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DISCOVERY IN A MILITARY AIRCRAFT CRASH — DEFENDANT'S VIEWPOINT

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THE PLAINTIFFS' bar has joined in today's popular crusade against secrecy in government by attempting to force production of confidential information generated following each and every United States military aircraft disaster.[1] This paper will attempt to deal with several important problems confronting every defendant's attorney who represents the manufacturer of military aircraft or component parts when his client is sued following the crash of a plane manufactured by it or for which it furnished components. There have been several very recent, well-written articles dealing with the subject of discovery problems in aviation litigation, including military aircraft litigation.[2] This writer will not attempt to rehash the general principles of law covered so thoroughly by other writers, but instead will attempt to focus on the problems confronting the manufacturer's attorney in the preparation of his case, with particular emphasis on several recent developments in the law.

The usual case arises when the injured serviceman, or his representatives if he is deceased, brings an action against the manufac-

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[1] The attack on governmental secrecy and especially on the doctrine of executive privilege reached its climax in the Supreme Court's important decision in the Watergate Tapes case, United States v. Nixon, 418 U.S. 683 (1974).

[2] Sales, *Discovery Problems in Aviation Litigation*, 38 J. AIR L. & COM. 297 (1972); Watts and Johnson, *Discovery Problems in Aviation Litigation*, 23 F.I.C. QUARTERLY 12 (1973).

turer alleging a design defect in the plane, improper manufacture, or negligent failure to warn. This is the normal course charted by plaintiffs because, while the Federal Tort Claims Act[3] does provide for suits against the United States for negligent acts of federal government employees, the Supreme Court has ruled that a soldier on active duty generally may not maintain a claim against the government for injuries he received based on activity incident to his military service.[4] Thus cases in which the United States is a party under the Federal Tort Claims Act involve non-garden variety situations, such as when a person on the ground is killed by a military plane.[5] Suit under the Federal Tort Claims Act is also allowed on behalf of civilian employees aboard military aircraft during a crash.[6] In a typical case, the defendant manufacturer's attorney finds himself representing a solitary defendant confronted by the heirs or representatives of a deceased military pilot or crewmembers.

In defending a products liability case as described above, the manufacturer's attorney is also placed in a rather unique position in that his client is faced with the difficult task of defending against allegations that a product it manufactured was defective and unreasonably dangerous while at the same time maintaining a satisfactory relationship with its best, and perhaps only, customer, (namely the United States Government), to which it sold the allegedly defective or unreasonably dangerous product. Obviously, if it is but hinted by the media, although erroneously, that a manufacturer's planes tend to crash with great frequency, the manufacturer's key customer relationship will be strained, even without disclosing information the government considers confidential, notwithstanding the fact that such information may not even be harmful to the defendant's case. Thus the manufacturer's attorney is often compelled to resist plaintiff's efforts to discover information which he would be more than willing to furnish in other cases. It is essential that the defendant's attorney be aware of this problem as he determines how to deal with the plaintiff's requests for

[3] 28 U.S.C. § 1346, *et seq.* (1970).

[4] Feres v. Unied States, 340 U.S. 135 (1950). The rationale for this holding is that military discipline might suffer if servicemen were generally permitted to sue their government.

[5] *E.g.*, Cresmer v. United States, 9 F.R.D. 203 (E.D.N.Y. 1949).

[6] United States v. Reynolds, 345 U.S. 1 (1953).

discovery, both for obvious factual reasons and in order to maintain a satisfactory relationship with the court.

Interrelated problems are presented with respect to several categories of information plaintiff is apt to attempt to discover. Broadly speaking, documents and reports may be broken into two general categories: those produced after the crash by the manufacturer and those generated by the government following the accident. A third category is possible: those generated by the manufacturer after the crash while investigating the crash for the government.

Material Generated by the Defendant Itself

Generally speaking, following the crash of a military aircraft, the manufacturer makes every effort to determine its cause. This is done because the manufacturer desires to attempt to determine the cause in order to prevent future disasters and because the government, desiring the information, hires the manufacturer to do so. Often these reports are prepared for the government whether or not litigation is pending or threatened.

The key provision of the Federal Rules of Civil Procedure applicable to discovery of the documents generated by the manufacturer following the crash is the first paragraph of rule 26(b) (3), which reads as follows:

> *Trial Preparation: Materials.* Subject to the provisions of subdivision (b) (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b) (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of *the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.* (emphasis added)

Prior to the 1970 amendments to the federal discovery rules, documents and other tangible things prepared by an attorney were subject to production under the work product doctrine when justice

so required. When prepared by others, they were subject to production on a showing of "good cause" under rule 34, as it then was worded. The addition of rule 26(b) (3) in 1970 and deletion of the "good cause" requirement from rule 23 eliminated this double verbal standard, leaving the district court with broad discretion to determine whether the circumstances of a particular case justified a requirement of disclosure. Clearly, the 1970 amendments do not reject the policy of protecting the privacy of the attorney in the preparation of his client's case that is the foundation of the Supreme Court's landmark decision in *Hickman v. Taylor.*[7] As amended, the rules no longer distinguish between materials prepared by the attorney in the case and those prepared by other consultants, sureties, indemnitors, insurers, or other agents of the party, or by the party itself. Under the work product doctrine, each document sought to be discovered will be judged upon the need to protect the privacy of the mental impressions, conclusions, opinions, or legal theories of the attorney or other representative of the party. Discussing the 1970 change from the double standard of "good cause" and work product to the single standard outlined in rule 26(b) (3), Professor J. W. Moore has stated:

> While some showing of necessity in the interest of justice over and beyond the fact that the material is relevant and not privileged has clearly been necessary to productions of documents, certainly the courts have exercised quite broad discretion in the application of Rule 34. Under Rule 26(b) (3), they will continue to do so. Each case will be determined on its peculiar facts. Under the Rule as presently worded the factors to be taken into account in the exercise of the district court's discretion are the importance of the information sought in the preparation of the case of the party seeking it, and the difficulty it will face in obtaining substantially equivalent information from other sources if production is denied.[8]

In the process of amending the federal discovery rules, the ad-

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[7] 329 U.S. 495 (1947).

[8] J. MOORE, 4 MOORE'S FEDERAL PRACTICE ¶ 26.64[3] (2d ed. 1972). Some examples of documents which have been held discoverable because of the impossibility or difficulty of obtaining substantially equivalent information are: (1) statements made contemporaneous with the occurrence, since these are considered unique; (2) photos of the scene of the accident when the scene may have changed; (3) photos of a car junked after the pictures were taken; (4) statements of witnesses who have become available; and (5) statements of hostile witnesses.

visory committee[9] adopted some of the language from the case of *Southern Ry. v. Lanham*,[10] especially that relating to the requirement that the discovering party must show he is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. The courts must consider the likelihood that a party who obtains the information by independent means will not have the substantial equivalent of the documents he seeks. Consideration of this factor may lead a court to distinguish between witness statements taken by an investigator, on the one hand, and other parts of an investigative file on the other. The court in *Lanham*, although addressing itself to the "good cause" requirements of the pre-1970 rule 34, pointed to certain circumstances under which witness statements will be discoverable. For example, the witness may have given a fresh and contemporaneous account in a written statement which is available to the parties seeking discovery only after a substantial time.[11] The witness may be reluctant or hostile.[12] On the other hand, a much stronger showing is needed to obtain evaluative materials in an investigative report.[13]

In order for documents generated by agents, attorneys, or other representatives of a manufacturer to be protected from discovery, they must have been "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative."[14] In a typical case, some of the material may have been generated in anticipation of a lawsuit while some was not. The latter documents are not immune from discovery under the Federal Rules, whereas, those prepared in anticipation of a lawsuit are protected to the extent that the party seeking discovery must make the required showing. The test has been stated to be whether the document can fairly be said to have been prepared or obtained because of the prospect of litigation.[15] The converse is that even

[9] *See* Advisory Commitee Notes to Rule 26.

[10] 403 F.2d 119 (5th Cir. 1968).

[11] *Id.* at 127-28; Guilford Nat'l Bank v. Southern Ry., 297 F.2d 921 (4th Cir. 1962).

[12] Southern Ry. v. Lanham, 403 F.2d 119, 128-29 (5th Cir. 1968); Brookshire v. Pennsylvania R.R., 14 F.R.D. 154 (N.D. Ohio 1953); Diamond v. Mohawk Rubber Co., 33 F.R.D. 264 (D. Col. 1963).

[13] Southern Ry. v. Lanham, 403 F.2d 119, 131-33 (5th Cir. 1968); Pickett v. L. R. Ryan, Inc., 237 F. Supp. 198 (E.D.S.C. 1965).

[14] FED. R. CIV. P. 26(b)(3).

[15] Kelleher v. U.S., 88 F. Supp. 139, 140 (D.C.N.Y. 1950).

though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business, rather than for purposes of litigation. Thus, a defendant railroad has been required to produce accident reports made in the regular course of its business.[16]

The routine reports prepared by the manufacturer for the government, whether or not litigation is in prospect, present an obviously difficult question of whether documents are prepared in "anticipation of litigation." If the documents are determined to have been prepared in anticipation of litigation, the plaintiff would then have to show (1) *substantial need* of the materials in the preparation of his case, and (2) that he is unable without *undue hardship* to obtain the substantial equivalent of the materials by other means.

It is important to recognize that rule 26(b) (3) protects only documents and other tangible things. The rule does not mean that the information contained in these documents may not be obtained through other discovery devices. At this point, the traditional work product standards enunciated in *Hickman v. Taylor* and codified in the last sentence of the provision of rule 26(b) (3) quoted above must be applied.[17] These standards require that discovery may not be had of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

If discovery of the documents is needed under rule 26(b) (3) and discovery is sought through depositions of persons having knowledge of the contents of the documents, then the provisions of rule 26(b) (4) relating to experts may apply. The first three paragraphs of that rule state:

> (4) *Trial Preparation: Experts*: Discovery of the facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b) (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
> (A) (i) A party may through interrogatories require any other

[16] Burns v. New York Cent. R.R., 33 F.R.D. 309 (N.D. Ohio 1963).

[17] "In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." FED. R. CIV. P. 26(b)(3).

> party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b) (4) (C) of this rule, concerning fees and expenses as the court may deem appropriate.
> (B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

These provisions, of course, will apply only if there are persons who qualify as expert witnesses within the scope of this rule.

Although the majority of military aircraft crashes are litigated in the federal courts, brief consideration will be given to the discovery rules in Texas.[18] The 1973 amendment to the Texas discovery rules preclude the discovery of work product. The pertinent provision of rule 186(a) reads as follows:

> Provided, however, that subject to the provisions of the succeeding sentence, the rights herein granted shall not extend to the work product of an attorney or to communications passing between agents or representatives or the employees of either party to the suit, or communications between any party and his agents, representatives, or their employees, where made subsequent to the occurrence or transaction upon which the suit is based, and made in connection with the prosecution, investigation, or defense of such claim, or the circumstances out of which same has arisen and shall not require the production of written statements of witnesses or disclosure of the mental impressions or opinions of experts used solely for consultation and who would not be witnesses in the case or information obtained in the course of an investigation of a claim or defense by a person employed to make such investigation.

This provision of rule 186(a) must be read in conjunction with the requirement in rule 167 that documents and tangible things not

[18] For a thorough treatment of Texas discovery rules *see* Walker, *Discovery—1973 Amendments to Texas Rules*, 38 TEX. B. J. 27 (1975). The article was written by Ruel C. Walker, the Senior Associate Justice of the Supreme Court of Texas.

privileged must be produced upon a showing of "good cause." Under Texas law, it must first be determined whether the documents are discoverable under the work product rule outlined in rule 186(a). If the documents in question are not immune from discovery, they must be produced upon a showing of "good cause" by the requesting party. The Texas rules do not contain the requirements of the federal rules that the party seeking discovery have substantial need of the materials in the preparation of his case and that he be unable without undue hardship to obtain the equivalent elsewhere. Thus, if the documents in question can qualify as

> communications between any party and his . . . representatives . . . where made subsequent to the occurrence or transaction upon which the suit is based, and made in connection with the prosecution, investigation, or defense of such claim , . . .

they are not discoverable. Under the federal rules, on the other hand, documents prepared in anticipation of litigation may be discovered only upon a proper showing by the party seeking discovery. Unlike Texas Rule 167, Federal Rule 34 no longer contains the requirement that "good cause" be shown. Thus if the documents do not qualify as having been prepared in anticipation of litigation, the party seeking discovery must still show "good cause" under the Texas rules.

If discovery of the documents is denied, the plaintiff may then seek to obtain the information through other discovery devices such as depositions of persons qualifying as expert witnesses. The Texas rules are somewhat ambiguous in this area. The second sentence of rule 186(a) clearly permits the discovery of the names of any experts having knowledge of relevant facts. The last sentence of rule 186(a) specifically states that the reports and opinions of an expert who will be called as a witness are discoverable. This latter provision appears to conflict with that portion of rule 186(a) which states that information obtained during the course of an investigation of a claim or defense of a person employed to make such investigation is immune from discovery. Until the meaning of the rules becomes clearer, defendant's attorneys in Texas can be expected to rely heavily on the prohibition against disclosure of information obtained in the course of an investigation of a claim or defense by a person employed to make such investigation.

The foregoing discussion of the federal and Texas rules of discovery presents only one aspect of the defendant's armor. If the reports prepared by the defendant for the federal government are not immune from discovery under any of the provisions discussed above, it is imperative that the defendant's attorney not accede to the plaintiff's insistence upon production without close coordination with the government since much of the information contained in these reports will be considered confidential by the government. A manufacturer's attorney must give his client's key customer the opportunity to intervene and assert the privilege of confidentiality. In addition to the customer relations benefit, this opportunity may also provide the defendant with a valid means of protecting damaging information from discovery. While the claim of confidentiality of material generated by the defendant manufacturer is important, it is of much greater significance when the plaintiff seeks reports and other material resulting from the government's own investigations.

It is important to recognize that the privilege of confidentiality belongs to the government and must be asserted by it; it can neither be claimed nor waived by the manufacturer.[19] Accordingly, we shall now shift our focus to the reports and other documents compiled by the government following a military aircraft crash, keeping in mind the possibility that the government may intervene and assert a claim of confidentiality with respect to materials produced by the manufacturer. The vast majority, if not all, of the cases dealing with the government's attempts to invoke this privilege in cases when it is not a party are situations involving government produced reports, reports which may be based upon information and reports supplied by the manufacturer.

Reports and Other Documents Generated by the Government

Several reports are customarily produced following a military aircraft crash. For example, when an Air Force aircraft crashes there will be generally a Collateral Board Investigation as well as an Air Force Aircraft Accident Investigation Board. These two investigations are generally conducted concurrently, but independently, because they serve two different purposes. The Aircraft Accident Investigation attempts to determine the factors contributing

[19] United States v. Reynolds, 345 U.S. 1 (1953).

to the accident for the purpose of initiating corrective accident prevention action. The military often asserts the fear that unless witnesses can be assured that their testimony will be held confidential, the true facts will be suppressed. The Collateral Investigation serves a fact-finding purpose to obtain evidence which may be used in litigation, claims, disciplinary actions, and administrative proceedings. Obviously, such information may be used against the witness so the witness is not given assurances of confidentiality. Consequently, the Collateral Investigation Report is routinely furnished by the government upon request. Needless to say, the existence of these two simultaneous, yet independent, investigations which have different purposes and methods of operation makes the discoverability of the documents or information extremely complex. The government asserts in support of nondisclosure that discovery would be inimical to the public welfare in determining causes of accidents and increasing the efficiency of flight safety programs through the cooperation of private industry, and frequently claims that disclosure, especially with respect to the Aircraft Accident Investigation Report, would jeopardize military secrets.

In the 1972 Symposium on Federal Practice and Aviation sponsored by this Journal, a presentation was made and an article subsequently published[20] dealing in considerable detail with the assertion by the government of the privilege based on maintaining the integrity of military air safety programs and on confidentiality. As discussed at that time, the rules of privilege were set forth in three leading cases.[21] Those cases stand for the general rule that data and opinions supplied by private industry investigations are privileged and nondiscoverable. While final conclusions and policy recommendations of the military investigation are privileged, facts and opinions of individual government personnel are discoverable.[22] Further, it has been held that when the Air Force voluntarily releases the documents to the manufacturer, the privilege is waived with respect to facts contained in the reports but not waived with

[20] Sales, *Discovery Problems in Aviation Litigation*, 38 J. AIR L. & COM. 297 (1972).

[21] *See* Machin v. Zuckert, 316 F.2d 336 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 896 (1963); McFaddin v. Avco Corp., 278 F. Supp. 57 (M.D. Ala. 1967); O'Keefe v. Boeing Co., 38 F.R.D. 329 (S.D.N.Y. 1965).

[22] *See* Machin v. Zuckert, 316 F.2d 336 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 896 (1963).

respect to opinions contained therein based upon a balancing of interests between the necessity for the plaintiff to obtain each type of information against the public interest.[23] These cases, and Mr. Sales, a speaker at the Journal's 1972 Symposium,[24] have concluded that the true rationale behind the privilege is the protection of the confidentiality of data and reports relating to the causative factors of an accident obtained *from private industry*. While the privilege would not be viable when only the U.S. Government is a defendant, the privilege should be upheld and all information and opinions based upon this information supplied by private industry should be excluded.

Freedom of Information Act

As Mr. Sales perceived, the full story does not end here. Although by late 1972 no suit concerning military aircraft accident reports had been reported under the Freedom of Information Act of 1966,[25] (it had been enacted after the two privilege cases discussed above) the Act appeared ripe for use by plaintiff's attorneys to broaden the scope of discovery of government reports. The decision by a plaintiff's attorney to commence a Freedom of Information Act suit means the start of a separate lawsuit because it cannot be joined as a part of the main litigation. This aspect distinguishes such an action from the two privilege cases discussed above because in those cases the plaintiffs attempted to obtain discovery through the normal discovery rules but were met by the defendant's claims of privilege. The Act provides that government agencies shall make available to the public a broad spectrum of information, including the final, concurring and dissenting opinions, and orders made in the adjudication of cases.[26] The Act does not apply to matters that are:

> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential; (5) inter-agency or intra-agency memorandums are letters which would be available

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[23] *See* O'Keefe v. Boeing, 38 F.R.D. 329 (S.D.N.Y. 1965).

[24] Sales, *Discovery Problems in Aviation Litigation*, 38 J. AIR L. & COM. 297 (1972).

[25] 5 U.S.C. § 552 (1966), *as amended*, 5 U.S.C. § 552 (Supp. I, 1975).

[26] 5 U.S.C. § 552(a)(2)(A) (1966), *as amended*, 5 U.S.C. § 552(a)(2)(A) (Supp. I, 1975).

> by law to a party other than an agency in litigation with the agency. . . .[27]

Mr. Sales concluded his discussion of the discoverability of military reports by stating, "It is certainly apparent there is an emerging trend to force disclosure. Injunctive relief to obtain military reports, particularly when the government is not a party to litigation, may be a versatile weapon in the arsenal of discovery."[28] Since that time, there have been some cases involving attempts by plaintiffs in military aircraft accidents to obtain accident reports by means of the Freedom of Information Act.

The door was seemingly thrown wide open by the United States Customs Court in *Verrazzano Trading Corp. v. United States.*[29] The court held that the Act was enacted to provide the public with the right to obtain information from administrative agencies and agencies in the executive branch of the government and not to provide discovery procedures for obtaining information during litigation. The court emphasized its position by noting that even though the Act provides specified exemptions from the public information requirements, it does not in and of itself create a judicial discovery privilege with respect to such exemptions. The court in *Verrazzano Trading Corp.* and the commentary upon the decision[30] made it appear that the Act had provided plaintiffs with a method of obtaining governmental accident reports without being limited by the exemptions contained in the Act itself.

Fortunately, the two courts[31] considering the question during 1974 have not carried the above-described plaintiff's theory to its furthest extreme. The courts have instead taken a very realistic viewpoint and ordered disclosure of matters which probably should be disclosed while simultaneously protecting elements deserving confidentiality.

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[27] 5 U.S.C. §§ 552(b(4), (5), 5 U.S.C. §§ 552(b)(4), (5) (Supp. I, 1975).

[28] Sales, *Discovery Problems in Aviation Litigation*, 38 J. AIR L. & COM. 297, 313 (1972).

[29] 349 F. Supp. 1401 (U.S. Customs Ct. 1972).

[30] Sales, *Discovery Problems in Aviation Litigation*, 38 J. AIR L. & COM. 297 (1972).

[31] Kreindler v. Department of Navy of United States, 372 F. Supp. 333 (S.D.N.Y. 1974) and Brockway v. Department of Air Force, 370 F. Supp. 738 (N.D. Iowa 1974).

In *Brockway v. Department of Air Force*,[32] the father of a deceased Air Force second lieutenant who was killed when his aircraft crashed during a training mission brought an action pursuant to the Freedom of Information Act to enjoin the Air Force from withholding certain information regarding the death of his son. Following the crash, pursuant to Air Force regulation, two investigations were conducted, a Collateral Accident Investigation and a Safety Investigation. Proceeding through Air Force administrative channels, the father requested all accident investigation reports. The Air Force, however, refused to produce complete reports, asserting that certain portions thereof were exempt from disclosure under exemptions (4) and (5) of the Act. Specifically, plaintiff sought disclosure of the Cessna Aircraft Company's report and the Safety Investigation Report, which included statements made by witnesses before the Aircraft Accident Investigation Board.

Plaintiff contended that Cessna's report should not be exempt under exemption (4) because it was not "commercial or financial information."[33] The father asserted that the witness statements should not be exempt under exemption (5) to the extent that they involve purely factual or scientific material as opposed to opinions of the witnesses or factual material inextricably intertwined with the policy-making process.

The government countered by maintaining that all factual material contained in the various reports had been disclosed to plaintiff and only materials containing expressions of opinion, conclusions, speculations, and recommendations were being withheld. The government contended that Cessna's report had been provided by a private commercial contractor under a guarantee of confidentiality and was therefore exempt under exemption (4). The government further asserted that witness statements were submitted under a guarantee of confidentialiy and should not be disclosed. Finally, the government argued that nondisclosure of the witness statements and similar materials was necessary so that the manufacturer could obtain the full information concerning the cause of an aircraft accident in an effort to prevent similar accidents in the future.

While the *Brockway* court recognized that the purpose of the

[32] 370 F. Supp. 738 (N.D. Iowa 1974).

[33] *Id.* at 739.

Act is to increase citizens' access to government records, it overlooked the possibility that documents not subject to disclosure under the Act may nevertheless be subject to discovery in a lawsuit. The court probably reached the proper result, however, by strictly and narrowly construing the exemptions from the disclosure requirements. On the positive side, the court saw the need for a balancing of interests and recognized that it must seek to insure that agencies enjoy a free flow of ideas essential to policy and decision making.

With respect to the Cessna report and exemption (4), the court recognized that the exemption covered only (1) trade secrets and (2) information which is (a) commercial or financial, (b) obtained from a person outside government, and (c) privileged or confidential. The plaintiff admitted that the report was obtained in confidence from a source outside government but asserted that it was not commercial or financial information. The court, however, concluded that the Cessna Aircraft Company, as a private defense contractor, was unquestionably a commercial enterprise, and the reports Cessna generates should be considered commercial information which it would be unwilling to share with its competitors. The report in question involved Cessna's findings and opinions concerning the possible causes of the accident and had been submitted to the government by Cessna under assurances of confidentiality. The court recognized that if such information is not treated confidentially, the Air Force will be hindered in its efforts to obtain valuable information necessary to determine the causes of accidents and to prevent similar occurrences in the future. The court examined a Cessna report *in camera* and exempted it from disclosure on the basis that it constituted confidential commercial information obtained from a person outside the government.

The witness statements were made by persons within the government, making unavailable the exemption provided by Section (4). Accordingly, the court turned its attention to exemption (5), which exempts inter-agency or intra-agency memorandum and letters which would not be available by law to a party other than a party in litigation with the agency. The *Brockway* court stated that the policy behind this exemption was to encourage the free exchange of ideas during the policy-making process. In order for the witness statements to be exempt, the government had to estab-

lish that they were inter- or intra-agency memoranda or letters which would not be available to a party in litigation with the agency, based upon present discovery practices as regulated by the courts.

The court held that, assuming that the written statements were intra-agency memoranda or letters, they would ordinarily be discoverable under rule 34(a), subject to the scope limitations of rule 26(b)(3) of the Federal Rules of Civil Procedure. In determining what fulfills the 'undue hardship" and "substantial need," requirements of rule 26(b)(3) the court stated that the relevant factors included the lapse of time since the accident, the availability and location of witnesses, the witnesses possible status as employees or agents of an adverse party, the availability of evidence after the accident, and the existence of survivors. The court found that Mr. Brockway had adequately established the undue hardship and substantial need to justify disclosure. The court based its holding upon the fact that the accident happened nearly two years previously, and that the statements made by witnesses soon after the accident were likely to be more accurate than their present recollections. The court noted that many of the witnesses were government employees likely to be dispersed throughout the country and possibly reluctant to testify against their employer. Finally, since there were no survivors of the crash, it would have been extremely difficult for plaintiff to determine what actually happened other than by obtaining the facts and evidence in the government's possession.

While recognizing the complex interrelationship between the federal rules of discovery and the government's claim of privilege, the court considered the defendant's vigorous contention that the witness statements were obtained under a guarantee of confidentiality, the absence of which would tend to compromise the Air Force's flight safety program. Citing the three pre-Freedom of Information Act cases,[34] the court rejected the Air Force's argument as it relates to factual materials such as witness statements, as distinguished from materials containing opinions, conclusions or recommendations. In short, the court did not appear to give the plaintiffs anything under the Freedom of Information Act which they could not

[34] Cases cited *supra* note 20.

have obtained under the holdings prior to the enactment of the Act. The court held that the government's claim of privilege would not prevent plaintiffs from obtaining witness statements which contain basically factual matters surrounding the accident in question, but the plaintiffs were not permitted to obtain witness statements of Air Force officers containing only character and ability evaluation. The latter were exempt from disclosure by virtue of exemption (5).

In another 1974 case, *Kreindler v. Department of Navy of United States*,[35] the court reached a similar result. The New York court in *Kreindler* refused to prohibit disclosure of witness statements and also held that portions of a JAG Report and portions of an AAR Report were exempt from disclosure under the Act to the extent that they involved opinions and staff advice. The court did exempt from disclosure, however, material from those reports containing factual matters. On its face, this appears to differ somewhat from the *Brockway* holding. The decision in *Brockway* probably can be reconciled, however, since the Air Force in *Brockway* had already produced all of the factual information in the reports, whereas the Navy in *Kreindler* had not.

CONCLUSION

Manufacturers of military aircraft routinely prepare reports following the crash of a government plane. Whether the reports are considered by the court as not having been prepared in anticipation of litigation and, therefore subject to disclosure under the federal discovery rule, or as having been prepared in anticipation of litigation, thereby requiring the plaintiff to show "substantial need" and "undue hardship," the attorney for the defendant may still be able, through the government, his client's key customer, to forestall discovery by asserting a claim of privilege. The Freedom of Information Act thus far has not proven to be a significant weapon in the plaintiff's assault on secrecy in government. At the present, defendants cannot forestall discovery of the facts surrounding the accident, but the plaintiff's efforts to probe into the realm of opinion will undoubtedly continue to fail.

[35] 372 F. Supp. 333 (S.D.N.Y. 1974).