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Areas of Interest: 12 planning, 15 socioeconomics, 70 transportation law (1 highway transportation, 2 public transit, 3 rail transportation, 4 air transportation, 5 other)

The Effects of Federal and State Public Information Acts on Highway and Transportation Department Activities

A report prepared under ongoing NCHRP Project 20-6, "Right-of-Way and Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the Agency conducting the Research. The report was prepared by Orrin F. Finch. Larry W. Thomas, TRB Counsel for Legal Research, is principal investigator, serving under the Special Technical Activities Division of the Board.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of special problems in highway law. This report deals with legal issues related to highway and transportation departments' compliance with Federal and State requirements for public information.

This paper is included in a text entitled, "Selected Studies in Highway Law." Volumes 1 and 2, dealing primarily with the law of eminent domain, were published by the Transportation Research Board in 1976; and Volume 3, dealing with contracts, torts, environmental and other areas of highway law, was published in 1978. An addendum to "Selected Studies in Highway Law," consisting of five new papers and updates of eight existing papers, was issued during 1979, and a second addendum, consisting of two new papers and 15 supplements, was distributed early 1981. A third addendum consisting of eight new papers, seven supplements, and an expandable binder for Volume 4 will be distributed early in 1983. The text now totals more than 2,200 pages comprising 56 papers, some 30 of which have been supplemented during the past 3 years. Copies have been distributed to NCHRP sponsors,

other offices of state and federal governments, and selected university and state law libraries. The officials receiving copies in each state are: the Attorney General, the Highway Department Chief Counsel, and the Right-of-Way Director. Beyond this initial distribution, the text is available through the TRB publications office at a cost of $90.00 per set.

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The Effects of Federal and State Public Information Acts on Highway and Transportation Department Activities

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INTRODUCTION

Congress enacted the Freedom of Information Act (FOIA) effective July 4, 1965.[1] This date was obviously chosen to symbolize a new freedom providing all persons, not merely citizens, with an effective right of access to government "information." Congress created in the Act a new private right enforceable in court for access to all federal agency records unless covered by one of the nine enumerated exemptions. The individual's right of access was created without regard to any standards of relevance, intended use, or need for the information. The motivation for enacting such legislation was to prevent secrecy in government and establish the "public's right to know" as a check on government. FOIA was enacted because federal agencies had turned the predecessor statute on its head, transforming it into a secrecy statute.[2]

Despite these worthwhile objectives, today it is found that the principal use of FOIA is for individual selfish objectives.[3] It provides potential litigants against government with an alternative discovery device with few limitations. As will be explored, FOIA may provide claimants and potential claimants against state and local agencies with the ability to use FOIA to discover information and documents in the possession of federal agencies which might otherwise not be available through local discovery rules.

STATE PUBLIC RECORD ACTS

Current political sensitivity to demands for more "government in the sunshine" [4] has not been confined to the federal level of government. State legislatures have also provided judicial remedies for governmental failure or refusal to divulge public records not deemed exempt.[5] Some of these statutes are patterned along the lines of FOIA. Other states have enacted "public records acts" requiring the production of specifically identified writings. In practice, the subtle distinction between "information acts" and "public records acts" may be more theoretical than actual. Major differences involve (1) the burden of record search imposed on the state agency, (2) the need and intended use of the record, (3) the weighing and balancing of interests between government and the requestor concerning the disclosure of the records sought, and (4) the specific exemption from disclosure of records for pending or potential litigation.

Generally, public record acts require the requestor to identify documents with a degree of specificity sufficient to locate the file or document with minimum effort. For example, in the so-called reverse-FOIA situation, it is not unusual for government agencies to receive information requests to determine if the agency has received any request from others pertaining to the requestor or the requestor's business. Such a demand would be proper under FOIA for federal agencies and could involve considerable search effort. Where agencies do not make or keep a record of requests an issue may exist as to the extent of effort required to locate this information.

Under California's Public Records Act [6] such blanket demands have been responded to on the basis that no such information or requests are known to exist and without further identification as to approximate date, subject matter, addressee and author, the demands are refused. This refusal is based on an assumption that no duty exists to conduct an original search of files and records to determine the possible existence of information falling within the scope of the demand. Of course, a state, as a party to civil litigation, may have a duty under discovery statutes to search out, describe, or produce for other parties to the litigation certain categories of relevant documents or writings that may tend to lead to the discovery of relevant documents.

State public record acts such as the California statute often provide express exemptions, including pending and potential litigation exemptions plus a provision for agency discretion in "balancing of the equities" in determining whether to disclose records. This latter exemption is sometimes referred to as a "conditional exemption." The California conditional exemption section reads as follows:

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[1] 5 U.S.C. § 552.

[2] H.R. REP. No. 1497, 89th Cong., 2d Sess. (1966), reprinted in Freedom of Information Act Source Book 22, 25–27 (1974).

[3] One author suggests that in practice "freedom of information may be less a vehicle for informing the public than a vast fishing expedition for private industry." Arnold, *Who's Going Fishing in Government Files?* Juris Doctor, April 1976, at 17, note 22.

[4] "Government in the sunshine" has general reference to opening the government's business to public scrutiny including rights of access to government documents. In the specific sense the terminology refers to "open meeting" laws such as that found in 5 U.S.C. § 552b. *See*, Berg & Klitzman, *An Interpretive Guide to the Government in the Sunshine Act* (1978).

[5] See *Freedom of Information: A Compilation of State Laws* (Senate) Committee Print., 95th Cong., 2d Sess. (1978), GPO Stock No. 052–070–04741–1.

[6] CAL. GOV'T CODE §§ 6250 *et seq.*

> The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or *that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.* (Emphasis supplied.)[7]

Balancing statutes such as this necessarily give rise to issues of motive, usage, and necessity, which may require disclosure of a document to one requestor and justify a refusal to another requestor. For example, the fact that a member of the press is entitled to certain internal documents does not ensure that another, such as a contractor with a claim against the agency, will have equal entitlement. The media representative may be viewed as seeking the documents to protect the public interest through potential disclosure of improper government activity, while the contractor may be viewed as seeking the documents for selfish reasons possibly opposed to the public interest.[8]

Contrasting this with FOIA, it has been caustically observed that any noncitizen, including a member of the Russian KGB, has an enforceable right to access to all nonexempt documents of the State Department and the Department of Defense.[9] In short, public information acts such as FOIA are more akin to discovery statutes without the protective limitations regarding relevancy, necessity, intended usage, or impact on the public interest.

No attempt has been made in this paper to review and analyze the various state information statutes or cases. By analogy the discussions presented herein regarding the use of the FOIA as a litigation discovery devise will be applicable depending on the extent that the particular local statute was patterned after the FOIA and whether the local statutes provide for broader exemptions, particularly exemptions for potential and pending litigation as well as conditional balancing privileges absent in the FOIA.

HISTORY OF FOIA

To appreciate the potential effect of information disclosure acts on transportation agency activities it is essential that one review the Federal Freedom of Information Act, its recent legislative history, and the reception it has received from federal agencies and the courts, particularly the United States Supreme Court. Few statutes have generated so much litigation in such a brief time.[10]

The legislative history of the FOIA is itself fascinating and significant. The Senate had passed the original bill and while it was before the House of Representatives President Johnson impliedly threatened its veto. A compromise was effected through the House Committee which, in conjunction with the Attorney General, wrote a report adopted by the House which was more favorable to the concerns of the federal agencies.[11] As a result, many irreconcilable conflicts exist between the Senate and House reports on the bill.

It can be generally stated that the court decisions favoring broader concepts for disclosure usually rely on the Senate Report, while decisions upholding an exemption will generally rely on the House Report. The significance of this difference between the House and Senate Reports is demonstrated in the important but yet indecisive case of *Ginsburg, Feldman & Bress v. Federal Energy Administration.*[12] Plaintiffs sought a copy of the Energy Department's "Field Audit Guidelines" containing instructions to auditors for determining compliance with federal pricing regulations by petroleum refineries. The majority of the three-judge panel of the District of Columbia Circuit belabored the legislative intent of the words of Exemption 2 regarding "internal personnel rules and practices of any agency." For nearly 35 pages, the majority and dissent argued as to whether the House Report or Senate

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[7] CAL. GOV'T CODE § 6255.

[8] *But see* CAL. GOV'T CODE § 6254.5 added January 1, 1982, providing that whenever a state or local agency discloses a public record otherwise exempt to a member of the public, such disclosure constitutes a waiver of exemption. To the same effect *see* Black Panther Party v. Kehoe, 42 Cal. App. 3d 645, 117 Cal. Rptr. 106 (1974).

[9] See *Proceedings of ABA National Institute on Freedom of Information, Sunshine and Privacy Laws; Impact on Business,* 34 BUS. LAWYER 975, 1007 (1979). The BUSINESS LAWYER is a publication of the Section of Corporations, Banking and Business Law of the American Bar Association. The proceedings, held December 9–10, 1977, in New York City were published March 1979, at 975–1145.

[10] See the 1,041 FOIA cases indexed through July 7, 1980, in the 1980 edition, *Freedom of Information Case List* edited by the U.S. Department of Justice, Office of Information Law and Policy. This publication is for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. It contains an alphabetical listing and index by topics of all court decisions relating to the FOIA together with the third edition of its *Short Guide to the Freedom of Information Act* at 151 *et seq. See,* 1981 edition of *Litigation Under the Federal Freedom of Information Act and Privacy Act* (6th ed.), published by the Center for National Security Studies sponsored by the American Civil Liberties Union Foundation and the Fund for Peace. Copies available at a regular price of $25 with prepaid orders mailed to: FOIA Handbook, Dept. J-1, Center for National Security Studies, 122 Maryland Ave. N.E., Washington, D.C. 20002. Also of general interest is a quarterly publication of the U.S. Department of Justice Office of Information Law and Policy called *FOIA UPDATE.* Subscriptions are available through the Superintendent of Documents, GPO, Washington, D.C. 20402. Annual rate is $4.25, single issues $1.50, stock No. 027–00–80002–5.

[11] *See,* Marson, *Obtaining Access to Information in the Files of Government Agencies: Discussion,* 34 BUS. LAWYER 1003, 1004 (1979).

[12] Ginsburg, Feldman & Bress v. Federal Energy Admin., 591 F.2d 717, *vacated pending reh. en banc, aff'd mem.,* 591 F.2d 752 (D.C. Cir. 1978), *cert. den.,* 441 U.S. 906 (1979).

Report was to be relied on in determining the true intent of Congress. The issue was whether it is to be read as "internal personnel rules and internal personnel practices" or as two independent exemptions: "internal personnel rules" and "practices of any agency." The majority held for the latter interpretation, relying on the House Report. The dissent cited the Senate version as its authority and rejected the House Report as unreliable, having been "inserted in an effort to *change* the meaning of the statutory language already adopted by the House which initiated the legislation." [13]

The Court of Appeals then granted a rare rehearing *en banc*, and for a while it appeared that this important issue on exempting audit manuals would be resolved. However, one justice disqualified himself and the court split 4 to 4, leaving the earlier majority opinion as the opinion of the D.C. Circuit.[14]

The original FOIA passed in 1966 is generally conceded to have been ineffective in achieving the objectives sought. Agencies tended to establish high fees for search and copying and demanded precise descriptions of writings sought. The 1974 amendments, passed over President Ford's veto turned that situation around. The administrative reaction of most federal agencies was generally a complete about face, releasing most everything and waiving available exemptions. This was reflected in the later policy adopted by Attorney General Bell, *infra*. The result has been that 90 percent of all information sought is of no interest except to the party requesting it and a concomitant rise in "reverse FOIA cases." [15]

FOIA PROCEDURES IN BRIEF

The substance and procedure of the entire Act is embodied in 5 U.S.C. § 552. It is divided into two major subsections. Subsection (a) specifies *what* information is to be disclosed and *how* this is to be accomplished. Subsection (b) enumerates nine specific exemptions from disclosure.

Subsection (a) describes three methods to be used by each agency to disclose specific types of information to the public:

1. Organizational and functional descriptions of each agency, its rules of procedure, substantive rules of general applicability, and statements of general policy or interpretations adopted by the agency are to be published in the Federal Register. For the United States Department of Transportation these are found in 49 CFR Parts 7 and 8.
2. Certain other information such as final opinions, statements of policy not published in the Federal Register, and staff manuals and instructions are to be made available for reading and copying at each agency. Usually reading rooms are provided for this purpose.
3. All other agency records that are reasonably described and not exempt under subparagraph (b) are to be made promptly available upon request.

The nine specific Subsection (b) exemptions from the disclosure mandates of Subsection (a) are often referred to by the legislative number assigned to each exemption in the Act. They are:

1. "Properly classified" national defense secrets.
2. Internal personnel rules and practices of an agency.
3. Specific statutory exemptions with a 1976 amendment limiting it to nondiscretionary statutes or statutes with established criteria for withholding records.
4. "[T]rade secrets and commercial or financial information obtained from a person [16] and privileged or confidential."
5. "[I]nter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."
6. Personnel and medical files.
7. Law enforcement investigatory records.
8. Records of financial institutions obtained by a regulatory agency.
9. Geological and geophysical information.

This paper will be concerned largely with Exemption 5 and somewhat with Exemption 4, each of which has been set forth in full above.

FOIA applies to all federal agencies within the Executive Branch. As defined, "agency" [17] does not include Congress, the Courts, or the govern-

[13] 591 F.2d 717, 747 (Wilkey, J., dissenting).

[14] The majority *en banc* held that the agency may not be required to disclose manuals or instructions that set forth criteria or guidelines for the staff in auditing, selecting, or handling of cases. Earlier in Hawkes v. Internal Revenue Service, 467 F.2d 787 (6th Cir. 1972), withholding of the Internal Revenue Service's "Return Classifier's Handbook" used to select tax returns for audit was affirmed on the basis that disclosure would significantly impede law enforcement.

[15] Arnold, *Who's Going Fishing in Government Files?* Juris Doctor, April 1976, at 17.

[16] The term "person" in exempting commercial and financial information "obtained from a person" includes individuals, corporations, partnerships and other associations but excludes "governmental agencies." Grumman Aircraft Engineer. Corp. v. Renegotiation Bd., 425 F.2d 578 (D.C. Cir. 1970). This would also appear to exclude state governments as "persons" within Exemption 4 submitting confidential and commercial information to federal agencies. However, in the *Grumman* case it is significant that the court in its opinion capitalized the word "Government," thereby leaving unresolved whether state and local governments are included within the definition of "persons" (at 582).

[17] 5 U.S.C. § 551(1).

ment of the District of Columbia. It does include the "Executive Office of the President," [18] but not the President's immediate personal staff.[19]

What constitutes "agency records" has been a source for much discussion and litigation.[20] Agencies are not duty bound to retrieve wrongfully removed records to satisfy a record request,[21] or obtain records from contractors or other agencies even though the agency may have a right to obtain them.[22]

The nine FOIA exemptions are not mandatory. A record otherwise exempt may be released by the agency unless its withholding from the public is controlled by some other statute. On May 5, 1977, Attorney General Bell in a letter to all federal agencies stated that the government should not withhold documents unless it was important to the public interest to do so, even if there was some arguable legal basis for a withholding.[23] This policy was ostensibly adopted to reflect a spirit of full disclosure and waiver of technical defenses. Obviously, its objective was also to reduce the tremendous workload on the Department of Justice that was added by the numerous complaints being filed. At the same time, the Department of Justice also demanded that it be advised of, and concur with, any agency refusal to produce documents.

THE REAGAN CHANGE IN POLICY

By letter dated May 4, 1981,[24] Attorney General William French Smith announced a new policy to defend all FOIA suits unless the agency's denial lacks "substantial legal basis" or presents "an unwarranted risk of adverse impact" on other agencies. This is in contrast with Attorney General Bell's prior policy of defending FOIA suits only when disclosure is "demonstrably harmful" even though exempt from disclosure. The gist of the new policy statement is embodied in the following paragraph from the Attorney General's letter:

> As always, agencies must be guided by the principle that, subject to the specific exemptions provided by Congress, disclosure of agency records is the foremost goal in administering the Act. Accordingly, in responding to individual FOIA requests, agencies are urged to consider the public interests which favor disclosure, to weigh the potential costs of FOIA litigation, and to ensure that nondisclosure will not serve to conceal or otherwise facilitate fraud, waste or other wrongdoing by government employees.

The letter concludes with an indication that the Department of Justice will be soliciting legislative proposals from the various agencies "to reform the FOIA."

At the July 1981 hearings before the Senate Subcommittee on the Constitution and the House Subcommittee on Government Information and Individual Rights,[25] the Assistant Attorney General of the Office of Legal Policy identified five specific problem areas where legislative amendments to the FOIA are being considered:

1. In the area of criminal law enforcement the following observations were offered:

> To comply with requests for investigatory information, investigatory files must be reviewed line-by-line to segregate exempt from non-exempt information. The present exemption applicable to criminal investigatory files is narrowly drawn and the review and segregation process is time-consuming and complex.
>
> It is often very difficult for an analyst to determine what information may have an adverse effect on important law enforcement interests. Requesters may be able to piece together (in ways unknown to the FBI employee responding to a FOIA request) segregated bits of information which appear innocuous on their face but which can be used to identify the existence of a government investigation or an informant. It has been the Department's experience that some criminals, especially those involved in organized crime, have both the incentive and the resources to use FOIA to such ends. Some have shown great persistence in using the Act. The FBI, for instance, has received 137 requests from one imprisoned felon, who is reported to be an organized crime "hit man."

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[18] 5 U.S.C. § 552(e).

[19] Kissinger v. Reporter's Committee for Freedom of the Press, 445 U.S. 136 (1980).

[20] The National Academy of Sciences has been held not to be a federal agency subject to FOIA. The court in Lombardo v. Handler, 397 F.Supp. 792 (D.C. Cir. 1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976), *cert. den.*, 431 U.S. 932 (1977), took into account that it was established by an Act of Congress (March 3, 1863); that it is obliged to perform various investigations, etc., for various departments of the Federal Government; that on several occasions the National Research Council was the subject of Executive Orders; and that a very substantial portion of the Academy's income is derived from the Federal Government. The definition of agency was expanded by amendment to the FOIA in 1974, PUB. L. No. 93-502, 88 STAT. 1561 (Nov. 21, 1974), 5 U.S.C. § 552(e), to include any government corporation or government-controlled corporation. Judge Sirica in the *Lombardo* case concluded from the Congressional Conference Report that they did not intend to include corporations which receive appropriated funds but are neither chartered by the Federal Government nor controlled by it (H.R. REP. No. 93-1380, 93d Cong., 2d Sess., at 13, 14 (1974)).

[21] *See* Kissinger v. Report. Com. for Freedom of the Press, 445 U.S. 136 (1980).

[22] *See* Forsham v. Harris, 445 U.S. 169 (1980).

[23] Marwick, *Litigation Under the Freedom of Information Act and Privacy Act*, Appendix, at 56 (1981 ed.).

[24] Vol. II, No. 3, *FOIA UPDATE*, June 1981 (U.S. Department of Justice), at 3.

[25] Vol. II, No. 4, *FOIA UPDATE*, September 1981 (U.S. Department of Justice), at 1 *et seq.*

2. The impact of FOIA upon national security is also viewed as a major concern:

> Our intelligence agencies can demonstrate that there is a belief among some important foreign sources that FOIA makes it impossible for our government to adequately protect sensitive information from disclosure. That belief in their view significantly impedes our intelligence activities abroad. . . . The line-by-line review of documents requested under FOIA seems a very questionable use of their time, particularly in light of the fact that, even though a great deal of material must be reviewed, very little can ultimately be released by intelligence agencies.

3. More pertinent to the subject matter of this paper, the administration is also concerned about its use as a discovery tool:

> The use of FOIA as a litigation discovery device presents a third area of great concern to parties in litigation with the United States, or for that matter parties engaged in private litigation, to request information under the Act, even where they have compulsory process available under the rules of civil or criminal procedure or under agency regulations. Such requests are often nothing more than attempts to circumvent the limitations of relevance and need imposed by applicable discovery rules, or, simply to harass the government. A requester/litigant can, through FOIA, impose burdensome document production requirements which are, for good reason, impermissible under the applicable discovery rules.
>
> It is often necessary for the government attorneys responsible for a government litigation to take time from their case preparation to review documents in response to a FOIA request from an opposing litigant. There is considerable evidence that many in the private bar are aware of the potential for disruption and delay of litigation afforded by FOIA and deliberately use the Act to harass a prosecuting agency.
>
> We do not believe that Congress intended FOIA to be so used as a means of disrupting law enforcement or avoiding the rules of discovery in judicial or administrative proceedings.

4. Use of FOIA by commercial interests to gain government information relating to their competition is also viewed as needing congressional review:

> It is apparent that commercial interests have made great use of FOIA to obtain such [confidential business] information. For instance, over 85 percent of the FOIA requests to the Food and Drug Administration, which received over 33,000 FOIA requests last year, are from the regulated food and drug industries, or their representatives seeking information relating to its competitors.

5. Lastly is the increasing costs to government of complying with FOIA requests. During deliberations on the 1974 amendments to FOIA, Congress estimated that annual government-wide costs in handling FOIA requests would be between $40,000 and $100,000. Very recent surveys indicated that 1980 *direct* costs exceeded $57 million, while less than 4 percent of this was recovered in fee collections.

In concluding his remarks, the Assistant Attorney General tossed out a not so subtle challenge to Congress to make the Act a more useful and reasonable public information device:

> In this regard, I would note also that Congress may wish to reconsider its own complete exclusion from the Act. Nothing in our review of the Act to date has convinced us of the wisdom or necessity for this complete and total Congressional exclusion. Certainly, no body of the federal government has more to do with how key decisions affecting our citizens are made. However, we of course recognize that this issue is one for the Congress itself to assess and resolve.

Already Congress has responded to a small portion of the Administration's concerns by attaching a rider to the Economic Recovery Tax Act of 1981 excluding the Internal Revenue Service from the requirements of FOIA.[26] The Administration would also like to see the FBI and the CIA excluded. This is likely to occur in the near future. Amendments have also been introduced to increase fees, increase the agency's response time, and restrict the number of requests that an individual can make of one agency on a given subject.

FOIA AS A DISCOVERY DEVICE

The requestor's motive, purpose, necessity, standing, or intended usage of the documents are all immaterial under FOIA.[27] As a result, the Act has proven to be an alternative and effective discovery device for litigants and potential litigants, particularly against governmental agencies.[28] If a governmental document is not obtainable under the rules

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[26] Section 701 of the Economic Recovery Act of 1981 provides as follows:

(a) GENERAL RULE.—Paragraph (2) of section 6103(b) (defining return information) is amended by adding at the end thereof the following new sentence: "Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws."

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall apply to disclosures after July 19, 1981.

[27] *See*, Shields, *Using the FOIA as an Alternative or Adjunct to Discovery*, in Marwick, *Litigation Under the Federal Freedom of Information Act and Privacy Act*, at 132 *et seq.* (1981 ed.); Levine, *Using the Freedom of Information Act as a Discovery Device*, 36 BUS. LAWYER 45 (1980); and Arnold, *Who's Going Fishing in Government Files?* Juris Doctor, April 1976, at 17.

[28] *See* Firestone Tire & Rubber Co. v. Coleman, 432 F.Supp. 1359 (N.D. Ohio 1976), which demonstrates that the disclosure requirements of the discovery rules are more rigorous than the disclosure requirements of FOIA. This case involved a consolidated hearing on discovery motions by Firestone in its action against the government and identical FOIA demands incorporated into a separate FOIA proceeding. *See also* Sterling Drug Inc. v. F. T. C., 450 F.2d 698 (D.C. Cir. 1971).

of discovery or a potential claimant desires the documents in advance of litigation, FOIA is readily available.[29] One advantage in using FOIA is that other litigation or agency proceedings may be enjoined, pending resolution of the FOIA demand, providing the potential for delay where administrative proceedings have been initiated by the government against the requestor. Of course, fees can be charged by the agency for FOIA productions of records, whereas none are provided for under the federal rules of discovery. Certain confusion has arisen from judicial statements of the Supreme Court that discovery for litigation purposes is not an expressly indicated purpose of FOIA.[30] The pronouncement is correct but fails to also indicate that purpose, usage, and necessity are immaterial.[31]

One interesting side issue is whether an attorney representing a litigant against an agency is guilty of violating the rules of ethics by making a FOIA demand. Direct communication with a client represented by counsel is a violation of the Canons of Professional Responsibility.[32] No case is known to exist discussing this issue, but the ABA rule appears to support the conclusion that such conduct is a violation. Some state rules do, however, exempt communications with public officials and government offices,[33] although the better rule prohibits direct communications with governmental employees and officers represented by counsel as to matters involved with the pending litigation.[34] Assuming that an ethical issue does exist, it can be avoided by submitting the FOIA request through the attorney representing the agency.

[29] In Hoover v United States Dept. of the Interior, 611 F.2d 1132, 1136–7 (5th Cir. 1980), the agency contended that the district court had the inherent power to stay or dismiss the FOIA proceedings where another action raising similar issues as to the discoverability of the same documents was pending. This argument was rejected by the Fifth Circuit because discoverability presented in the other action is not related to the rights of the general public for access to agency records under FOIA.

[30] Renegotiation Board v. Bannercraft Clothing Co., Inc., 415 U.S. 1, 24 (1974).

[31] 1 Davis, *Administrative Law Treatise*, § 5:7, at 324–5 (1978 ed.).

[32] DR 7-104(A)(1).

[33] *E.g.*, CAL. BUS. AND PROFESSIONS CODE § 6076, Rule 12.

[34] The Proposed Final Draft of the ABA Model Rules of Professional Conduct, dated May 30, 1981, regarding its proposed rule 4.2 (substantially identical to existing DR 7-104(A)(1)) comments that:

> This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nor lawyer representatives of the other regarding a separate matter. . . .

THE CASE OF EPA v. MINK

The history of FOIA before the United States Supreme Court is in itself a review of how litigants have attempted to use the Act as a discovery device. Generally, litigants and potential litigants have done well in the district courts and the courts of appeals in their efforts to convert FOIA into a discovery statute. However, on a dozen occasions to date, the Supreme Court has stepped in and has applied a very cautious and conservative interpretation of the FOIA to minimize abuses. The very first case, decided January 1973, was *EPA v. Mink*.[35] In a related prior action, seven conservation groups sought to enjoin the underground nuclear test on Amchitka Island, Alaska. The action was primarily based on the contention that the prepared environmental impact statement did not satisfy the requirements of the National Environmental Policy Act (NEPA).[36] Plaintiffs commenced discovery to establish deficiencies in the impact statement and confirm reported inconsistent agency recommendations. The government defendants moved for summary judgment and had all discovery stayed pending the outcome of the motion. The district court granted the government summary judgment and on appeal the court of appeals reversed and remanded the case to permit discovery.[37] On remand the government refused to produce certain documents, claiming executive privilege. The district court ordered the government to submit the documents for an *in camera* inspection. Following several appeals first by the government[38] and later by the plaintiffs,[39] the government's right to withhold certain documents from discovery was upheld by the court of appeals. Plaintiffs applied to the Supreme Court for a temporary injunction to prevent detonation of the bomb pending petition for *certiorari*. This was denied summarily, with Justices Douglas, Brennan, and Marshall favoring the application.[40]

Separate and independent of this unsuccessful discovery motion, Congresswoman Patsy Mink and 32 of her colleagues demanded release of agency recommendations and reports that were the subject of the prior unsuccessful discovery proceedings. When the request was denied, an action under FOIA was commenced. The government immediately moved for summary judgment on the ground that the request was properly denied on the basis of Exemption 1 (national security) and Exemption 5 (nondiscoverable inter- or intra-agency memos). The district

[35] Environmental Protection Agency v. Mink, 410 U.S. 73 (1973).

[36] 42 U.S.C. §§ 4331 *et seq.*

[37] Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783 (D.C. Cir. 1971).

[38] Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788 (D.C. Cir. 1971).

[39] Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 796 (D.C. Cir. 1971).

[40] Committee for Nuclear Responsibility, Inc. v. Schlesinger, 404 U.S. 917 (1971).

court granted summary judgment and the D.C. Circuit Court of Appeals reversed.[41] The government petitioned the Supreme Court for *certiorari*. On March 6, 1972, subsequent to detonation of the atomic bomb on Amchitka Island, the Supreme Court granted *certiorari* to the government on the question of the availability of these agency documents under FOIA.

Justice White in a 5 to 3 decision (Rehnquist did not participate) held that the documents being classified "secret" pursuant to executive order were exempt under FOIA. Other unclassified documents were also found exempt under Exemption 5 as confidential intra-agency advisory opinions not discoverable by private parties in litigation with the government. The Supreme Court also could find no legislative mandate for *in camera* inspections in FOIA cases to review whether the documents were properly classified as "secret" and refused to remand the case for such an inspection.

Congress, however, subsequently amended the FOIA to include *in camera* inspections [42] and to require the President to establish classification criteria for national defense and foreign policy secrets and for the courts to determine on review that the challenged documents are properly classified.[43]

THE RENEGOTIATION CASES

The next two FOIA cases reviewed by the Supreme Court involved the use of FOIA to discover records for use in pending administrative hearings where very limited discovery is available. In both instances, the lower courts granted the FOIA applications and the Supreme Court reversed.

The first of these cases, *Renegotiation Board v. Bannercraft Clothing Co.*,[44] is significant in that the Supreme Court used very broad language suggesting that FOIA was not intended as a discovery device. However, its holding was restricted to the injunctive powers of the district court to restrain an administrative renegotiation process under FOIA.

The Renegotiation Board had instituted proceedings to determine the amount of excess profits earned by three government contractors. The Board refused to furnish certain communications, reports, and facts demanded by the contractors, and in three separate FOIA actions each contractor obtained injunctions restraining the Renegotiation Board from proceeding further until the documents were produced. In a consolidated appeal, the District of Columbia Circuit affirmed, with one judge dissenting.[45] The majority concluded that it was sufficient that the contractors had exhausted their administrative remedies under FOIA to obtain the injunctive relief. The dissent believed that FOIA provided only a narrow remedy of injunction to compel withholding of records and that there was no jurisdiction to enjoin the proceedings before the Renegotiation Board.

The United States Supreme Court in a 5 to 4 decision reversed. Initially, the Court had no difficulty concluding that the Renegotiation Board was an "agency" as defined in FOIA and was not exempt from the Act.

The majority placed emphasis on the special nature of the statutory renegotiation procedure as a bargaining process and the fact that the contractors would have the right to a *de novo* trial in the court of claims with full rights of discovery. They could find no congressional intent in FOIA to alter the procedures set forth in the Renegotiation Act and felt that production of documents during the renegotiation stage would provide the contractor with an unfair negotiating advantage. In addition, the majority concluded that the use of FOIA for discovery purposes had not been expressly sanctioned by Congress:

> Interference with the agency proceeding opens the way to the use of the FOIA as a tool of discovery, see *Sears, Roebuck and Co. v. NLRB*, 433 F.2d 210, 211 (CA6 1970), over and beyond that provided by the . . . Renegotiation Board for its proceedings. See 32 CFR §§ 1480.1–1480.12 (1972). *Discovery for litigation purposes is not an expressly indicated purpose of the Act. . . .*" (Emphasis supplied.)[46]

It should be observed that the opinion does not hold that FOIA is unavailable as a discovery device in litigation. It holds only that Congress did not "expressly" indicate such a purpose in the Act.[47]

The second renegotiation case, *Renegotiation Board v. Grumman Aircraft Eng. Corp.*,[48] was handed down more than a year later, in April 1975, by the Supreme Court. The issue here was whether certain documents generated by the regional Renegotiation Board were "final opinions" under FOIA Section 552(a)(2)(A) requiring disclosure or are predecisional consultative memoranda exempted by Section 552(b)(5).

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[41] 464 F.2d 742 (1971).
[42] 5 U.S.C. § 552(a)(4)(B).
[43] 5 U.S.C. § 552(b)(1).
[44] Renegotiation Board v. Bannercraft Clothing Co., Inc., 415 U.S. 1 (1974).
[45] 466 F.2d 345 (1972).
[46] 415 U.S. at 24.
[47] *See*, 1 Davis, *Administrative Law Treatise*, § 5:7, "May Litigants Use the FOIA as a Substitute for Discovery?" at 325–328, where the author concludes that the "1974 amendments bring out the understanding of Congress that the purpose of the FOIA is both to inform 'the public' and to let 'any person' get information to satisfy his own self-interest. . . ." at 326.
[48] 421 U.S. 168 (1975).

The contractor had filed a complaint under FOIA seeking disclosure of certain reports, final opinions, and recommendations issued by the Regional Board involving 14 of the contractor's competitors for use in its own renegotiation proceedings. The district court concluded that these reports were "final opinions" of the Regional Board even though not adopted by the full Board and therefore disclosable as final opinions of the Regional Board for use in the administrative proceedings.

The Supreme Court held otherwise. Justice White in a 7 to 1 decision concluded that the reports were not final opinions and did fall within Exemption 5. In language certainly applicable to the relationship between FHWA and the states, the Supreme Court recognized the need for predecisional communications exempt from disclosure and discarded as immaterial the issue whether the regional boards are separate agencies:

> The premise is faulty, however, overlooking as it does the fact that Exemption 5 does not distinguish between *inter*-agency and *intra*-agency memoranda. By including *inter*-agency memoranda in Exemption 5, 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.[49]

However, the *Grumman* case must be read along with *NLRB v. Sears, Roebuck & Co.*[50] because they were argued and decided together. Sears had filed an unfair labor practice charge with the Regional Director of the National Labor Relations Board. Sears then filed an appeal to the General Counsel in Washington, D.C., from the refusal of the Regional Director to file a complaint. While the appeal was pending, Sears requested under FOIA all "Advice and Appeals Memoranda" issued within the previous five years on a particular labor-management issue. In an 8 to 0 opinion, Justice White concluded that all "Advice and Appeals Memoranda" that explained decisions by the General Counsel *not* to file complaints were "final opinions" and disclosable but those memoranda that explained decisions to file a complaint and commence litigation were not "final opinions" and were exempt under Exemption 5. Thus, the Court has drawn a sharp line between predecisional communications that are privileged and communications made after the decision and designed to explain it that are not privileged.[51]

[49] *Id.* at 188.

[50] 421 U.S. 132 (1975).

[51] Despite the court's reliance on the quotation from Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 797 (1967), he takes issue both with the rationale and conclusion of the *Sears* opinion. He would ignore the official information privilege in connection with nonfinal decisions and divide the memoranda into the agency's effective law and policy statements that are never exempt and attorney work product that can be exempt. 1 Davis, *Administrative Law Treatise* § 5:35, at 410 (2d ed. 1978).

This would indicate that reports, studies, investigations, and other communications or recommendations of a confidential nature proposed by state transportation agencies to assist a federal agency, such as an agency of the federal Department of Transportation, in making a final decision could be exempt. However, the same reports or communications informing the federal agency of the state's final action or decision would not be exempt where no federal action or decision is involved. The prospect that disclosure of these "lower level" decisions as "final opinions" might inhibit frank and open written discussion and result in the formulation of poor policies and discussions was discounted by the Court:

> Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions. The quality of a particular agency decision will clearly be affected by the communications received by the decisionmaker on the subject of the decision prior to the time the decision is made. However, it is difficult to see how the quality of a decision will be affected by communications with respect to the decision occurring after the decision is finally reached; and therefore equally difficult to see how the quality of the decision will be affected by forced disclosure of such communications, as long as prior communications and the ingredients of the decisionmaking process are not disclosed. Accordingly, the lower courts have uniformly drawn a distinction between predecisional communications, which are privileged, [citations] and communications made after the decision and designed to explain it, which are not. [Citations.] [52]

The Court also concluded that a writing otherwise protected by Exemption 5 will lose its exemption if attached to or incorporated by reference in a nonexempt "final opinion:"

> Thus, we hold that, if an agency chooses *expressly* to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion, that memorandum may be withheld only on the ground that it falls within the coverage of some exemption other than Exemption 5. [Emphasis original.][53]

The *Sears* case established that "final opinions" are not confined to opinions by boards or commissions and that any final action, decision, or interpretation affecting agency policy may well be included within the mandates of Section 502(a)(2). For example, in the *Sears* case decisions *not* to prosecute were deemed to be "final opinions."

[52] 421 U.S. at 151–152.

[53] *Id.* at 161.

REPORTS, STUDIES, AND INVESTIGATIONS

The next three FOIA cases reviewed by the Supreme Court involved attempts to obtain the results of reports, investigations, and interviews in support of pending or potential litigation. For the most part the attempts were unsuccessful.

In *FAA v. Robertson*[54] the Supreme Court ruled that certain FAA reports[55] on the operation, maintenance, and performance of commercial airlines need not be disclosed to respondents who were studying airline safety for the Center for the Study of Responsive Law. The Air Transportation Association had intervened at the administrative review level on behalf of its members, contending that confidentiality is the key to success of the safety program.[56]

Exemption 3 at the time of this decision excluded from FOIA any records "specifically exempt from disclosure by [some other] statute." The Federal Aviation Act provided the agency with discretionary authority to withhold such records and the Supreme Court concluded (7 to 2) that Congress did not intend to modify the effect of the "nearly 100" existing statutes restricting public access to specific records.

This decision was, however, short lived.[57] The following year Congress amended Exemption 3 by excluding from the exemption any statute permitting discretionary withholding unless the statute also established particular criteria for withholding the records.[58]

The second case involved a demand by the Editors of New York University Law Review for case summaries of honor and ethics hearings conducted by the Air Force in connection with the Air Force Academy's discipline of cadets for cheating. The Air Force refused to release the summaries even in a "sanitized" form excluding names or identifying information. The Air Force relied on Exemption 2 ("internal personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy").

The Supreme Court in *Dept. of the Air Force v. Rose*[59] held (5 to 3) that the requested summaries would not be exempted as personnel rules and practices (Exemption 2) and that personnel and medical files (Exemption 6) will be exempt only if disclosure would constitute a clearly unwarranted invasion of personal privacy. Therefore, the Court concluded that with *in camera* review and sanitization of the summaries, "clearly unwarranted" invasions of personal privacy could be avoided.

Historically, the National Labor Relations Board (NLRB) has provided very little prehearing discovery on unfair labor practice complaints. In *NLRB v. Robbins Tire & Rubber Co.*,[60] the Supreme Court concluded that statements from witnesses the Board intended to call at the hearing would not be obtainable under FOIA. The Supreme Court again recited its concern over the use of the Act as a means for discovery and delay and concluded (7 to 2) that the statements were protected by Exemption 7(A) (interference with law enforcement proceedings):

> Unlike ordinary discovery contests, where rulings are generally not appealable until the conclusion of the proceedings, an agency's denial of a FOIA request is immediately reviewable in the district court, and the district court's decision can then be reviewed in the court of appeals. The potential for delay and for restructuring of the NLRB's routine adjudications . . . is thus not insubstantial. . . . Our reluctance to override a long tradition of agency discovery, based on nothing more than an amendment to a statute [FOIA] designed to deal with a wholly different problem, is strengthened by our conclusion that the dangers posed by premature release of the statements sought here would involve precisely the kind of "interference with enforcement proceedings" that Exemption 7(A) was designed to avoid.[61]

The decision is limited to the specific discovery limitations available in NLRB proceedings and known to Congress at the time it enacted and subsequently amended the FOIA. Yet the Court noted that the purpose of the act was not to provide discovery for litigation:

> The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed. [Citations.] Respondent concedes that it seeks these statements solely for litigation discovery purposes, and that FOIA was *not* intended to function as a private discovery tool. . . .[62]

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[54] Administrator, Federal Aviation Admin. v. Robertson, 422 U.S. 255 (1975).

[55] The reports are known as Systems Worthiness Analysis Program (SWAP) reports consisting of analyses made by representatives of the FAA concerning the operation, maintenance, and performance of commercial airlines.

[56] *See also* Machin v. Zuckert, 316 F.2d 336 (D.C. Cir. 1963), where in a pre-FOIA tort action a subpoena was issued against the Secretary of the Air Force for production of reports on an aircraft accident involving the appellant. The Court of Appeals ruled that such reports are privileged where the information in large part has been obtained through promises of confidentiality and disclosure would hamper the efficient operation of an important government program. However, to the extent that the report contains factual as opposed to conclusionary information, it must be disclosed.

[57] The case might also have been decided on the basis of a privileged interior intradepartmental memorandum under Exemption 5, discussed *infra*.

[58] *See* Annot., *What Statutes Specifically Exempt Agency Records From Disclosure, Under 5 U.S.C. § 552(b)(3)*, 47 A.L.R. Fed. 439, which collects and analyzes the federal cases discussing what statutes are within the scope of Exemption 3 as amended.

[59] Department of the Air Force v. Rose, 425 U.S. 352 (1976).

[60] N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978).

[61] *Id.* at 238–239.

[62] *Id.* at 242.

At the very same time, the Court took care to footnote the fact that standing, necessity, and presumably relevance were still not an issue:

> This is not to suggest that respondent's rights are in any way diminished by its being a private litigant, but neither are they enhanced by respondent's particular, litigation-generated need for these materials.[63]

REVERSE FOIA

The next FOIA case to reach the Supreme Court was a so-called "reverse-FOIA" case entitled *Chrysler Corp. v. Brown.*[64] The prior Supreme Court cases involved the use of FOIA to obtain agency information and the government's right to withhold that information from disclosure. The reverse FOIA cases pertain to documents supplied to the agency by outside individuals and entities who seek to protect their own interests in preventing such information from being disclosed to others under FOIA.

The reverse-FOIA problem arises because the government has increasingly obtained information about the activities of individuals and entities, including states and local agencies. Often this information is obtained as a condition for contracting with the federal government or to obtain federal funding, approval, or licensing. Occasionally, this information is obtained with a promise of confidentiality. More often it is merely assumed or expected that the information will be held by the agency in confidence. Some of this type of information could, if released, be of tremendous benefit to a competitor or to a potential litigant and result in financial detriment to the individual or entity that supplied it to the agency.

As previously noted, the nine exemptions are not mandatory and the Attorney General, at least during President Carter's administration, encouraged agencies not to assert exemptions unless an important public interest was involved. The Act did not anticipate this issue of reverse-FOIA and until the Supreme Court's decision in the *Chrysler* case a sharp division existed among the federal circuit courts as to whether third parties could obtain injunctions under FOIA to assert exemptions not raised or recognized by an agency or to intervene in disputed requests.[65]

[61] *Id.* at 242, footnote 23.

[64] Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

[65] *Compare* Sears, Roebuck & Co. v. Eckerd, 575 F.2d 1197 (7th Cir. 1978), *vacated and remanded on other grounds,* 441 U.S. 918 (1979) and Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), *cert. den.,* 431 U.S. 924 (1977).

In *Chrysler Corp. v. Brown,* the Supreme Court held (9 to 0) that "the FOIA is purely a disclosure statute and affords . . . no private right of action to enjoin agency disclosure." [66] Fortunately for third-party suppliers of information the case did not completely preclude the possibility for other types of third-party relief.

In this case Chrysler, as a party to numerous government contracts, had been required to furnish information about its affirmative action programs. Regulations promulgated by the Secretary of Labor required that all such records be made available for public inspection, notwithstanding exemption from FOIA disclosure. Chrysler sought to enjoin the voluntary disclosure contemplated by the regulation over and above that mandated by the FOIA. Chrysler asserted three bases for an injunction:

1. Disclosure was barred by FOIA Exemption 4 (trade secrets and commercial or financial information obtained from a person and privileged or confidential).
2. Disclosure would violate the Trade Secrets Act.
3. Disclosure would be an abuse of agency discretion.

On the first issue the Supreme Court unanimously held that the FOIA is exclusively a disclosure statute and that the FOIA exemptions are not mandatory bars to disclosure:

> That the FOIA is exclusively a disclosure statute is, perhaps, demonstrated most convincingly by examining its provision for judicial relief. Subsection (a)(4)(B) gives federal district courts "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). That provision does not give the authority to bar disclosure, and thus fortifies our belief that Chrysler, and courts which have shared its view, have incorrectly interpreted the exemption provisions of the FOIA. . . . We simply hold here that Congress did not design the FOIA exemptions to be mandatory bars to disclosure.[67]

As to the second contention, the Trade Secrets Act makes it a crime for a government officer or employee to disclose information relating to "trade secrets, processes, operations, style of work, or apparatus," or "the identity, confidential statistical data" etc., of "any person, firm, partnership, corporation or association, . . . except as provided by law." [68] The Supreme Court concluded that the FOIA was not intended

[66] 441 U.S. at 285.

[67] *Id.* at 292-293.

[68] 18 U.S.C. § 1905.

as an exception to the Trade Secrets Act. In addition, the specific regulations issued by the Department of Labor calling for the disclosure were not viewed as having the force of law as contemplated by Congress. Also, the Court determined that procedural defects existed in promulgating the disclosure regulation. Similar to its ruling on the FOIA, the Supreme Court rejected the idea that the Trade Secrets Act affords a private right of action to enjoin disclosure in violation of the statute.

However, the Court did conclude that a department's decision to disclose the information is reviewable in the courts under the Federal Administrative Procedure Act. Therefore, the case was remanded for an Administrative Procedure Act review presumably on the basis of an abuse of discretion [69] based on the administrative record rather than as a *de novo* hearing.

The immediate reaction to *Chrysler Corp. v. Brown* was to conclude that "reverse-FOIA" litigation had been eliminated. Close analysis of the decision, however, reveals that it involves a very narrow holding. This was noted by Justice Marshall in his brief concurring opinion:

> Because the number and complexity of the issues presented by this case will inevitably tend to obscure the dispositive conclusions, I wish to emphasize the essential for the decision today. . . . The Court's holding is only that the [Office of Federal Contract Compliance Programs] regulations in issue here do not "authorize" disclosure within the meaning of [the Trade Secrets Act].[70]

Despite its narrow holding, the decision has brought into play the importance of collateral statutes and regulations dealing with confidentiality and disclosure of submitted records. It also makes clear that the administrative review will be limited and that the burden of proof is upon the party seeking to prevent disclosure. This means that a document may fall within an exemption of FOIA (e.g., Exemption 3 for statutory exemptions or Exemption 4 for confidential trade secrets and commercial or financial information) and still be released by the federal agency unless the court determines that the decision to release would be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Financial data of an individual or a corporation would fall within the broad definition of the Trade Secrets Act but this would probably not include state or local agencies submitting similar data to federal agencies.[71] It therefore appears very unlikely that state or local entities under a federal grant or a federal aid program could successfully obtain an APA review of any decision to release such financial information, assuming in the first instance that such information had been provided in confidence.

It is quite conceivable that a state highway or transportation department might submit to FHWA its analysis of a third party claim for which it plans to seek federal reimbursement. It might submit the data, analysis, and proposed action for federal review and approval. Once approved and the claim settled, there would be no problem for the local entity. If it were not approved or settled, could the state department prevent its disclosure under the APA? It appears not, unless some statute collateral to the FOIA other than the Trade Secrets Act could be cited as specific authority against its disclosure. Ironically, it may well be that the third-party contractor or other claimant might be able to obtain an APA review to the extent that the report to be disclosed violates the Trade Secrets Act.

The importance of the reverse-FOIA problem since *Chrysler v. Brown* has led to efforts to change the law to provide some additional relief to third parties from discretionary agency disclosure, principally by amending the Trade Secrets Act.[72]

INTER- AND INTRA-AGENCY MEMOS AND THE MERRILL CASE

Exemption 4 (trade secrets and confidential commercial and financial information) was designed to protect private information in the hands of federal agencies from being disclosed to others. As to similar infor-

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[69] An abuse of discretion is defined as "arbitrary, capricious, or abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

[70] 441 U.S. at 319–321.

[71] The use of the term "person" in Exemption 4 would also suggest that states and other governmental agencies were not included. See note 16, *supra*. *See*, McCarthy and Kornmeier, *Maintaining the Confidentiality of Confidential Business Information Submitted to the Federal Government*, 36 BUS. LAWYER 57, 61 (1980), where the authors contend that the courts have construed the confidential or financial information exemption more narrowly than a fair reading of the legislative history would justify. The United States Court of Appeals for the District of Columbia held that commercial or financial matter is "confidential" only if disclosure would either (1) impair the government's ability to obtain necessary information in the future, or (2) is likely to cause substantial harm to the competitive position of the person from whom the information was obtained. National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1975) (known as *National Parks I*) and National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976) (*National Parks II*).

[72] *See*, Riley and Simchak, *The Lingering Issues of Reverse-FOIA Litigation: The Need for Definitive Legislative History to Accompany Recodification of 18 U.S.C. Section 1905 in the Proposed Criminal Code Reform Act*, 11 PUB. CONTRACT L.J. 426 (1980).

mation of a confidential nature generated by government, including that furnished by state and local governments,[73] one must look to Exemption 5 for authorization to withhold it from release.[74] This exemption covers inter-agency and intra-agency memoranda "which would not be available by law to a party other than an agency in litigation with the agency." [75] This was intended to preserve the government's common law privilege from disclosure. However, in its very first FOIA opinion in *EPA v. Mink* the Supreme Court cautioned that discovery rules should be applied to FOIA cases only "by way of rough analogies." [76]

Much overlap and uncertainty exist in the definitions and applicability of the various privileges and it is also unsettled as to which of the privileges are deemed to be incorporated into Exemption 5. The attorney-client and attorney work product privileges are more definable and for the most part are recognized by the courts as incorporated into Exemption 5. *EPA v. Mink* and *NLRB v. Sears* recognized an "executive privilege" to the extent that the writings were a part of the decision-making process. What other privileges exist that might be incorporated into Exemption 5 has been and still remains an open question. The Supreme Court in its very next case, *Federal Open Market Committee of the Federal Reserve System v. Merrill*,[77] discussed a number of potential privileges and to prevent disclosure found a precontractual information privilege described as follows:

> We accordingly conclude that Exemption 5 incorporates a qualified privilege for confidential commercial information, at least to the extent that this information is generated by the Government itself in the process leading up to awarding a contract.[78]

Respondent in the *Merrill* case, a law student, was demanding prompt release of the monthly monetary policy directives issued by the Federal Open Market Committee. At the end of each month the directives are published in accordance with FOIA in the Federal Register as statements of general policy, but this occurs after they have been replaced by a new, current policy directive. Respondent sought release while the directives were still in effect.

The Committee, recognized as a federal agency, has exclusive control over the open market operations of the Federal Reserve System. It buys and sells securities on the open market in accordance with the stated policy directive to carry out the monetary policy decided upon for the period of time involved. The Court fully appreciated the economic impact that a prompt disclosure of current policy would have on the government and the economy.

The Supreme Court rejected (7 to 2) the Committee's principal argument that Exemption 5 conferred general authority to delay disclosure of an intra-agency memorandum based on a public interest standard.[79] The Court recognized full well that Congress enacted the FOIA to erase previous agency abuses of withholding and delaying disclosure "on the basis of some vague 'public interest' standard."

Exemption 5 excludes from disclosure memoranda or letters "which would not be available by law to a party other than an agency in litigation with the agency." At first glance this would seem to incorporate the Federal Rules of Civil Procedure on discovery of intra- or inter-agency writings. The Supreme Court, however, was unwilling to go further

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[73] *See* Hoover v. United States Dept. of the Interior, 611 F.2d 1132, 1137–1138 (5th Cir. 1980), holding that appraisal reports prepared by independent outside appraisers for a federal agency constitute an intra-agency memorandum exempt from disclosure. In a very recent decision a state agency purchasing federally owned realty demanded disclosure of the government's appraisal report under the FOIA. The First Circuit ruled that it was protected from disclosure by Exemption 5 since disclosure would place the Federal Government in a completely disadvantageous position and is not the sort of document routinely disclosed to litigants. Government Land Bank v. General Services Administration, 671 F.2d 663 (1st. Cir. 1982).

[74] It is uncertain whether writings submitted by state and local agencies to a federal agency would fall within the purview of Exemption 4 or Exemption 5 or both. The definition of "person" in § 551(2) includes a "public or private organization other than an agency [federal]" suggesting that a state agency could qualify as a "person" under Exemption 4 for confidential commercial and financial information. "Agency" is defined in § 551(1) as meaning "each authority of the Government of the United States" with certain exceptions. The unanswered question is whether Congress intended the term "inter-agency" memoranda in Exemption 5 to apply strictly to memoranda between federal agencies. As discussed *supra* in note 73, the cases to date have not imposed such a limitation in regard to appraisal reports prepared by outside independent appraisers. The same concept should extend to state agencies carrying out federally sponsored programs. *See* St. Michael's Convalescent Hospital v. State of Calif., 643 F.2d 1369 (9th Cir. 1981).

[75] *See generally,* Annot., *What are Inter-agency or Intra-agency Memorandums or Letters Exempt From Disclosure Under the Freedom of Information Act,* 7 A.L.R. Fed. 855.

[76] 410 U.S. 73, at 86.

[77] 443 U.S. 340 (1979).

[78] *Id.* at 360. *See also Comment,* Governmental Commercial and Precontractual Information under Exemption 5 of the FOIA: Merrill v. FOMC, 60 BOSTON U. L. REV. 765 (1980), concluding that the Supreme Court has added a significant new category of exempt material characterized as the "precontractual information privilege."

[79] 443 U.S. at 353–354. It remains unsettled whether the courts retain equitable discretion to deny or condition disclosure under FOIA. Renegotiation Board v. Bannercraft Clothing Co., Inc., 415 U.S. 1 (1974) [S.Ct. 1028] appears to conclude that Congress did not intend to deprive the Court of its broad equitable powers in injunctive proceedings under FOIA, but the Court found it unnecessary to decide that issue. *Merrill* could have been decided on that basis rather than relying on the commercial information privilege. The exercise of equitable discretion necessarily involves the public interest standard of the former act which Congress clearly intended to abolish. *See Comment,* Governmental Commercial and Precontractual Information Under Exemption 5 of the FOIA: Merrill v. FOMC, 60 BOSTON U. L. REV. 765, 786, note 164 (1980). *See also,* 1 Davis, *Administrative Law Treatise,"* Discretion of Equity Court to Refuse Enforcement," § 5:25, at 378–381 (2d ed. 1978).

than recognition of the precontractual information privilege and expressly refused to hold that all of the privileges of the Federal Rules of Civil Procedure were incorporated into Exemption 5.[80]

In the year following the *Merrill* decision the Circuit Court for the District of Columbia in *Ryan v. Department of Justice* described the protection of Exemption 5 in the following way:

> Exemption 5 protects only those memoranda which would not normally be discoverable in civil litigation against an agency. The standard of what is discoverable in civil litigation against an agency, as interpreted by the Supreme Court, indicates that purely factual material which is severable from the policy advice contained in a document, and which would not compromise the confidential remainder of the document, must be disclosed in an FOIA suit. This court has further elaborated the standard for determining which segments of an advisory document are disclosable under Exemption 5. We have held that factual segments are protected from disclosure as not being purely factual if the manner of selecting or presenting those facts would reveal the deliberate [sic] process, or if the facts are "inextricably intertwined" with the policy-making process. The Supreme Court has substantially endorsed this standard.[81]

The exemption protects deliberative material but not post-decisional writings or factual information. Written communications of an attorney-client nature fall within Exemption 5 as not "routinely available" to private litigants. But an attorney's work-product exclusion is not so clear. In *NLRB v. Sears, Roebuck & Co.*[82] discussed earlier, the Supreme Court acknowledged that Congress had attorney's work-product privilege specifically in mind when it adopted Exemption 5 but refused to determine whether Exemption 5 went beyond writings setting forth the attorney's theory of the case and litigation strategy. Some lower federal courts have refused to expand the boundaries of the privilege beyond that previously expressed above.[83] The *Merrill* decision carefully expanded this list to include a "qualified" [84] privilege for confidential commercial information, but refused to commit itself further:

> Preliminarily, we note that it is not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery. See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 254 n. 12, 98 S.Ct. 2311, 2321, 57 L.ED2d 159 (1978) (POWELL, J., concurring in part and dissenting in part). There are, to be sure, statements in our cases construing Exemption 5 that imply as much. See, *e.g., Renegotiation Board v. Grumman Aircraft 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"). Heretofore, however, this Court has recognized only two privileges in Exemption 5, and, as *NLRB v. Sears, Roebuck & Co.*, 421 U.S., at 150-154, emphasized, both these privileges are expressly mentioned in the legislative history of that Exemption. Moreover, material that may be subject to some other discovery privilege may also be exempt from disclosure under one of the other eight exemptions of FOIA, particularly Exemptions 1, 4, 6, and 7. We hesitate to construe Exemption 5 to incorporate a civil discovery privilege that would substantially duplicate another exemption. 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.[85]

The Supreme Court was careful not to expand the Exemption any further than necessary to decide this case. Nevertheless, by footnote it left the door slightly ajar for future consideration of the privilege for official government information:

> The two other privileges advanced by the FOMC are a privilege for "official government information" whose disclosure would be harmful to the public interest, see *Machin v. Zuckert*, 114 U.S. App. D.C. 335, 338, 316 F.2d 336, 339, cert. denied, 375 U.S. 896 (1963), and a privilege based on Fed. Rule Civ. Proc. 26(c)(2), which permits a court to order that discovery "may be had only on specified terms and conditions, including a designation of the time or place." In light of our disposition of this case, we do not consider whether either asserted privilege is incorporated in Exemption 5.[86]

[80] The rationale for not equating the language of Exemption 5 with the FED. R. CIV. P. on discovery is that Congress attempted to keep Exemption 5 as narrow as consistent with efficient government operations. Ryan v. Department of Justice, 617 F.2d 781, at 790 (D.C. Cir. 1980).

[81] Ryan v. Department of Justice, 617 F.2d 781, 790. A public interest group sought response to a questionnaire sent to United States Senators by the Department of Justice on behalf of the President concerning their procedures in selecting judicial nominees.

[82] 421 U.S. 132 (1975).

[83] *See Comment*, 60 BOSTON U. L. REV. 765, 771 (1980).

[84] As found in the *Merrill* case the commercial information privilege is both conditional and temporary. On remand the FOMC was directed to establish the detrimental effect of a disclosure of its policy directives and if found privileged and exempt it would remain so only for the effective life of the directive.

[85] 443 U.S. 340, at 354-355.

[86] *Id.* at 355, note 17.

It is significant that the Court's rationale to support a conditional privilege for confidential commercial information would appear to equally support the official information privilege.[87] Both involve the deliberative process and are conditional privileges based on a balancing [88] between need and harm and are privileges available under the Federal Rules of Civil Procedure.[89] It is also significant that this footnote also leaves open the question whether the court may specify terms and conditions for FOIA disclosures based on the Federal Rules of Civil Procedure.

Recently in *Hoover v. United States Dept. of the Interior* [90] the Fifth Circuit considered whether independent appraisal reports were privileged from disclosure by Exemption 5. The reports were held to be intra-agency memoranda, and relying on the *Merrill* case the Court concluded that they were qualifiedly privileged to avoid premature disclosure of the government's bargaining position.

The ability to protect state and local government information submitted to federal grantor agencies from FOIA disclosure will probably depend largely on the ultimate resolution of this issue, and like the *Merrill* case, its outcome may well depend on the severity of the perceived harm resulting from the disclosure or on the apparent "underhandedness" of the FOIA request designed to avoid limitations or protections of local discovery rules.

THE OFFICIAL GOVERNMENT INFORMATION PRIVILEGE

Private commercial information in government files, if confidential, is excluded by Exemption 4. Commercial information of a confidential nature generated by government itself falls within the official government information privilege and may be insulated from discovery.[91] The question raised and unanswered by the *Merrill* case is whether government information that would be exempt under the federal discovery rules will also be excluded from FOIA disclosure under Exemption 5. It is very likely that many of the significant state government writings lodged with federal agencies could otherwise qualify as confidential official information.[92]

The privilege is not well defined but is based on many of the same policies as the attorney-client and the attorney work-product privileges as well as the confidential commercial information privilege discussed in the *Merrill* case. It is known by several other names such as the "deliberative process" and "consultative functions" privilege and is closely related to the "executive privilege." [93] The earliest and most cited authority for the official information privilege is the 1958 Court of Claims case of *Kaiser Aluminum & Chemical Corp. v. United States*,[94]

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[87] The buying and selling decisions of the FOMC influenced by the policy directive were analogous to the recommendations and decisions associated with the award of a contract and have been characterized as a "precontractual information" privilege. *See Comment*, Governmental Commercial and Precontractual Information Under Exemption 5 of the FOIA: Merrill v. FOMC, 60 BOSTON U. L. REV. 765, 776 (1980). The author concludes that the court in effect created two privileges for exemptions: precontractual and a general commercial information privilege.

[88] Ostensibly there is no balancing of interests in applying FOIA. However, application of the conditional privileges of the FED. R. CIV. P. necessarily involve the balancing of interests and considerations of need. Therefore, to the extent that these privileges have been incorporated into Exemption 5, balancing will be involved. This has caused one author to observe that "[t]he notion, why is somebody after a paper and what are they going to do with it, is creeping in by the back door to FOIA adjudication." Marson, *Obtaining Access to Information in the Files of Government Agencies: Discussion*, 34 BUS. LAWYER 1003, at 1007 (1979).

[89] FED. R. CIV. P. 26(c)(7) authorizes the court to order "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a certain way." This is the basis for the "confidential commercial information" privilege found by the Supreme Court in the *Merrill* case to be included in Exemption 5.

[90] 611 F.2d 1132 (5th Cir. 1980).

[91] *See generally*, Annot., *Court's Power to Determine, Upon Government's Claim of Privilege, Whether Official Information Contains State Secrets or Other Matters Disclosure of Which Is Against Public Interest*, 32 A.L.R.2d 391.

[92] This is not to suggest that all writings submitted by states to a federal agency for the purpose of influencing a decision, determination or approval will be exempt. For example, the court in the leading case of Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975), at 1143–1144, expressed it as follows:

> Unevaluated factual reports or summaries of past administrative determinations are frequently used by decision-makers in coming to a determination, and yet it is beyond dispute that such documents would not be exempt from disclosure. Rather, to come within the privilege and thus within Exemption 5, the document must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. Put another way, pre-decisional materials are not exempt merely because they are pre-decisional; they must also be a part of the agency give-and-take—of the deliberative process—by which the decision itself is made. [Footnote omitted.]

[93] In California the official information privilege has been codified in EVIDENCE CODE § 1040 and is known as a 10–40 privilege:

> (b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing such information, if the privilege is claimed by a person authorized by the public entity to do so and:
>
> (1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or
>
> (2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

[94] 157 F. Supp. 939 (Ct. Cl. 1958).

quoted as authority by the United States Supreme Court in *EPA v. Mink* [95] and *NLRB v. Sears*.[96]

In the *Kaiser Aluminum* case, Kaiser sought damages and contract reformation for an alleged breach by the United States of a $36 million contract involving the sale of three aluminum plants by the General Services Administration. Kaiser sought certain documents from GSA through discovery. GSA claimed a privilege of confidentiality as to one report. On a motion for reconsideration, the court, in a well-considered opinion, overruled its prior decision which required disclosure and stated what has become the recognized foundation for the official information privilege:

> When this Administrator came to make a decision on this $36,000,000 contract, with intricate problems of accounting and balancing of interests, he needed advice as free from bias or pressure as possible. It was wisely put into writing instead of being left to misinterpretation but the purchaser, plaintiff here, was entitled to see only the final contracts, not the advisory opinion. . . . The document sought here was a part of the administrative reasoning process that reached the conclusion embodied in the contracts with Kaiser and Reynolds. The objective facts, such as the cost, condition, efficiency, terms and suitability are otherwise available. So far as the disclosure of confidential intra-agency advisory opinions is concerned, we conclude that they belong to that class of governmental documents that are privileged from inspection as against public interest but not absolutely. It is necessary therefore to consider the circumstances around the demand for this document in order to determine whether or not its production is injurious to the consultative functions of government that the privilege of nondisclosure protects. . . . While this is not the attorney-client privilege, the demand for this document seeks to lay bare the discussion and methods of reasoning of public officials. The fact that the author is dead is immaterial here. It is not a privilege to protect the official but one to protect free discussion of prospective operations and policy. This goes beyond the disclosure of primary facts upon which conclusions are based. It is akin to the request for "production of written statements and mental impressions contained in the files and the mind of the attorney," which are unprotected [sic] by the attorney-client privilege. Cf. Hickman v. Taylor, [329 U.S. 495, 509 (1947)]. Nothing is alleged by Kaiser, through the affidavit of its negotiating Vice President, Mr. Calhoun, or otherwise, to suggest any need for production of the document to establish facts.[97]

Prior to the *Kaiser Aluminum* case, in *Reynolds v. United States* [98] plaintiffs had sued the United States under the Federal Tort Claims Act for damages as widows of deceased civilians killed in the crash of a military aircraft, in which secret electronic equipment was being tested. Plaintiffs sought the production of the official accident report on the crash. The government contended that the report was privileged as official information, the disclosure of which would be detrimental to the interests of the nation. The circuit court ruled that this privilege had, in effect, been waived by enactment of the Tort Claims Act, and therefore the trial judge acted within his authority in determining that good cause existed for discovery and disclosure of the otherwise privileged official information. The Supreme Court granted *certiorari* and reversed on the basis that the report was privileged against the disclosure of military secrets, but did not comment on the official information privilege contention.[99]

Four of the twelve Supreme Court FOIA decisions discussed in this paper deal with Exemption 5 involving inter-agency memoranda. All four relied on the *Kaiser Aluminum* opinion and recognized the need for preserving the open expression of opinion in the formulation of government policy and decisions. *EPA v. Mink* quoted from the *Kaiser Aluminum* case and though it did not characterize the privilege as the official governmental information privilege, it is apparent from the following observation that the official information privilege was uppermost in the Courts thoughts:

> It appears to us that Exemption 5 contemplates that the public's access to internal memoranda will be governed by the same flexible, commonsense approach that has long governed private parties' discovery of such documents involved in litigation with Government agencies.[100]

The *NLRB v. Sears* case also cited and quoted the *Kaiser Aluminum* case and acknowledged "[t]hat Congress had the Government's executive privilege specifically in mind in adopting Exemption 5 is clear." [101] It is equally obvious that the "executive privilege" referred to was the "decision making processes of government agencies" which is a specific type of official information:

> Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions. . . . Exemption 5, properly construed, calls for "disclosure of all 'opinions and interpretations' which embody the agency's effective law and policy, and the withholding of all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be." Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 797 (1967); Note, Freedom of Information Act and the Exemption for Intra-agency Memoranda, 86 Harv. L. Rev. 1047 (1973).[102]

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[95] 410 U.S. 73, at 86–87 (1973).
[96] 421 U.S. 132, at 149 (1975).
[97] 157 F. Supp. at 946–947.
[98] 192 F.2d 987 (3d Cir. 1951).
[99] United States v. Reynolds, 345 U.S. 1 (1953).
[100] 410 U.S. 73, at 91 (1973).
[101] 421 U.S. 132, at 150 (1975).
[102] *Id.* at 151–153.

Another significant Exemption 5 case is *Renegotiation Board v. Grumman Aircraft Eng. Corp.*[103] argued with the *NLRB v. Sears* case previously discussed. At issue, in part, were reports prepared by regional boards that are used by the full Board in arriving at its decision:

> The Regional Board Reports are thus precisely the kind of predecisional deliberative advice and recommendations contemplated by Exemption 5 which must remain uninhibited and thus undisclosed, in order to supply maximum assistance to the Board in reaching its decision. . . . Accordingly, these reports are not "final opinions," they do fall within the protection of Exemption 5, and they are not subject to compulsory disclosure pursuant to the Act.[104]

Again, without denominating this as official government information privileged from disclosure, it clearly falls within the purview of that privilege.

In view of the tacit if not express recognition by Congress and the Supreme Court that the "official information" or "deliberative process" privilege was incorporated into Exemption 5, it is puzzling why the Supreme Court in its more recent *FOMC v. Merrill* case questioned in footnote 17 whether the privilege is a part of Exemption 5:

> In light of our disposition of this case, we do not consider whether . . . [the official government information] privilege is incorporated in Exemption 5.[105]

An explanation for the Supreme Court's failure to recognize its prior pronouncements on the "deliberative process" may be simply an oversight or more ominously, a hedge against its prior conclusions. The Supreme Court's conclusion exempting the FOMC policy directive seems justified, but its reasoning was strained. This in itself may result in reluctance by the lower courts to extend Exemption 5 to include a confidential information privilege. The next Supreme Court case on Exemption 5 will probably decide where the Court goes from here.[106] The facts of that case and the potential impacts upon governmental operation compared with the needs of the requestor will probably determine which direction the Court will turn next.

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[103] 421 U.S. 168 (1975).

[104] *Id.* at 186.

[105] 443 U.S. 340, at 355, note 17 (1979).

[106] To the date of this writing the Supreme Court has granted *certiorari* in three cases, none of which appear to involve Exemption 5. The three cases are Washington Post Co. v. U.S. Dept. of State, 647 F.2d 197 (D.C. Cir. 1981), involving the applications for U.S. citizenship by Iranian nationals living in Iran (Exemption 6); Abramson v. Federal Bur. of Investigation, 658 F.2d 806 (D.C. Cir. 1980), concerning loss of Exemption 7 by extracting and recompiling summaries of information from FBI records for a White House "name check"; and Shapiro v. Klutznick, 636 F.2d 1210 (3d Cir. 1980) (unpublished), which concerns the ability to withhold census data under Exemption 3.

NO FOIA DUTY TO OBTAIN RECORDS HELD BY OTHERS

On March 3, 1980, the Supreme Court issued two opinions written by Justice Rehnquist, *Kissinger v. Reporters Committee for Freedom of the Press*[107] and *Forsham v. Harris.*[108] These cases establish that a federal agency has no duty under FOIA to seek or otherwise obtain records from other "non-FOIA" agencies even though the federal agency has a legal right to obtain such records.

In the *Kissinger* case several FOIA requests were filed with the Department of State for certain telephone notes and transcriptions of telephone conversations of Henry Kissinger as Secretary of State. In the belief that these were private records, Kissinger had donated them with his private papers to the Library of Congress which is not subject to the FOIA. The Court, assuming *arguendo* that this was a violation of the Federal Records Act and the Records Disposal Act, concluded that FOIA requires that a federal agency disclose only that which it possesses:

> Most courts which have considered the question have concluded that the FOIA is only directed at requiring agencies to disclose those "agency records" for which they have chosen to retain possession or control. See also NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 221 . . . (1978), describing the Act as reaching "records and material in the possession of federal agencies. . . ." The conclusion that possession or control is a prerequisite to FOIA disclosure duties is reinforced by an examination of the purposes of the Act. The Act does not obligate agenices to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained. It has been settled by decision of this Court that only the Federal Records Act, and not the Freedom of Information Act, requires an agency to actually create records, even though the agency's failure to do so deprives the public of information which might have otherwise been available to it. [Citations.]
>
> If the agency is not required to create or to retain records under the FOIA, it is somewhat difficult to determine why the agency is nevertheless required to retrieve documents which have escaped its possession, but which it has not endeavored to recover. If the document is of so little interest to the agency that it does not believe the retrieval effort to be justified, the effect of this judgment on an FOIA request seems little different from the effect of an agency determination that a record should never be created, or should be discarded.[109]

Observe that the Supreme Court did not go so far as to suggest that agency records could be transferred or destroyed with impunity to avoid a FOIA request. One of the requests passed on by the Court was filed

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[107] 445 U.S. 136 (1980).

[108] 445 U.S. 169 (1980).

[109] 445 U.S. 136, at 151–153.

prior to the physical removal of the documents. The Court ruled on this request separately, holding that the demand was actually seeking telephone conversations which occurred when Kissinger was acting in his capacity as presidential advisor, which is exempt from the FOIA.[110] The further significance of this ruling is that exempt presidential writings did not lose their exempt status after becoming agency records of the State Department. At this juncture one can only speculate whether this is unique as to presidential records or whether the same view will be taken of exempt or confidential state and local government records lodged with federal agencies.

The companion case, *Forsham v. Harris*[111] dealt with the opposite side of the Kissinger issue: To what extent are the records of grantees under federal funding programs considered to be agency records obtainable under FOIA?[112] Generally, grants of federal funds do not create a partnership or joint venture with recipients nor convert the acts of the recipient from private to governmental acts without day-to-day supervision.[113] Following the rationale of the *Kissinger* case, the Court held that only records actually possessed by a federal agency are subject to FOIA disclosure even though contractually obtainable by the agency:

> We hold here that written data generated, owned, and possessed by a privately controlled organization receiving federal study grants are not "agency records" within the meaning of the Act when copies of those data have not been obtained by a federal agency subject to the FOIA. Federal participation in the generation of the data by means of a grant from the Department of Health, Education and Welfare (HEW) does not make the private organization a federal "agency" within the terms of the Act. Nor does this federal funding in combination with a federal right of access render the data "agency records" of HEW, which *is* a federal "agency" under the terms of the Act. [Emphasis original.][114]

In this case, the Department of Health, Education and Welfare had contracted with a group of private physicians and scientists to study the effectiveness of several drugs on the control and treatment of diabetes. The study was funded solely by federal grants amounting to about $15 million. The study generated more than 55 million records documenting the treatment of over 1,000 diabetic patients over an 8-year period. The grantee group retained control of its records, but the federal agency possessed the right of access to all the data to ensure compliance with the grant. And upon request, the agency could obtain permanent custody of the documents. Neither the right to review the records nor to obtain permanent custody was ever exercised by the federal agency. The agency did, however, contract with another private grantee for an assessment of the study and it was given direct access to the group's "raw data."

As an outgrowth of the two grantee reports and its own audit of the "raw data," the Federal Drug Administration took certain regulatory action proposing changes in labeling and recommended limited usage of some of the drugs tested in the study.

Manufacturers of the affected drugs challenged these orders and simultaneously initiated a series of FOIA requests seeking access to the raw data developed by the grantee study group. As previously noted, the Supreme Court concluded that the grantee records were not "federal agency records":

> Congress undoubtedly sought to expand public rights of access to Government information when it enacted the Freedom of Information Act, but that expansion was a finite one. Congress limited access to "agency records," 5 U.S.C. § 552(a)(4)(B), but did not provide any definition of "agency records" in that Act. The use of the word "agency" as a modifier demonstrates that Congress contemplated some relationship between an "agency" and the "record" requested under the FOIA. With due regard for the policies and language of the FOIA, we conclude that data generated by a privately controlled organization which has received grant funds from an agency (hereafter a "grantee"), but which data has not at any time been obtained by the agency, are not "agency records" accessible under the FOIA.[115]

[110] The *Kissinger* decision may be at variance with an earlier D.C. Circuit decision requiring disclosure of responses submitted by various Senators to an inquiry by the Attorney General regarding their views on the procedures for recommending judicial nominees. The questionnaire was prepared by the Attorney General at the request of the President. Neither the President nor Congress is subject to FOIA but the FOIA demand was made upon the Department of Justice which is not exempt. The court ruled that the Attorney General in control of the documents was acting as an independent controlling entity and not as legal advisor to the President. Ryan v. Department of Justice, 617 F.2d 781 (D.C. Cir. 1980). However, the court concluded that the documents were exempt under Exemption 5 (inter- and intra-agency memos) except for factual segments which did not reveal the deliberative process and were not intertwined with the policy-making process. 617 F.2d at 791.

[111] 445 U.S. 169 (1980).

[112] *See* Note, *Access to Grantee Records Under the Freedom of Information Act: An Analysis of Forsham v. Harris*, 34 SOUTHWESTERN L. J. 993 (1980).

[113] In United States v. Orleans, 425 U.S. 807 (1976), the Supreme Court held that a community action agency which received all of its funding from the United States under the Economic Opportunity Act was not a federal agency nor its workers federal employees for purposes of the Federal Tort Claims Act.

[114] 445 U.S. at 171.

[115] *Id.* at 178.

The rationale of this opinion would strongly support the proposition that records in possession of state and local governments as grantees of federal agencies would not be obtainable under FOIA.[116] Moreover, it would appear unlikely that the federal courts would provide access to local government records not already in the possession of a federal agency since most states have their own public records acts. But here are two cautionary notes: First, the opinion emphasized the fact that the grantee is a "private" recipient. Second, the Court suggested that with a strong enough demonstration of substantial federal supervision of the grantee's activities, the grantee might be viewed as being a federal instrumentality:

> This treatment of federal grantees under FOIA is consistent with congressional treatment of them in other areas of federal law. Grants of federal funds generally do not create a partnership or joint venture with the recipient, nor do they serve to convert the acts of the recipient from private acts to governmental acts absent extensive, detailed, and virtually day-to-day supervision. *United States v. Orleans*, 425 U.S. 807, 818 . . . (1976). Measured by these standards, the UGDP is not a federal instrumentality or an FOIA agency.[117]

The very latest Supreme Court FOIA decision in *GTE Sylvania, Inc. v. Consumers Union*[118] deals largely with technical and procedural issues, but provides continued, though cautious, protection to third parties supplying private data to federal agencies.

The Consumer Product Safety Commission obtained accident reports from various television manufacturers to study the hazards of television sets and the need for product safety standards. Some of the material was voluntarily supplied and other reports were obtained through orders and subpoenas. Claims of confidentiality by the manufacturers accompanied most of the reports.

These reports were subsequently requested by the Consumers Union and others under the FOIA. Those reports submitted without an assertion of confidentiality were given to the requestors by the agency. The manufacturers supplying the balance of the reports were given an opportunity by the federal agency to establish their claim of confidentiality.

The agency concluded that no FOIA exemption applied and announced that even if exempt, it was exercising its discretion to release the reports and waive the right to any exemption. The manufacturers acted promptly in filing a number of suits in various federal district courts to enjoin release of the documents. These actions were consolidated in the Delaware District Court where the judge issued temporary and preliminary injunctions prohibiting release of the documents. The manufacturers contended that the threatened release was prohibited by the Consumer Product Safety Act and the Trade Secrets Act.

The requestors were not joined in the injunctive actions and they did not seek to intervene. Rather they initiated their own FOIA action in the District of Columbia District Court demanding that the agency release the reports. The agency appeared, offering to release the reports once they were free of the pending injunction of the Delaware District Court.

The Supreme Court concluded that the requestors could enjoin the agency under FOIA from withholding the reports only with a showing that the agency (1) improperly (2) withheld (3) agency records. Here the requestors could not establish that the agency was acting improperly in withholding the reports as long as the Delaware injunctions were in force:

> There is nothing in the legislative history to suggest that in adopting the Freedom of Information Act to curb agency discretion to conceal information, Congress intended to require an agency to commit contempt of court in order to release documents.[119]

This case is further recognition by the Supreme Court that third-party document suppliers still have protective rights even after *Chrysler Corp. v. Brown.*

FOIA FISHING FOR RECORDS—AN OPEN SEASON?

Discovery today is the primary tool of every litigation lawyer. It assists the lawyer in developing his case or defense from the records of

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[116] In Ryan v. Department of Justice, 617 F.2d 781, 790 (D.C. Cir. 1980), the United States Circuit Court for the District of Columbia rejected the argument that documents received by a federal agency from Senators could not qualify as "inter-agency" or "intra-agency" because the FOIA does not apply to Congress.

When an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, we find it entirely reasonable to deem the resulting document to be an "intra-agency" memorandum for purposes of determining the applicability of Exemption 5. This common sense interpretation of "intra-agency" to accommodate the realities of the typical agency deliberative process has been consistently followed by the courts.[30]

Footnote 30 includes the following citations of authority:

See Brockway v. Department of Air Force, 518 F.2d 1184, 1191 (8th Cir. 1975) (statements of witnesses in a military aircraft safety investigation are within Exemption 5); Wu v. National Endowment for Humanities, 460 F.2d 1030, 1032 (5th Cir. 1972) (statements of professors who were not agency employees deemed to be intra-agency memoranda), *cert. denied*, 410 U.S. 926, 93 S.Ct. 1352, 35 L.Ed.2d 586 (1973); Soucie v. David, 145 U.S. App. D.C. 144, 155, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971) (materials prepared for an agency by outside experts should be treated as intra-agency memoranda).

[117] 445 U.S. at 180.

[118] 445 U.S. 375 (1980).

[119] *Id.* at 387.

others and it is useful to discover in advance the "cards" held by his opponent. Little wonder that FOIA has been seized upon as an additional discovery tool since relevancy, necessity, and filing of a lawsuit are themselves immaterial. In addition, the public agency has the burden of proof to justify any withholding of information; the district court proceeding is *de novo* with priority on the hearing calendar; and appeal is immediate. This is to be contrasted with typical discovery motions in many state actions where the need to know, relevancy, and perhaps good cause must be established by the moving party and appeal must await final judgment.

As has been observed, state and local records provided to federal agencies are subject to FOIA provisions but not records pertaining to federal grants and contracts retained in local files. State and local documents held not discoverable in litigation may still be reachable under FOIA from a federal agency if copies or duplicates were lodged with the federal agency.

Accident reports, proposed settlement justifications, appraisal reports, and investigative reports involving state or local activities are the types of writings filed with federal agencies which can become significant to an issue in tort, contract, eminent domain, or environmental law litigation. A simple request of the appropriate federal agency for all reports or writings involving the subject matter in litigation can prove more fruitful to the private litigant than local discovery rights.[120]

Congress never intended for the FOIA to serve as a discovery device for litigants or potential litigants. But, as has been noted, the status of the requestor as a litigant or potential litigant does not alter that person's rights under FOIA. Nor does the fact that these same records could be obtained through discovery or even that they could not properly be obtained through discovery take away rights otherwise available under FOIA.

The cases are clear in their statements that there is to be no balancing of the public's right to know against the public good by permitting nondisclosure under FOIA as exists in many state information statutes.[121] At the same time, one cannot deny that the Supreme Court's FOIA decisions reviewed above do overall reflect a careful and cautious weighing and balancing as against the potential impact that disclosure might have, measured by the public good. That was demonstrated particularly in *Federal Open Market Com'n v. Merrill* [122] where the Court expressly rejected the "public interest" standard but when pressed to find an exemption recognized that Exemption 5 included a qualified privilege for confidential information at least to the extent this information was generated by the government itself.[123]

Similarly in *NLRB v. Robbins Tire & Rubber Co.*,[124] the Court carefully noted that respondent-requestor's rights were neither diminished nor enhanced because of the pending of private litigation on the subject with the same government agency involved in the FOIA litigation. At the same time, the Court presumably concluded that it would be eminently unfair to provide the private litigant with FOIA rights traditionally denied in the NLRB proceeding. The same rationale seems to apply to the renegotiation cases decided by the Supreme Court and previously reviewed.

Of the 12 FOIA Supreme Court cases handed down to the date of this writing, one must say that the only "defeat" suffered by the involved agencies from "FOIA discovery" was *Dept. of the Air Force v. Rose* [125] (ignoring, of course, the effect of congressional amendments enacted in response to some of these decisions [126]). And even in the *Rose* case, in upholding the FOIA rights of the Law Review editors, the court carefully weighed the interests of the affected parties and ordered that the case files be "sanitized" and reviewed *in camera* to avoid any unwarranted invasion of privacy.

The United States Supreme Court from its very first FOIA decision in *EPA v. Mink* [127] has taken a careful, cautious, and conservative approach toward the FOIA, particularly where it is being employed purely as a litigation discovery device. The lower federal courts have tended to be more generous in their interpretation and application of FOIA as a discovery tool.

Since every case cannot justify or expect Supreme Court review, what can states and local entities do to prevent being outflanked by FOIA requests after denial of local discovery?

[120] *E.g.*, Aydin Corp. v. United States, 669 F.2d 681 (Ct. Cl. 1982), where the plaintiff gathered evidence to support a bid mistake claim from the government's records prior to filing any claim or lawsuit.

[121] Ginsburg, Feldman & Bress v. Federal Energy Admin., 591 F.2d 717 (D.C. Cir. 1978). *But see* note 90, *supra*.

[122] 443 U.S. 340 (1979).

[123] *See* Hoover v. United States Dept. of the Interior, 611 F.2d 1132 (5th Cir. 1980); Shermco Industries v. Secretary of Air Force, 613 F.2d 1314 (5th Cir. 1980).

[124] 437 U.S. 214 (1978).

[125] 425 U.S. 352 (1976).

[126] See FOIA Amendments of 1974, P.L. 93-502, 94th Cong., 1st Sess.; and 1976 amendment included in the "Government in the Sunshine Act," P.L. 94-409, 94th Cong., 2d Sess., 90 Stat. 1242.

[127] 410 U.S. 73 (1973).

PROTECTING STATE SUBMITTALS FROM FOIA DISCLOSURE

The first concern of each state in transmitting written information to federal agencies must be whether that information is already obtainable by others under state information or discovery statutes. If it is obtainable locally, the FOIA probably presents no added risk. If the answer is otherwise, can the state protect that information in the hands of a federal agency from disclosure?

The answer, of course, depends on whether one of the nine Exemptions can be made to apply. Of course, that is not the final answer because agencies can and in the past have waived privileges in favor of disclosure. The announced policies of the Reagan Administration, however, suggest a change in that policy.

This change is noted both specifically as to the administration of FOIA in discontinuing the practice of waiving exemptions for no reason and more generally, in the administration's apparent sensitivity toward the interests of the states. Therefore, the states should expect that the federal agencies will not release such information provided the affected state is aware of the request and is able to convince the agency that the information is exempted by FOIA. Looking ahead one can expect that the most likely exemptions available to a state found in this situation will be Exemption 5 (inter-agency memoranda), Exemption 4 (privileged and confidential, commercial, or financial information "obtained from a person"), Exemption 7 (law enforcement investigatory records),[128] and Exemption 3 (statutory exemptions).

Exemption 5 (inter-agency memoranda not available by law to a party in litigation with the agency) will probably afford the most protection.[129] This will be particularly so should the exemption be extended to "official information" as previously discussed.

Where a report or investigation summary is sent to Washington, it may be helpful to specifically mark it "confidential." If it is a report, it may be well to state in a cover letter that the report does contain deliberative information that may be inextricably intertwined with the facts, and that its confidential nature should be preserved until all litigation or potential litigation has been concluded. First, this will alert the agency's FOIA officer to contact the state should the document be requested under FOIA. Second, it may at least provide prima facie evidence of an intent that the information may not have been supplied had the state known in advance that it would be released. As noted in *G.T.E. Sylvania, Inc. v. Consumer's Union*,[130] the federal agency released without notice those accident reports submitted without an assertion of confidentiality. Those that asserted confidentiality on the face of the report were given an opportunity to establish their claimed exemption even though the agency chose to waive all existing exemptions. This also provided the submitters with the opportunity to obtain at least temporary injunctive relief against FOIA disclosure.

It might appear unique but apparently proper for a state to request that its documentation in support of a proposed settlement for funding be returned by the federal agency if found unacceptable. If accepted, presumably the local litigation would be settled and no motivation would exist for a private litigant to seek FOIA disclosure nor would it remain prejudicial at that stage. As one can see from the *Kissinger* case,[131] records removed or returned from government files are not reachable. A FOIA action can be maintained against a federal agency only for a "wrongful withholding" of "agency records."

CONCLUSIONS

The impact of FOIA on government will be felt for a long time. The concepts have been picked up by state legislatures and by state courts in interpreting their own public record and information statutes. Exorbitant costs and many abuses resulting from FOIA, apart from its impact on the FBI, CIA, and the IRS have caused the current administration and the Congress to take a further look at the statute. Apart from the agencies mentioned, drastic changes are not anticipated but a lack of sympathy for the abusers of the FOIA is apparent from amendments already introduced. Perhaps this current mood extends to the private litigant who uses the Act as a discovery tool. Heretofore, Congress' major concern with the FOIA has been to amend it because of some restrictive Supreme Court decision. In the future, the Congress and the Supreme Court may both be more concerned with the broader effects of FOIA disclosures in relation to the overall welfare of the public.

[128] In Moore-McCormack Lines, Inc. v. I.T.O. Corp. of Baltimore, 508 F.2d 945, 949 (4th Cir. 1974), the agency contended, among other things, that its investigatory report of an accident came within the purview of Exemption 7. The court concluded that mere assertion that the files were for law enforcement purposes is not sufficient where no enforcement proceedings are contemplated.

[129] *See* note 74 *supra*, regarding the question whether a writing from a state agency to a federal agency will qualify as an "inter-agency" memorandum.

[130] 445 U.S. 375 (1980).

[131] 445 U.S. 136 (1980).

APPLICATIONS

The foregoing research should prove helpful to highway and transportation administrators and their legal counsel. Officials are urged to review their practices and procedures to determine how this research can effectively be incorporated in a meaningful way. Attorneys should find this paper especially useful in their work as an easy and concise reference document.

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