See supra* notes 114-17 and accompanying text.

160. 49 Fed. Reg. 12,338 (1984) (proposed Aug. 10, 1983).

161. *Id.*

because those courts have held that the Privacy Act is not an exemption 3 statute.¹⁶² This warning proved prescient in view of the subsequent passage of the CIA bill, which invalidated the OMB regulation.¹⁶³

III. JUDICIAL DEVELOPMENTS

A. *The FOIA and Civil Discovery: The Scope of Exemption 5.*

1. *The Machin Privilege: United States v. Weber Aircraft.* Exemption 5 of the FOIA excludes from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."¹⁶⁴ The purpose of the exemption is to incorporate into the FOIA the government's common law and statutory privileges in the civil discovery context.¹⁶⁵ It is not always clear, however, whether a particular privilege falls within exemption 5. The Supreme Court has repeatedly addressed the scope of this exemption,¹⁶⁶ and in 1984 it was asked again to clarify the issue in *United States v. Weber Aircraft Corp.*¹⁶⁷ The Court's holding in the case, though helpful, does not entirely resolve the uncertainty.

In *Weber Aircraft*, the FOIA plaintiffs were defendants in a damages action arising from the crash of an Air Force plane.¹⁶⁸ During pretrial discovery, the defendants sought to discover all of the Air Force investigative reports pertaining to the accident. The Air Force, however, re-

162. See *Porter v. United States Dep't of Justice*, 717 F.2d 787 (3d Cir. 1983) (Privacy Act and FOIA provide separate access to information); *Greentree v. United States Customs Serv.*, 674 F.2d 74 (D.C. Cir. 1982) (material unavailable under Privacy Act is not per se unavailable under FOIA).

163. See *supra* notes 114-17 and accompanying text.

164. 5 U.S.C. § 552(b)(5) (1982).

165. *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975).

166. See, e.g., *FTC v. Grolier Inc.*, 103 S. Ct. 2209, 2214 (1983) ("The test under Exemption 5 is whether the documents would be 'routinely' or 'normally' disclosed upon a showing of relevance."); *Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 353 (1979) ("The House Report [on FOIA] states that Exemption 5 was intended to allow an agency to withhold intra-agency memoranda which would not be 'routinely disclosed to a private party through the discovery process in litigation with the agency.'") (quoting H.R. REP. NO. 1497, 89th Cong., 2d Sess. 10, reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2418, 2428) [hereinafter cited as H.R. REP. NO. 1497]; *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975) ("Exemption 5 incorporates the privileges which the government enjoys under the relevant statutory and case law in the pretrial discovery context."); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 148 (1975) ("Exemption 5 withholds from a member of the public documents which a private party could not discover in litigation with the agency."); *EPA v. Mink*, 410 U.S. 73, 85-86 (1973) ("This language clearly contemplates that the public is entitled to all such memoranda or letters that a private party could discover in litigation with the agency."). See also Note, *Developments—1983*, *supra* note 2, at 410-13.

167. 104 S. Ct. 1488 (1984).

168. See *Hoover v. Weber Aircraft Corp.*, No. 74-1064-WPG (C.D. Cal. Jan. 3, 1980).

fused to release certain confidential portions of its safety investigation,¹⁶⁹ relying on the privilege recognized in *Machin v. Zukert*,¹⁷⁰ which held that statements made to military air crash safety investigators pursuant to a promise of confidentiality are exempt from pretrial discovery.¹⁷¹ The defendants in *Weber Aircraft* filed FOIA requests for these confidential statements, and the Air Force continued to refuse to disclose the information.¹⁷²

The district court concluded that the disputed material would not be available by law to a party other than an agency in litigation with the withholding agency, and thus was privileged under exemption 5.¹⁷³ The United States Court of Appeals for the Ninth Circuit reversed.¹⁷⁴ Although the Ninth Circuit agreed that the documents were "intra-agency memorandums" within the meaning of exemption 5 and that they were protected under the *Machin* privilege in the civil discovery context, it cited the Supreme Court's decision in *Federal Open Market Committee v. Merrill*¹⁷⁵ as authority for holding that the statutory phrase "not . . . available by law" was not intended to incorporate every civil discovery privilege, but only those explicitly recognized in the FOIA's legislative history.¹⁷⁶

169. *Weber Aircraft*, 104 S. Ct. at 1490-91.

170. 316 F.2d 336, 339 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963).

171. *Machin*, 316 F.2d at 339.

172. *Weber Aircraft*, 104 S. Ct. at 1491.

173. *Id.* at 1492.

174. *Weber Aircraft Corp. v. United States*, 688 F.2d 638, 646 (9th Cir. 1982).

175. 443 U.S. 340, 354 (1979).

176. *Weber Aircraft*, 688 F.2d at 641-42. The Ninth Circuit Court of Appeals cited the following language from *Merrill*:

Preliminarily, we note that it is not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery. . . . Given that Congress specifically recognized that certain discovery privileges were incorporated into Exemption 5, and dealt with other civil discovery privileges in exemptions other than Exemption 5, a claim that a privilege other than executive privilege or the attorney privilege is covered by Exemption 5 must be viewed with caution.

Merrill, 443 U.S. at 354 (holding that exemption 5 incorporates a qualified privilege for confidential commercial information) (citations omitted). The *Merrill* Court made specific exceptions for executive and attorney privileges because both are expressly mentioned in the legislative history. *Merrill*, 443 U.S. at 355 & n.15 (citing H.R. REP. NO. 1497, *supra* note 166, at 10 ("advice from staff assistants and the exchange of ideas among agency personnel"), and S. REP. NO. 813, 89th Cong., 1st Sess. 2 (1965) (Exemption 5 includes "the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties.") [hereinafter cited as S. REP. NO. 813]).

The Ninth Circuit in *Weber Aircraft*, 688 F.2d at 642-44, considered and rejected pre-*Merrill* decisions from the Fifth and Eighth Circuits holding that exemption 5 incorporated the *Machin* privilege. See *Cooper v. Department of the Navy*, 558 F.2d 274, 278-79 (5th Cir. 1977), *modified on other grounds*, 594 F.2d 484, *cert. denied*, 444 U.S. 926 (1979); *Brockway v. Department of the Air Force*, 518 F.2d 1184, 1193 (8th Cir. 1975).

The Supreme Court reversed the Ninth Circuit's decision.¹⁷⁷ Reviewing its earlier decisions involving the scope of exemption 5, the Court stressed that "the *holding* of *Merrill* was that a privilege that was mentioned in the legislative history of Exemption 5 is incorporated by the exemption—not that all privileges not mentioned are excluded."¹⁷⁸ The Court continued:

It is one thing to say that recognition under Exemption 5 of a novel privilege, or one that has found less than universal acceptance, might not fall within Exemption 5 if not discussed in its legislative history. It is quite another to say that the *Machin* privilege, which has been well-settled for some two decades, need be viewed with the same degree of skepticism.¹⁷⁹

A contrary ruling, the Court observed, would "create an anomaly in that the FOIA could be used to supplement civil discovery,"¹⁸⁰ a position the Court has consistently rejected.¹⁸¹

The Court thus rejected the theory that the legislative history of exemption 5 contained a "comprehensive list of all privileges Congress intended to adopt," and concluded that Congress had merely provided certain "rough analogies."¹⁸² *Weber Aircraft* provides a somewhat improved guide for lower courts, yet by not resolving the future applicability of exemption 5 to a "novel privilege," it clearly falls short of providing a roadmap for determining the exemption's applicability to discovery privileges less "well-settled" than the *Machin* privilege, as well as to discovery privileges that courts may develop in the future.

2. *Predecisional Memoranda*: *Environmental Defense Fund v. Office of Management & Budget*. The scope of exemption 5 was also the subject of significant litigation before the Court of Appeals for the District of Columbia Circuit. In *Environmental Defense Fund v. Office of Management & Budget*, a case consolidated at the appellate level with

177. *Weber Aircraft*, 104 S. Ct. at 1495.

178. *Id.* at 1493 (citing *Merrill*, 443 U.S. at 357-60) (emphasis in original). The Court noted that *Merrill* involved a claimed privilege not clearly falling within any recognized civil discovery privilege; inquiry into legislative intent was therefore appropriate. *Id.*

179. *Weber Aircraft*, 104 S. Ct. at 1494.

180. *Id.* (citing *Baldrige v. Shapiro*, 455 U.S. 345, 360 n.14 (1982) (primary purpose of FOIA is not to benefit private litigants or serve as substitute for civil discovery)).

181. See, e.g., *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975) (FOIA's fundamental purpose is to inform public about agency action); *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) (discovery is not an expressly indicated purpose of the FOIA).

182. *Weber Aircraft*, 104 S. Ct. at 1494, 1495 n.22, (citing *EPA v. Mink*, 410 U.S. 73, 86 (1973), H.R. REP. NO. 1497, *supra* note 166, at 10; S. REP. NO. 813, *supra* note 176, at 9; and *Administrative Procedure Act: Hearings Before the Comm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 196, 206, 366-67, 418 (1965)).

Bureau of National Affairs v. United States Department of Justice,¹⁸³ the Environmental Defense Fund (EDF) sought the disclosure of materials submitted to the Office of Management and Budget (OMB) by the Environmental Protection Agency (EPA) concerning the latter's budget requests.¹⁸⁴ The budget figures later proposed by the President to Congress differed from the EPA's recommendations. This fact lent support to the OMB's argument that, because the President is ultimately responsible for submitting a final budget proposal to Congress, any agency recommendation made to him is merely advisory, and is thus a predecisional, deliberative interagency memorandum;¹⁸⁵ such memoranda fall within exemption 5, which incorporates the government's executive privilege.¹⁸⁶

Exemption 5 of the FOIA applies to advice, recommendations, or opinions that are "predecisional" in that they actually precede adoption of agency policy.¹⁸⁷ The purpose of the privilege is to ensure candor in the decisionmaking process, by protecting from public dissemination the exchanges of opinion that often precede the formulation of a final policy.¹⁸⁸ When a government agency invokes this exemption in a FOIA action, the agency bears the burden of showing that the material requested is predecisional.¹⁸⁹

The district court in *Environmental Defense Fund* concluded that the EPA's budget recommendations were not predecisional, but instead reflected a final decision by the agency regarding its 1982 budget request;

183. 742 F.2d 1484 (D.C. Cir. 1984). See *infra* notes 255-80 and accompanying text for another aspect of the case. Although both cases are reported under the name, *Bureau of Nat'l Affairs v. United States Dep't of Justice*, subsequent references in text and footnotes will, for clarity, distinguish between the two cases by name.

184. The materials reflected the EPA's assessment of its 1982 funding needs for the Superfund, 42 U.S.C. §§ 9601-9657 (1982).

185. *Environmental Defense Fund*, 742 F.2d at 1496.

186. *Id.* Predecisional memoranda falling within exemption 5 are those "prepared in order to assist an agency decisionmaker in arriving at his decision," whereas postdecisional memoranda are records "setting forth the reasons for an agency decision already made." *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975). Interagency, as well as intra-agency, memoranda are included: "Congress plainly intended to permit one agency possessing decisional authority to obtain written recommendations and advice from a separate agency not possessing such decisional authority without requiring that the advice be any more disclosable than similar advice received from within the agency." *Id.* at 188.

187. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151-53 (1975); *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc). The purpose of exemption 5 is "to protect the deliberative process of the government, by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision-makers without fear of publicity [that might] inhibit frank discussion of policy matters and likely impair the quality of decisions." *Ryan v. Department of Justice*, 617 F.2d 781, 789-90 (D.C. Cir. 1980) (footnote omitted).

188. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-51 (1975).

189. *Environmental Defense Fund*, 742 F.2d at 1497.

the district court therefore ordered disclosure.¹⁹⁰ The United States Court of Appeals for the District of Columbia Circuit reversed, however, holding that the district court's opinion misinterpreted the meaning of the phrase "final decision" in exemption 5.¹⁹¹ According to the Supreme Court's 1975 decision in *Renegotiation Board v. Grumman Aircraft Engineering Corp.*,¹⁹² opinions authored by one agency and communicated to an agency having final decisional authority are predecisional materials within the meaning of exemption 5. Accordingly, the court of appeals in *Environmental Defense Fund* concluded that, because the President is not bound in any way by the funding requests of federal agencies, "their budgetary 'decisions' constitute advice and suggestions for the President" rather than final agency decisions and are therefore exempt.¹⁹³

The reversal of the district court's decision in *Environmental Defense Fund* suggests that despite the Supreme Court's decision a decade ago in *Grumman Aircraft*, ambiguity persists in the concept of "predecisional" materials. In *Environmental Defense Fund*, the budget recommendation at the center of the dispute represented a final determination within the agency as to its 1982 budget requirements; the memorandum was predecisional solely because the agency lacked authority to act on its own decision. In such a case, a document may be final with respect to the agency, and its contents may be largely factual, revealing little of the subjective decisional process;¹⁹⁴ nonetheless, under the rationale of the District of Columbia Circuit, the document may be predecisional. The Court of Appeals' holding in *Environmental Defense Fund* suggests that this influential circuit will take a broad view of what constitutes "predecisional memoranda" in the future.

190. *Id.* at 1496-97 (citing unpublished district court opinion).

191. *Id.* at 1497.

192. 421 U.S. 168, 187-88 (1975).

193. *Environmental Defense Fund*, 742 F.2d at 1497. Although the court conceded that such "suggestions" are "likely to frame the ultimate budgetary choices made by" the President, it nonetheless distinguished such suggestions from predecisional recommendations "expressly adopted as the basis for agency action," which, according to the court of appeals, lose their exemption 5 status. *Id.* (quoting *Afshar v. Department of State*, 702 F.2d 1125, 1140, 1143 (D.C. Cir. 1983)). In the instant case, the EPA's 1982 budgetary recommendations were never adopted by the President. A finding that such interagency recommendations were "final," the court ruled, would render exemption 5 an "empty shell." *Environmental Defense Fund*, 742 F.2d at 1497.

194. A budget request has elements of factual reporting as well as elements suggesting advice or opinion; only the latter will trigger the exemption. See *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975) (unevaluated factual report not exempt as predecisional; to be exempt, it must reflect opinion or recommendations).

The broad scope of what the District of Columbia Circuit considers to be "predecisional" material is somewhat at odds with the First Circuit's dictum in *Crooker v. United States Parole Comm'n*, 730 F.2d 1, 4 (1st Cir.), *vacated and remanded*, 105 S. Ct. 317 (1984). See *infra* note 250.

B. *The "Confidential Source" Exemption and the Test of Confidentiality.*

Exemption 7(D) of the FOIA exempts from disclosure "investigatory records compiled for law enforcement purposes" to the extent that their production would "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, . . . confidential information furnished only by the confidential source."¹⁹⁵ The policy underlying this broad exemption is "that law enforcement agencies should not be faced with a 'drying up' of their sources of information or have their criminal investigative work be seriously impaired."¹⁹⁶

195. 5 U.S.C. § 552(b)(7)(D) (1982). This exemption differs from other FOIA exemptions because its operation in many cases does not depend on the information contained in the requested document, but rather on the source of the information. If the source is confidential, then the information is exempt from disclosure. *See* *Lesar v. Department of Justice*, 636 F.2d 472, 492 (D.C. Cir. 1980).

Exemption (b)(7) reads in full:

(b) This section does not apply to matters that are—

. . .

- (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel[.]

5 U.S.C. § 552(b)(7) (1982).

196. *Church of Scientology v. United States Dep't of Justice*, 612 F.2d 417, 425 (9th Cir. 1979) (citing *FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974* (P.L. 93-502), *SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS* 381, 391-92, 451, 468, 473, 476 (Joint Comm. Print 1975) [hereinafter cited as *SOURCE BOOK*]).

The tension between the FOIA's broad underlying policy of disclosure and Congress's concern that this policy not impede the investigative work of law enforcement agencies is illustrated in the legislative history of exemption 7(D). As originally enacted, exemption 7 excluded from disclosure "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." Pub. L. No. 89-487, § 3(e)(7), 80 Stat. 250, 251 (1966) (codified as amended by Pub. L. No. 90-23, 81 Stat. 54 (1967), at 5 U.S.C. § 552(a)(4) (1982)). *See* *Center for Nat'l Policy Review on Race & Urban Issues v. Weinberger*, 502 F.2d 370, 372 (D.C. Cir. 1974) (once court determines that materials requested are "investigatory files compiled for law enforcement purposes," its inquiry is at an end). This broad exemption was narrowed when exemption 7 was enacted in its present form in the 1974 amendments to the FOIA, Pub. L. No. 93-502, § 2(b), 88 Stat. 1563 (1974), which limited the exemption to particular types of information contained within the investigative files. As originally proposed by Senator Hart, the 1974 amendment exempted:

[I]nvestigatory 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 or constitute a clearly

The federal courts of appeals are divided on the appropriate standard for a finding of "confidentiality" in the context of information supplied to federal law enforcement officials pursuant to a criminal investigation. Three distinct approaches have evolved. In the absence of "an express assurance of confidentiality,"¹⁹⁷ the Second¹⁹⁸ and Fourth¹⁹⁹ Circuits require that the agency show "that the information was furnished under circumstances from which an assurance of confidentiality could be reasonably inferred."²⁰⁰ These courts treat the existence of an

unwarranted invasion of personal privacy, (C) disclose the identity of an informer, or (D) disclose investigatory techniques and procedures.

120 CONG. REC. 17,033 (1974), *reprinted in* SOURCE BOOK, *supra* at 332.

Hart's proposal was criticized as making the scope of the exemption far too narrow. Although the Senate passed the Hart amendment, no similar language appeared in the House bill. When the matter arose before a House-Senate conference committee, President Ford expressed the concerns of the amendment's critics in a letter to the conference committee:

I am concerned with any provision which could reduce our ability to effectively deal with crime. This amendment could have that effect if the sources of information or the information itself are disclosed. These sources and the information by which they may be identified must be protected in order not to severely hamper our efforts to combat crime.

SOURCE BOOK, *supra*, at 369-70, *quoted in* Keeney v. FBI, 630 F.2d 114, 118 (2d Cir. 1980) (local law enforcement agency can constitute a "confidential source" for FOIA purposes).

These concerns prompted the adoption of exemption 7(D) in its present and broader form, which substitutes "confidential source" for "informer," and which ensures that "the agency not only can withhold information which would disclose the identity of a confidential source but also can provide blanket protection for any information supplied by a confidential source." 120 CONG. REC. 36,871 (1974) (statement of Sen. Hart), *reprinted in* SOURCE BOOK, *supra*, at 451. Hart's statement in support of the modified bill went further, adding that the FBI need not "prove that disclosure would reveal an informer's identity; all the FBI has to do is to state that the information was furnished by a confidential source and it is exempt." *Id.* The breadth of Hart's claim contradicts the express language of the Conference Report, which states that a confidential source's identity "may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such assurance would be reasonably inferred." FREEDOM OF INFORMATION ACT AMENDMENTS, CONFERENCE REPORT, H.R. REP. NO. 1380, 93d Cong., 2d Sess. 13 (1974) [hereinafter cited as CONFERENCE REPORT], *reprinted in* SOURCE BOOK, *supra*, at 230, *quoted in* Deering Milliken, Inc. v. Irving, 548 F.2d 1131, 1137 (4th Cir. 1977) (existence of express or implied assurance of confidentiality is a question of fact). The divergence between these two standards has apparently contributed to the split among the federal courts of appeals on this issue. *See infra* notes 198-231 and accompanying text. Given the inherent conflict in the legislative history, the view expressed by the Conference Committee in its official report should be given greater weight as coming from the more authoritative source.

197. CONFERENCE REPORT, *supra* note 196, at 13.

198. *See* Keeney v. FBI, 630 F.2d 114, 119-20 (2d Cir. 1980) (whether local law enforcement agency provided information under such assurance is question of fact).

199. *See* Nix v. United States, 572 F.2d 998, 1003-04 (4th Cir. 1978) (it suffices to show that the information was furnished under circumstances in which an assurance of confidentiality could be reasonably inferred); *see also* Deering Milliken, Inc. v. Irving, 548 F.2d 1131, 1137 (4th Cir. 1977) (analyzing confidentiality along the same lines, but in the context of a noncriminal investigation). In at least one decision, the Fifth Circuit has apparently adopted the same approach. *See* Pope v. United States, 599 F.2d 1383, 1386-87 (5th Cir. 1979) (highly damaging character of information supplied to FBI creates strong inference that interviewee had expectation of confidentiality).

200. Nix v. United States, 572 F.2d 998, 1003 (4th Cir. 1978); *see also* CONFERENCE REPORT, *supra* note 196, at 13 (similar language).

express or implied assurance of confidentiality as a question of fact.²⁰¹ In contrast, within the Third Circuit there is authority both for this standard and for an alternative rule—that a criminal law enforcement agency need only “state that the information was furnished by a confidential source” in order to establish confidentiality.²⁰² Finally, the Sixth²⁰³ and Seventh²⁰⁴ Circuits have apparently adopted the rule that “[u]nless there is evidence to the contrary in the record, . . . promises of confidentiality are inherently implicit in FBI interviews conducted pursuant to a criminal investigation.”²⁰⁵ This standard imposes no burden of proof on the government beyond stating the exemptions invoked and the reasons for their applicability.²⁰⁶

201. *Keeney v. FBI*, 630 F.2d 114, 119-20 (2d Cir. 1980); *Deering Milliken, Inc. v. Irving*, 548 F.2d 1131, 1137 (4th Cir. 1977).

202. *Compare Conoco, Inc. v. United States Dep't of Justice*, 687 F.2d 724, 730 (3d Cir. 1982) (if plaintiff is the subject of criminal investigation of price control violations, then to claim exemption under 7(D), agency need only identify the document and state that the information was furnished by a confidential source; requiring more detail would increase possibility of revealing source and content) with *Lame v. United States Dep't of Justice*, 654 F.2d 917, 927-29 (3d Cir. 1981) (requiring detailed explanation showing assurance of confidentiality with respect to each alleged confidential source). The apparent source for the *Conoco* standard is a comment by Senator Hart. *See* 120 CONG. REC. 36,871 (1974), reprinted in *SOURCE BOOK*, *supra* note 196, at 451. For a discussion of Hart's comment, see *supra* note 196.

Although the Tenth Circuit Court of Appeals in *Johnson v. United States Dep't of Justice*, 739 F.2d 1514, 1517 (10th Cir. 1984), characterized the approach of the District of Columbia Circuit as consistent with that of the Third Circuit, the District of Columbia Circuit appears to take an approach that actually falls somewhere between that of the Third Circuit and that of the Second and Fourth Circuits. *See, e.g., Lesar v. United States Dep't of Justice*, 636 F.2d 472, 491-92 & n.114 (D.C. Cir. 1980) (if Department of Justice affidavits aver that police records were provided with explicit understanding of confidentiality, then detailed explanation found unnecessary; Senator Hart's statement quoted as support); *Shaw v. United States Dep't of State*, 559 F. Supp. 1053, 1064 (D.D.C. 1983) (agency affidavits demonstrated “at least an implied assurance of confidentiality”); *Iglesias v. CIA*, 525 F. Supp. 547, 564-65 (D.D.C. 1981) (fact that interviews were conducted in connection with criminal investigation that included a grand jury proceeding cannot alone support finding of implicit confidentiality; more detailed statement necessary to support inference of confidentiality); *Malloy v. United States Dep't of Justice*, 457 F. Supp. 543, 546 (D.D.C. 1978) (agency affidavit asserted both express and implicit assurances).

203. *Ingle v. Department of Justice*, 698 F.2d 259, 269 (6th Cir. 1983) (promise of confidentiality held “inherently implicit” in FBI interviews pursuant to criminal investigation, and FBI need not prove it extended such promise to interviewee as condition of interview).

204. *Miller v. Bell*, 661 F.2d 623, 627-28 (7th Cir. 1981) (promise of confidentiality “inherently implicit” in FBI interviews pursuant to criminal investigation; fact that one interviewee denied that such promises were made could refute this inference only with respect to her own interview), *cert. denied*, 456 U.S. 960 (1982); *Scherer v. Kelley*, 584 F.2d 170, 176 & n.7 (7th Cir. 1978) (seriousness of criminal allegations against plaintiff implied necessity of protecting persons interviewed; court rejects argument that some information may no longer be exempt once interviewee has testified at trial), *cert. denied*, 440 U.S. 964 (1979). *But see Maroscia v. Levi*, 569 F.2d 1000, 1002 (7th Cir. 1977) (finding an express or implied assurance of confidentiality, and not reaching question of whether lesser showing would be adequate to support exemption).

205. *Miller v. Bell*, 661 F.2d 623, 627 (7th Cir. 1981), *cert. denied*, 456 U.S. 960 (1982).

206. *Scherer v. Kelley*, 584 F.2d 170, 175-76 (7th Cir. 1978), *cert. denied*, 440 U.S. 964 (1979).

In 1984, both the Eighth and Tenth Circuits, as well as a district court in the Ninth Circuit, addressed this same issue. Unfortunately, each opinion adopted a different standard of "confidentiality." In *Parton v. United States Department of Justice*,²⁰⁷ the Eighth Circuit apparently adopted the "reasonable inference" standard of the Second and Fourth Circuits,²⁰⁸ although its brief opinion is somewhat ambiguous. *Parton* involved a federal prisoner's request for materials compiled in the course of an FBI investigation of alleged prisoner abuse by prison officials. The FBI released a portion of the information requested but refused to reveal the identities—or any statements that would disclose the identities—of prison officials and inmates interviewed during the investigation.²⁰⁹ In the district court, the FBI submitted an affidavit setting forth in detail the exemptions claimed for each withholding and the reasons why each exemption applied. The court completely ignored the FBI's exemption 7(D) claim,²¹⁰ and, finding exemption 7(C) inapplicable, ordered disclosure of the identities of the sources.²¹¹

The Court of Appeals for the Eighth Circuit reversed the district court, ruling that the FBI affidavit "adequately stated its grounds for nondisclosure" under 7(D) because it "clearly show[ed] that the prison officials who provided information did so under circumstances from which assurances of confidentiality could reasonably be inferred."²¹² The court failed to make clear, however, what type of factual showing was necessary to satisfy this standard.²¹³

In contrast, the Tenth Circuit Court of Appeals in *Johnson v. United States Department of Justice*²¹⁴ examined all three approaches and adopted the "inherently implicit" standard of the Sixth and Seventh Circuits.²¹⁵ The plaintiff in *Johnson* sought the contents of an FBI file containing records of a 1979 criminal investigation of the plaintiff by the

207. 727 F.2d 774 (8th Cir. 1984).

208. *Id.* at 776-77.

209. *Id.* at 775.

210. *Id.*

211. *Id.* (citing unpublished district court opinion). For the text of exemption 7(C), see *supra* note 195.

212. *Parton*, 727 F.2d at 776. The court also emphasized the dangers of reprisal and of impeding future investigations if disclosure were ordered. *Id.* at 776-77 (citing *Nix v. United States*, 572 F.2d 998, 1004 (4th Cir. 1978) (danger of reprisal against guard and inmate informants is one factor supporting a 7(D) claim)).

213. *Id.* at 776. The court introduced further ambiguity by quoting, from the FOIA's legislative history, the very language that is the foundation of the conflicting standard used in the Third Circuit. For a discussion of the legislative history cited by the court, see the statements of Senator Hart quoted *supra* note 196.

214. 739 F.2d 1514 (10th Cir. 1984).

215. *Id.* at 1518.

agency.²¹⁶ The FBI disclosed some of the requested materials, and justified its withholding of the remainder under exemptions 7(C)²¹⁷ and 7(D).²¹⁸ The district court conducted an in camera review of the withheld information and summarily ordered disclosure of the entire file.²¹⁹ On appeal, the court of appeals conducted its own in camera review and reversed the district court, concluding that all of the withheld information was exempt under either 7(C) or 7(D).²²⁰ The court found that assurances of confidentiality are “inherently implicit” in FBI interviews conducted pursuant to a criminal investigation,²²¹ reasoning that “[t]his approach best reconciles the general desirability of broad disclosure under the FOIA with the concern that, absent a robust 7(D) exemption, law enforcement agencies would be faced with a ‘drying up’ of their sources of information and their investigative work thereby would be seriously impeded.”²²²

Refusing to be bound by the conflicting standards that have evolved in the various federal courts of appeals, in 1984 a federal district court in California expressly rejected the “inherently implicit” standard. In *Powell v. United States Department of Justice*,²²³ the plaintiff, indicted between 1956 and 1961 for acts of sedition and treason, challenged the Justice Department’s claimed 7(D) exemption²²⁴ for the withheld portions of the investigative records.²²⁵ In granting plaintiff’s motion for an in camera review, the court explained its decision to deny the government’s summary judgment motion. Although the court acknowledged the existence of contrary authority both in other circuits and, at the district court level, within the Ninth Circuit itself,²²⁶ it did not accept the proposition that “all persons interviewed by the FBI receive an implied

216. *Id.* at 1515.

217. For the text of exemption 7(C), see *supra* note 195.

218. *Johnson*, 739 F.2d at 1515-16.

219. *Id.* at 1515.

220. *Id.*

221. *Id.* at 1518.

222. *Id.* (citing *Lesar v. United States Dep’t of Justice*, 636 F.2d 472, 492 (D.C. Cir. 1980); SOURCE BOOK, *supra* note 196, at 456-59, 468).

223. 584 F. Supp. 1508 (N.D. Cal. 1984).

224. For the text of exemption 7(D), see *supra* note 195.

225. *Powell*, 584 F. Supp. at 1511.

226. *Id.* at 1528 (citing *Miller v. Bell*, 661 F.2d 623, 627 (7th Cir. 1981) (“inherently implicit” standard), *cert. denied*, 456 U.S. 960 (1982); *Ingle v. Department of Justice*, 698 F.2d 259, 269 (6th Cir. 1983) (same); and *Dunaway v. Webster*, 519 F. Supp. 1059, 1081 (N.D. Cal. 1981) (applying “functional approach” to find implied assurance in all FBI interviews, because FBI’s “investigatory function depends for its existence upon information supplied by individuals who in many cases would suffer severe detriment if their identities were known”)).

assurance of confidentiality."²²⁷ Instead, the district court suggested its own analysis. It held that each type of information withheld requires a separate factual inquiry, and that confidentiality is implied "when the source would hardly have supplied the information unless it were confident that its identity would remain concealed."²²⁸ Absent evidence to the contrary, the court asserted, such an inference is reasonable if the information divulged pertains to the conduct of a suspected criminal, but not if it involves matters unrelated to the "normal trial issues."²²⁹ The court also found it necessary to consider any facts that might undercut this presumed expectation of confidentiality.²³⁰ The court implied that both the existence of an implied assurance of confidentiality and the existence of any waiver of this privilege by the source are questions of fact to be determined by reviewing the entire record.²³¹

Powell's ad hoc "expectations" approach attempts selectively to reduce the agency's burden of proof by singling out certain factual settings that give rise to a presumption of confidentiality. In contrast to the more sweeping approaches of the federal courts of appeals, the *Powell* approach requires a more detailed inquiry by the reviewing court; although this inquiry places a heavier burden on judicial resources by necessitating more frequent recourse to in camera review, it nonetheless seems more consistent both with the FOIA's broad policy of disclosure and with the legislative intent that specifically underlies exemption 7(D).

C. Defining "Agency Records."

1. *Presentence Reports: A "Crowded Corner" of the Law.* Because only federal agency records are subject to the FOIA's mandatory disclosure provisions, a recurrent theme in FOIA litigation is the defini-

227. *Powell*, 584 F. Supp. at 1528-29. The court found this approach "inconsistent with the requirement that the court engage in *de novo* review and with the express language of the Conference Report. Under the Report, whether confidentiality has been implied is a question of fact which must be determined from the surrounding circumstances . . ." *Id.* See CONFERENCE REPORT, *supra* note 196, at 13.

228. *Powell*, 584 F. Supp. at 1529 (quoting *Iglesias v. CIA*, 525 F. Supp. 547, 564 (D.C. Cir. 1981)). The court observed that "Congress . . . did not intend to place a heavy burden on the Agency in claiming that information was provided under an implied assurance of confidentiality." *Id.*

229. *Id.* In this case, for example, such matters included information about the alleged conduct of the United States in Korea. *Id.*

230. *Id.* Examples are the interviewee who has already testified, has agreed to testify in the near future, or is under a military duty to disclose the required information. In the case of informants who have agreed to testify, the court added, treating such persons as confidential sources "accords neither with the plain meaning of 'confidential,' nor with the legislative purpose of Exemption 7D." *Id.*

231. *Id.* at 1530.

tion of an "agency record."²³² This issue was heavily litigated in 1984 in the context of the criminal presentence report.

Pursuant to Rule 32(c) of the Federal Rules of Criminal Procedure,²³³ the presentence report is prepared by the federal district court probation officer for use by the federal court; like Congress, the federal courts are expressly excluded from FOIA coverage.²³⁴ Much of the information contained in the presentence report is necessarily obtained under assurances of confidentiality. After sentencing, however, the probation officer must, on request, transmit a copy to the United States Parole Commission,²³⁵ an agency subject to the FOIA.²³⁶ A prisoner's FOIA request to the Commission for release of his presentence report thus raises the question whether, upon transmittal, the report loses its exempt status as a court document and becomes an agency record subject to mandatory disclosure under the FOIA.

Prior to 1984, three circuits had considered this question. In *Carson v. United States Department of Justice*,²³⁷ the Court of Appeals for the District of Columbia Circuit held that presentence reports are "agency records" under the FOIA, declaring the Tenth Circuit's contrary position²³⁸ obsolete because of subsequent legislation.²³⁹ Three years later,

232. 5 U.S.C. § 552(a)(4)(B) (1982). The FOIA does not define the term "agency record" and "the legislative history yields insignificant insight into Congress' conception of the sorts of materials the Act covers." *McGehee v. CIA*, 697 F.2d 1095, 1106 (footnote omitted), *modified in other respects*, 711 F.2d 1076 (D.C. Cir. 1983). For a discussion of *McGehee* and the problem of defining "agency records," see Note, *Developments—1983, supra* note 2, at 394-402.

233. FED. R. CRIM. P. 32(c).

234. The Freedom of Information Act applies only to "agencies." See 5 U.S.C. § 552(a) (1982). For FOIA purposes, "agencies" are defined by section 551 of Title 5, which provides: "For the purpose of this subchapter—

(1) agency means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States[.]"

235. 18 U.S.C. § 4205(e) (1982).

236. 18 U.S.C. § 4218(a) (1982).

237. 631 F.2d 1008, 1011-15 (D.C. Cir. 1980). *Carson* applied, by analogy, the "control" test developed in *Goland v. CIA*, 607 F.2d 339, 347 (D.C. Cir. 1978), for determining the FOIA status of documents created by Congress and transferred to agencies: "Whether a congressionally generated document has become an agency record . . . depends on whether under all the facts of the case the document has passed from the control of Congress and become property subject to the free disposition of the agency with which the document resides." *Carson*, 631 F.2d at 1010.

238. *Cook v. Willingham*, 400 F.2d 885, 885 (10th Cir. 1968).

239. *Carson*, 631 F.2d at 1011-15. The Tenth Circuit ruled in *Cook v. Willingham*, 400 F.2d 885, 885 (10th Cir. 1968), that a presentence report is not an agency record, because it remains within the exclusive control of the court even after it is obtained by prison authorities, who are subject to the FOIA. After the *Cook* decision, the 1975 amendment to FED. R. CRIM. P. 32(c) and the passage of the Parole Commission and Reorganization Act (the Parole Act), 18 U.S.C. §§ 4201-4218 (1982), reduced the control retained by the court over the report and increased the control that becomes vested in the Parole Commission after it acquires the report.

however, in *United States v. Charmer Industries*, the Second Circuit adopted the Tenth Circuit's "obsolete" position, holding that after transmittal the report retains its status as a court document.²⁴⁰ In 1984, a flurry of litigation in this area created what one court²⁴¹ labeled a "crowded corner of the law," as federal courts of appeals in four circuits considered the FOIA status of presentence reports, with three of these circuits addressing the issue for the first time.

The Court of Appeals for the District of Columbia Circuit adhered to its *Carson* position in *Lykins v. United States Department of Justice*,²⁴² and the Ninth Circuit followed this lead in *Berry v. Department of Justice* by declaring that presentence reports are agency records.²⁴³ The position originally maintained by the Department of Justice—that the degree of control exercised by the federal agency receiving the presentence report was insufficient to overcome the report's status as a court document²⁴⁴—persuaded the First and Eleventh Circuits to hold, in *Crooker v. United States Parole Commission*²⁴⁵ and *Lindsey v. Bureau of Prisons*²⁴⁶ respectively, that a presentence report does not become an "agency record" merely because it is obtained by an agency subject to the FOIA.²⁴⁷

Shortly after this circuit split materialized, however, the Department of Justice retreated from its position that presentence reports are not agency records under the FOIA. In the Department's brief submitted to the Supreme Court in opposition to a petition for a writ of certio-

At the time of *Cook*, the sentencing court had the discretion to refuse to disclose the report to the criminal defendant. Fed. R. Crim. P. 32(c)(2) (Supp. 1966) (amended 1975). Under the 1975 amendment, verbatim disclosure is required except as to material that "in the opinion of the court . . . contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. . . ." FED. R. CRIM. P. 32(c)(3)(A).

The Parole Act requires the Parole Commission to consider presentence reports in making its determinations. 18 U.S.C. § 4207 (1982). Before 1976, this consideration was not expressly required. 18 U.S.C. § 4203 (1970) (repealed 1976). *Carson* found this express requirement persuasive evidence that the presentence report was subject to agency control. *Carson*, 631 F.2d at 1012; see also *Lykins v. United States Dep't of Justice*, 725 F.2d 1455, 1459 (D.C. Cir. 1984) (applying *Carson*).

240. 711 F.2d 1164, 1170 n.6 (2d Cir. 1983).

241. *Lykins v. Rose*, Civil Action No. 82-0241, slip op. at 2 (D.D.C. Sept. 28, 1984) (mem.).

242. 725 F.2d 1455, 1458-59 (D.C. Cir. 1984). In addition, the *Lykins* court held that even if the originating court specifically prohibits the report's subsequent release by the agency receiving it, a refusal to disclose by that agency may nonetheless constitute an "improper" withholding under the FOIA. *Id.* at 1458-59.

243. 733 F.2d 1343, 1350-52 (9th Cir. 1984).

244. *Crooker v. United States Parole Comm'n*, 730 F.2d 1, 4 (1st Cir.), *vacated and remanded*, 105 S. Ct. 317 (1984).

245. 730 F.2d 1 (1st Cir.), *vacated and remanded*, 105 S. Ct. 317 (1984).

246. 736 F.2d 1462 (11th Cir. 1984).

247. *Crooker*, 730 F.2d at 10; *Lindsey*, 736 F.2d at 1464-67.

rari in *Crooker*, the Solicitor General announced that the Department had "reassessed [its] position" and determined that the Parole Commission "will not in the future withhold copies of presentence reports on the ground that they are not 'agency records' for purposes of the FOIA."²⁴⁸ Despite this concession, however, the Department of Justice expressly reaffirmed its position on the larger issue—that "presentence reports are clearly exempt from mandatory disclosure under the FOIA"²⁴⁹—by relying on two types of exemption claims. The Department first argued that even if the report is an agency record, it is exempt in its entirety as a predecisional memorandum under exemption 5.²⁵⁰ Furthermore, it argued, even if the report is not exempt in its entirety, "especially sensitive portions" are protected by exemptions 3, 4, 6 and 7, as is true of any record covered by the FOIA.²⁵¹

The Justice Department's change of position has added to the confusion surrounding the FOIA status of records created by exempt entities and transmitted to agencies subject to the FOIA, an issue that may arise again outside of the presentence report context.²⁵² The Supreme Court

248. Brief for Respondent at 7, *Crooker v. United States Parole Comm'n*, 105 S. Ct. 317 (1984).

249. *Id.*

250. *Id.* at 18-19. The potential applicability of 5 U.S.C. § 552(b)(5) (1982) was noted in dictum by the United States Court of Appeals for the First Circuit in *Crooker*, 730 F.2d at 9. Two district courts in the Third Circuit have found exemption 5 to be applicable to presentence reports. *Smith v. Flaherty*, 465 F. Supp. 815, 819 & n.12 (M.D. Pa. 1978) (citing *Green v. Taylor*, Civ. No. 750140 (M.D. Pa. May 7, 1975) (Order, Sheridan, C.J.)). The *Crooker* court noted, however, that "most courts have limited the scope of exemption 5 to protect from disclosure only those documents that reflect inter- or intra-agency 'give and take' during policy development." Thus "[p]resentence reports may well not fit within this exemption." *Crooker*, 730 F.2d at 9. This view of exemption 5 is relatively restrictive compared to the broad view taken this year by the United States Court of Appeals for the District of Columbia Circuit in *Environmental Defense Fund v. Office of Management & Budget*, 742 F.2d 1484, 1496-98 (D.C. Cir. 1984). See *supra* notes 183-94 and accompanying text.

251. Brief for Respondent at 18-21, *Crooker v. United States Parole Comm'n*, 105 S. Ct. 317 (1984).

252. Contrary to the respondent's claim in *Crooker*, Brief for Respondent at 22-23, *Crooker v. United States Parole Comm'n*, 105 S. Ct. 317 (1984), this issue is likely to arise again in another context. Analogous problems involving records that originate in government departments not subject to the FOIA, such as Congress or the President's office, but which are later transferred to agencies subject to FOIA, have already arisen. Compare *Goland v. CIA*, 607 F.2d 339, 347 (D.C. Cir. 1978) (Congressional intent to retain control over transcripts transferred to the CIA sufficient to find that such transcripts are not "agency records") with *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 155-57 (1980) (if documents originated in office of President, then correct inquiry is whether recipient agency has actually obtained control) and *Paisley v. CIA*, 712 F.2d 686, 693 (D.C. Cir. 1983) (attempting to reconcile *Goland* and *Kissinger* by finding that an agency cannot lawfully obtain control if Congress has manifested its intent to retain control). See also *Tigar & Buffone v. United States Dep't of Justice*, 590 F. Supp. 1012, 1014-15 (D.D.C. 1984) (documents subpoenaed by federal grand jury and then impounded by Department of Justice pursuant to court order did not become agency records subject to FOIA).

has not yet addressed the status of such "hybrid records,"²⁵³ and the impact of the Department's new two-tiered argument is unknown at present.²⁵⁴

2. *Personal Records of Agency Officials and "Agency Record" Status.* The definition of "agency records" was litigated in another context in *Bureau of National Affairs v. United States Department of Jus-*

253. The First Circuit in *Crooker* observed that the problems with the presentence report resulted from its "hybrid function." *Crooker*, 730 F.2d at 3.

254. With regard to the Department's new arguments, the applicability of exemptions 4, 6, and 7 invites resolution on a case-by-case basis. The exemption 5 claim, however, turns on the question of whether the presentence report is, by its very nature, a privileged document. The Solicitor General's position is that because "the presentence report is privileged from discovery by third parties while in the possession of the Parole Commission, the Commission's copy of the report is exempt from mandatory disclosure" under the FOIA. Brief for Respondent at 18, *Crooker v. United States Parole Comm'n*, 105 S. Ct. 317 (1984). It is therefore irrelevant, according to the Solicitor General's argument, that Federal Rule of Criminal Procedure 32(c) and 18 U.S.C. § 4208(b) permit the prisoner to read the report prior to sentencing and prior to his parole hearing: "The pertinent question under the FOIA . . . is whether the document must be released to any member of the public at large, not simply to a person who has a special interest in the document." Brief for Respondent at 19, *Crooker v. United States Parole Comm'n*, 105 S. Ct. 317 (1984). See also *supra* note 250.

The Department's new exemption 3 claim will require a determination of whether section 4208 of the Parole Commission and Reorganization Act, 18 U.S.C. § 4208 (1982), qualifies as an exempting statute. The Ninth Circuit has already answered in the affirmative. See *Berry v. Department of Justice*, 733 F.2d 1343, 1354 (9th Cir. 1984).

Although *Crooker* was remanded by the Supreme Court for reconsideration in light of the Solicitor General's change in position, 105 S. Ct. 317 (1984), it is uncertain whether the First Circuit will hear these new arguments. In a presentence report case remanded in 1984 by the District of Columbia Circuit, *Crooker v. United States Bureau of Prisons*, No. 83-01838, (D.C. Cir. April 10, 1984) (not to be confused with the First Circuit's *Crooker* case), the court of appeals refused to grant a stay to permit the government to develop exemption claims that it had not raised originally in the district court, ruling that only "extraordinary circumstances" justify consideration on remand of claims not raised at the agency level or in the district court. *Id.* at 1. Such circumstances, according to the Court of Appeals for the District of Columbia Circuit, are present if there has been a "substantial change" in the factual context of a case or in the applicable legal doctrine, as well as where the material withheld is extremely sensitive, but not where the exemption claims are invoked merely to gain a tactical advantage. *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 780 (D.C. Cir. 1978) (en banc). See also *Lykins v. Rose*, No. 82-0241, slip op. at 5-6 (D.D.C. Sept. 28, 1984) (mem.) (exception "should not apply when the exemption was available but the government, as a result of a deliberate, tactical decision, simply chose not to assert it").

In contrast, the Fifth Circuit has adopted a position more receptive to the government's new exemption claims. In *Cotner v. United States Parole Comm'n*, 747 F.2d 1016 (5th Cir. 1984), the court held, on facts similar to those before the First Circuit in *Crooker*, that the government was not barred from asserting its new exemption claims on remand to the district court. *Id.* at 1018-19. Although it acknowledged "the policy ordinarily precluding consideration of exemptions not presented to the district court at the earliest opportunity," it noted that under 28 C.F.R. § 0.20, the Solicitor General was not required to review the government's position until the First Circuit's *Crooker* decision had reached the Supreme Court. *Cotner*, 747 F.2d at 1018. The resulting change in policy, the court concluded, was not an attempt to gain a tactical advantage, but a "considered review consistent with the historically unique . . . relationship between the office of Solicitor General and the Supreme Court." *Id.* at 1018-19.

*tice*²⁵⁵ and *Environmental Defense Fund v. Office of Management & Budget*,²⁵⁶ two cases consolidated for appeal before the United States Court of Appeals for the District of Columbia Circuit. Unlike the issue of presentence reports, the question in these cases did not involve the status of records created by an exempt entity and then physically transferred to an agency subject to the FOIA; rather, the question was whether appointment calendars, telephone logs and daily agendas that are created by agency officials for their personal use are "agency records" subject to the FOIA.²⁵⁷ The larger issue was "under what circumstances . . . an individual's creation of a record [can] be attributed to the agency, thereby making the material an 'agency record' disclosable under FOIA, rather than personal material not covered by the Act [.]'"²⁵⁸

Bureau of National Affairs involved a request for appointment calendars and daily agendas pertaining to meetings between William Baxter, who was then Assistant Attorney General for the Antitrust Division, and parties outside the Justice Department.²⁵⁹ The district court granted the government's motion for summary judgment on the ground that such documents are not "agency records" but personal papers that "exist essentially only for the convenience of their author" and "were not created at the request of or for the convenience of the agency"; thus "they play absolutely no role in the agency's recordkeeping program."²⁶⁰

In *Environmental Defense Fund*, the requested records included the daily appointment calendars and telephone message slips of several OMB officials.²⁶¹ In two of the contested instances, only the authors had access to the calendars; in two others, only the authors and their secretaries had access; and in a fifth instance, only the author's immediate staff had access.²⁶² The district court ruled that both the appointment calendars and the telephone message memoranda were agency records and ordered the OMB to submit a *Vaughn* index of the documents.²⁶³

255. 742 F.2d 1484 (D.C. Cir. 1984).

256. *Id.*

257. *Id.* at 1486.

258. *Id.* at 1489.

259. The daily agendas were prepared by Baxter's secretary and distributed to his staff. *Bureau of Nat'l Affairs*, 742 F.2d at 1487. The calendars included both business and personal appointments; a few staff members occasionally had access to the calendars in order to locate Baxter. The calendars generally indicated the place of the meeting, persons expected to attend, and, on occasion, the meeting's purpose. *Id.*

260. *Id.* (quoting *Bureau of Nat'l Affairs v. United States Dep't. of Justice*, Civ. Action No. 82-01211 (D.D.C. Nov. 29, 1982)).

261. *Id.* The calendars contained essentially the same type of information as those involved in *Bureau of Nat'l Affairs*.

262. *Id.* at 1488.

263. *Id.*; See *Vaughn v. Rosen*, 484 F.2d 820, 825-28 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). The *Vaughn* court held that the government must supply to a FOIA requester any reason-

In addressing the FOIA status of these records, the Court of Appeals for the District of Columbia Circuit turned to the Supreme Court's 1980 decision in *Kissinger v. Reporters Committee for Freedom of the Press*.²⁶⁴ In *Kissinger*, the Supreme Court established that the mere physical location of papers in an agency does not confer "agency record" status if the records neither enter that department's files nor are "used by the Department for any purpose."²⁶⁵ The court of appeals inferred from *Kissinger's* analysis that, in deciding "agency record" status, a court must consider whether the document in question is: (1) in the agency's control, (2) generated within the agency, (3) placed in the agency's files, and (4) used by the agency "for any purpose."²⁶⁶ In applying the *Kissinger* standards, the court of appeals in *Bureau of National Affairs* declined to adopt either a "control" or a "use" analysis exclusively, reasoning instead that "the inquiry necessarily must focus on a variety of factors surrounding the creation, possession, control, and use of the document by an agency."²⁶⁷

ably segregable, non-exempt portions of documents that it claims are partially exempt. *Id.* at 825-27. *Vaughn* disapproved of resolving factual disputes in FOIA cases on the basis of conclusory affidavits, and held that the government must supply the requester with a detailed index itemizing the material withheld and justifying each claimed exemption. *Id.* at 826-28.

264. 445 U.S. 136 (1980).

265. *Id.* at 157 (notes of telephone conversations taken by President's former national security advisor did not become agency records when they were later physically located in State Department), *quoted in Environmental Defense Fund*, 742 F.2d at 1489-90.

266. *Bureau of Nat'l Affairs*, 742 F.2d at 1489-90 (finding that the *Kissinger* Court focused on these four factors).

267. *Id.* at 1490 (citing *Crooker v. United States Parole Comm'n*, 730 F.2d 1, 5 (1st Cir.) ("['C]ontrol' for FOIA purposes [may have] no precise definition and may well change as relevant factors assume varying importance from case to case."), *vacated and remanded*, 105 S. Ct. 317 (1984)). See *supra* notes 232-54 and accompanying text. The *Bureau of Nat'l Affairs* court seemed to suggest a hybrid approach, stating:

In certain contexts, such as where a document is created by one agency and transferred to a second agency, control or possession is the critical analysis. But in cases such as these, where documents are created by an agency employee and located within the agency, use of the document becomes more important in determining the status of the document under FOIA.

Bureau of Nat'l Affairs, 742 F.2d at 1490.

The Court of Appeals for the District of Columbia Circuit also noted that, contrary to the government's argument, an analysis that considers the agency's use of or reliance on the disputed materials in determining their FOIA status is not inconsistent with the Supreme Court's opinion in *Forsham v. Harris*, 445 U.S. 169 (1980). In *Forsham*, petitioners sought FOIA disclosure of raw data that were created and held by a private organization under a federal grant. Pursuant to federal regulations, such data were available upon request to the agencies that had funded the program. The Court in *Forsham* refused to order the agency to exercise its right of access to the data because such an order would compel the agency to "create" a record, a result that went beyond the bounds of the FOIA. *Forsham*, 445 U.S. at 186. See also *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161-62 (1975) (FOIA imposes no duty to create records). The Court in *Forsham* rejected the argument that an agency's reliance on the information held by the grant recipient converted the data into an agency record: "[W]ithout first establishing that the agency has created or obtained the docu-

The District of Columbia Circuit held that, under the facts of *Bureau of National Affairs* and *Environmental Defense Fund*, if a record is generated by an agency employee "at least in part to enable him or her to conduct agency business . . . it is necessary to consider both the agency's asserted interest in the document and the extent to which the document is used to conduct agency business."²⁶⁸ It added that a court should consider the other *Kissinger* factors as well, to avoid conferring "agency record" status on "an employee's record that happens to be physically located within the agency."²⁶⁹

A further complication was whether the FOIA status of the disputed documents was affected by the fact that they were "non-record materials" that an agency is not required to preserve under federal records management statutes.²⁷⁰ The Supreme Court in *Forsham v. Harris*²⁷¹ had expressly left open the question whether such materials constitute "agency records" under the FOIA.²⁷² The District of Columbia Circuit in *Bureau of National Affairs* rejected the government's invitation to hold that the treatment of documents for disposal and retention purposes under such records statutes determines their status under the FOIA. "However tempting such a 'bright-line' test may be," the court observed, "it cannot be used as the divining rod for the meaning of 'agency records' under FOIA."²⁷³ Although noting that an agency's treatment of documents for preservation purposes "may provide some guidance to a court," the court of appeals warned that "an agency should

ment, reliance or use is irrelevant." *Forsham*, 445 U.S. at 186. The Court, however, also noted that "[r]eliance or use may well be relevant . . . to the question of whether a record in the possession of an agency is an 'agency record.'" *Id.* at 177 n.7 (emphasis added).

Agency use of a document was also considered relevant in *Kissinger*, where the Supreme Court noted the fact that the telephone memoranda "were not used by the Department for any purpose." *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 157 (1980).

268. *Bureau of Nat'l Affairs*, 742 F.2d at 1491.

269. *Id.* at 1492-93 (citing *Kissinger*, 445 U.S. at 157).

The Court of Appeals held that in order to be subject to the FOIA, personal papers must not merely "relate to" the employee's work, but must be relied upon by the employee in the performance of official duties. *Bureau of Nat'l Affairs*, 742 F.2d at 1493. See *Wolfe v. Department of Health & Human Servs.*, 711 F.2d 1077, 1081 (D.C. Cir. 1983) (applying disjunctive test of possession or control). One important consideration is whether and to what extent the records are used by employees other than their author. *Bureau of Nat'l Affairs*, 742 F.2d at 1493. The court concluded that an inquiry is required into (1) the purpose that compelled the creation of the document, (2) the actual use of the document, and (3) the extent to which the creator of the document and other employees acting within the scope of their employment relied upon the document in carrying out agency business. *Id.*

270. *E.g.*, Federal Records Act of 1950, 44 U.S.C. §§ 2901-2909 (1982).

271. 445 U.S. 169 (1980).

272. *Id.* at 183 n.14.

273. *Bureau of Nat'l Affairs*, 742 F.2d at 1493; see also *Forsham*, at 183-84 (although records statutes may support non-agency record status, the definitions in these statutes "are not dispositive of the proper interpretation of congressional use of the word in FOIA").

not be able to alter its disposal regulations to avoid the requirements of FOIA."²⁷⁴

Applying this analysis to the three categories of disputed records in *Bureau of National Affairs* and *Environmental Defense Fund*, the District of Columbia Circuit Court of Appeals held that the documents in all three categories—appointment calendars, telephone message memoranda, and daily agendas—(1) were generated by the agencies;²⁷⁵ (2) were not placed in agency files; and (3) were "non-record materials" subject to disposal at the discretion of agency employees under the records management statutes.²⁷⁶ Thus, although the agencies *could* have exercised institutional control over the documents under the relevant statutes and regulations, they had not in fact done so.²⁷⁷ The court therefore reasoned that the "agency records" issue must turn on how the documents were used within the agency.²⁷⁸ This "use" analysis led the court to conclude that except for the daily agendas, which were used in conducting agency—rather than purely personal—business, the appointment materials were not "agency records."²⁷⁹ The court noted that a different conclusion might have been warranted "if the agencies had exercised any control over the materials or if the documents had been created solely for the purpose of conducting official agency business."²⁸⁰

274. *Bureau of Nat'l Affairs*, 742 F.2d at 1493. The court conceded the truth of the government's observation that "so long as the records disposal regulations permit destruction of 'non-record materials' at the discretion of an agency or agency employee, documents will be available under FOIA solely based on whether an individual has chosen to keep those documents." *Id.* at 1495.

275. That is, they were prepared on government time, at government expense, and with government materials, and they were in some cases maintained by officials' secretaries as part of their official duties. *Bureau of Nat'l Affairs*, 742 F.2d at 1494-95.

276. *Id.*

277. *Id.* (citing 44 U.S.C. §§ 3301-3315 (1982) and GSA General Records Schedule 23 (1982)).

278. *Bureau of Nat'l Affairs*, 742 F.2d at 1495.

279. *Id.* at 1495-96.

280. *Id.* at 1496. The court analyzed each type of document separately. The telephone message slips were not agency records because they contained no substantive information, were used only by the official receiving the call, and, in many cases, segregation of personal and business calls was impossible. The daily agendas were declared agency records because they were created for the express purpose of facilitating the daily activities of the Antitrust Division; although they reflected personal as well as business appointments, they were circulated to the staff for a business purpose. In this instance, the court held that it was possible to segregate the personal materials before disclosure. *Id.* at 1495.

The appointment calendars presented a closer question. They were intended to aid the officials by organizing both their business and personal activities. In some instances, the staff had access to them. Nonetheless, they were found not to be agency records because (1) they were not distributed to other employees, and (2) they were created for the personal convenience of the individual officials, not for an official agency purpose. *Id.* at 1495-96.

The court considered this decision consistent with its prior decision in *Wolfe v. Department of Health & Human Servs.*, 711 F.2d 1077, 1078 (D.C. Cir. 1983). *Wolfe* addressed the question

D. *Exemption 3 and the Standard of Review for Nondisclosure Under Internal Revenue Code Section 6103.*

Exemption 3 of the FOIA exempts from mandatory disclosure any information "specifically exempted from disclosure by statute," as long as such statute meets the requirements set forth in the exemption.²⁸¹ Attempts to invoke this provision frequently raise the question of which statutes are incorporated in exemption 3²⁸² and, when the procedural requirements of such an exempting statute differ from those of the FOIA, which requirements control.

Section 6103 of the Internal Revenue Code²⁸³ has been a source of frequent litigation over the latter issue. Several provisions of this section allow the IRS to withhold taxpayer return information, even when the taxpayer himself is requesting disclosure, if the IRS determines that disclosure would "seriously impair federal tax administration."²⁸⁴ Although it appears well-settled that section 6103 qualifies as an exemption 3 statute,²⁸⁵ a long-standing split of authority exists as to whether Congress intended section 6103 to operate independently of the procedural requirements of the FOIA.²⁸⁶ The resolution of this dilemma affects the standard of review of IRS nondisclosure decisions. If Congress intended the disclosure of tax return information to be governed exclu-

whether a report prepared by President-elect Reagan's transition team concerning the Department of Health and Human Services was an "agency record." Although in *Wolfe* the Court focused primarily on the agency's control and possession of the requested document, it also inquired into the agency's use of the document. *Id.*

281. 5 U.S.C. § 552(b)(3) (1982). The exemption reads, in pertinent part:

(b) This section does not apply to matters that are—

...

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld

....

282. For example, *Shapiro v. Drug Enforcement Admin.*, 721 F.2d 215 (7th Cir. 1983), *vacated and remanded*, 105 S. Ct. 413 (1984) and *Povenzano v. United States Dep't of Justice*, 717 F.2d 799, *on reh'g*, 722 F.2d 36 (3d Cir. 1983), *vacated and remanded*, 105 S. Ct. 413 (1984), both raised the issue whether the Privacy Act, 5 U.S.C. § 552a (1982) is an exemption 3 statute under the FOIA. That issue was rendered moot by the Central Intelligence Agency Information Act, Pub. L. 98-477, § 2(c), 98 Stat. 2209, 2211-12 (1984), which declared that the Privacy Act is not an exempting statute under the FOIA. *See supra* notes 114-19 and accompanying text.

283. 26 U.S.C. § 6103 (1982).

284. *E.g.*, 26 U.S.C. §§ 6103 (b)(2), (c), (e)(7) (1982).

285. *See, e.g.*, *Currie v. IRS*, 704 F.2d 523, 526-28 (11th Cir. 1983); *White v. IRS*, 707 F.2d 897, 900-01 (6th Cir. 1983); *Willamette Indus. v. IRS*, 689 F.2d 865, 867-68 (9th Cir. 1982), *cert. denied*, 460 U.S. 1052 (1983); *Moody v. IRS*, 654 F.2d 795, 797 n.4 (D.C. Cir. 1981); *Breuhaus v. IRS*, 609 F.2d 80, 83 (2d Cir. 1979); *Chamberlain v. Kurtz*, 589 F.2d 827, 840 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979); *Freuhauf Corp. v. IRS*, 566 F.2d 574, 578 n.6 (6th Cir. 1977); *Mason v. Calloway*, 554 F.2d 129, 131 (4th Cir.), *cert. denied*, 434 U.S. 877 (1977).

286. *See infra* notes 292-94 and accompanying text.

sively by the provisions of section 6103, then a nondisclosure decision by the IRS would not be subject to judicial examination of the agency's adherence to the procedural requirements or the policy objectives of the FOIA.²⁸⁷ In that case, judicial review of the agency's decision would be limited to determining whether the agency's conclusion that disclosure would "seriously impair" tax administration was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²⁸⁸ In contrast, the FOIA requires the district court to conduct de novo review of the agency's decision.²⁸⁹ The court may require the agency to segregate exempt material, disclose the remainder, and supply an index providing detailed justification for each item withheld.²⁹⁰ In addition, the FOIA places the burden on the agency to justify nondisclosure.²⁹¹

Several courts have ruled that the FOIA provides the sole standard of review when section 6103 is invoked under exemption 3.²⁹² Others adhere to the view, first advanced by a district court in *Zale Corp. v. IRS*,²⁹³ that section 6103 preempts the more stringent FOIA standard.²⁹⁴

In 1984, courts of appeals in both the Fifth and the Ninth Circuits rejected *Zale* and applied the de novo standard of review. The Fifth Circuit's decision in *Linsteadt v. IRS*²⁹⁵ simply reaffirmed its pre-*Zale* commitment to this standard.²⁹⁶ In *Long v. IRS*,²⁹⁷ however, the Ninth

287. *Currie v. IRS*, 704 F.2d 523, 526 (11th Cir. 1983); *King v. IRS*, 688 F.2d 488, 495 (7th Cir. 1982).

288. Administrative Procedure Act, 5 U.S.C. §§ 701, 706 (1982).

289. The FOIA provides that the district court "shall determine the matter de novo, and may examine the contents of such agency records . . . to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B) (1982).

290. *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979); *Vaughn v. Rosen*, 484 F.2d 820, 825-28 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). For a discussion of the *Vaughn* index, see *supra* note 263.

291. 5 U.S.C. § 552(a)(4)(B) (1982).

292. See, e.g., *Currie v. IRS*, 704 F.2d 523, 526-28 (11th Cir. 1983); *Chamberlain v. Kurtz*, 589 F.2d 827, 841 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979); *Britt v. IRS*, 547 F. Supp. 808, 809-13 (D.D.C. 1982).

293. 481 F. Supp. 486 (D.D.C. 1979).

294. See, e.g., *King v. IRS*, 688 F.2d 488, 495-96 (7th Cir. 1982); *Church of Scientology v. IRS*, 569 F. Supp. 1165, 1170 (D.D.C. 1983); *Green v. IRS*, 556 F. Supp. 79, 83-84 (N.D. Ind. 1982), *aff'd*, 734 F.2d 18 (7th Cir. 1984); *Heinsohn v. IRS*, 553 F. Supp. 791, 792 (E.D. Tenn. 1982); *Watson v. IRS*, 538 F. Supp. 817, 818 (S.D. Tex. 1982); *Chermack v. IRS*, Civ. Action No. CA3-80-0164-C (N.D. Tex. Feb. 13, 1981); *Ashton v. Krutz*, Civ. Action No. 78-822 (D.D.C. Feb. 10, 1981); *Hulsey v. IRS*, 497 F. Supp. 617, 618 (N.D. Tex. 1980); *Kanter v. IRS*, 496 F. Supp. 1004, 1004-05 (N.D. Ill. 1980); see also *White v. IRS*, 707 F.2d 897, 900 (6th Cir. 1983) (court indicates inclination to accept the *Zale* rationale). The District of Columbia Circuit has not yet stated its position on *Zale*. See *Washington Post Co. v. United States Dep't of State*, 685 F.2d 698, 703 n.9 (D.C. Cir. 1982), *vacated*, 464 U.S. 979 (1983).

295. 729 F.2d 998, 1001-03 (5th Cir. 1984).

296. See *Chamberlain v. Kurtz*, 589 F.2d 827 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979).

Circuit reached the issue for the first time. It rejected not only *Zale*'s section 6103 preemption argument,²⁹⁸ but also a separate preemption argument based specifically on the 1981 Economic Recovery Tax Act (ERTA) amendment to section 6103.²⁹⁹

The district court in *Long* had held that the proper scope of a court's de novo review where section 6103 was invoked under exemption 3 was to ascertain whether (1) the requested material fell within the category of materials protected by that provision, and (2) the agency had in fact made the determination required by the statute—that disclosure would seriously impair federal tax administration.³⁰⁰ In reversing, the United States Court of Appeals for the Ninth Circuit held that the proper standard of review, where section 6103 is invoked under exemption 3, is the FOIA requirement that the reviewing court make an independent determination on the question of harm.³⁰¹ The *Long* court expressly rejected *Zale* on the ground that “neither section 6103 nor its legislative history contains any language indicating that section 6103 should operate independently of FOIA.”³⁰² It concluded that the re-

297. 742 F.2d 1173 (9th Cir. 1984).

298. *Id.* at 1178.

299. *Id.* The plaintiffs in *Long* were taxpayers seeking to compel the IRS to disclose computer tapes and other data used by the agency to determine standards for the selection of returns for auditing. *Id.* at 1175. The IRS refused, citing section 6103(b)(2) and, in particular, the language added to that section by the ERTA amendment. *Id.* at 1175-76. The ERTA amendment provides:

Nothing in the preceding sentence, nor in any other provision of law, shall be construed to require disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.

5 U.S.C. § 6103(b)(2) (1982). The IRS contended that the phrase “any other provision of law” referred to the FOIA and that even if other provisions of section 6103 do not preempt the FOIA's procedural standards, the ERTA amendment does. *Long*, 742 F.2d at 1178.

300. *Long v. IRS*, 82-2 U.S. Tax Cas. (CCH) ¶ 9487, at 84,780 (W.D. Wash. July 12, 1982). The district court first held that the ERTA amendment qualified as an exemption 3 statute and the auditing data requested by the plaintiffs clearly fell within the category of materials the ERTA provision was intended to protect. *Id.* It then cited *Zale* for the proposition that, in the context of a FOIA request for tax return information, section 6103 should provide the “sole standard governing release of return information,” *id.* at 84,781 (quoting *Zale*, 481 F. Supp. at 490), and concluded that if *Zale* provided the applicable standard then “to the extent any inconsistency exists between the provisions of the FOIA and those of Section 6103, the confidentiality provision of Section 6103 should prevail.” *Id.*

301. *Long*, 742 F.2d at 1182. The court stated: “We . . . reject the argument that Congress has committed the determination of impairment to agency discretion so that review is unavailable. We likewise reject the argument that the Commissioner's determination of impairment is subject to review only to determine whether it is ‘arbitrary and capricious.’ ” *Id.* at 1181. Although such review is sufficient to satisfy the Administrative Procedure Act, 5 U.S.C. § 701, 706 (1982 & Supp. I 1983), the court of appeals ruled that the APA standard does not govern review of FOIA requests. *Long*, 742 F.2d at 1181.

302. *Id.* at 1177. The court compared the language and legislative history of section 6103 with that of section 6110, which was added to the tax code at the same time that § 6103 was amended to

viewing court "must satisfy itself, on the basis of detailed and nonconclusory affidavits, that the [IRS] Commissioner is correct in his belief that disclosure . . . would pose a substantial risk of impairing the collection, assessment, or enforcement of the tax laws," with the agency bearing the burden of proof.³⁰³

The Court of Appeals also rejected the government's argument that the ERTA amendment³⁰⁴ prohibits application of the FOIA standard of judicial review to cases involving requests for disclosure of audit-related data.³⁰⁵ "Although FOIA surely is 'any other provision of law,' the only real effect of placing section 6103 within FOIA is procedural. . . . Inclusion does not have the effect of requiring disclosure so long as the amendment satisfies the criteria of exemption 3 and the [requested] data fall within its ambit."³⁰⁶ Review under an "arbitrary and capricious" standard, the court concluded, would broaden the agency's discretionary

its present form, in the Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1525 (1976). The court found it significant that Congress specified that the procedures of FOIA would be preempted by section 6110, 26 U.S.C. § 6110(1) (1982), and found Congress's failure to do likewise in amending section 6103 "highly persuasive of an intent not to preempt the procedural provisions of FOIA as to requests under section 6103." *Long*, 742 F.2d at 1178.

The Supreme Court addressed a similar issue in *EPA v. Mink*, 410 U.S. 73 (1973). *Mink* involved a nondisclosure decision under exemption 1 of the FOIA; at that time exemption 1 reached matters "specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy." 5 U.S.C. § 552(b)(1) (1970). Justice Stewart's concurrence in *Mink* defined the scope of a district court's *de novo* review under exemption 3 as consisting merely of an inquiry into the factual existence of a statute specifically exempting the sought-after material from disclosure: "[T]he only 'matter' to be determined *de novo* under § 552(b)(1) is whether in fact the President has required by Executive Order that the documents in question are to be kept secret. . . . [I]n enacting § 552(b)(1) Congress chose, instead, to decree blind acceptance of Executive fiat." *Mink*, 410 U.S. at 95 (Stewart, J., concurring). The district court in *Long* had relied on Stewart's language when it limited the scope of *de novo* review to ascertaining the factual existence of an exempting statute and of a determination that the statute was applicable. *Long*, 742 F.2d at 1180.

In 1974, however, Congress amended the FOIA for the express purpose of overturning *Mink*. See S. REP. NO. 1200, 93rd Cong., 2d Sess. 12, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 6267. The amendment modified exemption 1 to exempt only those matters (1) specifically authorized to be kept secret, and (2) "in fact properly classified" as such. 5 U.S.C. § 552(b)(1) (1982 & Supp. I 1983). The same amendment placed the burden on the agency to "sustain its action" in *de novo* review, Pub. L. No. 93-502, § 1, 88 Stat. 1561, 1562 (1974) (codified at 5 U.S.C. § 552(a)(4)(B) (1982 & Supp. I 1983)). Similarly, in 1976, Congress amended exemption 3—to achieve the exemption's present wording—out of concern that the old statute's delegation of discretion gave an agency "*carte blanche* to withhold any information [it] pleases." H.R. REP. NO. 880, pt. I, 94th Cong., 2d Sess. 23, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 2183, 2205. The court of appeals in *Long* found the legislative response to *Mink*, combined with the legislative history of the amendment to exemption 3, strongly indicative of Congress's intent that the FOIA court conduct an independent assessment of agency decisions. *Long*, 742 F.2d at 1180-81.

303. *Long*, 742 F.2d at 1183. The court noted, however, that on review special deference could properly be accorded the agency's determination. *Id.* at 1182-83.

304. For the text of the amendment, see *supra* note 299.

305. *Long*, 742 F.2d at 1178.

306. *Id.*

powers and thereby increase the risk of nondisclosure decisions that contravene the intent of Congress.³⁰⁷

E. *In Camera* Review and Trial Court Discretion Under Exemption 5.

The agency records sought by a FOIA plaintiff often consist of non-exempt factual information intertwined with exempt material. In response to such cases, Congress in 1974 amended the FOIA to provide that "any reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt."³⁰⁸ Another change added by the same legislation gave the district courts discretion to conduct in camera inspections of the disputed materials.³⁰⁹ In 1984, the United States Court of Appeals for the District of Columbia Circuit was asked in *Center for Auto Safety v. EPA*³¹⁰ to determine under what circumstances a district court must conduct an in camera review of part of the requested documents to verify an agency's claim that factual and deliberative material is "inextricably intertwined."³¹¹ Specifically, the court was asked to adopt a "limited per se rule" requiring the trial court to conduct in camera review of any documents claimed exempt under exemption 5 of the FOIA.³¹² Although the court recognized "persuasive policy reasons to adopt a per se rule,"³¹³ it declined to articulate a standard for mandatory in camera review, stating that "such a per se rule would contravene the clear grant by Congress of broad discretion to trial judges in this matter."³¹⁴

Center for Auto Safety involved a request by a nonprofit consumer organization for documents relevant to an EPA decision allowing General Motors to offset the illegal emission levels of its 1979 cars by lowering those of its 1982 and 1983 models.³¹⁵ The EPA withheld the requested materials, arguing that the materials were "intra-agency communications and records of settlement negotiations which reflect EPA's

307. *Id.* at 1182.

308. 5 U.S.C. § 552(b) (1982 & Supp. I 1983). This amendment incorporated the longstanding rule of the District of Columbia Circuit that an agency must disclose non-exempt factual information unless it is inextricably intertwined with exempt material. See, e.g., *Mead Data Cent., Inc. v. Department of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

309. "[T]he court may examine the contents of such agency records *in camera* . . ." 5 U.S.C. § 552(a)(4)(B) (1982).

310. 731 F.2d 16 (D.C. Cir. 1984).

311. *Id.* at 17.

312. *Id.* For the text of exemption 5, 5 U.S.C. § 552(b) (5) (1982), see *supra* text accompanying note 164.

313. *Center for Auto Safety*, 731 F.2d at 22.

314. *Id.* at 17.

315. *Id.* at 17-18.

deliberative process" and were thus exempt under exemption 5.³¹⁶ In support of its motion for summary judgment, the EPA submitted both a *Vaughn* index and an affidavit from the appropriate agency official.³¹⁷ The district court found that this "detailed explanatory material" provided sufficient basis for granting the agency's motion, and denied the Center's request for an *in camera* review.³¹⁸

In upholding the district court's decision, the District of Columbia Circuit Court of Appeals rejected the Center's contention that the trial court should have conducted an *in camera* inspection to determine whether any factual material was "reasonably segregable" from the withheld documents,³¹⁹ and pointed out that the language of the FOIA authorizing *in camera* review is permissive rather than mandatory.³²⁰ The court concluded that, in the absence of Congressional action to the contrary, a reviewing court is obligated to respect the FOIA's "clear grant of discretion" to the trial court.³²¹

316. *Id.* at 18. The EPA contended that it had disclosed all segregable factual material. *Id.*

317. *Id.* For a discussion of the *Vaughn* index, see *supra* note 263.

318. *Center for Auto Safety*, 731 F.2d at 18.

319. *Id.* at 20.

320. *Id.*; see 5 U.S.C. § 552(a)(4)(B) (1982) ("may examine the contents of such agency records *in camera*"). The court also noted that the legislative history of the 1974 amendment "clearly reflects the view that *in camera* reviews were to be a 'secondary tool of FOIA enforcement.'" *Center for Auto Safety*, 731 F.2d at 20 (citing *Ingle v. Department of Justice*, 698 F.2d 259, 264 (6th Cir. 1983)). The court quoted the 1974 Conference Report: "While *in camera* examinations need not be automatic, in many situations it will plainly be necessary and appropriate." *Center for Auto Safety*, 731 F.2d at 20 (quoting S. REP. NO. 1200, 93d Cong., 2d Sess. 9 (1974), reprinted in 1974 U.S. CODE CONG. & AD. NEWS 6267, 6287-88). Similarly, the House Report comments that FOIA "permit[s] such *in camera* inspection at the discretion of the Court." *Center for Auto Safety*, 731 F.2d at 20 (quoting H.R. REP. NO. 1380, 93d Cong., 2d Sess. 9 (1974)).

The court of appeals also cited the Supreme Court's language in *NLRB v. Robbins Tire & Rubber Co.*: "The *in camera* review provision [of the FOIA] is discretionary by its terms, and is designed to be invoked when the issue before the District Court could not be otherwise resolved; it thus does not mandate that the documents be individually examined in every case." *Center for Auto Safety*, 731 F.2d at 21 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978)). See also *Allen v. CIA*, 636 F.2d 1287 (D.C. Cir. 1980) (concluding from legislative history of 1974 and 1976 amendments that Congress intended the grant of broad discretion to trial judge); *Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978) (Congress did not specify proper scope of *in camera* inspection).

321. *Center for Auto Safety*, 731 F.2d at 22. The court of appeals expressed some reservations, however, noting that certain policy considerations favor the adoption of a *per se* rule for exemption 5 cases. In particular, it acknowledged the validity of the Center's claim that such cases "pose unique problems of determining whether segregable factual portions exist within a document, and . . . without *in camera* review, a district court is unable to test the accuracy of agency affidavits." *Id.* at 21. The court found these policy concerns outweighed, however, by "the fundamental principle of saving judicial resources," *id.*, and noted the precedential danger of the requested rule:

The "segregability" requirement applies to all documents and all exemptions in the FOIA. If this Court were to adopt the *per se* rule suggested by appellant, we would be hard

F. *Discovery by a FOIA Defendant.*

A novel issue in FOIA litigation reached the Court of Appeals for the District of Columbia Circuit in 1984 in *Weisberg v. Webster*.³²² The court was asked to determine whether a district court may order a FOIA plaintiff to respond to the government's discovery requests, and, if so, whether it may properly dismiss the complaint³²³ if the plaintiff refuses to comply.³²⁴ By answering both questions in the affirmative, the *Weisberg* decision has the potential to substantially influence the FOIA litigation procedure in the future.

The plaintiff in *Weisberg* filed his FOIA suit in 1978, seeking information from the FBI concerning the assassinations of President John F. Kennedy and Martin Luther King.³²⁵ The FBI released over two hundred thousand pages of documents and notified the plaintiff that it would not release more without a court order.³²⁶ When the plaintiff asserted that information in his possession demonstrated the inadequacy of the FBI's search, the agency sought discovery from him of "each and every fact" and "each and every document" upon which he based his claim of inadequacy.³²⁷ The district court denied the plaintiff's motion for a protective order excusing him from responding to the government's interrogatories.³²⁸ When the plaintiff refused to comply with the court's order to respond, the court granted the FBI's motion to dismiss.³²⁹

The court of appeals affirmed the dismissal. It rejected outright the plaintiff's argument that allowing discovery of information held by FOIA plaintiffs is inconsistent with the FOIA's policy of placing the burden of

pressed not to extend the rule in future cases to the other exemptions. This result would be contrary to the intent of Congress.

Id.

322. 749 F.2d 864 (D.C. Cir. 1984).

323. The dismissal sanction for failing to comply with a court order compelling response is authorized under Rule 37 of the Federal Rules of Civil Procedure.

324. *Weisberg*, 749 F.2d at 867.

325. *Id.* at 865.

326. *Id.* at 866. The plaintiff refused the FBI's offer to produce a random sample of the withheld documents in order to judge validity of their exemption claims. *Id.*

327. *Id.* On the strength of the plaintiff's assertions, the district court denied the FBI's motion for summary judgment on the issue of the adequacy of the search.

328. *Id.* The plaintiff's motion was based on three arguments: (1) there was no need for an agency to seek discovery from a FOIA plaintiff on search issues because the relevant information is in the agency's possession; (2) discovery in this instance was particularly burdensome to the plaintiff due to his illness; and (3) in the course of his administrative appeals, the plaintiff had already provided most of the information sought. *Id.*

329. *Id.* at 867. The district court assessed expenses and attorney fees against the plaintiff and his counsel, pursuant to Rules 37(a)(4) and 37(b)(2) of the Federal Rules of Civil Procedure. *Id.* at 866-67.

proof on the government,³³⁰ and found that neither the Federal Rules of Civil Procedure nor the language or policy of the FOIA provided for such an exemption.³³¹ The court also found it "possible that the individual members of the agency involved are not as astute or as knowledgeable as to what they have in their files as the plaintiff-requester"; thus, it held, it was appropriate to permit the government to "draw on that expertise" in order to meet more efficiently its burden of proof.³³²

Discovery by a FOIA defendant has the potential to discourage FOIA suits by increasing the litigation burdens that the FOIA was intended to alleviate.³³³ Although the *Weisberg* court predicted that defense discovery in FOIA cases would be limited in practice, it declined to articulate a special policy to govern such cases.³³⁴ Furthermore, in upholding the district court's dismissal sanction, the court of appeals failed to address the policy arguments for distinguishing FOIA plaintiffs from other civil litigants who refuse to comply with court orders compelling discovery. In the absence of special protection for FOIA plaintiffs, the government's exercise of this prerogative could frustrate the FOIA's un-

330. "[T]he burden of proof in most instances has nothing to do with the propriety of one side or the other engaging in discovery. The proper inquiry is whether anything in the FOIA or the statutes and cases governing discovery point to an exemption from discovery for FOIA plaintiffs." *Id.* at 867.

331. *Id.* at 867-68 & nn.17-22 (citing *Martin v. Neuschel*, 396 F.2d 759, 760 (3d Cir. 1968) (FOIA defendants are given "the right to . . . have the merits of the controversy decided in regular course," because "the government and its officers, as well as private citizens, are entitled to due and regular process in the pleading, hearing and disposition of litigated claims.")). The *Weisberg* court ruled that the underlying policy of the FOIA presents no obstacle to defense discovery:

The government should be able to use the discovery rules in FOIA suits like any other litigant, to uncover facts which enable it to meet its burden of proving either the adequacy of its search or the exempt status of requested documents. The government may also properly desire to use discovery in FOIA suits "as a device . . . to narrow and clarify the basic issues between the parties."

Id. at 868 (quoting *Hickman v. Taylor*, 329 U.S. 495, 501 (1947)).

332. *Weisberg*, 749 F.2d at 868-69. The court noted that the plaintiff had devoted twenty years to the subject matter of his request. In addition, the court indicated that because the plaintiff had defeated the FBI's motion for summary judgment by asserting that information in his possession demonstrated the inadequacy of its search, "fairness required that the agency be allowed access" to those materials. *Id.* at 868.

333. See *Werner-Continental, Inc. v. Farkas*, 478 F. Supp. 815, 816 (S.D. Ohio), *aff'd*, 661 F.2d 935 (6th Cir. 1981) (policy of FOIA is "to enable citizens to pursue their statutory rights by eliminating administrative barriers that could only be hurdled through expensive litigation").

334. The court stated:

Discovery must be relevant to the subject matter involved in the pending action, and in the usual FOIA case, the government will be in possession of all such evidence. For that reason, in the context of FOIA litigation courts will guard against the use of discovery as an instrument of abuse, just as they would in any other case. This is not to say that FOIA cases merit special protection against discovery abuse, but only that judges, as a practical matter, will naturally take note of the posture of the usual FOIA case, in the same way that they would take note of the posture of any case.

Weisberg, 749 F.2d at 868 (citing *FED. R. Civ. P.* 26(b)(1)).

derlying purpose of facilitating disclosure by persuading some plaintiffs to accept a dismissal sanction—or perhaps to forego litigation entirely³³⁵—rather than face the possibility that their personal records might have to be opened for government inspection.

IV. CONCLUSION

With the exception of the Durenburger bill dealing with the national security exemption, agency and Congressional activity in 1984 continued the general trend toward curtailment of access to agency information. The enactment in 1984 of the National Security Act Amendments significantly increased the CIA's discretion to withhold requested materials, although at the same time it eliminated one disputed ground for agency nondisclosure by declaring that the Privacy Act is not an exemption 3 statute. Legislation was also proposed to limit access to certain information reported by business entities, and to narrow the scope of the national security exemption. Also proposed but not enacted was a substantial reform bill that would have effected major changes in the FOIA's procedural provisions and broadened the scope of the law enforcement exemptions.

Administrative actions taken in 1984 effected some degree of clarification of the law but did so at the expense of open access. The DOJ issued guidelines making access to its records more expensive; both the DOJ and the CPSC amended their guidelines to give submitters of information a greater opportunity to restrict subsequent disclosures.

There was an absence of substantial Supreme Court activity concerning the FOIA in 1984, and the Court's single decision on the incorporation of civil discovery privileges in exemption 5 offers only limited guidance to courts and potential litigants.

The circuit courts of appeals, however, were sharply divided on a number of FOIA issues. The circuit courts' conflicting approaches took on special significance in two areas: the scope of the confidentiality requirement of exemption 7(D), and the distinguishing of agency records from other records physically possessed by agencies. It would not be surprising if, in light of *Environmental Defense Fund* and the government's new arguments in *Crooker*, future cases might give rise to conflicts in applying the exemption for predecisional memoranda as well. On one issue, however, the circuits seemed to have drawn closer to accord; with respect to the proper standard of review in exemption 3 cases,

335. The additional prospect of the assessment of expenses and attorney fees in conjunction with the dismissal of the plaintiff's claim could further inhibit the pursuit of FOIA claims. See *supra* note 329.

it appears unlikely, in view of the decisions in *Linsteadt* and *Long*, that the minority position of *Zale* will receive further support.

Finally, two otherwise unrelated decisions in the District of Columbia Circuit—one allowing discovery by a FOIA defendant, another upholding a trial court's discretion to refuse in camera review—both illustrated the judicial reluctance to offer procedural advantages to FOIA plaintiffs beyond those clearly mandated by Congress.

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