WACHTELL, LIPTON, ROSEN & KATZ

September 28, 1976

To Our Clients

Attached herewith is a memorandum prepared by Herb Wachtell, Peter Hein and Ronald Neumann with respect to protecting information filed with government agencies. This has become an extremely important problem for all major businesses. The new Freedom of Information acts and Sunshine laws can, if proper precautions are not taken, result in unwarranted disclosure of important business secrets to competitors and others who have no right to the information. It is recommended that internal procedures for protecting against these dangers be reviewed in light of this memorandum.

M. Lipton

76-0044

PROTECTING INFORMATION FILED WITH GOVERNMENT AGENCIES FROM DISCLOSURE TO THIRD PARTIES

By Herbert M. Wachtell

Table of Contents

Page

I. INTRODUCTION 1

II. GENERAL REVIEW OF THE FREEDOM OF INFORMATION ACT ("FOIA") AND THE SECTION 552(b) EXEMPTIONS 3

A. Subsection 552(a) 3

B. Subsection 552(b) Exemptions 4

C. Do the Subsection 552(b) Exemptions Prohibit Disclosure? 5

1. The Mandatory Approach 6

2. The Permissive Approach 7

3. Recognizing the Distinction Between Agency-Generated and Privately-Generated Information 8

D. No Corporate Right of Privacy 11

III. SUBSTANTIVE FOIA ISSUES WHICH COMMONLY ARISE IN THE REVERSE-FOIA CONTEXT 11

A. Subsection 552(b)(3) Exemption: Matters Specifically Exempted From Disclosure By Statute 11

B. Subsection 552(b)(4) Exemption: Trade Secrets and Confidential Commercial and Financial Information 23

Page

C. Subsection 552(b)(6) Exemption: Personnel and Medical Files and Similar Files 26

D. Subsection 552(b)(7) Exemption: Investigatory Records 28

IV. STEPS TO BE TAKEN PRIOR TO, OR CONTEMPORANEOUS WITH, FILING WITH THE GOVERNMENT IN ORDER TO GUARD AGAINST DISCLOSURE TO THIRD PARTIES 31

A. Attempt to Establish Confidential Nature of the Material Filed 31

B. Request Determination That the Material Filed Is Not Subject to Disclosure 33

C. Request, Pursuant To FOIA, For Disclosure of All FOIA Requests For Data Filed By the Filer 36

D. When Filer Can Influence Format Of Information Filed, Filer Should Consider The Effect Of The Format On Its Claim For Exemption 36

E. Secure a Promise by the Agency to Return the Information 37

V. PROCEDURAL ASPECTS OF REVERSE-FOIA LITIGATION 38

A. General 38

B. Administrative Determination of a Filer's Claim of Exemption 39

1. Temporary Relief Barring Disclosure Pending an Administrative Determination 39

Page

2. Administrative Procedures Applicable to Requestors and Filers 41

   2.1 Office of Federal Contract Compliance Programs ("OFCCP") Regulations 41

   2.2 Environmental Protection Agency Regulations 44

3. The Administrative Procedure For Determining a Filer's Claim of Exemption 48

   a. Is an evidentiary hearing required? 48

   b. The Filer's submission to the agency 50

   c. Confidentiality of materials submitted to the agency 52

4. Finality of Administrative Decisions 53

   a. Successive requests for the same documents 53

   b. Submission of the same information by successive Filers 57

C. Judicial Review 58

   1. Temporary Relief 58

   2. Standing 60

   3. Sovereign Immunity 61

   4. Problems Which Arise When the Filer and One or More Requestors Attempt To Litigate In Different Forums 63

      4.1 General 63

Page

4.2 Personal Jurisdiction and Venue 65

a. FOIA suits 65

b. Reverse-FOIA suits 66

4.3 Should the Filer's or the Requestor's Choice of Forum Be Favored 70

a. Policy considerations supporting the Requestor's choice 71

b. Policy considerations supporting the Filer's choice 73

4.4 Subject Matter Jurisdiction: Is there A Case Or Controversy? 75

4.5 Tri-party Proceedings 79

a. Joinder of the third party in the initial suit 79

b. Intervention 80

5. Finality of Judicial Decisions 81

6. Establishing A Claim of Exemption At Trial 86

a. The scope of judicial review 86

b. The procedures employed by the reviewing court 89

PROTECTING INFORMATION FILED WITH GOVERNMENT AGENCIES FROM DISCLOSURE TO THIRD PARTIES

By Herbert M. Wachtell*

I. INTRODUCTION.

The Government has increasingly become a vast storehouse of information about both private individuals and corporations. Some of this information is filed voluntarily; other information is filed as a condition of securing some government benefit; and yet other information is filed pursuant to a requirement of law or under compulsion of subpoena. Even though some of this information may be considered "sensitive", "confidential" or "privileged" by those individuals and corporations that file it with the Government (the "Filers"), the disclosure of this information is often sought pursuant to the Freedom of Information Act ("FOIA") by individuals, competitor corporations, or public interest groups (the "Requestors").

When a Filer's confidential information is requested, the agency possessing it must determine whether the material must be disclosed or whether it can be legally withheld. If the agency decides to withhold the infor-

---

* The author's associates, Peter C. Hein and Ronald M. Neumann, assisted in the preparation of this outline.

mation, the Requestor may sue to compel disclosure under the FOIA. Such "traditional" FOIA suits have become common since the FOIA was adopted in 1966. However, prior to the 1974 Amendments to the FOIA, many agencies were often able to drag their feet and effectively impede disclosure; when timely information was required, such excessive agency delays were frequently tantamount to denial.

The 1974 Amendments to the FOIA were intended to assist Requestors by, *inter alia*, specifying a rigid timetable for agencies to follow in acting upon requests for disclosure, providing for possible disciplinary action against government officials who arbitrarily or capriciously deny FOIA requests, authorizing effective and expeditious judicial review, and permitting plaintiffs who substantially prevail in an FOIA action to recover reasonable attorneys' fees and other costs from the government. Thus, subsequent to the adoption of these amendments, many agencies became much more inclined to release information filed with the government and began to grant requests for disclosure more and more frequently.

As a result of this trend toward greater disclosure, it became necessary for Filers who wished to preserve the confidential nature of their filed materials

to go to court to enjoin government agencies from permitting disclosure. These cases initiated by Filers against government agencies -- which are called "Reverse-FOIA" cases -- comprise a new and growing body of law. Indeed, all of the reported Reverse-FOIA cases have been decided subsequent to April 1, 1973.

II. GENERAL REVIEW OF THE FREEDOM OF INFORMATION ACT AND THE SECTION 552(b) EXEMPTIONS.

A. Subsection 552(a).

1. Subsection 552(a)(3) provides, in effect, that any agency must make all records in its possession "promptly available to any person." Exceptions are made only for:

    a. Certain information, procedural rules and substantive rules -- which must be published in the Federal Register pursuant to subsection 552(a)(1).

    b. Certain financial opinions, statements of policy and interpretations, and administrative staff manuals and instructions to staff that affect a member of the public -- which must be published

or made available for public inspection and copying pursuant to subsection 552(a)(2).

c. Agency records which fall within one of the nine exemptions specified in subsection 552(b).

2. Subsection 552(a)(2) also requires that indexes of matters specified in that subsection be prepared and made available.

3. Subsections 552(a)(4) and (6) specify various procedures which must be followed by agencies and courts in implementing the FOIA.

B. Subsection 552(b) Exemptions.

The FOIA "does not apply" to records that are:

1. Properly and specifically classified to be kept secret in the interest of 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 memoranda or letters which would not be available by law to a party (other than an agency) in litigation with the agency.

6. Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

7. Certain investigatory records compiled for law enforcement purposes.

8. Certain reports concerning financial institutions.

9. Certain data concerning wells.

C. Do the Subsection 552(b) Exemptions Prohibit Disclosure?

The FOIA clearly provides that information which does not fall within one of the 9 exempt categories specified in subsection 552(b) must be disclosed. 5 U.S.C. § 552(a)(3). However, the courts are divided over whether

the FOIA absolutely prohibits the disclosure of information which falls within one of these exempt categories, or merely grants the appropriate agency discretion to release or retain exempt information.

1. The Mandatory Approach.

The court in Westinghouse Elec. Corp. v. Schlesinger, 392 F. Supp. 1246 (E.D. Va. 1974) held that if information falls within the subsection 552(b)(4) exemption, then an agency is prohibited from disclosing such information. That court asserted that the permissive approach, which grants the agency discretion to release even exempt information, "makes the statutory exemption meaningless and flies in the face of the protective purposes of the exemption as enunciated in the Senate and House Reports". Id. at 1250. These protective purposes include (a) the necessity of protecting confidential business information (S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)), and (b) the need to ensure that citizens can continue to entrust confidential information to the Government without fear of disclosure (H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966)). Also adopting the mandatory approach were: Continental Oil Co. v. FPC, 519 F.2d 31, 35 (5th Cir. 1975), cert. denied, 96 S. Ct. 2168 (1976); McCoy v. Weinberger, 386 F. Supp. 504, 507 (W.D. Ky. 1974); U.S. Steel Corp. v. Schlesinger, 8 E.P.D ¶ 9717 at 5978 (E.D. Va. 1974).

2. The Permissive Approach.

Those courts which accept the permissive approach hold that even if certain information falls within one or more of the subsection 552(b) exemptions, the appropriate agency nevertheless has the discretion to disclose such information if disclosure is otherwise authorized by law. The permissive approach is principally supported by a literal reading of that portion of subsection 552(b) which states that the FOIA "does not apply" to matters which fall within the 9 enumerated exemptions. As stated in Charles River Park "A", Inc. v. HUD, 519 F.2d 935, 942 (D.C. Cir. 1975), the leading case articulating the permissive view, "the FOIA is neutral with respect to exempt information; it neither authorizes or prohibits the disclosure of such information". Charles River Park went on to hold that the FOIA therefore had no application to exempt materials, and disclosure of such materials could be made only if authorized by a statute other than the FOIA. Id. at 941. Accord, Chrysler Corp. v. Schlesinger, 412 F. Supp. 171, 176-77 (D. Del. 1976) (Court looked to agency regulations after finding records exempt).

By contrast, Sears, Roebuck and Co. v. GSA, 384 F. Supp. 996, 1001 (D.D.C.) [Sears I], stay pending appeal dissolved, 509 F.2d 527 (D.C. Cir. 1974), a district court

case decided prior to Charles River Park, held that the subsection 552(b) exemptions neither compelled nor precluded disclosure, but did not go as far as Charles River Park did in removing the FOIA from the decision-making process. Rather, Sears I indicated that "the policies behind the [subsection 552(b)] exemptions provide a sound basis for determining whether the release of the documents would be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'". Id. See also Pennzoil Co. v. FPC, 534 F.2d 627, 629-31 (5th Cir. 1976); Neal-Cooper Grain Co. v. Kissinger, 384 F. Supp. 769, 775, 777 (D.D.C. 1974). See generally K. Davis, Administrative Law Text, § 3A.5 at 71 (1972); Note, Protection from Government Disclosure -- the Reverse-FOIA Suit, 1976 Duke L.J. 330, 336-39 (1976); S. Rep. No. 93-854, 93d Cong., 2d Sess. 6 (1974). But cf. Sears, Roebuck and Co. v. GSA, 402 F. Supp. 378, 382 (D.D.C. 1975) [Sears II].

3. Recognizing the Distinction Between Agency-Generated and Privately-Generated Information.

The cases which have dealt with the mandatory versus permissive issue have failed to recognize or articulate the basic distinction between (a) disclosure of information or documents which has been generated by a government agency, and (b) disclosure of information or

documents which have been prepared by a private party and merely filed with a government agency. The impetus for the FOIA was Congress' concern about the conduct of numerous agencies which blocked the disclosure of their government records from public scrutiny. Consequently, Congress adopted the FOIA, and the 1974 amendments thereto, to facilitate "the right of persons to know about the business of their government." H.R. Rep. No. 93-876, 93d Cong., 2d Sess. (1974), reprinted in, 3 U.S. Code Cong. & Adm. News 6267, 6269 (1974). See also Conference Rep. No. 93-1200, 93d Cong., 2 Sess. (1974), reprinted in, 3 U.S. Code Cong. & Adm. News 6285 (1974); H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966), reprinted in, 2 U.S. Code Cong. & Adm. News 2418 (1966).

However, neither the language of 5 U.S.C. § 552, nor its legislative history, suggests that Congress in any way intended to abrogate the right of a private party to maintain the confidentiality of its own private documents and information simply because, at some point, that private party filed its private, confidential documents with a government agency. See generally National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974).

Accordingly, it makes sense to give an agency broad discretion to release exempt information and docu-

ments prepared by itself, yet give that same agency very little -- if any -- discretion to release exempt documents which have been filed by private parties.

The new Environmental Protection Agency regulations -- while implicitly accepting the view that the agency has the discretionary power to disclose information even though such information falls within the scope of the subsection 552(b) exemptions -- do attempt to make this distinction. Thus, an EPA officer is permitted to release records, despite the applicability of the (b)(2), (b)(5) or (b)(7) exemptions, if "no important purpose would be served by withholding the records". However, "as a matter of policy, EPA will not release a requested record if EPA has determined that [(b)(1), (b)(3) (b)(4), (b)(6), (b)(8) or (b)(9)] applies to the record, except when ordered to do so by a Federal court or in exceptional circumstances under appropriate restrictions with the approval of the Office of General Counsel or a Regional Counsel". 40 C.F.R. § 2.119, 41 Fed. Reg. 36906.*

* The Food and Drug Administration regulations also distinguish between the disclosure of agency-generated and Filer-generated information. Agency-generated information, although falling within one of the enumerated exemptions, may be released at the discretion of the Commissioner where such disclosure is in the public interest. 21 C.F.R. § 4.82. However, information which is exempt from disclosure pursuant to regulations that track the (b)(4) and (b)(6) exemptions (21 C.F.R. §§ 4.61, 4.63) is specifically taken out of the area of the Commissioner's discretionary authority and is made non-disclosable. 21 C.F.R. § 4.82(b)(1)-(2).

D. No Corporate Right of Privacy.

Corporations do not enjoy the common law right of privacy which courts have implied for individuals. See Robertson v. Department of Defense, 402 F. Supp. 1342, 1348-49 (D.D.C. 1975); Clinton Community Hospital Corp. v. Southern Maryland Medical Center, 374 F. Supp. 450, 456 (D. Md. 1974). Cf. California Bankers Ass'n v. Schultz, 416 U.S. 21, 65-66 (1974), quoting, United States v. Morton Salt Co., 338 U.S. 632, 652 (1949).

Neither do corporations have any statutory right of privacy. The Privacy Act is limited to "individuals", which the statute defines as citizens of the United States or aliens lawfully admitted for permanent residence. 5 U.S.C. § 552a(2). Similarly, the subsection 552(b)(6) exemption to the FOIA does not appear to embody any element of a corporate right of privacy. See Robertson v. Department of Defense, 402 F. Supp. 1342, 1348 (D.D.C. 1975); K. Davis, Administrative Law Text, § 3A.22 at 84 (1972).

III. SUBSTANTIVE FOIA ISSUES WHICH COMMONLY ARISE IN THE REVERSE-FOIA CONTEXT.

A. Subsection 552(b)(3) Exemption: Matters Specifically Exempted From Disclosure By Statute.

1. Current Text: The FOIA does not apply to

matters that are "specifically exempted from disclosure by statute."

2. The subsection 552(b)(3) exemption has undergone rapid change in the past year. First, in June, 1975, the Supreme Court broadly expanded the scope of the (b)(3) exemption. However, on September 13, 1976, an amendment to subsection (b)(3) was approved which appears to severely restrict the Supreme Court's broad construction of that provision.

3. FAA v. Robertson. The Supreme Court opinion in FAA v. Robertson, 422 U.S. 255, 95 S. Ct. 2140 (1975), rev'g, 498 F.2d 1031 (D.C. Cir. 1974), resolved conflicting opinions among the lower courts and broadly construed the b(3) exemption.

a. The documents sought by the Requestor in FAA v. Robertson were Systems Worthiness Analysis Program ("SWAP") Reports, which consist of the FAA's analysis of the operation and maintenance performance of commercial airlines.

b. The FAA asserted that these SWAP reports were protected from disclosure pursuant to the FOIA by virtue of 49 U.S.C. § 1504, which provides in pertinent part that:

> Any person may make written objection to the public disclosure of information contained in any appli-

> cation, report, or document filed pursuant to the provisions of this chapter or of information obtained by the Board or the Administrator, pursuant to the provisions of this chapter, stating the grounds for such objection. Whenever such objection is made, the Board or Administrator shall order such information withheld from public disclosure _when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public_.
>
> -- (emphasis added).

c. The Supreme Court held the SWAP reports were protected from disclosure by subsection b(3).

d. The broad scope of the _FAA_ v. _Robertson_ decision is apparent when one considers that the Court ruled that the fairly general language of 49 U.S.C. § 1504 "specifically exempted" the SWAP reports from disclosure. Other language in the Court's opinion also suggests that the Court intended to construe subsection b(3) broadly in favor of parties resisting disclosure:

> [Congress] was aware that it was acting not only against the backdrop of the 1946 Administrative Procedure Act, _supra_, but on the basis of a significant number of earlier congressional decisions that confidentiality was essential in certain departments and agencies in order to protect the public interest. _No distinction seems_

to have been made on the basis of the standards articulated in the exempting statute or on the degree of discretion which it vested in a particular Government officer.... When the House Committee on Government Operations focused on on Exemption 3, it took note that there are "nearly 100 statutes or parts of statutes which restrict public access to specific Government records. These would not be modified by the public records provisions of S. 1160." H.R. Rep. No. 1497, 89th Cong., 2d Sess., 10.

.... The term "specific" as there used cannot be read as meaning that the exemption applies only to documents specified, i.e., by naming them precisely or by describing the category in which they fall. To require this interpretation would be to ask of Congress a virtually impossible task. Such a construction would also imply that Congress had undertaken to reassess every delegation of authority to withhold information which it had made before the passage of this legislation -- a task which the legislative history shows it clearly did not undertake.

The discretion vested by Congress in the FAA, in both its nature and scope, is broad. There is not, however, any inevitable inconsistency between the general congressional intent to replace the broad standard of the former Administrative Procedure Act and its intent to preserve, for air transport regulation, a broad degree of discretion on what information is to be protected in the public interest in order to insure continuing access to the sources of sensitive information necessary to the regulation of air transport. Congress could not reasonably anticipate every situation in which the balance must tip in favor

> of nondisclosure as a means of insuring that the primary, or indeed sole-source of essential information, would continue to volunteer information needed to develop and maintain safety standards.
>
> -- 95 S. Ct. at 2146-48 (emphasis added).

4. The Sunshine Act Amendment. A recent amendment to subsection 552(b)(3) may, however, severely restrict -- if not altogether overrule -- the broad interpretation of the (b)(3) exemption enunciated in FAA v. Robertson.

Section 5(b) of the Government in the Sunshine Act (P.L. 94-409, 90 Stat. 1241, approved September 13, 1976, codified as,- 5 U.S.C. § 552b) made a "conforming amendment" to 5 U.S.C. 552(b)(3), amending subsection 552(b)(3) to read as follows:* The FOIA does not apply to matters that are:

> (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.

A review of the pertinent legislative history demonstrates unequivocally that the sponsors of this amendment to subsection 552(b)(3) fully intended that it over-

* This amendment will not become effective until 180 days subsequent to September 13, 1976.

rule the Supreme Court's decision in FAA v. Robertson concerning 49 U.S.C. § 1504 -- a statute which permitted, but did not require, the agency to withhold certain information from the public. For example, when Representative McCloskey introduced an amendment on the House floor which was virtually identical to the final language of the Sunshine Act Amendment to (b)(3), the following colloquy took place between Mr. McCloskey and Mr. Fascell:

> MR. FASCELL ... The original language in the bill of the Committee on Government Operations read that section 552(b)(3) of title V was amended to read: Subsection (3) "required to be withheld from the public, by any statute establishing particular criteria or referring to particular types of information," and the gentleman has offered that as an amendment to the Freedom of Information Act to undo the Robertson case decision?
>
> MR. McCLOSKEY, Madam Chairman if the gentleman will yield, that is correct.
>
> -- Cong. Rec. H7897 (daily ed. July 28, 1976) (emphasis added).

5. The Impact of FAA v. Robertson and the Sunshine Act Amendments on Future Applications of Subsection 552(b)(3) In Reverse-FOIA cases.

Before any evaluation can be made of the impact of FAA v. Robertson and the Sunshine Act Amendment, it is necessary to focus on the distinction between the "mandatory"

statutes -- which outright prohibit disclosure -- and the "permissive" statutes, which permit an agency to either withhold or release information, in its discretion.

The main thrust of the Supreme Court's broad interpretation of subsection (b)(3) in FAA v. Robertson was to increase the power of an agency, in its discretion, to withhold information pursuant to a "permissive" statute. However, an agency's enhanced power to withhold information, in its discretion, would have been of little utility to a Filer resisting disclosure if the agency favored disclosure. Thus, FAA v. Robertson really did not have any impact on the area of greatest concern to a Filer who is a Reverse-FOIA plaintiff -- namely, the extent to which mandatory statutes which prohibit disclosure will be read into subsection 552 (b)(3). It follows, then, that the Sunshine Act Amendment (see p. 15, supra), which limited only the number of "permissive" statutes which may be read into (b)(3), will likewise have little practical impact on a Filer who is resisting disclosure.

5. Mandatory Statutes.

Two mandatory statutes -- 18 U.S.C. § 1905 and 42 U.S.C. § 2000e-8(e) -- are frequently raised by plaintiffs in Reverse-FOIA actions, who contend that these mandatory

statutes fall within the scope of subsection (b)(3).

5.1 <u>18 U.S.C. § 1905</u>.

a. 18 U.S.C. § 1905 provides in pertinent part:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information ... which ... concerns or relates to the <u>trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association</u>; ... shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.
>
> -- (emphasis added.)

b. Two questions must be answered concerning 18 U.S.C. § 1905:

(i) Is § 1905 a statute which "specifically exempts" certain matters from disclosure?

(A) Although statutes such as 49 U.S.C. § 1504 grant broad discretionary authority to an agency, such authority is limited to a specified agency and a specified kind of records.

18 U.S.C. § 1905, by contrast, is far more open-ended.

(B) Because of the phrase in § 1905 "in any manner or to any extent not authorized by law", any attempt to read § 1905 together with § 552(b)(3) presents a renvoi problem. See Consumers Union of United States, Inc. v. Veterans Adm., 301 F. Supp. 796, 801-02, 802 n.20 (S.D.N.Y. 1969), appeal dismissed as moot, 436 F.2d 1363 (2d Cir. 1971).

(ii) Is the data sought by the Requestor the type of information which falls within the scope of § 1905 (i.e., data which concerns or relates to trade secrets, processes, operations, etc.)?

c. Most decisions have held that 18 U.S.C. § 1905 does not fall within the scope of subsection 552(b)(3): See, e.g., Charles River Park "A", Inc. v. HUD, 519 F.2d 935, 941 n.7 (D.C. Cir. 1975); Sears, Roebuck and Co. v. GSA, 509 F.2d 527, 529 (D.C. Cir. 1974); Robertson v. Butterfield, 498 F.2d 1031, 1033 n.6 (D.C. Cir. 1974), rev'd, 422 U.S.

255 (1975); Grumman Aircraft Engineering Corp. v. Renegotiation Board, 425 F.2d 578, 580 n.5 (D.C. Cir. 1970), rev'd on other grounds, 421 U.S. 168 (1975); Sears, Roebuck and Co. v. GSA, 402 F. Supp. 378, 381 n.3 (D.D.C. 1975) [Sears II]; Robertson v. Department of Defense, 402 F. Supp. 1342, 1347-48 (D.D.C. 1975); Pharmaceutical Mfr. Ass'n v. Weinberger, 401 F. Supp. 444, 446 n.1 (D.D.C. 1975); Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769, 774-76 (D.D.C. 1974). Cf. Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292, 295 (C.D. Cal. 1974).

d. However, it has been held that 18 U.S.C. § 1905 does fall within the scope of subsection 552(b)(3): See Westinghouse Elec. Corp. v. Schlesinger, 392 F. Supp. 1246, 1250 (E.D. Va. 1974). Cf. Chrysler Corp. v. Schlesinger, 412 F. Supp. 171, 177 (D. Del. 1976); Charles River Park "A", Inc. v. HUD, 360 F. Supp. 212, 213 (D.D.C. 1973), remanded for further proceedings, 519 F.2d 935, 941 nn.6-7 (D.C. Cir. 1975).

5.2 42 U.S.C. § 2000e-8(e).

a. Section 709(e) of the Civil Rights Act of 1964, codified as, 42 U.S.C. § 2000e-8(e) provides in pertinent part:

> It shall be unlawful <u>for any officer or employee of the Commission</u> to make public in any manner whatever any information <u>obtained by the Commission</u> pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information.
>
> -- (emphasis added)

b. Government contractors submit their EEO-1 Reports to the Joint Reporting Committee ("JRC"), which forwards copies to the appropriate federal compliance agency (e.g., the OFCCP) and to the EEOC. JRC is arguably composed of personnel from EEOC, funded by EEOC, and in other respects EEOC's alter ego. However, since 42 U.S.C. § 2000e-8(e), by its terms, applies only to employees of the EEOC, most courts have held that this statute does not apply to OFCCP (or JRC) so as to bar those agencies from disclosing the very materials which the EEOC unquestionably cannot itself disclose. See, e.g., Sears, Roebuck and Co. v. GSA, 509 F.2d 527, 529 (D.C. Cir. 1974), opinion below, 384 F. Supp. 996, 1002 (D.D.C. 1974) [Sears I]; Chrysler Corp. v. Schlesinger, 412 F. Supp. 171, 178 (D. Del. 1976); Robertson v. Department of Defense, 402 F. Supp. 1342, 1347-48 (D.D.C. 1975); Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292, 295 (C.D. Cal. 1974); Legal Aid Society v. Shultz, 349 F. Supp. 771, 775-76

(N.D. Cal. 1972). See also United States v. Trucking Employers, Inc., 11 E.P.D. ¶ 10,791 at 7331 (D.D.C. 1976). But see Chamber of Commerce v. Legal Aid Society, 96 S. Ct. 5 (1975) (Douglas, J.); Westinghouse Elec. Corp. v. Schlesinger, 392 F. Supp. 1246, 1249 (E.D. Va. 1974).

5.3 Other Mandatory Statutes.

a. Section 104(f) of the Antitrust Civil Process Act Amendments of 1976 is a good example of a statute which would clearly appear to fall within (b)(3). It provides that:

> (a)ny documentary material, answers to written interrogatories, or transcripts of oral testimony provided pursuant to any demand issued under this Act shall be exempt from disclosure under Section 552....

b. 21 U.S.C. § 331(j) expressly prohibits revealing to any person outside HEW or the Courts:

> any information acquired under authority of [the F.D.A.] concerning any method or process which as a trade secret is entitled to protection.

See Pharmaceutical Mfr. Ass'n v. Weinberger, 401 F. Supp. 444 (D.D.C. 1975)

B. Subsection 552(b)(4) Exemption: Trade Secrets and <u>Confidential Commercial and Financial Information</u>.

1. <u>Text</u>: The FOIA does not apply to matters that are:

> trade secrets and commercial or financial information obtained from a person and privileged or confidential.

2. Most Reverse-FOIA litigation is centered around the Filers' attempts to demonstrate that the information they have filed with an agency is both (a) commercial or financial information and (b) privileged or confidential.

a. Generally there is no difficulty in establishing the "commercial or financial" nature of the information which the Filer seeks to protect. But see <u>Washington Research Project, Inc</u>. v. <u>HEW</u>, 504 F.2d 238, 244-45 (D.C. Cir. 1974), <u>cert</u>. <u>denied</u>, 95 S. Ct. 1951 (1975).

b. The key question is whether the information in question is "confidential". The leading case of <u>National Parks and Conservation Ass'n</u> v. <u>Morton</u>, 498 F.2d 765 (D.C. Cir. 1974) held that

> ... commercial or financial matter is "confidential" for purposes of the

> exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.
>
> -- Id. at 770.

c. A company will weaken and most likely forfeit its claim of confidentiality if it makes available to any segment of the public (e.g., companies in the same industry, trade journals, etc.) the information for which a (b)(4) exemption is claimed. See Hughes Aircraft Co. v. Schlesinger, 384 F. Supp 292, 297-98 (C.D. Cal. 1974).

3. The following Reverse-FOIA cases have dealt with the subsection 552(b)(4) exemption:

(a) Generally: Charles River Park "A", Inc. v. HUD, 519 F.2d 935, 940-43 (D.C. Cir. 1975); Continental Oil Co. v. FPC, 519 F.2d 31, 34-36 (5th Cir. 1975), cert. denied, 96 S. Ct. 2168 (1976); Burroughs Corp. v. Schlesinger, 403 F. Supp. 633, 637 (E.D. Va. 1975).

(b) Disclosure of substantially all information prohibited: Westinghouse Elec. Corp. v. Schlesinger, 392 F. Supp. 1246, 1249-50 (E.D. Va. 1974) (affirmative action plans); McCoy v. Weinberger, 386 F. Supp. 504, 507-08

(W.D. Ky. 1974)(unaudited medicare cost report); U.S. Steel Corp. v. Schlesinger, 8 E.P.D. ¶ 9717 (E.D. Va. 1974) (affirmative action plans).

(c) Partial disclosure: Chrysler Corp. v. Schlesinger, 412 F. Supp. 171, 175-78 (D. Del. 1976) (affirmative action plans).

(d) Disclosure of substantially all information required: United States v. Trucking Employees, Inc., 11 E.P.D. ¶ 10,791 at 7331-32 (D.D.C. 1976)(civil rights compliance reports); Sea-Land Service, Inc. v. Morton, 11 E.P.D. ¶ 10,792 at 7333 (D.D.C. 1976) (affirmative action plans); Sears, Roebuck and Co. v. GSA, 402 F. Supp. 378, 383-85 (D.D.C. 1975)(affirmative action plans) [Sears II]; Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769, 776-77 (D.D.C. 1974)(information furnished Customs Service regarding importation of fertilizer); Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292, 295-98 (C.D. Cal. 1974) (affirmative action plans).

4. Several of these cases are presently on appeal: U.S. Steel Corp. v. Schlesinger, 4th Circuit; Sears II, D.C. Circuit and Hughes Aircraft Co. v. Schlesinger, 9th Circuit. Accordingly, the subsection 552(b)(4) law will undoubtedly continue to be in flux in the foreseeable future.

C. <u>Subsection 552(b)(6) Exemption: Personnel and Medical Files and Similar Files.</u>

1. <u>Text</u>: The FOIA does not apply to matters that are:

> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

2. A recent Supreme Court decision, <u>Department of the Air Force</u> v. <u>Rose</u>, 96 S. Ct. 1592 (1976), is the leading authority. <u>Rose</u> concerned a request by student law review editors researching an article for access to case summaries of Air Force Academy cadets' honors and ethics hearings.

a. The (b)(6) exemption -- unlike other exemptions -- "require[s] a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny'. The device adopted to achieve that balance was the limited exemption, where privacy was threatened, for 'clearly unwarranted' invasions of personal privacy." <u>Id</u>. at 1604. This balancing test applies regardless of whether the documents whose disclosure is sought are in "personnel" or "similar" files. <u>Id</u>. 1604-05.

b. The Court further observed that:

> ... these summaries, collected only in the Honor and Ethics Code Reading Files and the Academy's Honor Records, do not contain the "vast amounts of personal data," S. Rep. No. 813, at 9, which constitute the kind of profile of an individual ordinarily to be found in his personnel file: showing, for example, where he was born, the names of his parents, where he has lived from time to time, his high school or other school records, results of examinations, evaluations of his work performance. Moreover, access to these files is not drastically limited, as is customarily true of personnel files, only to supervisory personnel directly involved with the individual (apart from the personnel department itself), frequently thus excluding even the individual himself. On the contrary, the case summaries name no names except in guilty cases, are widely disseminated for examination by fellow cadets, contain no facts except such as pertain to the alleged violation of the Honor or Ethics Codes, and are justified by the Academy solely for their value as an educational and instructional tool the better to train military officers for discharge of their important and exacting functions.
>
> -- Id. at 1606 (emphasis added).

c. The Court affirmed the order of the Court of Appeals for the Second Circuit which required the district court to review the documents in camera and delete "personal references or other identifying information" and, if such deletions were not sufficient to safeguard privacy, to pro-

3. Only a few Reverse-FOIA cases have considered the (b)(7) exemption:

(a) United States v. Trucking Employers, Inc., 11 E.P.D. ¶ 10,791 at 7332-33 (D.D.C. 1976)(Files compiled subsequent to adjudication to monitor compliance with consent decree are not "investigatory files").

(b) Sears, Roebuck and Co. v. GSA, 509 F.2d 527, 529-30 (D.C. Cir. 1974) (Records compiled as part of a routine monitoring procedure are not protected by the (b)(7) exemption; by contrast, records compiled as part of investigations which focus directly on specifically alleged illegal acts are within (b)(7)).

(b) Sears, Roebuck and Co. v. GSA, 384 F. Supp. 996, 1004 (D.D.C.) [Sears I], stay pending appeal dissolved, 509 F.2d 527 (D.C. Cir. 1974) (Exemption (b)(7) is designed to protect the interests of the Government only; the Filer has no standing to assert the (b)(7) exemption). See also Westinghouse Elec. Corp. v. Schlesinger, 392 F. Supp. 1246, 1250-51 (E.D. Va. 1974); Legal Aid Society v. Shultz, 349 F. Supp. 771, 777 (N.D. Cal. 1972).

IV. STEPS TO BE TAKEN PRIOR TO, OR CONTEMPORANEOUS WITH, FILING WITH THE GOVERNMENT IN ORDER TO GUARD AGAINST DISCLOSURE TO THIRD PARTIES.

A. Attempt to Establish Confidential Nature of the Material Filed.

1. One may attempt to lay the ground work for a claim that the material filed falls within the b(4) exemption from disclosure by either:

   a. Obtaining a promise by the agency to keep the material confidential (sometimes such a promise of confidentiality by the agency will be set forth on a printed form which is prepared by the agency to be filed, *e.g.*, in the case of the boycott compliance form); or

   b. Including a recital of the confidential nature of the material in a letter or statement accompanying the submission of the material being filed.

2. Even a promise of confidentiality by the agency will not guarantee that a court will later hold that the materials filed qualify within the b(4) exemption. See, *e.g.*, *Charles River Park "A", Inc.* v. *Department of HUD*, 519

F.2d 935, 940 (D.C. Cir. 1975); Ackerly v. Ley, 420 F.2d 1336, 1339-40 n.3 (D.C. Cir. 1969); Burroughs Corp. v. Schlesinger, 403 F. Supp. 633, 637 (E.D. Va. 1975); Legal Aid Society v. Shultz, 349 F. Supp. 771, 776 (N.D. Cal. 1972). Cf. Westinghouse Elec. Corp. v. Schlesinger, 392 F. Supp. 1246, 1251 (E.D. Va. 1974). But see H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966) ("Where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations").

3. However, such a promise of confidentiality by the agency is valuable for two reasons:

a. Such a promise of confidentiality places the agency on the same side as the Filer -- i.e., resisting disclosure to third parties. This is particularly important in light of the tendency of many courts to rule that even if materials filed fall within one of nine exemptions, disclosure is nevertheless possible in the agency's discretion. See Part II(C)(2), supra.

b. Where the Filer voluntarily furnished

the business information to the agency, relying upon such promise of confidentiality, the Filer can effectively argue that the material filed qualifies within the (b)(4) exemption since disclosure is likely to impair the government's ability to obtain that information in the future. See National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

B. Request Determination That the Material Filed Is Not Subject to Disclosure.

1. General.

a. Many agencies' regulations require the Filer to expressly request a determination that the material being filed is exempt from disclosure pursuant to the FOIA. It is important to check each agency's regulations to determine its particular requirements. However, even if an express request for an exemption from disclosure is not required, it is advisable.

b. If corporate data has been submitted periodically over a period of time without being accompanied or preceded by an express claim that such data is exempt from dis-

regulations which expressly permit an advance determination of confidentiality, under certain circumstances, with respect to information which the Filer asserts would constitute voluntarily submitted information, if it were to be submitted.)*

C. Request, Pursuant To FOIA, For Disclosure of All FOIA Requests For Data Filed by the Filer.

1. Such a request should be made both in the text of the letter setting forth the Filer's claim of exemption and, in addition, in a separate letter which should be sent to the office which is designated to handle the agency's FOIA requests.

2. Many agencies' regulations do not expressly require agencies to notify filing party prior to disclosure -- though agencies commonly do so.

D. When the Filer Can Influence the Format Of Information Filed, the Filer Should Consider the Effect of the Format On Its Claim For Exemption.

1. The FOIA requires those portions of a document which are disclosable to be disclosed, even if other portions of the same document are not subject to disclosure.

* EPA regulation: 40 C.F.R. § 2.206; FDA regulation: 21 C.F.R. § 4.44.

5 U.S.C. § 552(a)(4)(B).

a. However, one may argue that disclosure is not required if the disclosable portions of the documents will have little significance without the release of protected portions. See, e.g., Fisher v. Renegotiation Board, 355 F. Supp. 1171, 1176 (D.D.C. 1973).)

b. See also 21 C.F.R. § 4.22: FDA will not release information if the disclosable and nondisclosable information is "so inextricably intertwined that it is not feasible to separate them or release of the disclosable information would compromise or impinge upon the nondisclosable portion of the record."

2. If Filer separates exempt and nonexempt material, it may facilitate the agency's determination of what may and may not be disclosed.

3. However, if clearly exempt material is present on the same pages as arguably nonexempt material, Requestors will often be faced with high costs for expurgation and recopying.

E. Secure a Promise by the Agency to Return the Information.

In a few limited instances, it may be possible

to obtain a promise from the agency (1) to return the material furnished by a Filer to the agency after the agency's need for the material is over, and (2) to assert all subsection 552(b) exemptions from disclosure available to the agency and to otherwise oppose disclosure, during the period of time the agency possesses the material. Example: An agency requests documents in the custody of a private party in connection with an agency investigation. This private party obtains a promise that all copies of any documents furnished by it will be returned when the investigation is completed, if no agency action against that private party is contemplated. During the course of the investigation the material will probably be exempt from disclosure pursuant to the b(7) exemption. Cf. Title Guarantee Co. v. NLRB, 534 F.2d 484, 491 (2d Cir. 1976). When the investigation is completed (and, at this time, the b(7) exemption may no longer be available), the material will be returned.*

V. PROCEDURAL ASPECTS OF REVERSE-FOIA LITIGATION.

A. General.

The numerous procedure problems which arise again and again in reverse-FOIA cases are attributable at least

* In view of the restrictive nature of the 1974 amendments to subsection 552(b)(7), it is not clear whether the Second Circuit's holding in Frankel v. SEC, 460 F.2d 813, 817 (2d Cir.), cert. denied, 409 U.S. 889 (1972) -- that the b(7) exemption from disclosure applies even after an investigation and an enforcement proceeding have been terminated -- has continuing vitality.

in part to the fact that the drafters of the FOIA focused only on the problem of government secrecy and the need for the public to obtain information generated by the government; Congress apparently did not foresee the Reverse-FOIA action. But cf. Comm. on Government Operations, Administration of the Freedom of Information Act, H.R. Rep. No. 92-1419, 92d Cong., 2d Sess. 30-32 (1972).

B. Administrative Determination of a Filer's Claim of Exemption.

1. Temporary Relief Barring Disclosure Pending an Administrative Determination.

a. Once a request for disclosure has been made, it is essential for the Filer to obtain temporary relief barring disclosure pending the administrative determination of the Filer's claim of exemption and the Requestor's request for disclosure.

b. In practice, agencies will generally refrain from disclosing a Filer's documents until the Filer has had an opportunity to exhaust its administrative remedies. However, nothing in the FOIA requires such a course and, indeed, an agency agreement to defer disclosure is arguably prohibited by the time limitations set forth in § 552(a)(6). At a minimum, once a request

for disclosure has been made, the Filer should insist on a written representation from the appropriate agency official that the agency will not release the documents in question prior to such time as the Filer exhausts its administrative remedies and has some opportunity (e.g., 5 or 10 days after the final agency decision) to seek judicial review on the merits, as well as temporary injunctive relief pending such review.

c. On occasion, Filers have had to go to court to block disclosure because an agency would not commit itself to refrain from disclosure pending the Filer's exhaustion of its administrative remedies. See, e.g., Metropolitan Life Ins. Co. v. Dunlop, 75 Civ. 4182 (S.D.N.Y., filed Aug. 22, 1975) (agency initially refused to commit itself to refrain from disclosure, but, once suit had been commenced, the agency agreed to a court order prohibiting disclosure pending plaintiff's exhaustion of its administrative remedies). See also Sears, Roebuck and Co. v. GSA, 384 F. Supp. 996, 1000 (D.D.C.), stay pending appeal dissolved, 509 F.2d 527 (D.C. Cir. 1974) [Sears I] (Sears withdrew its motions for preliminary injunctive relief after defendants stipulated that they would not release any material, absent ten days notice to Sears, pending resolution of suit).

2. Administrative Procedures Applicable to Requestors and Filers.

In cases concerning the disclosability of documents furnished to a government agency by an independent third party -- the Filer -- the administrative procedures for determining a Filer's claim of exemption and/or a Requestor's demand for disclosure are complicated by the fact that frequently multiple parties (i.e., the Filer and one or more Requestors) will dispute the disclosability of the same documents. This problem is particularly troublesome because many government agencies either have no regulations governing the manner in which a Filer may assert a claim of exemption, or have regulations which set up a procedure for asserting claims of exemption which is not integrated with the procedures used by a Requestor in making a request for disclosure. Recently, the Environmental Protection Agency ("EPA"), adopted comprehensive regulations which establish a coordinated procedure for determining whether business information possessed by the EPA is disclosable pursuant to the FOIA.

2.1 Office of Federal Contract Compliance Programs ("OFCCP") Regulations

a. The OFCCP Regulations. The regulatory maze faced by a government contractor who desires to assert a

agency decision to grant confidential treatment?

(iv) Why shouldn't a person whose claim of exemption is predicated on one of the other exemptions enumerated in subsection 552(b) also be entitled to utilize a procedure akin to that set forth in 40 C.F.R. § 2.201 *et seq*.?

Certain of these unresolved problems are addressed in the discussion which follows in Parts V(B)(3) & (4), *infra*.

3. The Administrative Procedure For Determining a Filer's Claim of Exemption.

a. Is an evidentiary hearing required?

Under general principles of constitutional and administrative law, a Filer is entitled to notice and an opportunity to be heard prior to the disclosure of any of the documents it has filed with a government agency. *Chrysler Corp*. v. *Schlesinger*, 412 F. Supp. 171, 178-79 (D. Del. 1976). See, *e.g.*, *Mathews* v. *Eldridge*, 96 S. Ct. 893, 902 (1976). See generally K. Davis, *Administrative Law Text*, § 7.01 *et seq*. (1972). But see *Pharmaceutical Mfr. Ass'n* v. *Weinberger*, 401 F. Supp. 444, 448 (D.D.C 1975); *Sears, Roebuck and Co.* v. *GSA*, 384 F. Supp. 996, 1006 (D.D.C.

1974) [Sears I].

However, the precise nature of the Filer's legal right of an opportunity to be heard is not clear. Some general considerations are suggested by the Supreme Court in Mathews v. Eldridge:

> The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness ... The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decision-making in all circumstances. The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it".... All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard" ... to insure that they are given a meaningful opportunity to present their case.
>
> -- 96 S. Ct. at 909.

Applying these standards, the Court found that with respect to certain facts, "information concerning [such facts] is amenable to effective written presentation" and that "[t]he value of an evidentiary hearing, or even a limited oral presentation, to an accurate presentation of those factors to the decision maker does not appear substantial." 96 S. Ct. at 907 n.28.

It would appear that in most instances written submissions will be adequate for presenting the facts relevant to a determination of whether certain documents are exempt from disclosure. Indeed Chrysler Corp. v. Schlesinger, 412 F. Supp. 171, 178-79 (D. Del. 1976) expressly held that the OFCCP regulations (see Section B(V)(2.1), *supra*), which provide only for written submissions and no oral argument or testimony, "grant [a Filer] a constitutionally adequate hearing". *Id.* at 179.

Nevertheless, in view of the uncertainty concerning both the availability of an evidentiary hearing and the scope of judicial review (see Part V(C)(6)(a), *infra*), an evidentiary hearing should be expressly requested by a Filer in order to protect against any prejudicial waiver of the right, if any, to present testimonial evidence at some stage in the proceedings. Moreover, all evidentiary material in support of the Filer's claim of exemption should be presented to the agency in the first instance.

b. The Filer's submission to the agency.

If no evidentiary hearing is available, the Filer should submit to the agency detailed written submissions and affidavits in support of its claim for confidential treatment. An illustration of the possible nature and contents of such materials is set forth below:

(i) Memorandum which summarizes relevant factual matter and which sets forth pertinent legal arguments with respect to each exemption upon which Filer relies.

(ii) Affidavit by an expert establishing that disclosure of the business information in question would result in substantial injury to the Filer's competitive position.

(iii) Affidavit by an expert or another appropriately situated person (A) establishing that such information is not otherwise publicly available, and (B) demonstrating that such information cannot be derived from any publicly available documents, such as financial reports and nonexempt materials filed with other municipal, state or federal agencies.

(iv) Affidavit(s) by employee(s) of the Filer concerning:

(A) Policies and procedures of the Filer which prohibit and effectively prevent disclosure of such information to both the Filer's employees who have no need-to-know and to third-parties.

(B) The occasions (if any) upon which disclosure of such information has been made to third-parties and the circumstances justifying each such disclosure.

(v) A complete copy of the documents containing such information, or if such documents are voluminous, a representative sample thereof. Most agencies will agree to use representative samples of the various categories of documents in issue for purposes of making an administrative determination of a claim of exemption. See, e.g., 40 C.F.R. § 2.204(f) (EPA). Courts, too, will use such representative samples in connection with their review of the agencies' actions. See Part V(C)(6)(b), infra. To facilitate reference to these documents, they should be serially numbered and bound.

c. Confidentiality of materials submitted to the agency.

(i) It is essential to assert a claim of exemption with respect to all documents submitted to the agency in support of the Filer's claim of exemption.

(ii) If a Requestor participates in the agency procedures concerning the claim of exemption, such Requestor may demand that it, or its counsel, be granted access to all submissions made by the Filer in support of its claim of exemption -- perhaps subject to some sort of protective order.

(iii) The EPA's new regulations expressly provide that submissions made by the Filer in support of its claim for confidential treatment will be deemed to be confidential and will not be disclosed, unless disclosure is duly ordered by a federal court. 40 C.F.R. § 2.205(c).

4. Finality of Administrative Decisions.

The possibility of duplicate and repetitive administrative proceedings with respect to whether information filed with an agency by a private party is entitled to confidential treatment is apparent, given the fact that successive Requestors may well request the disclosure of the same information. Moreover, there is a related problem concerning Filers: Often, many different Filers will submit the same forms or the same type of information to an agency and each will make a separate and independent claim of exemption.

a. Successive requests for the same documents. Professor Davis has summarized the propriety of the appli-

cation of the doctrine of res judicata to administrative proceedings as follows:

> The common-law doctrine of res judicata ... is designed to prevent the relitigation by the same parties of the same claims or issues. The reasons behind the doctrine as developed in the court system are fully applicable to some administrative proceedings, partially applicable to some, and not at all applicable to others. As a matter of principle, therefore, the doctrine should be applied to some administrative proceedings, modified for some, and rejected for others.
>
> The Supreme Court has essentially agreed with this statement of principle in declaring that res judicata may apply "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate."
>
> ... [T]he doctrine may be relaxed or qualified in any desired degree without destroying its essential service. The doctrine is at its best as applied to an adjudication of past facts; it is relaxed as applied to issues of law or policy involving continuing practices; it has no application to nonjudicial administrative action. The doctrine should be applied to avoid the freezing of administrative policies, while at the same time preventing unnecessary relitigation of the same claims or issues.
>
> -- K. Davis, <u>Administrative Law Text</u>, § 18.10 at 371 (1972).

Under this standard, it clearly seems fair, in most cases, to bar a Filer who has had a full opportunity to present its case in favor of a claim of exemption from "relitigating" an adverse administrative determination. However, if the Filer's claim of exemption was based in part of the (b)(6) exemption, and if the agency considered the identity of a Requestor and such Requestor's proposed use of the information in determining the applicability of that exemption, then the Filer should be able to relitigate the agency determination -- but only to the extent it relied on (b)(6) -- against successive Requestors.

The applicability of res judicata principles to bar successive Requestors from relitigating an adverse agency determination against another, independent Requestor raises more difficult problems. Two situations will commonly present themselves:

(1) Prior to the Requestor's request for disclosure, there has been an agency determination in favor of a Filer's claim of exemption in an agency proceedings in which no Requestor participated and at a time when no request for the Filer's information was pending.

Schlesinger, 392 F. Supp. 1246, 1248 (E.D. Va. 1974). Accord, Burroughs v. Schlesinger, 403 F. Supp. 633, 636 (E.D. Va. 1975); Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292, 294 (C.D. Cal. 1974).

b. These same courts also invoke an "ultra vires" theory to reject the sovereign immunity claim:

> Sovereign immunity does not bar this suit because the actions of the federal officers have been sufficiently alleged to be beyond their statutory powers and thus could not be the actions of the sovereign.

Hughes Aircraft Co. v. Schlesinger, 384 F. Supp 292, 294 (C.D. Cal. 1974). Accord, Burroughs Corp. v. Schlesinger, 403 F. Supp. 633, 636 (E.D. Va. 1975); Westinghouse Electric Corp. v. Schlesinger, 392 F. Supp. 1246, 1248 (E.D. Va. 1974).

c. Finally, a district judge in the District of Columbia has dismissed the sovereign immunity defense on the ground that "it is settled in this circuit that the APA is a waiver of sovereign immunity." Sears, Roebuck & Co. v. GSA, 384 F. Supp. 996, 1001 (D.D.C.), stay pending appeal dissolved, 509 F.2d 527 (D.C. Cir. 1974) [Sears I]. See generally, Note, "Protection From Government Disclosure -- The Reverse-FOIA Suit," 1976 Duke L.J. 330, 353-59 (1976).

4. Problems Which Arise When the Filer and One or More Requestors Attempt to Litigate In Different Forums.

4.1. General.

The potential for the bifurcation of a controversy over a single set of documents exists because both the Filer and the Requestor have standing to sue to assert their respective positions. In the past, there have been several cases where a Filer sued a government agency to halt disclosure in one federal court and then, later, a Requestor sued the same government agency in a different federal court seeking to obtain disclosure. See (1) Robertson v. Department of Defense, 402 F. Supp. 1342 (D.D.C. 1975) and General Motors Corp. v. Schlesinger, C.A. No. 195-74-A (E.D. Va., filed Apr. 10, 1974); (2) Consumers Union of United States, Inc. v. Consumer Product Safety Comm'n, 400 F. Supp. 848 (D.D.C. 1975) and In re Consumer Product Safety Comm'n Litigation, Civil Action Nos. 75-104, etc. (D. Del.); (3) Metropolitan Life Ins. Co. v. Dunlop, 75 Civ. 4182 (S.D.N.Y., filed Aug. 22, 1975) and National Organization for Women, Washington D.C. Chapter v. Social Security Administration, Civil Action No. 76-0087 (D.D.C. filed Jan. 16, 1976). In each of the cases brought by the Requestors, the Filers were purportedly joined as defendants with the defendant government agencies.

There is often a powerful incentive for either the Filer or the Requestor to bifurcate litigation and engage in forum shopping because, as noted above in Parts II(C) and III, the courts have often disagreed on the interpretation of the subsection 552(b) exemptions. The District of Columbia Circuit, for example, is generally distinctly unfavorable to Filers who resist disclosure. Since, as shown below, jurisdiction and venue in an FOIA action brought by a Requestor will always be proper in the District of Columbia, a Requestor will always have an opportunity to sue in a forum favorable to it.

The sections which follow explain the choices of fora which are available to both Requestors and Filers, consider whether the Filer's or the Requestor's choice of forum should be preferred, discuss the limitations upon forum shopping imposed by the jurisdictional requirement that there be a "case or controversy", review the legal theories which may be employed by either the Filer or the Requestor to name the other as a co-defendant in an action brought against agency officials, and explore the procedural questions which arise when the Filer or the Requestor intervenes in an action brought by the other.

4.2 Personal Jurisdiction and Venue. All parties are limited in their choice of forum by the necessity of bringing an action in a forum where personal jurisdiction and venue are proper.

a. FOIA suits. A Requestor who brings an FOIA action has a relatively broad choice of forums. The FOIA expressly provides that the Requestor may sue in (A) the district in which it resides or has its principal place of business, (B) the district in which the agency records are situated, or (C) the District of Columbia. 5 U.S.C. § 552(a)(4)(B).

It is not clear whether 5 U.S.C. § 552(A)(4)(B) provides for jurisdiction and venue with respect to nongovernment parties (such as Filers) who are joined with government officers and agencies as defendants in a suit by a Requestor. Although by its language § 552(a)(4)(B) provides only for "jurisdiction to enjoin the agency from withholding agency records", it has been argued that that section provides for jurisdiction and venue with respect to nongovernment Filers as well. If the section is held not to apply to nongovernment defendants who are joined in an FOIA action, jurisdiction over such persons must be established pursuant to the general

statutory provisions governing jurisdiction and venue, which are discussed below.

b. Reverse-FOIA suits. Since there is no statutory provision expressly authorizing reverse-FOIA suits, there is accordingly no statutory provision which expressly provides for the jurisdiction and venue over such suits.

(i) Jurisdiction for a reverse-FOIA action can be predicated on several theories:

> (A) General federal question jurisdiction, pursuant to 28 U.S.C. § 1331 on the grounds that the case arises under, e.g., the Fifth Amendment or 5 U.S.C. § 552. See, e.g., Westinghouse Elec. Corp. v. Schlesinger, 392 F. Supp. 1246, 1248 (E.D. Va. 1974); Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292, 294 (C.D. Cal. 1974); Chrysler Corp. v. Schlesinger, 412 F. Supp. 171, 174-75 (D. Del. 1976); Burroughs Corp. v. Schlesinger, 403 F. Supp. 633, 636 (E.D. Va. 1975).
>
> (B) Judicial review of agency action pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706. See, e.g., Charles River Park

"A", Inc. v. HUD, 519 F.2d 935, 939 (D.C. Cir. 1975); Burroughs Corp. v. Schlesinger, 403 F. Supp. 633, 636 (E.D. Va 1975); McCoy v. Weinberger, 386 F. Supp. 504, 507 (W.D. Ky. 1974); Sears, Roebuck and Co. v. GSA, 384 F. Supp. 996, 1000-01 (D.D.C.) [Sears I], stay pending appeal dissolved, 509 F.2d 527 (D.C. Cir. 1974).

(C) An implied private cause of action pursuant to a statute which prohibits disclosure. Cf. Charles River Park "A", Inc. v. HUD, 519 F.2d 935, 941 n.6 (D.C. Cir. 1975) (no need to imply private cause of action pursuant to 18 U.S.C. § 1905).

(D) A specific statutory grant of jurisdiction. Cf. GTE Sylvania Inc. v. Consumer Product Safety Comm'n, 404 F. Supp. 352, 365-66 (D. Del. 1975) (Court reads 18 U.S.C. § 1337 together with the Consumer Product Safety Act to find jurisdiction).

See generally Note, Protection From Government Disclosure -- The Reverse-FOIA Suit, 1976 Duke L.J. 330, 347-53 (1976).

(ii) Venue in a reverse-FOIA case must be predicated on 28 U.S.C. §§ 1391(b) or 1391(e).

28 U.S.C. § 1391(e), which affords the broadest selection of appropriate venues, provides in pertinent part that:

> A civil action in which _each defendant_ is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or ... (4) the plaintiff resides if no real property is involved in the action.
>
> -- (West 1976 Supp.) (emphasis added).

The key issue concerning § 1391(e) is whether a suit against one or more private parties (_i.e._, a Filer or a Requestor), in addition to various government defendants, comes within the scope of § 1391(e). The courts are about equally divided on this issue.

(A) Holding § 1391(e) applicable: _McKenna_ v. _Udall_, 418 F.2d 1171, 1176 (D.C. Cir. 1969) (dictum); _People_ v. _Department of Interior_, 356 F. Supp. 645, 651 (D. Hawaii 1973), _modified on other grounds_, 502 F.2d 90 (9th Cir. 1974), _cert_. _denied_, 420 U.S. 1003 (1975); _Powelton Civic Homeowners Ass'n_ v. _HUD_, 284 F. Supp. 809, 832-34 (E.D. Pa. 1968); _Macias_ v. _Finch_, 324 F. Supp. 1252, 1254-55 (N.D. Cal. 1970).

(B) Holding § 1391(e) not applicable: <u>Stinson</u> v. <u>Finch</u>, 317 F. Supp. 581, 586-87 (N.D. Ga. 1970); <u>Benson</u> v. <u>City of Minneapolis</u>, 286 F. Supp. 614, 620 (D. Minn. 1968); <u>Town of East Haven</u> v. <u>Eastern Airlines, Inc.</u>, 282 F. Supp. 507, 511 (D. Conn. 1968); <u>Chase Savings and Loan Ass'n</u> v. <u>Federal Home Loan Bank Board</u>, 269 F. Supp. 965, 967 (E.D. Pa. 1967).

28 U.S.C. § 1391(b) permits an action to be brought in the judicial district where all defendants reside or in the judicial district where the claim arose.

Since the residence of a public official sued in his official capacity is the place where his office is maintained (see <u>e.g.</u>, <u>Stroud</u> v. <u>Benson</u>, 254 F.2d 448, 451 (4th Cir.), <u>cert. denied</u>, 358 U.S. 817 (1958); <u>Hartke</u> v. <u>FAA</u>, 369 F. Supp. 741, 746 (E.D.N.Y. 1973)), the plaintiff will often be limited under the "all defendants reside" clause to the District of Columbia and its environs.

It is not clear where the "claim arises" in FOIA or Reverse-FOIA cases. Three possible judicial districts in which such a claim may be held to arise are: (1) the district in which the government officials acted to deny the plaintiff's request for disclosure or claim for exemption,

(2) the district in which the documents in issue are located, or (3) the district in which the Filer's principal place of business is located (on the theory that it is the district where the consequences of disclosing the documents in question will be most heavily felt).

4.3 Should the Filer's or the Requestor's Choice of Forum Be Favored?

Assuming both the Filer and the Requestor have brought an action in different judicial districts where both jurisdiction and venue are proper, one or both parties, or the government defendants, will presumably make a procedural motion -- such as a motion to transfer one action, or to enjoin the other -- which will force a court to determine the forum in which all actions concerning the same documents should proceed. Aside from the traditional factors governing motions to transfer under 28 U.S.C. § 1404(a) and motions to enjoin another action, there are several policy considerations unique to FOIA and Reverse-FOIA actions which are relevant to the choice of a forum when both a Filer and a Requestor are litigating over the disclosability of the same documents.

a. Policy considerations supporting the Requestor's choice.

The Requestor will invariably argue that in light of the strong policies of the FOIA in favor of disclosure, the Requestor should be entitled to bring its FOIA action in a forum of its own choosing -- even though its action may have been initiated after the Filer commenced its action. In addition, if the agency rules in favor of the Filer on the material issues about which there could be a good faith dispute, yet the Filer, as a tactical maneuver, initiates an action for judicial review of certain feigned issues in a forum of his liking, the Requestor may claim that since the Filer and the agency take essentially the same positions on the substantive issues concerning disclosability, it is inappropriate to require the Requestor to assert its FOIA claims in the Filer's action. (As discussed below in Part V(C)(4.4), where the agency and the plaintiff -- whether Filer or Requestor -- take essentially the same position on the substantive issues concerning disclosability, it can be argued that that plaintiff's action lacks subject matter jurisdiction since there is no case or controversy between the plaintiff and the agency.)

Two cases lend some support to a Requestor who asserts that policy considerations unique to the FOIA entitle it to choose the forum. In Robertson v. Department of Defense, 402 F. Supp. 1342 (D.D.C. 1975), the Requestor-plaintiff was permitted to maintain an FOIA action to obtain certain civil rights compliance reports filed by General Motors -- even though General Motors had already obtained a final judgment in an earlier action in federal court in Virginia which permanently restrained the Department of Defense from releasing certain positions of these very same reports. Although the Requestor, Robertson, was not a party to General Motors' Virginia action, he had made his request to the Department of Defense prior to General Motors' commencement of that action and an agency decision granting his request apparently prompted General Motors to sue. The Court in Robertson observed, among other things, that General Motors had "obviously sought a forum of its choice" and that "the government has never taken the position espoused by Robertson that the documents, in their entirety, are obtainable under the [FOIA]". Id. at 1347. While General Motors may have selected a forum of its choice, nevertheless that forum -- the Eastern District of Virginia -- was the district in which the agency's offices were situated

and could hardly be considered inconvenient by a plaintiff who is able to sue in the federal courts in the District of Columbia. Moreover, as a practical matter, the Robertson decision simply gave the Requestor two bites at the apple. (The implications of Robertson on the finality of judicial decisions in Reverse-FOIA cases are discussed below in Part V(C)(5).)

In a second case, Metropolitan Life Ins. Co. v. Dunlop, 75 Civ. 4182 (S.D.N.Y., Apr. 30, 1976), a Reverse-FOIA action in New York was transferred to the District of Columbia upon a motion by the government so that that action could be consolidated with a subsequent FOIA action brought by a Requestor which contested the disclosability of the same documents. The Metropolitan opinion was predicated entirely on a consideration of "traditional" factors pertinent to a Section 1404(a) motion and failed to address any of the policy considerations unique to FOIA and Reverse-FOIA actions.

b. Policy considerations supporting the Filer's choice.

There are two policy considerations unique to Reverse-FOIA actions which may militate in favor of the Filer's choice of forum:

(i) In cases where the agency takes essentially the same position on the question of disclosability as the Requestor, the Filer, likewise, can argue that its action for judicial review of that agency decision should not be relegated to a forum hand-picked by the Requestor. Frequently, however, the Requestor may contend -- as he did in Robertson -- that the Requestor is demanding disclosure of certain designated documents in their entirety, whereas the agency permitted various minor deletions. Yet, as discussed below, it does not appear that purely incidental differences in the parties' positions will create the adversary relationship which must exist if there is to be a "case or controversy" -- particularly when there are other persons who stand in truly substantial adversarial positions. See Part V(C)(4.4), *infra*.

(ii) Assuming one concludes that a Filer should not be subject to repeated litigation over the confidentiality of its documents by successive Requestors -- some of whom may seek to obtain only a portion of the documents which the Filer claims to be exempt from disclosure (a question addressed in Part V(C)(5), *infra*), the Filer can argue that multiplicity of litigation can be avoided only if the validity of the Filer's entire

claim of exemption (as opposed to that portion of the Filer's claim which is contested by some particular Requestor) is adjudicated in a single forum. In a sense though, this argument merely begs the choice-of-forum question: Such a single forum could instead be the district in which the first Requestor sues or the district in which the agency has its offices.

4.4 Subject Matter Jurisdiction: Is there A Case Or Controversy?

One clear limit on the ability of either a Filer or a Requestor to select a forum is the constitutional requirement that a suit initiated by any party must present a "case or controversy". Where the agency and the plaintiff -- whether Filer or Requestor -- take essentially the same position on the substantive issues concerning disclosability, it can be argued that that such a plaintiff's action lacks subject matter jurisdiction since such an action presents no "case or controversy" between the plaintiff and the agency, within the meaning of Article III of the Constitution.

As a general principle of law, there can be no "case or controversy" absent a true adversary relationship between the parties to an action. C. Wright, A.

Miller & E. Cooper, 13 Federal Practice and Procedure, § 3530 at 164-66 (1975). See, e.g., Moore v. Charlotte-Mecklenburg Board of Education, 402 U.S. 47 (1971). Moreover, it would appear that purely incidental differences in the parties' positions do not create the requisite adversary relationship -- particularly when there are other persons who stand in a truly substantial adversarial position. Cf. L'Hote v. New Orleans, 177 U.S. 587, 595-96 (1900); Ex-Cell-O Corp. v. Chicago, 115 F.2d 627, 629 (7th Cir. 1940); McReynolds v. Christenberry, 233 F. Supp. 143, 147-48 (S.D.N.Y. 1964), cert. denied, 379 U.S. 972 (1965). See also Heumann v. Board of Education, 320 F. Supp. 623 (S.D.N.Y. 1970).

The one FOIA case to address this problem to date, Consumers Union v. Consumer Product Safety Comm'n, 400 F. Supp. 848 (D.D.C. 1975), held that the case before it, a FOIA action brought by a Requestor, presented no "case of controversy". The Consumers Union case was precipitated by Consumers Union's request for access to certain accident reports submitted by various television manufacturers to the CPSC. CPSC informed these manufacturers of Consumers Union's request and directed the manufacturers to substantiate their claims of confiden-

tiality. Eventually, the CPSC determined that the documents in question were not exempt from disclosure. Upon being notified of this decision, various manufacturers sued the CPSC in the Delaware federal court (as well as in several other district courts) and obtained temporary restraining orders, some of which were consented to by the CPSC. Sometime thereafter, Consumers Union brought its own action in the United States District Court for the District of Columbia, seeking access to the documents in question. Judge Richey concluded that:

> At the heart of plaintiffs' [the requestors] claim is their contention that the documents are subject to mandatory disclosure under the FOIA. The defendant agency, however, came to <u>the exact same conclusion</u> in its abovementioned formal finding of March 28, 1975. <u>The CPSC and the plaintiffs thus stand in the same position on the crucial issue in this case</u>.
>
> -- <u>Id</u>. at 851 (emphasis added).

As a result, Judge Richey dismissed Consumers Union's suit because of the absence of a "case or controversy", and the consequent lack of subject matter jurisdiction.

It must be emphasized that Judge Richey found that the agency had come to "<u>the exact same conclusion</u>" as had the Requestor. See also <u>North Carolina</u> v. <u>FPC</u>, 393

F. Supp. 1116, 1126 (M.D.N.C. 1975) (the State "make[s] exactly the same claims and contentions"). Thus, in the more frequent situation where a Requestor demands the disclosure of the records in question in their entirety, but the agency makes at least a few minor deletions, one may attempt to distinguish Consumers Union on the ground that in Consumers Union both the Government and the Requestor took precisely the same position on the substantive issues concerning disclosure. However, as noted above, when there are other persons -- i.e., the Filer -- who stand in a truly substantial adversarial position, more than mere incidental differences in the parties' positions should be required to give rise to a "case or controversy". (Robertson v. Department of Defense, 402 F. Supp. 1342 (D.D.C. 1975), did not deal with the existence of a "case or controversy" and subject matter jurisdiction. Rather, the Robertson case dealt with a very different issue: namely, whether a Requestor, who was suing the government under the FOIA, was collaterally estopped by a prior judgment against the government. 402 F. Supp. at 1346-47. This problem is discussed in Part V(C)(5), infra.)

4.5 Tri-party Proceedings.

Regardless of whether the Filer or the Requestor prevails in obtaining its choice of a forum, there are two means by which the questions concerning disclosability can be decided in a proceedings to which the Filer, all current Requestors and the government agency are parties: joinder of the third party in the initial suit by the Filer or the Requestor and, if such joinder is not employed by the plaintiff, intervention by such third party.

a. Joinder of the third party in the initial suit.

The party who first commences suit -- whether the Filer or the Requestor -- may seek to foreclose other nongovernmental parties from bringing subsequent actions in other forums by joining such other nongovernmental parties in its initial suit. Thus, a Filer-plaintiff may seek to join any Requestors who are known to be seeking its documents, and, similarly, a Requestor-plaintiff may seek to join the Filer of the documents which it wishes to obtain.

Since the plaintiff in either an FOIA or a Reverse-FOIA action can state no claim for relief against the nongovernmental parties (*i.e.*, Filers or Requestors)

of Virginia. Although the facts are not completely clear, it appears that in the Virginia action the government had actively litigated the disclosability of some documents (the "Litigated Documents") but had conceded -- without contest -- that certain other documents (the "Conceded Documents") were exempt from disclosure.* In any event, the Virginia court held that certain portions of General Motor's EEO data were exempt from disclosure. Meanwhile, Robertson (who had submitted a request for the disclosure of General Motor's EEO data to the Department of Defense) commenced the Robertson action in the District of Columbia, and named, *inter alia*, both the Department of Defense and General Motors as defendants. General Motors thereafter moved for summary judgment, claiming, *inter alia*, that the second action brought by Robertson was barred by collateral estoppel in that the issues presented in the Robertson action had already been resolved in favor of General Motors in the Virginia action. The court held Robertson was *not* barred by the prior judgment against the Government.

---

* General Motors argued that "[t]he Government's argument [in the Virginia Action] that the exemptions were merely permissive raised a controversy [in the Virginia Action] as to all portions of the GM documents including those parts admittedly covered by the exemptions." Points and Authorities in support of General Motors' Motion for Summary Judgment, Feb. 13, 1975, p. 10.

So far as the Conceded Documents were concerned, Robertson is clearly correct in concluding that documents should not be forever exempt from disclosure simply because the government has conceded their exempt status in an earlier case. The Filer is not faced with the specter of successive relitigation, because the disclosability of the Conceded Documents has yet to be determined even once.

On the other hand, to the extent that Robertson is read as giving a Requestor the right to relitigate the disclosability of the Litigated Documents, the case appears to be wrong and should not be followed.* Permitting a Requestor to relitigate the merits of that portion of a claim of exemption which has already been completely contested by either the government, or both the government and a prior Requestor, will subject both the Filer and the government agencies to the burden of repeated litigation with successive Requestors. The argument which is, in essence, made in the Robertson opinion -- that since the Government did not contest the exempt status of the Conceded Documents in the Virginia action, the Requestor can not therefore be bound by the Virginia

---

* Contra Robertson, cf. Western Elec. Co. v. Hammond, 135 F.2d 283, 287 (1st Cir. 1943); North Carolina v. FPC, 393 F. Supp. 1116, 1126 (M.D.N.C. 1975).

court's determination as to the disclosability of the Litigated Documents (id. at 1347) -- simply ignores the fact that both the Requestor and the Government had identical interests with respect to their mutual desire to permit the disclosure of the Litigated Documents.

6. Establishing A Claim of Exemption At Trial.

a. The Scope of Judicial Review.

(i) Arbitrary and Capricious Standard.

The appropriate scope of review of an agency decision to disclose information submitted by a Filer is set forth in 5 U.S.C. § 706(2)(A), which provides that

> [t]he reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Charles River Park "A", Inc. v. HUD, 519 F.2d 935, 940 n.4, 941, 943 (D.C. Cir. 1975); Pennzoil Co. v. FPC, 534 F.2d 627, 631-32 (5th Cir. 1976); Chrysler Corp. v. Schlesinger, 412 F. Supp. 171, 177 (D. Del. 1976); GTE Sylvania Inc. v. Consumer Product Safety Comm'n, 404 F. Supp. 352, 367, 367 n.63 (D. Del. 1975); Sears, Roebuck and Co. v. GSA, 402 F. Supp. 378, 382-83 (D.D.C. 1975) [Sears II]; Sears,

Roebuck and Co. v. GSA, 384 F. Supp. 996, 1001 (D.D.C. 1974) [Sears I]. See, e.g. Camp v. Pitts, 411 U.S., 138, 140-42 (1973); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413-17 (1971).

(ii) De novo review.

There is some authority for the proposition that the applicability of the subsection 552(b) exemptions should be determined de novo by the reviewing court. See Sears, Roebuck and Co. v. GSA, 402 F. Supp. 378, 383 n.7 (D.D.C. 1975) [Sears II]; U.S. Steel Corp. v. Schlesinger, 8 E.P.D. ¶ 9717 (E.D. Va 1974); Westinghouse Elec. Corp. v. Schlesinger, 392 F. Supp. 1246 (E.D. Va. 1974). However, the Supreme Court has been quite explicit in stating its position that "de novo review is appropriate only where there are inadequate factfinding procedures in an adjudicatory proceeding". Camp v. Pitts, 411 U.S. 138, 142 (1973); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971). Thus, if the agency's factfinding procedures are adequate (see Part V(B)(3), supra), de novo judicial review is simply not possible.

Consequently, it is imperative that all evidentiary material necessary to support a Filer's claim of exemption be presented to the agency in the first instance.

Affidavits and other evidentiary material which is presented in the first instance to the reviewing court may be considered, if at all, only for certain limited purposes. See, e.g., GTE Sylvania Inc. v. Consumer Product Safety Comm'n, 404 F. Supp. 32, 368 nn. 67 & 68 (D. Del. 1975).

(iii) Procedural errors by the agency.

A Filer who maintains a Reverse-FOIA action should endeavor to allege specific procedural errors committed by the agency which denied the Filer's claim of exemption. Such procedural errors could include:

(1) The agency's failure to consider and deal with certain specific arguments made to it by the Filer. See, e.g., Sea-Land Service, Inc. v. Morton, 11 E.P.D. ¶ 10,646 (D.D.C. Jan. 28, 1976).

(2) The agency's failure to base its decision on "a consideration of the relevant factors". Pennzoil Co. v. FPC, 534 F.2d 627, 631 (5th Cir. 1976).

(3) The agency's failure to give independent consideration to the Filer's claim of

exemption with respect to certain categories of documents.

(4) Inconsistencies in the agency's decision.

b. The Procedures employed by the reviewing court.

In Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), the Court of Appeals for the District of Columbia articulated a set of procedures to be employed in the course of a hearing before a trial court in an FOIA action. Similar procedures would appear to be appropriate in Reverse-FOIA cases.

The Vaughn procedures provide that the agency (or Filer) which is resisting disclosure must provide the trial court with:

(1) a detailed justification of its claim of exemption;

(2) a copy of the documents in question, or representative samples thereof, for in camera inspection; and

(3) an index correlating statements in the detailed justification with the related portions of the documents, or representative samples thereof, which have been submitted to the Court.