Administrative Law - Freedom of Information Act

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The Freedom of Information Act\(^1\) 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 exemptions\(^6\) to the general policy of full agency disclosure.\(^7\)

Exemption 3 of the FOIA\(^8\) 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 exempted\(^9\) and others allowing statutes giving complete discretion to

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1. 5 U.S.C. § 552 [hereinafter referred to as FOIA].
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 Schecter 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.\textsuperscript{10} The
Supreme Court, however, had not dealt specifically with the con-
struction of Exemption 3 until this case, hereinafter cited as \textit{Robert-
son}.

In \textit{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.\textsuperscript{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 mean-
ing of Exemption 3 of the Information Act.”\textsuperscript{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

\textsuperscript{10} See \textit{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. \textit{Also see Sears v.
Gottschalk}, 502 F.2d 122, 125 (1974), where the court held that a statute requiring in-
formation relating to patents to be withheld except “... as may be determined by the
Commissioner” falls within the ambit of Exemption 3.

\textsuperscript{11} 49 U.S.C. § 1504 [hereinafter referred to as § 1104] states in relevant part:

\textit{Any person... may make written objection to the public disclosure of in-
formation 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).

\textsuperscript{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, where-in 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

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*, 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. Steel and the defendant resisted disclosure, relying on Exemption 3 and 15 U.S.C. 176a. 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.

The Secretary of Commerce shall have control of the work of gathering and distributing statistical information... relating to the subjects confided to his department... 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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