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Cover Page Footnote

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EMPLOYER RIGHTS AND ACCESS TO DOCUMENTS UNDER THE FREEDOM OF INFORMATION ACT

WALTER B. CONNOLLY* AND
JOHN C. FOX**

I. INTRODUCTION

IN the past year, an increasing number of Freedom of Information Act¹ (FOIA) requests have been filed with federal government compliance agencies seeking the Affirmative Action Plans (AAPs),² Equal Employment Opportunity Forms (EEO-1s), and Compliance Review Reports³ based on these plans and forms submitted pursuant to Executive Order

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1. 5 U.S.C. § 552 (1970 & Supp. V. 1975), as amended by Act of Sept. 13, 1976, Pub. L. No. 94-409, 90 Stat. 1241.

2. An Affirmative Action Program is "a detailed, results-oriented set of procedures which, when carried out with good faith efforts, results in compliance with the equal opportunity clause through full utilization and equal treatment of minority groups and women, at all levels and in all segments of the workforce. Through an AAP, a contractor seeks to:

- Establish strong company policy and commitment.
- Assign responsibility and authority for program to top company official.
- Analyze present workforce to identify jobs, departments and units where minorities and females are underutilized.
- Set specific, measurable, attainable hiring and promotion goals, with target data, in each area of underutilization.
- Make every manager and supervisor responsible and accountable for helping to meet these goals.
- Re-evaluate job descriptions and hiring criteria to assure that they effect actual job needs.
- Find minorities and females who qualify or can become qualified to fill goals.
- Review and revise all employment procedures to assure that they do not have discriminatory effects and that they help attain goals.
- Focus on getting minorities and females into upward mobility and relevant training pipelines where they have not had previous access.
- Develop systems to monitor and measure progress regularly. If results are not satisfactory to meet goals, find out why and make necessary changes."

OFCCP Compliance Manual § 3-300, reprinted in 1 Affirmative Action Compliance Manual for Federal Contractors (BNA) 3:0004-05. See also Revised Order No. 4, 41 C.F.R. § 60-2.10 to 2.14 (1976) (outlining the required contents of an AAP).

3. Compliance Review Reports are required to be made by Equal Employment Opportunity Compliance Officers pursuant to Revised Order No. 14, 41 C.F.R. § 60-60 (1976). The reports offer a candid and critical written evaluation of the company's equal employment programs.

Number 11,246⁴ by private contractors engaged in government contracts. Public interest groups continue to make up the single largest source of requests. Recently, however, FOIA requests have been filed by labor unions and by direct market competitors. As a result, a rash of so-called reverse FOIA cases⁵ have been defensively filed by employers seeking to enjoin government release of their confidential affirmative action data to the public. Results to date have been mixed with the Supreme Court recently denying certiorari in two test cases brought to it. One case allowed broad access to AAPs and EEO-1s⁶ and the other case firmly denied their disclosure.⁷

Employers have also actively been using the FOIA on the offensive at the National Labor Relations Board (NLRB) to gain access to union authorization cards filed with the NLRB by union organizers seeking certification as the bargaining agent of the company's employees. Again the case law has been divergent although employees have won early victories.⁸

The most common type of FOIA cases are those involving attempts by employers to use the FOIA to expand the NLRB's traditionally nonexistent discovery procedures in unfair labor practice proceedings. In over twenty reported district court cases and no fewer than eleven circuit court appeals, employers have sought discovery of witness statements gathered by NLRB investigators during secret interrogations of employees.⁹

Although closely rivaled by the number of FOIA cases brought by corporations in litigation with the Federal Trade Commission, the NLRB case law on access to employee witness statements represents the cutting edge in the current controversy raging over the question of whether the FOIA is a more appropriate discovery device than historically limited agency discovery procedures and rules available to those in litigation with the agency. Despite passage, after veto, of the 1974 FOIA amendments¹⁰ expanding access to documents, the federal appellate courts have nevertheless resoundingly rejected increased discovery

4. 3 C.F.R. 341 (1964-1965 Compilation).

5. A reverse FOIA case, as it has come to be known, is one brought by a private party to prevent a government agency possessed of information submitted by that party about that party from releasing it to members of the public.

6. *Metropolitan Life Ins. Co. v. Usery*, 426 F. Supp. 150 (D.D.C. 1976), *appeal docketed*, No. 77-1270 (D.C. Cir. Mar. 15, 1977) (stay entered pending appeal), *cert. denied*, 97 S. Ct. 2198 (1977) (in advance of judgment from District of Columbia Circuit).

7. *Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1246 (E.D. Va. 1974), *aff'd*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 97 S. Ct. 2199 (1977).

8. See pt. III *infra*.

9. See cases cited in notes 152-54 *infra*.

10. Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561 (codified at 5 U.S.C. § 552 (Supp. V 1975)).

of labor agency investigative documents sought by companies prosecuted by the Occupational Safety and Health Administration (OSHA), the NLRB, and the Equal Employment Opportunity Commission (EEOC).

In the Parts below, public rights of access under the FOIA to documents in the possession of government agencies charged with enforcing the labor laws are examined on an agency-by-agency basis. In Part II, access to AAPs is discussed with emphasis on the practical and legal means which a federal government contractor may take to protect against their disclosure by the Office of Federal Contract Compliance Programs (OFCCP) and to bar release of confidential and trade secret information in the courts. In Part III, case law concerning purely offensive use of the FOIA by employers to get copies of NLRB employee witness statements and union authorization cards is reviewed. In Part IV, rights of access to accident investigation reports conducted by the OSHA and employee complaints to the OSHA about unsafe conditions in the workplace are considered. In Part V, recent case law regarding access to EEOC reports given to charging parties, to predetermination settlement and conciliation agreements, and to corporate documents in possession of the EEOC is examined.

II. OFCCP FOIA CASES

Since February 1974, when the OFCCP promulgated regulations implementing the 1974 amendments to the FOIA,¹¹ the number of requests for AAPs, EEO-1s, and Compliance Review Reports filed with the OFCCP and its sixteen compliance agencies¹² by federal

11. 41 C.F.R. § 60-40 (1976).

12. Exec. Order No. 11,246 was issued by President Johnson in September 1965, delegating the responsibility for equal employment opportunity compliance among federal contractors to the Secretary of Labor. 3 C.F.R. 340 (1964-1965 Compilation).

By regulation published at 41 C.F.R. § 60-1.2 (1976), the Secretary of Labor delegated administration of the Executive Order to the Director of the OFCCP.

In October 1965, the OFCCP was established within the Department of Labor to enforce the equal employment opportunity mandate of Exec. Order No. 11,246. The Director of the OFCCP has in turn delegated enforcement responsibility for the order to 16 federal departments, agencies, and authorities. They are: the Department of Agriculture, the Energy Research and Development Administration, the Department of Commerce, the Department of Defense, the Environmental Protection Agency, the General Services Administration, the Department of Health, Education, and Welfare, the Department of the Interior, the Department of Housing and Urban Development, the Department of Justice, the Small Business Administration, the Tennessee Valley Authority, the Department of Transportation, the Department of Treasury, the Veterans Administration, and the National Aeronautics and Space Administration. The compliance responsibilities of these 16 agencies were assigned on an industry-by-industry basis pursuant to Revised Order No. 1. (Aug. 1, 1974), *reprinted in* 1 Affirmative Action Compliance Manual for Federal Contractors (BNA) 2:0025-35.

government contractors pursuant to Executive Order Number 11,246 has skyrocketed. This has occurred in response to the announcement in those regulations that for the first time EEO-1s would be released without qualification¹³ and that AAPs would be released¹⁴ except for goals and timetables.¹⁵ In addition, it was announced that staffing pattern information and pay scales¹⁶ and Compliance Review Reports¹⁷ would be released unless these data were found to constitute trade secret information. The OFCCP retained the right by regulation, however, to release even information conceded to be a trade secret if the OFCCP deemed that the public interest in disclosure outweighed the contractor's interest in confidentiality.¹⁸

As a result, FOIA requests to the OFCCP and its sixteen compliance agencies have flooded Washington. In one case, counsel for a tire company requested the Compliance Review Reports for all of its major rubber industry competitors.¹⁹ In most cases, however, requests have been filed by labor union representatives²⁰ or public interest groups hoping to use the information in collective bargaining or in Title VII

13. 41 C.F.R. § 60-40.4 (1976).

14. *Id.* § 60-40.2(b)(1).

15. *Id.* § 60-40.3(a)(1). Goals and timetables are the culmination of the underutilization analysis required to be filed with all AAPs. A goal must be established for each job group in which underutilization of minorities or women exists; *i.e.*, where the percentage of minority workforce population in a job group is lower than the percentage of available minorities or women in the applicable labor area population. Once a minority workforce goal has been identified, a specific timetable must then be established to reach the goal in the minimum feasible time period. *See* OFCCP Compliance Manual § 3-501(c), *reprinted in* 1 Affirmative Action Compliance Manual for Federal Contractors (BNA) 3:0008-09.

16. 41 C.F.R. § 60-40.3(a)(2) (1976).

17. *Id.* § 60-40.3(a)(5).

18. *Id.* § 60-40.3(a).

19. *Firestone Tire & Rubber Co. v. Kleppe*, No. 76-781-A (E.D. Va. March 11, 1977).

20. Labor unions have also sought affirmative action data for collective bargaining purposes pursuant to the National Labor Relations Act (NLRA) rather than under the FOIA. In several cases of first impression currently pending before the NLRB, employers have refused to make affirmative action data available to unions seeking it, prompting the unions to file unfair labor practice charges under section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5) (1970), alleging that the employers have refused to bargain in good faith.

Exceptions to disclosure orders by NLRB administrative law judges have been filed in the following cases: *Westinghouse Elec. Corp. & IUE*, No. 6-CA-7680 (N.L.R.B., filed Mar. 15, 1976); *East Dayton Tool & Die Co. & Electrical Workers (IUE)*, No. 9-CA-8887 (N.L.R.B., filed July 1, 1975). *See also* *General Motors Corp.*, No. 9-CA-9275 (N.L.R.B., filed Dec. 9, 1976); *Markle Mfr. Co.*, No. 23-CA-5460 (N.L.R.B., filed May 5, 1976). *Automation & Measuring Div. of Bendix Corp.*, No. 9-CA-8762 (N.L.R.B., filed July 8, 1975); *White Farm Equip.*, No. 9-CA-9385 (N.L.R.B., filed July 2, 1975) (cases involving contested disclosure orders independently awaiting oral argument before the NLRB).

litigation against the contractor or to attack the public relations image of the company. Government Compliance Review Reports are a prime target for such FOIA requests because of their orientation toward government enforcement and criticism of the employer's affirmative action programs. A common corporate concern, however, is that release of subjective government opinions, even where unsubstantiated by the underlying facts, will provoke litigation or further disrupt already emotional collective bargaining sessions because the statement carries the imprimatur of the United States government. Tabulations of employee workforce minority populations (Workforce Analyses²¹) are also highly sought after because of their statistical utility in Title VII cases.

A. *Practical Guides for Case Preparation: At the Agency*

Reverse FOIA cases tend to move slowly through the administrative agency but accelerate quickly through the courts. Because reverse FOIA plaintiffs first seek extraordinary relief in the federal courts by way of a temporary restraining order and a preliminary injunction, and because FOIA cases are accorded expedited docketing,²² trial counsel must be prepared to try his entire case on the merits—complete with expert witnesses, motions, and briefs—within ten to twenty days of the date

21. A Workforce Analysis is the first part of an Underutilization Analysis required to be filed with all AAPs. It must contain: "a listing of each job title as appears in applicable collective bargaining agreements or payroll records (not job group) ranked from the lowest paid to the highest paid within each department or other similar organizational unit including departmental or unit supervision. If there are separate work units or lines of progression within a department a separate list must be provided for each such work unit, or line, including unit supervisors. For lines of progression there must be indicated the order of jobs in the line through which an employee could move to the top of the line. Where there are no formal progression lines or usual promotional sequences, job titles should be listed by department, job families, or disciplines, in order of wage rates or salary ranges. For each job title, the total number of incumbents, and the total number of male and female incumbents in each of the following groups must be given: Blacks, spanish-surnamed Americans, American Indians, and Orientals. The wage rate or salary range for each job title must be given. All job titles, including managerial job titles, must be listed." 41 C.F.R. 60-2.11(a) (1976).

22. The FOIA provides: "Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way." 5 U.S.C. § 552(a)(4)(D) (Supp. V 1975). In practice, the only cases which generally take precedence over FOIA cases on the docket are criminal cases pursuant to the Speedy Trial Act of 1974, 18 U.S.C. § 3161 (Supp. V 1975).

established by the compliance agency for release of the contractor's documents.²³

Trial counsel should therefore use his time judiciously while administrative remedies are being exhausted to secure expert witnesses, draw up pleadings, and prepare arguments and authorities in advance of the document release date. Under the time limits imposed on the agencies to process FOIA requests, agencies may take ten working days after receipt of an FOIA request to decide whether or not to comply.²⁴ The agency may in "unusual circumstances" take a ten working day extension at the request level.²⁵ An appeal of the request may be taken by the requester to the head of the agency, if any part of his request is denied. The agency must respond to the appeal within twenty working days²⁶ but may take an additional ten working days extension at the appeal level.²⁷ The government, therefore, can take up to at least fifty working days, if it so desires, to determine whether to comply with an FOIA request. If an agency fails to respond during the time limits or properly to invoke its extensions, an FOIA requester may deem his request denied and his administrative remedies exhausted and file suit seeking to compel disclosure in federal district court.²⁸

In practice, the sixteen contract compliance agencies usually give a government contractor notice of the pendency of an FOIA request seeking its documents. In addition, the agencies give the contractor a stated time period within which to appeal the agency decision to disclose to the head of the agency. Because of the complexity and ever-changing nature of the case law, however, the agencies usually take longer than twenty days to dispose of the contractor's appeal, if one is filed. Unless the FOIA requester intervenes with the agency or deems its administrative

23. In *Vistron Corp. v. Andrus*, Civ. No. 77-85-A (E.D. Va. Feb. 23, 1977), only 11 days expired between the date the complaint was filed and trial on the merits of the permanent injunction was held. In *Metropolitan Life*, the trial included three days of testimony and certiorari in advance of judgment was filed in the Supreme Court. 426 F. Supp. 150 (D.D.C. 1976), *appeal docketed*, No. 77-1270 (D.C. Cir. Mar. 15, 1977), *cert. denied*, 97 S. Ct. 2198 (1977).

24. These time limits were first prescribed in the 1974 amendments to the FOIA. 5 U.S.C. § 552(a)(6)(A)(i) (Supp. V 1975).

25. *Id.* § 552(a)(6)(B).

26. *Id.* § 552(a)(6)(A)(ii).

27. *Id.* § 552(a)(6)(B).

28. The courts have taken a practical approach to the anguished cries of overburdened agency FOIA units that compliance with the time limits is not feasible. Two circuit courts have responded to these pleas and have rejected claims seeking a strict application of the time limit provisions. They have required agencies only to process requests in good faith and with due diligence on a first-come, first-served basis. *See Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976); *Exner v. FBI*, 542 F.2d 1121 (9th Cir. 1976).

remedies exhausted, however, the contractor will be content to let the agency delay in deciding its appeal.

If the agency denies the contractor's appeal, usually the contractor is then notified and given anywhere from two to five days to get to court to seek injunctive relief if it so desires. The contest then becomes a race to the court for the contractor's attorney.

B. *Due Process: A Contractor's Right to Notice of the FOIA Request*

Because of the multiplicity of agency regulations and the often haphazard agency procedures employed, one increasingly litigated issue is the contractor's right to notice of the FOIA request and an opportunity to be heard with regard to it. Although the agencies usually give a contractor notice of a request seeking its data, this is not always the case.²⁹ As a result, due process challenges asserting three distinct rights have been brought by contractors. These rights include (1) the right of the contractor to be notified of the FOIA request at the time it is made to the agency, (2) the right of the contractor to a hearing before the agency on the merits of the issues presented, and (3) sufficient opportunity to seek injunctive relief in the courts prior to the date set by the agency for release of the requested documents.³⁰

Currently, only the Food and Drug Administration, not one of the sixteen designated government contract compliance agencies,³¹ has established procedures for notice to a contractor and appeal from an agency decision to disclose information requested under the FOIA.³²

To lesser extents, the sixteen contract compliance agencies provide for the possibility of notice to information suppliers. The FOIA implementing regulations³³ promulgated by the Department of the Interior, for

29. In *Firestone Tire & Rubber Co. v. Kleppe*, No. 76-781-A (E.D. Va. Mar. 11, 1977), the Government failed to give Firestone notice of an FOIA request seeking its data. Having gotten wind of the FOIA request informally, Firestone sued for and won the right to two days prior notice of any release of its affirmative action data.

30. Plaintiff's Memorandum of Law in Support of Its Cross Motion for Summary Judgment and in Opposition to Defendants' Alternative Motion to Dismiss at 5, *Firestone Tire & Rubber Co. v. Kleppe*, No. 76-781-A (E.D. Va. Mar. 11, 1977).

31. See note 12 *supra*.

32. See Note, *Reverse Freedom of Information Act Suits: Confidential Information in Search of Protection*, 70 Nw. U.L. Rev. 995, 999 n.21 (1976).

33. Each agency was required to publish regulations implementing the FOIA. 5 U.S.C. § 552(a)(1)(A)-(D), (4)(A) (1970 & Supp. V 1975). These regulations appear in the various volumes of the Code of Federal Regulations. Because the OFCCP has not taken the lead in promulgating standardized procedures for the handling of requests made to agencies seeking affirmative action data, each agency follows its own FOIA implementing regulations. As a result, contractor rights and obligations in reverse FOIA cases may vary from agency to agency. The individual

example, state that the agency will attempt to notify the person or entity who supplied the information "when it is administratively feasible to do so."³⁴

In *Firestone Tire & Rubber Co. v. Kleppe*,³⁵ the Department of the Interior failed to give Firestone notice of a request filed by a direct market competitor seeking Compliance Review Reports for Firestone and all other tire companies.³⁶ The OFCCP itself has no regulation providing for notice to a contractor. Rather, the OFCCP has argued that there are "internal policy requirements in the Office of Federal Contract Compliance Programs and its compliance agencies that contractors generating data be given notice and opportunity to be heard upon the confidentiality and competitive harmful aspects of the data that they have submitted. This policy is reflected in the language of applicable regulations; e.g., 41 C.F.R. 60-60.4(d) and 60-40.3(a)(1)."³⁷

Section 60-60.4(d) of title 41 of the Code of Federal Regulations³⁸ has not been followed by the OFCCP, however, and agency officials have proffered in private conversations that the procedures outlined there could not be followed because of the massive logjam of cases that would occur. In addition, the OFCCP has taken a legal position in the courts which makes implementation of their regulation in reverse FOIA situations untenable.

regulations of each agency should therefore be separately consulted. Citations to the applicable regulations are as follows:

1. Department of Agriculture: 7 C.F.R. §§ 1.1-1.16 and §§ 1.110-.123 (1977).
2. Energy Research and Development Administration: 10 C.F.R. §§ 708.1-.23 (1977).
3. Department of Commerce: 15 C.F.R. §§ 4.1-9 (1977).
4. Department of Defense (Defense Supply Agency): 32 C.F.R. §§ 1285.1-.8 (1976).
5. Environmental Protection Agency: 40 C.F.R. §§ 2.100-.121 (1976).
6. General Services Administration: 41 C.F.R. §§ 105-60.000 to -60.701 (1976).
7. Department of Health, Education, and Welfare: 45 C.F.R. §§ 5.1-.85 (1976).
8. Department of the Interior: 43 C.F.R. §§ 2.1- 82 (1976).
9. Department of Housing and Urban Development: 24 C.F.R. §§ 15.1-.74 (1976).
10. Department of Justice: 28 C.F.R. §§ 16.1-.101 (1976).
11. Small Business Administration: 13 C.F.R. §§ 102.1-.36 (1976).
12. Tennessee Valley Authority: 18 C.F.R. §§ 301 1-.48 (1977).
13. Department of Transportation: 49 C.F.R. §§ 7.1-.101 (1976).
14. Department of the Treasury: 31 C.F.R. §§ 1.1-.36 (1976).
15. Veterans Administration: 38 C.F.R. §§ 1.500-.584 (1976).
16. National Aeronautics and Space Administration: 14 C.F.R. §§ 1206.100-.900 (1976).
34. 43 C.F.R. § 2.15(b)(2) (1976).
35. No. 76-781-A (E.D. Va. Mar. 11, 1977).
36. The court in *Firestone* rejected this position, imposing notice requirements on the Department of the Interior. See text accompanying note 41 *infra*.
37. Memorandum in Support of Defendant's Motion for Summary Judgment or in the Alternative to Dismiss at 4, *Firestone Tire & Rubber Co. v. Kleppe*, No. 76-781-A (E.D. Va. Mar. 11, 1977).
38. 41 C.F.R. § 60-60.4(d) (1976).

Section 60-60.4(d) states:

Public access to information. Information obtained from a contractor under Subpart B [Procedures for Disclosure] will be subject to the public inspection and copying provisions of the Freedom of Information Act, 5 U.S.C. 552. Contractors should identify any information which they believe is not subject to disclosure under 5 U.S.C. 552, and should specify the reasons why such information is not disclosable. The Contract Compliance Officer will consider the contractor's claim and make a determination, within 10 days, as to whether the material in question is exempt from disclosure. The contract compliance officer will inform the contractor of such a determination. The contractor may appeal that ruling to the Director of OFCC within 10 days. The Director of OFCC shall make a final determination within 10 days of the filing of the appeal. However, during the conduct of a compliance review or while enforcement action against the contractor is in progress or contemplated within a reasonable time, all information obtained from a contractor under Subpart B except information disclosable under §§ 60-40.2 and 60-40.3 of this chapter is to be considered part of an investigatory file compiled for law enforcement purposes within the meaning of 5 U.S.C. 552(b)(7), and such information obtained from a contractor under Subpart B shall be treated as exempt from mandatory disclosure under the Freedom of Information Act during the compliance review.³⁹

The regulations thus contemplate that contractors itemize their objections to release at the time they first submit their affirmative action data to the OFCCP. Theoretically, a compliance officer would consider the contractor's claim within ten days and notify him of his decision to either honor or deny it. The contractor would presumably have an opportunity to appeal this decision to the Director of the OFCCP and thereafter to the courts. However, the regulations indicate that this procedure should be accomplished in advance of a specific FOIA request for the data.

In practice, the OFCCP and all sixteen compliance agencies routinely ignore contractors' letters claiming that their affirmative action data is confidential until the FOIA request seeking the data is filed with the agency. Only then do the agencies make a determination with regard to the contractor's confidentiality claims and even then only as regards the precise information requested. If the contractor is dissatisfied with the determination made, the contractor may appeal the initial decision of the compliance agency to the Director of the OFCCP.⁴⁰

Too, contractors find it difficult to specify what information is confidential under all abstract situations which may arise, a problem exacerbated by ever-changing market conditions and the daily aging of the documents. Labor cost data submitted in 1975, for example, may have no competitive utility in 1980; yet the OFCCP's regulations, if followed, would require the contractor to undertake expert witness fees

39. *Id.*

40. A glimpse of the actual operating procedures employed by the OFCCP in reverse FOIA cases is briefly provided by the Department of Labor in OFCCP Equal Employment Opportunity Proposed Revisions and Redesignation of Regulations, 41 Fed. Reg. 40344 (1976).

and legal expenses in 1975 in the event of a hypothetical request which may never come.

The simple option would be to provide contractors, by uniform regulation, with notice of FOIA requests for their data and allow them an opportunity to argue their position before the agency and the court prior to the time the data is to be released. The OFCCP has not indicated any willingness to change its regulations. The Department of Labor may have given some thought to doing so in light of the Eastern District of Virginia's requirement in *Firestone* that contractors receive at least two working days in which to get to court following a decision of the OFCCP to release its confidential affirmative action submissions to an FOIA requester.⁴¹

Application of section 60-60.4(d) is further hampered by the legal position that the OFCCP and the Department of Justice have taken in the courts to the effect that article III of the Constitution requires a case or controversy to exist and that a contractor may not seek to bar disclosure in the absence of a request.

In *Firestone*, OFCCP argued:

In the absence of a specific request for certain documents, and agency consideration of that request, and the decision of the agency to release, the parties cannot be said to be 'in substantial controversy' [within the meaning of article III] as to the release of data in the documents themselves. The language chosen by a particular requestor to describe the information he wishes to obtain, the response of the agency to that language in deciding whether in fact, records are maintained by the agency which satisfy that request, and the decision of that agency within the parameters of its regulations and policies upon the material to be withheld under an exemption of the Act, are all variables which cannot be defined until the instance itself arises. The facts as alleged in this complaint given the withdrawal of the request do not constitute circumstances that are ripe for judicial review.⁴²

That such procedural rights of notice and an opportunity to be heard should be accorded to contractors would appear to be required if elementary principles of the due process clause of the fifth amendment

41. *Firestone Tire & Rubber Co. v. Kleppe*, No. 76-781-A (E.D. Va. Mar. 11, 1977). Nine days notice of disclosure was also provided by agreement in *Continental Cas. Co. v. Marshall*, No. 75-1836 (D.D.C. Apr. 15, 1977).

42. Memorandum in Support of Defendant's Motion for Summary Judgment or in the Alternative to Dismiss at 3, *Firestone Tire & Rubber Co. v. Kleppe*, No. 76-781-A (E.D. Va. Mar. 11, 1977). See also *Pharmaceutical Mfrs. Ass'n v. Weinberger*, 401 F. Supp. 444 (D.D.C. 1975) (preliminary injunction sought against FDA regulations not providing for notice to companies of the proposed release of their data pursuant to the FOIA denied in the absence of a specific FOIA request for the information). Currently pending is a similar suit brought by the Chemical Specialties Manufacturers Association against the Consumer Products Safety Commission seeking to compel assurances that adequate safeguards will be taken to insure the confidentiality of information submitted to that agency *Chemical Specialties Mfrs. Ass'n v. Consumer Prods. Safety Comm'n*, No. 75-1722 (D.D.C., filed Oct. 17, 1975).

are to be satisfied. With regard to property rights, it has been held that a hearing is required to be held before an individual is deprived of a property interest.⁴³

Similarly, advance notice of government action affecting the rights of individuals has been construed to be required as a corollary to the right to be heard and was expressly recognized in *Fuentes v. Shevin*,⁴⁴ where it was held that: "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'"⁴⁵ Further, it has been held that the right to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest."⁴⁶

The right to a hearing has also been construed in administrative settings to require the government to grant affected persons

not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.⁴⁷

In the recent case of *Mathews v. Eldridge*,⁴⁸ Mr. Justice Rehnquist addressed the issue of whether due process required the Department of Health, Education, and Welfare to establish administrative procedures granting pre-determination hearings before cutting off social security disability benefits. Writing on behalf of the court, he established a three-part test to determine whether administrative procedures are sufficiently cognizant—under the due process clause—of the private interests affected. It was held that the court must consider:

first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁴⁹

43. See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974); *Phillips v. Commissioner*, 283 U.S. 589, 596-97 (1931); *Dent v. West Virginia*, 129 U.S. 114, 124-25 (1889).

44. 407 U.S. 67 (1972).

45. *Id.* at 80.

46. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). See also *Goss v. Lopez*, 419 U.S. 565 (1975); *Boeing Air Transp. v. Farley*, 75 F.2d 765, 767 (D.C. Cir. 1935).

47. *Morgan v. United States*, 304 U.S. 1, 18-19 (1938); *Parker v. Lester*, 227 F.2d 703 (9th Cir. 1955). See also *Gonzalez v. United States*, 348 U.S. 407 (1954).

48. 424 U.S. 319 (1976).

49. *Id.* at 335.

1. The Private Interest at Stake

The single most problematical aspect of any FOIA case involving the release, whether purposeful or inadvertent, of confidential AAP and EEO-1 data is that it will irreparably injure the contractor which supplied the information. The potential injury arising from such a release is simply not compensable. Thus, successful appeal of an administrative agency's release of the information will neither restore the contractor to its former position nor make it whole.

Such an injury rises to the level of the deprivation described in *Goldberg v. Kelly*,⁵⁰ a case in which it was found that the temporary deprivation of welfare assistance pending resolution of a controversy over eligibility claims worked such a hardship on the claimant that due process required an administrative evidentiary hearing prior to the threatened deprivation. Injury of a similar magnitude and quality is in store for contractors whose AAPs and EEO-1s are released because of the irreparable nature of the injury. As such, *Goldberg* is persuasive of the need for a predeterminational hearing into the merits of the threatened release of affirmative action data.

2. The Risk of Erroneous Deprivation of the Contractor's Interest Through the Procedures Used

The risk of erroneous release of a contractor's affirmative action data is high. As the Fourth Circuit recently noted in *Westinghouse*:

[T]here is always the real risk that the agency itself will be delinquent in asserting the rights of the private party. After all, it could not care less about protecting the competitive position of a supplier of information. That is no part of its responsibility. Neither does it have, as has already been observed, in most instances, sufficient knowledge to assert properly the private party's right to confidentiality. And it must not be forgotten that the protection of a competitive position is both a valuable and often complex matter, dependent upon full proof, and one "basic to our free enterprise system."⁵¹

In addition, the potential for injury is heightened by the presence of numerous compliance agencies whose duty it is to exercise compliance responsibility under Executive Order Number 11,246. It is further exacerbated by the proliferation of Freedom of Information offices within the federal government, an estimated 5,000 to 6,000 offices alone within the United States Department of Defense. Most agencies have decentralized the authority to disclose data and allow countless

50. 397 U.S. 254 (1970).

51. 542 F.2d 1190, 1213 (4th Cir. 1976), *cert. denied*, 97 S. Ct. 2199 (1977) (footnote omitted).

thousands of persons to remove information from files and mail it out to requesters.⁵²

3. The Government's Interest and Administrative Burdens

Were administrative agencies to extend notice and the opportunity to be heard to contractors seeking to protect their confidential submissions, it is difficult to believe that the additional administrative burden involved would stall the federal contract compliance program. At any rate, such a program would not outweigh the potential for irreparable injury to contractors under the currently existing no-notice system. Indeed, the presence of contractors at an administrative hearing would in all likelihood benefit the agency, bring issues into focus, and help to relieve the agency of burdensome and time-consuming fact-finding missions.

As regards societal costs, it should be noted that reverse FOIA cases make up only a very small percentage of all FOIA cases litigated. In addition, a private industrial competitor should not be required to suffer the risk of irreparable injury on behalf of the public because of the additional costs, however large, imposed on society by passage of the FOIA. This would appear to be especially true given the congressional intent embodied within exemption 4 of the FOIA to exempt financial information from disclosure.⁵³

A common refrain often recited by the compliance agencies and OFCCP is that they simply do not have the time under the ten and twenty day time period limitations imposed by the 1974 amendments to allow contractors an opportunity to be heard. This would appear to be a spurious argument, however, in light of the decision in *Open America v. The Watergate Special Prosecution Force*,⁵⁴ which held that agencies could extend the time limits for decision so long as the agency was acting in good faith, with due diligence, and on a first-come, first-served basis.⁵⁵

Thus, after a consideration of all three factors figuring in the test of

52. Correspondingly, the right to deny access to data has generally been centralized in a few FOIA specialists assigned to the agency's head office in Washington. This has occurred as a result of the increasing complexity of the FOIA, the need for uniformity of decision making within the agency, and because of the stringent sanctions threatened by the FOIA for arbitrary and capricious refusal by government personnel to disclose non-exempt documents. See 5 U.S.C. § 552(a)(4)(E)-(F) (Supp. V 1975).

53. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966); S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

54. 547 F.2d 605 (D.C. Cir. 1976).

55. *Id.* at 616.

the need for administrative due process in cases involving the release of confidential affirmative action data, it would appear that nothing more than agency stubbornness stands in the way of making due process a reality.

C. *Preparing for Court Action*

Once notice has been received by the contractor, he should immediately request a copy of all materials proposed for release. The compliance agencies are loathe to make copies on the grounds that it is expensive and that the contractors have copies of the documents they supplied. A bigger practical problem for most agencies is that they have limited reproduction facilities and may have to give up actual possession of the documents to their reproduction rooms for weeks.

These agency objections should be overridden, however, because it is often unclear, for many reasons, which documents in fact are proposed for release. First, each agency has its own vocabulary. For example, the term Affirmative Action Plan may be construed to mean the plan with or without accompanying attachments. Second, the agencies apply their own numbering system to documents for their internal use with the aid of an automatic consecutive numbering machine. The contractor has no knowledge of this numbering system because the page numbers are added after the documents are submitted.

Third, if a Compliance Review Report is at issue, in all likelihood the contractor has not seen it and probably does not have a copy. Finally, agencies are under a duty pursuant to the FOIA to segregate out non-exempt material and release it.⁵⁶ As a result, the compliance agency may intend to release only certain pages or even portions of certain paragraphs. Routinely, documents are released with portions of lines deleted in mid-sentence. Under these circumstances, there is no better substitute for the documents proposed to be released than a photocopy of the precise document to be released as marked up with deletions, scratch outs, and white outs.⁵⁷

56. "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b) (Supp. V 1975); see *Rose v. Department of Air Force*, 495 F.2d 261, 268 (2d Cir. 1974), *aff'd*, 425 U.S. 352 (1976); *Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938-39, (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970); *Fisher v. Renegotiation Bd.*, 355 F. Supp. 1171 (D.D.C. 1973); *Wellford v. Hardin*, 315 F. Supp. 768 (D.D.C. 1970).

57. For example, in *Vistrion Corp. v. Andrus*, No. 77-85-A (E.D. Va. Feb. 23, 1977), counsel for Vistrion was denied a copy of the documents proposed for release and initiated a reverse FOIA suit on the basis of the documents contained in the contractor's files and the Department of the

After receiving the documents, counsel should consult experts early on to determine what information can be defended in the courts as trade secret data. If possible, these experts should help take part in drafting a letter of appeal, in conjunction with counsel, to the head of the OFCCP expressing the company's objections. This appeal letter need not be long or take the form of a legal brief but should simply identify the competitive harm which would result from the release of the various documents at issue. Counsel should consider that the information given to the agency at this point could serve as discovery for the government of legal theories which the contractor may raise subsequently at trial. It should be specifically noted in this regard that there is no bar to raising new legal theories at trial in federal district court not previously raised before the agency.

Once the agency has acted on the contractor's letter of appeal, the contractor is deemed to have exhausted his administrative remedies.

D. *Going to Court*

Once the compliance agency has made its decision to release and the contractor has exhausted his appeal to the director of the OFCCP, the contractor may then initiate suit in the federal district court to enjoin release of its data. This entails filing a complaint, a motion for a temporary restraining order (TRO) supported by affidavits, a motion for a preliminary injunction, and points and authorities in support of one's motions. The court will normally consider the TRO on the basis of the affidavits alone and without the need to put an expert witness on the stand. Expert witnesses will be required at the hearing for a preliminary injunction.

In jurisdictions where numerous reverse FOIA cases have been brought and the judge is familiar with the issues and the case law, he may well want to set the hearings for the preliminary and permanent injunctions together and dispose of them both at one time. This approach is encouraged by the mandate that FOIA cases take expedited docketing but the result is brutal on trial counsel who must then prepare a case often within ten working days.⁵⁸

Interior's descriptions of the portions of the documents to be released. Only after a court hearing was in progress, and at the direction of the judge, was the contractor and its counsel finally able to view the documents proposed for release. The agency discovered only then that there were different and supplemental documents on file with it and that the contractor was objecting to the disclosure of documents in its files which the agency did not intend to release. Furthermore, after additional comparisons were made, the Department discovered new files it had overlooked earlier and concluded that these additional documents also fell within the scope of the original FOIA request.

58. Although counsel had months to prepare in *Metropolitan Life*, a test case in the insurance

Federal courts have repeatedly recognized the need for an evidentiary hearing de novo before the trial judge on the merits of the exemption from disclosure claimed by the contractor.⁵⁹ As a result, the contractor must be ready to show at trial that the material it seeks to bar from disclosure is confidential, that there are competitors in the industry to whom the information may be useful, and that the data's release will cause substantial competitive injury.

Corporate personnel such as plant managers and industrial relations directors may be relied on to testify about procedures undertaken at the company to protect the confidentiality of the data at issue and corporate marketing managers may testify about the use to which competitors could put the information. Expert witnesses, usually university industrial economics professors, should also be called to testify about economic matters, especially where discovery of labor costs is at issue, and to testify regarding the nature of competition in the industry.

Additional experts may be necessary depending upon the precise issues raised in the case. In *Metropolitan Life*, for example, extensive testimony was taken from psychologists about the morale problems and competitive injury which would beset a contractor whose employees learned the contents of supervisor promotion memoranda in their personnel files. Moreover, economics professors, personnel department managers, and even professional "head hunters" have been brought to the stand to testify about how they would go about using affirmative action data to lure away a contractor's management level minority employees.

E. *Procedural Questions Raised by Reverse FOIA Cases*

1. Jurisdiction

Although the Department of Justice has energetically disputed the existence of a jurisdictional basis for reverse FOIA cases by contractors, "no court has [ever] failed to find jurisdiction."⁶⁰ It has only been since February of this year, however, with the Supreme Court's decision in

industry, the court heard three days of testimony. Even a relatively simple reverse case with few factual issues usually involves a solid day of trial time.

59. See *Sears, Roebuck & Co. v. GSA*, 553 F.2d 1378 (D.C. Cir. 1977); *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1213 (4th Cir. 1976), cert. denied, 97 S. Ct. 2199 (1977); *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 939-40, 943 (D.C. Cir. 1975).

60. Note, *Protection from Government Disclosure—The Reverse-FOIA Suit*, 1976 Duke L.J. 330, 347. See also *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1204 (4th Cir. 1976), cert. denied, 97 S. Ct. 2199 (1977), and cases cited therein; Note, *Reverse Freedom of Information Act Suits; Confidential Information in Search of Protection*, 70 Nw. U.L. Rev. 995, 1002-09 (1976).

Califano v. Sanders,⁶¹ that it has been clear that section 1331 of title 28 of the United States Code⁶² (federal question jurisdiction) and not section 10(a) of the Administrative Procedure Act⁶³ (APA) is the proper jurisdictional grounds. In *Sanders*, the Court held that the APA did not imply an independent grant of subject matter jurisdiction in the federal courts for litigants "aggrieved by agency action."⁶⁴ In a recent reverse FOIA case, one court of appeals revised its jurisdictional view in light of *Sanders* and found jurisdiction instead under section 1331(a).⁶⁵ Despite the change in the jurisdictional basis, form only and not substance is affected. The legal tests employed in reverse FOIA cases brought under both the APA and section 1331 have always been the same. Under both statutes, the issues were tried de novo in the federal district court pursuant to the mandate of the FOIA and not under the "abuse of discretion"⁶⁶ standard of review dictated by the APA.⁶⁷

61. 430 U.S. 99 (1977).

62. 28 U.S.C. § 1331 (1970) was amended to eliminate the requirement of a specified amount in controversy as a prerequisite to suit against the Government. Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721. The amended statute reads: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity." 28 U.S.C.A. § 1331 (Supp. 1977).

63. 5 U.S.C. § 702 (1970) (the current codification of section 10(a) of the APA). Section 10(a) states, in part, "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." *Id.*

64. 430 U.S. at 100-01 & n.1. In the District of Columbia, jurisdiction had been found for reverse FOIA's under the APA. *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935 (D.C. Cir. 1975). In *Westinghouse*, however, the Fourth Circuit found jurisdiction under 28 U.S.C. § 1331 (1970). 542 F.2d 1190, 1209 n.60 (4th Cir. 1976), *cert. denied*, 97 S. Ct. 2199 (1977). *See also* *Chrysler Corp. v. Schlesinger*, 412 F. Supp. 171, 174-75 (D. Del. 1976); *Burroughs Corp. v. Schlesinger*, 403 F. Supp. 633, 634 (E.D. Va. 1975) (finding jurisdiction on both grounds); *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292, 294 (C.D. Cal. 1974).

Prior to *Sanders*, seven of the eleven federal appellate circuits had held that section 10 of the APA was an independent grant of jurisdiction. *Sanders v. Weinberger*, 522 F.2d 1167 (7th Cir. 1975), *rev'd sub nom.* *Califano v. Sanders*, 430 U.S. 99 (1977); *Ortego v. Weinberger*, 516 F.2d 1005 (5th Cir. 1975); *Pickus v. United States Bd. of Parole*, 507 F.2d 1107 (D.C. Cir. 1974); *Bradley v. Weinberger*, 483 F.2d 410 (1st Cir. 1973); *Brandt v. Hickel*, 427 F.2d 53 (9th Cir. 1970); *Brennan v. Udall*, 379 F.2d 803 (10th Cir.), *cert. denied*, 389 U.S. 975 (1967); *Deering Milliken, Inc. v. Johnson*, 295 F.2d 856 (4th Cir. 1961).

65. *Sears, Roebuck & Co. v. GSA*, 553 F.2d 1378 (D.C. Cir. 1977).

66. Section 10(e) of the APA states: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . ." 5 U.S.C. § 706 (1970).

67. *See Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1206-07 (4th Cir. 1976), *cert.*

2. Venue

Under the 1974 amendments to the FOIA,⁶⁸ venue is proper in any of three places: where the complainant resides or has his principal place of business, where the agency records are situated, or in the District of Columbia.⁶⁹ These venue provisions give great latitude to the contractor to pick his judicial forum.

The first venue provision is very liberal and is actually twofold in that it allows a corporation to sue where it resides or where it has its principal place of business. The residence of a plaintiff corporation suing the Government in federal district court is, for venue purposes, in the state and district in which it has been incorporated.⁷⁰ Thus a company incorporated in Delaware with its principal place of business in Illinois would have proper venue in either jurisdiction under the first clause of the FOIA's venue provisions.

The second venue provision is often relied upon by multi-facility national contractors whose compliance agencies are located in Virginia in order to bring their reverse FOIA case in the Eastern District of Virginia and thus get within the jurisdiction of the Fourth Circuit. Given the Fourth Circuit's favorable decision in *Westinghouse*,⁷¹ it is a generally more desirable jurisdiction in which to find venue than across the Potomac River in the District of Columbia.⁷²

denied, 97 S. Ct. 2199 (1977); *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 941 (D.C. Cir. 1975); *United States Steel Corp. v. Schlesinger*, 8 Fair Empl. Prac. Cas. 923, 924 (E.D. Va. 1974), *aff'd sub nom. Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1197 (4th Cir. 1976), *cert. denied*, 97 S. Ct. 2199 (1977).

The district court in *Sears, Roebuck & Co. v. GSA*, 384 F. Supp. 996 (D.D.C. 1974), similarly rejected the agency's claim that the "abuse of discretion test" was to be used by the court on review, despite the fact that jurisdiction was grounded in the APA narrowly to apply "only when there is 'no law' that can be applied by the court in its review of the agency." *Id.* at 1001.

68. 5 U.S.C. § 552(a)(4)(B) (Supp. V 1975).

69. *Id.*; *cf. East Tenn. Research Corp. v. TVA*, 416 F. Supp. 988 (D.D.C. 1976) (extra-territorial service of process on a non-resident defendant is always proper under the FOIA or Fed. R. Civ. P. 4).

70. *Suttle v. Reich Bros. Constr. Co.*, 333 U.S. 163, 166-68 (1948); *American Cyanamid Co. v. Hammond Lead Prods., Inc.*, 495 F.2d 1183 (3d Cir. 1974); *Manchester Modes, Inc. v. Schuman*, 426 F.2d 629 (2d Cir. 1970); *Pure Oil Co. v. Suarez*, 346 F.2d 890 (5th Cir. 1965), *aff'd*, 384 U.S. 202 (1966); *D.C. Electronics, Inc. v. Schlesinger*, 368 F. Supp. 1029, 1031 (N.D. Ill. 1974).

71. 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 97 S. Ct. 2199 (1977).

72. *See Metropolitan Life Ins. Co. v. Usery*, 426 F. Supp. 150 (D.D.C. 1976), *appeal docketed*, No. 77-1270 (D.C. Cir. Mar. 15, 1977), *cert. denied*, 97 S. Ct. 2198 (1977). The Fourth Circuit sits in Richmond, Virginia, and has appellate jurisdiction over federal courts situated in Virginia, Maryland, West Virginia, and North and South Carolina. The Eastern District of Virginia is situated in Alexandria, Virginia, across the Potomac River from Washington, D.C., where the District of Columbia Circuit sits.

Although most federal agencies process and store contract compliance records in the District of Columbia, significant exceptions exist. The Defense Supply Agency (the contract compliance arm of the Department of Defense) and the Department of the Interior contract compliance components are situated in Virginia in suburban communities inhabited largely by federal government employees working in the District of Columbia. Large portions of the country's industry have their compliance activities governed by these two compliance agencies. Thus, corporations in the steel, rubber, petroleum, and electronics industries are able to avail themselves of venue in the Eastern District of Virginia. This is so despite the fact that the Department of the Interior, for example, moves its compliance documents to the District of Columbia when a FOIA request seeking them is filed.⁷³

3. Sovereign Immunity

This government defense is no longer raised as a bar to reverse FOIA suits although it was vigilantly pursued by the Department of Justice in *Westinghouse*.⁷⁴ There, Judge Bryan rejected a claim of sovereign immunity made by the Department of Defense, concluding that the relief sought was not of the type that would " 'expend itself on the public treasury or domain, or interfere with the public administration' to the extent that the Government would be 'stopped in its tracks.' "⁷⁵ In addition, he found the actions of the federal officers to be sufficiently "beyond their statutory powers so that those actions would not be the actions of the sovereign."⁷⁶

In the District of Columbia, where jurisdiction in reverse FOIA cases had usually been founded on the APA prior to the Supreme Court's decision in *Califano v. Sanders*,⁷⁷ the sovereign immunity argument was easily disposed of⁷⁸ in light of that circuit's leading decision in *Scanwell Laboratories, Inc. v. Shaffer*,⁷⁹ which held that the APA is a waiver of sovereign immunity.⁸⁰ Now that the District of

73. In a hearing seeking a temporary restraining order, Judge Bryan sitting in the Eastern District of Virginia in the Alexandria Division rejected the Department of the Interior's argument that venue in Virginia was improper because the documents at issue had been transported to Washington, D.C., during the pendency of the FOIA request seeking them. *Vistron Corp. v. Andrus*, No. 77-85-A (E.D. Va. Feb. 23, 1977).

74. 392 F. Supp. 1246, 1248 (E.D. Va. 1974), *aff'd*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 97 S. Ct. 2199 (1977).

75. *Id.* (citing *Land v. Dollar*, 330 U.S. 731, 738 (1947)).

76. *Id.*

77. 430 U.S. 99 (1977); see notes 61-64 *supra* and accompanying text.

78. See, e.g., *Sears, Roebuck & Co. v. GSA*, 384 F. Supp. 996, 1001 (D.C. Cir. 1974).

79. 424 F.2d 859 (D.C. Cir. 1970).

80. *Id.* at 873.

Columbia Circuit has abandoned its view that jurisdiction is predicated on the APA, presumably it will follow the Fourth Circuit's lead on the sovereign immunity issue, should it arise.

F. *Substantive Questions Raised
by Reverse FOIA Cases*

1. Exemption 4 as
a Bar to Disclosure

The federal courts have now recognized the right of government contractors to initiate suit in federal district court to enjoin the release by the government of information deemed to be "commercial or financial" within the meaning of exemption 4.⁸¹ Numerous courts have construed exemption 4 and with near unanimity have held that "the plain meaning of . . . 'this section exempts only (1) trade secrets and (2) information which is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential. The exemption given by the Congress does not apply to information which does not satisfy the three requirements stated in the statute.'"⁸²

Similarly, exemption 4 has been construed to serve the function of protecting the privacy and competitive position of the citizen who offers information to assist government policymakers.⁸³ Documents generated by the government, however, have not traditionally been protected from disclosure under exemption 4.⁸⁴ In the seminal case of *National Parks and Conservation Association v. Morton*,⁸⁵ the District

81. Exemption 4 exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4) (1970).

82. *Getman v. NLRB*, 450 F.2d 670, 673 (D.C. Cir. 1971) (footnote omitted); *accord*, *Sears, Roebuck & Co. v. GSA*, 384 F. Supp. 996, 1005 (D.D.C. 1974), *rev'd*, 553 F.2d 1378 (D.C. Cir. 1977); *Rabbitt v. Department of the Air Force*, 383 F. Supp. 1065, 1069 (S.D.N.Y. 1974); *Tax Analysts & Advocates v. IRS*, 362 F. Supp. 1298, 1307 (D.D.C. 1973), *modified on other grounds*, 505 F.2d 350 (D.C. Cir. 1974); *Consumers Union, Inc. v. VA*, 301 F. Supp. 796, 802 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971). *But see* *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591 (D.P.R. 1967) (any privileged or confidential data is protected from disclosure by exemption 4).

83. *See, e.g.*, *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

84. *See* *Soucie v. David*, 448 F.2d 1067, 1069 n.47 (D.D.C. Cir. 1971); *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 425 F.2d 578, 582 (D.C. Cir. 1970); *Fisher v. Renegotiation Bd.*, 355 F. Supp. 1171, 1174 (D.C. Cir. 1973); *Consumers Union, Inc. v. VA*, 301 F. Supp. 796, 802-03 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971); *Benson v. GSA*, 289 F. Supp. 590, 594 (W.D. Wash. 1968), *aff'd*, 415 F.2d 878 (9th Cir. 1969); *Davis, The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 787-92 (1967). *But see* *Brockway v. Department of the Air Force*, 518 F.2d 1184, 1188 (8th Cir. 1975).

85. 498 F.2d 765 (D.C. Cir. 1974).

of Columbia Circuit construed the meaning of the term "confidential or privileged" commercial or financial information as used in exemption 4 to encompass information which, if disclosed by the government, would be likely to: "(1) impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."⁸⁶

It should be made clear at the outset, however, that compliance agency promises of confidentiality may not overrule the disclosure provisions of the FOIA. Thus such assurances are meaningless unless the documents are independently exempt from disclosure under one of the nine exceptions⁸⁷ to disclosure set out in the FOIA.⁸⁸ The ultimate question then is what material and information can be shown to be "confidential."

The pertinent legislative history of exemption 4 reads as follows:

This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes.⁸⁹

It would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations.⁹⁰

(a) Information Which Has Been Barred from Disclosure

Relying upon exemption 4, and particularly the interpretation given it in *National Parks*,⁹¹ numerous federal courts have barred the government from disclosing those portions of AAPs and EEO-1s⁹² which would allow

86. *Id.* at 770 (footnote omitted).

87. See 5 U.S.C. § 552(b)(1)-(9) (1970 & Supp. V 1975).

88. Otherwise agencies could subvert the FOIA by promising confidentiality whenever a record is submitted. The courts have uniformly rejected such a "wild card" exemption. See *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 940 (D.C. Cir. 1975); *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971); *Save the Dolphins v. Department of Commerce*, 404 F. Supp. 407 (N.D. Cal. 1975).

89. S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). See also *GSA v. Benson*, 415 F.2d 878, 881-82 (9th Cir. 1969).

90. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966).

91. See notes 85-86 *supra* and accompanying text.

92. A common fallacy is that a per se exemption from disclosure exists for AAPs, EEO-1s, or CRRs, or all three together. The courts, however, have not been influenced by the way in which affirmative action information has been labeled. Rather, they have looked to the underlying

a competitor to: (1) derive a contractor's labor costs;⁹³ (2) inform itself of new products and processes being developed by the contractor;⁹⁴ (3) work up an analysis of the contractor's production capabilities;⁹⁵ (4) develop competitive bid strategies;⁹⁶ (5) identify the contractor's customers and their consumptive needs;⁹⁷ (6) raid the contractor's staff to meet minority group hiring quotas (manning tables);⁹⁸ (7) determine the use of the contractor's work force and the technology it uses;⁹⁹ and (8) reduce the risk-taking in purchasing capital equipment by examining the contractor's fluctuations in labor costs.¹⁰⁰

In addition, disclosure of promotion plans has been barred because of the competitive injury which would be sustained by contractors through its effect on employee morale and productivity,¹⁰¹ and because disclosure of the information would amount to an unwarranted invasion of personal privacy of those employees who could be identified.¹⁰²

substance to determine whether the data are commercial or financial in nature. Indeed, in exempting information from release, the courts are usually quite careful to note that their decision applies only to the documents before the court and not to a broader class of documents. *See* cases cited in notes 93-103 *infra*.

93. *See* *Holiday Inns, Inc. v. Kleppe*, 13 Fair Empl. Prac. Cas. 1337 (W.D. Tenn. 1976); *Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1246, 1249 (E.D. Va. 1974), *aff'd*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 97 S. Ct. 2199 (1977); *United States Steel Corp. v. Schlesinger*, 8 Fair Empl. Prac. Cas. 923 (E.D. Va. 1974), *aff'd sub nom. Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 97 S. Ct. 2199 (1977). *But see* *Vistron Corp. v. Andrus*, No. 77-85-A (E.D. Va. Feb. 23, 1977); *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292, 297 (C.D. Cal. 1974).

94. *Chrysler Corp. v. Schlesinger*, 412 F. Supp. 171, 176 (D. Del. 1976); *see* *Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1246 (E.D. Va. 1974), *aff'd*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 97 S. Ct. 2199 (1977); *United States Steel Corp. v. Schlesinger*, 8 Fair Empl. Prac. Cas. 923, 924 (E.D. Va. 1974), *aff'd sub nom. Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1196 (4th Cir. 1976), *cert. denied*, 97 S. Ct. 2199 (1977).

95. *United States Steel Corp. v. Schlesinger*, 8 Fair Empl. Prac. Cas. 923 (E.D. Va. 1974), *aff'd sub nom. Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 97 S. Ct. 2199 (1977).

96. *Id.*

97. *Id.*

98. *See* *Metropolitan Life Ins. Co. v. Usery*, 426 F. Supp. 150, 160 (D.D.C. 1976), *appeal docketed*, No. 77-1270 (D.C. Cir. Mar. 15, 1977), *cert. denied*, 97 S. Ct. 2198 (1977); *Chrysler Corp. v. Schlesinger*, 412 F. Supp. 171, 176 (D. Del. 1976). *But see* *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292, 297-98 (C.D. Cal. 1974).

99. *See* *Chrysler Corp. v. Schlesinger*, 412 F. Supp. 171, 176 (D. Del. 1976); *United States Steel Corp. v. Schlesinger*, 8 Fair Empl. Prac. Cas. 923, 924 (E.D. Va. 1974), *aff'd sub nom. Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1196 (4th Cir. 1976), *cert. denied*, 97 S. Ct. 2199 (1977).

100. *See* *Chrysler Corp. v. Schlesinger*, 412 F. Supp. 171 (D. Del. 1976).

101. *See* *Metropolitan Life Ins. Co. v. Usery*, 426 F. Supp. 150, 165 (D.D.C. 1976), *appeal docketed*, No. 77-1270 (D.C. Cir. Mar. 15, 1977), *cert. denied*, 97 S. Ct. 2198 (1977).

102. *See id.* at 166-68; *Hughes Aircraft Co. v. Schlesinger* 384 F. Supp. 292, 298 (C.D. Cal. 1974).

Some courts have, however, ordered some AAP and EEO-1 material disclosed after concluding that the release of the information at issue in those cases would not injure the competitive position of the company.¹⁰³

(b) The Agency Discretion Argument

One of the currently unresolved issues in reverse FOIA cases is whether the compliance agencies may, in their discretion, release admittedly trade secret data. As noted earlier, the OFCCP has reserved that right by regulation, and has argued that the courts must weigh the right to public disclosure against the right of the contractor to protect its confidential data. Under this theory, a reverse FOIA plaintiff seeking to bar the release of documents would have a twofold burden.

First, it would have to show that the documents were exempt from disclosure under the FOIA and that a person seeking them could not compel the agency to release them. Nonetheless, this may be insufficient to overcome the argument that the agency may release the documents if it so chooses because the FOIA neither authorizes nor prohibits disclosure of exempt information. Disclosure of exempt information, it has been argued, is therefore discretionary with the agency.¹⁰⁴ Second, the reverse FOIA plaintiff seeking to bar the release of confidential data must then urge upon the court a statute, rule, regulation, or any declaration of legislative policy that restricts the government's discretion to disclose.

The Fourth Circuit has rejected this balancing test approach and construed the legislative history of exemption 4 to give a private supplier of information the right to enjoin disclosure of its confidential data "*as a matter of right*, and as a matter basic to our free enterprise system."¹⁰⁵ The Fifth Circuit has taken a similar position¹⁰⁶ as has the Ninth Circuit,¹⁰⁷ although the Ninth Circuit later revoked its position on rehearing.¹⁰⁸

103. *Vistron Corp. v. Andrus*, No. 77-85-A (E.D. Va. Feb. 23, 1977); *Goodyear Tire & Rubber Co. v. Dunlop*, 13 Fair Empl. Prac. Cas. 1734, 1735 (D.D.C. 1976) (preliminary injunction denied); *Sears, Roebuck & Co. v. GSA*, 402 F. Supp. 378, 383 (D.D.C. 1975), *rev'd*, 553 F.2d 1378 (D.C. Cir. 1977); *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292, 297-98 (C.D. Cal. 1974); *Legal Aid Soc'y v. Schultz*, 349 F. Supp. 771, 776-77 (N.D. Cal. 1972).

104. *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 941-42 (D.C. Cir. 1975); *Moore-McCormack Lines, Inc. v. I.T.O. Corp.*, 508 F.2d 945, 950 (4th Cir. 1974).

105. *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1211 & n.70 (4th Cir. 1976), *cert. denied*, 97 S. Ct. 2199 (1977).

106. *Continental Oil Co. v. FPC*, 519 F.2d 31, 35-36 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1971).

107. *See Union Oil Co. v. FPC*, 542 F.2d 1036, 1044-45 (9th Cir. 1976).

108. *Id.* at 1045-46.

2. Exemption 3 as a Bar to Disclosure

Exemption 3 to the FOIA¹⁰⁹ exempts from disclosure information "specifically exempted from disclosure by statute."¹¹⁰ In a broad reading of this exemption, the Supreme Court in *Administrator, FAA v. Robertson*¹¹¹ construed exemption 3 to encompass a broadly worded statute which gave the Administrator of the Federal Aviation Administration much discretionary authority to withhold information from the public.¹¹² The breadth of this interpretation startled those who favored a narrow reading of exemption 3 that would allow greater access to government documents.

Since the decision in *Robertson*, the statute at issue there¹¹³ has stood as a benchmark for comparison with regard to other statutes which may fall within the scope of exemption 3.¹¹⁴ The legislative history of the FOIA vaguely refers to some 100 statutes which bar government disclosure of information.¹¹⁵ Determining which statutes fall within exemption 3 has become a process of judicial inclusion and exclusion on a case-by-case basis.

(a) 18 U.S.C. § 1905 as a Bar to Disclosure

With regard to AAPs and EEO-1s, employers have argued that section 1905 of title 18 of the United States Code falls within the scope of exemption 3 and bars their disclosure. That statute makes it a criminal offense for government employees to disclose trade secrets including confidential statistical data and certain other kinds of confidential commercial information described by the statute.¹¹⁶

109. 5 U.S.C.A. § 552(b)(3) (Supp. 1977).

110. *Id.*

111. 422 U.S. 255 (1975).

112. 49 U.S.C. § 1504 (1970). This statute permits the Administrator of the FAA to withhold any information obtained by the agency if he determines that disclosure "would adversely affect the interests of [any person objecting to disclosure] and is not required in the interest of the public." *Id.*

113. *Id.*

114. *See, e.g., National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 686 n.48 (D.D.C. 1976) (construing amended version of exemption 3).

115. *See* H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). *See also Administrator, FAA v. Robertson*, 422 U.S. 255, 265 (1975).

116. "Whoever, being an officer or employee of the United States or of any department or agency thereof, 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,

Prior to *Robertson*, the District of Columbia Circuit¹¹⁷ twice held that section 1905 was not within exemption 3 and thus could not be asserted by contractors to bar disclosure.¹¹⁸ The same court subsequently reaffirmed its view a year and a half later in a case¹¹⁹ decided after *Robertson*.

The Fourth Circuit has, however, expressly held that section 1905 falls within exemption 3, a decision which the Supreme Court has recently refused to review.¹²⁰ In so doing, however, the Fourth Circuit construed the protection offered by section 1905 and exemption 4 to be "co-extensive" and thus gave no greater protection to confidential commercial records under section 1905 than that already provided under exemption 4.¹²¹ As noted above, however, the protection the court found for the records of government contractors under exemption 4 was very broad.¹²²

partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particular 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." 18 U.S.C. § 1905 (1970).

117. The great majority of FOIA cases are filed in the District of Columbia because that is the headquarters of the federal government and because the federal judiciary there has greater expertise in matters of administrative law. Additionally, the overwhelming majority of FOIA cases filed in the courts seek the release of documents, a principle to which courts in the District of Columbia are widely thought to be more favorably disposed than those in any other federal jurisdiction. Nevertheless, the 1974 amendments to the FOIA included expanded venue provisions: "On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B) (Supp. V 1975).

118. *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 941 n.7 (D.C. Cir. 1975); *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 425 F.2d 578, 580 n.5 (D.C. Cir. 1970). See also *Pharmaceutical Mfrs. Ass'n v. Weinberger*, 401 F. Supp. 444, 446, n.1 (D.D.C. 1975); *Ditlow v. Volpe*, 362 F. Supp. 1321, 1323 (D.D.C. 1973), *rev'd sub nom. Ditlow v. Brinegar*, 494 F.2d 1073 (D.C. Cir.), *cert. denied*, 419 U.S. 974 (1974).

The *Grumman* court explained its reasoning as follows: "Unlike other statutes which specifically define the range of disclosable information . . . , section 1905 merely creates a criminal sanction for the release of 'confidential information.' Since this type of information is already protected from disclosure under the Act by § 552(b)(4), section 1905 should not be read to expand this exemption, especially because the Act requires that exemptions be narrowly construed." 425 F.2d at 580 n.5.

119. *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 686-87 (D.C. Cir. 1976).

120. *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1209 (4th Cir. 1976), *cert. denied*, 97 S. Ct. 2199 (1977).

121. *Id.* at 1204 n.38; see *Vistron Corp. v. Andrus*, Cir. No. 77-35-A (E.D. Va. Feb. 23, 1977). But see *Sears, Roebuck & Co. v. GSA*, 553 F.2d 1378 (D.C. Cir. 1977); *Pharmaceutical Mfrs. Ass'n v. Weinberger*, 401 F. Supp. 444, 446 (D.D.C. 1975). In this context, see *Crown Central Petroleum Corp. v. Kleppe*, 14 Fair Empl. Prac. Cas. 49, 52-54 (D. Md. Nov. 24, 1976), in which for the first time the documents at issue were found not to qualify simultaneously as trade secret information within the meanings of both exemption 4 and section 1905. This result is not explained in the decision except to note that the plaintiff did not urge exemption 4 upon the court although fully aware of *Westinghouse*. See note 105 *supra* and accompanying text.

122. See notes 91-102 *supra* and accompanying text.

The confusion over the applicability of section 1905 has taken on a new dimension in recent months with the amendment of exemption 3 of the FOIA by the Government in the Sunshine Act.¹²³ The struggle over the applicability of section 1905 via exemption 3 as a device to bar disclosure is, thus, far from over, even though the struggle may well be for naught if the Fourth Circuit is correct in its assertion that section 1905 and exemption 4 are co-extensive.

Exemption 3, as amended, now reads:

This section does not apply to matters that are . . . (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld . . .¹²⁴

The stated purpose of the amendment contained in its legislative history¹²⁵ was to narrow exemption 3 (thus making more documents available to the public) and to specifically overrule the Supreme Court's decision in *Administrator, FAA v. Robertson*.¹²⁶

In so doing, however, the House report refers to section 1905 as a statute which could be invoked to affect the agency's discretion once it was established that the documents at issue fall within exemption 4:

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; on the other hand, if material is within the trade secrets exemption of the Freedom of Information Act and therefore subject to disclosure if the agency determines that disclosure is in the public interest, section 1905 must be considered to ascertain whether the agency is forbidden from disclosing the information.¹²⁷

Government FOIA litigation specialists, and particularly the Privacy and Freedom of Information Unit at the United States Department of Labor, have taken the position that the House report language set out above precludes the use of section 1905 in both exemption 3 and 4 cases. Such a position would appear to be at odds with the legislative

123. Pub. L. No. 94-409, § 5(b), 90 Stat. 1247 (codified at 5 U.S.C.A. § 552 (Supp. 1977)) (effective March 12, 1977).

124. 5 U.S.C.A. § 552(b)(3) (Supp. 1977).

125. H.R. Rep. No. 880 (Pt. I), 94th Cong., 2d Sess., 22-23 (1976). See also *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 687 & n.49 (D.C. Cir. 1976).

126. 422 U.S. 255 (1975).

127. H.R. Rep. No. 880 (Pt. I), 94th Cong., 2d Sess. 23 (1976). See also *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 941 n.7 (D.C. Cir. 1975), and cases cited therein.

It has been argued that a reverse FOIA plaintiff seeking to bar the release of documents has a twofold burden. See pt. II.F.1.(b) *supra*. This approach, although rejected by the Fourth Circuit in *Westinghouse*, see note 105 *supra* and accompanying text, appears to underlie the thinking in the House report.

history, however, because the recent amendment of exemption 3¹²⁸ did not repeal section 1905. It is still good law. A contractor should still be able to rely on exemption 3 by invoking section 1905 to show that the proposed release of information is not in the public interest embodied in that section, which operates to restrict agency discretion in favor of disclosure.¹²⁹

With regard to the question of whether the amended exemption 3 incorporates section 1905, the House report accompanying the Government in the Sunshine Act is unclear.¹³⁰ It would appear, nonetheless, that the intent was to make section 1905 an independent source of authority, separate from exemption 4, to bar disclosure. Given the considerable confusion surrounding section 1905, however, the District of Columbia Circuit, in its most recent reverse FOIA case,¹³¹ refused to rule on whether exemption 3 incorporated section 1905 and remanded the case to the district court for further consideration in light of the amendment to exemption 3 of the FOIA.¹³²

Neither these issues nor the fear that he was failing to abide by the Fourth Circuit's recent precedent in *Westinghouse*,¹³³ however, deterred a federal judge in Maryland from raising sua sponte—on behalf of the government—the issue of the continuing validity of section 1905 in light of the most recent amendments to exemption 3.¹³⁴

(b) The Civil Rights Act as
a Bar to Disclosure

Along with section 1905, reverse FOIA plaintiffs have attempted to find other statutes within the ambit of exemption 3 which would serve as a bar to the release of affirmative action data. One statute which looked promising for this purpose was section 709(e) of the Civil Rights Act of 1964.¹³⁵ The courts have narrowly interpreted this statute,

128. See notes 123-24 *supra* and accompanying text.

129. It should be made clear that any discretion the agency might have to release confidential data stems from the FOIA and is not to be confused with agency discretion as that term is used in the Administrative Procedure Act. Agency discretion and considerations of the public interest may be required under the FOIA insofar as exemptions from disclosure are permissive with the agency and not mandatory. As noted above, see pt. II.F.1.(b) *supra*, this issue of agency discretion is still unresolved.

130. H.R. Rep. No. 880 (Pt. I), 94th Cong., 2d Sess. (1976).

131. *Sears, Roebuck & Co. v. GSA*, 553 F.2d 1378 (D.C. Cir. 1977).

132. *Id.* at 1385 (decided in light of *FAA, Administrator v. Robertson*, 422 U.S. 955 (1975)).

133. 542 F.2d 1190, 1210 (4th Cir. 1976), *cert. denied*, 97 S. Ct. 2199 (1977).

134. See *Crown Central Petroleum Corp. v. Kleppe*, 14 Fair Empl. Prac. Cas. 49, 54 (D. Md. Nov. 24, 1976) (held section 1905 did not fall within the ambit of exemption 3).

135. 42 U.S.C. § 2000e-8(e) (1970). The statute states: "It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by

however, to apply only to the EEOC and not to the OFCCP or any of its sixteen compliance agencies.¹³⁶ As a result, this avenue of approach appears to be blocked as to all agencies except the EEOC.

III. ACCESS TO NLRB DOCUMENTS

A. Introduction

Beginning with the Supreme Court's decision in *NLRB v. Sears, Roebuck & Co.*,¹³⁷ the NLRB has been in the forefront shaping FOIA case law. Since that decision, the NLRB has been at the center of the current controversy over the use of the FOIA as a discovery device to be used by persons in litigation with federal agencies. Fearful that the FOIA represents an expansion of traditionally limited agency discovery procedures, several investigatory federal agencies, in addition to the NLRB, have been involved in the question of whether the FOIA or the agency discovery regulations apply.¹³⁸

the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than one year." *Id.*

136. *See Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1246, 1249 (E.D. Va. 1974), *aff'd*, 542 F.2d 1190, 1199 (4th Cir. 1976), *cert. denied*, 97 S. Ct. 2199 (1977); *Legal Aid Soc'y v. Schultz*, 349 F. Supp. 771, 775-76 (N.D. Cal. 1972).

137. 421 U.S. 132 (1975). It was held that the NLRB could not raise exemption 5 as a bar to disclosing Advice and Appeals Memoranda written by the General Counsel to Regional Directors explaining decisions by the General Counsel not to file complaints in unfair labor practice cases. However, Advice and Appeals Memoranda directing that complaints be filed were held to be exempt from disclosure under exemption 5 as predecisional attorney work product. *Id.* at 154-55.

Exemption 5 states: "This section does not apply to matters that are . . . (5) 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." 5 U.S.C. § 552(b)(5) (1970).

138. *Moore-McCormack Lines, Inc. v. I.T.O. Corp.*, 508 F.2d 945, 950 (4th Cir. 1974); *Verrazano Trading Corp. v. United States*, 349 F. Supp. 1401, 1402-03 (Cust. Ct. 1972). Commenting on the use of the FOIA as a discovery device, Donald I. Baker, former Assistant Attorney General in the Antitrust Division of the Department of Justice stated: "There is one aspect of openness in government which concerns me, for I feel that its mechanics have been abused. The Freedom of Information Act was designed primarily so that public interest groups, scholars and the press could gain access to government records and information which would be of value to the public in understanding the operations of the government. In the past eighteen months the Antitrust Division has received less than a dozen Freedom of Information Act requests from the press, public interest groups and people doing research.

"We have, however, received a deluge of requests from antitrust counsel who happily believe that they have uncovered a new discovery device. Time and again, defense counsel in government antitrust suits have attempted to use the Freedom of Information Act to gain access to documents and information in our files that they could not reach using the discovery methods provided for by the Federal Rules of Civil or Criminal Procedure.

B. *NLRB Discovery Rules*

NLRB administrative law judges are authorized to order, in their discretion, the NLRB to produce "any statement" of the witness in the possession of the General Counsel which "relates to the subject matter as to which the witness has testified."¹³⁹ The procedure usually employed is for the NLRB to supply a copy of the witness' statement immediately after he has testified so that cross-examination may proceed. If there is additional information given in the statement about which the witness did not testify, the General Counsel is authorized¹⁴⁰ to submit the statement to the administrative law judge in camera and seek excision of information not relating to the oral testimony given. The administrative law judge, in his discretion, may refuse to excise portions of the information given in the statement which relate to matters raised in the pleadings but not given orally by the witness while on the stand. The expurgated version of the statement is then delivered to counsel and cross-examination is allowed to proceed. Because the NLRB's rule is patterned after the Jencks' Act,¹⁴¹ court decisions construing that Act may be helpful in interpreting the rule.¹⁴²

In practice, NLRB staff attorneys are advised to reject demands for statements, affidavits, or documents in their possession except in the following situations: "Where a witness has been given or is about to be given the document to refresh his memory, or to impeach his testimony", or "Where the General Counsel has granted advance permission."¹⁴³

It should also be noted, however, that despite the NLRB's historically non-existent discovery procedures, there exists in the law of evidence a discretionary right of access to memoranda or notes used by

"An extremely egregious case occurred recently. The defendants in a government suit were seeking to discover some data that had been collected and analyzed by one of our attorneys. We felt the information was irrelevant to the litigation and refused to turn it over. The defendants took us to court and made a motion for production of documents under Rule 34, but the judge agreed with us and denied their motion. Undaunted, defense counsel restyled their motion as a Freedom of Information Act request and mailed the papers to our Freedom of Information Officer. I appreciate imaginative lawyering as much as you, but in my opinion such use of the Freedom of Information Act clearly frustrates the purpose of having rules to govern civil and criminal litigation and discovery." Address of Donald I. Baker, N.Y.S. Bar Association Antitrust Law Section (Jan. 26, 1977).

139. 29 C.F.R. § 102.118(b)(1) (1976).

140. *Id.* § 102.118(b)(2).

141. 18 U.S.C. § 3500 (1970).

142. NLRB Case Handling Manual § 10394.7, *reprinted in* NLRB Case Handling Manual (CCH) ¶ 3947.

143. NLRB Case Handling Manual § 10400.1(a)-(b), *reprinted in* NLRB Case Handling Manual (CCH) ¶ 4001(a)-(b).

the witness to refresh his recollection even if those notes or memoranda were not used while on the stand.¹⁴⁴ In addition, an adverse inference may arise against the NLRB if it refuses to produce relevant documents exclusively in its possession and which it has the ability to produce.¹⁴⁵

Numerous due process challenges to these NLRB discovery "rights" have been brought and failed. The courts have, however, recognized that a right of discovery before an adjudicatory agency exists if the employer can show that he was prejudiced by the lack of it.¹⁴⁶ The courts have construed the term prejudice, however, to require an employer either to be denied a hearing or the right to cross-examine witnesses.

These narrow after-the-fact discovery provisions virtually begged for litigation under the FOIA, especially in light of language in *NLRB v. Sears, Roebuck & Co.*¹⁴⁷ which suggested that access to agency documents under the FOIA was co-extensive with traditional discovery rules in some circumstances.¹⁴⁸ In a footnote citing with approval the House report accompanying the FOIA, the Court noted that

144. *Goldman v. United States*, 316 U.S. 129, 132 (1942); *Miles v. Clairmont Transfer Co.*, 35 Mich. App. 319, 320-23, 192 N.W.2d 619, 620-21 (1971); *Doxtator v. Swarthout*, 38 App. Div. 2d 782, 782, 328 N.Y.S.2d 150, 151-52 (1972); *Fed. R. Evid.* 612.

145. *See UAW v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972); *NLRB v. Evans Packing Co.*, 463 F.2d 193, 197 (6th Cir. 1972); *P.R. Mallory & Co. v. NLRB*, 400 F.2d 956, 959 (7th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969); 2 J. Wigmore, *Evidence* § 291 (3d ed. 1940).

146. *NLRB v. Rex Disposables, Div. of DHJ Indus., Inc.*, 494 F.2d 588, 591-92 (5th Cir. 1974); *Electromec Design & Dev. Co. v. NLRB*, 409 F.2d 631, 635 (9th Cir. 1969); *NLRB v. Southern Materials Co.*, 345 F.2d 240, 244 (4th Cir. 1965). *See also Smith v. Schlesinger*, 513 F.2d 462, 475-78 (D.C. Cir. 1975); *NLRB v. Safway Steel Scaffolds Co.*, 383 F.2d 273, 277-78 (5th Cir.), *cert. denied*, 390 U.S. 955 (1967); *Firestone Synthetic Fibers Co. v. NLRB*, 374 F.2d 211, 214 (4th Cir. 1967).

147. 421 U.S. 132 (1975).

148. *Id.* at 148-55. Recently, the Chairman's Task Force on the NLRB has recommended some expanded discovery procedures:

- "31. Complaints should be more specific as to 'who, what, when, and where,' and bills of particulars should be granted to remedy any deficiencies. (The identification of individuals here refers to the respondent or its agents).
- 32. Advance disclosure of the names of outside experts should be required.
- 33. The exchange of documentary evidence should take place, preferably in advance of but at least at the pretrial conference, so long as there is no required identification of individual employees.
- 34. Issues and positions of the parties should be 'identified' at a pretrial conference held on the day of the hearing.
- 35. In back-pay cases, full disclosure should be available concerning information which would tend to verify, contradict, or further clarify the material in the files of the General Counsel." Chairman's Task Force on the NLRB, *Interim Report and Recommendations* (1976), *reprinted in* 1 Lab. Rel. Rep. (CCH) 93 LRR 221, 247 (Nov. 20, 1976).

"[e]xemption 5 was intended to permit disclosure of those intra-agency memoranda which would 'routinely be disclosed' in private litigation, . . . and we accept this as the law."¹⁴⁹

The Court, however, did not construe the 1974 amendments to the investigatory files exemption,¹⁵⁰ but remanded the case to the court of appeals for further consideration of this issue.¹⁵¹

C. *Employer Access to Witness Statements*

Soon thereafter employers began to litigate the first of over forty cases to be brought seeking access to employee witness statements and investigative reports compiled by NLRB investigators in unfair labor practice investigations. Although the early case law was unclear, it now appears that the NLRB may raise exemption 7(A) as a bar to disclosure and bar employer access to employee witness statements.¹⁵²

149. 421 U.S. at 149 n.16 (citations omitted).

150. Exemption 7 now states: "This section does not apply to matters that are . . . (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel." 5 U.S.C. § 552(b)(7) (Supp. V 1975).

151. 421 U.S. at 165 n.30.

152. NLRB v. Hardeman Garment Corp., 95 L.R.R.M. 2780 (6th Cir. June 22, 1977); Bellingham Frozen Foods v. Henderson, No. 76-1684 (9th Cir. May 3, 1977), *rev'g* 91 L.R.R.M. 2761 (W.D. Wash. 1976); New England Medical Center Hosp. v. NLRB, 548 F.2d 377 (1st Cir. 1976); Harvey's Wagon Wheel, Inc. v. NLRB, 550 F.2d 1139 (9th Cir. 1976); Cessna Aircraft Co. v. NLRB, 542 F.2d 834 (10th Cir. 1976); Maremount Corp. v. NLRB, 93 L.R.R.M. 2799 (10th Cir. Oct. 5, 1976); Climax Molybdenum Co. v. NLRB, 539 F.2d 63 (10th Cir. 1976); Goodfriend W. Corp. v. Fuchs, 535 F.2d 145 (1st Cir.), *cert. denied*, 429 U.S. 895 (1976); Kent Corp. v. NLRB, 530 F.2d 612 (5th Cir.), *cert. denied*, 429 U.S. 920 (1976); Title Guar. Co. v. NLRB, 534 F.2d 484 (2d Cir.), *cert. denied*, 429 U.S. 834 (1976).

District court cases denying employer access include: Furr's Cafeterias, Inc. v. NLRB, 416 F. Supp. 629 (N.D. Tex. 1976) (citing exemption 7(D)); Pacific Photo Type, Inc. v. NLRB, 92 L.R.R.M. 2560 (D. Hawaii 1976) (citing exemption 7(A)); Gerico, Inc. v. NLRB, 92 L.R.R.M. 2713 (D. Colo. 1976) (citing exemptions 5, 7(A), (C), and (D)); ITT Am. Elec. v. NLRB, 92 L.R.R.M. 2815 (N.D. Miss. 1976) (citing exemptions 5, 7(A) and (D)); Vegas Village Shopping Corp. v. NLRB, 92 L.R.R.M. 2683 (C.D. Cal. 1976) (citing exemptions 7(A), (C), and (D)); NLRB v. Biophysics Sys., Inc., No. M18-304 (S.D.N.Y. Apr. 12, 1976); Electric-Flex v. NLRB, 92 L.R.R.M. 2142 (N.D. Ill. 1976) (citing exemptions 5 and 7(A)); Harowe Servo Controls, Inc. v. NLRB, 92 L.R.R.M. 2572 (E.D. Pa. 1976) (citing exemptions 7(A), (C), and (D)); Atlas Indus. v. NLRB, 91 L.R.R.M. 2676 (N.D. Ohio 1976) (citing exemption 7(A)); Capital Cities v. NLRB, 91 L.R.R.M. 2565 (N.D. Cal. 1976) (citing exemption 7(A)); Read's, Inc. v. NLRB, 91 L.R.R.M. 2722 (D. Md. 1976) (citing exemption 7(A)); Jamco Int'l v. NLRB, 91 L.R.R.M. 2446 (N.D.

Moreover, the First Circuit has upheld the right of the NLRB to bar access under exemption 7(A) to even supervisorial and non-employee witness statements because their release would interfere with NLRB enforcement proceedings.¹⁵³ In addition to these cases, however, five district courts have granted access. The NLRB has appealed all but one.¹⁵⁴

As for NLRB discovery regulations denying access to witnesses' statements, it does not appear that NLRB discovery regulations denying access to witness statement will be expanded in the near future.

D. *Employer Access to Union Authorization Cards*

Employers have also sought access under the FOIA to union authorization cards on file with the NLRB. This issue is only of recent vintage and as a result only a handful of cases have been litigated. To date, results have again been mixed, although employers have won the right in one case to gain access to the cards.¹⁵⁵ Four other courts, including the Third Circuit, have denied employer access citing privacy exemptions 6¹⁵⁶ or 7(C)¹⁵⁷ of the FOIA.¹⁵⁸ Several other cases are awaiting decision at the trial court level.¹⁵⁹

Okla. 1976) (citing exemptions 5 and 7(A)); *Local 30, United Slate, Tile & Composition Roofers v. NLRB*, 408 F. Supp. 521 (E.D. Pa. 1976) (citing exemption 7(A)); *Mylan Pharmaceuticals, Inc. v. NLRB*, 407 F. Supp. 1124 (W.D. Pa. 1976) (citing exemptions 7(A), (C), and (D)); *Chassen Bakers, Inc. v. NLRB*, 91 L.R.R.M. 2345 (M.D. Pa. 1975) (citing exemption 7(A)); *Kaminer v. NLRB*, 90 L.R.R.M. 2269 (S.D. Miss. 1975) (citing exemption 7(D)).

153. *New England Medical Center Hosp. v. NLRB*, 548 F.2d 377, 382 (1st Cir. 1976).

154. *Baptist Memorial Hosp. v. NLRB*, 92 L.R.R.M. 2645 (W.D. Tenn. 1976), *appeal docketed*, No. 76-1953 (6th Cir. June 1, 1976); *Robbins Tire & Rubber Co. v. NLRB*, 92 L.R.R.M. 2586 (N.D. Ala. 1976), *appeal docketed*, No. 76-2099 (5th Cir. Apr. 1, 1976); *McDonnell Douglas Corp. v. NLRB*, 92 L.R.R.M. 2072 (C.D. Cal. 1976), *appeal docketed*, No. 76-1580 (9th Cir. Mar. 17, 1976); *Poss v. NLRB*, 91 L.R.R.M. 2232 (D.D.C. 1975), *appeal docketed*, No. 76-1328 (10th Cir. Mar. 5, 1976); *cf. Temple-Eastex, Inc. v. NLRB*, 410 F. Supp. 183 (E.D. Tex. 1976) (access granted) (appeal not taken because employer had voluntarily made witnesses available to NLRB and knew their testimony).

155. *Donn Products, Inc. v. NLRB*, 93 L.R.R.M. 2065 (N.D. Ohio 1976), *appeal docketed*, No. 76-2542 (6th Cir. July 22, 1976).

156. Exemption 6 states: "This section does not apply to matters that are . . . (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (1970).

157. See note 150 *supra* for text of exemption 7(C).

158. *Committee on Masonic Homes v. NLRB*, 556 F.2d 214 (3d Cir. 1977) (citing exemption 7(C)); *Howard Johnson Co. v. NLRB*, No. 77-124 (W.D.N.Y. May 16, 1977) (citing exemptions 6 and 7(C)); *L'eggs Prods., Inc. v. NLRB*, 93 L.R.R.M. 2488 (C.D. Cal. 1976) (citing exemptions 6 and 7(C)); *NLRB v. Biophysics Sys., Inc.*, 91 L.R.R.M. 3079 (S.D.N.Y. 1976) (citing exemption 7(C)).

159. *Case, Inc. v. NLRB*, No. 77-27 (E.D. Ky., filed Mar. 3, 1977); *Madeira Nursing Home v. NLRB*, No. C-1-77-88-14 (S.D. Ohio, filed Dec. 15, 1976); *Provincial House, Inc. v. NLRB*, No. 77-02288 (E.D. Mich., filed Apr. 21, 1976).

To date, the Third Circuit has been the only appellate court to address the issue. Its recent decision in *Committee on Masonic Homes v. NLRB*¹⁶⁰ rejected the NLRB's claimed exemption for authorization cards under exemptions 5, 7(A), and 7(C), but upheld its exemption 6 argument denying access. In exemption 6 cases, relating to personnel and medical files, a court must first determine whether disclosure would result in any invasion of privacy.¹⁶¹ If an invasion of privacy is found, the court must then go further and undertake a balancing test, weighing the seriousness of the invasion against the benefit to the public of disclosure.¹⁶²

In *Masonic Homes*, the Third Circuit found that release of the cards would constitute a "serious" violation of privacy because (1) an employee might be embarrassed or harmed should it come to the employer's or anyone else's attention that such person executed a union authorization card, (2) it was plausible that employees would be reluctant to sign a union card if they knew the employer could see who signed, and (3) the use of secret ballots in union elections demonstrates a policy that union employees do not have to acknowledge in public their support for the union.¹⁶³ The court found "no significant public interest in disclosure" and concluded that authorization cards should be exempt.¹⁶⁴

IV. ACCESS TO OSHA INVESTIGATIVE REPORTS

Employees or employee representatives who believe that their employer is violating the Occupational Safety and Health Act¹⁶⁵ may make a written request for an inspection by the OSHA. These requests must be turned over to the company at the time of any resulting inspection, although employees may request that their names not be released to the employer.¹⁶⁶ Despite the flood of FOIA cases at the

160. 556 F.2d 214 (3d Cir. 1977).

161. See note 156 *supra*.

162. *Department of the Air Force v. Rose*, 425 U.S. 352, 372-73, (1976); *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133, 136 (3d Cir. 1974); *Getman v. NLRB*, 450 F.2d 670, 674 (D.C. Cir. 1971). Note that exemption 6 is the only exemption in which the requester's reason or need for the documents is considered by the court. This is because of the language of the exemption, which requires a balancing in order to determine whether an invasion is "clearly unwarranted." 5 U.S.C. § 552(b)(6) (1970). It should also be noted that exemption 6, on its face, appears to require a broader construction (through its use of the phrase "clearly unwarranted invasion") than exemption 7(C), which speaks of merely an "unwarranted invasion" of privacy. Compare *id. with id.* § 552(b)(7) (Supp. V 1975).

163. 556 F.2d at 220-21.

164. *Id.*

165. 29 U.S.C. §§ 651-678 (1970).

166. *Id.* § 657(f)(1).

NLRB seeking employee witness statements, the OSHA has had very few such requests.¹⁶⁷

However, in *Cadena v. United States Department of Labor*¹⁶⁸ and *Fahr v. United States Department of Labor*,¹⁶⁹ two cases litigating a similar issue, the trial courts ordered the release of the names of witnesses while denying the Department of Labor's claimed exemption under exemption 7(C) and 7(D).¹⁷⁰ Significantly, however, the requests were not made by employers but by relatives of an employee killed on the job. In each of these cases, the relatives sought the names of the witnesses interviewed by the OSHA for use in wrongful death actions. In neither case was an employer seeking the names of his employees during an OSHA violation action. As a result, there could be little fear of reprisals against the witnesses because their employer was not the defendant in the wrongful death action. Correspondingly, exemption 7(A),¹⁷¹ which the NLRB has used with such great success to bar disclosure of employee witness statements to employers during unfair labor practice proceedings,¹⁷² was not applicable.

Both cases are interesting, however, in that both courts rejected the Department of Labor's contentions that witnesses to the accident were "confidential" within the meaning of exemption 7(D). In *Cadena*, it was held, for example, that "[t]he persons interviewed in the course of this OSHA investigation are potential witnesses whose identities will ultimately have to be disclosed to a plaintiff whose cause of action arises out of the accident prompting the OSHA investigation."¹⁷³ In *Fahr*, the court took a different tack and construed section 7(D) to require an "express" pledge of confidentiality to be given to the witnesses who supplied the information and put the burden on the Government to prove affirmatively that such an assurance was given.¹⁷⁴

167. Department of Labor FOIA specialists have speculated that this is so because employers usually order their own safety specialists to investigate accidents and as a result have information comparable to that developed by OSHA investigators. In addition, it should be noted that employee witnesses comprise the bulk of the NLRB's case in unfair labor practice proceedings, whereas OSHA generally relies upon the testimony of compliance officers who personally inspect the employer's workplace and note violations. Employee witnesses may become a factor when OSHA conducts an inspection following an accident and compliance officers are forced to rely on eye witnesses to the accident.

168. No. EP-76-CA-55 (W.D. Tex. Mar. 29, 1977).

169. No. 75-1286 (D.N.J. Sept. 14, 1976). Two other cases are currently pending: *Gass v. United States Dep't of Labor*, No. 76-C-15 (E.D. Wis., filed Feb. 20, 1976); *Clark v. United States Dep't of Labor*, No. 76-285 (W.D.N.Y., filed June 30, 1976).

170. For the text of exemptions 7(C) and 7(D), see note 150 *supra*.

171. For the text of exemption 7(A), see note 150 *supra*.

172. See cases in note 152 *supra*.

173. No. EP-76-CA-55, slip op. at 3-4 (W.D. Tex. Mar. 29, 1977).

174. No. 75-1286, slip op. at 4 (D.N.J. Sept. 14, 1976).

In both cases, the witness statements were supplied to the FOIA requester with the names of the witnesses and identifying material sanitized. Interestingly enough, however, the OSHA voluntarily delivered portions of its investigative reports, conclusions of investigators, and findings of relevant code violations to the requester in *Fahr*.¹⁷⁵ In *Cadena*, however, exemption 5¹⁷⁶ was invoked to bar the release of investigator evaluations, a contention upheld by the court "since these items of information consist of opinions and evaluations of a government investigator."¹⁷⁷ This result is consistent with case law development under exemption 5 which has held that particular factual information contained within classes of documents exempt from disclosure under exemption 5 must be disclosed.¹⁷⁸ It should be noted, however, that exemption 5 is intended to protect only pre-decisional work product but not factual material if it can reasonably be segregated.¹⁷⁹

In summary, the question of employer access to the names of employee witnesses given to OSHA investigators has yet to be litigated under the FOIA. It is highly unlikely, however, that such access could be compelled in the courts. In such a case, the OSHA, like the NLRB, would be able to invoke exemption 7(A) to bar disclosure. In addition, however, the OSHA could presumably invoke exemption 3¹⁸⁰ and argue that it incorporates that portion of the Occupational Health and Safety Act¹⁸¹ which authorizes the deletion of the names of employee witnesses.

V. EMPLOYER ACCESS TO EEOC INVESTIGATORY FILES

Access to the EEOC's investigatory files prior to the time suit has been filed has been difficult to obtain because of the agency's traditional reluctance to disclose information and because Congress by statute provided the agency with strong rights of secrecy. Title VII of the Civil Rights Act of 1964,¹⁸² as amended, provides in section 706(b) that: "[c]harges shall not be made public by the Commission,"¹⁸³ and in section 709(e) that "[i]t shall be unlawful for any officer or employee of the

175. This was done because there was no ongoing OSHA violation case. The case was "closed" insofar as the Department of Labor was concerned. *Id.*

176. For the text of exemption 5, see note 137 *supra*.

177. No. EP-76-CA-55, slip op. at 2 (W.D. Tex. Mar. 29, 1977).

178. *National Cable Television Ass'n v. FCC*, 479 F.2d 183 (D.C. Cir. 1973).

179. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).

180. *See* note 110 *supra* and accompanying text.

181. 29 U.S.C. § 657(f)(1) (1970).

182. 42 U.S.C. §§ 1981-2000 (1970 & Supp. II 1972).

183. *Id.* § 2000e-5(b) (Supp. II 1972).

Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information."¹⁸⁴

As a result of these statutory secrecy provisions, the EEOC may avail itself not only of the usual FOIA anti-disclosure provisions embodied in exemption 7¹⁸⁵ but may also invoke exemption 3¹⁸⁶ to bar access to information specifically exempted from disclosure by statute.

Government contractors do not themselves file AAPs with the EEOC. The EEOC may receive copies, however, by filing a request with the compliance agencies pursuant to the EEOC-OFCCP Memorandum of Understanding (1974),¹⁸⁷ an arrangement which has been upheld in the Eastern District of Virginia.¹⁸⁸ Should an FOIA request be filed with the EEOC for an AAP, the EEOC has declared its intention to refer the request to the "originating" compliance agency for determination.¹⁸⁹ As a result, the EEOC should never have occasion to consider the release of affirmative action data to a member of the public pursuant to the FOIA.

A troublesome issue, however, which has never been litigated, is the status of those AAPs voluntarily given to the EEOC by contractors. Because these records did not "originate" in another agency, it appears that only a very broad reading of the EEOC's regulations would apply to these documents. Regardless of how acquired, section 709(e) should stand as a bar to the release of AAP information to the public. It would appear, therefore, that a requester could not compel the EEOC to produce information supporting a charge,¹⁹⁰ including witness statements, under the FOIA.¹⁹¹

184. *Id.* § 2000e-8(e) (1970).

185. See pt. III *supra* for a discussion of exemption 7 in the context of NLRB discovery.

186. See note 109 *supra* and accompanying text.

187. 1 Empl. Prac. Guide (CCH) ¶ 3780.

188. *Reynolds Metals Co. v. Rumsfeld*, 417 F. Supp. 365 (E.D. Va. 1976), *appeal docketed*, Nos. 76-2124-26 (4th Cir. Sept. 27, 1976).

189. "Request for records that originated in another Agency and are in the custody of the Commission, will be referred to that Agency for processing, and the person submitting the request shall be so notified. The decision made by that Agency with respect to such records will be honored by the Commission." 29 C.F.R. § 1610.6 (1976).

190. The term "charges" as used in 42 U.S.C. § 2000e-5(b) has been broadly construed by District of Columbia courts to encompass even a pre-determination settlement agreement entered into by the EEOC and an employer prior to a reasonable cause determination. As a result, access to these agreements may not be compelled under the FOIA. *Parker v. EEOC*, 10 Fair Empl. Prac. Cas. 1239 (D.D.C. 1975), *aff'd.*, 534 F.2d 977 (D.C. Cir. 1976).

191. This issue is currently being litigated in the Fourth Circuit. *Charlotte-Mecklenburg Hosp. Auth. v. Perry*, 13 Fair Empl. Prac. Cas. 437 (W.D.N.C. 1976), *appeal docketed*, Nos. 76-2272 and 76-2273 (4th Cir. Nov. 12, 1976) (argued April 4, 1977, and currently awaiting decision). The district court directed the EEOC to release the affidavits of twelve charging

A respondent has an express right to notice of a charge, "including the date, place and circumstances of the alleged unlawful employment practice" within ten days of the date the charge is filed.¹⁹² Apart from this information, however, the EEOC has taken the position that it has discretion to release additional investigative data within its possession to the charging party, the respondent, witnesses, and representatives of interested federal, state, and local agencies.¹⁹³ This discretionary right of release has been specifically upheld so long as release is not made to the public at large.¹⁹⁴ Access has also been sought under the APA,¹⁹⁵ but it has been held that the APA does not confer a right of discovery in federal administrative proceedings.¹⁹⁶

Absent a compulsory right of access for pre-trial discovery of agency investigative files under the FOIA, Title VII itself, EEOC regulations, or the APA, employers can only fall back on a constitutional right of access for pre-trial discovery of agency investigative files. Such a right has been recognized before other quasi-judicial agencies where there has been a showing of prejudice to the employer.¹⁹⁷ The EEOC, however, is not an adjudicatory agency and must seek enforcement of its proceedings in the courts. In addition, it should be noted that prejudice has been construed to require either that the employer be denied a hearing or the right to cross-examine witnesses. Absent such prejudice, however, discovery before an administrative agency, even a quasi-judicial agency, has been held to be within the agency's discretion.¹⁹⁸

As a result, it appears to be highly unlikely that discovery at the

parties who were not then employed by the defendant employer. Further, the court denied employer access to eight affidavits on file with the EEOC and submitted by current employees. In addition, the court specifically forbade the employer from disclosing the affidavits to any person except in connection with an investigation of the charges. *Id.* This restriction appears to be overbroad, however, in that release to one person constitutes a public release under the FOIA.

192. 42 U.S.C. § 2000e-5(b) (Supp. II 1972).

193. 29 C.F.R. § 1601.20 (1976).

194. *H. Kessler & Co. v. EEOC*, 472 F.2d 1147 (5th Cir.), *cert. denied*, 412 U.S. 939 (1973). After suit has been initiated by the EEOC, however, additional rights under the discovery provisions of the Federal Rules of Civil Procedure become available to an employer. *See EEOC v. St. Francis Community Hosp.*, 12 Fair Empl. Prac. Cas. 423 (D.S.C. 1976) (EEOC's objections under section 706(b) overruled and release ordered of letters exchanged between the EEOC, the charging party, and third persons).

195. 5 U.S.C. §§ 551-559 (1970).

196. *Friette v. Kimberlin*, 508 F.2d 205, 208 (3d Cir. 1974) (en banc), *cert. denied*, 421 U.S. 980 (1975).

197. *See* note 146 *supra* and accompanying text.

198. *NLRB v. Valley Mold Co.*, 530 F.2d 693, 695 (6th Cir.), *cert. denied*, 97 S. Ct. 77 (1976); *NLRB v. Lizdale Knitting Mills, Inc.*, 523 F.2d 978 (2d Cir. 1975); *Moore v. Administrator, VA*, 475 F.2d 1283 (D.C. Cir. 1973); 1 K. Davis, *Administrative Law Treatise* § 8.15 (1958).

EEOC can be compelled beyond that provided for in the EEOC's own access regulations.

VI. CONCLUSION

The FOIA is a useful, albeit two-edged, discovery tool for employers in the labor relations area. On the one hand, the FOIA may afford employers access to some agency documents it seeks, but at the same time it provides a broad avenue to employer documents on file with the various federal agencies regulating labor relations activities. If the current trend toward greater government scrutiny of private business activity continues to grow in the labor relations area, it can only be expected that more reverse FOIA cases will be brought by employers defensively seeking to protect their confidential records from the prying eyes of the public, and particularly from any market competitors or labor relations antagonists. At the same time, so long as labor agency discovery regulations continue to prevent access to information useful to employers in litigation with the agency, it can be expected that companies will continue vigorously to use the FOIA affirmatively as a discovery device to help defend against agency prosecutions.