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THE FREEDOM OF INFORMATION ACT IN MILITARY AIRCRASH CASES¹

RICHARD H. JONES*
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INTRODUCTION

WHENEVER an Air Force plane crashes, two independent investigations are conducted simultaneously. The first, called the Collateral Investigation,⁷ is conducted by an officer who takes testimony, examines evidence, including the wreckage of the crash, and obtains laboratory analysis of any parts suspected of being defective. He then reaches conclusions respecting the cause of the accident. The results of this investigation are used as a basis for disciplinary action or court suits and are available as a matter of course under pretrial discovery procedure.⁸ The second investigation, called the Safety Investigation,⁴ is conducted by a board of officers who prepare a report as part of the Air Force safety program. The report and all evidence, including witness testimony, received by the investigatory board is used solely within the Air Force and only for the purposes of the Department's safety program.⁵ In order to obtain maximum cooperation,

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¹ The discussion in this article is focused upon Air Force plane crashes and Department of Air Force Regulations. The Departments of the Army and the Navy have similar regulations, and the same issues are raised in any military aircraft crash. See Cooper v. Department of the Navy, 396 F. Supp. 1040 (M.D. La. 1975), and McFadden v. Avco Corp., 278 F. Supp. 57 (M.D. Ala. 1967) (Army aircraft crash).

² This investigation is conducted in accordance with Air Force Regulation (hereinafter A.F.R.) 110-14.


⁴ A.F.R. 127-4.

⁵ Id., at § 19.
witnesses are promised that any statements they make will not be used in disciplinary action, civil or criminal actions, or for any purpose other than the safety program. Thus, a representative of the manufacturer can testify freely without fear of leaving his employer open to future civil liability.

The information revealed in these reports is unique. Only the government has the resources and the opportunity to conduct this type of investigation. By the time the plaintiff's attorney becomes involved in the case, often several months or years later, many of the facts contained in the reports are available nowhere else. The crash site has been cleaned up and any defective parts analyzed and disposed of. Witnesses have been dispersed, and if they can be located and deposed, their memory may have become faulty. The testimonies of witnesses given immediately following the accident represent "unique catalysts in the search for the truth."

The Freedom of Information Act provided a means by which a plaintiff's attorney could attempt to obtain the report of the Safety Investigation independent of pretrial discovery. Five recent federal cases have involved military aircraft accidents in which plaintiffs have used the Act to try to obtain this report. They have met with varying degrees of success, and the information withheld has been exempted from the disclosure requirements of the Act for a variety of reasons. This article will discuss the availability of the report under the Act, with a criticism of these recent court decisions.

The Freedom of Information Act

The Freedom of Information Act was enacted as part of an effort to make government documents more easily available to the

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7 5 U.S.C. § 552 (1970). This reasoning has often been found to be sufficient to overcome the immunity from discovery accorded to an attorney's work product.


The Act requires federal agencies to make identifiable records kept by an agency available to any person. Although there are nine exceptions to the disclosure requirement, several observations lead to the conclusion that they should be

11 5 U.S.C. § 552(a)(3) (1970). In addition, § 552(a)(1) of the Act requires a federal agency to publish four classifications of documents and amendments thereto in the Federal Register. Section (a)(2) requires each agency to make available to the public (A) final options; (B) policy statements and interpretations adopted by the agency and not published in the Federal Register; and (C) staff manuals. The primary purpose of these sections is to prevent an accumulation of secret law, affecting the public, to which the public has no access.
(b) This section does not apply to matters that are—
(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
(2) related solely to the internal personnel rules and practices of an agency;
(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;
(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
(9) geological and geophysical information and data, including maps, concerning wells.
narrowly construed. First, the general policy of the Act is to require disclosure. The exemptions defined in the Act are meant to be approached as exceptions to the general rule. As the Supreme Court noted in *Environmental Protection Agency v. Mink*,

It [the Freedom of Information Act] seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.

Secondly, the Act requires disclosure to "any person." The Freedom of Information Act eliminated "the 'properly and directly concerned' test of who shall have access to public records, stating that the great majority of records shall be available to 'any person'." There should be no balancing of the need of the person seeking access to the information against the requirements of government secrecy. The Act provides for disclosure to the public, not to the individual, and thus "any person" may obtain the information. Thirdly, the Act requires disclosure in all cases except where information is specifically exempted. The conclusion to

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In order to provide some teeth to the requirement of disclosure, the government has been given the burden of proving that the documents requested are within the protection of one of the specific exemptions. Campbell v. Civil Service Commission, 539 F.2d 58 (10th Cir. 1976).


A necessary corollary to this principle is that the right to obtain government documents is neither enhanced nor diminished by one's status or need for the information. The right belongs to the public and any member of the public may enforce the right. Deering Milliken, Inc. v. Irving, 548 F.2d 1131 (4th Cir. 1977); The Committee on Masonic Homes of the R.W. Grand Lodge v. NLRB, 414 F. Supp. 426 (E.D. Pa. 1976).

17 5 U.S.C. § 552(c) (1970): "This section [the entire Act] does not authorize withholding of information or limit the availability of records to the public, except as specifically stated . . . ." (Emphasis supplied.) Professor Davis has read this subsection to mean that a narrow interpretation should be given to each specific exemption; "The pull of the word 'specifically' is toward emphasis on statutory language and away from all else" such as implied meanings, legislative history or judicial legislation. Davis, *supra* note 16, at 783. The military has not interpreted § 552(c) in the same way. See Adams, *The Freedom of Information Act and Pretrial Discovery*, 43 MIL. L. REV. 1, 8-9 (1969):
be drawn from these three observations is that the exemptions are to be construed narrowly and the decision should always tilt in favor of disclosure in close cases."

Exemption Four of the Freedom of Information Act exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." There are two phrases in Exemption Four which present particular problems with respect to military air crash cases. The first is "commercial or financial," and the second, "from a person." The safety investigation report can only be exempted from disclosure by Exemption Four if it constitutes commercial or financial information received from a person outside the government.

A major controversy over Exemption Four, and the issue involved in many of the cases interpreting this exemption, is over the type of information protected. In Barceloneta Shoe Corporation v. Compton, one of the earliest cases construing the Freedom of Information Act, the plaintiff sought access to statements made by witnesses to investigators of the National Labor Relations Board who were investigating alleged violations of the Labor Management Relations Act. The court found that the witness statements were exempt from disclosure under Exemption Four without addressing the apparent lack of commercial or financial information. The fact that the statements were given in confidence was enough to preclude disclosure. This is also the position taken by the Air Force in suits brought under the Freedom of Information

The proper interpretation of subsection (f) [5 U.S.C. § 552(c)] and the legislative history referred to would seem to be that this subsection does have independent significance but not that attributed to it by Professor Davis. The writer suggests that subsection (f) is telling the executive and legislative branches that if they wish to withhold a record they must be able to fit the record within one of the exemptions created by Congress. No new exemptions are to be created. . . . Subsection (f) should not, however, be interpreted, as suggested by Professor Davis, as prohibiting the broad interpretation of a particular exemption found in (e) [5 U.S.C. § 552(b)] to produce a sound result in a particular case.

20 271 F. Supp. 591 (D.P.R. 1967). The case was decided July 31, 1967, just 27 days after the Act became effective.
Act. In an article written by Major James W. Johnson of the staff of the Judge Advocate General of the United States Air Force for the purpose of providing "assistance to custodians of Air Force records charged with the responsibility of responding to requests for information [under the Act]," the author concluded that Exemption Four applies to all statements given during the course of a safety investigation.

The view that Exemption Four applies to any confidential information finds support in both the House and Senate reports on the bill. The House Report concluded that Exemption Four would exempt information subject to the doctor-patient or lawyer-client privileges. This type of information is not necessarily commercial or financial in nature. The House Report went on to state that Exemption Four "would also include information which is given to an agency in confidence, since a citizen must be able to confide in his government," without any reference to the words "commercial or financial" in the statute. Similarly, the Senate Report generally ignored these same words. Professor Kenneth Davis of the University of Chicago Law School has pointed out that this apparent discrepancy is explained by the fact that both reports were based on an early version of the bill and the words "commercial or financial" were added to the statute, prior to enactment, but after the reports were written. Although he wishes the law were otherwise, Professor Davis concluded that "even a minimum degree of integrity in statutory interpretation" requires that Exemption Four be read as not exempting non-commercial and non-financial information from disclosure.

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See Brockway v. Department of the Air Force, 518 F.2d 1184 (8th Cir. 1975).


Id. at 55.


Id.


Id. at 7991. Davis believes, as does the executive branch, that any information given to the government by a citizen in confidence should be protected. In Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1970), the court noted that the NLRB had recommended to Congress that the words "commercial or financial" not be included in Exemption Four. The court refused to read these words out
considered the question have found that Exemption Four applies only to commercial or financial information.\textsuperscript{20}

The second issue involved in considering the scope of Exemption Four is the meaning of the phrase, "from a person." The purpose of Exemption Four is to enable a citizen to provide certain categories of information to his government in confidence with an assurance that information so provided will remain confidential. In \textit{Soucie v. David},\textsuperscript{39} the plaintiffs brought an action to compel the Director of the Office of Science and Technology (OST) to disclose a report prepared by the OST concerning the development of a supersonic transport. The district court held that the report was a presidential document and therefore exempt from disclosure. The court of appeals reversed, finding that the OST was an agency for purposes of the Freedom of Information Act. In providing guidelines to the district court to enable it to determine if the information sought was within Exemption Four, the court said: "This exemption is intended to encourage individuals to provide certain kinds of confidential information to the Government and it must be read narrowly in accordance with that purpose."\textsuperscript{33} The


The courts have found all of the following types of information to be commercial or financial information: sales and profit data, Sterling Drug, Inc. v. FTC, 450 F.2d 698 (D.C. Cir. 1971); sales statistics, inventories, expenses, profits, gross receipts, and liabilities, National Parks & Conservation Ass'n v. Morton, 351 F. Supp. 404 (D.D.C. 1972), rev'd on other grounds, 498 F.2d 765 (D.C. Cir. 1974).

National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974) contains an excellent discussion of what type of information is commercial or financial. Among the categories of information considered to be commercial or financial is information collected by the Bureau of Labor Statistics, information provided on Small Business Administration loan applications, information volunteered for purposes of market news services and labor and wage statistics, and information supplied to a lender by a borrower. \textit{Id.}

\textsuperscript{31} 448 F.2d 1067 (D.C. Cir. 1971).

\textsuperscript{32} \textit{Id.} at 1078.
court continued: "The exemption for confidential information is available only with respect to information received from sources outside the Government." This same reasoning was applied in *Fisher v. Renegotiation Board*. There the court found that an analysis of the amount of excess profits realized by a government contractor is information prepared within the government, not obtained from a person outside the government, and thus not exempt from disclosure by Exemption Four.

Major Johnson, after acknowledging that the courts have construed Exemption Four to include only information obtained from outside the government, concluded that such an interpretation would be disastrous to the Air Force's flight safety program, because it would mean that statements made by Air Force personnel during the investigation would not be exempt under Exemption Four. "It is the Air Force position that the statements of all witnesses and contracts evaluations provided to aircraft accident boards are confidential." This position runs contrary to the plain language of the statute, the legislative history, and the interpretation given this section by the courts.

Exemption Five to the Freedom of Information Act exempts "inter-agency or intra-agency memoranda or letters which would not be available by law to a party . . . in litigation with the agency." Simply stated, this exemption allows an agency to exempt from disclosure under the Act documents not available under the federal rules which govern pretrial discovery. It would be nonsensical to require the government to disclose information to "any person" which it need not disclose to a litigant who has demonstrated a need for the information. Thus, the disclosure requirements of the Act are no broader than the discovery rules, and the

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33 Id. at 1079 n.47.
36 Johnson, supra note 23, at 58, 59.
Act is subject to change as the scope of discovery is broadened or narrowed by judicial decision or revision of the rules.

In *Environmental Protection Agency v. Mink*, the Supreme Court was faced with a claim by the EPA that certain documents were within the purview of Exemption Five. Upon discovering that the President had ordered a report pertaining to an underground atomic explosion in Alaska, Congresswoman Patsy Mink and thirty-two of her fellow representatives sought disclosure of the report. When the government refused to disclose it, Mink and her colleagues brought an action under the Freedom of Information Act to compel disclosure of the report. The court reasoned that governmental documents not involving national security information are generally discoverable under the Federal Rules of Civil Procedure, and thus not exempted by Exemption Five, unless the documents are subject to executive privilege. The court relied heavily upon the decision rendered by Mr. Justice Reed, sitting by designation on the Court of Claims, in defining the scope of executive privilege. The purpose of executive privilege, as viewed by Justice Reed, is to protect the policy-making and deliberative functions of government and to insure honest and open discussion of ideas within the Executive Branch without fear of public disclosure. The Supreme Court therefore drew a line between "memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda," and the opinions and recommendations of agency staffs on policy or legal matters, and concluded that only the latter is exempted from disclosure by Exemption Five. Of particular interest in the context of military aircrash cases is the court's conclusion that, "Virtually all of the courts that have thus far applied Exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other." The determining factor in the decision whether to exempt a

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42 Id.
43 Id. at 89.
given document or record from disclosure under Exemption Five is its place in the policy-making process of the government. The Court of Appeals for the District of Columbia Circuit emphasized this point in *Vaughn v. Rosen*:

[W]e note initially that it is not enough to assert in the context of Exemption 5, that a document is used by a decision maker in the determination of policy. . . . [T]he document must be a direct part in the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters."

Thus, there are opinions which play no direct part in policy making and are, therefore, subject to disclosure under the Act. One such circumstance involves the opinions of real estate appraisers concerning the value of property. Two courts have held that such opinions are not exempt from disclosure under Exemption Five.

Another circumstance in which an opinion was not exempt from disclosure by Exemption Five was involved in *Moore-McCormack Lines v. I.T.O. Corp. of Baltimore.* In that case, a longshoreman was injured while unloading a ship. The shipowner settled the claim against itself and then brought an action for indemnity against the stevedore. The district court ruled that a part of the Department of Labor accident investigation report containing the investigator's conclusions as to the cause of the accident was exempt from disclosure by Exemption Five. Relying primarily on *Mink,* the Court of Appeals for the Fourth Circuit reversed the district court and held that the opinions and conclusions of the investigating officer were not exempt from disclosure: "Inferences about the cause of an accident drawn from facts revealed by the investigation, though labeled as opinions or conclusions, are not exempt under the guise of deliberative or policy making material."

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46 508 F.2d 945 (4th Cir. 1974).


48 508 F.2d 945, 949 (4th Cir. 1974).
Two other exemptions should be mentioned before the military aircrash cases can be discussed. Exemption One\textsuperscript{49} exempts from disclosure material classified in the interests of national defense. While the Air Force may argue that the flight safety program depends on the confidentiality promised to the witnesses,\textsuperscript{50} the government does not claim that the safety investigation reports involve national security information. Only when the aircraft had been carrying sensitive or classified information has the issue of national security been raised,\textsuperscript{51} and Exemption One has not been raised as a defense in any of the military aircrash cases brought to date.

Similarly, Exemption Three is generally not involved in military aircrash cases. Exemption Three exempts from disclosure material which is specifically exempted by another statute.\textsuperscript{52} There is no federal statute which exempts the report of the safety investigation from disclosure or authorizes the Secretary of the Air Force to exempt it. In \textit{Administrator, Federal Aviation Administration v. Robertson},\textsuperscript{53} the Supreme Court held that a statute which exempted information from disclosure or gave an administrative official discretion to exempt the material from disclosure would satisfy the requirements of Exemption Three. Authority for promulgation of Air Force Regulations is found in two general enabling acts.\textsuperscript{54} The safety report is not "specifically exempted from

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\textsuperscript{51}See United States v. Reynolds, 345 U.S. 1 (1953).


\textsuperscript{53}422 U.S. 255 (1975). \textit{Accord}, Kruh v. GSA, 421 F. Supp. 965 (E.D.N.Y. 1976). Following \textit{Robertson} Congress amended Section 552(b)(3) to allow an agency to withhold information only if the statute (A) gives the official no discretion or (B) provides specific criteria for the exercise of discretion in withholding the information. 5 U.S.C. § 552(b)(3) (1976).

\textsuperscript{54}5 U.S.C. § 301 (1970), known as the Housekeeping statute, allows the head of an executive or military department to prescribe regulations. Prior to 1958, this section was used by department heads as authority for withholding information. In that year, the statute was amended adding the following language: "This section does not authorize withholding information from the public or limiting availability of records to the public."

10 U.S.C. § 8101(f) (1970) reads: "The secretary [of the Air Force] may prescribe regulations to carry out his functions, powers and duties under this title." This statute neither exempts the safety report from disclosure nor gives
disclosure by either statute, and thus Exemption Three does not apply to the military aircrash cases either.

MILITARY AIRCRASH CASES

There have been five recent cases which have construed the Freedom of Information Act in the context of military aircrash cases. With one exception, the cases are not in accord with the case law decided under Exemption Four and Five as outlined above.

The leading Freedom of Information Act case involving a military aircrash is Brockway v. Department of the Air Force. Lieutenant David L. Brockway, Jr. was killed when his aircraft crashed near England Air Base, Louisiana. The father of the decedent brought an action seeking to ascertain the facts surrounding his son's death. Specifically, the plaintiff sought the investigation conducted by the manufacturer, Cessna Aircraft Corporation, and the Air Force Safety Investigation Report, including the witness testimony. The district court, after an in camera inspection, held that the Cessna report was exempt from disclosure under the trade secret exemption. The witness statements, however, were not exempt as trade secrets, because they were obtained from persons within the government, nor as intra-agency memoranda, because they would be discoverable by a party in litigation with the agency.

59 U.S.C. § 552(b)(3) (1970). Congress has specifically exempted investigations of accidents involving civil airplane accidents conducted by the National Transportation Safety Board, 49 U.S.C. § 441(e) (1970), and reports of railroad accidents submitted to, and conducted by, the Secretary of Transportation, 45 U.S.C. § 41 (1970), from use in suits for damages arising out of the accidents. Congress has provided no such privileges for Air Force Safety Investigations.

The safety investigation report is exempted from disclosure by the terms of A.F.R. 127-4. Agency regulations have been held not sufficient to bring government documents within the terms of Exemption Three. Freuhauf Corp. v. Internal Revenue Service, 522 F.2d 284 (6th Cir. 1975); Mobil Oil Co. v. FTC, 406 F. Supp. 305 (S.D.N.Y. 1976).


58 Id. at 741. The court construed the phrase "from a person" in Exemption Four to include only material received from persons outside the government. See Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971). See also text accompanying notes 30 through 35 supra.

59 370 F. Supp. at 741.
The Air Force appealed the ruling of the district court requiring disclosure of the witness statements. The Court of Appeals for the Eighth Circuit affirmed the district court's holding that the witness statements were not exempt from disclosure under Exemption Four, basing its decision on the lack of commercial or financial information rather than on the origin of the reports within the government. The court of appeals reversed the district court as to the question of the intra-agency memoranda privilege, however. The court focused on three areas for support in reaching its conclusion that the witness statements were exempt from the requirement of disclosure. First, the court argued that while the majority of courts which have considered the intra-agency exemption have relied on the Senate Report, the language of the House Report is broader. As support for making this distinction and for relying on the slightly broader language of the House Report, the court cited an administrative law treatise, published in 1970:

The exemption clearly serves that purpose [of protecting policy and agency memoranda], but the implication that the exemption does not go beyond that is unsound. It clearly reaches memoranda or letters which have nothing to do with the process of arriving at positions.

In reaching the conclusion that non-policy matters are exempt as intra-agency memoranda, the court ignored at least two Supreme Court decisions which clearly so limit the exemption. In *National Labor Relations Board v. Sears Roebuck & Co.*, the Court noted that "the cases uniformly rest the privilege on the policy of protecting 'decision making processes of government agencies.'" *Environmental Protection Agency v. Mink* also clearly drew the line between those documents which are part of the policy-making process and those which are not. Thus, while the Davis treatise may

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63 421 U.S. 132 (1975). This case was decided approximately six weeks prior to the decision of the Eighth Circuit in Brockway v. Department of the Air Force.
64 Id. at 150.
66 See text accompanying notes 38-43 supra, for the discussion of EPA v. Mink.
have reached a perfectly valid conclusion based on the state of the law in 1970, subsequent Supreme Court decisions have rendered it erroneous and outdated. The court in Brockway should not have placed such reliance on this treatise and on a slight difference in wording between the House and Senate Reports.

As a second basis for reversing the district court in Brockway, the Eighth Circuit relied on Machin v. Zuckert\textsuperscript{67} for the proposition that the witness statements contained in the Air Force investigation reports are generally not available in pretrial discovery under the Federal Rules of Civil Procedure. While the court in Machin withheld most of the safety investigation report from the plaintiff, it ordered disclosure of the statements of several witnesses who testified before the Investigation Board, namely the Air Force mechanics who examined the wreckage.\textsuperscript{68} In a supplemental order, the court in Machin made clear that the testimony of the mechanics to be disclosed included any opinions or the conclusions they had reached concerning the cause of the accident.\textsuperscript{69} The court in Brockway relied on Machin as authority for withholding the witness testimony without even mentioning the fact that some of the witness testimony was disclosed in Machin.\textsuperscript{70}

As the third basis for its decision, the court in Brockway relied on the purposes and goals of the Freedom of Information Act. The court saw the purpose of the Act as twofold, "(1) the dissemination of useful information to the public . . . and (2) the protection from inhibition of the free flow of information and free discussion within the agency."\textsuperscript{71} The second purpose, and the one which the court found to be thwarted by disclosure, is simply a rephrasing of the court's initial premise, that Exemption Five is broader than a mere exemption of policy-making memoranda. This interpretation is simply not in accordance with recent Supreme

\textsuperscript{68} Id. at 341.
\textsuperscript{69} Id.
\textsuperscript{71} 518 F.2d at 1193.
Court interpretations of Exemption Five.\textsuperscript{72}

\textit{Babbitt v. Department of the Air Force}\textsuperscript{73} is the second of the recent Freedom of Information Act cases dealing with military aircraft crash cases. In this case, the district court reversed its earlier decision\textsuperscript{74} ordering disclosure of the witness statements and held that the witness statements were exempt from disclosure by virtue of Exemption Five. The court relied heavily on \textit{Brockway v. Department of the Air Force}\textsuperscript{75} in concluding that the witness statements and the safety report were part of the deliberative process. As previously discussed, this conclusion is not in accordance with other decisional law under the Act.

In \textit{Theriault v. United States},\textsuperscript{76} the district court had ordered the government to produce the Air Force Accident Investigation Report for inspection and copying. The government appealed, and the Court of Appeals for the Ninth Circuit reversed and remanded the case to the district court because that court had failed to conduct a de novo hearing as required by the Act.\textsuperscript{77} In so doing, the court of appeals provided guidelines to the district court which stated that traditional equity principles should be considered in determining whether material is exempt under the Act:

\begin{itemize}
  \item The Court of Appeals for the District of Columbia Circuit has recently construed Exemption Five narrowly, limiting it to policy-making memoranda. Relying on the principles enunciated in the two Supreme Court cases ignored by the Eighth Circuit in \textit{Brockway}, NLRB v. Sears, Roebuck & Co., and EPA v. Mink, the court concluded,
  \begin{itemize}
    \item [T]o come within the privilege and thus within Exemption 5, the documents must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. Put another way, pre-decisional materials are not exempt merely because they are pre-decisional; they must also be a part of the agency give-and-take—of the deliberative process—by which the decision itself is made.
  \end{itemize}
  \item 518 F.2d 1184 (8th Cir. 1975).
  \item 503 F.2d 390 (9th Cir. 1974).
\end{itemize}
We realize that a given agency might fail to show a specific exemption protecting a given record and yet in good faith claim that dire adverse potentialities will occur and result from a disclosure of a given record.

The main spring of the proceedings under the Act is a judicious weighing of the complainant's need for and entitlement to production as against the government's or another's right to protection.78

On remand, the district court, employing equity principles and a balancing of interests, held that the entire report, including the witness statements, was exempt,79 without any consideration of the requirement that they must be commercial or financial information,80 and held that the Safety Investigation Report was exempt as an intra-agency document.81

Despite the language of the court of appeals and the holding of the district court, the exercise of the equity powers of the court in a suit under the Act, resulting in the withholding of information not specifically exempted, is prohibited by the terms of the Act. "This section [the entire Act] does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section." The Supreme Court has summarized the exemptions as follows:

Subsection (b) of the Act creates nine exemptions from compelled disclosures. These exemptions are explicitly made exclusive, 5 U.S.C. § 552(c), and are plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed.83

78 503 F.2d at 392 (citations omitted).
81 As previously noted, Barceloneta Shoe stands alone for the proposition that non-commercial information may be exempt under the Trade Secret exemption. The district court in Brockway specifically held that witness statements are not exempt under Exemption Four, and the court of appeals affirmed that ruling precisely because the information was not commercial or financial in nature. In Machin, a case not decided under the Freedom of Information Act, the court allowed discovery of some of the witness statements. Reynolds deals with national defense information and executive privilege and thus has nothing to do with the trade secret privilege under the Act.
82 See text accompanying notes 59-72 supra, concerning the applicability of Exemption Five to this report.
The balancing of interests between the need of the public for disclosure and the requirements of governmental secrecy has been done by Congress, and the courts ought not to repeat the process. As the Court of Appeals for the Fourth Circuit has concluded:

After considering voluminous testimony on both sides and balancing the public, private, and administrative interests, Congress decided that the best course was open access to the governmental process with a very few exceptions. It is not the province of the courts to restrict that legislative judgment under the guise of judicially balancing the same interests that Congress has considered.

There are two recent federal district court cases construing the Freedom of Information Act in the context of military aircraft accidents. In Kreindler v. Department of the Navy, the court ruled that the witness statements were not exempt under any of the exemptions and that the only portions of the Safety Investigation Report exempt from disclosure were those which contained “expert opinions, recommendations, or discussions of policy.” This decision is in accordance with the non-military aircraft cases construing the Act, insofar as the expert opinions and recommendations deal with policy matters rather than opinions concerning investigative facts.

Finally, in Cooper v. Department of the Navy, the court held that the entire Safety Report was exempt under the Act. Unfortunately, the court did not deal with any of the problems heretofore discussed. Specifically, the court did not consider whether the report was “commercial or financial information” as that phrase has been construed by the courts, or whether any of the material represented policy-making deliberative memoranda. The court did not cite a single case in its opinion and did not even specify which exemption it was using as authority for exempting the material from disclosure.

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84 See S. Rep. No. 813, supra note 60, at 3.
87 Id. at 334.
CONCLUSION

The Safety Investigation Report can be conveniently divided into two parts for a proper analysis under the Freedom of Information Act. First, there is the report of the investigators, including any conclusions they might have reached. This document originates within the government and therefore is not within the terms of Exemption Four. Furthermore, the report does not contain "commercial or financial information" in the sense in which that phrase has been construed under the Act. When considered in terms of Exemption Five the report fares no better. The factual portions of the report are clearly not exempt from disclosure, and the conclusions reached by the investigators are generally "inferences drawn from facts revealed by the investigation" and not recommendations concerning Department of Air Force policy.

The other section of the report that is of interest is the testimony of the witnesses given to the investigator. These witnesses can be divided into two groups for analysis. The first group is witnesses employed by the government. This group would include the experts who examined the wreckage and any survivors among the crew members. This testimony suffers from the same infirmities as the report of the investigators discussed above. Simply stated, it is non-commercial, non-financial information which originates within the government and which does not deal with agency policy. Thus it is not exempt under either Exemptions Four or Five. Testimony given by non-government employed witnesses has a greater claim to exemption from disclosure under the Trade Secret Exemption, being information received by the government from a citizen.

89 5 U.S.C. § 552(b)(4) (1970). "This section does not apply to matters that are trade secrets and commercial or financial information obtained from a person and privileged or confidential."


90 See text accompanying note 28 supra.
93 To the extent that these reports do contain genuine policy recommendations, the attorney for the prospective plaintiff in a personal injury or wrongful death action is probably not concerned with it. His immediate interest is in the facts of the accident and the conclusions of the investigator concerning the cause of the accident in which his client was injured.
in confidence. However, as this information will generally fail to be commercial or financial information as that phrase has been construed, it will not be exempt.

One can only speculate as to the reason for this discrepancy between the decisional law under the Act in military air crash cases on the one hand and in other types of cases on the other. As yet no United States Supreme Court case has resolved this conflict. Almost as important, there has been no decision by the Court of Appeals for the District of Columbia Circuit on the issue. The District of Columbia Circuit has produced many of the key decisions under the Act\(^6\) and a decision from that court would, it is submitted, go a long way toward bringing the military air crash cases into line with other decisions under the Act.\(^6\)