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The Right to Disclosure of NLRB Documents Under the Freedom of Information Act

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Abstract

This note analyzes the Freedom of Information Act (FOIA), especially as it pertains to the National Labor Relations Board (NLRB), which has been particularly affected by requests for disclosure of documents. The NLRB's function is to settle labor disputes and remedy unfair labor practices with a minimum of delay. The note argues that allowing Board proceedings to be enjoined via pre-hearing FOIA suits only encourages parties to use these suits as dilatory measures. The note suggests that the FOIA was never intended to be used as a tool of discovery and argues for a stop to the increase in discovery-injunction decisions that tip the balance in favor of parties to agency proceedings.

KEYWORDS: Freedom of Information Act, FOIA, National Labor Relations Board, NLRB

THE RIGHT TO DISCLOSURE OF NLRB DOCUMENTS UNDER THE FREEDOM OF INFORMATION ACT

I. Introduction

The Freedom of Information Act (FOIA)[1] makes it possible, within limitations, for the public to obtain disclosure of government documents. The purpose of the statute is to prevent the accumulation of a body of secret law;[2] however, some federal agencies contend that parties to agency proceedings have utilized this statute to obtain pre-hearing discovery.[3]

The National Labor Relations Board (NLRB) has been especially affected by requests of this nature.[4] This Note will briefly analyze FOIA, particularly as it applies to the NLRB. A balance between the agency's needs for secrecy and parties' rights to know will be suggested.

II. The Freedom of Information Act

A primary purpose of FOIA is to make disclosure of federal agency information the rule and to make secrecy the exception.[5] Agency procedures, statements of general policy, and other items of interest to the general public are available under the law.[6] Parties to agency proceedings, however, are primarily interested in materials listed in section 552(a)(2).[7] That section commands disclosure of orders, final opinions[8] and other similar items which carry the weight of legal

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1. 5 U.S.C. § 552 (1970), *as amended*, (Supp. IV, 1974)[hereinafter cited as FOIA].
2. Senator Dirksen summed up the need to prevent promulgation of laws known only to the promulgators as follows:

> [Fair] and just administrative proceedings require, first of all, that the people know not only what the statutory law is, but what the administrative rules and regulations are, where to go, who to see, what is required and how they must present their matter. They must be informed in advance about the decisions which the administrative agencies and departments may use as precedent in determining their matter and whether these decisions were unanimous or divided . . . .

110 CONG. REC. 17088 (1964) (remarks of Senator Dirksen).
3. *See* cases cited in notes 45-47 *infra*.
4. *Id.*
5. Ethyl Corp. v. EPA, 478 F.2d 47, 49 (4th Cir. 1973).
6. 5 U.S.C. § 552(a)(1) (1970).
7. *Id.* § 552(a)(2), *as amended*, (Supp. IV, 1974).
8. *Id.* § 552(a)(2)(A).

precedent in agency adjudication.[9] The law prohibits agency use of such material against another party unless the material has been indexed or made available, or the party has notice thereof.[10] Ideally, no agency should be permitted to prevail in a proceeding merely because it has access to material of precedential value which is unavailable to its opponent.

Through FOIA, Congress intended to give the public the broadest possible access to government documents and processes.[11] However, as President Lyndon B. Johnson realized, "the welfare of the Nation or the rights of individuals may require that some documents not be made available."[12] As a result, Congress passed section 552(b),[13] which creates nine categories of materials exempt from disclosure. In the context of NLRB proceedings, the fifth[14] and seventh[15] exemptions have become the most important.

Exemption 5 covers inter-agency or intra-agency memoranda and letters.[16] It exempts from discovery "attorney-work product" and intra-agency advisory opinions (sometimes called "executive privilege").[17] Exemption 7 protects investigatory files compiled for law enforcement purposes.[18] Prior to the 1974 amendments, an agency could, and often did, thwart FOIA by labelling a file "investigatory" and placing a multitude of material in it.[19] The amendments limited the "investigatory" material classification to data which would upon disclosure:[20]

> (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source . . . (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel . . . .

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9. *Id.* §§ 552(a)(2)(B)-(C).
10. *Id.* §§ 552(a)(2)(C)(i)-(ii).
11. *See, e.g.*, 110 CONG. REC. 17089 (1964).
12. SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SEN. COMM. ON THE JUDICIARY, 93d Cong., 2d Sess., FREEDOM OF INFORMATION ACT: LEGISLATIVE MATERIALS, CASES, ARTICLES 195 (Comm. Print 1974) (remarks of President Johnson).
13. 5 U.S.C. § 552(b) (1970), *as amended*, (Supp. IV, 1974).
14. *Id.* § 552(b)(5) (1970).
15. *Id.* § 552(b)(7), *as amended*, (Supp. IV, 1974).
16. *Id.* § 552(b)(5) (1970).
17. *See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-54 (1975).
18. 5 U.S.C. § 552(b)(7) (1970), *as amended*, (Supp. IV, 1974).
19. *See* 110 CONG. REC. 17088-89 (1964).
20. 5 U.S.C. § 552(b)(7) (Supp. IV, 1974), *amending* 5 U.S.C. § 552(b)(7) (1970).

Under either exemption, an agency may not indiscriminately classify material as protected from FOIA disclosure requirements.[21] In instances where the privilege has been abused and the inspection of documents has been wrongfully denied, federal district courts are empowered to grant a mandatory injunction.[22] This power, however, should be subject to the usual provisions that all available administrative remedies have been exhausted and that irreparable harm will result.[23]

III. The NLRB and FOIA

A. NLRB v. Sears, Roebuck & Co.: The Scope of Exemption 5

When an unfair labor practice is charged,[24] the NLRB sends a field examiner to investigate.[25] During the course of the investigation, the examiner may take statements from witnesses.[26] The examiner's findings, which are often in affidavit form, are next submitted to the regional director who decides whether a complaint should issue.[27]

The party who alleged the unfair labor practice may appeal a decision of the regional director not to issue a complaint.[28] The file on the matter is sent to an appeals committee within the general counsel's office.[29] The regional director is bound by the committee's decision which is set forth, with reasons, in a document called an appeals memorandum.[30]

The regional director is required, or "permitted," to solicit the general counsel's advice in several other instances.[31] In cases involv-

21. Ethyl Corp. v. EPA, 478 F.2d 47 (4th Cir. 1973).

22. *See* 5 U.S.C. § 552(a)(3) (1970), *as amended*, 5 U.S.C. § 552(a)(4)(B) (Supp. IV, 1974).

23. An injunction ordinarily will not issue unless the petitioner demonstrates that he had no adequate remedy at law (including administrative avenues to pursue), will suffer irreparable harm without the injunction, and is likely to be successful at trial on the merits. *See generally* 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, §§ 2942-50 (1973).

24. 29 C.F.R. § 101.2 (1975). The investigation of an unfair labor practice is initiated by filing a charge with the regional director. *Id.*

25. *Id.* § 101.4.

26. *Id.*

27. *Id.* §§ 101.4-.6.

28. *Id.* §§ 101.6, 102.19, 102.81.

29. *Id.* §§ 102.19, 102.81.

30. *Id.* §§ 101.6, 102.19(c).

31. For further discussion of this problem, see NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 140 (1975).

ing "novel, complex or doubtful issues,"[32] an advice memorandum will be issued.[33] Despite its name, that memorandum is also a final determination which binds the regional director to a given course of action.[34]

In *NLRB v. Sears, Roebuck & Co.*[35] plaintiff appellee sought examination of all appeals and advice memoranda which pertained to certain matters of legitimate interest to the company.[36] Plaintiff claimed that the memoranda constituted section 552(a)(2) material—"final opinions"—and that the Act mandated their disclosure.[37] Both the district court and the court of appeals agreed[38] and ordered the Board to release all of the documents. The NLRB appealed.

After receiving the case, the Supreme Court held,[39]

> those Advice and Appeals Memoranda which explain decisions by the General Counsel not to file a complaint are "final opinions" . . . and fall outside the scope of Exemption 5; but that those Advice and Appeals Memoranda which explain decisions by the General Counsel to file a complaint and commence litigation . . . are not "final opinions" . . . and do fall within the scope of Exemption 5.

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32. 1 NLRB CASEHANDLING MANUAL §§ 11750-56 (1975).

33. *Id.* §§ 11751.1(b)(1)-(13). "Novel, complex or doubtful issues" include: (1) issues concerning a union's duty of fair representation and/or union-caused employment discrimination for reasons of race, sex or other arbitrary considerations; (2) issues pertaining to union internal discipline; and (3) issues involving jurisdiction. *Id.*

34. *See* 29 C.F.R. § 102.19(c) (1975). For a discussion of this procedure, see NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 141-42 (1975).

35. 421 U.S. 132 (1975).

36. *Id.* at 142-43. Plaintiffs asked the NLRB for the memoranda issued within the previous five years dealing with the subjects of the propriety of withdrawals by employers or unions from multi-employer bargaining arrangements, disputes as to the commencement date of negotiations, or conflicting interpretations in any context of the Board's rule in *Retail Associates*, 120 NLRB 388 (1958). 421 U.S. at 142-43. Plaintiffs contended that they needed this material since it was the only source of agency law on the issues. The general counsel replied that advice memoranda are simply guides for the regional director and were not final opinions. Further, the general counsel said that appeals memoranda which involved the filing of a complaint were not final opinions and that appeals memoranda which did not result in the filing of a complaint were several thousand in number and had no precedential significance. As for the indices to the appeals memoranda, the general counsel alleged that such memos were not indexed by subject matter and that he was "unable" to comply with plaintiffs' request. *Id.* at 143-44.

37. *Id.* at 143-44.

38. *Id.* at 146-47.

39. *Id.* at 148.

Perhaps aware that these distinctions seemed contrary to the spirit of FOIA, the Court stated that the ultimate purpose of exemption 5 was to "prevent injury to the quality of agency decisions."[40] The deliberation processes of the agency had to be safeguarded; however, no harm would result by compelling disclosure of decisions finally reached. Therefore, "as long as prior communications and the ingredients of the decision-making process are not disclosed,"[41] the decision itself had to be made available for examination.

B. After *Sears*: Exemption 7 Cases

The *Sears* Court expressly declined to consider any claim under exemption 7.[42] Absent a Supreme Court decision concerning the scope of that rule, some lower courts in post-*Sears*[43] cases ordered full disclosure[44] while other courts denied disclosure altogether.[45] This confusion has been ameliorated somewhat by the general acceptance[46] of the Second Circuit's decision in *Title Guarantee Co. v. NLRB*.[47]

In 1975 plaintiff Title Guarantee was charged with committing an unfair labor practice by refusing to execute a collective bargaining agreement.[48] The NLRB issued a complaint after an investigation.[49] Plaintiff then requested copies of all witness statements obtained during the investigation. The regional director refused the request,

40. *Id.* at 151.

41. *Id.*

42. *Id.* at 162-65.

43. *See, e.g.*, Title Guarantee Co. v. NLRB, 534 F.2d 484 (2d Cir. 1976), *rev'g*, 407 F. Supp. 498 (S.D.N.Y. 1975); Capital Cities Communications, Inc. v. NLRB, 409 F. Supp. 971 (N.D. Cal. 1976).

44. *See, e.g.*, Maremont Corp. v. NLRB, 91 L.R.R.M. 2804 (W.D. Okla. 1976); Bellingham Frozen Foods v. Henderson, 91 L.R.R.M. 2761 (W.D. Wash. 1976); Title Guarantee Co. v. NLRB, 407 F. Supp. 498 (S.D.N.Y. 1975), *rev'd*, 534 F.2d 484 (2d Cir. 1976).

45. *See, e.g.*, Capital Cities Communications, Inc. v. NLRB, 409 F. Supp. 971 (N.D. Cal. 1976); Local 30 v. NLRB, 408 F. Supp. 520 (E.D. Pa. 1976); Roger J. Au & Son, Inc. v. NLRB, 405 F. Supp. 1200 (W.D. Pa.), *aff'd*, 538 F.2d 80 (3d Cir. 1976); Amerace Corp. v. NLRB, 91 L.R.R.M. 2344 (W.D. Tenn. 1975).

46. *See* Climax Molybdenum Co. v. NLRB, 539 F.2d 63 (10th Cir. 1976), *aff'g* 407 F. Supp. 208 (D. Colo. 1975); Goodfriend Western Corp. v. Fuchs, 535 F.2d 145 (1st Cir.), *rev'g* 411 F. Supp. 454 (D. Mass. 1976); Roger J. Au & Son, Inc. v. NLRB, 538 F.2d 80 (3d. Cir.), *aff'g* 405 F. Supp. 1200 (W.D. Pa. 1976). *See* Electri-Flex Co. v. NLRB, 412 F. Supp. 698 (N.D. Ill. 1976).

47. 534 F.2d 484 (2d Cir. 1976), *rev'g* 407 F. Supp. 498 (S.D.N.Y. 1975).

48. 407 F. Supp. 498, 500 (S.D.N.Y. 1975).

49. *Id.*

asserting privilege from disclosure under FOIA exemptions.[50] After the general counsel sustained this ruling, Title Guarantee applied for a mandatory injunction under FOIA in federal district court.[51] Following *in camera* review[52] of the documents in issue, the court ordered full disclosure, and pending compliance, enjoined further proceedings before the NLRB.[53] The court found that exemption 7(A), as amended in 1974, did not exempt disclosure of investigatory files unless specific harm would result. The possibility that witnesses would hesitate to come forward in the future was an insufficient basis to refuse disclosure.[54]

On appeal,[55] the NLRB contended that the 1974 amendments did not affect prior law regarding exemption 7(A). The Board argued that statements compiled as part of an ongoing unfair labor practice investigation were exempt under any interpretation of exemption 7.[56] The Second Circuit, after considering the legislative history of the amendments, concluded the Board had sustained the burden of proving that disclosure of witness statements would interfere with enforcement proceedings.[57] But the court declined to adopt a general rule that any so-called investigative information would be "per se nondisclosable."[58] The court recognized the need for construing the amended exemption narrowly to conform with congressional intent.[59]

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50. *Id.*

51. *Id.*

52. *Id.* This procedure is specifically allowed by 5 U.S.C. § 552(a)(4)(B) (Supp. IV, 1974).

53. 407 F. Supp. at 508.

54. *Id.* at 504-05. The court also rejected the NLRB's contention that the disclosure would result in an unwarranted invasion of privacy so as to fall under the section 7(C) exemption. The court said that the type of information plaintiffs sought was not of the kind that would warrant the invocation of this exemption. *Id.* at 505-06. For cases involving the use of the exemption which allows for the concealment of material that would result in an unwarranted invasion of privacy, see Wine Hobby USA v. IRS, 502 F.2d 133 (3d Cir. 1974) (home address, family status); Ditlow v. Schultz, 379 F. Supp. 326 (D.D.C. 1974) (travel history). The *Title Guarantee* court also rejected the NLRB's argument that the disclosure of materials would fall under the section 7(D) exemption allowing an agency to decline revelation of information that was elicited after an express assurance of confidentiality. In this case, according to the court, there was no evidence that the Board had so assured the witness it had interviewed. 407 F. Supp. at 505-06.

55. 534 F.2d 484 (2d Cir. 1976).

56. *Id.* at 490.

57. *Id.* at 491.

58. *Id.*

59. *Id.*

The Second Circuit also refused to accept,[60]

> the substantive effect . . . of appellee's disclosure contentions [which] would be tantamount to the issuance of new, broader discovery rules for NLRB proceedings . . . .

The court stated that the promulgation of discovery rules was committed to the NLRB,[61] and found no indication in the FOIA legislative history that Congress intended to supersede or supplement such rules.[62]

The National Labor Relations Act[63] imposes no duty upon the Board to adopt discovery procedures.[64] The Board's policy of allowing only limited discovery has been approved by courts dealing with analagous issues involving other federal agencies.[65] The commonly expressed justifications for narrow discovery are unassailably logical —the possibility of intimidation of employees who are known to have provided information; and the possibility that a charged party could use "discovered" information to prepare a defense that would thwart the proceeding and allow an unfair labor practice to go unremedied.[66]

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60. *Id.* at 487.

61. *Id.*

62. *Id.* at 491.

63. 29 U.S.C. §§ 151-68 (1970), *as amended*, (Supp. IV, 1974).

64. Title Guarantee v. NLRB, 534 F.2d 484, 487 (2d Cir. 1976), *citing* NLRB v. Interboro Contractors, Inc., 432 F.2d 854 (2d Cir. 1970), *cert. denied*, 402 U.S. 915 (1971).

Besides handling unfair labor practice cases, the NLRB is permitted under section 9 of the National Labor Relations Act to regulate the selection or designation of employee representatives for the purposes of collective bargaining as well as the determination of the appropriate unit for bargaining. 29 U.S.C. § 159 (1970). However, the court in *Title Guarantee* said that its decision was not to be applied broadly and not to cases involving other agencies. 534 F.2d at 492. Several NLRB decisions have held that the Board need not disclose how it determined that an employee organization showing of interest was valid and sufficient. *See, e.g.*, Pacific Gas & Elec. Co., 97 N.L.R.B. 1397 (1952); O.D. Jennings & Co., 68 N.L.R.B. 516 (1946).

65. *See, e.g.*, Center for Nat'l Policy Review on Race & Urban Issues v. Weinberger, 502 F.2d 370, 373-74 (D.C. Cir. 1974); Frankel v. SEC, 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972).

66. In a speech entitled "The Right to Privacy and Freedom of Information: The NLRB & Issues under the Privacy Act and Freedom of Information Act" [hereinafter cited as IRVING SPEECH], NLRB General Counsel John S. Irving gave another strong argument in favor of limited discovery, based upon the "special" nature of NLRB proceedings. According to Irving, a major problem with discovery in any litigation is the delay inherent in formal discovery procedures. Thus:

> In the context of labor disputes, this factor is critical since undue delay subverts the

Furthermore, Congress designed the 1974 FOIA amendments to tighten exemption 7, not to serve as a substitute for discovery legislation.[67] Thus, the Second Circuit stated:[68]

> In light of the delicate relationship . . . between employer and employee . . . Congress would be very reluctant to change the rather carefully arrived at limitations and procedures for discovery in unfair labor practice proceedings by way of an act which, while dealing with disclosure generally, does not purport to affect such discovery.

Since *Title Guarantee*, many courts have closely followed the analysis of the Second Circuit.

In *Roger J. Au & Son v. NLRB*,[69] the Third Circuit held that, "statements of charging parties and potential witnesses in pending enforcement proceedings are privileged under FOIA exemption 7(A)."[70] Plaintiff had sought copies of all written statements of charging parties or possible witnesses in the Board's files, contending that the 1974 amendments of exemption 7 had enlarged the scope of disclosure of investigative files.[71] In essence, plaintiff argued that all investigative files were to be made available "unless there is an affirmative showing with respect to the particular material in question of a harm specified in exemption 7."[72] The Third Circuit disagreed:[73]

> [D]isclosure of statements by witnesses contained in the file of a pending NLRB case . . . would "interfere with enforcement proceedings" as Congress understood that concept when it enacted exemption 7(A).

Several district court cases decided after *Title Guarantee* also have accepted the Second Circuit's conclusions regarding production of witness statements.[74] In *Vegas Village Shopping Corp. v.*

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basic purpose of the National Labor Relations Act which is the elimination of industrial strife.

4 CCH LAB. REL. REP. ¶ 9082, at 15,206-12 (1976).

67. *See* Title Guarantee Co. v. NLRB, 534 F.2d 484, 491-92 (2d Cir. 1976).

68. *Id.* at 492.

69. Roger J. Au & Son, Inc. v. NLRB, 538 F.2d 80 (3d Cir.) *aff'g* 405 F. Supp. 1200 (W.D. Pa. 1976).

70. 538 F.2d at 82.

71. *Id.*

72. *Id.*

73. *Id.* at 83.

74. *See* Electri-Flex Co. v. NLRB, 412 F. Supp. 698 (N.D. Ill. 1976); Gerico, Inc. v. NLRB, 92 L.R.R.M. 2713 (D. Colo. 1976); Pacific Photo Type, Inc. v. NLRB, 92 L.R.R.M. 2560 (D. Hawaii 1976); Vegas Village Shopping Corp. v. NLRB, 92 L.R.R.M. 2683 (C.D. Cal. 1976).

NLRB,[75] the court declared that FOIA is not a discovery tool.[76] Similarly, in *Gerico Inc. v. NLRB*,[77] the district court concluded, "the purpose of FOIA is not to set procedural guidelines in administrative proceedings."[78] All of the cases accepting the *Title Guarantee* holding, cite *Sears* for the proposition that a charged party's rights under FOIA,[79]

> are neither increased nor decreased by reason of the fact that it claims an interest in [the documents] greater than that shared by the average member of the public. The Act is fundamentally designed to inform the public about agency action and not to benefit private litigants [citations omitted].

Despite *Title Guarantee* and the cases which have adopted the Second Circuit's reasoning, uniformity among courts has not yet been reached. In *Baptist Memorial Hospital v. NLRB*,[80] a district court reluctantly applied exemption 7(D) to requested witness affidavits since the witness had received assurance of confidentiality.[81] Absent this fact, the court would have compelled disclosure because it viewed such pre-trial discovery as "almost essential to get to the true facts of any case and [a great aid] to enforcement proceedings."[82] In *Robbins Tire & Rubber Co. v. NLRB*,[83] a United States District Court ordered disclosure of written statements of witnesses who were certain to be called to testify. The court reasoned that the Board would be required to produce the statements after testimony was given; any deleterious effect of furnishing them beforehand would be de minimus.[84] The rationale of this opinion, and the one in *Baptist Memorial*, in effect gave parties to agency proceedings greater access to information than the general public and thus directly contravened the Supreme Court's opinion in *Sears*.[85]

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75. 92 L.R.R.M. 2683 (C.D. Cal. 1976).
76. *Id.* at 2685.
77. 92 L.R.R.M. 2713 (D. Colo. 1976).
78. *Id.* at 2716.
79. 421 U.S. at 143 n.10.
80. 92 L.R.R.M. 2645 (W.D. Tenn. 1976).
81. *Id.*
82. *Id.* at 2647-48.
83. 92 L.R.R.M. 2586 (N.D. Ala. 1976).
84. *Id.*
85. 421 U.S. 132 (1975). *See also* Furr's Cafeterias, Inc. v. NLRB, 416 F. Supp. 629 (N.D. Tex. 1976). In that case, the court permitted the disclosure of affadavits of witnesses but not the identity of such witnesses. *Id.* at 631.

The best method of implementing FOIA while protecting exemption 7 interests is suggested in *Gerico v. NLRB*:[86]

> While the expertise of the administrative agency in labor-management disputes may be decisive in terms of breadth of pre-hearing disclosure, that consideration is no longer relevant once the proceeding is terminated. On the other hand, the thrust of FOIA is to enforce the people's "right to know", which will be implemented just as effectively after the administrative hearing as it would be if disclosure were to occur prior to the hearing.

If disclosure is postponed until after the administrative hearing is concluded, no claim of interference with enforcement proceedings could be sustained and the public's right to know is nonetheless satisfied. The Board could delete names and other such identifying data from disclosable materials whenever it has reason to anticipate harassment after the fact.[87]

The discovery process encourages delay, which is antithetical to the federal labor policy of settling disputes and maintaining stable employer-employee relations. If the Board observes the requirement of due process, its narrow discovery procedures should be allowed to stand, unaugmented by FOIA.[88]

C. Injunctions

FOIA grants district courts jurisdiction to enjoin an agency from withholding disclosable documents and to order their production.[89] It is unclear, however, whether this injunctive power is in lieu of, or in addition to, the courts' traditional equitable powers. Some district courts have chosen the latter interpretation and have granted injunctions against further proceedings pending disclosure of the particular documents sought.[90] Others have agreed with the NLRB's

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86. 92 L.R.R.M. 2713, 2716 (D. Colo. 1976).

87. The court in *Baptist Memorial Hospital* suggested this procedure. *See* 92 L.R.R.M. 2645, 2647-48. (W.D. Tenn. 1976).

88. *See, e.g.*, NLRB v. Valley Mold Co., 530 F.2d 693 (6th Cir. 1976). The Sixth Circuit stated:

> Since there is no specific provision in the [National Labor Relations] Act for discovery procedures, it is the responsibility of the Board, so long as it conforms to the requirements of due process, to formulate its own rules as to when discovery is available to a party.

Id. at 695.

89. 5 U.S.C. § 552 (a)(3) (1970), *as amended*, 5 U.S.C. § 552 (a)(4)(B) (Supp. IV, 1974).

90. *See, e.g.*, Electri-Flex Co. v. NLRB, 412 F. Supp. 698 (N.D. Ill. 1976); Capital Cities Communications, Inc. v. NLRB, 409 F. Supp. 971 (N.D. Cal. 1976); Local 32 v. Irving, 92 L.R.R.M. 2437 (W.D. Wash. 1976).

general counsel that injunction of agency proceedings is inappropriate.[91]

In *Renegotiation Board v. Bannercraft Clothing Co.*,[92] the Supreme Court declined to decide whether a district court could enjoin agency proceedings until the agency complied with an order to produce particular documents.[93] Respondents had defense contracts subject to renegotiation. Petitioner Renegotiation Board determined that excess profits had been realized, and respondents requested the documents underlying that determination. The petitioner eventually produced some of them, but withheld others as exempt under FOIA. Respondents obtained an injunction against the proceedings until the resolution of the disclosure dispute.[94]

On appeal, the Supreme Court held that due to the unique nature of the agency, contractors must pursue administrative remedies in renegotiation cases.[95] The Court said, "[s]eeking injunctive relief during the pendency of negotiation encourages delay through resort to preliminary litigation over an FOIA claim."[96]

The "delay" argument utilized in *Bannercraft* should apply also to the injunction of hearings before the NLRB. The NLRB's function is to settle labor disputes and remedy unfair labor practices with a minimum of delay.[97] By allowing Board proceedings to be enjoined, courts encourage the use of pre-hearing FOIA suits as dilatory tactics. Unfair labor practices might thus be allowed to continue unremedied.

FOIA does not specifically withhold any powers from the courts in suits brought under the statute, and courts may use their injunctive powers when the situation warrants. Since no injunction will issue unless certain standards are met,[98] courts may manage to avoid the FOIA problem simply by finding insufficient likelihood of

91. *See, e.g.*, Goodfriend Western Corp. v. Fuchs, No. 76-116 (1st Cir., May 6, 1976), *rev'g* 91 L.R.R.M. 2454 (D. Mass. 1976); Roger J. Au & Son, Inc. v. NLRB, 405 F. Supp. 1200 (W.D. Pa.), *aff'd*, 538 F.2d 80 (3d Cir. 1976). *See* IRVING SPEECH, *supra* note 66 at 15,210-11.

92. 415 U.S. 1 (1974). *See* 3 FORDHAM URBAN L.J. 359 (1975).

93. 415 U.S. at 20.

94. *Id.* at 6-7.

95. *Id.* at 20.

96. *Id.* at 23.

97. *See* 29 U.S.C. § 141(b) (1970).

98. *See* WRIGHT, *supra* note 23, at 364-498.

irreparable harm, or insufficient probability that plaintiff would win at trial on the merits.[99]

III. Conclusion

A party to a Board proceeding should not be denied access to those opinions or rulings which are likely to act as precedent for the Board's opinion in a case. Neither should a party obtain an advantage by using FOIA as a tool of discovery, a purpose for which it was never intended. There is a difference between final opinions or rulings which establish legal policy, and a file filled with witness statements comprising one side's case in court. A delicate balance exists between employers and employees or their representatives, one which should not be upset lightly. If Congress had intended to broaden discovery in labor proceedings, it could have amended the National Labor Relations Act, and made sure that the interests of both sides were fully protected in accordance with established national labor policy.

FOIA is designed to satisfy the public's right to know. It does not favor private over public litigants. Yet the current increase of discovery-injunction decisions tips the balance in favor of parties to agency proceedings. Courts should not allow this trend to continue.

99. *See* Electri-Flex Co. v. NLRB, 412 F. Supp. 698 (N.D. Ill. 1976).