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THE FREEDOM OF INFORMATION ACT IN AIR CRASH DISCOVERY: FRIEND OR FOE?

SUSAN SCOTT HAYES

I. INTRODUCTION

AIR CRASH LITIGATION presents complex problems to practicing trial attorneys. One of the most pressing of these problems is the gathering of admissible evidence.¹ Aircraft accident investigations involve voluminous reports, documents, and memoranda. Therefore, discovery limitations play a particularly significant role in aviation litigation.

The federal government investigates every major air accident.² Thus, the attorney involved in air crash litigation is provided with a relatively thorough investigation at minimal cost. However, certain recognized privileges exist which could keep this evidence from being introduced

¹ Watts & Johnson, *Discovery Problems in Aircraft Litigation*, 23 FED'N INS. COUNS. Q. 112 (1973) [hereinafter cited as Watts & Johnson]. For information on general discovery problems in aviation litigation, see Howie, *Developing the Plaintiff's Discovery Plan in Mid-Air Collision Litigation*, 47 J. AIR L. & COM. 797 (1982); Madole, *Discovery Against Manufacturers in Air Crash Litigation*, 40 J. AIR L. & COM. 481 (1974); Sales, *Discovery Problems in Aviation Litigation*, 38 J. AIR L. & COM. 297 (1972); Speiser, *Dynamics of Airline Crash Litigation: What Makes the Cases Move?*, 43 J. AIR L. & COM. 565 (1977).

² Watts & Johnson, *supra* note 1, at 112. The Federal Aviation Act provides that when both civilian and military planes are involved in an accident, the investigation will be conducted by the National Transportation Safety Board (NTSB). Pub. L. No. 85-726, 72 Stat. 782 (codified at 49 U.S.C.A. § 1442 (West 1976)). When an accident involves military aircraft only, military authorities alone conduct the investigation which is governed by the regulations of the particular service branch involved. See A.F. Reg. 110-14, par. 3; A.F. Reg. 127-34, par. 19(A)(2); and Army Reg. 385-40, par. 1-4.

at trial.³ One tool which attorneys may use to by-pass these roadblocks is the Freedom of Information Act (FOIA).⁴ Yet, in light of recent court decisions and the costs of bringing a separate action, the Freedom of Information Act is not the panacea it was once believed to be.

II. DISCOVERY IN AIR CRASH LITIGATION

Airline crash litigation became important after World War II.⁵ In the 1940s and 1950s, courts dealt with accidents involving fairly simple aircraft compared to today's complex jet liners.⁶ Therefore, the litigation arising from these accidents was relatively simple.⁷

The picture had changed dramatically by the 1970s.⁸ As airplanes became more complex and carried more passengers, determining causes of and responsibility for accidents became difficult.⁹ Promulgation of the federal aviation regulations caused further complications.¹⁰

Today, aviation is one of the most documented activi-

³ For a discussion of the governmental privileges which could prevent discovery of air accident investigation, see *infra* notes 19-67 and accompanying text.

⁴ Act of September 6, 1966, Pub. L. No. 89-554, 80 Stat. 383 (codified as amended at 5 U.S.C.A. § 552 (West 1977)) [hereinafter cited as FOIA]. For a general discussion, see *infra* notes 7-18 and accompanying text.

⁵ Speiser, *supra* note 1, at 565. There were very few trials involving airline accidents prior to World War II. *Id.* According to Speiser, these trials belong to the "Stone Age" of aviation litigation. *Id.*

⁶ *Id.* In these early cases, courts were dealing with aircraft like the Douglas DC-3, which carried twenty-one passengers, and the DC-4, which seated approximately sixty passengers. *Id.* Both of these aircraft were simple to operate compared to today's airplanes. *Id.*

⁷ *Id.* Speiser points out that in this early litigation it was common to find the airline which operated the aircraft as the sole named defendant. *Id.* Also, manufacturing defects were difficult to find as well as difficult to prove. *Id.*

⁸ *Id.* at 566.

⁹ *Id.*

¹⁰ *Id.* See Federal Aviation Regulations, 14 C.F.R. §§ 1-200 (1985). The sections most often involved in air crash litigation include sections 25 (Airworthiness Standards; Transport Category Airplanes); 61 (Certification: Pilots and Flight Instructors); 63 (Certification: Flight Crewmembers Other Than Pilots); 97 (Standard Instrument Approach Procedures); 121 (Certification and Operations: Domestic Flag and Supplemental Air Carriers); and 129 (Operations of Foreign Air Carriers).

ties in the world.¹¹ Valuable evidence which may help establish liability on the part of airlines, manufacturers, and the government often exists in this mass of documents.¹² A plaintiff must join the government and the manufacturer as defendants to have access to this information.¹³ However, the government will likely claim that its information is privileged and try to prevent the plaintiff from discovering the documents.¹⁴ The Freedom of Information Act may help plaintiffs (who can afford the extra expense) in this situation by forcing the government to disclose the documents.

A. *Governmental Privilege*

Several types of cases can emerge from an aircraft accident, including those involving military aircraft, those in which the government is a party to the action under the Federal Tort Claims Act (FTCA),¹⁵ and those involving civilian air crashes.¹⁶ Although discovery in cases involving military aircraft may be especially difficult,¹⁷ the production of privileged information has been an issue in all types of air crash litigation.

In cases where the government is a party to the action under the FTCA,¹⁸ the official government investigation is discoverable under the Federal Rules of Civil Procedure.¹⁹ Rule 34 allows the production of any documents

¹¹ Speiser, *supra* note 1, at 567.

¹² *Id.*

¹³ The Federal Rules of Civil Procedure provide for the discovery of documents which contain matters within the scope of Rule 26(b) from any *party* to the lawsuit. FED. R. CIV. P. 34(a). Therefore, it is necessary for a plaintiff to join the party to get the desired information.

¹⁴ For a discussion of the governmental claim of privilege, see *infra* notes 19-74 and accompanying text.

¹⁵ Federal Torts Claims Act, ch. 646, 62 Stat. 933 (1948) (current version at 28 U.S.C.A. §§ 2671-80 (West 1986)).

¹⁶ See generally Watts & Johnson, *supra* note 1, at 120-24.

¹⁷ *Id.* at 112.

¹⁸ 28 U.S.C.A. §§ 2671-80 (West 1986).

¹⁹ See FED. R. CIV. P. 34(a). Under this rule, "any party may serve on any other party a request . . . to produce . . . any designated documents . . . which . . . contain matters within the scope of Rule 26(b) and which are in the possession,

within the scope of Rule 26(b), which states that parties may obtain discovery regarding any matter not privileged.²⁰ Litigants who have attempted to compel production of a government investigation report have, more often than not, been met by a claim of privilege by the government.²¹

In *United States v. Reynolds*,²² the United States Supreme Court established four requirements which must be met before a claim of privilege is allowed:²³ (1) the privilege must belong to the government and must be asserted by it; (2) the privilege can neither be invoked nor waived by a private party; (3) the head of the department must determine the existence of the report and claim for a privilege from a personal inspection thereof; and (4) a formal claim must be lodged by the head of the department.²⁴

The importance of the formal claim requirement in *Reynolds* became apparent in *United Airlines, Inc. v. United States*.²⁵ This case involved a collision between a government aircraft and an aircraft owned by United Airlines.²⁶ United Airlines sought government production of two investigation reports, several statements, and exhibits.²⁷ Due to the absence of a formal claim of privilege by the United States, the federal district court refused to con-

custody or control of the party upon whom the request is served." *Id.* Through the FTCA, the Government has been placed in a position similar to a private defendant in a civil tort action and is, therefore, considered a party within the meaning of Rule 34. Watts & Johnson, *supra* note 1, at 114.

²⁰ FED. R. CIV. P. 26(b). This rule provides: "Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action. . . ." *Id.* at 26(b)(1)(emphasis added).

²¹ Watts & Johnson, *supra* note 1, at 114.

²² 345 U.S. 1 (1953). For a discussion of the facts and precedential value of *Reynolds*, see *infra* notes 33-44 and accompanying text.

²³ *Id.* at 7-8.

²⁴ *Id.*

²⁵ 186 F. Supp. 824 (D. Del. 1960). This action was against the United States to recover property damaged and expenses incurred by a commercial airline as a result of a collision with a United States owned jet. *Id.*

²⁶ *Id.* at 825.

²⁷ *Id.* at 826.

sider the question of privilege.²⁸

In a case similar to *United Airlines*, the court examined the validity of the asserted privilege before making a determination. *Cresmer v. United States*²⁹ involved a wrongful death action under the FTCA. Although the four requirements of *Reynolds* had been met, the court held that no "good cause" for the privilege existed. The plaintiff's decedent had been struck on the ground when a government airplane crashed.³⁰ The plaintiff moved for an order directing the United States to produce the report prepared by the Navy Board of Investigation.³¹ The district court granted the motion based on the failure of the government to establish that a military secret or threat to the national security was involved.³²

In contrast to these cases, the government's right to refuse discovery of Accident Investigation Reports has

²⁸ *Id.* The court failed to elaborate on the process for filing a formal claim of privilege. Judge Wright, for the court, merely relied on language from the *Reynolds* decision in which the United States Supreme Court held that a formal claim was required. See *supra* note 22 and accompanying text. The court in *United Airlines* stated:

The government also urges that the Aircraft Accident Investigation is concerned solely with flight safety and that our national security is dependent upon this report remaining inaccessible to the plaintiff. Since the government has not formally invoked the claim of privilege, I deem any further reference to this phase of the matter at this time irrelevant.

United Airlines, 186 F. Supp. at 825. Despite the fact that a privilege could not be asserted, non-production was upheld. *Id.* at 828. This holding was based on the "good cause" requirement formerly in Rule 34. *Id.* Because Rule 34 no longer requires "good cause", the reports, statements, and exhibits would probably be subject to discovery today if the government has not claimed its privilege. See *Watts & Johnson, supra* note 1, at 116.

²⁹ 9 F.R.D. 203 (E.D.N.Y. 1949).

³⁰ *Id.* at 204.

³¹ *Id.*

³² *Id.* The court wrote:

In the absence of a showing of a war secret, or secret in respect to munitions of war, or any secret appliance used by the armed forces, or any threat to National security, it would appear to be unseemly for the Government to thwart the efforts of a plaintiff in a case such as this to learn as much as possible concerning the cause of the disaster.

Id.

strong support in *United States v. Reynolds*.³³ The widows of three civilian employees who were killed in the crash of an Air Force B-29 bomber instituted this case under the FTCA.³⁴ The plaintiffs moved under Rule 34 for production of the official investigation report prepared by the Air Force and the statements of the surviving crew members taken in connection with the investigation.³⁵ The Air Force filed a "claim of privilege" and indicated to the court that the aircraft was engaged in a highly secret mission.³⁶ The district court ordered the government to produce the documents for an *in camera* inspection to determine whether they contained privileged matter.³⁷ When the government refused to comply, the court ordered that the facts on the issue of negligence would be taken as established in the plaintiffs' favor.³⁸

The United States Supreme Court reversed the district court holding that the government's claim of privilege should have been allowed.³⁹ The Court ruled that there was a reasonable danger that the accident investigation report would refer to secret equipment which was of primary concern to the mission.⁴⁰ According to the Court, the government's claim of privilege was sufficient because a strong showing of necessity existed.⁴¹ Thus, the *Reynolds*

³³ 345 U.S. 1 (1953).

³⁴ *Id.* at 3-4. The aircraft was being flown to test secret electronic equipment. *Id.* at 3. Four civilians were aboard to observe the testing. *Id.* While aloft, fire broke out in one of the bomber's engines. *Id.*

³⁵ *Id.* at 3.

³⁶ *Id.* at 4.

³⁷ *Reynolds v. United States*, 192 F.2d 987, 990-91 (3rd Cir. 1951), *rev'd*, 345 U.S. 1 (1953).

³⁸ *Reynolds*, 345 U.S. at 5. This order was made pursuant to Rule 37(b)(2)(i) of the Federal Rules of Civil Procedure. This rule provides that if a party fails to comply with an order of the court, the court may deem designated facts as established for purposes of the action. FED. R. CIV. P. 37.

³⁹ *Reynolds*, 345 U.S. at 12.

⁴⁰ *Id.* at 10. Chief Justice Vinson wrote: "Experience in the past war has made it common knowledge that air power is one of the most potent weapons in our scheme of defense, and that newly developing electronic devices have greatly enhanced the effective use of air power." *Id.*

⁴¹ *Id.* at 10-11. The court held that "[in] each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate." *Id.* The court cited

decision establishes that where it appears from the nature of the accident that the report might reasonably be expected to divulge sensitive military secrets, the trial court should not order disclosure, even for an *in camera* inspection.

Although some governmental privilege cases like *Reynolds* involve national security, the usual claim of governmental privilege involves the right of the government to deny outsiders the results of official investigations. This right is based on the premise that disclosure would have a chilling effect on the participants in the investigations.⁴² Courts have accepted this argument, but limited the privilege to information obtained from private parties.⁴³

In *Machin v. Zuckert*,⁴⁴ the government's formal claim of privilege was upheld based on this "outsider" argument. The court held that the testimony of private parties who participated in the investigation was privileged when in the hands of the federal government.⁴⁵ Therefore, data supplied by representatives of private industry and opin-

Totten v. United States, 92 U.S. 105 (1875), where the very subject matter of the action, a contract to perform espionage, was a matter of utmost secrecy. *Id.* at 11.

⁴² See Burton, *Military Investigations and Reports of Aircraft Accident*, 36 J. AIR. L. & COM. 409 (1970).

⁴³ Watts & Johnson, *supra* note 1, at 118. The first case to limit the privilege in this way was *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir. 1963). For a discussion of *Machin*, see *infra* notes 44-57 and accompanying text.

⁴⁴ 316 F.2d 336 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963). On May 17, 1956, a B-25 Air Force bomber crashed after taking off from Lowry Air Force Base in Denver, Colorado. *Id.* at 337. Machin was the only survivor of the crash. *Id.* He brought an action in the United States District Court for the Southern District of New York against United Aircraft Corporation, the manufacturer of an allegedly defective propeller. *Id.* Machin attempted to obtain the Aircraft Accident Investigative Report prepared by the Air Force immediately after the accident. *Id.* He was allowed to look at it briefly, but could not copy it or take notes from it. *Id.* Not satisfied, Machin subpoenaed the Secretary of the Air Force. *Id.* The secretary filed a motion to quash as well as a formal claim of privilege. *Id.* at 337-38. The district court granted the motion. *Id.* at 338.

⁴⁵ *Id.* at 339. The court held that this privilege extended to any conclusions that might be based on such privileged information. *Id.* Furthermore, the court attached a recognized privilege to any portions of the report reflecting Air Force deliberations or recommendations as to policies that should be pursued. *Id.* (citing *Boeing Airplane Co. v. Coggeshall*, 280 F.2d 654 (D.C. Cir. 1960) and *Zacher v. United States*, 227 F.2d 219 (8th Cir. 1955)).

ions based on that data are nondiscoverable.⁴⁶ However, the facts and opinions of individual government personnel are discoverable.⁴⁷

In *O'Keefe v. Boeing Co.*,⁴⁸ the United States District Court for the Southern District of New York held that the government waived the privilege. This case involved a suit against the manufacturer of a jet bomber for wrongful death and injury sustained by the crew when the plane crashed.⁴⁹ The government investigators gave the accident report to the manufacturer.⁵⁰ The court held that this action constituted a waiver of any privilege.⁵¹

Similar problems of discovery and admissibility appear in civilian air crash cases, but to a lesser degree. Under the Federal Aviation Act,⁵² the National Transportation Safety Board (NTSB) is required to investigate all civil air-

⁴⁶ *Machin*, 316 F.2d at 339. The court agreed with the government that when disclosure of investigative reports obtained through promises of confidentiality would hamper operation of a government program, the reports should be considered privileged. *Id.* For this reason the court held that, insofar as the subpoena sought to obtain testimony of private parties who participated in such investigation, such information is privileged in the hands of the government. *Id.*

⁴⁷ *Machin*, 316 F.2d at 340. The court referred specifically to the factual findings of Air Force mechanics who examined the wreckage. *Id.* Their investigations and reports, according to the court, are not inhibited and their findings may well be of utmost relevance to the litigation. *Id.* at 341.

⁴⁸ 38 F.R.D. 329, 335 (S.D.N.Y. 1965). This action was for wrongful death and personal injuries caused by the crash of a B-52 Air Force jet bomber. *Id.* at 330. The aircraft was manufactured by Boeing. *Id.* The plaintiffs alleged breach of warranty and negligence on the part of Boeing. *Id.* The government sought intervention pursuant to Rule 24 of the Federal Rules to assert privilege when the plaintiffs requested discovery and inspection of the documents given to Boeing. *Id.* at 329-30.

⁴⁹ *Id.* at 330.

⁵⁰ *Id.* at 335.

⁵¹ *Id.* The Air Force provided Boeing with the Accident Investigation Report. *Id.* The plaintiff sought production from Boeing. *Id.* at 330. The Air Force intervened to oppose production claiming privilege. *Id.* The court held:

Under the circumstances here present, it does not seem fair that an executive privilege should be available against discovery and inspection of papers in the hands of Boeing so far as they deal with facts. Any privilege as to that part of the papers appears to have been waived.

Id. at 335.

⁵² See 49 U.S.C.A. § 1442 (West 1986).

craft accidents to determine probable cause.⁵³ Generally, factual matter may be obtained from NTSB regional offices upon the request of any person during any stage of an investigation.⁵⁴ However, limitations to obtaining the information in the reports do exist. FAA regulations provide that only factual information can be released,⁵⁵ regardless of whether a person institutes a wrongful death action or whether a person joins the government as a party.⁵⁶ The Federal Aviation Act states further that no part of the NTSB's report relating to an accident investigation shall be used as evidence in any suit for damages arising out of a matter within such report.⁵⁷

Interpreting these withholding regulations prior to the FOIA, courts attempted to balance the interests of the government agency with the interests of private litigants.⁵⁸ In *Ritts v. American Overseas Airlines, Inc.*⁵⁹ and *Tansey v. Transcontinental & Western Air, Inc.*,⁶⁰ the Court considered only the government's final report privileged. The preliminary information gathered was not.⁶¹ Also, in *Universal Airlines, Inc. v. Eastern Air Lines, Inc.*,⁶² and *Craig v. Eastern Air Lines, Inc.*,⁶³ the courts held that reports made by private investigators which contained opinions

⁵³ 69 U.S.C.A. § 1441(a) (West 1986). The Federal Aviation Act provides in part:

(a) It shall be the duty of the National Transportation Safety Board to . . . (2) Investigate such accidents [involving civil aircraft] and report the facts, conditions, and circumstances relating to each accident and the probable cause thereof; . . . (4) Make such reports public in such form and manner as may be deemed by it to be in the public interest. . . .

Id.

⁵⁴ Watts & Johnson, *supra* note 1, at 121.

⁵⁵ 14 C.F.R. § 311.1 (1986).

⁵⁶ *Id.*

⁵⁷ 69 U.S.C.A. § 1441(e) (West 1986).

⁵⁸ Originally this balance was between the Civil Aeronautics Board (CAB) and private litigants. However, all accident investigation and safety functions of the CAB have been transferred to the NTSB. 49 U.S.C.A. § 1655(d) (West 1982).

⁵⁹ 97 F. Supp. 457 (S.D.N.Y. 1947).

⁶⁰ 97 F. Supp. 458 (D.D.C. 1949).

⁶¹ *Tansey*, 97 F. Supp. at 461; *Ritts*, 97 F. Supp. at 458.

⁶² 88 F.2d 993 (D.C. Cir. 1951).

⁶³ 40 F.R.D. 508 (E.D.N.Y. 1966).

and conclusions of a government employee were not available to the public.⁶⁴

Prior to the passage of the FOIA, litigants in air crash cases faced many discovery obstacles. In cases involving the government or military, a claim of privilege could be asserted.⁶⁵ Ordinarily, the privilege would be based on national security or the right to keep private citizens from obtaining government information.⁶⁶ If the litigation involved a civilian air crash, then finalized reports and opinions of government investigators were not discoverable.⁶⁷ These problems still exist today, despite passage of the FOIA twenty years ago. However, as the following case demonstrates, the Act could potentially become an important tool to prevent the withholding of government reports in the future.

B. Freedom of Information Act

1. History

The FOIA, originally enacted in 1966,⁶⁸ establishes a statutory right of public access to government information.⁶⁹ The Act provides that any person⁷⁰ has access to identifiable, existing records⁷¹ of a federal government agency⁷² without demonstrating a need for the requested

⁶⁴ *Id.* at 509. The court based its conclusions on the grounds that there is no distinction between an expert retained by the government for litigation purposes or an employee of the respondent who happens to be an expert. *Id.* The court treated the United States as "any private litigant" and held that the movant failed to establish the right to inspect the FAA's expert's report. *Id.*

⁶⁵ See *supra* notes 15-51 and accompanying text.

⁶⁶ See *supra* notes 22-51 and accompanying text.

⁶⁷ See *supra* notes 52-64 and accompanying text.

⁶⁸ 7 U.S.C.A. § 552 (West 1971).

⁶⁹ *Id.* The Act provides that *each government agency shall make* certain information available to the public for inspection and copying. *Id.* at § 552(a)(2) (emphasis added). See also 111 CONG. REC. S. 2797 (daily ed. Feb. 17, 1965) (remarks of Senator Long) ("Our purpose in introducing the [FOIA] today. . . is that a necessary corollary to the right of a democratic people to participate in governmental affairs is the right to acquire information."); 112 CONG. REC. H13,641 (daily ed. June 20, 1966).

⁷⁰ 7 U.S.C.A. § 552(a)(3)(B) (West 1977).

⁷¹ *Id.* at § 552(a)(3).

⁷² *Id.* at § 552(e). The term "agency" is defined as any executive department,

information.⁷³ The FOIA strives primarily to mandate responsible disclosure of government information.⁷⁴

The broad disclosure requirements of the FOIA retain some qualifications. The Act attempts to balance the public's right of access to information and the government's obvious need for secrecy.⁷⁵ To achieve this balance, only nine categories of information may be withheld in the interest of national security, the privacy of individuals, or the effective operation of government.⁷⁶ Although these

military department, government corporation, government controlled corporation, or other establishment in the executive branch of the government or any independent regulatory agency. *Id.*

⁷³ See J. O'REILLY, *FEDERAL INFORMATION DISCLOSURE* 4-11 (1986). Access to any person for any reason has created a civil discovery policy problem which has troubled courts. *Id.* Litigants in actions against government agencies have attempted to avoid roadblocks to discovery by requesting non-discoverable documents under the FOIA. See, e.g., *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 159-160 (1975).

⁷⁴ See 112 CONG. REC., *supra* note 69 ("[The FOIA] seeks to open to all citizens, so far as consistent with other national goals of equal importance, the broadest possible range of information."); S. REP. No. 813, 89th Cong., 1st Sess. 3 (1965).

⁷⁵ 112 CONG. REC., *supra* note 69 (remarks of Senator Moss) ("[T]he committee has, with the utmost sense of responsibility, attempted to achieve a balance between a public need to know and necessary restraint upon access to information in specific instances."). *Id.*

⁷⁶ The nine exemptions appear at 5 U.S.C. § 552(b) (1982):

(b) This section does not apply to matters that are - (1)(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of *national defense or foreign policy* and (B) are in fact properly classified pursuant to such Executive Order; (2) related solely to the *internal personnel rules and practices* of any agency; (3) specifically *exempted from disclosure by Statute* (other than section 552(b) 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) established particular criteria for withholding or refers to particular types of matters to be withheld; (4) *trade secrets and commercial or financial information* obtained from a person and privileged or confidential; (5) *inter-agency or intra-agency memorandums or letters* which would not be available by law to a party other than an agency in litigation with the agency; (6) *personnel and medical files* and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) *investigatory records compiled for law enforcement purposes*, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement au-

categories of information may be protected from disclosure, the Act makes secrecy permissive and does not require agencies to withhold records.⁷⁷

The FOIA contains five subsections, with the most important being subsection (a). This subsection describes the type of information which shall be made available to the public,⁷⁸ the manner in which such information shall be made available,⁷⁹ and the general method by which a citizen must request the records.⁸⁰ Subsection (a) also explains the scope and procedure for judicial review of a decision not to disclose the requested information⁸¹ and outlines the provisions for disciplinary action against a government official who fails to comply with the Act.⁸²

thority 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. *Id.* (emphasis added).

⁷⁷ Congress did not intend the exemptions in the FOIA to be used either to prohibit disclosure of information or to justify automatic withholding of information. Rather, they are only permissive. See, S. REP. No. 854, 93rd Cong., 2d Sess. 6 (1974), reprinted in SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 183, 185 (1974).

⁷⁸ 7 U.S.C.A. § 552(a)(1) - (3) (West 1977). The type of information to be made available includes case opinions, statements of policy and interpretations adopted by an agency but not in the Federal Register and administrative staff manuals and instructions to staff that affect a member of the public. Each agency must also publish in the Federal Register: descriptions of its organization, general courses of procedure, rules of procedure, any substantive rules of general applicability, and each amendment, revision, or repeal of the foregoing. *Id.*

⁷⁹ *Id.* The information shall be made available either through publication in the Federal Register or by the agency providing access to the requesting individual. *Id.*

⁸⁰ *Id.* at § 552(a)(3).

⁸¹ *Id.* at § 552(a)(4)(B). The Act provides that upon receiving a complaint a district court may enjoin the agency from withholding records and order production of any records improperly withheld. *Id.* In such a case, the court may examine the contents of such records *in camera* to determine if they are within any of the nine exemptions of the Act. *Id.*

⁸² *Id.* at § 552(a)(4)(F). If the court orders the production of any improperly withheld records, assesses reasonable costs and attorney's fees and also finds that

Subsection (b) enumerates the nine categories of information not subject to disclosure⁸³ because they involve national security, individual privacy, and effective governmental operations.⁸⁴ Specifically, the nine categories of information exempt from disclosure include national security information,⁸⁵ government personnel rules,⁸⁶ information specifically exempted from disclosure by another statute,⁸⁷ trade secrets and confidential commercial information obtained from private companies,⁸⁸ inter-agency and intra-agency memoranda not available by law,⁸⁹ information that impermissibly invades personal privacy,⁹⁰ law enforcement records,⁹¹ reports related to the regulation of financial institutions,⁹² and geological data concerning wells.⁹³

Subsection (c) emphasizes the Act's policy of responsi-

the government employee's actions may have been arbitrary or capricious actions, the employee shall go before the Special Counsel to determine whether or not disciplinary action is warranted. *Id.*

⁸³ *Id.* § 552(b). See *supra* note 76 for the text of subsection (b).

⁸⁴ 5 U.S.C.A. § 552(b)(1)-(9) (West 1977).

⁸⁵ *Id.* § 552(b)(1). See, e.g., *EPA v. Mink*, 410 U.S. 73 (1973) (suit seeking disclosure of documents regarding Amchitka Island nuclear blast); *Goland v. CIA*, 607 F.2d 229 (D.C. Cir. 1978) *cert. denied*, 445 U.S. 927 (1980) (documents on legislative history of CIA Organic Statutes).

⁸⁶ 5 U.S.C.A. § 552(b)(2) (West 1977).

⁸⁷ *Id.* at § 552(b)(3).

⁸⁸ *Id.* at § 552(b)(4) [hereinafter trade secrets exemption]. See, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979); *Nat'l Org. for Women v. Social Sec. Admin.*, 736 F.2d 727 (D.C. Cir. 1984). See *infra* notes 105-114 and accompanying text for a discussion of the trade secrets exemption as used in air crash litigation.

⁸⁹ 7 U.S.C.A. § 552(b)(5) [hereinafter memorandum exemption]. *EPA v. Mink*, 410 U.S. 73 (1973); *Playboy Enter. v. Dep't of Justice*, 677 F.2d 931 (D.C. Cir. 1982) (report relating to activities of FBI informant and his treatment by FBI). See *infra* notes 105-140 and accompanying text for a discussion of the memorandum exemption as used in air crash litigation.

⁹⁰ 7 U.S.C.A. § 552(b)(6) (West 1977). *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595 (1982) (passport information); *Washington Post Co. v. United States Dep't of Health and Human Serv.*, 690 F.2d 252 (D.C. Cir. 1982) (conflict of interest forms filled out by advisory groups).

⁹¹ 7 U.S.C.A. § 552(b)(7) (West 1977). *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978) (potential witnesses' statements in NLRB proceeding); *Ginsburg, Feldman, & Bress v. Fed. Energy Admin.*, 591 F.2d 717 (D.C. Cir. 1978) (*en banc*), *cert. denied*, 441 U.S. 906 (1979).

⁹² 7 U.S.C.A. § 552(b)(8) (West 1977).

⁹³ *Id.* at § 552(b)(9).

ble disclosure by specifically limiting the scope of disclosure exemptions to those categories enumerated in subsection (b).⁹⁴ Subsection (d) requires agencies to report annually to Congress regarding administration of the FOIA.⁹⁵ Finally, subsection (e) describes the various governmental entities and agencies that the Act subjects to the disclosure provisions.⁹⁶

In 1974, an amendment by Congress substantially strengthened the FOIA.⁹⁷ The 1974 Amendment⁹⁸ made three basic changes in the Act. First, compulsory time limits of ten days for compliance and thirty days for appeals were imposed on agencies responding to FOIA requests.⁹⁹ Second, the amendment empowered Congress to conduct a discretionary review of the propriety as well as the classification of documents, and to examine disputed documents *in camera* when conducting such a review.¹⁰⁰ Finally, the amendment made the "investigatory record" exemption for law enforcement agencies applicable only when certain harmful consequences, such as disclosing the identities of informers, would result from disclosure.¹⁰¹

⁹⁴ *Id.* at § 552(c). The Act provides that the section "does not authorize withholding of information or limit the availability of records to the public. . . ." *Id.*

⁹⁵ *Id.* at § 552(d).

⁹⁶ *Id.* at § 552(e). See *supra* note 72 for a list of agencies that come under the Act.

⁹⁷ Note, *National Security Information Disclosure Under the FOIA: The Need for Effective Judicial Enforcement*, 25 B.C.L. REV. 611, 616 (1984). Several commentators believe that the demand for the FOIA was caused by the Watergate scare. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L. J. 649, 659 (1984); O'REILLY, *FEDERAL INFORMATION DISCLOSURE: PROCEDURES, FORMS AND THE LAW*, § 11.06 (1984) (The FOIA "came up for amendment at a period when 'national security' activities were more suspect than at perhaps any other time in history."); See also O'Reilly, *Who's on First?: The Role of the Office of Management and Budget in Federal Information Policy*, 10 J. LEGIS. 95, 105 (1983).

⁹⁸ Pub. L. No. 93-502, 88 Stat. 1561 (1974).

⁹⁹ 7 U.S.C.A. § 552(a) (West 1977).

¹⁰⁰ *Id.* at § 552(a)(4)(B).

¹⁰¹ See *supra* notes 17-22 and accompanying text. The 1974 amendments emphasized that the government must show affirmatively one of the enumerated harms of disclosure in order to justify its decision to withhold information. 5 U.S.C.A. § 552(b)(7)(A)-(F) (West 1977).

After the 1974 Amendments, a dramatic increase in the number of FOIA requests and litigation of denials occurred.¹⁰² As one commentator stated: "the subject matter for these cases reads like a tour guide to America in passage through the late 20th Century."¹⁰³ Unfortunately, very few cases involving aviation have been litigated.¹⁰⁴ However, there exists few cases involving the FOIA in air crash litigation. These cases may have set a trend for the future.

2. *Application in Air Crash Litigation*

There have been very few Freedom of Information Act suits concerning military or civilian aircraft accident reports. In *Brockway v. Department of Air Force*,¹⁰⁵ the father of an Air Force lieutenant brought an FOIA action to enjoin the Air Force from withholding certain information regarding his son's death in an airplane crash.¹⁰⁶ The Air Force asserted that the Act exempted the investigation report from disclosure as confidential commercial information.¹⁰⁷ It also contended that the statements of its witnesses were exempt because they were intra-agency memoranda, immune from discovery in litigation by a qualified privilege.¹⁰⁸

The district court rejected the Air Force's arguments on the exemption of the witness' statements and ordered

¹⁰² Wald, *supra* note 97, at 660. Well over 1300 FOIA cases were litigated from 1974 to 1981. 1 *1981 Senate Hearings* at 634 (testimony of Assistant Attorney General Jonathan Rose).

¹⁰³ Wald, *supra* note 97, at 662. The list of subject matter includes the Amchitka nuclear blasts, the Arab boycott of Israel, the identities of cadets dismissed for cheating at West Point, reports on Martin Luther King's assassination, and the Air Force's Agent Orange Report. *Id.* at 662-63.

¹⁰⁴ Watts & Johnson, *supra* 1, at 122. The authors believe that one reason for this is the expense involved. *Id.* Production under the FOIA may only be compelled in a separate lawsuit. *Id.* FOIA production may not be joined in tort litigation. *Id.*

¹⁰⁵ 518 F.2d 1184 (8th Cir. 1975).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1187. The particular report in question was prepared by Cessna Aircraft Company in connection with the crash. *Id.* at 1186.

¹⁰⁸ *Id.* at 1186.

production of all but three statements.¹⁰⁹ The case presented a question on appeal of whether the witness' statements fall within the scope of either the trade secrets exemption or the inter-agency memorandum exemption to the disclosure requirement of the FOIA.¹¹⁰ The United States Court of Appeals for the Eighth Circuit held that the statements were not exempt from disclosure since they were not trade secrets and were not commercial or financial in nature.¹¹¹ However, the court held that the witness' statements came within the scope of the memorandum exemption of the FOIA and were therefore protected by governmental privilege.¹¹² The court interpreted this exemption as corresponding to the rule in general discovery cases.¹¹³ In other words, a privilege exists with respect to intra-governmental documents reflecting advisory opinions, recommendations, and deliberations through which the government forms decisions and policies.¹¹⁴

Two years after *Brockway* the United States Court of Appeals for the Fifth Circuit decided the case of *Cooper v. Department of the Navy*.¹¹⁵ As in *Brockway*, *Cooper* involved the disclosure of air crash investigation reports under the memorandum exemption of the FOIA.¹¹⁶ A United States Marine Corps helicopter crashed while on a routine training mission.¹¹⁷ *Cooper*, the attorney retained by the fam-

¹⁰⁹ *Brockway v. Dep't of the Air Force*, 370 F. Supp. 38 (N.D. Iowa 1974), *reversed*, 518 F.2d 1184 (8th Cir. 1975).

¹¹⁰ *Brockway*, 518 F.2d at 1187.

¹¹¹ *Id.* at 1189.

¹¹² *Id.* at 1191.

¹¹³ *Id.*

¹¹⁴ *Id.* The court relied on *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), *aff'd*, 384 F.2d 979 (1966), *cert. denied*, 389 U.S. 952 (1967). In that case, the district court defined the scope of the memorandum exemption as corresponding to the rule in certain general discovery cases that a privilege obtains with respect to intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. *Id.* at 324.

¹¹⁵ 558 F.2d 274 (1977).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 275.

ily of a crash victim, requested investigation reports from the Navy.¹¹⁸ When the Navy refused, the attorney brought suit under the FOIA.¹¹⁹ The Navy responded that the reports were intra-agency memorandums and thus exempt from disclosure under the FOIA.¹²⁰

Cooper involved two reports — the Aircraft Accident Safety Investigation (AAR) and the JAG Manual Investigation Report (JAGIR).¹²¹ The court held the AAR report exempt under the FOIA.¹²² The court reasoned that confidentiality was of great importance in the report and that disclosure could potentially destroy the ability to obtain essential and honest information.¹²³ The court stated that when a party obtained disclosure of investigative reports through promises of confidentiality it would hamper efficient government operation to disclose the information.¹²⁴

The JAGIR report was treated differently by the court. According to the court, it was the product of more formal procedure and involved no considerations of confidentiality in its production.¹²⁵ The court found that the basic thrust of the report was fact-oriented and would normally be subject to disclosure, despite the memorandum exemption of the FOIA.¹²⁶ The court vacated the judgment

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 276.

¹²¹ *Id.* at 275-76. The purpose of the JAGIR is the factual documentation of all matters pertaining to the accident which may serve as a basis for legal or administrative action. *Id.* This investigation is independent of all others, and is primarily concerned with assessing property damage and unearthing possible negligence and neglect of duty. *Id.* at 276. On the other hand, the AAR is solely concerned with safety and the prevention of accidents. *Id.* Unlike those for the JAGIR, witnesses for the AAR are not sworn and are assured that their testimony will not be used in any legal or punitive proceeding. *Id.*

¹²² *Id.* at 278.

¹²³ *Id.* at 277.

¹²⁴ *Id.* (citing *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 896 (1965)).

¹²⁵ *Cooper*, 558 F.2d at 279.

¹²⁶ *Id.* The court noted the similarities between the JAGIR report and the memoranda discussed in *Wu v. National Endowment for Humanities*, 460 F.2d 1030 (1972). That case involved records revealing why the plaintiff was denied funding

of the district court and ordered an *in camera* examination.¹²⁷

The most recent case involving the FOIA and an aircraft accident investigation is *United States v. Weber Aircraft Corp.*¹²⁸ In *Weber*, the pilot of an Air Force aircraft was severely injured when the engine of his aircraft failed in flight and he ejected.¹²⁹ The pilot filed suit for damages and sought discovery of documents containing statements made during the Air Force's safety investigation.¹³⁰ Discovery was denied based on *Machin v. Zuckert*,¹³¹ which held that confidential statements made to air crash safety investigators are privileged with respect to pre-trial discovery when those confidential statements are in the hands of the government.¹³²

The pilot's attorney then filed requests for the statements under the FOIA.¹³³ The Air Force claimed exemption alleging that the statements constituted intra-agency memoranda which are protected from disclosure by the memorandum exemption of the FOIA.¹³⁴ The district court held that the statements were protected.¹³⁵ The Court of Appeals for the Ninth Circuit, however, reversed and stated that, although the documents were intra-agency memoranda, the statute did not encompass every discovery privilege and thus did not encompass the *Machin* privilege.¹³⁶

from the endowment. *Id.* at 1031. The documents were characterized as recommendations which would usually contain some factual material but was only incidental to the primary purpose of the documents — the expression of an opinion. *Id.* at 1033.

¹²⁷ *Cooper*, 558 F.2d at 279.

¹²⁸ 104 S. Ct. 1488 (1984).

¹²⁹ *Id.* at 1489.

¹³⁰ *Id.*

¹³¹ 316 F.2d 336 (D.C. Cir. 1962), *cert. denied*, 375 U.S. 896 (1963).

¹³² *Machin*, 316 F.2d at 339. The disclosures should be considered privileged "when disclosure of investigative reports . . . would hamper the efficient operation of an important government program[.]" *Id.*

¹³³ *Weber*, 104 S. Ct. at 1489.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ 688 F.2d 638, 644 (9th Cir. 1982). The court particularly noted the statutory phrase "not . . . available by law" and reasoned that this encompassed only

The United States Supreme Court reversed the Ninth Circuit Court of Appeals and held that the documents were protected from disclosure by the memorandum exemption.¹³⁷ The Court disagreed with the respondent's argument that the scope of the exemption was limited to privileges explicitly identified by FOIA legislative history.¹³⁸ To the contrary, the Court reasoned that the requested statements were unquestionably "intra-agency memorandums" within the meaning of the exemption and since the *Machin* privilege normally protects them from civil discovery, they "would not be available by law to a party other than the Air Force in litigation with the Air Force."¹³⁹ According to the Court, to hold normally privileged material obtainable through the FOIA would create an "anomaly" in that the FOIA could be used to supplement discovery.¹⁴⁰

III. CONCLUSION

In light of the Supreme Court's decision in *Weber*, it appears that the Freedom of Information Act will not open new doors for the air crash litigant. In 1973, Watts and Johnson wrote (referring to air crash litigation discovery): "With the trend toward full disclosure, the most important change in the law is the Freedom of Information Act."¹⁴¹ The commentators' prediction is unfulfilled. Although disclosure was the trend in the 1970's, the trend has shifted to protection of government information in the 1980's.

This trend could have an impact on attorneys and litigants in aircraft accident cases. Because 1985 was the worst year on record for aircraft accidents, numerous lawsuits are inevitable. Undoubtedly, attorneys will attempt

those privileges explicitly recognized in the FOIA's legislative history, of which the *Machin* privilege was not. *Id.* at 641-45.

¹³⁷ *Weber*, 104 S. Ct. at 1492-94.

¹³⁸ *Id.* at 1494-95.

¹³⁹ *Id.* at 1492.

¹⁴⁰ *Id.*

¹⁴¹ Watts & Johnson, *supra* note 1, at 123.

to discover investigation reports and documents from the government or the military. If the documents are held nondiscoverable, litigants should continue developing new theories to compel discovery. The likelihood that disclosure of government investigation reports will be compelled under the FOIA seems too small to risk the expense of filing another suit.