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Administrative Law - Freedom of Information Act

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ADMINISTRATIVE LAW— FREEDOM OF INFORMATION ACT

ADMINISTRATIVE LAW—FREEDOM OF INFORMATION ACT:

Pre-FOIA statutes giving Federal agencies discretion in withholding agency information held valid under Exemption 3. *Administrator, Federal Aviation Administration v. Robertson*, 422 U.S. 255 (1975).

The Freedom of Information Act¹ replaced the inadequate Public Information section of the Administrative Procedure Act of 1943.² The PI section 3 had been used “. . . more as an excuse for withholding [information requested by the public] than as a disclosure statute.”³ Specifically, one of the purposes of the FOIA was to eliminate such vague standards for exemption of agency information from disclosure as “for good cause found” and “in the public interest,”⁴ which were oftentimes used under Section 3 to prevent disclosure of embarrassing or incriminating information.⁵ In lieu of the ambiguous criterion of PI section 3, the FOIA states nine specific exemptions⁶ to the general policy of full agency disclosure.⁷

Exemption 3 of the FOIA⁸ states:

(b) This section does not apply to matters that are—

* * *

(3) specifically exempted from disclosure by statute.

Construction of Exemption 3 by the district and intermediate appellate courts has been varied, some courts requiring that the exempting statute identify specific classes or categories of items which are to be exempted⁹ and others allowing statutes giving complete discretion to

1. 5 U.S.C. § 552 [hereinafter referred to as FOIA].

2. 5 U.S.C. § 1002, *as amended*, 5 U.S.C. § 552 [hereinafter referred to as PI section 3].

3. S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965).

4. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 2 (1966), U.S. Code, Cong. & Admin. News 1966, at 2419.

5. S. Rep. No. 813, *supra* note 3.

6. 5 U.S.C. § 552(b)(1)-(9).

7. S. Rep. No. 813, *supra* note 3.

8. 5 U.S.C. § 552(b)(3) [hereinafter referred to as Exemption 3].

9. See *Stretch v. Weinberger*, 495 F.2d 639, 640 (1974) and *Schechter v. Weinberger*, 506 F.2d 1275 (1974), where the courts found that 42 U.S.C. § 1306(a), which allows disclosure of information “as the Secretary [of HEW] . . . may by regulations prescribe,” does not specifically exempt information from disclosure; and see *Cutler v. C.A.B.*, 375 F. Supp. 722, 724 (1974), where 49 U.S.C. § 1504 was held to not be under Exemption 3. *But see*

the administrator to fall within the scope of Exemption 3.¹⁰ The Supreme Court, however, had not dealt specifically with the construction of Exemption 3 until this case, hereinafter cited as *Robertson*.

In *Robertson*, members of the Center for the Study of Responsive Law requested certain information from the Federal Aviation Agency relating to airline safety standards in the form of Systems Worthiness Analysis Programs and Mechanical Reliability Reports which had been compiled by the Agency. At the administrative level the Agency succeeded in withholding the requested information, alleging that Exemption 3 allowed the Administrator to exempt the information from disclosure under authority of § 1104 of the Federal Aviation Act of 1958.¹¹ The same argument for nondisclosure was employed in subsequent proceedings in the federal courts, wherein the Plaintiffs sought an injunction against the Administrator.

The Supreme Court granted certiorari from a decision by the Court of Appeals for the District of Columbia Circuit upholding the District Court's grant of summary judgment in favor of Plaintiffs. The lower courts had held that "... the public information standard of [§ 1104] is not a specific exemption by statute within the meaning of Exemption 3 of the Information Act."¹²

The Supreme Court reversed the holding of the Court of Appeals, which suggested that the FOIA provides a comprehensive guide to congressional intent with regard to exemption of information and that the term "specific" in Exemption 3 requires reference to a particular class of documents. The Court stated that if the appellate court's interpretation were adopted, then all pre-FOIA statutes exempting information from disclosure without identification of

Evans v. Dept. of Transportation, 446 F.2d 821, 824 (1971) and the principal case for what is effectively a reversal of the Cutler decision.

10. See *Evans v. Department of Transportation*, *supra* note 9, holding that 49 U.S.C. § 1504 sets out sufficient guidelines to be included under Exemption 3. Also see *Sears v. Gottschalk*, 502 F.2d 122, 125 (1974), where the court held that a statute requiring information relating to patents to be withheld except "... as may be determined by the Commissioner" falls within the ambit of Exemption 3.

11. 49 U.S.C. § 1504 [hereinafter referred to as § 1104] states in relevant part: Any person ... may make written objection to the public disclosure of information contained in any application, report, or document ..., 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 supplied).

12. 498 F.2d 1031, 1036 (1974).

particular classes of documents would be repealed by implication; saying that "[r]epeals by implication are disfavored."¹³

The Court cited the legislative history of the FOIA to support its argument. It noted that the senate subcommittee "... expressed the clear intention that ... [the] exemption statutes [already in effect] would remain unaffected by the [FOIA]"¹⁴ and that neither the House nor the Senate raised any question nor made any objection when the FAA expressed the opinion during hearings that § 1104 was encompassed within Exemption 3. As further proof of the legislative intent, the Court pointed to the fact that Exemption 3 was not amended in 1974, despite the close Congressional scrutiny that the FOIA received by Congressional committees.

Finally, the Court stated that the FOIA and § 1104 are, in fact, coextant and consistent. It reasoned that the underlying purpose of the FOIA is to serve the public interest through a policy of opening public records to greater access while preserving confidentiality in certain areas,¹⁵ and that § 1104 is a reflection of that policy, wherein Congress determined that the public interest was best served through a grant of discretion to the Administrator.¹⁶ Refusing to examine the Congressional motive, the Court said: "The wisdom of the balance struck by Congress is not open to judicial scrutiny."

In environmental litigation, especially where the necessity for or the adequacy of an environmental impact statement is being challenged, the plaintiff's case is largely dependent upon the availability of information relating to the subject matter of the suit. Ordinarily, because of the expense of independent research, this information is available only through the adverse parties or through a government agency.¹⁷ The broad construction of Exemption 3 adopted by the *Robertson* court, allowing a statute which gives the administrator discretion to disclose or withhold information "in the public interest" to satisfy the Exemption 3 requirement of specificity, could

13. 422 U.S. at 265, citing the Regional Rail Reorganization Act Cases, 419 U.S. 102, 129 (1974).

14. 422 U.S. at 264.

15. 422 U.S. at 261

16. 422 U.S. at 266.

17. One instance where a Federal agency is empowered to obtain information from industry is set out in 15 U.S.C. §§ 171-98, which establishes the Bureau of Economic Analysis. One of the Bureau's functions is to "foster, promote, and develop the various manufacturing industries of the United States..." 15 U.S.C. § 175. To facilitate this process, the Bureau extends a survey form to various industries in order to gain information relating to current expenditures made on plant improvements. See *Citizens for a Better Environment v. Department of Commerce*, 8 E.R.C. 2049 (1976), for a more detailed presentation of the Bureau's activities.

provide agencies with an effective tool with which to ward off requests for information from the public.

That *Robertson* is being followed in the field of environmental litigation is shown by *Citizens for a Better Environment v. Department of Commerce*,¹⁸ decided in the U.S. District Court for the Northern District of Illinois. The Plaintiffs sought "... information relating to expenditures made on air and water pollution abatement equipment" by U.S. Steel¹⁹ and the defendant resisted disclosure, relying on Exemption 3 and 15 U.S.C. 176a.²⁰ The court, citing *Robertson*, held that the statute, which generally prohibited disclosure of "confidential" information, was within the ambit of Exemption 3 and that the Agency could, therefore, withhold the requested information.

While the *Citizens* court is one of the first to employ the *Robertson* holding in environmental litigation, it is probable that courts will continue to do so in the future in light of the clearly expressed Supreme Court opinion. Two examples of statutes similar to the one dealt with in *Robertson*, granting broad administrative discretion to withhold information, appear below. Under *Robertson* these statutes could fall within the scope of Exemption 3.

15 U.S.C. § 1516

The Secretary of Commerce *shall have control of the work of gathering and distributing statistical information* . . . relating to the subjects confided to his department²¹ . . . and he *may . . . publish such statistical information . . . in such a manner as to him may seem wise* (emphasis supplied).

43 U.S.C. § 1461

Nothing in . . . this title shall be construed to limit or restrict . . . the authority of the Secretary of the Interior *to prescribe such rules and regulations as he may deem proper* governing the inspection of the

18. 8 E.R.C. 2049 (1976) [hereinafter referred to as *Citizens*].

19. *Id.* at 2049.

20. 15 U.S.C. § 176a states:

Any . . . information furnished in confidence . . . shall be held to be confidential. . . . The Director . . . shall not permit anyone other than . . . employees . . . to examine such reports. . . .

The agency procedure was to include a caption on all surveys stating that the information would be held in confidence, thereby making all such information "confidential." *But see* M. A. Schapiro & Co. v. S.E.C., 339 F. Supp. 467 (1972), where the court stated that Exemption 3 does not relate to a statute that generally prohibits disclosure of confidential information. *Id.* at 470.

21. Some of the bureaus under the supervision of the Department of Commerce are: Bureau of Foreign and Domestic Commerce; Coast and Geodetic Survey; Federal Maritime Board; Inland Waterways Administration; National Oceanic and Atmospheric Administration; Bureau of Commercial Fisheries; and Environmental Science Services Administration. 15 U.S.C. § 1511.

records of said departments²² . . . by the general public, and any person having particular interest . . . may be permitted to take copies of such records *under such rules and regulations as may be prescribed by the Secretary of the Interior* (emphasis supplied).

CONCLUSION

While the *Robertson* holding has not yet been widely employed in environmental litigation, there is no question that it affords courts the opportunity to deny environmental groups access to information vital to their case. The question which remains, however, is whether the courts will hold the *Robertson* decision to instances where the statute proscribes a "public interest" standard or whether they will interpret it, as did the *Citizens* court, as a general relaxation of the FOIA requirement of specificity.

If the full impact of *Robertson* is realized, the FOIA, like its Section 3 predecessor, will come to be used ". . . more as an excuse for withholding information requested by the public than as a disclosure statute."

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22. "The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies: 1. Alaska Railroad; 2. Alaska Road Commission; 3. Bounty-lands; 4. Bureau of Land Management; 5. Bureau of Mines; 6. Bureau of Reclamation; 7. Division of Territories and Island Possessions; 8. Fish and Wildlife Service; 9. Geologic Survey; 10. Indians; 11. National Parks Service; 12. Petroleum conservation; 13. Public lands, including mines." 43 U.S.C. § 1457.