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UNITED STATES CODE
AND
UNITED STATES CODE ANNOTATED**

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**UNITED STATES CODE
ANNOTATED**

Title 18

Crimes and Criminal Procedure

§§ 1361 to 1950

(1984)

**Official Revision and Codification of the Laws Relating
to Crimes and Criminal Procedure
Under Arrangement of Official Code of
the Laws of the United States
with
Annotations from Federal and State Courts**

**ST. PAUL, MINN.
WEST PUBLISHING CO.**

§ 1905 — Trade Secrets Act
Criminal Disclosure

a fixed time, willfully imparts, directly or indirectly, such information, or any part thereof, to any person not entitled under the law or the rules of the department or agency to receive the same; or, before such information is made public through regular official channels, directly or indirectly speculates in any such product by buying or selling the same in any quantity, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

No person shall be deemed guilty of a violation of any such rules, unless prior to such alleged violation he shall have had actual knowledge thereof.

(June 25, 1948, c. 645, 62 Stat. 790.)

Historical and Revision Notes

Reviser's Note. Based on Title 18, U.S.C., 1940 ed., § 214 (Mar. 4, 1909, c. 321, § 123, 35 Stat. 1110). Minor changes were made in phraseology.

Words "agency thereof" were inserted in lieu of "office thereof" at beginning of section in conformity with section 6 of this title.

Cross References

Disqualification from holding any office of honor, trust, or profit, additional grounds for, see sections 204, 592, 593, 2071, 2381, 2385, and 2387 of this title.

Federal Practice and Procedure

Explicit exception for disclosure in response to judicial subpoena, see Wright & Graham: Evidence § 5437.

West's Federal Forms

Sentence and fine, see § 7531 et seq.

Library References

United States ⚖️ 52.
C.J.S. United States §§ 60, 61.

Notes of Decisions

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1. Common law

The giving out of information by a clerk or employee of a department of the United States government in respect to a matter which it was understood should be kept secret, although for private gain, is not a crime

against the United States, unless made so by law. U.S. v. Haas, D.C.N.Y. 1906, 167 F. 211.

2. Officers

A person engaged in the Department of Agriculture as an assistant statistician is not a public officer of the United States. U.S. v. Haas, D.C.N.Y. 1906, 167 F. 211.

§ 1903. Speculation in stocks or commodities affecting crop insurance

Whoever, while acting in any official capacity in the administration of any Act of Congress relating to crop insurance or to the Federal Crop Insurance Corporation speculates in any agricultural commodity or product thereof, to

which such enactments apply, or in contracts relating thereto, or in the stock or membership interests of any association or corporation engaged in handling, processing, or disposing of any such commodity or product, shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

(June 25, 1948, c. 645, 62 Stat. 790.)

Historical and Revision Notes

Reviser's Notes. Based on section 1514(b) of Title 7, U.S.C., 1940 ed., Agriculture (Feb. 16, 1938, c. 30, Title V, § 514(b), 52 Stat. 76). Minor changes were made in phraseology and translations.

Words "upon conviction thereof" were omitted as surplusage since punishment can be imposed only after a conviction.

West's Federal Forms

Sentence and fine, see § 7531 et seq.

§ 1904. Disclosure of information or speculation in securities affecting Reconstruction Finance Corporation

Whoever, being connected in any capacity with the Reconstruction Finance Corporation, gives any unauthorized information concerning any future action or plan of the said Corporation which might affect the value of securities, or, having such knowledge, invests or speculates, directly or indirectly in the securities or property of any company, bank, or corporation receiving loans or other assistance from the said Corporation, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(June 25, 1948, c. 645, 62 Stat. 791.)

Historical and Revision Notes

Reviser's Note. Based on section 616(c) of Title 15, U.S.C., 1940 ed., Commerce and Trade (Jan. 22, 1932, c. 8, § 16(c), 47 Stat. 11, 12).

Minor changes were made in translations and phraseology.

Abolition of Reconstruction Finance Corporation. Section 6(a) of Reorg. Plan No. 1, of 1957, eff. June 30, 1957, 22 F.R. 4633, 71 Stat. 647, set out in the Appendix to Title 5, Government Organization and Employees, abolished the Reconstruction Finance Corporation.

West's Federal Forms

Sentence and fine, see § 7531 et seq.

§ 1905. Disclosure of confidential information generally

Whoever, being an officer or employee of the United States or of any department or agency thereof, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314), publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investiga-

tion made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount, or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than \$1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

(June 25, 1948, c. 645, 62 Stat. 791; Sept. 12, 1980, Pub.L. 96-349, § 7(b), 94 Stat. 1158.)

Historical and Revision Notes

Reviser's Note. Based on section 176b of Title 15, U.S.C., 1940 ed., Commerce and Trade; section 216 of Title 18, U.S.C., 1940 ed.; section 1335 of Title 19, U.S.C., 1940 ed., Customs Duties (R.S. § 3167; Aug. 27, 1894, c. 349, § 24, 28 Stat. 557; Feb. 26, 1926, c. 27, § 1115, 44 Stat. 117; June 17, 1930, c. 497; Title III, § 335, 46 Stat. 701; Jan. 27, 1938, c. 11, § 2, 52 Stat. 8).

Section consolidates section 176b of Title 15, U.S.C., 1940 ed., Commerce and Trade; section 216 of Title 18, U.S.C., 1940 ed., and section 1335 of Title 19, U.S.C., 1940 ed., Customs Duties.

Words "or of any department or agency thereof" and words "such department or agency" were inserted so as to eliminate any possible ambiguity as to scope of section. (See definition of "department" and "agency" in section 6 of this title.)

References to the offenses as misdemeanors, contained in all of said sections, were omitted in view of definitive section 1 of this title.

The provisions of section 216 of Title 18, U.S.C., 1940 ed., relating to publication of income tax data by "any person", were omitted as covered by section 55(f)(1) of Title 26, U.S.C., 1940 ed., Internal Revenue Code.

Minor changes were made in translations and phraseology.

References in Text. The Antitrust Civil Process Act, referred to in text, is Pub.L. 87-664, Sept. 19, 1962, 76 Stat. 548, as amended, which is classified generally to chapter 34 (section 1311 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 1311 of Title 15 and Tables volume.

1980 Amendment. Pub.L. 96-349 provided for punishment and removal from office of an agent of the Department of Justice as defined in the Antitrust Civil Process Act for disclosure of confidential information.

Legislative History. For legislative history and purpose of Pub.L. 96-349, see 1980 U.S. Code Cong. and Adm. News, p. 2716.

Cross References

Disclosure of confidential information concerning—

Air pollution prevention and control, emission standards, see section 7542 of Title 42, The Public Health and Welfare.

Air pollution prevention and control, steel industry, see section 7413 of Title 42.

Air pollution prevention and control, subpoenaed papers and documents, see sections 7607 and 7621 of Title 42.

Consumer product safety, see section 2055 of Title 15, Commerce and Trade.

Deepwater ports, see section 1513 of Title 33, Navigation and Navigable Waters.

Electronic product radiation safety defects, see section 263g of Title 42, The Public Health and Welfare.

Electronic product radiation safety inspections, see section 263i of Title 42.

Energy information, generally, see sections 771 and 773 of Title 15, Commerce and Trade.

Energy information, methods or processes of energy supply, see section 796 of Title 15.

Energy producing companies, see section 7135 of Title 42, The Public Health and Welfare.

Environmental pesticide control, see section 136h of Title 7, Agriculture.

Exploration and commercial recovery of seabed mineral resources, see section 1423 of Title 30, Mineral Lands and Mining.

Fire prevention and control, see section 2217 of Title 15, Commerce and Trade.

Flammable fabrics standards, see section 1193 of Title 15.

Hazardous liquid pipeline safety, see section 2010 of Title 49, Transportation.

Hazardous substances releases, see section 9604 of Title 42, The Public Health and Welfare.

Hazardous wastes, see section 6927 of Title 42.

International energy supply, see section 6274 of Title 42.

Magnetic fusion energy, see section 9310 of Title 42, The Public Health and Welfare.

Motor vehicle consumer information, generally, see section 1944 of Title 15, Commerce and Trade.

Motor vehicle consumer information, automotive efficiency, see section 2008 of Title 15.

Motor vehicle consumer information, odometer requirements, see section 1990d of Title 15.

Motor vehicle safety standards, generally, see section 1401 of Title 15.

Motor vehicle safety standards, cost information, see section 1402 of Title 15.

Motor vehicle safety standards, defects and noncompliance with applicable standards, see section 1418 of Title 15.

National transportation safety, see section 1905 of Title 49, Transportation.

Natural gas pipeline safety, see section 1681 of Title 49.

Noise control, see section 4912 of Title 42, The Public Health and Welfare.

Nonnuclear energy resources and technology, see sections 5916 and 5919 of Title 42.

Occupational safety and health inspections or proceedings, see section 664 of Title 29, Labor.

Public water systems safety, see section 300j-4 of Title 42, The Public Health and Welfare.

Recreational vessel manufacturers, see section 4309 of Title 46, Shipping.

Toxic substances control, see section 2613 of Title 15, Commerce and Trade.

Water pollution prevention and control, effluent limitations, see section 1318 of Title 33, Navigation and Navigable Waters.

Water pollution prevention and control, international pollution abatement, see section 1320 of Title 33.

Water pollution prevention and control, sanitation devices, see section 1322 of Title 33.

Water pollution prevention and control, subpoenaed papers and documents, see section 1369 of Title 33.

Weather modification activities or attempts, see section 330b of Title 15, Commerce and Trade.

Wind energy systems, see section 9208 of Title 42, The Public Health and Welfare.

Disclosure of income information by shareholders, see section 7213 of Title 26, Internal Revenue Code.

Federal agency for purposes of this section—

Assigned employees from state or local government deemed federal employees, see section 3374 of Title 5, Government Organization and Employees.

Railroad Accounting Principles Board, see section 11161 of Title 49, Transportation.

United States Synthetic Fuels Corporation, see section 8717 of Title 42, The Public Health and Welfare.

Publication of income information, see section 6103 of Title 26, Internal Revenue Code.

Federal Practice and Procedure

Explicit exception for disclosure in response to judicial subpoena, see Wright & Graham: Evidence § 5437.

Propriety of implying private right of action, see Wright, Miller & Cooper: Jurisdiction § 3531.

West's Federal Forms

Sentence and fine, see § 7531 et seq.

West's Federal Practice Manual

Public disclosure exemptions, see § 68.

Trade secrets, see § 10868.

Library References

United States § 52.
C.J.S. United States §§ 60, 61.

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1. Power of Congress

Congress having conferred property right to which chemical companies had no prior claim could condition such rights to accommodate agency practice. *Chevron Chemical Co. v. Costle*, C.A.Del.1981, 641 F.2d 104, certiorari denied 101 S.Ct. 3110, 452 U.S. 961, 69 L.Ed.2d 972.

2. Officers or employees of United States

Since state agencies which administered Medicaid program in California were not federal agencies, no basis existed to justify transforming officers and employees of those state agencies into federal officers and employees for purposes of this section and section 1306 of Title 42. *St. Michael's Convalescent Hospital v. State of Cal.*, C.A.Cal.1981, 643 F.2d 1369.

3. Trade secrets

"Trade secrets," within former section 1335 of Title 19, ordinarily meant an unpatented secret, commercially valuable plan, appliance, formula, or process, which was used for the making, preparing, compounding, treating, or processing of articles or materials which were trade commodities. *U.S. ex rel. Norwegian Nitrogen Products Co. v. U.S. Tariff Commission*, 1925, 6 F.2d 491, 55 App.D.C. 366.

Although it was conceivable that employee list could contain such extensive and detailed information that would so devastate a company if disclosed to the wrong person that it could be characterized as a "trade secret," list composed of "employees' names, their home addresses, and other confidential information" did not constitute a "trade secret" which could be misappropriated by union and others and thus employer had failed to state claim for misappropriation of trade secrets based upon union's appropriation of such list. *C N A Financial Corp. v. Local 743 of Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, D.C. Ill.1981, 515 F.Supp. 942.

In view of need for judicial determination of conduct violative of confidentiality of trade secrets, extraordinary remedy of cancellation of ongoing competitive procurement, and di-

recting an agency to award, in effect, sole-source contract, is not appropriate. 1980, 59 Comp.Gen. 467.

4. Processes, operations, and styles of work

Employers' manning tables, department lists and projected promotions as contained in affirmative action program reports and compliance review reports constituted information pertaining to "processes, operations and styles of work" within meaning of this section penalizing unauthorized disclosure. *Metropolitan Life Ins. Co. v. Usery*, D.C.D.C.1976, 426 F.Supp. 150.

5. Authorization by law—Generally

This section does not forbid all interagency disclosure; it bars only disclosures which are not authorized by law. *Shell Oil Co. v. Department of Energy*, D.C.Del.1979, 477 F.Supp. 413, affirmed 631 F.2d 231, certiorari denied 101 S.Ct. 1730, 450 U.S. 1024, 68 L.Ed.2d 219.

6. — Executive agreements

Provision of this section making it a federal offense for an officer or employee of the United States or of any department or agency thereof to publish, divulge, disclose or make known in any manner or to any extent not authorized by law any information coming to him in course of his employment or official duties was inapplicable and, hence, did not operate to bar disclosure by United States Customs Service of information to Mexican officials pursuant to executive agreement with respect to sales of powdered milk to Mexican purchasers from bonded warehouses belonging to plaintiffs. *Guerra v. Guajardo*, D.C. Tex.1978, 466 F.Supp. 1046, affirmed 597 F.2d 769.

7. — Rules and regulations

Under this section, which precludes release of certain information not "authorized by law" properly promulgated, substantive agency regulations have force and effect of law; such regulation must be product of congressional grant of legislative authority, promulgated in conformity with procedural requirements imposed by Congress. *Chrysler Corp. v. Brown*, Del.1979, 99 S.Ct. 1705, 441 U.S. 281, 60 L.Ed.2d 208, on remand 611 F.2d 439.

Regulation authorizing public disclosure of financial reports of nursing homes operating under financial reimbursement through federal Medicare program was "authorized by law" within meaning of this section, which provides for disclosure, in that there was a nexus between authorization contained within section 1306 of Title 42 and the disclosure

regulation. *Parkridge Hospital, Inc. v. Califano*, C.A.Tenn.1980, 625 F.2d 719.

Section 1306 of Title 42 which prohibits disclosure of any file, record, report or other paper, or any information obtained at any time by the Secretary of Health, Education, and Welfare [now Secretary of Health and Human Services] except as the Secretary may by regulations prescribe, could at the very least reasonably be construed to contemplate promulgation of Secretary's regulation which provided that medicare cost reports be made available to public upon written request and thus, since regulation was entitled to force and effect of law, disclosure of medicare providers' costs reports, which contained detailed financial information, pursuant to regulation was not prohibited by this section. *Humana of Virginia, Inc. v. Blue Cross of Virginia*, C.A.Va.1980, 622 F.2d 76.

To determine whether a regulation, pursuant to which a disclosure has been made, has the "force and effect of law" necessary to provide the authorization contemplated by this section, which bars only disclosures not authorized by law, the regulation must satisfy three requirements: first, it must be a substantive or legislative-type rule; second, it must be promulgated according to the rule-making requirements of section 553 of Title 5; and third, it must be promulgated pursuant to legislative authority delegated to the agency by Congress. *St. Mary's Hospital, Inc. v. Harris*, C.A.Fla.1979, 604 F.2d 407.

Any release of proprietary information under Nuclear Regulatory Commission's rule of practice relating to public inspection of documents containing proprietary information would be "authorized by law," within this section. *Westinghouse Elec. Corp. v. U.S. Nuclear Regulatory Commission*, C.A.3, 1977, 555 F.2d 82.

Court properly decided that protection from disclosure should be accorded to affirmative action programs and equal employment opportunity reports filed by government contractors with Office of Federal Contract Compliance as required under regulations issued by Secretary of Labor pursuant to executive orders. *Westinghouse Elec. Corp. v. Schlesinger*, C.A.Va.1976, 542 F.2d 1190, certiorari denied 97 S.Ct. 2199, 431 U.S. 924, 53 L.Ed.2d 239.

In order for a regulation to have force and effect of law so as to authorize disclosure of information without violating this section, it must be a substantive, rather than an interpretive rule, it must be issued pursuant to statutory authority, and its promulgation must conform with any procedural require-

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ments imposed by Congress. *Louisiana Chemical Ass'n v. Bingham*, D.C.La.1982, 550 F.Supp. 1136, affirmed 731 F.2d 280.

Within provision of this section barring disclosure of covered material unless disclosure is otherwise authorized by law, authorization for disclosure may be found in statute or regulation, but authorization in regulation must be substantive, not procedural, and must be promulgated pursuant to both statutory grant of quasi-legislative authority and procedural requirements of Administrative Procedure Act, sections 551 et seq. and section 701 et seq. of Title 5, and, as to latter criterion, there must be nexus between regulation and delegation of requisite legislative authority by Congress. *J. H. Lawrence Co. v. Smith*, D.C.Md.1982, 545 F.Supp. 421.

Department of Health, Education, and Welfare [now Department of Health and Human Services] regulation authorizing disclosure of cost reports filed by hospitals participating in the Medicare program did not violate this section, since the regulation was substantive in nature, the disclosure which it authorized was contemplated by section 1306 of Title 42 precluding disclosure of Department files except as prescribed by Department regulations, and since the applicable procedural requirements were satisfied during the promulgation of the regulation. *St. Joseph's Hospital Health Center v. Blue Cross of Central New York, Inc.*, D.C.N.Y.1980, 489 F.Supp. 1052.

Because validly promulgated regulations satisfy authorization requirements of this section, disclosure of information under validly issued regulation is authorized by law for purposes of this section. *Westchester General Hospital, Inc. v. Department of Health, Ed. & Welfare*, D.C.Fla.1979, 464 F.Supp. 236.

Disclosure of information under a validly issued regulation, e.g., cost reports submitted by providers of medicare services to enable Secretary of Health, Education and Welfare [no Secretary of Health and Human Services] to determine amounts due such providers, is "authorized by law" for purposes of this section. *Doctors Hospital of Sarasota, Inc. v. Califano*, D.C.Fla.1978, 455 F.Supp. 476.

Administrative regulations regarding disclosure of documents may not limit scope of this section prohibiting government employee from disclosing trade secrets, processes, operations, etc., except as authorized by law. *Babcock & Wilcox Co. v. Rumsfeld*, D.C. Ohio 1976, 70 F.R.D. 595.

CRIMES Pt. 1

8. — Economic Stabilization Act

Members of Cost of Living Council were prohibited by 1973 amendment to Economic Stabilization Act, set out as a note under section 1904 of Title 12, from defining, as nonproprietary, and thus not subject to public disclosure, information required to be furnished by firms to Securities and Exchange Commission, and Council members were not subject to prosecution under this section, providing criminal penalty for any government officer making unauthorized disclosure of any information required to be filed with an agency. *Consumers Union of U.S. Inc. v. Cost of Living Council*, C.A.Em.App.1974, 491 F.2d 1396, certiorari denied 94 S.Ct. 2387, 416 U.S. 984, 40 L.Ed.2d 761.

9. — Federal Reports Act

Since Federal Reports Act, section 3501 et seq. of Title 44, directly controls exchanges between administrative agencies, it appears that this section was designed to apply only to public disclosures of trade secret material. *Emerson Elec. Co. v. Schlesinger*, C.A.Mo. 1979, 609 F.2d 898.

10. — Federal Rules of Civil Procedure

Any information that is discoverable in a civil suit under the Federal Rules of Civil Procedure, Title 28, cannot be said to be confidential information under this section proscribing disclosure of such by an officer or employee of the United States or of any department or agency thereof. *Exchange Nat. Bank of Chicago v. Abramson*, D.C. Minn.1969, 295 F.Supp. 87, appeal dismissed 407 F.2d 865.

This section did not provide basis for preventing disclosure of report prepared by non-party consulting firm in connection with settlement of antitrust claim against producers of titanium mill products where disclosure pursuant to discovery rules was a disclosure authorized by law, which the terms of this section permitted. *Grumman Aerospace Corp. v. Titanium Metals Corp. of America*, D.C.N.Y.1981, 91 F.R.D. 84.

Any information that is discoverable under rule 26, Federal Rules of Civil Procedure, Title 28, is not confidential information, within this section imposing criminal liability on government officer for disclosing confidential information, even if information is exempt from disclosure under section 552 of Title 5. *Pleasant Hill Bank v. U.S.*, D.C.Mo.1973, 58 F.R.D. 97.

11. — Freedom of Information Act

If documents, containing salary survey information obtained by Board of Governors of Federal Reserve System from private research

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group for purpose of determining salaries for Federal Reserve bank employees, were not exempt from disclosure under Freedom of Information Act's exemption under section 552 of Title 5 for confidential commercial information, disclosure of information would not violate this section since only the disclosure of information which fits into exemption under section 552 of Title 5 could constitute unauthorized disclosure and thus activate provisions of this section. 9 to 5 Organization for Women Office Workers v. Board of Governors of Federal Reserve System, C.A. Mass.1983, 721 F.2d 1.

Determination whether this section was applicable to information concerning employment of women and minorities by government contractor and concerning the availability of an exemption of such material from disclosure under the Freedom of Information Act, section 552 of Title 5, should be made in the first instance by the agencies from which the information was requested. *Chrysler Corp. v. Schlesinger*, C.A.Del.1979, 611 F.2d 439.

This section must be considered independent of the exemptions under the Freedom of Information Act, section 552 of Title 5, and congruence of this section with the exemption in the Freedom of Information Act for trade secrets and confidential and commercial data is immaterial, though issue remains whether this section is within the group of statutes described in the exemption, as amended, applicable to matters specifically exempted from disclosure by statute. *Sears, Roebuck & Co. v. General Services Administration*, 1977, 553 F.2d 1378, 180 U.S.App.D.C. 202, certiorari denied 98 S.Ct. 74, 434 U.S. 826, 54 L.Ed.2d 84.

Material qualifying for exemption under the Freedom of Information Act, section 552 of Title 5, for "trade secrets and commercial or financial information obtained from a person and privileged or confidential" falls within the material disclosure of which is prohibited under this section which prohibits under criminal penalty the disclosure by any federal employee of confidential trade and financial information supplied federal agency. *Westinghouse Elec. Corp. v. Schlesinger*, C.A.Va. 1976, 542 F.2d 1190, certiorari denied 97 S.Ct. 2199, 431 U.S. 924, 53 L.Ed.2d 239.

This section bars disclosure of government material unless disclosure is otherwise authorized by law and the Freedom of Information Act, section 552 of Title 5, does not constitute such authorization, if material falls within exemption of trade secrets and privileged or confidential commercial or financial information.

J.H. Lawrence Co. v. Smith, D.C. Md.1982, 545 F.Supp. 421.

Since only the disclosure of information which fit into one of the nine exemptions contained in the Freedom of Information Act, section 552 of Title 5 constituted unauthorized disclosures that might activate the provisions of this section, invocation of which added nothing to the defendant's claim that certain of the documents responsive to plaintiff's request were protected from disclosure beyond that which might be established under the exemptions of section 552 of Title 5. *Organization for Women Office Workers v. Board of Governors of Federal Reserve System*, D.C.Mass.1982, 527 F.Supp. 1163.

This section making it a criminal offense for an employee of the United States, or one of its agencies, to release trade secrets and certain other forms of confidential commercial and financial information except insofar as such disclosure is authorized by law does not afford a basis for exempting disclosure of documents under the Freedom of Information Act, section 552 of Title 5. *United Technologies Corp., Pratt & Whitney Aircraft Group v. Marshall*, D.C.Conn.1979, 464 F.Supp. 845.

If the information an agency seeks to withhold from public disclosure is not specifically mentioned in this section prohibiting disclosure by federal employees of confidential trade secrets, etc., this section cannot exempt the information from release under exemption from disclosure requirements of Freedom of Information Act, section 552 of Title 5, for matters specifically exempted from disclosure by section 552 of Title 5. *Westchester General Hospital, Inc. v. Department of Health, Ed. & Welfare*, D.C.Fla.1979, 464 F.Supp. 236.

This section prohibiting disclosure by any federal employee of confidential trade and financial information supplied federal agency and provision of Freedom of Information Act, section 552 of Title 5, exempting from disclosure trade secrets and commercial or financial information obtained from a person and privileged or confidential, are equivalent in scope. *Westchester General Hospital, Inc. v. Department of Health, Ed. and Welfare*, D.C.Fla.1977, 434 F.Supp. 435.

Those portions of employers' affirmative action program reports and compliance review reports which were exempt from mandatory disclosure only by virtue of Freedom of Information Act exemption, section 552 of Title 5, for personnel, medical or similar files, disclosure of which would constitute clearly unwarranted invasion of personal privacy and

which did not also come within exemption for trade secrets and commercial or financial information which is privileged or confidential were not within ambit of this section penalizing unauthorized disclosures. *Metropolitan Life Ins. Co. v. Usery*, D.C.D.C.1976, 426 F.Supp. 150.

This section making it a federal offense for United States officer or employee to disclose confidential information acquired in course of employment or official duties is not a statutory exception to the Freedom of Information Act, section 552 of Title 5, contemplated by exemption therein with respect to matters specifically exempted from disclosure by statute and this section did not preclude disclosure of government contractor's equal employment opportunity report to the Joint Reporting Committee. *Crown Central Petroleum Corp. v. Kleppe*, D.C.Md.1976, 424 F.Supp. 744.

Requests by special counsel to the president to Internal Revenue Service to inspect income tax returns of named taxpayers were not exempted from disclosure by this section prescribing penalties for disclosure of confidential information, and were not exempted from disclosure by section 6103 of Title 26 designed to prevent disclosure of information contained either in tax returns or in documents filed in conjunction therewith, and therefore, such requests were subject to disclosure under Freedom of Information Act, section 552 of Title 5. *Tax Reform Research Group v. Internal Revenue Service*, D.C.D.C. 1976, 419 F.Supp. 415.

This section prohibiting unauthorized disclosure of any information by a federal employee is not sufficiently specific to come within Freedom of Information Act exemption, section 552(b) of Title 5, pertaining to matters that are specifically exempted from disclosure by statute. *Neal-Cooper Grain Co. v. Kissinger*, D.C.D.C.1974, 385 F.Supp. 769.

Section 1401 of Title 15 making confidential all information which is obtained by the Secretary of Transportation pursuant to defect investigations and which relate to trade secrets or other matters referred to in this section imposing criminal sanction for disclosure of confidential information harmonizes with Freedom of Information Act, section 552 of Title 5, relating to trade secrets and commercial and financial information. *Ditlow v. Volpe*, D.C.D.C.1973, 362 F.Supp. 1321, affirmed 484 F.2d 956, certiorari denied 94 S.Ct. 1572, 415 U.S. 981, 39 L.Ed.2d 878.

This section relating to prohibition against general disclosure of confidential information

does not prevent disclosure of information authorized to be disclosed under other laws including the Freedom of Information Act, section 552 of Title 5. *M. A. Schapiro & Co. v. Securities and Exchange Commission*, D.C. D.C.1972, 339 F.Supp. 467.

This section making officer liable criminally if he discloses investigatory material where not authorized by law does not establish exemption from the Freedom of Information Act, section 552 of Title 5, but merely penalizes disclosure of nonexempt material. *Frankel v. Securities and Exchange Commission*, D.C.N.Y.1971, 336 F.Supp. 675, reversed on other grounds 460 F.2d 813, certiorari denied 93 S.Ct. 125, 409 U.S. 889, 34 L.Ed.2d 146.

Raw scores, scoring scheme and quality point scores of hearing aids tested by Veterans' Administration contained data available to any persons with resources and facilities to perform tests and did not contain trade secrets or other information prohibited from disclosure by this section coming to government official or employee and therefore would not be exempted from disclosure under the Freedom of Information Act, section 552 of Title 5, as matters specifically exempted from disclosure by statute. *Consumer Union of U.S., Inc. v. Veterans Administration*, D.C.N.Y.1969, 301 F.Supp. 796.

12. — Department of Energy information

By virtue of section 7256 of Title 42 authorizing Secretary of Department of Energy to enter into contracts to carry out functions vested in Secretary, Department of Energy was "authorized by law" within meaning of this section to disclose confidential information to accounting firm in order to carry out function of monitoring oil producers to determine whether they were in compliance with petroleum price and allocation regulations. *Coastal States Gas Corp. v. Dept. of Energy*, D.C.Tex.1979, 480 F.Supp. 813, motion denied 609 F.2d 736.

Disclosure by United States Customs Service of information to Mexican officials pursuant to executive agreement respecting sales to Mexican purchasers of powdered milk from bonded warehouses belonging to plaintiffs was not likely to impair ability of United States to obtain necessary information in future or to cause substantial harm to plaintiffs' competitive position and, hence, was not exempt as being "confidential" in nature. *Guerre v. Guajardo*, D.C.Tex.1978, 466 F.Supp. 1046, affirmed 597 F.2d 769.

13. — Federal Communications Commission information

Confidential documents obtained by administrative subpoenas in connection with Federal Trade Commission proceeding charging respondents with having maintained and reentered noncompetitive market structure and having exercised monopoly power in refining crude oil into petroleum products would be sufficiently protected by this section and section 46 of Title 15 and protective order which was entered by the administrative law judge, as modified by the Commission, and which provided for ten days notice where possible prior to release of respondents' confidential documents pursuant to court process or congressional process or request. *F.T.C. v. Anderson*, D.C.1977, 442 F.Supp. 1118, affirmed in part, remanded in part on other grounds 631 F.2d 741, 203 U.S.App.D.C. 159.

Disclosure by the Federal Communications Commission of information which it deems relevant to senate committee's investigation pursuant to former sections 190b and 190d of Title 2 would be "authorized by law" within the meaning of this section, and, therefore, would not be prohibited by this section, however, such authorization does not constitute a requirement that the Commission divulge to the committee confidential information, and the Commission is free to withhold that information in its discretion. 1955, 41 Op.Atty. Gen., July 15.

14. — Federal Trade Commission information

This section would not bar disclosure by Federal Trade Commission, to state attorneys general, of investigative files relating to corporation. *Jaymar-Ruby, Inc. v. F.T.C.*, D.C. Ind.1980, 496 F.Supp. 838.

15. — Informers

Identity and location of persons having knowledge of matters pertaining to an action are not privileged, except in possible instance of informers. *Federal Deposit Ins. Corp. v. St. Paul Fire & Marine Ins. Co.*, D.C.Okla. 1971, 53 F.R.D. 260.

16. — International Trade Commission information

Under former section 1336 of Title 19, requiring notice of hearing on petition for increase of tariff on particular commodity and opportunity to interested parties to be heard, Tariff Commission [now International Trade Commission] could not refuse to give opposing interested parties a copy of petition, and opposition was entitled to facts privately presented to Commission, notwithstanding former section 1335 of Title 19. U.S. ex rel.

Norwegian Nitrogen Products Co. v. Tariff Commission, 1925, 6 F.2d 491 App.D.C. 366.

The United States Tariff Commission [United States International Trade Commission] was not prohibited by former section 1335 of Title 19 from placing in the hands of the War Trade Board for appropriate trade secrets which had come into the possession of the Commission in the course of exercise of its official functions. 1919, Op.Atty.Gen. 541.

17. — Reconstruction Finance Corporation information

The authority to liquidate the assets of the Reconstruction Finance Corporation conferred by former sections 608 and 609 of Title 15 and Act July 30, 1953, c. 282, § 102(c), 67 Stat. 230, included by implication authority to disclose borrowers' financial and profit and loss statements, if efficient and economical liquidation was determined to require such disclosure and disclosure pursuant to such law within the meaning of this section and would, therefore, not have been prohibited by this section. 1953, 41 Op.Atty.Gen., December 1.

18. — Miscellaneous information authorized by law

This section which generally forbids disclosure of government information "unless authorized by law" was applicable to action brought by nursing homes seeking to enjoin public disclosure of financial reports required to be filed by nursing homes operating under financial reimbursement through federal Medicare program. *Parkridge Hospital, Inc. v. Califano*, C.A.Tenn.1980, 625 F.2d 719.

19. Disclosure to state authority

Former section 216 of this title did not preclude Social Security Board from making information obtained under authority of Social Security Act, section 301 et seq. of Title 42, available to state authorities. 1937, 39 Op.Atty.Gen. 1.

20. Manner of invoking privilege

A claim of privilege by government must be formally lodged by head of governmental department that has control over matter, after actual personal consideration by that officer. *Federal Deposit Ins. Corp. v. St. Paul Fire & Marine Ins. Co.*, D.C.Okla.1971, 53 F.R.D. 260.

21. Private cause of action

This section did not afford private right of action to enjoin disclosure in violation of its provisions. *Chrysler Corp. v. Brown*, 1979,

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99 S.Ct. 1705; 441 U.S. 281, 60 L.Ed.2d 208, on remand 611 F.2d 439.

This section does not confer private cause of action, but may provide standard by which to judge legality of proposed agency disclosures and can at best be construed to create federal law of right of nondisclosure, not of nonuse by agency. *Chevron Chemical Co. v. Costle*, C.A.Del.1981, 641 F.2d 104, certiorari denied 101 S.Ct. 3110, 452 U.S. 961, 69 L.Ed.2d 972.

This section does not imply a private right of action. *Bruce v. U.S.*, C.A.Mo.1980, 621 F.2d 914.

This section does not afford an implied private civil right of action to enjoin disclosures which might violate it. *Florida Medical Ass'n, Inc. v. Department of Health, Ed. & Welfare*, D.C.Fla.1979, 479 F.Supp. 1291.

This section provided no private civil cause of action. *Westchester General Hospital, Inc. v. Department of Health, Ed. & Welfare*, D.C.Fla.1979, 464 F.Supp. 236.

Civil cause of action would not be implied under this section in favor of medicare provider, which claimed that regulation permitting disclosure of its annual medicare "cost reports" to requesting third parties violated this section, a criminal statute designed solely to prevent government employees from surreptitiously divulging privileged information and never intended as a vehicle for challenging administrative agency regulation. *St. Mary's Hospital, Inc. v. Califano*, D.C.Fla.1978, 462 F.Supp. 315, affirmed 604 F.2d 407.

22. Judicial review of administrative action

Defense Logistics Agency's decision to disclose government contractor's reports concerning affirmative action programs and general composition of its work force was reviewable under Administrative Procedure Act, sections 551 et seq. and 701 et seq. of Title 5, in view of placing substantive limits on disclosure of such information by this section. *Chrysler Corp. v. Brown*, 1979, 99 S.Ct. 1705, 441 U.S. 281, 60 L.Ed.2d 208, on remand 611 F.2d 439.

23. Jurisdiction

Government contractor's claim against government seeking to prevent alleged violation of this section were not "disguised" contract claims, and, therefore, district court had jurisdiction of suit brought by government contractor which sought injunctive relief to prevent that alleged violation, since action was not in essence on contract and was outside scope of section 1346(a)(2) of Title 28.

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Megapulse, Inc. v. Lewis, 1982, 672 F.2d 959, 217 U.S.App.D.C. 397.

Suit to enjoin alleged violation of this section providing fine for unauthorized disclosure of information and alleged violation of Freedom of Information Act, section 552 of Title 5, and federal agency regulations was within jurisdiction of federal district court under section 1331 of Title 28, where injury sought to be prevented was sufficiently alleged to be in excess of \$10,000. *Burroughs Corp. v. Schlesinger*, D.C.Va.1975, 403 F.Supp. 633.

24. Proper parties

Equal Employment Opportunity Commission was not proper party to employer's suit alleging violation of this section prohibiting disclosure of confidential information by officers or employees of United States, and employer's claim against Commission would be dismissed, pending appropriate and timely motion to join individual commissioners as parties. *Associated Dry Goods Corp. v. Equal Employment Opportunity Commission*, D.C.Va.1976, 419 F.Supp. 814.

25. Summary judgment

In action by government subcontractor seeking to enjoin Department of Defense from disclosing certain documents and materials pursuant to request from competitor under Freedom of Information Act, section 552 of Title 5, questions of material fact existed as to whether intended disclosures would violate this section prohibiting government employee from divulging trade secrets, processes, operations, etc., except as authorized by law, precluding summary judgment. *Babcock & Wilcox Co. v. Rumsfeld*, D.C. Ohio 1976, 70 F.R.D. 595.

26. Questions of law

Whether governmental privilege is rightfully invoked is a question of law for court. *Federal Deposit Ins. Corp. v. St. Paul Fire & Marine Ins. Co.*, D.C.Okl.1971, 53 F.R.D. 260.

27. Injunction

In action by government contractor which sought injunctive relief to prevent alleged violation of this section, injunctive relief, preliminary or permanent, was available in district court. *Megapulse, Inc. v. Lewis*, 1982, 672 F.2d 959, 217 U.S.App.D.C. 397.

Operators of multifamily housing projects whose mortgages were insured by the Federal Housing Administration and who were required by the Administration to annually submit detailed financial reports had no right to bring a private action to enjoin an alleged

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violation of this section making it illegal for a government employee to disclose to any extent not authorized by law any information coming to him in the course of his employment, which information concerns or relates to the amount or source of any income, profits, losses, or expenditures of any persons; review under section 701 et seq. of Title 5 was sufficient to safeguard any interest that this section was supposed to protect. *Charles River Park "A", Inc. v. Department of Housing and Urban Development*, 1975, 519 F.2d 935, 171 U.S.App.D.C. 286.

Provider of health care services to medicare beneficiaries established a substantial likelihood of success on merits of its claim that regulation requiring disclosure of medicare costs reports was invalid, in view of fact that

it was likely that such disclosure would violate this section prohibiting disclosure by any federal employee of confidential trade and financial information supplied by federal agency. *Westchester General Hospital, Inc. v. Department of Health, Ed. and Welfare*, D.C.Fla.1977, 434 F.Supp. 435.

On application for preliminary injunction, in action seeking to prevent disclosure by Customs Service to foreign government of information furnished Service by importer for permission to import fertilizer, balancing of harms which might be inflicted by grant or denial of preliminary injunction tipped scale toward denial of injunction. *Neal-Cooper Grain Co. v. Kissinger*, D.C.D.C.1974, 385 F.Supp. 769.

§ 1906. Disclosure of information from a bank examination report

Whoever, being an examiner, public or private, or a General Accounting Office employee with access to bank examination report information under section 714 of title 31, discloses the names of borrowers or the collateral for loans of any member bank of the Federal Reserve System, or bank insured by the Federal Deposit Insurance Corporation examined by him or subject to General Accounting Office audit under section 714 of title 31 to other than the proper officers of such bank, without first having obtained the express permission in writing from the Comptroller of the Currency as to a national bank, the Board of Governors of the Federal Reserve System as to a State member bank, or the Federal Deposit Insurance Corporation as to any other insured bank, or from the board of directors of such bank, except when ordered to do so by a court of competent jurisdiction, or by direction of the Congress of the United States, or either House thereof, or any committee of Congress or either House duly authorized or as authorized by section 714 of title 31 shall be fined not more than \$5,000 or imprisoned not more than one year or both.

(June 25, 1948, c. 645, 62 Stat. 791; July 21, 1978, Pub.L. 95-320, § 3, 92 Stat. 393; Sept. 13, 1982, Pub.L. 97-258, § 3(e)(1), 96 Stat. 1064.)

Historical and Revision Notes

Reviser's Note. Based on section 594 of Title 12, U.S.C., 1940 ed., Banks and Banking (Dec. 23, 1913, c. 6, § 22 [second and third sentences of second paragraph], 38 Stat. 272, 273; Sept. 26, 1918, c. 177, § 5 [22(b), second paragraph], 40 Stat. 970; Aug. 23, 1935, c. 614, § 326(b), 49 Stat. 716).

Other provisions of section 594 of Title 12, U.S.C., 1940 ed., Banks and Banking, were consolidated with similar provisions from other sections, to form section 1909 of this title.

Changes were made in phraseology.

1982 Amendment. Pub.L. 97-258 substituted "714 of title 31" for "117(e) of the Accounting and Auditing Act of 1950" wherever appearing.

1978 Amendment. Pub.L. 95-320 substituted "from a bank examination report" for "by bank examiner" in the section catchline and, in text, substituted "public or private, or a General Accounting Office employee with access to bank examination report information under section 117(e) of the Accounting

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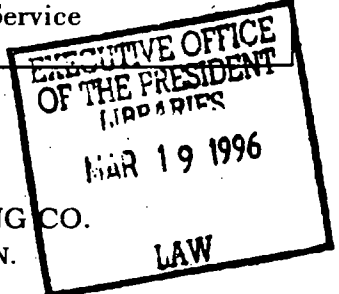
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HISTORICAL AND STATUTORY NOTES

1994 Amendments

Pub.L. 103-322, § 330016(1)(L), substituted "under this title" for "not more than \$10,000".

Legislative History

For legislative history and purpose of Pub.L. 103-322, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

CROSS REFERENCES

Disqualification from holding any office or honor, trust, or profit, additional grounds for, see 18 USCA §§ 592, 593, 2071, 2381, 2385, and 2387.

§ 1903. Speculation in stocks or commodities affecting crop insurance

Whoever, while acting in any official capacity in the administration of any Act of Congress relating to crop insurance or to the Federal Crop Insurance Corporation speculates in any agricultural commodity or product thereof, to which such enactments apply, or in contracts relating thereto, or in the stock or membership interest of any association or corporation engaged in handling, processing, or disposing of any such commodity or product, shall be fined under this title or imprisoned not more than two years, or both.

(As amended Sept. 13, 1994, Pub.L. 103-322, Title XXXIII, § 330016(1)(L), 108 Stat. 2147.)

HISTORICAL AND STATUTORY NOTES

1994 Amendments

Pub.L. 103-322, § 330016(1)(L), substituted "under this title" for "not more than \$10,000".

Legislative History

For legislative history and purpose of Pub.L. 103-322, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

[§ 1904. Repealed. Pub.L. 103-322, Title XXXIII, § 330004(11), Sept. 13, 1994, 108 Stat. 2141]

HISTORICAL AND STATUTORY NOTES

Section, Acts June 25, 1948, c. 645, 62 Stat. 791; Sept. 13, 1994, Pub.L. 103-322, Title XXXI-II, § 330016(1)(L), 108 Stat. 2147, related to

disclosure of information or speculation in securities affecting Reconstruction Finance Corporation.

§ 1905. Disclosure of confidential information generally

Whoever, being an officer or employee of the United States or of any department or agency thereof, any person acting on behalf of the Office of Federal Housing Enterprise Oversight, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314), publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law: shall be fined not more than \$1,000, or imprisoned not more than one year, or both: and shall be removed from office or employment.

(As amended Oct. 28, 1992, Pub.L. 102-550, Title XIII, § 1353, 106 Stat. 3970.)

HISTORICAL AND STATUTORY NOTES

1992 Amendments

Pub.L. 102-550, § 1353, inserted "any person acting on behalf of the Office of Federal Housing Enterprise Oversight," following "agency thereof".

Legislative History

For legislative history and purpose of Pub.L. 96-349, see 1980 U.S. Code Cong. and Adm. News, p. 2716. See also, Pub.L. 102-550, see 1992 U.S. Code Cong. and Adm. News, p. 3281.

CROSS REFERENCES

Automobile fuel economy federal officer or employee disclosures concerning violations of this section, see 49 USCA § 32912.

Cigarette ingredients, list supplied by maker to Secretary of Health and Human Services as subject to this section, see 15 USCA § 1335a.

Disclosure of confidential information concerning—

Bumper standards, see 49 USCA § 32505.

Importing noncomplying motor vehicles and equipment, see 49 USCA § 30141.

Odometers, see 49 USCA § 32708.

Pipeline safety, see 49 USCA § 60117.

Theft prevention of passenger motor vehicles, see 49 USCA § 33116.

Federal agency for purposes of this—
Motor vehicle consumer information investigations confidentiality, see 49 USCA § 32307.

National Transportation Safety Board disclosure of trade secrets related information, see 49 USCA § 1114.

Underground storage tanks, regulation of under Solid Waste Disposal Act, disclosure of confidential information concerning, see 42 USCA § 6991d.

WEST'S FEDERAL PRACTICE MANUAL

Public disclosure exemptions, see § 68.

ADMINISTRATIVE LAW

Exemptions to Freedom of Information Act disclosure, see Koch § 11.6.

Professional responsibility in administrative practice, see Koch § 1.13.

Protection for private information in public information system, see Koch § 11.7.

LAW REVIEW COMMENTARIES

Computers, copyright and tying agreements: An argument for the abandonment of the presumption of market power. Glen P. Belvis, 28 B.C.L.Rev. 285 (1987).

Intellectual Property Crimes. Anita M. Cream, 31 Am.Crim.L.Rev. 687 (1994).

Rethinking the rule against corporate privacy rights: Some conceptual quandries for the common law. Anita L. Allen, 20 John Marshall L.Rev. 628 (1987).

NOTES OF DECISIONS

Constitutionality ½
Knowledge or intent 19a

½. Constitutionality

Statute prohibiting knowing disclosure by federal employees of confidential information coming to them within course of their employment is not impermissibly vague, as construed to require at least that government agency have official policy that information not be disclosed and to prohibit only knowing violations. *U.S. v. Wallington*, C.A.5 (Tex.) 1989, 889 F.2d 573.

2. Officers or employees of United States

Criminal statute prohibiting disclosure of confidential information by federal officers and employees did not apply to Vermont Department of Banking, Insurance and Securities and did not protect Department records regarding a corporation which were sought by subpoena in securities fraud action. *Walsh v. Chittenden Corp.*, D.Vt.1992, 799 F.Supp. 405.

3. Trade secrets

Unless Navy had a right to subcontractor's data and drawings, they represented trade secrets of the subcontractor which can not be disclosed by the government. *Dowty Decoto, Inc. v. Department of Navy*, C.A.9 (Wash.) 1989, 883 F.2d 774.

Unit price information which had been submitted to the Department of Justice as part of contract proposal for providing litigation support services did not fall within exemption to the Freedom of Information Act and the Trade Secrets Act for trade secrets and commercial or financial information; release of information

would not allow competitor to derive bidder's profit multiplier, and thus, would not cause bidder competitive harm. *Acumenics Research & Technology v. U.S. Dept. of Justice*, C.A.4 (Va.) 1988, 843 F.2d 800.

Generalized assertions that release of contractor's contract line item prices (CLIN) would be substantial factor in virtually all future competitions and that competitors would use information to underbid contractor were insufficient to show likelihood of substantial competitive injury from injury so as to render information exempt from disclosure as trade secrets and commercial or financial information under exemption four of Freedom of Information Act (FOIA) and Trade Secrets Act. *McDonnell Douglas Corp. v. National Aeronautics & Space Admin.*, D.D.C.1995, 895 F.Supp. 319.

As long as only use of goods themselves is involved, rather than design information in which someone else may have proprietary rights, reverse engineering in no way violates any rights another party may have in trade secret. *Westech Gear Corp. v. Department of Navy*, D.D.C.1989, 733 F.Supp. 390, affirmed 907 F.2d 1225, 285 U.S.App.D.C. 219.

Army ammunition plant telephone directory was not "confidential information" under the Trade Secrets Act or Freedom of Information Act exemption from disclosure, and Army's decision to release directory in response to FOIA request was thus proper, where release of information contained in directory could not cause competitive harm to company that supplied much of the information contained in directory, as contract at ammunition plant was not awarded competitively, but was always awarded to the

company. *Hercules, Inc. v. Marsh*, W.D.Va. 1987, 659 F.Supp. 849, affirmed 839 F.2d 1027.

11. — Freedom of Information Act

For disclosure purposes, Trade Secrets Act, an independent prohibition on the disclosure of information within its scope, and the Freedom of Information Act (FOIA) are treated as coextensive. *General Dynamics Corp., Space Systems Div. v. U.S. Dept. of Air Force*, D.D.C.1992, 822 F.Supp. 804, vacated.

Trade Secrets Acts, by joinder with Freedom of Information Act exemption for material specifically exempted from disclosure by statute [5 U.S.C.A. § 552(b)(3)], could not protect from mandatory disclosure information that was determined not to fall within protection of Freedom of Information exemption for confidential information [5 U.S.C.A. § 552(b)(4)], where parties had agreed that confidential information exemption and Trade Secrets Acts were co extensive. *AT & T Information Systems, Inc. v. General Services Admin.*, D.D.C.1986, 627 F.Supp. 1396.

14. — Federal Trade Commission information

Section 48 of Title 15, Commerce and Trade is an authorization for the release of confidential corporate records, falling within the provision of this section "authorized by law". 1980 (Counsel-Inf. Op.) 4B Op.O.L.C. 735.

18. — Miscellaneous information authorized by law

Trade Secrets Act prohibits only public disclosure of drug-approval application, it does not bar internal agency use of submitted data. *Tri-Bio Laboratories, Inc. v. U.S., C.A.3 (Pa.)* 1987, 836 F.2d 135, certiorari denied 109 S.Ct. 57, 488 U.S. 818, 102 L.Ed.2d 35.

The Federal Mine Safety and Health Review Commission is a quasi-judicial body authorized and directed to make findings of fact, and therefore there is sufficient authorization by law within the meaning of this section to publish in its opinions and orders evidence, such as financial information derived from a copy of a tax return, which would otherwise be protected from disclosure. 1979 (Counsel-Inf.Op.) 3 Op.O.L.C. 201.

19a. Knowledge or intent

Appropriate culpability for violation of statute prohibiting federal employees from disclosing confidential information must at least include knowledge that information is "confidential," in sense that its disclosure is forbidden by agency official policy or by regulation or law. *U.S. v. Wallington, C.A.5 (Tex.)* 1989, 889 F.2d 573.

22. Judicial review of administrative action

Documents submitted to the Environmental Protection Agency in connection with application for hazardous waste facility permit were not entitled to confidentiality under the Trade Secrets Act [18 U.S.C.A. § 1905], and EPA did not act arbitrarily or capriciously, on abuse its dis-

cretion, in making negative confidentiality determination, inasmuch as, inter alia, applicant failed to make satisfactory showing that it had taken reasonable measures to protect the confidentiality of the information and that the information was not obtainable by other legitimate means without applicant's consent. *Alcolac, Inc. v. Wagoner*, D.C.Mo.1985, 610 F.Supp. 745.

23. Jurisdiction

Federal contractor's action to enjoin Department of Labor from disclosing documents substantially similar to affirmative action plan requested under Freedom of Information Act [5 U.S.C.A. § 552] by women's group without first determining whether requested disclosure would violate Trade Secrets Act [18 U.S.C.A. § 1905] was not ripe for review where evaluation of documents as trade secrets was subsequently required, additional disclosure could not be made without first granting contractor opportunity to challenge action in court, and hardship to contractor in delaying review was minimal. *Gulf Oil Corp. v. Brock*, C.A.D.C.1985, 778 F.2d 834, 250 U.S.App.D.C. 213.

Navy contractor's complaint seeking injunctive, mandamus and declaratory relief against Navy, which allegedly improperly threatened to disclose contractor's trade secrets by its announced action of removing restrictive legends from drawings that contractor developed under navy contracts, contained sufficient allegations to confer jurisdiction under the Trade Secrets Act, 18 U.S.C.A. § 1905 through the Administrative Procedure Act, 5 U.S.C.A. § 551 et seq., permitting district court to issue injunction to preserve status quo pending determination of merits of the action; fact that the dispute concerned drawings provided under a contract did not mean that the action arose out of that contract. *Conax Florida Corp. v. U.S.*, D.D.C. 1985, 625 F.Supp. 1324, on reconsideration 641 F.Supp. 408, affirmed 824 F.2d 1124, 263 U.S.App.D.C. 144.

27. Injunction

Navy contractor bringing action for injunctive, mandamus and declaratory relief against Navy, which allegedly threatened to disclose contractor's trade secrets by its announced action of removing restrictive legends from drawings the contractor developed under navy contracts, would be granted preliminary injunction preserving status quo pending determination of merits of the action. *Conax Florida Corp. v. U.S.*, D.D.C.1985, 625 F.Supp. 1324, on reconsideration 641 F.Supp. 408, affirmed 824 F.2d 1124, 263 U.S.App.D.C. 144.

Record failed to suggest a basis for viable concern on plaintiff's part that government's disclosure of plaintiff's computer software was about to occur and thus plaintiff could not obtain injunctive relief on count alleging violation of this section. *Management Science America, Inc. v. Pierce*, D.C.Ga.1984, 598 F.Supp. 223, affirmed 778 F.2d 792.

§ 1906. Disclosure of information from a bank examination report

Whoever, being an examiner, public or private, or a General Accounting Office employee with access to bank examination report information under section 714 of title

31, discloses the names of borrowers or the collateral for loans of any member bank of the Federal Reserve System, any bank insured by the Federal Deposit Insurance Corporation, any branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), or any organization operating under section 25 or section 25(a) of the Federal Reserve Act, examined by him or subject to General Accounting Office audit under section 714 of title 31 to other than the proper officers of such bank, branch, agency, or organization, without first having obtained the express permission in writing from the Comptroller of the Currency as to a national bank or a Federal branch or Federal agency (as such terms are defined in paragraphs (5) and (6) of section 1(b) of the International Banking Act of 1978), the Board of Governors of the Federal Reserve System as to a State member bank, an uninsured State branch or State agency (as such terms are defined in paragraphs (11) and (12) of section 1(b) of the International Banking Act of 1978), or an organization operating under section 25 or section 25(a) of the Federal Reserve Act, or the Federal Deposit Insurance Corporation as to any other insured bank, including any insured branch (as defined in section 3(s) of the Federal Deposit Insurance Act), or from the board of directors of such bank or organization, except when ordered to do so by a court of competent jurisdiction, or by direction of the Congress of the United States, or either House thereof, or any committee of Congress or either House duly authorized or as authorized by section 714 of title 31 shall be fined under this title or imprisoned not more than one year or both.

(As amended Nov. 29, 1990, Pub.L. 101-647, Title XXV, § 2597(k), 104 Stat. 4911; Sept. 13, 1994, Pub.L. 103-322, Title XXXIII, § 330016(1)(K), 108 Stat. 2147.)

HISTORICAL AND STATUTORY NOTES

References in Text

Section 1(b) of the International Banking Act of 1978, referred to in text, is classified to section 3101 of Title 12, Banks and Banking.

Section 25 of the Federal Reserve Act, referred to in text, is classified to subchapter I (section 601 et seq.) of chapter 6 of Title 12.

Section 25(a) of the Federal Reserve Act, referred to in text, is classified to subchapter II (section 611 et seq.) of chapter 6 of Title 12.

1994 Amendments

Pub.L. 103-322, § 330016(1)(K), substituted "under this title" for "not more than \$5,000" wherever appearing.

1990 Amendment

Pub.L. 101-647, § 2597(k), substituted:

(1) "System, any bank insured" for "System, or bank insured";

(2) "by the Federal Deposit Insurance Corporation, any branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), or any organization operating under section 25 or section 25(a) of the Federal Reserve Act," for "by the Federal Deposit Insurance Corporation";

(3) "proper officers of such bank, branch, agency, or organization," for "proper officers of such bank";

(4) "national bank or a Federal branch or Federal agency (as such terms are defined in paragraphs (5) and (6) of section 1(b) of the International Banking Act of 1978)" for "national bank";

(5) "as to a State member bank, an uninsured State branch or State agency (as such terms are defined in paragraphs (11) and (12) of section 1(b) of the International Banking Act of 1978), or an organization operating under section 25 or section 25(a) of the Federal Reserve Act" for "as to a State member bank";

(6) "any other insured bank, including any insured branch (as defined in section 3(s) of the Federal Deposit Insurance Act)," for "any other insured bank"; and

(7) "board of directors of such bank or organization" for "board of directors of such bank".

Legislative History

For legislative history and purpose of Pub.L. 101-647, see 1990 U.S.Code Cong. and Adm. News, p. 6472. See, also, Pub.L. 103-322, 1994 U.S. Code Cong. and Adm. News, p. 1801.

NOTES OF DECISIONS

Bankruptcy proceedings 4 Submissions to Comptroller of Currency 3

3. Submissions to Comptroller of Currency

Bank submissions to the comptroller of the currency are confidential. *Lundy v. Interfirst Corp.*, D.C.D.C.1985, 105 F.R.D. 499.

4. Bankruptcy proceedings

Statute establishing criminal offenses for unauthorized disclosure of bank examination re-

ports did not prohibit production of financial institutions' customer records to bankruptcy trustee upon motion to compel, since statute allowed disclosure to be made pursuant to authorization of Federal Deposit Insurance Corporation or by court order. *In re Financial Corp. of America*, Bkrcty.C.D.Cal.1990, 119 B.R. 728.

FEDERAL REPORTER

VOLUME 721, SECOND SERIES



**9 TO 5 ORGANIZATION FOR WOMEN
OFFICE WORKERS,
Plaintiff, Appellee,**

v.

**The BOARD OF GOVERNORS OF the
FEDERAL RESERVE SYSTEM,
Defendant, Appellant.**

No. 83-1171.

United States Court of Appeals,
First Circuit.

Argued May 4, 1983.

Decided Nov. 2, 1983.

Rehearing and Rehearing En Banc
Denied Dec. 28, 1983.

Action was brought to compel Board of Governors of Federal Reserve System to disclose certain records under the Freedom of Information Act. The United States District Court for the District of Massachusetts, Andrew A. Caffrey, Chief Judge, 551 F.Supp. 1006, found that records were not exempt from disclosure, and Board appealed. The Court of Appeals, Re, Chief Judge, sitting by designation, held that: (1) exemption for confidential commercial information applied not only to information essential to government operation but also to information helpful to agency officials in carrying out their mandate; (2) if documents were helpful, then they would be exempt as confidential commercial information; and (3) even if documents were not exempt, their disclosure would not violate Trade Secrets Act.

Vacated and remanded.

Breyer, Circuit Judge, filed a dissenting opinion.

1. Federal Courts ⇐612

Failure of Board of Governors of Federal Reserve System to attack at trial application of prior decision to request under Freedom of Information Act for documents containing salary survey information obtained from private research group did not preclude consideration on appeal where consideration of the Board's position would help explain appellate court's construction

of exemption from the Act for confidential commercial information and where, because Board view was rejected, there was no unfairness to the parties. 5 U.S.C.A. §§ 552, 552(b)(4).

2. Federal Courts ⇐611

The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to discretion of Courts of Appeals, to be exercised on facts of individual cases.

3. Records ⇐59

Term "necessary," used by District of Columbia Court of Appeals to explain application of Freedom of Information Act's exemption for confidential commercial information to information which, if disclosed, would impair government's ability to obtain necessary information in the future, was meant to reflect Congress' purpose to protect information which would be particularly helpful to agency officials in carrying out their mandate and not just information absolutely essential to the operation of the agency or to the governing process itself. 5 U.S.C.A. §§ 552, 552(b)(4).

See publication Words and Phrases for other judicial constructions and definitions.

4. Administrative Law and Procedure ⇐760

In absence of bad faith or abuse of discretion, it is normally not for court to substitute its judgment for that of administrative agency in determining what otherwise appropriate and relevant data is particularly helpful in fulfilling agency's statutory responsibilities or in defining most effective means in acquiring it.

5. Records ⇐59

Documents containing salary survey information, which Board of Governors of Federal Reserve System obtained from private research group for purposes of determining salaries at Federal Reserve bank, would be exempt from disclosure under Freedom of Information Act's exemption for confidential commercial information even though the documents were not abso-

lutely essential to salary determinations where they might be helpful in determining salaries. 5 U.S.C.A. §§ 552, 552(b)(4).

6. Records — 31

If documents, containing salary survey information obtained by Board of Governors of Federal Reserve System from private research group for purpose of determining salaries for Federal Reserve bank employees, were not exempt from disclosure under Freedom of Information Act's exemption for confidential commercial information, disclosure of information would not violate Trade Secrets Act since only the disclosure of information which fits into FOIA exemption could constitute unauthorized disclosure and thus activate provisions of Trade Secrets Act. 5 U.S.C.A. § 552(b)(4); 18 U.S.C.A. § 1905.

Peter R. Maier, Appellate Staff, Civ. Div., Dept. of Justice, with whom J. Paul McGrath, Asst. Atty. Gen., Washington, D.C., William F. Weld, U.S. Atty., Joseph J. McGovern, Asst. U.S. Atty., Boston, Mass., Leonard Schaitman, Appellate Staff, Civ. Div., Dept. of Justice, Michael Bradfield, Gen. Counsel, and Stephen L. Siciliano, Senior Counsel, Washington, D.C., were on brief, for defendant, appellant.

Robert E. Williams, Douglas S. McDowell, Lorence L. Kessler, and McGuinness & Williams, Washington, D.C., on brief, for Equal Employment Advisory Council, amicus curiae.

John Reinstein, Boston, Mass., with whom Marjorie Heins, Boston, Mass., was on brief, for plaintiff, appellee.

Cornish F. Hitchcock, and David C. Vladeck, Washington, D.C., on brief, for the Freedom of Information Clearinghouse, amicus curiae.

Before CAMPBELL, Chief Judge, BREYER, Circuit Judge, and RE,* Chief Judge.

* The Honorable Edward D. Re, Chief Judge of the United States Court of International Trade,

RE, Chief Judge.

In this action, brought under the Freedom of Information Act, 5 U.S.C. § 552 (1976), the Board of Governors of the Federal Reserve System appeals from a decision of the District Court for the District of Massachusetts ordering the Board to disclose to the 9 to 5 Organization for Women Office Workers documents containing salary survey data obtained from the Boston Salary Survey Group, a private organization. The Board contends that the documents, which consist primarily of salary-related correspondence between the Board and the Federal Reserve Bank of Boston, are exempt from disclosure under exemption 4 of the FOIA because they contain "commercial or financial information obtained from a person and ... confidential." 5 U.S.C. § 552(b)(4).

The district court, relying on *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C.Cir.1974), *aff'd in part and rev'd in part sub nom. National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C.Cir.1976), held that the documents are not "confidential" within the meaning of section 552(b)(4) because their disclosure "will not impair the government's ability to obtain necessary information in the future." 551 F.Supp. 1006, 1010 (D.Mass.1982) (emphasis in original). Because we find that the Boston Salary Survey Group salary data may be sufficiently "necessary" to merit confidential treatment, we vacate the judgment of the district court and remand this action so that the district court may determine, in light of this opinion, whether the requested information is confidential within the meaning of FOIA exemption 4.

The Facts

The Board of Governors of the Federal Reserve System (the Board) is an agency of the United States Government. By statute, it is required to supervise the operations of the twelve congressionally chartered federal reserve banks. 12 U.S.C. § 248(j) (1976).

sitting by designation.

Cite as 721 F.2d 1 ()

Included among the Board's supervisory responsibilities is the duty to review and approve the salaries paid to employees of the federal reserve banks. 12 U.S.C. § 307 (1976).

The Board has determined that, in order to attract, retain and motivate qualified employees, the federal reserve banks should maintain levels of compensation which are competitive with those offered by other employees in the relevant labor market. Toward this end, the Board requires that the regional reserve banks base their salary proposals on timely surveys of pay rates, benefits and other elements of compensation offered by competitive employers. The Board directs the reserve banks to participate, when possible, in broadly-based community salary surveys.

Since 1956, the Federal Reserve Bank of Boston (the Bank) has been a member of the Boston Salary Survey Group (BSSG), a private organization composed of approximately 40 of the Boston area's largest employers. On a periodic basis, BSSG compiles salary and wage data obtained from each of its members and distributes the results of the survey to each member of the group. Before the survey is distributed to the members of BSSG, the data is encoded to prevent the identification of individual employers. The members of BSSG have explicitly agreed to treat the salary information contained in the surveys as confidential, and to refrain from making the information available to the public. Members who violate this pledge of confidentiality are subject to expulsion from the group.

On September 29, 1980, the Secretary of the Board of Governors received an FOIA request from the 9 to 5 Organization for Women Office Workers (9 to 5). 9 to 5 sought access to all documents in the possession of the Board relating to: 1) BSSG surveys; 2) the Federal Reserve Bank of Boston's use of BSSG surveys; 3) BSSG membership lists and criteria; 4) use of BSSG surveys by member companies; 5) salary adjustments made by the Bank since 1956; and 6) correspondence within the

Federal Reserve System involving BSSG salary surveys.

Relying on exemptions 2, 4 and 5 of the FOIA, 5 U.S.C. § 552(b)(2), (4), (5), the Secretary declined to release any of the documents requested by 9 to 5. 9 to 5 appealed the denial of its request to the Board of Governors, which also declined to release the requested documents.

Proceedings in the District Court

After the denial of its administrative appeal, 9 to 5 filed in the District Court for the District of Massachusetts a suit to compel disclosure of the requested documents. The Board identified more than 350 documents which it thought were responsive to 9 to 5's request. Among these documents were annual reserve bank reports containing BSSG salary information; correspondence between the Board and the Bank concerning salary recommendations; and internal Board memoranda in which the Board's staff analyzed the Bank's salary proposals. The Board maintained that each of the documents was exempt from the FOIA's general mandate of disclosure under at least one, and sometimes more than one, of four exemptions specified in 5 U.S.C. § 552(b), which provides in pertinent part:

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

(2) related solely to internal personnel rules and practices of an agency;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

The Board also claimed that disclosure of some of the documents would violate the Trade Secrets Act, 18 U.S.C. § 1905 (Supp. IV 1980), which makes it a criminal offense for employees of the government to disclose trade secrets and other confidential business information obtained from private sources unless the disclosure is authorized by law.

Both parties filed motions for summary judgment, and the district court, in a series of memorandum opinions and orders, ruled as follows. See *9 to 5 Organization for Women Office Workers v. Board of Governors of the Federal Reserve System*, 527 F.Supp. 1163 (D.Mass.1981); *Id.*, 547 F.Supp. 846 (D.Mass.1982); *Id.*, 551 F.Supp. 1006 (D.Mass.1982).

In an opinion issued on December 21, 1981, the district court rejected the Board's contention that disclosure of some documents would violate the Trade Secrets Act. 527 F.Supp. 1163, 1166-67 (D.Mass.1981). The court held that, since the FOIA authorized disclosure of all information held by government agencies, "[o]nly the disclosure of information which fits into one of the nine exemptions of [section] 552(b) may constitute unauthorized disclosure and thus may activate the provisions of the Trade Secrets Act." 527 F.Supp. at 1167. Consequently, the district court held that invocation of the Trade Secrets Act provided no additional justification for withholding the requested documents.

Since 9 to 5 did not oppose the Board's contention that some of the documents were exempt from disclosure under exemptions 2 and 6 of the FOIA, the district court granted the Board's motion for summary judgment as to those documents. 527 F.Supp. at 1167.

Finding that a genuine issue of fact existed as to the Board's exemption 4 claim, the court deferred its consideration of that issue. At the same time the court ordered the Board to submit some of the remaining documents for an *in camera* inspection to determine whether they could properly be withheld under exemption 5.

1. See *Vaughn v. Rosen*, 523 F.2d 1136 (D.C.Cir.

Following the *in camera* inspection, and after the Board had complied with an order requiring it to submit a revised *Vaughn* index,¹ describing the remaining documents and correlating each of them with the statutory provision under which it was claimed to be exempt, the district court issued a second opinion on September 30, 1982. 547 F.Supp. 846 (D.Mass.1982). In that opinion, the district court addressed the Board's contention that the requested documents could be withheld under FOIA exemption 5, 5 U.S.C. § 552(b)(5), which allows agencies to withhold inter-agency or intra-agency memoranda, which would not be available by law to a party other than an agency in litigation with the agency. The court ruled that the internal Board memoranda, in which the Bank's salary proposals were analyzed by the Board's staff, were intra-agency memoranda containing recommendations and advice which had not been explicitly adopted as the policy of the Board. These internal memoranda, therefore, were held to be exempt from disclosure under exemption 5 of the FOIA.

As to the remaining documents, however, the court held that exemption 5 was inapplicable. The court found that the remaining documents consisted of letters from the Bank to the Board, requesting approval of changes in the Bank's salary structure; letters from the Board to the Bank announcing the Board's decisions as to the Bank's salary proposals; and salary reports compiled by the Bank and submitted to the Board in support of the Bank's salary proposals. Since the Bank's salary proposals were routinely adopted by the Board, and thus became the policy of the Board, the court held that the documents did not fall within the ambit of exemption 5, which is intended to protect only pre-decisional, deliberative materials. See *N.L.R.B. v. Sears-Roebuck & Co.*, 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975); *Environmental Protection Agency v. Mink*, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973).

1975).

Cite as 721 F.2d 1 (1983)

After the district court's first two opinions, the sole issue left to be decided was whether the same documents which had been denied exemption 5 status, were protected from disclosure under FOIA exemption 4, which allows agencies to withhold commercial or financial information that was obtained from a person and is privileged or confidential. Before the district court ruled on this issue, it was informed that, as a result of an investigation into the Group's survey practices, the Boston Salary Survey Group and the Attorney General of the Commonwealth of Massachusetts had entered into a consent decree. Under the terms of the decree, BSSG agreed that future salary surveys would be randomly encoded, would contain only aggregate data, would not include any job category having fewer than 10 incumbents, and would not include an industry-by-industry analysis of the data. BSSG also agreed to disclose upon reasonable request the identity of its members, and to permit group members, if they so wished, to disclose to an employee the aggregate weighted average salary data for the pertinent job category.

On December 2, 1982, the district court issued its decision as to the Board's exemption 4 claim. 551 F.Supp. 1006 (D.Mass. 1982). The court noted that under that provision information is exempt from disclosure if it is 1) commercial or financial in nature, 2) obtained from a person, and 3) confidential. Having determined in its first memorandum opinion that the requested information was commercial or financial in nature, and had been obtained from a person, the court focused on the issue of confidentiality.

The district court stated, and in the district court the parties agreed, that the standard for determining whether information is confidential under exemption 4 was enunciated in *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C.Cir.1974) (*National Parks I*), *aff'd in part and rev'd in part sub nom. National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir.1976) (*National Parks II*). According to *National Parks I*:

[C]ommercial or financial matter is "confidential" for purposes of [exemption 4] if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; ¹⁷ or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

498 F.2d at 770 (footnote 17 omitted).

Before the district court, the Board relied exclusively on the first part of the *National Parks I* test. It contended that the government's ability to obtain necessary information would be impaired because disclosure of the requested documents would lead inevitably to the Board's expulsion from the Boston survey group, and thus deprive the Bank of information needed to keep the salaries of Bank employees competitive.

In applying *National Parks I* to the facts of this case, the district court observed that the first part of the test was itself a two-part test. According to the district court, in order for the Board to prevail it had to establish "first, that disclosure is likely to impair the Government's ability to obtain such information in the future, and secondly, that the information is 'necessary.'" 551 F.Supp. at 1008 (emphasis in original).

After ruling that a genuine issue of fact still existed as to the likelihood that disclosure would impair the Government's ability to obtain information in the future, the district court granted 9 to 5's motion for summary judgment based on the court's determination that the survey data was not "necessary" information. In so ruling the court said that "an inspection of the legislative history reveals that one of the major Congressional goals was to safeguard information given to an agency in its official capacity." (emphasis in original) (citations omitted). Here, however, the court felt that the Board obtained the information merely in a commercial capacity. The legislative history, the court concluded, does not "reflect any particular Congressional concern that an exemption to the FOIA be created to protect information gained by an agency

through commercial relationships established with non-governmental business entities."

The court noted that 8 of 12 Federal Reserve Banks establish salary levels without participating in private salary survey groups, and that the Federal Reserve Bank of Boston itself utilized other sources of wage information. This evidence, it concluded, showed usefulness but not necessity:

The information provided to the Federal Reserve Bank by the BSG undoubtedly facilitates the establishment of a competitive compensation structure; however, the information is not "necessary," within the meaning of exemption 4, to the Federal Reserve Bank's role in the Government. The salary data is not of such importance to the Government, or more importantly, to the governing process, that it should be exempt from the general policy of disclosure embodied in the [FOIA].

551 F.Supp. at 1010. Thus, the district court found that the salary survey information was not confidential within the meaning of exemption 4 because it was not "necessary" to the Reserve Bank's role in the federal government.

The Board has appealed the decision of the district court that the requested documents are not confidential within the meaning of FOIA exemption 4. Although in the district court the Board relied on *National Parks I* in attempting to bring the requested documents within the ambit of exemption 4, on this appeal the Board urges us to reject the reasoning of *National Parks I*. Instead, the Board urges us to hold that information is confidential under exemption 4 if "it is commercial or financial information that (1) the submitter expects to be

treated confidentially, and (2) is of a type that is entitled to a reasonable expect[ation] of confidentiality by the submitter." Alternatively, the Board contends that even under *National Parks I*, the decision of the district court should be reversed.

In addition, the Equal Employment Advisory Council, which has filed an *amicus* brief, contends that the district court erred in summarily rejecting the Board's contention that disclosure of the requested documents would violate the Trade Secrets Act.

[1, 2] 9 to 5 and *amicus curiae*, the Freedom of Information Clearinghouse, have filed briefs urging that we affirm the decision of the district court. At the outset, 9 to 5 contends that we should dismiss without consideration the Board's attack on *National Parks I* because that issue was not raised in the district court. Should we consider the precedential impact of *National Parks I*, 9 to 5 urges that we approve its reasoning. However, 9 to 5 also contends that, under either *National Parks I* or the more permissive standard proposed by the Board, the requested documents should not be treated as confidential because the Board has not made a factual showing sufficient to support a finding of confidentiality.²

FOIA Exemption 4

The nature of the information that is "confidential" within the meaning of exemption 4 has troubled the courts since the enactment of the FOIA. At least part of the confusion surrounding exemption 4 must be attributed to what has been described as "the tortured, not to say obfuscating, legislative history of the FOIA...." *American Airlines, Inc. v.*

Justice Blackmun observed in *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 2877 (1976): "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." See *United States v. Krynicki*, 689 F.2d 289, 291 (1st Cir.1982); *United States v. Golon*, 511 F.2d 298, 300-01 (1st Cir.), cert. denied, 421 U.S. 992, 95 S.Ct. 1999, 44 L.Ed.2d 483 (1975).

Cite as 721 F.2d 1 (1983)

Nat'l Mediation Board, 588 F.2d 863, 865 (2d Cir.1978). Most important as to the present case is that, with reference to exemption 4, both the House and Senate reports speak of information which is customarily regarded as confidential. H.R.Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966), reprinted in 1966 U.S.Code Cong. & Ad.News 2418, 2427; S.Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). Yet, neither of the reports which accompanied the Act explains why an earlier version of exemption 4, which would have exempted "trade secrets and other information obtained from the public and customarily privileged or confidential," was amended to delete the word "customarily" and add the words "commercial or financial," bringing the provision to its enacted form. See *National Parks I*, 498 F.2d at 769; K. Davis, *Administrative Law Treatise* § 3A.10 (Supp.1970).

The attempt to analyze the FOIA's legislative history is complicated further by the fact that the 1966 House Report has been discredited as an aid to interpreting the Act because it was submitted after the Senate had made its report and passed the bill. The House then passed the bill without amendment, thereby depriving the Senate of the opportunity to object or concur in the interpretation of the Act written into the House Report. See *Dep't of the Air Force v. Rose*, 425 U.S. 352, 365-67, 96 S.Ct. 1592, 1601-02, 48 L.Ed.2d 11 (1976); K. Davis, *Administrative Law Treatise* § 5.3 (2d ed. 1978).

Despite the shortcomings of the FOIA's legislative history, it has nonetheless been relied upon by the courts which have had to interpret exemption 4. A 1978 Report of the House Committee on Government Operations collected and analyzed the various approaches taken by the courts which have interpreted and applied exemption 4 of the FOIA. H.R.Rep. No. 95-1382, 95th Cong., 2d Sess. 16-21 (1978). Early cases which applied exemption 4 utilized a "promise of confidentiality test" which exempted from disclosure any commercial or financial information that was revealed to the government under an express or implied promise by the Government to keep the information

confidential. The promise of confidentiality test was soon abandoned, however, because it established no standards for determining when the Government could properly extend a promise of confidentiality. Neither was it useful to determine whether to release information that was arguably confidential, but which had been obtained without a Government promise of confidentiality. *Id.* at 16-17.

The promise of confidentiality test was succeeded by the "expectation of confidentiality test." Under that test, commercial or financial information was regarded as confidential if it was of a type that customarily would not be released to the public by the person from whom it was obtained. The expectation of confidentiality test was criticized and ultimately rejected because it placed too much emphasis on the intent of the submitter, making the Government's disclosure policy contingent on the disclosure policy of the individual submitter. *Id.* at 17-18.

The expectation of confidentiality test was followed by the two-prong test announced in *National Parks I*. In *National Parks I*, the Court of Appeals for the District of Columbia Circuit addressed the question whether information contained in Department of the Interior records concerning the operation of concessions in the national parks was "confidential" within the meaning of FOIA exemption 4. After noting that whether the records were customarily treated as confidential was a "relevant inquiry," the court stated that before holding information to be confidential "[a] court must also be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption." 498 F.2d at 767.

Based on its examination of exemption 4's legislative history, the court in *National Parks I* identified two important purposes served by the exemption: it "encourag[es] cooperation with the Government by persons having information useful to officials," and "[i]t protects persons who submit financial or commercial data to government agencies from the competitive disadvan-

2. In the special circumstances of this case, we reject 9 to 5's argument that because the Board did not oppose the *National Parks I* standard below, we should not now consider the Board's opposition to that standard. Here we believe it will help explain our construction of section 552(b)(4), if we discuss the merits of the Board's contention that *National Parks I* is flawed. As we ultimately reject the Board's view and accept the *National Parks I* formulation, there is no unfairness to the parties. As

tages which would result from its publication." *Id.* at 768. With these purposes in mind, the court concluded that "commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; 17 or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.* at 770 (footnote 17 omitted).

Since 1975, numerous courts have used the two-prong test announced in *National Parks I* as a basis for determining whether documents are confidential within the meaning of FOIA exemption 4. See e.g., *Orion Research, Inc. v. E.P.A.*, 615 F.2d 551 (1st Cir.), cert. denied, 449 U.S. 833, 101 S.Ct. 103, 66 L.Ed.2d 38 (1980); *American Airlines v. National Mediation Board, supra*; *Westinghouse Electric Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir.1976), cert. denied, 431 U.S. 924, 97 S.Ct. 2199, 53 L.Ed.2d 239 (1977); *Continental Oil Co. v. F.P.C.*, 519 F.2d 31 (5th Cir.1975), cert. denied, 425 U.S. 971, 96 S.Ct. 2168, 48 L.Ed.2d 794 (1976).

On this appeal the Board maintains that the court in *National Parks I* erroneously superimposed upon the statutory language of exemption 4 another requirement, i.e., "that documents not be exempt unless exemption was mandated by one of two particular policy interests that were among many reasons why Congress included the exemption." According to the Board, "the *National Parks I* court arbitrarily selected two particular policy interests that Congress recognized in adopting exemption 4 and elevated them to the equivalent of statutory language."

We believe that the Board's analysis of *National Parks I* is unduly restrictive. In its brief, the Board states that, under *National Parks I*, government records fall within the ambit of exemption 4 "only in instances where the records contained information that, if disclosed would jeopardize the Government's ability to obtain necessary information in the future or would

threaten competitive harm to the submitter." (Emphasis added.)

This interpretation of the *National Parks I* test ignores footnote 17 of that court's opinion, in which it stated:

We express no opinion as to whether other governmental interests are embodied in this exemption. *Cf.* 1963 Hearings at 200 where the problems of compliance and program effectiveness are mentioned as governmental interests possibly served by this exemption.

498 F.2d at 770 n. 17 (emphasis added). Thus, in *National Parks I*, the court recognized the possibility that government interests other than the ability to obtain necessary information in the future could justify non-disclosure under exemption 4.

The admonition against viewing the two prongs of the *National Parks I* test as the exclusive criteria for determining confidentiality under exemption 4 was repeated by the Court of Appeals for the District of Columbia Circuit in *Washington Post Co. v. U.S. Dep't of Health and Human Services*, 690 F.2d 252 (D.C.Cir.1982). The question presented in that case was whether, under the FOIA, the National Cancer Institute could be compelled to disclose the non-federal employment and financial interests of its consultants. Speaking of the basis for determining confidentiality under exemption 4, the court approved the reasoning of *National Parks I*, but noted:

We reserved in *National Parks I*, have not since decided, and do not decide here the question "whether other governmental interests are embodied in this exemption." 498 F.2d at 770 n. 17. In particular, we do not decide whether it is proper to take into account the government's need to attract qualified scientists, who might choose not to seek consulting positions in order to avoid public disclosure of Form 474's financial information. The government did not ask us in this case to consider including that specific interest in the *National Parks I* test.

690 F.2d at 268 n. 51. See also *National Parks II*, 547 F.2d at 678 n. 16.

Cite as 721 F.2d 1 (1983)

The possibility alluded to in *National Parks I* and *Washington Post* became a reality in *Comstock International (U.S.A.), Inc. v. Export-Import Bank of the United States*, 464 F.Supp. 804 (D.D.C.1979). In *Comstock*, the District Court for the District of Columbia was called upon to decide whether documents containing information about parties seeking loans from the Export-Import Bank could be withheld from disclosure under FOIA exemption 4. The district court stated:

The Court of Appeals in *National Parks I* suggested that the most common governmental interest threatened by disclosure of commercial and financial information would be the Government's ability to obtain similar necessary information in the future. . . . This interest is not affected here, for the information contained in the loan agreement is not submitted to the government but rather generated by it through Eximbank's participation in the negotiation process. The *National Parks I* court, however, expressly left open the possibility that other governmental interests, such as the interest in program effectiveness, are embodied by this exemption. . . .

464 F.Supp. at 807-08 (emphasis added). The court proceeded to hold that the likelihood that disclosure would impair the effectiveness of the Eximbank justified treating the requested documents as confidential within the meaning of exemption 4. *Id.* at 808.

The test of confidentiality which is proposed by the Board as a substitute for *National Parks I* does not resolve the problems that have been presented. To satisfy the first part of the Board's test, i.e., that the submitter expects the information to be treated confidentially, would depend solely on the submitter's subjective intent. This approach to exemption 4 was considered, and, for good reason, rejected by the House Committee on Government Operations in its 1978 Report, in which the Committee stated:

disclosure policy cannot be contingent on the subjective intent of those who submit information. For example, it clearly

would be inappropriate to withhold all information, no matter how innocuous, submitted by a corporation with a blanket policy of refusing all public requests for information.

H.R.Rep. No. 95-1382, 95th Cong., 2d-Sess. 18 (1978).

The second part of the Board's proposed test, which the Board refers to as the "objective portion" of the test, would require that the information be of a type that is entitled to a reasonable expectation of privacy. The difficulty with this aspect of the Board's test is readily illustrated by the Board's application of its proposed standard to the facts of this case. The Board asserts that the salary information which 9 to 5 seeks "is entitled to a reasonable expectation of privacy by the BSSG inasmuch as private employers like those that comprise the BSSG normally keep such data closely confidential." Thus, the second part of the Board's proposed test would focus on the treatment submitters customarily accord information rather than on the reasons why certain kinds of information should be deemed confidential.

A more objective and superior method for determining whether commercial or financial information is confidential within the meaning of FOIA exemption 4 is suggested in *National Parks I*. The principle to be derived from *National Parks I*, and the cases which have followed it, is that information will not be regarded as confidential under exemption 4 unless it can be demonstrated that disclosure will harm a specific interest that Congress sought to protect by enacting the exemption. The court in *National Parks I* identified the two interests which are most frequently threatened by the disclosure of commercial or financial information. However, we do not view *National Parks I* as imposing a limitation on the number of legitimate interests which are protected by exemption 4.

If it can be demonstrated with particularity that a specific private or governmental interest will be harmed by the disclosure of commercial or financial information, the

Government should not be precluded from invoking the protection of exemption 4 merely because the asserted interest is not precisely one of those two identified in *National Parks I*. The emphasis, however, should be placed on the potential harm that will result from disclosure, rather than simply promises of confidentiality, or whether the information has customarily been regarded as confidential. The inquiry in each

should be whether public disclosure of the requested commercial or financial information will harm an identifiable private or governmental interest which the Congress sought to protect by enacting exemption 4 of the FOIA. It is clear that the burden rests with the Government to identify the particular interest, and, also, to demonstrate how that interest will be harmed by public disclosure of the specific information which has been requested.

The court in *National Parks I* specifically noted that the "various exemptions included in the [FOIA] serve two interests—that of the government in *efficient operation* and that of persons supplying certain kinds of information in maintaining its secrecy." 498 F.2d at 767 (emphasis added). More specifically, the court in that case made the following statement which is very pertinent here:

The "financial information" exemption recognizes the need of government policymakers to have access to commercial and financial data. Unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials and the *ability of the Government to make intelligent, well informed decisions will be impaired*.

Id. (emphasis added).

Significantly, the court added that "[t]his concern," that is, the ability of the Government to make intelligent, well-informed decisions, "finds expression in the legislative history as well as the case law." *Id.*

[3] We conclude, therefore, that the district court took a too narrow view of the *National Parks I* court's use of the term "necessary" in its explanation of exemption

4's confidentiality requirement. That term was meant, we believe, to reflect Congress' purpose to protect information which would be particularly helpful to agency officials in carrying out their mandate. We find no intimation in the FOIA's legislative history that for commercial or financial information to be confidential within exemption 4, it must be "necessary" in the sense of being absolutely essential to the operations of the agency or to the governing process itself.

We also see little basis in this case for the district court's distinction between information gathered in the government's official capacity and information gathered in some supposed commercial capacity. The Bank's apparent reason for participating in the Boston Salary Survey Group was to help maintain competitive levels of compensation for its employees. This purpose was in accordance with regulations and policies promulgated by the Board pursuant to its statutory duty to review and approve the salaries paid to employees of the Federal Reserve Banks. These aims are neither so trivial nor so remote from the Bank's and the Board's official purposes as to render exemption 4 necessarily inapplicable. Effective personnel policies and salary structures are legitimate goals of official agencies of this type.

[4] In the regular confines of administrative law, courts are generally required to show considerable deference to the decisions of agency officials. In the absence of bad faith or abuse of discretion, it is normally not for a court to substitute its judgment for that of the administrative agency in determining what otherwise appropriate and relevant data is particularly helpful in fulfilling the agency's statutory responsibilities, or in defining the most effective means in acquiring it. Nothing now before us indicates that the Bank sought the salary data for other than a proper purpose, nor that the Board has sought to shield the data in bad faith. Furthermore, there is no suggestion that the Board abused its discretion by allowing the Reserve Bank of Boston to participate in a private salary group that was determined to be the most efficient and

cost effective method of obtaining salary data, even though similar data might have been obtained by different means.³

While there can be no doubt that "the disclosure requirement [should] be construed broadly, [and] the exemptions narrowly," *Soucie v. David*, 448 F.2d 1067, 1080 (D.C.Cir.1971), courts must nevertheless give effect to both the disclosure requirements as well as to the exemptions set forth in the statute. In view of the legitimate governmental interest of efficient operation, it would do violence to the statutory purpose of exemption 4 were the Government to be disadvantaged by disclosing information which serves a valuable purpose and is useful for the effective execution of its statutory responsibilities.

[5] We accordingly vacate the district court's judgment based on its determination that exemption 4 was inapplicable because the information was not necessary. The matter will be remanded to the court for further consideration in light of this opinion. The court remains free to determine that exemption 4 does or does not apply but should consider the matter in accordance with the preceding principles.

Trade Secrets Act

[6] Finally, we turn to the contention of *amicus curiae*, the Equal Employment Advisory Council (EEAC), that the district court should not have summarily rejected the Board's argument that disclosure of the salary survey data would violate the Trade

Secrets Act, 18 U.S.C. § 1905 (Supp. IV 1980). EEAC contends that even if the requested documents are not confidential within the meaning of FOIA exemption 4, the Board may nevertheless be prohibited from disclosing the documents by section 1905.

Section 1905 makes it a criminal offense for an officer or employee of the United States to disclose information relating to the trade secrets or confidential business information, including "confidential statistical data," of any person, firm, partnership, corporation or association "to any extent not authorized by law."⁴ Section 1905 has been construed to prohibit both unofficial "leaks" by individual Government employees, and formal agency action which results in unauthorized disclosures. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 298-99 and n. 29, 99 S.Ct. 1705, 1715-16 and n. 29, 60 L.Ed.2d 208 (1979).

EEAC argues that despite the similarity in the language of section 1905 and that of FOIA exemption 4, "where a severely restrictive interpretation is given to exemption 4, there remains the possibility that the information is within the ambit of protection provided by section 1905." According to EEAC, this result is possible because section 1905 is a disclosure exemption statute within the meaning of FOIA exemption 3, 5 U.S.C. § 552(b)(3), which provides that the FOIA's disclosure mandate does not apply to matters that are specifically exempted from disclosure by another statute.

3. While Judge Breyer's dissent suggests that the BSSG's contract requirement that the information should be kept confidential may be against public policy and thus, unenforceable, we do not understand the district court decision to rest on that point. To the extent this issue is not precluded by the Massachusetts attorney general's consent decree, the district court, of course, may consider it on remand.

4. 18 U.S.C. § 1905 provides: Whoever, being an officer or employee of the United States or of any department or agency thereof, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314), publishes, divulges, discloses or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official

duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than \$1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

Whether section 1905 is an exempting statute referred to in FOIA exemption 3 has not been finally resolved, see *Chrysler v. Brown*, 441 U.S. 281, 319 n. 49, 99 S.Ct. 1705, 1726 n. 49, 60 L.Ed.2d 208 (1979), and we need not decide it here. For the purpose of argument, however, it may be assumed that section 1905 is an exempting statute. Nevertheless, in this case, section 1905 cannot serve as a basis for prohibiting disclosure.

Section 1905 only prohibits information disclosures not authorized by law. The FOIA expressly authorizes the disclosure of all government information that is not exempted from disclosure by one of the nine exemptions enumerated in the FOIA. Thus, the district court correctly observed that "[o]nly the disclosure of information which fits into one of the nine exemptions of § 552(b) may constitute unauthorized disclosure and thus may activate the provisions of the Trade Secrets Act." 527 F.Supp. at 1167.

This result was anticipated by Congress when it amended FOIA exemption 3 in the 1976 Government in the Sunshine Act. P.L. No. 94-409, § 5(b), 90 Stat. 1241, 1247 (1976). The House Report stated:

[T]he Trade Secrets Act, 18 U.S.C. § 1905 which relates only to the disclosure of information where disclosure is "not authorized by law," would not permit the withholding of information otherwise required to be disclosed by the Freedom of Information Act, since the disclosure is there authorized by law. Thus, for example, if material did not come within the broad trade secrets exemption contained in the Freedom of Information Act, section 1905 would not justify withholding;

H.R.Rep. No. 94-880 Part I, 94th Cong., 2d Sess. 23 (1976), reprinted in 1976 U.S.Code Cong. & Ad.News 2183, 2205. See also J. O'Reilly, *Federal Information Disclosure* § 13.06 (1982). Consequently, if the government cannot prove that the requested documents are within FOIA exemption 4, their disclosure will not violate section 1905. If the documents are found to be exempt from disclosure under the FOIA,

they will not be disclosed and no question will arise under section 1905. Therefore, the district court correctly dismissed the Board's section 1905 contention.

The judgment of the district court is vacated, and this action is remanded so that the district court may determine, consistent with this opinion, whether the requested information is confidential within the meaning of exemption 4 of the FOIA.

It is so ordered.

BREYER, Circuit Judge (dissenting).

While I agree with most of the majority opinion, I disagree with the result. I think it unlikely that the district court, on remand, will find a policy reason strong enough to prevent disclosure; I would affirm its judgment now.

National Parks and Conservation Association v. Morton, 498 F.2d 765 (D.C.Cir.1974), and the majority's opinion make clear that Congress did not intend to apply the word "confidential" automatically whenever an agency official agrees to a business request to keep information confidential. Otherwise, given the temptation of government and business officials to follow the path of least resistance and say "confidential" whenever they seek to satisfy the government's vast information needs, the exemption would expand beyond what Congress intended. Thus, *National Parks* (which I agree is illustrative and does not lay down a dispositive test) looked beyond the simple promise of confidentiality and examined whether either the business or government had a legitimate interest in ascribing confidential status to the information. And, the majority holds that the government can invoke the exemption only if it shows how disclosure will significantly harm some relevant private or governmental interest.

The record, in my view, shows that the legitimate business and governmental interests against disclosure are unusually weak in this case. First, the BSSG has entered into a consent decree with the Attorney General of Massachusetts promising to make all future anonymous salary compilations public. It is not obvious why there would be a significantly greater need to

keep past compilations private. Moreover, as the Commonwealth's suit against the BSSG suggests, employers who collect cost information, circulate it only among themselves, and deny others access to it, risk antitrust difficulties. Their practice may be viewed as an agreement among buyers of a factor (secretarial services), see *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328 (1948); *Cordova v. Bache & Co.*, 321 F.Supp. 600 (S.D.N.Y.1970); 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 229a (1978), to circulate price information, see *United States v. Container Corp. of America*, 393 U.S. 333, 89 S.Ct. 510, 21 L.Ed.2d 526 (1969); *Sugar Institute, Inc. v. United States*, 297 U.S. 553, 56 S.Ct. 629, 80 L.Ed. 859 (1936); *American Column & Lumber Co. v. United States*, 257 U.S. 377, 42 S.Ct. 114, 66 L.Ed. 284 (1921); *Tag Manufacturers Institute v. FTC*, 174 F.2d 452 (1st Cir. 1949); P. Areeda, *Antitrust Analysis* ch. 3C (3d ed. 1981), where the purpose or effect of the agreement is to suppress competition and where the agreement provides no offsetting benefit through the public dissemination of the information. I do not know whether the Commonwealth Attorney General would have proven such an antitrust violation in his suit, for the parties settled the case by consent decree. But, the legitimate business need for confidentiality is far from obvious in the case of a confidential salary information-sharing agreement among competitors.

Second, the government's need for confidentiality seems slight. The government activity at issue—the setting of salaries—is peripheral to the main job of the Federal Reserve Board and its regional banks. Normally government salary setting is conducted in public. Of course, the Federal Reserve Banks set their salaries differently and they are authorized by the Board to find out what comparable businesses pay their workers. But, these facts do not show any special need to enter into what was evidently a legally questionable, private salary information-sharing agreement among various competing organizations. Rather, the only interest to which the government can point is its general interest in keeping a

promise of confidentiality—an interest that is at stake whenever a promise of confidentiality is made, but an interest that is weakest when the information is related as peripherally to the agency's main mission as it is here. To accept the threat to this interest as determinative in this case would come close to making a simple "request plus promise" necessarily sufficient to apply the "confidentiality" exemption.

In the majority's view, these matters are better explored on remand. However, this litigation over a few documents has gone on for some time. It has been the subject of several district court opinions. No information of great moment is involved. And, the fact that a directly related state court consent decree exists prevents the case from having much precedential significance. It thus seems to me better to settle the matter now than to remand the case for yet another district court determination, another opinion, and possibly still another appeal. The government has had sufficient opportunity to demonstrate its interest in the confidentiality of the information. I do not think it has done so adequately. It is unlikely that the district court can reach a different result under the standards the majority instructs it to apply. Therefore, I would simply affirm the district court's result.



NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

LABOR SERVICES, INC., Respondent.

No. 83-1207.

United States Court of Appeals,
First Circuit.

Argued Sept. 8, 1983.

Decided Nov. 7, 1983.

On application for enforcement of order of the National Labor Relations Board,

compel compliance. However, it is quite a different matter to say that any grant of such power carried with it the right of a citizen to sue his state in matters relating to interstate commerce. Each of the cases cited in *Briggs* and the additional ones cited to the court by plaintiffs, are all cases where the United States or a person or agency of the federal government brought an action against a state or a state agency to enforce compliance with the various federal statutes relating to interstate commerce. *California v. Taylor*, 353 U.S. 553, 77 S.Ct. 1037, 1 L.Ed.2d 1034 (1957); *California v. United States*, 320 U.S. 577, 64 S.Ct. 352, 88 L.Ed. 322; *United States v. California*, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567 (1936); *Bd. of Trustees of University of Illinois v. United States*, 289 U.S. 48, 53 S.Ct. 509, 77 L.Ed. 1025 (1933); *Sanitary District of Chicago v. United States*, 266 U.S. 405, 45 S.Ct. 176, 69 L.Ed. 352 (1925) are all in this category. None of them were confronted with the Eleventh Amendment issue as is this court, and, therefore, are not persuasive on the point in issue.

[3,4] Plaintiffs contend that the State of Idaho has knowingly waived its sovereign immunity or in the alternative consented to suit in this court by adopting Sec. 67-5332, Idaho Code, S.L. '71, Ch. 327, Sec. 7, which provides, in part, that:

" [T]he method of payment and rate of overtime compensation for the classified employees of the state hospitals, state schools, and state institutions of higher learning shall be in accordance with the provisions of the Fair Labor Standards Act of 1938, as amended. "

Adoption of the "method of payment and rate of overtime compensation" can hardly be construed to constitute a waiver or consent of the defendant, State of Idaho's, federal constitutional right of sovereign immunity to be proceeded against under the F.L.S.A. by its own citizens in the absence of some showing of legislative intent to do so. Reference

to those specific matters, only, should not be extended by meaningless semantics to include express or implied adoption of the remedy or enforcement provisions of the F.L.S.A. and, thus, a consent to suit. To hold to the contrary would be tantamount to following the rule set forth in *Briggs v. Sagers*, supra, which this court does not see fit to accept. In short, the court, in passing on this question, should "find" a waiver clearly spelled out by the "facts"—a court should not in an Eleventh Amendment situation "impose" a waiver.

[5] In further support of their contention that the State of Idaho has knowingly waived its sovereign immunity or in the alternative consented to suit in this court, the plaintiffs rely upon the recent decisions of *Smith v. State*, 93 Idaho 795, 473 P.2d 937 (1970), and *Grant Const. Co. v. Burns*, 92 Idaho 408, 443 P.2d 1005 (1968) for the proposition that the State has waived its sovereign immunity in tort and contract, respectively. Assuming arguendo that the defendant, State of Idaho, has so waived its sovereign immunity, these cases do not constitute a waiver of Idaho's Eleventh Amendment rights as discussed herein because that issue was not before the Idaho Supreme Court in those cases. If Idaho waived its sovereign immunity in those cases, it only waived the common law immunity of the sovereign to be sued in its own courts with respect to the subject matter of those cases. *De-Long Corp. v. Oregon State Highway Comm.*, 233 F.Supp. 7 (D.C.Ore.1964), aff'd 343 F.2d 911 (9th Cir. 1965), cert. den. 382 U.S. 877, 86 S.Ct. 161, 15 L.Ed.2d 119 (1965).

[6] The establishment, in 1965, of the Idaho Personnel Commission (S.L. '65, Ch. 289, p. 746; Title 67, Ch. 53, Idaho Code) providing for administrative redress and enforcement of the method of payment and rate of compensation with respect to state employees is a clear expression by the Idaho Legislature that it has not waived its Eleventh Amendment right to immunity from suit in the federal courts. On the contrary,

Cite as 339 F.Supp. 467 (1972)

it has provided state employees with a means whereby they can be heard regarding their salaries within the framework of Idaho's own sovereign spheres of activity.

The court does not consider it necessary to comment on the various other contentions raised by the parties in view of the fact its decision with respect to sovereign immunity renders such additional contentions moot.

Having fully reviewed the record and briefs of counsel and having heard oral argument, it is the opinion of the court that the defendants' motion to dismiss for lack of jurisdiction should be granted on the grounds that the defendant, State of Idaho, and any official or administrative agency of the State, are immune from suit in their official capacity under the F.L.S.A. for the reasons more fully set forth hereinabove.

Accordingly, it is ordered, that the defendants' motion to dismiss for lack of jurisdiction be, and the same hereby is, granted.



M. A. SCHAPIRO & CO., Inc., Plaintiff,
v.
SECURITIES AND EXCHANGE COM-
MISSION et al., Defendants.
Civ. A. No. 2243-70.

United States District Court,
District of Columbia.

Feb. 24, 1972.

Suit brought under public information section of the Administrative Procedure Act to compel disclosure of Securities and Exchange Commission's staff study and documents and transcripts received by the Commission in course of investigation. The District Court, Au-

brey E. Robinson, Jr., J., held that where neither Securities and Exchange Commission nor any of the individuals who testified attempted to point to any information which they specifically claimed was exempt from disclosure and the parties failed to show any rational reason, other than the bare claim of confidentiality, why items should not be made public, court, after an in camera examination, ordered disclosure of such documents after all material identifying the individual giving information was deleted where the person so requested.

Ordered accordingly.

1. Records ⇐14

Purpose of Freedom of Information Act is to increase citizen's access to government records, and there is no intention that in the process of closing loopholes so that the public will not be denied legitimate information that new loopholes be created. 5 U.S.C.A. § 552(b) (3-5, 7).

2. Records ⇐14

Statute relating to prohibition against general disclosure of confidential information does not prevent disclosure of information authorized to be disclosed under other laws including the Freedom of Information Act. 5 U.S.C.A. § 552; 18 U.S.C.A. § 1905.

3. Records ⇐14

Provision in Freedom of Information Act concerning documents specifically exempted from disclosure by statute relates to those other laws that restrict public access to specific government records and does not relate to statute that generally prohibits all disclosure of confidential information. 5 U.S.C.A. § 552(b) (3); 18 U.S.C.A. § 1905.

4. Records ⇐14

Documents received by Securities and Exchange Commission in course of staff study investigation on off-board trading problems were not interagency or intraagency memoranda or letters excepted from operation of Freedom of Information Act, where none of the docu-

ments expressed an exchange of ideas between the agencies or their respective staff members and there was no administrative policy-making process exhibited in any of the transcripts or documents. 5 U.S.C.A. § 552(b) (5).

5. Records $\Rightarrow$ 14

Documents received by Securities and Exchange Commission in course of staff's study on off-board trading problems were not exempt from disclosure on ground that they were investigatory files compiled for law enforcement purposes, where the agency failed to proffer any facts which would show it contemplated within reasonably near future a law enforcement proceeding based on the six-year-old materials. 5 U.S.C.A. § 552(b) (7).

6. Records $\Rightarrow$ 14

Possibility that the integrity of any broker-dealer or securities exchange might be harmed by the forced disclosure of documents gathered by the Securities and Exchange Commission in connection with study relating to trading rules and related practices of national securities exchanges was remedied by the deletion of all identifying material therefrom. Public Utility Housing Act of 1935, §§ 1 et seq., 17(c), 15 U.S.C.A. §§ 79 et seq., 79q(c).

7. Records $\Rightarrow$ 14

Exemption from general disclosure rules with respect to trade secrets and commercial or financial information obtained from person and privileged or confidential serves function of protecting privacy and competitive position of citizens who offer information to assist government policy makers which statutory scheme does not permit a bare claim of confidentiality to immunize agency files from scrutiny and court has the responsibility to determine validity and extent of claim of confidentiality, insuring that the exemption is strictly construed in light of its legislative intent. 5 U.S.C.A. § 552(b) (4).

8. Records $\Rightarrow$ 14

Regardless of whether information was submitted to government agency on

express or implied condition that it be kept confidential, on demand for disclosure a court should determine, on objective information, that this was not the type of information that one would reveal to the public. 5 U.S.C.A. § 552(b) (4).

9. Records $\Rightarrow$ 14

Where neither Securities and Exchange Commission nor any of the individuals who testified in suit to compel disclosure of documents and transcripts gathered by Securities and Exchange Commission in connection with staff study relating to trading rules and practices of national securities exchanges attempted to point to any information which they specifically claimed was exempt from disclosure and the parties failed to show any rational reason, other than the bare claim of confidentiality, why item should not be made public, court, after an *in camera* examination, ordered disclosure of such documents after all material identifying the individual giving information was deleted where the person so requested.

George D. Reyecraft, New York City, for plaintiff.

Thomas A. Flannery, U. S. Atty., Philip A. Loomis, Jr., Gen. Counsel, Richard E. Nathan, Special Counsel, and Michael A. Macchiaroli, Washington, D. C., for defendants.

OPINION

AUBREY E. ROBINSON, District Judge.

This suit was brought under the public information section of the Administrative Procedure Act, 5 U.S.C. § 552, popularly known as the Freedom of Information Act of 1966. M. A. Schapiro & Co., Inc., plaintiff, is an underwriter and broker-dealer in bank securities. Plaintiff is suing for an order and judgment enjoining the defendants from withholding, and ordering the defendants to produce, the Securities and Exchange Commission's Staff Study on the

off-board trading problem raised by the New York Stock Exchange's original Rule 394; and all transcripts made and documents received by the Securities and Exchange Commission in the course of that investigation. Plaintiffs filed a Motion to Shorten the Time for Defendant to Answer, And For a Preliminary Injunction. Both parties have briefed the questions of law and fact, and this Court is now prepared to resolve them on the merits.

The defendants contend that the information requested by plaintiff should not be disclosed. They note that the staff study examined national securities exchanges and was performed by the agency that is responsible for the regulation and supervision of those "financial institutions." [5 U.S.C. § 552(b) (8).] If the study, related transcripts, and documents submitted in the course of investigation are indiscriminately disclosed, it could harm the integrity and security of financial institutions. Further, defendants allege that this information is exempt from disclosure having been gathered in the course of an investigation compiling facts relating to the enforcement of laws. [5 U.S.C. § 552(b) (7).] Moreover, the defendants assert that they must protect the privacy and the competitive position of citizens who offer information to assist government policy makers. Thus, they note the exception to disclosure under the Act for "trade secrets" and commercial or financial information obtained from a person and privileged or confidential. [5 U.S.C. § 552(b) (4).] Defendants also allege that this information is exempt from disclosure under 5 U.S.C. §§ 552(b) (3) and (5). These sections relate to information specifically exempted from disclosure by statute, and inter-agency or intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency.

[1] The purpose of the Freedom of Information Act is to increase citizen's access to government records. It was not intended that in the process of clos-

ing loopholes in the requirement that the public not be denied legitimate information, that new loopholes were created. In *Bristol-Myers Co. v. Federal Trade Commission*, 138 U.S.App.D.C. 22, 424 F.2d 935 (D.C.Cir.), cert. denied, 400 U.S. 824, 91 S.Ct. 46, 27 L.Ed.2d 52 (1970), it was held that specific exemption of records from disclosure pursuant to the Freedom of Information Act were to be narrowly construed. Where the request for information seeks material outside the needed category, the Court should view the records and determine the discoverability of each record. Further, in order to hold the material exempt from disclosure under this Act, the Court must examine each document and explain the specific statutory justification for withholding that particular item.

In compliance with this direction from the Court of Appeals, this Court issued an Order requiring the production of the requested documents for *in camera* inspection to determine whether they actually fell within the exceptions of the Freedom of Information Act. One week after the signing of the Order for Production of Documents For *In Camera* Inspection, and approximately six years after its creation, the Securities and Exchange Commission released for public consumption, the entire unexpurgated Staff Study that is the subject of this suit. This disclosure by the Securities and Exchange Commission makes the questions of exemption, as they relate to the Staff Study, moot. This action on the part of the defendants, however, is an indication on their part as to the merits of their initial assertions.

Upon *in camera* inspection of the submitted documents, it is the conclusion of this Court that, for the following reasons, all of the requested documents must be made available to the plaintiff.

[2,3] First, these documents are not specifically exempted from disclosure by any statute. The Securities and Exchange Commission alleges that 18 U.S.C. § 1905 prevents the disclosure of this information. That statute, however,

does not prevent disclosure of information that is authorized to be disclosed under other laws. There is nothing in § 1905 of Title 18 that prevents the operation of the Freedom of Information Act. Moreover, the provision for documents specifically exempted from disclosure by statute [5 U.S.C. § 552(b) (3)] relates to those other laws that restrict public access to specific government records. It does not, as defendants allege, relate to a statute that generally prohibits all disclosures of confidential information.

[4] Second, the documents involved are not inter-agency or intra-agency memoranda or letters. [5 U.S.C. § 552(b) (5).] Thus, they are not encompassed by this exception. None of these documents express an exchange of ideas between agencies or their respective staff members. There is no administrative policy-making process exhibited in any of the transcripts or documents presented. This exception,

"[d]oes not authorize an agency to throw a protective blanket over all information by casting it in the form of an internal memorandum. Purely factual reports and scientific studies cannot be cloaked in secrecy by an exemption designed to protect only 'those internal working papers in which opinions are expressed and policies formulated and recommended.'"

[Bristol-Myers Co. v. FTC, *supra*, 424 F.2d at 939.]

[5] Third, although arguably these documents are investigatory files compiled for law enforcement purposes, the agency has not proffered any facts that would show it contemplated within the reasonably near future, a law enforcement proceeding based upon the materials sought. Six (6) years have elapsed and these documents have not been, nor is it alleged that they will be, the basis for either a criminal or civil action against anyone. In fact, the Securities and Exchange Commission's willingness to make public any transcript or document that the person testifying said would be permissible indicates that the

Securities and Exchange Commission was not concerned with providing information to possible defendants that was gathered by this investigation. Thus, the exception for such information does not apply in this case. [Bristol-Myers Co. v. F. T. C., *supra*.]

[6] Fourth, these documents arguably do not concern financial institutions. A "financial institution" as defined by the defendants, means a "bank, trust company, investment banker, or banking association or firm . . ." [15 U.S.C. § 79 et seq., 79q(c) (1971).] This definition does not include national securities exchanges or broker-dealers. The possibility, however, that the integrity of any broker-dealer or securities exchange may be harmed is remedied by the deletion of all identifying material. [Davis, Administrative Law Treatise, 139 (Supp. 1970).] This study and its related transcripts and documents, initiated and gathered for the express purpose of changing trading rules and related practices of national securities exchanges, does not fit within the exception in the Act for material, "contained in or related to examination, operating, or condition reports prepared by . . . an agency responsible for the regulation or supervision of financial institutions." By deleting identifying features of the transcripts and documents, before release, the defendants may prevent any possible adverse effect that could befall any of those persons who openly discussed off-board trading with the Securities and Exchange Commission.

[7] Fifth, these items do not fall within the exemption for "trade secrets" and commercial or financial information obtained from a person and privileged or confidential. [5 U.S.C. § 552(b) (4).] This exemption serves the function of protecting privacy and competitive position of citizens who offer information to assist government policy makers. The statutory scheme, however, does not permit a bare claim of confidentiality to immunize agency files from scrutiny. This Court has the responsibility to determine the validity and extent of the

claim of confidentiality, insuring the fact that the exemption is strictly construed in light of its legislative intent. Where possible, the Court may order identifying material deleted from a document to render it subject to disclosure. [Bristol-Myers Co. v. F. T. C., *supra*.]

[8] This exemption was considered in Grumman Aircraft Engineering Corp. v. Renegotiation Board, 138 U.S.App.D. 147, 425 F.2d 578 (1970). Here, an aerospace contractor sought disclosure of Board orders and opinions issued during the 1962-1965 renegotiations of the contracts of fourteen other companies, and also records relating to its own 1965 contract renegotiations. The request for records relating to Grumman's own contract renegotiations during 1965 included correspondence between the Board and Grumman's prime contractor. The Board asserted this material was exempted from disclosure under 5 U.S.C. § 552(b) (4). The Court of Appeals held, as to these documents, that the test for availability was "whether they contain commercial or financial information which the contractor would not reveal to the public." [425 F.2d at 582.] Regardless of whether the information was submitted on the express or implied condition that it be kept confidential, a Court should determine, on an objective basis, that this is not the type of information one would reveal to its public. In Bristol-Myers Co. v. F. T. C., the District Court had assumed that the wishes of the submitter of information would govern. [284 F.Supp. 745, 747 (1968).] The Court of Appeals, in remanding the action for more particular adjudication on each exemption, suggested that the bare claim by an agency that records are within the "trade secrets" exemption is not determinative. [424 F.2d at 938.] The Circuit Court did not expressly disapprove of the District Court's subjective test. It did, however, suggest that it was adopting an objective standard for confidential information when it cited *Grumman*. It is submitted that this is the better test and the one that en-

forces the purposes of the Act to its utmost.

It should be noted here that the information divulged in the volumes of transcripts and documents does not relate to "trade secrets." Upon viewing them, one may candidly state that their sole concern was the practice and procedure for off-board trading. As among competitors and the basic public that is involved in off-board trading, nothing in the documents or transcripts could be classified as a "trade secret." Moreover, none of the information given could objectively be said to be of the type that one would mind revealing it to the public.

[9] The Commission has not attempted, nor have any one of the individuals who testified attempted (and many were on notice of this pending litigation) to point to any information specifically that they claim is exempted. No one has shown this Court any information that would be of the type they would not normally want the public to know. These parties have failed to express to this Court any rational reason why these items should not be made public other than a bare claim of confidentiality. Most of the people who gave information to the Commission were genuinely concerned with keeping the activities of broker-dealers and national exchanges in a "fish-bowl" for the public to view. Thus, the action of this Court is consistent with their genuine desires.

Having carefully reviewed everything presented to this Court, *in camera*, it is determined that none of the material may be withheld. All identifying material that would indicate who the individual giving the information was shall be deleted where the person so requested. The facts, figures, policies, and procedures, however, as discussed in the transcripts and illustrated by the documents, are not to be altered. They are relevant to the plaintiff's cause, and fully discoverable.

Therefore, plaintiff's motion for a Preliminary Injunction restraining the defendants and each of them, and officers acting under their direction and authority or in active concert or participation with them, from further withholding the records in question that constitute the subject matter of this complaint is granted.

An appropriate order is entered herein.



Marilyn P. ROBINSON

v.

Christo ANASTASIOU.

Civ. A. No. 71-H-736.

United States District Court,
S. D. Texas,
Houston Division.
March 17, 1972.

Wrongful death suit filed by Texas citizen seeking recovery in excess of \$10,000 as the only beneficiary of her deceased ten-year-old son's estate. On motion of defendant to dismiss for lack of jurisdiction, the District Court, Singleton, J., held that under statute providing that the district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds \$10,000 and is between "(1) citizens of different states; (2) citizens of a state, and foreign states or citizens or subjects thereof," the defendant—a Greek seaman who was born in Egypt, who also carried a British passport, who had legally lived in Houston as a permanent resident since 1959, who held a "green card" from the U.S. Immigration Service but who had never applied for nor received a status of naturalized U.S. citizen—was a domiciliary of Texas (the state of citizenship of plaintiff) within the meaning of clause (1); however,

though the parties had the same domicile, the District Court had jurisdiction under clause (2) of the statute since defendant simultaneously possessed a foreign citizenship.

Motion denied.

Courts —321

Under statute providing that the district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds \$10,000 and is between "(1) citizens of different states; (2) citizens of a state, and foreign states or citizens or subjects thereof," the defendant—a Greek seaman who was born in Egypt, who also carried a British passport, who had legally lived in Houston as a permanent resident since 1959, who held a "green card" from the U.S. Immigration Service but who had never applied for nor received a status of naturalized U.S. citizen—was a domiciliary of Texas (the state of citizenship of plaintiff) within the meaning of clause (1); however, though the parties had the same domicile, the district court had jurisdiction under clause (2) since defendant simultaneously possessed a foreign citizenship. 28 U.S.C.A. § 1332(a) (1, 2).

W. Jiles Roberts, Houston, Tex., for plaintiff.

Henry P. Giessel, Talbert, Giessel & Stone, Houston, Tex., for defendant.

Memorandum and Order:

SINGLETON, District Judge.

Plaintiff, a citizen of Texas, has filed this suit seeking recovery in excess of \$10,000.00 as the only beneficiary of her deceased ten-year-old son's estate. Plaintiff's son sustained personal injuries resulting in his death as he rode his bicycle on a Houston, Texas, street on June 26, 1969. The defendant is a Greek seaman who was born in Egypt and who also carries a British passport. The defendant has legally lived in Hous-

Arthur JONES and Charles Garden
v.

CITY OF HOUMA et al.

Civ. A. No. 70-719.

United States District Court,
E. D. Louisiana,
New Orleans Division.
March 17, 1972.

Action under federal civil rights law and tort claim under state law against city and city police officers for death of prisoner from injuries allegedly inflicted on prisoner during alleged beating by city police officers. On city's motion to dismiss, or in alternative for summary judgment, the District Court, Jack M. Gordon, J., held that city was not "person" under the Civil Rights Act and could not be held liable for money damages and further held that, in view of lack of federal claim against city, court could not exercise pendent jurisdiction over the city.

Motion for summary judgment granted.

1. Civil Rights —13.8(3)

City was not "person" within meaning of Civil Rights Act and could not be held liable for money damages under Civil Rights Act in action for death of prisoner which allegedly resulted from injuries sustained during alleged beating by city policemen. 42 U.S.C.A. §§ 1981, 1983, 1985(3), 1986, 1988: 28 U.S.C.A. § 1343(3).

See publication Words and Phrases for other judicial constructions and definitions.

2. Courts —263

Existence of federal question between the same parties is basic requirement for pendent jurisdiction of federal court.

3. Courts —263

Where heirs of prisoner who allegedly died as result of injuries inflicted upon him during alleged beating by city

as a permanent resident since 1959 and holds a "green card" from the U.S. Immigration Service. The defendant has never applied for nor received a status of naturalized United States citizen.

The case is presently before the court on a motion to dismiss for lack of jurisdiction. Upon review of the pleadings, this court concludes that the defendant is a domiciliary of Texas within the meaning of 28 U.S.C. § 1332(a) (1). Accordingly, 28 U.S.C. § 1332(a) (1) does not confer jurisdiction on this court since it reads as follows:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—

"(1) citizens of different States;"

However, the second section of the diversity jurisdiction statute would provide for jurisdiction by this court:

"(2) citizens of a State, and foreign states or citizens or subjects thereof." 28 U.S.C. § 1332(a) (2).

Unfortunately, there is a dearth of precedent on this issue of having a plaintiff and defendant of the same domicile but the defendant simultaneously possessing a foreign citizenship. The case of *Aguirre v. Nagel*, 270 F.Supp. 535 (E.D.Mich.1967), is the only case this court has found that directly relates to the issue in question. There a young girl was domiciled with her parents in Michigan but also had a Mexican citizenship because her parents were Mexican nationals. Because the defendant in that case was also a citizen of Michigan, the court declined jurisdiction under 28 U.S.C. § 1332(a) (1). However, that court declared it would be bad policy to decline jurisdiction under 28 U.S.C. § 1332(a) (2).

Therefore, this court will take jurisdiction under 28 U.S.C. § 1332(a) (2) even though jurisdiction would not exist under 28 U.S.C. § 1332(a) (1).

Accordingly, the motion to dismiss is denied.

to suit. However, as pointed out by counsel for the successor-trustee, § 62a(1) of the Bankruptcy Act, 11 U.S.C. § 102(a) (1), charges the Bankruptcy Court with the duty of approving actual and necessary costs and expenses incurred by officers of the Court during the administration of the estate. The interest earned in this case was earned during estate administration. According to 3A Collier on Bankruptcy ¶62.14, at 1518, the determination of taxes due and payable during the administration of a bankrupt estate is subject to the exclusive jurisdiction of the Bankruptcy Court. See also, 3A Collier on Bankruptcy ¶64.106; Mertens, 9 Law of Federal Income Taxation ¶54.03, n. 10. It appears clear to the Court that § 2(a) of the Bankruptcy Act is sufficiently broad to permit the Bankruptcy Court to entertain and pass upon a tax question arising during the administration of the estate. Section 2(a) (15) of the Bankruptcy Act is further authority that the Bankruptcy Court has the power to determine the trustee's tax liability accruing during bankruptcy liquidation.

Although the Referee in Bankruptcy and the successor-trustee have sought an early audit of the tax return filed by the successor-trustee, the Internal Revenue Service has not yet done so, nor does it appear that the return will ever be audited. Counsel for the United States, Internal Revenue Service, has admitted that the costs of administration of this estate exceed the interest earned and that such expenses are deductible, however.

The United States has suggested that the successor-trustee await the expiration of the minimum limitations period, which counsel agree is three and one-half years in this instance, before clos-

ing the estate. This suggestion is patently contradictory to the principal aim of the Bankruptcy Act—the expeditious administration of estates and prompt payment of dividends to creditors.

The Court is persuaded by counsel for the successor-trustee's *reductio ad infinitum* argument, that while the trustee awaits the expiration of the limitations period, it would be sound business judgment and good administration to continue to maintain estate funds in interest-bearing accounts, and that each year the funds so maintained would earn additional interest income, another tax return would become due, and the trustee would be required to await the expiration of yet another limitations period. Each succeeding year of waiting would thus extend the period of limitations another year, creating an estate in perpetuity. The estate could never be safely closed, and the avowed purpose of the Bankruptcy Act would be defeated.

The contingent liability of the successor-trustee, thus, is certainly a controversy, brought about by the inaction or failure of the Internal Revenue Service to conduct an audit. This is a controversy the successor-trustee must resolve to close the estate.

In reaching this conclusion, the Court is not unmindful of the recent opposite ruling of another Judge of this Court in *In the Matter of Statmaster Corporation*, 332 F.Supp. 1248 (S.D.Fla.1971). It should be noted however, that in *Statmaster* the trustee did not file a tax return; whereas, in the case before this Court, the trustee did. Thereupon, for all of the aforesaid reasons, it is

Ordered and adjudged that the petition for review be and the same is hereby denied.

Frank FRANKEL et al., Plaintiffs,
v.
SECURITIES AND EXCHANGE COMMISSION et al., Defendants.

No. 71 Civ. 2369.

United States District Court,
S. D. New York.

Oct. 20, 1971.

Action, under Freedom of Information Act, to compel disclosure of information procured in investigation by Securities and Exchange Commission. The District Court, Lasker, J., held that any person may obtain material from investigatory files to extent that rules of discovery would make them available.

Order accordingly.

1. Records ⇐14

Under Freedom of Information Act exemption accorded investigatory files compiled for law enforcement purposes "except to the extent available by law to a party other than an agency," any person may obtain material from investigatory files to extent that rules of discovery would make them available, and the "except" clause is not limited to parties whom agency is investigating. 5 U.S.C. A. § 552(a, b), (b) (4, 5, 7).

2. Records ⇐14

Files once classified "investigatory files" do not forever after retain that characterization so as to be immune from disclosure under the Freedom of Information Act, and exemption expires when file is no longer reasonably likely to be involved in investigation for law enforcement purposes. 5 U.S.C.A. § 552(a, b), (b) (4, 5, 7).

3. Records ⇐14

Determination as to whether files of Securities and Exchange Commission contained information falling within exemption from disclosure accorded to "trade secrets and commercial or financial information obtained from a person

and privileged or confidential", and determination as to applicability of exemption accorded inter-agency or intra-agency memorandums or letters which would not be available by law to party other than agency in litigation with agency, were required to be made in camera in first instance; and where files sought were voluminous and important criminal cases were on court's docket which were required to be disposed of forthwith, matter would be referred to a special master. 5 U.S.C.A. § 552(a) (3), (b) (3-5, 7); 28 U.S.C.A. § 636.

4. Records ⇐14

Statute making officer liable criminally if he discloses investigatory material where not authorized by law does not establish exemption from Freedom of Information Act but merely penalizes disclosure of nonexempt material. 5 U.S.C. A. § 552(b) (3-5); 18 U.S.C.A. § 1905; U.S.Dist.Ct.Rules S. & E.D.N.Y., General Rule 35.

Kaplan, Kilsheimer & Foley, New York City, for plaintiffs; Dermot G. Foley, Robert N. Kaplan, New York City, of counsel.

Richard E. Nathan, Special Counsel, Securities and Exchange Commission, by Michael A. Macchiaroli, Washington, D. C.

Kevin Thomas Duffy, Regional Administrator, Securities and Exchange Commission, New York City, for defendants.

MEMORANDUM

LASKER, District Judge.

This suit grows out of plaintiffs' efforts to secure documents and records in the possession of the Securities and Exchange Commission ("SEC") for use by plaintiffs in a pending civil action against Occidental Petroleum Corporation and its officers. The papers are in the custody of the SEC as a result of an investigation of Occidental made by it which had been settled by a consent decree enjoining violations of § 10(b)

of the Securities Exchange Act and Rule 10b-5 thereunder.¹

Plaintiffs seek, under provisions of the Freedom of Information Act, 5 U.S.C. § 552, to compel the SEC to disclose to them the information secured in the SEC investigation of Occidental.² The SEC opposes on the ground that the material is exempt from disclosure under three statutory exemptions discussed below.

Two motions are before the court: Plaintiffs move for an injunction under the Act compelling defendants to disclose.³ Defendants move for summary judgment on the ground that under the seventh exemption of 5 U.S.C. § 552(b) they are entitled to judgment as a matter of law. For the reasons set forth below, the motion for summary judgment is denied and decision on the motion for an injunction is deferred pending examina-

tion by a special master of the material in the SEC's files to determine whether or not any documents fall within the exemptions of § 552(b) (4) or (5).

SUMMARY JUDGMENT AND THE EXEMPTION UNDER § 552(b) (7)

Section 552(a) requires government agencies to disclose upon request broad categories of information in their files. Section 552(b) lists nine exemptions from the obligation to disclose.

Section 552(b) (7) reads as follows:

"This section does not apply to matters that are—

" . . . (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."

1. Securities and Exchange Commission v. Occidental Petroleum Corp., et al., 71 Civ. 982 (S.D.N.Y. March 5, 1971).

2. On March 22, 1971, plaintiffs' counsel requested, by letter and on SEC form 86 (7-67), that the SEC furnish all "letters, telegrams, reports, studies, memoranda, notes, lists, tabulations, press releases, summaries, analyses and other writings, including drafts," constituting material which "supports, explains and/or discusses" all violations of 15 U.S.C. § 77j(b) "during the period January 1, 1966 to March 4, 1971 referred to or alleged in the complaint filed by the Securities and Exchange Commission on March 4, 1971, in the United States District Court, Southern District of New York [Index Number 71 Civ. 982], against Occidental Petroleum Corporation and Armand Hammer," and to furnish all SEC staff discussions of "any facts which support the allegations in the SEC complaint."

Although plaintiffs' request for SEC records is broad, the SEC's objections to it clearly indicate that the SEC knows the records being sought. "[T]his is all that the identifiability requirement contemplates. The fact that to find the material would be a difficult or time-consuming task is of no importance in making this determination; an agency may make such charges for this work as permitted by the statute. Wellford v. Hardin, 315 F.Supp. 175, 177 (D.Md.1970), aff'd 444 F.2d 21 (4th Cir., 1971).

3. Plaintiffs brought their motion on by Order to Show Cause filed June 1, 1971, "pursuant to 28 U.S.C. 1361." Clause One of the complaint recites: "This action is brought under Title 28 U.S.C. Section 1361, Title 5 U.S.C. Section 552, 17 C.F.R. 200.80, and the general equity powers of this court." 5 U.S.C. § 552 (a) (3) provides, inter alia, that this court "has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." This authority to grant injunctions is sufficient for the relief sought here. No duty arises under the Freedom of Information Act, when the agency involved has invoked an exemption clause under § 552(b), until the district court has reviewed the request for information *de novo*. Similarly, it has been held that Congress, by explicitly limiting the scope for judicial discretion in providing for injunctive relief when records are "improperly withheld," intended to curb the general equity powers of the court cited in plaintiffs' complaint. As was stated in *Soucie v. David*, 448 F.2d 1067 (D.C.Cir. 1971), "Congress clearly has the power to eliminate ordinary discretionary barriers to injunctive relief, and we believe that Congress intended to do so here." Accordingly, plaintiffs' motion is treated here as one for injunctive relief pursuant to 5 U.S.C. § 552; so much of the application as relies upon 28 U.S.C. § 1361 or general equity powers is superfluous.

Cite as 336 F.Supp. 675 (1971)

[1] The SEC contends that this provision exempts investigatory files "as a class" (including the Occidental documents) from the requirements of the Freedom of Information Act. The Commission also urges that the "except" clause (within the exemption) must, in the light of its legislative history, be read narrowly to apply only to parties whom a given agency is investigating, and not an outside party such as the plaintiffs here. Defendants admit that if this court finds that § 552(b) (7) does not provide the blanket exemption urged, then their motion for summary judgment must be denied.

Plaintiffs contend that neither the plain meaning of the exemption's language nor its legislative history supports the SEC position. Further, they argue that, since the investigation was terminated in a consent decree on March 5, 1971, and the SEC has failed to establish that any further investigation will occur, the Commission has not met the burden of demonstrating that exemption (7) is now applicable.

The courts have divided on the question whether § 552(b) (7) provides a blanket

exemption for all investigatory files. *Cowles Communications v. Department of Justice*, 325 F.Supp. 726 (N.D.Cal.D.C. 1971), held that investigatory files "need not be produced whether [enforcement] proceedings be contemplated or not." However, where, as here, the investigation by the agency has been completed, the exemption of § 552(b) (7) has been held not to apply.⁴ As the court remarked in *Bristol-Myers Co. v. Federal Trade Commission*, 138 U.S.App.D.C. 22, 424 F.2d 935, 939 (D.C.Cir.1970), "the agency cannot, consistent with the broad disclosure mandate of the Act, protect all its files with the label 'investigatory'".

the District Court must determine whether the prospect of enforcement proceedings is concrete enough to bring into operation the exemption for investigatory files, and if so whether the particular documents sought by the complaint are nevertheless discoverable."⁵

[2] As in *Cooney v. Sun Shipping & Drydock Co.*, 288 F.Supp. 708, 711 (E.D. Pa.1968), the question is presented "whether files once classified 'investigatory files' may forever after retain that characterization so as to be immune from

"We agree with the district court that the legislative history of this exemption reveals that its purpose was to prevent premature discovery by a defendant in an enforcement proceeding. The reports of the House Government Operations Committee and the Senate Judiciary Committee define the purpose of the exemption as the protection of the government's case in court. [Here] the request for records does not come from a party facing an enforcement proceeding to which the investigative material is germane."

The clause is specific and when viewed in the context of the right of "any person" under § 552(a) to obtain information ought not be narrowly construed. Any person may obtain material from investigatory files to the extent that the rules of discovery would make them available. See *Davis, The Information Act: A Preliminary Analysis*, 34 U.Chi.L. Rev. 761, 799-800 (1966); Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, at 38 (1967).

4. Even if we were to accept the holding of *Cowles Communications v. Department of Justice*, *supra* in text, defendants would not be entitled to summary judgment at this juncture since the file sought has not been submitted or offered to the court for review in connection with this motion. In *Cowles*, the court declared that, despite the blanket protection of § 552(b) (7), "[t]here remains . . . the question of whether a given file is an investigatory file compiled for law enforcement purposes . . . the Government should not be allowed to file an affidavit stating that conclusion and by so doing foreclose any other determination of the fact." Furthermore, there would remain an issue of fact as to whether the government's investigation for law enforcement purposes has concluded or whether action by the Attorney General was likely or probable.

5. The SEC's contention that if the "except" clause of § 552(b) (7) applies at all, it must be limited to the actual party being investigated by the agency, is without merit. As was stated in *Wellford v. Hardin*, (4th Circuit), *supra* note 2,

disclosure under the statute." Here the SEC's investigation has concluded. It is true that the possibility remains that under 15 U.S.C. § 78u(e) the SEC could "transmit" the file to the Attorney General who "may, in his discretion, institute the necessary criminal proceedings." However, the SEC has expressed no intention of transmitting the file, nearly one-half year has passed since the consent decree was entered, and absent some affirmative act by the agency to maintain the file as a legitimate one "compiled for law enforcement purposes" the Commission has not demonstrated for purposes of summary judgment, that the files any longer enjoy exemption under § 552(b) (7).

This construction of the "investigatory files" exemption finds support in the language of § 552, which explicitly provides (§ 552(c)) that "[t]his section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section." It protects adequately the government's interest in maintaining its files undisclosed for so long as it is actually or reasonably likely to be involved in an investigation for law enforcement purposes, and at the same time carries out the policy of the Act "to increase significantly the public availability of agency records." *LaMorte v. Mansfield*, 438 F.2d 448, 451 (2d Cir. 1971).

THE (b) (3), (4) and (5) EXEMPTIONS

Having concluded that defendants cannot rely upon § 552(b) (7), it remains to be determined whether or not any of the files sought are exempt under § 552(b) (3), (4) or (5).

[3] Section 552(b) (4) exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential"; section 552(b) (5) exempts "inter-agency or intra-agency memorandums or letters which would not be available by

law to a party other than an agency in litigation with the agency." As the record stands, it is impossible to determine whether and to what extent the files contain material covered by either the exemptions of (b) (4) or (5). Certainly it is reasonable to assume, however, that the files contain some information which may fall within the various categories enumerated in (b) (4), and the provisions of (b) (5) may apply to some extent as well. Such a determination must be made *in camera* in the first instance.

Section 552(a) (3) of the Act requires the court to expedite the determination of such questions. Since the files sought here are voluminous, containing 25 individual transcripts numbering 2100 pages and some 5000 pages of other documents,⁶ and since important criminal cases are on the court's docket which must be disposed of forthwith, the matter will be referred, pursuant to 28 U.S.C. § 636 and General Rule 35 of this Court, to the Magistrates of the Southern District of New York, to hold a hearing sitting as special master, at the earliest practicable date, for review of the material in the Commission's files and a report to this court as to whether and to what extent any of the material contained in such files falls within the exemptions of § 552 (b) (4) and (5).

[4] There remains for discussion the Commission's claim that the "(b) (3)" exemption applies. That clause provides that disclosure need not be made as to materials "specifically exempted from disclosure by statute." The Commission claims that, since 18 U.S.C. § 1905 provides *inter alia* that an officer of the United States is liable criminally if he discloses investigatory material where "not authorized by law," the material here sought is exempt under § 552(b) (3).

But this circular reasoning adds nothing to the defendants' armory. 18 U.S.C. § 1905 does not establish an exemption from the Freedom of Informa-

Cite as 336 F.Supp. 679 (1971)

tion Act, but merely penalizes a disclosure of non-exempt material. We must still determine whether the material here sought is or is not exempt.

CONCLUSION

Defendants' motion for summary judgment is denied. A decision on plaintiffs' motion for an injunction is deferred pending the receipt of the report of the special master and the court's action thereon.

Submit order, including provisions for reference to the special master.



RAYMOND INTERNATIONAL INC., Plaintiff,

v.

The M/T DALZELLEAGLE, her engines, boilers, etc., and McAllister Brothers Inc., Defendant and Third-Party Plaintiff,

v.

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, Third-Party Defendant.

No. 70 Civ. 2421.

United States District Court,
S. D. New York.

Nov. 4, 1971.

Proceeding on motion by bridge and tunnel authority to dismiss third-party complaint filed against it in suit arising after plaintiff's barge, while in tow by defendant third-party plaintiff's tug, collided with bridge owned and operated by the authority. The District Court, Lasker, J., held that the authority, which retained control over all its projects, including tolls and revenue collection, which was liable for debts and liabilities it incurred, which was required to acquire all real property in the name of city rather than state, and which issued bonds upon which neither state nor

city was liable, was not the alter ego of the state so as to be immune from suit, notwithstanding that it was created by the state, its commission members were appointed by the governor, and it was performing a state function.

Motion denied.

1. Courts ⇨361

In determining whether bridge and tunnel authority was immune from suit under the Eleventh Amendment, federal law had to be applied. U.S.C.A. Const. Amend. 11.

2. Courts ⇨303(2)

In determining whether public authority is the alter ego of the state and therefore immune from suit, whether the authority is entirely separate and distinct from the state for every purpose need not be determined, and what is critical is whether the relief sought is in effect, relief against the state. U.S.C.A. Const. Amend. 11.

3. Courts ⇨303(2)

Bridge and tunnel authority, which retained control over all its projects, including tolls and revenue collection, which was liable for debts and liabilities it incurred, which was required to acquire all real property in the name of city rather than state, and which issued bonds upon which neither state nor city was liable, was not the alter ego of the state so as to be immune from suit, notwithstanding that it was created by the state, its commission members were appointed by the governor, and it was performing a state function. U.S.C.A. Const. Amend. 11; Public Authorities Law N.Y. §§ 552, subd. 2, 553, subds. 1, 4, 561, 567.

4. Admiralty ⇨1

Where claim against bridge and tunnel authority was based on admiralty law, state statute providing that in any claim against the authority notice must be given to it within 90 days after the claim arises did not apply. Fed. Rules Civ. Proc. rule 9(h), 28 U.S.C.A.; General Municipal Law N.Y. § 50-e.

6. See Affidavit of John G. Carleton, sworn to June 7, 1971.

**METROPOLITAN LIFE INSURANCE
COMPANY, Plaintiff,**

v.

W. J. USERY et al., Defendants.

**NATIONAL ORGANIZATION FOR
WOMEN, Plaintiff,**

v.

**SOCIAL SECURITY ADMINISTRATION
et al., Defendants.**

Civ. A. Nos. 76-0914, 76-0087.

United States District Court,
District of Columbia.

Dec. 6, 1976.

As Amended Dec. 6, 1976.

Insurance companies as employers sought injunctive relief against disclosure of certain equal employment opportunity forms, affirmative action plans and compliance review reports. The District Court, Gasch, J., held that portions of the material fell within provisions of the Freedom of Information Act exempting from mandatory disclosure. Some of the exempt information came within the ambit of a statute penalizing unauthorized disclosure and, in addition, the agency abused its discretion in determining to disclose the exempt information. The public interest would not be harmed but rather would be served by the grant of injunctive relief with respect to the exempt information.

Relief granted.

1. Records ⇐ 14

In reverse Freedom of Information Act case, threshold question is whether documents sought are subject to mandatory disclosure or fall within exemption to Act; if documents, or portions thereof, fall within exemption to mandatory disclosure, Act does not apply, and agency's decision to disclose documents is subject to reversal only for abuse of discretion. 5 U.S.C.A. §§ 552, 552(a), (b)(3, 4, 6, 7).

2. Records ⇐ 14

In determining whether any Freedom of Information Act exemptions apply to information which agency intends to disclose, court is not confined to reviewing agency record; even under Administrative Procedure Act review, court must hold hearing and determine de novo whether exemption applies just as if suit were one brought to compel disclosure, but, in determining whether agency abused its discretion in deciding to disclose information, court must only review administrative record. 5 U.S.C.A. §§ 552, 552(a), (b)(3, 4, 6, 7), 701 et seq.

3. Records ⇐ 14

Civil Rights Act section concerning disclosure of information collected by employees or officers of the Equal Employment Opportunity Commission did not bar disclosure of equal employment opportunity forms, affirmative action plans and compliance review reports collected by the insurance compliance staff of the Social Security Administration. 5 U.S.C.A. § 552(b)(3); 18 U.S.C.A. § 1905; Civil Rights Act of 1964, §§ 709, 709(e) as amended 42 U.S.C.A. §§ 2000e-8, 2000e-8(e); 44 U.S.C.A. § 3508; Executive Order No. 11246 as amended 42 U.S.C.A. § 2000e note.

4. Records ⇐ 14

Where equal employment opportunity forms were released to Office of Federal Contract Compliance by joint reporting committee, not by Equal Employment Opportunity Commission, statute prohibiting agencies from disclosing confidential information received from other agencies which would not themselves be permitted by law to make disclosure were not applicable on theory that the equal employment opportunity forms were in effect released to OFCC by EEOC. 5 U.S.C.A. § 552(b)(3); Civil Rights Act of 1964, § 709(e) as amended 42 U.S.C.A. § 2000e-8(e); 44 U.S.C.A. § 3508.

5. Disorderly Conduct ⇐ 1

In a reverse Freedom of Information Act case, consideration of statute imposing

criminal sanctions for unauthorized disclosure of commercial or financial information submitted to the government was appropriate only after court determined that information sought fell within FOIA exemption for trade secrets and commercial or financial information which was privileged or confidential. 5 U.S.C.A. § 552(b)(3, 4); 18 U.S.C.A. § 1905.

6. Records ⇐ 14

Freedom of Information Act exemption for trade secrets and commercial or financial information which is privileged or confidential applies to confidential documents whose disclosure would cause substantial competitive injury to person from whom the information was obtained or would impair the government's ability to obtain information. 5 U.S.C.A. § 552(b)(4).

7. Records ⇐ 14

In reverse Freedom of Information Act case, insurance companies established substantial likelihood that some, but not all, of information contained in equal employment opportunity forms, affirmative action plans and compliance review reports fell within exemption for trade secrets and commercial or financial information which is privileged or confidential, but not all information contained in such documents was thus protected. 5 U.S.C.A. § 552(b)(4); Executive Order No. 11246 as amended 42 U.S.C.A. § 2000e et seq. as amended 42 U.S.C.A. § 2000e et seq.

8. Records ⇐ 14

Freedom of Information Act exemption for personnel, medical or similar files, disclosure of which would constitute clearly unwarranted invasion of personal privacy, is applicable only if information constitutes personnel, medical or similar files, if disclosure of information would constitute invasion of personal privacy, and if severity of the invasion of the personal privacy would outweigh public interest in disclosure. 5 U.S.C.A. § 552(b)(6).

9. Records ⇐ 14

Those portions of affirmative action program reports which contained data on

promotions, job performance, job evaluations and personal preferences and goals constituted "similar files" within Freedom of Information Act exemption applying to personnel, medical or similar files, disclosure of which would constitute clearly unwarranted invasion of personal privacy. 5 U.S.C.A. § 552(b)(6); Executive Order No. 11246 as amended 42 U.S.C.A. § 2000e note.

See publication Words and Phrases for other judicial constructions and definitions.

10. Records ⇐ 14

Disclosure of information concerning employee's promotion prospects, lack of promotion prospects, job performance evaluations, personal preferences and goals and reasons for employee's termination contained in the portions of affirmative action program reports would constitute substantial invasion of company employees' personal privacy, within Freedom of Information Act exemption for personnel, medical or similar files, the disclosure of which would constitute a clearly unwarranted "invasion of personal privacy." 5 U.S.C.A. § 552(b)(6); Executive Order No. 11246 as amended 42 U.S.C.A. § 2000e note.

See publication Words and Phrases for other judicial constructions and definitions.

11. Records ⇐ 14

Freedom of Information Act exemption for personnel, medical or similar files, disclosure of which would constitute clearly unwarranted invasion of personal privacy was designed to protect individuals from wide range of embarrassing disclosures, not just disclosure of derogatory information. 5 U.S.C.A. § 552(b)(6).

12. Records ⇐ 14

To determine whether invasion of privacy was "clearly unwarranted" within Freedom of Information Act exemption for personnel, medical or similar files, disclosure of which would constitute "clearly unwarranted" invasion of personal privacy, court was required to de novo balance the severity of invasion of personal privacy

with public interest in disclosure, with "tilt" in favor of disclosure. 5 U.S.C.A. § 552(b)(6).

See publication Words and Phrases for other judicial constructions and definitions.

13. Records ⇐ 14

With respect to very small portion of information contained in affirmative action program reports filed by insurance companies as employers, severity of invasion of personal privacy outweighed impairment to achievement of public interest, and such portions of the reports fell within Freedom of Information Act exemption for personnel, medical or similar files, disclosure of which would constitute clearly unwarranted invasion of personal privacy. 5 U.S.C.A. § 552(b)(6); Executive Order No. 11246 as amended 42 U.S.C.A. § 2000e note.

14. Records ⇐ 14

Where insurance companies as employers submitted affirmative action program reports and equal employment opportunity reports in connection with general monitoring process and not in connection with investigation of specific illegal actions, and compliance review reports were compiled by agency as part of same routine monitoring process, Freedom of Information Act exemption for investigatory records compiled for law enforcement purposes was not applicable. 5 U.S.C.A. § 552(b)(7); Executive Order No. 11246 as amended 42 U.S.C.A. § 2000e note.

15. Records ⇐ 14

That portions of documents contain exempt information does not alone prevent their disclosure; disclosure of exempt information is discretionary with agency, but the exercise of the discretion is subject to review for abuse. 5 U.S.C.A. § 552(b)(3, 4, 6, 7).

16. Records ⇐ 14

In determining whether agency has abused its discretion in disclosing information exempt under Freedom of Information Act, court must first determine whether disclosure of exempt information would be violation of criminal statute penalizing un-

authorized disclosure and, if not, whether disclosure would otherwise be abuse of discretion. 5 U.S.C.A. § 552(b)(3, 4, 6, 7); 18 U.S.C.A. § 1905.

17. Records ⇐ 14

Where agency's disclosure of certain portions of information exempt from mandatory disclosure would constitute criminal offense under statute penalizing unauthorized disclosure, agency's decision to disclose such information was clear abuse of its discretion. 5 U.S.C.A. § 552(b)(3, 4, 6, 7); 18 U.S.C.A. § 1905.

18. Records ⇐ 14

Those portions of employers' affirmative action program reports and compliance review reports which were exempt from mandatory disclosure only by virtue of Freedom of Information Act exemption for personnel, medical or similar files, disclosure of which would constitute clearly unwarranted invasion of personal privacy and which did not also come within exemption for trade secrets and commercial or financial information which is privileged or confidential were not within ambit of statute penalizing unauthorized disclosures; such information did not constitute information relating to "processes, operations or styles of work" within meaning of such statute. 5 U.S.C.A. § 552(b)(4, 6); 18 U.S.C.A. § 1905; Executive Order No. 11246 as amended 42 U.S.C.A. § 2000e note.

See publication Words and Phrases for other judicial constructions and definitions.

19. Records ⇐ 14

Employers' manning tables, department lists and projected promotions as contained in affirmative action program reports and compliance review reports constituted information pertaining to "processes, operations and styles of work" within meaning of statute penalizing unauthorized disclosure. 5 U.S.C.A. § 552(b)(4, 6); 18 U.S.C.A. § 1905; Executive Order No. 11246 as amended 42 U.S.C.A. § 2000e note.

20. Records ⇐ 14

Freedom of Information Act is not source of authority for promulgating regu-

lations on information exempt under Act, and release of exempt information cannot be justified on basis of such regulations. 5 U.S.C.A. § 552(b)(3, 4, 6, 7).

21. Records ⇐ 14

Insurance compliance staff of Social Security Administration and Office of Federal Contract Compliance abused discretion in failing to exercise any discretion with respect to information exempt under Freedom of Information Act, including exempt information as to which government had made representations of confidentiality, and in failing to give any meaningful consideration to whether discretionary disclosure was appropriate. 5 U.S.C.A. § 552(b)(3, 4, 6, 7); Civil Rights Act of 1964, § 709(e) as amended 42 U.S.C.A. § 2000e-8(e).

22. Records ⇐ 14

In reverse Freedom of Information Act case, court was required to consider public interest in disclosure, in determining whether agency abused its discretion in determining to disclose exempt information; balanced against public interest was interest of employing insurance companies in protecting their competitive position and employees' interest in their privacy, and, on balance, slight harm to public interest from nondisclosure was outweighed by serious harm to employees and companies. 5 U.S.C.A. § 552(b)(3, 4, 6, 7).

23. Records ⇐ 14

Government agency cannot evade requirements of Freedom of Information Act simply by representing to information supplier that information will be kept confidential. 5 U.S.C.A. § 552(a), (b)(3, 4, 6, 7); Civil Rights Act of 1964, § 709(e) as amended 42 U.S.C.A. § 2000e-8(e).

24. Records ⇐ 14

Where it appeared that information contained in affirmative action program reports was much more extensive than necessary under applicable executive orders and regulations, and that such extensive information had been included by employers in reliance on assurances of confidentiality, agencies abused discretion in determining to make disclosure without investigating

the employers' claims about representations of confidentiality or considering whether discretionary disclosure of such information was appropriate in light of such assurances. 5 U.S.C.A. § 552(a), (b)(3, 4, 6, 7); Executive Order No. 11246 as amended 42 U.S.C.A. § 2000e note; Civil Rights Act of 1964, § 709(e) as amended 42 U.S.C.A. § 2000e-8(e).

25. Constitutional Law ⇐ 318(2)

Agencies did not abuse discretion or deprive employers of due process by failing to give oral hearing on employers' claims of exemption after employers had filed, with agencies, written objections to disclosure of documents. 5 U.S.C.A. § 552(a), (b)(3, 4, 6, 7).

26. Injunction ⇐ 136(3)

In view of fact that, once disclosed, confidential information would lose its confidentiality forever, and that there was strong likelihood that disclosure would cause substantial injury to employers and their employees, injuries from disclosure would be irreparable, in context of application for preliminary injunction, and, though it was objected that preliminary injunction delaying disclosure would cause data to become increasingly stale, any such injury was clearly outweighed by serious and irreparable injury to the employers from denial of injunctive relief. 5 U.S.C.A. § 552(a), (b)(3, 4, 6, 7).

27. Injunction ⇐ 137(1)

That grant of preliminary injunction would cause injury by requiring expenditure of additional time and expense in litigation did not warrant any special consideration, being an aspect always present whenever court issues preliminary injunction.

Lois J. Schiffer and Margaret A. Kohn, Women's Rights Project, Center for Law and Social Policy, Washington, D. C., for D. C. NOW.

Joseph Guerrieri, Asst. U. S. Atty., Washington, D. C., for Federal Government.

Margaret F. Kelly and William J. Toppetta, Washington, D. C., for Metropolitan Life.

Michael S. Horne and Robert H. Loeffler, Covington & Burling, Washington, D. C., for Prudential Life.

William F. Joy and Robert P. Joy, Morgan, Brown, Kearns & Joy, Boston, Mass., admitted pro hac vice, for John Hancock Mutual Life.

MEMORANDUM

GASCH, District Judge.

In this action three insurance companies, the John Hancock Mutual Life Insurance Company ("John Hancock"), the Metropolitan Life Insurance Company ("Metropolitan"), and the Prudential Life Insurance Company of America ("Prudential"), seek to prevent the disclosure to the District of Columbia Chapter of the National Organization for Women ("D.C. NOW") of certain EEO-1 forms and affirmative action plans ("AAPs") submitted by the companies to the Insurance Compliance Staff of the Social Security Administration ("ICS") and the Office of Federal Contract Compliance ("OFCC") pursuant to Executive Order 11246, as amended by Executive Order 11375, and 41 C.F.R. § 60-2.1 et seq. and 41 C.F.R. 60-61.1 et seq.¹ The companies also seek to prevent the disclosure of certain Compliance Review Reports ("CRR") compiled by the ICS. This Freedom of Information Act ("FOIA") case is before this Court in a reverse posture. Unlike the typical FOIA action in which a party seeks to force the government to disclose infor-

mation, in a reverse FOIA action, a party who has submitted information to a government agency seeks to prevent the agency from disclosing information to a third party pursuant to a FOIA, 5 U.S.C. § 552(a), request.

As government contractors, each of these insurance companies are required, pursuant to the above Executive Orders and regulations, to file annually an EEO-1 for its entire domestic operation and a separate EEO-1 for each individual domestic facility and office. These reports contain summary data on the number of women and minority group members employed by the company. The AAPs which the companies are also required to prepare provide much more extensive and detailed information on the past and projected employment of women and minority group members by the company. The AAPs are made available to the ICS only when the ICS conducts a compliance review of a particular facility.² The ICS periodically conducts such reviews of the companies subject to its jurisdiction and thereafter compiles a CRR which may incorporate portions of the AAPs.

On August 9, 1975, D.C. NOW made a FOIA request to the ICS for all current EEO-1s, AAPs, and CRRs³ filed by or relating to the three insurance companies parties to this action and the Equitable Life Assurance Society of the United States.⁴ Upon being informed by the ICS of D.C. NOW's request, the insurance companies objected to disclosure, arguing that the documents were exempted under sections

the ICS. Since AAPs are submitted to the ICS only when a compliance review of a particular facility is undertaken, substantially less than all of the companies' AAPs were on file at the time of the request.

4. The Equitable Life Assurance Society of U.S. withdrew its objections to disclosure of its EEO-1s, AAPs, and CRRs after the ICS issued its decision. See letter from Werner Weinstock to ICS, dated February 11, 1976, Attachment 1 to D.C. NOW's Memorandum in Opposition to Application by Insurance Company Defendants for Temporary Restraining Order.

(b)(3), (4), (6), and (7) of the Act's exemptions. The ICS rejected most of the companies' contentions.⁵ The companies then appealed to the OFCC pursuant to the provisions of 41 C.F.R. § 60-60.4(d). On July 19, 1976, the OFCC substantially affirmed the ICS's decision. It determined to disclose the EEO-1s and substantial portions of the AAPs and CRRs. Wage and salary information, the names, social security numbers, employee identification numbers, and "other identifying information," comments revealing the closing or reorganization of a unit or units not already publicly disclosed, and training data revealing entry into a new market were deleted.⁶

While the administrative appeal was pending, the two suits which have been consolidated in this action⁷ were brought. On August 22, 1975, Metropolitan initiated litigation in the Southern District of New York to enjoin release to D.C. NOW of its EEO-1s, AAPs, and CRRs. This action was subsequently transferred to this Court. On January 16, 1976, D.C. NOW filed an action pursuant to the FOIA, 5 U.S.C. § 552, to

compel disclosure of the documents which were the subject of its August 9, 1975 request to the ICS. This Court stayed judicial proceedings in this suit pending the final agency decision.

On July 19, 1976, the insurance companies applied for a temporary restraining order to enjoin the release of the documents subject to D.C. NOW's August 9, 1975 request pending a hearing on a motion for preliminary injunction. After a hearing, this Court granted the companies' motion for a temporary restraining order.

This action is now before this Court on the insurance companies' motion for a preliminary injunction.⁸ The companies to enjoin the release by the agency of any of the EEO-1s, AAPs, and CRRs which are the subject of D.C. NOW's August 9, 1975 request to the ICS. Alternatively, if this Court is unwilling to enjoin the release of all of the foregoing material, Prudential seeks a preliminary injunction protecting certain portions of the documents.⁹ The companies take the position that the docu-

5. The ICS determined that most of the information contained in the documents was subject to mandatory disclosure under the FOIA. See letter from Everett Friedman, Chief of the ICS to Herbert Watchell, dated February 4, 1976, Exhibit F attached to Metropolitan's Application for a Temporary Restraining Order, filed July 19, 1976; letter from Everett Friedman to Robert Loeffler, dated February 4, 1976, Exhibit I attached to Prudential's Application for a Temporary Restraining Order, filed July 19, 1976; and letter from Everett Friedman to Milton Corey, dated February 4, 1976, Exhibit 2 attached to D.C. NOW's Motion For a Preliminary Injunction, filed February, 1976.

6. See letter from Lawrence Z. Lorber, Deputy Assistant Secretary and Director, OFCC, to Robert Loeffler, dated July 13, 1976, Exhibit Q attached to Prudential's Application for a Temporary Restraining Order, filed July 19, 1976; letter from Lawrence Z. Lorber to William F. Joy, dated July 13, 1976; and letter from Lawrence Z. Lorber to John Creedon, dated July 13, 1976, Exhibit I attached to Metropolitan's Application for a Temporary Restraining Order, filed July 19, 1976. These letters reveal that the OFCC based its decision to disclose the documents on a determination that none of the exemptions to the FOIA relied upon by the companies were applicable.

7. *National Organization for Women, Washington, D. C. Chapter v. Social Security Administration of the Department of Health, Education and Welfare, et al.*, Civil Action No. 76-0087 (D.D.C.1976), and *Metropolitan Life Insurance Company v. Usery, et al.*, Civil Action No. 76-914 (D.D.C.1976). The federal agencies and officials who are the defendants in these actions are frequently referred to hereinafter as the "federal defendants."

8. The Court held evidentiary hearings on this matter on September 8, 10, 13 and 14, and the parties have submitted numerous memoranda, affidavits, exhibits, and proposed findings of fact and conclusions of law.

9. Specifically, Prudential seeks, in the alternative, a preliminary injunction protecting: 1) its DAPs; 2) the work force analyses, job group analyses and personnel practices analyses contained in its utilization analysis in its AAPs; 3) the Identification of Problem Areas in its AAPs; 4) the Statement of Goals and Timetables contained in its AAPs; and 5) any portions of its CRRs which consist of attachments of Prudential documents containing the above information.

Although only Prudential has specifically made such an alternative motion, this Court is obligated under the Act to consider on a page-

1. The Secretary of Labor, who has the overall responsibility for enforcing the affirmative action requirements to which federal contractors are subjected, has delegated this authority to the Department of Labor's Director of the OFCC. The OFCC has in turn designated various federal agencies as "compliance agencies" which review and rule in the first instance on the adequacy of a contractor's affirmative action program and efforts. The ICS, a division of the Social Security Administration, is the compliance agency for the insurance industry.
2. The scheduling of compliance reviews is governed by 41 C.F.R. § 60-60.3.
3. Specifically, D.C. NOW requested only the EEO-1s, AAPs, and CRRs for 1975 on file with

ments are exempt from mandatory disclosure under the Act by virtue of exemptions (b)(3), (4), (6), and (7) of the Act, 5 U.S.C. §§ 552(b)(3), (4), (6) and (7), and that the agency abused its discretion in deciding to disclose the documents.¹⁰ The companies have met the well-recognized standards for preliminary injunctive relief outlined by this Circuit in *Virginia Petroleum Jobbers Association v. F.P.C.*, 104 U.S.App.D.C. 106, 259 F.2d 921 (1958), with respect to certain data contained in the AAPs and those portions of the CRRs which incorporate this data. Specifically, this Court has determined that the insurance companies are entitled to preliminary injunctive relief as to the disclosure of the work force analyses, the department lists, the statistical and narrative data on projected promotions, the reasons for termination contained in certain termination tables, and certain narrative comments concerning performance evaluations or preferences or comments of employees contained in the AAPs and any portions of the CRRs which incorporate this data. The companies have not met the standards for preliminary injunctive relief with respect to the disclosure of the EEO-1s or any of the other data contained in the AAPs and CRRs.¹¹

JURISDICTION AND STANDARD OF REVIEW

The parties do not dispute this Court's jurisdiction over the matter. This Court has jurisdiction to review the agency's decision under the Administrative Procedure

by-page basis what, if any, of the information contained in the documents is subject to mandatory disclosure and what, if any, of the information comes within an exemption. Therefore, the Court has not limited its consideration to whether an injunction protecting all of the information in the documents submitted by the companies is warranted or not for any of the companies. Instead, the Court has examined each of the companies' documents on a page-by-page basis to make the required determinations.

10. Only Prudential, of the three insurance companies, has addressed the question of whether the determination to disclose the exempt information constituted an abuse of the agency's discretion in any depth. The Court has, however, considered this question with respect to

Act, 5 U.S.C. § 701 et seq.; *Pickus v. United States Board of Parole*, 165 U.S.App.D.C. 284, 507 F.2d 1107, 1110 (1974); *Charles River Park "A", Inc. v. H.U.D.*, 171 U.S.App.D.C. 286, 519 F.2d 935, 939 (1975).

The parties are in dispute as to the appropriate standard of review in a reverse-FOIA case. The federal government and D.C. NOW argue that the Court is limited to reviewing the agency's decision, on the basis of the agency record, for an abuse of discretion.¹² The insurance companies contend that they are entitled to *de novo* review in this Court. To some extent, both positions have merit.

[1,2] In a reverse-FOIA case the threshold question is whether the documents sought are subject to mandatory disclosure or fall within an exemption to the Act. If the documents sought are subject to mandatory disclosure, the lawsuit is at an end. If the documents, or portions thereof, fall within an exemption to mandatory disclosure, the Act does not apply and the agency's decision to disclose the documents is subject to reversal only for an abuse of discretion. *Charles River Park "A", Inc. v. H.U.D.*, supra, at 941-42. In determining whether any exemptions apply to the information which the agency intends to disclose, the Court is not confined to reviewing the agency record. Even under APA review, the Court must hold a hearing and determine *de novo* whether an exemption applies just as if the suit were

the documents of all three of the insurance companies.

11. D.C. NOW urges that Metropolitan and Prudential have waived certain objections because of the position they took at the administrative level and, with respect to Prudential, because of the position it took in the temporary restraining order proceeding. The Court is unpersuaded by these claims. Even assuming such a waiver did occur, it is not relevant in light of the Court's view of the merits.

12. They argue that the evidence adduced at the oral hearing and the affidavits are relevant only to the question of irreparable injury.

one brought to compel disclosure. *Id.* at 940 n. 4. However, in determining whether the agency abused its discretion in deciding to disclose the information, the Court must only review the administrative record. *Id.* at 943.

MERITS

The parties have submitted numerous EEO-1s and AAPs, which they have stipulated to be representative of the documents which are the subject of this action, to the Court. No CRRs were submitted. After reviewing the documents on a page-by-page basis to determine what, if any, of the information falls within an exemption to the Act, the Court is of the opinion that there is a substantial likelihood that certain portions of the AAPs fall within the ambit of the (b)(4) and (b)(6) exemptions. To the extent that the CRRs incorporate portions of the AAPs¹³ which the Court has determined to be exempt, those portions of the CRRs are also likely to fall within these exemptions. The EEO-1s do not come within either the (b)(4) or (b)(6) exemption. Neither the (b)(3) nor (b)(7) exemption is applicable to the EEO-1s, AAPs and CRRs.

EXEMPTION (b)(3)

This exemption applies to documents "specifically exempted from disclosure by statute." The insurance companies rely on these exemption statutes: § 709(e) of the Civil Rights Act, 42 U.S.C. § 2000e-8(e); 44 U.S.C. § 3508; and 18 U.S.C. § 1905.

[3] Section 709(e) of the Civil Rights Act concerns the disclosure of information collected by the Equal Employment Opportunity Commission (EEOC) pursuant to its authority under § 709 of the Civil Rights Act by employees or officers of the EEOC. The documents involved in the instant ac-

13. Although no CRRs were submitted to the Court for its inspection, all parties have represented that the CRRs may contain portions of the AAPs. Should the parties not be able to agree as to the extent to which the CRRs incorporate exempt portions of the AAPs, represent-

ation were collected by the ICS, not the EEOC. The contentions put forth by the insurance companies to circumvent this hurdle to the applicability of § 709(e) are lacking in merit. The courts which have considered the question of the applicability of § 709(e) to EEO-1s, AAPs, and CRRs have uniformly rejected such arguments and held that § 709(e) is not applicable to documents. See *Sears, Roebuck and Co. v. General Services Administration*, 166 U.S.App.D.C. 194, 509 F.2d 527 (1974); *Goodyear Tire and Rubber Co. v. Dunlop, C.A. No. 75-1828* (D.D.C. December 9, 1975); *Hughes Aircraft Company v. Schlesinger*, 384 F.Supp. 292 (C.D.Cal.1974); *Legal Aid Society of Alameda County v. Shultz*, 349 F.Supp. 771 (N.D.Cal.1972). Therefore the Court holds that § 709(e) does not bar disclosure of these documents.

[4] Only John Hancock relies on 44 U.S.C. § 3508. Section 3508 provides that when confidential information supplied to one agency is released to another agency, the recipient agency is subject to the same disclosure restrictions as the original agency. John Hancock argues that since the EEO-1s¹⁴ were in effect released to the OFCC by the EEOC, under § 3508 the OFCC is subject to the same disclosure restrictions with respect to this data as is the EEOC, in particular § 709(e). The EEO-1s were released to the OFCC by the Joint Reporting Committee (JRC), not the EEOC. The arguments put forth by John Hancock to circumvent this hurdle to the applicability of § 3508 have repeatedly met with defeat in the courts. See *Sears, Roebuck and Co. v. General Services Administration*, 166 U.S.App.D.C. 194, 509 F.2d 527 (1974); *Goodyear Tire and Rubber Co. v. Schlesinger*, supra; *Lawyers Cooperative Publishing Co. v. Schlesinger*, C.A. No. 74-212 (W.D.N.Y. July 20, 1974). Therefore, the

ative CRRs will have to be submitted to the Court at that time.

14. Apparently John Hancock limits its § 3508 argument to EEO-1s. Even if the argument is addressed to the AAPs and CRRs as well, it is equally defective.

Court holds that the disclosure of the EEO-1s is not barred by § 3508.

[5] The applicability of 18 U.S.C. § 1905 to these documents presents a more difficult question.¹⁵ Section 1905 imposes criminal sanctions for the unauthorized disclosure of commercial or financial information submitted to the government. The insurance companies rely on the Fourth Circuit's recent decision in *Westinghouse Electric Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), and precedents from other district courts to the effect that § 1905 is one of the statutes incorporated into the (b)(3) exemption and that AAPs, EEO-1s and CRRs are exempt from disclosure, in part, because of § 1905.¹⁶

The District of Columbia Circuit has taken a somewhat different approach to the applicability of § 1905. In *Charles River Park "A", Inc. v. H.U.D.*, *supra*, this Circuit indicated that while the (b)(3) exemption may incorporate § 1905, the scope of § 1905 is no broader than the scope of the (b)(4) exemption to the Act. *Id.* at 941 n. 7. Consideration of § 1905 was deemed to be appropriate in a reverse-FOIA case only after a court determined that the information sought falls within the (b)(4) exemption. At that point, § 1905 was seen as a check on the discretionary disclosure of exempt information. *Id.* at 943.¹⁷ Therefore, consideration of the applicability of § 1905 is premature at this point and will be deferred until after this Court considers the applicability of the (b)(4) exemption.

15. To a large extent this issue will soon be of historical interest only. Congress has recently amended the (b)(3) exemption, in Public Law 94-409, to limit its scope. The Committee reports indicate that one of the purposes of this amendment is to assure that § 1905 is not considered to be within the ambit of exemption (b)(3). See H.R.Rep.No.880, 94th Cong., 2d Sess., Part I, 23 (1976) and Conference Report, H.R.Rep.No.1441, 94th Cong., 2d Sess., 25 (1976), U.S.Code Cong. & Admin.News, p. 2183.

16. They rely primarily on *Chrysler Corp. v. Schlesinger*, 412 F.Supp. 171 (D.Del.1976), and *Westinghouse Electric Corp. v. Schlesinger*, 392 F.Supp. 1246 (E.D.Va.1974). However, the court in *Westinghouse* expressly declined to resolve the question of the applicability of

EXEMPTION (b)(4)

[6] This exemption applies to "trade secrets and commercial or financial information" which is privileged or confidential." Specifically, this exemption applies to confidential documents whose disclosure would cause substantial competitive injury to the person from whom the information was obtained or would impair the government's ability to obtain information. *National Parks and Conservation Ass'n v. Morton*, 162 U.S.App.D.C. 223, 498 F.2d 765, 770 (1974). The courts which have considered the applicability of this exemption to EEO-1s, AAPs, and CRRs have reached disparate results. Compare *Westinghouse Electric Corp. v. Schlesinger*, 392 F.Supp. 1246 (E.D.Va.1974), affirmed *Westinghouse Electric Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976); *U.S. Steel Corp. v. Schlesinger*, 8 F.E.P. Cases 923 (E.D.Va.1974), affirmed *Westinghouse Electric Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976); *Chrysler Corp. v. Schlesinger*, *supra*; with *Sea-Land Service, Inc. v. Morton*, C.A. No. 76-161 (D.D.C.1976); *Sears, Roebuck and Co. v. General Services Administration*, 402 F.Supp. 378 (D.D.C.1975) appeal pending; *Goodyear Tire and Rubber Co. v. Dunlop*, *supra*; *Hughes Aircraft Company v. Schlesinger*, *supra*; *Lawyers Cooperative Publishing Co. v. Schlesinger*, *supra*.

[7] In the instant action, the companies have shown that there is a substantial likelihood that some, but not all, of the information contained in these documents falls

§ 1905 to EEO-1s and AAPs, although it did view plaintiff's argument as raising substantial questions. *Id.* at 1248-49.

17. The insurance companies argue that the Supreme Court's decision in *F.A.A. Administrator v. Robertson*, 422 U.S. 255, 95 S.Ct. 2140, 45 L.Ed.2d 164 (1975), sheds doubt on the merits of this Circuit's interpretation of the (b)(3) exemption and § 1905. The *Robertson* decision was concerned primarily with the question of what statutes fall within the ambit of the (b)(3) exemption. The Circuit's decision in *Charles River Park "A", Inc. v. H.U.D.*, *supra*, construed the scope of § 1905 and to that extent is not affected by the *Robertson* decision.

Cite as 426 F.Supp. 150 (1976)

within the (b)(4) exemption. The companies have made this showing with respect to the work force analyses, department lists and projected promotions data contained in the AAPs and any portions of the CRRs which incorporate this data. The companies have not made this showing with respect to the EEO-1s or any of the other information contained in the AAPs of CRRs.

The testimony adduced at the hearing revealed that the insurance industry is a highly competitive industry and that the insurance companies involved in this action are engaged in intense competition with numerous other companies.¹⁸ There are approximately 1600 to 1800 insurance companies in the United States.¹⁹ These companies, including the insurance companies who are parties to this action, compete not only with other insurance companies but also with the newly emerging administrative services companies.²⁰ These administrative services companies perform only the administrative functions involved in insurance business.²¹ Dr. Schwartzchild, testifying for D.C. NOW and the federal defendants, agreed that there was intense competition at the point of sale, although he did not believe there was competition in other aspects of the insurance business.²² The wit-

nesses for the insurance companies testified throughout the hearing that competition exists in all aspects of the insurance business.²³ In the case of group insurance contracts such as the one handled by John Hancock's Ford Group Office which is renewable on an annual basis, the competition at the time of renewal is particularly intense.²⁴

The work force analyses, department lists, and projected promotions data contained in these documents are clearly confidential commercial information.²⁵ This data constitutes commercial information in that it pertains to the mode of operations, work force, policies, and employment practices of these companies. The companies have not customarily released these documents to the public and have consistently treated this information in a confidential manner.²⁶

With respect to the question of whether disclosure of these documents will cause substantial competitive harm to the companies or impair the government's ability to obtain information, the companies have set forth numerous contentions as to how such detrimental results will flow from disclosure of these documents. The Court is not persuaded that there is a substantial likelihood that disclosure of these documents will

18. Tr. 153, 256-57, 260-61, 285, 287, 479-6, 479-7, 479-8, 487, 515, 601-02, 605, 699-70, 738, 764. In fact, no testimony was adduced to the effect that the insurance industry was not a competitive one. Neither D.C. NOW nor the federal defendants has seriously questioned the existence of competition in this industry, at least with respect to competition in the sale of insurance products.

19. Tr. 257, 610.

20. Tr. 30, 255, 497-7.

21. Tr. 30.

22. Tr. 153, 256-57, 260-61. Dr. Schwartzchild also testified that the price of the insurance product was an important aspect of the competition at the point of sale. Tr. 260. Dr. Carbone testified for John Hancock that both service and the ability to recruit and train employees, as well as price, were important in meeting the intense competition in the insurance industry. Tr. 508.

23. In addition, Dr. Rutenberg testified that because Prudential has diversified its business into areas other than insurance, it is competing not only against many insurance companies, but also against mutual funds, real estate companies, and mortgage bankers. Tr. 699.

24. Tr. 29-30, 285, 287, 479-6, 479-7. In fact, John Hancock reported that it was recently unsuccessful in its competition with Aetna for the Ford Motor Company's dental insurance contract for its union employees. Tr. 479-6 to 479-7.

25. Other courts which have considered this question have also determined that these documents are commercial and financial information. See *Westinghouse Electric Corp. v. Schlesinger*, *supra* at 1215-1216; *U. S. Steel Corp. v. Schlesinger*, *supra* at 924.

26. Tr. 384, 454, 520-23, 653, 663-65.

impair the government's ability to obtain information. The Court is also not persuaded that all of the information contained in these documents falls within exemption (b)(4) because its disclosure would result in substantial competitive harm²⁷ or that all of the companies' claims to competitive injury have merit. The Court has determined, however, that the companies have shown that there is a substantial likelihood that the disclosure of the work force analyses, department lists, and projected promotions data contained in the AAPs and any portions of the CRRs which incorporate this data would result in substantial competitive injury to the companies.

1. *Work force analyses and department lists.*

The work force analyses, or manning tables, contain a breakdown by specific job categories of the total number of employees in each job category and of the number of women and minorities in each job category.²⁸ Metropolitan's Department lists also reveal the number of women, and, in the 1975 Department List, the number of minority group members ("MGMs") employed in each of the Company's specific job categories. The disclosure of this information would cause the companies substantial

27. The companies do not appear to be arguing that all of the information contained in the EEO-Is, AAPs, and CRRs comes within the ambit of the (b)(4) exemption. They certainly have not introduced any evidence on, or otherwise attempted to show, how many portions of these documents, such as policy statements and introductory comments, come within this exemption.

28. For purposes of clarity, when the Court speaks of work force analysis or manning tables, it is referring to the computer printouts and tables so titled, the Utilization Analyses, and the information contained on the line "Incumbents in job group", of "B. Annual Goals," in the "Utilization Analyses, Goals and Timetables" in Metropolitan's AAPs. These documents contain the same type of information and present the same considerations.

29. Tr. 33, 40, 479-17, 491, 519, 607-08.

30. Tr. 606-612. The testimony revealed that both John Hancock and Prudential had in the past lost valued employees to others because of

competitive harm by increasing the companies' vulnerability to employee raiding.

The raiding or proselytizing of employees is a serious problem faced by the insurance industry today,²⁹ particularly for large companies with sophisticated training programs such as John Hancock, Metropolitan, and Prudential.³⁰ Proselytizing of employees is particularly prevalent during periods when there is a sharp increase in demand for particular labor skills or categories of employees.³¹ Such an increase is occurring today in the insurance industry with respect to female and minority group members with the training and experience these companies provide.³² Thus, the raiding of employees, particularly of women and minority group members, is a distinct and serious prospect for these companies.

Although raiding has occurred in the past without access to these documents through the use of other sources of information,³³ these alternative sources of information do not provide as efficient and comprehensive a method for employee raiding as the manning tables and department lists would provide. The licensing information on file with the state insurance commissions is not particularly useful since it pertains only to sales agents and does not reveal the agent's race or sex or whether the agent is an

raiding. Tr. 510, 607-608, 754-55. Dr. Carbone testified that attempts had been made to proselytize him. Tr. 510.

31. Tr. 607-610.

32. *Id.* NOW's and the government's expert, Dr. Schwartzchild, agreed that this raiding of minorities and females trained in insurance would do competitive harm to a company. Tr. 256.

33. Tr. 184, 186, 189, 315, 631-32, and 715-16. The alternative sources of information referred to by D.C. NOW and the federal defendants are personal contacts, trade and in-house publications on noteworthy employees, trade association membership lists, the information on file with state insurance commissions, "head-hunters," and general knowledge in the insurance industry about successful salespersons.

active, inactive, or part-time agent.³⁴ The membership lists of various industry associations may provide some useful information on potential raiding targets, but not all employees belong and those that do are listed only if they have paid their dues.³⁵ While a raider may be able to stumble upon a trade or in-house publication about noteworthy employees, such publications are not helpful in locating the experienced but less visible employee. Dr. Schwartzchild testified that a raider's contacts within a particular office would be an easier method than the use of these documents to locate employees,³⁶ but this assumes that the raider has such contacts.³⁷ Finally, none of these sources provide the raider with a comprehensive picture of the breakdown of the work force in particular offices.³⁸

Even with the names and identification numbers of employees deleted, disclosure of the manning tables would significantly enhance a person's ability to locate employees and the companies' vulnerability to raiding. The tables systematically and precisely provide information which is currently available, if at all, on a "hit-or-miss" basis. Because the tables provide a breakdown of employees at a particular location by job, grade, sex, and race, these tables provide information on the precise location and availability of many types of employees, such as computer programmers or claims approvers, by sex and race, which does not

appear to be currently available to any significant degree. Unlike the existing sources of information, these tables provide a comprehensive picture of employees at a particular office and identify pools of potential subjects for raiding.³⁹ Disclosure of these tables would, therefore, reveal to the raider which offices are particularly productive grounds for raiding different types of employees. Because these tables identify the precise job in which a person is employed, and hence the person's probable experience and training, as well as the employee's sex and race, they would allow a raider quickly and easily to pinpoint the precise type of employee in which the raider is interested and that person's specific graphic location. Disclosure of these tables would provide a much more accurate and efficient method for raiding than the information currently available. Thus, the disclosure of these tables would increase the efficiency of raiding, the vulnerability of these companies to the raiding of individual employees, and the impact on these companies of such raiding.

The disclosure of this information would also enhance the efficiency of and the companies' vulnerability to what has been called "vacuum cleaner" raiding. This occurs when a party raids an entire cadre of employees,⁴⁰ which is a common practice in the insurance industry.⁴¹ Because the man-

34. Tr. 307, 529, 654, 668. While Schedule G which is also filed with state insurance commissions lists employees earning more than \$30,000 a year, it would not be of any use in locating employees paid less than \$30,000. As Dr. Rutenberg testified, many key employees in whom raiders would be particularly interested earn less than \$30,000 a year. Tr. 722. Indeed, only about 2 1/2% of Prudential's employees are listed on Schedule G. Tr. 616.

35. Tr. 306, 654-55. Mr. Dunn testified that Prudential has found that these membership lists are not at all accurate with respect to its employees. Tr. 654-55.

36. Tr. 189, 315.

37. Neither D.C. NOW nor the federal defendants demonstrated how frequently raiders had such contacts or how adequate they were.

38. Dr. Schwartzchild admitted that he did not know of any other source of information which would reveal the number of people employed in a particular office. Tr. 189.

39. Various witnesses testified at the hearing that this data would reveal the existence of pools of employees and that this information would be particularly useful to potential raiders. Tr. 59-61, 492, 525-26, 546-47, 706-08, 717.

40. Tr. 700-01, 707-08, 788.

41. Tr. 700-01, 707-09, 710-11. While Dr. Krantz testified that vacuum cleaner raiding is an almost nonexistent practice, Tr. 789, he must not have been aware that Prudential was the subject of this practice when it lost the entire nucleus of a group insurance office. Tr. 608.

ning tables and department lists systematically and comprehensively lay out the number of employees and distribution of these employees among specific job categories at the different offices, the potential vacuum cleaner raider could quickly and easily identify the existence and location of the precise type of team of employees in which he is interested.⁴² As noted, this type of information is not currently available from any other source.⁴³ This increased susceptibility to vacuum cleaner raiding poses a particularly serious problem in light of the rise of the administrative services companies who are looking for teams of trained employees.⁴⁴

The increased susceptibility to more efficient raiding which would result from disclosure of this data would inflict substantial competitive injury on these companies. The loss of experienced and trained employees alone is a serious injury to these companies. It would impair their productivity and efficiency and thereby place them in a weaker competitive position.⁴⁵ The acquisition of these trained and experienced employees from these companies by a competitor would also, in turn, greatly strengthen the competitor's competitive position.⁴⁶ Added to this is the substantial cost involved in replacing only one employee.⁴⁷ With increased raiding, the cost of replacing lost employees would become quite burdensome. This burden would most likely be

reflected in an increased price for the companies' products; and since price is a critical element in meeting the competition in the insurance industry,⁴⁸ these companies would be placed at a disadvantage in meeting the competition.

The increased susceptibility to vacuum cleaner raiding would also seriously injure these companies. A competitor interested in expanding into a new area or employing a new technology but who does not have employees trained in the new area or technology could easily shanghai an entire team of employees from these companies, which team would readily be revealed from these tables. Not only would such pirating confer a great advantage on the competitor who would thereby be able to offer new and more challenging competition, it would also critically disrupt the operations of the raided company which would place it at a serious disadvantage in meeting this competition.⁴⁹

Moreover, there is a danger that raiding could occur precisely for the purpose of hurting a competitor as much as for the purpose of gaining experienced employees.⁵⁰ Dr. Rutenberg testified that enormous competitive damage could be visited upon these companies by a competitor intent upon doing such damage. With access to the detailed information contained in the work force analyses, a competitor could pinpoint perhaps no more than 12 critically located

representative over three and a half years at \$75,000. Affidavit of Mr. Thomas Kelley, Metropolitan Exhibit 2, ¶ 5. Mr. Peter Carbone, John Hancock's Vice President of Sales, testified that a new sales agent receives an allowance during training and is in effect subsidized during his initial sales experience. The cost of the training allowance is more than \$6,000 in the first year. Tr. 509. Mr. Carbone further testified that training expense was a tremendous expense incurred by John Hancock. *Id.* Dr. Hendricks also testified that the resulting cost of retraining would add an undue expense to a company. Tr. 368.

48. Tr. 260, 508, 510-11.

49. Tr. 699-700.

50. Tr. 710.

technical employees whose loss would cause the companies enormous problems.⁵¹

The courts which have considered the problem of raiding in connection with the disclosure of EEO-1s AAPs, and CRRs have reached disparate results. In *Chrysler Corp. v. Schlesinger*, *supra*, the court determined that the work force analyses fell within the (b)(4) exemption in part because of the raiding problem disclosure presented. In both *Sears, Roebuck and Company v. General Services Administration*, 402 F.Supp. 385 (D.D.C.1975), and *Hughes Aircraft Company v. Schlesinger*, *supra*, the courts were unconvinced by the information suppliers' raiding arguments. In both of these cases the companies apparently based their raiding analysis on the somewhat similar premises. In *Sears*, the companies appear to have argued that these documents reveal disgruntled employees who would be susceptible to raiding. *Id.* at 384 n. 10. In *Hughes*, the companies apparently contended that disclosure of the information revealing employee turnover would reveal employee dissatisfaction, and thereby encourage raiding of the company's employees. *Id.* at 297. The insurance companies here have proceeded upon entirely different, and much sounder, premises. In the two other cases in this district court which determined that AAPs did not fall within the (b)(4) exemption,⁵² the raiding argument was apparently not presented to the courts.

51. Tr. 710-1.

52. See *Sea-Land Service, Inc. v. Morton*, *supra*; *Goodyear Tire and Rubber Co. v. Dunlop*, *supra*.

53. The OFCC determined to delete the salary data contained in the AAPs. Consequently, a competitor would need an alternative source of salary information to be able to compute labor costs. The insurance companies appear to consider the BLS data as the best, and most likely, alternative. For purposes of the companies' motions for preliminary injunction, the Court has evaluated the alleged effects of disclosure of these documents in light of the deletion of salary data. However, D.C. NOW has indicated that it is not withdrawing its request for the salary information and intends to raise this question in conjunction with any motions for a permanent injunction. Tr. 42.

54. Tr. 54-55.

With respect to the companies' other contentions as to how disclosure of the manning tables would result in substantial competitive harm, this Court is unpersuaded. The companies introduced extensive testimony on how a competitor would be able to discern their labor costs from the use of the manning tables in conjunction with wage surveys of the Bureau of Labor Statistics ("BLS").⁵³ However, the BLS salary data contains only averages for each occupation;⁵⁴ there is no direct correspondence between the occupational categories of the BLS and those employed in the tables; the wage surveys, which are conducted only once in five years,⁵⁵ would not provide accurate, up-to-date, data in these inflationary times except in the year of the survey; and the wage surveys do not contain data on other critical elements of labor costs, such as fringe benefits.⁵⁶ All of the witnesses who testified on this subject agreed that a significant margin of error was involved,⁵⁷ and the insurance companies' witnesses only testified that a competitor could get a "good fix" on the labor costs,⁵⁸ which is a somewhat imprecise characterization. The use of the manning tables with the BLS data would provide only the roughest approximation of labor costs and not result in substantial competitive injury.

The insurance companies also contend that the data in these documents provides a

55. Tr. 22. The most recent BLS data for the insurance industry was compiled in 1971. Affidavit of Norman Samuels, an Assistant Commissioner for Wages and Industrial Relations in the Bureau of Labor Statistics, Department of Labor, filed October 21, 1976.

56. Tr. 54-57, 487.

57. Dr. Rowan admitted that estimates of a company's labor costs based on the BLS data would involve a 5 to 10% margin of error. Tr. 90. Dr. Schwartzchild felt that the margin of error would be greater, about 20%. Tr. 151, 316.

58. *E.g.* Tr. 22, 28, 44.

42. Tr. 707-08.

43. See note 38 *supra* and accompanying text.

44. Tr. 479-17, 479-18.

45. Service is an important aspect of the competition in the insurance industry. Tr. 508. Consequently, this impairment of the efficiency and adequacy of their service would cause serious competitive injury.

46. Tr. 479-19.

47. Testimony was adduced at the hearing that the cost of replacing a claims adjuster is \$6,000, the cost of replacing a senior examiner is about \$16,000 and the cost of replacing a field examiner is \$25,000. Tr. 368-69. Mr. Thomas Kelley, an Assistant Vice President at Metropolitan, put the total investment in recruiting, training and developing a sales repre-

model for the organization of an office and the deployment of a sales force which competitors would emulate if the data were revealed. This contention assumes that the office organization and sales force deployment employed by these companies is productive and efficient and that competitors are aware of this. The record does not support such a finding. Further, this information would be useful only if the competitor knows the nature and volume of the business conducted at that facility. The companies failed to demonstrate that competitors are in possession of such information, except perhaps in the case of establishments such as John Hancock's Ford Group Office. Even there, the efficiency of the office is unknown.⁵⁹

The insurance companies also introduced testimony to the effect that disclosure of most of the companies' AAPs over a period of time would reveal new products and technologies and expansion into or the withdrawal from different markets. These arguments assume that most of the AAPs for a period of years will be disclosed, which questions are not before this Court.⁶⁰ The AAPs subject to the FOIA request are substantially less than most of the companies' AAPs and are only those for the year 1975.

59. The argument that disclosure of the AAPs for facilities serving one contract, such as John Hancock's Ford Group Office, would allow competitors to establish an "efficiency index" which they could use to improve their efficiency is unpersuasive for similar reasons. This argument assumes that such offices are operating at optimum efficiency and that competitors know this. Neither of these assumptions are supported by the record.

60. *Accord, Sears, Roebuck and Company v. General Services Administration*, 402 F.Supp. 378, 383-84 (D.D.C.1975). See note 3 *supra* and accompanying text for a discussion of what documents are currently at issue.

61. For example, such changes could simply reflect employee turnover. The witnesses testified on this point only in general terms and never precisely explained what would be revealed and how.

62. Tr. 384, 398, 400, 407-08, 454, 456, 460, 561-63.

63. By the phrase "projected promotions," the Court is referring to data on intended future

Even so, changes in the work force composition or distribution are susceptible to many interpretations besides market, technology, or product expansion.⁶¹

2. Data on Projected Promotions.

At the outset, D.C. NOW and the federal defendants have questioned whether the statistical and narrative data on projected promotions contained in the AAPs and CRRs is confidential information. They argue that employees are already aware of this information. While employees are counseled in general terms concerning their promotion prospects, this counseling is done in general terms and does not involve specific projections or timetables contained in the AAPs.⁶² Consequently, the Court is of the opinion that this data is, and has been treated by the insurance companies as, confidential information.

The companies have shown that there is a substantial likelihood that disclosure of the statistical and narrative data on projected promotions⁶³ would cause them to suffer serious competitive injury through its effect on employee morale and productivity.⁶⁴ From this data, a substantial number of employees could ascertain the plans for their promotion, or the lack thereof.⁶⁵ The

promotions, not promotions which have already occurred.

64. The affidavit of Dr. John R. Hinrichs, President of Management Decision Systems, Inc., dated July 14, 1976, explains in detail the psychological theory, known as the expectancy theory, of how disclosure of this data will affect employee morale.

65. Tr. 350-62, 388, 433, 556. For example, from Metropolitan's 1976 Law Department AAP, 66% of the employees will know whether or not there are plans to promote them in the next year, and 58% of the employees that they will not be promoted for the next two years. Tr. 359. From Metropolitan's 1975 Law Department AAP, 73% of the employees will know whether or not there are plans to promote them. Tr. 360.

After reviewing the documents and evaluating the testimony, it appears to the Court that in most, although not all, instances, employees can deduce their promotion plans or the lack thereof from the projected promotions data. This is a sufficient showing by the insurance

insurance companies' witnesses testified that, as a result of such perceptions, employees' morale and productivity would be adversely affected.⁶⁶ Employees who "know" they will be promoted will conclude that little further effort is required since their promotion is "assured." The morale and productivity of employees who perceive no chance of promotion in the near future will deteriorate because they will "know" that however hard they work, they will not be promoted. Dr. Krantz, who testified for D.C. NOW and the federal defendants, admitted that this data requires careful handling.⁶⁷

The insurance companies have shown that this deterioration in morale and productivity will cause them substantial competitive injury. Demoralized employees are likely to leave their jobs,⁶⁸ which would result in the loss of the investment of the companies in these employees and the additional expense of recruiting and training new employees.⁶⁹ Those employees who do not leave will be less committed to their jobs,⁷⁰ and this loss of productivity would also be quite costly.⁷¹ These additional expenses would seriously impair the companies' ability to be effective competitors in terms of the price of their products. Further, managerial employees would have to devote more time and energy to employee counseling and handling morale-related problems.⁷² Finally, the quality of the service provided by these companies, which is so critical to successful competition,⁷³ would

companies at this stage of the proceedings. However, because of the possibility that certain portions of the projected promotions data do not reveal promotion prospects with sufficient certainty, a more detailed analysis of this data will be required if any motions for a permanent injunction are brought.

66. Tr. 348-50, 361-65, 396, 553-55. D.C. NOW and the federal defendants stress that the companies do not intend these projections as guarantees or hard facts. While the companies may not intend these projections to be so interpreted, this does not change the fact that employees will so interpret this data. Tr. 401, 462.

67. Tr. 786.

deteriorate. Employees suffering from a morale crisis would provide less effective service to customers.⁷⁴ This would place these companies in a seriously handicapped position vis-a-vis service competition with other companies.

3. Other Information Contained in the Documents.

The companies have failed to show that disclosure of any other information in the documents which are the subject of this suit would result in substantial competitive injury. Many of the companies' contentions as to how disclosure of the EEO-1s and other portions of the AAPs will cause them competitive harm were also raised with respect to the manning tables. Those claims which the Court found unpersuasive with respect to the manning tables are also unpersuasive when applied to the EEO-1s and other portions of the AAPs for the same reasons.

Disclosure of the EEO-1s would not cause the companies to suffer any competitive injury. Since these reports do not contain any data on projected promotions, no adverse effect on employee morale would result from their disclosure. Their disclosure would also not increase the companies' vulnerability to raiding. The job categories employed in the EEO-1s are much less specific than the job categories contained in the manning tables. Consequently, they would be of little use in pinpointing the

68. Tr. 366-68, 554-55.

69. See note 47 *supra* concerning the cost of training employees.

70. Tr. 365-68, 554-55.

71. With a decline in productivity, these companies would have to hire additional personnel to compensate for this decline. See note 47 *supra* for the costs of training such new personnel.

72. Tr. 370.

73. Tr. 37-38, 349, 508, 510-11.

74. Tr. 349-50, 365-7.

existence of particular employees or teams of employees.

The agency has agreed to delete data on training programs which reveals the entry of a company into a new market or with respect to new products or processes and has done so.⁷⁵ Consequently, the agency has adequately dealt with many of the companies' objections to disclosure of this data.

The testimony with respect to the training data in the AAPs was in general terms, and the witnesses did not explain how this data would reveal new processes and products or how disclosure would otherwise result in competitive injury. Many of the training programs are common training programs which any major insurance company would be expected to have.⁷⁶ Further, the fact that a large or small number of employees is enrolled in a particular training program is susceptible to several interpretations, such as high or low employee turnover in those jobs or that the program has been made available to all employees. The training data would not be particularly useful to a potential raider since it does not reveal the specific job held by the trainee or the total number of employees who have taken a particular course.

The companies have also failed to demonstrate how a competitor could use the information contained in the application logs, the other information contained in the termination logs or the list of recruiting sources to inflict substantial competitive injury upon them. Certainly the termination logs are useless to a raider; and the application logs, like the training data, lack the specificity and comprehensiveness of the manning tables. Most of the recruiting sources are ones commonly used by employers,⁷⁷ and the names of individual contacts within a source would be of little use to a

75. See letter of Lawrence Lorber, Director of the OFCC, to William F. Joy, dated July 13, 1976.

76. Tr. 62, 230, 233-36, 240-41.

77. For example, local community colleges and the local chapter of the NAACP are such common sources.

competitor unless it knew how helpful that source was and went to the trouble of cultivating that particular source itself.

4. Impairment of the Government's Ability to Obtain Information.

The insurance companies have failed to demonstrate a substantial likelihood of success on the merits with respect to their claim that disclosure of the AAPs will impair the government's ability to obtain information. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq., the Executive Orders, and the agencies' regulations promulgated thereunder require the companies to report much of the information contained in the AAPs. However, testimony was adduced to the effect that these reports contain more information than the companies are required to provide and that if they were publicly available, in the future, the quantity and quality of information provided would decline.⁷⁸ By agreeing to disclose most of the information contained in the AAPs, the ICS must have felt that disclosure would not impair its ability to obtain information. Further, the threat of compliance actions and/or refusing to enter into contracts with these companies, should enable the ICS to obtain the information it desires. *Accord, National Parks Conservation Ass'n v. Morton, supra* at 770; *Hughes Aircraft Company v. Schlesinger, supra* at 296.

EXEMPTION (b)(6)

[8] This exemption applies to personnel, medical, or similar files the disclosure of which would constitute a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). In this Circuit, the information must satisfy a three-part test for this exemption to be applicable: (1) the

78. Tr. 31-33, 99, 100, 378, 381-82, 559. Affidavit of Thomas C. Kelley, dated September 7, 1976, at ¶ 12, filed September 15, 1976; affidavit of Colby Tibbetts dated September 7, 1976, at ¶ 21, filed September 15, 1976.

information must constitute personnel, medical or similar files; (2) the disclosure of the information must constitute an invasion of personal privacy; and (3) the severity of the invasion of personal privacy must outweigh the public interest in disclosure. *Rural Housing Alliance v. United States Department of Agriculture*, 162 U.S.App.D.C. 122, 498 F.2d 73, 76-77 (1974); *Getman v. N. L. R. B.*, 146 U.S.App.D.C. 209, 450 F.2d 670, 674 (1971). In the instant action, the government has agreed to delete employees' names, social security numbers, employee identification numbers, and other identifying information. The government has not made clear what it means by the phrase "other identifying information."⁷⁹ Since this Court finds that even with names and identification numbers deleted from these documents, individual employees can still be identified in certain portions of the AAPs, that in certain contexts such identification would result in a clearly unwarranted invasion of personal privacy, and that the government's statement concerning "other identifying information" is nebulous at best, this Court is of the opinion that certain portions of the AAPs which the government has not clearly determined to delete may well come within the (b)(6) exemption to the Act. These portions are: (1) the statistical data or narrative data on projected promotions or the lack of promotion prospects;⁸⁰ (2) the Department Lists contained in Metropolitan's AAPs; (3) the reasons for termination contained in the Termination Tables contained in John Hancock's AAPs;⁸¹ and (4) the narrative comments in the AAPs involving performance or job evaluations or the preferences, goals, or comments of employees where there is a

79. At the hearing D.C. NOW waived any right to any personal, identifiable, negative information concerning employees. Tr. 114, D.C. NOW did not waive any right to any other personal information about an identifiable individual.

80. The Court is referring to the same statistical and narrative data on projected promotions which was found to be within the (b)(4) exemption. See pages 164-165, *supra*.

reasonable possibility that the employee could be identified by other persons.

For purposes of clarity, some further comments on the type of narrative comments this Court has determined fall within exemption (b)(6) are in order. Such comments most frequently occur in the "Problem Areas" or "Goals and Timetables" portions of the AAPs. This Court does not mean to imply, however, that all narrative comments in these two sections are exempt or that only the comments in these two sections are exempt. The following examples are intended to illustrate the types of narrative comments this Court finds fall within the (b)(6) exemption:

a) A comment that an MGM in a particular unit or department who was hired six months ago is doing very well and shows management potential;

b) A comment that a female in a particular unit or department who was recently promoted is training for a particular job;

c) A comment that the MGMs in a particular unit or department do not show much potential;

d) A comment that no promotions are anticipated in a particular unit or department in the next year, or two years; and

e) A comment that in a unit or department with approximately thirty employees only one or two promotions is anticipated in the next year or two.

More general narrative comments, as illustrated below, do not fall within the ambit of the (b)(6) exemption:

a) A comment that there is a low turnover rate in a particular unit or department;

81. Metropolitan's and Prudential's termination tables do not contain the detail provided in John Hancock's termination logs. Consequently, employees could not be identified from the data contained in their termination tables, whereas such identification is possible with John Hancock's log because of the extensive information contained therein. For a case in this District Court also ordering the deletion of the reasons for an employee's termination, see *Sea-Land Services, Inc v. Morton, supra*.

b) A comment concerning the number of persons hired, promoted, or transferred in the last year;

c) A comment that the company intends to hire or recruit more women or MGMs for a particular job or unit; and

d) A comment that a certain unnamed woman in a unit employing 20 women is well suited to her job.

[9] Much of the information contained in the AAPs does not constitute a personnel, medical, or similar file within the meaning of (b)(6). However, those portions of the AAPs which contain data on promotions, job performance, job evaluations, and personal preferences and goals do constitute "similar files" in that they reflect highly personal details about company employees. *Rural Housing Alliance v. United States Department of Agriculture*, *supra* at 77.

Much testimony was adduced at the hearing to the effect that individual employees being referred to in the AAPs could be identified by their fellow workers.⁸² After reviewing the representative AAPs, this Court is also of the opinion that such identification is possible with respect to John Hancock's termination logs, Metropolitan's department lists, the projected promotion tables and certain narrative comments.⁸³

82. Tr. 44, 351, 372-75, 556, 624-25. Consideration of the possibility that persons particularly familiar with the information will be able to identify individuals, even though the general public could not, is appropriate in determining whether disclosure will result in an invasion of privacy. *Department of the Air Force v. Rose*, 425 U.S. 353, 96 S.Ct. 1592, 1608, 48 L.Ed.2d 11 (1976).

83. After reviewing the documents and evaluating the testimony, it appears to the Court that while identification is possible in most instances, it may not be possible in all instances. This is a sufficient showing to warrant a preliminary injunction. A more discriminating analysis of this data to pinpoint precisely when identification is and is not possible would be required before any permanent injunctive relief would be warranted.

84. The information supplier's claim to a (b)(6) exemption in *Sears, Roebuck and Company v. General Services Administration*, 402 F.Supp. 378 (D.D.C.1975), appears to have been rejected in large part because the Court did not feel

These portions of the AAPs, even with names and identification numbers deleted, still contain sufficient information, such as dates of hire and termination, job title, race, and sex, to enable a co-worker or other person in possession of this information to recognize the employee to whom the tables or comments pertain.⁸⁴

[10, 11] The disclosure of information concerning an employee's promotion prospects, lack of promotion prospects, job performance, evaluations, and personal preferences and goals, and the reasons for an employee's termination contained in these portions of the AAPs would constitute a substantial invasion of the companies' employees' personal privacy.⁸⁵ The disclosure of negative comments or information about an employee on these subjects could be quite embarrassing and painful to the employee. While many of the comments and much of the information are favorable or neutral, the (b)(6) exemption was designed to protect individuals from a wide range of embarrassing disclosures, not just the disclosure of derogatory information.⁸⁶ Indeed, the disclosure of favorable information could place the employee in a very embarrassing position with other, possibly jealous, employees.⁸⁷

that individual employees could be identified. *Id.* at 384. As the AAPs submitted to this Court reveal, the AAPs vary greatly in the amount and manner of presentation of the information contained in these documents. Thus, it may be that *Sears'* AAPs did not contain the same kind of detail as those presented to this Court.

85. The Court is not persuaded by the companies' claims that disclosure of an employee's sex and marital status would result in an invasion of privacy. An employee's sex must be obvious, and marital status is almost as equally well known to co-workers. To the extent that any invasion of privacy would result from disclosure of an employee's marital status, it would be quite slight.

86. *Rural Housing Alliance v. United States Department of Agriculture*, *supra* at 77.

87. Tr. 559.

[12, 13] To determine whether the invasion of privacy is "clearly unwarranted," this Court must *de novo* balance the severity of the invasion of personal privacy with the public interest in disclosure, with a "tilt" in favor of disclosure. *Rural Housing Alliance v. United States Department of Agriculture*, *supra*; *Getman v. N. L. R. B.*, *supra*. In the instant action, the invasion of the employee's privacy which would result from the disclosure of this information would, as discussed, be substantial. D.C. NOW asserts that the public interest will be served by disclosure in that D.C. NOW intends to use the information to further the goals of equal employment opportunity and elimination of discrimination in employment. D.C. NOW also claims that it has no alternative sources for securing this information. While the interest asserted by D.C. NOW is one which has been considered by the courts in determining whether an invasion of personal privacy is clearly unwarranted⁸⁸ and D.C. NOW probably has no other source for this information, the severity of the potential invasion outweighs the factors favoring disclosure in this case. Much of the information, such as that concerning the employee's personal preferences and goals and job performance evaluations, has little, if any, relevance to the public interest asserted. Thus, deletion of such information will have no effect on the public interest asserted. Some of the information may be relevant to this public interest. However, the information the disclosure of which this Court feels would result in a substantial invasion of personal privacy constitutes only a very small portion of the information contained in the AAPs. Deletion of this small amount of information should not significantly impair the achievement of D.C. NOW's goals. To the extent that any impairment may result from non-disclosure, the severity of the invasion outweighs such an impairment to the achievement of the public interest.

88. See *Sears, Roebuck and Company v. General Services Administration*, 402 F.Supp. 378, 384 (D.D.C.1975).

EXEMPTION (b)(7)

[14] The insurance companies contend that these documents are investigatory records compiled for law enforcement purposes within the meaning of exemption (b)(7), and, as such, are exempt from mandatory disclosure under the Act. In light of recent cases by this District Court and the United States Court of Appeals for the District of Columbia Circuit, the Court is of the opinion that the companies have not shown a substantial likelihood of success on the merits with respect to this contention.

Unlike the present case, in the cases relied upon by the companies to support their position, the government was raising the (b)(7) exemption. In both *Goodyear Tire and Rubber Company*, *supra* and *Sears, Roebuck and Company v. General Services Administration*, 384 F.Supp. 966 (D.C.C. 1974), this District Court refused to apply exemption (b)(7) in reverse-FOIA actions. In *Sears*, the Court determined that this exemption was designed to protect the interests of the government, not private parties, and therefore held that where, as here, the government determines to disclose information, a private party lacks standing to assert the government's interests under exemption (b)(7). *Id.* at 1004.

Although this Circuit has not affirmed the position taken by the district court, it has held that the (b)(7) exemption does not apply to AAPs and EEO-1s for other reasons. Distinguishing between reports compiled as part of a routine monitoring process and reports compiled as part of an investigation focusing directly on specifically alleged illegal acts, the Court determined that the AAPs and EEO-1s which a government contractor was required to supply in order that its compliance with executive orders could be monitored were not "investigatory files" and were not exempt under (b)(7). *Sears, Roebuck and Company v. General Services Administration*, 166 U.S.App.D.C. 194, 509 F.2d 527, 529-30.

(1975). In the instant action, the insurance companies' AAPs and EEO-1s were submitted in connection with the OFCC's general monitoring process and not in connection with an investigation of specific illegal actions of the companies. The CRRs were compiled by the agency as part of this same routine monitoring process.

AGENCY DISCRETION

[15, 16] The fact that certain portions of the AAPs and CRRs contain exempt information does not alone prevent their disclosure. In this circuit, the disclosure of exempt information is discretionary with the agency, and can only be reversed for an abuse of discretion. *Charles River Park "A", Inc. v. H.U.D.*, *supra* at 943. Once the court determines that the information sought falls within an exemption, it must then determine whether the agency abused its discretion. In determining whether the agency abused its discretion, the court must determine first whether the disclosure of the exempt information would be a violation of § 1905 and if not, whether disclosure would otherwise be an abuse of discretion. *Id.* at 943. In the instant case, some of the exempt information the agency determined to disclose comes within the ambit of § 1905, and, in addition, the agency abused its discretion in determining to disclose the exempt information.

[17] Section 1905 imposes criminal penalties on government employees who disclose any information coming to them in the course of their employment which relates to, *inter alia*, processes, operations or styles, if such disclosure is not authorized by law. If the disclosure of exempt information would constitute a criminal offense, such disclosure would be a clear abuse of the agency's discretion. *Charles River Park*

89. Those portions of the AAPs and CRRs which are exempt from mandatory disclosure only by virtue of Section (b)(6) and do not also come within the (b)(4) exemption, are not within the ambit of § 1905. That information does not constitute information relating to processes, operations or styles of work within the meaning of § 1905. Further, this Circuit has indicated that the scope of § 1905 is, at best, coextensive with the scope of the fourth

"A", *Inc. v. H.U.D.*, *supra* at 943. In the instant case, the disclosure of certain portions of the information the Court has determined to be exempt would constitute a criminal offense under § 1905. Hence, the agency's decision to disclose this information was a clear abuse of its discretion.

[18-20] The agency officials obtained the information in the AAPs and CRRs in the course of their employment. The manning tables, department lists, and projected promotions⁸⁹ contained therein constitute information pertaining to processes, operations, and styles of work within the meaning of § 1905.⁹⁰ The disclosure of this information is not authorized by law. The federal defendants' argument that disclosure is authorized by the regulations implementing the FOIA, 41 C.F.R. §§ 60-40.1 *et seq.* ignores the fact that the Act is not a source of authority for promulgating regulations on information exempt under the Act. The release of exempt information cannot be justified on the basis of such regulations. *Charles River Park "A", Inc. v. H.U.D.*, *supra* at 942.

[21] Apart from § 1905, the agency also abused its discretion in determining to disclose the exempt information. The ICS and the OFCC failed to exercise any discretion with respect to the exempt information and to give any meaningful consideration to whether discretionary disclosure was appropriate. In addition, the disclosure of the exempt information in the face of government representations of confidentiality was, on the facts presented here, an abuse of discretion.

The administrative record, primarily letter rulings addressed to the insurance companies, reveals that both the ICS and OFCC considered only the applicability of the

exemption. *Charles River Park "A", Inc. v. H.U.D.*, *supra* at 941 n. 7.

90. Other courts which have considered the applicability of § 1905 to AAPs and CRRs have reached similar conclusions. See *Chrysler Corp. v. Schlesinger*, *supra* at 179; see also, *Westinghouse Electric Corp. v. Schlesinger*, *supra* at 1248-49.

Cite as 426 F.Supp. 150 (1978)

FOIA exemptions to the information sought by D.C. NOW. Having determined that the information did not fall within an exemption to the Act, they never reached the question of discretionary disclosure of the data. As a result, the record reflects no meaningful consideration of whether it would be an appropriate exercise of their discretion to disclose the exempt information. Such a failure to exercise any discretion, and the resulting failure to engage in any meaningful consideration of this question, constitutes an abuse of that discretion.

[22] The Court must also consider the public interest in disclosure in determining whether the agency abused its discretion in determining to disclose the exempt information. *Charles River Park "A", Inc. v. H.U.D.*, *supra* at 943. The public interest in disclosure asserted by D.C. NOW is that D.C. NOW intends to use the documents to monitor the companies' compliance with the equal employment opportunity laws. Much of the information D.C. NOW seeks has been determined not to be exempt information. With access to this information, D.C. NOW should be able substantially to achieve its public interest goals, even though some portions of the documents would not be disclosed. Balanced against the public interest is the insurance companies' interest in protecting their competitive position and the employees' interest in their privacy. Disclosure of the exempt information would seriously impair these interests. On the balance, the slight harm to the public interest from non-disclosure of these documents is outweighed by the serious harm to the employees and the companies which would result from the disclosure of these documents.

[23] The companies also claim that the representation of confidentiality allegedly

made by the government when the companies submitted these documents somehow prevent their disclosure. As to those portions of the documents which are subject to mandatory disclosure under the Act, any such representations would not preclude their disclosure. A government agency cannot evade the requirements of the FOIA simply by representing to an information supplier that the information will be kept confidential. See *Legal Aid Society of Alameda County v. Schultz*, *supra* at 776; *Lawyers Cooperative Publishing Company v. Schlesinger*, *supra* at 4.⁹¹

With respect to those portions of the documents containing exempt information, the alleged representations of confidentiality present a more difficult question of whether the agencies abused their discretion in determining to disclose this information in light of such representations. Initially, the parties are in dispute as to whether any such representations were made. Dr. Whitman of the ICS testified for the government that to the best of his knowledge the ICS did not give assurances of confidentiality.⁹² However, Dr. Whitman, when questioned as to whether he was sure such assurances had not been made, only stated that the ICS had been instructed not to give such assurances.⁹³ The insurance companies adduced testimony to the effect that the company understood that the data they submitted would be treated confidentially.⁹⁴ The Court is persuaded, after evaluating the testimony on this matter, that the companies were led to believe that the documents submitted by them would be accorded confidential treatment.

[24] The information contained in the AAPs is much more extensive than it need be under the applicable Executive Orders

Civil Rights Act. The Court has already determined that this provision does not apply to EEO-1s submitted to the ICS.

92. Tr. 464.

93. Tr. 472-73.

94. Tr. 469, 475, 559, 576, 577-78, 653.

91. The companies' claims with respect to assurances of confidentiality as to the EEO-1s must fail for an additional reason. The statement on the EEO-1 forms supplied by the government relied upon by the companies provides: "All reports and information obtained from individual reports will be kept confidential as required by Section 709(e) of Title VII." This assurance of confidentiality is limited by its terms to the requirements of § 709(e) of the

and regulations. It appears that such extensive information was included by the companies in reliance on these assurances of confidentiality. The agencies did not investigate the companies' claims about representations of confidentiality or consider whether the discretionary disclosure of information was appropriate in light of such assurances. Under these circumstances, the disclosure of the exempt information was an abuse of discretion.⁹⁵ While it may be that it is not always an abuse of discretion to disclose after assurances of confidentiality have been made,⁹⁶ the agency must at least give some meaningful consideration to whether disclosure under such circumstances is appropriate.

[25] Pursuant to 41 C.F.R. §§ 60-40.8 *et seq.*, the insurance companies were permitted to file written objections to the disclosure of these documents with the ICS and OFCC. They were not given an oral hearing on their claims of exemption. Metropolitan claims that the agencies abused their discretion and denied it due process by failing to hold such a hearing. Similar allegations have met with defeat in the courts. See *Chrysler Corporation v. Schlesinger*, *supra* at 179; *Lawyers Cooperative Publishing Company v. Schlesinger*, *supra* at 3. This Court is also of the opinion that the failure to hold an oral hearing did not constitute an abuse of discretion or a deprivation of due process.

IRREPARABLE INJURY

[26, 27] The disclosure of those portions of the documents containing exempt information would irreparably injure the insurance companies. Once disclosed, such information would lose its confidentiality forever. As has been already noted in the discussion of the merits, there is a strong likelihood that disclosure will cause substantial injury to the companies and their employees. Since the confidentiality of this information can never be regained, the above injuries would indeed be irreparable.

Neither D.C. NOW nor the federal defendants will suffer any substantial harm from nondisclosure. D.C. NOW complains that it will be seriously injured by the grant of a preliminary injunction because the delay in disclosure will cause the data to become increasingly stale.⁹⁷ It is noted that most of the information contained in the documents does not fall within the terms of the preliminary injunction. To the extent that D.C. NOW will suffer any injury from the grant of a preliminary injunction, such injury is clearly outweighed by the serious and irreparable injury to the insurance companies which would result from a denial of injunctive relief.

The public interest will not be harmed but will be served by the grant of injunctive relief with respect to the exempt information. The public interest in disclosure of this information through its use to monitor the companies' compliance with equal employment opportunity laws and to remove informational barriers to equal employment and the fear of rejection suffered by potential job applicants will not be impaired by the grant of injunctive relief. The information which will be disclosed, which

95. This Circuit has indicated that the fact that information is submitted to an agency in confidence does not alone render the agency's decision to disclose such information an abuse of discretion, if the public interest favors disclosure. *Charles River Park "A", Inc. v. H.U.D.*, *supra* at 943. As has already been discussed, disclosure of the exempt information in the instant case will not serve any public interest which cannot be adequately achieved by the disclosure of the non-exempt information in these documents.

96. See *Charles River Park "A", Inc. v. H.U.D.*, *supra* at 943.

97. D.C. NOW also claims that the grant of a preliminary injunction will cause it injury by requiring it to expend additional time and expense in litigation. This is true whenever a court issues a preliminary injunction, and, hence, does not warrant any special consideration. Further, a corresponding injury would be suffered by the insurance companies should this court deny injunctive relief. In any event, it would appear to this Court from the nature of the lawsuit and the representations of the parties that neither the grant nor denial of a preliminary injunction will end this litigation here.

amounts to a substantial portion of the information sought by D.C. NOW, should be sufficient to foster these goals. Additionally, the public interest in protecting the privacy of the companies' employees and in insuring that the agencies fulfill their responsibilities under the Act will be served.



Rev. Negil L. McPHERSON, Sr., Individually and on behalf of Angela Marie McPherson, and Negil Livingston McPherson, Jr., minors, et al.

v.

SCHOOL DISTRICT # 186, SPRINGFIELD, ILLINOIS, and the Board of Education, School District # 186, Springfield, Illinois, et al.

No. S-Civ-74-44.

United States District Court,
S. D. Illinois, S. D.

Dec. 7, 1976.

Suit was instituted to accomplish desegregation of schools in district. The District Court, Ackerman, J., held that alternative plan submitted by plaintiff for desegregation of elementary schools in district would be adopted where plan contained certain distinct advantages, including fact that it maintained attendance centers currently possessing an appropriate racial balance without significant change, that plan submitted by defendants for desegregation of junior and senior high schools in district met constitutional standards and would be adopted, that aggressive affirmative action was required by defendants to ensure minority faculty and staff in at least the same ratio as minority board population, that an in-service training program was to be set up to equip faculty and staff to handle different composition of their student enrollment and problems that might be expected, that it was necessary to form a biracial citizens' advisory and monitoring commission to coordinate efforts of interested community agencies and individuals, that automobile transportation was to be furnished for those children who became ill while attending schools further from their homes, and that implementation of plan for elementary students would not begin until next term in order to preclude any harmful effects to elementary children caused by disruption.

Order accordingly.

1. Schools and School Districts ⇌ 13

That responsibility for development of a new plan to desegregate schools in district was placed entirely on shoulders of school board by previous consent order was not such as to preclude court from subsequently receiving evidence on alternative plans and feasible options. 42 U.S.C.A. §§ 1981-1983, 1988; U.S.C.A.Const. Amends. 1, 13, 14.

2. Schools and School Districts ⇌ 13

A court in a school desegregation case has not only the power but the duty to render a decree that will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. 42 U.S.C.A. §§ 1981-1983, 1988; U.S.C.A.Const. Amends. 1, 13, 14.

3. Schools and School Districts ⇌ 13

Consideration of alternative plans of desegregation was not subject to being postponed until plan submitted by school board was rejected, notwithstanding claim that plan put forth by school board promised meaningful and immediate progress in light of feasible alternatives presented, where it was duty of court to order implementation of alternative plans in event they proved superior. 42 U.S.C.A. §§ 1981-1983, 1988; U.S.C.A.Const. Amends. 1, 13, 14.

4. Schools and School Districts ⇌ 13

Once a right and a violation have been shown in a school desegregation case, scope of district court's equitable powers to remedy past wrongs is broad. 42 U.S.C.A.

The Declining Need for the Special Master

Though this Court has often been dismayed at the slow pace with which its Orders have been carried out, there has been progress. As of March 17, 1978, Pennhurst had a population of 1,156 persons. Assuming that the defendants will be in full compliance with this Court's Order of March 2, 1981, which directs them to have completed the transfer of a specific number of Pennhurst residents prior to September 30, 1982 to community living arrangements, only about 600 retarded persons will remain as residents at Pennhurst. The Pennhurst residents who have been transferred to community living arrangements are receiving minimally adequate habilitation in community living arrangements, a less restrictive environment than that in which they had been confined at Pennhurst. As this Court noted in its Memorandum of September 11, 1981:

The transfers from Pennhurst to date have in the main provided each of the retarded residents of Pennhurst such minimally adequate habilitation as will give them the opportunity to acquire and maintain such life skills as are necessary for them to cope with life as effectively as their limited capacities will permit. Although a few of the retarded residents of Pennhurst and their families have demonstrated a reluctance to leave the institution, the overwhelming majority are now happy for the freedom to begin a life which offers the assurance of a better life.

526 F.Supp. at 423.

Regularly conducted follow-up surveys of the progress of these persons shows that the retarded residents of Pennhurst, when placed in community living arrangements, not only cease to regress, but are showing substantial improvement in their life skills. Most psychologists accept the Adaptive Behavior Scale as a measure of a retarded person's life skills. In Chester County facilities, for example, Pennhurst class members in community living arrangements have increased their Adaptive Behavior Scale score by an average of 15 points (on a 128-point

scale). As a whole, the Pennhurst class members receiving habilitation in the community have shown substantial increases in measured intelligence, neuromotor skills, and adaptive behavior (an average of six points for the five-county Southeast Region of Pennsylvania). See C. Feinstein, J. Lem-anowicz, J. Conroy, *Pennhurst Study: Progress of Clients in Community Living Arrangements 5-8* (September 19, 1981). The regularly compiled reports of the Special Master state that the community facilities in which Pennhurst class members live are safe and sanitary, and that the class members are participating in training programs designed to provide them with minimally adequate habilitation.

Although the monitoring reports compiled by the Office of the Special Master indicate that the conditions at Pennhurst have improved, unfortunately there continue to be reports of incidents of unnecessary injury to and abuse of residents. See Woestendiek, *Pennhurst Probe Finds Patient Abuse*, Philadelphia Inquirer, August 11, 1982 at 1-A, col. 1). In amending its orders to eliminate the Office of the Special Master, it will therefore be necessary for this Court to establish additional safeguards for those retarded persons remaining at Pennhurst.

This Court's Order directing the phasing out of the Office of the Special Master should not be interpreted as an indication that this Court will be less vigilant in insisting that the defendants comply with its Orders. As the defendants are now aware, the Court will not hesitate to take appropriate remedial action whenever it finds that such action is necessary to protect the members of the Pennhurst class. See, e.g., Memorandum of March 2, 1981; Memorandum of August 25, 1981 (533 F.Supp. at 631); Memorandum of September 11, 1981 (526 F.Supp. 414).

Friend-Advocate Program and Revision of this Court's Injunctive Orders

The planned closing of the Special Master's Office may make it necessary for the plaintiff class to assume a more active role in informing the Court of any non-compli-

ance with the Court's Orders. It may also be necessary for the Court to assure that some type of a friend advocate system is operative in order to speak on behalf of those retarded residents who do not have a close relative dedicated to their habilitation and safety.

The imminent closing of the Office of the Special Master obviously alters the Court's plan for monitoring the implementation of the injunctive relief ordered by this Court. The Court's Order of April 24, 1980 must therefore be amended. The Court will enter an Order setting a hearing to determine the amendments necessary to the April 24, 1980 Order so that the Orders of this Court will accurately reflect an enforcement mechanism necessary to replace the monitoring functions of the Special Master.

On many occasions, the defendants have contended that they could better effectuate this Court's Orders without the presence of the Office of the Special Master. The Court will now give them the opportunity to make good on this claim and will enter an Order directing that the defendants provide the Court with updated plans for placing Pennhurst class members in appropriate community living arrangements during the remainder of the 1982-83 fiscal year (through June 30, 1983) and for achieving overall compliance with this Court's injunctive Orders. A hearing will be scheduled to determine whether the defendants' plans are appropriate and consistent with the injunctive relief ordered by the Court.

Finally, the Special Master is directed to submit to this Court on or before August 30, 1982 a proposal for the phasing out and closing of the Office of the Special Master by December 31, 1982. Appropriate orders will be accordingly entered.

ORDER

AND NOW, this 12th day of August, 1982, for the reasons set forth in this Court's Memorandum of August 12, 1982,

IT IS HEREBY ORDERED: The defendants shall submit to this Court, on or before September 15, 1982, their: (1) plans to provide community living arrangements to-

gether with all services required by the retarded person's individual habilitation plan for Pennhurst plaintiff class members (not covered by the School-Age Order) in the Southeast Region of Pennsylvania (Bucks, Chester, Delaware, Montgomery, and Philadelphia Counties) during the period commencing October 1, 1982 and closing June 30, 1984; (2) plans to provide community living arrangements together with all the services required by the retarded person's individual habilitation plan for retarded persons in the Southeast Region of Pennsylvania who are not members of the Pennhurst plaintiff class for the period commencing October 1, 1982 and closing June 30, 1984; and (3) plans to provide community living arrangements together with all the services required by the retarded person's individual habilitation plan for Pennhurst plaintiff class members (not covered by the School-Age Order) from counties outside the Southeast Region of Pennsylvania during the period commencing October 1, 1982 and closing June 30, 1984; (4) plans designed to assure compliance with this Court's Order of April 24, 1980.



The J. H. LAWRENCE COMPANY,
Plaintiff,

v.

The Honorable William French SMITH
and **The Honorable James N. Beggs**
and **Robert M. Keefe, Defendants,**

and

Dickinson-Heffner, Inc., Intervenor.

Civ. A. Nos. J-81-2993, J-82-361.

United States District Court,
D. Maryland.

Aug. 12, 1982.

Actions were brought to preclude release of information supplied by plaintiff to

the National Aeronautics and Space Administration in connection with two different NASA contracts. The District Court, Shirley B. Jones, J., held that: (1) summary judgments for defendants were precluded by fact questions as to whether the information was confidential within the Freedom of Information Act exemption of confidential financial and commercial information, and (2) disclosure of NASA contractor's unit of work and price schedule on contract items was not authorized as matter of law under the Trade Secrets Act.

Motion for summary judgment denied.

1. Records ⇐ 35

Party seeking to bar agency's disclosure of information he has supplied has no cause of action under Freedom of Information Act, but he may seek review of agency action under the Administrative Procedure Act. 5 U.S.C.A. § 552(b)(4); 18 U.S.C.A. § 1905.

2. Records ⇐ 35, 59

Agency's disclosure of information in violation of Trade Secrets Act is not "in accordance with law" within meaning of the Administrative Procedure Act. 5 U.S.C.A. § 552(b)(4); 18 U.S.C.A. § 1905.

3. Records ⇐ 59

Trade Secrets Act bars disclosure of government material unless disclosure is otherwise authorized by law and the Freedom of Information Act does not constitute such authorization, if material falls within Freedom of Information Act's exemption of trade secrets and privileged or confidential commercial or financial information. 5 U.S.C.A. § 552(b)(4); 18 U.S.C.A. § 1905.

4. Records ⇐ 59

Within Trade Secrets Act barring disclosure of covered material unless disclosure is otherwise authorized by law, authorization for disclosure may be found in statute or regulation, but authorization in regulation must be substantive, not procedural, and must be promulgated pursuant to both statutory grant of quasi-legislative authority and procedural requirements of Adminis-

trative Procedure Act and, as to latter criterion, there must be nexus between regulation and delegation of requisite legislative authority by Congress. 5 U.S.C.A. § 552(b)(4); 18 U.S.C.A. § 1905.

5. Records ⇐ 59

Within Freedom of Information Act exemption of confidential commercial or financial information, the information must have effect of impairing government's ability to obtain necessary information in future or causing substantial harm to competitive position of supplier of information and must be of type not normally made public. 5 U.S.C.A. § 552(b)(4).

6. Records ⇐ 59

To show likelihood of substantial competitive harm resulting from release of confidential financial or commercial information by government agency, so that release will be exempt under Freedom of Information Act, actual competition and likelihood of substantial competitive injury are to be shown. 5 U.S.C.A. § 552(b)(4).

7. Federal Civil Procedure ⇐ 2492

In reverse freedom of information case brought by NASA contractor to prevent disclosure of unit of work and price schedule on some 2,000 contract items, summary judgment for defendants was precluded by fact questions as to whether information was confidential within the Freedom of Information Act's exemption of confidential financial and commercial information. 5 U.S.C.A. § 552(b)(4).

8. Records ⇐ 59

Disclosure of NASA contractor's unit of work and price schedule on contract items was not authorized as matter of law under Trade Secrets Act. 5 U.S.C.A. § 552(b)(4); 18 U.S.C.A. § 1905.

Richard W. Moore, George W. Maugans, Baltimore, Md., for plaintiff.

Thomas C. Morrow, Baltimore, Md., for intervenor.

J. Frederick Motz, U. S. Atty., Stuart O. Simms, Asst. U. S. Atty., Baltimore, Md., for defendant.

MEMORANDUM

SHIRLEY B. JONES, District Judge.

These two cases present similar questions concerning the release of information supplied by J. H. Lawrence Company to the National Aeronautics and Space Administration (NASA) in connection with two different NASA contracts. Defendants moved for summary judgment in both cases, and Dickinson-Heffner, Inc. moved for summary judgment in the action in which it has intervened, C.A. No. J-82-361. Plaintiffs filed an opposition to both motions, and oral argument was heard on August 6, 1982.

The facts giving rise to this litigation are largely undisputed. In December 1978 Lawrence submitted a bid on a NASA contract for minor construction, alteration and repairs. It supplied, as required, a unit of work and prices (UWP) schedule, giving its unit prices on some 2,000 contract items. Lawrence advised NASA that it wanted the UWP materials kept confidential but was told that NASA considered the information to be in the public domain because the bid was a public bid. Lawrence was awarded the contract, but no requests for information were immediately filed. After NASA advised Lawrence in November 1981 that it intended to honor a FOIA request for disclosure of Lawrence's UWP schedule, Lawrence filed Civil Action No. J-81-2993. Disclosure by NASA was, by agreement, enjoined.

Lawrence submitted a bid in the fall of 1981 on a similar NASA contract, again supplying a UWP schedule. It was awarded the contract. After being told in February 1982 that a FOIA request for its UWP schedule had been filed, Lawrence filed Civil Action No. J-82-361. Disclosure was again enjoined. The requesting party, Dickinson-Heffner, was permitted to intervene.

The material with which these lawsuits are concerned deserves more detailed description. The actual material has not been submitted to the Court, but the parties agree sufficiently on its nature to permit discussion of the legal issues presented by the motions. The invitation for bids (IFB)

in both instances required the submission of individual line item prices on over 2,000 contract items in support of the overall bid. The UWP schedule consists of whole number prices for all items. For example, an item price for hand excavation of soil might be shown as \$13.39 per cubic yard. The parties agree that the mathematical formula for calculation of this line item would be: wage rate per hour × efficiency (work performed per hour) + overhead and profit. Other line items must include the cost of materials, as well as the other factors. The formula and calculations are not shown on the UWP schedule; there is simply a price given for each item. Lawrence contends, however, that its profit and overhead is readily calculable from the line items because the formula and other factors are known, or readily ascertainable, by competitors. It thus contends that the UWP schedule is protected from disclosure because it reveals trade secrets, or confidential financial information.

The defendants contend primarily that the information is required to be disclosed upon request because it was supplied as a part of a public bid. They also contend, as does the intervenor, that the UWP schedule is not a protected trade secret because it does not reveal on its face Lawrence's profit and because that information is not so readily calculated as Lawrence contends.

[1-4] The trade secret question underlying these cases is presented here in the context of "reverse Freedom of Information Act" suits. Analysis of the legal issues begins with *Chrysler Corporation v. Brown*, 441 U.S. 231, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979). The Supreme Court's holdings can be summarized as follows:

1. A party seeking to bar an agency's disclosure of information he has supplied has no cause of action under FOIA, *id.* at 294, 99 S.Ct. at 1713-14, or the Trade Secrets Act, *id.* at 316-17, 99 S.Ct. at 1724-25, but he may seek review of the agency action under the Administrative Procedure Act, *id.* at 317, 99 S.Ct. at 1725. A disclosure made in violation of the Trade Secrets Act is "not in accordance with law" within

the meaning of the APA. *Id.* at 318, 99 S.Ct. at 1726.

2. The Trade Secrets Act, 18 U.S.C. § 1905, bars disclosure of covered material unless disclosure is otherwise authorized by law. FOIA itself does not constitute such authorization, if the material falls within exemption (b)(4) of that Act. *Id.* at 303-04, 99 S.Ct. at 1718-19. In *General Motors Corp. v. Marshall*, 654 F.2d 294, 296-97 (4th Cir. 1981), the United States Court of Appeals for the Fourth Circuit determined that FOIA exemption (b)(4) and the Trade Secrets Act are to be treated as coextensive for disclosure purposes. Material exempt from disclosure under (b)(4) is within the Act.

3. Authorization for disclosure may be found in a statute or in some regulations. A federal regulation that meets certain criteria may constitute authorization for Trade Secrets Act purposes. It must be substantive, not procedural, *Chrysler Corp.*, 441 U.S. at 301-02, 99 S.Ct. at 1717-18; must be promulgated pursuant to a statutory grant of quasi-legislative authority, *id.* at 302-03, 99 S.Ct. at 1717-18; and pursuant to the procedural requirements of the APA, *id.* at 303, 99 S.Ct. at 1718. With respect to the second criterion, there must be a "nexus between the regulations and some delegation of the requisite legislative authority by Congress." *Id.* at 304, 99 S.Ct. at 1719.

The first step in analysis is to determine whether the UWP is covered by FOIA Exemption (b)(4) and the Trade Secrets Act. The FOIA exemption applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The information involved in this case is not a trade secret, such as technical information or a customer list, see, e.g., *Megapulse, Inc. v. Lewis*, 672 F.2d 959 (D.C.Cir.1982) (technical information); *Audio Technical Services v. Department of Army*, 487 F.Supp. 779, 782 (D.D.C.1979) (customer lists; employees' histories), but it arguably constitutes information within the second category of (b)(4).

There is no dispute that the information is commercial or financial and that it was obtained from a person. The real question is whether it is confidential.

[5] The courts have adopted a two-pronged test for determining whether information is "confidential." The Fourth Circuit has indicated its agreement with other circuits. *General Motors Corp.*, 654 F.2d at 297 n. 8 (noting two cases as providing "informative" and "well-reasoned" discussions of the scope of the exception). To be confidential, the information must have the effect of (1) impairing the Government's ability to obtain necessary information in the future or (2) causing substantial harm to the competitive position of the supplier of the information. *American Airlines, Inc. v. National Mediation Bd.*, 588 F.2d 863, 871 (2d Cir. 1978); cf. *Gulf & Western Industries, Inc. v. United States*, 615 F.2d 527 (D.C.Cir.1979) (applying competitive harm test only). The information must be of a type not normally made public. *Id.* at 530.

The first test is not at issue here. The Government is willing to disclose the UWP schedule and obviously believes its ability to obtain this kind of information in the future will not be impaired by disclosure.

The question is whether release of the information will cause substantial harm to Lawrence's competitive position. Actual cost and rate data has been held to come within (b)(4). E.g., *Gulf & Western Industries, Inc. v. United States*, 615 F.2d 527 (D.C.Cir.1979). A few cases have dealt with or mentioned release of cost or pricing data before award of a contract, *Audio Technical Services v. Department of Army*, 487 F.Supp. 779, 782 (D.D.C.1979) (distinguishing cost proposal from bid information sought there); *Shermco Industries, Inc. v. Secretary of Air Force*, 452 F.Supp. 306, 323-24 (N.D.Tex.1978), *rev'd on other grounds*, 613 F.2d 1314, 1317 (5th Cir. 1980), and have apparently assumed that bid price or cost information was disclosable after the contract was awarded, see *Shermco Industries*, 613 F.2d at 1317, 452 F.Supp. at 324. That question was not decided, however, and these are FOIA cases.

[6] To show a likelihood of substantial competitive harm, actual competition and the likelihood of substantial competitive injury are to be shown. *Gulf & Western*, 615 F.2d at 530. There is no question that there is actual competition here. Lawrence competes with the requesters of information and other bidders. Lawrence contends that if the unit prices are released, its competitors will be able to calculate its overhead or profit and, using that factor, estimate and undercut its future bids. The ability to undercut bids was held to constitute sufficient "likelihood of substantial competitive injury" where actual costs, rates, and profits were involved in the disclosure. *Gulf & Western*, 615 F.2d at 530-31.

[7] The item prices do not actually reveal the plaintiff's underlying profit or overhead data. Although the affidavit of Mr. Lawrence explains how a competitor could calculate the information using standard sources, even his affidavit indicates that the calculation is not certain. For example, although he refers to standard references giving efficiency factors, he also notes that he might be using a different efficiency factor, based on his own experience. It cannot be determined as a matter of law that this information is not confidential information or a trade secret, in light of the support advanced in Lawrence's affidavit, nor can it be determined that the information is confidential. In addition, factors such as the staleness of the information affect whether its disclosure is likely to cause competitive harm. Cf. *Timken Co. v. U. S. Customs Service*, 491 F.Supp. 557 (D.D.C.1980) (unit price data supplied to Customs Service held within exemption (b)(4)), (*Timken I*); 531 F.Supp. 194 (D.D.C. 1981) (*Timken III*) (recent information within exemption (b)(4)). There are sufficient issues of material fact to preclude summary judgment on the protected nature of the information itself.

[8] That may not be material, however, if, regardless of its status, disclosure of the UWP schedule is "otherwise authorized by law." There is no specific statutory provi-

sion governing disclosure. The statute governing military procurement, 10 U.S.C. § 2305(c), which applies to NASA, *id.* § 2303(a)(5), provides: "Bids shall be opened publicly at the time and place stated in the advertisement." The NASA statute contains a provision on release of information: "information obtained or developed by the Administrator in the performance of his functions under this chapter shall be made available for public inspection, except (A) information authorized or required by Federal statute to be withheld. . . ." Neither statute authorizes disclosure, since the second one refers back to other provisions. It might be argued that the statutory provision that bids are to be opened publicly implicitly authorizes disclosure, or the promulgation of disclosure regulations, but that language is significantly different from statutes that have been found to authorize disclosure regulations, for example, the provision of the Social Security Act relied upon in *Humana of Virginia v. Blue Cross of Virginia*, 622 F.2d 76 (4th Cir. 1980).

NASA relies on 41 C.F.R. § 2.402-1 (1979), which governs the opening of bids. It provides, in pertinent part, that when the time set for bid opening arrives, "all bids received prior to the time set for opening shall then be publicly opened, and, when practicable, read aloud to the persons present, and be recorded. If it is impracticable to read the entire bid, as where many items are involved, the total amount of the bid shall be read, if feasible." 41 C.F.R. § 2.402-1(a). The same section also provides, "Examination of bids by interested persons shall be permitted if it does not interfere unduly with the conduct of Government business." *Id.* § 2.402-1(c).

It is questionable whether these provisions can be read, as the Government contends, as authorizing disclosure of confidential information contained in bids. Elsewhere in the NASA procurement regulations a general policy of keeping information in proposals confidential to the extent permitted by law is stated. 41 C.F.R. 18.1-304-2(d)(1)(C).

This regulation fails the three-part test of *Chrysler Corporation*. The procurement regulations generally may have some substantive aspects, but this particular provision is procedural. The regulations are not subject to the substantive rulemaking provisions of 5 U.S.C. § 553. 5 U.S.C. § 553(a)(1). Most important, the required nexus between a grant of quasi-legislative authority and the rule, to give the regulation the "force and effect of law," is not present. Unlike military departments, for example, see 10 U.S.C. § 2381, specific authorization to promulgate procurement regulations is not contained in the NASA statute. The Administrator has a general authority to promulgate regulations under a "housekeeping" provision, 42 U.S.C. § 2473(b)(1), and specific authority under the Act to promulgate regulations for waiver and licensing of the Government's rights with respect to inventions, 42 U.S.C. § 2457(f), (g); and for NASA employees' and contractors' financial reports, *id.* § 2462(b). The grant of a general authority to carry out his functions may be read as authority to promulgate practice requirements in procurement matters but not to the extent that those regulations are read as authorizing the release of information required to be kept confidential.

For the foregoing reasons, it cannot be said as a matter of law that disclosure of the information involved is authorized under the Trade Secrets Act. The motions for summary judgment must be denied because, as previously noted, questions of fact exist concerning whether the information qualifies as confidential information.



Kathryn SULESKY, et al., Plaintiffs,

v.

UNITED STATES of America,
Defendant.

Civ. A. No. 79-2229-CH.

United States District Court.

S. D. West Virginia,
Charleston Division.

Aug. 12, 1982.

Woman who had contracted Gullian-Barre syndrome after she received swine flu shot sought to recover monetary damages against the United States. Parties stipulated that only issues of causation and damages were to be tried. The District Court, Haden, Chief Judge, held that: (1) proximate cause of woman's Gullian-Barre syndrome was administration of swine flu shot; (2) woman was entitled to \$21,065.80 damages for medical expenses; (3) woman was entitled to \$150,000 damages for pain and suffering; (4) woman was not entitled to recover for any future mental anguish or nervousness; and (5) husband was entitled to receive \$10,000 for loss of consortium for period from onset of wife's illness until her recovery.

Order accordingly.

1. Evidence ⇐ 571(9)

Testimony of physician that, to reasonable degree of medical certainty, swine flu shot caused woman's Gullian-Barre syndrome some 14 or 15 weeks after shot was administered to her, together with testimony of treating physician, established by a preponderance of the evidence that proximate cause of woman's Gullian-Barre syndrome was administration of swine flu shot.

2. Damages ⇐ 135

Where proximate cause of Gullian-Barre syndrome contracted by woman was swine flu shot that she had received, woman was entitled to recover damages of \$21,065.80 for reasonable and necessary medical expenses.

3. Damages ⇐ 130(1)

Where woman remained wholly conscious for five-week period while on respirator, and throughout those five weeks, anguished over whether she would recover, over whether respirator would malfunction, over relying entirely on others to attend her most basic bodily needs and functions, and over her sons' reaction to seeing their mother in paralyzed condition, woman suffered substantial and intense mental anguish during period of her hospitalization for, and her subsequent recovery from, Gullian-Barre syndrome entitling her to \$150,000 damages for injuries, pain, suffering and mental anguish.

4. Damages ⇐ 192

Where woman merely made general statement that she was more nervous, tense and frequently short with her husband and sons during five-year period after she recovered from Gullian-Barre syndrome contracted after receiving swine flu vaccine, but failed to offer any evidence to degree or character of her increased nervousness, woman was not entitled to recover for any future mental anguish or nervousness.

5. Damages ⇐ 133

Where husband of wife who contracted Gullian-Barre syndrome after receiving swine flu vaccine suffered loss of consortium, husband was entitled to recover \$10,000 for loss of consortium, limited to period from onset of his wife's illness until her recovery.

Donald R. Wilson, Gary L. Call, Preiser & Wilson, Legal Corp., Charleston, W. Va., for plaintiffs.

Robert B. King, U. S. Atty., S. D. W. Va., Charleston, W. Va., for defendant.

MEMORANDUM OPINION AND ORDER

HADEN, Chief Judge.

The Plaintiffs in this action seek to recover monetary damages against the United

1. The theory of liability, e.g., negligence, strict liability in tort, breach of warranty, etc., is not

States, pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671, et seq., and the National Swine Flu Immunization Program of 1976, 42 U.S.C. § 247b(j), et seq. Prior to the trial of this action, the parties stipulated that the Plaintiff, Kathryn Sulesky, had contracted Gullian-Barre Syndrome [GBS] after she received a swine flu shot in 1976. The parties further stipulated that only the issues of causation and damages were to be tried in this action.¹ This Court conducted a four day trial on these issues during the week of June 1, 1982, at the conclusion of which, this Court made a bench ruling wherein it analyzed the evidence in the and found that the swine flu shot was the proximate cause of Kathryn Sulesky's GBS. Whereupon the Court deferred its determination of the appropriate award of damages until the parties had an opportunity to brief that issue. Those briefs having now been submitted, the Court is now issuing this Memorandum Opinion and Order.

I. Findings of Fact

A. Agreed Upon Facts.

Prior to the trial of this action, the parties submitted to the Court their proposed findings of fact, wherein they agreed to the following findings of fact, which the Court hereby adopts as its own:

1. The Plaintiff, Kathryn Sulesky, received the swine flu immunization shot on October 22, 1976.

2. The shot was received during the course of the mass immunization program instituted and conducted by the Government. [42 U.S.C. § 247b(j), et seq.]

3. Kathryn Sulesky was 30 years old when she received the shot.

4. Kathryn Sulesky received the swine flu shot in South Charleston, West Virginia.

5. Kathryn Sulesky is married and has two children who are 11 and 9 years of age.

6. Kathryn Sulesky has a high school education.

an issue in this decision and was not addressed, explicitly, by the Court.

NAME	AMOUNT
G. VANDERLUGT, Contract No. 5238	\$5,003.18
G. VANDERLUGT, Contract No. 5239	<u>5,003.18</u>
(23 contracts)	
Total	\$74,435.75

3. That the remaining members of the plaintiff class, as has been established by the records of this court, as note purchasers listed on the summary filed with this Court as Docket Item # 920 on or about February 4, 1974 deleting therefrom only those persons who asked to be excluded from the class action and did not subsequently withdraw their exclusion, and including persons who are not identified in Docket # 920 but who filed a request to be included in plaintiff class, have partial summary judgment against defendants Curran and Inland Capital Corp. jointly and severally and recover therefrom the sum representing the total damages to plaintiff class upon further hearings on the issue of damages alone with interest on such sum at the rate of 6% per annum until paid. The members of the plaintiff class shall have judgment as to the costs of the class action to date as delineated in paragraph 4 of this judgment.

4. That as additional damages, the plaintiff class have judgment against Richard P. Curran and Inland Capital Corporation, jointly and severally, and recover therefrom the sum of \$826,288.00 as costs of accounting, title searches, counsel fees and receivership costs heretofore incurred or paid by plaintiffs pursuant to this Court's order of November 17, 1972 appointing a receiver and judgment of January 23, 1974, *Hall v. Security Planning Service, Inc.*, 371 F.Supp. 7 (D.Ariz.1974).

5. That plaintiffs have judgment against defendants Richard P. Curran and Inland Capital Corporation, jointly and severally, and recover as exemplary damages the sum of \$300,000.

6. That plaintiffs named in paragraphs 1 and 2 of this order have judgment against defendants Richard P. Curran and Inland

Capital Corporation, jointly and severally, and recover therefrom as and for attorneys' fees the sum of \$84,283.28. In addition to this amount the remaining members of plaintiff class are awarded a 10% surcharge for attorneys' fees for any damages proven in the future pursuant to paragraph 3 of this judgment.

7. That any funds awarded herein and recovered from defendants by the plaintiff class shall be held in trust for a period of one year or until otherwise ordered by this Court. Such funds shall be disbursed at the end of such period in a sum proportionate to the claims proven in this court and shown by the records of Wayne Brown & Co., as of that date. Such funds shall be paid out after surcharge for necessary costs and expenses of disbursement in the amount and manner as may be approved by the Court. Counsel for the plaintiff class shall be allowed 10% of any recovery hereunder until such time as the full amount of attorney's fees herein or heretofore awarded him are paid.

8. Plaintiffs are awarded their additional costs incurred in this action to be taxed to defendants Richard P. Curran and Inland Capital Corporation, jointly and severally, in the manner usually provided for taxing costs in this court in the amount to be approved by the Court upon submission.

9. The Clerk is directed to forthwith enter this judgment as a final judgment in accordance with rule 54(b) F.R.C.P. and to mail copies to all counsel presently of record or presently parties appearing pro per.



**TAX REFORM RESEARCH GROUP
et al., Plaintiffs,**

v.

**INTERNAL REVENUE SERVICE,
Defendant.**

Civ. A. No. 74-216.

United States District Court,
District of Columbia.

July 19, 1976.

Public interest group concerned with reform of tax laws brought action against Internal Revenue Service to obtain certain documents pursuant to Freedom of Information Act. The parties cross-moved for summary judgment. The District Court, Bryant, J., held, inter alia, that requests by special counsel to the president to Internal Revenue Service to inspect income tax returns of named taxpayers were not exempted from disclosure by statutes designed to prevent disclosure of information contained either in tax returns or in documents filed in conjunction therewith; that summary reports of Internal Revenue Service investigations of taxpayers were "investigatory files" and names of taxpayers contained in such reports were not subject to disclosure; that memoranda from special counsel to the president to the Internal Revenue Service indicating individuals suspected to be violating tax laws were subject to disclosure; that communications from White House to Internal Revenue Service regarding status of tax affairs of named taxpayers were subject to disclosure, except for portions of such documents containing tax return information; that deliberative documents containing discussions of Internal Revenue Service policy were properly disclosed with identity of participants in discussion withheld; and that names of taxpayers and identifying data contained in correspondence between White House and Internal Revenue Service on tax policy matters were exempt from disclosure.

Plaintiffs' motion granted in part and denied in part; defendants' motion granted in part and denied in part.

1. Records ⇐ 14

Basic purpose of Freedom of Information Act is to open to public scrutiny the actions of various government agencies without unnecessarily invading individuals' personal privacy. 5 U.S.C.A. § 552.

**2. Internal Revenue ⇐ 1363
Records ⇐ 14**

Requests by special counsel to the president to Internal Revenue Service to inspect income tax returns of named taxpayers were not exempted from disclosure by statute prescribing penalties for disclosure of confidential information, and were not exempted from disclosure by statute designed to prevent disclosure of information contained either in tax returns or in documents filed in conjunction therewith, and therefore, such requests were subject to disclosure under Freedom of Information Act. 5 U.S.C.A. §§ 552, 552(b)(3); 18 U.S.C.A. § 1905; 26 U.S.C.A. (I.R.C.1954) §§ 6103, 7213.

3. Records ⇐ 14

Summary reports of Internal Revenue Service investigations of taxpayers were "investigatory files" within meaning of provision of Freedom of Information Act exempting from disclosure investigatory files for law enforcement purposes and, since disclosure of names of investigated taxpayers would constitute a serious invasion of privacy, names of taxpayers and certain other identifying data contained in reports were not subject to disclosure under the Freedom of Information Act. 5 U.S.C.A. §§ 552, 552(b)(7)(C).

4. Records ⇐ 14

Nine specified exemptions to Freedom of Information Act provide only basis for an agency's refusal to disclose information sought, and are to be construed narrowly. 5 U.S.C.A. §§ 552, 552(b).

5. Internal Revenue ⇐ 1363

Other than investigatory files, only files generated by normal Internal Revenue Service activity to which a privacy exemp-

tion might apply are those files which are already protected by statutes designed to prevent disclosure of information contained either in tax returns or in documents filed in conjunction therewith. 5 U.S.C.A. § 552(b)(7); 26 U.S.C.A. (I.R.C.1954) §§ 6103, 7213.

6. Internal Revenue ⇐ 1363

Records ⇐ 14

Memoranda from special counsel to the president to the Internal Revenue Service indicating individuals suspected to be violating tax laws were not specifically exempted from disclosure by statutes designed to prevent disclosure of information contained either in tax returns or in documents filed in conjunction therewith and, since reach of Freedom of Information Act exemption for "personnel and medical files and similar files" was defined by the limits of those statutory provisions, such memoranda were subject to disclosure under Freedom of Information Act upon condition that parties obtaining such memoranda would not release names involved without obtaining prior written permission of persons named. 5 U.S.C.A. §§ 552, 552(b)(3, 6); 26 U.S.C.A. (I.R.C.1954) §§ 6103, 7213.

7. Records ⇐ 14

Document containing routine inquiries, requests or comments of taxpayers, which documents were received by White House and forwarded to Internal Revenue Service for appropriate action fell outside of plaintiffs' Freedom of Information Act request which specifically excluded routine referrals of taxpayers' complaints or questions, and were properly withheld as nonresponsive. 5 U.S.C.A. § 552.

8. Records ⇐ 14

Communications from White House to Internal Revenue Service regarding status of tax affairs of named taxpayers and Internal Revenue Service response to such communications were subject to disclosure under Freedom of Information Act except for portions of such documents containing tax return information which was specifically exempted from disclosure by statute. 5 U.S.C.A. §§ 552, 552(b)(3); 26 U.S.C.A. (I.R.C.) §§ 6103, 7213.

9. Records ⇐ 14

Expressions of an agency's opinion, advice or suggestion are generally exempt from disclosure under Freedom of Information Act exemption for interagency or intraagency memorandums or letters; however, factual material which is segregable from an otherwise deliberative memorandum must be disclosed; but where factual and deliberative material are inextricably intertwined entire document may be withheld. 5 U.S.C.A. § 552(b)(5).

10. Records ⇐ 14

Any deliberative or advisory material intended to explain an agency's decision of policy already adopted is not within purview of exemption from Freedom of Information Act for interagency or intraagency memorandums or letters. 5 U.S.C.A. § 552(b)(5).

11. Records ⇐ 14

It is deliberative, nonfactual, predecisional memoranda, disclosure of which would injure the quality of agency decisions, that are protected from disclosure by exemption from Freedom of Information Act for interagency or intraagency memoranda or letters. 5 U.S.C.A. § 552(b)(5).

12. Records ⇐ 14

Internal Revenue Service investigatory files which were exempt from disclosure because disclosure would adversely affect criminal investigations would not be released after termination of such investigations, since disclosure would constitute an unwarranted invasion of personal privacy. 5 U.S.C.A. § 552(b)(7)(A, C).

13. Records ⇐ 14

Internal Revenue Service deliberative documents containing discussions of Internal Revenue Service policy were properly disclosed with identity of participants in discussions withheld, in view of fact that identity of participants was exempted from disclosure by Freedom of Information Act exemption for interagency or intraagency memorandums or letters. 5 U.S.C.A. § 552(b)(5).

14. Records ⇐ 14

Names of taxpayers and identifying data contained in correspondence between White House and Internal Revenue Service on tax policy matters were exempt from disclosure where such documents contained information contained in tax returns and used in determination of taxes. 5 U.S.C.A. § 552(b)(3).

15. Records ⇐ 14

In general, the Freedom of Information Act seeks to make public all records of government actions and functions, unless specifically exempted by the Act itself. 5 U.S.C.A. § 552.

16. Records ⇐ 14

Documents which were submitted to district judge for in camera inspection in action before such judge and which were provided to the office of chief counsel of the Internal Revenue Service by Justice Department for purpose of determining whether Internal Revenue Service wished to appeal decision in such action were not exempt from disclosure on ground that they were not identifiable records of the Internal Revenue Service, in view of fact that Internal Revenue Service did use such documents in making litigation decisions and such documents were in fact identifiable; fact that such documents were generated by White House and fact that Internal Revenue Service was no longer in physical possession of documents were not determinative. 5 U.S.C.A. § 552(a)(3).

17. Records ⇐ 14

Documents which were submitted to district judge for in camera inspection in action before such judge and which were provided to the office of chief counsel of Internal Revenue Service by Justice Department for purpose of determining whether Internal Revenue Service wished to appeal decision in such action were not exempt from disclosure as interagency or intraagency memorandums or letters. 5 U.S.C.A. § 552(b)(5).

Donald J. Gavin, U. S. Dept. of Justice, Tax Div., Washington, D. C., for defendant.

MEMORANDUM

BRYANT, District Judge.

This matter is now before the Court on cross motions for summary judgment. For the reasons discussed below, both motions are granted in part and denied in part. Plaintiffs in this case include a public interest group concerned with reform of the tax laws in the United States. In August of 1973, shortly after the testimony of John W. Dean, III before the Senate Select Committee On Presidential Campaign Activity (the Ervin Watergate Committee), plaintiffs made a freedom of information request of the Internal Revenue Service for certain documents whose existence or probable existence had been revealed by that testimony. Mr. Dean's testimony indicated that the Nixon Administration had been pressuring the Internal Revenue Service to take various actions with respect to persons perceived by the White House as either "friends" or "enemies" of the Administration. The records sought in plaintiffs' FOIA request were generally those which would disclose specific contacts between the White House and the I.R.S. in connection with this endeavor. Following the refusal of the I.R.S. to honor a narrowed request, plaintiffs commenced this action on February 1, 1974. Since that time the issues in the case have been considerably narrowed by negotiation between the parties, and the remaining documents as to which disagreements still exist have been submitted to the Court for *in camera* inspection. Having inspected the more than 330 documents at issue, the Court now directs that a large number of them be released, and sustains the I.R.S.'s claims of exemption with respect to a relatively few of them.

[1] As Mr. Chief Justice Burger observed in another FOIA case, "[i]f 'hard cases make a bad law,' unusual cases surely have the potential to make even worse law." *Department of the Air Force v.*

William A. Dobrovir and Joseph D. Gebhardt, Washington, D. C., for plaintiffs.

Rose, 425 U.S. 352, 96 S.Ct. 1592, 1609, 48 L.Ed.2d 11 (1976). This is such a case; the Court is faced here with many conflicting and overlapping values to serve, in the context of a unique factual setting. The conflicts are serious: on the one hand, the basic purpose of the Act is to open to public scrutiny the actions of the various government agencies without unnecessarily invading individuals' personal privacy; on the other hand, by opening to public scrutiny certain details of abuses which themselves were invasions of personal privacy, the personal privacy of individuals involved in the original abuses may be further invaded. Moreover, the agency involved, the I.R.S., has traditionally guaranteed the privacy of its transactions with taxpayers. While in normal circumstances that privacy is protected by statute, difficulties arise where, as here, the activities involved are not part of the normal and proper operations of the agency, in relation to which taxpayer privacy is normally protected, but are rather connected with serious abuses of an essentially political nature, which—not being contemplated by the privacy statute—may therefore not be protected from disclosure. Also to be weighed in the balance is the obvious public interest in a full and thorough airing of the serious abuses that did in fact occur, in the hope that such abuses will not occur in the future and that confidence in the neutrality of the I.R.S. and in the privacy of taxpayer relations with the I.R.S. may be restored. In weighing these various interests in light of the mandate of the Act that the balance be tipped towards disclosure, the Court has attempted to be sensitive to these values and to reconcile them to the extent possible; the Court does wish to note however that the resolution of the issues herein must be viewed in light of the unusual context in which the case arises.

The records plaintiffs claim have been wrongfully withheld fall into three categories: correspondence between the I.R.S. and a Special Assistant to the President, Clark Mollenhoff, during the time Mr. Mollenhoff was at the White House (referred to as the "Mollenhoff documents"); records that are

responsive to paragraph 16b of the amended complaint (referred to as the "16b documents"); and four documents written by White House personnel, responsive to paragraph 16e of the complaint (referred to as "16e documents").

I. THE MOLLENHOFF DOCUMENTS

By agreement of the parties, the Mollenhoff documents consist of those documents compiled by the I.R.S. in connection with its investigation of charges of undue influence by the White House on the Service. The correspondence between Mr. Mollenhoff and the I.R.S. falls into three subcategories:

(A) Requests by Mr. Mollenhoff, as Special Counsel to President Nixon, to inspect income tax returns of named taxpayers.

[2] The twenty-three pages in this category are "form" requests and summaries of the form requests and were furnished to the plaintiff with the taxpayers' names deleted. The I.R.S. has claimed that these deletions are proper under 5 U.S.C. § 552(b)(3), which exempts documents which are "specifically exempted from disclosure by statute." Defendant relies on 26 U.S.C. § 6103, 26 U.S.C. § 7213 and 18 U.S.C. § 1905 to support that claim. Section 1905 of Title 18 does not exempt the I.R.S. from disclosure of records, rather, it prescribes the penalties for disclosure of confidential information; it is therefore irrelevant to the defendant's claim. In *Tax Analysts & Advocates v. I.R.S.*, 164 U.S. App.D.C. 243, 505 F.2d 350 (1974), the Court held that sections 6103 and 7213 provide "for protection of the privacy of taxpayers filing tax returns and are designed to prevent disclosure of information contained either in the returns or in documents filed in conjunction therewith which enable the secretary or his delegate to determine tax due the United States." Accord, *Fruehauf Corp. v. I.R.S.*, 522 F.2d 234 (C.A.6, 1975), cert. granted 423 U.S. 1047, 96 S.Ct. 772, 46 L.Ed.2d 635 (1976). The Court in *Tax Analysts* further held that certain documents known as "technical advice memoranda" were protected by the statutes since the

Cite as 419 F.Supp. 415 (1976)

memoranda dealt directly with information contained in "returns made with respect to taxes" and are part of "the process by which tax determinations are made" and, thus, "specifically exempt from disclosure by statute." Id. at 355. The documents now before the Court are simply form requests from Mr. Mollenhoff to the I.R.S. requesting tax information on the named individuals. They do not contain any information supplied to the I.R.S. by the taxpayer that is entitled to the protection of sections 6103 and 7213.

[3] The defendant argues that the Court of Appeals' construction of sections 6103 and 7213 has been altered by the Supreme Court's decision in *F.A.A. Administrator v. Robertson*, 422 U.S. 255, 95 S.Ct. 2140, 45 L.Ed.2d 164 (1975). Plaintiff in that FOIA suit sought certain reports concerning the operation and maintenance performance of commercial airlines. The administrator of the F.A.A. withheld the documents under exemption 3 of the Act, claiming that 49 U.S.C. § 1504¹ gave him the discretion to disclose or to withhold the documents sought by the plaintiff. The Supreme Court was faced with the question of whether the FOIA impliedly repealed all such discretionary disclosure statutes. The Court found no congressional intent to do so and held that a statute which confers discretion on an administrator to disclose is no less a "statute" within the meaning of § 552(b)(3), and thus can serve as a basis for an agency's refusal to disclose records sought under the FOIA. Because the statutes relied on by the defendant here contain no grant of discretion comparable to section 1504 the defendant's reliance on *Robertson*, *supra*, is misplaced. Since no other exemptions are applicable, these documents must be released in their entirety.

(B) Requests by Mr. Mollenhoff, as Special Counsel to President Nixon, for information regarding Service treatment of specific taxpayers.

1. In relevant part that statute provides: "the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such

These documents are requests by the White House, as well as the I.R.S. responses to those requests, for status reports on pending I.R.S. investigations of several taxpayers. From the Court's inspection it is clear that the documents are summaries of investigations the I.R.S. had undertaken by virtue of its authority to enforce the tax laws. The documents detail what the taxpayers were being investigated for and what the results of those investigation show, and the contemplated future action of the I.R.S. The documents in question were released to the plaintiff with the names of the taxpayers and certain other identifying data deleted. The I.R.S. has asserted exemption (b)(3) for the three documents (6 pages) in this category. For the same reasons that apply to Category I(A), the Court holds that exemption (b)(3) does not apply. However section (b)(7)(C) of the Act allows an agency to withhold identifiable records when those records constitute "investigatory files compiled for law enforcement purposes, but only to the extent that the production of such records would constitute an unwarranted invasion of personal privacy." Summary reports of investigations are certainly "investigatory files" within the meaning of exemption (b)(7). Upon reading the documents it becomes clear that the data on which the reports were based was compiled by the I.R.S. for the purpose of enforcing the tax laws. In *Retail Credit Co. v. Federal Trade Commission*, CA 75-0895 (D.C. D.C., February 2, 1976), Judge Jones said: "Exemption (b)(7)(C) is closely patterned on Exemption (b)(6), which precludes disclosure of information which would constitute a clearly unwarranted invasion of personal privacy." The Court of Appeals, in *Getman v. N.L.R.B.*, 146 U.S.App.D.C. 209, 450 F.2d 670 (1971), outlined the considerations relevant to determining whether disclosure would constitute a clearly unwarranted invasion of privacy. One of those considerations is the use to which the requesters wish

information would adversely affect the interests of such person and is not required in the interests of the public" (emphasis added)

to put the materials. Plaintiff here is an organization generally seeking a more equitable and efficient tax system. In pursuit of this goal it needs all the information it can obtain concerning the present condition of the internal revenue system. The documents here at issue disclose the existence of and request the details of settlement arrangements and tax liabilities of the taxpayers involved. The Court perceives no way in which the plaintiffs could use this information, and believes it would reveal nothing further about the attempts by the Administration to use the I.R.S. for political purposes than is already well known. See, e. g. Joint Committee On Internal Revenue, "Investigation Into Certain Charges Of The Use Of The Internal Revenue Service For Political Purposes", December 20, 1973, 93d Cong., 1st Sess. (Committee Print). Because the disclosure of the withheld names would constitute a serious invasion of the personal privacy of the taxpayers involved, the Court believes that the disclosure would therefore be unwarranted. *Getman v. N.L.R.B.*, *supra*. Their privacy has already been invaded by the requests themselves, and the Court finds no public interest in exacerbating that invasion. For these reasons the Court holds that the edited portions of the documents in this category (as specified in the attached order) are properly withheld from disclosure under § 552(b)(7)(C).

(C) Memoranda from Mr. Mollenhoff, as Special Counsel to President Nixon, to the I.R.S. indicating individuals suspected to be violating the tax laws.

There are two documents (consisting of four pages) in this category. Both documents were released to the plaintiffs with the names of the taxpayers deleted. The first document states that Mr. Mollenhoff had been informed that an attached list of thirteen individuals had been reporting

2. The Court notes that the I.R.S. response to this memorandum stated that it was contrary to I.R.S. policy to begin an investigation on mere allegations of criminal activity, and requested the White House to support the allegations prior to any I.R.S. investigation. The subsequent action of these two agencies on this

their income improperly, and requests a study of their returns.² The second document alleges financial irregularities in connection with bankruptcy and courts and asks that the tax returns of the nine people listed be given close examination "with particular reference to payoff money for political bribes." The I.R.S. claims that the taxpayers' names are protected from disclosure by exemption (b)(3) or (b)(6). For the reasons discussed earlier the Court rejects the I.R.S. argument that these documents are protected from disclosure by (b)(3). Exemption 6 allows an agency to withhold "personnel and medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The defendant contends that the White House transmittals to the I.R.S. of the lists containing names and addresses and accompanied by unsupported allegations of criminal activity are "similar files" within the meaning of this exemption.³

[4] The nine specified exemptions to the FOIA provide the only basis for an agency's refusal to disclose information sought. *Soucie v. David*, 145 U.S.App.D.C. 144, 448 F.2d 1067 (1971), *Getman v. NLRB*, 146 U.S.App.D.C. 209, 450 F.2d 670 (1971), *Tax Analysts And Advocates v. Internal Revenue Service*, 164 U.S.App.D.C. 243, 505 F.2d 350 (1974), and are to be construed narrowly, *Vaughn v. Rosen*, 157 U.S.App.D.C. 340, 484 F.2d 820 (1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974), *Cuneo v. Schlesinger*, 157 U.S.App.D.C. 368, 484 F.2d 1086 (1973). In the process of executing their respective congressional mandates many agencies must compile and evaluate data of a highly personal nature on various individuals. It is critical to this process to preserve and protect a citizen's expectation of privacy lest the candor necessary between the government and the citizenry be lost. Exemption 6 provides

matter is not revealed by the documents submitted to the Court.

3. The I.R.S. does not claim that Exemption 7 applies to these lists, and the Court has no reason to believe that it does.

such protection, but instructs the court when balancing these interests to "tilt the balance in favor of disclosure." *Getman v. NLRB*, *supra*, at 674. As Judge Wright said in that case, "the real thrust of Exemption (6) is to guard against unnecessary disclosure of files of such agencies as the Veterans Administration or the Welfare Department or the Selective Service or the Bureau of Prisons which would contain 'intimate details' of a 'highly personal' nature. The giving of names and addresses is a very much lower degree of disclosure; in themselves a bare name and address give no information about an individual which is embarrassing." 450 F.2d at 675.

[5, 6] The I.R.S. occupies a unique role among administrative agencies, in that all citizens are required by law to report to it the intimate details of their financial lives. Congress was well aware of the sensitive and private nature of the information involved, and therefore explicitly provided that this information should remain confidential; these provisions are found in sections 6103 and 7213 of Title 26. Were these statutes not in existence, the information they protect would surely be protected by Exemption (b)(6), since it has all the attributes of personal privacy files present in other cases to which the exemption has been found to apply. However, aside from files on its own employees, the only other files on individual taxpayers which the I.R.S. would compile in its normal activities and for which any privacy exemption might be available would be those utilized in law enforcement investigations of taxpayers suspected of violating the tax laws, which might be exempt under (b)(7)(C). Other than such investigatory files, therefore, the only files generated by normal I.R.S. activity to which a privacy exemption might ap-

ply are those which are already protected by sections 6103 and 7213. Because this material is the same material which would otherwise be covered by exemption (b)(6), and because no other "similar" files would normally exist,⁴ the reach of the (b)(6) exemption is defined by the limits of those two statutory provisions. Since those sections, for reasons discussed earlier, do not cover this material here at issue, the Court holds that these documents are not exempt under (b)(6).⁵ However because the material is so potentially embarrassing (White House allegations of criminal activity), the Court orders plaintiffs not to release the names involved to anyone without obtaining prior written permission of the persons named.

II. THE 16b DOCUMENTS:

These documents constitute the bulk of the material withheld from the plaintiff and can be described as follows:

(A) Documents responsive to paragraph 16b of the complaint withheld in their entirety.

(1) Documents which are non-responsive to the FOIA request.

[7] By the terms of amended paragraph 16b, plaintiffs specifically excluded from their request all records which were "routine White House referrals of taxpayers' complaints, suggestions, or questions; written communications not located at the National Office of the I.R.S. in Washington, D. C.; any income tax return, accompanying document or explanatory material filed by a taxpayer; and FBI requests for tax checks on individuals considered for appointment to government positions."⁶ A number of the documents submitted to the Court fall

as a result of normal I.R.S. activity, but rather of highly questionable activity stimulated by the White House. Had normal investigatory activity been involved, the material would presumably be protected by Exemption (b)(7)(C).

4. A possible exception to this rule might be found in the case of identifying information in certain "letter rulings", which would appear to constitute "similar" files, but which are not protected by exemption (b)(3). See *Tax Analysts*, *supra*, and *Fruehauf*, *supra*.

5. This anomalous result, that highly embarrassing and sensitive material is not protected by the privacy provisions of the Act or the Code, results from the fact that it was not compiled

6. Stipulation Authorizing the Amendment of paragraph 16(b) of the plaintiffs' complaint, pp. 2-3, filed December 13, 1974.

into this category. Thus, where the White House received a routine inquiry, request or comment from a taxpayer and forwarded it to the I.R.S. for a reply with a notation that the I.R.S. should take "whatever action it deemed appropriate", the document fell outside of the scope of the complaint and is properly withheld from the plaintiff as non-responsive to the FOIA request.

- (2) Communications from the White House to the I.R.S. regarding the status of tax affairs of named taxpayers and the I.R.S. response to these communications.

[8] Typically these documents consist of a White House referral of a request for assistance by an individual or corporate taxpayer with a suggestion on how the matter should be handled. The request for assistance usually contains a detailed description of the individual's financial plight and his/her present problem with the I.R.S. The I.R.S. withheld these documents in their entirety on the basis of (b)(3). The court, for the reasons stated earlier, disagrees with the defendant's expansive definition of (b)(3). However, portions of these documents do come within the scope of (b)(3). Thus, where the documents contain tax return information for which (b)(3) is properly invoked, that material has been edited by the Court and the portions disclosable ordered released, 5 U.S.C. § 552(b).

- (3) Notes of telephone conversations and memoranda discussing policies and practices of the I.R.S.

The documents that fall into this category consist of very cryptic transcribed short hand notes of telephone conversations as well as memoranda discussing policies and practices of the I.R.S. The subject matter of these documents ranges from the I.R.S. position on tax exempt status for racially discriminatory schools to the handling of questions by the media. The defendant contends that Exemption (b)(5), which permits an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation

with another agency," provides the basis for withholding these documents.

[9-11] As the Supreme Court stated in *N.L.R.B. v. Sears Roebuck & Co.*, 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975), "the ultimate purpose of this long recognized privilege is to prevent injury to the quality of agency decisions." It is, as that court stated, "the deliberations comprising part of a process by which governmental decisions and policies are formulated" which are to be protected. *Id.* at 150-151, 95 S.Ct. at 1516. Thus, expressions of opinion, advice or suggestion are generally exempt under Exemption 5. *Environmental Protection Agency v. Mink*, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973); *Sterling Drug Co. v. F.T.C.*, 146 U.S.App.D.C. 237, 450 F.2d 698 (1971). However, factual material which is segregable from an otherwise deliberative memorandum must be disclosed. *Environmental Protection Agency v. Mink*, *supra*. But where factual and deliberative material are inextricably intertwined the entire document may be withheld. *Soucie v. David*, 145 U.S.App.D.C. 144, 448 F.2d 1067 (1971). In certain cases exempt material may become non-exempt if the reasoning of the previously exempt material is incorporated by reference in otherwise disclosable materials. *N.L.R.B. v. Sears Roebuck & Co.*, *supra*; *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 95 S.Ct. 1491, 44 L.Ed.2d 57 (1975). Likewise, any "deliberative" or "advisory" material intended to explain a decision of policy already adopted is not within the purview of Exemption 5, *N.L.R.B. v. Sears Roebuck & Co.*, *supra*; *Sterling Drug Co. v. F.T.C.*, *supra*. In sum, it is deliberative, non-factual, predecisional memoranda, the disclosure of which would injure the quality of agency decisions, that are protected by Exemption 5. The wide variety and the sheer volume of these documents prohibit a lengthy explanation of the application of these principles to the documents in question. The court has, as indicated in the attached order, applied the above principles to each document and where appropriate ordered released, withheld, or edited information contained therein.

- (B) Documents responsive to paragraph 16b of the complaint released to the plaintiff with deletions:

These documents cover a wide range of subjects. Many of them are discussions between Service and White House personnel regarding specific issues of tax policy, such as underwithholding or tax exempt status of racially discriminatory private schools. Many of these documents are simply routing forms that were attached to materials withheld in their entirety. Still others deal substantively with an individual taxpayer's difficulties with the I.R.S. Also included in these documents are taxpayers' opinions or inquiries on tax policy matters that were forwarded to the I.R.S. by the White House. The documents fall into the following subcategories:

- (1) Documents which are non-responsive to the FOIA request.

[12, 13] For the reasons stated in the discussion of the plaintiffs' amended complaint, documents which were specifically excluded from the amended complaint are properly withheld from the plaintiffs. The Court has indicated on the attached order the reason each document is non-responsive.

- (2) Documents which defendant claims are protected by Exemption 7(A).

Exemption 7(A) protects "investigatory files compiled for law enforcement purposes, but only to the extent that production of such records would interfere with enforcement proceedings." Defendant has supplied to this Court an affidavit of a Mr. Jay Horowitz, Assistant Special Prosecutor, Office of the Watergate Special Prosecution Force. Mr. Horowitz states that certain documents (numbers E-3 through E-8 listed on Defendant's Appendix A) would adversely affect the criminal investigation to which these documents are relevant. Plaintiffs do not contest this claim; rather they request the court to order the documents released once that investigation has been terminated. The court is satisfied that these documents are investigatory files within the meaning of Exemption 7 and for

the reasons stated in the previous discussion of Exemption 7(C), holds that disclosure of these documents after the termination of the present investigation would constitute an unwarranted invasion of personal privacy.

- (3) Documents released to the plaintiff with the names of the I.R.S. employees deleted.

These documents are primarily discussions of I.R.S. policy. The I.R.S. has released the documents in their entirety except for the signatures of the I.R.S. employees who prepared, reviewed or commented on these documents. Voicing a concern that the I.R.S. employees involved in matters will be harassed by the media if their names are released, the I.R.S. claims protection under (b)(5) and (b)(6). For the reasons stated in the discussion of Exemption 6 the court rejects the I.R.S. claim that these documents are protected by that exemption. As to the Service's claim of exemption under (b)(5), however, the Court finds that the deletions made in the documents are within the intended scope of the exemption.

As the Court has noted earlier, the (b)(5) exemption is intended to protect the decision-making process used by the agency in arriving at its policy decisions. An integral element in any such deliberative process, if it is to function effectively, is the free, uninhibited, and candid exchange of views and ideas among the participants in the process. The facilitation of this open exchange is one of the primary purposes of the protection afforded by this exemption. It is widely recognized that disclosure of the advice and comments made by particular individuals on a policy issue may have a chilling effect on the openness with which those individuals subsequently express such comments and advice. One aspect of the deliberative process therefore protected by exemption (b)(5) is the identity of persons giving particular advice on a policy matter. In the instant case, in which the issue seems to be one of first impression, the agency has disclosed the actual substance of the policy

discussions, withholding only the identity of the participants in those discussions. (A participant in this context is anyone who authored, reviewed, approved, or commented on a given deliberative document. To be more restrictive in definition would undermine the protection afforded by the exemption by allowing indirect, deductive identification of the author or endorser of the views expressed). In light of the Act's general policy of maximum possible disclosure, and the resulting approval of segregation and release of non-exempt material as a device for furthering that policy, the Court believes that it is permissible for an agency to determine that only part of a deliberative memorandum need be withheld to protect the deliberative process, and to disclose the remainder of the document. Because the identity of the parties to the deliberations reflected by the memorandum is protected by the exemption, the Court cannot say that segregation and non-disclosure of that identity segment of the contested documents is improper. Accordingly, the Court has reviewed the relevant documents and has approved the withholding of the identity portion of any of those documents which are otherwise deliberative. Identity segments of non-deliberative documents (otherwise non-exempt) must of course be released.⁷

- (4) Documents containing correspondence between the White House and the I.R.S. on tax policy matters; letters from taxpayers or requests for assistance which were other than routine.

[14] The defendant has deleted the names of taxpayers and identifying data from these documents, asserting Exemption 3 or Exemption 6. The majority of these documents do not contain information contained in returns and used in the determination of taxes, thus Exemptions 3 and 6 are inapplicable. Where (b)(3) deletions were proper, i. e. where taxpayers' names were linked to information contained in re-

turns, the court has so indicated in the attached order.

III. THE 16e DOCUMENTS

In paragraph 16e of its complaint, plaintiff requests disclosure of the four documents submitted to United States District Judge Charles R. Richey for *in camera* inspection in *Center On Corporate Responsibility v. Shultz*, 368 F.Supp. 863 (D.D.C., 1973). Defendant has withheld the documents entirely, claiming (1) that they are not "identifiable agency records of the I.R.S.," (2) that they are "inter-agency or intra-agency records," and (3) that they are protected by the attorney-client privilege. The Court finds these contentions without merit, and directs that the documents be released.

The claim upon which the I.R.S. chiefly relies to shield these documents is the first, that they are not identifiable agency records of the Service within the meaning of § 552(a)(3). To support its claim, the I.R.S. points out that the documents were not generated by the agency itself in the normal course of its business, but rather came into its possession when the Office of Chief Counsel at the Service was provided the documents by the Justice Department (which apparently had received them from the White House for *in camera* submission to Judge Richey) for the purpose of determining whether the Service wished to appeal the *Center On Corporate Responsibility* decision. The I.R.S. also states that the documents were not in any of its own files prior to that time; rather, they were kept in a locked safe in the Chief Counsel's Office while the Service was using them, and were returned to the Justice Department after the decision was made not to appeal Judge Richey's decision. The defendant also argues that the four memoranda "do not directly involve any ordinary Service administrative function; and it is the White House, not the Service, which is equipped to state the circumstances of their generation,

the applicability to them of any privileges, and all other considerations relevant to their defense from discovery." Memorandum In Support Of Defendant's Motion For Summary Judgment, p. 19 (filed November 13, 1975). No assertion is made that the documents are protected by the doctrine of executive privilege, nor that they are not responsive to the FOIA request as clarified and amended during the course of negotiations and litigation.

[15, 16] No case has been found which addresses the issue involved here, nor does the legislative history of the Act provide any real guidance. The Court believes however, that the structure and purposes of the Act operate to foreclose defendant's claim that these memoranda do not constitute agency records subject to the Act's disclosure requirements. In general, the Act seeks to make public all records of government actions and functions, unless specifically exempted by the Act itself. And it cannot be denied that making decisions with respect to litigation in which it is involved is a normal function of the I.R.S., or any agency, despite the fact that it is not the central function of the agency. Moreover, the Court does not believe that the nature of the function is a relevant criterion: the Act directs disclosure of all agency records unless specifically exempted, whatever the reason for their use by the agency. As the Service concedes, it did use these documents in making litigation decisions, cf. *Wu v. National Endowment For Humanities*, 460 F.2d 1030, 1032 (C.A.5, 1972) (report of outside consultants is agency record for purpose of Exemption 5). Nor is it decisive that the documents were generated by the White House rather than the I.R.S. Agencies often utilize or receive copies of documents generated in other agencies, and such documents, if identifiable, are clearly agency records for the purposes of the Act. Indeed the Act itself makes provision for this situation. Section

552(a)(6)(B)(iii) allows for a short extension of the Act's time provisions (in responding to a request) in a case where the agency must consult with another agency having a substantial interest in the determination of the request. This provision would certainly be applicable to the instant situation, and is the method prescribed by the Act for the assertion of any claims of exemption by the agency which, *inter alia*, generated the document. To hold that a document received by an agency and actually used by it in agency decision-making is not an agency record for purposes of the Act simply because the document was not generated by that agency or because the decision was on a peripheral matter would seriously undermine one of the central purposes of the Act: to allow the public to become informed on the bases for agency decisions and actions. Such a holding would contradict the mandates of Congress that documents be disclosed unless specifically exempt and that the balance should be tipped in favor of disclosure in questionable situations.⁸ Finally in this regard, the fact that the Service returned the documents to the Justice Department after using them does not exempt them from disclosure. The criterion provided by the Act is that the records be "identifiable" (or in the 1974 amendments, "reasonably identified"); that these records are identifiable is clear from the fact that they were produced to the Court in response to plaintiff's request. That the agency may no longer be in physical possession of the records (which is not what the Service contends here) is not determinative, cf. *Soucie v. David*, 145 U.S.App.D.C. 144, 448 F.2d 1067, 1075-1076 (1971); if the agency knows what records a given request is directed towards, knows where those records are located, and is able to produce them, the Act requires that it do so.⁹ A contrary holding would mean, for example, that the Federal Energy Administration, in making determinations requiring conversion to coal as a fuel source pursuant to the

7. As the attached order reflects, only two memoranda in this category were found by the Court to be deliberative.

8. The Court would also note that the specific documents involved here do in fact relate to the central functions of the I.R.S., albeit in the context of an abuse of those functions.

9. Whether the agency is able to produce the records is a matter for case-by-case determination, in light of the particular circumstances involved.

Energy Supply and Environmental Coordination Act of 1974, P.L. 93-319, 88 Stat. 246, could utilize data supplied by the Environmental Protection Agency, then return the data to EPA, and be exempt from producing the data under the FOIA. This is obviously not what Congress intended, and the Court will not create such a gaping loophole in the Act.

[17] The Service also argues that Exemption 5 should apply to this material. As the Court has discussed earlier, and as the cases make clear, this exemption is intended to cover material reflecting the deliberative process involved in governmental policy-making. The four documents at issue here simply cannot be construed as being part of any proper governmental process. As Judge Richey noted in the *Center On Corporate Responsibility* case, the documents "demonstrate that the White House staff did in fact consider using the I.R.S. against their 'enemies,'" 368 F.Supp. at 872, n. 19. The memoranda relate "to the recommendations and attempts to use the Internal Revenue Service in a selective and discriminatory fashion against those tax-exempt organizations which express opposition to the policies and programs of the Administration." *Id.* at 881. They are no more part of the legitimate governmental process intended to be protected by Exemption 5 than would be memoranda discussing the possibility of using a government agency to deliberately harass an opposition political party. In short, these memoranda possess none of the attributes required for an exemption under § 552(b)(5), and must accordingly be released.¹⁰



10. The Service does not seriously press its contention that these documents are protected by the attorney-client privilege, nor could it. The documents are clearly not an attorney's work product in connection with any litigation, and

James E. REYNOLDS and Mrs. James E. Reynolds

v.

Bobby J. LEWIS and Greyhound Lines, Inc.

Civ. No. 3-76-132.

United States District Court,
E. D. Tennessee, N. D.

July 20, 1976.

Truck driver and his wife brought action to recover for personal injuries sustained in a motor vehicle accident in which a truck driven by plaintiff was struck from the rear by a bus. Defendants denied liability, asserting that the bus driver had become unconscious and that the accident was unavoidable. The District Court, Robert L. Taylor, J., held that defendants had the burden of proving their unavoidable accident defense; that evidence did not establish that the defendant bus driver had become unconscious immediately prior to or at the time of the accident; that evidence established that defendants were guilty of negligence which was the proximate and direct cause of the accident; and that an award of \$50,000 to the truck driver and \$1,500 to his wife was, under the circumstances, proper.

Ordered in accordance with opinion.

1. Automobiles ⇐ 157, 201(10)

Under the law of Tennessee and the general law, a motor vehicle driver who, without forewarning, suddenly becomes unconscious due to a blackout is not considered negligent and any accident which may occur as a result is considered an "unavoidable accident."

See publication Words and Phrases for other judicial constructions and definitions.

2. Automobiles ⇐ 244(40)

In action by truck driver to recover for personal injuries sustained when truck was

the mere fact that the I.R.S. came into possession of the documents initially in connection with its defense of a suit does not in any way implicate the privilege.

MEMORANDUM

ROBERT L. TAYLOR, District Judge.

James E. Reynolds and his wife, Mrs. James E. Reynolds, seek damages against Bobby J. Lewis and Lewis' employer, Greyhound Lines, Inc., for personal injuries sustained in a motor vehicle accident in which a tractor-trailer truck driven by Mr. Reynolds and a Greyhound Lines bus operated by Mr. Lewis were involved. The accident occurred on June 15, 1975 on I-75 in Campbell County, Tennessee.

Mr. Reynolds was driving his tractor-trailer on the four lane highway, which had a dividing median strip, in the outside or righthand lane in a generally southerly direction at approximately 2:45 a.m., when his truck was suddenly struck in the rear by the Greyhound bus operated by Mr. Lewis as an employee of Greyhound.

The plaintiffs claim that Lewis was guilty of many acts of negligence, i. e., he failed to keep a reasonable and proper lookout ahead, failed to keep his bus under control, drove his bus at an excessive speed under the circumstances and conditions then existing, followed too closely to the truck, operated his bus in a fatigued condition, and operated it while he was ill or sick, said condition being known to him.

Violations of certain Tennessee statutes by the bus driver are also asserted.

Defendants deny liability. They say that the accident was an unavoidable one because Mr. Lewis became unconscious at or immediately prior to the time he ran into the rear of the tractor-trailer, and that under the applicable law of Tennessee, including the cases of *Robinson v. Moore*, 512 S.W.2d 573 (Tenn.App.1974); *Hayes v. Gill*, 216 Tenn. 39, 390 S.W.2d 213 (1965), and *McCloud v. City of La Follette*, 38 Tenn. App. 553, 276 S.W.2d 763 (1954); the defendants are not liable.

The issues for the determination of the Court set forth in the pre-trial order are as follows:

(1) Did defendants violate any duty owed to the plaintiffs; if so, was such violation

struck from behind by bus, bus driver and employer had burden to establish by a preponderance of the evidence their claim that the accident was unavoidable because the bus driver suddenly lost consciousness and as a result the bus was caused to strike the truck.

3. Automobiles ⇐ 244(40)

Defendants bus driver and his employer did not sustain their burden of proving that accident in which bus struck truck from rear was unavoidable due to bus driver's sudden loss of consciousness where, inter alia, bus driver did not assert that he lost consciousness immediately before the accident but stated that he did not know what occurred and where accident could have been due to other causes.

4. Automobiles ⇐ 244(36)

Evidence that, inter alia, truck driver was driving his truck in a careful, cautious manner in the right-hand lane of a four-lane interstate highway and that the truck was suddenly struck in the rear by a bus sufficiently established that the bus driver and his employer were guilty of negligence which was the proximate and direct cause of the accident and of the injuries which resulted to the truck driver.

5. Damages ⇐ 130(3)

Award of damages in the amount of \$50,000 to truck driver who suffered a sprain of the cervical and dorsal spine with sciatica and possible hernia and of \$1,500 to the truck driver's wife was appropriate where, inter alia, injured driver lost approximately \$15,000 in earnings due to the injuries and had undergone considerable suffering.

E. G. Moody, William W. Hawkins, Kingsport, Tenn., Cecil R. Jenkins, Jr., Knoxville, N. C., for plaintiffs.

Ernest F. Smith, Kingsport, Tenn., for defendants.

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected; and

(8) the term "matching program"--

(A) means any computerized comparison of--

(i) two or more automated systems of records or ...

... members of the uniformed services (including members of the Reserve Components), individuals entitled to receive immediate or deferred retirement benefits under any retirement program of the Government of the United States (including survivor benefits).

(b) Conditions of disclosure. No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as ...

... maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his ...

... General Accounting Office;

civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) Rights of legal guardians. For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(i) Criminal penalties.

(1) Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than \$ 5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than \$ 5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than \$ 5,000.

(j) General exemptions. The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is--

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a

criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(k) Specific exemptions. The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is--

(1) subject to provisions of section 552(b)(1) of this title;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: Provided, however, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material

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shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

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*** CURRENT THROUGH 104-115, 3/12/96, EXCEPT FOR PLs 104, 106, 114 ***

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART III. EMPLOYEES
SUBPART F. LABOR-MANAGEMENT AND EMPLOYEE RELATIONS
CHAPTER 73. SUITABILITY, SECURITY, AND CONDUCT
SUBCHAPTER II. EMPLOYMENT LIMITATIONS

5 USCS § 7311 (1996)

§ 7311. Loyalty and striking

An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he--

- (1) advocates the overthrow of our constitutional form of government;
- (2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;
- (3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or
- (4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia.

HISTORY: (Sept. 6, 1966, P.L. 89-554, § 1, 80 Stat. 524.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

PRIOR LAW AND REVISION:

Derivation	U.S. Code	Revised Statutes and Statutes at Large
.....	5 U.S.C. 118p.	Aug. 9, 1955, ch. 690, Sec. 1, 69 Stat. 624.
.....	[Uncodified].	June 29, 1956, ch. 479, Sec. 3, (as applicable to the Act of Aug. 9, 1955, ch. 690, Sec. 1, 69 Stat. 624), 70 Stat. 453.

The word "position" is coextensive with and is substituted for "office or employment".

In paragraphs (1) and (2), the words "in the United States" in former section

118p(1), (2) are omitted as unnecessary in view of the reference to "our constitutional form of government".

In paragraphs (3) and (4), the reference to the "government of the District of Columbia" is added on authority of the Act of June 29, 1956, in order to make

these paragraphs meaningful with respect to individuals employed by the government of the District of Columbia. The words "From and after July 1, 1956", appearing in the Act of June 29, 1956, are omitted as executed.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

OTHER PROVISIONS:

Security requirements for government employees. Ex. Or. No. 10450 of April 27, 1953, 18 Fed. Reg. 2489, as amended by Ex. Or. No. 10491 of Oct. 15, 1953, 18 Fed. Reg. 6583; Ex. Or. No. 10531 of May 27, 1954, 19 Fed. Reg. 3069; Ex. Or. No. 10548 of Aug 3, 1954, 19 Fed. Reg. 4871; Ex. Or. No. 10550 of Aug. 6, 1954, 19 Fed. Reg. 4981; Ex. Or. No. 11605 of July 2, 1971, 36 Fed. Reg. 12831; Ex. Or. No. 11785 of June 4, 1974, 39 Fed. Reg. 20053; Ex. Or. No. 12107 of Dec. 28, 1978, 44 Fed. Reg. 1055, effective 1/11/79, provided:

"WHEREAS the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and

"WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

"NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U.S.C. 631) [now 5 USCS §§ 3301, 7301]; the Civil Service Act of 1883 (22 Stat. 403; 5 U.S.C. 632, et seq.) [now 5 USCS §§ 1101 et seq.]; section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U.S.C. 118j) [now 5 USCS §§ 3333, 7311]; and the act of August 26, 1950, 64 Stat. 476 (5 U.S.C. 22-1, et seq.) [now 5 USCS §§ 7501 et seq.], and as President of the United States, and deeming such action necessary in the best interests of the national security it is hereby ordered as follows:

"Section 1. In addition to the departments and agencies specified in the said act of August 26, 1950 [see now 5 USCS §§ 7501 et seq.], and Executive Order No. 10237 of April 26, 1951 [unclassified] the provisions of that act shall apply to all other departments and agencies of the Government.

"Sec. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

"Sec. 3. (a) The appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation. The scope of the investigation shall be determined in the first instance according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security, but in no event shall the investigation include less than a

national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation: Provided, that upon request of the § head of the department or agency concerned, the Office of Personnel Management may, in its discretion, authorize such less investigation as may meet the requirements of the national security with respect to per-diem, intermittent, temporary, or seasonal employees, or aliens employed outside the United States. Should there develop at any stage of investigation information indicating that the employment of any such person may not be clearly consistent with the interests of the national security, there shall be conducted with respect to such person a full field investigation, or such less investigation as shall be sufficient to enable the head of the department or agency concerned to determine whether retention of such person is clearly consistent with the interests of the national security.

"(b) The head of any department or agency shall designate, or cause to be designated, any position within his department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position. Any position so designated shall be filled or occupied only by a person with respect to whom a full field investigation has been conducted: Provided, that a person occupying a sensitive position at the time it is designated as such may continue to occupy such position pending the completion of a full field investigation, subject to the other provisions of this order [note]: And provided further, that in case of emergency a sensitive position may be filled for a limited period by a person with respect to whom a full field pre-appointment investigation has not been completed if the head of the department or agency concerned finds that such action is necessary in the national interest, which findings shall be made a part of the records of such department or agency.

"Sec. 4. The head of each department and agency shall review, or cause to be reviewed, the cases of all civilian officers and employees with respect to whom there has been conducted a full field investigation under Executive Order No. 9835 of March 21, 1947 [unclassified], and, after such further investigation as may be appropriate, shall re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950 [now 5 USCS §§ 7501 et seq.] such of those cases as have not been adjudicated under a security standard commensurate with that established under this order [this note].

"Sec. 5. Whenever there is developed or received by any department or agency information indicating that the retention in employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, such information shall be forwarded to the head of the employing department or agency or his representative, who, after such investigation as may be appropriate, shall review, or cause to be reviewed, and, where necessary, re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, the case of such officer or employee.

"Sec. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employees of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary the head of the department or agency concerned shall terminate the employment of such suspended officer in the interests of the national security, or employee wherever he shall determine such

termination necessary or advisable in accordance with the said act of August 26, 1950 [see now 5 USCS §§ 7501 et seq.].

"Sec. 7. Any person whose employment is suspended or terminated under the authority granted to heads of departments and agencies by or in accordance § with the said act of August 26, 1950 [see now 5 USCS §§ 7501 et seq.], or pursuant to the said Executive Order No. 9835 [unclassified] or any other security or loyalty program relating to officers or employees of the Government, shall not be reinstated or restored to duty or reemployed in the same department or agency and shall not be reemployed in any other department or agency, unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security, which finding shall be made a part of the records of such department or agency: Provided, that no person whose employment has been terminated under such authority thereafter may be employed by any other department or agency except after a determination by the Office of Personnel Management that such person is eligible for such employment.

"Sec. 8. (a) The investigations conducted pursuant to this order [this note] shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

"(1) Depending on the relation of the Government employment to the national security:

"(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

"(ii) Any deliberate misrepresentations, falsifications or omissions of material facts.

"(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction or sexual perversion.

"(iv) Any illness, including any mental condition, of a nature which in the opinion of competent medical authority may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings in such case.

"(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

"(2) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

"(3) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with any espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interest may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

"(4) Advocacy of use of force or violence to overthrow the government of the United States, or the alteration of the form of government of the United States by unconstitutional means.

"(5) Knowing membership with the specific intent of furthering the aims of, or adherence to and active participation in, any foreign or domestic organization, association, movement, group, or combination of persons

(hereinafter referred to as organizations) which unlawfully advocates or practices the commission of acts of force or violence to prevent others from exercising their rights under the Constitution or laws of the United States or of any State, or which seeks to overthrow the Government of the United States § or any State or subdivision thereof by unlawful means.

"(6) Intentional unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

"(7) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

"(8) Refusal by the individual, upon the ground of constitutional privilege against self-incrimination, to testify before a congressional committee regarding charges of his alleged disloyalty or other misconduct.

"(b) The investigation of persons entering or employed in the competitive service shall primarily be the responsibility of the Office of Personnel Management, except in cases in which the head of a department or agency assumes that responsibility pursuant to law or by agreement with the Office. The Office shall furnish a full investigative report to the department or agency concerned.

"(c) The investigation of persons (including consultants, however employed), entering employment of, or employed by, the Government other than in the competitive service shall primarily be the responsibility of the employing department or agency. Departments and agencies without investigate facilities may use the investigative facilities of the Office of Personnel Management, and other departments and agencies may use such facilities under agreement with the Office.

"(d) There shall be referred promptly to the Federal Bureau of Investigation all investigations being conducted by any other agencies which develop information indicating that an individual may have been subjected to coercion, influence, or pressure to act contrary to the interests of the national security, or information relating to any of the matters described in subdivisions (2) through (8) of subsection (a) of this section. In cases so referred to it, the Federal Bureau of Investigation shall make a full field investigation.

"Sec. 9. (a) There shall be established and maintained in the Office of Personnel Management a security-investigations index covering all persons as to whom security investigations have been conducted by any department or agency of the Government under this order [this note]. The central index established and maintained by the Office under Executive Order No. 9835 of March 21, 1947 [unclassified], shall be made a part of the security-investigations index. The security-investigations index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted an investigation concerning the person involved or has suspended or terminated the employment of such person under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950 [see now 5 USCS §§ 7501 et seq.].

"(b) The heads of all departments and agencies shall furnish promptly to the Office of Personnel Management information appropriate for the establishment and maintenance of the security-investigations index.

"(c) The reports and other investigative material and information developed by investigations conducted pursuant to any statute, order, or program described in section 7 of this order [note] shall remain the property of the investigative agencies conducting the investigations, but may, subject to considerations to

the national security, be retained by the department or agency concerned. Such reports and other investigative material and information shall be maintained in confidence, and no access shall be given thereto except with the consent of the investigative agency concerned, to other departments and agencies conducting § security programs under the authority granted by or in accordance with the said

act of August 26, 1950 [see now 5 USCS §§ 7501 et seq.], as may be required for the efficient conduct of Government business.

"Sec. 10. Nothing in this order [this note] shall be construed as eliminating or modifying in any way the requirement for any investigation or any determination as to security which may be required by law.

"Sec. 11. On and after the effective date of this order [see section 15 of this note] the Loyalty Review Board established by Executive Order No. 9835 of March 21, 1947 [unclassified], shall not accept agency findings for review, upon appeal or otherwise. Appeals pending before the Loyalty Review Board on such date shall be heard to final determination in accordance with the provisions of the said Executive Order No. 9835, as amended [unclassified]. Agency determinations favorable to the officer or employee concerned pending before the Loyalty Review Board on such date shall be acted upon by such Board, and whenever the Board is not in agreement with such favorable determination the case shall be remanded to the department or agency concerned for determination in accordance with the standards and procedures established pursuant to this order [note]. Cases pending before the regional loyalty boards of the Office of Personnel Management on which hearings have not been initiated on such date shall be referred to the department or agency concerned. Cases being heard by regional loyalty boards on such date shall be heard to conclusion, and the determination of the board shall be forwarded to the head of the department or agency concerned: Provided, that if no specific department or agency is involved, the case shall be dismissed without prejudice to the applicant. Investigations pending in the Federal Bureau of Investigation or the Office of Personnel Management on such date shall be completed, and the reports thereon shall be made to the appropriate department or agency.

"Sec. 12. Executive Order No. 9835 of March 21, 1947, as amended [unclassified], is hereby revoked.

"Sec. 13. The Attorney General is requested to render to the heads of departments and agencies such advice as may be requisite to enable them to establish and maintain an appropriate employee-security program.

"Sec. 14. (a) The Office of Personnel Management, with the continuing advice and collaboration of representatives of such departments and agencies as the National Security Council may designate, shall make a continuing study of the manner in which this order [this note] is being implemented by the departments and agencies of the Government for the purpose of determining:

"(1) Deficiencies in the department and agency security programs established under this order [this note] which are inconsistent with the interests of or directly or indirectly weaken, the national security.

"(2) Tendencies in such programs to deny to individual employees fair, impartial and equitable treatment at the hands of the Government, or rights under the Constitution and laws of the United States or this order [this note].

"Information affecting any department or agency developed or received during the course of such continuing study shall be furnished immediately to the head of the department or agency concerned. The Office of Personnel Management shall report to the National Security Council, at least semiannually, on the results of such study, shall recommend means to correct any such deficiencies or tendencies, and shall inform the National Security Council immediately of any

deficiency which which is deemed to be of major importance.

"(b) All departments and agencies of the Government are directed to cooperate with the Office of Personnel Management to facilitate the accomplishment of the responsibilities assigned to it by subsection (a) of this section.

"(c) To assist the Office of Personnel Management in discharging its § responsibilities under this order [this note], the head of each department and agency shall, as soon as possible and in no event later than ninety days after receipt of the final investigative report on a civilian officer or employee subject to a full field investigation under the provisions of this order, advise the commission as to the action taken with respect to such officer or employee. The information furnished by the heads of departments and agencies pursuant to this section shall be included in the reports which the Office of Personnel Management is required to submit to the National Security Council in accordance with subsection (a) of this section. Such reports shall set forth any deficiencies on the part of the heads of departments and agencies in taking timely action under this order [note], and shall mention specifically any instances of noncompliance with this subsection.

"Sec. 15. This order [this note] shall become effective thirty days after the date hereof [issued April 27, 1953].".

Ex. Or. No. 11605 revoked. Ex. Or. No. 11605 of July 2, 1971, 36 Fed. Reg. 12831, which amended Ex. Or. No. 10450 of April 27, 1953, 18 Fed. Reg. 2489, which formerly appeared as a note to this section, and which related to security requirements for government employees, was revoked by Ex. Or. No. 11785 of June 4, 1974, 39 Fed. Reg. 20053, which appears as a note to this section.

Security requirements for government employees. Ex. Or. No. 11785 of June 4, 1974, 39 Fed. Reg. 20053, provided:

"By virtue of the authority vested in me by the Constitution and statutes of the United States, including 5 U.S.C. 1101 et seq., 3301, 3571, 7301, 7313, 7501(c), 7512, 7532, and 7533 [5 USCS §§ 1101 et seq., 3301, 3571, 7301, 7313, 7501(c), 7512, 7532 and 7533]; and as President of the United States, and finding such action necessary in the best interests of national security, it is hereby ordered as follows:

"SECTION 1. Section 12 of Executive Order No. 10450 of April 27, 1953, as amended [note to this section], is revised to read in its entirety as follows:

" 'SEC. 12. Executive Order No. 9835 of March 21, 1947, as amended, is hereby revoked.'

"SEC. 2. Neither the Attorney General, nor the Subversive Activities Control Board, nor any other agency shall designate organizations pursuant to section 12 of Executive Order No. 10450, as amended [note to this section], nor circulate nor publish a list of organizations previously so designated. The list of organizations previously designated is hereby abolished and shall not be used for any purpose.

"SEC. 3. Subparagraph (5) of paragraph (a) of section 8 of Executive Order No. 10450, as amended [note to this section] is revised to read as follows:

'Knowing membership with the specific intent of furthering the aims of, or adherence to and active participation in, any foreign or domestic organization, association, movement, group, or combination of persons (hereinafter referred to as organizations) which unlawfully advocates or practices the commission of acts of force or violence to prevent others from exercising their rights under the Constitution or laws of the United States or of any State, or which seeks to overthrow the Government of the United States or any State or subdivision thereof by unlawful means.'

"SEC. 4. Executive Order No. 11605 of July 2, 1971, is revoked.".

NOTES:

CROSS REFERENCES

Disloyalty and asserting the right to strike against the Government, public officers and employees, 18 USCS § 1918.

§ This section is referred to in 5 USCS §§ 3333, 7103; 18 USCS § 1918; 22 USCS § 4102.

RESEARCH GUIDE

AM JUR:

15A Am Jur 2d, Civil Service § 4.

45A Am Jur 2d, Job Discrimination § 287.

AM JUR TRIALS:

Defending Civil Service Employee from Discharge, 24 Am Jur Trials, p. 421.

12 Employment Coord, Labor Relations 34,511; 34,512.

ANNOTATIONS:

The Supreme Court and the First Amendment right of association. 33 L Ed 2d 865.

Relief under Federal Civil Rights Act to state prisoners complaining of interference with access to courts. 23 ALR Fed 6.

Validity, construction, and application of provisions of 5 USCS § 7311(3) and (4) prohibiting federal employees from striking, asserting right to strike, or being member of organization known to assert right to strike against government. 23 ALR Fed 691.

Eligibility of management's relatives to vote in NLRB election. 26 ALR Fed 427.

Federal employee's right to award of interest under Back Pay Act (5 USCS § 5596). 37 ALR Fed 863.

Construction and application of § 8(g) of National Labor Relations Act (29 USCS § 158(g)), requiring labor organization to give notice of intention to engage in strike, picketing, or other concerted refusal to work at health care institution. 43 ALR Fed 449.

Dispute between labor union and transit authority involving breach of agreement entered into pursuant to § 13(c) of the Urban Mass Transportation Act of 1964 (49 USCS § 1609(c)) as controversy arising under the laws of the United States (28 USCS § 1331(a)) within jurisdiction of United States District Court. 48 ALR Fed 624.

Criminal prosecution, under 18 USCS § 1918, of federal employees participating in illegal strike. 61 ALR Fed 701.

Employer's right, under § 8(a)(1) of National Labor Relations Act (29 USCS § 158(a)(1)), to ask employee whether employee intends to participate in strike. 72 ALR Fed 818.

Who are employees forbidden to strike under state enactments or state common-law rules prohibiting strikes by public employees or stated classes of public employees. 22 ALR4th 1103.

Labor law: Right of public employees to strike or engage in work stoppage. 37 ALR3d 1147.

Right of public employees to form or join a labor organization affiliated with a federation of trade unions or which includes private employees. 40 ALR3d 728.

Bargainable or negotiable issues in state public employment labor relations.
84 ALR3d 242.

LAW REVIEW ARTICLES:

- Lev. Strikes by Government Employees: Problems and Solutions. 57 ABA J 771.
- Witt. Public Sector Strike: Dilemma of the Seventies. 8 Cal Western L Rev § 102.
- Howlett. Right to Strike in the Public Sector. 53 Chicago B Record 108.
- Isbell. Dissidents in the Federal Government. 4 Civil Liberties Rev 72, September/October 1977.
- Vaughn. Public Employees and the Right to Disobey. 29 Hastings L J 261, November 1977.
- Ostan. right of Federal Civilian Employees to Picket: confusion and Controversy. 29 Lab L J 219.
- Clark. Public Employee Strikes: Some Proposed Solutions. 23 Lab. L J 111.
- Constitutional Law--Loyalty Oaths Obstructing Civil Liberties. 19 NY LF 185, Summer 1973.
- Haemmel. Government Employees and the Right to Strike--The Final Necessary Step. 39 Tenn L Rev 75.

INTERPRETIVE NOTES AND DECISIONS

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2. Membership in subversive organization
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I. LOYALTY AND SECURITY REQUIREMENTS

1. Loyalty oath

Oath required of college instructor as condition of federal employment under 5 USCS § 3333, incorporating provisions of 5 USCS § 7311 to effect that he was not member of organization which advocated overthrow of government violated First Amendment of Constitution of United States as being too broad because it covered all members, even those who did not have specific intent to further organization's unlawful aims. *Haskett v Washington* (1968, DC Dist Col) 294 F Supp 912.

By virtue of applicable decisions of Supreme Court, provisions of 5 USCS § 7311 incorporated into loyalty oath under 5 USCS § 3333, are unconstitutional as against First Amendment of Constitution the United States. *Stewart v Washington* (1969, DC Dist Col) 301 F Supp 610.

2. Membership in subversive organization

§ Membership of civil service employee in organization designated by attorney general as one which was seeking to overthrow United States government by unconstitutional means did not on that sole ground justify his discharge. *Kutcher v Gray* (1952) 91 US App DC 266, 199 F2d 783.

It is incumbent upon organizations seeking removal from Attorney General's list of subversive agencies promulgated pursuant to predecessor of Executive Order 10450 (5 USCS § 7311 note), to exhaust prescribed administrative procedures prior to seeking judicial relief. *National Council of American-Soviet Friendship v Brownell* (1957) 100 US App DC 116, 243 F2d 222.

Tenants of municipally-operated housing units may not be evicted from premises for failure to sign certificate denying membership in any one of list of allegedly subversive organizations designated by Attorney General of United States as within Executive Order 10450 (5 USCS § 7311 note). *Housing Authority of Los Angeles v Cordova* (1955) 130 Cal App 2d Supp 883, 279 P2d 215, cert den (1956) 350 US 969, 100 L Ed 841, 76 S Ct 440.

3. Employment or discharge of personnel

Executive Order 10450 (5 USCS § 7311 note), which provides standards and procedures for exercise by agency heads of their power under Summary Suspension Act (predecessor of 5 USCS §§ 3571, 5594 note, 7312, 7531--7533) to summarily dismiss employees in interest of national security, and which establishes controlling standard for dismissal determinations by agency heads that employee's retention is not clearly consistent with interest of national security, is invalid to extent that it enjoins upon agency heads duty of discharging any employee of doubtful loyalty, irrespective of character of his job and his relationship to national security, determination that federal employee occupies sensitive position being condition precedent to exercise by agency head of power of summary dismissal; any ambiguities in Executive Order 10450 are to be resolved against government. *Cole v Young* (1956) 351 US 536, 100 L Ed 1396, 76 S Ct 861.

Executive Order 10450 (5 USCS § 7311 note), relating to discharge of government employees on security or loyalty grounds, does not alter executive power to discharge summarily, without giving of any reason, employee who is not within protection of Civil Service Act (5 USCS §§ 632 et seq.), Veterans' Preference Act (5 USCS §§ 851 et seq.), or any other statute relating to employment rights of government employees. *Vitarelli v Seaton* (1959) 359 US 535, 3 L Ed 2d 1012, 79 S Ct 968.

Fact that job applicant could not qualify for job because he could not obtain necessary security clearance rebuts prima facie showing of discrimination; government policy attaching special weight to fact that applicant has relatives residing in foreign country controlled by government whose interests or policies are hostile to United States does not support finding of unlawful discrimination; denial of security clearance does not constitute stigmatization. *Molerio v FBI* (1984) 242 US App DC 137, 749 F2d 815, 36 BNA FEP Cas 586, 35 CCH EPD para. 34825, 16 Fed Rules Evid Serv 1295, 40 FR Serv 2d 769.

Executive Order 10450 (5 USCS § 7311 note) which provides standards for investigation of employees in interest of national security, does not create constitutional or statutory right to cause of action based upon dismissal as

result of investigation in which apparently unreliable informant raised issues concerning employee's sexual preferences. *Richards v Mileski* (1983, DC Dist Col) 567 F Supp 1391.

Office of Personnel Management is responsible for determining whether agencies and departments are complying with Executive Order 10450 (5 USCS § 7311 note); agencies may not require full security investigation for positions that § do not affect national security of United States; senior trial attorney position does not implicate national security concerns. *Flake v Bennett* (1985, DC Dist Col) 611 F Supp 70.

II. STRIKES AND ASSERTION OF RIGHT TO STRIKE [5 USCS § 7311(3), (4)]

A. In General

4. Constitutionality of proscription of assertion of right to strike

5 USCS § 7311 is not rendered totally invalid by unconstitutionality of provision prohibiting holding or accepting federal employment by one who asserts right to strike, since offending provision may be severed, leaving remainder of section fully operative. *United States v Taylor* (1982, CA9 Ariz) 693 F2d 919, 112 BNA LRRM 2068.

That portion of 5 USCS § 7311(3) which prohibits federal employees from asserting right to strike against government of United States or government of District of Columbia, and all of 5 USCS § 7311(4) are unconstitutional as violating First Amendment (USCS Constitution, Amendment 1), since to ordinary citizen, word "assert" evokes image of advocacy or reasoned argument and such prohibition of advocacy of change in law to legalize strike by government employee is restriction on speech proscribed by First Amendment. *National Asso. of Letter Carriers v Blount* (1969, DC Dist Col) 305 F Supp 546, 72 BNA LRRM 2591, 61 CCH LC para. 10449, 23 ALR Fed 684, app dismd (1970) 400 US 801, 27 L Ed 2d 33, 91 S Ct 7.

Provision of District of Columbia Code, similar to 5 USCS § 7311(4), which prohibited policemen from becoming members of any labor organization which held or claimed right to strike, is unconstitutional since provision on its face ran expressly counter to time-honored right to engage in advocacy or reasoned argument, which activity lies at heart of free speech in association protected by First Amendment. *Police Officers' Guild, etc. v Washington* (1973, DC Dist Col) 369 F Supp 543, 85 BNA LRRM 2203, 72 CCH LC para. 53214.

5. Persons to whom provisions apply

Employees of various federal executive departments working aboard government vessel are federal employees, and by virtue of their governmental employment, their right to join unions and to select bargaining representatives, unlike that of private seamen, exists only by express leave of President and otherwise they are forbidden, under pain of discharge, fine, and imprisonment, from exercising or asserting right to strike as result of predecessors to 5 USCS § 7311(3), (4) and 18 USCS § 1918. *Amell v United States* (1966) 384 US 158, 16 L Ed 2d 445, 86 S Ct 1384.

5 USCS § 7311(3) applies to Library of Congress employees. *Bullock v Mumford* (1974) 166 US App DC 51, 509 F2d 384, 8 CCH EPD para.9730, 9 CCH EPD para. 9866.

5 USCS § 7311(3), (4) has been made applicable to employees of United States Postal Service by 39 USCS § 410(b)(1). *National Asso. of Letter Carriers v Sombrotto* (1971, CA2 NY) 449 F2d 915, 78 BNA LRRM 2550, 66 CCH LC para. 12092.

For purposes of 5 USCS § 7311(3), employees of Tennessee Valley Authority are

employees holding positions with federal government. *Tennessee Valley Authority v Bailey* (1980, ED Tenn) 495 F Supp 711.

6. -Standing to challenge

Public employee union serving as certified exclusive representative of 6,000 bargaining units of postal employees, has standing to challenge validity of those portions of 5 USCS § 7311(3) and (4) which prohibit federal employees § from asserting right to strike against United States Government or government of District of Columbia, and from being members of organizations of employees which are known to assert right to strike against such government since if plaintiff union openly asserted right to strike, its members could be put at hazard and employees could be barred from government employment because of plaintiff's activities, and since other letter carriers might be inhibited from joining union because of possible sanction thus giving plaintiff union interest in testing validity of provisions whose legal effect would be to hamper its efforts. *National Asso. of Letter Carriers v Blount* (1969, DC Dist Col) 305 F Supp 546, 72 BNA LRRM 2591, 61 CCH LC para. 10449, 23 ALR Fed 684, app dismd (1970) 400 US 801, 27 L Ed 2d 33, 91 S Ct 7.

B. Participation In Strikes and Related Actions

7. Generally

It is not necessary for arbitrator to state precise words that employee "participates in strike" in order to conclude that continued employment would violate 5 USCS § 7311. *American Postal Workers Union v United States Postal Service* (1982, CA9 Cal) 682 F2d 1280, 110 BNA LRRM 2764, cert den (1983) 459 US 1200, 75 L Ed 2d 431, 103 S Ct 1183, 112 BNA LRRM 2752.

5 USCS § 7311, which expressly bars from federal employment any person who strikes against U.S. Government, contemplates indefinite ban on employment; thus, even if existing federal regulation applies more lenient policy than that allowed by statute, President, acting under his statutory authority to regulate federal employment (5 USCS § 3301) may issue directive overriding such regulation. *Dehainaut v Pena* (1994, CA7 Ill) 32 F3d 1066, 147 BNA LRRM 2014, cert den (1995, US) 131 L Ed 2d 309, 115 S Ct 1427, 148 BNA LRRM 2960.

Either participation strike planning or express agreement with others to perpetuate strike is necessary ingredient of proof that particular employee participated in strike; proof of general intent is sufficient; unexplained absence during strike of general knowledge establishes that employee intended to strike. *Russell v Department of Transp., FAA* (1985, CA FC) 771 F2d 493, 120 BNA LRRM 3002, cert den (1986) 476 US 1158, 90 L Ed 2d 718, 106 S Ct 2275, 122 BNA LRRM 2424.

Strikes by federal employees against federal government are forbidden by 5 USCS § 7311 and 18 USCS § 1918. *Bateman v South Carolina State Ports Authority* (1969, DC SC) 298 F Supp 999, 71 BNA LRRM 2961, 60 CCH LC para. 10266.

8. What constitutes participation in strike

Agency can establish prima facie case of striking by showing employee's unauthorized absence during strike of general knowledge and his presence on picketline; presence on picketline is not essential and charge of striking is proven when it is shown that employee withheld services in concert with others regardless of whether employee joined picketline; proof of widespread strike of general knowledge together with proof of absence without authorization or explanation during strike constitutes prima facie case of participation in

strike; upon showing of prima facie case, burden shifts to employee to go forward with evidence to rebut showing of participation in strike; proof of striking charge does not require proof of employee's specific intent to implement agreed upon plan. *Schapansky v Department of Transp.*, FAA (1984, CA FC) 735 F2d 477, 116 BNA LRRM 2532, cert den (1984) 469 US 1018, 83 L Ed 2d 358, 105 S Ct 432, 123 BNA LRRM 3128.

Removal of employee for striking is appropriate where there is evidence that absence from work during strike is in concert with strikers in view of § evidence of presence among pickets, at union rally, and failure of employee to explain need for relief due to demands of changing residence and going on vacation. *Letenyei v Department of Transp.*, FAA (1985, CA FC) 767 F2d 898, 119 BNA LRRM 3613.

Phrase "participates in strike" means "striking," essence of which is actual refusal in concert with others to provide services to one's employer, and since precise parameters of phrase "participates in strike" are not so unclear that employees could fail to exercise other protective First Amendment rights for fear of overstepping line, and phrase is not too broad to withstand judicial scrutiny; portions of 5 USCS § 7311(3), appointment affidavit required by 5 USCS § 3333, portions of 18 USCS § 1918(3), and those portions of § 2(e)(2) of Executive Order 11491 which prohibit federal employees from participating in strikes against United States Government or government of District of Columbia are constitutional since no employee at common law had right to strike in concert with his fellow employees and in absence of statute, do not possess right to strike; in absence of such right it is not irrational or arbitrary for government to condition employment on promise not to withhold labor collectively or to prohibit strikes by those in public employment. *United Federation of Postal Clerks v Blount* (1971, DC Dist Col) 325 F Supp 879, 76 BNA LRRM 2932, 65 CCH LC para. 11645, affd (1971) 404 US 802, 30 L Ed 2d 38, 92 S Ct 80, 78 BNA LRRM 2463.

Word "strike" as used in 5 USCS § 7311 means actual refusal in concert with others to provide services to one's employer. *Tennessee Valley Authority v Bailey* (1980, ED Tenn) 495 F Supp 711.

Participation in strike may be shown by fact that employee was absent without leave at time when, as matter of general knowledge, strike occurred; in order to establish that employee was absent without leave, agency must submit time and attendance records or evidentiary substitutes for such records. *Fagan v Department of Transp.* (9/29/83 MSPB) Docket No. DE075281F0594.

9. Effect of participation on eligibility for unemployment compensation

Actions of air traffic controllers in engaging in prohibited strike constitute misconduct for purpose of state law disqualifying striking employees from unemployment benefits. *FAA v Montana State Dep't of Labor & Indus.* (1984) 212 Mont 1, 685 P2d 365.

10. Injunctive and related relief

Court of Appeals will affirm as much of District Court's opinion as is concerned with issuance of preliminary injunction enjoining air traffic controller from "in any manner continuing, encouraging, ordering, engaging, aiding, or taking any part in any strike, work stoppage or slowdown or any interference with or obstruction to movement of operation of any aircraft" but will reverse as much of opinion as enjoined Federal Aviation Administration from taking any disciplinary action against air traffic controller who participated in work stoppage by calling in ill or by giving other reasons for absences since government had proven prima facie case of illegal work stoppage under 5 USCS §

7311(3) and District Court's opinion enjoining FAA from taking any disciplinary action against air controllers based on work stoppage "obviously flies in face of statute". *United States v Professional Air Traffic Controllers Organization (PATCO)* (1970, CA2 NY) 438 F2d 79, 75 BNA LRRM 2834, 64 CCH LC para. 11342, cert den (1971) 402 US 915, 28 L Ed 2d 661, 91 S Ct 1373, 76 BNA LRRM 3027, 65 CCH LC para. 11671.

Court will enjoin local union from continuing strike and picketing steam plant being constructed by Tennessee Valley Authority since TVA was corporate § agency and instrumentality of United States and its employees were employees of

United States thereby making concerted actions of union members in refusing to report for work at steam plant and establishing and maintaining picket line at plant to induce other TVA employees not to work unlawful strike in violation of predecessors to 5 USCS § 7311(3) and 18 USCS § 1918 and since TVA would suffer irreparable injury as result of picketing. *Tennessee Valley Authority v Sheet Metal Workers' International Asso.* (1962, WD Ky) 233 F Supp 997, 51 CCH LC para. 19521.

Court will issue injunction enjoining unions, officers, and postal employees from striking against United States Post Office Department and from interfering with orderly operations of Postal Service since defendants were engaged in unlawful strike against United States Government under 5 USCS § 7311(3) and (4) and 18 USCS § 1918, and since strike would cause immediate and irreparable injury to United States and its citizens. *United States v Branch 60 National Asso. of Letter Carriers* (1970, DC Conn) 312 F Supp 619, 73 BNA LRRM 2853, 62 CCH LC para. 10805.

Air Transport Association is entitled to judgment holding Professional Air Traffic Controllers Organization in civil contempt as well as for damages for violating final judgment of earlier suit by virtue of defendants' alleged slowdowns where in negotiating and executing stipulation upon which permanent injunction was entered in earlier suit parties had intended injunction to be applicable to all future violations by defendants and where enforcement of permanent injunction is further supported by 18 USCS § 1918 which prohibits federal employees from engaging in strikes. *Air Transport Asso. v Professional Air Traffic Controllers Organization ("PATCO")* (1978, ED NY) 453 F Supp 1287, 98 BNA LRRM 2985, affd without op (1978, CA2 NY) 594 F2d 851, 107 BNA LRRM 3213, cert den (1979) 441 US 944, 60 L Ed 2d 1046, 99 S Ct 2163, 107 BNA LRRM 3213.

Action by former air traffic controllers who participated in 1981 illegal strike, seeking declaration that total ban on their re-employment with FAA was illegal, is dismissed, since 5 USCS § 7311 allows federal employee who participates in strike a *Clarry v United States* (1995, ED NY) 891 F Supp 105.

Action by former air traffic controllers who participated in 1981 illegal strike, seeking declaration that total ban on their re-employment with FAA was illegal, is dismissed, since 5 USCS § 7311 allows federal employee who participates in strike against U.S. to be banned from future federal employment, and Supreme Court has held that federal employee's employment may be conditioned on promise not to strike, and plaintiffs therefore have no claim to entitlement to federal employment following their acknowledged participation in illegal strike. *Clarry v United States* (1995, ED NY) 891 F Supp 105.

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to federal employment following their acknowledged participation in illegal strike. *Clarry v United States* (1995, ED NY) 891 F Supp 105.

11. -Standing to seek relief

Airline association and 13 member airlines have standing to bring action against air traffic controllers' organization to enjoin work stoppage in New York City metropolitan area, which job action was based on false assertions of illness and which was causing serious financial damage to plaintiff airlines and interfering with normal operations. *Air Transport Asso. v Professional Air § Traffic Controllers Organization* (1970, ED NY) 313 F Supp 181, 73 BNA LRRM 3003, 75 BNA LRRM 2149, 62 CCH LC para. 10804, vacated, in part on other grounds (1970, CA2 NY) 438 F2d 79, 75 BNA LRRM 2834, 64 CCH LC para. 11342, cert den (1971) 402 US 915, 28 L Ed 2d 661, 91 S Ct 1373, 76 BNA LRRM 3027, 65 CCH LC para. 11671.

Federal employee knowingly violated 5 USCS § 7324(a)(2) by running as Democrat for mayor of municipality, and violation was of such scope and effect as to warrant removal. *Special Counsel v Carney* (6/4/86 MSPB) Docket No. HQ12068510030, 31 MSPR 32.

12. Suspension or removal of employee

District Court did not abuse its discretion when it granted motion for protective order and stay of administrative action prohibiting, during term of preliminary injunction, certain suspensions and removals of employees by Federal Aviation Administration in connection with work stoppage conducted in violation of 5 USCS § 7311(3). *United States v Moore* (1970, CA10 Colo) 427 F2d 1020, 74 BNA LRRM 2401.

Court will deny requested stay of discharge, pending appeal of dismissal of complaint alleging wrongful discharge filed by 4 persons who participated in nationwide "sick-out" of air traffic controllers, on ground that men had failed to exhaust their administrative remedies by appealing their discharges to Federal Aviation Administration or to Civil Service Commission. *Ogden v Department of Transp.* (1970, CA6 Mich) 430 F2d 660, 63 CCH LC para. 11102.

Determination of appropriate penalty for striking against government is matter committed primarily to discretion of employing agency; removal is clearly justified for striking against government since striking is violation of oath employee signs as condition of employment and constitutes criminal offense; length and quality of past service does not constitute grounds for mitigation of penalty of removal for striking; unevenness in application of penalty is not grounds for invalidating penalty, and government's failure to remove those to return to work during grace period may be treated differently than those who stay out on strike; government's failure to remove participants in previous strikes does not bind government against removal of any striker under later circumstances. *Schapansky v Department of Transp., FAA* (1984, CA FC) 735 F2d 477, 116 BNA LRRM 2532, cert den (1984) 469 US 1018, 83 L Ed 2d 358, 105 S Ct 432, 123 BNA LRRM 3128.

Employee removed for participating in unlawful strike is ineligible, despite presidential alleviation of total disbarment to extent of permitting re-employment in positions outside scope of former employing agency, for position as air traffic controller for Department of Defense since such position would interface with former employing agency, Federal Aviation Administration. *Meyer v Office of Personnel Management* (1985, CA FC) 767 F2d 868.

Persons who participated in strike against United States government may be barred indefinitely from employment in government and Office of Personnel

management's interpretation of presidential directive as imposing indefinite ban upon employment by federal aviation administration of former air traffic controllers dismissed on account of striking was not incorrect, but consistent with determination that employment would be detrimental to efficiency of operations at FAA. *Wagner v Office of Personnel Management* (1986, CA FC) 783 F2d 1042, 121 BNA LRRM 2980, cert den (1986) 477 US 906, 91 L Ed 2d 566, 106 S Ct 3276, 122 BNA LRRM 2656.

Court will uphold discharge of 2 air traffic controllers who failed to report for work and will not attempt to discover new due process rights to undercut long established administrative procedure since recent discovery by public § employees of all levels of government that under general system of due process,

laws cannot be enforced against mass violators of law and that no-strike law (5 USCS § 7311) applicable to government employees can be violated almost with impunity as immeasurably increased burdens of executive department of government and it ill behooves judiciary to add to those burdens by enlargening due process concepts. *Herriges v Unites States* (1970, DC Mont) 314 F Supp 1352, 74 BNA LRRM 2656, 63 CCH LC para. 11051.

Agency's imposition of removal penalty on air traffic controller cannot be deemed clearly excessive or disproportionate to sustained charge of striking against federal government, despite many years of government service and flawless prior employment record; nature and gravity of offense and direct effect on agency's ability to perform its mission outweighs otherwise mitigating factors. *Croissant v Department of Transp.* (1983, MSPB) Docket No. SE075281F0439, 28 MSPR 1.

It was more likely than not that employee would have returned to work prior to expiration of deadline shift if he had been able to complete attempted contacts where evidence demonstrated that employee upon returning from vacation called agency and spoke with supervisor, was informed that his leave was "probably" canceled and he would not be permitted to return to work, and was not allowed access to facility, confirming his suspicion that he had been removed from his position, so that employee's absence from work was result of factors other than strike participation and charges against him cannot be sustained. *Anderson v Department of Transp.* (1983, MSPB) Docket No. CH 075281F0874, 29 M.S.P.R. 620.

13. -Coercion defense

Employee contesting removal based upon participation in illegal strike has defense of coercion; coercion will be found if employee's failure to report for work was result of threat or other intimidating conduct directed towards him which is sufficient to instill reasonable fear of physical danger to himself or others which person of ordinary firmness would not be expected to resist; threats of union harassment by monitoring work are speculative, being dependant on return of strikers to old jobs, and do not constitute coercion; general fear of being ostracized and refused co-operation by fellow employees is insufficient to establish coercion. *Ferrando v Department of Transp., Federal Aviation Admin.* (1985, CA FC) 771 F2d 489, 120 BNA LRRM 2418.

Removal of air traffic controller for participation in strike is appropriate where absence from work during strike is voluntary; subjective fear of employee is not sufficient cause to escape sanctions. *Russell v Department of Transp., FAA* (1985, CA FC) 771 F2d 493, 120 BNA LRRM 3002, cert den (1986) 476 US 1158, 90 L Ed 2d 718, 106 S Ct 2275, 122 BNA LRRM 2424.

Mere generalized threats and fear of working conditions should union win are not sufficient to establish that employee failed to report for work because of

threat that created reasonable fear of physical danger to himself or others which person of ordinary firmness should not be expected to resist. *Schultz v Department of Transp., FAA* (1985, CA FC) 773 F2d 296, 120 BNA LRRM 2536.

Absence of employee as result of coercion does not warrant suspension or removal; employee must show that absence from work was result of threat or other intimidating conduct sufficient to instill in him reasonable fear of physical danger to himself or others which person of ordinary firmness would not be expected to resist; threat of personal injury to employee and his spouse made in context of continuing intimidation constitutes coercion. *Hoyer v Department of Transp.* (9/30/83 MSPB) Docket No. CH075281F1893.

§ 14. -Other defenses

Air traffic controller on annual leave who was not informed of cancellation of leave during pendency of illegal strike and who was unaware of strike due to his absence from country, was wrongfully removed for participation in unlawful strike. *Carpenter v Department of Transp.* (9/29/83 MSPB) Docket No. NY075281F1432.

Air traffic controller's reporting for duty on deadline shift, and departure from work following apparent chest pains and shortness of breath, does not warrant removal for participation in unlawful strike. *Coller v Department of Transp.* (9/30/83MSPB) Docket No. PH075281F0746.

Air traffic controller who did not report for work during strike for medical reasons and who provided medical documentation of his illness is not subject to removal, but instead is subject to 30-day suspension. *Pressley v Department of Transp.* (9/30/83 MSPB) Docket No. AT075281F2453.

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SEND TO: WHITE, WENDY
 WHO - GEN. COUNSEL
 725 17TH ST. N.W.
 WASHINGTON, DISTRICT OF COLUMBIA 20503

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plaintiff wishes the Executive Office of the President to conduct an FOIA search for responsive documents, plaintiff must properly submit an FOIA request to that agency. n1

- - - - -Footnotes- - - - -

n1 The term "agency" within the meaning of <=14> 5 U.S.C. @ 552 does not include the White House. It does, however, include the Executive Office of the President. <=15> Nixon v. Sampson, 389 F. Supp. 107 (D.D.C. 1975), stay granted <=16> 513 F.2d 430 (D.C. Cir. 1975).

- - - - -End Footnotes- - - - -

Plaintiff opposes dismissal in this case because he claims the criminal as well as political implications of the materials he seeks pursuant to the FOIA are too great. There is nothing in the FOIA; however, that requires a court to evaluate the importance of requested [*10] information. The only issue before this Court is whether or not the search was reasonable.

Plaintiff claims that defendants' counsel have a conflict of interest in this case because of an association between Department of Defense attorneys and Attorneys General Russell and Day. n2 Plaintiff claims that Attorneys General

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