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A Balanced Approach to Affirmative Action
Discovery in Title VII Suits

By Lynne Charlotte Hermle*

Executive Order No. 11,246, issued on September 24, 1965, was designed to assure increased enforcement of the antidiscrimination provisions of Title VII of the Civil Rights Act. The Order requires that most government contracts contain a provision in which the employer agrees not to discriminate on the basis of race, creed, color, national origin, or sex. Additionally, the Order requires the employer's commitment to affirmative action.7

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Section 201 of the Executive Order authorizes the Secretary of Labor to adopt regulations necessary to achieve the purposes of the Order. The regulations repeat the provisions of the Order and provide detailed procedures to further the Order's provisions. See 41 C.F.R. §§ 60-1.1-1.47 (1979). When possible, a parallel citation to corresponding sections of the regulations is given.

2. BARRISTER, FALL, 1976, at 71.


4. The requirements of Executive Order No. 11,246 do not apply to contracts of $10,000 or less, certain contracts for indefinite quantities, contracts to be performed outside the United States, contracts with religious educational institutions, contracts for work to be performed on or near Indian reservations, and any additional contracts that the Director exempts from the provision. See 41 C.F.R. § 60-1.5 (1979).


6. Executive Order No. 11,246 originally prohibited only discrimination on grounds of "race, creed, color, or national origin." On October 17, 1967, President Lyndon Johnson signed Executive Order No. 11,375, 3 C.F.R. 684 (1966-1970 Compilation), which extended the requirements of 11,246 to prohibit discrimination based on sex.

Executive Order No. 11,141, 3 C.F.R. 179 (1964-1965 Compilation), prohibits discrimination by federal contractors on the basis of age. The analysis of this Note, therefore, also applies generally to discovery efforts by plaintiffs in Age Discrimination in Employment Act (ADEA) suits. See 29 U.S.C. §§ 621-634 (1976).

To comply with the obligations imposed by the Order, the contracting employer must draft an affirmative action plan in which it candidly discusses the minority hiring, firing, and promotion policies of the company. The plan also must include statistical data on such practices, as well as time tables, projections, and goals for minority employment policies. The contractor is expected to be openly self-critical in the plan and to discuss any problem areas fully. The Director of the Office of Federal Contract Compliance Programs, charged with enforcement of the Executive Order, has entrusted certain “compliance agencies” with primary responsibility for monitoring compliance with the Order’s provisions.

Persons interested in the content of the submitted plans frequently attempt to obtain them either from a compliance agency or from the contracting company during litigation. Plaintiffs bringing federal employment discrimination suits against government contractors are often interested in a company’s self-analysis of minority employment policies. There are two procedures by


10. Id. § 60-2.12.

11. See id. § 60-2.10.

12. Id. § 60-1.2.

13. 41 C.F.R. § 60-1.46 (1979) authorizes the Director to delegate authority, subject to his or her “general direction and control.” For a list of the review assignments of the compliance agencies, see Galloway, Administrative and Judicial Nullification of Federal Affirmative Action Law, 17 SANTA CLARA L. REV. 559, 563 (1977).


15. The plaintiff in a Title VII action may be either the Equal Employment Opportunity Commission (EEOC) or a private individual. An employee who feels that he or she has been the victim of discrimination prohibited by Title VII must file a complaint with the EEOC. Id. § 2000e-5(b). The EEOC conducts an investigation to determine whether probable cause for the charge exists. Id. If the EEOC finds that there is probable cause, the agency will negotiate possible remedies with the employer. Id. The EEOC can then file suit against the employer if the negotiations fail to bring about a solution. The employee may file suit 90 days after the Commission gives notice of its failure to settle and its decision not to file suit, or 180 days after the filing of the charge if no conciliation agreement has been reached and no suit has been filed. Id. § 2000e-5(f)(1). See generally B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (1976 & Supp. 1979).

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16. Attempts by Title VII plaintiffs to obtain an employer’s affirmative action plans must be distinguished from attempts by individual Title VII plaintiffs to procure informa-
which they can procure materials contained in the plans. The first is a Freedom of Information Act (FOIA) request; the second involves pretrial discovery procedures.

In either situation, a plaintiff's request creates a conflict between his or her interest in obtaining the plans and a defendant's interest in protecting the documents from disclosure. Defendants frequently contest disclosure of the plans, claiming that the plans contain sensitive and confidential information, which, if disclosed, would injure the defendant's competitive position. These defendants further argue that the plans are protected by a public policy privilege, alleging that disclosure of the affirmative action plans will result in less candid self-evaluation in the future. Additionally, some defendants have claimed that the work product privilege is applicable to the plans. Plaintiffs, on the other hand, argue that the plans are needed to overcome the heavy burden of proof involved in establishing a case of discrimination.

Federal district court cases conflict on the issue of the discoverability of affirmative action plans in discrimination suits. Four federal district courts have refused to grant Title VII plaintiffs access to defendants' affirmative action plans.17 Five district courts have reached the opposite conclusion.18 One of the latter decisions


was affirmed by the Eighth Circuit.\(^{19}\)

This Note evaluates whether plaintiffs involved in discrimination suits against their employers should be able to obtain the employer’s affirmative action plans through pretrial discovery procedures. After discussing FOIA attempts to obtain the plans, the Note examines the public policy and work product privileges asserted by defendants in response to discovery requests. The Note concludes that the work product privilege is inapplicable to prevent disclosure of affirmative action plans and that although courts should consider the public policy issues involved in disclosure of the plans, public policy review should constitute only one component in a comprehensive inquiry aimed at balancing both plaintiffs’ and defendants’ interests. Finally, the Note proposes a balancing test to be used by the courts in determining whether to permit disclosure of affirmative action plans to plaintiffs who seek them in pretrial discovery.

**Suits Brought Under the Freedom of Information Act**

The Freedom of Information Act,\(^{20}\) which provides for increased disclosure of information by federal government agencies,\(^{21}\) is a redrafted version of section 3 of the Administrative Procedure Act\(^{22}\) (APA). Section 552(a) of the FOIA provides that each government agency shall make information available to the public and sets forth the procedures for disclosure.\(^ {23}\) Section 552(b) creates

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19. EEOC v. Quick Shop Mkts., Inc., 526 F.2d 802 (8th Cir. 1975).
21. See S. Rep. No. 813, 89th Cong., 1st Sess. 5-8 (1965). “Government agencies” subject to the FOIA mandates are defined broadly. The Act states: “For the purpose of this subchapter—(1) ‘agency’ means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—(A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia.” 5 U.S.C. § 551 (1976).
nine exemptions to the Act's disclosure provisions. Because the exemptions are expressly stated to be exclusive, courts have narrowly construed them and have held that the primary objective of the Act is to provide a mechanism for disclosure.

24. Id. § 552(b). Section 552(b) provides that the disclosure provisions of § 552(a) do not apply to matters that are: (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order; (2) related solely to the internal personnel rules and practices of an agency; (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld; (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential; (5) inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency; (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel; (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or (9) geological and geophysical information and data, including maps, concerning wells.” See generally Comment, The Freedom of Information Act: A Survey of Litigation Under the Exemptions, 48 Miss. L.J. 784 (1977).

25. 5 U.S.C. § 552(c) (1976) provides in part: “This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section.” See also Soucie v. David, 448 F.2d 1057, 1077 (D.C. Cir. 1971); Wellford v. Hardin, 444 F.2d 21, 25 (4th Cir. 1971); Bristol-Myers Co. v. FTC, 424 F.2d 935, 938 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970). Contra, Consumers Union of United States, Inc. v. Veterans Administration, 301 F. Supp. 796, 806 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F.2d 1383 (2d Cir. 1971) (suggesting that courts have equity discretion to bar disclosure of materials that do not fall within one of the express exemptions to the FOIA). But see Getman v. NLRB, 450 F.2d 670, 678 n.25 (D.C. Cir. 1971) (stating that that holding in Consumers Union was a moot point).


27. See Chrysler Corp. v. Brown, 441 U.S. 281, 290 (1979); Department of Air Force v. Rose, 425 U.S. 352, 361 (1976); EPA v. Mink, 410 U.S. 73, 80 (1973); Theriault v. United States, 503 F.2d 390, 392 (9th Cir. 1974); Legal Aid Soc. v. Schultz, 349 F. Supp. 771, 774-75 (N.D. Cal. 1972). This view is supported by the legislative history. The House Report on the
Persons seeking FOIA disclosure need not have any personal interest in the requested materials. While the earlier version of the APA provided for disclosure only "to persons properly and directly concerned," the FOIA now requires government agencies to disclose requested information to "any person." Any private individual, therefore, may initiate the FOIA disclosure procedure by submitting a request to the agency possessing such information. Because the offices responsible for monitoring compliance with Executive Order No. 11,246 are within the definition of "government agency" in the FOIA, a Title VII plaintiff may seek a defendant's affirmative action plans from the compliance agencies under the Act.

FOIA requests for affirmative action plans are frequently met with "reverse FOIA" suits. In these suits, the supplier of

FOIA provides: "A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. . . . [The FOIA] provides the necessary machinery to assure the availability of Government information necessary to an informed electorate." H.R. REP. No. 1497, 89th Cong., 2d Sess. 12 (1966). See also S. REP. No. 813, 89th Cong., 1st Sess. 8-10 (1965).


29. 5 U.S.C. § 552(a)(3) (1976). As the FOIA does not require that a requester be "properly and directly concerned," one seeking the affirmative action plans need not be a Title VII litigant at the time the request is made. Moreover, one requesting the plans under the FOIA will not be refused because the information pertains to pending or anticipated litigation. See generally Symposium, Obtaining Access to Information in the Files of Government Agencies: The Corporate Perspective, 34 Bus. LAW. 993 (1979) (remarks of Peter C. Hein). In the discussion, Mr. Hein notes: "How does a request for information pursuant to the FOIA differ from discovery pursuant to the federal rules or applicable state court rules? The short answer is that there is no relationship, as such, between access under the FOIA and discovery. Both are independent means of obtaining information and each has its own relative advantages and relative disadvantages. Thus, one can engage in a fishing expedition under the FOIA without regard to whether the documents requested are relevant or material to the issues in any pending litigation. Similarly, one can obtain documents under the Act even in advance of litigation, and one can obtain documents concerning nonparties to the litigation under the Act, all without any necessity for complying with the applicable discovery rules concerning discovery in advance of litigation or discovery of nonparties. In addition, when suit is brought under the FOIA the burden of proof is on the government to show that an exemption applies. Furthermore, it is conceivable—although for a corporate plaintiff I do not think very likely—that you could recover attorneys' fees, or a portion of your attorneys' fees." Id. at 994.

30. 5 U.S.C. § 552(a)(3). For information on making a successful FOIA request, and sample FOIA request forms, see J. O'REILLY, FEDERAL INFORMATION DISCLOSURE §§ 7.01-.08, F-4 (1977).

31. See note 21 supra.

32. The agency possessing the information may notify the employer when FOIA requests are made for information submitted by that employer. Employers can utilize "watch
information to the government agency brings an action to block release of the information to a third party. Reverse-FOIA plaintiffs generally have argued that the FOIA exemptions create an implied right of action under the Act allowing private parties to assert the exemptions as a bar to government disclosure of information to a third party. Additionally, these plaintiffs often have asserted supplemental causes of action under the APA and section 1905 of the Trade Secrets Act in attempting to bar disclosure of the affirmative action plans.

In *Chrysler Corp. v. Brown*, the United States Supreme Court outlined the cause of action available to a reverse-FOIA plaintiff. The plaintiff in *Chrysler* brought suit to enjoin a compliance agency from releasing the plaintiff's affirmative action plans to a third party. The Supreme Court rejected the plaintiff's assertions that the FOIA and section 1905 of the Trade Secrets Act impliedly create a private right of action to enjoin government disclosure of information. However, the Court did find that section

service" companies, which, for a fee, inform clients when such requests are made. See Symposium, *Obtaining Access to Information in the Files of Government Agencies: Discussion*, 34 Bus. Law. 1003, 1013 (1979) (remarks of Peter C. Hein).


34. For cases in which plaintiffs have raised this argument, see *A New Direction*, supra note 33, at 188 n.25.

35. Under the APA, a reviewing court may set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1976). See *A New Direction*, supra note 33, at 190-91.


38. 441 U.S. at 294. In *Chrysler*, the plaintiff argued that materials falling within the express exemptions of the FOIA were conclusively barred from agency disclosure. The Court rejected the plaintiff's argument, stating: "Congress did not design the FOIA exemptions to be mandatory bars to disclosure." Id. at 293. Accordingly, the Court found that a contractor who wishes to enjoin agency disclosure does not have a private cause of action under FOIA.

39. Id. at 316-17.
10(a) of the APA provides reverse-FOIA plaintiffs with a means of obtaining judicial review of a compliance agency's action. The Court found that Chrysler was a person "adversely affected or aggrieved" within the meaning of section 10(a) and held that the compliance agency's decision to release the plans was a reviewable agency action.

After Chrysler, a reverse-FOIA plaintiff can enjoin a compliance agency from disclosing affirmative action plans by establishing that disclosure violates section 10(a) of the APA. Under section 10(a), a reviewing court may set aside agency actions that are arbitrary, capricious, an abuse of discretion, or otherwise "not in accordance with law." If the disclosure is held to violate section 10(a), presumably the agency will be permanently enjoined from disclosing the plans. In Chrysler the Court expressly refused to deter-

40. See note 35 supra.
41. 441 U.S. at 316-18.
42. Id.
44. Although the Court held that § 1905 of the Trade Secrets Act did not afford reverse-FOIA plaintiffs a private right of action, it stated that a disclosure that violated § 1905 because it revealed confidential business information in a manner not authorized by law would be "not in accordance with law" under the APA and could be set aside by the reviewing court. Id. at 316-17. Section 1905, therefore, is still relevant to a reverse-FOIA cause of action. The construction of a reverse-FOIA cause of action under this formula is quite complex. A reverse-FOIA plaintiff must show that the planned disclosure is an unauthorized disclosure under § 1905 and is thus "not in accordance with law" under the APA. The plaintiff must show that the material comes within one of the FOIA exemptions; otherwise, the general FOIA disclosure provisions provide the requisite "authorization of law" which precludes the application of § 1905. A reverse-FOIA plaintiff must show both that the material to be disclosed comes within a FOIA exemption and that disclosure is otherwise unauthorized within the meaning of § 1905 of the Trade Secrets Act to demonstrate that disclosure of the material will violate the APA.

Two of the nine FOIA exemptions are relevant to affirmative action plans: exemption three, which protects materials specifically exempted from disclosure by statute, and exemption four, which exempts trade secrets and confidential commercial or financial information. See note 24 supra. Reverse-FOIA plaintiffs have argued that, because § 1905 prohibits unauthorized disclosure, the material is "specifically exempted from disclosure by statute" under exemption three and therefore, because the disclosure is within a FOIA exemption, it is not "authorized by law" under § 1905. However, most courts have rejected the argument that § 1905 is not a statute "specifically exempting disclosure," and that exemption three does not apply to preclude disclosure of affirmative action plans. See A New Direction, supra note 33, at 195 n.71.

It is less clear whether affirmative action plans come within the confidential commercial information category of exemption four. The courts have divided on the issue. See Metropolitan Life Ins. Co. v. Usery, 426 F. Supp. 150, 158 (D.D.C. 1976) (citing cases). One commentator has suggested that the courts answer the question on a case by case basis. See A New Direction, supra note 33, at 196. If the court determines that the plans do not come
mine whether affirmative action plan disclosure by compliance agencies was not in accordance with law, and the issue remains to be decided in future cases.\textsuperscript{45}

Resolution of this issue is important to Title VII plaintiffs who seek defendants' affirmative action plans. If affirmative action plan disclosure is found to be "not in accordance with law" under the APA, plaintiffs theoretically would not be able to obtain the plans under the FOIA.\textsuperscript{46} In practice, however, this result would not greatly affect affirmative action plan disclosure, because obtaining information through the FOIA is frequently a difficult and frustrating process.\textsuperscript{47} Agencies are often reluctant to grant FOIA requests,\textsuperscript{48} and completion of FOIA procedures can be time consuming.\textsuperscript{49} The difficulty of obtaining affirmative action plans through within exemption four, they fall under the general FOIA mandate and will not come within § 1905 or the APA. The plans must then be disclosed under the FOIA. If the court finds that the material comes within exemption four, the reverse-FOIA plaintiff is free to argue that the materials fall under § 1905 of the Trade Secrets Act and thus under the APA.

Whether agency disclosure of affirmative action plans violates § 1905 also remains unclear. The issue is now before the district court in the remanded Chrysler case. See note 45 infra. The better view is that it does not and that disclosure is "in accordance with law" under the APA. See A New Direction, supra note 33, at 200-01. Under this view, however, a reverse-FOIA plaintiff will be able to argue that an agency disclosure, although not violative of § 1905, is otherwise "not in accordance with law" under the APA.

45. On remand, the Third Circuit held that the district court should decide the issue, and remanded the case to the district court. Chrysler Corp. v. Schlesinger, 611 F.2d 439 (3d Cir. 1979).

46. See note 44 supra.


48. See authorities cited at note 47 supra.

49. Originally, the FOIA did not contain explicit deadlines for agency responses to disclosure requests. 5 U.S.C. § 552(a)(3) (1970) (amended 1974). As one commentator noted: "Delay in responding to requests for information was characterized as being of 'epidemic proportion.' . . . The House Committee on Government Operations concluded that 'the delay by most Federal agencies in responding to an individual's request for public records under the FOI Act, or delay in acting on an administrative appeal frequently has negated the basic purpose of the Act.' " Recent Decisions—Administrative Law, 11 Ga. L. Rev. 241, 245 n.21 (1976). In 1974, Congress amended the FOIA to require an agency to determine whether to comply with the request within 10 working days. 5 U.S.C. § 552(a)(6) (1976). If the agency refuses to disclose the information, an appeal by the applicant must be decided within 20 working days. Id. § 552(a)(6)(A). See generally Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 610 n.11 (D.C. Cir. 1976); Clark, Holding Government Accountable: The Amended Freedom of Information Act, 84 Yale L.J. 741 (1975). How-
the FOIA, coupled with the possibility of reverse-FOIA litigation under the APA, magnifies the importance of plan disclosure to Title VII plaintiffs through pretrial discovery procedures.

**Obtaining Affirmative Action Plans Through Pretrial Discovery**

The scope of pretrial discovery in Title VII cases is particularly broad. One court has held that Title VII discovery is limited only by relevancy and burdensomeness. This does not mean, however, that plaintiffs' pretrial discovery requests for affirmative action plans are routinely approved. Although judicial rationales for denying access have varied slightly, courts denying discovery have generally held that work product or public policy privileges bar affirmative action plan disclosure.

**The Work Product Privilege**

Three federal district courts denying affirmative action plan disclosure have cited work product concerns as a basis for their decisions. In *Parker v. Kroger*, *Banks v. Lockheed-Georgia Co.*, ever, many agencies continue to circumvent the deadlines. See Hayden v. United States Dep't of Justice, 413 F. Supp. 1285 (D.D.C. 1976) (FBI estimated that it would take four years to complete Tom Hayden's request for information concerning himself).


52. See note 17 supra.


54. See note 53 supra. The fact that the plaintiff has made a successful or unsuccessful FOIA request for the plans will have no bearing upon the discovery request. See note 29 supra.

and Rodgers v. United States Steel, the courts held that affirmative action plans constituted “work product” and therefore were protected from disclosure by rule 26(b)(3) of the Federal Rules of Civil Procedure.

The term “work product” was initially articulated in Hickman v. Taylor. The Hickman court used the term to describe materials collected by an attorney in anticipation of litigation, a concept developed more fully in later cases. Federal Rule of Civil Procedure 26(b)(3) subsequently was enacted as a codification of the Hickman doctrine as modified by the later decisions.

Under rule 26(b)(3), a document must be “prepared in anticipation of litigation or for trial” to come under the protection of the work product privilege. The test for determining whether a document is protected by the privilege is whether, in light of the nature of the document and the factual circumstances of the particular case, the document can be said to have been prepared or obtained because of the prospect of litigation. The work product privilege does not apply to materials prepared primarily in the regular course of business, even when litigation already is pending.

The restrictions on the work product privilege preclude any application of the privilege to affirmative action plans sought in the course of discrimination cases. Affirmative action plans are prepared by companies seeking contracts with the federal government. Executive Order No. 11,246 gives those companies no choice but to comply with the guidelines if they choose to con-
Furthermore, any company executive is capable of preparing plans that conform to the current guidelines, and it is not necessary that a lawyer take part in the preparation of a plan. The mere presence of a lawyer on the committee that drafts the plan is insufficient to invoke the privilege. Thus, the plans are not being prepared in anticipation of litigation; the affirmative action plans are created for the purpose of enabling an employer to participate in government contracts and should not be considered immune from disclosure requests on the basis of the work product privilege.

The Public Policy Privilege

Public policy considerations have figured prominently in most cases denying plaintiffs' affirmative action plan discovery requests. Although the rationale underlying these decisions has been described in different terms by the courts, the thrust of the public policy concern is that requiring contractors to disclose affirmative action plans may result in less than candid self-evaluations in the future. For example, in Banks v. Lockheed-Georgia Co., the first case to discuss whether affirmative action plans are privileged on the basis of public policy, the court found that granting the plaintiff's discovery request would be contrary to public policy in that it would "discourage frank self-criticism and evaluation in the development of affirmative action programs of this kind." Several other cases denying discovery of the plans use similar language. In Dickerson v. United States Steel Corp., the court rejected the plaintiff's request for affirmative action plan disclosure, stating: "Disclosure of such subjective information could

68. The regulations promulgated under Executive Order No. 11,246 require "the contractor" to develop the affirmative action plan. 41 C.F.R. § 60-1.40(a) (1979). See also id. § 60-2. The regulations governing the creation and implementation of the affirmative action plans are comprehensive; none of the sections setting forth procedures for the plans requires legal knowledge or training.
70. See cases cited note 69 supra.
72. Id. at 5521.
discourage employers from making the candid internal evaluations that the affirmative action programs envision.\textsuperscript{74}

None of the cases denying plaintiffs’ discovery requests adequately defines the basis for the public policy privilege; the courts have summarily accepted defendants’ public policy assertions without fully discussing the issues involved.\textsuperscript{75} The most complete statement of the privilege appears in the case of Webb v. Westinghouse Electric Corp.\textsuperscript{76} in which the court rejected the public policy argument and granted the plaintiff’s discovery request. In Westinghouse, the defendant claimed that its affirmative action plans should be shielded from discovery on the grounds that the plans contained “self-critical analysis.”\textsuperscript{77} The court noted:

The theoretical basis for the defense of “self-critical analysis” stems from the public policy which recognizes that voluntary compliance by employers with federal equal employment opportunity laws is essential for implementation of the policy of equal opportunity in employment. In furtherance of voluntary compliance, employers must be encouraged to be candid and forthright in assessing their employment practices and setting goals and timetables for eradicating policies deemed to be discriminatory in operation or effect. If subjective materials constituting “self-critical analysis” are subject to disclosure during discovery, this disclosure would tend to have a “chilling effect” on an employer’s voluntary compliance with equal employment laws.\textsuperscript{78}

The courts allowing defendants’ claims that the affirmative action plans are privileged on the basis of public policy have offered little justification for their conclusions. One clue to the courts’ reasoning appears in Banks v. Lockheed-Georgia Co.\textsuperscript{79} The Banks court, in accepting the defendant’s statement of the need for protection of the plans, cited the case of Bredice v. Doctor’s Hospital\textsuperscript{80} as support for its decision.\textsuperscript{81}

\textsuperscript{74} Id. at 5071.
\textsuperscript{75} See cases cited note 69 supra.
\textsuperscript{76} 81 F.R.D. 491 (E.D. Pa. 1978).
\textsuperscript{77} Id. at 433.
\textsuperscript{78} Id.
\textsuperscript{80} 50 F.R.D. 249 (D.D.C. 1970).
Bredice involved a malpractice action brought against the defendant hospital. The plaintiff attempted to discover the reports of a hospital committee that evaluated the treatment of patients by hospital doctors. The court denied the plaintiff access to the reports, holding that discovery would end candor in the committee’s operation.\(^\text{82}\) Such candor, the court reasoned, was necessary to ensure the quality of medical treatment: “candid and conscientious evaluation of clinical practices is a \textit{sine qua non} of adequate hospital care.”\(^\text{83}\) The court in \textit{Bredice} thus concluded that the public interest in denying disclosure outweighed the need to release the plans.\(^\text{84}\)

A few cases have rejected the \textit{Bredice} privilege and allowed plaintiffs in personal injury suits to obtain committee reports.\(^\text{85}\) Most cases, however, have followed the \textit{Bredice} rule,\(^\text{86}\) and commentators generally have approved of the \textit{Bredice} court’s reasoning.\(^\text{87}\) State legislatures also have shown themselves to be in agreement with \textit{Bredice}; twenty-two states have passed statutes prohibiting disclosure of reports of medical review committees.\(^\text{88}\)

\(\text{Pa. 1975).}\)

82. 50 F.R.D. at 249-50.
83. \textit{Id.} at 250.
84. \textit{Id.} at 250-51.
Although the scope of protection provided by the statutes varies, they all present obstacles for plaintiffs who attempt to obtain such committee reports.

The use of the Bredice rationale in Banks supplies insight into the courts' acceptance of the public policy defense. The opinion in Banks implies that the need for candor in the drafting of affirmative action plans is similar to that required in hospital evaluations and that disclosures posing a threat to candor must be carefully considered. However, while the Bredice privilege may be necessary to protect hospital review committee reports, it is questionable whether a similar privilege is needed to protect the disclosure of affirmative action plans. The circumstances surrounding the Bredice privilege differ greatly from those involved in cases involving alleged discrimination.

One important distinction between hospital committee reports and affirmative action plans is the purpose for which such documents are drafted. This difference has been stressed in cases rejecting the application of the Bredice privilege to affirmative action plans in FOIA suits. In Reynolds Metals Co. v. Rumsfeld, the defendant claimed that the compliance agency should be prevented from supplying the EEOC with copies of the defendant's affirmative action plans under the Bredice rule. The Fourth Circuit rejected the defendant's contention, noting that the reports were ultimately to be used in administration of the Civil Rights Act of 1964. As the responsibility for enforcing the Civil Rights Act rests with the EEOC, and the defendant had notice of that fact, the court held that the defendant could not claim that it was protected by Bredice from disclosing the reports to the EEOC.

In an identical factual situation, the defendant in Emerson Electric Co. v. Schlesinger also asserted the Bredice privilege. Again, the court rejected the defendant's claim of privilege, holding that

unlike the situation in Bredice, the [affirmative action] reports are not made solely for internal use. [affirmative action plans] and other documents are submitted to the [Office of Fed-

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89. Id. at 275.
90. See text accompanying notes 20-49 supra.
91. 564 F.2d 663 (4th Cir. 1977).
92. Id. at 667.
93. Id.
94. 609 F.2d 898 (8th Cir. 1979).
eral Contract Compliance Programs] with the express understand-
ing that they will be used in the administration of Executive
Order 11246 and the Civil Rights Act.95

The purpose for which the affirmative action plans are drafted
is not the only important difference between the hospital commit-
tee reports, protected by the Bredice privilege, and such plans. An-
other significant distinction is the weight to be given defendants' predic-
tions regarding the effect of allowing access to the requested
materials. In both situations, defendants argue that disclosure of
the documents will harm the public interest by eliminating conscien-
tious evaluations in future reports. The assertion is appealing;
reduced candor in both hospital quality committee reports and em-
ployers' affirmative action plan self-evaluations would be contrary
to the public interest. However, there is a strong safeguard against
the dangers of unconscientious self-evaluation in future affirmative
action plans. Severe sanctions are available for use against employ-
ers who fail to comply with the requirements of Executive Order
No. 11,246 and the regulations promulgated under it.96

The impact of available sanctions upon defendants' policy pre-
dictions was emphasized by the court in Hughes Aircraft Co. v.
Schlesinger.97 In Hughes, the defendant company raised the public
policy defense in a FOIA suit instituted to obtain affirmative ac-
tion plans. The court rejected the defendant's argument. It noted
that the defendant was subject to statutory and regulatory duties
to file the requested information and stressed that failure to file
the requested information "would be an act of bad faith and ex-
pose the contractor to penalties."98

Several of the sanctions available under the Order have a po-
tentially substantial impact on a federal contractor.99 The Director
of the Office of Federal Contract Compliance100 may cancel, termi-

95. Id. at 907.
96. Exec. Order No. 11,246, § 209, 3 C.F.R. 339, 343-44 (1964-65 Compilation), re-
(1979).
98. Id. at 296.
99. See BARRISTER, Fall, 1976, at 76.
100. The Director acts under the authority of the Secretary of Labor in policing af-
1.26(C) (1979).
nate, or suspend the offender's government contract. The Director also has the power to debar the contractor from participating in future government contracts. Alternatively, the Director may refer the violations to the Department of Justice prior to exhausting administrative remedies. The Department of Justice may choose to enforce the contractual provisions of the Order, seek injunctive relief, or demand additional relief, including back pay.

These sanctions are available for anything less than a candid self-evaluation produced by defendants asserting a public policy privilege. Sanctions under the Order may be imposed for any substantial or material violation, or threat of violation, of the Order or the regulations. In addition, the regulations require that an employer make a good faith “analysis of areas within which the contractor is deficient in the utilization of minority groups and women.” Therefore, the deliberately vague self-evaluations envisioned by those asserting the public policy privilege would vio-

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102. Exec. Order No. 11,246, §§ 208(b), 209(a)(6), 3 C.F.R. 339, 343-44 (1964-1965 Compilation), reprinted in 42 U.S.C. § 2000e (1976). See also 41 C.F.R. § 60-1.26(c) (1979). This regulation provides that a contractor must be afforded an opportunity for a judicial or administrative hearing before he or she is debarred from future government contracts under § 209(a)(6). However, a contractor found to be violating the regulations or the provisions of the Order may be “passed over” as a bidder for two government contracts without an administrative hearing. Crown Zellerbach Corp. v. Marshall, 441 F. Supp. 1110, 1116-18 (E.D. La. 1977). For a general discussion of the processes of federal government contract suspension and debarment, see Steadman, “Banned in Boston—and Birmingham and Boise and . . .”: Due Process in the Debarment and Suspension of Government Contractors, 27 Hastings L.J. 793 (1976).


105. 41 C.F.R. § 60-1.26(a)(1)(vii) (1979). Section 1.26(a)(1) also provides that violations of the regulations may be found in: “(i) The results of a complaint investigation . . . (iii) the results of an on-site review of the contractor's compliance with the Order and its implementing regulations, (iv) an employer's refusal to submit an affirmative action program; (v) a contractor's refusal to allow an on-site compliance review to be conducted; or (vi) a contractor's refusal to supply records or other information as required by these regulations or applicable construction industry requirements.”

106. Id. § 60-2.10.
late the regulations. Finally, faulty analysis of an affirmative action plan is prohibited as a violation of the Order.\footnote{107} Therefore, the anticipated diminution in candor in the self-evaluations contained in future affirmative action plans would subject the contractor to the threat of substantial penalties.

The severity of the sanctions available for nonconscientious analysis lessens the force of defendants' arguments for a public policy privilege. If a hospital quality review committee learns that its reports could be disclosed to third parties, it is free to tailor the evaluations in the reports as it chooses. Unlike the review committee, however, a government employer-contractor is under statutory and regulatory duties to evaluate its affirmative action plans conscientiously and candidly. If the employer fails to do so, it is subject to severe penalties. Studies have shown that past efforts to enforce these duties are sporadic and inefficient,\footnote{108} and indeed that the number of contractors who actually are debarred from future contracts for violations of Executive Order No. 11,246 is not large.\footnote{109} However, because government contracts provide a major source of income for many of the contracting companies,\footnote{110} the debarment of a few contracting companies may deter many others from failing to comply.\footnote{111} Further, the need for more diligent enforcement of the provisions of Executive Order No. 11,246 should

\footnote{107. \textit{Id.} \textsection 60-1.26(a)(1)(ii).}
\footnote{108. \textit{See} N. \textsc{Benokraitis} \& J. \textsc{Feagin}, \textsc{Affirmative Action and Equal Opportunity: Action, Inaction, Reaction} 10,317 (1978); \textsc{Galloway} \& \textsc{Ronfeldt}, \textit{Enforcing the Affirmative Action Requirements of Executive Order 11,246}, 8 \textsc{Clearinghouse Rev.} 481, 482-83 (1974); \textsc{Galloway}, \textit{Administrative and Judicial Nullification of Federal Affirmative Action Law}, 17 \textsc{Santa Clara L. Rev.} 559, 564-72 (1977).
\footnote{109. One study shows that five contractors had been barred from future government contracts for violations of Executive Order No. 11,246 prior to 1975. In 1975, four additional contractors were debarred. \textsc{Steadman}, "\textit{Banned in Boston—and Birmingham and Boise and . . .}": \textit{Due Process in the Debarment and Suspension of Government Contractors}, 27 \textsc{Hastings L.J.} 793, 876 (1976).
\footnote{110. \textit{See} \textit{id.} at 793.
\footnote{111. Agency policing of violations can also be spurred by private litigants. Although an individual has no private right of action to sue for redress for injury under Executive Order No. 11,246, \textit{see} \textsc{Rogers} v. Frito-Lay, Inc., 433 F. Supp. 200, 202-03 n.1 (N.D. Tex. 1977); \textsc{Traylor} v. Safeway Stores, Inc., 402 F. Supp. 871, 876 (N.D. Cal. 1975), a private plaintiff who has exhausted administrative remedies may obtain a writ of mandate compelling the agencies to comply with the edicts of Executive Order No. 11,246 and the regulations promulgated to enforce the Order. \textit{See} \textsc{Lewis} v. \textsc{Western Airlines, Inc.}, 379 F. Supp. 684, 689 (N.D. Cal. 1974). \textit{See generally} \textsc{Galloway} \& \textsc{Ronfeldt}, \textit{Enforcing the Affirmative Action Requirements of Executive Order 11,246}, 8 \textsc{Clearinghouse Rev.} 481 (1974). Such a litigant could well encourage debarment proceedings against a noncomplying contractor.}
not be a sufficient justification for preventing the disclosure of affirmative action plans in cases of alleged discrimination under Title VII.

The Bredice privilege thus should not preclude discovery of affirmative action plans. The plans differ from the hospital review reports in both the purpose for which they were drafted and the potential effect of disclosure to third parties. These considerations suggest that the application of a blanket public policy privilege to protect the plans is an inappropriate solution. The public policy approach is unsatisfactory for an additional reason. The courts fail in their determinations to consider plaintiffs' interests in obtaining the plans. Although this omission would not be disturbing if the defendants' interests were consistently overwhelming in all affirmative action plan discovery requests, this is obviously not the case. The courts, therefore, should develop a method of balancing the potential harms and benefits which could result from affirmative action plan disclosure.

The Ligon-Westinghouse Test: A Suggested Approach

Elements of the approaches used by courts in the cases of Ligon v. Frito-Lay, Inc.\textsuperscript{112} and Webb v. Westinghouse Electric Corp.\textsuperscript{113} could be synthesized to provide a uniform test for affirmative action plan disclosure. Under this approach, a court faced with a discovery request would make a thorough in camera examination of the affirmative action plans as suggested in Ligon. The court would then fully explore the benefits and detriments to be expected from disclosure of the plans in light of the circumstances of the case. Finally, the court would apply the standard set forth in Westinghouse to evaluate the impact of disclosure.

In Camera Review

Ligon was the first case to suggest the use of an in camera review\textsuperscript{114} to resolve affirmative action plan discovery conflicts. In

\textsuperscript{112} 19 F.E.P. Cas. 722 (N.D. Tex. 1978).
\textsuperscript{113} 81 F.R.D. 431 (E.D. Pa. 1978).
\textsuperscript{114} 19 F.E.P. Cas. at 723. The court in Brown v. Ford Motor Co., 19 Empl. Prac. Dec. 6026 (N.D. Ga. 1978), also utilized an in camera review to determine whether to allow discovery of the plans. In Brown, the court stated: "The abundance of conflicting authority in
Ligon, the court rejected the defendant's public policy and work product arguments, noting that an in camera review would prevent the release of privileged materials and that the issuance of a protective order would stop the plaintiff from disclosing the documents to the general community.  

The somewhat perfunctory approach used in Ligon is not an entirely satisfactory method of resolving affirmative action plan disclosure problems. Use of an in camera review would allow the courts to evaluate assertions that focus on the specific information contained in the plans themselves. The courts, therefore, would be able to evaluate defendants' claims that the plans contain confidential business information and plaintiffs' assertions that the plans are relevant to the Title VII case. If portions of the plans did contain confidential business information not relevant to the case, these portions could be deleted from the plans during the review.

However, the restricted scope of the Ligon review prevents a proper resolution of the conflicting interests of the parties. The focus on the plans themselves in the Ligon approach results in the failure to take account of those interests of the parties that are not apparent on the face of the plans. To resolve fully the conflict of interests presented by an affirmative action plan discovery request, a court must consider all factors relevant to the respective interests of the parties involved.

The Defendant's Interests: Factors Favoring Protection

In evaluating the interests supporting protection of affirmative action plans, a court should carefully scrutinize public policy claims made by the defendant. Although public policy considerations alone are insufficient to justify an absolute privilege, they should be taken into account in considering whether discovery of the plans should be allowed. In determining the weight to be given

the cases suggests that the law has not yet struck a definitive balance between the competing considerations of a plaintiff's right to full discovery and the desire not to discourage the highly desirable self-evaluation and improvement that affirmative action plans assist. The court believes that, as no clear rule exists, the more prudent course is to order in camera inspection of the disputed plans. This procedure will permit the court to evaluate both the danger that limited disclosure of the plans through discovery would pose and the importance of the plans to the plaintiff's case.” Id. at 6026. See also Dickerson v. United States Steel Corp., 12 Empl. Prac. Dec. 5070, 5071 (E.D. Pa. 1976).

115. 19 F.E.P. Cas. at 722-23.

116. See text accompanying notes 69-110 supra.
to this factor the court might review the extent of the contractor's self-evaluation in the plans. For example, if the self-analysis is less than complete, a defendant's predictions of incomplete analysis in the future should be entitled to little weight. The court could also consider independent evidence of the defendant's relative commitment to affirmative action; if the defendant has repeatedly violated civil rights mandates, disclosure of the plans is unlikely to be detrimental.

The court should carefully evaluate assertions that plans contain sensitive or confidential business information. The evaluation should be conducted in light of the relevant conditions in the defendant's industry at the time of the suit, noting, for example, the competitive nature of the industry and the likelihood that competitive disadvantage may result from disclosure. The court should question the confidentiality of the plans within the company itself, considering whether the plans are used for other purposes within the company, the number of people who have access to the plans, and whether the defendant releases all or part of the plan data to industrial survey programs.

If the court finds that the affirmative action plans contain confidential business information, it should determine whether a protective order prohibiting the plaintiff from disclosing the information would resolve the potential problem. Under rule 26(c) of the Federal Rules of Civil Procedure, a court may make a variety of orders for the protection of participants in the discovery process. Further, rule 26(c)(7) provides that a defendant may request a protective order declaring that "confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way," and under rule 26(c)(7), the court could make an appropriate order preventing public disclosure of the information contained in the plans.

If the defendant has failed to move for a protective order, a plaintiff hoping to extinguish the defendant's "confidentiality" ob-

119. Id. 26(c)(7).
jections may request such an order.\textsuperscript{121} The motion could be made on the grounds that the order is one “which justice requires to protect a party or person from . . . oppression.”\textsuperscript{122} In many cases, such an order will protect the defendant’s interests and do away with this consideration altogether.

It is unclear what effect disclosure of the plans may have upon EEOC conciliation proceedings.\textsuperscript{123} Although private plaintiffs play an important role in the enforcement process of Title VII,\textsuperscript{124} enforcement of the Act is primarily accomplished by informal conciliation and negotiation between the employer and the EEOC.\textsuperscript{125} This emphasis results from the belief that discrimination is more effectively eliminated by broad and systematic agreements than by individual lawsuits.\textsuperscript{126} Under one view, if conciliation efforts are in progress or are impending, disclosures that further individual suits may hamper the conciliation proceeding.\textsuperscript{127} In Johnson v. Railway Express Agency, Inc.,\textsuperscript{128} a 1975 case, the Supreme Court noted: “We recognize . . . that the filing of a lawsuit might tend to deter efforts at conciliation, that lack of success in the legal action could weaken the Commission’s efforts to induce voluntary compliance . . . .”\textsuperscript{129} Under this view, because the employer may negotiate with the Commission to avoid litigation,\textsuperscript{130} its incentive to settle may diminish if it continues to face private suits.\textsuperscript{131} If conciliation


\textsuperscript{122.} FED. R. CIV. P. 26(c).

\textsuperscript{123.} Section 706(b) of Title VII provides in part: “If the Commission determines after . . . investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.” 42 U.S.C. § 2000e-5(b) (1976). See generally Katz, Investigation And Conciliation of Employment Discrimination Charges Under Title VII: Employers’ Rights in an Adversary Process, 28 Hastings L.J. 877 (1977).

\textsuperscript{124.} See text accompanying notes 140-47 infra.


\textsuperscript{128.} 421 U.S. 454 (1975).

\textsuperscript{129.} Id. at 461.

\textsuperscript{130.} See id.

\textsuperscript{131.} More recently, however, the Supreme Court has expressed a different view on this
proceedings are in progress at the time a plaintiff seeks discovery of the plans, the court should consider whether the goals of Title VII will be better effectuated by denying discovery and encouraging conciliation.

The Other Side of the Scale: Factors Favoring Disclosure

In evaluating factors favoring affirmative action plan disclosure, courts should consider initially whether the plaintiff is able, without possession of the plans, to articulate a credible basis for a Title VII suit. The court need not determine whether the plaintiff can prove the elements of a Title VII case. However, evidence that the suit is brought to harass a defendant, or otherwise is not in good faith, is relevant to the issue of a plaintiff's legitimate need for discovery of the plans. Such evidence weighs heavily against disclosure.

Once the court has considered the plaintiff's good faith in bringing the suit, it should consider the burden of proof imposed upon Title VII plaintiffs. In a Title VII action, the plaintiff bears the initial burden of proof in establishing a prima facie case of discrimination. If the employer is able to do so, the plaintiff is given an opportunity to demonstrate that the employer's stated basis for the disputed acts is in fact a pretext.

A Title VII plaintiff frequently has difficulty in meeting his or
her burden of proof.\textsuperscript{134} Proof of discriminatory practices is rarely direct, and the employee is at an inherent disadvantage in gathering evidence of employment discrimination.\textsuperscript{135} This difficulty is increased by "the typically impecunious position of the Title VII plaintiff. A victim of employment discrimination often will not have the financial resources to support a lawsuit; without substantial information about his claim, he may be unable to obtain counsel on a contingent-fee basis."\textsuperscript{136} Because of the difficulty of documenting a charge of discriminatory practices, the scope of discovery is particularly broad in a Title VII case.\textsuperscript{137} This policy of broad discovery in all Title VII cases, based upon judicial recognition of the difficulties in meeting the Title VII burden of proof, provides a weighty argument in favor of disclosure. In some instances additional difficulties facing a particular plaintiff may be relevant to the evaluation.\textsuperscript{138}

Another important consideration bearing upon the need for disclosure is the need to encourage the participation of private litigants in the Title VII enforcement process. As noted above, Title VII was designed to be enforced principally through informal conciliation procedures.\textsuperscript{139} In a recent case,\textsuperscript{140} the Supreme Court suggested that disclosure of EEOC investigative materials to private litigants could expedite conciliation proceedings. The Court noted that disclosure of information to private plaintiffs could improve the Commission's ability to resolve charges through informal means, stating: "A party is far more likely to settle when he has enough information to assess the strengths and weaknesses of his opponent's case as well as his own."\textsuperscript{141}

\begin{itemize}
\item \textsuperscript{134} See, e.g., Senter v. General Motors Corp., 532 F.2d 511, 527 (6th Cir.), \textit{cert denied}, 429 U.S. 870 (1976) (citing cases).
\item \textsuperscript{135} 532 F.2d at 527.
\item \textsuperscript{136} Comment, \textit{Access to EEOC Files Concerning Private Employers}, 46 U. CHI. L. Rev. 477, 487 (1979).
\item \textsuperscript{137} See notes 50-51 & accompanying text supra.
\item \textsuperscript{138} For example, there may be evidence that the plaintiff has been unable to obtain documentation of his or her charge because of defendant's bad faith discovery responses in this—or other—discrimination suits. Consideration of this factor may involve substantial problems of relevancy, proof, and res judicata. The court may wish to disregard this factor entirely as a result of these difficulties. However, if direct evidence shows that the defendant has attempted to discourage Title VII suits through bad faith discovery responses, it can possibly be inferred that plaintiff's need for the plans is substantial.
\item \textsuperscript{139} See note 125 & accompanying text supra.
\item \textsuperscript{140} Associated Dry Goods Corp. v. EEOC, 49 U.S.L.W. 4149 (1981).
\item \textsuperscript{141} \textit{Id.} at 4151.
\end{itemize}
The role of the private litigant assumes increased importance if the EEOC has failed to bring conciliation proceedings, or if such proceedings have failed. The EEOC has insufficient resources to pursue legal action in ninety percent of the cases in which conciliation is unsuccessful. If conciliation is not in progress, the complications and expense resulting from the defense of several individual suits in fact might encourage an employer to initiate conciliation and settle all the claims. Additionally, it can be argued that prosecution of individual suits, where more general attempts have failed, serves the public interest. The Supreme Court has noted: "[T]he private right of action remains an essential means of obtaining judicial enforcement of Title VII. . . . In such cases, the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices."

The Westinghouse Standard for Disclosure

Once a court has evaluated the interests of the parties—and the public—in an affirmative action plan discovery suit, it must determine whether to grant plaintiff's discovery request. If the interests of either party completely outweigh the interests of the other, the court's decision is simple. In most cases, however, the considerations may be strong on both sides. Where the interests of the plaintiff and the defendant seem equally strong, the situation is more complex and the court must determine which to favor. The answer is provided by the decision in Webb v. Westinghouse Elec-
tric Corp. 147

In Westinghouse, the court set guidelines for affirmative action plan disclosure in cases in which both parties have demonstrated that substantial interests are involved in the discovery issue. The court acknowledged that the defendant’s public policy arguments were valid. It also discussed the importance of eliminating employment discrimination. After examining the cases denying discovery of affirmative action plans, the court articulated a standard based on decisions in those cases:

[S]everal factors emerge as potential guideposts for the application of the “self-critical analysis” defense. First, materials protected have generally been those prepared for mandatory governmental reports. Second, only subjective evaluative materials have been protected; objective data contained in those same reports in no case have been protected. Finally, courts have been sensitive to the need of the plaintiffs for such materials, and have denied discovery only where the policy favoring exclusion of the materials clearly outweighed plaintiff’s need.148

The preference for discovery in the Westinghouse test is justified by the extremely broad scope of discovery in federal courts149 and the special emphasis on liberal discovery in Title VII cases. Under this standard, the courts would deny discovery only when the factors favoring protection “clearly outweigh” the plaintiff’s need for discovery. The Ligon-Westinghouse approach, consisting of an in camera review, evaluation of the competing interests of the parties, and denial of discovery only when a defendant can show that a preponderance of factors favor protection, provides a uniform approach that balances the competing interests in affirmative action plan discovery requests.

Conclusion

Whether a plaintiff in an employment discrimination suit may discover a defendant employer’s affirmative action plans remains unclear. Obtaining the plans under the FOIA has proven difficult. When a Title VII plaintiff attempts to discover affirmative action plans, the interests of the plaintiff and the defendant come into conflict. The work product privilege applied by some courts to de-

148. Id. at 434.
149. See notes 50-51 & accompanying text supra.
feat disclosure should be entirely inapplicable to prevent disclosure of the plans. A routine application of the blanket “public policy” privilege to bar discovery is also unsatisfactory because it fails to take into account the interests of the plaintiff in discovering the plans.

A better approach is one in which the court reviews the plans in camera and then balances the interests of both parties to the suit. The court should protect the plans from disclosure only when the interests favoring protection “clearly outweigh” plaintiff’s need for discovery. This procedure, a synthesis of the *Ligon v. Frito-Lay* and *Webb v. Westinghouse* cases, best resolves the competing interests inherent in a plaintiff’s affirmative action plan discovery request.