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# USE OF THE FREEDOM OF INFORMATION ACT FOR DISCOVERY PURPOSES*

EDWARD A. TOMLINSON**

The Freedom of Information Act[1] (FOIA) and discovery provide separate mechanisms for obtaining the disclosure of government documents. Under the FOIA, any person may obtain any reasonably described agency records unless the records fall within one of the nine exemptions specified in the Act.[2] In discovery, on the other hand, a

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* The author prepared this article while serving as a consultant to the Administrative Conference of the United States. The views expressed are those of the author. For the Conference's action on the consultant's report, see *infra* note 3.

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1. 5 U.S.C. § 552 (1982).

2. *Id.* at § 552(b). Section 552(b) provides that:

This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

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

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(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 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;

(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

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

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.

party to litigation may obtain—to the extent permitted by the applicable procedural rules—relevant, unprivileged government documents. A litigant's access to discovery raises the issue of whether the litigant should be permitted to use the FOIA for discovery purposes. At present, the two mechanisms are distinct, and a litigant has the same right of access under the FOIA as does any other FOIA requester.

This Article analyzes the advantages of FOIA access to litigants and the disadvantages it poses for the government. Part I identifies various uses of the FOIA for discovery purposes. Part II then compares the discovery available under the FOIA with that available in civil, criminal, and administrative proceedings. Part III describes in more detail eight different uses of the FOIA for discovery purposes. Finally, Part IV analyzes pending legislative proposals to restrict litigants' FOIA access. The Article concludes that Congress should not amend the FOIA to deny litigants the same access to agency records that is available to others, but that Congress should require a party to litigation with the government to notify government counsel of any discovery motivated FOIA requests.[3]

## I. INTRODUCTION

### *A. The Relationship Between the FOIA and Discovery*

Congress's fundamental design when it enacted the FOIA in 1966 was to permit the public to inform itself about the operations of government.[4] Because all members of the public are beneficiaries of the Act, a

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3. At its Plenary Session on December 16, 1983, the Administrative Conference did not take a position on whether the Congress should limit the FOIA rights of litigants. The consultant's report favored the status quo. The Committee on Governmental Processes, whose report brought the matter to the floor, proposed that the Conference approve the provisions in S. 774 temporarily closing the FOIA to parties in litigation with the government. For a discussion of S. 774, see text accompanying notes 357-58. The Recommendation adopted by the Conference addressed only the notice requirement. It reads as follows:

> 1. Congress should amend the Freedom of Information Act (FOIA) to require a party to a judicial action or to an administrative adjudication or formal rulemaking proceeding, to which the Government is also a party, to notify counsel for the Government promptly of any FOIA requests made by the party, by his counsel, or by some other person acting on the party's behalf, during the pendency of the proceeding for the purpose of securing the release of agency records that may be relevant to the proceeding.
>
> 2. Congress should also provide that, if a party does not comply with this notice requirement, the court or agency conducting the proceeding may preclude the party from offering in the proceeding any agency records released in response to the request.

1 C.F.R. § 305.83-4 (1984).

4. NLRB v. Sears Roebuck & Co., 421 U.S. 132, 143 n.10 (1975). When enacting the

requester's rights are not affected by his litigation generated need for government records.[5] Discovery, on the other hand, is designed to narrow and clarify the issues in litigation and to ascertain the facts, or information as to the existence or whereabouts of facts, relevant to those issues.[6] In discovery, therefore, the strength of a party's litigation generated need for documents may result in the production of documents not available to the public; or, ironically, the weakness of a party's need may result in the withholding of documents obtainable through the FOIA. Because Congress designed the FOIA to provide a uniform, minimum level of access to government records, that access should remain available even though the FOIA requester also has access to discovery. Discovery should provide a second level of access available only to parties to litigation. Ideally, a party's access to relevant documents in discovery should be as great or greater than that available under the FOIA, and it should not be necessary to use the FOIA for discovery purposes.

Partly because discovery is not primarily a disclosure mechanism, the actual relationship between the FOIA and discovery is far more complicated. Although discovery does serve as a disclosure device, its primary function is to enable parties to litigation to prepare for trial or to settle a controversy without a trial. It is not designed to provide the parties with the first level, minimum access to government records that is available under the FOIA, and even the most generous rules of discovery do not always provide that level of access.

A second factor contributing to the complicated interaction between the FOIA and discovery is the limited nature of the government's disclosure obligations in discovery. Full discovery is normally available only for a short time before trial or hearing and only with respect to relevant documents. Less generous discovery is available in criminal proceedings than in civil actions, and in some agency adjudications, no formal discovery is available at all. Even with respect to civil actions, reformers, emphasizing that the purpose of discovery is not the disclosure of information but the simplification of issues, have urged the restructuring of discovery and other pretrial procedures, not to maximize the exchange of information, but to require the parties to focus their presentations in advance of trial.[7] The 1980 and 1983 amendments to

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FOIA, Congress recognized "the right of the individual to be able to find out how his Government is operating." H.R. REP. NO. 1497, 89th Cong., 2d Sess. 6, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2418, 2423. It also sought to ensure that the "private citizen" would be afforded "the essential information to enable him to deal effectively and knowledgeably with the Federal agencies." S. REP. NO. 813, 89th Cong., 1st Sess. 7 (1965).

5. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 n.23 (1978).

6. Hickman v. Taylor, 329 U.S. 495, 501 (1947).

7. Lundquist, *Trial Lawyer or Litigator*, 7 LITIGATION, Summer, 1981, at 3. Mr. Lund-

the Federal Rules of Civil Procedure adopt the reformers' approach and seek to prevent "overdiscovery" by increasing the trial judge's supervisory role and reducing a party's access to information.[8]

Hence, discovery motivated uses of the FOIA are likely to occur despite the Supreme Court's admonition in *NLRB v. Robbins Tire & Rubber Co.*[9] that the FOIA was "not intended to function as a private discovery tool"[10] and despite the Court's earlier interpretation of the FOIA in *NLRB v. Sears Roebuck & Co.*[11] as "fundamentally designed to inform the public about agency action and not to benefit private litigants."[12] A litigant is a member of the general public and, in that capacity, is entitled under the FOIA to the same access to government records as is any other person. Thus, in both *Sears*[13] and *Robbins Tire*,[14] the Court explicitly recognized that although a FOIA requester's status as a party to litigation did not "enhance" his rights under the FOIA, that status did not "diminish" them.

### *B. Description of Present Study*

Theoretical analysis of the relationship between the FOIA and discovery provides a framework for evaluating the various proposals to close the FOIA to litigants, but it is also necessary to consider the practical problems created for the government when a litigant has access to both the FOIA and discovery. To obtain information about the use of the FOIA for discovery purposes and about the problems that that use poses for government agencies, the author interviewed FOIA experts in twenty-eight agencies, at the Department of Justice, and in private practice.[15] The information obtained through these interviews was largely

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quist was a co-chairman of the American Bar Association's Special Committee for the Study of Discovery Abuse. The Committee was instrumental in securing the Supreme Court's adoption of the 1980 and 1983 amendments to the civil discovery rules.

8. *See infra* text accompanying notes 104-14.

9. 437 U.S. 214 (1978).

10. *Id.* at 242.

11. 421 U.S. 132 (1975).

12. *Id.* at 143 n.10.

13. *Id.*

14. 437 U.S. at 242 n.23.

15. The author and the Administrative Conference staff, on the basis of a preliminary survey of the case law and secondary literature, compiled an initial list of twenty-four agencies to contact for further information. The agencies constituted a good cross-section of the federal administrative establishment and included all agencies believed to have had substantial experience with the use of the FOIA for discovery purposes. In late December, 1982, the Chairman of the Conference wrote the general counsel of each agency on the list asking him to designate someone in his office knowledgeable on FOIA matters to serve as a contact. During the winter and spring of 1983, the author interviewed the agency contacts and usually followed up this initial interview by interviewing at least two or three additional agency offi-

impressionistic, because the agencies do not generate any hard data about the use of the FOIA for discovery purposes. An agency cannot require a FOIA requester to identify the purpose of his request, and the FOIA requester need not even properly identify himself (*i.e.*, he may employ a straw man or a service company to make the request). The mere fact that attorneys and regulated interests comprise a significant portion of an agency's FOIA requesters thus does not reveal much about the nature of the requests or about the problems the requests present to the agency.[16]

Nevertheless, several facts did emerge from the interviews. First, the FOIA is no substitute for pretrial discovery when the government is a party to the proceeding and adequate discovery is available. In this situation, agency and private lawyers agree that discovery is a more reliable disclosure mechanism and that a litigant is unlikely to obtain additional relevant documents through the FOIA. Hence, in litigation to which the government is a party, the heaviest use of the FOIA occurs

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cials recommended to him. The author also expanded the list of agencies to include four additional agencies which he contacted on his own initiative.

The interviewees in most agencies were lawyers. The initial contact in the majority of cases was the lawyer in the general counsel's office who handled (normally in an advisory capacity) appeals from initial denials of FOIA requests. The interviews focused on the FOIA's impact on the conduct of agency investigations and on the preparation of cases for trial. For this reason, an effort was made to interview agency litigators who were more likely to be informed on these matters than public information officers.

The author also interviewed approximately twenty attorneys in the Department of Justice (primarily in the Civil, Land and Natural Resources, and Tax Divisions) and approximately thirty private practitioners. The Justice Department lawyers were recommended to him by one of the co-directors of the Office of Information and Privacy in the Department and by agency attorneys with contacts in the Department. The private practitioners were contacted because of their known expertise on FOIA or discovery matters or because they were recommended by agency attorneys as persons to contact to obtain the practitioner's perspective on the use of the FOIA for discovery purposes. While there was no systematic basis for the selection of Justice Department attorneys and private practitioners, the author believes that he interviewed a representative sample of informed respondents. An effort to contact a larger group of private attorneys through a mailed questionnaire did not receive a statistically significant response.

The Chairman of the Conference contacted the following agencies: Department of Agriculture; Deparment of the Air Force; Department of Defense; Department of Energy; Department of Health and Human Services; Department of Housing and Urban Development; Department of the Interior; Department of Labor; Department of Transportation; Department of the Treasury; Commodity Futures Trading Commission (CFTC); EEOC; FCC; FERC; Federal Reserve Board; FTC; GSA; INS; IRS; NLRB; NRC; SEC.

The additional agencies contacted by the author were: Department of the Army; Department of the Navy; Department of State; CIA.

16. For statistics on the heavy use of the FOIA at certain agencies (*e.g.*, the FDA, the SEC, and the Consumer Product Safety Commission) by attorneys and regulated interests, see Koch & Rubin, *A Proposal for a Comprehensive Restructuring of the Public Information System*, 1979 DUKE L.J. 1, 17 n.54.

prior to the commencement of the action, when discovery is not yet available. Parties or potential parties to private litigation also extensively use the FOIA. Many agency lawyers and private practitioners believe that in private litigation the FOIA is a more efficient mechanism for obtaining access to agency records than discovery.

A second fact that emerged from these interviews is that the use of the FOIA for discovery purposes often imposes a significant burden on government agencies. When the government is not a party to a proceeding, responding to FOIA requests may be no more burdensome than providing third party discovery—unless, of course, the discovering party asks the government to do both. The government's burden is more acute when it is a party because, although the government is normally able to prevent the release under the FOIA of documents that are privileged in the discovery context, the FOIA process favors disclosure and requires the government to work harder to protect privileged documents.[17] The FOIA also permits parties to circumvent relevancy, temporal, and other discovery restrictions designed "to secure the just, speedy and inexpensive determination of every action."[18] The use of the FOIA by parties to whom discovery is unavailable is particularly burdensome for government agencies.

Yet the interviews did not answer the crucial question of whether the burden, which primarily involves assigning government personnel, who might be more profitably engaged in other tasks, to FOIA matters, is unwarranted. Indeed, the bureaucratic burden is part of the cost of complying with the Act, for Congress has decided to afford all persons access to all nonexempt agency records. It is nonetheless disturbing to learn that in order to comply with the Act, the FBI, at the behest of federal prisoners, must assign hundreds of professional agents to review, on a line-by-line basis, closed investigatory files to determine which portions it may safely release.[19] Parties to litigation, like prisoners, often make FOIA requests because they have an incentive to do so. But is the burden of responding to these requests unwarranted when the same agency would respond in the same fashion to an identical request by a

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17. In discovery, the government shares with other parties the attorney-client and work-product privileges. Among the privileges which are unique with the government are the state secrets privilege, the informer's privilege, the official information privilege, and the law enforcement evidentiary privilege. *See* Association for Women in Science v. Califano, 566 F.2d 339, 343-44 (D.C. Cir. 1977).

18. FED. R. CIV. P. 1.

19. 1 *Freedom of Information Act: Hearings on S. 587, S. 1235, S. 1247, S. 1730, and S. 1751 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 861-62 (1981) (testimony of William H. Webster, Director, FBI) [hereinafter cited as *Hearings*].

curious bystander? Perhaps the *level* of access available to the general public is too great. If the burden of responding to certain types of FOIA requests becomes too overwhelming, the proper remedy is not to bar requesters selectively, but to restrict the access available to everyone.[20]

The interviews did disclose that parties make FOIA requests to supplement discovery because they believe they will receive more information, or receive it sooner. These advantages of the FOIA are most apparent when the controversy between the government and a potential party has not yet ripened into a formal proceeding in which the party has access to discovery. But parties to litigation may invoke the FOIA in other contexts and for a variety of reasons. Although the categories into which this article divides the various uses[21] are somewhat imprecise, categorization assists the analysis of why parties use the FOIA for discovery and how those techniques affect government agencies.

Finally, the interviews disclosed that the various uses of the FOIA for discovery purposes may overlap other, clearly permissible uses of the Act. Often, the distinction between informing the public and furthering one's own interest in litigation is not a sharp one, and FOIA requesters may have both purposes in mind. For example, a public interest organization such as the Natural Resources Defense Council may seek agency records both to inform the public of an environmental hazard and to use in a proceeding to which the organization is a party (*e.g.*, a licensing proceeding at the NRC). Likewise, a victim of governmental wrongdo-

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20. For example, section 14 of S. 774, as approved by the Senate Judiciary Committee in June, 1983, excludes organized crime files from the entire Act for a period of five years from the date generated or acquired. Similarly, the Privacy Act, 5 U.S.C. § 552a, denies all requesters access to a large category of agency records that are primarily of interest to persons in litigation with the government. Section 552a(d)(5) exempts from the provisions of that Act "any information compiled in reasonable anticipation of civil action or proceeding." That exemption affords broader protection to an agency's case files than does the work product component of FOIA exemption b(5). Smiertka v. Department of the Treasury, 447 F. Supp. 221, 227-28 (D.D.C. 1978). Courts are divided on whether a first party FOIA requester (i.e., a requester seeking information about himself) may obtain records exempt under the Privacy Act. *See, e.g.,* Greentree v. United States Customs Serv., 674 F.2d 74 (D.C. Cir. 1982) (FOIA access available). *But see, e.g.,* Shapiro v. DEA, 721 F.2d 215 (7th Cir. 1983) (Privacy Act an exemption b(3) statute under the FOIA). In practice, most agencies have followed *Greentree*.

21. Parties or potential parties to litigation use the FOIA as follows:

A. To obtain evidence or leads for a claim prior to filing suit against the government.
B. To obtain information about a potential governmental proceeding against the requester.
C. To obtain agency generated records for use in private litigation.
D. To obtain privately submitted agency records for use in private litigation.
E. To obtain agency records unavailable in discovery because they are privileged.
F. To obtain irrelevant agency records.
G. To obtain an additional search for relevant agency records.
H. To obtain agency records which are not adequately discoverable because of external limitations on discovery.

ing may use the FOIA both to influence government policy by publicizing the wrongdoing and to further a tort suit. In these instances, the FOIA should remain open to litigants even if they are barred from using the FOIA for discovery purposes.

This article will not address one major use of the FOIA by potential litigants. Persons subject to agency regulation often use the FOIA to keep abreast of the agency's operative law and of studies that may lead to changes. Law firms representing energy companies, for example, often maintain their own libraries of Department of Energy records. Congressional testimony or other public utterances by departmental officials that reveal new factual studies or a possible change in policy invariably prompt FOIA requests for agency records on the matter. Lawyers in many specialized areas of practice similarly use the FOIA to obtain operational manuals and other internal materials prepared for the guidance of agency staff. Those records, which contain much of an agency's operative law and procedure, are very useful in dealing with an agency on a day-to-day basis even if the practitioner has no particular litigation in mind. If litigation does arise, he will have a head start in preparing for trial.

Use of the FOIA to gather information about an agency's internal operations is consistent with the Act's purpose of furthering open government because it permits regulated interests to deal more intelligently with the agency. The FOIA is thus immensely useful to the private practitioner who must advise a client whether a course of conduct is legal and prudent or who must appear informally before an agency on behalf of a client. As will be seen, the FOIA is less useful as a discovery device.[22] Although a party may avoid the time, scope, and other limitations on discovery requests, the FOIA only affords a party the first level access to agency records that is available to the general public. To prepare adequately for a trial or hearing, a party must participate in the exchange of information and the narrowing of issues which are the hallmarks of discovery.

### *C. Summary of Conclusions*

The use of the FOIA for discovery purposes takes many forms. As will be seen, some discovery uses are plainly appropriate (*e.g.*, the prelitigation use of the FOIA to discover the factual basis for a lawsuit), while others are more questionable (*e.g.*, a party's use of the FOIA to require an agency to conduct additional or duplicative searches). In addition to the burdens imposed by discovery motivated FOIA requests, the avail-

22. *See infra* Part III.

ability of the FOIA as a discovery tool may also disadvantage the government in litigation. Despite the problems associated with the use of the FOIA for discovery purposes, it is neither fair nor workable to deny a litigant access to records available to anyone else. Discrimination based on a requester's status is inconsistent with the FOIA's basic goal of providing all members of the public with first level access to information about the operations of government.

The argument for treating persons using the FOIA for discovery purposes differently than nondiscovery motivated requesters is premised upon the belief that litigants do not need the FOIA because they have, or will have, access to discovery. Why then, the argument goes, should parties or potential parties to litigation be permitted to burden the government with FOIA requests that may delay the government's response to other FOIA requests or disrupt the government's trial preparation?

This rationale for closing the FOIA to litigants is not convincing. A party to litigation "needs" the FOIA because discovery is not designed to afford, and often does not afford, the first level access to government documents available to any person under the FOIA. When the government makes an inadequate discovery search, raises a claim of privilege, obtains a protective order, or contends that the documents sought are irrelevant, a party needs the FOIA at least as much as anyone else does. While in theory a discovering party should obtain all the government documents necessary to prepare for trial or hearing, functional considerations (*i.e.*, the goal of resolving controversies in a timely fashion) may influence a discovery system or court to interpret narrowly a party's discovery needs. In these situations, a requester's status as a party should not reduce his rights under the FOIA.[23] Although a party's FOIA requests may be burdensome, it is both unfair and unenforceable for an agency to deny a party the first level access which it affords to other FOIA requesters whose interest in obtaining the records almost surely will be less than that of the party.[24]

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23. It seems particularly unjustified to deprive a defendant of his statutory right of access to government records merely because the government has initiated a proceeding against him.

24. A FOIA requester's status as a party to litigation likewise should not enlarge his access to agency records. Even under exemptions b(6) and b(7)(C), where the agency must balance the public interest in disclosure against the privacy interests which would be invaded by disclosure, it is the public's interest in disclosure that is dispositive. Washington Post Co. v. Department of Health and Human Servs., 690 F.2d 252, 260 (D.C. Cir. 1982). The party requester also should not receive any preferential treatment in the processing of his request. Courts have held that a requester's need for records in collateral litigation does not constitute a "genuine need and reason for urgency" permitting him to gain access to government records ahead of prior FOIA requesters. Open Am. v. Watergate Special Prosecution Force, 547 F.2d 605, 616 (D.C. Cir. 1976); Mitsubishi Elec. Co. v. Department of Justice, 39 Ad. L.

The use of the FOIA for discovery purposes is nevertheless a matter of valid concern because that use, unlike others, may disadvantage the government's position in litigation. First, a party in litigation with the government may obtain agency records without the knowledge of government counsel and then use those records to surprise him at trial or hearing. Second, the party may disrupt the government's preparation by seeking, perhaps on the eve of the trial or hearing, the release of records in the government's litigation files. The government then must divert its attention from trial preparation in order to prevent a FOIA release to an opposing party of sensitive, nondisclosable records. Under the FOIA, unlike in discovery, the government does not enjoy the protection of a cut-off date for the making of requests or of a neutral judge to resolve disputes. Third, a party may request the government to produce the same documents under the FOIA and in discovery, thus necessitating duplicative searches and releases. In these cases, the government's primary concern is not the extra burden imposed on the agency's public information office in processing the FOIA request—that is part of the cost of having a Freedom of Information Act—but the burden imposed on government counsel who must prevent inadvertent FOIA releases and remain informed of government documents obtained by opposing parties.

The disadvantages to the government are substantial, but they do not accompany most uses of the FOIA for discovery purposes. Parties in litigation with the government use the FOIA for discovery purposes because they expect to obtain the release of agency records not obtainable in discovery, or only obtainable in a less convenient fashion or at a later time. They seldom use the FOIA to surprise government counsel, to disrupt counsel's trial preparation, or to require the government to conduct duplicative searches. Abusive FOIA requests occur most frequently prior to the commencement of criminal and administrative enforcement proceedings by the persons under investigation. Thus, proposals to close the FOIA to parties to *pending* proceedings would provide agencies with limited relief.

On the other hand, the government will receive some protection from the abuses which occur if a party in litigation with the government must notify government counsel of all discovery motivated FOIA re-

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Rep. 2d 1133 (D.D.C. 1976); Gonzalez v. DEA, 2 GOV'T DISCLOSURE SERV. ¶ 81,016 (D.D.C. 1980); Rivera v. DEA, 2 GOV'T DISCLOSURE SERV. ¶ 81,365 (D.D.C. 1981); Greentree v. DEA, 1 GOV'T DISCLOSURE SERV. ¶ 80,201 (D.D.C. 1980), *rev'd on other grounds*, 674 F.2d 74 (D.C. Cir. 1982). However, one court ordered expedited processing of a FOIA request filed by a criminal defendant in a state capital prosecution. *See* Cleaver v. Kelley, 427 F. Supp. 80 (D.D.C. 1976).

quests. A "discovery motivated" FOIA request is a request made by a party, his counsel, or some person acting on his behalf, for the purpose of obtaining information for use in pending litigation with the government. If counsel representing the government receives notice of these FOIA requests, he will be able to determine what records the agency plans to release and thus eliminate any danger of surprise at trial or hearing. Further, government counsel will be able to coordinate FOIA and discovery searches and to avoid duplicative releases. Although he still may need to divert his attention from trial preparation to assist the agency's public information office in resisting the disclosure of exempt records, advance notice of FOIA requests should enhance counsel's ability to protect litigation files. Because such notice would afford the government considerable relief from abuse of the FOIA, Congress should amend the FOIA to require notice and reject proposals to close the FOIA to litigants.[25]

## II. DOCUMENT DISCOVERY UNDER THE FOIA AND THE RULES OF DISCOVERY: A COMPARISON

It is necessary to consider how the FOIA and discovery systems function to understand why agencies object to some uses of the FOIA for discovery purposes and why litigants continue to use the FOIA despite the fact that discovery is ordinarily the more reliable way to obtain documents for use in litigation. The FOIA offers litigants an invariable level of discovery unaffected by differences in the discovery rules applicable to civil, criminal, and agency proceedings. Even under a single set of rules, discovery varies according to the subject matter of the proceeding. For example, the civil rules permit more discovery in tort suits against state or federal officials for constitutional violations,[26] or in antitrust suits brought by the government,[27] than in nonstatutory review proceedings, in which the court limits its review to the agency record.[28]

From the government's perspective, the FOIA is open to all the abuses of discovery without supplying any of discovery's concomitant advantages. Parties can make massive demands for irrelevant documents, deliberately request nondisclosable documents, and file multiple requests for the same information. In discovery, such unreasonable requests are tempered by a mutuality of interest in exchanging information and by the presence of a neutral umpire. In the FOIA process, on

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25. For further discussion of the notice proposal, see *infra* Part IV(c).

26. *See* Wood v. Breier, 54 F.R.D. 7, 10-11 (E.D. Wis. 1972).

27. *See* United States v. IBM, 67 F.R.D. 40, 43 n.3 (S.D.N.Y. 1975).

28. *See* McMillan & Peterson, *The Permissible Scope of Hearings, Discovery, and Additional Factfinding During Judicial Review of Informal Agency Action*, 1982 DUKE L.J. 333, 333-34.

the other hand, only one side receives any disclosure, and there is no satisfactory mechanism for limiting unreasonable requests. Not only are discovery motivated FOIA requests less useful in resolving lawsuits, but they place a greater burden on the government than do similar discovery requests. For even though agency records that are privileged in discovery almost always are exempt under the FOIA, the agency usually must work harder under the FOIA to protect the same documents. In particular, the FOIA gives an agency less time to respond to requests and requires it to provide a more detailed justification for withholding a document.

### *A. The Release of Agency Records Under the FOIA*

The Act makes it very easy to make a FOIA request. The requester need only "reasonably describe" the records he wants and comply with the agency's published rules on the "time, place, fees (if any), and procedures to be followed."[29] The burdens placed on the agency are much greater. It must decide within ten working days[30] whether to comply with the request, determine any appeal from an initial denial within twenty working days after receipt of the appeal,[31] and notify the requester of the reasons for its determination.[32] Upon notice to a requester, an agency may extend the time limits for only ten working days in "unusual circumstances."[33] If an agency fails to meet the time limits,[34] or withholds a requested record by claiming an exemption, the requester may file suit to compel disclosure.[35] Within thirty days of service, the agency must serve an answer or otherwise plead to the complaint.[36] The court then must expedite the case in every way[37] and determine de novo whether the agency improperly withheld any records.[38]

In court the agency has the burden of sustaining its action in withholding records.[39] To avoid summary judgment the agency must either

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29. 5 U.S.C. § 552(a)(3) (1982).

30. 5 U.S.C. § 552(a)(6)(A)(i) (1982).

31. 5 U.S.C. § 552(a)(6)(A)(ii) (1982).

32. 5 U.S.C. § 552(a)(6)(A)(i) (1982).

33. Agencies may take extra time to search distant offices for records, to examine a voluminous amount of records, or to consult other agencies. 5 U.S.C. § 552(6)(B)(i)-(iii) (1982).

34. *See* 5 U.S.C. § 552(a)(6)(C) (1982).

35. 5 U.S.C. § 552(a)(4)(B) (1982) permits requesters to sue in the district court in the district in which the requester resides or has his place of business, in which the records are kept, or in the District of Columbia.

36. 5 U.S.C. § 552(a)(4)(C) (1982).

37. 5 U.S.C. § 552(a)(4)(D) (1982).

38. 5 U.S.C. § 552(a)(4)(B) (1982).

39. *Id.*

produce the records or establish that they are nonexistent or exempt.[40] An agency must file detailed affidavits to justify exemption claims. The requester, who has not seen the records and thus has little basis for challenging the affidavits, normally moves the court to order the agency to file a *Vaughn* index,[41] which contains in affidavit form a detailed itemization of the withheld records (often on a paragraph-by-paragraph or line-by-line basis). The agency must cross-reference each item to the statutory bases for the withholding and to the justifications advanced in the agency's other affidavits. Courts require a detailed breakdown of the withheld records because the agency must establish, not only that each record contains exempt matter, but that none contain any reasonably segregable, nonexempt matter.[42]

The *Vaughn* index serves a twofold purpose: first, it permits a requester to argue intelligently for the nonexempt status of a document; and second, it permits the court to avoid conducting an in camera proceeding.[43] Although the district court has statutory authority to examine agency records in camera,[44] case law strongly disfavors such inspections because they are burdensome and lack the benefit of an adversary presentation.[45]

The lack of in camera review imposes a significant burden of justification on the government.[46] Although the courts of appeals have emphasized that the district courts must be flexible in allowing the government to protect the confidentiality of its records (*e.g.*, by making some of its showing in camera or by submitting a randomly selected sample of the documents for in camera inspection),[47] district courts normally order the government to submit a detailed *Vaughn* index.[48] Too

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40. National Cable Television Ass'n v. FCC, 479 F.2d 183, 186 (D.C. Cir. 1973).

41. The term is derived from the first case in which a court ordered the government to prepare such an index, Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

42. 5 U.S.C. § 552(b) (1982) requires the release of reasonably segregable nonexempt portions of otherwise exempt records.

43. *See* Ingle v. Department of Justice, 698 F.2d 259, 263-64 (6th Cir. 1983); *Vaughn*, 484 F.2d at 824-25.

44. 5 U.S.C. § 552(a)(4)(B) (1982).

45. *See, e.g.,* Weissman v. CIA, 565 F.2d 692, 697 (D.C. Cir. 1977); Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242, 250 n.10 (D.C. Cir. 1977); *Ingle*, 698 F.2d at 264-65; Currie v. IRS, 704 F.2d 523, 530-31 (11th Cir. 1983).

46. This burden is particularly onerous in cases involving the withholding of information for national security reasons. *See, e.g.*, Stein v. Department of Justice, 662 F.2d 1245 (7th Cir. 1981); Military Audit Project v. Casey, 656 F.2d 724 (D.C. Cir. 1981); Terkel v. Kelly, 599 F.2d 214 (7th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980).

47. *See, e.g., Stein*, 662 F.2d 1245, 1254; Stephenson v. IRS, 629 F.2d 1140, 1145-46 (5th Cir. 1980); Vaughn v. Rosen, 523 F.2d 1136, at 1139-40 (D.C. Cir. 1975).

48. Ironically, requesters also are unhappy with the FOIA's "awkward" mechanism for

often the FOIA court focuses not on the question of whether the records themselves are exempt, but on whether the agency's stated justification for withholding them is adequate. This situation is made tolerable only by the deference[49] accorded agency determinations on such questions as whether a record is properly classified (exemption b(1)),[50] whether the release of an investigatory record would interfere with law enforcement proceedings (exemption b(7)(A)),[51] or whether the release of an investigatory record would constitute an unwarranted invasion of personal privacy (exemption b(7)(C)).[52]

The disclosure process is quite different in discovery despite the occasional use of some FOIA procedures to resolve discovery disputes. Except with respect to claims of privilege for state secrets, in camera review of withheld documents is the norm.[53] Until recently, most attorneys relied upon the judgment and good faith of counsel asserting a privilege; today, opposing counsel is more likely to press for a judicial determination.[54] Counsel commonly asks for a list of all responsive documents that a party has withheld on the basis of privilege. The list typically identifies each document by author, recipient, date, and subject matter and states the basis for the claim of privilege.[55] Courts have even used the term *Vaughn* index to describe these lists when prepared by the government.[56] Private practitioners complain, especially with respect to documents covered by the attorney-client privilege, that the lists disclose information (*e.g.*, the subject matter of the document) which the privilege ought to protect.[57]

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review of agency withholdings. *See, e.g., Stein*, 662 F.2d at 1252. Requesters who, like the courts, have had no opportunity to review the withheld records are concerned by the courts' ready acceptance of agency justifications. *See* Lively, *Catch 7(A): The Plaintiff's Burden Under the Freedom of Information Act*, 28 VILL. L. REV. 75 (1982-83).

49. The *Stein* court, for example, described its role as one of "judicial review," apparently ignoring the de novo review requirement of 5 U.S.C. § 552(a)(4)(B) (1982). 662 F.2d at 1252.

50. *See, e.g., Military Audit Project*, 656 F.2d at 738; Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980).

51. *See* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 239 (1978).

52. *See* Nix v. United States, 572 F.2d 998, 1006 (4th Cir. 1978).

53. *See, e.g., In re* "Agent Orange" Prod. Liab. Litig., 97 F.R.D. 427, 434 (E.D.N.Y. 1983) (deliberative process privilege); United States v. AT&T, 86 F.R.D. 603, 608 (D.D.C. 1979) (Special Masters' Guidelines for the Resolution of Privilege Claims); United States v. Pfizer, Inc., 560 F.2d 326, 336 n.20 (8th Cir. 1977) (work product privilege); Black v. Sheraton Corp. of Am., 564 F.2d 531, 543 (D.C. Cir. 1977) (law enforcement evidentiary privilege).

54. *See* Davidson, *Judicial Procedures for Resolving Claims of Privilege*, 8 LITIGATION, Summer, 1982, at 36.

55. *Id.* at 37.

56. *See, e.g., Black*, 564 F.2d at 544-45. The court nevertheless held that the government was entitled to an in camera inspection of the documents before it could be ordered to produce them. *Id.* at 545.

57. Davidson, *supra* note 54, at 36.

The availability of in camera review, however, substantially lessens the government's burden of justifying the withholding of a document and shifts to the court much of the burden of reviewing withheld documents. In the "Agent Orange" litigation, for example, Judge Pratt required the government to submit an affidavit describing in general terms any documents claimed to be privileged, why a privilege applied, and the harm which would result from disclosure.[58] He also required the government to make the documents available for in camera inspection. The court explicitly recognized that automatic in camera inspection lessens the government's burden because its affidavits can then be less detailed.[59] The court can better manage the burden of review in discovery because the judge or master is more likely to be familiar with the subject matter of the documents. In addition, the discovery court has a greater need to assume the burden because, unlike a FOIA court, it often must determine whether a party's need for a document outweighs the government's interest in confidentiality. In camera review thus benefits both the government[60] and the discovery court and makes it procedurally easier to withhold documents in discovery than under the FOIA.

Another factor facilitating the release of agency records is the highly decentralized nature of most agency FOIA operations. To permit the more efficient release of agency records, agency regulations normally require that a FOIA requester submit her request to the office where the requested records are located—in most cases a regional or local office.[61] Public information officers in these offices, despite their lack of legal training, may release nonexempt records. On the other hand, the denial of a request is a legal matter which requires the advice of an attorney. The Department of the Air Force, for example, authorizes hundreds of public information officers around the world to grant FOIA requests but permits only thirty-two persons, acting on the advice of counsel, to deny them. Of course, if an agency knows that a particular custodian is responsible for a considerable number of records likely to contain exempt matter, such as proprietary information (exemption b(4)) or classified information (exemption b(1)), the agency may institute tighter controls over the release decision.

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58. *In re* "Agent Orange" Prod. Liab. Litig., 97 F.R.D. at 429-30.

59. *Id.* at 430.

60. Government attorneys do not always view in camera proceedings in such rosy terms. They often prefer to describe sensitive documents for a judge rather than to permit the judge to read the documents himself because they fear that a judge who reviews the documents personally may too readily conclude that there is no harm in disclosing them.

61. Requests to an agency's national or Washington office form a very small portion of most agencies' FOIA workload.

Predictably, agencies employ a standard routine for processing FOIA requests. Upon the receipt of a FOIA request, the agency's public information office searches for the responsive records and then reviews them to determine whether they are exempt. (The paper flow is staggering; the Act could not have been implemented prior to the advent of photocopying machines.) If the records appear to be connected with litigation, the public information officer normally contacts the lawyers representing the agency in the matter. Although the agency's litigators rarely have authority to deny FOIA requests,[62] agencies accord great weight to their views on what records are exempt.

Government litigators fear that a release of exempt records will occur through inadvertence, inability to comply with the statutory time limits, or failure to present to the reviewing court an adequate justification for withholding. The latter two fears are largely unjustified because the courts have been excessively indulgent with agencies that miss statutory time limits[63] or that fail initially to justify the withholding of exempt records.[64] Individual district court judges sometimes are not so patient; but there is little evidence that agencies have been forced to release exempt records because of an inadequate opportunity to justify withholding them.[65] Government lawyers mostly complain about the double burden of protecting sensitive litigation files from discovery and FOIA requests and about FOIA releases made without consulting them.

In addition to the disadvantages of the intricate system for responding to FOIA requests, the lack of any reasonableness or relevancy limitations on FOIA requests burdens the government. In discovery, a judge or umpire is available to protect the government from unreasonably burdensome requests, and the rules limit discovery to relevant documents. Under the FOIA, however, the requester need only "reasonably describe" the records he wants.

Despite the lack of any clearly drawn limits, the courts have inter-

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62. Among the agencies contacted, only the FTC authorizes agency litigators to deny FOIA requests. At the Commission, the Bureau Director or regional office responsible for an investigation may deny access to an open investigatory file. 16 C.F.R. § 4.11(a)(1)(iv)(B) (1983). Appeals from these initial denials are to the General Counsel.

63. *See, e.g.*, Open Am. v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976) (large volume of requests an "exceptional circumstance" under 5 U.S.C. § 552(a)(6)(C)(1982) for allowing an agency additional time to respond). To avoid the statutory time limits, the agency need only show that it is processing a backlog of requests with due diligence on a first-in, first-out basis. *Id.* at 616.

64. *See, e.g.*, Coastal States Gas Corp. v. Department of Energy, 644 F.2d 969 (3rd Cir. 1981) (agency granted a second chance to prepare an adequate *Vaughn* index).

65. However, in the *Coastal States* litigation, the Department of Energy did release a substantial number of records under the district court's order before the court of appeals reversed and gave the agency more time to establish the exempt status of the records. *See id.*

preted this "reasonable description" requirement to provide some protection to agencies. The requester's description of the record must enable "a professional employee of the agency who [is] familiar with the subject area of the request to locate the record with a reasonable amount of effort."[66] If the description coincides with a category of documents previously identified by the agency, it must search for the documents through its established indexing and retrieval systems.[67] But if the agency has not segregated its records in accordance with the description, it need only make a reasonable search; it is not required to reorganize its filing system in response to a FOIA request.[68] For example, an agency need not conduct a page-by-page search of its files to uncover records that served as preparatory documents for congressional testimony[69] or that support a particular proposition (*e.g.*, the safety of a product).[70]

Courts also have held that an agency may limit its search to the office where the requester submitted the FOIA request and that an agency need not search its files nationwide simply because a requester chose to file with the national office.[71] Nothing prevents a requester, however, from filing multiple requests at different offices or from specifying that he wants a nationwide search. While an agency may refuse to conduct a burdensome FOIA search if it is highly unlikely to produce any responsive documents,[72] it may not decline a search on the grounds that it is likely to produce an unreasonably large number of responsive documents. In the latter situation, the agency can do no more than tell the requester that the search may take time and be costly. If the requester is seeking the records primarily for use in litigation (a quintessentially "private" purpose), the agency normally may charge its search

66. Goland v. CIA, 607 F.2d 339, 353 n.88 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1981).

67. *Id.*

68. *Id.* at 369-70 (opinion on rehearing); *see also* National Cable Television Ass'n. v. FCC, 479 F.2d 183, 192 (D.C. Cir. 1973). The *National Cable* opinion interpreted the pre-1974 requirement that the requester "reasonably identify" the records it wished the agency to release. *Goland* followed *National Cable* in interpreting the "reasonably describe" requirement found in the present Act. *Goland*, 607 F.2d at 353 n.88 (initial panel opinion).

69. *See Goland*, 607 F.2d at 353.

70. *See* Bristol-Myers Co. v. FTC, 424 F.2d 935, 938 n.8 (D.C. Cir. 1970) (dictum).

71. *See, e.g.*, Marks v. Department of Justice, 578 F.2d 261, 263 (9th Cir. 1978); Clinchfield Coal Corp. v. Donovan, 3 GOV'T DISCLOSURE SERV. ¶ 82,251 (D.D.C. 1982).

72. *See* Weisberg v. Department of Justice, 705 F.2d 1344, 1357 (D.C. Cir. 1983) (search of FBI's Dallas office would be "fruitless and unreasonable"); Shaw v. NSA, 3 GOV'T DISCLOSURE SERV. ¶ 83,196 (D.D.C. 1983). *Weisberg* reaffirms earlier decisions that a FOIA search must be reasonably calculated to uncover all responsive documents. *See, e.g.*, Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (per curiam).

and duplication costs.[73] Most litigant requesters do not have unlimited time or money and are therefore willing to narrow their requests, but such negotiations provide less protection for the agency than would a neutral judge, especially if the litigant has substantial financial resources.

### *B. Production of Documents Under Rule 34*

The Federal Rules of Civil Procedure facilitate document discovery between parties to litigation and protect the parties (including the government when it enjoys party status) from unreasonable discovery requests. Rule 34 permits a party to request any other party to produce for inspection and copying any designated, relevant, and unprivileged documents.[74] The request may be served upon the plaintiff after the commencement of the action, and upon any other party with or after service of the summons and complaint.[75] The request must specify a reasonable time, place, and manner for the inspection.[76] Rule 34 thus leaves the timing of document production to the parties, subject to court supervision. The rule only requires a party to respond within 30 days after service of the request (or, in the case of a defendant, within 45 days after service of the summons and complaint) by indicating whether he will comply or object.[77] Of course, if a party objects to a request, or fails to respond or to permit inspection, the discovering party may move for a Rule 37(a) order to compel production.[78]

Under Rule 34, the discovering party must describe the documents (by item or category) with "reasonable particularity."[79] The designation requirement permits a party to obtain a more thorough search and more useful information than under the FOIA. The description need only be "sufficient to apprise a man of ordinary intelligence what documents are required" and to permit the court "to ascertain whether the requested documents have been produced."[80] Thus, the requester may

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73. Dorta v. FBI, 3 GOV'T DISCLOSURE SERV. ¶ 82,349 (D.D.C. 1982). 5 U.S.C. § 552(a)(4)(A)(1982) authorizes the agency to waive or reduce its customary charges for document search and duplication if the agency determines that furnishing the information can be considered as "primarily benefiting the general public." The agency's denial of a fee waiver request is reviewable for arbitrariness and capriciousness. Eudey v. CIA, 478 F. Supp. 1175, 1176 (D.D.C. 1979).

74. FED. R. CIV. P. 34(a).

75. *Id.* at 34(b).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2211, at n.86 (1970)(citing cases).

assume that the responding party has a "brain" and that, once put on notice of the documents requested, he will find them even if his indexing or retrieval system does not coincide with the requester's categorization. A court may limit, however, a discovery search to those files that potentially contain enough relevant information to warrant searching them.[81]

The designation requirement of Rule 34 favors the discovering party in other ways. It permits a party to request all documents relevant to an incident or product, or all the documents an opponent will use to establish a proposition. These discovery requests[82] are useful in limiting an opposing party's proof at trial or hearing. They are also likely to generate more intensive searches than would a FOIA request, because an agency may not limit a discovery search to its established indexing and retrieval systems. Documents produced in discovery are then admissible at trial without additional authentication. The availability of interrogatories and depositions also makes it easier to obtain further discovery on the existence of relevant documents. Although a FOIA requester may, by suing to enjoin the withholding of records, obtain discovery on the sufficiency of a FOIA search, the district court is likely to grant summary judgment to the government on this issue if the agency affidavits describing its search are detailed, nonconclusory, and in good faith.[83]

Rule 34 has other advantages for the discovering party. First, discovery is normally free,[84] while FOIA requesters seeking records for litigation purposes rarely obtain fee waivers. Second, a party may obtain litigation related sanctions if an agency fails to provide discovery ordered by the court[85] or even if it successfully invokes a claim of privilege.[86] The sanctions available under the FOIA (*e.g.*, the disciplining of agency employees who arbitrarily withhold records[87]) are not as useful

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81. *See* United States v. Exxon Corp., 87 F.R.D. 624, 634 (D.D.C. 1980).

82. Such commonplace discovery requests are not proper FOIA requests. For a discussion of the FOIA requirement that the requester must "reasonably describe" the requested records, see *supra* text accompanying notes 67-70.

83. *See, e.g.*, Perry v. Block, 684 F.2d 121, 126 (D.C. Cir. 1982) (per curiam); Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1981); Founding Church of Scientology v. NSA, 610 F.2d 824, 836 (D.C. Cir. 1979).

84. A basic premise underlying the liberal discovery provisions of the federal civil rules is that the burden of complying with discovery requests is an incident of litigation. Each party therefore bears his own search and production costs. Sherman & Kinnard, *Federal Court Discovery in the '80's—Making the Rules Work*, 95 F.R.D. 245, 248 (1982).

85. *See, e.g.*, *In re* Att'y Gen. of the United States, 596 F.2d 58, 65 (2d Cir. 1979).

86. If the government chooses to withhold relevant but privileged information, a court may impose litigation related sanctions. *See, e.g.*, Liuzzo v. United States, 508 F. Supp. 923, 940 (E.D. Mich. 1981) (finding of liability in tort suit against United States); United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944) (dismissal of indictment).

87. 5 U.S.C. 552(a)(4)(F) (1982).

to parties in litigation. Third, a party who prevails in litigation with the government may recover attorney's fees attributable to the government's failure, without substantial justification, to provide discovery that was ordered by the court or requested by the party.[88] A victorious complainant in a FOIA suit who sought records for discovery purposes rarely obtains attorney's fees because his entitlement to an award depends upon a balancing of four factors, one of which is the public benefit (as opposed to a litigation or other private benefit) that results from the release of the records.[89] Finally, a party may obtain relevant documents under Rule 34 that are exempt under the FOIA. An agency cannot base a claim of privilege on a FOIA exemption,[90] even though a court may consider the congressional policies underlying the FOIA exemption when considering the claim of privilege.[91] Thus, exempt docu-

88. Section 204(b) of the Small Business Export Expansion Act of 1980, Pub. L. No. 96-481, § 204(b), 1980 U.S. CODE CONG. & AD. NEWS (94 Stat.) 2321, 2328, provides that the United States shall be liable for costs and expenses, including attorney's fees, to the prevailing party in any civil action to the extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award. See 28 U.S.C. § 2412(b)(1982) for the codification of this provision, which is part of what is commonly referred to as the Equal Access to Justice Act. The Department of Justice apparently concedes that Rule 37 is a qualifying statute but insists that a private party may recover attorney's fees for discovery matters only if he is entitled to them under Rule 37 *and* if he prevails in the underlying litigation. OFFICE OF LEGAL POLICY, DEPARTMENT OF JUSTICE, AWARD OF ATTORNEY'S FEES AND OTHER EXPENSES IN JUDICIAL PROCEEDINGS UNDER THE EQUAL ACCESS TO JUSTICE ACT 29, 57 (undated). The Supreme Court similarly interpreted the prevailing party requirement of the Civil Rights Attorney's Fees Awards Act of 1976. Hanrahan v. Hampton, 446 U.S. 754 (1980).

89. The four factors that the FOIA court must weigh in determining a prevailing complainant's entitlement to attorney's fees under 5 U.S.C. § 552(a)(4)(E) (1982) are: 1) the public benefit derived from the release; 2) the commercial benefit to the requester; 3) the nature of the requester's interest in the records sought; and 4) whether the government's withholding had a reasonable basis in law. S. REP. NO. 854, 93rd Cong., 2d Sess. 19 (1974). These factors are not exhaustive, but the court must consider them. *E.g.*, Church of Scientology v. United States Postal Serv., 700 F.2d 486, 492 (9th Cir. 1983); Cox v. Department of Justice, 601 F.2d 1, 7 (D.C. Cir. 1979). In denying awards courts have reasoned that complainants who are using the FOIA for discovery purposes already have sufficient incentives for pursuing their judicial remedies under the FOIA. *See, e.g.*, Guam Contractors Ass'n v. Department of Labor, 3 GOV'T DISCLOSURE SERV. ¶ 83,174 (N.D. Calif. 1983). In rare cases, the public interest in the disclosure of the records, or the lack of any reasonable basis to support the government's withholding, may result in an award of attorney's fees even though the complainant seeks the records for discovery purposes. *See, e.g.*, Cazalas v. Department of Justice, 709 F.2d 1051 (5th Cir. 1983) (employment records sought by potential title VII plaintiff).

90. *See* Jupiter Painting Contracting Co. v. United States, 87 F.R.D. 593, 597 (E.D. Pa. 1980); Canal Auth. v. Froehlke, 81 F.R.D. 609, 612 (M.D. Fla. 1979), *noted in* Note, Canal Authority of Florida v. Froehlke: *The Freedom of Information Act Exemptions Provide No Bar to Discovery*, 11 ENVTL. L. REV. 435, *passim* (1980); Kinoy v. Mitchell, 67 F.R.D. 1, 12 n.41 (S.D.N.Y. 1975); Pleasant Hill Bank v. United States, 58 F.R.D. 97, 99 (W.D. Mo. 1973).

91. *See* Toran, *Information Disclosure in Civil Actions: The Freedom of Information Act and the*

ments may be discoverable under Rule 34 either because the discovery privilege is narrower than the corresponding FOIA exemption[92] or because, as is more likely, the party's need for the document overrides the government's privilege.

The qualified scope of the privileges available to the government—the official information, the informer's, and the law enforcement evidentiary privileges—permit a party, upon a showing of need, to obtain more relevant documents in discovery than under the FOIA.[93] The official information privilege provides the clearest case. In enacting exemption 5, Congress intended to afford FOIA requesters the same access to deliberative material and work product as was routinely available in discovery.[94] Discovery courts nevertheless have allowed parties, upon a showing of litigation need, to obtain agency records containing deliberative matter previously found to be exempt under the FOIA.[95] A showing of a case-specific need therefore can entitle a party to greater access to agency records than that "routinely" available to parties in litigation with the agency, and thus also greater than that available to the public under the FOIA.[96]

The scope of the law enforcement evidentiary privilege is less certain. Courts have interpreted the privilege to cover all investigatory files

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*Federal Discovery Rules*, 49 GEO. WASH. L. REV. 843, 852 (1981) (citing cases holding that a court may consider the legislative intent underlying the FOIA exemption).

92. In *Canal Authority*, for example, the court held that confidential business information in an appendix to an agency's environmental impact statement (presumably covered by FOIA exemption b(4)) was not privileged in discovery in the absence of some statutory basis for the claim of privilege. It also held that the court ordered disclosure did not violate the Trade Secrets Act, 18 U.S.C. § 1905 (1982), because the disclosure was authorized by law (*i.e.*, by FED. R. CIV. P. 26(b)). *Canal Authority*, 81 F.R.D. at 611. The court did express willingness to enter a protective order upon an appropriate showing. *Id.*

93. *See* Association for Women in Science v. Califano, 566 F.2d 339 (D.C. Cir. 1977) (providing a general discussion of these qualified privileges).

The state secrets privilege is an exception because it is absolute. A party's need for discovery affects only the court's scrutiny of the government's claim of a state secrets privilege; the more a party does to establish his need for the information, the more closely a court must scrutinize the government's claim of privilege. *See* United States v. Reynolds, 345 U.S. 1, 11 (1953); Halkin v. Helms, 690 F.2d 977, 990 (D.C. Cir. 1982).

94. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 148-49 (1975); EPA v. Mink, 410 U.S. 73, 85-86 (1973). Given the ambiguity of the reference in H. REP. NO. 1497, 89th Cong., 2d Sess. 10, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2418, 2428 to "routinely discoverable" (under which discovery rules?), courts interpret exemption 5 to cover only deliberative material produced in the process of making agency decisions—not factual material or agency law. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 405 (2d ed. 1978).

95. *E.g.*, United States v. Exxon Corp., 4 ENERGY MGMT. (CCH) ¶ 26,350 (D.D.C. 1982) (discovery court applied FOIA standards to determine what documents were exempt and thus privileged from disclosure absent some showing of need).

96. McClelland v. Andrus, 606 F.2d 1278, 1287 n.54 (D.C. Cir. 1979) (uniquely relevant internal report may be discoverable although exempt from release under the FOIA).

(other than those containing information on governmental wrongdoing) the release of which might impede law enforcement.[97] If this interpretation is accurate, the privilege is broader than the corresponding FOIA exemption b(7), which only protects investigatory records when disclosure would cause one of six specific harms.[98] And it would seem that fewer documents would be available in discovery. But, as a practical matter, a party's access to investigatory files in discovery is at least as great as that of a FOIA requester. Parties primarily seek discovery of agency investigatory files in tort suits which involve claims of wrongdoing or closed files whose release would not impede law enforcement. Furthermore, while parties in both tort[99] and judicial enforcement actions[100] have only limited access in civil discovery to open investigatory files, a FOIA requester's access is no greater because exemption b(7)(A) generally precludes access to investigatory records in pending proceedings until those records would be available through discovery.[101]

A party seeking documents that contain the names of confidential sources is also more likely to obtain the document through discovery than by using the FOIA. FOIA exemption b(7)(D) affords absolute protection to records that would disclose a confidential source if released, while the informer's privilege affords only qualified protection.[102] Further, upon a showing of need, tort plaintiffs may obtain investigatory reports without the redactions that would be made to protect the personal privacy of informants, witnesses, or law enforcement officers when an agency releases the same documents under the FOIA (exemption b(7)(C)).[103]

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97. *See, e.g.*, Black v. Sheraton Corp. of Am., 564 F.2d 531, 545-46 (D.C. Cir. 1977) (closed investigatory files may be privileged if disclosure would tend to reveal law enforcement techniques or sources); Machin v. Zuckert, 316 F.2d 336, 339 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963) (investigative report privileged if disclosure would hamper efficient operation of important government program).

98. 5 U.S.C. 552(b)(7)(A)-(F) (1982).

99. *E.g.*, Swanner v. United States, 406 F.2d 716, 719 (5th Cir. 1969) (no abuse of discretion for trial court to deny tort plaintiff access to open investigatory file). *But cf.* Brown v. Thompson, 430 F.2d 1214, 1216-1217 (5th Cir. 1970) (dismissing a tort plaintiff's complaint with prejudice for lack of proof may be an abuse of discretion if a privileged active file eventually may become discoverable).

100. The government must provide discovery of the evidence it anticipates using at trial, but the remainder of the open file, with the exception of exculpatory and *Jencks* material, may constitute privileged work product. *See* J.H. Rutter Rex Mfg. Co. v. NLRB, 473 F.2d 223, 234 (5th Cir.), *cert. denied*, 414 U.S. 822 (1973).

101. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 232 (1978).

102. *See In re* United States, 565 F.2d 19, 22-23 (2d Cir. 1977), *cert. denied*, 436 U.S. 962 (1978) (tort suit); Wirtz v. Continental Fin. & Loan Co., 326 F.2d 561, 563-64 (5th Cir. 1964) (enforcement proceeding).

103. *See* Frankenhauser v. Rizzo, 59 F.R.D. 339, 345 (E.D. Pa. 1973); Note, *Discovery of Government Documents and the Official Information Privilege*, 76 COLUM. L. REV. 142, 157-62

Many government lawyers fear that allowing the use of the FOIA for discovery purposes will undermine many of the protections that discovery provides. A party's access to government documents under Rule 34, although quite broad, is subject to several constraints. A request must be timely and the documents must be relevant to the litigation; in addition, the Supreme Court has amended the civil rules to impose further limitations to prevent discovery abuse. Discovery abuses fall into two categories,[104] both largely attributable to excessive adversariness by attorneys.[105] First, parties engage in discovery avoidance through delay, obfuscation, and other strategems. Judges are reluctant to impose sanctions even for direct violations of the discovery rules because they do not want to become involved and do not want to punish the client for the faults of the attorney.[106] Second, parties zealously overuse discovery, although there is considerable controversy over whether this problem is pervasive or limited to "big" cases.[107] Seeking to win a case through discovery, lawyers sometimes make redundant or excessive requests.[108] A variant of these abuses occurs when a responding party "dumps" a huge mass of disorganized documents on the requester.[109] The amended discovery rules respond to these abuses by increasing judicial control over discovery, and thus abandoning the prior philosophy that the rules should be "designed to encourage extrajudicial discovery with a minimum of judicial intervention."[110]

The new discovery rules build upon the experience acquired by judges trying cases under local rules of court[111] and under the case management approach recommended by the *Manual for Complex Litigation*.[112] Rule 26(f), added in 1980, authorizes the trial court to hold a discovery conference to identify issues and to establish plans, schedules, and limi-

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(1976). For a FOIA case describing the redactions permissible under the FOIA but not in discovery, see Nix v. United States, 572 F.2d 998, 1001-06 (4th Cir. 1978).

104. *See* Sherman & Kinnard, *supra* note 84, at 246.

105. *See* Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978).

106. *See* Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CALIF. L. REV. 264, 273-74 (1979).

107. *See* Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806, 812-13 (1981).

108. *See* Rosenberg, *Discovery Abuse*, 7 LITIGATION, Spring, 1981, at 8.

109. *See* Pope, *Rule 34: Controlling the Paper Avalanche*, 7 LITIGATION, Spring, 1981, at 28.

110. Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, Advisory Committee's Explanatory Statement Concerning Amendments to the Discovery Rules, 48 F.R.D. 485, 488 (1970).

111. *See* Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981).

112. *See* MANUAL FOR COMPLEX LITIGATION § 1.10 (1981) (supplement to C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE (1982)).

tations applicable to discovery. The rule only requires the court to hold a conference if an attorney shows that he has made reasonable efforts to agree on these matters with opposing counsel. The draftsmen of Rule 26(f) thus did not contemplate that discovery conferences would become routine.[113] But in 1983, the Court amended Rule 16[114] to require the trial court to enter a scheduling order (containing time limits for the completion of discovery) within 90 days of the filing of a complaint in all actions not exempted by a district court rule.[115] The amendment's elaborate provisions for pretrial conferences and orders further encourage judicial control.[116]

The 1983 amendments to Rule 26 also augment judicial control by requiring the trial court to limit discovery if it is "unreasonably cumulative or duplicative" or is "unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake."[117] The judicially fashioned discovery plan should include, in all but the simplest cases, strict time limits and simultaneous discovery in separate waves. After a first wave limited to discovery of sources of information (*i.e.*, the names of witnesses and the existence, location, and names of custodians of discoverable documents), successive waves of discovery should follow on the merits and on any special issues raised by the litigation.[118] Trial judges, when determining what constitutes "redundant" or "excessive" discovery, must consider the importance of the case. Although it is uncertain whether judges have the capacity or fortitude to enforce the results of such a balancing test,[119] the government may now resist the production of relevant documents on the ground that the requests are cumulative or excessively burdensome given the importance of the case. Closing discovery in this fashion would encourage litigants to use the FOIA.

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113. Advisory Committee Notes to 1980 Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 524, 526-27 (1980).

114. FED. R. CIV. P. 16(b) (effective August 1, 1983). For the text of the amended rule, see 97 F.R.D. 165, 168-69 (1983).

115. FED. R. CIV. P. 16(b)(3).

116. *Id.* at 16(c)-(e).

117. *Id.* at 26(b)(1). The 1983 amendments also repealed the final sentence in former Rule 26(a), which left the frequency of discovery to the judgment of the parties, subject only to the court's authority to issue a protective order.

118. *See* MANUAL FOR COMPLEX LEGISLATION, *supra* note 112, at § 0.50.

119. Because the optimal level of discovery will vary from case to case, there are no absolute boundaries. In the abstract, the limitations can only be said to be analogous to, but narrower than, the former relevancy limitations. *See* Sherman & Kinnard, *supra* note 84, at 280. In drafting the 1980 amendments, the Advisory Committee on the Civil Rules rejected a proposal that would have limited discovery in civil actions to any unprivileged matter relevant to a claim or defense of any party to the proceeding. *Id.* at 247 n.7.

### *C. Production of Documents Under Rule 45*

Although Rule 34 only applies to discovery from a party, Rule 45 of the Federal Rules of Civil Procedure permits a party to discover documents from a person who is not a party. To obtain agency records under this rule, the party serves a notice to take the deposition of the agency employee who has possession or control of the records and then serves a subpoena on the deponent to produce the documents.[120] Because Rule 34 only requires the production of documents in the possession, custody, or control of a party,[121] Rule 45 is the only discovery device available for obtaining agency records in private litigation and in government litigation to which the agency possessing the desired records is not a party. With respect to the latter category of cases, the courts rarely address the status of an agency not named as a party when the United States or another agency is a named party. Private litigants frequently ask Department of Justice lawyers to produce documents generated by agencies that are not named parties. If these requests are sufficiently specific, the Department usually does not limit its search to its own or client agencies' files, but makes reasonable efforts to produce documents from throughout the government.

These discovery requests raise legal and practical problems. If only the United States or agency A is a named party, it is often unclear whether the records of agency B are within the possession, custody or control of the named party, and thus discoverable under Rule 34. In the leading case on this issue, the District Court for the District of Columbia held, in *United States v. AT&T*,[122] that all executive branch agencies were party plaintiffs in an antitrust suit bought by the United States.[123] The court reasoned that unencumbered discovery under Rule 34 was appropriate against executive branch agencies because the government's allegations were wide-ranging and many agencies had participated in the policy formulation that led to the lawsuit.[124]

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120. *See* FED. R. CIV. P. 45(d)(1). The party may also subpoena the agency custodian to produce documentary evidence at a hearing or trial. *See id.* at 45(b). Subpoenas returnable at a deposition, on the other hand, are not limited to documentary evidence but may obtain the production of documents containing matters within the scope of the discovery rules. *See id.* at 45(d)(1). Most state courts have adopted a comparable rule. Because the federal government is rarely a party to civil actions in the state courts, parties in state court litigation normally will seek discovery of agency records under rules similar to Rule 45.

121. *See id.* at 34(a).

122. 461 F. Supp. 1314 (D.D.C. 1978).

123. *Id.* at 1334.

124. *Id.*

The narrowness of the *AT&T* court's holding[125] confirms the uncertainty in other government litigation surrounding the status of agencies not named as parties. In some situations, agency B plainly is not a party within the meaning of Rule 34. The *AT&T* court itself held that independent agencies, such as the FCC, are not party plaintiffs in antitrust suits brought by the United States because the records of those agencies are beyond the control of the executive branch.[126] Thus, although private parties may rely on the voluntary efforts of government counsel to obtain records from agencies who may not be parties, one may wonder whether this search will be as thorough as it would be if the agency were directly served with a discovery request. Rule 45 allows such a request, as does the FOIA.

The scope of discovery is the same under Rule 45 and Rule 34, but Rule 45 procedures are more cumbersome. A party may serve a Rule 34 request on an opposing party through his counsel.[127] Under Rule 45, on the other hand, the party must identify, subpoena, and depose the agency official who possesses or controls the records.[128] While parties normally do not charge each other fees under Rule 34,[129] Rule 45(b) authorizes a court to condition document discovery from a nonparty on the discovering party's advancement of reasonable costs.[130] Finally, contempt, the only sanction available for failure to provide discovery under Rule 45,[131] is not likely to be effective against agency officials, especially high-ranking ones.[132]

Agency housekeeping regulations also apply to Rule 45 and state court subpoenas. The Housekeeping Statute[133] authorizes agencies to prescribe regulations for the custody, use, and preservation of agency records. Although a 1958 amendment states that the statute does not authorize "withholding information from the public or limiting the availability of records to the public,"[134] it did not disturb agency regulations which instruct employees not to testify or to produce documents

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125. On the narrowness of the *AT&T* court's holding, see Trane Co. v. Klutznick, 87 F.R.D. 473, 475 (W.D. Wis. 1980).

126. *AT&T*, 461 F. Supp. at 1335-37.

127. *See* FED. R. CIV. P. 5(b).

128. *See id.* at 45(d).

129. *See supra* note 84.

130. *See* FED. R. CIV. P. 45(b).

131. *See id.* at 45(f).

132. *See* 4 MOORE'S FEDERAL PRACTICE § 26.61 [5.-1] (2d ed. 1982). The agency may invoke a housekeeping regulation to vest in the agency head or other high-level official the decision whether to produce a subpoenaed document.

133. 5 U.S.C. § 301 (1982).

134. Act of Aug. 12, 1958, Pub. L. No. 85-619, 1958 U.S. CODE CONG. & AD. NEWS (72 Stat.) 547.

without the permission of their superiors.[135] Those regulations normally require document custodians to bring subpoenas to the attention of the general counsel or other agency official and then to await instructions.[136] Some housekeeping regulations permit the custodian to release records disclosable under the FOIA on his own authority.[137] Others require the discovering party to submit a summary of the information sought and its relevance to the pending proceeding.[138] A few agencies will produce documents without a subpoena; they expect the party's lawyer to establish the relevance of the records by supplying the pleadings or other information about the pending proceeding.[139] All of the agencies contacted expressed a willingness to help private litigants by releasing as much information as they could. Normally, an agency will negotiate a reasonable accommodation for producing its records, under a protective order if necessary, to avoid the need for agency employees to appear and give testimony. No doubt this informal approach makes the disclosure of records in the hands of nonparty agencies less cumbersome than it might be, but if an agency resists disclosure the discovering party must proceed under the inhospitable provisions of Rule 45.

### *D. Disclosure Under the Federal Rules of Criminal Procedure*

Federal Rule of Criminal Procedure 16(a)(1)(C) requires the government to disclose, upon the request of a criminal defendant, all documents and tangible objects in the possession, custody, or control of the government "which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or

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135. *See* 4 MOORE'S FEDERAL PRACTICE. *supra* note 132, at §26.61 [4.-2]. For pre-1958 decisions upholding housekeeping regulations and overturning sanctions imposed on agency custodians who refused to produce subpoenaed documents without the permission of their superiors, see United States *ex rel*. Touhy v. Ragen, 340 U.S. 462 (1951); Boske v. Comingore, 177 U.S. 459 (1900).

136. *See, e.g.*, 16 C.F.R. § 4.11(e) (1983) (FTC). None of the agencies contacted require, as the cases cited *supra*, note 135, seemingly permit, that the discovering party serve a subpoena on the agency head rather than on a lower level custodian, whom a party often may find more convenient to serve. But for a case where an agency did use a housekeeping regulation to bar the production of nonprivileged documents solely because the discovering party subpoenaed a subordinate agency employee rather than the agency head, see United States Steel Corp. v. Mattingly, 89 F.R.D. 301, 302 (D. Colo.), *rev'd*, No. 80-1647 (10th Cir. Aug. 12, 1980), *cert. denied*, 450 U.S. 980 (1981), discussed in Lively, *Government Housekeeping Authority: Bureaucratic Privileges with a Bureaucratic Privilege*, 16 HARV. C.R.-C.L. L. REV. 495, 502-11 (1981).

137. 7 C.F.R. § 1.15 (1983) (Department of Agriculture); 43 C.F.R. § 2.80 (1982) (Department of the Interior).

138. 28 C.F.R. § 16.22(d) (1982) (Department of Justice)(summary mandatory); 29 C.F.R. § 2.21 (1982) (Department of Labor) (departmental officials may waive summary).

139. For example, this is the practice in the Office of the Comptroller of the Currency in the Department of the Treasury and at the Federal Reserve Board.

were obtained from or belong to the defendant." Major problems associated with this rule include both the overdisclosure and underdisclosure of documents.

The first problem resembles that posed by the "boxcar" production of documents under Rule 34 of the Federal Rules of Civil Procedure, but it is aggravated in criminal cases by the absence of pretrial mechanisms (*e.g.*, interrogatories or requests for admissions) for narrowing the issues. In complex cases, the government often discloses a mass of documents which the defendant, on account of the Speedy Trial Act,[140] has only 60 to 90 days to review.[141] The defendant's efforts to extract useful information from the documents may be hampered by the absence of a "road map" to the government's case and by the government's unwillingness to identify which documents will serve as its exhibits (*i.e.*, the government discloses the documents *from which* its exhibits will be chosen).[142] Although the defendant may obtain a substantial number of documents, the inability to identify before trial the factual issues in dispute makes the disclosure less useful.

The second problem arises when the defendant requests documents for his own defense that are not part of the government's case-in-chief and which it claims are not "material." The rule does not define that term, and a number of recent cases indicate that it covers little more than exculpatory material that the prosecutor must disclose anyway under the *Brady* doctrine.[143] Another line of cases interprets "material" more broadly to require the government to disclose all requested documents relevant to an asserted defense.[144]

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140. 18 U.S.C. §§ 3161-3174 (1982).

141. 18 U.S.C. § 3161 requires the prosecutor to bring the defendant to trial within this time period.

142. Obermaier, *Special Aspects of Litigating White-Collar Criminal Cases*, 6 LITIGATION, Spring, 1980, at 12; Doramus, *The White Collar Chafes: Looking for Evidence after Indictment*, 6 LITIGATION, Spring, 1980, at 16. For a case holding that the government complied with FED. R. CRIM. P. 16(a)(1)(C) when it disclosed its entire case file without designating its exhibits, see United States v. Marino, 639 F.2d 882, 889 (2d Cir. 1981), *cert. denied*, 454 U.S. 825 (1982) (documents disclosed did not exceed capacity of attorney to read and study in preparation for a major trial).

143. These cases hold that a document is material under FED. R. CRIM. P. 16(a)(1)(C) only if its disclosure would have significantly altered the quantum of proof in the defendant's favor. *E.g.*, United States v. Rhoads, 617 F.2d 1313, 1319 (8th Cir. 1980); United States v. Orzechowski, 547 F.2d 978, 984, (7th Cir. 1977), *cert. denied*, 431 U.S. 906 (1979); United States v. Marshall, 532 F.2d 1279, 1285 (9th Cir. 1976); Ross v. United States, 511 F.2d 757, 762-63 (5th Cir. 1973), *cert. denied*, 423 U.S. 836 (1975).

144. *E.g.*, United States v. Felt, 491 F. Supp. 179, 186 (D.D.C. 1979); United States v. Leichtfuss, 331 F. Supp. 723 (N.D. Ill. 1971); United States v. Tanner, 279 F. Supp. 457, 469-470 (N.D. Ill. 1967). For an argument that these cases properly interpret FED. R. CRIM. P. 16 and that *Ross* and its progeny are in error, see Reznick, *Pretrial Discovery in the Federal Courts*, in 1A CRIMINAL DEFENSE TECHNIQUES § 10.01[5] (1983).

Under the narrow interpretation of Rule 16, the government need not disclose relevant documents (*i.e.*, ones that might lead to admissible evidence) that are available to the public under the FOIA.[145] This anamoly led the trial court in *United States v. Brown*[146] to order the government to produce relevant documents releasable under the FOIA, even though the defendant had not made FOIA requests to the agencies with custody of the records.[147] This approach is satisfactory when the defendant seeks a discrete number of arguably relevant documents, but a defendant should not be allowed to delay trial by obtaining massive FOIA-like searches that are unlikely to produce relevant material and that require the processing of voluminous, and often exempt, documents.[148]

The difference between the two interpretations of Rule 16's materiality requirement may be more apparent than real, however, because there is no judicial supervision of the government's document disclosures under the rule. In most districts, the defendant receives what the United States Attorney decides to disclose. Disclosure policies vary widely from one prosecutor's office to another; in some, the defendant obtains access to the prosecutor's whole file while in others he receives the legal minimum (*i.e.*, the government's exhibits plus exculpatory and *Jencks* materials).[149] The *Manual for Complex Litigation* recommends a more active judicial role in complex criminal cases, but it also recognizes that voluntary discovery may be equally effective.[150] Thus, a defendant's access to government documents under Rule 16 remains largely a matter of prosecutorial discretion.

The limitations of Rule 16 have led criminal defendants to use

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145. *See, e.g.*, *Orzechowski*, 547 F.2d at 983-85 (finding immaterial certain internal memoranda of the DEA containing policy guidelines for determining whether a substance was an unlawful isomer of cocaine). The adequacy of the agency's testing procedure was at issue at trial and the memoranda therefore were plainly relevant. Although the court did not address the issue, the memoranda do not appear to be exempt under the FOIA. They contained no deliberative matter (exemption b(5)) and their disclosure would hardly risk circumvention of statutes or regulations (exemption b(2)). *See also* Crooker v. Bureau of Alcohol, Tobacco and Firearms, 670 F.2d 1051 (D.C. Cir. 1981)(en banc).

146. 562 F.2d 1144, 1151 (9th Cir. 1977).

147. *Id.* *See also* United States v. Wahlin, 384 F. Supp. 43, 47-48 (W.D. Wis. 1974).

148. United States v. Layton, 2 GOV'T DISCLOSURE SERV. ¶ 81,390 (N.D. Calif. 1981) (trial court in criminal case denied defendant's request for a FOIA search for CIA records on the Jonestown massacre). In *Brown*, on the other hand, the defendants were charged with smuggling heroin into a prison. One of the defendants sought to obtain discovery, both under Rule 16 and under the FOIA, of the Bureau of Prisons' records on the defendants' alleged act. *See also* the DeLorean case, discussed *infra* note 246.

149. *See* Feffer & Abrams, *Trial of a Criminal Tax Fraud Case: Prosecution and Defense Perspectives*, 6 LITIGATION, Spring, 1980, at 19.

150. MANUAL FOR COMPLEX LITIGATION, *supra* note 112, at § 6.10.

Rule 17(c) of the Federal Rules of Criminal Procedure for discovery purposes. That rule permits them to subpoena nonparties (including federal agencies) to produce relevant documentary evidence in court at any time prior to trial. Although Rule 17(c) is only supposed to permit parties to obtain evidence for trial,[151] private practitioners assert that it is an invaluable discovery device in white-collar cases when the prosecutor does not have all the relevant documents or refuses to disclose, on grounds of immateriality, the documents which he has acquired.[152] Rule 17(c) authorizes the trial court to order the pretrial production of the subpoenaed documents; but, if the defendant wishes to obtain the documents prior to trial, it is necessary, or at least advisable, to file a motion for the issuance of the subpoena.[153] In *United States v. Iozia*,[154] Judge Weinfeld formulated the rigorous showing that the movant must make to obtain pretrial production:

> (1) That the documents are evidentiary and relevant;
> (2) That they are not otherwise procurable by the defendant reasonably in advance of trial by exercise of due diligence;
> (3) That the defendant cannot properly prepare for trial without such production and inspection in advance of trial and the failure to obtain such inspection may tend unreasonably to delay the trial;
> (4) That the application is made in good faith and is not intended as a general fishing expedition.[155]

Despite the courts' general endorsement of *Iozia*, practitioners report that substantial document discovery may be obtained under Rule 17(c) if the defendant demonstrates real need. Courts do not expect the defendant to know the evidentiary value of the documents until he has seen them and the government has presented its case. Thus, a defendant need not introduce the discovered documents into evidence and may find some of them more useful than others. While Rule 17(c) is technically not a discovery device, it serves the same function by allowing the defendant to obtain documents before trial.

Rule 17(c) subpoenas have two distinct advantages over FOIA requests. First, the defendant may obtain agency records exempt under the FOIA. A striking example of this occurs in prosecutions for defrauding the United States when courts order agencies to produce bank examiners' reports (exemption b(8)) or internal memoranda (exemption

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151. *See* United States v. Nixon, 418 U.S. 683, 698 (1974).
152. *See, e.g.*, Doramus, *supra* note 142.
153. 2 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE: CRIMINAL § 274, at 155 (1982).
154. 13 F.R.D. 335 (S.D.N.Y. 1952).
155. *Id.* at 338.

b(5)) that reflect what the agency knew, at a particular time, about the defendant's activities or representations. Second, the defendant may obtain a more timely response under Rule 17(c) than under the FOIA. The subpoena is returnable prior to trial but there is no assurance that a FOIA request will receive a similarly timely response, especially from law enforcement agencies which have significant backlogs of FOIA requests.[156] The criminal practitioner is thus well advised, in the limited time between charge and trial, to concentrate document discovery efforts on mastering those obtained from the prosecutor under Rule 16(a)(1)(C) and on seeking through a Rule 17(c) subpoena whatever other documents he needs.

### *E. Production of Documents in Agency Adjudication*

In 1970, the Administrative Conference recommended that parties to formal adjudicatory proceedings have access through discovery to all relevant, unprivileged information.[157] The recommendation addressed six discovery tools (including the production of documents and tangible things) and specified minimum standards for their use.[158] To ensure that the administrative process remained speedier and less expensive than the judicial, the Conference assigned a major role to the presiding officer. With respect to document discovery, the Conference recommended that the parties exchange evidentiary exhibits and witness lists at a prehearing conference[159] and that the parties be required to apply to the presiding officer for an order if they wished to obtain the production of additional documents.[160] Most agencies have substantially complied with the Conference's recommendation for affording full discovery under the control of the presiding officer. In 1977, fifteen out of the twenty independent agencies to which the recommendation applied were in substantial compliance, three were in partial compliance, and only two (the NLRB and the United States Postal Service) were not in compliance.[161]

Despite this greater availability of discovery in agency adjudication, parties continue to use the FOIA for discovery purposes. Many

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156. One practitioner reports that he filed FOIA requests prior to his client's criminal trial to obtain information on an agency's control over its informants. Years later, long after the completion of the trial and appellate process, the agency is still releasing records to him on a regular basis.

157. ACUS Recommendation 70-4, 1 C.F.R. § 305.70-4 (1983).

158. *See id.*

159. *See id.* at .70-4(1).

160. *See id.* at .70-4(6)(b).

161. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION IMPLEMENTATION SUMMARY 7-8 (1977).

agencies still do not authorize the presiding officer to order the parties to produce relevant documents, thus limiting document discovery from the agency or other parties to the prehearing exchange of exhibits.[162] Under this procedure a party only receives notice of an opponent's case, not documents that might undermine that case or support his own case. Although at some agencies the presiding officer may use his control over the parties' prehearing exchange to provide further discovery,[163] the parties' inability to compel the production of relevant documents naturally encourages the use of the FOIA. The FCC has approved this use of the FOIA, instructing parties to adjudicatory proceedings to make FOIA requests whenever they seek document discovery from the agency.[164] The Commission thus avoids the creation of duplicative disclosure mechanisms and retains final authority to make release decisions.[165] The FDA also uses the FOIA in this manner, but the FDA, unlike the FCC, lacks subpoena authority from Congress; it is therefore

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162. Among the agencies contacted, only the FTC (16 C.F.R. § 3.37 (1983)), the Consumer Product Safety Commission (16 C.F.R. § 1025.33 (1983)), the NRC (10 C.F.R. § 2.744 (1983)), the Department of Energy (10 C.F.R. § 205.198 (1983)), and the National Highway Traffic Safety Administration in the Department of Transportation (49 C.F.R. §511.33 (1983)) explicitly authorize the presiding officer in an adjudicatory proceeding to order a party (including the agency) to produce relevant documents. At the EPA (40 C.F.R. § 22.19(b)(1982)), the SEC (17 C.F.R. § 201.8(d)(1982)), the CFTC (17 C.F.R. § 10; 42(a)(1982)), the FERC (18 C.F.R. § 1.18 (1982)), the Federal Reserve Board (12 C.F.R. § 263.6(c)(1983)), the OSHA (29 C.F.R. § 2200.51 (1982)), the Department of Agriculture (7 C.F.R. § 1.140 (1983)), and the FDA (21 C.F.R. § 12.85 (1982)), the presiding officer lacks that authority, but he may order the parties to exchange their witness lists and documentary exhibits prior to the hearing. At the FCC, the presiding officer may order private parties to produce relevant documents, but he may not order the agency to do so (47 C.F.R. § 1.325 (1982)). At the INS, the rules of practice do not provide for discovery but do afford a party or his attorney prehearing access to the Service's evidence (8 C.F.R. § 292.4(b)(1983)). Attorneys at several other agencies report that discovery of the agency's case is available to the parties to adjudicatory proceedings even though the applicable rules of procedure do not formally provide for it. Examples include pilot and airplane certificate proceedings before the National Transportation Safety Board (49 C.F.R. pt. 821 (1982)) and contractor and grantee debarment proceedings in the Department of Housing and Urban Development (24 C.F.R. pt. 24 (1982)).

163. At the CFTC, for example, the Commission has required the Division of Enforcement to disclose all exculpatory or *Brady* material when it submits its case-in-chief. *See, e.g., In re* First Guar. Metals Co., [1980-82 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,074 (1980). The presiding officer often conducts a hearing to determine whether the Division has fulfilled its disclosure obligations. At the FDA, the presiding officer may require a party to produce all prior reports authored by a witness, or on which the witness relies, under threat of refusing to permit the witness to testify. At other agencies, such as the Federal Reserve Board, the presiding officer may engage in considerable jawboning to convince the parties to include additional relevant documents in their prehearing evidentiary submissions.

164. 47 C.F.R. § 1.325(b) (1982). The Commission's rules do not subject it to orders to produce documents in adjudicatory proceedings, even when one of its bureaus is a party.

165. The Commission itself determines appeals from initial denials of FOIA requests by the Executive Director. 47 C.F.R. §0.461(k)(1982). While the Office of the Executive Direc-

unlikely that a presiding officer at the FDA has statutory authority to order the agency to produce relevant documents. Thus, if a party to an FDA adjudicatory proceeding wishes to discover agency records not included in the agency's submission of its case, the presiding officer usually suggests that the party make a FOIA request.[166]

The Conference's Discovery Recommendation, on the other hand, recognized that the FOIA cannot satisfy a private party's discovery needs.[167] Because a party to an agency adjudication needs more information than the public does, he should have greater access than the public. The FCC recognizes this need when it uses FOIA appeals to determine the scope of discovery available to a party. In the FOIA appeal of *Gilmore Broadcasting Corp.*,[168] the Commission held that the Broadcast Bureau must release certain exempt documents from its investigatory files to ensure the respondent a fair license revocation hearing. The Commission then issued a protective order barring the requester (the respondent in the licensing proceeding) from publicly disclosing these sensitive documents. This discretionary, nonpublic release of exempt records does not violate the FOIA's "any person access" standard for nonexempt records. Although most agencies still maintain a uniform access policy (*i.e.*, all FOIA requesters obtain the same access),[169] the Commission's limited experience demonstrates that an agency may use FOIA procedures to afford parties to litigation access to agency records not available to other FOIA requesters.[170]

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tor is responsible for all initial denials, it normally follows the recommendations of the operating bureau with custody of the records (*i.e.*, the party to the proceeding).

166. *See, e.g.*, Sterling Drug, Inc. v. Harris, 488 F. Supp. 1019, 1023 (S.D.N.Y. 1980). Agency staff do not have that option and must be content with a private party's submission.

167. The Conference recommended that the presiding officer have authority to order the agency conducting the proceeding to produce relevant documents. 1 C.F.R. §305.70-4(6)(c)(1983). For the discussion in the consultant's report on the inadequacy of the FOIA as a substitute discovery device, see Tomlinson, *Discovery in Agency Adjudication*, 1971 DUKE L.J. 89, 133-35.

168. 69 F.C.C.2d 2105 (1978). For other FOIA appeals by parties to formal adjudicatory proceedings, see New England Broadcasting, Inc., 52 RAD. REG. 2d (P&F) 1054 (1982); New England Broadcasting, Inc., 52 RAD. REG. 2d (P&F) 1418 (1982); Mid-Continent Telecasting, Inc., 56 F.C.C.2d 814 (1975).

169. *See, e.g.*, 21 C.F.R. § 20.21 (1982) (FDA).

170. The Commission recently completed an evaluation of its discovery rules and decided to make only two minor changes. *See* Discovery Procedures in Adjudicatory Hearings, Fed. Reg. 51869 (Nov. 18, 1982). Approximately one-fourth of the practitioners who responded to the Commission's survey indicated that Commission procedures did not afford parties adequate access to Commission files that were not routinely available to the public. The remainder of the respondents were either satisfied with present procedures or had no need to use them. Most respondents did believe, however, that the Commission should establish a discovery procedure affording access, on the basis of need, to Commission records not routinely available to the public. The respondents also approved the Commission's recent decision

In addition to affording any discovery required by rule, agencies have due process obligations. It is generally accepted, for example, that in enforcement proceedings agencies must disclose exculpatory material as well as the prior statements of agency witnesses upon completion of their direct testimony.[171] In addition, although the courts generally have upheld the NLRB's refusal to adopt discovery rules,[172] they have recognized in dicta that a denial of discovery in a particular case may so prejudice a party as to be a denial of due process.[173] What is involved in these cases is not really a right to prehearing discovery, but the right to present proof at the hearing itself. Due process includes the right to be heard in one's own defense[174] and a due process violation may result if an agency denies a party access to evidence that is crucial to presenting that defense.[175] Thus, a minimum level of discovery may be constitutionally required.[176]

## III. USES OF THE FOIA FOR DISCOVERY PURPOSES

Discovery is the most efficient mechanism for obtaining disclosure of agency documents relevant to a proceeding. Available free of charge, it ordinarily offers greater access than does the FOIA. Furthermore, an agency's production of documents in discovery necessarily precedes the trial or hearing for which the documents are sought. On the other hand, a litigant making a FOIA request pays the agency's search and duplica-

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requiring parties to make discovery requests to the presiding officer for the production of nonpublic records submitted by private persons before seeking them under the FOIA. *See* Central Ala. Broadcasters, Inc., 70 F.C.C.2d 1762, 1766-67 (1979). For the consultant's report containing these findings, see M. PAGLIN, REPORT ON EVALUATION OF THE FEDERAL COMMUNICATIONS COMMISSION'S DISCOVERY PROCEDURE IN ADJUDICATORY HEARINGS 61-63 (1982).

171. On the constitutional and statutory bases for the *Jencks* rule in administrative enforcement proceedings, see Harvey Aluminum, Inc. v. NLRB, 335 F.2d 749, 753-55 (9th Cir. 1964).

172. *See, e.g.*, Trojan Freight Lines, Inc. v. NLRB, 356 F.2d 947, 948 (6th Cir. 1966); NLRB v. Globe Wireless, Ltd., 193 F.2d 748, 751 (9th Cir. 1951). *But see* NLRB v. Safeway Steel Scaffolds Co., 383 F.2d 273, 278 (5th Cir. 1967), *cert. denied*, 390 U.S. 955 (1969).

173. *See* NLRB v. Valley Mold Co., 530 F.2d 693, 695 (6th Cir. 1976), and cases cited therein.

174. Goss v. Lopez, 419 U.S. 565, 579 (1977).

175. The opportunity to be heard includes, in most proceedings, the opportunity to submit one's proof and to have it considered by the agency decider. *See, e.g.*, Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954).

176. *Cf.* McClelland v. Andrus, 606 F.2d 1278, 1286 (D.C. Cir. 1979) (lack of access by federal employee in adverse action proceeding to "uniquely relevant" report could, depending on what the report shows, do "violence to our conception of fair procedure and due process"); Marroquin-Manriquez v. INS, 699 F.2d 129, 135 (3d Cir. 1983) (denial of discovery did not result in fundamentally unfair proceeding because alien had access to information by other means).

tion costs, obtains the same access as everyone else, and has no assurance that the agency will release the records in time for the party to use them in litigation. Nevertheless, parties or potential parties to litigation often use the FOIA in place of normal discovery procedures. This Part explores the reasons for those uses and analyzes their impact on the government.

### *A. The Use of the FOIA to Obtain Information for a Potential Suit against the Government*

The FOIA provides a mechanism for obtaining the release of agency records prior to the filing of a lawsuit, at a time when discovery is not yet available. For example, persons injured in accidents occurring on federal installations or involving on-duty federal personnel or equipment are naturally interested in obtaining any official reports or regularly kept records (*e.g.*, hospital records or performance records on equipment) that might shed light on the incident or help determine whether to file a lawsuit. In most instances the suit would be against the United States under the Federal Tort Claims Act. Because the *Feres* doctrine bars most suits by servicemen under the Act,[177] they often use the FOIA to determine whether a private manufacturer or supplier of equipment is a potential defendant. Federal employees contemplating title VII antidiscrimination suits against the government also use the FOIA to obtain agency personnel records. Similarly, government contractors, prior to bringing a contract dispute before a Board of Contract Appeals, routinely use the FOIA to obtain records on contract specifications or on the agency's disallowance or allocation of the contractor's costs.[178]

Courts have condemned abusive and frivolous lawsuits brought with nothing more than hope and faith in the discovery process.[179] The FOIA thus serves an important function in assisting potential litigants to determine whether they have a valid claim. Former Rule 11 of the Federal Rules of Civil Procedure provided that an attorney's signature on a pleading constituted a certification that he had read the pleading and that to the best of his knowledge, information, and belief there was "good ground to support it."[180] In 1983, the Supreme Court amended

177. Feres v. United States, 340 U.S. 135 (1950).

178. Boards of Contract Appeals afford discovery similar in scope to that available in the district courts under the Federal Rules of Civil Procedure. Peacock, *Discovery Before Boards of Contract Appeals*, 13 PUB. CONT. L.J. 1 (1982).

179. *E.g.*, Rhinehart v. Stauffer, 638 F.2d 1169, 1171 (9th Cir. 1979); Anderson v. Cryavoc, Inc., 96 F.R.D. 431, 431 (D. Mass 1983).

180. Courts construed the "good ground" requirement to apply to both the factual and legal elements of the complaint. *See, e.g.*, Heart Disease Research Found. v. GM, 15 Fed. R.

Rule 11 to strengthen the certification requirement. By signing a pleading, the attorney now certifies not only his belief that the pleading is "well grounded in fact," but also that he has formed that belief after "reasonable inquiry."[181] The new rule, as well as the majority of the cases interpreting the former rule, require an attorney to conduct a preliminary factual investigation prior to filing a complaint. On occasion it will be necessary for an attorney to obtain publicly available agency records to corroborate the basis for a client's claim. The FOIA provides a mechanism for obtaining that corroboration and fullfilling the Rule 11 obligation.

Prelitigation use of the FOIA for discovery purposes also occurs when a litigant already has an adequate factual basis for a claim. Many FOIA requesters, having decided to bring suit, merely wish to discover relevant agency records earlier than normal discovery procedures would permit. For these litigants, the FOIA provides an effective, relatively inexpensive, and, in most cases, surprisingly speedy tool for obtaining relevant documents from government hospitals, military bases, and other federal installations. This prelitigation use of the FOIA occurs routinely in tort, employment discrimination, and contract suits against the government.

Government lawyers representing agencies in litigation are ambivalent about the use of the FOIA as a discovery tool when reciprocal discovery is not available. Some believe it unfair because they must work hard to "catch up" on discovery while their better prepared adversaries push for an early trial date. Others argue that a potential litigant's access to more complete information may convince the litigant not to file suit or to accept an early settlement. All seem to agree that the government suffers no prejudice that it cannot overcome with hard work. The government lawyers' principal concern is that the litigant may obtain agency records that are privileged in the discovery context (*e.g.*, confidential safety investigations).

### *B. The Use of the FOIA to Obtain Information about a Potential Governmental Proceeding against the Requester*

The government must also investigate the factual basis of its case before bringing suit. Quite often, a potential defendant learns of an investigation before the government initiates a formal action or proceeding: The arrival of an IRS special agent alerts the taxpayer that he is

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Serv. 2d 1517, 1519 (S.D.N.Y. 1972). *See also* Advisory Committee Notes to 1983 Amendments to the Federal Rules of Civil Procedure, 97 F.R.D. 165, 198 (1983).

181. FED. R. CIV. P. 11.

the subject of a criminal tax investigation; a friend informs a corporate officer that a SEC investigator has interviewed him and shown him the Commission's order of investigation naming the officer; the government serves the subject with a subpoena or other investigatory demand. In all these situations, the requester may use the FOIA defensively to attempt to discover what the government knows.[182]

Although the requester may use the information obtained through the FOIA to prepare for an eventual trial or hearing, the availability of the FOIA is more significant for purposes of prelitigation advocacy because the requester will have access to discovery once the government initiates an enforcement proceeding. Criminal tax practitioners confirm that the most effective advocacy in criminal tax cases occurs before indictment when the defense attorney has an opportunity to convince government attorneys not to proceed criminally. Similar preindictment advocacy, often in the form of plea bargaining, occurs in the defense of white-collar crime. Such advocacy, to be effective, must be based on adequate information.[183]

Persons under investigation do not obtain much useful information under the FOIA. An agency may withhold investigatory records under exemption b(7)(A), if the release of the records would "interfere with" prospective or pending enforcement proceedings.[184] The exemption does not afford blanket protection to open investigatory files, but, as a practical matter, FOIA requesters obtain very little useful information on the factual or legal basis for an ongoing investigation. Usually, the most useful information obtained is confirmation of whether the requester is under investigation. For example, following an inspection by the OSHA, an employer may file a FOIA request for the inspector's report. If the agency withholds the report on the basis of exemption b(7)(A), the employer knows it is the subject of an investigation. The agency's description of the records withheld may communicate additional useful information on the scope or status of the investigation. By filing subsequent requests at regular intervals, the employer may learn

182. The FOIA requester may simultaneously file a Privacy Act request, 5 U.S.C. § 552a(d)(1982), which affords the requester access to personal records that the agency must withhold from the general public under FOIA exemption b(6).

183. Among the contacted agencies, the IRS, the Tax and Antitrust Divisions in the Department of Justice, the Department of Energy, the FTC, the CFTC, and the SEC report substantial use of the FOIA by persons under investigation. The requesters are seeking agency records pertaining to the individual requester (*i.e.*, the investigatory file), law enforcement manuals or other internal guidelines describing the steps in the investigatory process, agency rulings or statements of policy on enforcement matters, and other records that contain information on investigatory policies and enforcement techniques.

184. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 236 (1978).

whether the agency has terminated the investigation in its favor. An employer also may obtain information on the focus of a complex health investigation by securing the release of factual studies prepared by the agency which identify the practices under scrutiny.[185]

The 1974 FOIA amendments that narrowed the investigatory records exemption [186] prompted widespread efforts by persons under investigation, particularly potential respondents in unfair labor practice proceedings before the NLRB, to use the FOIA to discover records in investigatory files. In *NLRB v. Robbins Tire & Rubber Co.*,[187] the Supreme Court squelched those efforts. The Court found that although Congress amended exemption b(7) to clarify that the exemption did not "endlessly protect" investigatory material,[188] Congress intended to protect prospective enforcement proceedings from any harm caused by the premature release of evidence and information.[189] Thus, exemption b(7)(A) does not require agencies to establish "interference with enforcement proceedings" on a document-by-document basis but allows them to withhold whole categories of sensitive records in open investigatory files.[190] Lower courts have applied this categorical approach to permit agencies to withhold witness statements, documentary evidence, agents' reports and work papers, and internal memoranda that were compiled for law enforcement purposes.[191] Any agency may withhold these records even though the requester may eventually obtain them through discovery in an enforcement proceeding.[192] Withholding is also permissible if the records would be privileged in discovery (*e.g.*, they are privileged work product), because in that case their release "would increase a

185. General studies on health hazards are not exempt investigatory records compiled for law enforcement purposes.

186. Exemption b(7), as originally enacted in 1966, permitted the withholding of "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." The amended exemption permits the withholding of investigatory records compiled for law enforcement purposes only to the extent that the release of the records would result in one of six specified harms. The first listed harm is interference with enforcement proceedings.

187. 437 U.S. 214 (1978).

188. *Id.* at 230.

189. *Id.* at 232.

190. *Id.* at 236. *Robbins Tire* thus afforded categorical protection to witness statements in unfair labor practice proceedings.

191. *E.g.*, Barney v. IRS, 618 F.2d 1268, 1272-74 (8th Cir. 1980); Parker/Hunter, Inc. v. SEC, [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,873 (D.D.C. Feb. 3, 1981); Fedders Corp. v. FTC, 494 F. Supp. 325, 329-30 (S.D.N.Y.), *aff'd*, 646 F.2d 560 (2d Cir. 1980); OKC Corp. v. Williams, 489 F. Supp. 576, 586 (N.D. Tex.) *aff'd*, 614 F.2d 58 (5th Cir.), *cert. denied*, 449 U.S. 952 (1980); Hunt v. CFTC, 484 F. Supp. 47, 50 (D.D.C. 1979); Steinberg v. IRS, 463 F. Supp. 1272, 1273-74 (S.D. Fla. 1979); Grabinski v. IRS, 478 F. Supp. 486, 487 (E.D. Mo. 1979).

192. Murphy v. FBI, 490 F. Supp. 1134, 1137-38 (D.D.C. 1980).

defendant's resources and thereby weaken and interfere with the government's efforts in an enforcement action."[193]

Private practitioners confirm the limited utility of the FOIA for discovering the substance of the government's case against a person under investigation.[194] Leading criminal tax practitioners report that they no longer make FOIA requests to the IRS or to the Tax Division for records pertaining to their clients because they have never obtained the release of any useful records.[195] The NLRB reports that FOIA requests by respondents in unfair labor practice proceedings slowed significantly after the *Robbins Tire* decision. None of the criminal practitioners interviewed use the FOIA to obtain precharge discovery of the government's case, and the use of the FOIA to obtain access to open investigatory files in criminal cases is in fact comparatively rare.[196]

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193. Kantner v. IRS, 433 F. Supp. 812, 818 (N.D. Ill. 1977).

194. Although agencies are able to withhold most of the requested records, persons under investigation continue to make FOIA requests because they have nothing to lose: They may obtain useful information; if they do not, they will incur no significant fees because most agencies do not charge requesters for search time for withheld records. Lawyers responsible for FOIA matters at the IRS, the Tax, Antitrust, and Criminal Divisions in the Justice Department, the SEC, the CFTC, and the FTC confirm that they are able to prevent the release of sensitive investigatory records but cite the annoyance and effort involved in responding to FOIA requests by persons under investigation. Enforcement attorneys also object to the distraction of working with the agency's FOIA staff, but the post-*Robbins Tire* case law contains few if any instances where a court has ordered an agency to release records from an open file to a person under investigation. *See* cases cited *supra* note 191. *See also* Lively, *supra* note 48, at 79 (discussing burden for exemption b(7)).

195. They attribute the continuation of FOIA requests by persons under investigation to the ease of making requests and to the stories within the profession of occasional "surprise" releases of useful information. None of the literature on discovery in criminal tax cases offers much encouragement on the use of the FOIA. *See* Culverhouse, *Defending Criminal Tax Trials: Discovery Strategy*, 18 TRIAL, May, 1982, at 52; Feffer and Abrams, *supra* note 149, at 19; Garbis, *Defenses and Discovery in Tax Fraud Investigations*, 10 CUM. L. REV. 655 (1980). In addition, two leading practitioners' treatises discourage its use. *See* H. BALTER, TAX FRAUD AND EVASION § 12.07[4] (5th ed. 1983) (FOIA "affords very little use to defendants in tax-related prosecutions"); R. FINK, TAX FRAUD: AUDIT, INVESTIGATION AND PROSECUTION (1980).

196. In 1981, the FBI denied in whole or in part only 294 requests for records in open investigatory files (exemption b(7)(A)), while it denied in whole or in part 1912 requests for investigatory records to protect personal privacy (exemption b(7)(C)) and 1452 requests for investigatory records to protect a confidential source (exemption b(7)(D)). The former exemption applies only to open files, while the latter two exemptions apply to closed files. OFFICE OF LEGAL POLICY, DEPARTMENT OF JUSTICE, FREEDOM OF INFORMATION ACT (FOIA) ANNUAL REPORT 3 (1981). During 1982, the FBI invoked exemption b(7)(A) on 228 occasions and exemptions b(7)(C) and b(7)(D) on 1268 and 1034 occasions respectively. *Id.* Other law enforcement agencies report a similar imbalance with more withholdings based on exemptions b(7)(C) and b(7)(D)) than on exemption b(7)(A). In 1981, the Drug Enforcement Administration invoked exemption b(7)(A) on 81 occasions and exemptions b(7)(C) and b(7)(D) on 229 and 264 occasions respectively. The Criminal Division invoked exemption b(7)(A) only 34 times, while it invoked exemptions b(7)(C) and b(7)(D) 315 and 130 times respectively. *Id.*

The FBI and the DEA contend that criminals and their accomplices do not use the FOIA for legitimate discovery purposes but to evade detection, to derail investigations by uncovering and driving away informants, and to uncover and kill informants.[197] These abuses are primarily associated with FOIA requests for records in closed files where the existing exemptions may not be adequate to prevent the release of sensitive information. For records in closed investigatory files, a law enforcement agency cannot invoke exemption b(7)(A) to prevent premature discovery of the government's case, but can only withhold information to protect a confidential source (exemption b(7)(D)) or to protect personal privacy (exemption b(7)(C)). In accordance with these exemptions, the agency can redact the names of witnesses and agents and any other information that would disclose the identity of a confidential source or constitute an unwarranted invasion of personal privacy,[198] but the agency must release most other requested records from a closed file. Because the requester obtains records containing a good deal of factual information,[199] he can often combine that information with other known information to determine the identity of an informant.[200] The proper response to this abuse is not to restrict the use of the FOIA, but to enact a new exemption affording blanket protection for a certain number of years to organized crime or similar investigatory files.[201] The cause of the problem is the inadequacy of the exemptions and not the use of the Act for discovery purposes.

Finally, persons under investigation have been able to obtain under the FOIA law enforcement manuals and records containing information about the agency's position on enforcement matters. These records are

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197. 1 *Hearings*, *supra* note 19, at 843 (testimony of FBI Director William H. Webster); *id.* at 1081 (submission of Acting DEA Administrator Francis M. Mullen, Jr.).

198. Nix v. United States, 572 F.2d 998, 1003, 1006 (4th Cir. 1978); Radowich v. United States Att'y, 658 F.2d 957, 959-60 (4th Cir. 1981).

199. The agency normally need not release factual information from an open file because to do so would interfere with enforcement proceedings by indicating the scope of the investigation.

200. FBI Director Webster has warned of the "green sedan phenomenon," which can occur when the agency discloses to a FOIA requester a seemingly innocuous bit of information (*e.g.*, the fact that the witness drove a green sedan). The requester, in light of other information known to him, can acertain the identity of the information's source. For Director Webster's remarks before the American Bar Association, see *National Security, Law Enforcement, and Business Secrets Under the FOIA*, 38 BUS. LAW. 705, 711 (1982) (remarks of Director William H. Webster) [hereinafter cited as *National Security*], and for his remarks before the Congress in the 1981 Hearings on the FOIA, *see* 1 *Hearings*, *supra* note 19, at 843.

201. Most of the recent bills introduced in the Congress to amend the FOIA have included provisons granting the government blanket authority to withhold organized crime records for a certain number of years. The FBI desires similar blanket protection for terrorism and foreign counter-intelligence files. *See National Security*, *supra* note 200, at 711.

normally not investigatory records compiled for law enforcement purposes, and the agency must release them unless it can invoke the exemption for internal personnel rules and practices (exemption b(2)) or for deliberative materials (exemption b(5)). Under exemption b(2), the agency may withhold a law enforcement manual only if it is "predominately internal" and if its disclosure raises significant risks of "circumventing agency regulations or statutes."[202] Under exemption b(5), the agency may withhold predecisional matter, but it must release records which embody agency policy or explain action already taken by the agency.[203] The limited scope of these exemptions may permit a person under investigation to learn how the agency conducts its investigations and how it has resolved similar matters in the past. That information may be useful in persuading a government attorney not to institute formal enforcement proceedings.

### *C. The Use of the FOIA to Obtain Agency Generated Records for Use in Private Litigation*

Two general categories of agency records are often relevant to private litigation to which the government is not a party: records generated by the government and records submitted to the government by private persons. The records in the first category are most often in the government's exclusive possession, but a private person submitting documents to the government usually retains copies. Thus, the purpose of the FOIA requester in seeking the two types of records may be quite different. In the former case the requester is seeking discovery from the government, while in the latter case he is really seeking it from the submitter.

Parties to litigation frequently use the FOIA to obtain records in the first category, and this seldom raises problems. Agency files contain much government generated data on health, economic, and environmental matters that may be relevant to private litigation. Both plaintiffs and defendants use the FOIA to obtain governmental investigative reports which, although not themselves admissible as evidence, often provide useful leads on the basis of liability or defenses.[204] Litigants

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202. Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d, 1051, 1074 (D.C. Cir. 1981)(en banc).

203. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866-8 (D.C. Cir. 1980).

204. Agencies such as the National Highway Traffic Safety Administration, the OSHA, the Mine Safety and Health Administration, and the Consumer Product Safety Commission prepare investigative reports on accidents that occur on highways, in workplaces, or in a consumer's home. Exemption b(7) does not cover these reports because the agencies do not compile them for law enforcement purposes.

naturally seek to obtain these reports as quickly as possible—usually prior to the commencement of litigation—and the FOIA provides earlier access to agency records than does discovery.[205]

Agency personnel often prefer private litigants to use the FOIA because responding to a FOIA request is more convenient than responding to a Rule 45 or state court subpoena. The agency has a mechanism in place for processing FOIA requests and may make a FOIA release without concerning itself about a discovery court's time limits and demands for authentication. In the case of a subpoena, the agency's lawyer must reassure the often distraught subpoenaed employees and must negotiate a reasonable disclosure mechanism which eliminates, if possible, the need for any testimony by agency officials. The Department of Labor thus treats a subpoena for a compliance officer's report the same as a FOIA request,[206] *i.e.*, the Department processes the subpoena in the same fashion and "cuts" the same material from the document, thus affording the subpoenaing party no greater access than the FOIA requester.[207] Of course, upon a showing of need, a party may obtain through discovery greater access to agency records than a FOIA requester. Department of Labor officials recognize that a discovery court may order the production of a compliance officer's report without the FOIA redactions, but they do not recall that ever having occurred. The Office of the Comptroller of the Currency in the Department of the Treasury likewise treats subpoenas for nonexempt records the same as FOIA requests, but it produces bank examiners' reports covered by ex-

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205. The Consumer Product Safety Commission's FOIA procedures are an exception. Section 6(b) of the Consumer Product Safety Act, 15 U.S.C. § 2055(b) (1982), requires the Commission to take reasonable steps to assure the accuracy of product information disclosures and to afford manufacturers a reasonable opportunity to submit comments to the Commission before disclosure. The Supreme Court has held that these statutory requirements apply to FOIA releases. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1979). Exemption b(3) authorizes the agency to withhold the records during the comment process. *Id.* FOIA requesters must wait six months to a year to obtain the release of accident reports subject to section 6(b) procedures. Although other agencies are not subject to similar constraints, the targets of allegedly inaccurate reports have occasionally sought to enjoin their release by the agency. *See* Reagan Bush Committee v. Federal Election Comm'n, 525 F. Supp. 1330 (D.D.C. 1980) (court refused to enjoin release of audit report).

206. Unless further enforcement proceedings are contemplated, the Department will release under the FOIA a compliance officer's report on an industrial accident after redacting the officer's recommendations and the names of informants. Miles v. Department of Labor, 546 F. Supp. 437, 440-41 (M.D. Pa. 1982); Lloyd & Henniger v. Marshall, 526 F. Supp. 485, 487 (M.D. Fla. 1981). *See also* New England Apple Council, Inc. v. Donovan, 560 F. Supp. 231, 235 (D. Mass. 1983) (routine redaction of officer's name impermissible under exemption b(7)(C)).

207. The Department of Agriculture also processes subpoenas for nonexempt agency records as FOIA requests. 7 C.F.R. § 1.15 (1983).

emption b(8) only under court order.[208] Under its housekeeping regulation,[209] the Office of the Comptroller will disclose exempt records without formal service of a subpoena upon the agency custodian, but a party must establish by affidavit that litigation is pending and that he needs the report for litigation purposes.

The common sense approach of these agencies supports the conclusion that parties to private litigation should be able to use the FOIA for discovery purposes. A party should be required to use a subpoena only to obtain exempt agency records; neither the party nor the agency should be subjected to the more burdensome discovery procedures of Rule 45 or of analagous state court rules, if the party seeks only first level access to agency records.

If a party uses the FOIA to augment prior or simultaneous Rule 45 discovery, different issues arise. Supplemental use of the FOIA chiefly occurs in complex litigation and raises few problems if all the relevant documents are in the custody of a single or limited number of individuals[210] so that the government has to produce the documents only once. If the relevant documents, or copies thereof, are scattered in hundreds of federal offices and installations throughout the country, the situation is somewhat different. Duplicitous searches and a loss of control over document production, two of the resulting problems, are discussed below.[211]

### *D. The Use of the FOIA to Obtain Privately Submitted Agency Records for Use in Private Litigation*

The use of the FOIA by a party or potential party to private litigation to obtain the second category of agency records (*i.e.*, records submitted to the government by private persons) raises a number of special problems because the party is actually seeking discovery from the private submitter. The agencies most frequently encountering this use of the FOIA are those which investigate business conduct that may subsequently become the subject of private antitrust, securities, or other commercial litigation.[212] In the course of the investigation, the agency, through compulsory process or voluntary submissions, obtains many

208. The court normally issues a protective order.

209. 12 C.F.R. § 4.19 (1983).

210. Thus, in Colonel Hebert's and General Westmoreland's libel suits against CBS, all of the relevant documents on the Vietnam War were in several military records centers. It was a matter of indifference to the military departments whether the parties sought the records through Rule 45 subpoenas or FOIA requests.

211. For a discussion of these issues, see *infra* Part III(G).

212. Among the agencies contacted, the Antitrust Division, the FTC, the SEC, the CFTC, the Department of Energy, and the Federal Reserve Board have encountered this use of the FOIA.

documents from persons under investigation and other persons with relevant evidence. Government files thus became repositories of documents of interest to parties to private litigation.

Once private litigation commences, a party may seek discovery directly from the private submitter, but discovery of the documents from the government is often more efficient. This form of discovery is analogous to the phenomenon of second degree discovery that has become widespread in recent years. Under that approach, a party may discover documents discovered by another party to an earlier action from that other party so long as the documents would be discoverable in the subsequent action from the persons who originally afforded the discovery. Proponents of second degree discovery argue that it is inefficient to require a party to rediscover documents that another party has already discovered in an earlier action.[213]

Despite the apparent analogy, government investigatory files differ from a prior party's first degree discovery files. The government did not obtain the documents through discovery in litigation but through an investigatory process in which the government's power to compel is extensive and the individual's ability to resist limited. Whether the government's files should be available to a private litigant under the FOIA or only under court subpoena is less important than whether they should be available at all: Should the government transfer its investigatory advantage, which is based on society's paramount interest in law enforcement, to private parties for litigation purposes? If the transfer is justified, it does not make much difference whther it occurs through discovery or under the FOIA.

Courts generally permit both plaintiffs and defendants in private litigation to obtain privately submitted, unprivileged documents from the government through a Rule 45 subpoena.[214] The government's par-

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213. Sherman & Kinnard, *supra* note 84, at 284-91; Note, *Non-party Access to Discovery Materials in the Federal Courts*, 94 HARV. L. REV. 1085, 1089-91 (1981); Comment, *Government Use of Civil Investigative Demand to Obtain Materials Discovered in Private Antitrust Litigation*, 79 COLUM. L. REV. 804 (1979). For cases granting second degree discovery, see United States v. GAF Corp., 596 F.2d 10 (2d Cir. 1979); Olympic Refining Co. v. Carter, 332 F.2d 260 (9th Cir. 1964), *cert. denied*, 379 U.S. 900 (1966). In *GAF*, the court upheld the Antitrust Division's use of a civil investigative demand (CID) to obtain second degree discovery from a private antitrust plaintiff. Congress codified that result in the 1980 amendments to the Antitrust Civil Process Act. Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 2(b)(1)-(3), 1980 U.S. CODE CONG. & AD. NEWS (194 Stat.) 1154 (codified at 15 U.S.C. § 1312 (1982)).

214. *See* Freeman v. Seligson, 405 F.2d 1326, 1336 (D.C. Cir. 1968); Westinghouse Electric Corp. v. Burlington, 351 F.2d 762, 766-67 (D.C. Cir. 1965). *But see* Friedman v. Bache Halsey Stuart Shields, Inc., Misc. No. 83-0026 (D.D.C. 1983) (plaintiff's motion to compel the non-party CFTC to produce privately submitted records denied because plaintiff failed to prove

amount interest "in having justice done between litigants in the federal courts militates in favor of requiring a great effort on its part to produce any documents relevant to a fair termination of [the] litigation."[215] A discovery court may protect the government from unduly burdensome requests by considering, when determining whether a subpoena directed at the government is unreasonable or oppressive, whether the discovering party has made full use of discovery procedures to obtain the requested documents in a more efficient way. But the availability of discovery from the document's author or submitter does not bar the issuance of a subpoena against the government.[216]

Congress has on occasion barred the disclosure of privately submitted agency records. In the Antitrust Civil Process Act of 1962,[217] Congress established elaborate custodianship provisions to ensure the confidentiality of documents submitted to the Antitrust Division in response to a civil investigative demand (CID). The 1976 amendments to the Act further guaranteed this confidentiality by exempting privately submitted documents from disclosure under the FOIA[218] and by stating in the legislative history that the documents were not discoverable under the Federal Rules of Civil Procedure except by a submitter who became a defendant in an antitrust suit brought by the government.[219] The Antitrust Division therefore cannot release CID material to a nonsubmitter under the FOIA or in response to a discovery subpoena. Furthermore, the submitter may obtain the return of the original documents (but not of any copies properly made by the government) upon completion of any governmental action or proceeding involving the documents or, if the government has not commenced an action or proceeding, within a reasonable time.[220] In the Federal Trade Commission Improvements Act of 1980,[221] Congress similarly restricted discovery of documents submitted to the Commission in response to a CID. Except for requests for disclosure to Congress, federal agencies, or state officials, the Commission may disclose these documents only in "Commission adjudicatory

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that the records were not discoverable from the private submitters). The *Friedman* case is now on appeal.

215. *Westinghouse*, 351 F.2d at 767.

216. *Id.* at 767 n.8.

217. Antitrust Civil Process Act, Pub. L. No. 87-664, 1962 U.S. CODE CONG. & AD. NEWS (76 Stat.) 548 (codified at 15 U.S.C. §§ 1311-14 (1982)).

218. Rodino Antitrust Improvement Act of 1976, Pub. L. No. 94-435, § 104(e), 1976 U.S. CODE CONG. & AD. NEWS (90 Stat.) 1389 (codified at 15 U.S.C. § 1314 (1982)).

219. H.R. REP. NO. 94-1343, 94th Cong., 2d Sess. 15 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, 2572, 2609-10.

220. 15 U.S.C. § 1313(e) (1982).

221. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, §13, 1980 U.S. CODE CONG. & AD NEWS (94 Stat.) 374, 380-85 (codified at 15 U.S.C. § 57b-1 (1982)).

proceedings or in judicial proceedings to which the Commission is a party."[222] Only documents submitted pursuant to compulsory process (*i.e.*, a CID) are thus protected. Another section in the same Act, however, exempts from release under the FOIA (but not from subpoenas) all records submitted to the Commission in the course of an investigation.[223]

In the absence of a statutory provision analogous to those applicable to the Antitrust Division and the FTC, a party to litigation may seek privately submitted records either by a FOIA request or by a third party subpoena served on the agency custodian. A private litigant's choice of the FOIA to obtain records presents two problems to those who have submitted documents. First, a submitter does not know what documents an adversary may have obtained under the FOIA. Second, an agency may release FOIA-exempt records that contain trade secrets or other confidential business information (exemption b(4)). The former problem is a common one in litigation; a party often does not know what information an opposing party previously has obtained. Discovery permits a party to learn whether an opponent has made any FOIA requests.[224] The Administrative Conference addressed the latter problem in Recommendation 82-1, adopted in June, 1982.[225] The Conference recommended that Congress amend the FOIA to require agencies to notify a submitter prior to the release of any records that the submitter designated as confidential.[226] The Recommendation did not address the disclosure of trade secrets or confidential business information in response to discovery subpoenas, but the consultant's report intimates that this problem did not exist in that context.[227]

Despite the concern over the use of the FOIA to obtain trade secrets or confidential business information, the FOIA should remain open to parties to private litigation seeking first level access to privately submitted agency records. Parties seeking access to these records are not

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222. *Id.* at § 14, (94 Stat.) 387 (codified at 15 U.S.C. § 57b-2(d)(1)(c)(1982)).

223. *Id.* at § 14, (94 Stat.) 388 (codified at 15 U.S.C. § 57b-2(f)(1982)).

224. FOIA requests are themselves public records and therefore do not deserve work-product protection.

225. 1 C.F.R. § 305.82-1 (1983).

226. The notice provision affords submitters an opportunity to file with the agency written objections to the agency's release of the records and to seek de novo review in the courts of the agency's release decision. The Conference believed that these additional safeguards were necessary to protect the interests of submitters because the FOIA process encouraged agencies to withhold "only those items which the agency itself needs to defend—and private documents are more likely to be given up by the agency to avoid prolonged litigation by requesters." O'Reilly, *Regaining a Confidence: Protection of Business Confidential Data Through Reform of the Freedom of Information Act*, 34 AD. L. REV. 263, 303 (1982).

227. *See id.* at 269-70 ("judicial protection" will attach).

engaged (as other FOIA requesters may be) in legalized industrial espionage but are seeking evidence for use in litigation. Often, they are seeking to determine whether any basis for a lawsuit exists. Only a small percentage of the records sought are likely to contain either common-law trade secrets or trade secrets and confidential business information exempt from disclosure under FOIA exemption b(4). The records are evidence of past business behavior; their staleness[228] makes it unlikely that disclosure will afford a nonlitigation advantage to the submitter's competitors. Furthermore, the Conference has recognized that it is possible to develop FOIA procedures to protect confidential business information in agency files.[229] Although Congress has yet to act on the Conference's recommendation, most agencies have voluntarily adopted procedures to protect the interests of submitters.

In addition, trade secrets and confidential business information are unlikely to receive increased protection from unwarranted disclosure in discovery. Statutes and agency rules, with few exceptions, do not require an agency to notify a submitter prior to producing a document in response to a discovery subpoena.[230] The agency need not, and perhaps cannot, raise any claim of privilege on behalf of the submitter.[231] Even if the agency records contain common-law trade secrets, the agency's disclosure in response to a subpoena is authorized by law and thus does

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228. As a practical matter, private litigants can only obtain the release of agency records from closed investigatory files. If a litigant seeks the release of records from a fresh or open file, the agency will invoke exemption b(7)(A). Thus, it is likely that any records released to the litigant will pertain to events that took place several years in the past.

229. Recommendation 82-1, 1 C.F.R. § 305.82-1 (1983).

230. Section 222(5) of the Futures Trading Act of 1982, Pub. L. No. 97-444, 1983 U.S. CODE CONG. & AD. NEWS (96 Stat.) 2294, 2310, *amending* 7 U.S.C. § 12(f) (1982), is one of the few statutes expressly requiring an agency to notify a submitter that it has received a court subpoena for information submitted by the submitter. The CFTC must give the submitter fourteen days notice before disclosing the information. The FTC has committed itself by rule to afford a submitter an opportunity to seek a protective order before it releases privately submitted materials in "Commission administrative or court proceedings." 16 C.F.R. § 4.10(g)(1983). In the past, the Commission, when issuing adjudicatory subpoenas, has agreed to notify the submitter before releasing confidential information in response to an official Congressional request or to the compulsory process of a court. *See, e.g.,* Exxon Corp. v. FTC, 665 F.2d 1274, 1279 (D.C. Cir. 1981); FTC v. Anderson, 631 F.2d 741, 746 (D.C. Cir. 1979).

231. In *In re* Westinghouse Elec. Corp. Uranium Contract Litig., 76 F.R.D. 47, 59 (W.D. Pa. 1977), the court held that a private party had no standing to object that the documents which the court ordered it to produce were secret Canadian government documents. The court, however, did order the party's counsel to notify the Canadian government so that it might seek confidential treatment for the documents. *But see* Overby v. United States Fidelity and Guar. Co., 224 F.2d 158, 162-63 (5th Cir. 1955) (government may assert privilege to prevent production by bank of bank examiner's report in bank's possession).

not violate the Trade Secrets Act.[232] Agencies do not have established procedures for responding to subpoenas seeking the production of privately submitted documents and are subject to the same incentives as in the FOIA context to surrender the documents without a fight. In practice, agency counsel attempt to contact the submitter before disclosing any documents, but often counsel does not have sufficient time to give effective notice and can do no more than inform the court that the subpoenaed documents contain information for which the private submitter might desire a protective order.[233] A submitter who is not a party to the litigation may encounter difficulty in securing a protective order when the agency produces the records because there is no clear authority recognizing the submitter's status as the real party in interest.[234] Thus, the absence of discovery safeguards similar to the FOIA safeguards proposed in Conference Recommendation 82-1 makes it difficult to argue that trade secrets and other confidential business information receive effective protection in the discovery context.

Counsel for the agencies contacted report that private litigants employ both FOIA requests and discovery subpoenas to gain access to privately submitted agency records and generally obtain the same documents in both instances.[235] Although discovery may afford access to exempt records, a party often can obtain that access through a FOIA request. For example, if it is obvious that certain confidential business information in agency files is relevant to pending litigation, the submitter and the FOIA requester normally agree to the agency's production of the records under a protective order.[236] Closing the FOIA to requests

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232. *See* Canal Auth. v. Froehlke, 81 F.R.D. 609, 612-13 (M.D. Fla. 1979); Pleasant Hill Bank v. United States, 58 F.R.D. 97, 98 n.1 (W.D. Mo. 1973).

233. Even if the submitter is a party to the private litigation in which the records are sought, he has no assurance that he will receive notice of an opposing party's service on an agency custodian of a third party subpoena. If the submitter is not a party to the litigation, he will receive notice only if the agency or the court chooses to give it to him.

234. In the analogous context of efforts by private litigants to obtain access to grand jury materials under FED. R. CRIM. P. 6(e), the Supreme Court has recognized the standing of the submittees to challenge the disclosure. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 n.8 (1979)("release of the transcripts to their civil adversaries could result in substantial harm to them").

235. Private antitrust plaintiffs and defendants do not receive under the FOIA the CID material available only to defendants in government antitrust suits. Motion Picture Ass'n of Am. v. Department of Justice, 80 Civ. 6612 (S.D.N.Y.). Antitrust Division lawyers report that persons under investigation are insisting with greater frequency that the Division use the cumbersome CID machinery to obtain the submission of documents. They estimate that voluntary submissions now comprise less than one-half of the documents obtained by the Division. The submitters' increased concern for confidentiality naturally reduces the utility to private litigants of the Division's investigatory files.

236. Under the Federal Rules of Civil Procedure, the key issue in most such cases is not whether trade secrets or confidential business information will be disclosed, but under what

for records generated by private submitters therefore would serve no purpose.

### *E. The Use of the FOIA to Obtain Agency Records Unavailable in Discovery Because They Are Privileged*

Inadvertent or careless FOIA releases of exempt records are a rarity.[237] More frequently, the public information officer's release decision is, in the words of government litigators, "mistaken." It is perhaps more accurate to say that the officer's perspective on claiming an exemption is different than that of a litigating attorney. This difference is particularly apparent with respect to the deliberative process component of exemption b(5). The public information officer's job is to release as much information as possible, while the attorney's job is to defend the government's position in litigation. The attorney is particularly sensitive about releasing internal documents critical of the agency's present position or advocating a contrary position; public information officers and lower level program people are likely to be less sensitive. In addition, deliberative process and work-product claims have special cogency when raised in litigation and lose much of their force when considered in the abstract in response to a FOIA request.

Government counsel are nearly unanimous in their condemnation of the parallel use of the FOIA for "backdoor" discovery from the government during the pendency of litigation. They fear that they will lose control over the flow of documents to the other parties and that their opponents will obtain the release of privileged documents, or of documents that can be used to surprise the government at trial or hearing. FOIA requests by opposing counsel particularly irk Department of Justice lawyers because they believe that counsel should not communicate directly with the client agency on matters that are in litigation, but should address all communications to the Department.[238] A number of agencies have responded by adopting procedures which involve litigat-

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conditions they will be disclosed. 8 C. WRIGHT & A. MILLER, *supra* note 80, § 2043, at 305 (1970).

237. *But see infra* notes 307, 308 and accompanying text.

238. This latter, ethical objection is unfounded because DR 7-104(A)(1) only prohibits counsel from communicating with a "party" whom he knows to be represented by a lawyer on the subject matter of the communication. While this disciplinary rule does apply to communications between lawyers representing private parties and government officials, the government officials covered by the prohibition of communications with a "party" include only those officials who have the power to commit or bind the government with respect to the subject matter in question. Legal Ethics Committee of the District of Columbia Bar, Op. No. 80 (1979) (interpreting DR 7-104(A)(1) on "Communicating With One of Adverse Interest"). A public information officer is not such an official.

ing attorneys in the FOIA process.[239]

Although most courts have analyzed the issues raised by claims of privilege in discovery and exemptions under the FOIA as "separate issues" requiring "separate analysis,"[240] a minority of courts have held that the government cannot raise a claim of privilege in defense to a discovery subpoena if it would be required to release the documents under the FIOA. In *Moore-McCormack Lines, Inc. v. I.T.O. Corp.*,[241] the court enforced a Rule 45 subpoena to produce the conclusions as well as the factual portions of an accident report against a Department of Labor compliance officer. After ruling, perhaps erroneously,[242] that the Department could not withhold any portion of the report under the FOIA, the court held that the government could not raise a claim of privilege for a document that is already in the public domain. "It is sufficient for us to hold that Rule 26(b) does not authorize an agency to withhold any records which the Act commands it to disclose."[243] The court in *Firestone Tire & Rubber Co. v. Coleman*[244] reached a similar conclusion. Ruling on discovery motions in an action for preenforcement review of a federal motor vehicle safety standard, the court held that "[i]nformation which the government must disclose to the public generally may not be withheld from a member of the public who engages the government in litigation."[245] In *Firestone*, unlike in *Moore-McCormack*, the discovering party had filed FOIA requests with the agency for the records which it subsequently moved the court to compel the agency to produce; and its FOIA suit to enjoin the agency from withholding the requested records had been consolidated with the preenforcement review action.[246]

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239. See *infra* text accompanying note 309.

240. Washington Post Co. v. Department of Health and Human Servs., 690 F.2d 252, 259 (D.C. Cir. 1982).

241. 508 F.2d 945 (4th Cir. 1974).

242. Other courts have held in FOIA litigation that the Department of Labor may withhold the conclusions in a compliance officer's accident report. *E.g.*, Miles v. Department of Labor, 546 F. Supp. 437, 439-40 (M.D. Pa. 1982); Lloyd & Heminger v. Marshall, 526 F. Supp. 485, 486-87 (M.D. Fla. 1981). In *Moore-McCormack*, the court actually read the compliance officer's "Conclusions" and found that they were no more than factually based inferences (*i.e.*, a list of factors which the compliance officer believed caused the accident) devoid of policy-making or deliberative material. 508 F.2d at 948-49.

243. 508 F.2d at 950.

244. 432 F. Supp. 1359 (N.D. Ohio 1976).

245. *Id.* at 1371 n.23.

246. Thus the *Firestone* court had jurisdiction to determine the discovering party's access under the FOIA as well as under the discovery rules. On the other hand, at least two courts have afforded criminal defendants access in a criminal case to government records not exempt from release under the FOIA, despite the absence of FOIA requests. United States v. Brown, 562 F.2d 1144, 1152 (9th Cir. 1978); United States v. Wahlin, 384 F. Supp. 43, 47 (W.D. Wis. 1974). Since the *Brown* and *Wahlin* courts did not have jurisdiction to enjoin the withholding

The approach of the *Moore-McCormack* and *Firestone* courts is often followed in complex litigation. In the government's recent antitrust suit against *AT&T*, for example, the Special Masters' Guidelines for the Resolution of Privilege Claims provided that "information obtainable by a member of the public under the Freedom of Information Act is not privileged."[247] Even in the absence of such a guideline or court ruling, Antitrust Division lawyers often consult the Division's FOIA staff to determine whether a document sought in discovery is the type of document that the FOIA staff would release. This approach recognizes that it is absurd for the government to waste the court's time by raising a claim of privilege for a document that the government must release to the general public under the FOIA.

If *Moore-McCormack* and *Firestone* reflected the prevailing approach, parties to litigation would not resort to the FOIA to discover privileged documents because the privilege rules would allow the party to obtain the documents in discovery. By employing different criteria for determining access rights, the FOIA and discovery mechanisms function independently of each other; and the FOIA, as the Fifth Circuit held in *United States v. Murdock*,[248] does not "enlarge the scope of discovery beyond that already provided by the Rules."[249] Consequently, the majority view is that a document may be privileged in discovery and nevertheless available to the general public under the FOIA.[250] In these instances, the party may use the FOIA to obtain discovery of privileged documents.

A number of considerations support the prevailing approach of *Murdock*. First, it does not burden a discovery court with deciding FOIA issues.[251] Second, permitting a discovery court to order an agency to release nonexempt agency records is inconsistent with Congress' grant of exclusive jurisdiction to the district courts over suits by FOIA reques-

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of nonexempt agency records, the decisions can only be understood as exercises of the courts' inherent authority to provide discovery in criminal cases. The Ninth Circuit subsequently disapproved *Brown* and restricted the criminal defendant's discovery to that available under the federal criminal rules. United States v. United States District Court (DeLorean), 717 F.2d 478, 480-81 (9th Cir. 1983).

247. United States v. AT&T, 86 F.R.D. 603, 635 (D.D.C. 1979). The special masters were Professors Geoffrey Hazard and Paul Rice.

248. 548 F.2d 599 (5th Cir. 1977).

249. *Id.* at 602. *See also* Fruehauf Corp. v. Thornton, 507 F.2d 1253, 1254 (6th Cir. 1974). Both *Murdock* and *Fruehauf* were criminal prosecutions.

250. *E.g.*, Playboy Enter., Inc. v. Department of Justice, 677 F.2d 931, 936 (D.C. Cir. 1982).

251. If the nonexempt status of the records was not in dispute, the party already would have obtained them under the FOIA.

ters.[252] Third, the *Murdock* approach prevents a party from delaying a proceeding by seeking additional "discovery" under the FOIA. Courts have resisted efforts to postpone judicial trial dates[253] or to enjoin administrative proceedings[254] to allow a party to obtain a FOIA release. If the same documents were made available to the party in discovery, delay would more likely occur. Finally, the *Murdock* approach is more consistent with Congressional intent to open up the administrative process to the inquiring public. While parties to litigation may benefit from the FOIA access provided to the public, Congress did not intend to afford litigants additional discovery rights.[255]

Although it does not expand the scope of discovery, the *Murdock* approach permits the indirect use of the FOIA for discovery purposes. Unable to assert FOIA availability as a defense to a claim of privilege in discovery, a litigant may still request the documents under the FOIA.[256] Generally, because the FOIA *should* provide everyone with a minimum level of access to government records and discovery *should* provide litigants with a second level of access to relevant records, a litigant *should* not obtain access to privileged materials through the FOIA. But the ideal relationship between the FOIA and discovery is unachievable as long as courts develop separate bodies of FOIA and discovery law.

In several recent cases, FOIA courts ordered the release of agency records recognized as privileged in the discovery context. In *Playboy Enterprises, Inc. v. Department of Justice*,[257] the FOIA court ordered the release of the Rowe Report. The report reviewed the involvement of a FBI informant in the 1965 murder of a civil rights worker by Ku Klux Klan members.[258] Several district courts, in lawsuits brought against the United States under the Federal Tort Claims Act by the murder victim's survivors, had held the report to be privileged.[259] Similarly, in *Weber*

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252. 5 U.S.C. § 552(a)(4)(B) (1982).

253. *E.g.*, Fruehauf Corp. v. Thornton, 507 F.2d 1253 (6th Cir. 1974) (criminal defendant unsuccessfully sought mandamus to compel postponement).

254. *E.g.*, Columbia Packing Co. v. Department of Agriculture, 563 F.2d 495 (1st Cir. 1977). Federal courts have the equitable power to enjoin administrative proceedings until a party obtains the release of nonexempt records under the FOIA, but they should take such a serious step only upon the strongest showing of irreparable injury. *Id.* at 500. *See also* Encyclopedia Britannica, Inc. v. FTC, 517 F.2d 1013 (7th Cir. 1975).

255. *See* Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 22, 24 (1974).

256. Of course, one disadvantage to this approach is that the litigant has no assurance that the trial or hearing will await the agency's response to his FOIA request.

257. 677 F.2d 931 (D.C. Cir. 1982).

258. A task force established by the Attorney General submitted the 302 page document to him in July, 1979. *Id.* at 933.

259. *See, e.g.*, Peck v. United States, 88 F.R.D. 65, 74 (S.D.N.Y. 1980); *cf.* Liuzzo v. United States, 508 F. Supp. 923, 940 (1981) (court did not independently assess the privilege claim but relied on the determination of the Attorney General).

*Aircraft Corp. v. United States*,[260] the FOIA court ordered the release of witness statements obtained in a confidential safety investigation of a fatal air crash. Courts have traditionally recognized the privileged, official information status of these reports.[261]

The incongruity apparent in *Weber* and *Playboy* results from applying different standards to release decisions under the FOIA and in discovery. Both *Playboy* and *Weber* were exemption b(5) cases raising the issue of the exempt status of factual material in otherwise deliberative records. The exemption does not protect purely factual materials "appearing in . . . documents in a form that is severable without compromising the private remainder of the document."[262] To simplify a great deal, an agency must segregate and release factual portions of otherwise deliberative records if the release would not expose the deliberative process.[263] The official information privilege, on the other hand, more broadly protects investigative reports from discovery.[264] In the leading case recognizing a qualified privilege for witness statements,[265] the court held that the factual nature of the statements did not bar a claim of privilege if the agency, to obtain complete information, had assured the witnesses of confidentiality (*i.e.*, that the agency would use their information only for safety and not for litigation purposes).[266] The *Weber* court held that exemption b(5) did not incorporate this civil discovery privilege for confidential investigative reports.[267] The *Playboy* court also expressly rejected, without citation, civil discovery precedents which had recognized that the selection, interpretation, and integration of facts by

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260. 688 F.2d 638 (9th Cir. 1982), *cert. granted*, 103 S. Ct. 3534 (1983).

261. *E.g.*, Machin v. Zuckert, 316 F.2d 336, 339 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963).

262. EPA v. Mink, 410 U.S. 73, 91 (1973).

263. *See, e.g.*, Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977). The records withheld in *Playboy* and *Weber* were factual and their disclosure would not expose the deliberative process other than to reveal what facts the author of the report or the witnesses thought material. *Playboy*, 677 F.2d at 935. Therefore, the decisions were correct under the prevailing interpretation of exemption b(5). *Weber*, however, is in conflict with two earlier FOIA cases that afforded witness statements in confidential safety investigations greater protection under exemption b(5). Cooper v. Department of the Navy, 558 F.2d 174 (5th Cir. 1977); Brockway v. Department of the Air Force, 518 F.2d 1184 (8th Cir. 1975). After this Article went to press, the Supreme Court reversed the court of appeals decision in *Weber*. United States v. Weber Aircraft Corp., 52 U.S.L.W. 4351 (March 20, 1984). *See infra* note 272. (All references to *Weber* are to the court of appeals decision.)

264. The scope of the discovery privilege is similar to that afforded by FOIA exemption b(7) for investigatory records compiled for law enforcement purposes.

265. Machin v. Zukert, 316 F.2d 336 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963).

266. *Id.* at 339.

267. *Weber*, 688 F.2d at 644. The court relied upon the Supreme Court's cautious approach to the incorporation of discovery privileges into exemption b(5). *See, e.g.*, EPA v. Mink, 410 U.S. 73 (1973); Federal Open Market Comm. v. Merrill, 443 U.S. 340 (1979).

high level agency officials—the very process involved in the preparation of the report in *Playboy*—are part of the deliberative process and thus privileged from disclosure.[268]

In a third decision ordering the release of privileged agency records, *Washington Post Co. v. Department of Health and Human Services*,[269] the FOIA court ordered the release of the nonfederal employment and financial interests of consultants employed by the National Cancer Institute. The same court of appeals, in an earlier lawsuit challenging the grant program administered with the aid of these consultants, had upheld the Department's claim of privilege.[270] The *Washington Post* case involved exemption b(6)—the personal privacy exemption—and the court of appeals reached a different result on the exemption issue than it reached on the privilege issue because, again, the applicable criteria were different. In discovery, the disclosure of the consulants' employment and financial reports depended upon a balancing of the party's interest in disclosure against the government's need to foster the gathering of information from the consultants. In the FOIA context, the court balanced the public interest in disclosure against the consultants' privacy interests. In *Association for Women in Science v. Califano*,[271] the earlier case in which the court denied discovery, the party's need for the information did not override the privilege for confidential reports because the party had access to the information in another form (*i.e.*, the government had provided the discovering party with direct access to the consultants). The public, represented by the Washington Post, had no access outside of the FOIA and therefore had a greater need for the same records.

Because Congress requires the courts to interpret the FOIA as providing separate access to government records, some litigants inevitably will be able to discover privileged documents through FOIA requests. Although the Supreme Court could narrow one of these "gaps" in the FOIA exemptions by abandoning the factual-deliberative dichotomy in exemption b(5) cases,[272] additional gaps will arise in other areas. For

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268. *Playboy*, 677 F.2d at 935. *See supra* note 259 and the discovery cases cited therein. Those cases, especially *Peck*, relied on Judge Weinstein's analysis in *In re* Franklin Nat'l Bank Sec. Litig., 478 F. Supp. 577, 587-89 (E.D. N.Y. 1979).

269. 690 F.2d 252 (D.C. Cir. 1982).

270. Association for Women in Science v. Califano, 566 F.2d 339 (D.C. Cir. 1977).

271. *Id.*

272. That interpretation of exemption b(5) is inconsistent with the law of civil discovery and with the Congress's overall purpose to afford FOIA requesters no more access to government records than that which is routinely available to parties to litigation. It has even prompted a number of lower courts to hold that exemption b(5) does not protect "factual" statements of witnesses protected from discovery under the work product doctrine when obtained in anticipation of litigation. *See, e.g.*, Robbins Tire & Rubber Co. v. NLRB, 563 F.2d 724, 734-37 (5th Cir. 1977), *rev'd on other grounds*, 437 U.S. 214 (1978); Associated Dry Goods

example, the Court of Appeals for the District of Columbia Circuit recently held that exemption b(4) protects only trade secrets that are used in the process of production.[273] The common law, as the court recognized, protects a broader category of trade secrets—any secret that gives one business a competitive advantage.[274] The gaps that have so far appeared have not prompted any major use of the FOIA for discovery purposes but they do encourage some litigants to use the FOIA. Although a circumvention of the discovery rules, this use of the FOIA is not abusive: it only permits a party to obtain access to "privileged" documents that are available to everybody else.

### *F. The Use of FOIA to Obtain Irrelevant Records*

Because relevancy limitations on discovery do not apply to FOIA requests, a party may obtain the FOIA release of records that are irrelevant to a pending action. Relevance and burden are pragmatic concepts designed to keep lawsuits within reasonable bounds; that documents are insufficiently relevant to be discoverable does not mean that they are of no value to the party. When relevancy is borderline and the burden of complying with a discovery request is considerable, the trial judge has broad discretion to sustain a relevancy objection.[275] He also may deny burdensome requests that only marginally advance the objectives of providing information to the parties and of narrowing the issues in the lawsuit. The civil discovery rules authorize the trial judge to limit the discovery of relevant documents to matters occurring at a particular time or at a particular place or pertaining to a particular transaction.[276] A party may easily avoid these parameters on discovery

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Corp. v. NLRB, 455 F. Supp. 802, 808-09 (S.D.N.Y. 1978). For a FOIA decision which is more faithful to the civil discovery approach, see Hoover v. Department of the Interior, 611 F.2d 1132 (5th Cir. 1980) (report of nontestifying expert exempt under the FOIA because not discoverable routinely but only upon a showing of exceptional circumstances).

The Court's recent opinion in United States v. Weber Aircraft Corp., 52 U.S.L.W. 4351 (March 20, 1984), indicates a greater willingness to recognize discovery privileges as a basis for withholding records under exemption b(5). In *Weber*, the Court held that exemption b(5) incorporates the *Machin* privilege for confidential safety investigations. The Court indicated that even factual material could be withheld. *Id.* at 4353 n.17. Under this approach, FOIA and discovery courts normally will apply the same standards to decide whether to order the government to disclose a record. Although this approach makes it easier for the government to withhold potentially privileged documents from a FOIA requester, it does not guarantee that a FOIA court will reach the same result as a discovery court.

273. Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

274. *Id.* at 1286-89.

275. 4 MOORE'S FEDERAL PRACTICE, *supra* note 132, at § 26.56[1] n.35.

276. 8 C. WRIGHT & A. MILLER, *supra* note 80, at 287. Under the 1983 amendments to Rule 26, the trial judge may act on his own initiative. *See* FED. R. CIV. P. 26(b)(1)(iii)(trial court may limit unduly burdensome or expensive discovery).

through use of the FOIA.

Private parties defending against governmental enforcement proceedings often desire questionably relevant documents. First, parties seek to learn of prior inconsistent positions of the agency that may lessen the weight a court or an agency adjudicator will give to the agency's present position or that may expose the agency to charges of arbitrariness or selective prosecution. Second, parties are interested in the agency's internal operating procedures because that information may help a party to anticipate agency tactics or to challenge any departures from established procedures.

Courts often limit discovery of prior agency statements and internal manuals because their production may burden inordinately the agency. Neverthless, these matters are potentially relevant. Any inconsistency between the agency's present interpretation of a statute or regulation and its past interpretation affects the deference that a court gives the agency's present views.[277] An agency's inconsistent treatment of similarly situated persons becomes, at some point, arbitrary, or at least requires some explanation.[278] Finally, a violation of an agency's own regulations or any special, unfavorable treatment afforded a particular party may provide the party with grounds for relief.[279]

To balance the potential relevance of such documents with the potential burden on the agency, the courts afford discovery on a controlled rather than on a routine basis. Thus the courts have limited the scope of discovery when a party is seeking documents that may disclose agency inconsistency. For example, in judicial and administrative proceedings brought by the Department of Energy to enforce price control regulations, the courts and the Department's adjudicatory authority (the Office of Hearings and Appeals) have permitted some "contemporaneous construction" discovery. Through contemporaneous construction discovery, energy producers may seek prior statements[280] interpreting or

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277. *See* Udall v. Tallman, 380 U.S. 1, 16 (1965). The weight a court gives an administrative interpretation of a statute or regulation depends on the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, all of those factors which give it power to persuade, if lacking power to control." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

278. Melody Music, Inc. v. FCC, 345 F.2d 730, 732-33 (D.C. Cir. 1965)(agency must explain different treatment afforded similarly situated applicants); IBM v. United States, 343 F.2d 914, 923 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 1028 (1966)(different treatment of similarly situated taxpayers arbitrary and illegal).

279. *See* Vitarelli v. Seaton, 359 U.S. 535, 539-40 (1959) (agency bound by its own regulations); United States v. Steele, 461 F.2d 1148 (9th Cir. 1972) (selective prosecution defense to a criminal charge).

280. The statements may be in the form of official interpretive rulings or actions taken by low-level inspectors or auditors. McMillan & Peterson, *supra* note 28, at 372-83.

applying agency regulations only if the regulation is ambiguous or silent on the issue in dispute[281] or if the agency seeks to apply retroactively a clarifying interpretive ruling.[282] The more recent cases have refused to formulate rules on the scope of contemporaneous construction discovery but balance "the potential relevance of the desired evidence, along with the likelihood of its existence, against the burden incurred by the agency in culling through its files."[283] Under this approach, the courts have limited the discovery of evidence of contemporaneous construction to particular periods of time or to particular agency filing systems.[284]

The courts also have limited discovery of agency treatment of similarly situated third persons. The Court of Claims, in actions brought by the United States to redetermine excess profits, has permitted contractors to discover third party contract data from the Renegotiation Board but normally has denied discovery of cost data submitted by third party contractors to procurement agencies. Recognizing that "[o]nce the most immediately relevant data of the other [contractor's] case is at hand, inquiry into all its ramifications must be resolutely halted,"[285] the court has limited the scope of discovery to prevent the renegotiation of one contract from becoming an occasion for reviewing those of the contractor's competitors.[286] The Tax Court has taken a still firmer line against the discovery of private rulings or other determinations issued by the IRS to nonparty taxpayers. To establish relevance sufficient to permit discovery, a party must establish more than an inconsistency between the Service's prior, nonbinding ruling to another taxpayer and its treatment of the present taxpayer.[287] The Tax Court has reasoned that "even if the private letter rulings can be viewed as potentially relevant, such relevance is, nevertheless, too remote to cause the underlying document to be discoverable."[288]

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281. *See* Gulf Oil Corp. v. Schlesinger, 465 F. Supp. 913, 916 (E.D. Pa. 1979).

282. United States v. Exxon Corp., 87 F.R.D. 624, 633 (D.D.C. 1980).

283. *Id.* at 634.

284. For the similar treatment of contemporaneous construction discovery before the Department of Energy's Office of Hearings and Appeals, see Atlantic Richfield Co., 5 DOE (CCH) ¶ 82,521 (1980).

285. Instrument Sys. Corp. v. United States, 546 F.2d 357, 361 (Ct. Cl. 1976).

286. Boards of Contract Appeals have similarly limited discovery of third party contract data to those documents for which relevance is clearly demonstrated. Essex Elec. Engineers, DOT CAB No. 1025, 79-2 BCA (CCH) ¶14,158 at 69,711 (Nov. 8, 1979) (number of other contracts for which appellant sought discovery sufficiently limited). *See* Peacock, *supra* note 178, at 19-20.

287. *See* Teichgraeber v. Commissioner, 64 T.C. 453, 456-57 (1975). *But see* Corelli v. Commissioner, 66 T.C. 220 (1976) (private rulings to nonparty taxpayer relevant to taxpayer's liability for negligence penalty). *See generally* Royal, *Discovery Process in the United States Tax Court*, 65 MASS. L. REV. 227, 232-35 (1980).

288. Davis v. Commissioner, 69 T.C. 716, 722 (1978). In *Davis*, the taxpayer was seeking

Many courts have insisted that the discovering party make a "strong" or "prima facie" showing of impropriety before permitting any discovery on procedural irregularities or other agency improprieties.[289] If a party merely alleges that the agency succumbed to congressional or other political pressure, received ex parte communications, acted in bad faith or for an improper purpose, or violated its own regulations, the courts will deny discovery.[290] Criminal courts also deny discovery on claims of selective prosecution unless the defendant makes a prima facie showing that the government has not prosecuted other, similarly situated offenders and that the government's prosecution of him is selective, invidious, in bad faith, or based on impermissible considerations such as race, religion, or the exercise of a constitutional right.[291]

Relevancy limitations naturally encourage parties to litigation to use the FOIA. In *United States v. Exxon Corp.*,[292] an action to enforce the Department of Energy's petroleum pricing regulations, the defendant sought to discover internal agency documents construing a regulation the interpretation of which was in dispute. Limiting the scope of this discovery, the court established a cut-off date of September 1, 1976, the date when the Department of Energy issued an interpretive rule that defined a crucial term in the regulation. The court held that only documents dated prior to September 1, 1976, were relevant and thereby discoverable.[293] In two parallel FOIA actions, Exxon sought the release of all agency records construing the regulation, including documents dated subsequent to September 1, 1976.[294] Similarly, in *National Presto Indus-*

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the production of pre-1976 private rulings which were unavailable under 26 U.S.C. § 6110. *See infra* note 298.

289. Sierra Club v. Costle, 657 F.2d 298, 405 (D.C. Cir. 1981); Environmental Defense Fund v. Blum, 458 F. Supp. 650, 663 (D.D.C. 1978).

290. McMillan & Peterson, *supra* note 28, at 367-73. The authors argue that a lesser showing by the discovering party should suffice if the discovery sought involves neither allegations of moral turpitude nor inquiries into the thought processes of agency officials. *Id.* at 372-73.

291. *E.g.*, United States v. Kahl, 583 F.2d 1351, 1353 (5th Cir. 1978); United States v. Johnson, 577 F.2d 1304, 1308 (5th Cir. 1978).

292. 87 F.R.D. 624 (D.D.C. 1980).

293. *Id.* at 635-36.

294. Exxon Corp. v. Department of Energy, 4 ENERGY MGMT. (CCH) ¶ 26,325 (D.D.C. 1981) (thoroughness of Department's search); Exxon Corp. v. Department of Energy, No. 80-2500 (D.D.C.) (transferred from the Southern District of New York, Sept. 16, 1980). Exxon obtained the release of a large number of records in response to its FOIA requests and vigorously litigated the thoroughness of the Department's search and the lawfulness of its withholding of responsive records, but the judge hearing the enforcement action ruled against Exxon on the merits before the judge hearing the FOIA actions determined whether the Department had improperly withheld 245 documents which it refused to release under the FOIA. United States v. Exxon Corp., 561 F. Supp. 816 (D.D.C. 1983) (decision on merits). As of late 1983, the district court had still not decided the FOIA cases.

*tries, Inc.*,[295] a contractor, whose excess profits were subject to redetermination, sought comparative cost data contained in preaward surveys and in the submissions of third party contractors from various procurement agencies. The court, in an earlier interlocutory order vacating the trial judge's broad discovery order, had instructed the trial judge that third party contract data was discoverable only upon proof of relevance and notice to the third party.[296] When the court learned that the contractor had bypassed its discovery ruling by filing FOIA requests directly with the procurement agencies, the court ordered the suspension of discovery while the contractor pursued its FOIA requests. The court instructed the contractor to inform the trial judge when it had completed its FOIA discovery and to acquaint him with what it had discovered.[297]

In both *Exxon* and *National Presto* the FOIA requests imposed heavy burdens on the agencies involved and, in effect, deprived them of the protection from unreasonable demands afforded by the applicable discovery rules. In other areas, however, the use of the FOIA to discover documents of questionable relevance has become less controversial and often permits parties to litigation to discover an agency's working law. Thus, a taxpayer may use the FOIA to obtain private letter rulings issued by the IRS to other taxpayers and the background file documents with respect to those rulings[298]—information that courts normally consider irrelevant and nondiscoverable. An energy producer also may use the FOIA to obtain regional counsel memoranda responding to audi-

295. 218 Ct. Cl. 696 (1978).

296. National Presto Indus., Inc., 216 Ct. Cl. 422, 429 (1978).

297. The trial judge then could lift the suspension on discovery to the extent necessary for the contractor to obtain relevant information not discoverable under the FOIA. Judge Davis, writing for the Court of Claims, complained that "if the use of FOIA makes it possible despite our wishes, to make a *Jamdyce v. Jamdyce* out of this case, that is the responsibility of the Congress which enacted the FOIA, and of the courts Congress has designated to interpret and enforce the FOIA." 218 Ct. Cl. at 698. For a similar case before the Armed Services Board of Contract Appeals, see Murdock Contracting and Eng'g Co., ASBCA 204339 (1980). In *Murdock*, government counsel stopped providing discovery to the contractor when the contractor filed FOIA requests for irrelevant data on third party contracts. The Board member serving as trial judge did not rule on the propriety of counsel's action, but he did deny the contractor's motion to recover the extra expenses caused by the interrupted discovery.

298. Strictly speaking, access to these records is not governed by the FOIA but by 26 U.S.C. § 6110 (1982), which governs the public inspection of the Service's written determinations and background file documents. However, the enactment of that section was prompted by a court decision holding that private letter rulings were not exempt from disclosure under the FOIA. Tax Analysts & Advocates v. IRS, 362 F. Supp. 1298 (D.D.C. 1973), *modified and remanded*, 505 F.2d 350 (D.C. Cir. 1974). Congress accepted that result, enacting § 6110 to regulate the release of written determinations by providing certain safeguards, such as the deletion of identifying details.

tors' requests for interpretations of Department of Energy regulations.[299] As an agency develops routine procedures for releasing its determinations in other cases and for protecting the interests of the parties to those cases from unwarranted disclosure of personal or business data, this use of the FOIA becomes less burdensome.[300]

Parties to litigation also have used the FOIA to obtain records that describe an agency's internal operating procedures or that contain information on possible procedural irregularities. These records are also questionably relevant and not normally discoverable absent some special showing. In *Lord & Taylor v. Department of Labor*,[301] for example, a defendant in a minimum wage and hours enforcement proceeding unsuccessfully sought the production in discovery of the Department's *Wages and Hours Division Field Operations Handbook*. The defendant employer subsequently obtained most of the handbook under the FOIA.[302] Likewise, in *FAA v. Tison*,[303] the National Transportation Safety Board, in a proceeding to revoke a pilot's license for landing on an unopened runway, had denied, on the grounds of minimal relevance and undue burden, the pilot's request for a large number of documents on the FAA's runway closings policy and on the subsequent opening of the runway in question. The pilot then obtained the same documents from the FAA under the FOIA.

### *G. The Use of the FOIA to Obtain an Additional Search For Relevant Records*

The parallel use of the FOIA and discovery to obtain relevant documents, or "double-dipping" as it is sometimes called, occurs infrequently except in adjudicatary proceedings before a limited number of agencies. Discovery should provide parties to litigation with access to all documents necessary to prepare their case. Nevertheless, some parties use the FOIA for discovery because they believe that a FOIA search will produce additional documents, or will secure the earlier release of relevant documents.

A FOIA search may produce more relevant documents than a discovery search because public information officers are good searchers and

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299. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 868-70 (D.C. Cir. 1980).

300. See the elaborate safeguards in 26 U.S.C. § 6110 (1982) for the release of written determinations by the IRS.

301. Lord & Taylor v. Department of Labor, 39 Ad. L. 2d 635 (S.D.N.Y. 1976).

302. *Id.* The decision of the FOIA court does not discuss the FOIA requester's unsuccessful efforts to obtain the same Handbook through discovery. That information came from attorneys in the Department of Labor.

303. National Transportation Safety Board No. SE-5551.

have access to records that lawyers conducting a discovery search may not find. Public information officers may release documents that a lawyer, who represents an agency in litigation and thus looks at the same document with a more adversarial eye, would consider to be privileged. Furthermore, even a FOIA response which does not release any relevant documents may enable the requester to obtain additional documents in discovery. When responding to a FOIA request, the agency must notify the requester of its determination to withhold a record.[304] The requester may then formulate a specific discovery request based on the agency response.

Multiple FOIA requests to the constituent units of an agency also reach more record custodians, and uncover more responsive records, than a discovery request directed to the attorneys representing the agency. At most agencies, the base for conducting FOIA searches is broader because the agency's system of recordkeeping is highly decentralized.[305] If the agency expects to process FOIA requests efficiently and in compliance with the statutory time limits, a FOIA office with release authority must be located near the records. Far-flung agencies such as the military departments, the EPA, the Department of Energy, and the FAA release records at dozens if not hundreds of local, district, and regional offices around the country. Searching from the bottom up, public information officers may uncover records that the lawyers, searching from the top down in response to a discovery request, do not reach. Lower level program people may have kept long-forgotten studies, correspondence, or rulings on issues that are now the subject of litigation. Even in an agency as centralized as the Antitrust Division, lawyers coordinating responses to similar FOIA and discovery requests acknowledge that public information officers have a better sense of where to look than do lawyers and therefore may uncover more responsive, disclosable records.

A public information officer may not claim an exemption for a record that a litigating attorney would resist disclosing. If the record's custodian does not object, the public information officer normally arranges for its prompt release without consulting the agency's lawyers. Occasionally, a public information officer may inadvertently release an exempt record that would otherwise be privileged. Government litigation attorneys have a significant number of horror stories, most unverifiable,

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304. This notification must accompany all administrative denials and explain the reasons therefore. 5 U.S.C. § 552(a)(6)(A) (1982). If the requester sues to enjoin the withholding of agency records, the court may order the agency to prepare a more elaborate *Vaughn* index.

305. The Department of Energy, for example, found that the amount of paper shuffling required to centralize FOIA releases made such a plan unworkable.

of inadvertent or careless releases.[306] In one verified instance, a regional office of the EPA afforded a FOIA requester access to a roomful of documents so that he could find the records that he wished the agency to release. The requester, who happened to be in litigation with the agency over the subject matter of the records, then argued that the government waived any claim of privilege with respect to the records in the room.[307] In another verified instance, the Department of Justice released a summary of a document while Justice Department attorneys were arguing in court that the document was privileged. The FOIA requester was a party to that litigation, and the court held that the Department had waived the privilege when it released the record under the FOIA.[308]

A number of agencies have adopted procedures to prevent inadvertent releases. These measures normally include involving the agency's attorneys in FOIA releases. The attorney representing the agency in litigation will learn of a FOIA request by a party to the litigation if the public information officer's search leads to the attorney's case file, but if the party seeks the release of technical documents (*e.g.*, economic or scientific studies) or correspondence discussing the agency's action, the public information officer's search may end with the program office's files. The attorney may have only copies of the requested records or may be unaware of their existence. In these instances, the attorney will not know of the FOIA request unless the agency has developed procedures for notifying him.

Thus, a growing number of agencies have informally instructed public information officers not to release records that appear to be related to pending litigation without contacting the agency's lawyers. At the NRC, for example, the Office of the Executive Director has instituted a procedure designed to ensure that the agency's trial attorneys receive notice of FOIA requests made on behalf of parties to pending adjudicatory proceedings. Under the procedure, trial attorneys prepare litigation notices to alert public information officers of pending administrative and judicial proceedings, and public information officers prepare summaries of FOIA requests for circulation among the attorneys.[309]

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306. Such stories fuel government attorneys' fears that a public information officer's judgment on when to raise exemption claims may differ from that of a trial attorney. *See supra* text accompanying notes 237-39.

307. Bethlehem Steel Corp. v. EPA, No. H82-517 (N.D. Ill.) (Dec. 2, 1983).

308. Phillips Petroleum Co. v. Department of Energy, 4 ENERGY MGMT. (CCH) ¶ 9740 (D. Del. 1977).

309. Other agencies, such as the Department of Health and Human Services, the EPA, and the Federal Reserve Board, also have tried to tighten their FOIA operations by involving their lawyers in release decisions.

Nevertheless, it is not easy to detect all litigation oriented FOIA requests. Requests often focus on generic safety issues (*e.g.*, the adequacy of fire fighting equipment at nuclear plants), and an attorney must identify requests that pertain to generic issues designated in pending licensing proceedings to determine whether the requests may be litigation related.

Similar protective measures are not feasible in all government agencies. In relatively small and centralized agencies like the NRC or the Federal Reserve Board, an agency may involve its trial attorneys in responding to litigation oriented FOIA requests and maintain accurate records of release decisions. In larger agencies, however, such as the military departments, the EPA, and the Department of Energy, centralizing and documenting release decisions in the same manner as denials would be inconsistent with the openness required by the Act. Timely release decisions are possible only if the field unit with custody of a record has authority to release it. In such cases, the agency's trial attorney, or the attorney in the Department of Justice representing the agency in court, simply cannot know with any degree of assurance what records the agency has released under the FOIA. Therefore, government attorneys face not only the danger of surprise but also the embarrassment of raising a claim of privilege for a document the agency already has released. A review of the various areas in which these problems may arise, however, indicates that the FOIA release of agency records seldom presents a serious problem to government litigators.

*1. Parallel Use of the FOIA and Discovery in Civil Litigation in the Federal Courts.* —Because the Federal Rules of Civil Procedure normally provide adequate discovery of relevant documents, the parallel use of the FOIA for discovery purposes rarely occurs in civil litigation in the federal courts. Counsel in the Litigation Division of the Office of the Army Judge Advocate General produced only one recent case (out of a varied case load of 1,500 pending cases) in which a party plainly used the FOIA for discovery purposes. In an enforcement action against a government contractor for failure to pay its employees time and a half for overtime,[310] the contractor's counsel surprised government counsel with records on weather conditions at the job site where the contractor's employees worked. The government suffered no prejudice, however, because the records were not particularly probative on the issue of whether

310. Jim Boothe Contracting & Supply Co. v. United States, No. 82-0038-H-B (S.D. Ala. Sept. 26, 1983). The dispute arose under the Contract Hours and Safety Standards Act, 40 U.S.C. § 330 (1982). The contractor brought suit for remission of the liquidated damages withheld by the government.

the employees had worked the extra hours.[311] The other agencies contacted also reported few instances in which parties to litigation made substantial use of the FOIA to discover relevant documents. When such requests did occur, they usually could be explained as a result of either a breakdown in discovery[312] or the familiarity of the party's counsel with the agency's filing system—a familiarity which allowed him to make very specific FOIA requests.[313]

The parallel use of the FOIA and discovery occurs primarily in major environmental and tort litigation in which relevant documents are likely to be scattered in hundreds of repositories at dozens of different agencies. In these instances the purpose of the double-dipping is usually to verify the completeness of the government's discovery efforts rather than to substitute the FOIA for available discovery methods. Counsel at the EPA estimate that only in one percent of the agency's caseload does a private party make significant use of the FOIA to supplement discovery.[314] At the Land and Natural Resource Division of the Department of Justice, there were 500-600 pending cases in the spring of 1983, but only four parallel FOIA actions. In the hazardous waste enforcement area, for example, a waste generator who receives notice of potential responsibility usually responds by making FOIA requests to obtain additional information, but a generator served with a complaint normally restricts himself to discovery.

Although relatively rare, double-dipping may impose significant burdens on the government. In a class action brought against the United States by persons who suffered adverse reactions to the swine flu vaccination program,[315] a number of parties supplemented their discovery of relevant documents with FOIA requests. Because the government had already produced an estimated 50,000 documents in the national discovery phase of the litigation, government counsel requested that the agencies forward the FOIA requests to him so that he could notify the requester that the agency previously had released the requested records in discovery. Extensive parallel use of the FOIA also occurred in the Agent Orange litigation brought by Vietnam veterans against the United States and the chemical's manufacturers. The Air Force and a

311. The contractor was arguing that bad weather conditions closed the base and prevented the employees from working overtime.

312. *See* California Canners and Growers v. United States, Cong. Ref. Case No. 2-77 (petition filed May 18, 1977) (FDA).

313. Mandalay Shores Coop. Hous. Ass'n v. Pierce, 667 F.2d 1195 (Cir. 1982), *cert. denied*, 103 S. Ct. 446 (1983) (Department of Housing and Urban Development case).

314. *But see infra* notes 370-71 and cases cited therein.

315. For a description of this litigation, see Rheingold & Shoemaker, *The Swine Flu Litigation*, 8 Litigation, Fall, 1981, at 28.

number of other agencies sought to lighten the burden of these requests by responding that they had already released the requested records in discovery.[316] In these cases, the parties using the FOIA appeared to be concerned that government counsel had not produced all the relevant documents during discovery. Finally, prior to the commencement of the recent litigation challenging the deployment of the MX missile system,[317] the plaintiffs made numerous FOIA requests to the Air Force to obtain records analyzing the environmental impact of the deployment. Upon filing suit, the plaintiffs sought the same information through expedited discovery prior to obtaining preliminary relief. The government objected to the burden of responding to both FOIA and discovery requests at the same time, and plaintiffs' counsel agreed to suspend all FOIA requests (*i.e.*, to withdraw them temporarily) while the government produced the documents in discovery. The trial judge never established a time table for discovery and never barred the private parties from using the FOIA; he simply told the parties to reach an agreement for expedited discovery.

*2. Parallel Use of the FOIA and Discovery in Criminal Cases in the Federal Courts.*—The Speedy Trial Act[318] affords criminal defense counsel so little time to prepare for trial that he cannot rely on FOIA requests to obtain relevant documents. Unless the trial court adopts the aberrational approach of ruling on FOIA requests,[319] defense counsel must use Rules 16 and 17 of the Federal Rules of Criminal Procedure to discover the documents he needs prior to trial.

The FOIA is nevertheless occasionally useful to defense counsel for investigation. Counsel may acquire information on the defendant's or a witness's background or about the federal facility where the offense allegedly occurred. Hospital and medical records and reports on safety conditions at a facility often contain useful background information. While defense counsel could seek these documents from the prosecutor under Rule 16 or from the agency under a Rule 17(c) subpoena, the materiality and evidentiary criteria in those rules may bar discovery if

316. This tactic is of limited utility because the agency can only invoke it when the party status of the requester is obvious from the face of the request. Agent Orange is a hot topic at present; and the Air Force receives, at its Pentagon headquarters alone, several FOIA requests per day for the release of records pertaining to Agent Orange. Unless the requester is one of the many counsel of record or a party in the Agent Orange class action, there is no way for the agency to know whether the requester is a party or is acting on a party's behalf. In fact, most Agent Orange requests are not litigation oriented but reflect the public's interest and concern on the matter.

317. Friends of the Earth v. Weinberger, 562 F. Supp. 265 (1983).

318. 18 U.S.C. §§ 3161-3174 (1982).

319. *See supra* note 246.

counsel is only looking for leads on defenses. Thus, in these cases counsel may use the FOIA as an investigatory tool.

*3. Parallel use of the FOIA and discovery in agency adjudication.*—The parallel use of the FOIA and discovery occurs most often in agency adjudication. Although the absence of provisions for formal discovery does not necessarily prompt parties to use the FOIA, perceived inadequacies in administrative discovery increase the parallel use of the FOIA. In many low-visibility proceedings the parties make little or no use of the FOIA.[320] In these proceedings, the issues are relatively straightforward, and the agency staff usually discloses its files despite the absence of formal discovery rules requiring it to do so.[321] Few issues of policy arise, and the agency only brings charges when the proof of a violation is particularly strong.[322] The respondents are usually small businesses whose counsel may not be as astute in the use of the FOIA as are counsel who represent larger economic interests before the FTC or the Commodity Futures Trading Commission (CFTC). Because of perceived deficiencies in administrative discovery, enforcement proceedings at the Department of Energy, the CFTC, and the FTC feature a heavy use of the FOIA. In those proceedings, most respondents either make FOIA requests during the proceeding or pursue requests that they made during the agency's investigation.

At the Department of Energy, the Economic Regulatory Administration commences an enforcement proceeding by issuing a proposed remedial order charging the respondent with a violation of the applicable price control regulations.[323] The respondent must file a Notice of Objection within 15 days and a Statement of Objections (in effect a

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320. Examples include unfair trade practice proceedings under the Packers and Stockyards Act (Department of Agriculture), enforcement proceedings on the disqualification of stores from participation in the Food Stamp Program (Department of Agriculture), hazardous materials proceedings before the Materials Transportation Bureau (Department of Transportation), proceedings to resolve disputes over mineral and other public land claims before the Bureau of Land Appeals (Department of the Interior), and contractor and grantee debarment proceedings under federal housing programs (Department of Housing and Urban development).

321. At the Department of Agriculture, the presiding officer may order the parties to exchange their witness lists and documentary exhibits, but he may not otherwise order them to produce documents. *See* 7 C.F.R. § 1.140 (1983). No discovery is available in the other proceedings listed *supra* note 320. *See* 49 C.F.R. §§ 107.315, 107.355 (1982) (Materials Transportation Bureau); 43 C.F.R. §§ 4.430 to 4.439 (Board of Land Appeals); 24 C.F.R. § 24 (1982) (Department of Housing and Urban Development debarment proceedings).

322. Excepting only public land appeals, the agencies in these low-visibility proceedings charge the respondent with the commission of a specific wrongful or dishonest act.

323. The procedural rules for enforcement proceedings are in 10 C.F.R. §§ 205.190-205.199 (1983).

combined answer and trial brief) within 40 days thereafter. To obtain discovery, the party must file a Motion for Discovery with the Statement of Objections. The motion "shall set forth the reasons why the particular discovery is necessary in order to obtain relevant and material evidence and shall explain why such discovery would not unduly delay the proceeding."[324] Because the interpretation of the applicable regulations is usually in dispute, respondents seek documents containing prior constructions by auditors, enforcement staff, and other agency officials. The Department's Office of Hearings and Appeals often affords respondents broad discovery on the prior construction of agency regulations and has permitted, despite the silence of the Department's procedural rules on this point, a second round of discovery motions.[325]

Despite the Office of Hearings and Appeals' broad discovery orders, respondents are dissatisfied with the discovery they obtain for two reasons. First, they obtain no discovery before filing a Statement of Objections and Motion for Discovery. In the motion, the respondent must justify all its discovery requests at the same time. A potential respondent, on the other hand, may make multiple FOIA requests once he realizes that he is the subject of an investigation.[326] Second, respondents do not believe that the presiding officers are sufficiently independent to ensure that the respondent receives a thorough discovery search. The presiding officer too often accepts agency counsel's assertion that the agency has conducted a through search without permitting discovery on that issue. A dissatisfied FOIA requester, on the other hand, may obtain a ruling from a federal judge on the thoroughness of the agency's search.

At the CFTC and the FTC, respondents primarily use the FOIA to supplement their efforts to obtain factual materials in agency files. At both agencies, respondents routinely discover documentary exhibits; they also seek to discover factual material (*e.g.*, economic studies, witness statements) that the agency does not plan to present as part of its case-in-chief but which might help the respondent. At the CFTC, the presiding officer does not have authority to order the agency or any other party to produce relevant documents, and the respondent can therefore obtain these records only by making FOIA requests or by convincing the presiding officer to order the Division of Enforcement to disclose poten-

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324. 10 C.F.R. § 205.198(c) (1983).

325. Atlantic Richfield, 5 DOE (CCH) ¶ 82,521 (1980) ("crude cluster" proceeding); Gulf Oil Corp., 8 DOE (CCH) ¶ 82,569 (1981).

326. Because a FOIA request by the respondent normally precedes a discovery request for the same documents, the Department does not produce the documents a second time but simply informs the respondent what he has already obtained.

tially exculpatory documents with the agency's case-in-chief.[327] Respondents have vigorously pursued both routes, but they have had greater success with the latter than with the former, which the agency has normally blocked by invoking exemption b(7)(A).[328]

At the FTC the presiding officer does have authority to order the agency to produce relevant documents, but private practitioners believe that the Commission's administrative law judges have never become accustomed to ordering discovery from agency files. Consequently, the ALJs allow the agency to withhold as work product factual material that a district judge would order a party to produce. By seeking the release of these records under the FOIA, the respondent may obtain a more objective determination of whether the records are protected work product.[329] Once again, this route to additional discovery has not proved to be particularly fruitful; practitioners report that a respondent does not obtain many additional, relevant documents under the FOIA. But respondents continue to make FOIA requests if only to guarantee disclosure or to obtain the earlier release of documents.

When responding to a respondent's FOIA request, the FTC does not release exempt records merely because they are available in discovery. Of course, if the agency has produced the documents in discovery prior to the FOIA request, the public information officer may inform the respondent that the agency has already released the records to him. But the respondent cannot use the FOIA to augment the document discovery he has obtained under the Commission's rules or to obtain discovery which, although available under the rules, he has not sought.[330] This approach is supported by the pragmatic consideration that the agency's FOIA office, and the FOIA court on judicial review, should not rule on discovery issues,[331] but is subject to the objection that a FOIA

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327. The Commission has required the Division to include all exculpatory or *Brady* material in the pretrial submission of its evidence under Rule 12.85. 17 C.F.R. § 12.85 (1983). *See supra* note 163.

328. That trend will surely continue because section 222 of the Futures Trading Act of 1982, which appears to qualify as an exemption b(3) statute under the FOIA, allows the Commission to withhold from public disclosure "any data or information concerning or obtained in connection with a pending investigation of any person." Futures Trading Act of 1982, Pub. L. No. 97-444, § 222, 1983 U.S. CODE CONG. & AD. NEWS (96 Stat.) 2294, 2309.

329. At the FTC, the General Counsel's office hears all appeals from initial denials. 16 C.F.R. § 4.11(a)(2) (1983). Initial denial authority belongs to the Secretary or, in the case of open investigatory files, to the bureau or regional office responsible for the investigation. 16 C.F.R. § 4.11(a)(1)(iv)(B) (1983).

330. Heublein, Inc. v. FTC, 457 F. Supp. 52, 55 (D.D.C. 1978); Gifford-Hill & Co. v. FTC, 1975-2 Trade Cas. (CCH) ¶ 60.674 (D.D.C. 1976).

331. For a case upholding this approach under the pre-1974 version of exemption b(7), see Williams v. IRS, 345 F. Supp. 591, 594 (D. Del. 1972), *aff'd*, 479 F.2d 317 (3rd Cir.), *cert. denied*, 414 U.S. 1024 (1973).

release of discoverable records cannot possibly interfere with an enforcement proceeding.[332]

The IRS also has experienced the parallel use of the FOIA by taxpayers to discover relevant factual documents in investigatory files. Section 6103 of the Internal Revenue Code, which protects the confidentiality of tax return information, permits the Service to release information to a taxpayer only if it determines that "such disclosure would not seriously impair Federal tax administration."[333] In criminal matters taxpayers usually file FOIA requests during the special agent's investigation; in civil matters they file requests when the case is at the audit stage in the District Office, on appeal within the Service, or before the Tax Court. In criminal matters or civil fraud cases, the Service releases very few records—usually no more than correspondence with the taxpayer, records submitted by the taxpayer, or other "junk" items that are already known to the taxpayer. In other civil cases, the Service often releases a great deal, including the much sought after revenue agent's report (RAR). To determine what records to release, the disclosure officer contacts the agency official handling the case. These officials—the revenue agent at the audit stage, the appeals officer at the appellate stage, and the attorney representing the Service at the Tax Court stage—all have authority to release information in a taxpayer's file if they believe that doing so would advance the resolution of the controversy. If the official handling the case would disclose the RAR or other records, the disclosure officer will release them under the FOIA.

The Service's use of the FOIA to provide discovery to a taxpayer is necessary because the taxpayer, unlike the respondent in a FTC proceeding, does not have any right to formal discovery (*i.e.*, any access to discovery rules) during the early, informal stages of the adjudication. Discovery is available only when the case reaches the Tax Court and the parties have been unable to stipulate for the exchange of relevant documents.[334] An appeals officer, or a Service attorney in a Tax Court pro-

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332. *See* Campbell v. Department of Health and Human Servs., 682 F.2d 256, 259-65 (D.C. Cir. 1982) (release to third party requester of records available to the respondent does not interfere with enforcement proceedings; exemption b(7)(A) therefore inapplicable).

333. 26 U.S.C. § 6103(e)(2)(1982). This statute qualifies as an exemption b(3) withholding statute. Chamberlain v. Kurtz, 589 F.2d 827, 838-39 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979). Other courts have gone further, holding that it supplants the FOIA and that a taxpayer may obtain access to tax return information (*i.e.*, to the investigatory file in his case) only in accordance with § 6103. King v. IRS, 688 F.2d 488, 495-96 (7th Cir. 1982); Zale Corp. v. IRS, 481 F. Supp. 486, 489-90 (D.D.C. 1979).

334. The Tax Court has authority to order the Service to produce relevant documents, but it requires parties to make reasonable efforts to stipulate for the exchange of necessary documents before they invoke the court's discovery rules. TAX CT. R. PRAC. P. 70(a); *see, e.g.*, Branerton Corp. v. Commissioner, 61 T.C. 691 (1974).

ceeding, might well expect some discovery from the taxpayer before he agreed to disclose an RAR. But because the Service's approach encourages taxpayers to use the FOIA to obtain the release of otherwise discoverable information without providing any quid pro quo, the availability of the FOIA for discovery purposes disadvantages the Service. Under its approach, the Service also must justify withholding records that normally would not be discoverable because of their deliberative, predecisional quality.[335]

### *H. The Use of the FOIA to Obtain Relevant Agency Records That Are Not Adequately Discoverable Because of External Limitations on Discovery*

Various limitations on the availability of discovery may prompt a party to a proceeding to use the FOIA. Discovery is a mutual venture which takes time, and a party seeking speedy preliminary relief against the government may prefer to use the FOIA to obtain relevant documents rather than invoke the cumbersome civil discovery rules.[336] Similarly, the government, when it is a party to civil litigation, may obtain a protective order under Rule 26(c)[337] barring discovery during the pendency of a motion that would dispose of the action. A court will bar discovery pending the resolution of a dispositive motion if it finds that subjecting the government to discovery would be unreasonable and unduly burdensome.[338]

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335. For example, appellate conference reports may not be exempt under the FOIA even though they generally are not discoverable.

One should not exaggerate the number of taxpayers who make FOIA requests. In 1982, the IRS received 12,538 FOIA requests, mostly from taxpayers. It denied 3,281 requests for technical reasons (no records, imperfect requests) and relied upon exemption b(3) and exemption b(7) to withhold records on only 1,510 and 920 occasions respectively. These figures indicate that only a small percentage of the taxpayers with tax controversies with the Service make FOIA requests. DEPARTMENT OF THE TREASURY, FREEDOM OF INFORMATION ACT ANNUAL REPORT TO THE CONGRESS 1 (1982).

336. For an example of this use of the FOIA, see Council of Large Pub. Hous. Auth. v. Department of Hous. and Urban Dev., No. 82-1210 (D.C. Cir. 1982).

337. FED. R. CIV. P. 26 (c)(i).

338. For an example of the use of the FOIA to circumvent this limitation on discovery, see Copper and Brass Fabricators Council, Inc. v. Department of the Treasury, 524 F. Supp. 945 (D.D.C. 1981). In that case an association of copper producers challenged the Treasury Department's switch from a 95% copper penny to a penny that was almost 98% zinc. The plaintiff sought document discovery on the factual basis for the change. The Department, after moving to dismiss the complaint on the ground of the plaintiff's lack of standing, obtained a protective order barring further discovery pending the court's ruling on that motion. The plaintiff promptly resubmitted its Rule 34 discovery request in the form of a FOIA request to the Department's public information office. In that fashion, the plaintiff obtained most of the documents it had unsuccessfully sought in discovery, as the Department withheld only a limited number of records containing deliberative material. This use of the FOIA

Despite the attractiveness of the FOIA to a party barred from discovery by a protective order, parties rarely use the FOIA in this fashion.[339] Parties also rarely use the FOIA to obtain discovery after the time limits for discovery have expired. The Department of Health and Human Services reports that in title VII suits against the agency, employee plaintiffs occasionally use the FOIA to discover relevant documents when their counsel have neglected to make discovery requests within the time permitted. There are few other verifiable incidents of litigants' using the FOIA as a last-minute discovery option.

In judicial review proceedings in the federal courts, a party may use the FOIA for discovery because formal discovery is either not available or is quite limited. In statutory review proceedings in the courts of appeals, the applicable rules do not provide for discovery,[340] and the reviewing court's ill-defined and uncertain power to order discovery has been "sparingly used."[341] In nonstatutory review proceedings in the district courts, the civil discovery rules do apply, but review normally is limited, as it is in the courts of appeals, to the administrative record.[342] In these "administrative record" cases the government has sought to avoid any discovery or other fact-finding procedures, and the courts have permitted discovery only under certain specific exceptions to the general rule that limits review to the agency record.[343]

In administrative record cases, the government normally submits an index of the record to the reviewing court. If the action is in a district court, the party seeking review may request the government under Rule 34 to produce all the documents constituting the administrative record. What constitutes the administrative record is a matter of some uncertainty in informal proceedings (both rulemaking and adjudicatory) where the agency does not make a decision "on the record" as that term is used in the Administrative Procedure Act.[344] The record in-

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deprived the Department of some of the benefits of the protective order, although it ultimately won the lawsuit on the standing issue. Copper & Brass Fabricators Council, Inc. v. Department of the Treasury, 679 F.2d 951 (D.C. Cir. 1982). The protective order still spared the Department the burden of responding to interrogatories and depositions, and any coin collector enamored with the copper penny could have made an identical FOIA request.

339. But for another case where the plaintiff resorted to the FOIA after the government obtained a protective order barring all discovery, see Cannon v. Marsh, C.A. 82-1479 (D.D.C. 1982) (plaintiff claimed breach of employment contract; government's successful motion to dismiss based on sovereign immunity defense).

340. FED. R. APP. P. 69(b) speaks only of supplementing the record.

341. Lead Indus. Ass'n, Inc. v. OSHA, 610 F.2d 70, 78 (2d Cir. 1979).

342. *See, e.g.,* Camp v. Pitts, 411 U.S. 138, 142 (1973); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971).

343. McMillan & Peterson, *supra* note 28, at 333-34.

344. 5 U.S.C. §§ 553(c) and 554(a)(1982).

cludes all documents that the agency considered[345] or that influenced the agency in reaching its decision.[346] Privileged documents (*e.g.*, deliberative material, legal advice) are either not part of the record, or if considered part of the record, they need not be disclosed.

If the party challenging the agency action questions the completeness of the record that is certified by the government, the party can request discovery on that issue. Most district courts afford some document discovery on the completeness of the record, but such discovery is not normally available in a court of appeals. In either case, the FOIA provides an easier and more effective procedure for obtaining the relevant documents. If a FOIA request results in the release of additional documents, the party may move to supplement the administrative record. In *Center for Auto Safety v. Gorsuch*,[347] for example, the petitioners challenged the EPA's decision to allow General Motors (GM) to offset excess pollution generated by certain models against pollution savings on other models rather than to require GM to recall the offending cars. After obtaining a FOIA release of several factual documents that the government may have erroneously excluded from the administrative record, the petitioners requested the court of appeals to supplement the record.[348] Justice Department and agency attorneys do not object to this use of the FOIA because they receive notice of the records released under the FOIA before the requester can use them in litigation: there is no danger of surprise.

A party also may expand the scope of discovery by requesting a FOIA release of records in the possession or control of an agency that is not a party to the proceeding. If the proceeding is in federal court, the party also may seek the documents through the Justice Department attorneys representing the government, who may secure the voluntary cooperation of the agency, or through a third party subpoena served on the agency itself under Rule 45 or Rule 17(c). If the proceeding is before an agency, however, the adjudicating agency may not have subpoena power or its subpoenas may not be effective in prying documents loose from the files of other agencies. For example, when an administrative law judge at the FTC issued third party subpoenas to thirteen federal agencies in the Commission's antitrust proceeding against seven

345. McMillan & Peterson, *supra* note 28, at 341-42.

346. National Courier Ass'n v. Board of Governors of the Fed. Reserve Sys., 516 F.2d 1229, 1241 (D.C. Cir. 1975).

347. No. 82-2032 (D.C. Cir. filed Nov. 9, 1982).

348. The court of appeals will rule on the petitioners' motion to supplement the record when it decides the case on the merits. For a case in which a party to a review proceeding was permitted to supplement the administrative record with documents obtained through the FOIA, see Bethlehem Steel Corp. v. EPA, 638 F.2d 994, 1000-01 (7th Cir. 1980).

major oil companies, the Department of Justice argued that the Commission could obtain documents from executive branch agencies only by directing its requests to the President.[349] Largely agreeing with the Department, the Commission ruled that it would issue a subpoena to another federal agency only in the most compelling circumstances and only after a Commission request directed to the President had been denied.[350] Agency attorneys appearing before the Armed Services Board of Contract Appeals also report that they cannot extract relevant documents from nonparty agencies as effectively as do Justice Department attorneys. Although subpoenas are available to the parties, counsel often tell a contractor that a FOIA request to the custodian agency is an easier discovery technique.[351]

Despite the FOIA's usefulness when administrative discovery is unavailable, the Act is an inadequate substitute for effective discovery, and private parties are ill-advised to rely exclusively on the FOIA to obtain government documents. Department of Agriculture records, for example, are often relevant to new animal drug proceedings at the FDA, but the presiding officers do not have authority to issue subpoenas. A party to an FDA proceeding is nevertheless most likely to secure the timely production of Agriculture Department documents if he makes a showing of his need on the record before the presiding officer. In these cases, agency counsel are usually able to obtain the records from the Department.

As is clear from the discussion in this part, the uses of the FOIA as a discovery tool are many and varied. The FOIA is useful both as a supplement to and as a substitute for normal discovery techniques. A few of these uses of the FOIA disadvantage the government in litigation and are thus arguably abusive. Others impose little or no burden on the government other than the burdens associated with the usual FOIA request. Any proposal to correct the abuses must take into account both the legitimate uses of the FOIA and the peculiar circumstances of the illegitimate ones.

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349. 15 U.S.C. § 47 (1982). Section 8 of the Federal Trade Commission Act instructs other government agencies to furnish records, papers and information to the Commission when directed to do so by the President.

350. *Exxon Corp.*, Docket 8934 (Interlocutory Order June 30, 1980). The General Counsel's office reports that no other respondents have invoked this cumbersome procedure for discovering documents from nonparty agencies.

351. Parties to grant proceedings before the Department of Health and Human Services also use the FOIA to obtain relevant Department of Labor records, preferring not to rely on the efforts of agency counsel or the subpoenas of the presiding officer.

## IV. PROPOSALS TO CLOSE THE FOIA TO PARTIES TO PENDING PROCEEDINGS

### *A. Description of Proposals*

In the fall of 1981, the Reagan Administration submitted to Congress a package of amendments to the Freedom of Information Act that included a provision intended to limit the use of the FOIA for discovery purposes.[352] The amendment bars a party to an "ongoing" proceeding, or any person acting on his behalf, from "making" or "maintaining" a FOIA request for records "relating to" the subject matter of the proceeding.[353] The closing of the FOIA is only temporary; once the proceeding is no longer "ongoing," a party may seek the release under the FOIA of records related to the proceeding. In support of the proposal, the Justice Department claimed that FOIA requests by parties to litigation divert government resources and impair the ability of the government to bring cases to trial.[354] Although the Department's section-by-section analysis did not address the issue, the Administration's draft not only closes the FOIA to persons engaged in litigation with the government, but also to persons engaged in private litigation. The latter limitation did not provoke any comment at the hearings before the Subcommittee on the Constitution of the Senate Judiciary Committee, but Senator Hatch (the subcommittee chairman) questioned the closing of the FOIA to a party to an agency adjudication if the agency did not have adequate discovery rules.[355]

In the fall of 1982, the Senate Judiciary Committee unanimously approved, as part of S. 1730, a somewhat narrower provision than that submitted by the Administration.[356] The Committee's bill did not come to a vote in the Senate during the 97th Congress but was reintroduced in the 98th Congress as S. 774. In June 1983, the Judiciary Committee unanimously approved S. 774.[357] Section 13 of S. 774 provides that the

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352. 1 *Hearings*, *supra* note 19, at 638-41 (text and section-by-section analysis of Administration's proposed amendments). The Administration's proposals were introduced as S. 1751, 97th Cong., 1st Sess. (1981).

353. The full text of the provision reads as follows:

> A requester shall not make or maintain a request under this paragraph for records relating to the subject matter of any ongoing judicial or adjudicatory administrative proceeding (civil or criminal) to which the requester, or any person on whose behalf the requester acts in making the request, is a party.

1 *Hearings*, *supra* note 19, at 641 (section 2(b) of draft bill).

354. *Id.* at 659-60 (section by section analysis).

355. *Id.* at 635-36 (testimony of Assistant Attorney General Jonathan Rose).

356. S. REP. NO. 690, 97th Cong., 2d Sess. (1982).

357. S. REP. NO. 221, 98th Cong., 1st Sess. 6 (1983).

time limits prescribed for an agency response to a FOIA request "shall be tolled" whenever:

> 1) the requester, or any person on whose behalf the request is made, is a party to an ongoing judicial proceeding or administrative adjudication; and
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> 2) the government is also a party to the proceeding or adjudication; and
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> 3) the government may be requested to produce the records in the proceeding or adjudication.

The section then adds that it shall not be construed to bar:

> 1) a request for any records which are not "related to" the subject matter of the ongoing proceeding; or
>
> 2) a request for any records which have been denied to a party in the course of a judicial proceeding or administrative adjudication that is no longer pending.[358]

In support of this provision, the Judiciary Committee asserted that criminal defendants frequently use the FOIA to disrupt the prosecutor's case preparation and to delay trial. In addition, the Committee objected to the use of the FOIA to circumvent limitations on civil and criminal discovery.[359]

Under the Judiciary Committee's bill, the temporary closing of the FOIA is discretionary with the agency. Unlike the Administration's proposal, S. 774 permits a party to continue to make and maintain FOIA requests during litigation. The agency may, if it chooses, decline to process those requests because the time limits for responding "shall be tolled." Of course, the agency may respond if it chooses to do so. Once the litigation terminates, the time limits again begin to run, and a party may request any records that he did not obtain in discovery.

Another difference between S. 774 and the Administration's bill is that S. 774 only closes the FOIA to parties in litigation with the government who may request the government to produce the records in discovery. This latter modification reflects Senator Hatch's concern to keep

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358. The text of the relevant part of section 13 of S. 774 reads as follows:

> B. The time limits prescribed in subparagraph (A) of paragraph 6 shall be tolled whenever the requester (or any person on whose behalf the request is made) is a party to any ongoing judicial proceeding or administrative adjudication in which the Government is also a party and may be requested to produce the records sought. Nothing in this subparagraph shall be construed to bar (i) a request for any records which are not related to the subject matter of such proceeding, or (ii) a request for any records which have been denied to a party in the course of a judicial proceeding or administrative adjudication that is no longer pending.

359. S. REP. NO. 221, 98th Cong., 1st Sess. 29 (1983).

the FOIA open to parties to agency adjudication when agency rules do not afford adequate discovery.[360] It is unclear, however, why the Committee also decided to require agencies to respond to FOIA requests made by parties to private litigation. The 1981 Hearings on the Freedom of Information Act before the Subcommittee on the Constitution[361] are replete with testimony that private litigants make such requests to discover competitors' trade secrets and other confidential business information. The subcommittee and the full Judiciary Committee responded by amending the FOIA to provide submitters of confidential business information with notice and an opportunity to be heard prior to an agency's release of records designated as confidential by the submitter.[362] But neither body explained why it declined to close the FOIA to parties to private litigation.

### *B. Objections to Proposals*

There are three major objections to closing the FOIA to parties to litigation. First, the FOIA often provides private parties with speedier, more convenient access to government records than does discovery. Second, parties to litigation normally have a greater need for access to government records than do other persons for whom the FOIA would remain open. Third, there is no fair or rational way to enforce such a closing. In addition, temporarily closing the FOIA to parties to litigation will surely increase the already burdensome prelitigation use of the FOIA for discovery purposes.

With respect to the first objection, litigants who benefit from the availability of the FOIA include private litigants who seek government prepared accident reports, criminal defendants who are investigating possible defenses, respondents in agency adjudication who do not have access to formal discovery or who distrust the adequacy of the discovery available, parties in government litigation who seek records from nonparty agencies, and parties to judicial review proceedings who seek to verify the completeness of the administrative record. One might even add to this list parties who seek marginally relevant documents that are obtainable quite easily under the FOIA but only with difficulty in discovery. The Judiciary Committee's bill responds in part to these concerns by permitting an agency to continue using the FOIA to furnish parties with discovery if it chooses to do so.

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360. *See Hearings*, *supra* note 19, at 659-60 (remarks of Senator Hatch).

361. *See Hearings*, *supra* note 19.

362. Both S. 1751 and S. 774 contain elaborate provisions protecting the rights of submitters from inadvertent or mistaken releases under the FOIA of confidential business information.

The second objection may be explained by a hypothetical. Let us assume that the FTC commences a precedent-setting enforcement proceeding against company X. Other, similarly situated companies become aware of the Commission's action and naturally are interested in learning as much as they can about the legal and factual bases for the Commission's new position. As potential parties to future enforcement proceedings, they may obtain under the FOIA all nonexempt agency records pertaining to the agency's new policy. Yet, inexplicably, under the Administration's and the Judiciary Committee's approaches, these same records are not available to the actual respondent, who of course is even more interested in their release. Prior to the 1966 amendments to section 3 of the Administrative Procedure Act,[363] a requester had to establish his interest in the matter in order to obtain agency records. The FOIA rejected this limitation in favor of "any person" access. To provide that a party's interest in a record now disqualifies him from obtaining access available to others is both retrogressive and unfair.

A possible response to this second objection is that the Administration's and the Judiciary Committee's approaches affect only the means by which a party obtains discoverable agency records. Neither proposal bars all FOIA requests by a party; a party still can obtain records that are "not related to the subject matter" of the proceeding through the FOIA. On the other hand, if the records are related to the subject matter of the proceeding, the party must obtain them through discovery.

This response is not convincing. As discussed above, discovery does not always afford a party the first level access to agency records available to the public under the FOIA.[364] For example, the government may block a party's discovery request for relevant documents by successfully raising a claim of privilege or by obtaining a protective order barring discovery prior to the court's ruling on a dispositive motion. Under the Administration's proposal, the FOIA is unavailable to the party because of his status as a party, and under S. 774, the agency may close the FOIA to the party if he can "request" the government to produce the records in the ongoing proceeding. Apparently it does not matter in either case that the discovery request has been or will be denied. The party's "remedy" if a denial occurs is to make a FOIA request after the litigation terminates, when the party no longer needs the records for litigation purposes.[365] Although it may appear unseemly for a party to

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363. 5 U.S.C. § 552(c) (1964).

364. *See supra* text accompanying notes 23-24.

365. The discovery provision in of S. 774 § 13 provides that it shall not be construed to bar a request "for any records which have been denied to a party in the course of a judicial proceeding or administrative adjudication that *is no longer pending*." (emphasis added).

use the FOIA to circumvent restrictions on discovery, it is indefensible to bar a party, even temporarily, from obtaining agency records available under the FOIA to other requesters. In addition, this circumvention should not occur very often because in the great majority of cases discovery affords better access to agency records than does the FOIA.

The argument that discovery provides a party with an adequate substitute for the FOIA is even less convincing when one takes into account what records a party must seek through discovery (records that are "related to the subject matter" of the pending proceeding).[366] Only if the phrase "related to" means "relevant" is the closing of the FOIA no broader than the corresponding access in discovery. But it is not at all clear that "related to" and "relevant" are synonymous.

The legislative history of the proposed amendments establishes that their proponents contemplate that the "related to" limitation would do more than bar parties from obtaining relevant documents through the FOIA. The phrase "related to" first appeared in the Administration's 1981 draft bill to amend the FOIA.[367] The Justice Department's accompanying section-by-section analysis argued that criminal defendants and civil litigants used the FOIA to "circumvent" the discovery limitation that an agency need honor requests for "relevant" information only if "compliance with the request would not be unreasonably harassing, oppressive or burdensome."[368] The Judiciary Committee's section-by-section analysis of S. 774 makes the same argument in almost identical language.[369] Circumvention of discovery restrictions is thus the evil to be remedied by the new legislation, and that goal can only be accomplished if an agency can deny a party's litigation related FOIA request when compliance would be "unreasonably" burdensome or would result in the release of irrelevant records. If the drafters of S. 774 intended to close the FOIA to parties seeking relevant, discoverable documents, they

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366. S. 1751, the Administration's bill, required a party to seek through discovery all records "relating to the subject matter" of a pending proceeding. *See supra* note 353. There is no discernible difference between "relating to" and "related to."

367. *See* 5 U.S.C. §§ 553(c), 554(a) (1982).

368. OFFICE OF THE ATTORNEY GENERAL, THE ADMINISTRATION'S PROPOSED AMENDMENTS TO THE FREEDOM OF INFORMATION ACT 8-9 (October 15, 1981).

369. In civil cases, parties often openly use the FOIA to bypass discovery procedures or to circumvent discovery requirements that they show a need for the requested information, the relevance of the information to the case, and that compliance with the request would not be unreasonably harassing, oppressive or budensome. *See* FED. R. CIV. P. 26. Similarly in criminal cases, a defendant seeking discovery must demonstrate not only the relevance of the information sought, but also that the request is 'reasonable' and within the scope of criminal discovery. *See* FED. R. CRIM. P. 16(a).

S. REP. NO. 221, 98th Cong., 1st Sess. 29 (1983).

could very easily have said so. Thus, it appears that records which are not "relevant" may still be "related to" a pending proceeding and therefore not available to a party under the FOIA or in discovery.

Such a rule would produce inequitable results. For example, in *Bethlehem Steel Corp. v. EPA*,[370] a citizen's enforcement action brought by Bethlehem to compel the EPA to promulgate new rules, Bethlehem sought discovery on the agency's regulation of the steel industry under the Clean Air Act. As of late 1983, the government had resisted discovery on the grounds that the information sought was irrelevant. The presiding master rejected the government's efforts to limit the scope of discovery but also refused to order it to produce the documents requested by Bethlehem. The impasse in discovery encouraged Bethlehem to make FOIA requests and to file FOIA suits to enjoin the withholding of these records.[371] The EPA released many responsive records while claiming that many others were exempt even under the FOIA. If S. 774 were law, the EPA could have argued that Bethlehem's discovery request for the records established that the records were "related to the subject matter" of the pending litigation and hence need not be released to Bethlehem under the FOIA. If, on the other hand, FOIA courts interpret "not related to" to mean "not relevant," then S. 774 would afford EPA no relief and fail to accomplish its essential purpose—preventing the "circumvention" of discovery restrictions. The use of the FOIA for discovery purposes is not nearly as burdensome from the agency's perspective as is a FOIA request for a large mass of irrelevant documents.

The final objection to the closing of the FOIA to parties to ligitation is that the closing is, at worst, unenforceable and, at best, not enforceable in any fair or rational fashion. The legislative history of S. 774 indicates that the language restricting FOIA requests by parties to litigation and persons acting on their behalf "authorizes each agency to require requesters to identify the persons on whose behalf the requester is acting in making the request."[372] Agency regulations therefore could require a requester to certify whether he is a party to a proceeding or making the request on behalf of a party to a proceeding, thus deterring the use of strawmen to make FOIA requests.[373] Nevertheless, the ambi-

370. Bethlehem Steel Corp. v. EPA, No. 83C 7939 (N.D. Ill. Dec. 2, 1983).

371. Rothhaar v. EPA, I.P. 83-123-C (S.D. Ind.) (Nov. 16, 1983)(agency granted summary judgment); Tabler v. EPA, I.P. 83-168-C (S.D. Ind.) (Sept. 23, 1983)(dismissed without prejudice on Tabler's motion).

372. 2 *Hearings*, *supra* note 19, at 45 (subcommittee's section-by-section analysis of what is now section 13 of S. 774).

373. Ethical constraints would deter most attorneys from participating in such schemes,

guity of the phrase "on behalf of" raises serious problems, as does application of the FOIA access restriction to persons or organizations who make FOIA requests for many different purposes.

A FOIA requester clearly is acting "on behalf of" a party if the party asks him to make the FOIA request. But what if the FOIA requester seeks agency records to inform the public and is willing to make the records available to any one who asks for them? It should be clear that, if he makes the request on his own initiative and for his own purposes, he is not acting on behalf of the persons to whom he subsequently distributes the records. The answer becomes less clear, however, if there were some prior contact between the FOIA requester and the party to litigation, or if they share an interest in changing government policy.

These difficulties become clearer when the "on behalf of a party" standard is applied to an actual case. In *Orantes-Hernandez v. Smith*,[374] for example, the plaintiffs are Salvadoran refugees seeking political asylum in this country. As of early summer 1983, the plaintiffs were seeking discovery from the Department of State of documents pertaining to political conditions and human rights in El Salvador. At the same time, the Center for National Security Studies was seeking basically the same documents under the FOIA. Although the Center made its initial FOIA request prior to the Salvadorans' lawsuit, the Center maintained its request, and the Department responded to it, during the pendency of the *Orantes-Hernandez* litigation.[375] There were many entirely proper contacts between the Center's lawyers in Washington and the lawyers for the Salvadorans in California, and the Center evidently made available to the Salvadorans' lawyers some of the records it obtained under the FOIA. On these facts, is the Center acting on behalf of the Salvadorans? If the Center certifies that it is not seeking the records on behalf of a party to litigation, may the government challenge the certification by asking about prior contacts between the Center and the Salvadorans and about the Center's plans for sharing the records? A certification requirement does not mean much if it cannot be challenged, but challenges will involve courts and agencies in investigating cooperation between private litigants—a matter that is really none of the government's business. Even if an agency did not adopt a certification requirement, it still would be authorized to toll the time periods for

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and any use in the pending proceeding of records obtained through the FOIA most likely would expose the false certification.

374. 541 F. Supp. 351 (C.D. Calif. 1982).

375. Peterzell v. Department of State, C.A. 82-2853 (D.D.C. filed Oct. 3, 1982). As of late 1983, the State Department was preparing a *Vaughn* index covering the records withheld by it and already had released many responsive records.

responding to FOIA requests made on behalf of a party to litigation. If the requester challenged a tolling determination, then the agency would need to conduct some sort of proceeding to find the facts before applying the ambiguous "on behalf of a party" standard.

The difficulty in applying a certification requirement to requests by the parties themselves is not one of ambiguity but of overbreadth. Industrial giants like GM, and public interest organizations like the Center for Auto Safety, are almost always involved in litigation with the government. If GM or the Center for Auto Safety makes a FOIA request for records pertaining to auto safety, it is almost inevitable that those reocrds will be "related" in some fashion to a pending proceeding to which the requester is a party, perhaps a low-visibility administrative proceeding before the National Highway Traffic Safety Administration. The employee who makes the FOIA request on behalf of the organization may be completely unaware of or uninterested in the pending litigation. The phenomenon of the left hand not knowing what the right hand is doing applies to many large organizations.

It might be argued that a law permitting the temporary closing of the FOIA to parties to pending proceedings would not be overbroad if it were construed in light of its purpose—to bar the use of the FOIA as a supplementary discovery device. On this reasoning, the FOIA would remain open to a requester who is seeking agency records to plan company activities or to support a lobbying effort. Perhaps that result is consistent with the purpose of the bill, but the language of S. 774 requires a contrary result. Unless the requested records are unrelated to the subject matter of pending prodeedings, the agency may decline to process a party's FOIA request during the pendency of that proceeding. If, therefore, the records are "related to" the proceeding, the requester's purpose in seeking their release is irrelevant. Evidently, the drafters of S. 774 contemplate that the left hand may always find out what the right hand is doing.

Thus, if agencies implement S. 774 through a certification requirement, employees must ask their employers' lawyers about pending litigation before making a FOIA request on behalf of the employer. If the records an employee seeks are "related to" a pending proceeding, he must certify as to the employer's party status, and the agency then may delay processing the request by invoking the new tolling provision. Thus, not only would a temporary closing of the FOIA be overbroad, but it would almost force private entities to centralize their procedures for making FOIA requests. Some large organizations (chiefly businesses) already have done so by requiring a high official to approve all FOIA requests made on behalf of the organization. But some businesses

and most public interest groups allow employees more discretion in making FOIA requests, and they should not be forced to adopt a more centralized, cumbersome procedure.

### *C. An Alternative Prosposal*

The chief disadvantage of prior proposals to deal with the abuse of the FOIA for discovery purposes is that they deprive litigants of the timely first level access available to everyone under the FOIA. Congress should consider requiring a party in litigation with the government to notify government counsel of all discovery motivated FOIA requests. By amending the FOIA in this fashion, Congress can protect the government from the abuses of the FOIA which do occur without depriving litigants of equal rights under the Act.

A notice requirement limited to discovery motivated FOIA requests would not impose a significant burden on a party in litigation with the government. To comply with the notice requirement, a party's counsel need only mail a photocopy of each request to government counsel; the filing of a certification with the agency's FOIA office would be unnecessary. If an employee of a party seeks the release of agency records for nonlitigation purposes (*e.g.*, planning or lobbying purposes), then the employee need not notify government counsel of the request. More importantly, the employee need not even determine whether the requested records are related to pending litigation between the employer and the government.

Although fairness dictates that government counsel should receive notice if an opposing party is using the FOIA for discovery purposes, existing procedures do not ensure that he will receive notice. Government counsel might obtain information about a party's FOIA requests through discovery, but that disclosure may come too late to be of much value. Furthermore, the requester may seek to block disclosure by claiming work-product protection. Although advance notice of FOIA requests may make it easier for government counsel to become involved in the FOIA release decision and thus deprive a party of a nonadversarial (and perhaps more generous) response to the request, parties still should receive the minimum level access to which they are entitled under the Act.

The suggested notice requirement should also lighten the government's disclosure burden by permitting government counsel to eliminate duplicative searches and releases. An agency need not release records under the FOIA that the agency already has produced, or is producing, in discovery. The FOIA only proscribes the improper "withholding" of

agency records,[376] and the definition of "withholding"—significantly impairing a requester's ability to obtain records or significantly increasing the amount of time a requester must wait[377]—affords agencies considerable leeway in responding to FOIA requests. An agency has not improperly withheld a record if the agency has made the record available to the requester in discovery.[378] On the other hand, if the FOIA request precedes any discovery request, then the agency must respond to the FOIA request in the normal fashion but it need not produce disclosable documents a second time in discovery.

Because a discovery search is normally more intensive than a FOIA search,[379] government counsel's authority to avoid duplicative searches is not as clear as the authority to avoid duplicative releases. If an agency has conducted a discovery search prior to a FOIA request, the FOIA does not require an additional search for the same records unless there is reason to believe that the discovery search did not produce all responsive agency records or that the agency has acquired additional responsive records subsequent to the discovery search. (A FOIA search must only be calculated reasonably to uncover all relevant documents; although additional responsive documents conceivably may exist, an agency need only conduct a reasonable search.[380]) The agency's public information officer may limit any subsequent FOIA search to files not searched during discovery, but the information officer's superior knowledge of the agency's record keeping systems—knowledge which often leads him to uncover records missed during a discovery search—still benefits the FOIA requester. On the other hand, if the FOIA request precedes a discovery request, the agency should conduct both a normal FOIA search and a discovery search. The agency can nevertheless reduce the burden of the discovery search by maintaining accurate records on the scope of the FOIA search and on the records released.

Another means to avoid the disruption of the government's trial preparation when it must respond to discovery motivated FOIA requests would be to allow the government to respond to these requests

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376. *See* Kissenger v. Reporter's Comm. for Freedom of the Press, 445 U.S. 136, 139 (1980).

377. *See, e.g.*, McGehee v. CIA, 697 F.2d 1095, 1110 (D.C. Cir. 1983).

378. *See* Ackerly v. Ley, 420 F.2d 1336 (D.C. Cir. 1969), in which the court held that the agency's disclosure of records to the FOIA requester in discovery mooted the FOIA requester's lawsuit. *Id.* at 1340.

379. *See supra* text accompanying notes 64-74.

380. *See* Weisberg v. Department of Justice, 705 F.2d 1344, 1357 (D.C. Cir. 1983); Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (per curiam). Although in both *Weisberg* and *Perry* the reasonable prior search was a FOIA search, the same principle should apply to a reasonable prior discovery search.

before the court or agency in which the proceeding is pending.[381] Nevertheless, there are serious drawbacks to this untested approach. Litigation is already an overly complicated affair. To inject FOIA issues into all judicial or administrative proceedings in which the government is a party would complicate the proceedings still more, exacerbating the well-documented problem of delay in our courts.[382] The disruption caused by discovery motivated FOIA requests is not serious enough to warrant further disruption of the litigation process. In addition, assigning FOIA issues to the discovery court could dilute a party's rights under the FOIA. The discovery court will naturally focus on the documents that it believes the party needs for trial or hearing; discovery standards will inevitably take precedence over FOIA standards. Parties to litigation therefore may receive less favorable treatment than other FOIA requesters. Although consigning a party to discovery for vindication of his FOIA rights is better from the party's perspective than closing the FOIA to him altogether, the adverse effect upon the justice system mitigates against this option.

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381. The trial court or agency could apply FOIA standards to resolve FOIA issues.

382. Accordingly, the Department of Justice always tries to prevent discovery courts from considering FOIA issues.