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COMMENTS

THE FREEDOM OF INFORMATION ACT AND ITS INTERNAL MEMORANDA EXEMPTION: TIME FOR A PRACTICAL APPROACH

by James Richard O'Neill

The Public Information Section of the Administrative Procedure Act,¹ popularly known as the Freedom of Information Act, attempts to provide "the necessary machinery to assure the availability of Government information necessary to an informed electorate."² The Freedom of Information Act essentially provides that disclosure of federal government information is to be the rule, and denial of access to it the exception. The Act requires disclosure of government records, upon request, to "any person" except as "specifically stated" in the Act's nine exemptions.³ Its predecessor, the 1946 Administrative Procedure Act, provided that only persons "properly and directly concerned" could obtain access to agency records, and even then, withholding of records was permitted "in the public interest" or for

¹ 5 U.S.C. § 552 (1970). Enacted on July 4, 1966, and amended on June 5, 1967, the law, as amended, became effective July 4, 1967.

² H.R. REP. NO. 1497, 89th Cong., 2d Sess. 12 (1966) [hereinafter cited as H.R. REP. NO. 1497].

³ The Freedom of Information Act, 5 U.S.C. § 552 (1970), consists of three subsections. Subsection (a) contains four paragraphs, the first of which requires certain agency materials of a general nature to be published in the Federal Register. The second paragraph requires agency opinions, orders, statements of policy, interpretations, staff manuals, and instructions to staff to be made available for inspection and copying. All other identifiable records of a government agency are required to be made available, upon request, by the third paragraph. The fourth paragraph makes available final votes in agency proceedings.

Subsection (b) contains nine exemptions which limit the availability of government records under subsection (a):

This section does not apply to matters that are—

- (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;
- (2) related solely to the internal personnel rules and practices of an agency;
- (3) specifically exempted from disclosure by statute;
- (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 files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;
- (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.

Subsection (c) mandates disclosure of information except as "specifically stated" in the nine exemptions. This subsection also provides that the nine exemptions are not authority to withhold information from Congress.

"good cause."⁴ Under the present law, the party requesting access is no longer required to have any particular interest in or need for the records. A person who is merely curious has as much right to information required to be disclosed as a person whose success or failure in litigation depends on access to the information. This is made apparent by the philosophy of the Act—the information is either made public or not made public; the Act never provides for disclosure to some private parties and withholding from others.

A government agency can refuse to comply with the request for information only if the information falls specifically within one of the nine exemptions provided in the Act.⁵ Even then, disclosure is not precluded; the Act simply does not require disclosure of exempted materials. Upon an agency's refusal to disclose information, the requesting party may file suit in federal district court to challenge the denial.⁶ The court proceeding is not merely a determination of whether the agency acted within its discretion in denying access, but rather, the proceeding is to be *de novo*. The Government has the burden of proving that disclosure of the requested document is not required by the Act, and the court is vested with jurisdiction to enjoin an agency from improperly withholding information.

Since justification for nondisclosure of information must be found in one of the exemptions, the exemptions have proven to be the most frequent subject of litigation under the Act. While the governmental agencies have been criticized extensively for their policies and practices under the Act,⁷ the primary and recurring cause of difficulty is traceable to the problem of interpreting the broad and ambiguous exemptions. One of the most frequently relied upon exemptions and one of the most difficult to interpret has been the fifth exemption, subsection (b)(5) of the Act. The purpose of this Comment is to examine the present status of exemption five, and to offer solutions to the problems encountered in its application.

I. THE FIFTH EXEMPTION—INTERNAL MEMORANDA

The fifth exemption under the Freedom of Information Act permits withholding "inter-agency and intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."⁸ The legislative history of the Act indicates that the purpose of this exemption is to encourage full and candid intra-agency discussion and to shield from disclosure the mental processes of staff and administrative officers.⁹ A related purpose is that of preventing premature

⁴ Act of June 11, 1946, ch. 324, § 3, 60 Stat. 238.

⁵ See note 3 *supra*.

⁶ 5 U.S.C. § 552(a)(3) (1970).

⁷ See, e.g., Fellmeth, *The Freedom of Information Act and the Federal Trade Commission: A Study in Malfeasance*, 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 345 (1969); Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 46 TEXAS L. REV. 1261 (1970); Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1 (1970).

⁸ 5 U.S.C. § 552(b)(5) (1970).

⁹ The Senate committee stated:

It was pointed out in the comments of many of the agencies that it would

disclosure of agency records when it might impede the proper functioning of the administrative process.¹⁰ While Congress recognized that there is a need for officials within the Government to communicate with one another fully and frankly without publicity, the disclosure provisions in subsection (a) of the Act make it clear that secret law is prohibited. The Act expressly requires the availability of final opinions, statements of policy and interpretations adopted by an agency, and administrative staff manuals and instructions.¹¹ Therefore, recognition of this distinction between necessary secret communications between agency staff and officials and prohibited secret law is a necessary guide to the interpretation of exemption five.

The United States Attorney General has failed to recognize this distinction in his analysis of the Act,¹² and has stated that the fifth exemption would cover information such as "internal drafts, memoranda between officials or agencies, opinions and interpretations prepared by agency staff personnel or consultants for the use of the agency, and records of the deliberations of the agency or staff groups . . ."¹³ All of these items could potentially be statements of the working law and final policy of the agency, particularly "opinions and interpretations prepared by agency staff personnel or consultants for the use of the agency." If the document represents staff thinking in the process of arriving at the agency's law or policy, then exemption five is applicable. It is when the document states the agency's final position toward a matter under consideration that subsection (a) of the Freedom of Information Act requires its disclosure to prevent the accumulation of secret agency law.¹⁴

There is a definite relationship in purpose and design between the fifth exemption and traditional discovery law. The exemption's modifying phrase—"which would not be available to a party other than an agency in litigation with the agency"—indicates that even though a document is an internal memorandum, it may nevertheless be subject to required disclosure if it would be available under applicable discovery rules. The House committee report's explanation of the modifying phrase has been recognized as the proper test in applying discovery law as a limitation on the coverage of the fifth exemption: "[A]ny internal memorandums which would routinely be disclosed to a private party through the discovery process in litiga-

be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to 'operate in a fishbowl'.

S. REP. NO. 813, 89th Cong., 1st Sess. 9 (1965) [hereinafter cited as S. REP. NO. 813]. The House committee made a similar statement. See H.R. REP. NO. 1497, at 10.

¹⁰ H.R. REP. NO. 1497, at 10.

¹¹ 5 U.S.C. § 552(a) (1970).

¹² *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (June 1967), reprinted in 20 AD. L. REV. 263 (1967). The Attorney General's analysis of the Act generally reflects the point of view of the agencies. For discussion and criticism of the Attorney General's memorandum, as well as an in depth review of the entire Act, see Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967).

¹³ As reprinted in 20 AD. L. REV. 263, 304 (1967).

¹⁴ See generally 5 U.S.C. § 552(a) (1970). See also Davis, *supra* note 12, at 797.

tion with the agency would be available to the general public."¹⁵ It should be noted that while discovery law is in fact adopted as part of exemption five, the sole purpose of its adoption is to create an exception to that exemption's coverage—internal memoranda are exempt from disclosure except for those already available under discovery law.

The fifth exemption, as originally proposed, was limited in coverage to "memorandums or letters dealing solely with matters of law or policy,"¹⁶ thereby requiring all factual agency material to be available to the public.¹⁷ The change to the present language adopting the discovery standard was made after agencies pointed out that the exemption, as proposed, would in essence provide no exemption at all for many documents and parts of documents in which facts and law were intertwined to the point of being incapable of separation.¹⁸ This change was not intended to permit the withholding of purely factual material under exemption five, but only to grant an exemption for entire documents which contained facts and policy which were inextricably intertwined.¹⁹ The law of discovery itself recognizes the fact-policy dichotomy in the many cases that have held factual memoranda discoverable, but memoranda of law or policy not discoverable.²⁰ Therefore, principles of discovery law, as well as the outgrowth from those principles of the distinction between factual and policy material, are important in determining the extent to which withholding of documents is permitted by the fifth exemption.

Incorporation of discovery law into subsection (b)(5) does not render the Freedom of Information Act internally inconsistent, even though the operative principles under discovery law and under the Act offer a sharp contrast. Important in the determination of any request for discovery of documents is the need of the applicant for those documents. Under the Freedom of Information Act, however, disclosure is available to "any person," and the need of the person requesting disclosure is irrelevant.²¹ The indirect reference to discovery law in exemption five's language was intended only to make it clear that those internal memoranda which traditionally have been available were to continue to be available, notwithstanding the fifth exemption. Despite the merits of the position that any document already available should remain available under the Act, the rather vague language used in adopting this position as a part of the exemption has caused the discovery limitation on exemption five to be a continual source of difficulty for the courts. The courts have at times been misled by the indirect reference to discovery law in the fifth exemption into believing that balancing need

¹⁵ H.R. REP. NO. 1497, at 10. The House report has been criticized, in regard to other aspects of the Act, as an unreliable guide to interpretation of the Act. See, e.g., Davis, *supra* note 12, at 763, 809-10.

¹⁶ S. 1666, 88th Cong., 2d Sess. (1964).

¹⁷ S. REP. NO. 1219, 88th Cong., 2d Sess. 7 (1964).

¹⁸ See, e.g., *Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary on S. 1160*, 89th Cong., 1st Sess., 30-31, 94-95, 205, 244, 296 (1965).

¹⁹ *EPA v. Mink*, 410 U.S. 73, 89-91 (1973).

²⁰ See, e.g., *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963); *Boeing Airplane Co. v. Coggeshall*, 280 F.2d 654 (D.C. Cir. 1960).

²¹ See Davis, *supra* note 12, at 795-96.

against harm, common in the context of discovery law, is an appropriate course to follow in cases involving requests for documents under the Act.²² Further, although Congress never intended for discovery law to enter into the Act except by way of limiting certain exemptions,²³ it is not clear what Congress intended as to the propriety of transforming the Act into a discovery statute when the requirements for production of documents under the discovery rules cannot be met.

The broad and ambiguous language of the fifth exemption also allows it to be indiscriminately raised in many cases in conjunction with other more appropriate exemptions, thereby obscuring the real issue in the action. Indeed, use of exemption five as justification for withholding information has been so extensive that at times it seems the exemption is viewed by some courts and some agencies as approximating a catch-all provision, available for use when other exemptions fail.²⁴

II. JUDICIAL INTERPRETATION OF THE FIFTH EXEMPTION

The nature of the fifth exemption under the Freedom of Information Act has made it necessary for the courts to use a case-by-case approach in dealing with the applicability of the exemption to particular documents. This is because exemption five applies only if the document sought is an inter-agency or intra-agency memorandum or letter, and even if the requested document meets this requirement, two further issues must be considered before exemption will be granted: (1) If the inter-agency or intra-agency document would nevertheless be routinely disclosed under traditional discovery law, exemption is not warranted, and (2) if factual material is present in the document and capable of delineation, this factual material is not subject to exemption under subsection (b)(5), although some other exemption might apply.²⁵ However, this approach will not always be adequate for determination of the fifth exemption issue, and if this is the case, the court's decision should be controlled by the governing principle underlying the disclosure provisions of subsection (a) of the Act that agencies are to be prohibited from accumulating bodies of secret law. By applying this approach in their consideration of exemption five claims, many courts have found it possible to narrow the controversy in each case to one specific element within the approach.

The Discovery Limitation and Related Discovery Matters. The discovery standard under the fifth exemption was examined and clarified in *Benson v. General Services Administration*,²⁶ in which various intra-agency memoranda

²² See, e.g., *Consumers Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969).

²³ See H.R. REP. NO. 1497, at 10.

²⁴ See, e.g., *Aspin v. Department of Defense*, 348 F. Supp. 1081 (D.D.C. 1972); *Cuneo v. Laird*, 338 F. Supp. 504 (D.D.C. 1972), *remanded for further consideration sub nom. Cuneo v. Schlesinger*, 484 F.2d 1086 (D.C. Cir. 1973).

²⁵ See notes 8-22 *supra*, and accompanying text.

²⁶ 289 F. Supp. 590 (W.D. Wash. 1968), *aff'd on other grounds*, 415 F.2d 878 (9th Cir. 1969).

concerning a GSA negotiation and sale of real estate were sought by one of the individual purchasers. The court noted that inter-agency and intra-agency memoranda are subject to the Act's disclosure requirements if a court would routinely require their production in a discovery proceeding,²⁷ and whether the GSA would routinely grant access to the documents is irrelevant. The court also stated that an agency is not required to show that there is no type of litigation in which discovery of the documents would be granted in order to withhold the documents, since this would be a universal negative difficult of proof. Rather, there may be actions in which the documents would be discoverable, and yet the agency would not be required to disclose the documents if it could show that in the normal type of action in which the documents might be sought, courts would not order the documents produced.²⁸ This statement would seem to be in accord with the House committee report's use of the word "routinely" in reference to the discovery standard.²⁹ The lower court ordered disclosure of the memoranda since they would be routinely disclosed in litigation dealing with the sale of the land.³⁰ In affirming the lower court's decision, the court of appeals correctly noted that most of the memoranda were, in addition to being discoverable, largely statements of fact, and that two were, in essence, "statements of policy and interpretations" adopted by an agency, required to be disclosed under subsection (a) of the Act.³¹

The courts' difficulty with the fifth exemption's discovery standard is illustrated by *Talbot Construction Co. v. United States*,³² a tax refund action. Certain Internal Revenue Service documents, admittedly intra-agency memoranda, were sought through normal discovery procedures. After denying discovery of the documents, the court held that whenever the adverse party is a government agency, the Freedom of Information Act applies.³³ The court noted the fact-policy dichotomy under the fifth exemption,³⁴ and recognized that the memoranda might contain both factual and policy material. Nevertheless, the court held the documents exempt in their entirety, intermingling discovery rules and purported principles of the Act in the process. Any policy material was held to be unavailable because the applicant failed to show that the documents were not exempt under subsection (b)(5); any factual material was held to be unavailable because good cause for production of the documents was not shown.³⁵

This reasoning is incorrect as to the party having the burden of proof un-

²⁷ 289 F. Supp. at 595.

²⁸ *Id.*

²⁹ H.R. REP. No. 1497, at 10.

³⁰ Exemptions 2 and 4 were also raised in the lower court but held inapplicable, except for a Dun and Bradstreet report contained within one of the memoranda which was held to be exempt under the fourth exemption. 289 F. Supp. at 594.

³¹ 415 F.2d at 881. Exemption 4 was similarly considered by the court of appeals and rejected as a basis for denying disclosure.

³² 49 F.R.D. 68 (E.D. Ky. 1969).

³³ *Id.* at 71.

³⁴ *Id.*

³⁵ *Id.* The requirement of "good cause" for discovery has since been removed for most documents under the Federal Rules of Civil Procedure. Compare the present FED. R. CIV. P. 34 with the language of that same rule as it appeared prior to 1970.

der the Act, since subsection (a) expressly places the burden on the agency to sustain its action.³⁶ In addition, the use of the prior discovery requirement of a showing of good cause—apparently used by the court in connection with the Act—is totally in contravention of the policy to exclude any requirement of need for or interest in the documents by the party seeking disclosure. Despite the complete impropriety of its action, the court's mingling of discovery law and principles applicable under the fifth exemption is understandable due to the vagueness of the indirect reference to discovery in the fifth exemption.

One result of permitting disclosure of the requested documents under the Act in *Talbott* would have been to give judicial approval to the use of the Act as a back door discovery statute. Such possible use of the Act resulted from the good cause requirement for discovery prior to 1970 under Federal Rule of Civil Procedure 34. When documents were unavailable under discovery procedures because of lack of good cause for production, the Act's disregard of the applicant's need for the documents could have been used to secure production had the courts consented to the scheme. In neither the Act itself nor in its legislative history is a position clearly stated as to whether the Act could be used as an alternative to discovery procedures. Under present discovery law the need for use of the Act as an alternative to discovery procedures has been considerably reduced because of the abolition of the good cause requirement for discovery of most documents.³⁷ But the present requirement of relevance in Federal Rule of Civil Procedure 26(b)³⁸ may necessitate use of the Act as an alternative discovery statute where relevance is altogether lacking.

*International Paper Co. v. Federal Power Commission*³⁹ is similar to *Talbott* in requiring a demonstration of need on the part of the applicant. *International Paper* requested certain staff memoranda which it claimed supported its legal position in a dispute with the Commission. While resting the decision on a determination that the documents were part of the deliberative process of the agency, which does justify withholding under the fifth exemption, the court nevertheless proceeded to state that *International Paper* had failed to show a compelling need for disclosure of the documents.⁴⁰ Besides this improper requirement of need on the part of the applicant, the document may possibly have represented statements of policy or interpretations adopted by the Commission,⁴¹ and if so, they would have been subject to required disclosure under subsection (a) of the Act.

The erroneous requirement of need for the documents imposed by the court in *International Paper* is much more discouraging than the imposition of the same requirement in *Talbott*. The request for disclosure of docu-

³⁶ 5 U.S.C. § 552(a)(3) (1970).

³⁷ See FED. R. CIV. P. 26(b), 34.

³⁸ "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action" FED. R. CIV. P. 26(b)(1).

³⁹ 438 F.2d 1349 (2d Cir.), cert. denied, 404 U.S. 827 (1971).

⁴⁰ *Id.* at 1359.

⁴¹ See *id.*

ments in *International Paper* was clearly based on the Act, and the court so treated the request. Nevertheless, the court at one point in its opinion superimposed on the Act a requirement of need for the documents, a requirement which is clearly inconsistent with the Act. While *Talbott* imposed the same requirement of need, that case was primarily a discovery case in which the court was seeking to prevent any use of the Act as an alternative to the discovery procedures initially relied on by the plaintiff. In fact, it could be argued that the court treated the case solely as a discovery case and, accordingly, relied solely on discovery law in reaching its decision.

The decision in *Simons-Eastern Co. v. United States*⁴² indicates that there are definite similarities between the Act and discovery law, and illustrates that in some cases, no matter which body of law is considered controlling, the same result will be reached. The case was primarily a discovery action, arising under present discovery rules,⁴³ in which certain intra-agency documents in an administrative file were sought from the Internal Revenue Service. The court noted that both the Act and discovery law protect the opinions and mental processes of government officials,⁴⁴ and in accord with both discovery law and the fact-policy limitation on the fifth exemption, ordered disclosure of factual material in the file but denied disclosure of any material reflecting revenue agents' mental processes.⁴⁵ However, the court ordered disclosure only after considering the positions of the parties and balancing their respective interests,⁴⁶ which indicates that the case was ultimately decided on the basis of discovery law since balancing of interests under the Act is improper.⁴⁷

*Verrazzano Trading Corp. v. United States*⁴⁸ is a well-reasoned recent decision which examines the proper relation between the Act and discovery law in regard to both the applicability of the Act in discovery actions and the use of discovery law as a limitation on the fifth exemption. Primarily the case involved a request for discovery of working notes, data, and computations pertaining to a Bureau of Customs laboratory report, with disclosure of the completed report having already been acceded to by the Bureau. The request was filed under the Customs Court's discovery rules,⁴⁹ but the Bureau raised in defense the Freedom of Information Act's fifth exemption. In finding the materials to be subject to discovery, the court held that denial of plaintiff's discovery request could not be based on the theory that the fifth exemption created a privilege under discovery law, for the entire Act was determined to be inapplicable in discovery actions.⁵⁰ The

⁴² 55 F.R.D. 88 (N.D. Ga. 1972).

⁴³ FED. R. CIV. P. 26-37, effective July 1, 1970.

⁴⁴ 55 F.R.D. at 88.

⁴⁵ *Id.* at 89.

⁴⁶ *Id.*

⁴⁷ See notes 88-90 *infra*, and accompanying text.

⁴⁸ 349 F. Supp. 1401 (Cust. Ct. 1972).

⁴⁹ The U.S. Customs Court operates under its own discovery rules rather than the Federal Rules of Civil Procedure. For the Customs Court's discovery rules, see U.S. CUST. CT. RULES 6.1-.5.

⁵⁰ 349 F. Supp. at 1403.

court stated that "the Freedom of Information 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; it was not enacted to provide discovery procedures for obtaining information during litigation."⁵¹ While disregarding the Act in discovery actions is contrary to the court's statement in *Talbott* that the Act is applicable whenever a government agency is the adverse party, the *Verrazzano* approach does have the effect of preventing the Act from ever being used as a "back door" discovery statute.

In a later part of its opinion, the court in *Verrazzano* recognized that if the Act were to be considered applicable in this discovery action, one of the criteria to be used in evaluating the applicability of the fifth exemption to admittedly intra-agency documents would be the discovery practices as regulated by the courts.⁵² Under these facts, the court indicated that disclosure would still be required, since the fifth exemption could not protect essentially factual material.

The position taken by the court in *Verrazzano* is that the Act is not applicable in discovery actions, but discovery law is applicable as a limiting principle in determining the validity of fifth exemption claims. The *Verrazzano* approach of disregarding the Act in discovery actions would appear to be a logical and sensible solution to the dilemma created by the attempted use of the Act as an alternative means of discovery. However, despite the *Verrazzano* court's belief to the contrary, the language of the fifth exemption does not state that it or the Act is inapplicable in discovery litigation situations, but rather states that it will not afford exemption whenever the requested materials could otherwise be obtained in a discovery proceeding.⁵³ Further, the statute's purpose of providing for disclosure to the public, persuasively advanced by the court as evidence of the inapplicability of the Act in discovery actions, does not definitively resolve the issue, since it can be argued that disclosure to a discovery litigant results, in essence, in disclosure to the public. Therefore, if the *Verrazzano* position is viewed as being correct in result, Congress should amend the Act to recite specifically that the Act is not applicable in discovery proceedings. It is submitted that the *Verrazzano* approach is desirable, but it would require formulation of workable criteria for determining whether a case is a discovery action or an action under the Act when a plaintiff seeks government records, claiming a right to disclosure under both discovery law and the Act. This necessary task of formulating workable criteria could prove to be almost impossible.

The Fact-Policy Dichotomy. Discussion of the fact-policy dichotomy is present in most fifth exemption cases, and the basic principle is not difficult to comprehend at a theoretical level. However, determining the proper use to be made of this limitation in a practical context has produced decisions which are extremely inconsistent in their results, as is best illustrated by two de-

⁵¹ *Id.*

⁵² *Id.* at 1405.

⁵³ See H.R. REP. NO. 1497, at 10.

cisions from the same district court within the same year. In *M.A. Schapiro & Co. v. SEC*⁵⁴ an SEC staff report on the off-board trading problem was ordered disclosed in its entirety. The court noted the distinction between factual material and materials which were part of the staff's thinking processes leading toward policy-making, but then concluded on the basis of an in camera inspection that the entire report consisted of purely factual material.⁵⁵

Six month later, in *Aspin v. Department of Defense*,⁵⁶ the same district court rendered a decision which would appear to be not only incorrect in its application of the fifth exemption, but also a complete departure from *Schapiro* in its handling of the fact-policy limitation on the fifth exemption. In *Aspin* the document sought and disclosure of which was denied in full was a four-volume report entitled "Department of the Army Review of the Preliminary Investigation into the My Lai Incident" commonly known as the Peers Commission Report. Since the report was used in a law enforcement proceeding, the court's reliance on exemption seven⁵⁷ would appear correct for justifying exemption of the report, although possibly not in its entirety. However, the court proceeded to cite exemption five as authorizing withholding of the entire report. While the court's observation that internal working papers for subsequent use in arriving at policy formulations were present in the intra-agency report must certainly have been true, the court never considered the limitation that any separable factual material in the report was not protected by the fifth exemption. Further, in applying exemption five, the court failed to consider the possibility that the report constituted "statements of policy and interpretations" adopted by the Department of Defense as its position in the matter, and therefore subject to required disclosure under subsection (a) of the Act.

The most disturbing element of the court's decision in *Aspin* was its conclusion that since Volume One was deemed exempt under subsection (b)(5), and since the other volumes were deemed to be mere appendices to that volume, the remaining volumes should "share the same protection" accorded Volume One.⁵⁸ This blanket protection afforded subsequent volumes of a many-faceted report because of the exemption of a preceding volume would appear to be in patent disregard of the warnings given by this district court's circuit concerning the inevitable tendency of the Government to give exemption five an expansive interpretation causing it to approximate a blanket exemption.⁵⁹

Although the subjects of the reports in *Aspin* and *Schapiro* were admit-

⁵⁴ 339 F. Supp. 467 (D.D.C. 1972).

⁵⁵ *Id.* at 470. Exemptions 3, 4, 7 and 8 were also rejected by the court as inapplicable.

⁵⁶ 348 F. Supp. 1081 (D.D.C. 1972).

⁵⁷ Exemption 7 exempts from disclosure "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 5 U.S.C. § 552(b)(7) (1970).

⁵⁸ 348 F. Supp. at 1082.

⁵⁹ See *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 939 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970); *Ackerly v. Ley*, 420 F.2d 1336, 1341 (D.C. Cir. 1969). Both cases are discussed at notes 99-102 *infra*, and accompanying text.

tedly of significant difference, in considering solely the fifth exemption's fact-policy limitation as applied to both, it is difficult to perceive how one report could consist solely of factual data, and yet the other report could contain absolutely no separable factual data. The nature of a report or study, whatever its subject matter, dictates a conclusion that favors the position that at least some factual data exists within the report and is likely separable.

The Prohibition of Secret Agency Law. Several cases have arisen in which the courts have correctly determined that a literal application of the language of and limitations on the fifth exemption would require the court to allow the agency to withhold the requested document, but to permit this would result in allowing a government agency to keep its final policy hidden from the public. When faced with this dilemma, most courts have ordered disclosure of the document, recognizing that the disclosure provisions in subsection (a) of the Act should control in view of the Act's overriding policy, implicit in that subsection, of prohibiting secret agency law. In *American Mail Line, Ltd. v. Gulick*,⁶⁰ an early case involving exemption five, the Maritime Subsidy Board stated in its publicly issued ruling on proper crew sizes that it had based its ruling on the memorandum sought to be disclosed. The court noted that despite the staff-prepared memorandum's probable qualification for subsection (b)(5) exemption at one time, the document had lost its intra-agency status when cited as the sole basis for the Board's decision.⁶¹ The Board's reliance on the memorandum showed that it had adopted its contents as a statement of final policy, thereby dictating disclosure under subsection (a) of the Act to prevent the accumulation of secret law within the Government.

The court's approach in *Sterling Drug Inc. v. FTC*⁶² demonstrates the importance of the Act's policy against secret law, in that even after its determination that the discovery limitation did not bar application of the fifth exemption to the documents requested, the court still felt it necessary to examine in depth the claim that the documents being withheld represented an accumulation of binding agency law and policy. After being charged by the FTC with an alleged antitrust violation, Sterling sought certain FTC documents relating to a recently approved merger involving a direct competitor, which Sterling claimed were dispositive of the case against it. After noting the intra-agency status of many of these documents, the court proceeded to consider exemption five's discovery limitation as applied to these particular documents.⁶³ The court noted that the proper test in applying that limitation was whether a private party—not necessarily the applicant—would routinely be entitled to discovery of the documents.⁶⁴ The court concluded that, although discovery of government memoranda containing

⁶⁰ 411 F.2d 696 (D.C. Cir. 1969).

⁶¹ *Id.* at 703.

⁶² 450 F.2d 698 (D.C. Cir. 1971).

⁶³ The remaining documents involving various financial data were held to be exempt from disclosure under the fourth exemption. *Id.* at 708-09.

⁶⁴ *Id.* at 705.

legal analyses and recommendations was sometimes permitted, this type of grant was extraordinary.⁶⁵

Sterling raised a further argument that the documents sought contained final policies adopted by the agency, and that they were subject to required disclosure under subsection (a) of the Act, despite the applicability of the fifth exemption. In response to this claim involving the maintenance of secret law by the FTC, the court divided the memoranda into three categories: those prepared by (1) the Commission staff, (2) individual members of the Commission, and (3) the Commission itself. Disclosure of documents in the first and second categories was denied on the ground that they might be misleading and incomplete as not reflecting the policy stance of the entire Commission, and on the further ground that disclosure would defeat the fifth exemption's purpose to preserve the free flow of ideas among staff and Commissioners.⁶⁶ Nowhere did the court consider the possibility that these documents contained separable factual material of significant value. The documents in the third category, those prepared by the Commission itself, were remanded for possible disclosure if found to contain binding agency opinions and interpretations, the court explicitly recognizing the overriding disclosure policy of the Act which prohibits accumulation of secret agency law. On the basis of the same overriding disclosure policy, the court stated that any memoranda in the first and second categories which were incorporated by reference in Commission memoranda as reasons for Commission action in the earlier approved merger must also be disclosed.⁶⁷

The decision to require disclosure of documents in the first and second categories only if they were specifically incorporated by reference in Commission memoranda was criticized by Chief Judge Bazelon in his separate opinion. The criticism was appropriate, for the possibility existed that final agency policy was stated in the staff and individual Commissioners' memoranda even if these documents were not specifically incorporated by reference in the third category of memoranda. The Chief Judge believed the majority's division of the documents into three categories was artificial, and, in lieu of this procedure, he would have remanded all of the documents for a determination of whether any contained final agency policy declarations.⁶⁸ The conclusion is inescapable that the decision would have been more in conformity with the express language and overriding policy of the Freedom of Information Act had the Chief Judge's approach been adopted.

Two fifth exemption cases decided by different courts of appeals within two days of each other appear to be conflicting in their interpretation of subsection (a)'s required disclosure of final agency opinions and binding policy statements. In *Tennessean Newspapers, Inc. v. Federal Housing Administration*⁶⁹ a property appraisal report made by an FHA employee

⁶⁵ *Id.* The court cited three cases for its conclusion: *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966); *Lykes Corp. v. United States*, 185 Ct. Cl. 792 (1968); *Weiss v. United States*, 180 Ct. Cl. 863 (1967).

⁶⁶ 450 F.2d at 706-08.

⁶⁷ *Id.* at 708.

⁶⁸ *Id.* at 713-14 (Bazelon, C.J., concurring in part and dissenting in part).

⁶⁹ 464 F.2d 657 (6th Cir. 1972).

was held to be subject to required disclosure as a "finished work product,"⁷⁰ despite its status as an intra-agency memorandum. The court recognized that the appraisal consisted of factual data, together with an opinion which constituted the agency's final position in the matter.⁷¹ Further, the name of the appraiser was held to be a relevant part of the opinion, as well as factual in nature, and it was likewise ordered disclosed.⁷² Besides correctly finding exemption five inapplicable to both the appraisal and the appraiser's name, the court denied that it had equitable power to withhold the appraisal or the author's name.⁷³ The court's decision to require disclosure would seem to be correct as to both the appraisal and the author's name in light of the limitation on exemption five as to factual material and the overriding policy of the Act, as expressed by the disclosure provisions in subsection (a) which seeks to prevent secret agency law.

Appearing to conflict with *Tennessean* is *Wu v. National Endowment for Humanities*.⁷⁴ This case arose out of the Endowment's denial of a grant requested by Wu to enable him to produce a book on Chinese history. The application for the grant had been referred by the Endowment to outside experts for their consideration and advice. The experts' recommendations of denial were accepted by the agency and denial of the grant followed, whereupon Wu sought the experts' memoranda to the agency under the Act. The court denied disclosure of the experts' memoranda, holding them to be internal working papers in which opinions were expressed as part of the agency's deliberative process, and, therefore, exempt under subsection (b)(5) of the Act.⁷⁵ Although the experts' opinions were theoretically rendered only to assist the Endowment in its decision, the conclusion is inescapable that the opinions were adopted as the Endowment's reasons for denial of the grant, and should, therefore, have been held to be subject to required disclosure under subsection (a) of the Act as final agency opinions.

In *Tennessean* the nature of the appraisal report as a final opinion was expressly recognized.⁷⁶ The *Wu* court failed to recognize the final opinion status of the experts' recommendations. It is submitted that these two cases are indistinguishable on the basis of their facts or the documents sought, and that *Tennessean's* approach and result would have been proper in *Wu*. Also contrary to *Tennessean* was the refusal of the court in *Wu* to disclose the

⁷⁰ *Id.* at 660.

⁷¹ *Id.*

⁷² *Id.* An earlier case similarly holding an appraiser's name to be factual and therefore not exempt from disclosure was *Philadelphia Newspapers, Inc. v. Department of Housing & Urban Dev.*, 343 F. Supp. 1176 (E.D. Pa. 1972).

⁷³ 464 F.2d at 661-62.

⁷⁴ 460 F.2d 1030 (5th Cir. 1972), *cert. denied*, 410 U.S. 926 (1973).

⁷⁵ *Id.* at 1034.

⁷⁶ For a later decision which is similar to *Tennessean* in requiring disclosure of final agency opinions, see *Sears, Roebuck & Co. v. NLRB*, 346 F. Supp. 751 (D.D.C. 1972), wherein advice and appeals memoranda prepared by the NLRB's Office of General Counsel were sought. Despite the claimed applicability of the fifth exemption, the appeals memoranda were recognized to be final Board opinions, and consequently were held to be subject to required disclosure. The decision was reversed on another ground on appeal. 473 F.2d 91 (D.C. Cir. 1972).

names of the outside experts, but this, of course, was consistent with denial of access to their opinions. A troublesome aspect of the denial in *Wu* of disclosure of the memoranda and names was the court's resort to balancing of the equities. As a final reason for denying disclosure, the court stated: "The Endowment's interest in retaining the services of these outside experts clearly outweighs the public's interest in whatever factual excerpts there may be in the memoranda appellant seeks."⁷⁷ Despite the admitted need of the Endowment to retain the experts and the damaging effect disclosure of their opinions might have on the possibility of securing their services in the future, Congress clearly intended by subsection (c) of the Act to deny the courts' equitable powers. The solution here to afford necessary protection in a *Wu* situation is not to be found in distortion of the Act by the courts, but rather in legislative re-examination.

The most interesting aspect of the *Wu* decision is its extension of the inter-agency and intra-agency memoranda exemption to cover memoranda and letters prepared by persons who are not employees of an agency.⁷⁸ While memoranda from persons outside an agency could not technically qualify as being of an inter-agency or intra-agency nature, it would seem that extension of that exemption to non-employee consultants would be proper, if the use of consultants is essential to the agency's operations. However, when the consultants' advice becomes the agency's final opinion or policy, disclosure of the opinion and the author's name would be required under the *Tennessean* analysis, which is in accord with the overriding policy of the Act to prevent secret law.

One of the most controversial cases ever decided under the Act, but one in which the district court handled the Act's disclosure provisions, as well as their implicit prohibition of secret agency law, extremely well is the recent decision in *Tax Analysts & Advocates v. IRS*.⁷⁹ IRS letter rulings, technical advice memoranda, and related communications and indices were requested. Exemption five was raised in defense of disclosure of only the related communications and indices, but was rejected for certain of these documents because of their close relation to the letter rulings and technical advice memoranda already ordered disclosed.⁸⁰ The remaining communications and indices were ordered produced for in camera inspection. The reason for requiring disclosure of the letter rulings and technical advice memoranda, and, consequently, the reason for required disclosure of the closely related index-digest system held not exempt under subsection (b)(5), was that they fell within the required disclosure category of interpretations adopted by an agency in subsection (a) of the Act.⁸¹ The court's discussion demonstrated that it recognized that the letter rulings and technical advice mem-

⁷⁷ 460 F.2d at 1034.

⁷⁸ An earlier case, *Soucie v. David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971), had indicated that this extension was appropriate under the fifth exemption.

⁷⁹ 362 F. Supp. 1298 (D.D.C. 1973). The case is currently on appeal to the District of Columbia Court of Appeals.

⁸⁰ *Id.* at 1309. The third and fourth exemptions were held inapplicable to the letter rulings and technical advice memoranda.

⁸¹ *Id.* at 1306.

oranda represented a body of secret agency law being accumulated by the IRS, clearly prohibited by the express language of the Act, as well as by its overriding policy.

Equitable Considerations Under the Act. In permitting administrative bodies to withhold documents "in the public interest" or for "good cause," the Freedom of Information Act's predecessor, the 1946 Administrative Procedure Act,⁸² afforded agencies such broad discretionary power in connection with requests for documents that disclosure could be denied whenever an agency desired to do so. Despite the deletion of this language in the Freedom of Information Act, agencies found they could achieve the same broad discretion to deny disclosure by asserting at the administrative hearing level that, regardless of the Act's language, no court of equity would ever order disclosure of the disputed document. In many of the early cases the courts were more than willing to assert their traditional equitable powers and to deny access to requested documents without regard to the Act's specific exemptions. This practice of introducing equitable principles into the Act originated with the early case of *Consumers Union of United States, Inc. v. Veterans Administration*.⁸³ Consumers Union sought the results of hearing aid tests conducted by the VA, desiring both the raw scores from the various tests as well as the final quality point score computed for each model submitted. After noting the possibility that the written results could qualify as intra-agency memoranda,⁸⁴ the court proceeded to consider the availability of the results under discovery rules and concluded: "It is not difficult to hypothesize actions in which the hearing aid testing records would be relevant. The most obvious action would be one for breach of a hearing-aid supply contract. Good cause for discovery is equally easy to imagine."⁸⁵ Also noted was the distinction between documents which constitute part of the administrative reasoning process and those which are factual or investigatory reports,⁸⁶ the court concluding that the results constituted factual material which was not intended to be protected by the fifth exemption. Although noting that neither the fifth exemption nor any other exemption applied, the court proceeded to deny access to the quality point scores on equitable principles. This decision was based on the court's conclusion that, in addition to the withholding permitted by the exemptions, agencies may withhold documents upon proof "that disclosure will result in significantly greater harm than good."⁸⁷

⁸² Ch. 324, § 3, 60 Stat. 238.

⁸³ 301 F. Supp. 796 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971).

⁸⁴ Other exemptions raised by the VA as justifying withholding, but rejected by the court, were exemptions 2, 3 and 4. 301 F. Supp. at 800-04.

⁸⁵ *Id.* at 804.

⁸⁶ *Id.* at 805.

⁸⁷ *Id.* at 806. The court ordered disclosure of the raw scores after concluding that no significant harm to the public would result from their release. The harm envisioned by the court from release of the quality point scores was reliance by the public on a top ranking under this score as indicative of the best hearing aid for every type of hearing deficiency.

As noted by writers⁸⁸ and accepted by later cases,⁸⁹ the use of equitable considerations to deny disclosure when the Act's exemptions are inapplicable is patently contrary to the express words of the statute. Subsection (c) of the Act provides that availability of information under the Act is limited only by what is "specifically stated" in the exemptions. The Senate committee stated that "[t]he purpose of this subsection is to make it clear beyond doubt that all *materials* of the Government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exemptions"⁹⁰ The clear import of the Act's language and history is to deny courts the use of their normal equitable powers in a Freedom of Information Act case.

Two years after *Consumers Union's* erroneous interjection of equitable principles into the Act, the fifth exemption case of *Soucie v. David*⁹¹ expressly disavowed the courts' claimed retention of equitable powers under the Freedom of Information Act. Two citizens sought from the Office of Science and Technology the Garwin Report, which evaluated the Government's supersonic transport program. In remanding for the district court to determine the applicability of specific exemptions,⁹² the court of appeals set out relevant factors for the district court to consider. As to the courts' equitable powers under the Act, *Soucie* held that "Congress did not intend to confer on district courts a general power to deny relief on equitable grounds apart from the exemptions in the Act itself."⁹³ However, the court hedged somewhat on its disavowal of equitable powers: "There may be exceptional circumstances in which a court could fairly conclude that Congress intended to leave room for the operation of limited judicial discretion"⁹⁴

Although the express provisions of the Act leave no room whatsoever for a court to exercise its traditional equitable powers,⁹⁵ the "exceptional circumstances" statement has proven to be of little consequence, since subsequent cases have generally recognized the validity of the *Soucie* holding that the courts retain no equitable powers under the Act.⁹⁶ Subsequent cases have also followed *Soucie's* assessment of the fact-policy dichotomy under the fifth exemption as protecting internal communications which reflect deliberative or policy-making processes but not purely factual material unless

⁸⁸ See, e.g., Davis, *supra* note 12, at 811; Note, *Courts Must Order Agencies To Disclose Information Unless It Falls Within Specific Exemptions*, 1971 LAW. F. 329, 333-36.

⁸⁹ See, e.g., Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971).

⁹⁰ S. REP. No. 813, at 10. The House committee stated a similar purpose of the subsection. H.R. REP. No. 1497, at 11.

⁹¹ 448 F.2d 1067 (D.C. Cir. 1971).

⁹² The district court had dismissed the complaint stating that the report was a Presidential document and that the Office of Science and Technology was not an agency for purposes of the Freedom of Information Act. The court of appeals disagreed. *Id.* at 1071.

⁹³ *Id.* at 1077 (footnote of the court citing to committee reports omitted).

⁹⁴ *Id.*

⁹⁵ See 5 U.S.C. § 552(c) (1970).

⁹⁶ See, e.g., *Tennessean Newspapers, Inc. v. FHA*, 464 F.2d 657, 661-62 (6th Cir. 1972); *Tax Analysts & Advocates v. IRS*, 362 F. Supp. 1298, 1309 (D.D.C. 1973).

that factual material is "inextricably intertwined with policy-making processes."⁹⁷ Also implicit in the court's discussion was the previously recognized possibility of disclosing those portions of a document containing factual material while exempting policy and opinion portions.⁹⁸

Requirements and Procedures for Resolving Fifth Exemption Claims. Two District of Columbia Court of Appeals decisions have recognized the tendency on the part of agencies to attempt to limit the effectiveness of the Act, and have offered solutions to the problem in the form of requirements imposed on and procedures to be followed by federal district courts in handling claims of exemption. In *Ackerly v. Ley*⁹⁹ the court of appeals noted the inevitable temptation of a governmental litigant to give the fifth exemption an expansive interpretation, and further noted the lower court's lack of reference to any of the enumerated exemptions in denying the request for a memorandum compiled by Food and Drug Administration staff. Unable to review the indefinite record presented by the district court, the court of appeals remanded for a more detailed identification of the nature of the documents and the reasons why the documents were determined to be exempt.¹⁰⁰

In addition to the requirements imposed on district courts for handling fifth exemption claims by *Ackerly, Bristol-Myers Co. v. FTC*¹⁰¹ indicated that the district court should examine the disputed documents in camera before determining whether disclosure is required. As in *Ackerly*, the court in *Bristol-Myers* expressed concern over potentially abusive agency practices under the fifth exemption due to the breadth of that exemption:

This provision encourages the free exchange of ideas among government policy makers, but it does not authorize an agency to throw a protective blanket over all information by casting it in the form of an internal memorandum. Purely factual reports and scientific studies cannot be cloaked in secrecy by an exemption designed to protect only 'those internal working papers in which opinions are expressed and policies formulated and recommended.'¹⁰²

The importance of an in camera inspection to the district court's ability to determine the nature of requested documents and, thereby, properly resolve claims of exemption for the documents, is made apparent by the questionable result reached in *Wellford v. Hardin*,¹⁰³ in which the court deemed an in camera inspection unnecessary. Plaintiff sought certain bi-weekly reports prepared by the Slaughter Inspection Division of the Department of Agriculture as part of its reporting mechanism, as well as minutes of the meetings of the National Food Inspection Advisory Committee.

⁹⁷ 448 F.2d at 1077-78.

⁹⁸ For a previous case discussing this possibility, see *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970).

⁹⁹ 420 F.2d 1336 (D.C. Cir. 1969).

¹⁰⁰ *Id.* at 1342.

¹⁰¹ 424 F.2d 935 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970).

¹⁰² *Id.* at 939. Exemptions 4 and 7 were also raised by the Commission and left open by the court of appeals for consideration by the district court on remand.

¹⁰³ 330 F. Supp. 915 (D. Md. 1971).

Solely on the basis of an affidavit of a department administrator, the court held the fifth exemption applicable. The court concluded that the character of the documents was of an "opinion and formative nature."¹⁰⁴ Its earlier order¹⁰⁵ to produce the documents for an in camera inspection was reversed. Minutes of an advisory committee would generally consist in large part of opinions and policy recommendations not yet adopted by an agency as its working law, and would, therefore, generally be exempt under subsection (b)(5) of the Act.¹⁰⁶ However, it is submitted that even in light of the subsequent Supreme Court decision in *Environmental Protection Agency v. Mink*,¹⁰⁷ disclaiming the need for in camera inspection in every case, the likelihood of the biweekly reports containing factual data separable from policy material was great enough and the affidavit cursory enough to justify an in camera inspection by the district court to determine whether separable factual material did in fact exist. The court failed to realize that a report which is part of an inspection unit's reporting system would generally contain a great deal of factual material. Further, situations can be hypothesized in which the reports would normally be subject to discovery, such as in products liability cases involving food. The court failed to heed the warning of *Ackerly* as to the inevitable expansive interpretation given the fifth exemption by the Government.

In *Environmental Protection Agency v. Mink* the United States Supreme Court not only summarized and clarified the rules to be applied under the fifth exemption, but also, and more importantly, it relaxed the in camera inspection procedure previously imposed in *Bristol-Myers* and other courts of appeals' decisions. In *Mink* several documents relating to a scheduled underground nuclear test were claimed to be exempt from disclosure under the first and fifth exemptions. The Court's consideration of the fifth exemption claim indicated that it intended to abide fully by the orderly and logical approach called for by the legislative history. The Court, therefore, commenced its discussion by noting that the documents were intra-agency memoranda or letters, and then proceeded to consider whether the discovery limitation on the fifth exemption nevertheless required disclosure of those memoranda. Noting that the application of the discovery limita-

¹⁰⁴ *Id.* at 917-18. The administrator's affidavit stated that the biweekly reports included:

[S]ummaries of work accomplishments; current and potential problems of both an operational and an administrative nature; future procurement plans for food commodities . . . and comments, opinions, judgments, and recommendations on developments and personnel practices affecting or relating to the administration of agency programs.

As to the minutes, the affidavit recited the purposes of the National Food Inspection Advisory Committee. It then concluded that the minutes were records of the deliberations of the Committee and contained its opinions, conclusions, and recommendations. *Id.* at 917. In the original district court opinion in *Wellford v. Hardin*, 315 F. Supp. 175, 178 (D. Md. 1970), exemption 7 was raised but rejected; this portion of the opinion was affirmed. 444 F.2d 21, 23 (4th Cir. 1971).

¹⁰⁵ 315 F. Supp. 175 (D. Md. 1970).

¹⁰⁶ A later decision indicated that minutes may not be entitled to exemption in their entirety if separable factual material appears in them. *Fisher v. Renegotiation Bd.*, 473 F.2d 109 (D.C. Cir. 1972).

¹⁰⁷ 410 U.S. 73 (1973).

tion on the fifth exemption was difficult, the Court concluded that the discovery rules could only be applied in connection with the fifth exemption "by way of rough analogies,"¹⁰⁸ exemplified by the impermissibility under the Act of inquiries into a particular applicant's need. This statement by the Court would seem conclusively to require that courts apply the discovery rules solely in limiting the fifth exemption, and not introduce discovery principles, such as balancing, into the Act.

The final step in the Court's analysis involved consideration of the fact-policy limitation on the fifth exemption. In accordance with this limitation, the Court remanded certain unclassified documents¹⁰⁹ for a determination by the district court of whether they contained any separable factual material making them subject to partial disclosure, unless otherwise exempted, despite their intra-agency status. Adoption by all lower courts of the Supreme Court's step-by-step approach as called for by the fifth exemption's legislative history would allow for much easier and much more orderly disposition of fifth exemption claims.

Contrary to the position taken by at least one circuit,¹¹⁰ the Supreme Court in *Mink* held that in camera inspection of requested documents was not necessarily appropriate in every case.¹¹¹ Agencies were held to be entitled to an opportunity to prove to the satisfaction of a court, by means short of submission of the requested documents, that the documents fell within an exemption and contained no separable factual material. The means suggested by the Court for making the required showings were the use of detailed affidavits or oral testimony. The Court also sanctioned in camera inspection of a representative document only. The Court reasoned that with automatic in camera inspection, any member of the public could require clearly exempt and confidential information to be brought forward for court inspection.¹¹² Although it can be argued that this reasoning is not in keeping with the broad disclosure policy of the Act, the Court's decision would appear to be justifiable, to a certain extent, on the ground that it relieves the district courts from the burdensome task of performing an automatic in camera inspection in every case. However, in light of the inevitable temptation of government litigants to give the exemptions an expansive interpretation, as noted in *Ackerly*, the Court should have emphasized even more clearly than it did that the showing required by an agency in order to avoid in camera inspection of its documents is to be an extremely strong one.

The potential for an expansive interpretation to be given the in camera inspection holding of *Mink* by district courts and agencies, in order to permit summary disposition of Freedom of Information Act cases upon the basis of general affidavits and general testimony, was realized in *National Cable*

¹⁰⁸ *Id.* at 86.

¹⁰⁹ Certain of the documents were found to be classified, and exempt under subsection (b)(1) of the Act.

¹¹⁰ See *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

¹¹¹ 410 U.S. at 93.

¹¹² *Id.*

Television Ass'n v FCC.¹¹³ Disclosure of several broad categories of documents relating to a proposed Commission rule dealing with increases in its license fee schedule had been denied by the district court in a vague and very brief statement, which apparently placed reliance on the fifth exemption.¹¹⁴ Summary judgment had been granted the Commission on the basis of its general affidavits and equally general oral testimony given by an agency official. Aware of the extreme likelihood of the presence of separable factual material, not otherwise exempt, in at least some of the documents, the court of appeals in *National Cable* properly remanded the case because of the insufficient consideration given the request by the district court. The court of appeals further stated that the FCC could not simply rest on its blanket allegations of compliance, unidentifiability, and exemption which were made in its affidavit supporting the motion for summary judgment.¹¹⁵ The decision clearly held that a general and vague showing advanced by an agency is certainly not enough to warrant summary judgment for the agency, and is equally insufficient to avoid *in camera* review of the documents. It should be recognized that *Mink* is fully in accord.¹¹⁶

Requests for Agency Staff Manuals. Several cases have considered whether the fifth exemption should apply to manuals which instruct agency personnel in techniques and procedures for the detection of noncompliance with or violations of agency rules or statutes.¹¹⁷ In *Long v. IRS*¹¹⁸ the manual sought was the IRS's Closing Agreement Handbook which guided agents in negotiating closing agreements with the public.¹¹⁹ The manual was held to be subject to required disclosure and the court apparently considered the second¹²⁰ and fifth exemptions inapplicable. The court stated that there were a number of circumstances under which the manual would be sub-

¹¹³ 479 F.2d 183 (D.C. Cir. 1973).

¹¹⁴ The district court stated: "To me, what you are seeking are the work papers and internal memoranda of this agency to which I do not believe you are entitled. What you want are the tapes, the yellow work sheets and possibly to pick somebody's brain. I do not think you have made out a case." *Id.* at 186.

¹¹⁵ *Id.* at 190.

¹¹⁶ The Supreme Court in *Mink* required that an agency produce "detailed affidavits or oral testimony" in order to avoid an *in camera* inspection of its documents. 410 U.S. at 93.

¹¹⁷ The Freedom of Information Act requires that agencies make available "administrative staff manuals and instructions to staff that affect a member of the public." 5 U.S.C. § 552(a)(2)(C) (1970). However, as will be seen, this phrase has not been interpreted to be as clear as it might seem.

¹¹⁸ 349 F. Supp. 871 (W.D. Wash. 1972).

¹¹⁹ Also sought in the same action was an IRS report, entitled "Management Information Report, Source of Returns—Income Taxes," dealing with the sources and results of examination of income tax returns. This report was ordered to be disclosed as not exempted under the second exemption dealing with internal personnel rules and practices.

In an earlier proceeding in the same action, the IRS's motion to dismiss the complaint as to this report and the closing agreement manual was denied. The motion to dismiss as to numerous files of the IRS requested by Long was granted on the basis that the information was either obtainable more easily elsewhere or was exempt, and on the further ground that Long's vague request was not for "identifiable records" as required by the Act. 339 F. Supp. 1266 (W.D. Wash. 1971).

¹²⁰ 5 U.S.C. § 552(b)(2) (1970) exempts matters "related solely to the internal personnel rules and practices of an agency."

ject to discovery,¹²¹ and this was as specific as the court chose to be in apparently excluding the fifth exemption from application. Besides the lack of detailed identification of which exemption was considered and the reasons for its applicability or inapplicability which had been deemed necessary by the *Ackerly* court, the court in *Long* chose not to follow the *Soucie* holding, as the court declared that disclosure ultimately rested on "an equitable determination of whether the benefits to the public of disclosure outweigh the effects of nondisclosure."¹²² As previously noted, this balancing of equities approach is clearly improper under the Act.

In *Cuneo v. Schlesinger*¹²³ the Contract Audit Manual of the Defense Contract Audit Agency of the Department of Defense was sought against claims of exemption under the second and fifth exemptions. The manual provided operating guidelines for investigative audits of defense contractors by agency staff. The district court¹²⁴ had denied disclosure of the manual in its entirety, but stated no reasons for its application of the second and fifth exemptions. Instead, it concluded: "To require the Government to make public to Defense Contractors the non-public portions of the Contract Audit Manual would be comparable to requiring one football team to give its 'play-book' to the opposing team before a game."¹²⁵ Due to the lack of a detailed record and supportive reasoning, the court of appeals remanded with instructions that the Government specifically justify exemption of each part of the manual.¹²⁶ However, only those portions of the manual which might deal with interpretations of the Armed Services Procurement Regulations and guidelines for the allowability of costs under those regulations were ordered by the court of appeals to be considered on remand as to whether they constituted secret agency law. The court deemed it unnecessary to consider the sensitive portions of the manual relating to the development and use of selective auditing procedures since, on appeal, the plaintiff abandoned his claim to those portions of the manual.

The district court opinion in *Cuneo* is illustrative of the resulting confusion as to the basis for decision when a court is faced with determining the disclosability of sensitive manuals or portions of manuals. The lower court's characterization of the manual as a playbook or game plan shows that the court recognized the manual contained, at least in part, an explanation of tactics to be employed in performing defense contract audits. Disclosure of these tactics would clearly have made the circumvention of auditing procedures easy to achieve. The problem in the sensitive manual situation, apparent from the district court's opinion in *Cuneo*, lies in the fact that the Act clearly requires the specific applicability of one of the exemptions before disclosure can be denied, but the Act and its legislative history leave the issue unclear as to whether any exemption was intended specifically to

¹²¹ 349 F. Supp. at 874-75.

¹²² *Id.* at 875.

¹²³ 484 F.2d 1086 (D.C. Cir. 1973).

¹²⁴ *Cuneo v. Laird*, 338 F. Supp. 504 (D.D.C. 1972).

¹²⁵ *Id.* at 506.

¹²⁶ 484 F.2d at 1092.

cover this situation. As to the second exemption, the House report adopted an interpretation which would hold the manuals to be within the exemption,¹²⁷ but the Senate committee would find the manuals to be completely outside the exemption.¹²⁸ With this much confusion among the legislators as to what the language of the second exemption was intended to mean, the difficulty which the courts have experienced with requests for manuals is fully understandable.

As to exemption five, it would seem to be generally inapplicable to manuals since it is difficult to justify any characterization of manuals as "memorandums,"¹²⁹ although a few agency manuals could possibly be said to be means of arriving at policy determinations and therefore part of the deliberative process intended to be protected by the fifth exemption. Apart from a legislative redefining of the exemptions under the Act, the immediate solution in those manual cases which prove difficult of decision would seem to be adoption of the House report's interpretation of the second exemption, despite claims of its unreliability as a source of interpretation.¹³⁰ In fact, one commentary has suggested that the lower court's summary disposition of the request in *Cuneo* is one point indicating that the court likely adopted the House Report's interpretation of the second exemption.¹³¹

A third case involving a request for an agency manual, *Stokes v. Brennan*,¹³² was decided with much more ease due to the factual and instructive nature of the manual and other materials requested. The request was for training manuals and teaching aids used by the Occupational Safety and Health Administration of the Department of Labor. The court held disclosure to be required under the Act after the claimed applicability of the second and fifth exemptions was refuted.¹³³ As to the fifth exemption, the court stated that substance, not form, was the determinative factor, and that the materials were of a factual and instructive nature.¹³⁴ With reference to the training manual request, the court concluded: "The subject manual is an impersonal, mass-produced statement of established policy designed to be utilized as an educational and reference tool, not for policy-making or deliberative purposes. If this material be a 'memorandum' then the term would cover virtually all government documents of any description or na-

¹²⁷ The House committee report states that under the second exemption, "[O]perating rules, guidelines, and manuals of procedure for Government investigators or examiners would be exempt from disclosure . . ." H.R. REP. NO. 1497, at 10.

¹²⁸ The Senate committee report states: "Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave and the like." S. REP. NO. 813, at 8.

¹²⁹ One court has noted that the legislative history of the Act nowhere defines or discusses the term "memorandum." *City of Concord v. Ambrose*, 333 F. Supp. 958, 961 (N.D. Cal. 1971).

¹³⁰ See, e.g., Davis, *supra* note 12, at 809-10.

¹³¹ *Federal Administrative Law Developments—1972*, 1973 DUKE L.J. 178, 188-89.

¹³² 476 F.2d 699 (5th Cir. 1973).

¹³³ The second exemption was held inapplicable, even though the court admitted that the manuals and teaching aids contained some material falling within the category of personnel rules and practices, because the requested records were not solely or even primarily composed of that type of material. *Id.* at 703.

¹³⁴ 476 F.2d at 703-04.

ture."¹³⁵

While the second sentence of the court's statement impliedly recognizes the difficulty and danger of characterizing a manual as a memorandum, implicit in the first sentence is the possibility of some agency manuals being held exempt under subsection (b)(5) as essential elements in the policy formulating process. It is submitted that a more appropriate solution to the need to withhold certain sensitive manuals, existing in some agencies, would be a legislative re-defining of the second exemption that adopts a more strictly limited version of the House report's interpretation.¹³⁶ This course would obviate the need for raising the fifth exemption in cases involving requests for manuals, with the consequence of thwarting the temptation of courts and agencies to strain the meaning of "memorandum" and the purpose of the fifth exemption.

Although there may yet be hope for widely proper applications of the Act in light of recent decisions, such as the *Tax Analysts* decision, the inconsistent applications of the fifth exemption in the past, as shown by many of the preceding cases, indicate that the fifth exemption is one of the most likely to be continually misapplied in the future. However, the difficulty lies not so much with the courts as it does with the language of the fifth exemption itself, and the impractical tests for its limitation imposed by the draftsmen.

III. PROBLEMS WITH AND DEFICIENCIES OF THE FIFTH EXEMPTION

Most of the major problems presented by the language of the fifth exemption have been indicated and crystallized by the foregoing judicial decisions. The fifth exemption's close interrelation with discovery law and the possibility for use of the Freedom of Information Act as a discovery tool have been major sources of difficulty with the exemption. This exemption recognizes the agency's interest in avoiding the disclosure of internal memoranda, but proceeds to curtail the privilege granted agencies, by an oblique reference to discovery law. Further obscuring the proper relation between the Act and discovery law is the recognition by many litigants in disputes with the Government that when discovery law fails to afford them access to documents, the Act may be resorted to as another device for achieving that access.¹³⁷ Both of these problems were squarely confronted and judicially resolved in the *Verrazzano*¹³⁸ decision which concluded that discovery law should in fact be applied to the fifth exemption, but only by way of limitation, so that those internal documents previously available

¹³⁵ *Id.* at 704.

¹³⁶ The 1972 House Committee on Government Operations recommended this approach. H.R. REP. NO. 1419, 92d Cong., 2d Sess. 83 (1972). A similar recommendation was made by the Section of Administrative Law of the ABA. *Hearings on U.S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act Before a Subcomm. of the House Comm. on Government Operations*, 92d Cong., 2d Sess., pt. 4, at 1436 (1972).

¹³⁷ See, e.g., *Talbott Constr. Co. v. United States*, 49 F.R.D. 68 (E.D. Ky. 1969); *Verrazzano Trading Corp. v. United States*, 349 F. Supp. 1401 (Cust. Ct. 1972).

¹³⁸ 349 F. Supp. 1401 (Cust. Ct. 1972); see notes 48-53 *supra*, and accompanying text.

under discovery procedures would continue to be available despite the fifth exemption. The major contribution made by that case was its declaration that the Act could not be resorted to as an additional means of seeking discovery during litigation. The difference between a plaintiff seeking memoranda as a litigant with the Government, and a plaintiff seeking memoranda as a member of the general public was recognized. However, as previously noted, this resolution of the problem of using the Act as a discovery statute cannot be considered authoritative, since the Act makes no inquiries into the use to be made of the documents prior to requiring disclosure, nor does the legislative history clearly express an opinion on such use.

While the proper use to be made of discovery law in limiting the coverage of the fifth exemption has been fairly well-defined by *Verrazzano* and several other cases,¹³⁹ the introduction of this discovery standard into the exemption has created the further problem of courts exercising their equitable powers to defeat the Act. Despite the well-reasoned declaration in *Soucie* that courts retain no equitable powers under the Act,¹⁴⁰ some subsequent cases still contain assertions by the courts that they retain their equitable powers to deny disclosure apart from the exemptions,¹⁴¹ and even the *Soucie* statement did not absolutely foreclose the possibility of denying disclosure through equitable discretion in "exceptional circumstances."¹⁴² The problem with recognizing equitable discretion to deny disclosure is that it offers the agencies another theory to raise in attempting to avoid disclosure, and represents a reversion to the old Administrative Procedure Act's requirement of a good cause showing on the part of the plaintiff prior to disclosure.¹⁴³ The overall result of inserting discretion into the Act is to restrict the availability of information. Again, this problem arises because Congress chose not to clearly and expressly deny the courts their equitable powers, but rather implied the denial in the statement in subsection (c) that availability of information is not to be restricted except as "specifically stated."

The other limitation on the fifth exemption, requiring differentiation between factual material and policy material in internal memoranda, has also created its share of problems. Many of the cases indicate the difficulty of distinguishing between facts and law or policy in inter-agency or intra-agency memoranda.¹⁴⁴ Although this limitation on the fifth exemption has resulted in more material being made available, the discretion it permits to

¹³⁹ See, e.g., *Sterling Drug, Inc. v. FTC*, 450 F.2d 698 (D.C. Cir. 1971); *Benson v. General Serv. Administration*, 289 F. Supp. 590 (W.D. Wash. 1968), *aff'd*, 415 F.2d 878 (9th Cir. 1969).

¹⁴⁰ 448 F.2d 1067, 1076-77 (D.C. Cir. 1971).

¹⁴¹ See, e.g., *Wu v. National Endowment for Humanities*, 460 F.2d 1030 (5th Cir. 1972); *Long v. IRS*, 349 F. Supp. 871 (W.D. Wash. 1972).

¹⁴² 448 F.2d at 1077.

¹⁴³ The 1946 Administrative Procedure Act provided that only persons "properly and directly concerned" could obtain access to agency documents, and even then, withholding of records was permitted "in the public interest" or for "good cause." Ch. 324, § 3, 60 Stat. 238.

¹⁴⁴ See, e.g., *Wu v. National Endowment for Humanities*, 460 F.2d 1030 (5th Cir. 1972); *Wellford v. Hardin*, 330 F. Supp. 915 (D. Md. 1971).

the courts and agencies due to the subjectivity involved in drawing the line between fact and policy would indicate that it was a rather unwise approach to adopt as a limiting test in a statute designed to give wide access to governmental records.

The problems in the preceding cases are in large part traceable to the ambiguous language in the fifth exemption as well as the ambiguous and deficient tests adopted by the draftsmen for the exemption's limitation. That the federal district courts have experienced great difficulties in applying this exemption is evidenced by the frequent remand of fifth exemption cases. The difficulty of interpreting not only the fifth exemption's language, but also the language of the entire Act, is further evidenced by the conflicting views expressed by the Senate and House committees as to exactly what various provisions of the Act were intended to mean. The Senate Committee report¹⁴⁵ generally followed the language of the Act and, if anything, viewed the language as requiring more disclosure than the statute might actually indicate. On the other hand, the House report¹⁴⁶ continually viewed many of the Act's provisions as much more restrictive than the statute's language was ever intended by the Senate to be. When the legislators expressed this much disagreement over what the language of the statute they passed was intended to mean, it is not surprising that the courts have had great difficulty in applying the statute's language to specific factual situations. Further, it was not unjustified when Professor Davis referred to the overall Act as a "shabby product" and concluded that the causes of the drafting deficiencies were "in the nature of inattention and indifference."¹⁴⁷ That inattention was probably one of the reasons for the vague and ambiguous language of the statute is evidenced by the fact that Congress was, more likely than not, unaware that correspondence between it and the agencies could not receive the benefits of the fifth exemption, since the definition of "agency" in the Administrative Procedure Act excludes Congress.¹⁴⁸

Whatever the causes of the statute's deficiencies and ambiguities, there is no doubt that the vague and ambiguous language used in defining and limiting the exemptions, particularly the fifth exemption, has afforded the agencies an arsenal of means to avoid or at least delay disclosure. It requires little effort by the agencies to fit almost any document they possess within the terms of one of the exemptions. In fact, one of the major criticisms of the Act has been the agencies' practices under it, of which an extreme example was offered in *Wellford v. Hardin*.¹⁴⁹ In that case the Pesticides Regulation Division of the Department of Agriculture refused to release any document not specifically identified by its assigned file number. In order to determine the file number, reference to the agency's master index was necessary. However, the agency refused to permit public access to this in-

¹⁴⁵ See generally S. REP. NO. 813.

¹⁴⁶ See generally H.R. REP. NO. 1497.

¹⁴⁷ Davis, *supra* note 12, at 807.

¹⁴⁸ "[A]gency" means each authority of the Government of the United States . . . but does not include—(A) the Congress . . ." 5 U.S.C. § 551(1) (1970).

¹⁴⁹ 315 F. Supp. 768 (D.D.C. 1970).

dex. The court was quick to declare this practice impermissible. While some agencies have been less than enthusiastic in carrying out the provisions of the Freedom of Information Act, though none quite as reluctant as the agency in *Wellford*, it is submitted that the source of the problem is traceable to the vague language of the Act which permits any such practices to thrive.

Rather than responsibility for the problems under the fifth exemption and the entire Act lying solely with the language used by the draftsmen, a recent case indicated that many of the difficulties with the Act have their source in the Act's overall scheme. The court in *Vaughn v. Rosen*¹⁵⁰ noted that in the traditional adversary proceeding there is more or less equal access to the facts which are relevant to the dispute. However, the court observed that in an action arising under the Freedom of Information Act, only one side to the controversy, the side opposing disclosure, has knowledge of the nature and contents of the documents sought which form the basis of the dispute.¹⁵¹ Therefore, in a case arising under the Act only the Government has the opportunity to evaluate the disputed documents to determine the best line of defense to be used in attacking the request. In fact, the party seeking disclosure is often unaware of what documents exist, or in some cases even whether any documents exist, to fulfill his needs.

The court in *Vaughn* considered some of the supposed solutions to this dilemma which prior courts had devised, primarily in camera review of the documents by the district court to determine the validity of the Government's claim of exemption. However, as noted in *Vaughn*, our court system is not designed nor intended to be operational with judges serving in an adversary capacity.¹⁵² An interested litigant is better suited than a judge to scrutinize the documents presented to find supporting evidence for his cause, and, as the *Vaughn* court noted,¹⁵³ this is particularly true when the requested documents turn out to consist of hundreds or thousands of pages, as is often the case. Further, the court recognized the burdensome task facing a trial court when it is deemed necessary to inspect large numbers of lengthy documents which could be expected to contain some exempt and some non-exempt material, as was the case in *Vaughn*. The solution suggested by the court of appeals was a requirement that the Government index and categorize, as to exempt or non-exempt status, any documents or parts of documents relevant to the request so that the dispute could be narrowed to documents whose nature and contents were more easily ascertainable by the opposing party as well as the court.¹⁵⁴ The court hoped that this procedure would more nearly achieve normal adversary status for the party seeking the documents and aid in the court's in camera review.

While the Act's overall scheme, as well as its ambiguous language, are cer-

¹⁵⁰ 484 F.2d 820 (D.C. Cir. 1973).

¹⁵¹ *Id.* at 824-25.

¹⁵² *Id.* at 826.

¹⁵³ *Id.* at 825.

¹⁵⁴ *Id.* at 827. See also *Cuneo v. Schlesinger*, 484 F.2d 1086, 1092 (D.C. Cir. 1973), *aff'g* 338 F. Supp. 504 (D.D.C. 1972).

tainly severe handicaps that must be overcome before it can fulfill its purpose of providing easy accessibility to, and wide availability of, government information for the public, a practical approach to the Act and its exemptions such as that taken by the *Vaughn* court, would go far toward overcoming these handicaps and permitting the Act to realize its potential as the key to a successful public information system. The evidence which points to the need for such a practical approach to the Act is overwhelming.

IV. A PRACTICAL APPROACH TO THE FIFTH EXEMPTION

The most strikingly impractical aspect of the Freedom of Information Act is the manner in which it was designed by the draftsmen to operate. Under the Act a request for identifiable records is necessary, but the requesting party is often unaware of what information lies within the governmental agency to fulfill his needs. Even if a reasonably intelligible request can be formulated and is submitted, delay ensues while the particular agency performs the burdensome, expensive, and time-consuming task of sifting through the requested documents to determine whether or not they are exempt in whole or in part. More delay results if the decision reached at the administrative level is deemed unsatisfactory by the requesting party, as is too often the case, since the last resort is suit in the already overburdened courts.¹⁵⁵ As noted in *Vaughn*, the courts are not equipped to act in an adversary capacity, and certainly do not have the time nor the resources to search through endless streams of documents to delineate exempt and non-exempt material.

The fifth exemption is equally impractical, particularly because of the tests adopted by the draftsmen to limit its scope. It is exceedingly difficult for the courts to distinguish between factual and policy material. To expect lower level agency staff to be able to make this distinction goes beyond even impracticability and approaches absurdity. In view of such a requirement, less than enthusiastic agency attitudes toward carrying out the Act are to be expected. The discovery limitation fares no better, for under it agencies are presumed to be capable of determining whether a court would find internal memoranda to be discoverable under the Federal Rules of Civil Procedure. Obviously such a task must be left to the courts. But when resort to the already overburdened courts is necessary to determine the memorandum's discoverability, aggravation of the problem is only enhanced because of the resulting delay. While much of the responsibility for the impracticalities under the Act lies with the Act's draftsmen, it should be noted that few courts and few agencies have attempted any practical interpretation or implementation of the Act themselves.

These practical limitations of the fifth exemption and the Act's functional nature can be overcome within the present framework of the Freedom of Information Act, but only by legislative modification of that framework.

¹⁵⁵ 5 U.S.C. § 552(a)(3) (1970) vests the district courts with jurisdiction to enjoin agencies from improperly withholding requested documents.

The solution suggested here could remove many of the ambiguities from the Act as well as go far toward relieving the problem of the unequal positions of the adversaries in a Freedom of Information Act case.

The first proposed solution has been advanced in a more limited form by several writers¹⁵⁶ and courts,¹⁵⁷ and would require each agency to compile an index or directory of all its written documents and materials, regardless of whether they are believed to be exempt or non-exempt under the Act. A master index of these documents, containing a notation as to their exempt or non-exempt status, would be required to be maintained and made available to the public upon request. While a revision of the Act to accomplish this proposal could be expected to be met with serious objection by many agencies, particularly the larger executive departments, it should be noted that two agencies have already adopted a similar approach. The Civil Aeronautics Board compiled and made available a master list of records issued with its regulations governing its practices under the Freedom of Information Act,¹⁵⁸ and the Federal Communications Commission also set forth in its regulations a detailed list of the kinds of material available from it.¹⁵⁹ Despite the accomplishments of these two agencies, most agencies would require an additional allocation of resources, both manpower and financial, which only Congress is in a position to authorize. The degree of detailed classification of documents for purposes of the index would necessarily be expected to vary from one agency to another, and less detail should be expected in the larger executive departments such as Health, Education and Welfare, or Defense.

Several benefits would be achieved by adoption of such an indexing system. Of greatest importance is that the party requesting access to documents under the Act could readily determine whether and which agency documents exist to fulfill his need, and the master index would permit him to frame a very specific request. As a result, agencies would no longer be faced with the need for searching out documents to fulfill a vague request, nor would they be able to deny the request on grounds of unidentifiability. This knowledge on the part of the requesting party should serve to equate more nearly the positions of the adversaries in any court action found necessary. Another significant benefit could be achieved under the indexing proposal by requiring that, in addition to a notation of whether the documents are exempt or non-exempt, upon initial classification by agency staff all agency claims of exemption must be supported by a detailed written explanation. Under the present scheme, agency staff find it much easier to deny access generally for all documents requested. By requiring at the time of initial classification a written explanation of the reasons believed to sup-

¹⁵⁶ See, e.g., Giannella, *Agency Procedures Implementing the Freedom of Information Act: A Proposal for Uniform Regulations*, 23 AD. L. REV. 217 (1971); Koch, *The Freedom of Information Act: Suggestions for Making Information Available to the Public*, 32 MD. L. REV. 189 (1972).

¹⁵⁷ See, e.g., *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973); *Irons v. Schuyler*, 321 F. Supp. 628 (D.D.C. 1970).

¹⁵⁸ 14 C.F.R. pt. 185, at 597 (1973).

¹⁵⁹ 47 C.F.R. § 0.455 (1973).

port a claimed exemption, all incentives would lie in the direction of assigning a non-exempt status, since no explanation for non-exempt documents would be necessary. It is believed an allocation of resources to ensure agency ability to implement and continue this systematic indexing would be considered by taxpayers in general as resources well-utilized.

The second proposal for revision of the Act to achieve the goal of a true public information system is directed specifically at the fifth exemption and would relieve agencies of much of the burden which might be thought to exist under an indexing requirement. This proposal is to retain an exemption from disclosure for all internal memoranda, but only while they are still pertinent to a decision or policy statement at which the agency is attempting to arrive.¹⁶⁰ All internal memoranda, whether they contain factual or policy material, would be protected for a limited period of time only. Once the related decision had been reached on the policy statement or the interpretation had been adopted by the agency, thereby becoming part of the agency's working law, all documentation created in the process of arriving at that agency position would be subject to required indexing for subsequent disclosure in full. Since no exception for materials reflecting deliberate processes would be made, there would no longer be any need for the fact-policy limitation on the fifth exemption. The discovery limitation would similarly be unnecessary since all documentation would be subject to disclosure, regardless of discoverability, when it no longer related to a currently pending matter.

Though this time frame reference would alleviate the problems created by the present limiting tests imposed on the fifth exemption, it might be thought that it would receive minimal support in Congress, and even if adopted, unwilling implementation by the agencies. However, there has recently been a growing recognition among commentators and government officials that little harm could actually result from disclosing internal memoranda once they are no longer relevant to the decision making process.¹⁶¹ As an attorney with the General Counsel's Office in the Federal Trade Commission has concluded: "The problems of bureaucrats operating in a 'fish bowl' are overstated."¹⁶² The exemption's purpose of encouraging uninhibited discussion within the Government is fulfilled while any harm from publicity can occur. Once the agency arrives at a final position, no staff member whose proposals and related reasoning were disclosed would suffer any significant adverse effects since his product would be recognized for just what it was intended to be—a proposal and supportive reasoning for suggested action. Any criticism of the position adopted would be directed at the agency which finally determined the choice between various proposed courses of action. Further, any public employee must expect this work product to be examined not only by his immediate superior, but also

¹⁶⁰ See Koch, *supra* note 156, at 209, 213, where the author notes that several cases, such as *Bristol-Myers*, have developed a similar test under exemption 7, and indicates the possibility of applying an analogous approach under the fifth exemption.

¹⁶¹ See, e.g., Katz, *supra* note 7, at 1275-77.

¹⁶² Koch, *supra* note 156, at 215.

by his ultimate employer, the general public, no matter how remotely removed from employment authority the public may actually be.

On a more realistic and immediate level, it is believed that the critical evaluation of the agency staff employee's work product comes at the point of his immediate superior's review, and that rarely would adverse effects upon the staff employee's future ambitions in Government be caused by public perusal of his memoranda. If disparagement of a staff employee were regarded as a serious possibility, little would be lost in terms of informing the electorate by deleting the author's name from the memorandum.

Such a revision of the fifth exemption should drastically reduce the burden presently placed on agency staff by the requirement of distinguishing between factual material and policy material. Even assuming the distinction is capable of being made by the agency's staff, it requires such an inordinately large amount of time and personnel, not to mention financial resources, that it must be viewed as an extremely impractical and wasteful allocation of government resources. Probably the greatest benefit to be received from adoption of this proposal to extend the fifth exemption's coverage only to currently pertinent internal memoranda, as well as from adoption of the indexing requirement, is the almost certain significant reduction in the number of court actions necessary to enforce required disclosure. Not only does a court action necessarily delay any desired disclosure, but also when the time and money involved in such an action are weighed against the benefits likely to result, abandonment of the claim to a right of disclosure is often the only course open for many members of the public. The belief expressed that the number of court actions would be reduced is founded on the fact that removal of the fifth exemption as a defense to disclosure after the current status of memoranda has ceased to exist removes one of the most frequently cited reasons for nondisclosure at the administrative level. Further, the requirement of indexing all documents and explaining in writing the reasons for assigning an exempt status to any should serve as a sufficient incentive to work a significant change in agency attitudes toward disclosure.

V. CONCLUSION

The Freedom of Information Act was a much needed legislative reform to aid in opening up government information. The individuals responsible for its drafting and ultimate enactment are to be commended for the ideals they sought to attain through it. However, the experience gained through agency practices and court decisions under the Act has shown that the commendable ideal it represents is incapable of realization under the Act's present scheme due to the practical difficulties of implementation. The fifth exemption particularly has been prone to defeat any attempt at achieving easy accessibility to and wide availability of government information due to its imprecise and impractical limitations. The proposals suggested are offered as a means of overcoming the practical difficulties experienced in interpreting and implementing the Act, and would require relatively minor

revisions in the scheme of the Act while retaining its present framework. Though adoption of the proposals may require an additional allocation of resources to the agencies, the extent of the allocation necessary should be relatively minimal when the savings achieved from abolishing the present impractical and ineffective use of resources under the Act are considered. Congress has erected a theoretically sound framework for achieving the goal of ensuring "the availability of Government information necessary to an informed electorate,"¹⁶³ and it is now time for it to complete that framework and expand it in a practical manner toward maximizing openness of government information.

¹⁶³ H.R. REP. NO. 1497, at 12.