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Roscoe Bryant

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The History and Background of Public Law 90-23 The Freedom of Information Act¹

The information contained herein is a statement of the purpose and background of the Freedom of Information Act. The purpose of this bill was to incorporate into Title 5 of the United States Code, without substantive change, the provisions of Public Law 89-487 Government Information—Public Access², which was enacted subsequent to the passage of Title 5 by the House of Representatives.

Public Law 89-487 made the following major changes:

1. It eliminated the "properly and directly concerned" test of who shall have access to public records, stating the great majority of records shall be available to "any person."³
2. It set up workable standards for the categories of records which may be exempt from public disclosure, replacing the vague phrases "good cause found," "the public interest," and "internal management" with⁴ specific definitions of information which may be withheld.
3. It gave an aggrieved citizen a remedy by permitting an appeal to a United States District Court. The court review procedure would be expected to persuade against the initial improper withholding and would not add substantially to crowded court dockets.

In 1958 Congress corrected abuse of the Government's 180 year old "housekeeping statute" (which gave government officials general authority to operate their agencies under the executive privilege concept).

While there had been substantial improvement in two of the areas of excessive government secrecy, nothing had been done to correct abuses in the third area. In fact, Section Three of the Administrative Procedure Act had become the major statutory excuse for withholding government records from public view. Section Three of the Administrative Pro-

¹ 5 U.S.C. § 552. The term "Freedom of Information Act" refers to the 1966 Amendments to the Public Information Section Three of the Administrative Procedure Act. These Amendments became effective July 4, 1967, and were re-enacted without substantive change a month before they became effective to make them part of the codification of Title 5, U.S.C.

² Public Law 89-487, 80 Stat. 250, revises 5, U.S.C. 552, formerly Section Three of the Administrative Procedure Act, 60 Stat. 237, 5, U.S.C. 1002 (1964 Ed.).

³ Attorney General's Memorandum on the Public Information Section of the A.P.A. 34, 1967 (hereinafter cited as Att'y Gen. Mem.).

⁴ *Ibid.*

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cedure Act⁵ though titled "Public Information" and clearly intended for that purpose, had been used as an authority for withholding rather than disclosing information. Such a one hundred eighty degree turn was easy to accomplish given the broad language of the Act.⁶

The purpose of Public Law 89-487 was to amend Section Three of the Administrative Procedure Act. The problem with Section Three was that it was not a general public records law in that it did not afford the public at large access to official records generally.

The Administrative Procedure Act provided no adequate remedy to members of the public to force disclosures in cases of improper withholding. Matters which were able to be withheld under the provisions ranged from the important to the insignificant—from the number and names of a particular agency employees to a matter of national security.

Even though the early act was entitled a "public information" section, the requirements for publicity were so hedged with restrictions that it had been cited as the basic statutory authority for twenty-four separate terms which federal agencies had devised to stamp on administrative information they wanted to keep from public view.

The areas of exemption of the Public Information Act that could keep from release copies of letters, finding, opinions, and investigatory files from the public.

Exemption 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."⁷ Rule 26(b) of the Federal Rules of Civil Procedure sets the limits of discovery of documents in civil actions with a government agency once a good cause is shown.⁸

Thus, an agency does not have to disclose those internal working papers in which opinions are expressed and policies formulated and recommended. Purely factual reports and scientific studies do not fall within the exemption.

Exemption 7—"investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."⁹ As stated in The Congressional Record, "these are files prepared by governmental agencies to prosecute law violators. Their dis-

⁵ U.S.C. 1002 (1964, Ed.).

⁶ *Ibid.*

⁷ Att'y Gen. Mem. *supra* note 3.

⁸ Under Rule 34 (a) of the Federal Rules of Civil Procedure, a party may obtain an order for the production of nonprivileged documents.

⁹ 5 U.S.C. 552(b)(7) (Supp. V, 1970).

closure of such files, except to the extent they are available by law to a private party could harm the government case in court."¹⁰

In enacting this section, Congress did not intend to give private parties charged with violation of federal regulatory statutes any greater right to inspect investigative file material than had been granted to persons accused of violating federal criminal laws.¹¹ This exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws. This would include files prepared in connection with related government litigation and adjudicative proceedings.¹²

In *Barceloneta Shoe Corporation v. Campton*¹³ statements made by witness to National Labor Relations Board investigators during investigation of the unfair labor practices charge were within exemption of investigatory files compiled for law enforcement purposes provided in the Act and the Board would not be required to produce statements for inspection by employer prior to a hearing by Board on the unfair labor practice charge against employers.¹⁴

Also found in *Barceloneta* were "statements of persons given in confidence to National Labor Relations Board agents in connection with investigation of unfair labor practice charges being exempt from disclosure requirements of the public information section of the act and need not be disclosed by National Labor Relations Board to the public until the persons giving the statements have testified at a hearing."¹⁵

A government agency cannot protect all its files with label investigations and suggestions that enforcement proceeding may be launched at some unspecified future date.¹⁶ The District Court must determine whether the prospect of enforcement proceeding is concrete enough to bring into operation exemption for investigatory files within the Act and if so, whether particular documents sought are nevertheless discoverable as stated in *Bristol Myers Co. v. Federal Trade Commission*.¹⁷

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

¹¹ 23 Ad. L.J. 129 (March 1971).

¹² See note 10, *supra*.

¹³ 271 F. Supp. 591 (1967).

¹⁴ 5 U.S.C. 552(e)(7).

¹⁵ 5 U.S.C. 552(e)(4).

¹⁶ Admittedly, it may sometimes be difficult for the agency itself to know whether an enforcement action will be brought in the near future. As long as there is a realistic prospect that such an action will be instituted and as long as administrators endeavor to make the enforcement decision as quickly as possible, the exemption should apply.

¹⁷ 424 F.2d 935 (1970).

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To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, a statement of policy interpretation or a staff manual instruction. However, in each case the justification for the deletion shall be explained fully in writing. Where portions of documents requested under the Act are protected against disclosure as privileged or confidential identifying details or secret matters can be deleted to render the material subject to disclosure.¹⁸

Although bare claims of confidentiality will not immunize files of a government agency from scrutiny, the District Court has the responsibility of determining the validity and extent of the claim after careful consideration of the particular documents in question, and of insuring that the exemption is strictly construed.¹⁹

CONGRESSIONAL RECORD—DESCRIPTIVE LIMITATION OF EXEMPTION
DESCRIPTION OF SUBSECTION (f) CONGRESS

The purpose of this section is to make it clear beyond doubt that all materials of the government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exemptions in subsection (e). Further, it is made clear that, because this section only refers to the public's right to know, it cannot, therefore, be backhandedly construed as authorizing the withholding of information from the Congress, the collective representative of the public.²⁰

The limitation of the exemption clause concerning Congress seemingly says that, everything applies to everyone, except to Congress. Congress, as the creator of the Act was not going to legislate away its right to know.

Counterbalancing the presumption that in a democracy the public has the right to know the business of its government is the executive privilege theory—a theory whose roots run deeply in the American political tradition. This concept holds that the President may authorize the withholding of such information as he deems appropriate to the national well-being.

While the bounds of the executive privilege claim have of late been more carefully spelled out and in effect, narrowed, widespread withhold-

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ H.R. Rep. No. 11, *supra* note 10.

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ing of government records by executive agency officials continues in spite of the enactment of limiting statutes.

CONCLUSION

With all the governmental safeguards to protect the public's right to know, the citizens and public interest groups still are unable to attain full access. The problem is that the very safeguards set up to protect the rights and to set out the limitations are still broad enough for putting any desired document out of reach.

Assuredly, the Act provides for any person's right to obtain information and in the event of a denial, to seek judicial redress. Furthermore, the 1946 "public interest" and "good cause" phraseology have been eliminated, and the Act emphasizes that only information that it specifically exempts may be withheld.²¹ Unfortunately, however, the nine purportedly "specific" exemptions are generally confusing and ambiguous.²² The agencies have been able to convert these congressional limitations into administrative loopholes through which federal officials escape with records intact. By concealing their records, bureaucrats maintain their aura of governmental inviolability and shield the incompetence and corruption which often exist in administrative agencies.²³

In all likelihood, the ambiguities and deficiencies of this statute will be remedied, if at all, only by the passage of new and improved legislation. For the moment, however, a string of loopholes is all that exists to pull administrative agencies into line on information practices. Unless lawyers and courts fill some of these loopholes with rational disclosure policies, the Freedom of Information Act will provide less than a show for the public to grasp while awaiting better information disclosure laws.²⁴

ROSCOE BRYANT

Analysis of the Food Stamp Program in the United States

INTRODUCTION

The purpose of this report is to recommend suggestions for the transportation of Food Coupons from Washington, D. C., to all points

²¹ "This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section," 5 U.S.C. 552(c) (Supp. V. 1970).

²² 5 U.S.C. 552(b)(1)-(9) (Supp. V. 1970).

²³ For more detailed comparisons between the old and new legislation see Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761 (1967).

²⁴ 48 Tex. L.R. 1289 (1970).