

1980

Using the Freedom of Information Act as a Discovery Device

David I. Levine

UC Hastings College of the Law, levined@uchastings.edu

Follow this and additional works at: http://repository.uchastings.edu/faculty_scholarship



Part of the [Civil Procedure Commons](#)

Recommended Citation

David I. Levine, *Using the Freedom of Information Act as a Discovery Device*, 36 *Bus. Law.* 45 (1980).

Available at: http://repository.uchastings.edu/faculty_scholarship/404

This Article is brought to you for free and open access by UC Hastings Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UC Hastings Scholarship Repository. For more information, please contact marcusc@uchastings.edu.



Faculty Publications
UC Hastings College of the Law Library

Author: David I. Levine

Source: Business Lawyer

Citation: 36 Bus. Law. 45 (1980).

Title: *Using the Freedom of Information Act as a Discovery Device*

Originally published in BUSINESS LAWYER. This information or any portion thereof may not be copied or disseminated in any form or by any means or downloaded or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Using the Freedom of Information Act as a Discovery Device

By DAVID I. LEVINE*

Congress passed the Freedom of Information Act (FOIA)¹ in 1966 to enable members of the public to obtain information about the workings of their government.² Many people have explored the possibility of using the FOIA to obtain information about their business competitors or litigation adversaries, either because an agency of the government has compiled relevant records or because a competitor or an adversary has submitted records or information to an agency in compliance with federal law.³ This article addresses four questions that commonly arise when someone wishes to use the FOIA to supplement discovery available under rules of civil procedure.⁴ First, can the FOIA be used in a litigation context? Second, when should FOIA requests be made? Third, what are "agency records" under the FOIA? And last, what is the current status of "reverse FOIA" suits?

1. Can a litigant use the FOIA to obtain information from or about another party?

Involvement in litigation does not harm a person's right of access to information under the FOIA. An FOIA requestor does not have to prove relevance or need to know in order to obtain information under the Act. If the FOIA commands disclosure, an agency may not cite the rules of discovery to withhold its records.⁵ Involvement in litigation, however, does not enhance access rights. The agency's determination of whether disclosure is required under the FOIA should not be affected by the requestor's need or desire to use the documents in connection with litigation.⁶

*Member of the California and Pennsylvania bars. This article is based, in part, on research conducted by the author while assisting in the preparation of a New York Law Journal seminar outline, *Discovery from Third Parties*, published in *Federal Discovery in Complex Civil Cases* (1980).

1. 5 U.S.C. § 552.

2. *See, e.g.*, *SDC Dev. Corp. v. Matthews*, 542 F.2d 1116, 1119 (9th Cir. 1976).

3. Obviously a government agency can also be a litigation opponent. The focus of this article, however, is on obtaining information under the FOIA that was prepared by or concerns a private entity or person.

4. For a full discussion of the Act, *see, e.g.*, 2 B. Menzies, J. Stein & J. Gruff, *Administrative Law* §§ 7.05, 9.01-10.10 (1980).

5. *Moore-McCormack Lines, Inc. v. I.T.O. Corp.*, 508 F.2d 945, 949-50 (4th Cir. 1974).

6. *E.g.*, *Columbia Packing Co. v. United States Dep't of Agriculture*, 563 F.2d 495, 499 (1st Cir. 1977). *See also* *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975) (FOIA rights are neither increased nor decreased by the existence of an interest greater than that of an average member of the public).

Congress did not intend to permit litigants to use the FOIA instead of the discovery mechanism provided by the Federal Rules of Civil Procedure. Congress did not desire to give participants in litigation "any earlier or greater access" under FOIA than they would receive through normal discovery procedures when the Act was first passed.⁷ When the FOIA was amended in 1974 to change the limits of exemption 7 (investigatory records compiled for law enforcement purposes), Congressmen were careful to state that they did not desire to permit increased access to investigation files in lieu of discovery.⁸

The courts have accurately reflected congressional intent on this issue. For example, they have refused to infer that Congress intended to overrule administrative discovery procedures by passing the FOIA because they note that Congress could have done so expressly and directly.⁹ Courts are also concerned that deciding discovery-related matters via FOIA litigation will lead to "crippling delays" in administrative procedures while the courts review the agency records.¹⁰

Thus, while neither Congress nor the courts are delighted with the use of FOIA as a quasi-discovery device, a litigant can use the Act to obtain information. But an FOIA requestor will have no special right to information merely because the data is desired for use in connection with litigation.

2. When should FOIA requests be made?

FOIA requests should be made as far in advance as possible. Agencies should be given a substantial amount of time to respond to requests, even though they work under strict time limits provided by statute.

Upon receipt of an FOIA request, an agency must determine within ten working days whether it will comply.¹¹ If an adverse decision is appealed, the agency must rule on the appeal within twenty working days.¹² The time limit may be extended up to ten days by written notice to the requestor. However, the agency must cite specific "unusual circumstances" to justify the extension.

Although agencies have no obligation to do so, they have on rare occasions accorded preferential handling to FOIA requests involving information needed in connection with pending litigation. For example, in 1976, the Department of Justice told the Court of Appeals for the District of Columbia that out of "numerous" requests for preferential handling, it had speeded the process in just three cases where the information was needed imminently for pending litigation. *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 613-14 n.16 (D.C. Cir. 1976).

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

8. See 120 Cong. Rec. 17033 (May 30, 1974) (remarks of Senator Hart). Cf., Lacher, *The Freedom of Information Act Amendments of 1974: An Analysis*, 26 Syracuse L. Rev. 951 (1975).

9. See, e.g., *Harvey's Wagon Wheel, Inc. v. NLRB*, 550 F.2d 1139, 1141 (9th Cir. 1976); *Title Guarantee Co. v. NLRB*, 534 F.2d 484, 491-92 (2d Cir.), cert. denied, 429 U.S. 834 (1976).

10. E.g., *New England Medical Center Hospital v. NLRB*, 548 F.2d 377, 384 (1st Cir. 1976). For similar reasons, courts attempt to avoid determining whether disclosure of a particular file is required. See *Climax Molybdenum v. NLRB*, 539 F.2d 63, 65 (10th Cir. 1976).

11. 5 U.S.C. § 552(6)(A).

12. *Id.*

Justifiable excuses include the need to collect the requested records from scattered facilities of the agency, to collect and review voluminous records called for in a single request, or the need to consult with other agencies.¹³ If an agency fails to comply with these time limits, a requestor is deemed to have exhausted administrative remedies and may apply to the district court for an order commanding disclosure.¹⁴

The statute empowers the court, in a suit to compel FOIA disclosure, to allow the agency additional time to complete review of its records if it can demonstrate that “exceptional circumstances” exist and it has exercised “due diligence” in complying with the request.¹⁵ The courts have split, however, on whether “exceptional circumstances” include the backlog of FOIA requests filed with the agency. For example, in *Open America v. Watergate Special Prosecution Force*,¹⁶ the Court of Appeals for the District of Columbia held that “exceptional circumstances” included the FBI’s backlog¹⁷ and that the use of a queue was permissible exercise of “due diligence.” Under the FBI’s system, FOIA requests were processed on a strict “first-in-first-out” basis. The court refused to require the agency to put Open America’s request at the head of the queue merely because Open America filed suit, at least where the plaintiffs made no showing of exceptional need or urgency.¹⁸ The Ninth Circuit¹⁹ adopted the approach of the late Judge Harold Levanthal,²⁰ who concurred in the result reached in *Open America*. The panel held that “first-in-first-out” consideration of FOIA requests based on the date of filing “ordinarily seems reasonable.” But they also held that a person who filed suit demanding disclosure “can but does not necessarily” move up the line. Thus, in the Ninth Circuit, filing suit can create a preference, especially if the district court orders it.

13. 5 U.S.C. § 552(6)(B).

14. 5 U.S.C. § 552(6)(C).

15. *Id.*

16. 547 F.2d 605 (D.C. Cir. 1976). For discussion of the decision in generally positive terms, see Note, *Developments Under the Freedom of Information Act—1976*, 1977 Duke L.J. 532, 533-38 (1977); Note, *The Freedom of Information Act: 1974 Amended Time Provisions Interpreted*, 32 U. Miami L. Rev. 212 (1977). A strongly critical view is provided in Note, *Open America v. Watergate Special Prosecution Force: Judicial Revision of FOIA Time Limits*, 71 Nw. L. Rev. 805 (1977).

17. The FBI had a backlog of 5,137 requests at the time Open America filed its request. Almost 200 employees were exclusively assigned to FOIA requests at FBI headquarters. *Id.* at 613.

18. *Id.* at 615. The court noted that, otherwise, the backlog soon would be transformed into a list based on date of filing suit in district court, rather than date of filing the request with the agency, a result that would benefit no one. *Id.*

19. *Exner v. FBI*, 542 F.2d 1121, 1123 (9th Cir. 1976).

20. Judge Levanthal acknowledged that an unforeseeably large number of FOIA requests might constitute “exceptional circumstances” under § 552(a)(6)(C) warranting extra time for compliance. However, he objected to requiring the plaintiff to show need or urgency; he favored putting the burden on the agency to show “exceptional circumstances” in every case. *Supra* n. 6, at 617. He expressed concern that the majority’s position would become a “self-fulfilling prophecy” because the agencies would have no incentive to meet the time limits set by Congress. *Id.* at 621.

The FBI did not fare as well with its FIFO argument in the Midwest as on both the East and West Coasts. In *Hamlin v. Kelley*,²¹ the district court held that "inadequate staff, insufficient funding, or a great number of requests are not within the meaning of 'exceptional circumstances' as that language is used in the statute." The court flatly rejected the FBI's "first-in-first-out" approach, and ordered disclosure to the plaintiff.

If material desired from an FOIA request is to be used in litigation or an administrative hearing, one should be especially diligent in making a request far ahead of time. It will be very difficult to interrupt the proceeding in which the material is to be used to wait for disclosure under the FOIA. A plaintiff will not be able to enjoin a pending proceeding for the reason that its FOIA request has not yet been answered unless irreparable injury can be shown. The allegation that the information that is being sought through the FOIA merely *might* be relevant to the proceeding is not sufficient for the required showing of injury.²² Therefore, it may be totally impossible to enjoin certain types of proceedings, such as renegotiations.²³

Thus, an FOIA request ought to be filed far in advance of any anticipated use of the information. It can be expected that requests to particularly beleaguered agencies will not be processed within the statutory time limits. If it is necessary to go to court, the delay will be even longer.²⁴ Of course, an FOIA request that leads to protracted litigation is an inefficient "short-cut" to normal discovery procedures.

3. What information can be obtained as "Agency Records" under the FOIA?

The FOIA requires that agencies give access to their records in response to proper requests. Courts have had to determine what is meant by a "record," an "agency," and an "agency record." Several cases,²⁵ including two recently decided by the Supreme Court, demonstrate that a real issue often arises as to whether the Act applies to requested material.

21. 433 F. Supp. 180, 182 (N.D. Ill. 1977). See also Note, *Developments Under the Freedom of Information Act—1977*, 1978 Duke L.J. 189, 197-99 (1978).

22. *Sears, Roebuck & Co. v. NLRB*, 473 F.2d 91, 93 (D.C. Cir. 1972), cert. denied, 415 U.S. 950 (1974).

23. *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 20 (1974).

24. E.g., *Goland v. CIA*, 607 F.2d 339 (D.C. Cir. 1978), cert. denied, 100 S. Ct. 1312 (1980) (FOIA request filed May 2, 1975.)

25. E.g., *Kissinger v. Reporters Comm. for Freedom of the Press*, 100 S. Ct. 960 (1980); *Forsham v. Harris*, 100 S. Ct. 978 (1980); *Goland v. CIA*, *supra* n. 24; *SDC Dev. Corp. v. Matthews*, *supra* n. 2.

a. *What is a "Record"?*

Material is not subject to disclosure under the FOIA if it is not in the form of a "record."²⁶ What is meant by "record" in addition to writings on paper, has been a subject of litigation. Courts have held that films²⁷ and tape recordings²⁸ are records. Three-dimensional objects have posed more of a problem. The Attorney General's 1967 Memorandum on the Act proposed excluding all three-dimensional objects from the definition because Congress emphasized the right to copy records.²⁹ One court found that the Kennedy assassination rifle, bullets, and clothing were not "records because they were not written or transcribed to perpetuate knowledge."³⁰ This narrow definition of "records" has been attacked because an agency may very well make a decision based on information it derives from objects.³¹

b. *What is an "Agency"?*

The definition of "agency" has been a matter for litigation because the FOIA requires that only "agencies" make records available to requestors.³² The statutory definition of agency includes "any executive department, military department, government corporation, government-controlled corporation, or other establishment in the executive branch of the government (including the executive office of the president), or any independent regulatory agency."³³ This expanded definition is broader than the definition of "agency" in the Administrative Procedure Act³⁴ and includes entities performing governmental functions and controlling information of public interest.³⁵

Government corporations or government-controlled corporations may be subject to FOIA requests if there is sufficient federal involvement in their activities. Government corporations are wholly government-owned enter-

26. See generally J. O'Reilly, Federal Information Disclosure § 5.03 (1978); Comment, *What is a Record? Two Approaches to the Freedom of Information Act's Threshold Requirement*, 1978 B.Y.U. L. Rev. 408 (1978).

27. *Save the Dolphins v. United States Dep't of Commerce*, 404 F. Supp. 407 (N.D. Cal. 1975).

28. *Hrynko v. Crawford*, 402 F. Supp. 1083 (E.D. Pa. 1975).

29. Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 93d Cong., 2d Sess., *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles 222* (1974).

30. *Nichols v. United States*, 325 F. Supp. 130, 135 (D. Kan. 1971), *aff'd on other grounds*, 460 F.2d 671 (10th Cir.), *cert. denied*, 409 U.S. 966 (1972).

31. Comment, *The Definition of "Agency Records" Under the Freedom of Information Act*, 31 Stan. L. Rev. 1093, 1097 (1979).

32. 5 U.S.C. § 552(a).

33. 5 U.S.C. § 552(e).

34. 5 U.S.C. § 551(i).

35. See Subcommittee on Government Information and Individual Rights of the House Committee on Government Operations & Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., *Freedom of Information Act and Amendments of 1974* (Pub.L. 93-502) *Source Book: Legislative History, Texts and Other Documents 128* (1975) [1974 U.S. Code Cong. & Ad. News 6267, 6274].

prises established by Congress. The quintessential example is the Tennessee Valley Authority.³⁶

The limits of the meaning of "government controlled corporation" are less certain. One court of appeals has determined that the Federal Home Loan Mortgage Corporation is subject to the FOIA even though national banks and federally insured savings and loan associations are not.³⁷ The court noted that the cumulative effect of a number of characteristics distinguished the home loan corporation from such other financial institutions. The corporation: (a) held a federal charter; (b) had its board of directors appointed by the president; (c) had its business transactions closely supervised by the government; (d) was required to comply with federal audit and reporting regulations; (e) had employees who were federal employees for certain purposes; and (f) was empowered to make its own rules and regulations under the provisions of its enabling act.³⁸ That establishment by Congress does not necessarily create a government-controlled corporation was demonstrated in *Lombardo v. Handler*.³⁹ The district court held that the National Academy of Sciences was not a government-controlled corporation, despite the unquestioned facts that it was established by an Act of Congress, reports to Congress, and performs investigations for departments of the federal government.⁴⁰

Until recently, consultants and researchers under government contract have been considered "agencies" for FOIA purposes if they made decisions on behalf of the government and do not merely make recommendations. For example, the Secretary of Health and Human Services (formerly HEW) is required to contract with professional standards review organizations as part of the congressionally-mandated system for monitoring hospital care. A district court found that one such organization was an "agency" that had to respond to FOIA requests.⁴¹ The Department of HEW was required to process the request, even though it did not possess or control the records.⁴² The court noted that the review organization had "authority in law to make decisions,"⁴³ received federal funds, was created by statute, performed executive functions for the government, and operated under "direct, pervasive, continuous regulatory control."⁴⁴

36. *Id.*

37. *Rocap v. Indiek*, 539 F.2d 174 (D.C. Cir. 1976).

38. *Id.* at 180.

39. 397 F. Supp. 792 (D.D.C. 1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 932 (1977).

40. *Id.* at 802. In part, the court held that the Academy was not a government-controlled corporation because its charter was granted at a time when Congress had to do all incorporating for the District of Columbia.

41. *Public Citizen Health Research Group v. Department of HEW*, 449 F. Supp. 937 (D.D.C. 1978).

42. *Id.* at 941.

43. *Id.*, quoting *Washington Research Project v. Department of HEW*, 504 F.2d 238 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

44. *Id.*

The Supreme Court, however, recently decided that private research organizations do not qualify as “agencies” under the FOIA definition.⁴⁵ In *Forsham v. Harris*,⁴⁶ Mr. Justice Rehnquist, writing for himself and six other members of the Court, found that private organizations receiving federal financial assistance grants are not “agencies” subject to the FOIA. The Court indicated that an entity would not be regarded as “federal” without a threshold showing of substantial federal involvement, defined as “extensive detailed, and virtually day-to-day supervision.”⁴⁷

c. *What is an “Agency Record”?*

Several courts have been faced with determining whether mere possession by a body subject to the FOIA makes a record an “agency record.” In most situations, possession by an agency is sufficient to create an “agency record.” In special circumstances, however, courts have held that mere possession is not sufficient to transform a record into an “agency record.” This is an especially important question when the records were created by a group excluded from the disclosure requirements of the Act, but the record is in the possession of an agency that is subject to the Act. For example, in *Goland v. CIA*,⁴⁸ the court of appeals found that a congressional committee hearing transcript in the possession of the CIA for thirty years was not an agency record because control of the transcript had not passed from Congress. The court adopted a standard of control going beyond simple possession. It considered whether, under all the facts, the document passed from the control of Congress and became subject to unlimited disposition of the agency holding the document.

Two circuit panels have protected court records from disclosure as agency records under the FOIA. In *Warth v. Department of Justice*,⁴⁹ the Ninth Circuit held that a court record in the possession of the Department of Justice was not an agency record. The Tenth Circuit similarly concluded that a presentence report originally created for the use of a trial court remained in court control even after it was sent to prison officials for their use.⁵⁰

Parties not subject to the FOIA may now have to be more careful in expressing the desire to prevent FOIA disclosure of records that are put in the hands of an agency subject to FOIA disclosure. In *Ryan v. Department of Justice*,⁵¹ Judge Wilkey of the D.C. Circuit held that responses of United States Senators to a questionnaire prepared by the Attorney General inquir-

45. 5 U.S.C. § 552(e).

46. *Supra* n. 25. The earlier opinion of the court of appeals, which the Supreme Court affirmed, is discussed in Note, “Agency records” Under the Freedom of Information Act: An Analysis of *Forsham v. Califano*, 13 Ga. L. Rev. 1040 (1979).

47. *Id.* at 984 and n. 11.

48. *See* n. 24, *supra*.

49. 595 F.2d 521 (9th Cir. 1979).

50. *Cook v. Willingham*, 400 F.2d 885 (10th Cir. 1968).

51. 617 F.2d 781 (D.C. Cir. 1980).

ing into their procedures for recommending judicial nominees were agency records within the scope of the Freedom of Information Act. Judge Wilkey noted that the documents were in the control of the Attorney General and there was no evidence of control by any other entity. The Senators responded to the request of the Attorney General without indicating that they wished the use of their answers to be limited in any way. The court found it insignificant that the documents were for the ultimate benefit of the President (who is not subject to disclosure under the FOIA) in the exercise of his exclusive power to nominate people to the federal bench or that the information would have been exempt had the President directly solicited the responses from the Senators. The Attorney General was acting as an "independent controlling entity,"⁵² and was not a conduit for getting information to the President. There was no evidence that the President diminished the Attorney General's control over these documents or that they would ever be sent to the President. The court analogized from the many cases where FOIA requests directed to the CIA and the National Security Agency have been upheld, even though those agencies create documents for the primary purpose of advising the President.

In its recent decision, *Kissinger v. Reporters Committee for Freedom of the Press*,⁵³ the Supreme Court has given a signal that is possibly at variance with Judge Wilkey's holding in *Ryan*. In *Kissinger*, the Court refused to find that mere physical location rendered notes of Henry Kissinger's telephone conversations into "agency records." The Court held that the notes, made while Kissinger was Advisor to the President (and thus exempt from FOIA disclosure), did not lose their exemption simply because Kissinger moved them to the State Department, an agency subject to the FOIA, when he became Secretary of State. The Court pointed out that the notes were never in the control of the State Department, were not generated by the Department, never entered its files, and were never used by the Department.⁵⁴

The two recent Supreme Court pronouncements on the FOIA also prevent requestors from obtaining records that are not in the agency's possession at the time of the request. Thus, in *Kissinger*, the Court held that the FOIA did not supply a private right of action to reporters seeking access to telephone notes that Henry Kissinger allegedly removed from the State Department unlawfully, and deeded to the Library of Congress.⁵⁵ The Court found that the FOIA is not triggered until an agency subject to the FOIA possesses or

52. *Id.* at 786.

53. *Supra* n. 25.

54. *Id.* at 972.

55. The Library of Congress is not subject to the FOIA, because it is not an "agency" under the Act. *Id.* at 966. Secretary Kissinger's agreement with the Library restricts access to the notes for at least 25 years. *Id.* at 964.

controls the requested documents. An agency is under no FOIA-obligation to retrieve documents that may have unlawfully escaped its possession.⁵⁶

On the same day that the Court decided *Kissinger*, it also found that an FOIA requestor could not force an agency to create records. In *Forsham v. Harris*,⁵⁷ the Court turned back an FOIA suit by specialists in the treatment of diabetics who sought access to the research data of a federally funded, but privately conducted, long-term study of diabetes. The Court held that the FOIA imposed no duty on the government to generate records, or to exercise its right of access to the books, documents, papers or records of the grantees. The Court's position was simply that the FOIA permits access to "agency records" and not information in the abstract. The Court rejected the position that the data were "agency records" by virtue of the government's 100% funding of the project, its unlimited right of access to the data, and the fact that the data had been used by government agencies in fashioning regulations.

4. What is the current status of "Reverse FOIA" suits?

One of the important tributaries to the river of FOIA suits in the courts is that group of cases known as "reverse FOIA" suits.⁵⁸ These cases have been brought by individuals who supplied information to the government, but objected to release of that information to other parties.

The Supreme Court has substantially dammed the flow by a decision it reached last term. In *Chrysler Corp. v. Brown*,⁵⁹ Justice Rehnquist, writing for the entire Court, held that a party submitting documents to a federal agency does not have a private right of action under the FOIA to enjoin subsequent disclosure. That party's interest in confidentiality is limited to the extent that it is endorsed by the agency holding the records. The Court unanimously rejected the theory that the FOIA exemptions were intended to be mandatory bars to disclosure. The Court referred to the legislative history indicating that exemptions were intended merely to permit an agency to withhold certain information.⁶⁰ In addition, the Court interpreted the FOIA as purely a

56. *Id.* at 969. The Court also found that the Federal Records Act and the Federal Records Disposal Act were administrative directives, and did not create private rights of action. *Id.* at 967-68.

57. *Supra* n. 25.

58. *See, e.g.*, the score of cases collected in Campbell, *Reverse Freedom of Information Act Litigation: The Need for Congressional Action*, 67 *Geo. L. J.* 103, 107 n. 28 (1978). The cases have also been the source of a prodigious literature. *See, e.g.*, Wachtell, *Disclosure to Third Parties of Information Filed With Government Agencies: Preventing Disclosure to Third Parties*, 34 *Bus. Law.* 1049 (1979); Campbell, *supra*; Clement, *The Rights of Submitters To Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit*, 55 *Texas L. Rev.* 587 (1977); Drachler, *The Freedom of Information Act and the "Right" of Non-disclosure*, 28 *Adm. L. Rev.* 1 (1976).

59. 441 U.S. 281 (1979). *See generally*: Note, *The Reverse-FOIA Lawsuit: Routes to Nondisclosure After Chrysler*, 46 *Brooklyn L. Rev.* 269 (1980); *Chrysler Corporation v. Brown: Seeking a Formula for Responsible Disclosure Under the FOIA*, 29 *Cath. L. Rev.* 159 (1979); and 49 *U. Cin. L. Rev.* 270 (1980).

60. *Id.* at 290-94.

disclosure statute because the Act confers jurisdiction on federal courts to enjoin withholding records⁶¹ but not to prohibit disclosure.⁶²

The Court also placed significant limitations on the use of Section 1905 of the Trade Secrets Act⁶³ as a vehicle for a reverse FOIA suit. The Court held that Section 1905 does not create a private right of action to enjoin disclosure.⁶⁴ The Court refused, however, to permit the government to ignore the impediment to disclosure imposed by the Trade Secrets Act. The Court remanded to the Court of Appeals for the Third Circuit for consideration of whether the contemplated disclosures would violate the prohibition of Section 1905.⁶⁵ The Court confirmed that violations of the Trade Secrets Act were subject to judicial review under the provisions of Section 10 of the Administrative Procedure Act.⁶⁶ But Chrysler, although an "adversely affected person" under the statute, was entitled only to review of the administrative board, not *de novo* consideration by the district court.⁶⁷ In remanding, the Court cautioned that it had not attempted to determine the relative "ambits" of Exemption 4 and Section 1905, or to determine whether Section 1905 is an exemption statute within the terms of Exemption 3 of FOIA.⁶⁸ The Court acknowledged the theoretical possibility that material might be outside Exemption 4 yet within Section 1905, and thus FOIA might be considered "authorization by law" for purposes of Section 1905.

If Senator Robert Dole has his way, the *Chrysler* decision will not be law for very long. Within five days of the release of *Chrysler*, Senator Dole announced his intention to "insure that the FOIA serves the public's need to know what the government is doing, not the private desire to know what competitors are doing."⁶⁹ He charged that FOIA "has been twisted into an instrument for industrial espionage"⁷⁰ and promised new legislation granting submitters of information a statutory right to object to disclosure of their confidential information.

61. See 5 U.S.C. § 552(a)(4)(B).

62. *Id.* at 292.

63. 18 U.S.C. § 1905.

64. The Court relied on the principles outlined in *Cort v. Ash*, 422 U.S. 66 (1975), to conclude that Section 1905, a criminal statute, did not create a private right of action. Section 1905 contained no basis for implying a civil cause of action, and the Court found no other reason to depart from its observation that a private right of action is rarely implied from a criminal statute. *Chrysler Corp. v. Brown*, *supra* n. 59, at 316-17.

65. *Id.* at 318-19. The Court of Appeals in turn remanded the case to the District Court with directions that it order the defendant agencies to make a new determination of the applicability of Section 1905 and of the availability of an exemption from disclosure under 5 U.S.C. § 552(b)(3) in light of the opinions of the Supreme Court and the Third Circuit. *Chrysler Corp. v. Schlesinger*, 611 F.2d 439, 440 (3d Cir. 1979).

66. 5 U.S.C. § 702.

67. *Supra* n. 59, at 318.

68. *Id.* at 319 n. 49.

69. 125 Cong. Rec. S4504 (daily ed. April 23, 1979).

70. *Id.*

Senator Dole recently introduced the “Preservation of Confidential Information Act.”⁷¹ The bill would reverse *Chrysler Corp. v. Brown* in almost every detail. It would confer substantial protective rights on private persons, such as Chrysler, who supplied information to the government but objected to the release of that information to FOIA requesters. The bill provides that whenever an agency receives a request for records containing or based on information not already in the public domain which was obtained from a private party, and the agency decides not to withhold such records, the agency must promptly give written notice of the request to the submitter of the information. Within ten working days the submitter may provide to the agency written objections to disclosure “clearly and succinctly” describing the factual and legal grounds for the objections. The submitter may also obtain an informal *ex parte* hearing within thirty days, if the request is made within five working days of receipt of the agency’s notice, and the agency does not find that the request is frivolous, that the hearing would “severely prejudice” specific interests of the agency or identified third parties, or that the agency will deny the disclosure request. The agency is required to make a final decision regarding disclosure within thirty days after the agency receives the written objections of the submitter, unless the time limits are extended due to the existence of exceptional circumstances. The bill requires the agency to keep the requester informed, but without prejudicing the status of the record as exempt from disclosure.

Submitters are entitled to *de novo* review in federal district court if the agency decided to disclose the requested records after following the bill’s procedures. The burden is on the agency to sustain its decision by a preponderance of evidence. The court may assess attorneys’ fees and costs against the United States if the submitter substantially prevails over the agency.⁷²

The bill is now before the Senate Judiciary Committee.

5. Summary

In summary, the FOIA may be a fruitful source of information prepared by or about business competitors or litigation adversaries. Although Congress and the courts have not welcomed this use of the Act, nothing currently prevents or hinders it. The FOIA is not an appropriate channel for obtaining information if time is limited, or if the desired information is not contained in an “agency record,” or it is not in the possession or control of an agency subject to the FOIA. Finally, for the moment, a requester need not fear that a reverse-FOIA suit will prevent disclosure when the agency is willing to open its files. But Senator Dole’s new bill seeks to bring back reverse-FOIA suits with renewed vengeance.

71. S. 2397, 96th Cong., 2d Sess. (1980).

72. The bill also deems § 1905 of the Trade Secrets Act to fall within the provisions of exemption 3 of the FOIA.

