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THE RELEASE OF GOVERNMENT-OWNED TECHNICAL  
DATA UNDER THE FREEDOM OF INFORMATION  
LAW: BETWEEN SCYLLA AND CHARYBDIS

JAMES A. DOBKIN†

ON JULY 4, 1966, President Johnson signed into law Senate Bill 1160 which amends section 3 of the Administrative Procedure Act.<sup>1</sup> Commonly known as the "Freedom of Information Law," the new section, which became effective 1 year from its date of enactment, represents 10 years of effort by congressional leaders to provide the public with an effective means of extracting data from federal administrative agencies.<sup>2</sup>

As enacted, the new section provides, *inter alia*, that "each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person."<sup>3</sup> There are nine exemptions to that prescription which exclude matters that are:

- (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;
- (2) related solely to the internal personnel rules and practices of an agency;
- (3) specifically exempted from disclosure by statute;
- (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (5) inter-agency or intra-agency memorandums or letters . . . ;

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1. Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250, amending 5 U.S.C. § 1002 (1964) (codified by Act of June 5, 1967, Pub. L. No. 90-23, 81 Stat. 54, 5 U.S.C. § 552 (Supp. III, 1968)). For a discussion of the effect of this Law on discovery proceedings in tax litigation see Murdoch, *Discovery Against the United States in Civil Tax Proceedings*, 13 VILL. L. REV. 58, 93-96 (1967).

2. See H.R. REP. No. 1497, 89th Cong., 2d Sess. 4 (1966) [hereinafter cited as H.R. REP. No. 1497].

3. 5 U.S.C. § 552(a) (3) (Supp. III, 1968).

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

(7) investigatory files compiled for law enforcement purposes except to the extent available by law . . . ;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.<sup>4</sup>

While the purpose of the Freedom of Information Law — namely, to expose the functioning of government to the public in general by requiring full disclosure of information except for specific, limited exemptions<sup>5</sup> — is clear, equally clear is the language of the Law which requires prompt availability of *all* nonexempted records to *any* person.<sup>6</sup> A problem arises with respect to information which falls within the literal wording of the Law, but not within its purpose. This problem can best be demonstrated by examining the application of the new Law to a narrow, yet increasingly common, fact pattern.

The hypothetical case of ABC Company will serve as a vehicle for the discussion. ABC Company writes to a field installation of the Department of the Army requesting all available drawings for 36,000 BTU airconditioners. ABC is neither a government contractor nor a prospective bidder. In fact, ABC's letter indicates that the drawings are sought solely for private commercial exploitation. Several of the more than 100 pertinent drawings, though acquired through a research and development contract with a private concern, contain no express restrictions on government use. Further, for the purpose of the immediate discussion, the following assumptions will be made: that the data requested by ABC Company does not fall within the enumerated exemptions; that the mandate that information be made "promptly available" prescribes reproduction and provision rather than mere accessibility;<sup>7</sup> and that accedence to the request will not interfere with the mission of the affected facility. The applicability of the specific exemptions and the possible interference with the mission of the affected facility will be discussed below.

4. 5 U.S.C. § 552(b) (Supp. III, 1968).

5. See S. REP. No. 813, 89th Cong., 1st Sess. 3 (1965) [hereinafter cited as S. REP. No. 813]; H.R. REP. No. 1497, at 12.

6. 5 U.S.C. § 552(a) (3) (Supp. III, 1968).

7. See H.R. REP. No. 1497, at 8-9.

A literal reading of the new section *in vacuo* seems to force the conclusion that the Government will be constrained to furnish any and all information in its possession. Moreover, there are some that might argue that the Law is clear and unambiguous and, therefore, that consulting the legislative history is improper. None the less, in the words of Mr. Justice Holmes:

If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute in which the phrase is included.<sup>8</sup>

Accordingly, it is proposed that numerous references in the legislative history of section 3 prove that the section was promulgated to expose the executive machinery and that disclosure of substantive data unrelated to agency function is beyond the intent of the legislators; the status of such data should be unaffected by the new Law.

### I. THE SCOPE OF THE NEW SECTION

The gravamen of the old section 3 was to require "agencies to keep the public currently informed of their organization, procedures and rules."<sup>9</sup> In 1945, Senator McCarran, then Chairman of the Committee on the Judiciary, reported to the Senate that the section had been "drawn upon the theory that administrative *operations and procedures* are public property which the general public . . . is entitled to know . . ."<sup>10</sup> However, the section permitted suppression "in the public interest" or for "good cause found," and prescribed disclosure only to persons "properly and directly concerned therewith."<sup>11</sup> By giving the agencies the discretion to interpret those criteria, the Law became a ground for denial rather than for disclosure of information. In *purpose*, the new section 3 is identical to the old section. The three criteria for denial have been omitted. Therefore, it would seem that the depth of the pool of information sought to be sounded by both sections is the same; only the plummet has been redefined.

Consider the following statements reflecting on the expected and intended purpose of the new Law: "The bill, it is believed, may make it easier to find out how members of regulatory bodies vote and to get access to . . . administrative procedures of Federal Agencies."<sup>12</sup> "[W]hat we are aiming at . . . is sound administrative *procedures* in

8. *Boston Sand Co. v. United States*, 278 U.S. 41, 48 (1928).

9. ADMINISTRATIVE PROCEDURE ACT, ATT'Y GEN. MANUAL 9 (1947).

10. S. REP. NO. 752, 79th Cong., 1st Sess. 198 (1945) (emphasis added).

11. See H.R. REP. NO. 1497, at 1-2.

12. N.Y. Times, July 5, 1966, at 25, col. 3 (emphasis added).

the interest of effective administration . . . ."<sup>13</sup> The taxpayer has the right "to know how his money is being spent; to know how public business is conducted; the reasons for decisions that affect the lives, businesses and future of our people."<sup>14</sup> "The people only control their Government so long as they have a voice in its decisions; and if this voice is to be meaningful and constructive, the people must have a way of informing themselves of *governmental activity*."<sup>15</sup>

[O]ur system of government is based on the participation of the governed . . . . We must remove every barrier to information about — and understanding of — *Government activities* consistent with our security if the American public is to be adequately equipped to fulfill the ever more demanding role of responsible citizenship.

S. 1160 is a bill which will accomplish that objective by shoring up the public right of access to the *facts of government* and, inherently, providing easier access to the officials clothed with governmental responsibility.<sup>16</sup>

"[T]he public is entitled to all possible information about the activities, plans and the policies of the Federal Government."<sup>17</sup> "Threats to cherished liberties and fundamental rights are inherent in the relatively unchecked operations of a mushrooming bureaucracy . . . . [N]o citizen will be denied full access to data that may be of crucial importance to his case . . . ."<sup>18</sup>

Determined resistance to the clearly expressed will of Congress has forced us to bring more pressure to make a reality the right of the people *to know what their Government is doing*.

13. *Hearings on S. 1160, S. 1336, S. 1758, and S. 1879 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 100 (1965) (statement of Robert M. Benjamin, American Bar Ass'n) (emphasis added).

14. *Hearings on H.R. 5012-21, 5237, 5406, 5520, 5583, 6172, 6739, 7010, and 7161 Before a Subcomm. of the House Comm. on Government Operations*, 89th Cong., 1st Sess., pt. 1, at 111 (1965) (statement of John H. Colburn) [hereinafter cited as *Hearings on H.R. 5012*]. See *id.* at 114 (statement of John H. Colburn) ("conduct of public affairs"); *id.* at 119 (remarks of Richard D. Smyser) ("agency's workings"); *id.* at 129 (remarks of Creed Black) ("what is going on"); 112 CONG. REC. 13,642 (1966) (remarks of Congressman Moss) ("workings of the Federal Government"); *id.* at 13,643 (remarks of Congressman King) ("information relevant to governmental activities"); *id.* at 13,647-48 (remarks of Congressman Laird) ("essential information as a citizen and taxpayer"); *id.* at 13,648 (remarks of Congressman Fascell) ("policies and activities"); *id.* at 13,652 (remarks of Congressman Shriver) ("ordinary business of their Government"); *id.* at 13,653 (remarks of Congressman Rumsfeld) ("evidence of official government action"); REPUBLICAN POLICY COMM. STATEMENT ON FREEDOM OF INFORMATION LEGISLATION, S. 1160, May 18, 1966, reprinted in 112 CONG. REC. 13,648 (1966).

15. *Hearings on H.R. 5012*, at 165 (statement of Senator Edward V. Long, sponsor of S. 1160) (emphasis added).

16. 112 CONG. REC. 13,641 (1966) (remarks of Congressman Moss).

17. *Id.* at 13,642 (remarks of Congressman Moss).

18. *Id.* at 13,645 (remarks of Congressman King).

This bill . . . will remove the umbrella under which bureaucrats may hide.

This provision gives an opportunity to correct *erroneous interpretations and applications* of the statute which may be applied by the individual in Government service.<sup>19</sup>

With this legislation, it would be possible for the citizen to take recourse against arbitrary *administrative decisions*. He could demand and receive information on *decisions* made at the Federal level. With this information he could more adequately challenge arbitrary *bureaucratic acts*.<sup>20</sup>

Procedures, operations, activities, malfeasance, administration, conduct, decisions, workings — each are words used by the legislators to describe the target of section 3; each is an administrative function logically falling under the aegis of the Administrative Procedure Act.<sup>21</sup> In other words, the “right to know” cited in myriad instances throughout the legislative history,<sup>22</sup> is the right to know what the agency is doing and how it is doing it.

Whether an agency must disclose information should depend, not on who is seeking the information nor why it is sought, but rather on the nature of the information itself. Under the new Law, if the information sought is related to the function of the agency, it must be disclosed unless it fits under one of the exemptions.<sup>23</sup> If no such relation is found, it would appear that the purpose of the Law would not require the information to be disclosed.<sup>24</sup>

19. *Hearings on H.R. 5012*, at 167 (statement of Senator Frank E. Moss) (emphasis added).

20. *Id.* at 169 (statement of Senator Lee Metcalf) (emphasis added). *See id.* at 168 (statement of Senator E. L. Bartlett); *id.* at 170 (statement of Senator Thomas L. Ashley).

“Administrative information” and information permitting the individual “to find out how his government is operating” are words used in H.R. REP. No. 1497, at 6, by the House Committee on Government Operations. *See also id.* at 12 (“public information about Government activities”); S. REP. No. 813, 89th Cong., 1st Sess. 2-3 (1965).

21. 5 U.S.C. § 1002 (1964).

22. *See, e.g.*, 112 CONG. REC. 13,641-44 (1966).

23. There is evidence that Congressman Moss’s subcommittee realized that the context of the Administrative Procedure Act might restrict the application of the bill. *See Hearings on H.R. 5012*, at 34 (colloquy between Benny Kass, counsel, and Norbert Schlei). For that reason it was thought by many that the Housekeeping Statute, 5 U.S.C. § 22 (1964), would be the more appropriate vehicle. If nothing else, that the Administrative Procedure Act finally became host to the subject provisions tends to prove that the promulgators intended the restrictions inherent in that Act. *Cf. Hearings on H.R. 5012*, at 103 (colloquy between Benny Kass and Robert Benjamin).

24. In one of the first of the few cases interpreting the new Law, Judge Alexander Holtzoff stated:

[The purpose of the Law] was to prevent Government agencies from unjustifiably withholding information that should be reasonably available to a person having some basis for seeking it. That this must have been the intent of Congress appears, first, from the rather limited grant of power. It is granted only as to identifiable

In the hypothetical, whether ABC is entitled to access to the drawings depends upon whether the drawings are functional or non-functional. If the agency refuses to disclose the information, the burden is upon it to justify such action by showing that the information sought is nonfunctional.<sup>25</sup> Unfortunately, the line between functional and nonfunctional is not always clear. For example, while information on the airconditioners in the field installation of the Department of the Army might, at first, appear to be nonfunctional, that same information might be considered functional if sought by someone who was trying to determine the procurement practices of the Department of the Army. It should be carefully noted, however, that the distinction is not made on the basis of who is making the request, but rather on the basis of how this information is related to the function of the agency. At times, far-fetched relationships may be raised in order to gain access to information held by an agency. It will be up to the courts in a case-by-case analysis to draw the line between functional and nonfunctional, as it does in similar situations in other areas.

## II. INTERFERENCE WITH THE MISSION

If the broad provisions of the new section are deemed to apply to requests like that of ABC Company, will the burden placed on the Government by accommodating ABC affect the applicability of the Law? The need for effective government has been acknowledged to be at least as great as the need to know.<sup>26</sup> In the case of the Department of Defense, for example, it can be argued that accomplishment of the Department's mission outweighs many other considerations. For reasons equally peculiar to DOD, how much of a burden on an installation is too much should not be the subject of legislation. The determination lies in the realm of military preparedness; only the affected facility can judge its own effectiveness. Although leaving such a conclusion to the discretion of the agency interjects into the new Law one objectionable criterion of the old section, a balancing of the interests in defense circumstances seems to warrant the risk.

The promulgators of the new section were well aware of the problem. In the words of Representative Moss:

[W]e certainly intend that this [disclosure requirement] be reasonable, the Government not be put to any heavy costs or

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records. Secondly, it appears from the exceptions, which are almost greater than the grant.

*Bristol-Meyers Co. v. FTC*, 284 F. Supp. 745, 747 (D.D.C. 1968) (emphasis added). While it is not clear from the opinion what the court was referring to when it spoke of a "basis" for seeking the information, as discussed in text, the "basis" should be related to the nature of the information rather than the person's reason for requesting it.

25. 5 U.S.C. § 552(a) (3) (Supp. III, 1968).

26. *Hearings on H.R. 5012*, at 1 (statement of Congressman Moss).

extra costs in compiling specialized information, [and that disclosure be required of only] that which is available conveniently. We are not asking here that there be a requirement imposed upon the agencies and departments that they go in and compile exhaustive data for a person who might just be curious . . . .<sup>27</sup>

Although several legislators suggested charging fees to eliminate any burden,<sup>28</sup> Congressman Moss acknowledged the pragmatic difficulty inherent in too broad a reading of the statute: "I just [want] to make [it] clear that we are not asking here that you marshal up an *army* of new clerks to start gathering information."<sup>29</sup> President Johnson concurred when he signed the bill: "There are some who have expressed concern that the Language of this bill will be construed in such a way as to impair Government operations. I do not share this concern."<sup>30</sup>

The above remarks were directed at government operations, in general, and at the provision of information which unquestionably qualify as records. As applied to the Defense Department, in particular, and to material such as technical data, the status of which under the new Law may be hazy, the statements assume greater emphasis. It seems, therefore, that the degree of effort necessary to retrieve, reproduce, and provide data should be used as a rule of thumb to define what data must be furnished and what data is impliedly excepted from the the new section.<sup>31</sup> One element that should be included in the application of this "rule of reason" would seem to be the expense and effort that the party seeking the information is willing to undertake. For example, if compliance with the Law would seriously encumber government operations, a requirement that the party provide his own means of reproduction should be upheld.

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27. *Id.* at 61 (remarks of Congressman Moss). It should be understood that what is being here discussed is not the reproduction and provision of several sheets of drawings. It is not uncommon to receive a request for 8,000 documents. Moreover, if the records are to be used for evidentiary purposes, each sheet must be certified as an authentic copy. It is conceivable that a single system could involve 50,000 drawings.

28. *See, e.g.*, H.R. REP. No. 1497, at 2.

29. *Hearings on H.R. 5012*, at 62 (remarks of Congressman Moss) (emphasis added).

30. *N.Y. Times*, July 5, 1966, at 24, col. 5.

31. *See Machin v. Zuchert*, 316 F.2d 336 (D.C. Cir. 1963), in which the court of appeals proposed that to the extent a disclosure of information interferes with an important government function, such information should be treated as privileged. The court was concerned primarily with the content of the information sought rather than with the physical burden which might be imposed on the agency. Nevertheless, it is conceivable that the broad principle of the case could be applied to situations where disclosure, regardless of content, would interfere with an important government function.



### III. THE SPECIFIC EXEMPTIONS

It would seem at first that the exemption providing for withholding trade secrets and privileged or confidential items is applicable to documents of the type under discussion. The terms "privileged" and "confidential" have been judicially expanded<sup>32</sup> to include many items which would not qualify under classical legal definition. Consistent with this trend is evidence in the legislative history of the new Law that Congress intended "privileged or confidential" to be interpreted as that which "would customarily not be released to the public by the person from whom it was obtained."<sup>33</sup>

The Attorney General, in his memorandum providing guidelines for the implementation of the new Law, states:

An important consideration should be noted as to formulae, designs, drawings, research data, etc., which, although set forth on pieces of paper, are significant not as records but as items of valuable property. These may have been developed by or for the Government at great expense. There is no indication anywhere in the consideration of this legislation that the Congress intended, by subsection (c), to give away such property to every citizen or alien who is willing to pay the price of making a copy. Where similar property in private hands would be held in confidence, such property in the hands of the United States should be covered under exemption (e)(4).<sup>34</sup>

The Department of Defense directive<sup>35</sup> accords with the Attorney General's suggestion. Under the "privileged or confidential" exemption, four categories of material are listed, one of which is:

(iv) Information such as research data, formulae, designs, drawings, and other technical data and reports which:

(a) Are significant as items of valuable property acquired in connection with research, grants, or contracts.

(b) Would likely be held in confidence if owned by private parties.<sup>36</sup>

32. See, e.g., *id.*

33. *Hearings on H.R. 5012*, at 41. In discussing the term "trade secrets" in another context, however, the court of appeals stated that "it is well settled that detailed manufacturing drawings . . . are prima facie trade secrets." *A.H. Emery Co. v. Marcan Prods. Corp.*, 389 F.2d 11, 16 (2d Cir. 1968).

34. ATT'Y GEN. MEM. ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT 34 (1967).

35. Department of Defense Directive No. 5400.7, 32 C.F.R. § 286 (1968).

36. 32 C.F.R. § 286.8(b)(4)(iv) (1968). By eliminating any requirement of "confidence," the National Aeronautics and Space Administration's exemption is even broader than the DOD's. 14 C.F.R. §§ 1206.200-.205 (1968). See also the Atomic Energy Commission implementation, 10 C.F.R. §§ 9.4-9.5 (1968).

Unfortunately, the Department of Army regulation,<sup>37</sup> which should be based upon the DOD directive, seems to have missed the mark. The regulation's counterpart to the above quoted passages exempts:

(4) Commercial information such as formulae, designs, drawings, and other technical data submitted in *confidence* in connection with research, grants or contracts.<sup>38</sup>

At best, the language of the regulation is confusing. None of the Defense agencies accepts these types of drawings "in confidence." Drawings and other technical data generated by research, grant, or contract are acquired with either limited or unlimited rights for their dissemination and use. Moreover, the regulation by referring to a *submission* of the data seems to overlook the large body of data generated by the Government "in-house." Such data would be exempted under the Attorney General's memorandum and the DOD directive. Further, by requiring a submission in confidence, the regulation has narrowed greatly the directive's prescription that the data only be of a nature which would "likely be held in confidence if owned by private parties."<sup>39</sup> It would seem advisable to amend the regulation to bring it into line with the Defense Department directive, rather than place Department of Army personnel in the difficult position of trying to determine which document takes precedence.<sup>40</sup>

Another exemption calls for withholding pursuant to executive order "in the interest of the national defense or foreign policy."<sup>41</sup> There was concern during the congressional hearings over the possible strict interpretation of that exemption,<sup>42</sup> and a substitution of the much broader term "national security" was suggested. Although not adopted, frequent references throughout the legislative history indicate that the authors of the section considered the words of the exemption tantamount to "national security."<sup>43</sup>

We do not challenge that right to withhold for the *national interest*, because we specifically require it by Executive order to be kept secret in the interest of the national defense or foreign policy. Now, *that is very broad*. That means that any of these documents that are of sufficient significance to the *security* of this Nation or to the *interests* of this Nation as it deals with other

37. Department of Army Reg. No. 345-20, 32 C.F.R. § 518 (1968).

38. 32 C.F.R. § 518.10(d)(4) (1968) (emphasis added).

39. 32 C.F.R. § 286.8(b)(4)(iv)(b) (1968).

40. It seems likely that the DOD directive, as a pronouncement of the higher authority, would govern. Speaking pragmatically, however, the Army regulation, because of its wider circulation in the field, might have a greater following.

41. 5 U.S.C. § 552(b)(1) (Supp. III, 1968).

42. See, e.g., *Hearings on H.R. 5012*, at 51 (remarks of Fred Smith).

43. See *id.* at 61 (remarks of Congressman Moss); *id.* at 99 (colloquy between

nations can, by appropriate designation, be excluded from the provisions of this act.<sup>44</sup>

The public interest or national security is adversely affected by indiscriminate disclosure of drawings in two ways. First, there is the interference with the mission of the affected installation<sup>45</sup> and, second, there is the impact that such disclosure would have upon government contractors who supply the bulk of the drawings in question. When a contractor provides the Government with data pursuant to a contract he expects that even data conveyed with unlimited rights will be used only for governmental purposes. That policy has encouraged a free and untrammelled flow of information. Any change in policy would have several effects: the cost of research and development will rise, inherently reflecting an increment for the disclosure of data formerly withheld from the public; or less data will be given to the Government; or more data will be restrictively labeled (in such case the Government would again pay for the additional effort of dissemination and marking). Even the supporters of the bill clearly manifested that it was not intended that "information which would be prejudicial to the Government, to its security, *whether it be fiscal or military*, be made available to anybody."<sup>46</sup>

Two exemptions which, in combination, have bearing on the present subject are those which encompass "investigatory files compiled for law enforcement purposes except to the extent available by law to a party"<sup>47</sup> and matter "specifically exempted from disclosure by statute."<sup>48</sup> "Investigatory files" include information compiled for the purpose of civil litigation.<sup>49</sup> But, rule 34 of the Federal Rules of Civil Procedure prescribes that a litigant must show "good cause" to obtain documents from the adverse party. An anomalous situation arises when on one hand the investigatory files exemption acknowledges the discovery rules of federal litigation, and on the other hand the new section if given broadest application would nullify those rules with respect to the Government.<sup>50</sup> Further, it is unreasonable to urge one rule for litigation purposes and another for all other times; especially if the

44. *Id.* at 14 (remarks of Congressman Moss) (emphasis added). See also President Johnson's comment that, "no one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest." N.Y. Times, July 5, 1966, at 24, col. 4.

45. See pp. 79-80 *supra*.

46. *Hearings on H.R. 5012*, at 61 (remarks of Congressman Moss) (emphasis added).

47. 5 U.S.C. § 522(b) (7) (Supp. III, 1968).

48. *Id.* § 522(b) (3).

49. H.R. REP. No. 1497, at 11.

50. See *Hearings on H.R. 5012*, at 166 (statement of Senator Sam J. Ervin).

See also *id.* at 57 (remarks of Fred Smith).

litigation rule is the more restrictive. It is reasonable indeed to try to reconcile the two proclamations rather than deem one repealed by the apparently inconsistent language of the other. Since it would seem to give undue breadth to the language of the "disclosure by statute" exemption to permit it to cover rule 34, which *prescribes* rather than *proscribes* activity, to bring them into line the requirement of "good cause" should be read into the new section.

An argument can be made that drawings in the possession of the Department of Defense also qualify under the exemption covering information specifically exempted from disclosure by statute.<sup>51</sup> The only statutes applicable to DOD and pertinent to the release of drawings are sections 4506 and 9506 of title 10 of the United States Code.<sup>52</sup> Those sections authorize the Secretaries of the Army and Air Force, respectively, to sell, lend, or give drawings and manufacturing information as they consider best for the national defense "(1) to any contractor for . . . supplies under approved production plans; and (2) to any person likely to manufacture or supply . . . supplies under such plans."<sup>53</sup> The wording of these sections appears broad enough to permit release to any present or prospective DOD suppliers. However, the legislative history of an earlier statute,<sup>54</sup> of which the cited sections are codifications, casts light on the congressional intent behind sections 4506 and 9506. In a colloquy between committee members discussing the original bill, one Senator voiced the fear that the terms of the statute were so broad as to permit release of information generally, whereas release was intended only in "*anticipation of bid.*" He felt that such a safeguard should be written into the bill to prevent violation of this intent by future Secretaries of War.<sup>55</sup> It was finally decided not to include the clause. However, it was stated to be the intention, and so recorded, that release of drawings and other information within the purview of the statute be made with that purpose in mind.<sup>56</sup> In view of these congressional statements, it is evident that the authority to release DOD drawings should be invoked only where the party requesting them is participating in procedures which will culminate in the award of a contract. Conversely, it would seem that the same sections can be used as authority for the proposition that DOD drawings may *not* be released to just anybody who may care to possess them. Therefore, those drawings may conceivably fall within the exemption for information exempted from disclosure by statute.

51. 5 U.S.C. § 552(b) (3) (Supp. III, 1968).

52. 10 U.S.C. §§ 4506, 9506 (1964).

53. *Id.* Interestingly, the Secretary of the Navy has no equivalent authority.

54. Act of July 28, 1937, ch. 525, 50 Stat. 535.

55. 81 CONG. REC. 7211 (1937) (remarks of Senator Walcott).

56. *Id.*

## IV. CONCLUSION

Notwithstanding the arguments above, it is the firm belief of the author that the public has a right to government-owned drawings and should have a means for acquiring them. For the reasons presented, however, it is submitted that the Freedom of Information Law is inappropriate authority for forcing provision of the type of information requested by ABC Company. The intent of the authors of the new Law appears clear, and their admonition — “[w]e have expressed an intent in the report on this bill which we hope the courts will read with great care”<sup>57</sup> — should be taken just as seriously by the public.

It is submitted that the purpose and reach of the new section are consistent with the old. The language has been changed to put the emphasis where it belongs — on disclosure, and to place the burden of proof on the agency.<sup>58</sup> Most importantly, the new section provides judicial review<sup>59</sup> — the teeth which were lacking previously. There is, however, the minimum requirement that the information requested be related to the function or operation of the agency.

Finally, it is suggested that releases of the type described which might be authorized by other laws should be made through some central facility such as the Department of Commerce Clearinghouse for Scientific and Technical Information.<sup>60</sup> In that manner a staff created for that purpose and trained in the dissemination of information, with all the safeguards required thereby, could accomplish expeditiously what might be an unreasonable imposition on some administrative agencies.

57. 112 CONG. REC. 13,642 (1966) (remarks of Congressman Moss).

58. 5 U.S.C. § 552(a) (3) (Supp. III, 1968).

59. *Id.*

60. See 15 U.S.C. §§ 1151-57 (1964), which authorizes the Secretary of Commerce to maintain a clearinghouse for the collection and dissemination of scientific, technical, and engineering information. The statute directs specifically that the Secretary take steps to

make such information available to industry and business . . . and to the general public, through the preparation of abstracts, digests, translations, bibliographies, indexes, and microfilm and other reproductions, for distribution either directly or by utilization of business, trade, technical and scientific publications and services.

*Id.* at § 1152(b). The military departments have complemented this statute with memorandums directing the release of unclassified technical information to the Department of Commerce.