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NLRB INVESTIGATORY RECORDS: DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT

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A fundamental maxim of American political philosophy is the right of each citizen to know what his government is doing.¹ Political leaders have repeatedly assured the American people that government activities are consistent with the ideals of a free and open society. Whatever confidence the American people may have bestowed upon their government as a result of such pronouncements, it was shattered by the revelations of Watergate, and other allegations of illegal activities attributed to several government agencies. Concurrent with these debilitating developments was the less visible bureaucratic obstruction of the Freedom of Information Act of 1966 (FOIA).²

The Freedom of Information Act was the result of more than a decade of congressional hearings concerning the withholding of information by the federal bureaucracy. It was prompted to a great extent by the inadequacy of section 3 of the Administrative Procedure Act of 1946,³ which had become as much a basis for withholding information as one for disclosure.⁴ In passing the FOIA, Congress intended that "any person" should have access to identifiable federal agency records unless those records were subject to one of nine

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1. HOUSE COMM. ON GOVERNMENT OPERATIONS, SUBCOMM. ON GOVERNMENT INFORMATION AND INDIVIDUAL RIGHTS, SENATE COMM. ON JUDICIARY, SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE, 94th CONG., 1st SESS., FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (P. L. 93-502), SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS AND OTHER DOCUMENTS 472 (1975) [hereinafter cited as SOURCE BOOK].

2. 5 U.S.C. § 522(9) (1970), as amended, 5 U.S.C.A. § 552(6) (Cum. Supp. 1976).

3. 5 U.S.C. § 551 *et. seq.* (1946).

4. See H.R. REP. NO. 1419, 92d Cong., 2d Sess. 2 (1972). The House Committee on Government Operations criticized the Administrative Procedure Act for its vague and overbroad exemptions for any document which required secrecy "in the public interest" or for any document related solely to an agency's internal management. The Act also contained a catch-all phrase for the withholding of any document where "good cause" was found. *Id.* at 3.

specific exemptions⁵ and the burden of proving the applicability of any exemption was to be carried by the federal agency. The Act was vigorously opposed by various government agencies contending that, if such a law were passed, the result would be a "bureaucratic nightmare" simply because of the tremendous administrative burden of providing information to everyone who requested it. Moreover, it was argued that extensive litigation could ensue each time an agency refused to disclose the information sought.⁶

Though the federal agencies were not able to prevent the enactment of the FOIA, they were successful in frustrating its purpose through continued bureaucratic foot-dragging and litigation.⁷ In a series of cases decided by the United States Court of Appeals for the District of Columbia in 1973 and 1974, the nine exemptions to the FOIA were construed so as to include practically any information the Government so designated.⁸ Indeed, the Supreme Court agreed

5. 5 U.S.C. § 552(b) (1970), *as amended*, 5 U.S.C.A. § 552(b) (Cum. Supp. 1976) provides exemptions for those documents which are:

- (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 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 report prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (9) geological and geophysical information and data, including maps, concerning (oil) wells.

6. Opponents of the FOIA have repeatedly argued that FOI cases would flood the federal courts. H.R. REP. NO. 1419, *supra* note 4, at 78. Despite this opposition, the bill was signed into law on July 4, 1966. *Id.* at 1.

7. *Id.* at 7-11, 20-42. Examples of the bureaucratic resistance referred to by the House Committee on Government Operations included delays in responding to requests, abuse of fee schedules, and overclassification of documents.

8. See *Center for Nat'l Policy Review on Race and Urban Issues v. Weinberger*, 502 F.2d 370 (D.C. Cir. 1974); *Ditlow v. Brinegar*, 494 F.2d 1073, 1074 (D.C. Cir. 1974); *Aspin v. Dep't of Defense*, 491 F.2d 24 (D.C. Cir. 1973); *Weisburg v. United States Dep't of Justice*, 489 F.2d 1195, 1202 (D.C. Cir. 1973). These cases involved Exemption 7 and established that if information is classified as an "investigatory" file it need not be disclosed regardless of whether

that, with respect to the national security exemption,⁹ such a classification was solely within the President's discretion.¹⁰

The congressional response to the evils of Watergate, revelations of illegal agency activities, and continuing bureaucratic obstruction of the FOIA resulted in the passage of the 1974 amendments to the FOIA.¹¹ Congress, through those amendments, sought to establish a philosophy of full agency disclosure.¹² The amendments clearly increase the Government's burden to justify the withholding of information. This is done by giving any member of the public denied disclosure the right to file an expedited action in federal district court where the court will hear the matter *de novo*, with the agency having the burden of justifying its action.¹³ Further, the court has the power to examine all requested agency records in camera in order to determine the applicability of the exemptions.¹⁴

Since the effective date of the FOIA amendments, numerous suits have been instituted by respondents to National Labor Relations Board (NLRB) unfair labor practices proceedings, seeking disclosure of particular information contained in the Board's investiga-

proceedings are likely in the future. Moreover even after proceedings are completed there is no assurance that there will be no future proceedings and, therefore, disclosure is again not required. In addition, enforcement proceedings are broader in scope than criminal proceedings and can include any civil proceeding by a regulatory agency. On this basis, files on public school segregation were not disclosed even though voluntary compliance was being sought; files on correspondence between the National Highway Traffic Safety Administration and automobile manufacturers were not released because of a pending investigation; nor were files on the adequacy of the Army's investigation of My Lai revealed even after some criminal proceedings were terminated.

9. 5 U.S.C. § 552(b)(1) (1967).

10. *EPA v. Mink*, 410 U.S. 73 (1973). In his concurring opinion, Justice Stewart noted that the FOIA exemption provides to the public no means of questioning an executive decision, "however cynical, myopic, or even corrupt that decision might have been." *Id.* at 95.

11. 5 U.S.C.A. § 552(b) (Cum. Supp. 1976), *amending* 5 U.S.C. § 552(b) (1970). Among other changes, Exemption 7 was substantially altered to exempt:

[I]nvestigatory records compiled for law enforcement purposes, but only to the extent the production of such records would (A) interfere with enforcement proceedings . . .

(C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source.

12. See H.R. REP. No. 1380, 93d Cong., 2d Sess. (1974). Bureaucratic resistance to these amendments was intense and contributed significantly to President Ford's veto of the amendments. SOURCE BOOK, *supra* note 1, at 481-85. Congress subsequently overrode the veto by an overwhelming margin and these amendments became law on February 19, 1975. *Id.* at 431.

13. 5 U.S.C.A. § 552(a)(4)(B) (Cum. Supp. 1976).

14. *Id.*

tory files. Respondents before the NLRB find FOIA litigation especially appealing since Board complaints are merely notice pleadings,¹⁵ and the Board does not permit pre-trial discovery.¹⁶ Successful FOIA plaintiffs may indeed be instituting a new era in unfair labor practice trial preparation.¹⁷ The Board, however, steadfastly maintains that the FOIA does not require disclosure of its investigatory records. The remainder of this article will analyze the legal arguments advanced by the Board in refusing disclosure in light of the recent amendments to the Act.

PRODUCTION CAUSING INTERFERENCE WITH ENFORCEMENT PROCEEDINGS: EXEMPTION 7(A)

The Board asserts that Exemption 7,¹⁸ as originally enacted, prevented a defendant (or respondent) in any criminal or civil law enforcement proceeding from obtaining "any earlier or greater access to the Government's case than it would have directly in such litigation or proceeding."¹⁹ Courts ruling upon the issue upheld the Board's position.²⁰ According to the Board's rationale, the language and legislative history²¹ of amended Exemption 7 indicate that,

15. See 29 C.F.R. § 102.15 (1975) (specifying what facts a complaint must contain).

16. The Board is authorized by 29 U.S.C. § 160(b) (1970) to prescribe discovery procedures but has not done so. See *NLRB v. Interboro Cont'rs, Inc.*, 432 F.2d 854 (2d Cir. 1970), *cert. denied*, 402 U.S. 915 (1971); *Electromec Design and Devel. Co. v. NLRB*, 409 F.2d 631 (9th Cir. 1969); *North American Rockwell Corp. v. NLRB*, 389 F.2d 800 (10th Cir. 1968); *NLRB v. Globe Wireless Ltd.*, 193 F.2d 748, 751 (9th Cir. 1951).

17. Efforts to open the Board's investigatory files for pretrial preparation purposes by amending the Board's Rules and Regulations have been commenced by a 27-member NLRB Task Force now engaged in a two-year study of how Board procedures might be made more efficient. See *NLRB Task Force and NAM Comments*, 91 LAB. L.J. 181 (1976).

18. 5 U.S.C.A. § 552(b)(7) (Cum. Supp. 1976).

19. H.R. REP. NO. 1497, 89th Cong., 2d Sess. 11 (1967).

20. *Wellman Indus., Inc. v. NLRB*, 490 F.2d 427 (4th Cir.), *cert. denied*, 419 U.S. 834 (1974); *NLRB v. Clement Bros. Co.*, 407 F.2d 1027 (5th Cir. 1969); *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591 (D.P.R. 1967). FOIA plaintiffs have generally conceded that Board investigatory records did not have to be disclosed under the 1966 Act.

21. The Board has asserted in recent FOIA litigation that the following remarks of Senators Hart and Kennedy support its position:

SENATOR HART: This amendment is by no means a radical departure from existing case law under the Freedom of Information Act. Until a year ago the courts looked to the reasons for the seventh exemption before allowing the withholding of documents. That approach is in keeping with the intent of Congress and by this amendment we wish to reinstall it as the basis for access to information.

SENATOR KENNEDY: As a matter of fact, looking back over the development of legisla-

while Congress wanted to overrule the blanket exemption doctrine espoused by earlier decisions of the District of Columbia Circuit, it was still the intent of Congress to keep the investigatory records exemption for the Board.²² While some courts have agreed with the Board's position,²³ others have not.²⁴

The Board's position with respect to Exemption 7(A) is defective on two points. First, proper statutory construction requires that where language is clear and unambiguous, the words must be given their ordinary meaning without resort to the legislative history.²⁵ Examination of amended Exemption 7 discloses that investigatory records are exempt "only to the extent" that one of the specific harms enumerated in subsections (A) through (E) can be shown,²⁶

tion under the 1966 Act and looking at the Senate Report language from that legislation, it was clearly the interpretation in the Senate's development of that legislation that the 'investigatory file' exemption would be extremely narrowly defined. It was so until recent times - really, until about the past few months. It is to remedy that different interpretation that the amendment . . . was proposed. . . Does the Senator's amendment in effect override the court decisions in the court of appeals on the Weisberg against United States, Aspin against Department of Defense; Ditlow against Brinegar; and National Center against Weinberger?

MR. HART: The Senator from Michigan [*sic*] is correct. That is its purpose. . . . Until about 9 or 12 months ago, the courts had consistently approached it on a balancing basis, which is exactly what his amendment seeks to do. 120 CONG. REC. S 9330, S 9336 (daily ed. May 30, 1974).

22. See note 8 *supra*. Senator Hart remarked that the intent of the amendment was to "prevent harm to the government's case in court by not allowing an opposing litigant earlier or greater access to investigative files than he would otherwise have." 120 CONG. REC. S 9329 (daily ed. May 30, 1974). The Board contends that this statement supports its position that no radical departure from existing precedent was intended.

23. See *Hook Drugs, Inc. v. NLRB*, 91 L.R.R.M. 2797 (S.D. Ind. 1976); *Capital Cities v. NLRB*, 91 L.R.R.M. 2565 (N.D. Cal. 1976); *Local 30 v. NLRB*, 91 L.R.R.M. 2515 (E.D. Pa. 1976); *Jamco Int'l, Inc. v. NLRB*, 91 L.R.R.M. 2446 (N.D. Okla. 1976); *Harvey's Wagon Wheel, Inc. v. NLRB*, 91 L.R.R.M. 2410 (W.D. Cal. 1976); *Mylan Pharmaceuticals, Inc. v. NLRB*, 91 L.R.R.M. 2354 (W.D. Pa. 1976); *Climax Molybdenum Co. v. NLRB*, 90 L.R.R.M. 3126 (D. Colo. 1975).

24. See *Maremont Corp. v. NLRB*, 91 L.R.R.M. 2804 (W.D. Okla. 1976); *Bellingham Frozen Foods v. Henderson*, 91 L.R.R.M. 2764 (W.D. Wash. 1976); *Goodfriend Western Corp. v. Fuchs*, 91 L.R.R.M. 2454 (D. Mass. 1976); *St. Elizabeth's Hosp. v. NLRB*, 91 L.R.R.M. 2453 (N.D. Ill. 1976); *Deering Milliken, Inc. v. Nash*, 90 L.R.R.M. 3138 (D.S.C. 1975); *Title Guar. Co. v. NLRB*, 90 L.R.R.M. 2849 (S.D.N.Y. 1975), *rev'd*, Docket No. 75-6119 (2d Cir., Apr. 2, 1976); *Kaminer v. NLRB*, 90 L.R.R.M. 2209 (S.D. Miss. 1975); *Cessna Aircraft Co. v. NLRB*, 405 F. Supp. 1042 (D. Kan. 1975).

25. *United States v. Oregon*, 366 U.S. 643 (1961); *FTC v. Retail Credit Co.*, 515 F.2d 988, 995-96 (D.C. Cir. 1975).

26. SOURCE BOOK, *supra* note 1, at 413 (Congressman Reid).

and the 1974 FOIA places the burden on the Board to show how disclosure would result in one or more of the claimed harms.²⁷ Second, amended Exemption 7 does not contain the proviso of the original exemption that "investigatory files compiled for law enforcement purposes [were exempt] except to the extent available by law to a party other than an agency."²⁸ While the Board's argument that the original FOIA did not provide greater access to investigatory records than the Board's Rules and Regulations permitted was plausible under the original exemption language,²⁹ nothing in the present language supports this contention.³⁰

One complicating factor in considering the legislative history is the fact that agencies involved with the enforcement of federal labor

27. *Id.* at 522-23 (ATT'Y GEN. MEM. ON THE 1974 AMENDMENTS TO THE FOI ACT.).

28. 5 U.S.C. § 552(b) (1970), *as amended*, 5 U.S.C.A. § 552(b) (Cum. Supp. 1976).

29. *Williams v. IRS*, 345 F. Supp. 591, 594 (D. Del. 1972), *aff'd per curiam*, 479 F.2d 317 (3d Cir. 1973).

30. The Board asserts that the legislative history clearly supports its position that only *Weisberg v. United States Dep't of Justice*, 489 F.2d 1195 (D.C. Cir. 1973), and its progeny, which granted a blanket privilege for investigatory materials, were intended to be overruled. The problem inherent with the Board's analysis of the legislative history is its selection of the remarks of only two Senators during one day of debate as indicating congressional intent. Analysis of the relevant legislative history ordinarily requires an attempt to ascertain the viewpoint of a majority of Senators and Congressmen. Apparently overlooked by the Board in its 7(A) arguments in recent FOIA litigation is that Congress has published a comprehensive report on the FOIA and its 1974 amendments, containing 564 pages of legislative history and interpretative material. SOURCE BOOK, *supra* note 1. Examination of the entire legislative history does not indicate that Congress or President Ford were as naive about the language of Exemption 7 as the Board claims. President Ford acknowledged in his veto message of October 17, 1974 that Exemption 7 would

subject to compulsory disclosure (investigatory law enforcement records) at the request of any person unless the Government could prove to a Court—separately for each paragraph of each document—that disclosure 'would' cause the type of harm specified in the Amendment. *Id.* at 484.

In the debate preceding the vote to override the President's veto, Senator Thurmond pointed out in support of the President's veto that

[a]nother objectionable area in H.R. 12471 deals with compulsory disclosure of the confidential investigatory files of the Federal Bureau of Investigation and other law enforcement agencies. *Id.* at 466.

However, proponents of the Act contended that this is exactly what they intended the Act to do. As Senator Kennedy noted:

Finally, the President has asked that we allow agencies to deny access to records where the agency considers a review of the records to be impractical, and concludes that they probably contain only investigatory records. This is but another attempt, hardly disguised, to shut the door to access to FBI files and Congress should reject it resoundingly. *Id.* at 440.

laws were never mentioned during the congressional debate. However, sensitive national security and criminal law enforcement agencies such as the CIA, Department of Defense and FBI were mentioned repeatedly,³¹ indicating that it was clearly the intent of Congress, in rejecting President Ford's objections to Exemption 7, to permit no federal agency to escape its specific requirements.³²

In recent cases, the Board has argued that investigatory records, particularly affidavits taken during the course of an unfair labor practice investigation, are exempt because of the Board's authority under 29 U.S.C. § 160(b).³³ This provision allows the Board to prescribe its own discovery procedures which do not, in fact, provide for access to statements obtained by Board agents unless and until the affiant is called to testify in a formal proceeding. After the affiant has testified, his affidavit is available for the limited purpose of "examination [by the respondent] and for . . . cross examination."³⁴ Thus, if a litigant makes a timely request for such statements, he may examine them and use them during cross examination, but he is not entitled to retain copies of them unless they are admitted into evidence.³⁵ Further, a respondent is not entitled to

31. For general congressional remarks relating to the CIA, Department of Defense and FBI see 120 CONG. REC. S 19806 (daily ed. Nov. 21, 1974). See also H.R. REP. No. 1380, *supra* note 12, and its definition of "agency".

32. As Judge Brown stated in *Cessna Aircraft Co. v. NLRB*, 405 F. Supp. 1042, 1047 (D. Kan. 1975):

The Board in this instance may not avoid the consequences of the Freedom of Information Act by simply asserting that the requested documents are all subject to exemption. . . . A review of the legislative history of the Freedom of Information Act reveals that Government agencies have continually resisted legislation establishing a right of access to information in agency files. . . . Blanket assertions of privilege and exemption are not to be rubber-stamped by court approval, and as required by law, the agency will be required to assume its burden of proof that a withheld document is covered by specific statutory exemption.

33. See note 16 *supra*.

34. 29 C.F.R. § 102.118(b)(1) (1975) provides that statements are only available to a litigant after a witness called by the General Counsel or by the charging party has testified in a hearing upon a complaint. The Board's regulation has been consistently upheld in numerous cases not involving an FOIA claim. *NLRB v. Automotive Textile Prod. Co.*, 422 F.2d 1255 (6th Cir. 1970); *Intertype Co. v. NLRB*, 401 F.2d 41 (4th Cir. 1968), *cert. denied*, 393 U.S. 1049 (1969); *NLRB v. Vapor Blast Mfg. Co.*, 287 F.2d 402 (7th Cir.), *cert. denied*, 368 U.S. 823 (1961); *Raser Tanning Corp. v. NLRB*, 276 F.2d 80 (6th Cir.), *cert. denied*, 363 U.S. 830 (1960); *Intertype Co. v. Penello*, 269 F. Supp. 573 (W.D. Va. 1967).

35. *Manbeck Baking Co.*, 130 N.L.R.B. 1186, 1189-90 (1961); see *NLRB Manual, Division of Judges* § 17380.11.

production of the statement of any affiant who does not testify at the hearing,³⁶ so that he is often deprived of exculpatory material in the possession of the General Counsel.

The Board's emphasis on its traditional authority to restrict pre-trial disclosure, notwithstanding the recent amendments to the FOIA, adds nothing to its primary claim that amended Exemption 7 was not intended to change the law with regard to disclosure of Board investigatory records. What the Board really seems to be saying is that its investigatory records are exempt simply because the Board, through its interpretation of its regulations, says they are. This position would appear to be an extension of the blanket exemption doctrine formulated by the District of Columbia Circuit³⁷ before the FOIA amendments—a rationale Congress clearly wanted to end.³⁸

As a condition precedent to the withholding of any information under this exemption, the agency must specify the alleged harm to its law enforcement efforts. The Board advances three reasons why statements contained in its investigatory records are exempt under Exemption 7(A). First, the Board argues that its General Counsel, who under the National Labor Relations Act³⁹ is charged with the duty of investigating charges and issuing and prosecuting complaints, must be able to present his strongest case to the Board and the courts. The Board suggests that if it cannot keep its investigatory records confidential until trial, suspected violators of the Act will be able to frustrate enforcement proceedings or construct defenses which would permit violations to go unremedied. But in FOIA actions to date, the Board has failed to present any evidence to support this contention. This argument seems particularly weak in light of the fact that one of the primary purposes of the FOIA was to require disclosure of information in order that agencies could not bury their mistakes, cover up politically embarrassing actions or

36. See *NLRB v. Clement Bros., Inc.*, 407 F.2d 1027, 1031 (5th Cir. 1969). Thus, 29 C.F.R. § 102.118(b)(1) (1975) incorporates the Jenck's Act, 18 U.S.C. § 3500(a) (1970), which "manifests the general statutory aim to restrict the use of such statements to impeachment." *Polvero v. United States*, 360 U.S. 343, 349 (1959).

37. See note 8 *supra* and accompanying text.

38. See note 21 *supra*.

39. 29 U.S.C.A. § 153(d) (1973).

conceal unfavorable agency publicity.⁴⁰ The Board also alleges that employees who are interviewed may be reluctant to have it known that they gave information against their employer, for fear of incurring his displeasure. While a number of courts⁴¹ have given considerable credence to this argument, the Board has not presented any evidence in recent FOIA cases that specific harm has or is likely to occur. While the Board desires to argue principle, the statute requires the court to examine fact.⁴²

Finally, the Board argues that statements in its investigatory records may constitute an attorney's work product.⁴³ Again, the recent cases indicate the Board prefers to argue this point by principle rather than by evidence. It is unlikely, however, that the attorney work product privilege applies to many of the Board's affidavits since nearly all of them are taken during the course of the Board's investigation of unfair labor practice charges.⁴⁴ Indeed, all that is really sought at the investigatory stage is the "gathering of the relevant facts."⁴⁵ Statements containing such relevant facts are frequently taken by Board agents who are not attorneys. Moreover, the taking of statements and ancillary matters during the investigation do not constitute adversary proceedings.⁴⁶

In essence, the Board argues that pre-amendment interpretations⁴⁷ of Exemption 7, as well as the possibility that the FOIA could

40. Even under the original FOIA, Congress found that "in too many cases, information is withheld, over classified, or otherwise hidden from the public to avoid administrative mistakes, waste of funds or political embarrassment." H.R. REP. NO. 1419, *supra* note 4, at 8. However, as the Supreme Court has pointed out, it is the Government's job to see that justice is done without regard to merely winning or losing cases. *Burger v. United States*, 259 U.S. 78, 88 (1935), *cited in* *Maremont Corp. v. NLRB*, 91 L.R.R.M. 2804 (W.D. Okla. 1976).

41. *See* *Wellman Indus., Inc. v. NLRB*, 490 F.2d 427, 430 (4th Cir. 1974); *Surprenant Mfg. Co. v. NLRB*, 341 F.2d 756, 763 (6th Cir. 1965); *United States v. Northside Realty Assoc.*, 324 F. Supp. 287, 295 (N.D. Ga. 1971).

42. *See* *Deering Milliken, Inc. v. Nash*, 90 L.R.R.M. 3138 (D.S.C. 1975); *Title Guar. Co. v. NLRB*, 90 L.R.R.M. 2849 (S.D.N.Y. 1975), *rev'd*, Docket No. 75-6119 (2d Cir., Apr. 2, 1976); *Kaminer v. NLRB*, 90 L.R.R.M. 2269 (S.D. Miss. 1975); *Cessna Aircraft Co. v. NLRB*, 405 F. Supp. 1042 (D. Kan. 1975).

43. *See* *NLRB v. Quest-Shon Mark Brassiere Co.*, 185 F.2d 285, 289-90 (2d Cir. 1950), *cert. denied*, 342 U.S. 812 (1951).

44. *See* NATIONAL LABOR RELATIONS BOARD CASEHANDLING MANUAL (PART 1) UNFAIR LABOR PRACTICE PROCEEDINGS (*April, 1975 Edition*) [hereinafter cited as CASEHANDLING MANUAL]. "The keystone of the investigation is the *affidavit*." *Id.* § 10058.2.

45. *Id.* § 10050.

46. *Id.* § 10058.2.

47. *See, e.g.,* *Wellman Indus., Inc. v. NLRB*, 490 F.2d 427 (4th Cir.), *cert. denied*, 419 U.S.

obstruct Board enforcement proceedings, entitle it to a blanket exemption. Nevertheless, the legislative history of amended Exemption 7 appears to indicate that Congress intended to allow an exemption under 7(A) only when an agency carried its statutory burden on a case-by-case basis.⁴⁸ Recent litigation has shown that the Board is unable, or at least unwilling, to meet its burden under the FOIA of demonstrating the specific harm which it alleges will occur.

PRODUCTION CONSTITUTING AN INVASION OF PRIVACY: EXEMPTION 7(C)

Exemption 7(C) permits the withholding of investigatory records "only to the extent that the production . . . would constitute an unwarranted invasion of personal privacy."⁴⁹ The Board claims that if an individual can be said to possess a right of privacy, it must include the right to select people to whom he will communicate his ideas. Therefore, it would be a breach of this right for the Board to be forced to release statements contained in its investigatory records.⁵⁰ The Board reasons that an affiant's right to privacy, safeguarded by Congress in Exemptions 6 and 7(C), and section 2(b)(2) of the Privacy Act of 1974, would be seriously diminished if disclosure of the affiant's statement is required in circumstances other than those set forth in the Board's Rules and Regulations.⁵¹ As noted in *Title Guarantee Co. v. NLRB*,⁵² the Board's "contention that the documents would constitute an unwarranted invasion of personal privacy seems to hinge on a rather wide interpretation of exemption 7(C)."

In its haste to defend its investigatory records against disclosure, the Board apparently overlooked the fact that Congress expressly

834 (1974); *NLRB v. Clement Bros., Inc.*, 407 F.2d 1027, 1031 (5th Cir. 1919); *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591, 593-94 (D.P.R. 1967).

48. See note 32 *supra*.

49. 5 U.S.C.A. § 552(b)(7)(b) (Cum. Supp. 1976).

50. The Board has cited the Privacy Act of 1974, 5 U.S.C.A. § 552a (1974), as supporting its position:

The purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring federal agencies except as otherwise provided by law, to permit . . . an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent. *Id.*

51. 29 C.F.R. § 102.118 (1975). See text accompanying notes 34-36 *supra*.

52. 90 L.R.R.M. 2829, 2853 (S.D.N.Y. 1975), *rev'd*, Docket No. 75-6119 (2d Cir., Apr. 2, 1976).

chose not to treat the Privacy Act as a guide to agencies in interpreting the "unwarranted invasion of personal privacy" clause in Exemptions 6 and 7(C) of the FOIA. This fact is reflected in subsection (b)(2) of the Privacy Act, which permits an agency to disclose a record about an individual without first obtaining the individual's consent when disclosure is sought under the FOIA.⁵³

The Board has also asserted that the affiant's privacy right must be balanced against the public interest which FOIA litigants are asserting.⁵⁴ However, to the extent that a balancing test may have existed in determining whether or not an invasion of privacy was warranted, it appears to have been abandoned in *NLRB v. Sears, Roebuck & Co.*⁵⁵ Curiously, the Board has not explained how the right of privacy can include the "right to select the people to whom . . . one will communicate his ideas."⁵⁶

Several recent decisions have rejected the Board's Exemption 7(C) contentions regarding disclosure of investigatory files as an invasion of privacy.⁵⁷ As pointed out in *Title Guarantee Co.*:⁵⁸ "The cases applying exemption 7(C) are generally concerned with items which are much more commonly thought of as private."⁵⁹

53. Explaining subsection (b)(2) of the Privacy Act, the report of the House/Senate Staff Conference on the Act states that it "is designed to preserve the status quo, as interpreted by the courts, regarding the disclosure of personal information" under the FOIA. 120 CONG. REC. S 21817, H 12244 (daily ed. Dec. 18, 1974). See also Metz, *Privacy Legislation: Yesterday, Today and Tomorrow*, 34 FED. B.J. 311, 312 (1975).

54. *Wine Hobby U.S.A., Inc. v. IRS*, 502 F.2d 133, 137 (3d Cir. 1974).

55. 421 U.S. 132 (1975). The Court noted that Sears' rights under the Act are "neither increased nor decreased by reason of the fact that it claims an interest . . . greater than that shared by the average member of the public. . . ." *Id.* at 143 n.10.

56. Logical analysis of this concept indicates that the Board routinely violates these alleged privacy rights through its own Jenck's rule and subpoena power. See 29 C.F.R. §§ 102.31, 102.118 (1975) (concerning subpoenas and depositions). In *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935 (D.C. Cir. 1975), the court held that there was no such thing as a "reverse FOI Act case"—a cause of action under the statute to prevent the voluntary release of information furnished in confidence. See also *Petkas v. Staats*, 501 F.2d 887 (D.C. Cir. 1974).

57. See, e.g., *Bellingham Frozen Foods v. Henderson*, 91 L.R.R.M. 2761 (W.D. Wash. 1976); *Maremont Corp. v. NLRB*, 91 L.R.R.M. 2804 (W.D. Okla. 1976); *Goodfriend Western Corp. v. Fuchs*, 91 L.R.R.M. 2454 (D. Mass. 1976); *St. Elizabeth's Hosp. v. NLRB*, 91 L.R.R.M. 2453 (N.D. Ind. 1976); *Climax Molybdenum Co. v. NLRB*, 90 L.R.R.M. 3121 (D. Colo. 1975); *Poss v. NLRB*, Civ. No. 75-A-825 (D. Colo., Dec. 17, 1975); *NLRB v. Hardemann Garment Corp.*, 400 F. Supp. 510 (W.D. Tenn. 1975).

58. 90 L.R.R.M. 2829 (S.D.N.Y. 1975), *rev'd*, Docket No. 75-6119 (2d Cir., Apr. 2, 1976).

59. *Id.* at 2854. See, e.g., *Rural Housing Alliance v. United States Dep't of Agriculture*, 497 F.2d 73 (D.C. Cir. 1974) (information concerning marital status, legitimacy of children,

DISCLOSURE OF A CONFIDENTIAL SOURCE: EXEMPTION 7(D)

Exemption 7(D) permits withholding of investigative records which would "disclose the identity of a confidential source."⁶⁰ The Board argues that, in effect, this is the traditional privilege afforded government to protect its sources of law enforcement information. The traditional source of information to the Board has been employees dissatisfied with the practices of their employer. Therefore, the Board maintains that any employee reporting a violation is automatically protected by this privilege.⁶¹

The problem with this approach is that it again involves arguments based on assumptions which the Board has not yet seen fit in FOIA cases to support with any evidence. The legislative history indicates that in order for 7(D) to apply, a person must have provided information under an express assurance of confidentiality or in circumstances from which such assurance could be reasonably inferred.⁶² However, an examination of the Board's Rules and Regulations and *Casehandling Manual*⁶³ discloses that Board personnel are not specifically empowered to grant assurances of confidentiality and are warned against making such promises.⁶⁴ The legislative

identity of fathers of children, medical conditions, welfare payments, alcoholic consumption, family fights); *Wine Hobby U.S.A., Inc. v. IRS*, 502 F.2d 133 (3d Cir. 1974) (home address, family status); *Ackerley v. Ley*, 420 F.2d 1336 (D.C. Cir. 1969) (medical files); *Ditlow v. Schultz*, 379 F. Supp. 326 (D.D.C. 1974) (travel history).

60. 5 U.S.C.A. § 552(b)(7)(b) (1975). See CONF. REP., H.R. REP. NO. 1380, 93d Cong., 2d Sess. (1974). As was noted in the report:

Substitution of the term 'confidential source' in § 522(b)(7)(D) is to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. Under this category in every case where the investigatory records sought were compiled for law enforcement purposes - either civil or criminal in nature - the agency can withhold names, addresses, and other information that would reveal the identity of the confidential source who furnished the information.

61. See, e.g., *NLRB v. Wellman Indus., Inc.*, 490 F.2d 427, 431 (4th Cir.), cert. denied, 419 U.S. 934 (1974) (information of employee complaint held to be not subject to disclosure).

62. SOURCE BOOK, *supra* note 1, at 230.

63. See note 44 *supra*.

64. CASEHANDLING MANUAL, *supra* note 44, § 10058.4. The manual provides:

He [the affiant] should not be told that he will never be called on to testify, or that we could 'protect' him under all circumstances. As for the confidential nature of his information, he should be told the truth - that the information would be used by us in ascertaining the total picture and this would be its only use unless and until he might be called on to give his information in the form of testimony at a formal hearing or in the unlikely event another agency made a valid request upon us for such information.

history also emphasizes that an agency compiling investigatory records for civil law enforcement purposes can withhold only those facts which identify the confidential source and not the information supplied by that source. Therefore, if the non-exempt information is requested it must be disclosed.⁶⁵

It is highly questionable whether the Board's affiants qualify as confidential sources under the traditional criteria for confidential informers.⁶⁶ A traditional requirement of "informer" or "confidential source" status is an individual's unsolicited volunteering of confidential information. This is precluded by the Board's procedures in most instances which require the charging party to present witnesses and documents in support of its charge under a threat of dismissal.⁶⁷ Another requirement of "informer" status is that those volunteering confidential information are not "participants in the transaction."⁶⁸ However, individuals who give statements to the Board are invariably "participants in the transaction" with respect to the unfair labor practice charges. Consequently, few sources will reach the status of informer under traditional definitions.

The Board's current *Casehandling Manual* does not give its investigators the authority to grant express assurances of confidentiality.⁶⁹ While the Board argues that it has the express right to grant confidential status to individuals, a number of court decisions hold that an agency cannot, by claiming to give such assurances or even by giving such assurances, arbitrarily defeat the rights of FOIA litigants to disclosure. Otherwise, the FOIA would be rendered a nullity.⁷⁰

65. 5 U.S.C.A. § 552(b) (Cum. Supp. 1976) provides:

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.

See also 5 U.S.C.A. § 552(a)(4)(B) (Cum. Supp. 1976).

66. For a traditional definition of "informer," see *Gordon v. United States*, 438 F.2d 858 (5th Cir.), cert. denied, 404 U.S. 828 (1971) (undisclosed person who volunteers information in confidence without solicitation by police interviews or investigation).

67. CASEHANDLING MANUAL, supra note 44, § 10050 et seq.

68. *Gordon v. United States*, 438 F.2d 858, 874-75 (5th Cir.), cert. denied, 404 U.S. 828 (1971).

69. See note 64 supra.

70. *Petkas v. Staats*, 501 F.2d 887 (D.C. Cir. 1974); *Robles v. EPA*, 484 F.2d 843 (4th Cir. 1973).

PRODUCTION OF CONFIDENTIAL AGENCY MATERIALS: EXEMPTION 5

The last exemption which will be discussed deals with "inter-agency or intra-agency memoranda or letters which by law would not be available to a party other than an agency in litigation with the agency."⁷¹ While the Board acknowledges that this section exempts "those documents . . . normally privileged in the civil discovery context,"⁷² it asserts that this extends to Board statements because they may reflect the attorney's work product or the Government's "executive privilege," thereby reflecting the agency's deliberative processes.⁷³ The problem with the Board's position is that, according to its own procedures, Board statements are supposed to reflect the investigator's "gathering of the relevant facts" from witnesses.⁷⁴ In addition, Board procedures do not provide a means for the agency's deliberative processes to be included in anyone's affidavit or investigatory record.⁷⁵ The Board's deliberative processes are reflected in the investigator's written report recommending for or against the issuance of a complaint, and in the minutes prepared from the regional committee meetings or committee discussion. However, these reports have no relationship to the facts contained in an affiant's statements.⁷⁶ Essentially, the Board seeks again through Exemption 5 to bootstrap its 7(A) argument while failing to offer any evidence in recent FOIA cases to support its contention.

CONCLUSION

The promise of the FOIA amendments ushering in a new era of government disclosure has not yet led to NLRB openness about its investigatory records. The Board still refuses to acknowledge that the recent amendments to the FOIA apply to the information ob-

71. 5 U.S.C.A. § 552(b)(5) (Cum. Supp. 1976).

72. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975).

73. *Id.* at 150-54.

74. CASEHANDLING MANUAL, *supra* note 44, § 10058.2.

75. *Id.*

76. Even items generally privileged from disclosure in the civil discovery context must often be disclosed. In *United States v. Nobles*, 422 U.S. 225 (1975), Justice White observed: "[E]ven in the pretrial discovery area in which the work product rule does apply, work product notions have been thought insufficient to prevent discovery of *evidentiary* and *impeachment* material." *Id.* at 249 (White, J., concurring) (emphasis in original), *citing Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

tained by its investigators during unfair labor practice investigations. Through such methods, agencies are again seeking "with some help from the Courts . . . to enlarge [the amendments] into gaping and blanket exemptions."⁷⁷ While the results from FOIA litigation in the federal district courts are inconclusive at this time, the importance of the issue to both sides indicates that it ultimately must be decided by the Supreme Court.

If the Board is unable to restore its blanket exemption status under the amended FOIA, significant changes in the Board's unfair labor practice trial strategy will be required. Victory by FOIA litigants on the issue of pretrial disclosure of statements taken during the course of the Board's investigation would, under present circumstances, place the Board at a distinct disadvantage in prosecuting unfair labor practices. Since the Board's present rules do not permit pretrial discovery, the Board would be required to disclose its evidence, while the respondent would not. Future FOIA developments may require the Board to reappraise its civil discovery policy or its present pretrial policy since the present practice may keep only the Board itself in darkness.

77. SOURCE BOOK, *supra* note 1, at 469 (Senate Action and Vote on Presidential Veto, November 21, 1974).

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