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INTRODUCTION

In the 1960's Congress set out to disclose the workings of federal administrative agencies through the mechanism of the Freedom of Information Act (FOIA).1 However, expansive judicial interpretations of the FOIA's exemptions produced an Act that fell short of the legislative intent of "pierc[ing] the paper curtain of bureaucracy."2 In response, Congress amended the Act, effecting important substantive changes in the investigatory records exemption. The changes in that exemption's language may placate those commentators who had criticized earlier drafts of the legislation.3 Congress established a weighing of interests in order to abrogate a line of judicial interpretations that allowed too much withholding. Increased disclosure may be a laudable goal, but it remains to be seen whether a balancing of interests will reconcile the courts and Congress. Specifically, it appears that courts, when confronting FOIA actions brought against labor administrative agencies, have given an unduly restrictive interpretation to the congressional intent behind the amended exemption. Such interpretations are based, at

3. One of the earliest critics of the Freedom of Information Act, Kenneth Culp Davis, claimed, "A crucial observation that some will find regrettable is that apparently no federal statute of general applicability forbids federal agencies or employees to make disclosures that would constitute clearly unwarranted invasions of personal privacy." Davis, The Information Act: A Preliminary Analysis, 34 U. CHI. L. REV. 761, 766 (1967) [hereinafter cited as Davis]. See also Note, The Freedom of Information Act—The Parameters of the Exemptions, 62 GEO. L.J. 171 (1973) [hereinafter cited as FOIA—Parameters].
least in part, upon the particular administrative context in which such cases have arisen. The result has been the creation of potentially dangerous precedents that could once again circumvent the broad congressional mandate of disclosure. This article explores the case law under the earlier investigatory files exemption to the Freedom of Information Act, the congressional response to these interpretations, and the resulting language and judicial interpretations of the new exemption amendment.

**The Original Investigatory Files Exemption**

The Freedom of Information Act of 1967 was the first federal legislation providing for a broad rule of disclosure. The Act compelled federal administrative agencies to disclose identifiable records to any person upon request, except those records involving matters within nine stated exemptions. To implement the disclosure policy, the Administrative Procedures Act was used as authority to withhold public records. See H.R. Rep. No. 1947, 89th Cong., 2d Sess. 4-6 (1966) [hereinafter cited as H. REP. 1497]; H.R. Rep. No. 918, 88th Cong., 1st Sess. 5 (1963); 112 Cong. Rec. 12,976 (1966) (remarks of Representative Howard). The Act’s major deficiency was that it made records available only to interested persons as opposed to the general public. The Act’s exemptions for government functions requiring secrecy and adjudicatory final opinions and orders were too vague to implement effectively any disclosure policy, and no enforcement mechanism existed.

In 1958, Congress amended the previously non-disclosure-oriented Federal Housekeeping Act to no longer “authorize withholding information from the public or limiting the availability of records to the public.” Act of Aug. 12, 1958, Pub. L. No. 85-619, 72 Stat. 547, amending 5 U.S.C. § 22 (1958) (Rev. Stat. § 161). Nonetheless, agency disclosures were few and far between. See Sperandeo v. Milk Drivers Local 537, 334 F.2d 381 (10th Cir. 1964); Olson Rug Co. v. NLRB, 291 F.2d 655 (7th Cir. 1961); Rosee v. Board of Trade, 35 F.R.D. 512 (N.D. Ill. 1964). The inability of these Acts to provide the desired disclosure necessitated further congressional action.

As originally enacted, section 552(b) exempted matters that were:

1. specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;
2. related solely to the internal personnel rules and practices of an agency;
3. specifically exempted from disclosure by statute;
4. trade secrets and commercial or financial information obtained from a person and privileged or confidential;
5. inter-agency or intra-agency memorandums or letters which would not be available by the law to a party other than an agency in litigation with the agency;
6. events or transactions that, if made public, would constitute a clearly unwarranted invasion of personal privacy.

The FOIA was the product of a 12-year effort to correct the deficiencies of the former section 3 of the Administrative Procedures Act. See note supra.
sure scheme of the Act, Congress vested in the federal district courts jurisdiction to review de novo an agency's denial of a request. In such proceedings the burden rests on the agency to demonstrate a specific exemption as a basis for its action.\textsuperscript{7} Although the original Act did not provide for a procedure to determine the applicability of the exemption, some courts took it upon themselves to review the documents \textit{in camera} in order to assess their protected status.\textsuperscript{8} For the most part, however, courts relied upon the affidavits of the defending agencies to ascertain if disclosure was warranted.

The original Act did not clearly define the scope and application of the exemptions.\textsuperscript{9} Conflicting with the Act's stated goal—freedom

\begin{itemize}
\item[(6)] personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
\item[(7)] investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;
\item[(8)] contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
\item[(9)] geological and geophysical information and data, including maps, concerning wells.
\end{itemize}


\textsuperscript{8} Despite the lack of statutory authorization, a number of courts did conclude that \textit{in camera} review was warranted when dealing with an investigatory files case. For example, in Cowles Communications, Inc. v. Department of Justice, 325 F. Supp. 726 (N.D. Cal. 1971), the court summarily rejected the government's affidavit as conclusive on the exemption issue and examined the files in order to determine their nature. See Evans v. Department of Transportation, 446 F.2d 821, 822 (5th Cir. 1971), cert. denied, 405 U.S. 918 (1972); Ash Grove Cement Co. v. FTC, 371 F. Supp. 370, 374 (D.D.C. 1973); Stern v. Richardson, 367 F. Supp. 1316, 1319 (D.D.C. 1973). \textit{Contra}, Aspin v. Department of Defense, 491 F.2d 24, 27 (D.C. Cir. 1973); Weisberg v. Department of Justice, 489 F.2d 1195 (D.C. Cir. 1973), cert. denied, 416 U.S. 993 (1974).

\textsuperscript{9} The rationales supporting the invocation of the original exemption were found in the various congressional debates and not in the language of the exemption itself. Additionally, the Act's legislative history, although voluminous, sheds no light on the subject and may be one of the reasons behind the courts' unwarranted assumption of the responsibility to define the meaning and the application of the exemptions. Hearings and committee meetings were held over a 10-year period. However, most of the useful legislative history is found in a 10-page Senate committee report, and a 14-page House report. S. Rep. No. 813, 89th Cong., 1st Sess. (1965) [hereinafter cited as S. Rep. 813]; H. Rep. 1497, supra note 5. See also S. Rep. No. 1219, 88th Cong., 2d Sess. (1964); \textit{Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee on S. 1160, S. 1336, S. 1758, and S. 1879, Administrative Procedures Act, 89th Cong., 1st Sess. (1965); Hearings Before the Subcommittee of the House Committee on Government Operations, on H.R. 5012-21, 5237, 5406, 5583, 6172, 6739, 7010, and 7161, Federal Public Records Law, 89th Cong., 1st Sess. (1965); Hearings Before the Subcommittee On Administrative Practice and Procedure of the Senate Judiciary Committee on S. 1663 Administrative Procedure Act, 88th Cong., 2d Sess. (1964); Hearings Before the Subcommittee of the House Committee on Governmental Operations, Government Information, Plans and Policies, 88th Cong., 1st Sess. (1963); \textit{Hearings Before the Subcommittee on Administrative Procedure and Practice of the Senate Judiciary Committee on S. 1663, Administrative Procedure Act, 88th Cong., 2d Sess. (1964).}
of information—were the equally important rights of privacy with respect to certain information in government files. Faced with these opposing interests, Congress debated at length which interests warranted protection despite the disclosure orientation of the Act. With regard to investigatory files, Congress made the following determinations: (a) the government must be allowed to avoid the premature disclosure of information obtained during an investigation in order to prevent such information from falling into the hands of potential defendants and to preserve the government’s case for the courtroom; (b) the government must be allowed to keep confidential its investigatory procedures and techniques; and (c) the privacy of persons involved in investigations must be protected.

As originally enacted, the seventh exemption provided for the protection of “investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency.” As stated in the Attorney General’s Memorandum on the Public Information Section of the Administrative Procedures Act, the exemption preserved a litigant’s access to those documents from investigatory files to which he otherwise would have access. The clause was interpreted to give a party defendant in an action for a violation of a federal regulatory statute the same discovery rights to obtain investigatory files as were available to persons charged with


10. S. Rep. 813, supra note 9, at 3.
11. Id. at 9.
12. Id. at 3.
violating federal criminal laws.\textsuperscript{17} The few courts that considered the effect of the clause on a claim of exemption ruled that the Federal Rules of Criminal Procedure governed disclosure. The courts reasoned that Congress did not intend to give private individuals or parties charged with violations of federal regulatory statutes greater access to investigatory files than they would enjoy as defendants in criminal actions.\textsuperscript{18} Other courts interpreted the phrase to be merely a "savings clause" designed to ensure that the FOIA did not abridge rights guaranteed by other legislation providing access to information during litigation.\textsuperscript{19} Although these views remained peacefully unreconciled by the courts, the divergence did not become significant until the courts confronted the newly amended seventh exemption.\textsuperscript{20}

Despite legislative history and judicial authority to the contrary,\textsuperscript{21} it was settled that "law enforcement purposes" involved regulatory as well as judicial enforcement proceedings.\textsuperscript{22} What was not settled

\textsuperscript{17} The defendant would, for example, have the right given to criminal defendants by the Jencks Act, 18 U.S.C. § 3500 (1970), providing that a defendant in a United States criminal prosecution may examine relevant statements of government witnesses after the witness has testified on direct examination. See, e.g., Clement Bros. Co. v. NLRB, 282 F. Supp. 540, 542 (N.D. Ga. 1968); Cooney v. Sun Shipbuilding & Drydock Co., 288 F. Supp. 708, 712 (E.D. Pa. 1968); Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591, 593-94 (D.P.R. 1967).

\textsuperscript{18} Fed. R. Crim. P. 16 is the general discovery rule. Rule 16(a) permits discovery of any confession or grand jury testimony of a defendant, in addition to reports of medical examinations and scientific tests. Rule 16(b) allows discovery of books, papers and other tangible materials, but exempts any investigatory file and witness statements except for exculpatory material, as authorized by the Jencks Act, 18 U.S.C. § 3500 (1970).


\textsuperscript{20} See text accompanying notes 121 and 151 infra.

\textsuperscript{21} Whereas the Senate Report discussed the seventh exemption as pertaining to "files prepared by Government agencies to prosecute law violators," the House Report interpreted the exemption to cover files related to the enforcement of "all kinds of laws, labor and securities laws as well as criminal laws." S. Rep. 813, supra note 9, at 9; H. Rep. 1497, supra note 5, at 11. See also 1967 Attorney General's Memo, supra note 15, at 37.

was whether the exemption applied only to investigatory material gathered for imminent adjudicatory proceedings. In *Bristol-Myers Co. v. FTC*,\(^2^3\) the Court of Appeals for the District of Columbia Circuit had occasion to construe the statutory language. The court held that an agency could invoke the investigatory files exemption only if, at the time the request for disclosure was made, the prospect that enforcement proceedings would be initiated was found by the district court to be sufficiently “concrete.”\(^2^4\) In reaching this decision, the court considered it important that the FTC had terminated enforcement proceedings prior to the plaintiff’s information request. The court recognized only one purpose of the exemption: preventing the premature disclosure of the government’s case.

The *Bristol-Myers* rationale was partially adopted by the Fourth Circuit in *Wellford v. Hardin*,\(^2^5\) which required disclosure of warning letters that the Department of Agriculture had sent to meat processors. The court concluded that since the purpose of the exemption was “to prevent premature discovery by a defendant in an enforcement proceeding,”\(^2^6\) such proceedings were not likely to be hindered

If the exemption applies only to files with primarily a law enforcement purpose behind them, then those not qualifying are readily producable. See Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971) (where professors engaged in a NLRB voting study were granted names and addresses of employees eligible to vote in certain representation elections over the government’s claim of the application of the (b)(7) exemption).

23. 424 F.2d 935 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970). Bristol-Myers sought an order to compel the FTC to produce documents relevant to a rule-making proceeding based upon an extensive FTC staff investigation. Bristol-Myers wished to gain access to the information forming the basis for the proposed rule. The FTC had originally intended to litigate directly against Bristol-Myers concerning the subject matter of the rule which was subsequently proposed; however, formal proceedings were never held and the complaint was subsequently withdrawn. For a discussion see Note, 51 TEXAS L. REV. 119 (1972); Note, 38 U. CIN. L. REV. 570 (1969).

24. 424 F.2d at 939-40, citing H. Rep. 1497, supra note 5, at 11. The case was remanded with orders that the district court determine whether there was a realistic prospect of enforcement proceedings. Such a decision is certainly in line with the congressional intent that the exemption was designed to prevent “harm [to] the Government’s case in court.” S. Rep. 813, supra note 9, at 9.

Similarly, if no enforcement proceedings have been instigated formally, a question remains concerning the investigatory files compiled on any given subject. In Cowles Communications, Inc. v. Department of Justice, 325 F. Supp. 726 (N.D. Cal. 1971), plaintiff filed a FOIA complaint against the Immigration and Naturalization Service to obtain records on a particular person. The plaintiff argued that the investigatory files exemption was inapplicable since no proceedings were pending against the person whose records he sought. Relying on the statutory language alone, the court found the Act applicable to investigatory files even though later circumstances did not warrant an enforcement proceeding. Cf. Legal Aid Society of Alameda County v. Schultz, 349 F. Supp. 771 (N.D. Cal. 1972) (files sought were not exempt under § 552(b)(7) because there was no evidence that such files would be used in an imminent enforcement action or proceeding).


26. 444 F.2d at 23. See also Soucie v. David, 448 F.2d 1067, 1080 (D.C. Cir. 1971); Getman
by giving the same information to the public, because the alleged offenders already had access to the material.

Another legislative purpose was noted in *Evans v. Department of Transportation*. The plaintiff sought letters written to the Federal Aviation Administration 11 years earlier alleging that he was mentally unfit for service as a commercial airlines pilot. The court held that the investigatory files exemption protected the informant’s identity, reasoning that disclosure might decrease voluntary public cooperation with the agency and that Congress could not have intended to require disclosure simply because an investigation had been completed.

Both *Bristol-Myers* and *Evans v. Department of Transportation* played a significant part in the later decision of *Frankel v. SEC.* In *Frankel*, shareholders of Occidental Petroleum Corporation sought disclosure of a mass of SEC material collected in the course of an intensive investigation of that corporation. The SEC investigation had resulted in a civil lawsuit which ended in a consent decree. The Second Circuit, with a divided panel, thought the crucial issue was whether exemption 7 continues to apply after termination of enforcement proceedings. It noted two purposes behind the exemption: (a) the preventing of premature disclosure of the results of an investigation so that the government can present its strongest case in court; and (b) keeping confidential the procedures by which the agency conducted its investigation and by which it obtained information. Under the latter rationale, the court rejected the dissent’s suggestion of *in camera* review and found the files in question within the protection of the exemption despite the termi-

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27. 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972).

28. It should be noted that the court relied in part on a statute requiring secrecy for information affecting the safety of airline passengers, 49 U.S.C. § 1504 (1970), thereby bringing the material within another specific exemption to the FOIA, 5 U.S.C. § 552(b)(3) (1970), disallowing disclosure of information protected by another statute.

29. *See also* Clement Bros. Co. v. NLRB, 282 F. Supp. 540 (N.D. Ga. 1968), *approved in* 407 F.2d 1027 (5th Cir. 1969) (exempting statements made by the plaintiff’s employees during NLRB investigations on grounds that employees would be “less candid” in their disclosures if they knew their statements and identity would be freely available to their employers); Barceloneta Shoe Corporation v. Compton, 271 F. Supp. 591 (D.P.R. 1967) (similar case detailing the hampering effect disclosure would have on the NLRB’s interviewing process).


31. 460 F.2d at 814.

32. 460 F.2d at 818, 820 (Oakes, J., dissenting).
nation of the investigation by consent decree. The disclosable files, which were accessible under *Bristol-Myers* upon the termination of proceedings, were now permanently sealed under a rationale that would continue for the life of the agency. The decision in *Frankel* left FOIA litigants with a substantial impasse; the termination of proceedings or investigation did not lift the exemption of the material if its revelation would expose that agency’s investigative techniques or bare the government’s strategy. Although a reasonable conclusion, its effect was to abrogate the disclosure orientation of the Act by extending protection infinitely.

If termination of proceedings would not justify disclosure, it is difficult to see how initiation of enforcement proceedings would require a different outcome. In *Wellman Industries, Inc. v. NLRB*, an employer sought access to NLRB investigatory affidavits and witness statements that had resulted in the Board’s setting aside a representative election held at the plaintiff’s plant. During the course of internal administrative appeal, the plaintiff filed a FOIA complaint to obtain the documents. In denying the requests, the court cited premature disclosure of the Board’s case and fear of cutting off confidential sources as the reasons for their decision, relying on the Act’s legislative history. The court alluded to a line of labor cases detailing the unique nature of the employer-employee relationship in terms of unfair labor practice proceedings and concluded that if an employee knew his statements would be revealed to his employer, he would be less likely, for fear of reprisal, to make an uninhibited and non-evasive statement. To support its conclusion that exemption of investigatory files was necessary in order to prevent premature disclosure of the Board’s case, the court found an analogous concern with confidential sources voiced in *Frankel* and *Evans v. Department of Transportation*. The court, in effect, took the existence of labor enforcement proceedings as the indicator

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33. The court relied upon the Fifth Circuit’s finding of a continuing exemption beyond the life of the investigation or proceeding, citing *Evans v. Department of Transportation*, 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972), despite the fact that the *Evans* court relied on the viability of informers’ information rationale to justify its conclusion. 446 F.2d at 824. A similar rationale has been applied to discovery attempts in non-FOIA cases. See, e.g., *Intertype Co. v. NLRB*, 401 F.2d 41 (4th Cir.), *cert. denied*, 393 U.S. 1049 (1969); *NLRB v. National Survey Service, Inc.*, 361 F.2d 199, 206 (7th Cir. 1966).


35. Unlike most courts, the bench looked to the House Report to find that “S. 1160 is not intended to give a party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings.” H. Rep. 1497, *supra* note 5, at 11.

that disclosure of materials related to that proceeding would be unwarranted.

The divergence between congressional intent and judicial interpretation became apparent in a 1973 decision, *Weisberg v. Department of Justice.* Plaintiff Weisberg, author of several books on the assassination of President John F. Kennedy, sought access to a spectrographic analysis of the bullet that killed the president. Though the government had completed its investigation and though the files involved neither informants’ identities nor secret investigatory techniques, the court nevertheless asserted that the materials were “investigatory files compiled by the FBI for law enforcement purposes, and, as such, [we]re exempt from the disclosure sought to be compelled.” The court did not discuss whether any of the previously cited purposes of the exemption would be defeated by disclosure and made it clear that it was unnecessary to do so. Citing the Supreme Court’s ruling in *EPA v. Mink,* the court suggested that there was no room for balancing opposing interests when the government relied upon the investigatory files exemption and could show that the files had in fact been compiled for law enforcement purposes. Such decisions quickly limited the issue in (b)(7) exemption litigation to a finding of whether the materials sought were investigatory and compiled for a law enforcement purpose, regardless of what the file contained and whether proceedings were ongoing.

Urban Issues v. Weinberger\textsuperscript{42} quickly followed, further expanding the seventh exemption. Aspin involved a Congressman’s attempts to obtain release of the Peers Commission Report, otherwise known as the “Department of the Army Review of the Preliminary Investigations into the My Lai Incident.”\textsuperscript{43} The purpose of the investigation was to discover possible suppression or withholding of information in the original Army investigations “with a view towards prosecution if warranted.”\textsuperscript{44} Relying on \textit{Frankel}, the court noted that 15 officers had already been court-martialed on the basis of the Peers Commission Report, thereby establishing the report as prepared for “law enforcement purposes.” The court went on to reject plaintiff’s argument that the termination of court-martial proceedings removed the report’s protected status, following the analysis of courts that had feared disclosing investigative techniques and inhibiting voluntary informants. Having concluded that the exemption’s protection extended beyond the useful life of the investigation, the court gave the entire report a blanket protection from disclosure.

\textit{Ditlow v. Brinegar}, the second in the trilogy of “last straw” cases, involved an attempt to gain access to correspondence between the National Highway Traffic Safety Administration and auto manufacturers in connection with pending safety defect investigations. In a summary opinion, the Court of Appeals for the District of Columbia reasoned:

[If the documents in issue are clearly to be classified as “investigatory files compiled for law enforcement purposes,” the exemption attaches, and it is not in the province of the courts to second-guess the Congress by relying upon considerations which argue that the Government will not actually be injured by revelation in the particular case.\textsuperscript{45}]

By the time the \textit{Center for National Policy} case appeared before the Court of Appeals for the District of Columbia, that court had narrowed its scope of inquiry in FOIA litigation to the question of whether the material was an investigatory file compiled for law enforcement purposes, holding that if the answer was “in the affirmative, [the court’s] role is at an end.”\textsuperscript{46} In arriving at such a re-

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\textsuperscript{42} 502 F.2d 370 (D.C. Cir. 1974).
\textsuperscript{43} Although the four-volume report was given to the House Armed Service Committee, of which plaintiff was a member, this action under the FOIA was commenced in the plaintiff’s capacity as a private citizen seeking public release of the entire Peers Committee Report. 491 F.2d at 26 n.14.
\textsuperscript{44} \textit{Id}. at 25.
\textsuperscript{45} 494 F.2d at 1074.
\textsuperscript{46} 502 F.2d at 372. Davis had earlier predicted such a result:
stricted issue, the court invoked the line of cases from *Weisberg* through *Aspin* and *Ditlow*, and declared HEW's Title VI Civil Rights Compliance Records concerning segregation and discrimination practices in northern public schools exempt because of the possibility of a future fund cut-off proceeding. Such literal readings of the investigatory files exemption ignored both the reasons behind the exemption and the interests in favor of disclosure. The courts had fashioned a mechanical test from the literal language of the statute and thereby reduced the relevant scope of inquiry to a finding that materials sought were either within or beyond the ambit of the exemption. Considering the awkward drafting and conflicting legislative reports, there may not have been any logical

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Courts that usually constitute themselves working partners with legislative bodies to produce sensible and desirable legislation may follow their accustomed habits in narrowing the ascertainable meaning of the words of an exemption, but in some degree they are restricted in following those habits in broadening that meaning. Davis, supra note 3, at 783-84.

47. As one commentator has noted, "By following a mechanical approach to the exemption, courts are freed from the difficult task of weighing competing interests and performing in camera inspections." Comment, *Amendment of the Seventh Exemption Under the Freedom of Information Act*, 16 WM. & MARY L. REV. 697, 709 n.59 (1975), referring to Center for National Policy Review of Race and Urban Issues v. Weinberger and Weisberg v. Department of Justice.


49. Davis, supra note 3, at 763, 809:

In general, the Senate committee is relatively faithful to the words of the Act, and the House committee ambitiously undertakes to change the meaning that appears in the Act's words. The main thrust of the House committee remarks that seem to pull away from the literal statutory words is almost always in the direction of nondisclosure.

* * *

[After the bill had passed the Senate] . . . the House committee was subjected to pressures to restrict the disclosure requirements. It yielded to the pressure. But it did not change the bill. Instead, it wrote the restrictions into the committee report. These restrictions differ drastically from the bill as passed by the Senate; they often contradict the words of the bill, and they sometimes contradict both the statutory words and the Senate committee report.

The House Report was published after the Senate had passed its version of the bill, leaving only the Senate Report to be considered by both houses of Congress. For this reason it may prove to be a better indication of congressional intent. In construing the Act, courts have noted this distinction and given deference to the Senate Report. See, e.g., *Tax Analysts & Advocates v. IRS*, 362 F. Supp. 1298, 1304 (D.D.C. 1973), *modified in part*, 505 F. 2d 350 (D.C. Cir. 1974) (rejecting the defendant's reliance on the House Report to draw a distinction between "precedents" and "interpretations"); *Stokes v. Brennan*, 476 F.2d 699 (5th Cir. 1973) (using the Senate Report in interpreting the (b)(2) exemption); *Hawkes v. IRS*, 467 F.2d 787, 794 (6th Cir. 1972) (relying on the Senate Report in regard to administrative staff manuals and instructions); *Soucie v. David*, 448 F.2d 1067, 1077 n.39 (D.C. Cir. 1971) (relying on the difference in the two reports to grant relief on equitable grounds apart from the
alternative. A judicially-created "balancing of interests” test in FOIA litigation\textsuperscript{29} was probably beyond the proper discretion of the courts since Congress had failed to make provision for such a balancing though the legislative history demonstrates that it recognized the need.\textsuperscript{30} Regardless, the result was a virtual nullification of the statute's disclosure orientation under the seventh exemption.

**CONGRESSIONAL RESPONSES TO JUDICIAL RESTRICTIONS**

*Ditlow, Aspin, and Center for National Policy* overcame congressional inertia and forced a reconsideration of certain parts of the FOIA. Within a year, a number of proposals to amend the FOIA were introduced in Congress.\textsuperscript{31} During the course of debate on H.R.

exemptions in the Act itself); Consumers Union of the United States, Inc. v. Veterans Administration, 301 F. Supp. 796, 801 (S.D.N.Y. 1969) (citing the Senate Report to find rules of practice and staff manuals were not related to personnel matters exempt under the second exemption); Benson v. General Services Administration, 289 F. Supp. 590 (W.D. Wash. 1968) (deferring to the Senate Report in construing the second exemption).

50. Some courts found that the legislative balance had already been struck by the Congress leaving no room for such balancing on the part of the judiciary.

After considering voluminous testimony on both sides and balancing the public, private, and administrative interests, Congress decided that the best course was open access to the governmental process with very few exceptions. It is not the province of the courts to restrict that legislative judgment under the guise of judicially balancing the same interests that Congress has considered.


51. The Senate report recognized the problem of balancing the interest in nondisclosure with the equally valid public interest in disclosure to accord with the purposes of the Act, but failed to find a proper solution:

It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.

S. REP. 813, supra note 9, at 3.

At one point courts made an effort to achieve what the Congress had failed to accomplish. In Pilar v. SS Hess Petrol, 55 F.R.D. 159, 163 (D. Md. 1972), the court used a balancing process, stating:

Having determined that the reports and files are within the investigatory file exemption of the Act, our inquiry must shift now to determine whether these particular files should be accorded immunity from disclosure and, if so, to what extent. . . .

. . . In determining the applicability of this privilege to the case at bar, this court must weigh the competing interests asserted and attempt to reconcile the conflicting policies involved.

In assessing such interests, the court talked in terms of the “speculative interest” that disclosure of informants would inhibit future information flows, and the “immediate interest” that no active litigation would be jeopardized by immediate disclosure. *Id.* at 164-65. However, such judicial attempts at formulating a workable test were seldom undertaken.

52. Amendments had been introduced as early as 1973 following the Supreme Court's decision in *EPA v. Mink*, 410 U.S. 73 (1973). For a discussion see note 39 *supra*. As a result
12471, Senator Philip Hart introduced an amendment dealing with the substance of the (b)(7) exemption.\textsuperscript{53} Congressional dissatisfaction with the judicial interpretation of the original seventh exemption was the primary reason for seeking a change.\textsuperscript{54} Committee reports emphasized that the mechanical test applied by the courts in administering the exemption had negated congressional intent:

Congress did not intend the exemptions in the FOIA to be used to prohibit disclosure of information or to justify automatic withholding of information. Rather they are only permissive. They merely mark the outer limits of the information that may be withheld . . . .\textsuperscript{55}


53. Senator Hart’s amendment was patterned closely after a proposal by the Administrative Law Section of the American Bar Association. *Compare* 120 Cong. Rec. S 9329 (daily ed. May 30, 1974) with *Hearings on H.R. 5425 Before the Subcomm. on Administrative Practice and Procedure of the House Comm. on Governmental Operations*, 93d Cong., 1st Sess. 317 (1973). An alternative proposal by the Justice Department was rejected as overly broad. The proposal would have exempted “investigatory records compiled for any specific law enforcement purpose the disclosure of which [was] not in the public interest . . . .” In addition it would have prohibited absolutely nondisclosure of the following: “(i) scientific tests, reports, or data, (ii) inspection reports of any agency which relates to health, safety, environmental protection, or (iii) records which serve as a basis for any public policy statement made by an agency or officer or employee of the United States or which serve as a basis for rulemaking by any agency. . . .” S. 1142, 93d Cong., 1st Sess. § 2(d) (1973); H.R. 5425, 93d Cong., 1st Sess. § 2(d) (1973). *See Hearings on S. 1142 Before the Senate Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess., vol. 2, at 227 (1973). *See also* 120 Cong. Rec. S 9336 (daily ed. May 30, 1974)(excerpt from *Report of the Committee on Federal Legislation of The Association of the Bar of the City of New York*, April 22, 1974).

54. Mr. KENNEDY. . . . Does the Senator’s amendment in effect override the court decisions in the court of appeals on the Weinberg against United States; Aspin against Department of Defense; Ditlow against Brinegar; and National Center against Weinberger [cases]? As I understand it, the holdings in those particular cases are of the greatest concern to the Senator from Michigan. As I interpret it, the impact and effect of his amendment would be to override those particular decisions. Is that not correct?

Mr. HART. The Senator from Michigan [sic] is correct. That is its purpose. That was the purpose of the Congress in 1966, we thought, when we enacted this. 120 Cong. Rec. S 9336 (daily ed. May 30, 1974). *See also* H.R. Rep. No. 1380 (Conference Report), 93d Cong., 2d Sess. 12 (1974).

In addition to expressing the intent to override case law expanding the substantive parameters of the exception, the Senate Report specifically adverted to the limited use of in camera inspection. The Report rejected blind reliance on agency affidavits and established in camera inspection of questioned documents as the means to determine conclusively their protected status. These admonitions presaged the revision of the investigatory files exemption itself. If the conditions necessary to invoke the seventh exemption could be satisfied merely by showing that the file was investigative, that its compilation was for law enforcement, and that an enforcement proceeding was pending, there would be no need for a court to conduct an in camera inspection. The material in the file would be exempt as a matter of law. Thus, the inclusion of the in camera inspection provision in the amended Act complements the subsequent amendment to exemption 7.

Senator Hart believed that the courts had erred in not balancing the relevant interests. However, instead of requiring or permitting the courts to engage in a process of ad hoc balancing, the amendment sought to balance the relevant interests. As finally enacted by Congress, the amended investigatory records exemption implements this balancing by enumerating six interests protected from disclosure under the Act. The amendment explicitly places

v. HUD, 519 F.2d 935 (D.C. Cir. 1975).

56. It should be noted that on at least two occasions, however the government has taken the position that the seventh exemption (subsection (b)(7)) relating to disclosure of investigatory files also represents a blanket exemption where in camera inspection is unwarranted and inappropriate under the statute. (Stern v. Richardson . . . Weisberg v. Department of Justice . . . ) By expressly providing for in camera inspection regardless of the exemption invoked by the government S. 2543 would make clear the congressional intent—implied but not expressed in the original FOIA—as to the availability of an in camera examination in all FOIA cases. This examination would apply not just to the labeling but to the substance of the records involved.


58. The newly amended exemption reads:

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

the burden of justifying non-disclosure on the government, which now has to show that disclosure would interfere with enforcement proceedings, deprive a person of a right to a fair trial, constitute an unwarranted invasion of personal privacy, reveal the identity of informants, disclose investigative techniques, or endanger the life or safety of enforcement personnel. Thus, the amendment has added a necessary additional step to any judicial determination on a FOIA action. Having determined that the materials are within the purview of the statute as investigatory records, the court must still order disclosure unless it would harm one or more of the protected interests.

Under the first subsection of the amended Act, records may be withheld if disclosure would "interfere with enforcement proceedings." If there is a concrete prospect of an enforcement proceeding, documents or portions of documents may be withheld if disclosure would impede the investigation or would harm the government's case. Even with enforcement proceedings in progress, in camera inspection is necessary to determine if disclosure would interfere with such proceedings.

Records may be withheld if disclosure would "deprive a person of a right to a fair trial or an impartial adjudication." The exemption is designed to protect individuals against prejudicial publicity in criminal trials.

59. The amendment changed the previously worded "files" to "records," and so pacified at least one of the earlier statute's critics, Kenneth Culp Davis, who contended that "files" was an unsatisfactory term since it implied if part of the material in any given file was investigatory, the entire file was exempt. Davis, supra note 3, at 800, 807. The change avoids the problem of rendering otherwise disclosable materials exempt merely by placing it in an investigatory file. 120 Cong. Rec. S 9332 (daily ed. May 30, 1974)(remarks of Senator Kennedy).

60. The legislative history indicates that "enforcement proceedings" refers only to a "concrete prospective law enforcement proceeding." H. Rep. 1497, supra note 5, at 11.


63. Ellsworth, Amended Exemption 7 of the Freedom of Information Act, 25 Am. U.L. Rev. 37, 46 (1975). The exemption appears to adopt the reasoning advanced in the pre-
Records may be withheld if disclosure would "constitute an unwarranted invasion of personal privacy." The exemption's protection extends to all individuals mentioned in files, as well as the person who is the subject of the investigation. Potential invasions of privacy can best be avoided by deleting names and other identifying details of persons referred to in files. Similarly, no invasion of privacy would result from granting access to a file on the person making such a request.

The (b)(7)(D) exemption relating to the identity and information of confidential sources has two parts. In civil cases, this clause protects the names and other identifying details that might reasonably be found to lead to disclosure of a source who has received an expressed or implied assurance of confidentiality. The subsection D exemption was primarily aimed at protecting informants in criminal investigations. It confers "blanket protection" not only for the
identity of the confidential source, but for the information he alone provided. However, if information is furnished by more than one source, though the information must be disclosed, the names and identifying details of the confidential source may still be withheld. It appears that Congress decided not to extend the added protection for confidential sources to civil law enforcement agencies or to civil investigations, but there is no explanation for this decision in the legislative history. Since civil law enforcement investigations can lead to criminal prosecutions, similar protections may be warranted for confidential files in such instances. Second, the need for the complete protection of confidential sources may be as important in civil investigations as in criminal investigations because a confidential source may be equally critical to the success of each.

Under subsection E, records may also be withheld if production would “disclose investigative techniques and procedures.” The 1975 amendment rejects the Bristol-Myers rule that the exemption cannot apply if no enforcement proceeding is pending, since dated records could still disclose useful investigative practices. Likewise, the amendment rejects the approach of the Frankel court, which would have extended the exemption to include even those investigative techniques generally known to the public. The legislative history limits the application of the exemption to secret techniques and procedures, rather than routine scientific tests such as fingerprinting or ballistics, questioning of witnesses, or preparation of affidavits.

The exemption for records the disclosure of which would “endanger the life or physical safety of law enforcement personnel” presents no interpretive difficulties.

Certain conclusions emerge from this review of the case law and the congressional intent. First, Congress sought to exclude as a basis for exemption generalized assertions that confidential sources or investigative procedures would be compromised. Second, it

71. “[I]t relieves [the agency] of the burden of showing that disclosure would actually reveal the identity of a confidential source.” 120 Cong. Rec. S 19812 (Nov. 21, 1974) (remarks of Senator Hart). However, Senator Kennedy was quick to add, “such information . . . compiled in civil litigation” would be available. Id. at S 1981.
75. 120 Cong. Rec. S 9332 (Report of the Committee on Federal Legislation of The Association of the Bar of the City of New York). But cf. Frankel v. SEC, 460 F.2d 813, 817 (2d Cir.), cert. denied, 409 U.S. 889 (1972). Congress did retain an exception in amended exemption 7(E) for specialized investigative techniques; such exemption does not however refer to
changed the focus of inquiry from a broad view of “investigatory files” to a narrower concern with particular “investigatory records.” Third, it emphasized that the “Government . . . would have to show that disclosure would” result in a specified statutory harm. This makes the burden of proof provisions of amended section 552(a)(4)(B) applicable to exemption 7. Fourth, Congress eliminated from the statute the “savings” clause of the original exemption—“except to the extent available by law to a party other than an agency”—which the government had construed as fixing the maximum disclosure it need allow.

The amended FOIA garnered the requisite two-thirds margin to overcome a presidential veto and became effective February 19, 1975.

**Litigation Under the Amended Investigatory Records Exemption**

The amended Act appears to have been successful in nullifying specific case law. The Peers Commission Report sought in *Aspin v. Department of Defense,* the spectrographic analysis of the assassin’s bullet requested in *Weisberg v. Department of Justice,* and

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routine techniques or procedures which are generally known outside the Government. S. REP. No. 1200, 93d Cong., 2d Sess. at 12 (1974).


78. See Weisberg v. Department of Justice, 489 F.2d 1195 (D.C. Cir. 1973), cert. denied, 416 U.S. 993 (1974), where the court suggests that a FOIA plaintiff must in fact be engaged in the litigation with the Government in order to qualify as a “party” and to invoke the Act. Id. at 1203 n.15.

79. President Ford returned H.R. 12471 without approval on October 17, 1974, citing the stringent showing of harmful effect that an agency must make to justify nondisclosure. Ford offered a substitute proposal which would have allowed nondisclosure upon demonstration of a “substantial possibility” that disclosure would affect an enumerated interest. Letter from President Ford to Representative Cari Albert, Oct. 25, 1974. The President expressed disapproval of the limited protection of confidential sources which the amendment provided, noting that several agencies perform civil law enforcement functions that often lead to criminal prosecutions, thereby impairing the confidentiality of information to be eventually used in such proceedings. Finally, the President voiced criticism of any provision that would require law enforcement agencies to devote efforts to a paragraph-by-paragraph screening of their files. MESSAGE OF THE PRESIDENT OF THE UNITED STATES VETOING H.R. 12471, H.R. Doc. No. 93-383, 93d Cong., 2d Sess. (Nov. 18, 1974). Congress overrode the President’s veto by a substantial margin in the House of Representatives (371 to 31), 120 CONG. REC. H 10,875 (daily ed. Nov. 20, 1974) and a more narrow margin in the Senate (65 to 27), 120 CONG. REC. S 19,823 (daily ed. Nov. 21, 1974).

80. See text accompanying note 43 supra. Subsequent to passage of the amendments, the report was released to the Daily Oklahoman, a newspaper that had initiated a new FOIA request for the report. Some names were deleted to protect privacy interests.

81. See text accompanying note 37 supra. After negotiations failed, Mr. Weisberg again filed suit on the day the amendments took effect, seeking access to the spectrographic analysis and also seeking reports on several other scientific tests conducted for the Warren Commis-
the safety defect correspondence desired in *Ditlow v. Brinegar*, were all disclosed as a result of proceedings re instituted by concerned parties after the effective date of the amended Act.

Other problems unresolved under the original Act have received specific judicial treatment. *Frankel v. SEC* had placed a substantial roadblock in the path of FOIA litigants by extending an exemption beyond the life of an investigation or proceeding. The court in *Kaminer v. NLRB* was asked to reconsider such a problem within the context of the amended Act. Upon the receipt of an unfair labor practice charge by a union official, the NLRB conducted its usual investigation, interviewing witnesses and taking affidavits. Before the Board acted on the investigation, however, the union requested and received permission to withdraw the charges. Upon receipt of such permission the union filed its own civil suit against the employer. The employer brought a FOIA action against the NLRB to obtain the affidavits that the Board's agents took in the course of their investigation. The court rejected the government's claim that subsection 7(A) was applicable, citing legislative debate to the effect that the claimed exemption:

should apply only when "the Government's case in court . . . would be harmed by the premature release of evidence . . .", or where disclosure would "harm such proceedings by impeding any necessary investigation before the proceeding."

The Government had disclosed several such reports to him, but it alleged that others either never existed or could not be located. Weisberg originally challenged the good faith of the FBI's representations but agreed to drop the suit on July 15, 1975, after having gained access to the spectrographic analysis. Weisberg v. Department of Justice, Civ. No. 75-226 (D.D.C., filed Feb. 19, 1975), dismissed as moot per stipulation, July 15, 1975. Prior to dismissal, Weisberg had sought to use interrogatories to pin down questions that remained unanswered by the affidavits filed by the Government. The Court of Appeals for the District of Columbia ordered a new trial after it found that the district court erred in refusing to order the Government to answer Weisberg's interrogatories. Weisberg v. Department of Justice, Civ. No. 75-2021 (D.C. Cir., July 7, 1976).

82. See text accompanying note 45 supra. Since the passage of the amendments, the NHTSA has adopted a policy of making these files available to the public while the investigation is being conducted.

83. This left the *Center for National Policy Review on Race and Urban Issues v. Weinberger* as the only case specifically remaining after passage of the amended Act. The Center, rather than making a new FOIA request to the agency, sought to have the court reopen the original case. The court declined to do so on the ground that it lacked subject matter jurisdiction. Center for National Policy Review on Race and Urban Issues v. Richardson, Civ. No. 2177-71 (D.D.C., Feb. 24, 1975). On appeal, the court of appeals held that the original "case or controversy" had ended, and following the amendment of the Act, plaintiffs had to begin at the beginning, with an initial request to the agency involved. Center for National Policy Review on Race and Urban Issues v. Weinberger, 534 F.2d 351, 353 (D.C. Cir. 1976).

84. 90 L.R.R.M. 2269 (S.D. Miss. 1975).

Since the Board's file in the case had already been closed, as in Bristol-Myers, the court reasoned that there was simply no possibility of future enforcement proceedings, finding that the "interference with enforcement proceedings" rationale of the exemption could not survive termination of the proceedings themselves.\textsuperscript{86}

\textit{Mobil Oil Corporation v. FTC}\textsuperscript{87} laid to rest the preamendment cases holding that the pendency of law enforcement proceedings in and of itself established the applicability of exemption 7. The \textit{Mobil Oil} court rejected the FTC's argument that an "implicit exemption" authorized the withholding of contested information.\textsuperscript{88} In this respect the amended seventh exemption appears to have accomplished its goal of completely reversing the thrust of the exemption so as to allow withholding only when a protected interest is shown to be invaded.\textsuperscript{89}

Although initially endorsed by the Supreme Court,\textsuperscript{90} the renewed

\begin{footnotes}
\item 86. 90 L.R.R.M. at 2271. The court did find that the "confidential source" rationale of the 7(D) exemption was applicable because of an implied promise of confidentiality by the very nature of the Board's investigatory function. The court ordered an \textit{in camera} inspection to delete material identifying the confidential sources, thereby protecting such sources from an unwarranted invasion of personal privacy within the terms of the 7(C) exemption.
\item 87. 406 F. Supp. 305 (S.D.N.Y. 1976). Plaintiff corporation sought access to FTC communications relating to petroleum use from early 1970 to mid-1973. The documents fell into three categories: (a) those between the FTC and Congress, (b) those between the Commission and various federal agencies, and (c) those between the Commission and state government agencies. The FTC partially granted the request but continued to refuse disclosure of certain portions of state agency documents which contained identifying names and details of persons who communicated with government officials. In discussing the FTC's "black-out" of all identifying information or Commission correspondence, the FTC argued an "implicit exemption" inherent in the Act. The Commission claimed the deletions were part of a file compiled and utilized by the FTC for an ongoing investigation into activities of the petroleum industry for possible violations of the Federal Trade Commission Act and that identifying details in the documents are accordingly protected from disclosure.
\item 88. 406 F. Supp. at 313. The court concluded that the absence of supportive affidavits clearly demonstrated that the government could not sustain its burden of showing disclosure would interfere with enforcement proceedings.
\item 89. As to communications between the FTC and other federal agencies, the court deferred ruling on the claimed (b)(7)(A) exemption in order to allow the Commission to index the documents and to file affidavits in conference, noting that the FTC could conceivably demonstrate that disclosure of such information could, in and of itself, interfere with enforcement proceedings.
\item 90. Although dealing only indirectly with the newly amended exemption; the Supreme Court in \textit{NLRB v. Sears, Roebuck & Co.,} 421 U.S. 132 (1975), reaffirmed the congressional intent regarding the exemption by refusing to consider the NLRB's contention that documents falling into the category of investigatory records need not be individually scrutinized to see if they contravene the Act. The Court noted in dictum that the purpose of the amendment was to:
\end{footnotes}
Amended FOIA disclosure orientation of the amended exemption has had a troubled infancy. By far the greatest number of postamendment cases have involved an agency that has traditionally led a secluded existence in relation to information requests of any form, the National Labor Relations Board. Litigation under the amended Act involving the NLRB is one response to the Board's restrictive prehearing discovery procedures.

The National Labor Relations Act does not specifically require the NLRB to adopt discovery procedures, leaving the matter to the Board's rule-making power. The Board rule pertaining to an enforcement proceeding, unlike the Federal Rules of Civil Procedure, does not provide for the taking of depositions for the purpose of discovery. Instead, it permits limited discovery only to obtain and preserve evidence for trial. Despite numerous arguments to the

constitute an unwarranted invasion of personal privacy, disclose the identity of an informer, or disclose investigative techniques and procedures.”

Id. at 164-65, quoting S. REP. No. 1200, 93d Cong., 2d Sess. 12 (1974). The procedural posture of the case warranted the Court's summary treatment of the issue before remanding on other grounds. 421 U.S. at 165.

91. Traditionally, Board regulations have substantially limited investigation and discovery by a party involved in proceedings with the NLRB. See 29 C.F.R. § 102.30 (1975), providing for limited discovery only for the purpose of obtaining and preserving evidence for trial as opposed to the taking of depositions for the purpose of discovery, as in the case of the Federal Rules of Civil Procedure. Under the Board's rules, affidavits are only available to litigant “after a witness called by the general counsel or by the charging party has testified in a hearing upon a complaint . . . .” The rules provide that “the administrative law judge shall, upon motion of the respondent, order the production of any statement . . . of such witness in the possession of the general counsel which relates to the subject matter as to which the witness has testified [for] examination and use for the purpose of cross-examination.” 29 C.F.R. § 102.118(b)(1) (1975). The Board's Rules and Regulations thus, in effect, incorporate the Jencks Act, 18 U.S.C. § 3500 (1970). See text accompanying note 21 supra.


94. 29 C.F.R. § 102.30 (1975).

95. NLRB v. Interboro Contractors, Inc., 432 F.2d 854, 858 (2d Cir. 1970), cert. denied, 402 U.S. 915 (1971). Section 102.30 of the National Labor Relations Board, Rules and Regulations, Series 8, as amended, provides in pertinent part:

Examination of witnesses; depositions

Witnesses shall be examined orally under oath, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition.

(a) Applications to take depositions . . . shall be made to the regional director prior to the hearing, and to the administrative law judge during and subsequent to the hearing but before transfer of the case to the Board . . . . The regional director or administrative law judge, as the case may be, shall upon receipt of the application.
contrary,96 neither other administrative agencies,97 nor the original Administrative Procedures Act98 provide for prehearing discovery in the administrative process. However, under the Board rules, witness affidavits99 become available to a litigant "after a witness called by the general counsel or by the charging party has testified in a hearing upon a complaint. . . ."100 In other words, the only discovery available to a party charged with an unfair labor practice under the National Labor Relations Act, absent the requirements of the Freedom of Information Act, is equivalent to that available to a criminal defendant under the Jencks Act.101 Within such a limited discovery context, it is understandable why labor practitioners viewed the Freedom of Information Act as a source of broader discovery. The notion that the FOIA may provide an alternative to rigid discovery practices before some federal agencies and commissions has not gone unnoticed. In fact, one government official has remarked that the FOIA could be "the catalyst for establishing pretrial discovery" in proceedings before federal administrative agencies.102 Such use of the disclosure act has been criticized:

97. Federal Maritime Commission v. Anglo-Canadian Shipping Co., 335 F.2d 255 (9th Cir. 1964) (Merchant Marine Act does not warrant, much less require, adoption of pre-trial discovery procedures by the Federal Maritime Commission); Louisville Builders Supply Co. v. Commissioner of Internal Revenue, 294 F.2d 333, 339-42 (6th Cir. 1961) (same result in pre-trial discovery sought before the Tax Court of the United States).
99. The NLRB Casehandling Manual (Unfair Labor Practice Proceedings) (1975) provides that, "[w]henever possible, the charging party's case, if one exists, should be established through interviews with the charging party and witnesses offered by the charging party." Id. at §§ 10056, 10056.2. The statements obtained in these interviews are to be reduced to affidavits to form the "keystone of the investigation." Id. at §§ 10058.1, 10058.2, 10058.5.
100. 29 C.F.R. § 102.118(b)(1) (1975). The rules provide that the administrative law judge shall "order the production of any statement . . . of such witness in the possession of the general counsel which relates to the subject matter as to which the witness has testified. . . . [for] examination and use for the purpose of cross-examination." 29 C.F.R. § 102.118(b)(1) (1975).
102. Remarks of National Labor Relations Board Chairman Betty Southard Murphy at
[T]he policies behind the FOIA and discovery procedures are entirely different. The purpose of the FOIA is public disclosure. . . . [T]he discovery rules . . . have as their primary goal the elimination of surprise and unfair trial practices. The two should not be used interchangeably. 103

This distinction, between private citizens seeking agency information through the FOIA and unfair labor practice defendants seeking prehearing discovery by the same means, has fostered a line of case law that could lead to a return to the mechanical approach used under the original Act. Yet it is this same line of judicial interpretations that has grasped the congressional intent of balancing interests and has applied it realistically to the ever-increasing claims of FOIA litigants.

**Title Guarantee Company v. NLRB**

*Title Guarantee Company v. NLRB* 104 and *Cessna Aircraft Company v. NLRB* 105 represent the courts’ early attempts to integrate the FOIA in the context of unfair labor practice proceedings. *Cessna Aircraft Company v. NLRB* 106 involved a plaintiff employer’s attempt to compel production of NLRB-assembled statements of witnesses, investigative notes, witness lists and complaint documents relating to a Board investigation of an unfair labor practice complaint filed against the plaintiff. Defending on the basis of the (b)(7) exemption, the Board claimed disclosure would result in an unwarranted invasion of privacy, reveal confidential sources, and interfere with present and future enforcement proceedings. In deciding the case, the court concluded that the Board was operating under two misconceptions. First, whereas the NLRB characterized the suit as an attempt by Cessna to compel prehearing discovery, the court viewed the suit simply as an attempt to enforce the company’s rights under the FOIA. Second, the court rejected the Board’s assertion that the material was exempt based only on the Board’s deter-

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106. Id.
mination and ordered in camera inspection in keeping with the mandate of the amended Act. The court reiterated its reliance on the Act's legislative history in denying the defendant's later motion for a protective order, in compelling answers to interrogatories relating to the content of the documents, and in setting a later date for an in camera inspection.

Before the Cessna court rendered its decision on the merits, the United States District Court for the Southern District of New York handed down its decision in Title Guarantee v. NLRB. On essentially similar facts, the court quoted Cessna:

"[T]his is not an action to review decisions of the Board regarding discovery matters which may or may not arise during the hearing in controversy now before the Board. This is a separate and distinct action to enforce provisions of the Freedom of Information Act, whose benefits are available 'to any person'."

Regarding the substance of the exemption, the Board relied on subsections 7(A), 7(C), and 7(D) in arguing that disclosure would interfere with proceedings, constitute an invasion of personal privacy and disclose confidential sources. The court analyzed the wording of the unamended Act and concluded that case law under it had withheld any material compiled in the course of an investigation. The court included Wellman Industries, Inc. v. NLRB in that category, finding the case significant insofar as it held that affidavits obtained by NLRB investigators were not discoverable under the unamended Act. The court reasoned that the exemption was designed to "prevent premature disclosure of an investigation

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107. Id. at 1047.


109. An unfair labor practice complaint had been filed against the FOIA plaintiff. The NLRB had concluded its investigation and set the date for its administrative hearing on the matter when the plaintiff employer filed its request for certain materials relating to the unfair labor practice action.


111. 407 F. Supp. at 504, citing H. REP. 1497, supra note 5, at 11; S. REP. 813, supra note 9, at 9.

so that the Board can present its strongest case." Not content to allow Wellman to act as precedent, the court interpreted the legislative history and subsequent amendment of the claimed exemption to require the government to specify some enumerated harm in order to claim the exemption. Following in camera inspection of the material, the court concluded that release of the information would neither block further information of the same type from similar sources nor stifle effective preparation of the case, despite the government’s contention to the contrary. As to the claim of the 7(C) exemption, the court summarily rejected the defendant’s argument that the right to privacy protected by the exemption included the right to select the people to whom one would communicate his ideas. Finally, with regard to defendant’s claim that disclosure would reveal a confidential source, the court noted that the government had presented no evidence that the material sought was elicited under an expressed or implied assurance of confidentiality.

The court’s review of the history and language of the amendment caused it to conclude that:

[C]ourts must examine each situation individually and determine if any of the specific harms enumerated by the statute would result from disclosure. If the government does not satisfy its statutory burden of proof . . . that some such particular harm exists, the “general philosophy of full agency disclosure,” . . . must prevail and the material be disclosed.

Having determined that the NLRB had failed to sustain its burden of proof as to the enumerated harms, the court denied the Board’s motion to stay an earlier production order.

Such disclosure-oriented ammunition was used effectively in the pending proceedings in Cessna Aircraft Corporation v. NLRB. Having reviewed the documents in camera, the remaining confron-

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113. Id. at 431, quoting Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971).
114. 407 F. Supp. at 504.
115. See also NLRB v. Hardeman Garment Corporation, 406 F. Supp. 510 (W.D. Tenn. 1976), holding Title Guarantee dispositive on the issue of disclosure of similar witness affidavits to another unfair labor practice defendant. The Hardeman Garment court gave the same reading to the original Act, Wellman Industries, and the amended Act's legislative history, concluding:

"In light of this history, and from the language of the amendment as well, it is clear that . . . [if] the government does not satisfy its statutory burden of proof, 5 U.S.C. § 552(a)(4)(B), that some such particular harm exists, the 'general philosophy of full agency disclosure,' NLRB v. Sears, Roebuck & Co., 421 U.S. 132, at 136, . . . must prevail and the material be disclosed." 406 F. Supp. at 513. The court concluded that disclosure would not constitute an unwarranted invasion of privacy nor were such statements taken under an express assurance of confidentiality.
tation concerned two witness statements in the Board’s possession. Adopting the reasoning of Title Guarantee, the court found that disclosure of the two statements would not interfere with enforcement proceedings, would not constitute an unwarranted invasion of privacy, and would not expose the identity of confidential sources. 116

On expedited appeal, the Second Circuit reversed the district court in Title Guarantee. 117 The court ruled that because of the 7(A) exemption the employer was not entitled to the written statements and affidavits, and never reached the invasion of privacy 118 and confidentiality 119 issues. Not content with what the lower court’s in camera inspection had revealed, the court of appeals concluded that although all investigative information obtained in connection with pending enforcement proceedings in itself might be disclosable, disclosure of information gathered in connection with unfair labor practice proceedings could interfere with such proceedings. Such disclosure could permit suspected violators to learn the Board's case prematurely and frustrate proceedings or construct defenses which would permit violations to go unremedied. In addition, employees might be reluctant to have it known that they supplied information for fear of incurring employer displeasure or compromising the union's position in negotiations. The court’s opinion was grounded upon the effect the decision would have on future NLRB proceedings, since “the substantive effect of acceptance of appellee’s disclosure contentions would be tantamount to the issuance of new, broader discovery rules for NLRB proceedings.” 120 This result, in

116. 405 F. Supp. at 1052.
117. Title Guarantee Company v. NLRB, 534 F.2d 484 (2d Cir. 1976). The Act directs that in the district court and on appellate review, cases arising under the FOIA shall take precedence on the docket over all cases and shall be assigned for hearing or trial or for argument at the earliest practicable date and expedited in every way. This requirement resulted from a strong congressional commitment to prompt handling of cases of public access to government records. 5 U.S.C.A. § 552(a)(4)(D) (Supp. I, 1975), amending 5 U.S.C. § 552(a)(4) (1970).
119. Unable to present evidence that the statements were offered in confidence, the Board argued such confidentiality could be implied from the circumstances. The Second Circuit Court of Appeals noted the lower court’s rejection of the argument, citing Deering Milliken, Inc. v. Nash, 90 L.R.R.M. 3138 (D.S.C. 1975); Climax Molybdenum Co. v. NLRB, 407 F. Supp. 208 (D. Colo. 1975).
120. 534 F.2d at 487. The court viewed as significant the delicate relationship between employer and employee finding Congress reluctant to upset limits and procedures in unfair labor practice proceedings by way of an act which does not purport to deal with discovery, although dealing with disclosure generally. Other courts reaching the same conclusion have
substance, ignored the FOIA aspect of the controversy.

A review of the same exemption, legislative history and case law that the district court had surveyed prompted the Second Circuit's opposite conclusion. Curiously, the Second Circuit read the pre-amendment case of *Wellman Industries, Inc. v. NLRB* as stating the applicable law. Rather than finding it undermined by the amended exemption, the court read the legislative debates on the amendment as seeking to abrogate a line of cases dealing with the unavailability of closed files. Since *Wellman* dealt with an active NLRB file, the court reasoned that it remained viable and required nondisclosure in any pending enforcement proceeding. Having read the legislative intent behind the amended exemption so narrowly, the court could easily ground its decision in the labor context of the case:

We cannot envisage that Congress intended to overrule the line of cases dealing with labor board discovery in pending enforcement proceedings by virtue of a back-door amendment to the FOIA when it could very easily have done so by direct amendment to Section 10(b) of the National Labor Relations Act . . . or by a blanket enactment pertaining to discovery in pending administrative enforcement proceedings.

* * *

In light of the delicate relationship which exists between employer and employee, we think that Congress would be very reluctant to

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122. 534 F.2d at 490. "The cases that Exemption 7(A) was intended to overrule were for the most part closed investigative file cases." *Id.* at 492. To give such a reading to the body of legislative debates that took place on the floor of both houses necessarily restricts one's focus to *Frankel v. SEC*, which is precisely the case cited by the court. Such a limitation not only unduly restricts the focus of the amendments but clearly abrogates a congressional intent to dispose of an entire line of cases only beginning with *Frankel v. SEC*. See text accompanying notes 27 through 55 supra.

123. 534 F.2d at 490 (emphasis added). The court backed away from stating a per se rule of exemption in all pending NLRB proceedings finding themselves unprepared to hold that disclosure may be required under the FOIA in connection with any ongoing unfair labor practice proceeding. *Id.* at 491. The court ultimately held "statements of employees, and their representatives, obtained in connection with unfair practice enforcement proceedings are not subject to disclosure as a result of Exemption 7(A)." *Id.* at 492.
change the rather carefully arrived at limitations and procedures for discovery in unfair labor practice proceedings by way of an act which, while dealing with disclosure generally, does not purport to affect such discovery. 124

In its emphasis on the labor relations posture of the case, the Second Circuit had reduced congressional dissatisfaction with an entire line of case law to mere discontent with the exemption's application to closed investigatory files.

**Goodfriend Western Corporation v. Fuchs**

The disagreement between the district court and court of appeals in *Title Guarantee* was mirrored in *Goodfriend Western Corp. v. Fuchs*. 125 The lower court adopted the reasoning of the district court in *Title Guarantee* that claims of protection under exemption 7 must be examined individually and that the specific harm imputed to the agency must be weighed case-by-case. 126 The *Goodfriend Western Corp.* court found that disclosure of witness affidavits would not interfere with an enforcement proceeding scheduled less than 24 hours later, because the agency had already completed its investigation and subpoenaed witnesses. 127 The court ordered the release of only the affidavits of witnesses who had already committed themselves to air publicly the contents of their affidavits. It noted that, in any event, such affidavits would be available to the plaintiff immediately after the direct examination, which would take place less than 24 hours after the issuance of the court's disclosure order.

The First Circuit reversed, relying upon the newly decided *Title
Guarantee opinion from the Second Circuit. The court rejected the district court's emphasis on the "timing" of the disclosure while the circumstances minimized the possible interference with enforcement proceedings, the court could not rule out the possibility that the company might be able to use disclosure to learn the Board's case in advance and frustrate the proceedings. The court refused to shoulder a "case-by-case adjudication of [such] discovery disputes in unfair labor practice proceedings," and in so doing, read Title Guarantee as a per se rule of nondisclosure.

Although explicitly overruled by the Second Circuit and implicitly abandoned by the First Circuit, the district court opinion in Title Guarantee nonetheless remained as precedent for a number of other courts presented with analogous facts. Moreover, the distinction between the district court and court of appeals decisions in Title Guarantee serves as a useful device for categorizing the multiplying FOIA complaints being filed against the National Labor Relations Board in recent months. Whereas the district court opinion in Title Guarantee approaches the disclosure issue as purely a matter of statutory interpretation with a secondary glance at the legislative history and case law underlying the exemption, the court of appeals decision carries a definite labor relations orientation and a concern for the ramifications a disclosure decision would create.

Characterization of the FOIA Claim in a Labor Context

All courts have agreed that Congress did not intend the FOIA to be used as a discovery tool. How the courts handle the disclosure

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128. 535 F.2d 145, 146 (1st Cir. 1976).
129. Id. at 147.
130. Id.
132. "It is interesting . . . to note that in the past 10 months there have been at least 10 opinions/orders of federal courts dealing with the issue presented herein." Chrysler Corp. v. NLRB, 92 L.R.R.M. 3191, 3192 (E.D. Mich. 1976); "[T]his precise problem, disclosure of investigative materials compiled by the NLRB for use in pending enforcement proceedings, has been the subject of a plethora of lawsuits in district courts throughout the country, resulting in widely divergent decisions." Read's Inc. v. NLRB, 91 L.R.R.M. 2722, 2723 (D. Md. 1976).
issue when such an unintended use of the FOIA is employed has resulted in two lines of analysis.

One line emphasizes the labor relations implications of information requests. Many of the courts that adopt this approach do not view the plaintiff's claim as one seeking disclosure under the FOIA, but instead view the action as one seeking prehearing discovery against the NLRB. Relying on the Board's statutory right to prescribe its own discovery procedures in unfair labor practice proceedings, these courts note that discovery is prohibited for the most part, and that disclosure of witness statements occurs only after the Board has presented its case. Although these courts are sympathetic to the plaintiff's cries of "trial by ambush" and recognize the stringent limits of the Board's discovery procedures, they believe the remedy for any inequities lies with Congress and not the judiciary:

It is for Congress and not [the] Court, to tell the N.L.R.B. to reform discovery procedures. The F.O.I.A. does not provide this

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137. However, sympathetic as the Court may be to the claim that refusal of the NLRB to disclose witness statements results in "trial by ambush," and however disdainful the Court might be of the NLRB's policy of restricting discovery to the bare legal minimum, the wisdom of the NLRB's discovery rules are not before this Court.

Court with a vehicle for reforming archaic N.L.R.B. proceedings, despite the Court's contrary desire.139

The primary rationale underlying a labor characterization of a FOIA action rests in the nature of labor proceedings themselves. As the Second Circuit recognized in Title Guarantee, there exists a delicate relationship between employer and employee in unfair labor practice proceedings.140 An appreciation of this relationship helps explain the NLRB's reluctance to release information that might tend to strain the relationship and unduly hamper the Board's efforts to enforce federal labor legislation. Accordingly, in deference to the peculiar character of labor litigation, the courts restrict discovery of government witnesses and their statements. The witnesses are likely to be inhibited by fear of the employer's or the union's capacity for reprisal and harassment.141 In fact, it was this possibility of employer coercion that prompted the Supreme Court to extend the protection of the National Labor Relations Act to employees giving statements during NLRB investigations.142 This fear of inhibiting witness cooperation has substantially occupied the courts that stress the labor context of the plaintiff's FOIA claim. When a plaintiff advocates disclosure of "investigatory records" in possession of the Board, a number of courts have relied on exemption 7(A) to deny a release that could interfere with enforcement proceedings. These courts are convinced that to hold otherwise would have a tendency to "chill" employees who sought to exercise their right to press unfair labor practice charges.143

Recognizing this possibility, the court in Local 30, United Slate, Tile and Composition Roofers v. NLRB144 remarked that its in camera inspection of affidavits in the Board's investigatory file revealed personal assaults, threats of bodily harm, prevention of persons from entering work sites, expulsion of persons from work sites, and destruction of materials, property and equipment. Statements

139. Pepsi-Cola Bottling Co. v. NLRB, 92 L.R.R.M. 3527, 3531 (D. Kan. 1976). See also Au & Son, Inc. v. NLRB, 538 F.2d 80, 83 (3d Cir. 1976)(had Congress intended to amend Board discovery procedures it could have done so directly); Harvey's Wagon Wheel v. NLRB, 91 L.R.R.M. 2410, 2414 (N.D. Cal. 1976) (declining to alter discovery balance between NLRB and defendant, absent a much clearer indication from Congress to that effect).

140. 534 F.2d at 492.

141. Au & Son, Inc. v. NLRB, 538 F.2d 80, 83 (3d Cir. 1976).


regarding these incidents led the court to conclude that the divulgence of affidavits containing such information in advance of the hearing would create substantial danger that witnesses might be intimidated or might become reluctant to testify.\textsuperscript{146} The courts that dwell on the unique labor posture of these cases verge upon a per se rule of nondisclosure so as to avoid coercion in the labor proceedings themselves. The holding of the court in \textit{Climax Molybdenum Company v. NLRB}\textsuperscript{146} is illustrative:

The labor case is peculiarly susceptible to employer retaliation, coercion, or influence to the point that it can be concluded that there is \textit{no need for an express showing} of interference in each case to justify giving effect to the exemption contained in Section 7(A) in Labor Board proceedings.

In sum, it follows that the proceedings herein were enforcement in nature and were continuing, and the [7(A)] exemption applies to the present efforts of the company to gain possession of the requested documents.\textsuperscript{147}

This language is reminiscent of earlier case law denounced by the Congress for mechanical resolution of the exemption issue. Moreover, the focus on labor relations consequences in such cases has blurred the court's view of the Freedom of Information Act as a whole.

\textbf{DEALING WITH THE INFORMATION REQUEST IN ITS FOIA CONTEXT}

A second line of analysis\textsuperscript{148} has come from courts that also recognize that the FOIA was not intended as a discovery device but
conclude that a party’s litigation status with an agency does not affect his right of access to information available under the FOIA. Indeed, some courts have gone so far as to exclude consideration of a plaintiff’s reasons for seeking disclosure when dealing with the exemption question.

These courts resolve the disclosure issue by a review of case law under the original Act and the effect of the subsequent amendment upon the precedential value of that case law. Many of these courts consider Wellman Industries, Inc. v. NLRB the appropriate analytical starting point. Confronted with a similar request for NLRB witness affidavits, these courts concluded that Wellman was still good law despite its preamendment status. Wellman was decided when the exemption contained the proviso “except to the extent available by law to a party other than an agency.” But NLRB rules had never allowed disclosure of witness affidavits and investigative reports, so the absence of the proviso could not inure to the benefit of plaintiffs seeking disclosure under the amended Act. In so doing, courts read the congressional intent behind the amendment as limited to reversing “closed file” cases, or a specific line of “District of Columbia Circuit Court cases.” Accordingly, since Wellman was “notably absent from the list of cases Senator Hart intended to overrule by his amendment,” it remained precedent for nondisclosure.


152. Although the Wellman court did not cite the NLRB’s administrative regulation barring such disclosure, the court did find the House Report significant in that the Act was not intended to give a party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings. H. Rep. 1497, supra note 5, at 11.


156. Finding that Wellman had not been undercut by the 1974 amendments, many courts
Because the legislative history stated that the amended Act was not meant to be a radical departure from existing case law, this interpretation appears to do justice to the congressional intent. However, such a reading of the amended Act fails to take into account the depth of congressional concern with the expansive interpretations given the exemption by certain courts. Rather than sanctioning a per se rule of exemption that could be invoked by demonstrating the existence of investigatory files used in an enforcement proceeding, Congress intended that the agency bear the burden of demonstrating that disclosure violates one of the protected interests of the exemption. By shifting the burden of proof to the agency and authorizing in camera review, Congress sought to do more than undermine such cases as Ditlow, Weisberg, Aspin and Center for National Policy. Congress demanded that the agency show conclusively that release of the information would produce a harm falling explicitly within an exemption. If the agency could offer nothing more than generalized assertions of enforcement interference, then the policy of disclosure should govern. By delimiting the legislative concern behind the amendment to a disapprobation of closed file cases, courts have similarly undermined the burden of proof and in camera inspection mandates. There is a trend to repudiate altogether the need for in camera inspection of disputed materials when the statements sought are part of a case file in a pending enforcement proceeding.

Yet if courts do not inspect the documents in question, they must rely upon an agency's unsupported characterization of the contested papers. Unwilling to avail themselves of an impartial means of as-

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158. The Third Circuit in Au & Son, Inc. v. NLRB, 538 F.2d 80, 83 (3d Cir. 1976), points up the growing trend among courts concluding, "[s]ince there is no question that the statements sought are part of a case file in a pending enforcement proceeding, there is no need for an in camera inspection of the disputed materials." Id. at 3185 n.11. See also Climax Molybdenum Co. v. NLRB, 92 L.R.R.M. 3466, 3468 (10th Cir. 1976); Harvey's Wagon Wheel v. NLRB, 91 L.R.R.M. 2410, 2415 (N.D. Cal. 1976); Pacific Photo Type, Inc. v. NLRB, 92 L.R.R.M. 2580 (D. Hawaii 1976) (consolidated); Robbins Tire & Rubber Co. v. NLRB, 92 L.R.R.M. 2586, 2588 (N.D. Ala. 1976).
Amended FOIA assessment and reluctant to engage in the case-by-case determinations inherent in de novo review, these courts have embraced blanket nondisclosure in all labor proceeding cases. Some have shifted the burden of proof from the defending agency to the plaintiff, incontrovertibly in derogation of the FOIA's language. Others have abdicated their statutory duty to justify reliance upon exemption 7(A) by an express showing of interference in each case. In these ways, many courts have distorted the FOIA's language and purpose.

The recent case law involving the seventh exemption reflects judicial inability to integrate the schemes set forth in the Freedom of Information Act and the National Labor Relations Act. Distressingly, the courts that have considered the FOIA aspects of disclosure of NLRB investigative reports have done the most violence to the spirit and letter of the Act itself. By reversing the burden of proof, denying the need for specific showing of harm, rejecting in camera review, and restricting the congressional intent behind the amended exemption, courts have nurtured precedents that threaten to nullify the Act's balanced disclosure policy regarding investigatory records. However, a few courts have made genuine efforts to reconcile these two ostensibly conflicting approaches.

JUDICIAL ATTEMPTS TO FIT THE FOIA REQUEST INTO THE LABOR CONTEXT

The FOIA mandates a general policy of full disclosure; the National Labor Relations Act requires a sensitivity to the unique relationship of management and labor. Thus, the disclosure requirements of FOIA must be tempered with an awareness of the important sequence of events dictated by the National Labor Relations Act. The courts that have attempted to harmonize the objectives

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159. [A] consequence of the company's position would be that the courts would be called on to determine on a case by case basis whether a particular file would interfere with NLRB enforcement proceedings. This court is ill-fitted to make such determinations. It is impossible to believe that Congress intended to call upon the federal courts to perform this task. Climax Molybdenum Co. v. NLRB, 92 L.R.R.M. 3466, 3468 (10th Cir. 1976). See also Goodfriend Western Corp. v. Fuchs, 535 F.2d 145, 147 (1st Cir.), cert. denied, 45 U.S.L.W. 3306 (U.S., Oct. 19, 1976); Gimbel Bros. v. NLRB, 92 L.R.R.M. 2733, 2734 (E.D. Pa. 1976); Local 30, United Slate, Tile & Composition Roofers v. NLRB, 408 F. Supp. 520, 524 (E.D. Pa. 1976).


162. The language of the court in Gerico, Inc. v. NLRB, 92 L.R.R.M. 2713 (D. Colo. 1976) (consolidated), is illustrative:

While the FOIA mandates a general policy and blue print of full disclosure, the NLRA requires a sensitivity to the unique relationship of management and labor. Thus, the disclosure requirements of FOIA must be tempered with an awareness
of the NLRA with the FOIA have tried to assess the potential for coercion surrounding an unfair labor practice charge. Fully aware of how coercion can interfere with the Board's enforcement function, the courts allow disclosure whenever such interference can be minimized or done away with totally. An important consideration influencing the courts is the NLRB rule providing for disclosure of witness affidavits after direct examination in the administrative proceeding.\(^{163}\) This "eventual disclosure" has motivated some courts to frame the question in terms of setting a proper timetable for disclosure.\(^{164}\) They have reasoned that after the NLRB has completed an investigation, committed witnesses to testify, and scheduled the proceedings for the near future, release of witness affidavits at this juncture could in no way interfere with enforcement proceedings.\(^{165}\) Such judicially constructed timetables have ranged from a 24-hour period\(^{166}\) to 1 month\(^{167}\) depending upon the likelihood that interference would result from a premature disclosure.

In constructing these disclosure timetables, courts have fashioned the disclosure remedy to ensure that the harms sought to be avoided by the exemptions do not occur. These qualifications have taken various forms. A distinction has usually been drawn between the affidavits of witnesses who will not testify at the enforcement proceeding and the statements of those who will, only the latter being subject to disclosure under a timetable.\(^{168}\) One court limited the NLRB to calling to testify just those witnesses whose affidavits had been previously released to the FOIA plaintiff.\(^{169}\) To prevent intimi-
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dication of witnesses during the period between disclosure and the unfair labor practice hearing, some courts have prohibited the FOIA plaintiff from contacting the witnesses whose affidavits were ordered disclosed.\(^{170}\) In an attempt to release the substance of contested affidavits but preserve the anonymity of the affiant employee, the court in *Furr's Cafeterias Inc. v. NLRB*\(^ {171}\) ordered the release of all witness affidavits following the deletion of names and identifying references. Such innovative remedies go far towards accommodating the preoccupation with witness coercion in the labor context and the disclosure policy of the FOIA.

A dividend of such case law is a more equitable discovery balance between unfair labor practice defendants and the NLRB. These courts recognize that disclosure should benefit rather than harm the Board's case,\(^ {172}\) enabling the defense to understand the charges against its client,\(^ {173}\) prepare its case,\(^ {174}\) plan its cross-examination, develop the administrative record,\(^ {175}\) or otherwise defend against the charges. The court's reasoning in *Maremont Corp. v. NLRB*\(^ {176}\) serves as an example:

> It is true that F.O.I.A. disclosure may inconvenience [the NLRB]. However, inconvenience is not synonymous with Exemption (7) "interference." [The Board's] prosecutive task may become somewhat more exacting; its witnesses will have to be more scrupulous in their attention to the truth; they will have to be better able to withstand knowledgeable cross-examination. But such difficulties are not what the amended exemption contemplated. . . .

> The ruling of this Court will not prevent [the Board] from presenting its strongest case in the administrative hearing. Rather,

\(^{170}\) Should the affidavits . . . reveal the affiants . . . [the plaintiff] is hereby prohibited from approaching, contacting, calling or otherwise seeking out and confronting the affiants prior to the presentation of each affiant's testimony at the National Labor Relations Board hearing in question.


> Contrary to defendant's assertions, the Court finds compelling plaintiff's argument that F.O.I.A. disclosure of witness statements might actually aid defendant's efforts to effectuate the purposes of the N.L.R.A. Voluntary settlement of claims the Board finds to be meritorious and warranting a complaint is a significant enforcement goal. To the extent that F.O.I.A. disclosure would inform Board respondents of the strengths of the case against them, the Board's pre-hearing settlement record may be increased.


\(^{174}\) Baptist Memorial Hospital v. NLRB, 92 L.R.R.M. 2645, 2647 (W.D. Tenn. 1976).


\(^{176}\) 91 L.R.R.M. 2804 (W.D. Okla. 1976).
[it] will be compelled to do so. [The NLRB] should not be able to prevail simply by virtue of a cross-examination or defense weakened by lack of fore-knowledge. If [the Board] is to succeed in its administrative hearings, it should be because of the strengths of its own case, not the Board-fostered weaknesses of its opponent's.\textsuperscript{177}

The constantly reiterated justification for protecting NLRB affidavits from disclosure is fear of reprisal by the company or the union against the employee. Therefore, in instances where disclosure will not precipitate reprisal, the court should order release of the contested material. \textit{Temple-Eastex, Inc. v. NLRB}\textsuperscript{178} illustrates the proper approach. Plaintiff sought an injunctive order requiring disclosure of certain statements and affidavits obtained in the course of an NLRB investigation of an unfair labor practice charge. When plaintiff requested information pursuant to the FOIA, the NLRB denied the request on the basis that the statements were exempt under sections 7(A), 7(C) and 7(D). The court agreed with the NLRB that the records were "investigatory" and were compiled for law enforcement purposes. However, the court reasoned that certain affidavits, favorable to Temple-Eastex in its defense at the unfair labor practice hearing, would never come to light for inspection at the hearing because the Board prosecutor would not call a witness who had made statements favorable to the company. Because the company would not desire to punish affiants who had made statements supporting its position\textsuperscript{179} and because the affidavits did not involve union members, the court discerned no justification for invoking the exemption and thus ordered immediate disclosure.\textsuperscript{180}

The \textit{Temple-Eastex} court adopted the FOIA's emphasis on the fullest responsible disclosure without jeopardizing the interests of the parties in the labor dispute. By reviewing contested documents \textit{in camera} on a case-by-case basis, some courts have avoided the imposition of a per se rule of disclosure or exemption. To integrate the FOIA's disclosure mandate into the labor context, a few courts have created timetables that allow for maximum disclosure with

\begin{itemize}
\item \textsuperscript{177} \textit{Id.} at 2810.
\item \textsuperscript{178} 410 F. Supp. 183 (E.D. Tex. 1976).
\item \textsuperscript{179} \textit{Id.} at 186.
\item \textsuperscript{180} \textit{See also} Gerico, Inc. v. NLRB, 92 L.R.R.M. 2713 (D. Colo. 1976), where the court's \textit{in camera} inspection revealed similar pro-company witness statements. Rather than order immediate disclosure, the court postponed release until termination of the unfair labor practice proceedings. The court noted that there was opportunity for review of the Board's decision prior to the entry of an enforcement order and that the Board's finding had to be supported by "substantial evidence" in any case. \textit{Id.} at 2717.
\end{itemize}
minimum enforcement proceeding 'rnterference. In so doing, the courts have judicially resolved a conflict that Congress did not anticipate when it drafted and amended the Freedom of Information Act—the use of the FOIA as a discovery device against federal administrative agencies.

**CONCLUSION**

Congress and the courts may once again be squaring off for a battle over the proper interpretation of the Freedom of Information Act. Congress, for all its laudable intentions, did not foresee certain ingenious uses of the amended Act. The FOIA was designed to expose the internal workings of administrative agencies, but legal practitioners have used it to advance their clients' cases. With an eye to the stated congressional intent, the courts have scrutinized the claims of those who view the Act as a discovery tool. In the absence of congressional guidance, the burden of resolving the question of disclosure for litigation purposes has fallen upon the courts. Because of the Act's provisions for expedited trial and appeal, litigation has burgeoned and the attendant problems have rapidly developed to a critical stage.

The courts may be able to shoulder the burden by staying within the framework of the amended Act. Though Congress did not explicitly consider the novel uses of the FOIA when it amended the Act, exemption 7 appears to contain language sufficient to protect governmental enforcement efforts. Thus, it is possible that the balancing of interests embodied in the amended investigatory records exemption can fully accommodate the attempts of administrative litigants to use the FOIA for litigation purposes.

The recent claims of litigants in unfair labor practice cases have caused some courts to seek mechanical bases of decision, a treatment expressly repudiated by Congress when it amended the original Act. While courts should consider the administrative context of these claims, a single consideration should not provide the exclusive basis of decision. Deference to the labor posture of a case without reflection upon its FOIA implications may result in an evasion of congressional intent. Moreover, many courts have not restricted the precedential value of their holdings to the labor context.181

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181. The court in Title Guarantee Co. v. NLRB, 534 F.2d 484 (2d Cir. 1976), specifically limited its holding to the labor context in which the case arose. "[W]e do not intend our comments to apply broadly to administrative contexts other than unfair labor practice enforcement proceedings before the NLRB." Id. at 492. Other courts have not circumscribed the precedential value of their holdings. See Au & Son, Inc. v. NLRB, 538 F.2d 80, 83 (3d Cir. 1976); Climax Molybdenum Co. v. NLRB, 92 L.R.R.M. 3467, 3468 (10th Cir. 1976);
to other administrative circumstances that lack the unique characteristics of the labor relationship, the decisions of these courts stand as a broad rule of nondisclosure in any ongoing enforcement proceeding. This recurrence of mechanical interpretations of the original Act threatens the disclosure policy behind the congressional amendment.

TIMOTHY J. McGONEGLE

## APPENDIX


### Table of Freedom of Information Act Data (For Period: July 1, 1971-July 1, 1972)

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Percentages in parentheses are percentages of the total number of formal requests to the agency. Due to rounding the percentages may not equal 100 percent.