For some years municipalities have been able to provide support for local industrial projects by erecting facilities for industrial use. The municipalities then pay to other taxing districts an amount equivalent to the taxes that would have been obtained if the facilities were privately owned. The industry involved reimburses the municipality for any tax equivalent paid.[121] The chapter authorizing this arrangement was amended to allow municipal support for pollution control facilities suitable for use by industries, commercial enterprises or utilities, subject to the same treatment for tax equivalents.[122]

In an effort to control junkyards and billboards, the owners of regulated advertising devices are to obtain annual permits ($5 initially per device, $3 for renewal). The funds from these permits are to be used to administer the act, including acquiring and removing such devices. Devices maintained in violation of the act may be removed, and their owners can be assessed the court fees and expenses plus other expenses involved in the removal. The statutory provision for regulating advertising signs near interstate highways[123] also was amended to provide similarly for removal procedures and assessments of costs.[124]

Amusement rides, devices, and related electrical equipment are now subject to regulation and inspection. An annual permit fee of $5 is charged plus an annual inspection fee of not over $10 per unit or the cost of inspection whichever is less. The Commissioner may by rule set the inspection fee. Both fees are paid into the amusement inspection fund.[125]

Fees charged physicians by the board of medical examiners in connection with programs for supervising medical assistants had been payable to the state board of medical examiners fund but are now to go to a physicians' assistants fund.[126]

Two attorney general opinions deal with fees charged by county recorders. One says that each separate assignment is an instrument, and the fee for recording should be charged accordingly.[127] The other says that the fee for copies of documents filed in the recorder's office depends on the nature of the copy and the statute authorizing the document to be filed.[128]

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121 IOWA CODE ch. 419 (1971).
122 Ch. 1103 [1972] Iowa Acts 355-57.
123 IOWA CODE § 306B.5 (1971).
124 Ch. 1068 [1972] Iowa Acts 178-89.
125 Ch. 1029 [1972] Iowa Acts 113-17.
126 Ch. 1045 [1972] Iowa Acts 146-47.
127 1971 OP. IOWA ATT'Y GEN. No. 71-11-19, *construing* IOWA CODE § 335.14 (1971).
128 1972 OP. IOWA ATT'Y GEN. No. 72-6-10.

THE FREEDOM OF INFORMATION ACT: A BRANCH ACROSS THE MOAT?

I. INTRODUCTION

During this century the American public has witnessed the development of a much more centralized federal government and with it a bureaucracy of awkward proportions. It is a rare citizen who does not have to communicate with this governmental department store, and as it grows and subdivides it becomes a more difficult task to understand the inner workings of the agencies within the federal government. One of the axioms of democracy is that citizens have a "right" to scrutinize the inner workings of government. A principle gaining much acceptance is that government may likewise scrutinize the inner workings of the private sector. Taken together, it appears obvious that an uninhibited two-way flow of information and data is essential. Recognizing that this was far from the case, Congress passed the Freedom of Information Act[1] which has been in effect since 1967. Both before and after its passage, students and observers of the bureaucracy speculated and commented upon the Act's potential and actual effectiveness, and most concluded that there was vast room for improvement.[2] It is the purpose of this Note to reappraise the results obtained under the Act.

II. BACKGROUND

The concept of the Peoples' right to know what is transpiring in the halls of government may have its origins in the United States Constitution. Although there is no specific mandate therein, some writers find an implied right derived from the first and ninth amendments.[3] Whatever rights may be established as flowing from the Constitution must be analyzed and tempered by the acknowledged Article II executive powers, particularly in the area of foreign affairs.

The 1946 Administrative Procedure Act[4] provided that agency records could be obtained, but there were severe limitations regarding who could obtain them. It was necessary that the information-seeking party be "properly and directly concerned" which meant that only persons directly involved with the agency at that time could utilize the Act. In addition, there was no provision

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[1] 5 U.S.C. § 552 (1970).

[2] *See, e.g.*, Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967); Nader, *Freedom From Information: The Act and the Agencies*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1 (1970); Note, *The Freedom of Information Act: A Critical Review*, 38 GEO. WASH. L. REV. 150 (1969).

[3] Hennings, *Constitutional Law: The People's Right to Know*, 45 A.B.A.J. 667 (1959). *See also* Parks, *The Open Government Principle: Applying the Right to Know under the Constitution*, 26 GEO. WASH. L. REV. 1 (1957).

[4] Administrative Procedure Act § 3, 5 U.S.C. § 1002 (1946).

for judicial review, which in effect, placed the agency in a position of near complete authority, and the citizen at the mercy of the agency. From these observations alone it can be seen that change was necessary.

The change came in the form of the Public Information Section of the Administrative Procedure Act,[5] popularly known as the Freedom of Information Act (hereinafter FOIA). In general terms, the FOIA was passed "to shred the paper curtain of bureaucracy that covers up public misinformation and secret sins with secret silence."[6] The overall purpose of the FOIA is to make disclosure the rule, and denial of access the exception, thereby reversing the trend of agencies to keep their records, documents, and memoranda from the public. The FOIA may be construed as a mandate to federal agencies to disclose documents upon request unless the requested information falls within one of the nine statutory exemptions[7] specifically provided. Of equal significance is recourse to the judiciary when the agency declines to produce the requested information.[8] Theoretically at least, if the agencies comply with the FOIA, they will be responsible and responsive to the people they were created to serve, and the aura of secrecy customarily maintained by them would vanish. This has not been the case.[9]

III. A Dissection

A. The FOIA Provisions

A detailed analysis of the statute as written will not be attempted here, as that task has been effectively undertaken elsewhere.[10] Legislative history must be consulted. In the case of the FOIA the Senate and House Reports,[11] although furnishing guidance, are not totally consistent. Thus, some confusion results in construing the reports together. The agencies themselves rely principally upon the Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act.[12] As would be expected this memorandum reflects the agency point of view,[13] and where statutory language is amenable to broad construction in favor of the agencies' exemptions, the agencies in many cases use the memorandum as authority for so reading them.

The FOIA begins with a requirement to publish in the Federal Register "for the guidance of the public" items such as the location of field organiza-

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[5] 5 U.S.C. § 552 (1970), *formerly* ch. 324, § 3, 60 Stat. 237 (1964) (codified by Pub. L. No. 90-23, 81 Stat. 54).

[6] 112 Cong. Rec. 13,648 (1966) (remarks of Congressman Laird).

[7] 5 U.S.C. § 552 (4)(b)(1)-(9) (1970).

[8] *Id.* § 552(3).

[9] *See, e.g.*, Nader, *supra* note 2.

[10] *See* Davis, *supra* note 2. *See also* Note, *Freedom of Information: The Statute and Regulations*, 56 Geo. L. J. 18 (1967), wherein the author states, at 52: "The Freedom of Information Act is a poorly drafted statute with a confusing legislative history."

[11] S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965), H.R. Rep. No. 1497, 89th Cong., 2d Sess. 9 (1966).

[12] *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (June, 1967), reprinted in 20 Ad. L. Rev. 263 (1968).

[13] Davis, *supra* note 2, at 761.

tions, requirements of formal and informal procedures available, rules of procedure and descriptions of forms, substantive rules adopted, and statements of general policy formulated and adopted by the agency.[14] The FOIA further requires that the agencies[15] make available for public inspection and copying the following:

> (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and
> (C) administrative staff manuals and instructions to staff that affect a member of the public. . . .[16]

If releasing any of the above would be tantamount to a "clearly unwarranted invasion of personal privacy" identifying details may be deleted, although the justification for such deletion must be explained in writing.[17] The underlying invasion of privacy issue is critical, and by inserting "clearly unwarranted" as a modifier of "invasion" it is apparent that some disclosures will interfere with privacy, and perhaps this is unavoidable. It must be remembered that the bureacracy has a legitimate interest in maintaining the confidence of the people it deals with, and persons divulging information to the agencies should be able to request and have it kept confidential. The FOIA exemptions do provide safeguards to persons giving confidential information to agencies, but they are not entirely adequate.[18]

To insure that parties affected by agency rulings and interpretations have a glimpse at more than the tip of the iceberg the FOIA provides:

> A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—
> (i) it has been indexed and either made available or published as provided by this paragraph; or
> (ii) the party has actual and timely notice of the terms thereof.[19]

Thus if a document or file is not disclosed as falling within an exemption, and is subsequently relied upon by the agency in a ruling, it loses its exempt status and paragraph (2) applies. In *American Mail Line, Ltd. v. Gulick*,[20] the Mari-

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14 5 U.S.C. § 552(a)(1) (1970).

15 5 U.S.C. § 551 (1970) defines "agency." The FOIA applies only to agencies as therein defined. This problem is illustrated by *Nichols v. United States*, 325 F. Supp. 130 (N.D. Kan. 1971) wherein a pathologist sought materials relating to the assassination of President Kennedy. Although certain reports and x-rays were "records," they were in the custody of the United States Secret Service which is not under the control of an agency.

16 5 U.S.C. § 552(a)(2) (1970).

17 *Id.*

18 A collateral problem arises where the agency releases copies of a transcript, and does not release it conditionally based upon an exemption. *See, e.g.*, LaMorte v. Mansfield, 438 F.2d 448 (2d Cir. 1971).

19 5 U.S.C. § 552(a)(2) (1970).

20 411 F.2d 696 (D.C. Cir. 1969).

time Subsidy Board directed steamship operators to refund past subsidy payments, the ruling being based upon a memorandum the Board refused to disclose, under an exemption for inter-agency or intra-agency memoranda.[21] On appeal, the court held that the memorandum lost its exempt status and became a public record as a result of the Board's action.

The FOIA provides that records not made available under the previous requirements shall be released "on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute" to "any person."[22] This is of course qualified and extremely limited by the exemptions.[23] It is instructive to note how the courts have construed this phraseology. In *Brystol-Myers Co. v. F.T.C.*,[24] the Federal Trade Commission moved to dismiss a complaint seeking to compel it to prepare a list from its files, to obtain injunctive relief, and to permit the taking of certain depositions. In granting the motion, the district court stated: "An identifiable record necessarily means a record that is described with sufficient precision in order that by ministerial action of some subordinate the document can be identified and selected out of files."[25] While this standard is ambiguous, its extremes are clear: If the document is only alluded to by a vague description or if one is requesting research and compilation the identification will be insufficient, whereas if the document is specified according to agency indices and may be readily extracted the test is met. One of the assumptions here applied is that agencies are performing their duties, and failing to require a reasonable degree of specificity might cause the agencies to become tremendously overburdened. One seeking records from an agency must ascertain the appropriate agency procedure and pursue it. The agencies may establish fees for copying or on a time basis for monitoring fees.[26] The FOIA may be invoked by "any person" and this amendment was designed to expand the Act's coverage beyond the category of those "properly and directly concerned" to include anyone. While the FOIA was passed in large part due to media interests, it has received relatively little use by them.[27] This might have been predicted due to the costs in time and money necessary to pursue court action under the Act. The major cases under the FOIA have involved corporations regulated by federal agencies and parties with major interests in the outcome of agency decision-making. With a few exceptions, the average citizen has not litigated un-

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21 5 U.S.C. § 552(b)(5) (1970).
22 *Id.* § 552(a)(3).
23 *Id.* § 552(b).
24 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).
25 284 F. Supp. 745, 747 (D.D.C. 1968).
26 *See, e.g.*, Reinoehl v. Hershey, 426 F.2d 815 (9th Cir. 1970) (dismissal of challenge to a Selective Service Regulation, 32 C.F.R. § 1606.57 (1969) which required a fee to copy file before an indictment or habeas corpus proceeding, but not after).
27 *See, e.g.*, Philadelphia Newspapers, Inc. v. Department of Housing and Urban Development of the United States, 343 F. Supp. 1176 (E.D. Penn. 1972) (proceedings initiated by newspaper to release names of appraisers). *See also Symposium: The Freedom of Information Act and the Agencies*, 23 AD. L. REV. 129, 143 (1971) (*Journalist's View*).

der the Act. This may be due in part to agency compliance and the consequent lack of need for law suits, but is more probably due to lack of time or resources.[28] Inasmuch as "any person" may request information it is possible for an attorney to request on behalf of a client, without revealing the identity of the party for whom the information is sought,[29] although this is not always advisable.

Under the FOIA, the federal district courts have jurisdiction over the agencies.[30] A complaint may be filed in the district where complainant resides, or has his principal place of business, or where the requested records are located.[31] In FOIA cases, the court must determine the case *de novo*, and FOIA cases are to have precedence on the court's docket.[32] Further, and in conformity with the purpose of the Act, the *burden is on the agency to sustain its action.*[33] Theoretically, a person need only assert that a request for information has been denied, and the agency would have to sustain its burden by showing justifiable classification within one of the exemptions.

The equity jurisdiction of the federal courts applies to all of the provisions of Section 552. Although there may be ambiguity in the statute, it has been held that the judicial enforcement provisions of paragraph (3) apply to all of the other provisions in the FOIA.[34] Judicial review is available unless the records have already been disclosed.[35] In *Epstein v. Resor*[36] the district court concluded that if the information in question fell within one of the exemptions it did not have jurisdiction, and this view was expressly disapproved on appeal, although the summary judgment granted defendants was affirmed. If the agency has denied disclosure, the court may be called upon to determine whether the documents in question fall within one of the exemptions. The court may, in some cases, inspect the materials *in camera*[37] and then determine whether the exemption has been properly invoked. It is important in such a case that the court state its reasons for inclusion or exclusion based upon its characterization of the documents for purposes of appellate review.[38] An *in camera* inspection may also reveal that portions of a file may be disclosed while others are exempt.[39]

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[28] It has been suggested that it is more informative to monitor the agencies in this regard than the courts. Project, *Federal Administrative Law Development-1970*, 1971 DUKE L.J. 149, 164 (1971).

[29] General Services Administration v. Benson, 415 F.2d 878 (9th Cir. 1969).

[30] 5 U.S.C. § 552(a)(3) (1970).

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] American Mail Line, Ltd. v. Gulick, 411 F.2d 696 (D.C. Cir. 1969). *See also* Davis, *supra* note 2, at 803.

[35] 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970). Annot., 7 A.L.R. FED. 876 (1971).

[36] 296 F. Supp. 214 (D.C. Cal. 1969).

[37] *See, e.g.*, Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971), *but see* Environmental Protection Agency v. Mink, 93 S. Ct. 827 (1973), and Epstein v. Resor, 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970).

[38] Ackerly v. Ley, 420 F.2d 1336 (D.C. Cir. 1969).

[39] Grumman Aircraft Engineering Corp. v. Renegotiation Board, 425 F.2d 578 (D.C. Cir. 1970).

The scope of the equitable discretion granted the courts by the Act is not expressly set forth. *Consumers Union of United States, Inc. v. Veterans Administration*[40] was an action to compel disclosure of specified records of a hearing aid testing program. The district court denied the request as to comparative scores and scoring schemes, but ordered disclosure as to raw test data. It held that although the express terms of the Act permitted disclousre (*i.e.*, it did not fall within an exemption) the court had discretion to deny relief where disclosure would be detrimental to the public.[41] In *General Services Administration v. Benson*,[42] an action to obtain records concerning the sale of property to a partnership, the district court enjoined the General Services Administration from withholding the records,[43] and in affirming the appellate court stated: "In exercising the equity jurisdiction conferred by the Freedom of Information Act, the court must weigh the effects of disclosure and nondisclosure, according to traditional equity principles, and determine the best course to follow in the given circumstances. The effect on the public is the primary consideration."[44] *Consumers Union* indicates that it is within the courts' equitable discretionary powers to deny disclosure even where the information does not fall within one of the specific exemptions. There is considerable disagreement with this proposition. In *Getman v. NLRB*,[45] a number of law professors engaged in a voting study sought the names and addresses of employees eligible to vote in certain elections, the district court granted relief, and the appellate court affirmed. The NLRB sought to categorize the information under three exemptions,[46] but the court found that none applied. They also answered in the negative the question of equitably refusing to disclose notwithstanding the absence of an exemption.[47] The *Consumers Union* position is also weakened by virtue of its being dismissed on appeal. Perhaps the most harmonious view in terms of conforming with the purpose of the FOIA is stated in *Soucie v. David*,[48] an action to obtain the "Garwin Report" on the development of the supersonic transport (SST) brought against the Office of Science and Technology. The appellate court held that the defendant was an "agency" and that despite the fact that the report was prepared at the request of the President's Office, the Constitutional executive privilege must be specifically raised. In remanding the case to the district court for a determination as to whether any of the exemptions applied, the court stated:

> It has been argued that courts may recognize other grounds for

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[40] 301 F. Supp. 796 (S.D.N.Y. 1969), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971). *See* Comment, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 21 (1970).

[41] 301 F. Supp. 796 (S.D.N.Y. 1969).

[42] 415 F.2d 878 (9th Cir. 1969).

[43] 289 F. Supp. 590 (W.D. Wash. 1969).

[44] 415 F.2d 878, 880 (9th Cir. 1969).

[45] 450 F.2d 670 (D.C. Cir. 1971). *See* Note, 47 IND. L.J. 530 (1972).

[46] 5 U.S.C. § 552(b)(4), (6), (7) (1970).

[47] The court noted that counsel as *amicus curiae* in *Getman* were counsel for *Consumers Union*, and they stated to the court that the equitable discretion issue was neither briefed nor argued before the district court in *Consumers Union*.

[48] 448 F.2d 1067 (D.C. Cir. 1971).

> nondisclosure, apart from the statutory exemptions. At least one court has held that the Act's grant of "jurisdiction to enjoin" improper withholding of agency records leaves district courts with discretion to deny relief on general equitable grounds, even when no exemption is applicable . . . . But Congress clearly has the power to eliminate ordinary discretionary barriers to injunctive relief, and we believe that Congress intended to do so here.[49]

The FOIA is totally unambiguous as to burden of proof, as in any judicial proceeding under the Act, "the burden is on the agency to sustain its action."[50] The application becomes more complex however when applied with the exemptions, and in some cases the burden actually shifts. Thus the paragraph (3) provision is negated, in fact violated in some cases. This confusion arises where FOIA provisions and rules pertaining to federal discovery practice become intermingled. The simple reason for this is that the exemptions include documents which have been privileged under principles of discovery law, and the courts have applied this body of law in construing the FOIA exemptions.[51] In *Talbott Construction Co. v. United States*,[52] a tax refund case, complainant sought certain IRS documents. The court applied the fact/policy dichotomy and held the documents exempt under section 552(b)(5) as intra-agency memoranda. The court used the federal discovery standard[53] and concluded that the "plaintiff has failed to show good cause for their production."[54] According to the FOIA the defendant should be required to show that the documents are privileged. The "good cause" requirement, if the documents contain factual data, although present when *Talbott* was decided in 1969, has been removed for the production of documents under the Federal Rules of Civil Procedure.[55] Other cases[56] have also required a demonstration of need on the part of the claimant not only under the "which would not be available by law to a party"[57] standard of section 552(b)(5), but also under the section 552 (b)(7) investigatory files exemption.[58] This is to prevent using the FOIA as a discovery device under circumstances where ordinary procedures would be inapplicable. Thus, what might appear to be a "back door" discovery statute is not allowed by the courts to operate as such.[59]

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[49] *Id.* at 1076. In fact the very reason that judicial review must be *de novo* is so the courts will not be in a position to "rubber stamp" agency decisions. J. Moss & B. Kass, *The Spirit of Freedom of Information*, 8 TRIAL 14 (1972) (Congressman Moss was the principal author of the FOIA).

[50] 5 U.S.C. § 552(a)(3) (1970).

[51] *See, e.g.*, General Services Administration v. Benson, 415 F.2d 878 (9th Cir. 1969). (Court held that partner entitled to discover records under FED. R. CIV. P. 26(b), and thus could obtain them despite claim they fell under 5 U.S.C. § 522(b)(5) exemption).

[52] 49 F.R.D. 68 (E.D. Ky. 1969). *See also* Simons-Eastern Co. v. United States, 55 F.R.D. 88 (N.D. Ga. 1972).

[53] FED. R. CIV. P. 34.

[54] 49 F.R.D. 68, 71 (E.D. Ky. 1969).

[55] FED. R. CIV. P. 34, amended in 1970, effective July 1, 1971.

[56] *See, e.g.*, International Paper Co. v. Federal Power Comm'n, 438 F.2d 1349, 1359 (2d Cir. 1971).

[57] 5 U.S.C. § 552(b)(5) (1970).

[58] *Id.* § 552(b)(7).

[59] Benson v. United States, 309 F. Supp. 1144 (D. Neb. 1970).

B. The Exemptions

If the FOIA is envisioned as a mandate to the agencies to disclose information, either on their own, or upon request, then statutory exemptions are considered barriers to disclosure by the public and as protective shields by the federal agencies. The *exemptions* do not forbid disclosure under any circumstances, and agencies may decide to make information available which does fall within one of the exemptions.[60] Despite this possibility, agencies are reluctant to release "exempt" information, and in some instances this may be based upon fear of violating other statutory provisions.[61] The exemptions[62] have been the source of litigation in the courts and much criticism concerning the FOIA has been focused on them.[63] Although all of the exemptions are significant, this Note will treat (1), (4), (5) and (7).

Exemption (1)[64] is the "national security" exemption and is a statutory incorporation of the most direct form of executive privilege. It is a manifestation of a legitimate, albeit controversial, concern that matters affecting national security be privileged from disclosure. In *Epstein v. Resor*,[65] the appellants were engaged in research on the forced repatriation of anti-Communist Russians following World War II, and sought an army file designated "Forcible Repatriation of Displaced Soviet Citizens—Operation Keelhaul." The file was over twenty years old and was still classified as top secret. This file was finally

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[60] *See, e.g.*, LaMorte v. Mansfield, 438 F.2d 448 (2d Cir. 1971). *See also* 37 F.R. 25075-6 (1972).

[61] *See, e.g.*, 18 U.S.C. § 1905 (1970) (criminal sanction for disclosure of confidential information by federal officers and employees. Such employees are prohibited from disclosing any "trade secrets, processes, operations . . . [or] confidential statistical data. . . ." A violation is punishable up to a fine of $1,000 and/or a one-year prison sentence, and removal from office).

[62] 5 U.S.C. § 522 (1970) provides:

> . . . .
>
> (b) This section does not apply to matters that are—
>
> (1) specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy;
>
> (2) related solely to the internal personnel rules and practices of an agency;
>
> (3) specifically exempted from disclosure by statute;
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
>
> (6) personnel and medical files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
>
> (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;
>
> (8) contained in or related to examination, operating or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
>
> (9) geological and geophysical information and data, including maps, concerning wells.

[63] *See, e.g.*, Katz, *Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEX. L. REV. 1261 (1968).

[64] 5 U.S.C. § 552(b)(1) (1970).

[65] 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970), Annot., 7 A.L.R. FED. 876 (1971).

stored with the National Archives and Records Service, General Services Administration. Its classification was reviewed in 1954, and retained, and it was reviewed again in 1967 upon appellants' request. In 1968 appellant again requested release, and the Adjutant General of the Army ordered a complete re-examination of the file. This action was then initiated, and the district court granted summary judgment for defendants which was affirmed on appeal. The appellate court held that if the file came under the exemption, judicial inquiry did not warrant an *in camera* inspection of the file. The court held that determination as to whether secrecy is required in the national interest is within the province of the executive, and the court will ascertain only whether an executive order pertains to the material being sought. Thus, the language of exemption one, "specifically required by Executive order"[66] is being adopted as the criterion for the exemptions applicability. The court in *Soucie v. David*[67] held that the Constitutional executive privilege must be *specifically* raised, and the "policy of the Act requires that the disclosure requirement be construed broadly, the exemptions narrowly."[68] Recently, the United States Supreme Court, in *Environmental Protection Agency v. Mink*,[69] reviewed the national security exemption and resolved most doubt with respect to its scope and use. In *Mink* thirty-three members of Congress had sought documents regarding the underground nuclear test explosion scheduled to take place on Amchitka Island, Alaska.[70] The district court dismissed the complaint, but the court of appeals reversed and remanded for an *in camera* inspection. The appellants contended that exemption one required each document to be classified by separate Executive order. The classification procedure was accomplished pursuant to Executive Order No. 10501,[71] which has been superseded. This order required a file to be classified according to the most highly classified document therein. The court of appeals rejected this approach as being inconsistent with the FOIA, as it rejected a similar provison of 10501 pertaining to physically connected documents. On appeal, the Supreme Court reversed, and remanded for further proceedings with respect to another exemption. Six of the documents sought were classified Top Secret or Secret according to the affidavit of John N. Irwin, II, an Undersecretary of State, and these documents were classified pursuant to Executive Order 10501. The thrust of the Court's holding with respect to the national security exemption is twofold: (1) the documents need only be classified pursuant to Executive order, and need not be so classified specifically or individually, and (2) an *in camera* inspection is *not permissible* to decide whether the documents properly fall within the purview of the exemption. The Court stated:

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66 5 U.S.C. § 552(b)(1) (1970).
67 448 F.2d 1067 (D.C. Cir. 1971).
68 *Id.* at 1080.
69 93 S. Ct. 827 (1973), *rev'g* 464 F.2d 742 (D.C. Cir. 1971).
70 *See* 5 U.S.C. § 552(c) (1970).
71 3 C.F.R. 292 (1970). Such classification is now accomplished pursuant to Executive Order 11652, 37 Fed. Reg. 5209 (1972). The new order took effect June 1, 1972, but was promulgated on March 8, 1972, only two days after *certiorari* was granted in *Mink*.

> We do not believe that Exemption 1 permits compelled disclosure of documents such as the six here, that were classified pursuant to this Executive Order. Nor does the Exemption permit *in camera* inspection of such documents to sift out so-called "non-secret components." Obviously, this test was not the only alternative available. But Congress chose to follow the Executive's determination in these matters and that choice must be honored.[72]

It seems that most potential problems arising under exemption one have been resolved. The responding party may claim the exemption orally or by affidavit and simply state that the relevant materials have been classified within the exemption pursuant to executive order; with this minimal proof in its presence, the court is precluded from further review. Thus, the Executive branch is well protected by the national security exemption. As Justice Stewart, in his concurring opinion points out: "[I]t [Congress] has built into the Freedom of Information Act an exemption that provides no means to question an executive decision to stamp a document 'secret,' however cynical, myopic, or even corrupt that decision might have been."[73] This may very well lead to the conclusion that further restrictions or limitations of exemption one, if any, will necessarily come from Congress.

The fourth exemption excludes from disclosure requirements "trade secrets and commercial or financial information obtained from a person and privileged or confidential"[74] and presumably applies to vast quantities of data collected by regulatory agencies. This provision requires some further defining. A "trade secret" may be defined in various ways, and there is difference of opinion. Organizations reporting data to an agency, as in the case of a pharmaceutical firm submitting a new drug application to the Food and Drug Administration, consider laboratory test results "trade secrets," whereas competitors and consumers may not consider it in that way. It is of course necessary in the free enterprise system to protect such industries, and this must be tempered in most cases with the authority to regulate them.[75] The exemption is applicable only to information obtained *outside* the agency, and documents originating within the agency are not covered by this exemption.[76] Early analysis of the FOIA revealed that exemption four would not include all information given to the agencies by citizens, and this is demonstrated in *Getman v. NLRB*[77] where the requirements for exemption four are set forth. The exemption applies to (1) trade secrets *and* (2) information which is (a) commercial

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[72] 93 S. Ct. 827, 833 (1973).

[73] *Id.* at 840. In a dissenting opinion, Justice Douglas observes, at 846: "[A]nyone who has ever been in the Executive Branch knows how convenient the 'Top Secret' or 'Secret' stamp is, how easy it is to use, and how it covers perhaps for decades the footprints of a nervous bureaucrat or a wary executive."

[74] 5 US.C. § 552(b)(4) (1970).

[75] *See, e.g.*, Pendergast, *The Responsibility of the FDA to Protect Trade Secrets and Confidential Data*, 27 FOOD DRUG COSM. L.J. 366 (1972).

[76] Grumman Aircraft Engineering Corp. v. Renegotiation Board, 425 F.2d 578 (D.C. Cir. 1970); Wecksler v. Schultz, 324 F. Supp. 1084 (D.D.C. 1971). *See also* Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591 (D. Puerto Rico 1967).

[77] 450 F.2d 670 (D.C. Cir. 1971). *See* Note, 47 IND. L.J. 530 (1972).

or financial, (b) obtained from a person, *and* (c) privileged or confidential.[78] Hence, to qualify for exemption four the information must originate outside the agency, be a "trade secret" or meet the test of *Getman* as commercial or financial information.

The "internal memoranda" exemption[79] applies to agency generated documents for use within the agency or for purposes of communication with other agencies. As discussed previously, the law pertaining to discovery practice is implicit here as reference is made to "available by law" in the exemption.[80] Thus, the "mental processes/factual data" dichotomy applies, and if the documents may be described as the former, they are exempt.[81] This standard for determining whether disclosure will be required is of course not this clear cut, as indicated in *Environmental Protection Agency v. Mink*.[82] In construing exemption five, the Court noted that "the rules governing discovery in such litigation have remained uncertain from the very beginnings of the Republic."[83] There will necessarily be a case-by-case analysis to determine whether the documents would be discoverable if the claimant were actually engaged in litigation with the agency, other than proceedings under the FOIA. The discovery practices in the system provide the framework, however. In *Mink* the Court further held that *in camera* inspection is not required when the internal memoranda exemption is alleged by an agency, and if the agency is able to sustain its burden of proof relative to the claimed exemption with affidavits or oral testimony, no *in camera* inspection is warranted.[84] Where the issue approaches a stalemate, the court may select a representative document for *in camera* inspection. An immediate question with respect to this practice arises; who decides which document is representative? If the agency performs this task there is obvious prejudice, and if the court does, this amounts to a partial *in camera* inspection. Ultimately, the courts' discretion will be relied upon. While a claimant does not have a right to *in camera* inspection, it may be ordered if the agency cannot show by other means that the documents are nondisclosable under exemption five.

Where an agency bases a ruling on a memorandum, as was done in *American Mail Line, Ltd. v. Gulick*,[85] the memorandum loses its exempt status and must be disclosed. It would certainly seem that despite the FOIA, the agencies would, in regulation cases, have to comport with due process standards. As discussed, the courts are also willing to conduct *in camera* inspections of documents allegedly exempt under (5) since there is a tendency and concomitant prohibition regarding the "blanketing" of documents into this

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78 450 F.2d 670, 673 (D.C. Cir. 1971).
79 5 U.S.C. § 552(b)(5) (1970).
80 General Services Administration v. Benson, 415 F.2d 878 (9th Cir. 1969).
81 *See* Talbott Construction Co. v. United States, 49 F.R.D. 68, 71 (E.D. Ky. 1969).
82 93 S. Ct. 827 (1973).
83 *Id.* at 835.
84 *Id.* at 839.
85 411 F.2d 696 (D.C. Cir. 1969), Annot., 7 A.L.R. FED. 855 (1971). This, in effect, places the memorandum under 5 U.S.C. § 552(a)(2)(A) (1970).

category.[86] In *Sterling Drug, Inc. v. F.T.C.*,[87] the court divided Commission memoranda into three categories: (1) those prepared by Commission staff, (2) those prepared by Commission members, and (3) those prepared by the Commission itself.[88] In remanding the case for possible deletions in documents which would render them disclosable, the court indicated that memoranda of types (1) and (2) would not be disclosable, whereas those of type (3) would be. The court is adhering to the "free flow of ideas" rationale behind exemption five. It is felt that free and frank discussion within the agency would be inhibited if all memoranda were made public. Further, views expressed by one or several agency officials may not reflect the official stance of the agency.

The "investigatory files"[89] exemption is designed to preclude disclosure of agency files which have been assembled pursuant to statutory and regulatory provisions. These files need not be compiled for possible criminal violations, but may be for purposes of agency proceedings as well.[90] In *Wellford v. Hardin*[91] the court ordered disclosure of letters of warning sent to meat and poultry producers as well as information with respect to detention of such products by the Department of Agriculture. The court alluded to the purpose of the exemption, prevention of premature disclosure, and ordered disclosure since these documents were in the possession of those against whom the law was enforced. A contrary result is suggested by *Frankel v. S.E.C.*,[92] wherein the investigatory files exemption was held to apply *after* the investigation and enforcement proceeding had terminated. Although the district court found that the S.E.C. contemplated no further action, the appellate court reversed and remanded. The court, in addition to the premature disclosure rationale, holds the files exempt to maintain confidential the procedures which are necessary for effective law enforcement, and to maintain an atmosphere conducive to open disclosure by witnesses and informers. There appears to be division on this issue. It seems that after proceedings have terminated, the major rationale, that of preventing premature disclosure, does not apply. In addition, it would be possible to delete certain identifying details which would possibly invade the personal privacy of someone, and consequently inhibit the disclosure of others, while at the same time providing the essentials of the investigations. This pertains likewise to investigatory techniques and procedures. An approach similar to this was taken in *Cooney v. Sun Shipbuilding & Drydock Co.*[93] The court attempted to reconcile the divergent policy considerations: nondisclosure to enhance uninhibited testimony by witnesses, and disclosure of non-privileged

[86] Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971); Bristol-Myers Co. v. F.T.C., 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

[87] 450 F.2d 698 (D.C. Cir. 1971). *See* Note, 50 TEX. L. REV. 1006 (1972). *See also* International Paper Co. v. Federal Power Comm'n, 438 F.2d 1349 (2d Cir. 1971).

[88] 450 F.2d 698, 706 (D.C. Cir. 1971).

[89] 5 U.S.C. § 552(b)(7) (1970).

[90] *See, e.g.*, Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591 (D. Puerto Rico 1967) (action brought the same month the FOIA was effective).

[91] 444 F.2d 21 (4th Cir. 1971).

[92] 460 F.2d 813 (2d Cir. 1972).

[93] 288 F. Supp. 708 (E.D. Penn. 1968).

information to litigants. The court allowed disclosure of factual investigations conducted by agency personnel and their conclusions as to causes of the accident, but refused to release the statements of third-party witnesses. It should be noted that the files in question in *Cooney* were four and one-half years old and it seems reasonable to infer that the exemption applies only to files which are assimilated for law enforcement purposes in the near future. If no proceedings are contemplated, the file should not be exempt.

C. *Procedure under the Act*

Although much of what might be stated regarding procedural sequence, has been discussed, a brief outline is in order. Under the FOIA "any person"[94] may request agency documents. Such request should be made in accordance with published agency rules and regulations, and ideally on provided agency forms. If the request is denied, pursue agency channels of appeal or review to satisfy exhaustion requirements.[95] If further denial results, and the agency basis appears unwarranted, the jurisdiction of the district courts may be invoked pursuant to the Act,[96] in a district where the complainant resides, has his principal place of business, or where the records are located. The agency as well as specified officials may be named defendants; however, adjudication affecting the agencies necessarily applies to its officials. It has been well stated that "[a]n act of Congress such as the FOIA is only as good as the lawyers want it to be. Constant pressure—and litigation, if necessary—in every federal district court in this country may be the only answer to making our government truly responsive to the people it serves."[97]

IV. Conclusion

The entire concept of freedom of information, or the public's right to know, is both popular,[98] and difficult to clarify. The "right" has its genesis in several places, and is not absolute in nature,[99] but highly qualified. It is qualified by the doctrine of executive privilege which is based upon Constitutional precepts and tradition, by the statutory and common law pertaining to discovery practice, by agency rules and regulations, by the FOIA, and finally by the manner in which the federal agencies respond to each of the above.

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94 5 U.S.C. § 552(a)(3) (1970).
95 Tuchinsky v. Selective Service System, 418 F.2d 155 (7th Cir. 1969).
96 5 U.S.C. § 552(a)(3) (1970).
97 Moss & Kass, *supra* note 49, at 15.
98 At least 42 states have adopted FOIA provisions of some type (Freedom of Information Center, State access Statutes, Report No. 202, June 1968, School of Journalism, University of Missouri as reported in Flannery, *Commercial Information Brokers*, 4 Colum. Human Rights L. Rev. 203, 205 n.18 (1972). *See* Note, 57 Iowa L. Rev. 1163 (1972) (Iowa's Freedom of Information Act). The states may use federal cases under the FOIA in construing their own statutes as was done in *Uribe v. Howie*, 19 Cal. App. 3d 194, 96 Cal. Rptr. 493 (1971). *See* 20 Kan. L. Rev. 525 (1972).
99 R. Mardian, *What Should the People Know?*, 8 Trial 16 (1972) (Mr. Mardian is Assistant Attorney General for Internal Security, United States Department of Justice).

The FOIA must be considered in context, as it is applied and construed amidst other sources of law. While the FOIA signifies a move toward greater accessability to public documents, this movement has been thwarted to some extent by a combination of drafting infirmities, agency practices, judicial interpretations, and a lack of momentum on the public's part. Consequently the FOIA has not been overly praised as accomplishing what many hoped it would.[100] The major criticisms may be summarized as follows: (1) the agencies tend to broaden the statutory exemptions, both beyond their language and the purposes of the Act; (2) the agencies attempt to classify material under as many exemptions as possible[101] or else apply an exemption as a "blanket" over a file which contains both exempted and non-exempted records; and (3) the inertia of many agencies results in delays, and where court action is necessary the private citizen is at a disadvantage economically.

Experience under the FOIA will provide a basis for new legislation which is both necessary[102] and inevitable. Meanwhile, the agencies might be well-advised to review their practices and procedures and strive for an alignment with the FOIA. "There is little doubt that if government officials display as much imagination and initiative in administering their programs as they do in denying information about them, many national problems now in the grip of bureaucractic blight might become vulnerable to resolution."[103] The final source of enforcement for the FOIA, and the concepts it seeks to implement, is the most crucial: the bar and the public it represents.

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100 As stated in Huard, *The 1966 Public Information Act: An Appraisal without Enthusiasm*, 2 PUB. CONTRACT L. J. 213 (1969) at 213: "Upon close study, the new public information amendment to the Administrative Procedure Act is revealed as rather thin stuff. It will not displace the Magna Carta, our Constitution, or even the Natural Gas Act as an exemplar of significant social, economic, or political legislation."

101 *See, e.g.*, Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971).

102 *See generally* Katz, *supra* note 63, at 1284.

103 Nader, *Freedom From Information: The Act and the Agencies*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1, 5 (1970).

DISSOLUTION OF MARRIAGE IN IOWA: COLLATERAL DETERMINATIONS UNDER THE NO-FAULT CONCEPT

I. INTRODUCTION

In 1969 the Iowa legislature seriously confronted the issue of divorce reform in Iowa. A committee was appointed to study the inadequacies of the existing law and to recommend reform measures.[1] During the 1970 session of the legislature, the Committee's recommendations were considered, and a major statutory change was instituted. The resulting statute was the Dissolution Act, which became effective July 1, 1970.[2] The enactment of this legislation made Iowa the second state to have a no-fault divorce statute.[3] The reforms thereby assimilated into Iowa divorce law were considerably less radical in some respects than those originally envisioned by the Divorce Laws Study Committee;[4] however, in other respects, the legislators surpassed the prevailing expectations and the express recommendations of the Committee. For instance, the Committee had initially proposed that the courts admit all evidence going to the issue of marital breakdown.[5] Fault evidence was not to be excluded. In fact, the Committee specifically recommended that certain kinds of evidence be designated as relevant and within the scope of review by the courts. The list made specific reference to the inclusion of evidence of adultery, chronic alcoholism, conviction of a felony, and inhuman treatment[6]—all instances of marital fault. The statute, as finally drafted, did not include this list.[7] It is

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[1] Peters, *Iowa Reform of Marriage Termination*, 20 DRAKE L. REV. 211, 213 (1971). Peters' article provides a competent treatment of the legislative history and the drafting of no-fault legislation in Iowa. It is not the purpose of this Note to duplicate that study.

[2] IOWA CODE §§ 598.1-.34 (1973). The no-fault concept, as embodied in Iowa law, is expressed in § 598.17, which provides:

> A decree dissolving the marriage may be entered when the court is satisfied from the evidence presented that there has been a breakdown of the marriage relationship to the extent that the legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved.

[3] California was the first state to institute major divorce reform. CAL. CIV. CODE §§ 4500-40 (1971). The provisions of this statute, which went into effect January 1, 1970, differ somewhat from those enacted in Iowa. For instance, § 4506 provides:

> A court may decree a dissolution of the marriage or a legal separation on either of the following grounds, which shall be pleaded generally:
>
> (1) Irreconcilable differences, which have caused the irremedial breakdown of the marriage.
>
> (2) Incurable insanity.

[4] Peters, *Iowa Reform of Marriage Termination*, 20 DRAKE L. REV. 211, 215 (1971).

[5] *Id.*

[6] *Id.* The Committee listed nine categories in all. The list is reproduced in its entirety in Peters' article.

[7] *Id.* at 216. In reviewing the legislature's treatment of this matter of fault evidence, Peters states: "Other than the above, the legislative history seems to make it clear that there is to be no vestige of the old fault concept. The *existence* of a dead marriage rather than the *cause* of death is to be the focus of judicial inquiry. Therefore,