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AN EXAMPLE OF JUDICIAL LEGISLATION: THE THIRD  
CIRCUIT'S EXPANSION OF EXEMPTION 6 OF THE  
FREEDOM OF INFORMATION ACT TO INCLUDE  
UNION AUTHORIZATION CARDS

MARTIN J. SOBOL†

I. INTRODUCTION

IN THE RECENT CASE OF *Committee on Masonic Homes v. NLRB*,<sup>1</sup> the Third Circuit addressed the issue of whether, under the Freedom of Information Act (FOIA),<sup>2</sup> an employer is entitled to copies of authorization cards that have been submitted by a union to the National Labor Relations Board (Board) in support of a petition for a representation election.<sup>3</sup> In brief, the court held that union authorization cards fell within exemption 6 of the FOIA (Exemption 6), which exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."<sup>4</sup> It is submitted that *Masonic Homes* seriously contorts the FOIA's disclosure requirements and exemptions.

It is important to note at the outset that past FOIA cases that concerned the Board have involved unfair labor practice, rather than representation, issues.<sup>5</sup> These decisions have established that the FOIA does not require disclosure of documents held by the Board in connection with unfair labor practice charges.<sup>6</sup> However, in unfair

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1. 556 F.2d 214 (3d Cir. 1977).

2. 5 U.S.C. § 552 (1976).

3. 556 F.2d at 215, 218-22.

4. 5 U.S.C. § 552(b)(6) (1976). See 556 F.2d at 219-21.

5. See, e.g., *Goodfriend Western Corp. v. Fuchs*, 535 F.2d 145 (1st Cir.), cert. denied, 429 U.S. 895 (1976); *Title Guarantee Co. v. NLRB*, 534 F.2d 484 (2d Cir.), cert. denied, 429 U.S. 834 (1976); *Roger J. Au & Son v. NLRB*, 538 F.2d 80 (3d Cir. 1976); *Climax Molybdenum Co. v. NLRB*, 539 F.2d 63 (10th Cir. 1976); *Local 30, United States Workers Ass'n v. NLRB*, 408 F. Supp. 520 (E.D. Pa. 1976); *L'Eggs Products, Inc. v. NLRB*, 93 L.R.R.M. 2488 (C.D. Cal. Sept. 14, 1976); *Donn Products, Inc. v. NLRB*, 93 L.R.R.M. 2065 (N.D. Ohio Aug. 12, 1976); *NLRB v. Biophysics System, Inc.*, 91 L.R.R.M. 3079 (S.D.N.Y. Apr. 12, 1976).

6. See, e.g., *Goodfriend Western Corp. v. Fuchs*, 535 F.2d 145 (1st Cir.), cert. denied, 429 U.S. 895 (1976); *Title Guarantee Co. v. NLRB*, 534 F.2d 484 (2d Cir.), cert. denied, 429 U.S. 834 (1976); *Roger J. Au & Son, Inc. v. NLRB*, 538 F.2d 80 (3d Cir. 1976); *Climax Molybdenum Co. v. NLRB*, 539 F.2d 63 (10th Cir. 1976); *Local 30, United States Workers Ass'n v. NLRB*, 408 F. Supp. 520 (E.D. Pa. 1976); *L'Eggs Products, Inc. v. NLRB*, 93 L.R.R.M. 2488 (C.D. Cal. Sept. 14, 1976); *NLRB v. Biophysics System, Inc.*, 91 L.R.R.M. 3079 (S.D.N.Y. Apr. 12, 1976).

labor practice cases, the Board assumes a prosecutorial role; whereas, in representation proceedings, the Board takes a nonadversary, fact-finding and neutral stance.<sup>7</sup> Therefore, FOIA cases involving unfair labor practice charges are not applicable to disclosure requests in representation cases, and the Third Circuit in *Masonic Homes* was presented with an issue never before addressed by an appellate court.

The Third Circuit's resolution of this issue is far from satisfactory. It is submitted that the court's reliance upon Exemption 6 is neither logical nor supported by existing case law or the legislative history of the FOIA. Furthermore, it is submitted that the court contorted the FOIA in order to make a policy decision that exceeded the scope of its judicial power.

This article will explain in detail the origin of *Masonic Homes* and the Third Circuit's decision. An analysis of that decision will then be undertaken.

## II. THE BOARD'S RESPONSE TO FOIA DISCLOSURE REQUIREMENTS

Congress enacted the FOIA to open the doors of the administrative decisionmaking process.<sup>8</sup> To achieve this goal the FOIA is designed "to establish a general philosophy of full agency disclosure . . . ."<sup>9</sup> As the FOIA is structured, virtually every document is available to the public in one form or another "unless information is exempted under clearly delineated statutory language."<sup>10</sup> Moreover, in accordance with congressional intent, the courts have interpreted the obligation to disclose broadly, and the exemptions narrowly.<sup>11</sup>

It has also been established that in proceedings brought pursuant to the FOIA, the agency possessing the requested information has the burden of proving the applicability of one of the exemptions preventing disclosure,<sup>12</sup> and the Supreme Court has made it clear that the rights sought to be secured under the FOIA are not affected by the fact that the plaintiff is a litigant in a pending

7. See *American Fed'n of Labor v. NLRB*, 308 U.S. 401, 405 (1940).

8. S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965) [hereinafter cited as S. REP. NO. 813].

9. *Id.*

10. *Id.* See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975).

11. *Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S. 1 (1974); *EPA v. Mink*, 410 U.S. 73 (1973); *Ethyl Corp. v. EPA*, 478 F.2d 47 (4th Cir. 1973). See S. REP. NO. 813, *supra* note 8, at 3.

12. See 556 F.2d at 218, *citing* *Department of the Air Force v. Rose*, 425 U.S. 352, 361-62 (1976), and *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1972).

agency proceeding.<sup>13</sup> A court must regard a plaintiff who is a litigant in a pending agency proceeding just as it would any disinterested party requesting the same information, "neither penalizing . . . [the plaintiff] . . . for its self-interest in seeking disclosure nor allowing it any greater consideration because of the consequences which might result from nondisclosure."<sup>14</sup>

In spite of these clearly enunciated policies and court pronouncements, the Board has steadfastly maintained a policy of nondisclosure.<sup>15</sup> The present action was instituted in order to challenge the Board's policy of nondisclosure in a representation election proceeding. It is important to note that at all times material herein, there were not, nor have there ever been, any unfair labor practice charges filed against the employer seeking disclosure in *Masonic Homes*.<sup>16</sup> Thus, the nonadversarial nature of the proceedings in this particular case made it an appropriate test of the Board's policy of nondisclosure.<sup>17</sup>

### III. THE BACKGROUND OF *Masonic Homes*

The Committee on Masonic Homes of the R. W. Grand Lodge, F. & A.M. of Pennsylvania (Home) operated a nursing home in Elizabethtown, Pennsylvania.<sup>18</sup> On February 20, 1976, the American Federation of Grain Millers, AFL-CIO (Union) filed a Representation Petition with the regional office of the Board requesting that the Board conduct an election among certain of the Home's employees to determine whether they desired to be represented by the Union for purposes of collective bargaining.<sup>19</sup> The petition alleged that a "substantial number" of the Home's employees desired representation and that the petition was supported by at least thirty percent of the employees in question.<sup>20</sup> Also in support of its petition, the Union submitted "authorization cards."<sup>21</sup> On March 6, 1976, the Home sent

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13. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975).

14. *Deering Milliken, Inc. v. Nash*, 78 Lab. Cas. (CCH) ¶ 11, 182, at 20,040 (D.S.C. Nov. 12, 1975).

15. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Wellman Indus. Inc. v. NLRB*, 490 F.2d 427 (4th Cir. 1974); *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971).

16. *Committee on Masonic Homes v. NLRB*, 414 F. Supp. 426, 430 (E.D. Pa. 1976).

17. See text accompanying notes 5-7 *supra*.

18. 556 F.2d at 216.

19. *Id.*

20. *Id.*

21. *Id.* The Third Circuit explained the significance of authorization cards: "Union authorization cards are cards signed by employees, authorizing a certain union to represent them, 'for all purposes of collective bargaining in respect to wages, hours and other conditions of employment.'" *Id.* at 217 (footnote omitted), quoting 29 U.S.C. § 159(a) (1970). For a sample of an authorization card, see 556 F.2d at 217 n.2.

a letter to the Regional Director challenging the sufficiency of the Union's showing of interest in regard to its petition for a representation election.<sup>22</sup>

On March 15, 1976, the Home requested the Regional Director to disclose, pursuant to the FOIA, "all authorization cards submitted by the [Union] as evidence of its showing of interest"<sup>23</sup> and "any documents indicating the Region's final determination of the [Union's] showing of interest or lack thereof."<sup>24</sup> The Regional Director denied the Home's request on the ground that the documents were privileged from disclosure under exemptions 5, 6, 7(A) and 7(C) of the FOIA.<sup>25</sup> The Home appealed the Regional Director's denial to the Board's General Council, which affirmed the Director's refusal to disclose.<sup>26</sup>

Thereafter, the Home filed a suit in the Federal District Court for the Eastern District of Pennsylvania to compel disclosure of the information requested in its March 15th letter to the Regional Director and to enjoin the Board from proceeding on the representation petition until the requested documents were produced.<sup>27</sup> The district court considered the applicability of exemptions 5, 6, 7(A), 7(C) and 7(D) of the FOIA,<sup>28</sup> but concluded that none of the exemptions protected the authorization cards from disclosure.<sup>29</sup>

22. 556 F.2d at 216. Specifically, the Home objected to the fact that the Union based its claim of 30% employee support on a total of 320 employees, while the payroll records of the Home indicated a workforce of 480 or more. *Id.*

23. *Id.*

24. *Id.*

25. 5 U.S.C. § 552(b)(5), (6), (7)(A), (C) (1976). *See* 556 F.2d at 216.

26. *See* 556 F.2d at 216.

27. *Committee on Masonic Homes v. NLRB*, 414 F. Supp. 426, 429 (E.D. Pa. 1976).

28. 5 U.S.C. § 552(b)(5), (6), 7(A), (C), (D) (1976); *see* 414 F. Supp. at 431-34.

29. 414 F. Supp. at 431, 433. Exemption 5 of the FOIA (Exemption 5) protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5) (1976). The Board argued that Exemption 5 was applicable because authorization cards are "predecisional memoranda which reflect the . . . [Board's] deliberative process" and are included in the "attorney work-product privilege." 414 F. Supp. at 431. Since no adversary proceedings, such as an unfair labor practice charge, were pending in this case, the court rejected the Board's argument and concluded that Exemption 5 did not cover authorization cards submitted in support of a representation petition. *Id.* *See* text accompanying notes 5-7 *supra*.

The district court also determined that authorization cards do not fall within Exemption 6, which protects "personnel," "medical" or "similar files" from disclosure. 414 F. Supp. at 432. For the pertinent text of Exemption 6, *see* text accompanying note 4 *supra*. In reaching this conclusion, the court relied primarily upon *Robles v. EPA*, 484 F.2d 843 (4th Cir. 1973), where the Fourth Circuit held that Exemption 6 was applicable only to "intimate details" of a "highly personal nature" in . . . [an] individual's employment record or health history or the like." *Id.* at 845. *See* 414 F. Supp. at 431-32.

Exemption 7(A), (C) and (D) of the FOIA (Exemption 7(A), (C) and (D)) protects "investigatory records compiled for purposes of law enforcement," where

Consequently, the court ordered the NLRB to permit the Home to inspect the cards.<sup>30</sup>

#### IV. THE THIRD CIRCUIT'S DECISION

The Third Circuit is the only appellate court that has considered the issue of whether an employer is entitled, under the FOIA, to copies of authorization cards that have been submitted by a union to the Board in support of a petition for a representation election.<sup>31</sup> It is submitted that the Third Circuit contorted the FOIA in order to make a policy decision that was beyond its power to make. In this section, the decision will be examined in detail to illustrate how this occurred.

The Third Circuit reversed that portion of the district court's judgment ordering disclosure of the cards, holding that the union authorization cards were privileged under Exemption 6.<sup>32</sup> The proceedings were, however, remanded for the limited purpose of clarification by the district court of its order to disclose documents

disclosure would "interfere with enforcement proceedings," or "constitute an unwarranted invasion of personal privacy," or "disclose the identity of a confidential source." 5 U.S.C. § 552(b)(7)(A), (C), (D) (1976). Since the Board assumes a neutral role in a representation proceeding, the district court found it difficult to conclude that authorization cards constitute investigatory records compiled for purposes of law enforcement. 414 F. Supp. at 432. Moreover, after balancing the need for disclosure against the extent of personal privacy involved, the court determined that disclosure of authorization cards to an employer would not constitute an unwarranted invasion of the employees' privacy. *Id.* at 432-33. See *Getman v. NLRB*, 450 F.2d 670, 674-75 (D.C. Cir. 1971). The district court further concluded that disclosure would not interfere with any enforcement proceedings because the Board's statutory duty merely entailed a decision as to whether or not a representation election should be held. 414 F. Supp. at 433. Finally, the court decided that since there had been no showing that the authorization cards were received "in confidence," Exemption 7(D) did not apply. *Id.* In short, the district court rejected each of the statutory exemptions that were advanced by the Board to justify denying the Home's request to see the authorization cards submitted by the Union in support of its representation petition. *Id.* at 430.

30. 414 F. Supp. at 430. The disclosure order was stayed by the district court, pending the disposition on appeal. See 556 F.2d at 217.

31. See 556 F.2d at 215. The case was heard before Chief Judge Seitz and Circuit Judges Aldisert and Hunter. Judge Hunter wrote the opinion of the court.

32. *Id.* at 222. For the pertinent text of Exemption 6, see text accompanying note 4 *supra*. The Third Circuit agreed with the district court that Exemption 7(A) and (C) of the FOIA did not apply to union authorization cards that are submitted to the Board as evidence of 30% employee support of a petition for a representation election. *Id.* at 218. See note 29 *supra*. The Third Circuit concluded that in these circumstances, authorization cards were not compiled for law enforcement purposes, as required by Exemption 7. 556 F.2d at 218. This conclusion is well supported both by case law and legislative history. See *Roger J. Au & Son, Inc. v. NLRB*, 538 F.2d 80, 83 (3d Cir. 1976); *Title Guarantee Co. v. NLRB*, 534 F.2d 484, 488-91 (2d Cir.), *cert. denied*, 429 U.S. 834 (1976); *Wellman Indus., Inc. v. NLRB*, 490 F.2d 427, 429-31 (4th Cir.), *cert. denied*, 419 U.S. 834 (1974); S. REP. No. 813, *supra* note 8, at 9; H. REP. No. 1497, 89th Cong., 2d Sess. 11 (1966).

indicating a final determination of interest.<sup>33</sup> A brief examination of the circumstances of *Masonic Homes* will reveal that Exemption 6 is totally inapplicable to the authorization cards sought by the Home.

As it was not disputed that the authorization cards were neither personnel nor medical files, the preliminary issue resolved by the court was whether the cards are "similar" files.<sup>34</sup> In its decision, the Third Circuit set forth little more than a two-sentence conclusory statement that the authorization cards are similar files because the cards contain "a thumb-nail sketch of an employee's job classification and status."<sup>35</sup>

Neither the language of the FOIA nor its legislative background provides an explanation of the term "similar," as used in Exemption 6. However, in *Department of the Air Force v. Rose*,<sup>36</sup> the Supreme Court commented on the intended scope of Exemption 6 as follows: "It is quite clear from the committee reports that the privacy concern of Congress in drafting Exemption 6 was to provide for the confidentiality of personal matters in such files as those maintained by the Department of Health, Education and Welfare, the Selective Service, and the Veterans Administration."<sup>37</sup> From this language alone it could be argued that union authorization cards were not contemplated in the reference to "similar files" in Exemption 6.

Moreover, other language in *Rose* concerning Exemption 6 demonstrates that the Third Circuit erred in concluding that authorization cards are "similar files." *Rose* involved litigation designed to compel disclosure of disciplinary case summaries of United States Air Force Academy students.<sup>38</sup> The Court ruled that these records were "similar files" because "they relate to the discipline of cadet personnel, . . . and most significantly, the disclosure of these summaries implicates similar privacy values."<sup>39</sup>

33. 556 F.2d at 222. In addition to seeking the disclosure of the authorization cards, the Home also requested to see "[a]ny documents indicating the Region's final determination of the [Union's] . . . showing of interest or lack thereof." 414 F.2d at 429. The district court granted this request for disclosure. *Id.* at 428. Finding that the parties were unable to explain which documents were subject to this disclosure order, the Third Circuit remanded "to the district court, for clarification of that part of its order." 556 F.2d at 222.

34. *Id.* See text accompanying note 4 *supra*. In *Wine Hobby U.S.A., Inc. v. IRS*, 502 F.2d 133 (3d Cir. 1974), the Third Circuit remarked that "[t]he common denominator in 'personel and medical and similar files' is the personal quality of information in the file, the disclosure of which may constitute a clearly unwarranted invasion of privacy." *Id.* at 135.

35. 556 F.2d at 220.

36. 425 U.S. 352 (1976).

37. *Id.* at 375 n.14 (citation omitted).

38. *Id.* at 355.

39. *Id.* at 376 (emphasis added).

In contrast, union authorization cards carry no such implication of "privacy values." As a practical matter, an individual who signs a card, unlike an Air Force Academy student subject to disciplinary proceedings, cannot have an expectation of privacy. In most instances, the cards are signed in public places and/or in the presence of others, and unions frequently present signed cards to employers in an effort to gain voluntary recognition.<sup>40</sup>

A review of the actual contents of a typical authorization card further evidences the inapplicability of Exemption 6. The information listed on the cards bears little similarity to personnel or medical files maintained by the Department of Health, Education and Welfare, or the other government agencies specifically referred to in *Rose*.<sup>41</sup> Moreover, as the Fourth Circuit observed in *Robles v. EPA*,<sup>42</sup> Exemption 6 "applies only to information which relates to a specific person or individual, and to intimate details of a highly personal nature in that individual's employment or health history, or the like."<sup>43</sup> Clearly, these cases indicate that the information contained in union authorization cards — an employee's name, his employer, work department, shift and address<sup>44</sup> — was not intended to be protected from disclosure under Exemption 6. The only information contained in an authorization card that is not already known to the employer is the employee's name. There is no secrecy whatsoever attached to the other information, such as the employee's home address, employer and department. Further, the Third Circuit's reliance on *Wine Hobby U.S.A., Inc. v. IRS*,<sup>45</sup> in concluding that Exemption 6 applied,<sup>46</sup> appears misplaced because that case is clearly distinguishable from *Masonic Homes*. In *Wine Hobby*, the information sought was totally unknown to the parties seeking disclosure.<sup>47</sup>

Having concluded that authorization cards are "similar files," the Third Circuit then addressed the issue of whether disclosure of

40. See *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974); *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

41. See text accompanying note 37 *supra*. For a sample of the information contained on an authorization card, see 556 F.2d at 217 n.2.

42. 484 F.2d 843 (4th Cir. 1973).

43. *Id.* at 845.

44. 556 F.2d at 217 n.2.

45. 502 F.2d 133 (3d Cir. 1974).

46. 556 F.2d at 219.

47. 502 F.2d at 134. *Wine Hobby U.S.A., Inc.*, a seller and distributor of amateur winemaking equipment, sought to obtain the names and addresses of all persons who registered with the United States Bureau of Alcohol, Tobacco and Firearms as producers of wine for family use. *Id.* The purpose for acquiring this information was to be able to send catalogues and other announcements to registered wine producers. *Id.* For a discussion of this case, see text accompanying notes 73-75 *infra*.



the cards would “constitute a clearly unwarranted invasion of personal privacy.”<sup>48</sup> In its analysis, the Third Circuit applied the balancing test mandated by the Supreme Court in *Rose*.<sup>49</sup> This test balances the individual’s privacy against “the preservation of the basic purpose of the Freedom of Information Act . . . to open agency action to the light of public scrutiny.”<sup>50</sup> Specifically, the Third Circuit stated that “having found an invasion of privacy, a court must then weigh against the seriousness of that invasion whatever gain would result to the ‘public.’”<sup>51</sup>

In deciding that disclosure of the cards would constitute an invasion of privacy, the Third Circuit concluded that “an employee who signed a card was *entitled to a private choice*, given the policies of the [National Labor Relations Act].”<sup>52</sup> This conclusion was apparently based upon an incorrect statement of law. The Third Circuit criticized the district court for stating that an employer would be entitled to examine authorization cards whenever a union claims *majority* support and asks for immediate recognition.<sup>53</sup> In contrast to the district court’s position, the Third Circuit maintained that the most a union in this situation might offer is to have a neutral third party check the cards.<sup>54</sup> If in fact, this were the law, employees would be “entitled to a private choice,” and the Third Circuit’s conclusion would be valid. However, the Supreme Court’s decisions in *Linden Lumber Division, Summer & Co. v. NLRB*,<sup>55</sup> and *NLRB v. Gissel Packing Co.*<sup>56</sup> clearly establish that unions *do* frequently show the cards directly to employers in an attempt to gain voluntary recognition.<sup>57</sup> Therefore, the Third Circuit relied upon an incorrect premise in finding that an invasion of privacy would result from disclosure.

The court then concluded that the invasion of privacy resulting from disclosure would be clearly unwarranted because such disclosure might have a chilling impact upon employees otherwise

48. 556 F.2d at 220–21. See text accompanying note 4 *supra*.

49. 425 U.S. at 372–73. See 556 F.2d at 220–21.

50. 425 U.S. at 372.

51. 556 F.2d at 220.

52. *Id.* (emphasis added). The policies to which the court was referring include prohibiting an employer from challenging the sufficiency of the employee showing of interest in support of a representation petition and granting employees the right to vote for a collective bargaining representative by secret ballot. See *id.* at 217. The aim of these policies, according to the court is to prevent an employer from ever finding out which employees supported the union. *Id.*

53. *Id.* at 218 n.3.

54. *Id.*

55. 419 U.S. 301 (1974).

56. 395 U.S. 575 (1969).

57. See text accompanying note 40 *supra*.

inclined to support and vote for a union.<sup>58</sup> The speculative nature of this argument is evidenced by the court's language: "[I]t is *entirely plausible* that employees would be 'chilled' when asked to sign a union card if they knew the employer could see who signed."<sup>59</sup> However, this conjecture is unfounded in light of the facts of *Masonic Homes*. First, there was absolutely no factual basis for even speculating that the Home would retaliate against employees who signed cards. In addition, there was no history of any unfair labor practices or any other antiunion activity by the Home.<sup>60</sup> More importantly, this whole line of reasoning has specifically been preempted by the Supreme Court in *NLRB v. Sears, Roebuck & Co.*<sup>61</sup> In that case, the Supreme Court made it clear that a court must regard a plaintiff who is a litigant in a pending agency proceeding just as it would any disinterested party seeking the same information.<sup>62</sup> Thus, the "chilling impact" that disclosure to an employer would have no future organizational attempts was not a proper consideration for the court. Clearly, the Third Circuit's reasoning on this issue conflicts with the mandate of the Supreme Court in *Sears, Roebuck* that a plaintiff should not be penalized for seeking disclosure based on its own self-interest in the case.<sup>63</sup>

Moreover, the appropriateness of disclosure under these circumstances is confirmed by the Supreme Court's holding in *Linden Lumber*. *Linden Lumber* involved an employer who was confronted by a union demand for recognition, that was supported by authorization cards signed by a majority of the employees.<sup>64</sup> After examining the cards that the union presented, the employer refused to bargain on the ground that it doubted the union's majority status.<sup>65</sup> The Court ruled that under these circumstances, and absent any unfair labor practices, the employer was not required to voluntarily recognize the union.<sup>66</sup> Rather, the employer had a right to await the results of a representation election.<sup>67</sup> Most critical for purposes of the issue at hand, the Court found no statutory infirmity and, more importantly, no chilling impact upon the employees' right to freely participate in a representation election as a result of the

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58. 556 F.2d at 221.

59. *Id.* (footnote omitted) (emphasis added).

60. See text accompanying note 16 *supra*.

61. 421 U.S. 132 (1975).

62. *Id.* at 143 n. 10. See text accompanying notes 12-14 *supra*.

63. See 421 U.S. at 143 n.10.

64. 419 U.S. at 302.

65. *Id.*

66. *Id.* at 307-10.

67. *Id.* at 310.

employer's scrutiny of the authorization cards and knowledge of the employees' union sympathies prior to the election.<sup>68</sup> If the Supreme Court was not troubled by the disclosure of authorization cards in *Linden Lumber*, despite an impending representation election, there is no basis for the Third Circuit's finding of an invasion of privacy in this particular case, where a representation election was also pending.

In applying the second arm of the balancing test for Exemption 6,<sup>69</sup> the court found "no significant public interest in disclosure."<sup>70</sup> In reaching its conclusion, the Third Circuit stated: "If the basic thrust of the [FOIA] is to inform the electorate of the ways in which government agencies operate, the cards will disclose nothing."<sup>71</sup> This statement is grossly inaccurate. In actuality, the validity of the union authorization cards goes to the very genesis of the representation election process, for it is at this stage that the Board decides whether to impose its statutory authority upon the employer. The number of signed cards and the authenticity of the signatures are *critical issues* which will be more efficiently and more accurately resolved if the right to public disclosure is recognized.

The important benefits that disclosure would provide clearly distinguish this case from *Wine Hobby*, a decision heavily relied upon by the Third Circuit.<sup>72</sup> In *Wine Hobby*, an amateur winemaking company sought disclosure of the names and addresses of individuals who filed with the Bureau of Alcohol, Tobacco and Firearms, as home wine producers.<sup>73</sup> The Third Circuit there denied the company's request based upon Exemption 6.<sup>74</sup> In so doing, the court relied heavily upon the fact that "the sole purpose asserted for disclosure was private commercial exploitation."<sup>75</sup> For this reason alone, *Wine Hobby* should not have been used as a basis for denying the request for disclosure in the instant case. Rather, it provides

68. See *id.* at 304-05.

69. See text accompanying notes 50-51 *supra*.

70. 556 F.2d at 221. The court emphasized that it was considering the benefit to the public rather than the benefit to the Home specifically. It stated:

Masonic Homes has asserted *its* benefit — it wants to challenge the signatures and avoid an election. We are not interested in the employer's benefit, though. Rather we must consider the public benefit that would result from the disclosure, to an employer or to anyone, of union authorization cards submitted to support an election petition.

*Id.* at 220 (emphasis in original).

71. *Id.*

72. *Id.* at 219-20. See notes 45-47 and accompanying text *supra*.

73. 502 F.2d at 134.

74. *Id.* at 136-37.

75. *Id.* at 137. See note 47 *supra*.

further support for the proposition that where legitimate public policy reasons are set forth in favor of disclosure, Exemption 6 is rendered inapplicable.

Moreover, it is important to recall that although a weighing of interests is required under Exemption 6, this does not detract from the overriding FOIA policy in favor of disclosure.<sup>76</sup> In the words of one court, the "legislative plan creates a liberal disclosure requirement, limited only by specific exemptions which are to be narrowly construed."<sup>77</sup> The legislative history is particularly elucidating with respect to Exemption 6. The inclusion of the language "*clearly unwarranted* invasion of personal privacy" evidences a carefully considered congressional policy favoring disclosure. At hearings conducted prior to the final drafting and passage of the FOIA, various federal agency spokesmen urged deletion of either the word "clearly" or the entire phrase "clearly unwarranted," so that nondisclosure could be permitted whenever disclosure would result in *any* invasion of privacy.<sup>78</sup> Congress, however, refused to delete this language, which it obviously considered critical in limiting the scope of the exemption.

It is apparent that the Third Circuit's reliance on Exemption 6 as the basis for refusing disclosure of union authorization cards in these circumstances is neither logical nor supported by existing case law or the legislative history of the FOIA. It is submitted that the Third Circuit chose to rely on Exemption 6 because it is the only exemption in the FOIA that permits a balancing approach. Thus, by invoking this exemption, the court was afforded the latitude to mold the decision to reach the desired result. In so doing, it contorted the concepts of "similar file" and "clearly unwarranted invasion of personal privacy." Furthermore, in denying disclosure of authorization cards to employers in a representation context, the Third Circuit decided, in effect, that the unfair labor practice proscriptions of Section 8(a) of the National Labor Relations Act (NLRA)<sup>79</sup> are insufficient to protect employees from coercive employer tactics and preserve the rights guaranteed to them in Section 7 of the NLRA.<sup>80</sup>

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76. See text accompanying notes 8-10 *supra*.

77. *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir. 1970) (footnote omitted).

78. *Hearings on H.R. 5012 before the Subcomm. on Government Operations of the House of Representatives*, 89th Cong., 1st Sess. 56 (1965) (Sup. Doc. No. Y4.6-74/7: R 24/3) (testimony of Fred B. Smith, Acting General Counsel, Treasury Dep't); *id.* at 151 (testimony of Clark Molenhoff, Vice Chairman, Sigma Delta Chi Comm. for Advance of Freedom of Information); *id.* at 257 (testimony of William Feldesman, NLRB solicitor).

79. 29 U.S.C. § 158(a) (1970).

80. *Id.* § 157.

The "chilling effect" that disclosure of the cards would have on union organizational activity, alluded to by the Third Circuit,<sup>81</sup> is not a relevant consideration in light of the policy of the FOIA, the mandates of the Supreme Court, and the protections afforded employees by the NLRA, the Board, and the courts.

#### V. CONCLUSION

The policy of the FOIA is "to establish a general philosophy of full agency disclosure."<sup>82</sup> However, this statutory policy may conflict with the policy of the NLRA as enunciated in Section 7, that:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .<sup>83</sup>

If indeed there is such a conflict, it must be resolved by Congress through appropriate legislation and not by rewriting Exemption 6 to accomplish this purpose, as the Third Circuit did in *Masonic Homes*. In short, the Third Circuit rendered a hopelessly unpersuasive opinion to reconcile what it perceived to be a conflict in the policies of these two statutes. In so doing, it also overstepped its limited judicial function and engaged in a policy-making role reserved to Congress.

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81. See text accompanying note 58 *supra*.

82. See note 9 and accompanying text *supra*.

83. 29 U.S.C. § 157 (1970).