

William & Mary Law Review

Volume 16 (1974-1975)
Issue 3 Symposium: *The Second Decade of
Title VII: Refinement of the Remedies*

Article 12

March 1975

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Amendment of the Seventh Exemption Under the Freedom of Information Act, 16 Wm. & Mary L. Rev. 697 (1975), <https://scholarship.law.wm.edu/wmlr/vol16/iss3/12>

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AMENDMENT OF THE SEVENTH EXEMPTION UNDER THE FREEDOM OF INFORMATION ACT

One of the final actions of the 93d Congress was the amendment of the Freedom of Information Act (FOIA)¹ to alter significantly the exemption under the 1966 Act² of "investigatory files compiled for law enforcement purposes"³ from the general mandate of the Act for disclosure of information by governmental agencies.⁴ In an apparent attempt to provide more disclosure than had been obtained under the previous language of this seventh FOIA exemption,⁵ Congress may have removed an element of flexibility necessary to the usefulness of the investigatory files exemption.

Though antecedents for access to information can be found in the historical concept of an informed electorate as essential to democracy,⁶ the common law developed no general right in all citizens to

1. 5 U.S.C. § 552 (1970), as amended by Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561.

2. The seventh exemption in the 1966 enactment covered: "(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency" Act of July 4, 1966, Pub. L. No. 89-487, § (3)(e)(7), 80 Stat. 250. The exemption now reads as follows:

"(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"

Act of Nov. 21, 1974, Pub. L. No. 93-502, § 2(b), 88 Stat. 1561.

3. 5 U.S.C. § 552(b)(7) (1970).

4. Section 552(a) states that each agency is to make information available to the public as described therein. 5 U.S.C. § 552(a) (1970). The second part of the Act, 5 U.S.C. § 552(b) (1970), contains nine exemptions. See notes 16, 17 *infra*.

5. One commentator suggested: "Exemption 7 has emerged as the most relied upon exemption to support withholding though other sections have also been used." Note, *The Freedom of Information Act: A Critical Review*, 38 GEO. WASH. L. REV. 150, 158 (1969) (footnote omitted). See also Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEXAS L. REV. 1261, 1277-84 (1970).

6. The words of James Madison are quoted frequently in decisions and in the legislative history on the FOIA: "Knowledge will forever govern ignorance, and a people who mean to

inspect government documents.⁷ Congress began a turnaround in the law with the enactment of the "Public Information" section of the Administrative Procedure Act (APA),⁸ but this provision, enacted to allow broad disclosure, was used as authority to withhold public records.⁹ This section nevertheless contained the first provision for public disclosure of government information.¹⁰ In 1958, Congress amended the Federal Housekeeping Act,¹¹ previously interpreted by agencies as allowing general nondisclosure,¹² to empha-

be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both." S. PADOVER, *THE COMPLETE MADISON* 337 (1953). It has been stated: "The right of citizens to know about the conduct of their own government, to see for themselves the public records of the executive departments, certainly seems implicit in all the theories of democracy and self-government upon which our system rests." J. WIGGINS, *FREEDOM OR SECRECY* 66 (1964). See Hennings, *Constitutional Law: The People's Right to Know*, 45 A.B.A.J. 667 (1959); Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1 (1970); 40 FORDHAM L. REV. 921 (1972). Introducing a proposed amendment to the FOIA, Senator Kennedy stated: "We should keep in mind that it does not take marching armies to end republics. . . . If the people of a democratic nation do not know what decisions their government is making, do not know the basis on which those decisions are being made, then their rights as a free people may gradually slip away, silently stolen when decisions which affect their lives are made under the cover of secrecy." S. REP. NO. 93-854, 93d Cong., 2d Sess. 5 (1974).

7. See H. CROSS, *THE PEOPLE'S RIGHT TO KNOW* 25 (1953). Some cases dealing with the first amendment right to free speech under the Constitution contain language from which could be derived tangentially an argument supporting a common law right to governmental information: "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369 (1931), *quoted in*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). See also *Nowack v. Fuller*, 243 Mich. 200, 219 N.W. 749 (1928); *Burton v. Tuite*, 78 Mich. 363, 44 N.W. 282 (1889).

8. Administrative Procedure Act of 1946, ch. 324, § 3, 60 Stat. 238.

9. See H.R. REP. NO. 918, 88th Cong., 1st Sess. 5 (1963); 112 CONG. REC. 12,976 (1966) (remarks of Representative Howard). See also Katz, *supra* note 5; Moss, *Public Information Policies, the APA, and Executive Privilege*, 15 AD. L. REV. 111, 113-14 (1963); Note, *Freedom of Information: The Statute and the Regulations*, 56 GEO. L.J. 18 (1967); 80 HARV. L. REV. 909 (1967).

10. The APA provided for disclosure of rules, official opinions and orders, and public records, "[e]xcept to the extent that there [was] involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency. . . ." Administrative Procedure Act of 1946, ch. 324, § 3, 60 Stat. 238. The public records were to "be made available to persons properly and directly concerned except information held confidential for good cause found." *Id.* § 3(c).

11. Act of Aug. 12, 1958, Pub. L. No. 85-619, 72 Stat. 547, *amending* 5 U.S.C. § 22 (1958) (Rev. Stat. § 161).

12. The Federal Housekeeping Act had provided: "The head of each department is author-

size that the Act did not authorize withholding information.¹³

Notwithstanding the addition to the Federal Housekeeping Act, agency disclosure was still an exception rather than the rule.¹⁴ Congress therefore enacted the Freedom of Information Act¹⁵ in 1966, providing first a broad rule of disclosure,¹⁶ then specifying nine exemptions from that rule of disclosure.¹⁷ The Act nonetheless left

ized to prescribe regulations not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it." 5 U.S.C. § 22 (1958) (Rev. Stat. § 161). In *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), the Supreme Court upheld the reversal of a contempt conviction of an agent of the Federal Bureau of Investigation for failure to respond to a subpoena duces tecum because the Attorney General had issued an order which had made all official files of the Department of Justice confidential under the Federal Housekeeping Act. See also *Boske v. Comingore*, 177 U.S. 459 (1900); *Fowkes v. Dravo Corp.*, 5 F.R.D. 51 (E.D. Pa. 1945); *Walling v. Richmond Screw Anchor Co.*, 4 F.R.D. 265 (E.D.N.Y. 1943).

13. The 1958 amendment added: "This section does not authorize withholding information from the public or limiting the availability of records to the public." Act of Aug. 12, 1958, Pub. L. No. 85-619, 72 Stat. 547, amending 5 U.S.C. § 22 (1958) (Rev. Stat. § 161). See *Sperandeo v. Milk Drivers Local 537*, 334 F.2d 381 (10th Cir. 1964); *Olson Rug Co. v. NLRB*, 291 F.2d 655 (7th Cir. 1961); *Rosee v. Board of Trade*, 35 F.R.D. 512 (N.D. Ill. 1964).

14. See note 9 *supra*.

15. Pub. L. No. 89-487, § 3(e)(7), 80 Stat. 250 (1966).

16. 5 U.S.C. § 552(a) (1970). The Senate report accompanying the proposed bill stated: "It is the purpose of the present bill to eliminate such [nondisclosure statements in the 1946 'Public Information' section], to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language . . ." S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965). The report further stated: "S. 1160 would emphasize that section 3 of the Administrative Procedure Act is not a withholding statute but a disclosure statute . . . There is, of course, a certain need for confidentiality in some aspects of Government operations and these are protected specifically; but outside these limited areas, all citizens have a right to know." *Id.* at 5-6.

17. Section 552(b) exempted matters that were:

- (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;
- (2) related solely to the internal personnel rules and practices of an agency;
- (3) specifically exempted from disclosure by statute;
- (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (5) inter-agency or intra-agency memorandums or letters which would not be available by the law to a party other than an agency in litigation with the agency;
- (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;
- (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

much to be desired, especially by its failure to clarify the meaning of the exemptions,¹⁸ including exemption seven for "investigatory files compiled for law enforcement purposes."¹⁹

Definitional problems pervaded the exemption. Congress failed to explain whether "law enforcement" meant only criminal law enforcement or whether it applied to all laws. In a sense most governmental investigations and studies are conducted to aid enforcement of laws by discovering violations of laws or by providing the impetus for new laws.²⁰ An alternate construction of the exemption would bar only disclosure of information generated by an ongoing investigation for enforcement of the criminal laws. Nevertheless, courts uniformly held that the exemption applied to the enforcement of all types of federal laws.²¹

Use of the term "file" also proved troublesome. Since, as a mere "collection of papers,"²² a file often might include materials not

(9) geological and geophysical information and data, including maps, concerning wells.

5 U.S.C. § 552(b) (1970). Professor Davis has noted: "The exemptions, of course, take back a goodly portion of what the affirmative provisions give, so that the extent of required disclosure usually depends upon interpretation of the exemptions." K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 3A1, at 69 (3d ed. 1972).

18. Professor Davis has stated: "After more than ten years of hearings, questionnaires, studies, reports, drafts, and pulling and hauling, Congress wound up with a rather shabby product . . . The drafting deficiencies are discouraging. They cannot be explained away as the product of extreme complexity, intractable subject matter, or unruly struggles between irreconcilable political philosophies. The failures are in the nature of inattention and indifference." *Id.* § 3A.25, at 85-86.

19. In regard to the seventh exemption, Professor Davis has suggested: "Even the simplest question may be unanswerable in the statutory language: Is law enforcement the purpose of investigating the crash of a passenger plane? When the investigation begins no one may yet know. If the evidence disproves in three minutes a suspicion of bomb planting, but if three months are devoted to metal fatigue, is the file 'compiled for law enforcement purposes'?" K. DAVIS, *supra* note 17, § 3A.23, at 85.

20. See generally note 27 *infra*.

21. In *Clement Bros. Co. v. NLRB*, 282 F. Supp. 540, 542 (N.D. Ga. 1968), the court stated: "[T]he legislative history of the Act itself makes it clear that . . . exemption [seven] is not limited solely to criminal law enforcement but rather applies to law enforcement activities of all natures." See also *Aspin v. Department of Defense*, 348 F. Supp. 1081 (D.D.C. 1972), *aff'd*, 491 F.2d 24 (D.C. Cir. 1973); *Bristol-Myers Co. v. FTC*, 284 F. Supp. 745, 747 (D.D.C. 1968), *aff'd in part, rev'd in part on other grounds*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970). The recent amendment, Act of Nov. 21, 1974, Pub. L. No. 93-502, § 2(b), 88 Stat. 1561, strongly implies that "law enforcement" includes noncriminal laws by specifically limiting one subpart (section D) of the exemption to criminal law enforcement and intelligence activities. See note 75 *infra* & accompanying text.

22. A "file" is defined as "a collection of cards or papers [usually] arranged or classified." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 849 (1969).

investigatory in character,²³ courts confronted two unsatisfactory choices. They could inspect files in camera to segregate nonexempt papers, thereby risking disclosure of exempted material because of imperfect procedures or an inexperienced decision. Alternatively, courts could rely upon the self-serving classification of the material by the agency and risk frustration of the Act's purpose by sanctioning non-disclosure of nonexempt information. Some courts proved more willing than others to conduct in camera separation of investigatory and noninvestigatory materials,²⁴ although most agreed that disclosure of an entire file was not to be withheld merely because some of its materials were within the exemption.²⁵ Practical difficulties of sifting through voluminous file materials apparently deterred some courts from attempting in camera file segregation.²⁶

23. Ralph Nader has argued: "Federal Trade Commission officials have also discovered how to exploit this exemption: merely by instructing a secretary to open an investigatory file and drop in the desired item serves to side-step the FOIA." Nader, *supra* note 6, at 7. Professor Davis also suggested: "The Act is faulty in its use of the unsatisfactory term 'files.' Much of the contents of investigatory files compiled for purposes that may include law enforcement should not be exempt from required disclosure." Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 800 (1967).

24. The court of appeals in *Frankel v. SEC*, 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972), ignored the in camera procedure as a means of separating materials that were outside the exemption. *Accord*, *Aspin v. Department of Defense*, 491 F.2d 24 (D.C. Cir. 1973). The dissent in *Frankel* chided the court for ignoring this valuable procedure: "I am of the view that the federal courts can amply safeguard investigatory agency procedures and informants by in camera examination of the files in doubtful cases." 460 F.2d at 820 (Oakes, J., dissenting).

Many other decisions have found in camera review an essential procedure. *See Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973); *Fisher v. Renegotiation Bd.*, 473 F.2d 109, 114 (D.C. Cir. 1972); *Sterling Drug Inc. v. FTC*, 450 F.2d 698, 704 (D.C. Cir. 1971); *Soucie v. David*, 448 F.2d 1067, 1079-80 (D.C. Cir. 1971); *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 425 F.2d 578, 580-81 (D.C. Cir. 1970).

The Supreme Court, however, severely restricted the use of in camera inspection of records in *EPA v. Mink*, 410 U.S. 73 (1973), in which the Court reversed a court of appeals mandate to a district court to inspect and segregate materials allegedly exempted by the FOIA exemptions one (materials classified under executive order) and five (interagency memoranda). Reacting to *Mink*, *see* S. REP. NO. 93-1200, 93d Cong., 2d Sess. 9 (1974), Congress specifically authorized in camera review of material claimed to be within an exemption. *See* note 74 *infra* & accompanying text.

25. The statement in *Ethyl Corp. v. EPA*, 478 F.2d 47 (4th Cir. 1973), generally is accepted: "Congress never 'intended to exempt an entire document merely because it contained some confidential information.'" *Id.* at 49, *quoting* *Grumman Aircraft Engr. Corp. v. Renegotiation Bd.*, 425 F.2d 578, 580 (D.C. Cir. 1970). *See, e.g., Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973); *Simons-Eastern Co. v. United States*, 55 F.R.D. 88, 89 (N.D. Ga. 1972).

26. In *Vaughn v. Rosen*, 484 F.2d 820, 825-27 (D.C. Cir. 1973), the court suggested that the burden of facilitating an orderly and meaningful in camera review should be placed upon

Another problem concerned the interpretation of investigations "for law enforcement purposes" in relation to internal audits and investigations within a particular agency. Most internal audits or investigations have the broad purpose of aiding proper law enforcement and administration since such audits could result in disciplinary action or criminal charges.²⁷ Before exempting such an investigation from disclosure, however, courts generally required the investigation to have been focused "directly on specifically alleged illegal acts . . . which could, if proved, result in civil or criminal sanctions."²⁸ Since courts interpreted "law enforcement purposes" as referring to the likelihood of ultimate adjudication,²⁹ internal

the agency. The court in *Vaughn* suggested that the agencies should separate and itemize thoroughly material within the files under scrutiny and that courts could perform the sifting process through the use of special masters. *Id.*

27. The Court of Appeals for the District of Columbia Circuit has stated: "[W]e immediately encounter the problem that most information sought by the Government about its own operations is for the purpose ultimately of determining whether such operations comport with applicable law, and thus is 'for law enforcement purposes.' . . . But if this broad interpretation is correct, then the exemption swallows up the Act" *Rural Housing Alliance v. Department of Agric.*, 498 F.2d 73, 81 (D.C. Cir. 1974).

28. *Id.*

29. In *Stern v. Richardson*, 367 F. Supp. 1316, 1321 (D.D.C. 1973), quoting *Hawkes v. IRS*, 467 F.2d 787, 795 (6th Cir. 1972), the court stated: "[L]aw enforcement is the process by which society secures compliance with its duly adopted rules." Most courts apparently assume that adjudication is involved in law enforcement proceedings: "If further adjudicatory proceedings are imminent, then the company's request may fall within the category the exemption was designed to control." *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 939 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970). This assumption is implicit in judicial statements that exemption seven was designed to prevent premature disclosure of files 'prepared in connection with related Government litigation and adjudicative proceedings.' *Black v. Sheraton Corp.*, 371 F. Supp. 97, 102 (D.D.C. 1974), quoting H.R. REP. NO. 1497, 89th Cong., 2d Sess. 11 (1966).

In a system of law enforcement, adjudication is usually a necessary step in the imposition of sanctions. Thus the following statement by the Court of Appeals for the District of Columbia Circuit would seem to be in accord with the decisions that equate adjudication with "law enforcement purposes":

For the purpose of analyzing the application of exemption 7 in the instant and similar cases, it is therefore necessary to distinguish two types of files relating to government employees: (1) government surveillance or oversight of the performance of duties of its employees; (2) investigations which focus directly on specifically alleged illegal acts, illegal acts of particular identified officials, acts which could, if proved, result in civil or criminal sanctions. The applicability of exemption 7 to each individual case is to be ascertained by making a careful distinction between these two categories.

Rural Housing Alliance v. Department of Agric., 498 F.2d 73, 81 (D.C. Cir. 1974) (footnotes omitted).

That same court later enunciated a standard more inclusive than the "likelihood of adjudication."

audits did not become exempt until aimed at particular individuals or activity.

Perhaps the most fundamental problem inherent in the seventh exemption concerned files retained beyond their originally intended usefulness.³⁰ When the file was in use in a pending proceeding or was being compiled for an imminent proceeding, there was little doubt that the file was exempt.³¹ When the possibility of law enforcement

cation" standard. In *Center for Nat'l Policy Review v. Weinberger*, 502 F.2d 370 (D.C. Cir. 1974), the court suggested that for administrative determinations of ineligibility for governmental benefits, the "[l]ikelihood of adjudication is not the decisive determinant of whether a file has been compiled for law enforcement purposes." *Id.* at 373. The court instead created a "special scrutiny" test which may operate without regard for allegations of illegality or the possibility of civil or criminal sanctions. "What is clear, however, is that where the inquiry departs from the routine and focuses with special intensity upon a particular party, an investigation is under way." *Id.* This test would seem to include internal audits or studies that are nonroutine and have an element of "special scrutiny." In essence, the court deemed unimportant the "law enforcement purposes" requirement because it concluded that "[w]here an agency . . . has both voluntary compliance and formal determination functions, though the investigations may end up directed to one or both, the pertinent files are 'compiled for law enforcement purposes.'" *Id.* A better view, in light of one of exemption seven's main purposes, protection of the government's court cases, see S. REP. NO. 813, 89th Cong., 1st Sess. 9 (1965), would be that the "law enforcement" purposes contemplated by Congress do not include termination of governmental benefits, but do include the imposition of civil and criminal sanctions.

30. The first decision confronting the problem of the permanence of the exempt status was *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708 (E.D. Pa. 1968), in which the plaintiff sought an accident report from the Office of Occupational Safety of the Department of Labor for use in a damage suit. There was no doubt in *Cooney* that the files sought were investigatory and were compiled for law enforcement purposes; under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 941 (1970), the Secretary of Labor has the responsibility for investigating violations and enforcing safety regulations. Notwithstanding the exemption's apparent applicability, the court stated: "But perhaps a more relevant inquiry is not, for what purpose were the files originally compiled; but rather, whether they retain that characterization over four and one half years after their compilation?" 288 F. Supp. at 711. The court answered the question only indirectly by suggesting that a balancing of the interests involved was appropriate. By considering all the relevant factors, the court precluded an absolute and permanent immunity from disclosure. See *id.* at 711-12, 718-19. After the weighing process, the court conditionally denied disclosure of the "parts of the report containing the observations and factual investigations of the officials of the Office of Occupational Safety and conclusions as to the cause of the accident" subject to reconsideration upon a showing of the factual basis which gave the plaintiff a need for the report. *Id.* at 718-19.

31. See, e.g., *Philadelphia Newspapers, Inc. v. HUD*, 343 F. Supp. 1176, 1179 (E.D. Pa. 1972); *Benson v. United States*, 309 F. Supp. 1144, 1146 (D. Neb. 1970); *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591, 593 (D.P.R. 1967). Certain decisions propounding a balancing approach to the exemption, however, seem to suggest that investigatory files can be disclosed, even though law enforcement proceedings are imminent, if the public interest in disclosure outweighs the interests in nondisclosure. See *Pilar v. S.S. Hess Petrol*, 55 F.R.D. 159, 163-65 (D. Md. 1972); notes 40-43 *infra* & accompanying text.

proceedings became slight or nonexistent, continued exemption was less justified, even though the language of the Act appeared to grant a permanent exemption based on the file's purpose at the time of compilation.³² Perceived inconsistency of such nondisclosure with congressional intent apparently led some courts to reject the "clear language" of the Act.³³

Although the legislative history of the 1966 Act was far from definitive concerning the intended duration of the exemption,³⁴ courts

32. See *Weisberg v. Department of Justice*, 489 F.2d 1195 (D.C. Cir. 1973), *cert. denied*, 94 S. Ct. 2405 (1974); *Evans v. Department of Transp.*, 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972).

33. In *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970), the court was hesitant to acknowledge that the terms of the exemption focus upon the time of compilation. The court stated: "At one time the [FTC] apparently intended to deal with the subject of its proposed rule by proceeding against Bristol-Myers . . . for misleading advertising practices. Thus there is some basis for the view that the items sought are 'investigatory files compiled for law enforcement purposes.'" *Id.* at 939 (footnote omitted).

In *Black v. Sheraton Corp.*, 371 F. Supp. 97, 102 (D.D.C. 1974), the court stated: "The question then is whether the documents relate to that which can be fairly described as an enforcement proceeding." The key word in that statement is "relate"; the literal approach would require the use of the word "related" in reference to the time of compilation.

In support of focusing upon the time disclosure was sought, it could be argued that if no law enforcement proceeding was pending or imminent at that time, then the file in retrospect could not have been compiled for law enforcement purposes. If law enforcement proceedings had been commenced, but simply had ended prior to the seeking of disclosure, then the purpose would have been manifested and the exemption would apply. In essence, this reasoning requires a manifestation of purpose before the exemption would apply. No court has utilized such reasoning to reject the literal approach to the exemption because it could require application of the exemption long after enforcement proceedings have ended. Nevertheless a court adhering to the literal approach has stated:

To prevent the unauthorized use of a § 7 exemption by agencies as a shield against disclosure, there must be some method of assuring that the exemption is being properly invoked. Here 15 individuals were in fact already court-martialed on the basis of the Peers Commission Report, a showing which goes beyond the bare allegation that proceedings were merely contemplated at the time the files were compiled. Where, as here, enforcement proceedings have in fact resulted, there can be little doubt that files were compiled for law enforcement purposes.

Aspin v. Department of Defense, 491 F.2d 24, 29 (D.C. Cir. 1973). Thus, though the court applied the literal approach and focused upon the time of compilation, it justified its conclusion by examining also the time of disclosure. This later focus would assure that law enforcement proceedings actually had been contemplated at the time of compilation. The court in *Aspin*, however, used the later-focus analysis merely to doublecheck itself. Other literal approach decisions could not have utilized this doublecheck because law enforcement proceedings simply had never materialized. See *Weisberg v. Department of Justice*, 489 F.2d 1195 (D.C. Cir. 1973), *cert. denied*, 94 S. Ct. 2405 (1974); *Evans v. Department of Transp.*, 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972).

34. The language of the Senate report indicated that the exemption could apply perma-

have considered several policy arguments that might bear upon the legislative intent: preventing disclosure of information gleaned from criminal investigations may prevent the undermining of criminal law enforcement;³⁵ the exemption prevents premature disclosure of government court cases;³⁶ the exemption can protect the privacy of individuals who are being investigated;³⁷ and protection of an informant's identity through the exemption can protect necessary sources of information.³⁸ Viewed in light of the differing rationales, the problem thus was one of balancing the public interest in nondisclosure with the equally valid public interest in disclosure to accord with the purpose of the Act.³⁹

nently, but the report also seemed to contemplate a more narrow exemption, one relating only to prosecution of law violators of a criminal nature. S. REP. NO. 813, 89th Cong., 1st Sess. 9 (1965). The House report, however, deemed the exemptions quite broad, and specifically stated that the seventh exemption should apply to all laws. H.R. REP. NO. 1497, 89th Cong., 2d Sess. 11 (1966). Courts and commentators have displayed a general preference for the Senate report because the House report was not published until after the bill had passed. *See Getman v. NLRB*, 450 F.2d 670, 673 n.8 (D.C. Cir. 1971); *Tax Analysts & Advocates v. IRS*, 362 F. Supp. 1298, 1304 (D.D.C. 1973); K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 3A.2, 3A.9 (Supp. 1970).

35. The Senate report stated: "It is . . . necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation." S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965). Ralph Nader has stated: "The intent of [the seventh] exemption was to protect investigative material which if revealed would undermine law enforcement." Nader, *supra* note 6, at 6 (footnote omitted).

36. The Senate report described the exempt files as "files prepared by Government agencies to prosecute law violators. The disclosure of such files, except to the extent they are available by law to a private party, could harm the Government's case in court." S. REP. NO. 813, 89th Cong., 1st Sess. 9 (1965). Courts have taken note of the intent reflected in exemption seven to prevent premature disclosure: "Of the nine exceptions listed in § 552(b), only (5) . . . and (7) . . . are aimed at preventing premature disclosure of matters pertaining to litigation with an agency." *Long v. IRS*, 339 F. Supp. 1266, 1268 (W.D. Wash. 1971). *See Wellman Indus., Inc. v. NLRB*, 490 F.2d 427, 430 (4th Cir. 1974); *LaMorte v. Mansfield*, 438 F.2d 448, 451 (2d Cir. 1971); *Legal Aid Soc'y v. Shultz*, 349 F. Supp. 771, 777 (N.D. Cal. 1972); *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708, 711 (E.D. Pa. 1968).

37. An invasion of privacy could occur when a private citizen, seeking information about another private citizen, is given access to materials collected by the government. In *Cowles Communications, Inc. v. Department of Justice*, 325 F. Supp. 726 (N.D. Cal. 1971), the court stated: "[B]ut more important in this day of increasing concern over the conflict between the citizen's right of privacy and the need of the Government to investigate it is unthinkable that rights of privacy should be jeopardized further by making investigatory files available to private persons." *Id.* at 727 (footnote omitted). *See also* *Center for Nat'l Policy Review v. Weinberger*, 502 F.2d 370, 374 (D.C. Cir. 1974).

38. Courts have realized that "[t]he informant may not inform unless he knows that what he says is not available to private persons at their request. . . ." *Cowles Communications, Inc. v. Department of Justice*, 325 F. Supp. 726, 727 (N.D. Cal. 1971).

39. The Senate report recognized the problem, but failed to find a proper solution: "It is

In *Pilar v. S.S. Hess Petrol*,⁴⁰ the court utilized a balancing process, stating: "Having determined that the reports and files are within the investigatory file exemption of the Act, our inquiry must shift now to determine whether these particular files should be accorded immunity from disclosure and, if so, to what extent In determining the applicability of this privilege to the case at bar, this court must weigh the competing interests asserted and attempt to reconcile the conflicting policies involved."⁴¹ First, the court balanced speculative interests: "Disclosure of the identity of the informant or his statements [would] inhibit persons in the future from informing"⁴² The court then weighed the immediate interests: "[I]n the instant case where the government has no 'active' litigation in progress, we believe that disclosure of the results of the Department of Labor's HESS PETROL investigation will neither endanger the government's fact-finding process nor jeopardize any litigation"⁴³

Other judicial approaches to the seventh exemption have evidenced less of an attempt at balancing. One approach utilized a narrow reading of the exemption to exempt the smallest amount of information and to provide the broadest disclosure. *Bristol-Myers Co. v. Federal Trade Commission*⁴⁴ exemplified a narrow interpretation, the court allowing disclosure upon determining that the investigatory file did not relate to a pending or imminent law enforcement proceeding.⁴⁵ Other decisions construed the exemption broadly, exempting material if the files were compiled originally for law enforcement purposes, regardless of the subsequent termination of law enforcement activity.⁴⁶ Courts relying upon the broad inter-

not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965).

40. 55 F.R.D. 159 (D. Md. 1972).

41. *Id.* at 163.

42. *Id.*

43. *Id.* at 164-65.

44. 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970) (plaintiff sought production of FTC materials relevant to a rulemaking proceeding).

45. The court propounded the following test: "[T]he District Court must determine whether the prospect of enforcement proceedings is concrete enough to bring into operation the exemption" 424 F.2d at 939.

46. See, e.g., *Frankel v. SEC*, 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972); *Evans v. Department of Transp.*, 446 F.2d 821 (5th Cir. 1971), *cert. denied*, 405 U.S. 918

pretation nevertheless recognized to some extent the reasons behind the seventh exemption, apparently realizing that a balancing of interests may be conceivable.⁴⁷

Still other decisions applied the exemption mechanically without any attempt at interpretation, neither balancing interests according to the disclosure purposes of the Act nor distinguishing factually similar decisions. In *Rural Housing Alliance v. Department of Agriculture*,⁴⁸ the Court of Appeals for the District of Columbia Circuit held that if an investigatory file can be characterized fairly as relating to or having related to law enforcement, the exemption applies permanently. Relying upon *Aspin v. Department of Defense*,⁴⁹ the court ruled inapplicable the *Bristol-Myers* holding⁵⁰ that exempt status ended with termination of enforcement proceedings. The *Aspin* decision distinguished *Bristol-Myers* because, in the latter case, the Federal Trade Commission "had made a conscious decision *not* to maintain any enforcement proceedings at least two years prior to the suit to compel disclosure" ⁵¹ Be-

(1972). In *Cowles Communications, Inc. v. Department of Justice*, 325 F. Supp. 726 (N.D. Cal. 1971), the court rejected the narrow interpretation of *Bristol-Myers* and *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708 (E.D. Pa. 1968), see note 30 *supra*, stating: "If these cases are authority for the proposition that any investigatory file becomes the subject of private discovery when it is demonstrated that the file will not be used in a law enforcement proceeding, then I do not follow them." 325 F. Supp. at 727. The factual situation (the plaintiff sought production of Immigration and Naturalization Service records concerning a particular individual for use in a libel suit) may have led to the court's interpretation of the Act: "The language of the Act is clear. It protects investigatory files compiled for law enforcement purposes. A file is no less compiled for law enforcement purposes because after the compilation it is decided for some reason there will be no enforcement proceeding." *Id.*

47. See *Frankel v. SEC*, 460 F.2d 813, 818 (2d Cir. 1972) (the court considered the public gain that would result from disclosure and the possibility that the plaintiff could obtain the information through discovery); *Evans v. Department of Transp.*, 446 F.2d 821, 824 (5th Cir. 1971). In *Evans*, the court clearly evinced a propensity to balance the interests involved, noting: "The desire of an individual to know the name of the person who wrote these letters over ten years ago is totally submerged by the public interest, that is, the safety of millions of the general public who use airline transportation and who must depend upon the Federal Aviation Agency, by investigation and otherwise, to foster that safety." *Id.*

48. 498 F.2d 73 (D.C. Cir. 1974).

49. 491 F.2d 24 (D.C. Cir. 1973).

50. In *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir. 1970), the court ordered disclosure of documents compiled for the purpose of proceeding against the manufacturer for misleading advertising practices. The court admitted that the documents were "investigatory files compiled for law enforcement purposes." *Id.* at 939. See also notes 44-45 *supra* & accompanying text.

51. 491 F.2d at 29. The court added: "The question in that case was, therefore, whether the bare assertion by an agency that files were compiled for law enforcement purposes *when*

cause enforcement proceedings actually had resulted in *Aspin*, the court exempted from disclosure the material sought.⁵²

The court in *Rural Housing*, however, while accepting the distinction in one paragraph of the opinion, rejected the basis for the distinction in the next paragraph, stating: "Whether the adjudication or enforcement has been completed is not determinative, nor is the degree of likelihood that the adjudication . . . may be imminent" ⁵³ Reliance by the *Rural Housing* court upon such a distinction, which it refuted itself, cannot be justified, especially when viewed in light of the disclosure purpose of the Act.⁵⁴

Another decision by the Court of Appeals for the District of Columbia Circuit, *Center for National Policy Review v. Weinberger*,⁵⁵

no enforcement proceedings were in fact ever prosecuted, would be enough to preclude disclosure." *Id.*

52. *Id.* at 30. The court stated: "We therefore hold that an exemption under § 552(b)(7), as investigatory files compiled for law enforcement purposes, remains available after the termination of investigation and enforcement proceedings." *Id.*

53. 498 F.2d at 80.

54. Notwithstanding "the purpose of the [1966 Act] to establish a general philosophy of full agency disclosure," S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965), the Court of Appeals for the District of Columbia Circuit has refused to compel disclosure of materials relating to major national incidents despite strong public interests in disclosure. In *Weisberg v. Department of Justice*, 489 F.2d 1195 (D.C. Cir. 1973), *cert. denied*, 94 S. Ct. 2405 (1974), the plaintiff sought disclosure of materials compiled by the FBI following the assassination of President Kennedy in 1963, requesting the results of spectrographic tests which had been released previously. See 489 F.2d 1203, 1204-05 (Bazelon, J., dissenting) (strong reasons suggested for allowing disclosure). The involvement of FBI files in *Weisberg* certainly militated against disclosure; even the Senate report on the 1966 bill, which is generally favorable to disclosure, stated that FBI files were among those covered under the exception. S. REP. NO. 813, *supra* at 3. See also note 35 *supra*.

In *Aspin v. Department of Defense*, 491 F.2d 24 (D.C. Cir. 1973), the plaintiff sought disclosure of the Peers Commission report on the preliminary investigation of the My Lai incident. Certain portions of the report were released to the public in March of 1970, and the entire report had been given to the Armed Services Committees of both houses of Congress.

In both cases, the public interest in disclosure is strong despite the controversial nature of the issues involved, especially in light of congressional rhetoric that "[a] democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. A danger signal to our democratic society . . . is the fact that such a political truism needs repeating." H.R. REP. NO. 1497, 89th Cong., 2d Sess. 12 (1966).

55. 502 F.2d 370 (D.C. Cir. 1974). In *Center* the plaintiffs sought disclosure of Department of Health, Education, & Welfare files relating to review of public school segregation practices. Because racial discrimination in federally assisted programs is prohibited by statute, 42 U.S.C. § 2000d (1970), a law enforcement purpose was deemed to exist in the compilation of files. The ultimate penalty for noncompliance, however, is termination of the financial assistance, and the statute, 42 U.S.C. § 2000d-1 (1970), places "initial reliance on voluntary compliance, and indeed requires discussion with local entities before formal steps are taken." 502 F.2d at 373. Thus a substantial argument could be made that the files were compiled for

exemplified the most expansive interpretation possible of the investigatory file exemption. In *Center*, the court applied the exemption upon a showing that the file was compiled for the purpose of an "investigation,"⁵⁶ a requirement met merely by proof that the agency rendered "special scrutiny" by means of intense and detailed inquiry into a particular situation.⁵⁷ No showing that law enforcement proceedings were contemplated or imminent was necessary to justify permanent exemption.⁵⁸ Because the *Center* and *Rural Housing* decisions used a literal approach to the seventh exemption, both the reasons behind the exemption and the interests in favor of disclosure were ignored.⁵⁹

The application of differing legal standards throughout seventh exemption litigation in similar fact situations⁶⁰ to determine the

the collection of statistical data rather than for strict law enforcement purposes that would lead to an adjudication.

56. 502 F.2d at 373-74.

57. *Id.*

58. The court in *Center* stated: "For a file to be deemed to have been compiled for law enforcement purposes it is not necessary that an adjudication have been imminent or even likely, either at the time the material was amassed or at the time disclosure is sought under the FOIA." *Id.* Although most courts have assumed that procedurally "law enforcement purposes" referred ultimately to an adjudication or required the likelihood of such, the court in *Center* deemed that not to be the "decisive determinant." *Id.* at 373. See also note 29 *supra*.

59. The court in *Center* acknowledged the trend, stating: "Recent decisions of this court construing exemption 7 have considerably narrowed the scope of our inquiry. The sole question before us is whether the materials in question are 'investigatory files compiled for law enforcement purposes.' Should we answer that question in the affirmative, our role is 'at an end'." 502 F.2d at 372, quoting *Weisberg v. Department of Justice*, 489 F.2d 1195, 1202 (D.C. Cir. 1973). By following a mechanical approach to the exemption, courts are freed from the difficult task of weighing competing interests and performing in camera inspections. The decisions broadly interpreting the 1966 exemption were supported by a liberal reading of the exemption and by the certainty and objectivity intended to inhere in the exemption. See S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965). The language of the exemption, however, is sufficiently uncertain that conflicting interpretations are possible; in light of the overriding purpose of the FOIA and the requirement that the exemptions be construed narrowly, see S. REP. NO. 813, *supra*, a disclosure-oriented interpretation of the 1966 exemption would have been more reasonable. Nevertheless, as Professor Davis has pointed out: "Courts that usually constitute themselves working partners with legislative bodies to produce sensible and desirable legislation may follow their accustomed habits in narrowing the ascertainable meaning of the words of an exemption, but in some degree they are restricted in following those habits in broadening that meaning. The 'specifically stated' restriction operates in only one direction." Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 783-84 (1967).

60. It has been suggested that the varying decisions interpreting exemption seven can be explained only by the varying factual situations rather than by any underlying legal principles. See 41 GEO. WASH. L. REV. 93, 97 (1972). The factual situations in these cases, however, do not explain the different results. The most important factual variable has been whether

duration of the exemption demonstrated the need for the 1974 amendment of the exemption.⁶¹ The amendment specifically allows in camera, de novo judicial review of agency classifications under any exemption⁶² and mandates that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt"⁶³ These provisions reinforce the disclosure purpose of the Act, but the changes to the exemption for investigatory materials must continue to determine disclosure or nondisclosure in accord with the public interest. Whether the amendment will remedy the failure of some courts to balance the competing interests is unclear.

an actual law enforcement proceeding has occurred. In both *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708 (E.D. Pa. 1968), see note 30 *supra*, and *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir. 1970), see notes 44-45, 50 *supra*, although the files were compiled for law enforcement purposes, no enforcement proceeding had materialized, and in each case this inactivity had continued for several years (two years in *Bristol-Myers*; more than four years in *Cooney*) prior to the requests for disclosure. In *Cooney* disclosure was partially allowed, and in *Bristol-Myers* the court held the file no longer exempt under the seventh exemption. In two other cases, *Frankel v. SEC*, 460 F.2d 813, 817 (2d Cir.), cert. denied, 409 U.S. 889 (1972), and *Evans v. Department of Transp.*, 446 F.2d 821, 824 (5th Cir. 1971), cert. denied, 405 U.S. 918 (1972), disclosure was denied, although the files in the first case pertained to an investigation by the SEC which had been terminated by a consent decree, and in the later case the information sought related to an investigation begun 10 years before and long since terminated.

In all four cases, the seemingly "dead" files were needed for a pending or potential action. In *Bristol-Myers* the documents were needed for a rulemaking proceeding, in *Cooney* and *Frankel* for a civil damage suit, and in *Evans*, the plaintiff sought an informant's name to initiate a libel action. To the extent that the court justified its actions in *Evans* by citing the need to protect sources of governmental information and to prevent disclosure based solely on curiosity, it can be distinguished from *Bristol-Meyers*, in which the FTC merely cited general investigations as a rationale for holding a rulemaking hearing without disclosing the investigations upon which it relied.

Use of a balancing approach, like that used in *Cooney*, see note 30 *supra*, or in *Pilar v. S.S. Hess Petrol*, 55 F.R.D. 159 (D. Md. 1972), see notes 40-43 *supra* & accompanying text, could have produced the same result as that reached by the *Evans* court while providing consistency in the selection of the legal standard. Nevertheless, no balancing of interests was apparent in *Evans* or *Frankel*. The court in *Frankel* stated: "The conclusion that the § 552(b)(7) exemption from disclosure applies even after an investigation and an enforcement proceeding have been terminated is supported both by the authority of the cases decided under the Act and by consideration of the policies underlying the Act" 460 F.2d at 817. In contrast, the court in *Bristol-Myers* held that the company's request would fall within the exemption only "[i]f further adjudicatory proceedings are imminent" 424 F.2d at 939.

61. Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561. See note 2 *supra*.

62. Act of Nov. 21, 1974, Pub. L. No. 93-502, § 1(b)(2), 88 Stat. 1561, amending 5 U.S.C. § 552(a) (1970).

63. *Id.* § 2(c), amending 5 U.S.C. § 552(b).

The new seventh exemption⁶⁴ is a montage of several proposals.⁶⁵ Senate Bill 1142 and House Bill 5425 would have exempted "investigatory records compiled for any specific law enforcement purpose the disclosure of which [was] not in the public interest : . . ."⁶⁶ and would have prohibited absolutely the nondisclosure of certain records.⁶⁷ These proposals presented problems for defining the term "specific" in relation to law enforcement⁶⁸ and the phrase "disclosure . . . not in the public interest."⁶⁹ Nevertheless, the inclusion of the latter phrase was significant because it required a balancing of interests. Other proposals attempted to define more precisely the public interest in disclosure by incorporating the reasons for the exemption into the statutory language.⁷⁰ The amendment enacted

64. See note 2 *supra*.

65. Neither H.R. 12471, 93d Cong., 2d Sess. (1974), the bill finally enacted, nor S. 2543, 93d Cong., 2d Sess. (1974), which was incorporated substantially into H.R. 12471, see S. REP. NO. 93-1200, 93d Cong., 2d Sess. (1974), included major changes to the seventh exemption. Predecessor bills included H.R. 5425, 93d Cong., 1st Sess. (1974); H.R. 4960, 93d Cong., 1st Sess. (1974); S. 1142, 93d Cong., 1st Sess. (1974). Proposals from the Administrative Law Section of the American Bar Association and from the Department of Justice also were considered. *Hearings on S. 1142 Before the Subcomm. on Administrative Practice and Procedure and Separation of Powers of the Senate Comm. on the Judiciary and the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 93d Cong., 1st Sess. 158, 273 (1973) (vol. 2) [hereinafter cited as *Hearings on S. 1142*].

66. S. 1142, 93d Cong., 1st Sess. § 2(d) (1973); H.R. 5425, 93d Cong., 1st Sess. § 2(d) (1973).

67. The proposed investigatory records provisions would have prohibited absolutely nondisclosure of the following: "(i) scientific tests, reports, or data, (ii) inspection reports of any agency which relate to health, safety, environmental protection, or (iii) records which serve as a basis for any public policy statement made by any agency or officer or employee of the United States or which serve as a basis for rulemaking by any agency . . ." S. 1142, 93d Cong., 1st Sess. § 2(d) (1973); H.R. 5425, 93d Cong., 1st Sess. § 2(d) (1973).

68. A statement in the hearings on S. 1142 by the General Counsel of the Department of Defense suggested the problem:

The insertion of the word "specific" before the term "law enforcement purposes" does little, if anything, to define or limit the intended scope of the exemption. Presumably, any investigation for a law enforcement purpose must have some specific objective in mind. We are left with the question of how specific a 'specific purpose' must be. If the intent is to limit the exemption to situations in which the investigation is intended to culminate in a decision whether to commence an administrative or judicial action against an individual, corporation, or other organization, then further clarification of the language is necessary.

Hearings on S. 1142, supra note 65, at 288-89.

69. See, e.g., *id.* at 298-99, (report of Atomic Energy Commission).

70. H.R. 4960, 93d Cong., 2d Sess. § 103(c) (1974), would have exempted the following records: "[I]nvestigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would constitute (A) a genuine risk to enforcement proceedings, (B) a clearly unwarranted invasion of personal privacy, or (C) a threat to life."

follows this approach, naming six instances to which the exemption applies.⁷¹

Within the exemption and the six express applications are solutions to some of the issues raised under the 1966 exemption. Inasmuch as the exemption now pertains to "records," not "files,"⁷² and segregation is required where reasonable,⁷³ portions of entire files now should be readily accessible.⁷⁴ Because language in one of the six instances specifically provides for exemption in certain criminal law enforcement activities,⁷⁵ the remaining instances apparently apply to all areas of law enforcement, not just criminal law enforcement. The six instances of the exemption also may reduce the likelihood of permanent exemption because they tend to focus upon the effect of disclosure at the time it is sought, not at the time of compilation,⁷⁶ although the Conference report accompanying the bill indi-

The Administrative Law Section of the American Bar Association proposed the following exemption: "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) disclose the identity of an informer, or (D) disclose investigative techniques and procedures." *See Hearings on S. 1142, supra* note 65, at 158. The proposal by the Justice Department also would have exempted files older than a specified number of years by providing:

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency; *Provided, That* with respect to files compiled by noncriminal law enforcement agencies, or files compiled by criminal law enforcement agencies that are more than ____ years old, this exemption shall be invoked only while a law enforcement proceeding or investigation to which such files pertain is pending or contemplated, or to the extent that the production of such files would (A) interfere with law enforcement functions designed directly to protect individuals against violations of law, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) disclose the identity of an informant, (D) disclose investigatory techniques and procedures, (E) damage the reputation of innocent persons, or (F) jeopardize law enforcement personnel or their families or assignments.

Hearings on S. 1142, supra note 65, at 273. The conferees suggested in the report on the bills enacted that old records should be released from exempt status by expressing approval of the policy of the Justice Department, as reflected in its proposed amendment, of waiving legal exemptions for investigatory records more than 15 years old. S. REP. NO. 93-1200, 93d Cong., 2d Sess. 13 (1974).

71. *See* note 2 *supra*.

72. Act of Nov. 21, 1974, Pub. L. No. 93-502, § 2(b), 88 Stat. 1561.

73. *Id.* § 1(b)(2).

74. Nevertheless, the new language merely authorizes in camera inspection and segregation of files; it does not mandate such a procedure. Courts may therefore deem such inspection and segregation beyond their capability or desire. *See* note 26 *supra* & accompanying text.

75. *See* subpart (D) of exemption seven at note 2 *supra*.

76. Subpart (A) of the exemption focuses upon interference with enforcement proceedings,

cates that some of the instances may justify indefinite exemption.⁷⁷

These six instances, however, may provide merely further criteria for applying the exemption mechanically. Although itemization of the six instances may induce judicial consideration of the reasons behind the exemption,⁷⁸ a finding that one reason applies expressly will preclude disclosure regardless of other facts surrounding the request for disclosure. Had Congress specifically mandated consideration of the public interests in disclosure or nondisclosure,⁷⁹ the amendment could have provided a more flexible standard.⁸⁰ In light of the previous judicial inclination to construe the exemption in favor of nondisclosure,⁸¹ Congress could have reiterated the policy of the Act favoring disclosure by adding qualifying language to the six instances⁸² to assure a judicial

which, if terminated, would not be interfered with by subsequent disclosure of information gathered for use in the enforcement proceeding. Subpart (B) would affect the disclosure decision only where an adjudication was pending, the fairness of which could be altered by such disclosure. Even where fairness might be an issue, if the adjudication had been completed when disclosure was sought, the material would lose its exempt status. In subpart (C) material is exempted if its disclosure would be an unwarranted invasion of personal privacy; whether information would invade privacy in an unwarranted manner could change with circumstances, and whether disclosure constituted an invasion could be changed by a passage of time. Also, since this subpart relates to "personal" privacy, the nature of the exemption created could be personal and might be held to lapse upon death of the individual whose privacy was being protected. Subpart (F) relates to danger to law enforcement personnel and thus should have no effect once any danger has passed.

77. One instance is the "confidential source" exemption of subpart (D) which would exempt permanently the name and address of such a source from disclosure in general investigations and all the information given by such a source in criminal or national security investigations. S. REP. NO. 93-1200, 93d Cong., 2d Sess. 13 (1974). Another exemption is the "investigative technique and procedure" exemption of subpart (E). If special techniques or procedures are once used, the exemption would apply indefinitely, subject to those techniques losing their "special" character. The legislative history indicates that this exemption "should not be interpreted to include routine techniques and procedures already known to the public, such as ballistics tests, fingerprinting, and other scientific tests or commonly known techniques." S. REP. NO. 93-1200, 93d Cong., 2d Sess. 12 (1974).

78. Indeed, Congress went beyond the reasons for exemption seven previously stated in judicial decisions and legislative history. See notes 34-39 *supra* & accompanying text.

79. See note 66 *supra* & accompanying text.

80. A flexible standard may be necessary to protect valid public interests in nondisclosure, as well as in disclosure, of certain information. A balancing test for disclosure would make uniform the legal standard by which differing fact situations would be judged. See note 60 *supra*. The need for flexibility was one reason adduced for the presidential veto, later overridden by Congress, of the 1974 amendment. See MESSAGE OF THE PRESIDENT OF THE UNITED STATES VETOING H.R. 12471, H.R. Doc. No. 93-383, 93d Cong., 2d Sess., at iii (1974).

81. See notes 48-60 *supra* & accompanying text.

82. Qualifying language could have been used in the following manner: The exemption could have applied only to the extent that the production of the records would have interfered

balancing process.⁸³ The new exemption instead focuses greater attention upon factors favoring non-disclosure without any specific inducement within the exemption to consider the public interest in disclosure that pervades the entire Act.⁸⁴

It is the context of the Act which nonetheless may impel a changed judicial attitude toward the exemption. The amendment altered the Act significantly to provide increased disclosure⁸⁵ despite adamant opposition from administrative agencies⁸⁶ and a presiden-

"substantially" with enforcement proceedings, would have limited "significantly" a right to a fair trial or an impartial adjudication, would have constituted a "clearly" unwarranted invasion of personal privacy, would have disclosed "positively" the identity of a confidential source, would have disclosed "unique" investigative techniques and procedures, or "definitely" would have endangered the life or physical safety of law enforcement personnel.

83. Surely the purpose of the FOIA requires that the seventh exemption not be construed in a vacuum. Such a blinkered approach has been used, however, with previous statutes attempting to effect general disclosure. See notes 8-17 *supra* & accompanying text. Speaking of the 1966 exemption, the Court of Appeals for the District of Columbia Circuit in *Ditlow v. Brinegar*, 494 F.2d 1073, 1074 (D.C. Cir. 1974), stated: "[I]f the documents in issue are clearly to be classified as 'investigatory files compiled for law enforcement purposes,' the exemption attaches, and it is not in the province of the courts to second-guess the Congress by relying upon considerations which argue that the Government will not actually be injured by revelation in the particular case."

84. The conference report on the bill attempts to infuse a disclosure context into the interpretation of the exemption. For example, Congress specifically noted disapproval of certain court interpretations of the 1966 exemption. See note 88 *infra* & accompanying text. Congress also attempted to limit construction of certain terms, such as "investigative techniques" to nonroutine techniques and procedures. S. REP. NO. 93-1200, 93d Cong., 2d Sess. 12 (1974). Congress further limited "criminal law enforcement authority" in subpart (D) to the Federal Bureau of Investigation "and similar investigative authorities." *Id.* at 13. The conference report also mandates strict construction of "national security" as used in subpart (D). *Id.*

85. The amendments require agency indexes identifying information, lessen the requirement of "identifiable records" to records reasonably described, attempt to remove fees as an obstacle to disclosure, specifically authorize in camera inspections of records by courts, allow attorney fees to be awarded to complainants in suits brought to compel disclosure, create relatively short deadlines for agency action in response to requests for production of documents, expedite appeals of district court actions as well as cases at the district court level, substantially change the first exemption to require information exempted by executive order to be related to national defense or foreign policy, provide for division of reasonably segregable records, and require annual reports to Congress by the agencies of the requests for information received by each agency. Act of Nov. 21, 1974, Pub. L. No. 93-502, 93d Cong., 2d Sess., 88 Stat. 1561. See S. REP. NO. 93-1200, 93d Cong., 2d Sess. (1974).

86. The statement from the Department of Justice indicated that "[i]n sum . . . we do not believe that an amendment of exemption 7 is needed . . ." *Hearings on S. 1142, supra* note 65, at 273. Regarding the change from "identifiable records" to reasonably describable records, the Treasury Department statement noted: "[W]e see no need for this amendment." *Id.* at 282. In regard to the time for response by the agencies, the Department of State declared the proposed bill "unworkable." *Id.* at 280.

tial veto.⁸⁷ Moreover, in regard to the seventh exemption, the legislative history shows that Congress clearly disapproved "court interpretations which have tended to expand the scope of agency authority to withhold certain 'investigatory files compiled for law enforcement purposes.'"⁸⁸ The conference report accompanying the amendment also attempted to clarify the six instances where the exemption applies to preclude future interpretations inconsistent with the general intent of the Act to increase disclosure.⁸⁹ If this context is accorded proper weight in cases arising under the new seventh exemption, additional legislative changes perhaps may be avoided.

Disparate judicial treatment of the 1966 language of the seventh exemption under the Freedom of Information Act led to an attempt by Congress to clarify the intent of the exemption by amendment in 1974. By itemizing six instances which justify invoking the exemption, Congress perhaps has foreclosed one source of inappropriate extensions of the exemption beyond its intended use. Legislative failure, however, to mandate consideration of the general purpose of the Act when a court confronts one of the six instances creates the possibility that the 1974 amendment may be applied as mechanically as was the 1966 language. To perform the proper balancing of varying public interests in disclosure and nondisclosure, courts will find it necessary to look to the statutory context of the seventh exemption, the increased disclosure directed by the entire Act, as well as to the exemption itself.

87. President Ford vetoed the bill on Oct. 17, 1974, on grounds that it could affect adversely diplomatic relations, that it would impose unreasonable demands upon law enforcement agencies to delineate line-by-line the material within its records which could or could not be disclosed, and that the bill imposed unreasonable deadlines for agency response to requests for information. MESSAGE OF THE PRESIDENT OF THE UNITED STATES VETOING H.R. 12471, H.R. Doc. No. 93-383, 93d Cong., 2d Sess. (Nov. 18, 1974). Congress overrode the President's veto by a substantial margin in the House of Representatives (371 to 31, 120 CONG. REC. H10,875 (daily ed. Nov. 20, 1974)) and a more narrow margin in the Senate (65 to 27, 120 CONG. REC. S19,823 (daily ed. Nov. 21, 1974)).

88. S. REP. NO. 93-1200, 93D CONG., 2D SESS. 12 (1974).

89. See note 84 *supra*. See also S. REP. NO. 93-1200, 93d Cong., 2d Sess. (1974).